**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MWARIJA, J.A., MZIRAY, J.A., And KWARIKO, J.A.)**

**CRIMINAL APPEAL NO. 214 OF 2015**

**1. JUMA OMARY JUMA**
**2. ABEL JOHN MBAWALA ..... APPELLANTS**

**VERSUS**

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

**(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)**

**(Utamwa, J.)**

**dated the 7th day of February, 2015**

**in**

**Criminal Appeal No. 72 of 2013**

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## JUDGMENT OF THE COURT

20th August & 27th September, 2018

**MWARIJA, J.A.:**

In the Resident Magistrate's Court of Kinondoni, the appellants, Juma Omary Juma and Abel John Mbawala (the 1st and 2nd appellants respectively), were jointly and together charged with five other persons, Hussein Bashiri Massawe, Wilbert Karoli Solestine, Yassin Ally Chambo, Dongo Hashim Rashid and Joseph Axavery Simba (hereinafter referred to as "the co-accused persons") were charged with two counts under the Penal Code [Cap. 16 R.E. 2002] (the Penal Code).

In the 1st count, they were charged with the offence of conspiracy to commit an offence contrary to section 384 of the Penal Code. It was alleged that on unknown date and time in August, 2010 within the Dar es Salaam City, the appellants and the co-accused persons conspired to commit the offence of armed robbery at Mbezi Beach, Oasis Club area in Kinondoni district.

In the 2nd count, they were charged with the offence of armed robbery contrary to section 287 A of the Penal Code as amended by Act No. 4 of 2004. The particulars of the offence are that, on 9/9/2010 at about 07.30 a.m. at Mbezi Oasis Club area within Kinondoni district in Dar es Salaam region, the appellant and the co-accused persons stole one Motor Vehicle Reg. No. T. 134 AEP make Toyota Land Cruiser valued at TZS 15,000,000.00 the property of Afriq Engineering and Construction as well as other properties including cash TZS 260,000.00, the properties of Charles Billinga Mushi. It was alleged further that immediately before such stealing, they threatened to stab one Ally Shaban with a knife and by pointing a toy pistol at him.

The appellants and the co-accused persons denied the two counts. As a result, the prosecution called a total of 24 witnesses to testify before the trial court. It also relied on documentary evidence including

the cautioned statements of the 1st appellant (Exhibit PE 12) and identification parade registers (Exhibits PE 17 and PE 18). On their part, the appellants and the co-accused persons were the only witnesses for the defence.

After a full trial, the appellants were found guilty of the two counts and were consequently convicted and sentenced to two years imprisonment for the 1st count and thirty years imprisonment for the 2nd count. The co-accused persons were however, found not guilty and were as a result, acquitted.

The appellants were aggrieved by the decision of the trial court and thus appealed to the High Court. The appeal was unsuccessful hence this second appeal.

The facts giving rise to the appeal can be briefly stated as follows: On 9/9/2010 in the morning, Charles Billinga Mushi (PW6) was at his home at Mbezi Beach, Oasis club area. He was preparing himself for a journey to Dodoma. His driver, Ally Shabani (PW13) had arrived and parked Motor Vehicle Reg. No. T. 134 AEP make, Toyota Land Cruiser (hereinafter "the Vehicle") outside at the gate of PW6's house ready for the journey. An employee of PW6, one Hassan Pius Liwanga (PW12), took out PW6's bags with a view of placing them in the Vehicle. Before

he did so, one person appeared and demanded to be given the bags. When PW12 resisted, another person who was armed with what PW12 believed to be a pistol, appeared and threatened him by brandishing it at him. He did not have an option but to surrender the properties to the culprit. Thereafter, another person approached PW13 who was in the Vehicle and ordered him to get out. PW13 disembarked, thereby giving chance to the culprits to steal the Vehicle.

Shortly thereafter, PW12 and PW13 ran to inform PW6 about the incident. He in turn immediately reported the matter to the police. According to PW6, later on in the same day at about 13.00 hrs, he received a phone call. The caller identified himself as one of the members of a notorious gang of criminals, boasting that it was involved in the robbery committed at PW6's home. That person threatened PW6 demanding to be given TZS 5,000,000.00 with instruction that the amount be deposited in an M-pesa account. He informed PW6 that the gang did not have an interest in the Vehicle but rather, their intention was to steal money and so they had abandoned it (the Vehicle) at Makonde area in Mbezi.

PW6 reported that information to the police who went to take the Vehicle and advised PW6 to keep on communicating with the culprits.

Eventually through a trap, which was arranged by the police, on 15/9/2010 PW6 deposited TZS 1,700,000.00 in the mobile phone number provided by the culprits. On 16/9/2010, Hussein Bashiri Massawe @ Macha, one of the appellants' co-accused persons (the 1st accused person at the trial), was arrested by police officers led by No. D.4426 D/CPL Fred (PW1) while in the process of withdrawing money at Keko Magurumbasi area from one Yobu Munisi, an M-Pesa agent. The money which was intended to be withdrawn was allegedly transferred from mobile phone No. 0778498294.

According to the prosecution evidence, the arrest of the said Hussein Bashiri Massawe led to the arrest of the appellants and the co-accused persons. It was the prosecution's evidence further that, upon interrogation, some of them including the 1st appellant, confessed that they participated in the commission of the offences charged. His statement was admitted in evidence as Exhibit PE 12. Furthermore, according to their evidence, PW12 and PW13 identified the appellants at the identification parade as the persons who committed the offence of robbery at PW6's home on 9/9/2010. The parade was under supervision of Insp. Vernon (PW24).

In their defence, the appellants denied the charges brought against them. The 1st appellant told the trial court that he was arrested on 16/9/2010 at Ilala area and was thereafter taken to Stakishari Police station. On 19/9/2010, he was interrogated by PW18 No. E 1737 D/Cpl Evance in the presence of a group of other police officers. He said that he was forced to sign some documents and later charged in court.

On his part, the 2nd appellant testified that he was arrested on 6/9/2010 and taken to Chang'ombe police station where he was incarcerated until on 16/9/2010 when he was transferred to Stakishari police station. It was his defence that he was arrested out of grudges which existed between him and one of the arresting police officers.

As stated above, the trial court convicted the appellants of both counts. In so doing, it relied mainly on the identification evidence of PW12 and PW13 made at the identification parade and the cautioned statements of the 1st and 2nd appellants. On appeal, although it expunged the 2nd appellant's cautioned statement on the ground that the same was improperly admitted in evidence, the learned judge was of the view that the evidence of the 1st appellant's cautioned statement was sufficient to found the appellants' conviction because, that evidence was corroborated by identification evidence of PW12 and PW13.

In their appeal, the appellants have filed separate memoranda of appeal. Whereas in his memorandum, the 1st appellant has raised five grounds of appeal, the 2nd appellant's memorandum consists of six grounds. The grounds are however identical. The same can be consolidated into five grounds as follows:

1. That the learned High Court judge erred in upholding the appellants' conviction while their conviction was based on inadmissible evidence of the 1st appellant's cautioned statement.

2. That the learned High Court judge erred in law in upholding the appellants' conviction by relying on the evidence of identification parade which was conducted contrary to the laid down procedure.

3. That the learned High Court judge erred in law in failing to find that the appellants' conviction was wrongly based on the contradictory and uncorroborated visual identification evidence of PW12 and PW13.

4. That the learned High Court judge erred in upholding the 2nd appellant's conviction on the 1st count while his conviction was based on the wrongly admitted cautioned statement of the 1st appellant.

5. That the learned High Court judge erred in law in failing to find that the prosecution did not prove its case beyond reasonable doubt.

At the hearing of the appeal, the appellants appeared in person, unrepresented. On the other hand, the respondent/Republic was represented by Mr. Mutalemwa Kishenyi, learned Senior State Attorney who was assisted by Ms. Ashura Mnzava, learned State Attorney.

When they were called upon to argue the appeal, the appellants opted to hear first, the respondent's response to the grounds of appeal and thereafter make a rejoinder, would the need to do so arise. In response, Mr. Kishenyi informed the Court that the respondent was not opposing the appeal. He agreed with the appellants' contentions **firstly**, that their conviction was based on the evidence which was admitted contrary to the law. Starting with the evidence of the cautioned statement, the learned Senior State Attorney submitted that such

evidence was not only uncorroborated but the statement was recorded outside the period prescribed under S. 50 (1) (a) of the Criminal Procedure Act [Cap. 20 R.E. 2002] (the CPA).

**Secondly**, with regard to the evidence of identification tendered by PW12 and PW13, Mr. Kishenyi submitted that the same was improperly obtained because the identification parade was conducted contrary to the Police General Orders (the P.G.O.) as regards the number of persons required to compose a parade. He had in mind rule 2 (n) of P.G.O. No. 231 which provides that, where one suspect is to be identified, the parade should be composed of eight or more persons but where, like in this case, the number of suspects is two, then the parade should be composed of ten or more persons. The learned Senior State Attorney submitted further that the identification evidence was wrongly acted upon by the courts below because the witnesses (PW12 and PW13) gave contradictory versions as regards the nature of the weapon used at the scene of crime.

It was on the basis of these arguments that the learned Senior State Attorney supported the appeal. He prayed to the Court to allow the appeal. On their part, the appellants were happy with the position taken by respondent. They supported the learned Senior State

Attorney's submission and urged us to find that their appeal has merit thus entitling them to be set free.

Indeed, as earlier on stated in this judgment and as has been submitted by Mr. Kishenyi, in upholding the appellants' conviction, the High Court acted on the evidence of the 1st appellant's cautioned statement and the evidence of PW12 and PW13 obtained from the identification parade. In the 1st and 4th grounds of the consolidated memorandum of appeal, the appellants have challenged the validity of that evidence contending that the same was inadmissible. Mr. Kishenyi conceded that the cautioned statement was wrongly admitted because it was recorded contrary to the provisions of S.50 (1) (a) of the Criminal Procedure Act [Cap. 20 R.E. 2002] which requires that such statement be recorded within four hours from the time of placing a suspect under restraint.

It is not disputed that the 1st appellant was arrested on 16/9/2010 by PW1 who was in the company of other police officers. According to PW1, on that day, the 1st appellant and other suspects were arrested between 01.00 and 15.00 hrs. His statement was later recorded by PW18 D/Cpl Evance on 17/9/2010 between 15.00 and 16.10 hrs. That was obviously done beyond the prescribed period of four hours from the

time of the 1st appellant's arrest without any extension of time pursuant to the provisions of S. 51 (1) of the CPA.

Section 50 (1) (a) of the CPA provides as follows:-

> *"50 – (1) For the purpose this Act, the period available for interview of a person who is in restraint in respect of an offence is –*
>
> *(a) Subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence."*

Since therefore, the 1st appellant's cautioned statement was recorded contrary to the mandatory provisions of S. 50 (1) (a) of the CPA, that statement was wrongly acted upon because the same was inadmissible. In the case of **Said Bakari v. The Republic**, Criminal Appeal No. 422 of 2013 (unreported), the Court stated as follows on the effect of contravention of the above cited provision of the CPA.

> *"The law is well-settled that non-compliance with the provisions of sections 50 and 51 of the Criminal*

because the identification parade did not comply with the requirement of rule 2 (n) of P.G.O. No. 232 which states as follows:-

> *"2. Identification parades shall be conducted as far as possible in accordance with the following rules:-*
>
> *(a) – (m) ... N/A.*
>
> *(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."*

From the evidence of PW24 and Exhibit PE17, the parade which was for identification of two suspects, was composed of ten persons including two suspects.

Although we agree with Mr. Kashenyi that the conduct of identification parades is governed by the G.P.O., we do not intend to consider whether or not rule 2(n) of the G.P.O. was breached and if that was the case, whether from the wording of that rule, which is not couched in mandatory terms, the breach invalidates the obtained evidence. We think the issue may be properly addressed in a fit case

*Procedure Act is a fundamental irregularity that goes to the root of the matter and therefore renders the illegally obtained evidence inadmissible and one that cannot be acted upon by the court. (See – **Janta Joseph Komba and 3 Others v. Republic**; [Criminal Appeal No. 95 of 2006], **Jumaini Moleli @ John Walker and Others v. R.**, Criminal Appeal No. 40 of 1999; **Sahim Petro Ngalawa v. Republic.**, Criminal Appeal No. 85 of 2004; **Joseph Mkumbwa and Another v. Republic.**, Criminal Appeal No. 94 of 2007; **Abbas Selemani Mfinga v. Republic.**, Criminal Appeal No. 250 of 2008 and **Christopher Chengula v. Republic.**, Criminal Appeal No. 215 of 2010 (CA- all unreported.)"*

Having found that the 1st appellant's cautioned statement was illegally obtained hence inadmissible, we hereby expunge it from the record. The consequence of discarding that statement is to make the prosecution case remain with the evidence of PW12 and PW13 as the only evidence implicating the appellants with the offences charged. Mr. Kishenyi has submitted that such evidence was also improperly obtained

when an opportunity to do so arises. We have taken that stance because in any case, as will be apparent herein, the answer to ground 2 of the appellants' consolidated memorandum of appeal invalidates the identification evidence of PW13.

It is trite law that, for any evidence obtained at any identification parade to have any value, the identifying witness must give descriptions of the identified person prior to the making of the identification. In the case of **Athumani Buji v. The Republic**; Criminal Appeal No. 118 of 2008 (unreported), the Court had this to say on that requirement:-

> *"... it is trite law, that for any identification parade to be of any value, the identifying witness(es) must have earlier given a detailed description of the suspect before being taken to the identification parade. See* ***Emmillian Aidan Fungo @ Alex & Another v. R.****, (CAT) Criminal Appeal No. 278 of 2008,* ***Ahmad Hassan Marwa v. R.****, (CAT) Criminal Appeal No. 264 of 2005 (both unreported)"*

In the case at hand, it is plain from the evidence of PW24, the police officer who supervised the identification parade, that the identifying

witness (PW13), did not give any description of the suspect before he made the identification at the parade.

Given the above stated position, there is no gainsaying that, had the learned judge considered that point, he would not have upheld the appellant's conviction.

In the upshot, on the basis of the above stated reasons, we find merit in the appeal and hereby allow it. We accordingly hereby quash the appellant's conviction and set aside the sentences imposed on them. They shall be released from custody unless they are otherwise held for any other lawful cause.

DATED at DAR ES SALAAM this 17th day of September, 2018.

A.G. MWARIJA
**JUSTICE OF APPEAL**

R.E.S. MZIRAY
**JUSTICE OF APPEAL**

M. A. KWARIKO
**JUSTICE OF APPEAL**

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

A. H. MSUMI
**DEPUTY REGISTRAR**
**COURT OF APPEAL**