

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

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

CRIMINAL APPEAL NO. 596 OF 2015

1. HAMISI ALLY	} APPELLANTS
2. HAMISI ISSA		
3. KHALID HAMISI		
4. ABUBAKARY JUMANNE		

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the decision of the Resident Magistrate Court of Singida
at Singida)**

(W.E. Lema, PRM (Ext. Jurisdiction))

dated the 8th day of December, 2015

in

PRM. Criminal Appeal No. 47 of 2015

REASONS FOR JUDGMENT OF THE COURT

20th & 25th April, 2016

KILEO, J.A.:

On 20th April 2016, in terms of Rule 39 (6) of the Court of Appeal Rules, 2009 we allowed the appeals by Hamisi Ally, Hamisi Issa, Khalid Hamisi and Abubakary Jumanne quashed their convictions and set aside the sentences imposed. We ordered their immediate release from prison

unless they were held therein for some lawful cause. We reserved our reasons which we shall now give.

The facts of the case as they came to light at the trial were briefly to the following effect:

On 8/12/2012 PW1 one Makaranga Nona and his colleagues from Sokoine University in Morogoro who included PW2, PW4 and PW5 had started off from Morogoro to Tarime to transport the remains of a fellow student. PW3 was the driver of the vehicle in which the coffin was being transported. At around 01.30 hours when they were at an area called Kisiwa in Singida they came across a road block and before PW3 had opportunity to do anything they heard gunshots. Several armed bandits appeared. They smashed the vehicle's windscreen and forced their way into the bus. They beat up the occupants, ransacked them and left with the loot which included cash Tsh. 7,819,000/-laptop, a mobile phone and two modems. The victims reported the matter to the police. Those who were injured in the incident got medical attention after which they secured some alternative transport which took them to Tarime for the burial. On 11/12/2012 they were informed by the police that the culprits had been arrested and were required to attend an identification parade. It was the

prosecution case that witnesses identified the appellants at the identification parade.

The appellants who appeared before us in person with no legal counsel had each filed a separate memorandum of appeal. The major complaint in all the memoranda is based on identification which they claimed was not watertight.

In supporting the appeal Ms. Chivanenda Luwongo learned State Attorney who appeared for the respondent Republic conceded that the evidence of identification upon which the conviction was grounded was not watertight to sustain the conviction. She pointed out that since the crime was committed at night and the appellants were not known to the victims prior to the incident it was necessary, first to prove that there was sufficient light to enable the witnesses to identify their assailants and secondly, to have evidence of prior description of the appellants which would have shown how they came to be arrested and subjected to the identification parade. The learned State Attorney also submitted that the identification parade was not properly conducted and it was unsafe to rely on it in convicting the appellants.

As already pointed out the incident occurred at night. The victims were on the road travelling to Tarime when they were ambushed. They purported to have identified the appellants by lights inside the vehicle, and by light from the front lights of the car.

Time and again this Court has insisted that when a case is centred on evidence of visual identification such evidence must be watertight before arriving at a conviction. This insistence is borne out of the fact that visual identification is of the weakest kind and hence the necessity of ruling out any possibilities of mistaken identity. In the celebrated case **of Waziri Amani v. R.** (1980) TLR 250 this Court stated that visual identification is of the weakest kind of evidence and the most unreliable, and that a court should not act on it unless all possibilities of mistaken identity are eliminated. And in **Raymond Francis v. R.**, (1994) TLR the Court stated:-

"....It is elementary that in a criminal case whose determination depends entirely on identification, evidence on conditions favouring a correct identification is of utmost importance."

Also in **Issa s/o Magara @ Shuka V R**, Criminal Appeal No. 37 of 2005 (unreported) observed:

'In our settled minds, we believe that it is not sufficient to make bare assertions that there was light at the scene of the crime. It is common knowledge that lamps be they electric bulbs, fluorescent tubes, hurricane lamps, wick lamps, lanterns etc. give out light with varying intensities. Definitely, light from a wick lamp cannot be compared with light from a pressure lamp or fluorescent tube. Hence the overriding need to give in evidence sufficient details the intensity and size of the area illuminated.'...

In the present case the witnesses referred to two sources of light which enabled them to identify the appellants. They mentioned light inside the vehicle and the front lights. None of the witnesses however explained how intense the light was so as to remove any possibility of mistaken identity. PW1 claimed that one of the bandits had a torch which he was told, by their leader, to hold properly and not to direct the light at the others. (Page 22 of the record). This suggests to us that there was not sufficient illumination at the scene of crime for watertight identification.

Ms. Luwongo argued that none of the identifying witnesses described the appellants and there was no evidence on how they came to be arrested

by the police. Indeed, apart from the appellant's own account of how the police arrested them there was no evidence on what led the police to apprehend them. We think it was vital, in the circumstances of this case, for the police to give details of the description of the appellants given to them by the witnesses which enabled them to single out the appellants for the identification parade. The Court in **Abdul Farijalah and another v. Republic**, Criminal Appeal No. 99 of 2008 (unreported) explained the purpose of an identification parade as follows:

"....It is trite law that the test in an identification parade is to enable a witness to identify a person or persons whom she or he had not known or seen before the incident....An identification parade held soon after the incident in which a witness positively identifies an accused lends assurance to the court of that witness's dock identification of that person. "

Forming a group of people for purposes of having a witness single out a person from the group presupposes that such witness will have given a description of the suspect beforehand.

As it has been observed earlier, the witnesses did not give prior description of the suspects and a heavy cloud lingers as to how they came to be linked to the crime. The defunct Eastern Africa Court of Appeal held in **Republic 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 always ought 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 the person or persons to whom the description was given"

The learned State Attorney rightly argued that the identification parade which formed the basis of the appellants' conviction was not properly conducted and should not have been given any weight. She pointed out that the result of each witness should have been clarified indicating specifically as to whom each witness identified.

The procedure for conducting an identification parade is very well detailed in the Police General Order (PGO) 232. PW8 who conducted the parade did not elaborate in his evidence that he complied with the rules. In fact, he testified very fleetingly about the identification parade and his testimony should have been taken as not giving weight to the case for the prosecution. For the purposes of enlightenment, we find it appropriate to reproduce here the basic rules as listed in PGO 232:

- a) The officer-in-charge of the case will make the preliminary arrangements for the parade and shall enter the number of persons attending the parade and the suspects in the space provided under Head No. 3 in the Identification Parade Register (P.F. 186). He will enter the names of the witnesses under Head No. 4 of the register in the order in which they are to be called. A supPLICATE copy of all entries in the register will be made by inserting a sheet of carbon paper between the original and duplicate pages.*
- b) Although the officer-in-charge of the case may be present, he will take no part in conducting the parade. The officer conducting the parade must be an officer unconnected with the case and, whenever possible, a Gazetted Officer, Officer below the rank of Assistant Inspector are not permitted to conduct Identification Parade.*

- c) At a reasonable time prior to the parade, the officer-in-charge of the case will inform the suspect that he will be put up for identification. Any objections raised by the suspect will be noted and communicated by the officer-in-charge of the case to the officer conducting the parade before it is held.*
- d) If the suspect desires the attendance of a solicitor or friend, arrangements must be made for him to attend the parade if he wishes to do so. The person so attending will be required to remain in the background, observing only and saying nothing.*
- e) The place selected for the parade should have a good light. No unauthorized persons will be permitted to attend or witness the parade.*

The witnesses will be assembled under the charge of a Police Officer who has no connection with the case in a room or place out of sight and hearing of the parade, from which they can be called to the parade by the officer conducting it.

The witnesses will not be allowed to see or hear the suspect before he is put up for identification, nor should they be assisted by any description or photograph of him, or in any other way.

Officers who made the arrest or who took part in the investigation will not be sent to bring or notify witnesses to attend the parade and will not communicate with them before the parade is held.

- i) Arrangements will be made to ensure that witnesses have no opportunity to see, or be seen by; any of the persons to be paraded.*
- j) There is no objection to the suspect being put up for identification in the clothing he was wearing when the offence was committed (providing that such clothing does not show stains, marks, or tears which patently distinguish his clothing from that of other persons on the parade). Alternatively, the suspect may be put up for identification in the clothing he was wearing when arrested.*
- k) Persons selected to make up the parade should be of similar age, height, general appearance and class of life. Their clothing should be in a general way similar.*

The persons selected for the parade must not be known to the complainant or the identifying witnesses as identification would then have little value.

Police Officers will not be used to make up the parade unless the case is one in which a Police Officer is concerned as a suspect.
- n) There should be eight or more persons on the parade for one suspect; ten or more for two suspects. If there are more than two suspects, more than one parade will normally be held, with different personnel being used to form each parade.*
- o) When the officer conducting the parade has arrived and has taken charge of the proceedings, the suspect will be brought on to the parade. The officer conducting the parade will explain*

the purpose of the parade and will ask the suspect if he has any objection to any person participating in the parade. Any objection raised by the suspect will be noted in the Identification Parade Register and immediate steps taken to replace those persons to whom the suspect objects. The suspect will then be invited to stand where he please in the line. The position he selects will be noted in the Register.

- p) Great care must be taken that the suspect is not wearing handcuffs or anything else that might distinguish him from the others. No attempts at disguise will be permitted.*
- q) The first witness will be called to the parade by the officer conducting it, who will explain the purpose of the parade in the hearing of those on parade and invite him or her to point out by touching any persons he or she identifies. Under no circumstances shall the witness be touched or led during his or her examination of the parade.*
- r) If the witness requires any person on the parade to walk, talk, see him with his hat on or off, this may be done but the whole parade must be asked to do likewise.*

The officer conducting the parade will not carefully in his Identification Parade Register any identification or degree of identification made and any material circumstances connected therewith including any wrong identification, and any remark or objection made by the suspect. He shall ask the witness who makes, the identification; "In what connection do you identify

this person? and shall similarly record precise details of the witness's reply. No other questions are permissible.

t) On leaving the parade, the witness will be conducted to a place where he or she is out of sight and hearing of the parade and cannot communicate in any way with other witnesses waiting or members of the Force and will remain there under the charge of a Police Officer, who has no connection with the case, until the parade is finished.

*u) Subsequent witnesses will be brought into the parade and handled in accordance with the same procedure set out in sub-
paras. (a) – (t) above.*

In the present case there is no doubt that the rules on conducting an identification parade were flouted. For one thing there were 16 persons in the first group including the four suspects. The rules require that there be 8 people for each suspect or ten or more for two suspects. Secondly, the officer conducting the parade was required to indicate on the relevant form, the position of each suspect. This was not done. Furthermore, the officer conducting the parade (PW8) did not explain, in his evidence, whether those people on the parade had similar (alike) features with the suspects so as to ensure that the parade was conducted in a fair and just manner. Surprisingly as well, none of those people on the parade was called as a witness to lend credence to the case for the prosecution. As it

has been observed earlier, the witnesses did not give prior description of the suspects and a heavy cloud lingers as to how they came to be linked to the crime.

There is no gainsaying that where an identification parade is conducted with irregularities; such irregularities reduce the probative value of the identification parade.

It was in the light of the above considerations that we allowed the appeals by Hamis Ally, Hamis Issa, Khalid Hamisi and Abubakary Jumanne and ordered their immediate release from prison custody unless they were held therein for some lawful cause.

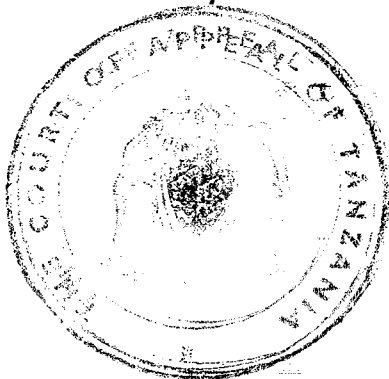
DATED at DODOMA this 21st Day of April 2016.

E. A. KILEO
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

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



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL