IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A, KOROSSO, J.A And SEHEL, J.A.)

CRIMINAL APPEAL NO. 174 OF 2018

SHADRACK MESHAKI MADIGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Phillip, J)

dated the 9th day of July, 2018.
In
Criminal Appeal No. 302 of 2016.

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JUDGMENT OF THE COURT

14th August, & 6th Oct, 2020

LILA, J.A.:

The appellant, Shadrack Meshaki Madiga, was arraigned before the District Court of Temeke of the offence of armed robbery contrary to section 287A of the Penal Code Cap. 16 R.E 2002 as amended by Act No. 3 of 2011. It was alleged that, on 15th December, 2013 at Mbagala Kongowe area within Temeke District in Dar es Salaam Region, he did steal a motor

vehicle with Registration No. T 902 CHR make Suzuki Carry (henceforth the stolen car) valued at TZS 7,500,000.00 the property of one Rogartius Urasa and immediately before such stealing did use a *panga* to threaten one Omary Hemed Mshamu in order to obtain the said stolen property. He denied the charge. Trial ensued and after a full trial, he was convicted and sentenced to serve thirty (30) years imprisonment. His first appeal to the High Court was dismissed, hence this second appeal to this Court against both conviction and sentence.

The brief facts of the case as can be gleaned from the record of appeal are as follows; Omari Mshamu (PW2) was a driver employed by Deogratius Urassa (PW6) to drive for transport business his motor vehicle with Registration No. T902 CHR Suzuki Carry. He used to park the motor vehicle at Manzese. According to him, on 15/12/2013 at around 1830hrs he was approached by two people who were in a motorcycle and one of them told him that they had timber to transport from Manzese to Kongowe-Mbagala. After a brief negotiation, they agreed about the fare. They then went to where the timber was; loaded them in the car and a journey to Mbagala began. The one who hired him sat with him at the front cabin and

the other person followed them using the motorcycle. As it was already late, PW2 picked one Seleman to accompany him in that trip. On the way, the guy who was sitting with PW2 instructed him (PW2) to stop the vehicle at Kizuiani where they picked a person he said was a mason. That person had a sulphate bag. The journey proceeded.

Upon arrival at Kongowe, he (PW2) was again directed to stop so as to carry other persons who would help them to offload the timber as there was a long distance from the road to where the timbers were to be offloaded. He refused to stop claiming that those in the car were enough to do so. They proceeded with the journey taking the rough road and after a short while he found that they were in the bushes, he decided to stop and insisted that he would not move a step. Then it was around 2130hrs but there was moonlight which shed light as if it was day time hence easy to see and identify those people. As he (PW2) was about to step down from the car, the person with the motorcycle passed and stopped his motorcycle in front of the vehicle. Suddenly, he (PW2), received a blow from the blunt side of the bush knife. PW2 lay down. Those people pressed him down, tied him and used ropes to tie both his and Selemani's hands and legs.

The appellant proposed that he be killed but the one who hired the car stopped him. They were then carried to the bush and left there. A short time later, PW2 managed to untie himself and Selemani using his teeth. They walked up to the road where they narrated the story to motorcyclists who were there and together mounted a search for the car following the car tyre marks. The marks led them up to the football ground near goalposts at Mbande Rufu whereat they found the robbed car parked. They invaded the car and thieves ran away and were chased by other people while PW2 and Seleman remained. A short time later they saw one person coming out of the car through the driver seat and they chased him while shouting "thief" and one person came to assist him. That person stopped and wanted to fight PW2 but the one who turned up for help, beat that person with a stick twice and he fell down. The person beaten turned out to be the one who had hired PW2. Many people appeared and threw various things onto him. Then two people who introduced themselves as the assistant ten cell leaders appeared. That person who was arrested named Juma White of Mtongani and Shedrack Meshaki as the ones he was with in the robbery incident. The ten cell leader was shocked to hear the

name of Shedrack Meshaki as was a person he knew him to be the owner of the house near where the stolen car had parked. A ten cell leader was called as well as the police. However, the mob around could not be contained. They set that person to fire. Then PW2 drove the car to Mbagala Police Station.

While that was happening where the stolen car was found, at about 0100hrs that very night, Antony John (PW3) who responded to the call "thief thief" raised by PW2 got awakened from sleep and moved out with his dog and hid himself near Songas road. Not sooner, a person on a short and singlet appeared looking worried and was limping. Upon enquiring him, he replied that he resided at Chamazi and his motorcycle had been stolen at Mzinga. As he wanted to call for help, that man ran away. There was moonlight and was able to identify him to be his neighbor Shedrack. He raised an alarm and nobody responded. He went to the bus stop where he saw shedrak who told him that "Masanja nisamehe, I ran out of fuel". While talking, again, Shedrack ran away. He (PW3) decided to call for thief and as it was already about 0400hrs people helped him to arrest him (shedrack). In the course he (PW3) was told that one of Shedrack's fellows

was killed. He then took Shedrack to police post whereat he was interviewed and, in his presence, he named his fellows in the robbery incident including one White who was killed by mob.

When he was cross-examined by the appellant, PW3 said he knew him before the incident as he lived in that area and that he confessed and mentioned his fellow thieves at the police station. He said although he did not know what he (appellant) had done; he arrested him because he was suspicious because he ran away from him when he wanted to call fellow "bodaboda" to assist him when he said his motorcycle was stolen.

Iddi Kapimbula (PW4), a street chairman of Rufu Street, told the trial court that on 15/12/2013 he received a call from one Mohamed Khalid (PW5) informing him that a certain person who was being suspected of stealing a Suzuki Carry which was packed in the appellant's compound was being burnt and while he was there that person was set to fire. He said he called police who went and collected the dead body. He also said he was informed that another person was arrested at Songas but was not killed. He further said he went to the police station and found the appellant and he heard him confess and named other fellows.

Khalid Mohamed (PW5), a ten cell leader of the area where the appellant resided, told the trial court that he was, on 15/12/2013 at about 0100hrs, awakened by alarm from the football pitch where people were saying someone has to be set to fire. He went there and found a man not yet burned. Upon interrogating him, that person said four of them, including the one where the stolen car had parked, went to steal a car at Manzese. He said the house where the car was parked belonged to the appellant. PW5 then made a call to PW4 who called the police. That the police turned up and carried the body of the burnt person. Then he went back home to sleep.

When he was cross-examined by the appellant, PW5 said he did not see the appellant but he saw the car parked in his compound which is not fenced. He also said he did not witness the robbery incident. He said PW3 is also called Masanja.

Rogartius S. Urassa (PW6) told the trial court that he was the owner of the stolen car with Registration No. T 902 CHR. He bought it from one Majura Mahende or Majura Matawa at TZS 6.8 million and he tendered both the Registration Card No. 5531807, sale agreement and the stolen car

which were admitted as exhibits P3, P4 and P5, respectively. He said after being informed of his car which he was using for business and was being driven by one Omar Mshamu (PW2) being stolen on 16/12/2013, he went to the police station and was given the car after writing a letter requesting for the same. E. 6221 D/Sgt Elipharesi (PW7) recorded the appellant's confessional statement. He said the appellant told him that he, together with other fellows, hired the car at Manzese to carry tree logs to Tuangoma but at a place near a school they turned against the driver and his helper, tied them with rope and threw them in the bush and then drove the car to Mbande near Mkuranga whereat he was arrested by civilians in the morning. However, admission of the statement as exhibit was objected. A trial-within-trial was conducted and the ruling was reserved to be part of the judgment. This is what the trial court said at page 30 of the record of appeal:-

> *"**Court**: Ruling on admissibility of this exhibit shall be discussed in the trial determination of this suit."*

In the said judgment, the trial court overruled the objection and admitted the cautioned statement as exhibit P.6. This is what the learned trial magistrate stated:-

> *"Therefore this court accepts this confession and it is therefore admissible before this court and it is received as exhibit P.6 and the court intends to rely on it in this judgment."*

In his sworn defence, the appellant (DW1) vehemently denied involvement in the commission of the offence. He claimed that while at the railway station waiting for his wife who was expected to arrive from Mwanza, he received a call at about 0100hrs from his house maid informing him that a certain person was being killed near his house. He was, again, later at 0230hrs, called and told that the police had asked him to report at Mbande Police Station which order he obeyed and personally reported at the Police Station at 0400hrs after being informed that the train would not come. Upon arrival at the Police station, he said, he was arrested and stayed till 1400hrs. He was then asked by the OC-CID about the whereabouts of one Silas something he denied having any knowledge of. That he was beaten following instructions given by the OC-CID and

later taken to Mbagala Police Station. He also gave the background of the accusation saying that he was earlier on charged twice for the same offence and the charges were withdrawn. He tendered two charge sheets which were admitted as exhibit D1, collectively. In all those charges, he said, the car involved was T 902 CHR.

In respect of the prosecution evidence against him, he assailed it stating that PW2 gave different statements respecting when he was given the stolen car for, in his statement at the police station he said in September but in court he said December. He also claimed that while in the statement he said Identification Parade was conducted on 17/12/2013 but in court he said 16/12/2013. He went on to say that in the parade people were not similar as there were fat and tall people.

Despite the appellant's denial, the trial court found the charge was proved beyond doubt. Addressing herself on admissibility of the appellant's confessional statement the ruling of which was deferred to the stage of judgment, the learned trial magistrate was convinced that the appellant was not truthful and there was no allegation of torture or ill-treatment from the appellant in making it hence she admitted it as exhibit P.6. She was

also, citing the case of **Michael Joseph vs Republic** [1995] TLR 278, satisfied that the facts presented by the prosecution established the ingredients of the offence of armed robbery because PW2 was tied with ropes and bush knives were used to threaten him. In respect of identification, the learned trial magistrate was firm that the appellant was identified by PW3, his neighbour who arrested him in the night of the incident in suspicious conducts such as the fact that the stolen car was found packed at the football ground near the appellant's house and the time taken at the scene of robbery was sufficient enough to enable PW2 see and identify him. Generally, she was convinced that the evidence of PW3, PW4, PW5, the appellant's confession made before PW7 and the exhibits tendered sufficiently proved the appellant's involvement in the robbery incident. She dismissed the appellant's defence of *alibi* as being untrue because he did not prove not being at the scene where the car was robbed and also failed to prove that he was at the railway station. In addition, the learned trial magistrate said the accused's defence evidence was contradictory on the fact that at first he said he was at the railway station waiting for arrival of his wife and later said the train never arrived.

However, without missing a point, we think the learned magistrate did not comprehend the appellant's evidence properly over what she said to be a contradiction. The true position, is as demonstrated above, that the appellant said, at the material time, he was at the Railway Station waiting for the arrival of his wife from Mwanza and as it did not arrive, he decided to abide by the police directive to go to police station. All the same, based on the above findings the learned trial magistrate convicted the appellant and sentenced him to serve a statutory jail term of thirty (30) years.

The conviction and sentence aggrieved the appellant. He appealed to the High Court seeking to impugn the trial court's verdict. As it were, he was unsuccessful. His appeal was dismissed in its entirety. The learned judge concurred with the trial magistrate that there was overwhelming evidence by PW2, PW3 and PW4 that established the appellant's guilt in that he was properly identified at the scene of crime and he was arrested that night and taken to the police station as opposed to his allegation that he presented himself to the police station. In addition, she discounted the appellant's defence of *alibi* for not being credible. However, in respect of the cautioned statement, the learned judge agreed with the learned State

Attorney that the trial magistrate ought to have given a ruling after the enquiry to determine whether the appellant's cautioned statement was admissible instead of reserving it till the judgment stage. She therefore found that the procedure adopted in admitting the appellant's cautioned statement was flawed hence she expunged it from the record of proceedings. We hasten to agree with the learned judge for the reason that the appellant had the right to know whether the cautioned statement was admissible and formed part of the prosecution evidence against him before he rendered his defence. That would have enabled him to properly marshal his defence against it. The course taken by the learned trial magistrate denied the appellant that right. That was unfair. Expunging the cautioned statement was a deserving outcome. It needs no overemphasis that a finding (ruling) must immediately follow after enquiry and where possible before proceeding with recording of evidence of other witnesses and, most importantly, before the accused renders his defence.

Still aggrieved, the appellant lodged the present appeal in his quest to fault the findings of guilt made by both courts below. He has advanced

six long and detailed grounds of appeal which may conveniently be paraphrased into the following grounds:-

1. The first appellate erred to hold that the appellant was properly identified as being one of those who robbed PW2 the car.
2. The first appellate judge erred in not finding that the identification parade was improperly conducted.
3. The first appellate judge erred in not appreciating that there were contradictions in the witnesses' testimonies.
4. The first appellate judge erred in not finding that the provisions of section 38(3) of the Criminal Procedure Act, Cap. 20 R. E. 2002 (the CPA) was not complied with because no certificate of seizure was issued after the car was retrieved.
5. The first appellate judge erred in not finding that PW2, PW4 and PW5 were not shown the car allegedly stolen for identification purposes.

6. The learned first appellate judge erred in not realizing that exhibits P3 and P4 were improperly admitted into evidence for not being read out in court after being cleared for admission.

7. The learned first appellate judge erred in finding that the appellant was arrested and taken to police station.

At the hearing of the appeal, the appellant who was in the prison was linked to the Court through video facilities. On the other hand, Ms. Ester Martin and Ms. Chesensi Gavyole, both learned State Attorneys, appeared before us representing the respondent Republic.

In amplifying the grounds of appeal, the appellant, who had earlier on 10/8/2020 lodged written submission in support of the appeal, simply adopted both the grounds of appeal and the submission and urged the Court to allow his appeal and set him free. He also urged the Court to let the respondent Republic respond to his grounds of appeal and written submission and then he would make a rejoinder.

In his submission in respect of ground one (1) of appeal, the appellant faulted the judge for upholding his conviction based on visual

identification which was not watertight as it was done in unfavourable conditions. He argued that he was not known to PW2 before the incident as he, in his testimony, admitted that it was his first time to see him and he first heard his name from the one who was killed. He further submitted that the intensity of the said moon light could not be equated with day light contending since according to evidence light was weak such that he said he used car light to see the one on the motorcycle. To bolster his assertion he referred the Court to the case of **Ally Manono vs. Republic**, Criminal Appeal No. 94 of 2005 in which the case of **Abdallah Bin Wendo vs. R** [1953] 20 EACA which set forth the factors to be considered which were followed in the case of **Waziri Aman vs. Republic** [1980] TLR 250.

In respect of the second (2) ground, the appellant submitted that the identification parade certificate (PF-186) was not tendered to fortify that PW2 identified him and that the parade was improperly conducted for not involving similar and identical persons and that even the police who conducted it did not testify in court.

The learned judge is, in ground three (3) of appeal, also faulted for not appreciating that there were fundamental contradictions in the

witnesses' own evidence and between them which went to the root of the case. He pointed them out as follows;

1. PW2, at first, said he asked the one on the motorcycle to check if the head lights were functioning and he saw him clearly but later on he said he could not tell the registration number of the motorcycle.

2. PW1 said when he stopped the vehicle four people with knives went to him, tied him and the turn boy and left with the car while PW2 said when he stopped he suddenly received one blow from the blunt side of the bush knife meaning there was only one knife.

3. PW2's evidence in court differed with his statement at the police (exhibit D.2). Such difference rendered him unreliable.

4. PW5 contradicted himself when he said when he went to the scene he found one person burning but later said that he found that person not yet burnt.

In augmenting the above arguments the appellant referred the Court to its earlier decisions in **Evarist Nyangove vs Republic**, Criminal appeal

No. 72 of 2010 **Leonard Zedekia Maratu vs Republic**, Criminal Appeal No. 86 of 2005 and **Beda Philipo vs Republic**, Criminal Appeal No. 114 of 2009 (all unreported) in which he said the Court stated that contradictions render the witnesses' evidence untruthful hence should be acted on with caution.

In ground four (4) of appeal, the appellant's complaint is two-limbed. In the first limb, the appellant has made a long submission elaborating that the provisions of section 38(3) of the CPA was not complied with when the stolen car was recovered because no seizure certificate was issued. We think, we need not be detained in this ground. As rightly argued by the learned State Attorney, the evidence on record is clear that the stolen car was found in the football pitch near the appellant's house. It was not seized in the appellant's house after an official search being conducted as envisaged under section 38 of the CPA hence the need to issue a certificate of seizure does not arise. The complaint is, for that reason, unfounded and is hereby dismissed.

In the second limb, the appellant's complaint is founded on the way the stolen car was handled (chain of custody) after it was recovered. The

complaint is that its handling was not documented and cited the cases of **Paul Maduka vs Republic**, Criminal Appeal No. 110 of 2007 and **Julius Matama @ Babu @ Mzee Mzima vs Republic**, Criminal Appeal No. 137 0f 2015 (both unreported). We, again, think that this complaint is unfounded. The evidence on record clearly shows that after the stolen car was recovered in the football pitch, the ignition switch was found not to be in car hence they traced it and found it at the place where the robbery incident occurred and thereafter PW2 drove the car to the police station whereat it was later returned to the owner (PW6) for custody. So, the handling of the car was sufficiently explained and it being not a property capable of changing hands easily or being easily tempered with, we find nothing irregular was done that occasioned injustice to the appellant. Even, when it was tendered in court, the appellant did not object or raise anything suggesting being tempered with. Just for clarification, faced with an identical scenario, in the case of **Leonard Manyota vs Republic**, Criminal Appeal No. 487 of 2015 (unreported), this Court drew a distinction between principles applicable in handling properties capable of changing hands or easily being tempered with as promulgated in the case of **Paulo**

Maduka and 4 others vs Republic, Criminal appeal No. 110 of 2007 (unreported) which involved handling of money in cash and those items which cannot and stated that:-

> *"It is not every time that when the chain of custody is broken, then the relevant item cannot be produced and accepted by court as evidence, regales of its nature. We are certain that this cannot be the case say, where the potential evidence is not in the danger of being destroyed, or polluted, and/or in any way tampered with. Where the circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have been broken. Of course, this will depend on the prevailing circumstances in every particular case."*

Consistent with the above exposition of the law, the Court, in the case of **Kadiria Said Kimaro vs Republic**, Criminal Appeal No. 301 of 2017 (unreported), considered the issue whether the pellets were properly received in evidence for which its stages of its handling was not documented and was of the view that being items which could not change

hands easily or be tampered with, they were properly admitted into evidence and the chain of custody was consistent.

The complaint in ground five (5) of appeal concerns failure by the prosecution to let PW2, PW4 and PW5 identify the stolen car (exhibit P.5). The resolve of this complaint rises no difficulty at all. As rightly conceded by the learned State Attorney the record bears out that the prosecution did not cause the named witnesses to see and identify exhibit 5. The issue that arises is whether, in the circumstances of this case, such failure negatively impacted on the prosecution case. On this the learned State Attorney argued that PW2 throughout his testimony maintained that the stolen car was registration Number T 902 CHR make suzuki carry owned by one Urasa and that it was the same car Rogartius Urasa (PW6) tendered in court and admitted as exhibit P.5. More so, PW6 tendered a Registration Card (exhibit P.3) which indicated Majura Matawa as being the one from whom he bought the car as evidenced by the sale agreement (Exhibit P.4). She argued therefore that the omission to show the stolen car to PW2, PW4 and PW5 for identification was inconsequential. With this evidence on record we are inclined to agree with the learned State Attorney that, much

as it would have been better that PW2, PW4 and PW5 were availed with the opportunity to see and identify the stolen car (exhibit P.6), the omission had no serious effects on the prosecution case. The rationale here is that the description of the stolen car given by PW2, PW4 and PW5 tallied exactly with the particulars contained in exhibit P.4 and even exhibit P.6 tendered by PW6. The omission was therefore not fatal. This ground fails too.

In ground six (6) of appeal, the learned first appellate judge is being challenged for not realizing that exhibits P3 and P4 were improperly admitted into evidence for not being read out in court after being cleared for admission. The infraction was readily conceded by the learned State Attorney and was quick to urge the Court to expunge them from the record of proceedings. In cementing her assertion, she cited to us the case of **Issa Hassan Uki vs. Republic**, Criminal Appeal No. 129 of 2017 (unreported). That notwithstanding, relying in the same decision, she was insistent that the detailed oral testimony by PW6 sufficiently established that he was the owner of the stolen car (exhibit P.6) after buying it from Majura Matawa. After all, she added, there was no dispute regarding

ownership of Exhibit P.6. It is, indeed, clear that the two exhibits were not read out aloud in court after admission as exhibits. It is fairly settled that once an exhibit is cleared for admission and admitted in evidence, it must be read out in court. In addition to the cited decision, we are also guided by our holding in the case of **Sunni Amman Awenda vs. Republic**, Criminal Appeal No. 393 of 2013 (unreported) and they deserve, as we hereby do, to be expunged from the record of proceedings.

Another complaint connected to this ground of appeal is that the sketch map showing where exhibit P.6 packed at the time it was recovered was not drawn. The learned State Attorney was of the view that it was not necessary because according to evidence on record the car (exhibit P.6) parked near the appellant's house. We, on our part, have seriously perused the record of appeal. We have noted that the appellant's guilt was not founded on the invocation of the doctrine of recent possession whereby it is necessary to prove, among other factors, that he was found in possession of the stolen property. (See See, **Joseph Mkumbwa & Samson Mwakegenda v. R**, Criminal Appeal No. 94 of 2007 (unreported). Since the appellant was not found in possession of exhibit

P.6 then the location of the recovered stolen property was not relevant. That not being the case, we agree with the learned State Attorney that drawing of the sketch map was not important.

The learned judge is also faulted for concurring with the trial court that the appellant was arrested and taken to police station as opposed to his contention that he surrendered himself to the Police station upon being informed by his house maid that he was required by the police to report at the police station. The learned State Attorney was emphatic that the evidence on record is to the effect that the appellant was arrested by PW3 during the night of the incident and PW4 is the one who called the police who took the appellant to the police station. We hasten to say that it is a well-established principle that this being a second appeal, this Court will not interfere with the concurrent findings of facts by the lower courts unless there was misapprehension of evidence or violation of principles of law or procedure. The Court pronounced that stance in the case of **Aloyce Maridadi vs. The Republic**, Criminal Appeal No. 208 of 2016 which quoted with approval the case of **Wankuru Mwita vs The Republic,** Criminal Appeal No. 219 of 2012 (unreported) it was held that:

"...The law is well-settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial Court and first appellate Court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence; misdirection or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."

In the present case, the evidence on record is clear that the appellant was arrested by PW3 and was picked by police following the call by PW4. The two witnesses were believed by both courts below and found as a fact that the appellant was arrested by PW3 and later picked by police. That finding of fact is based on evidence which was properly received by the trial court. We see nothing on record suggesting misapprehension of the substance, nature and quality of the evidence; misdirection or non-direction on the evidence or a violation of some principle of law or procedure. There is therefore no justification for us to interfere with that

finding of fact by both courts below. This ground of appeal is equally devoid of any merit and we dismiss it.

We now revert to ground three (3) of appeal in which the appellant complains that there were huge and substantive contradictions going to the root of the case. To begin with, we find it proper, to expound the general principles governing contradictions by any particular witness or among witnesses. It is generally acceptable witnesses of the same incident are prone to give different explanations. Appreciative of that fact, in the case of **Lusungu Duwe vs Republic**, Criminal Appeal No. 76 of 2014 (unreported) the Court cited the case of **Dickson Elia Nsamba shapwata & another vs Republic**, Criminal Appeal No. 92 of 2007 (unreported) and the Court stated that:-

> *"It was stated in that case that in all trials, normal contradictions and discrepancies are bound to occur in testimonies of the witnesses due to normal errors of observation, or errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence...Minor contradictions, inconsistencies, or discrepancies*

which do not affect the case of the prosecution, it went on to say, should not be made a ground on which the evidence can be rejected in its entirety. While minor contradictions and discrepancies do not corrode the credibility of a party's case, material contradictions and discrepancies do."

The above stance was reiterated in various other decisions of the Court in which it emphasized that not every discrepancy in the prosecution's witnesses will cause the prosecution case to flop and that it is only where the gist of the evidence is contradictory then the prosecution's case will be dismantled (See **Saidi Ally Ismail vs. Republic,** Criminal Appeal No. 241 of 2008 and **Samson Matiga vs. Republic**, Criminal Appeal No. 205 of 2007 (both unreported).

Guided by the above principles, we have objectively perused the entire record and considered the claimed patent contradictions and inconsistences in the evidence of the prosecution witnesses as listed herein above. We are of the view that they were not fundamental and the two courts below were entitled to gloss over them without occasioning any injustice to the appellant. We shall demonstrate.

In respect of the alleged first contradiction, the record bears out that PW2 told the one on the motorcycle to check the front lights so as to enable him see and identify him not so as to read the Registration Number of the motorcycle. There is therefore no contradiction when PW2 later said he could not tell the Registration Number.

As for the second alleged contradiction that the police who investigated the case (PW1) and PW2 differed on the number of knives involved in the robbery incident, it is indeed on record at page 8 of the record of appeal that PW2 told PW1 that he was hired by four people who later on attacked him with knives. PW1 was narrating what he was told by PW2. On his part, PW2 told the trial court that after making up his mind not to proceed with the journey and as he stepped down from the car, he suddenly faced a blow from the blunt side of the bush knife. He did not tell whether other bandits had bush knives too. With the fatal blow, it seems he had no time to check how many bandits had bush knives. However, the number of bush knives was not material as the fact remains that a weapon was employed in stealing the car. The contradiction is not material and therefore did not go to the root and hence affect the prosecution case.

Next to be considered is whether PW2's evidence in court differed with his statement at the police (exhibit D.2) and if such discrepancy rendered him unreliable. We have seriously perused PW2's statement (exhibit D.2) and his evidence on record. Much as we appreciate that PW2 did not give, in court, the details of the incidence in the same manner and using the same words as he did in his statement, which is definitely not expected of a witness due to lapse of time and also ability to cram what he told the police verbatim, the gist of the event remained unchanged. Both in court and in his statement he gave a detailed account of the event from the time he was approached by the bandit who was killed who was with another person on a motorcycle, the time he was robbed the car and till when the bandit was killed. We are therefore not prepared to accept the contention that there are material contradictions between what PW2 said in court and the contents of his statement (Exhibit D.1).

Lastly, we will consider whether PW5 contradicted himself in his explanation regarding the other bandit being set to fire. The appellant claimed that PW5 at first said when he went to the scene he found one person burning but later said that he found that person not yet burnt. We

are confident that the appellant is referring to PW5's telling at page 18 of the record about what befell on the bandit who was killed upon his arrest where he is recorded to have said:-

> *"I am also a ten cell leader of cell No. 39. I remember on 15/12/2013 at night I was asleep. At 0100hrs I heard alarm outside. People were saying someone should be set ablaze. The noises were coming from a football pitch. I warned the people by telling them that it was not proper. I urged them they should have interrogated him. When I reached there he was yet burnt...when the police came the person was already burnt to death..."*(emphasis added).

It is discernible from the above excerpt that there is nothing contradictory. PW2 is very clear that when he arrived at the place where the bandit was arrested he found him not yet to be burnt but was burnt later on before the police arrived. The appellant's complaint is by any stretch of imagination unfounded.

We are now remained with the crucial issue whether the appellant was properly identified as complained in ground one (1) of appeal.

We, however, think we should, first, determine whether the identification parade conducted added any value to the prosecution case. We are alive of the legal position that identification parade is by itself not substantive evidence. It is usually only admitted for collateral purposes, mostly, to corroborate dock identification of an accused by a witness (See **Moses Deo vs R** [1987] TLR. 134. And, for it to be of any value, such identification parades must be conducted in compliance with the applicable procedure as set out by the Police General Orders No. 232 (the PGO) which was also discussed in **Republic vs XC-7535 PC Venance Mbuta** (2002) TLR 48 citing the famous Ugandan case of **Republic vs Mwango Manaa**(1936) 18 EACA 29. Of particular relevance for our purposes is paragraph 2 (k) of PGO No. 232 which reads:-

> *"(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 general way similar"*

Since it is a condition that the participants in the parade must look similar or alike, then where conducted otherwise, it will be of little probative value against an accused person. The evidence by PW2 is clear

that the parade conducted constituted of people who were substantially different in various aspects. In fact, this is what PW2 told the trial court at page 13 to 14 of the record of appeal when he was cross-examined by the appellant:-

> *"The people in the parade were different. They were not in uniforms. You were in short trouser. You had wound on your head. Nobody had a wound on his (sic) except you. He was the only person in shorts. They did not look the same."*

Given the nature and appearance of people involved in the parade, we have no hesitation to hold that it manifestly violated the law. On this account therefore, there is merit in the complaint that the parade was not properly conducted hence rendering it valueless. It was therefore unsafe to rely on it to found the appellant's guilt. Both courts below seemed to have realized that anomaly as they did not rely on it to convict the appellant.

We now turn to the issue whether the appellant was identified. The evidence relied on is that of visual identification by PW2 alone. The law on visual identification is now fairly settled that it is of the weakest kind, especially if the conditions of identification are unfavourable. The Court has

in numerous decisions warned that no court should base a conviction on such evidence unless, the evidence is absolutely watertight. In the often cited case of **Waziri Amani vs R** [1980] TLR 250, the Court stated with sufficient lucidity the guidelines to be followed by the courts where the determination of a case depends on identification such as whether or not it was day time or at night, and if at night, the type and intensity of light; the closeness of the encounter at the scene of crime; whether there were any obstructions to clear vision, whether or not the suspect(s) were known to the identifier previously and the time taken in the whole incident.

It is evident that the background of the incidence can be traced way back to the time when two people approached PW2 for hiring a motor car Registration No. T 902 CHR make Suzuki Carry driven by PW2 and which had parked at Manzese at 1830hrs to when the stolen car was recovered parked at the football pitch. PW2 is, in his testimony, clear that he was approached by two people who were on a motorcycle and the one who was killed negotiated with him the fare of hiring the car for carrying timber from Manzese to Kongowe-Mbagala. At this point, definitely, it was still bright and PW2 had enough time to see and identify the two persons, the

appellant inclusive. Then, they went to where the timber was with the one who was killed and sat with him (PW2) and were followed behind by the motorcycle, paid for the timber and were loaded in the car. Thereafter, he said, before they left to Mbagala, the one who was killed went to talk to the one on the motorcycle. After their talk, PW2 called the one killed to check if all the head lights were properly functioning. That was intended to enable him to check if they were the very ones who had hired him and he was satisfied to be ones. That suggests that it was already dark and what followed thereafter occurred at night. By using the light he gave the descriptions of the two persons to be:-

> *"My lights showed the one on the motorcycle very clearly. The one who sate with me was tall, thin and brown in complexion. In the motorcycle he was not very thin. He was medium. Not tall, not short and he was black in complexion."*

Here, again we entertain no doubt that PW2 saw the two persons at a close range and was able to identify them as there was enough light from the car and PW2 was able to give their descriptions. The conditions

were favourable for identification.(See **Raymond Francis vs R** [1994] TLR 100).

Turning to the robbery incident, the issue that crops up for our determination is whether the conditions were favourable to enable PW2 see and identify the appellant as one of those who robbed him the car at the scene of crime, that is, at the place where PW2 was hit with the blunt side of the bush knife, he and one Selemani were tied with ropes, dumped in the bush and the bandits left with the car.

In the present case, PW2 is the victim and sole and key witness of what happened. According to him the one with the motorcycle followed them from Manzese until at the Institute of Accountancy where the one he had sat with in the front cabin stopped him and told him that the one with motorcycle had ran out of fuel. He then disembarked and went to assist him refuel the motorcycle and returned after about 40 to 45 minutes. The journey proceeded and nowhere did PW2 state that he had opportunity to see the one on the motorcycle until at the place where there were bushes where he stopped and declined to further continue with the journey. As to

what happened thereat, he (PW2) is recorded, at page 11 of the record of appeal, to have said:-

> *"We continued and took a rough road. I later came to discover that we were in the bushes. I stopped and said I was not going to move a step. He opened the door and started to talk with the person behind. I also opened the door but before I touched the ground with my second foot a motorcycle came and passed and stopped in front of my vehicle. Suddenly I received one blow from the blunt side of the bush knife. They continued to give me blows. I had to raise my hands. I asked them what they wanted. They said my boss has taken things from other people. They caused me to lie down and step on me. The people who beat me is the one who was with a motorcycle. It was at 2130hrs. I knew these people as we had been together since 1830hrs. There was moon light almost like day light and so it was easy to identify. I was tied up with ropes (my legs and arms). They wanted to tie my hands at back but I reslsted. They tied me in front. They then carried me to the bushes. They brought Selemani also tied. They the concentrated to me*

and said I should not move until after one hour. One of them said they should kill me. It was the accused person who said they should kill me. The accused was the one who was riding the motorcycle. When he came and wanted to kill me the one who had sat with me and who hired me stopped him and said they should leave."

It is plain, from the above excerpt, that PW2 described the source and intensity of light and the specific acts done by the appellant in the robbery incidence. No doubt, the act of tying PW2 and Selemani with ropes brought the bandits closer to PW2. Going by such evidence and bearing in mind that it was his third time to see the appellant during that incident, we entertain no doubt that PW2 correctly identified the appellant out of the many robbers.

Besides the above evidence, there was yet another piece of evidence that implicated the appellant with the commission of the offence. That was circumstantial evidence. To sustain a conviction on circumstantial evidence the test set up by the law is that, such evidence must irresistibly point to the guilt of the accused person. (See **August Mahiyo vs R** [1993] TLR

117). That stance is in line with the legal position stated much earlier in the Kenyan case of **R vs Kipkering arap Koske and Another** (1949) 16 E.A. 135 where it was held that in order to justify a conviction based on circumstantial evidence, the inference of guilt, the inculpatory facts, must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.

In the present case, PW2's evidence is to the effect that after he was, with Selemani, tied with ropes and dumped in the bush, the bandits left with the car and after sometime he untied himself and Selemani using his teeth and mounted a search for the bandits. Assisted by motorcyclists whom they reported the incidence, they went up to the football pitch where they saw the stolen car packed. That they went close to it and invaded it. People in the car got out and ran away. He ran after the one who hired him and with the help of a person who responded to the call for "thief" got hold of him after he was hit with a stick on his head. That, other

people turned up to be the one who hired him, and upon inquiring him, he named other persons he was with in the robbery incident as being Juma White and Shedrack Meshaki who live at the place where the stolen car had packed. Those people then set him to fire and he burnt to death. While that was happening, PW3 who, as demonstrated above, responded to the call for thief with his dog, saw a person who, using moon light, he identified to be his neighbour Shedrack who looked suspicious and was limping. Upon questioning him, he claimed to have his motorcycle stolen at Mzinga but then ran away. PW3 traced him and, assisted by other people who responded to his call for thief, managed to arrest him and was later sent to police station.

The above evidence shows that the appellant was named by the one who hired the car before he was burnt to death; he was arrested immediately after the robbery incidence and under suspicious circumstances and the stolen car parked at the football pitch near his house. With such evidence, we are satisfied that the test for circumstantial evidence to found a conviction was met.

The appellant, in his defence, gave an explanation to account for his being associated with the commission of the offence. In all, he raised the defence of *alibi.* He claimed that at the material time he was at the Railway Station waiting for the arrival of his wife from Mwanza and was informed of the incident of a person being burnt near his house through a call from his house maid. The evidence by PW2 which was not doubted by the trial court gave detailed account of the incident and the appellant's involvement in it. Even PW2 and PW5 told the trial court that the appellant was named by the one who was burnt down to have participated in the robbery incident. The testimonies of these witnesses and that of PW3 who arrested the appellant on the fateful night and took him to police station squarely placed the appellant at the scene of crime. The appellant's claim that he was not at the scene of crime is highly implausible. This ground of appeal fails too.

All said, save for the admissibility of exhibits P3 and P4 and the conduct of the identification parade which was flawed hence expunged and disregarded, respectively, there still remained, as demonstrated above, sufficient evidence on which the appellant's conviction was grounded.

For the foregoing reasons, this appeal is devoid of merit and is hereby dismissed.

DATED at **DAR ES SALAAM** this 30th day of September, 2020

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered on this 6th day of October, 2020, in the Presence of the Appellant linked through video conference from Ukonga Prison and Mr. Adolph Kisima, State Attorney for the Respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL