IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 214 OF 2017

1. OMARY IDDI MBEZI
2. VICTOR CHARLES @ MPIGA PICHA
3. SAID ALLY CHIKUPA
4. SAID MRISHO @ KUJIKUNA
5. JAFARI IDDI MBEZI
6. JOHN ANDREA @ JOHN WALKER @ MRUNDI
7. ABDALLAH ISIAKA @ MANILA ..... **APPELLANTS**

VERSUS

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

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

(Mushi, J.)

dated the 16th day of December, 2009
in
Criminal Appeal No. 125 of 2008
.....

JUDGMENT OF THE COURT

12th February & 5th May, 2020

KOROSSO, J.A.:

Omary Iddi Mbezi, Victor Charles @ Mpiga picha, Said Ally Chikupa, Said Mrisho @ Kujikuna, Jafari Iddi Mbezi, John Andrea @John Walker @ Mrundi and Abdallah Isiaka @ Manila, the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th appellants respectively were jointly arraigned before the District Court of Morogoro at Morogoro for the offence of Armed Robbery contrary to

section 287A of the Penal Code, Cap 16 Revised Edition 2002 (the Penal Code).

Particulars of the charge alleged that the appellants on the 12th July, 2006 on or about 00.30hours at Nanenane area within the Municipality and Region of Morogoro did rob various items with a total value of Tshs. 810,000/-. The items included, one television 21" Sony make valued at Tshs 280,000/=; One deck Phillips make black in colour valued at Tshs 80,000/=; one mobile phone Nokia 120 worth Tshs. 130,000/=; two pairs of rubber shoes valued at Tshs. 45,000/-; a Walkman radio worth Tshs. 5000/=; Two jeans trousers valued at Tshs. 20,000/-; and cash money Tshs. 250,000/-. The appellants entered a plea of not guilty and a full trial ensued.

At the culmination of the trial, each of the appellants was found guilty as charged, convicted and sentenced to thirty (30) years imprisonment plus 12 strokes of cane. Aggrieved by the convictions and sentences they appealed to the High Court of Tanzania at Dar es Salaam. The appeal was dismissed and undaunted, they lodged the current appeal.

Background to this appeal can be grasped through three prosecution witnesses, Jumanne Omary (PW1) and ADHA Mustafa (PW2) a husband and wife whose house was invaded and robbed on the material day and from Kassil Aidan (PW5) their neighbor. Allegedly, on the material day and time, being in their room PW1 and PW2 preparing to sleep after watching television, between seven and ten robbers armed with guns and machetes (*pangas*) invaded their house, demanding for money while threatening and assaulting the occupants including injuring PW1. Various items were taken from the house and the attack is estimated to have lasted between fifteen and thirty minutes. The incident was reported to the police and investigations that ensued led to the arrest of the seven appellants and included other persons whose charges were withdrawn at various stages of the trial. It should be noted that some appellants were arrested for other offences and later joined to face the charges which they have appealed against in this Court.

All appellants filed a joint memorandum of appeal with 17 grounds which have been paraphrased and now read as follows: **First**, Insufficiency of evidence on visual identification against all the appellants (found in grounds 1, 5, 9, 10, 11 and 12). **Second**, Confessions of the 1st, 2nd, 3rd,

5th and 7th appellants relied upon by the trial court in convicting appellants and the first appellate court in upholding conviction were recorded and admitted un-procedurally (grounds 3 and 4). **Third,** failure of the trial and first appellate courts to address inconsistencies, discrepancies and contradictions in prosecution witnesses' testimonies and thus find their evidence questionable and lacking in credibility (grounds 2, 6, 13, 14 and 15). **Fourth,** admissibility of exhibits without following procedures (ground 7). **Fifth,** wrong application of the doctrine of recent possession (ground 8). **Sixth,** failure to consider the defence evidence (ground 16) and **seventh,** failure to enter Pleas upon substitution of the charge against the appellants (ground 17).

On the day of hearing of this appeal, each of the seven appellants appeared in person unrepresented, while for the respondent Republic, Ms. Dorothy Massawe, learned Senior State Attorney assisted by Ms. Salome Assey, learned State Attorney entered appearance.

When accorded the opportunity to amplify their grounds of appeal, the 1st appellant intimated a preference for the learned State Attorneys to

respond to the grounds of appeal first and leave them to respond thereafter, a position supported by all the remaining six appellants.

On the part of the respondent Republic, Ms. Dorothy Massawe onset, sought leave of the Court to allow her to submit in two parts. That the first part was to support the appeal for the 1st, 2nd, 3rd, 4th, 5th and 6th appellants and the second part to address the appeal by the 7th appellant whose appeal they did not support. In the midst of her submissions, after a short dialogue with the Court, she upturned her original position on not supporting the appeal for some appellants thus pleaded to be recorded as opposing the appeal and supporting the conviction and sentence as against all the appellants.

On the first ground of appeal that faults the first appellate court for upholding the trial court's finding that the appellants were properly identified, the learned Senior State Attorney submitted that the first appellate court had no reason to depart from the said findings in view of PW1 and PW2's testimonies on identification of the appellants at the crime scene and in the dock. She argued that failure to conduct Identification parade to identify appellants, has not dented prosecution evidence on

identification of the appellants. That both PW1 and PW2 testified that the 2nd appellant who they identified as being at the crime scene was known to them before the incidence as a camera man. Ms. Massawe also averred that it was PW1 and PW3 who identified the 1st and 2nd appellant as holding guns at the crime scene and stated that the 3rd appellant had a scar on his cheek and had demanded for money at and also threatening to injure their child. Regarding the 4th and 5th appellant, PW1 and PW2 averred that they had machetes and PW2 testified that it was 5th appellant who slashed PW1 with a machete. PW1 and PW2 also testified that there was sufficient light arising from electric tubelight which enabled them to identify the appellants at the scene of crime.

Submitting further Ms. Massawe, stated that the 7th appellant was the first to be arrested and thereafter did assist investigators to arrest the other appellants. That during arrest of the 7th appellant, according to PW1 and PW5, he was found with PW1's shoes allegedly stolen in the robbery. PW1 recognized the shoes as his own from the shape and colour and the superglue he had used to repair them.

Ms. Massawe further submitted that some of the stolen items such as, a Sony Television and shoes were found and seized with the assistance of some of the appellants particularly 3rd and 7th appellants, and identified by PW1 and PW2 to belong to them. On the proximity between the assailants and the witnesses while at the crime scene, she contended that the attack was in a room which facilitated easy and close access for witnesses to observe the assailants and especially since the attack is estimated to have run for more than fifteen minutes. She was thus of the view that all these facts should lead to a conclusion that PW1 and PW2 duly identified the appellants within the standard set by the law.

On the part of the appellants, the 1st appellant started by urging the Court to consider the grounds of appeal submitted and to allow the appeal and set him free. He queried the prosecution evidence on his identification wondering how PW1 and PW2 managed to identify all ten assailants who invaded their house, bearing in mind it is alleged that the attack occurred at midnight and with the pertaining circumstances since without doubt it was imbedded with fear and apprehension. He also castigated the evidence on identification arguing that it failed to specify the intensity of brightness

at the crime scene and therefore did not satisfy the standard set for proper identification.

The 1st appellant also challenged lack of forensic evidence to show how the guns were seized or their connection to the crime. He argued that there was neither a certificate of seizure tendered nor any evidence tendered to determine connection of the guns seized and alleged to have been used at the scene of crime to the offence charged since no evidence was brought showing whether they had been used or not. For the 1st appellant, the implored the Court to find that the evidential gaps highlighted left doubts in the prosecution case which should be determined in his favour. He also denied any knowledge of the disputed shoes (Exhibit PE1) challenging the evidence that he was the one to have given the shoes to the 7th appellant and stating that the allegations are mere lies especially since there was no attempt by the 7th appellant to cross-examine him on this assertion to justify such claim.

On his part, the 2nd appellant probed PW1 and PW2's evidence that they recognized him at the crime scene and knew him as the camera man prior to the attack. Contending that the assertions are lies since they were

first spoken in the trial court and nothing to show this was also stated in their recorded statements to the police. The 2nd appellant however, conceded that the witnesses' statements to the police were not tendered and are not part of the record of appeal and thus it will be difficult to verify his assertions. He also contended that the prosecution failed to prove that he was the one to show the whereabouts of the guns alleged to have been used at the crime scene, that is, at his father in law's place. He thus pled that he be set free and his appeal be allowed.

The 3rd appellant challenged PW1's evidence that he managed to identify him at the crime scene because of a scar on his cheek arguing that such a particular was not stated in PW1's statement recorded by the police, nor was the said statement tendered and admitted in evidence. The 3rd appellant contended that failure by the prosecution side to tender PW1's statement to the police rendered his evidence on identification unreliable. Another challenge was the trial court's reliance on prosecution witnesses dock identification in the absence of Identification Parade to support. Arguing that in effect the prosecution neither proved the 3rd appellant was properly identified nor the charges against him. Consequently he urged for his appeal to be allowed.

The 4th appellant sought for a revisit of the evidential value of the evidence on his identification arguing that the evidence against him lacks credibility and that the Court should find in his favor. That under the circumstances his conviction be quashed, sentence set aside and appeal be allowed.

On the part of the 5th appellant, he underscored the fact that PW1 never revealed the intensity of brightness of the light at the crime scene, arguing that the evidence that there was electric tubelight is not sufficient to ascertain that he was properly identified. He further submitted that the only evidence about his identification at the crime scene is that he was holding a machete. He thus implored the Court to consider the grounds of appeal and allow the appeal. The 6th and 7th appellants had brief submissions, stating that their grounds of appeal be considered in their favor, the appeal be allowed and they be released.

Having considered the submissions and arguments by the appellants and respondent Republic in amplifying the grounds of appeal and response thereof, before going any further it is important to highlight from the outset the fact that the parties were queried on the relevance of some grounds of appeal before us which were neither raised nor addressed in

the 1st appellate court. What ensued from this discussion was that the Court shall refrain from considering the 7th ground of appeal as paraphrased that addresses failure of the trial court to allow accuseds to enter Pleas upon substitution of the charge against the appellants in line with the various decisions such as **Zakayo Mwashilingi and Two Others vs Republic**, Criminal Appeal No. 78 of 2007 (unreported). In **Hassan Bundala Swaga vs Republic**, Criminal Appeal No. 385 of 2015 (unreported) we stated:

> *"It is now settled that as a matter of general principle this Court will only look into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal".*

Our next undertaking is an issue raised by the 1st and 2nd appellants we find pertinent, that the record of appeal does not have a charge sheet that has the names of all seven appellants against the offence charged, convicted and sentenced. The appellants urged us to find that this anomaly went to the substance of the case and that it occasioned injustice on their part. When invited to respond, the prosecution conceded to this anomaly stating that all efforts to trace such a charge sheet ran futile. It suffices

that after perusal of the record of appeal we are of a considered view that there is no charge sheet that has the names of all seven appellants relating to the charges they were convicted and sentenced.

We are also aware that this was not raised in the first appellate court, but despite this in the interest of justice, we shall address the concern. Our perusal of the record of appeal revealed that after the testimony of each of prosecution witness, all the seven appellants were provided an opportunity to cross examine the witnesses (see pages 40-43, 45-47, 54-57, 59-60 and 61-62). Further to this, the record of appeal shows that during the testimony of D.4429 D/Cpl. Lukuba (PW3), the investigator, he alluded to knowing all the accused persons sitting in the trial court and managed to call out the names of each of the appellants. Again, during the trial, after an order by the trial court that the accused persons had a case to answer and addressed them in terms of section 231 of the Criminal Procedure Act, Cap 20 Revised Edition 2002 ("the CPA"), each of the seven appellants recorded response was that he will give evidence on oath. Thereafter, names of each of the appellants were recorded when testifying for the defence.

It is also significant that the appellants did not challenge this perceived anomaly in their first appeal (pages 118 and 121 of the record of appeal) and the content of the judgments of the trial and first appellate courts has names of all the seven appellants and the charge they faced (pages 102a and 132). Taking all these factors into account there is no doubt that the appellants did know and understand the content and nature of the charges they faced from the start of the trial up to the end of the trial and the first appeal. This means they were not in any form denied or limited opportunity to prepare their defence. Consequently, despite the said anomaly of a missing copy of a proper charge sheet in the record of appeal, we find for the reasons stated above, this flaw was not prejudicial to any side.

We now venture to determine the grounds of appeal as paraphrased. Our starting point revolves on whether the appellants were properly identified according to established standards.

The position of the law is well settled that a court should not act on evidence of visual identification unless all possibilities of mistaken identity are eliminated, and the court is fully satisfied that the evidence before it is

absolutely watertight as expounded by this Court in **Waziri Amani vs Republic** (1980) TLR 250. The Court listed various factors to be considered in determining propriety of such identification. These factors include:-

> *"the time the witness had the accused under observation, the distance at which he observed him; the conditions in which the observation occurred, if it was day or night time; whether there was good or poor lighting at the scene; whether the witness knew or had seen the accused before or not."*

Another case is **Felician Joseph vs The Republic,** Criminal Appeal No. 152 of 2011 (unreported) which emphasized that visual identification in unfavorable condition is the weakest kind and unreliable and a court should only act on such evidence where all possibilities of mistaken identity have been eliminated and satisfied that the evidence is watertight.

Moving to the 1st appellant's identification, PW1 averred that he identified the 1st appellant who at the time had both his legs because one of his hand was deformed (popularly known in Swahili as "*mikono milimani*"). The issue of the 1st appellant having an abnormal arm was also alluded to by D. 4429 D/Cpl Lukuba (PW3) saying that PW1 had informed

him that the 1st appellant had a deformed hand, revealed when he was cross-examined by the 1st appellant. There is the 7th appellant's evidence regarding the shoes Exhibit PE1 which were seized from him as evidenced by PW1, PW4 and PW5. The 7th appellant stated that Exhibit PE1 was left at his place by the 1st appellant. In this, we exercise caution, understanding that this is evidence of a co-accused and even though the 1st appellant disputed any knowledge of the shoes, he never questioned the 7th appellant on this issue during the trial and thus leaving the matter hanging but in effect supporting the prosecution case. The shoes were found by the trial court and first appellate court to be among the items stolen from PW1's house during the robbery and ownership of the shoes was not challenged.

At this juncture, we find it is important, to also address the credibility of prosecution witnesses on evidence touching on identification of appellants at the crime scene. We are aware that there is a separate ground on this issue, and the appellants have implored the Court to find inconsistencies and contradictions in the testimonies of PW1 and PW2 as contained in the paraphrased 3rd ground of appeal. A concern raised by appellants was how these two witnesses managed to identify them as

having been at the crime scene taking into consideration the alleged number of assailants, and under such unfavourable circumstances. A scrutiny of the evidence on record, we find reveals no material contradictions or inconsistencies in PW1 and PW2's evidence, this is because, whilst PW1 pointed out that the attackers were ten people in number, PW2 averred that they were more than seven.

With regard to evidence relating to the duration of the robbery incident differing, concern being that while PW1 stated that it lasted about fifteen (15) minutes, PW2 testified it was around thirty (30) minutes, having perused the record we discerned that each one of them estimated from a different context. PW1 narrated from the time he left the room and came back while PW2 reflected on the whole incident until the time the attackers left.

This position is fortified by the fact that the two witnesses exhibited consistency in their testimonies as already alluded to above as held by both the trial and the first appellate courts. That being the case we find no reason to depart from the concurrent findings of the trial and first appellate courts having failed to find any apparent misapprehension, non-direction or

misdirection of the said evidence in line with holdings in various decisions of this Court. These include; **Mustapha Khamis vs Republic**, Criminal Appeal No. 70 of 2016 and **Khamis Abdrahakim vs Republic**, Criminal Appeal No. 423 of 2018 (both unreported). Consequently, we hold that there is nothing to lead us to find there were any apparent inconsistencies in the prosecution testimonies on the issue raised as argued by the 1st appellant and even if inconsistencies existed, they are minor and do not go to the substance of the case. Under the circumstances taking all factors into consideration we are of firm view that the credibility of PW1 and PW2 was in no way shaken by the defence to lead us to find their evidence was not credible. We are thus satisfied that the 1st appellant was properly identified.

With respect to the 2nd appellant, PW1 and PW2's evidence is relevant stating that they identified him at the scene because he was holding a gun together with the 1st appellant, and that they knew him before as a camera man known in the streets as "*mpiga picha*". PW2 stated further that she had seen the 2nd appellant before at her house when he came to take photos. The 2nd appellant implored the Court to find the prosecution evidence weak especially bearing in mind there was no

Identification Parade conducted. He also sought the Court to find the evidence of PW1 and PW2 that he was known to them before not believable since their statements at the police did not include such assertions.

The fact that the 2nd appellant was known as a cameraman has not been disputed, in fact it is one of his alias as can be seen from the charge sheet, judgments and memorandum of appeal and also called himself that when testifying since it is so recorded. During her testimony, PW2 was adamant that she knew the 2nd appellant prior to the attack since he had previously taken photos at her house and that at the crime scene he was one of the two assailants who held guns.

The 2nd appellant was the only one of all the appellants that PW1 and PW2 stated they knew him from before and recognized him at the scene of crime. We are aware of decisions of this Court in **Issa Ngara @Shuka vs Republic**, Criminal Appeal No. 37 of 2005 and **Magwisha Mzee Shija Paulo vs Republic**, Criminal Appeal No. 465 of 2007 (both unreported) stating in effect that in cases where there are claims by witnesses to have recognized the accused, although mistakes may be made sometimes, but

to a large extent, evidence of recognition is taken to be more reliable that identification of a stranger. Having considered all the circumstances especially the fact that he was known to PW1 and PW2 there was no need to conduct an identification parade. Taking into consideration the totality of evidence on this issue and warning ourselves on the need to ensure that the evidence on identification of the 2nd appellant is incontrovertible, on this issue, we subscribe to the submissions by the learned Senior State Attorney that the 2nd appellant was properly identified.

The 3rd appellant queried the evidence against him by witnesses that he was identified in view of the scar on his cheek. He argued that the said evidence was insufficient since the concerned witnesses never recorded this assertion when their statements were recorded by the police. Failure to conduct an identification parade was also an issue raised, arguing that without it, rendered the dock identification against him irrelevant especially since PW1 and PW2 did not know the 3rd appellant before the attack, and thus reduces the evidence on his identification very weak and doubtful. He also challenged the evidence by PW1 that he has a scar on his cheek, stating that this fact was not recorded in the statement to the police. With respect to the 3rd appellant, the learned State Attorney stated that despite

the fact that no identification parade was conducted, having regard to the evidence before the Court, lack of the said evidence does not in anyways weaken the prosecution evidence which she implored the Court to find it watertight. She also submitted on the strength of the prosecution evidence in light of PW1 and PW3 testimonies related to identification of the appellant.

Scrutiny of the evidence against the 3rd appellant shows there was no identification parade conducted, and so the only evidence against him are the testimonies of PW1 and PW2 and dock identification. PW1 evidence was that, he identified the 3rd appellant because of a scar on his cheek while PW2 stated that, the 3rd appellant was the one who threatened their child while demanding for money. Unfortunately, there was no witness to bring forth and show that PW1 and PW2 had informed them the same particulars, with regard to one of the assailants they had seen, so that it could be linked to the 3rd appellant. PW3, PW4 or PW5 who assisted in investigating did not state anything to having been told by PW1 or PW2 what they stated in court as specific things to identify the 3rd appellant. The other evidence is that PW1 and PW2 identified the 3rd appellant in the dock.

This Court had an opportunity to address the weight to be accorded to dock identification in **Francis Majaliwa Deus & 2 Others vs Republic**, Criminal Appeal No. 139 of 2005 (unreported) and adopted the reasoning **Gabriel Kamau Njoroge v Republic** (1982-1988) I KAR 1134, where the Kenya Court of Appeal stated:

> *"Dock identification is worthless (the Court should not rely on dock identification) unless this had been preceded by a properly conducted identification parade."*

(See also, **Joseph Mkumbwa & Another v Republic**, Criminal Appeal No. 97 of 2007 (unreported)).

There being no other evidence to be relied upon against the 3rd appellant, we are therefore of firm view that his identification provides room for mistaken identity and is therefore not watertight.

In terms of identification of the 4th, 5th and 6th appellants their main grievance was credibility of prosecution witnesses and insufficiency of light to facilitate their identification. Arguing that the prosecution witnesses failed to describe the level of brightness at the scene of crime. The prosecution evidence against the 4th, 5th and 6th appellants is grounded on

the testimonies of PW1 and PW2 that they identified these appellants at the crime scene. Stating that all of them were holding machetes although no particular description that led to identification claims was given of any of these appellants by PW1 and PW2. At the same time, while PW1 stated it was the 7th appellant who slashed him with a machete, PW2 claimed she saw the 5th appellant cut PW1 with a machete. It is interesting to note that this evidence was not given during examination in chief but when each of the witness was cross examined by the respective appellants. There was no identification parade despite the fact that none of the appellants were previously known to the appellants. Therefore under the circumstance failure to conduct identification parade for the appellants meant the only evidence left on this issue is dock identification. As already stated hereinabove, it is a well settled principle that dock identification should not be relied upon by itself unless supported by identification parade.

Having diligently considered all the evidence relating to the identification of the 4th, 5th and 6th appellants, we are of the view that the prosecution failed to provide evidence that is watertight to satisfy this Court that they were properly identified and there is no possibility of

mistaken identity. We thus hold that the identification of the 4th, 5th and 6th appellants leaves doubts which should favour the appellants.

Addressing whether or not the 7th appellant was properly identified, there is the evidence of PW1 and PW2. PW1 alluded that he identified the appellant as being at the crime scene because he was the one who had cut him with a machete and since he was cut then his testimony on this is more reliable. PW2 had no special description on how she identified the appellant. PW4 stated that on 13th July, 2006 following up on information of a robbery at Chamwino area and later upon hearing the whereabouts of the culprits, together with PW1 and a witness they went to the 7th appellant house and found him outside and he was wearing shoes (Exhibit PE1) which were identified by PW1 as his. When asked where he got the shoes, the 7th appellant stated they were left at his place by the 1st appellant. That it was the 7th appellant who thereafter took them to the 1st appellant's house but they did not find him. PW1 was also present during the arrest of the 7th appellant and he recognized Exhibit PE1 as his shoes because of the repairs made to one shoe with superglue. PW5 also witnessed the arrest of 7th appellant with shoes claimed by PW1 to be his. Shoes which were later also identified as belonging to PW1 by PW2.

Having found the 3rd, 4th, 5th and 6th appellants not to be properly identified and the identification of the 7th appellant failing the standard of watertight identification within the required standard, it is now imperative to deliberate whether there is any other cogent evidence against them relating to the charge they face. The other evidence which led to their convictions are the cautioned statement of the 1st, 2nd, 3rd, 5th and 7th appellants. It is important to also remember that the second ground of appeal was a grievance against the trial and first appellate courts reliance on alleged confessions which they contended were admitted unprocedurally.

Cautioned statements of the 1st, 2nd, 3rd, 5th and 7th appellants were tendered and their admissibility was objected by the respective appellants. The 1st, 2nd, 3rd, 5th and 7th appellants repudiated and retracted the alleged confessions respectively but the trial magistrate ruled against the objection and admitted them collectively as Exhibit PE3. Apart from this, the record reveals upon being admitted the said cautioned statements were not read over in court to accord the then accused persons an opportunity to hear the contents of the admitted exhibits (pages 52 to 54 of the record of appeal) which is also an anomaly.

The first appellate court supported the reasoning of the trial magistrate that the cautioned statements contained elements of truths and that the law allows admissibility of statements where he finds the contents are true. With due respect, the first appellate judge stand was incorrect. Case law is clear that where a statement is repudiated or retracted or its voluntariness challenged, an inquiry or trial within trial must ensue. Failure to proceed as such, renders the cautioned statements of the 1st, 2nd, 3rd, 5th and 7th appellants collectively admitted as Exhibit PE3 is an incurable irregularity.

In **Twaha Ali and 3 others vs Republic**, Criminal Appeal No. 78 of 2004 (unreported) stated:

> *"... If that objection is made after the trial court has informed the accused of his right to say something in connection with alleged confession, the trial court must stop everything and proceed to conduct an inquiry (or a trial within trial) into the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence".*

Again, in **Makumbi Ramadhani Makumbi and 4 others vs Republic**, Criminal Appeal No. 199 of 2010 (unreported), this Court held:

"that the only way for every trial court to satisfy itself on the voluntariness of a disputed accused's statement is by holding a trial within a trial".

In addition, in a case decided earlier, that is **Michael John Mtei vs Republic,** Criminal Appeal No. 202 of 2002 (unreported) the Court said:-

"a trial within a trial should be held to determine not only the voluntariness or otherwise of an alleged confessional statement but also whether or not it was made at all..."

In the present case, despite the objection raised on voluntariness of the statements of the 1st, 2nd, 3rd, 5th and 7th appellants, the trial magistrate did not proceed to inquire into the voluntariness of the said statements and also determine whether or not they were made. This being the position the consequences of such failure to comply with the requisite procedure are expounded in various cases including in **Selemani Abdallah & Two Others vs Republic** Criminal Appeal No. 384 of 2008 (unreported) the Court said:

"Failure to conduct a trial within a trial is, in our settled view, a fundamental and incurable irregularity and inevitably leads to the admitted confessional statement being expunged from the record".

This being the position, there is no other route but to expunge all the said cautioned statements found in Exhibit PE3.

The third ground of appeal, relates to assertions of there being contradictions and discrepancies in the evidence and credibility of prosecution witnesses. This ground has been dealt with above when dealing with identification of the appellants in the first ground of appeal.

The fourth ground of appeal, challenges admissibility of exhibits without following procedures and it addresses admissibility of two guns whereby despite objections from the 1st and 2nd appellant, they were admitted as Exhibit PE4. The appellants contend that there was no certificate of seizure, search order or ballistic report tendered to prove the prosecution assertions that they were found with the 2nd appellant and that the firearms were used at the crime scene. The first appellate judge did not address this issue within lines of the current ground of appeal.

From the evidence on record, the only evidence relating to the guns is that of PW1 and PW2, that the 1st and 2nd appellants had guns at the crime scene. PW1 also stated that when he was running away after he had escaped he heard a gun being fired. PW2 also gave evidence that when they were departing gun shots were fired and PW5 also heard gun shots

twice which refrained him from running to assist those who were affected, that is his neighbors PW1 and PW2. PW3 also testified that upon arresting the 7th, 2nd, 4th, 3rd appellants during the interviews he learnt they had guns when they committed a robbery at the home of PW1 and that it was the 2nd appellant who led the investigators to where the guns were hidden and thereafter seizing them. Two Firearms were admitted into evidence as Exhibit PE4, despite objections by the 1st and 2nd accused persons.

Moreover, despite evidence of gunshots at the crime scene as testified by PW1, PW2 and PW5, also evidence that it was the 1st and 2nd appellants who held guns, there is no evidence of seized cartridges at the crime scene. There is also no evidence that the seized guns allegedly at the place shown by the 2nd appellant and tendered and admitted as Exhibit PE4, were taken to a ballistic expert to be examined and analyzed on whether the firearms tendered in court were the same ones seen and used at the crime scene and those admitted as Exhbit PE4. There was no certificate of seizure tendered to show how and where the guns were seized from and from whom in contravention with section 38(3) of the CPA, a mandatory requirement. This being the position, without doubt no chain

of custody was established. It was held in **Paulo Maduka and 4 Others vs Republic**, Criminal Appeal No. 110 of 2007 (unreported) that:

> *"the idea of chain of custody, it is stressed is to establish that the alleged evidence is in fact related to the alleged crime- rather than, for instance, having been planted fraudulently to make someone guilty."*

In the case before us, there is not enough evidence to confirm that the said guns were seized in the hands of the 1st and 2nd appellants as claimed by the prosecution, nor to show that Exhibit PE4 are indeed guns which were used at the crime scene. Therefore without doubt the prosecution side failed to prove this fact and with due respect we differ with the findings of the 1st appellate court in supporting a finding of the trial court that the 1st and 2nd appellant had possession of Exh.PE4 in the absence of any evidence to connect the tendered firearms to the robbery. Notwithstanding the above finding, it is important to bear in mind that there is evidence to illustrate that there were guns at the crime scene from the evidence of PW1, PW2 and PW5. As stated earlier, gun shots were heard and the 1st and 2nd appellant were seen to hold guns. Therefore in our considered view, despite the fact that the way the guns were

introduced into evidence was remiss, this does not remove the fact that at the crime scene, the assailants had guns which they used to facilitate the robbery. All in all, we find merit in this ground.

The fifth ground of appeal relates to application of the doctrine of recent possession, with respect to the shoes found with the 7th appellant, the trial court did find that the said shoes were identified as an item stolen from PW1 on the day of the robbery. Shoes which the 7th appellant did not deny being found with but stated they were not his, having been left there by the 1st appellant. The 1st appellate court found that the 7th appellant failed to give a reasonable explanation on how he came into possession of the rubber shoes claimed by PW1, a position we also share.

The doctrine of recent possession is well articulated in the case of **Joseph Mkumbwa and another vs. Republic** (supra) as follows:

> *"Where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained. For the doctrine to apply as a basis of conviction, it must be proved, first, that the property was found with the suspect, second, that the property is positively proved to be the property of the*

complainant, third, that the property was recently stolen from the complainant and lastly, that the stolen thing constitutes the subject of the charge against the accused ..."

In the present case, the 7th appellant was found in possession of rubber shoes, which he acknowledged were not his, but alleged they were brought to his place by the 1st appellant. PW1 and PW2 identified the shoes Exhibit PE3 as belonging to PW1. PW1 identified the shoes from the superglue used to repair the shoes. From the evidence, the shoes were listed in the items stolen in a robbery at PW1's house. The robbery occurred on the 12th July, 2006 and according to PW4 the 7th appellant was arrested on the 13th July, 2006 which is just one day after the robbery at PW1's house. It is indisputable that used shoes cannot be said to be items that are quick to dispose of. Exhibit PE3 according to prosecution witnesses were found with the 7th appellant and they are part of the charges current under scrutiny against the 7th appellant. Without doubt the doctrine of recent possession is applicable in this case as against the 7th appellant for being found in recent possession of stolen property and failure to give a reasonable explanation on how he came to possess them, his explanation denied by the 1st appellant and neither of them queried the other on this issue.

Possession of the shoes is not in doubt upon the evidence of PW1 and PW2. This leads this Court to a conclusion, that is, taking into consideration the evidence of identification of the 1st appellant discussed earlier hereinabove, and the fact that recent possession has been proved as against the 7th appellant, there is sufficient evidence to the standard required to show that the 7th appellant took part in the robbery at PW1's house. Therefore this ground falls.

The sixth ground is on failure of the trial and 1st appellate courts to consider the appellants' defence. This ground comes to this Court after being considered and determined by the first appellate court. Suffice to say, this grievance has no merit. The trial court, when determining whether or not the appellants were identified, while it is true that the record in the trial court do not show the defence being considered, and even for the other issues, it was just highlighted in one sentence or two, but this anomaly was rectified by the first appellate court, where the defence was amply considered on each of the issue determined. Therefore we find this ground without merit.

From the above analysis, we find that the 1st and 2nd appellants were properly identified with no possibility of mistaken identity. On the part of the 7th appellant, we found that though the evidence of identification was not conclusive but the fact that he was found in possession of stolen items, the shoes, stolen a day before from the robbery, and the fact that according to PW3 and PW4, he was the one who assisted in the arrest of the other appellants, enjoins him as one of the culprits at the scene of crime who took part in the robbery.

In the premises, we are of considered view that the charges levelled against the Omary Iddi Mbezi, Victor Charles @ Mpiga Picha and Abdallah Isiaka @ Manila (1st, 2nd and 7th appellants) were proved to the standard required. Therefore, their appeal lacks merit and is dismissed in its entirety.

On the part of the 3rd, 4th, 5th and 6th appellants, we have found no cogent evidence to sustain their conviction and sentence. In the end, their appeal is allowed. Consequently, convictions of Said Ally Chikupa, Said Mrisho @ Kujikuna, Jafari Iddi Mbezi and John Andrea @John Walker @ Mrundi (3rd, 4th, 5th and 6th appellants) are hereby quashed and sentences

set aside. These appellants should be released henceforth unless detained for other lawful purposes.

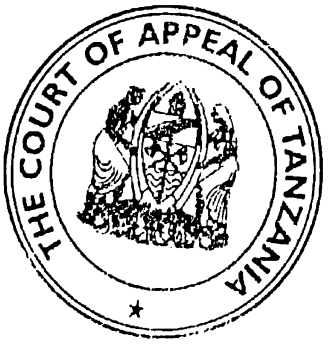
DATED at **DAR ES SALAAM** this 6th day of April, 2020.

S. A. LILA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

Judgment delivered this 5th day of May 2020 in the presence of the appellants in person-linked via video conference and Ms. Chesensi Gavyole, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL