IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 58 OF 2018

1. MAULID JUMA BAKARI @ DAMU MBAYA.....1ST APPELLANT

2. FIKIRI JOSEPH PANTALEO.....2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Shangwa, J.)

dated the 20th day of November, 2013
in
HC Criminal Appeal No. 102 of 2012

.....

JUDGMENT OF THE COURT

8th May, & 13th July 2020

LILA JA:

The appellants, Maulid Juma bakari @ Damu Mbaya and Fikiri Joseph @ Pantaleo, the first and second appellants herein, together with three others who were acquitted by the trial District Court of Kinondoni were arraigned of the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 RE: 2002. It was alleged that the appellants jointly and together on 30th January, 2009 at about 1400 hours at Kunduchi Mtongani area in Kinondoni District, did steal minerals make tanzanite valued at TZs 45,000,000/= the property of

Barnabas Joseph and before and immediately after such stealing did use a pistol to threaten the said Barnabas Joseph in order to obtain the said property. The appellants pleaded not guilty to the charge. The trial ensued and at the end they were convicted as charged. Their appeal to the High Court was unsuccessful hence the present appeal.

At the trial the respondent Republic paraded a total of seven witnesses and tendered eight exhibits. The substance of their evidence may be summarised thus. Peter William (PW1) owned a jewellery shop situate along Livingstone Street at Kariakooo area. On 3/12/ 2018 while in the shop together with Barnabas (PW2) and a certain Edward, they were visited by a certain person who identified himself as Othman Edward according to PW1 and Athuman Mohamed according to PW2 and a businessman in Zanzibar dealing with buying and selling vehicles importing from Dubai. That man turned out to be the first appellant. At his departure he promised to look for a lucrative market for tanzanite in Dubai and will press for a big order. Sometime in mid-January that man called and informed him that he had secured a big market and asked for preparation of 200 carrates. In return, on 20/1/2009 PW1 made a call back to Othman Edward informing him the order was ready for collection and the later promised to visit the shop on 27/1/2009. He however turned out on 28/1/2009 and PW1

showed him 173 tanzanit carats and agreed the price to be 45 Million. All the same, Othman Edward left promising to go back on 30/1/2009 for payment. As promised, the first appellant appeared and asked the minerals be verified at Summik Kunduchi area so that he can be issued with a certificate. That idea was welcomed by PW1 and, together with Barnabas (PW2), they left at 0900am with the minerals to Summik aboard a Nissan saloon car Registration No. T864AWB (Exh. P1) the first appellant had gone there with the car that was being driven by a person who turned out to be the second appellant (then 5th accused). According to PW1, he read the Registration Number before boarding it. At summik they met one Lilian Mushi (PW5) at 11:00hrs who checked the minerals given to her by PW1 at a cost of TZs 175,000/= which was paid by the first appellant and at 1400hrs she was through with the verification and issued a Germ Certificate (Exh. P5) in the name of the first appellant. PW5 said three people went to their office at Kunduchi on 30/1/2009 at 11:00hrs including PW1 and first appellant whose name was Othman Mohamed was introduced as the customer. PW1 took the minerals and the certificate which was issued in the name of Othman Mohamed and put them in his bag. They then left heading to PW1's office where the first appellant would pay him the price of the minerals. That

expectation could not be achieved for no sooner had they covered a distance of about 500 meters; the second appellant stopped the car where there were two people on the left side and one on the right side of the road. The one on the right side went for Barnabas (PW2) and pointed to him a pistol while the other two went for him (PW1) and beat him up demanding to be given everything. So as to serve their lives, PW2 called upon PW1 to abide to the order. The bag was taken and given to the first appellant and then they took a wallet which had money, a mobile phone make Nokia and eye glasses. PW1 and PW2 were taken out of the car and those people who were outside the car boarded it and the car took off. PW1 and PW2 reported the matter to Mtongani Police Post and left but did not tell the descriptions of robbers.

After a week PW1 and PW2 were called at the Police Post where they identified the car and the owner, a certain woman later revealed to be Asha Julius Mhanzi (PW3), was there who said on the material day the car was with her driver one Bilali. Upon arrest, Bilali said on the material day he gave the car to one Sele. The said Sele was arrested after three days. PW1 and PW2 went there but found him not to be the one who was driving the car on the incident day. Instead, Sele said he had given the car to one Ostadhi who was later

found and arrested. In an identification parade conducted by ASP Rawia (PW7) at Stakishari Police Station, PW1 and PW2 managed, among the ten persons in the parade, to positively identify the second appellant as being the one who was driving the car on the incident day. Another identification parade was conducted three days later (on 24/2/2009) by Assistant Inspector Gilbert Kalange (PW6) and PW1, PW2 and Edward participated. PW1 and PW2 managed to identify the first appellant among the twelve persons paraded.

In his affirmed defence, the first appellant flatly denied committing the offence, knowing PW1 and PW2 and doing gemstone business with them. Conversely, he claimed that he was arrested on 24/2/2009 at Kawe Club and taken to Kawe Police station suspected of committing robbery which accusation he denied. He also complained that while the identification report showed that two people identified him in an identification parade only two people testified. In respect of doing business with PW1, he said no agreement was produced in court. He also alleged that he was not properly identified before his arrest as PW1 and PW2 did not avail the police with his description. In all, he claimed that the case was a frame up by the police. He tendered his statement (Exh, D1) at the police station which showed that the offence was committed on

30/01/2009 but in the additional statement it showed 30/2/2009. He also tendered his passport (Exh. D2) which he claimed indicated his proper name and signature.

On his part, the second appellant claimed that on 31/1/2009, he was at his business place at Kariakoo area from morning to evening. He was arrested at Tabata SMS Pub on 13/2/2009 where he had set with a certain woman by a police and was taken to Stakishari Police Station accused of causing breach of the peace. The police promised to fix him and since then he has been charged with various armed robbery cases including this one which was charged after five months. He denied knowing the first appellant previously but he came to know him in court. He also denied knowing PW1 and PW2. He protested that the case was a frame up by Inspector Mreto who arrested him.

The trial court was satisfied that the prosecution managed to prove the charge against the appellant and defence evidence implausible. It was satisfied, first, that the second appellant's cautioned statement (Exh. P3) incriminated both appellants and was corroborated by the evidence on identification. Second, that the circumstantial evidence was water tight. On that the trial court stated that, we hereunder quote:-

"The prosecution evidence was that the 2nd and 5th accused were in the car, and when they were robbed, the criminals left with the other criminals. The fact that the 5th accused stopped the car allowing the criminals to invade the car is the circumstantial evidence showing that the 2nd and 5th accused persons had common intention."

The High Court, on first appeal, concurred with the findings by the trial court. The presiding Judge was satisfied that both appellants were identified by PW1 and PW2 in the identification parade as well as when the first appellant visited their office three times and when on the way to and from Kunduchi. He was, further, of the view that even if the second appellant's cautioned statement (exhibit P3) is discounted the remaining evidence sufficiently established the appellants' guilt. That finding prompted the appellants to prefer the instant appeal.

The appellants filed a joint memorandum of appeal containing two sets of grounds of appeal; five for first appellant and six for the second appellant. They also filed a joint supplementary memorandum of appeal comprising three grounds of appeal.

The grounds of appeal by the first appellant, as presented, are as follows:-

> *"That the first appellate court erred in law by upholding the conviction of the first appellant despite the trial court having deviated from its own ruling after the appellant's objection of PW6 giving evidence and tendering the said parade forms exhibits P6, P7 and P8.*
>
> 1. *That the first appellate court erred in law by upholding to the conviction and sentence meted out to the first appellant based on unreliable visual identification evidence of PW1 and PW2 against the appellant despite them having failed to his give distinctive features at first instance to the police as they exemplified in their testimony in court.*
> 2. *That the first appellate court erred in law by upholding the conviction of the first appellant based on untruthful, incredible and contradicting evidence of the prosecution witnesses that lack corroboration.*
> 3. *That the first appellate court erred in law by upholding to the first appellant's conviction and sentence based on PW1's and PW2's evidence despite them giving contradictory evidence regarding to the names the appellant*

is alleged to have introduced himself on PW1's and PW2's evidence despite giving contradictory evidence regarding to the names the first appellant is alleged to have introduced himself.

4. *That the first appellate court erred in law by upholding to the conviction and sentence meted out to the first appellant based on exhibits P6, P7 and P8 despite them being conducted contrary to the PGO and worse still had no reason of identification."*

The second appellant's grounds of appeal, as were presented, are as follows:-

"*1. That the first appellate court erred in law by upholding the conviction and sentence meted out to the second appellant despite it being based on unprocedural conducted I.D. parade and worse still the manner in which the parade officer who filled the parade form (PF. 186), it shows the identifying witnesses identified the appellant at the same time.*

2. That the first appellate court erred in law by upholding to the second appellant's conviction and sentence based on Exh. P 9 (PF. 186) which does not show reason(s) of identification.

3. *That the first appellate court erred in law by upholding the conviction and sentence meted out to the second appellant based on unreliable visual identification evidence of PW1 and PW2 yet they failed to state where they sat when they boarded the alleged vehicle (taxi).*
4. *That the first appellate court erred in law by upholding to the conviction and sentence of the second appellant based on untruthful evidence of PW1 and PW2 whom the trial court had rejected their evidence against the 4th accused the appellant's co-accused at trial.*
5. *That the first appellate court erred in law by upholding to both appellants conviction and based on a case that was not proved to the required standard."*

The joint supplementary memorandum of appeal contained the following grounds of appeal:-

"1. *That the trial court and the first appellate judge erred in law and fact in convicting the appellants on the basis of the defective charge*

2. *that the first appellate judge erred in law and fact for failure to observe that the trial court record was conducted contrary to section 228 (1) of the CPA Cap 20, RE: 2002*

3. *that the first appellate judge erred by upholding the appellants conviction by relying on the evidence of PW6 and PW7 which was obtained contrary to section 289 (1) of the CPA Cap 20, RE: 2002 which renders the exhibits P8 and P9 receivable but not admissible in court."*

The above grounds of appeal were followed by a joint written submission.

The appellants appeared in person and unrepresented before us for hearing the appeal. Ms Mwasiti Athumani Ally, learned Senior State Attorney appeared for the respondent Republic.

Both appellants adopted both the grounds of appeal and the written submissions which they said were in respect of the memorandum of appeal they had filed and elaborated the grounds of appeal comprised in the supplementary memorandum of appeal. We, however, find it appropriate to first narrate their arguments in their joint written submission in support of the appeal.

The appellants' attack was first directed towards the charge alleging that it was fatally defective for being directed to the police authority instead of the court where they were arraigned. They claimed that to be offensive and denied them the right to know the

accusations contained in it hence occasioning injustice. They did not, however, go further to show the offended provision of the law.

Further, in respect of the charge, the appellants submitted that while the charge sheet was signed by the Public Prosecutor on 2/12/2009 and taken to court, they were arraigned in court on 18/8/2010 and in respect of the second appellant; his statement was recorded on 20/2/2009 but arraigned in court on 18/8/2010. The lapse of time, they argued, suggested that the case is a concocted one.

Submitting on another complaint, the appellants raised issue with their being taken to court on 18/8/2010 but the charge was not read to them hence offending the provisions of section 228(1) of the Criminal Procedure Act, Cap. 20 R. E. 2002 (the CPA). They urged the Court to expunge the whole prosecution evidence under section 169 of the CPA.

The appellants also submitted that both courts below wrongly relied on the identification parade conducted by PW6 and PW7 who were not listed as witnesses during the preliminary hearing and no notice to add them was given in sufficient time as required under section 289(1) of the CPA and as expounded in the case of **Hamisi**

Mwure vs. R [1993] TLR 213. They urged the Court to expunge the evidence by PW6 and PW7 from the record and exhibits P.8 and P.9 tendered by them, respectively

Before us, each appellant took time to further elaborate on the grounds of appeal. The first appellant argued that he was not properly identified at the incident and that the claim by PW1 and PW2 that he visited their office prior to be untrue for they failed to give the police his description and even the names they told the court varied. He argued that while PW1 at page 4 said he introduced himself as Othman Edward, PW2 at page 11 of the record said he introduced himself as Othman Mohamed. He insisted that those names are different and neither of them was charged.

In faulting the evidence on his being identified, the second appellant's arguments were two-fold. **First**; he concentrated on the identification parade which he claimed was improperly conducted because he was not given opportunity to comment on how it was conducted, the one who conducted it did not show why it was held, the report is not stamped and the report was not read out in court. **Second**; in faulting the evidence on visual identification, he claimed that PW1 and PW2 did not explain to the court the sitting

arrangement in the saloon car (Exh.P1) such that they could be able to see and identify him. Like the first appellant, he further argued that the two failed to avail the police with his description when they reported the robbery incident as could be discerned at pages 9 and 10 of the record of appeal. He accordingly argued that his identification was mere dock identification. In addition, he doubted the failure by one Sele who allegedly gave him (named then as Ustadhi) the car (Exh. P1) to testify as he was the proper person to show and prove that he was the one whom he gave the car. Lastly, he contended that the cautioned statement he allegedly made (exh. P3) was not read out in court hence it should be expunged because despite the first appellate judge having noted that infraction failed to expunge it from the record of appeal.

In opposition to the appeal, Ms Ally opted to argue the appeal on two grounds generally and later focused on few areas of complaint. She started submitting on the identification of the appellants.

Starting with visual identification, she contended that according to evidence by PW1 and PW2, the first appellant visited their office three times prior to the incident and introduced himself as Othman

Mohamed or Athuman Mohamed hence they had ample time to see and identify him. She also argued that PW5 who took over two hours to verify the gemstones had ample time to see and identify the first appellant and to prove that she was able to identify him in court and was able to tell the court that even the germ report was issued in the first appellant's name. As for PW1 stating that the first appellant introduced himself as Mohamed Edward while PW2 said Athumani Mohamed, she contended that it was a mere slip of the tongue. In respect of the second appellant, she argued that PW1, PW2 and the first appellant, while on the way to Summik Kunduchi, boarded the car (Exh. P1) at 09:00hrs hence it was during broad day light and it was being driven by the second appellant and it being a saloon car they set close to each other hence it was easy for them to see him and identify him both while going to Summik and thereafter when going back to the office but before the robbery incident. To bolster her argument she referred the Court to the decision in the case of **Charles Nanati vs Republic**, Criminal Appeal No. 286 of 2017. In addition she submitted that PW1 and PW2 were summoned twice to the police station to identify the driver who drove the car (Exh. P1) on the incident date, in both occasions they were firm that those arrested were not the ones and were discharged. It was until when they

identified the second appellant in a parade that they pointed at him to be the one. That, according to the learned Senior State Attorney, was an assurance that they properly saw and identified the second appellant. Notwithstanding the fact that PW1 and PW2 did not give the descriptions of the appellants, the learned Senior State Attorney implored us to find that they were properly identified.

Arguing in respect of the identification parades conducted, the learned Senior State Attorney had it that since PW1 and PW2 had seen and known very well the first appellant, identification parade to identify the first appellant was unnecessary. As for the second appellant, she conceded that the report was not read out in court hence it should be expunged from the record of appeal.

The learned Senior State Attorney then turned to argue against few specific complaints. First was the cautioned statement by the second appellant. She argued that it was not read out in court after it was admitted hence was subject to be expunged and cited the case of **Hassan Said Said and Another vs Republic**, Criminal Appeal No. 298 of 2017.

In respect of ground 3 of appeal in the supplementary memorandum of appeal, Ms Ally submitted that section 289(1) of the

CPA is applicable in trials in the High Court whereby the prosecution is imperatively required to issue a notice where it intends to call a witness whose substance of his evidence was not read out during committal and listed as one of the prosecution witnesses. She therefore argued that it was not applicable in the present case where trial was conducted by the District Court.

Lastly, Ms Ally submitted on the propriety of the charge. Brief but focused, she argued that a proper charge is the one which complies with the provisions of section 132 and 135 of the CPA and is framed in accordance with the format provided in the Second Schedule to the CPA which is made under section 181 of the CPA. Seriously examined, she contended, the charge contained the offence section and the particulars provided the essential information on how the offence was committed. She submitted that by being directed to the police authority instead of the court which tried it did not affect the validity of the charge and the appellants were not prejudiced hence the defect is curable under section 388 of the CPA.

Reading the grounds of appeal comprised in the memorandum of appeal and the supplementary memorandum of appeal as a whole it is clear to us, that the following substantive complaints are raised.

1. The appellants were convicted on a defective charge.
2. The charge was not read over to the appellants and asked to plead there to hence contravening the provisions of section 228(1) of the CPA.
3. The appellants' identification was unsatisfactory.
4. PW1 and PW2 were incredible witnesses and their evidence required corroboration.
5. PW6 and PW7 gave evidence without complying with the requirements of section 289(1) of the CPA hence exhibits P8 and P9 were wrongly admitted into evidence.
6. The prosecution failed to prove the charge against the appellants.

We propose to consider the grounds of appeal in the following manner

The first complaint concerns the propriety of the charge. We must state at the outset that we fully agree with the learned Senior State Attorney that the propriety of a charge is gauged in terms of its compliance with the provisions of sections 132 and 135 of the CPA which imperatively requires it to comprise of a statement of the specific offence section and the necessary particulars set out in ordinary language sufficiently informing the accused the accusation

levelled against him. More so, the charge is required to be as nearly as may be in the form provided in the Second Schedule to the CPA [section 135(a)(iv)]. The essential factors to be considered in framing a charge are well spelt under section 132 of the CPA which provides:-

> *132. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.*

The mainstay of the above quoted provision was with sufficient lucidity explained in the case of **Mussa Mwaikunda v R [2006] TLR 387** where the Court stated, inter alia, that:-

> *"The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge discloses the essential element of an offence."*

In yet another case **Isidori Patrice v R** Criminal Appeal No. 224 of 2007 (unreported) the Court stated:-

"It is a mandatory statutory requirement that every charge in a subordinate court shall contain not only a statement of the specific offence with which the accused is charged but such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. It is now trite law that the particulars of the charge shall disclose the essential elements or ingredients of the offence. This requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that the accused committed the ***actus reus*** *of the offence with the necessary* ***mens rea****. Accordingly, the particulars, in order to give the accused a fair trial in enabling him to prepare his defence, must allege the essential facts of the offence and any intent specifically required by law."*

Although the provisions of section 181 of the CPA directs that an offence may be inquired or tried by a court within which the offence was committed or the consequences ensued, the formats provided do not suggest that the court to try it be shown in the charge. That said, indication or non-indication of the court to try an offence is immaterial and does not invalidate the charge. The same is the case where the

charge is titled "TANZANI POLICE FORCE" which, in our view, refers to where the same originated. This cannot be said to have any prejudice to the appellant. Since, in the present case, the charge complied with the mandatory requirements of the law, the irregularity is curable under section 388 of the CPA. This ground is therefore without bases and is dismissed.

Somehow connected to the above ground is the complaint that the charge was not read over to the appellants hence violating the provisions of section 228(1) of the CPA. That section enjoins the trial magistrate to ensure that the substance of the charge is stated to the accused and is asked to plead thereto (admit or deny). Much as we agree with the appellants that the record of appeal supplied to them did not indicate that the substance of the charge were stated to the appellants and required to plead whether they admit or deny the truth of the charge as mandatorily required under section 228(1) of the CPA, our perusal of the original record revealed that the proceedings of the trial court prior to 18/8/2010 which were conducted by Makabwa RM before whom the appellants first appeared were not typed. The anomaly was caused by such proceedings being left loose hence easy to be misplaced. To this, we would like to note with considerable apprehension the need for those dealing with

preparation of records of appeal to be careful and ensure the records of appeal served to the appellants are complete. For this reason, this ground is inconsequential. We accordingly dismiss it.

We now turn to consider the fifth (5) complaint that PW6 and PW7 gave evidence without complying with the requirements of section 289(1) of the CPA hence exhibits P8 and P9 were wrongly admitted into evidence. We need not be detained so much on this ground. As rightly submitted by the learned Senior State Attorney the requirement to issue a notice adding a witness is applicable in the High Court only. Section 289 of the CPA is in PART VIII of the CPA which is specific to procedures applicable in trials before the High Court. That section [section 289(1)] enacts that:-

> *"289-(1) No witness whose statement or substance of evidence was not read at committal proceedings shall be called by the prosecution at the trial unless the prosecution has given a reasonable notice in writing to the accused person or his advocate of the intention to call such witness."*

In view of the foregoing provision, a witness for whom a notice should be issued is the one who was not listed as a witness during committal proceedings during which time the substance of evidence is

read out to the accused. In the present case no committal proceedings were held and the case was tried by the District Court of Kinondoni. It seems the appellants wrongly equated the procedure in committal proceedings conducted by an inquiry court in terms of sections 243 to 251 of the CPA and preliminary hearing conducted in terms of section 192 of the CPA. The two are distinct. Whereas in trials before the subordinate courts a witness not listed during preliminary hearing may be called to testify unconditionally, in trials before the High Court a witness not listed as a witness hence the substance of his evidence having been not read out during committal proceedings may be called to testify only upon the prosecution serving a reasonable notice stating the name, address and the substance of his evidence to the accused. The rationale here is to enable the accused know the substance of the evidence the witness would lead in court beforehand. This ground is unmeritorious and we dismiss it.

Credibility of PW1 and PW2 forms a subject of serious criticism in the fourth complaint. The appellants contended that their respective evidences required corroboration. It is now settled law that all witnesses are entitled to credence unless there are good reasons for not doing so, (see **Goodluck Kyando vs Republic** [2006] TLR

363). As to how credibility can be determined the court pronounced itself in the case of **Yasin Ramadhani Chang'a vs Republic** [1999] T.L.R. 489 and **Shabani Daud vs Republic**, Criminal Appeal No. 28 of 2001 (unreported) both quoted in **Nyakuboga Boniface vs Republic**, Criminal Appeal No. 434 of 2017 (unreported), that:-

> *"a witness's credibility basing on demeanor is exclusively measured by the trial court."*

The Court further stated that:-

> *"Apart from demeanour.... The credibility of a witness can also be determined in other two ways that is,* ***one by assessing*** *the coherence of the testimony of the witness, and* ***two****, when the testimony of the witness is considered in relation to the evidence of other witnesses."*

[see also **Edward Nzabuga vs R**epublic, Criminal Appeal No 136 of 2008, (unreported)],

In the instant case, the trial court which had the opportunity to observe PW1 and PW2 testifying believed them to be witnesses of truth. This was the exclusive domain of the trial Court. For other courts, factors to be considered were explained with lucidity in the

case of **Patrick Sanga vs Republic**, Criminal Appeal No. 213 of 2008 (unreported) thus:-

> *"To us, there are many and varied good reasons for not believing a witness. These may include the fact that the witness has given improbable evidence; he/she has demonstrated a manifest intention or desire to lie; the evidence has been materially contradicted by another witness or witnesses; the evidence is laden with embellishments than facts; the witness has exhibited a clear partiality in order to deceive or achieve a certain ends, etc."*

On our examination of the evidence on record, we find nothing suspect in the testimonies of PW1 and PW2. Their respective evidence was not only clear but also consistent. The substance of their evidence on what they saw and did, save for few matters deferred to a later stage, was analogous. Like the first appellate court, we see no reason to discredit them as the appellants suggest. This ground fails and is dismissed too.

Before we move to the crucial issue whether the appellants were properly identified and whether the prosecution proved the case against both appellants, we have decided to address other less

involving matters raised in the memorandum of appeal. First, the second appellant contended that his conviction was based on a cautioned statement (Exh. P3) of which its admission was fraught with procedural irregularities that an inquiry was not conducted. This ground was, however, not amplified. Instead, the appellant seemingly elaborating on that ground contended that exhibit P3 was not read out after it was admitted as an exhibit. Without hesitation, the learned Senior State Attorney conceded to the anomaly that exhibit P3 was not read out after being admitted and urged it to be expunged from the record of appeal. As we observed in **Mohamed Juma @ Mpakama vs Republic**, Criminal Appeal No. 385 of 2017 (unreported) and **Robinson Mwanjisi and Three Others vs R [2003] TLR 218**, this requirement is intended to ensure that the contents of a document are made clear to the accused (now appellant) so as to enable him align his defence accordingly. We accordingly agree with the learned Senior State Attorney that the omission is contrary to a well-established practice hence the second appellant's cautioned statement (Exh. P3) suffers the natural wrath of being expunged, as we hereby do.

We lastly turn to consider the complaint that the appellants were not properly identified. We shall start with the identification

parade. The second appellant assailed the whole exercise pointing out that no reason for conducting it was given, the report was wrongly prepared for showing that the two identifying witnesses identified the appellants at the same time and in one identification parade. He supported his assertion by referring us to identification parade report (exhibit P9) in which form two persons are indicated. He also faulted the report (Exhibit P9) arguing that it was not read out after it was admitted. The learned Senior State Attorney argued first, and rightly so in our view, that since PW1 and PW2 knew the first appellant prior to because he had visited their office twice and they lastly saw him on the incident date, identification parade was unnecessary for them to identify the first appellant. This stance accords with our observation that the purpose of an identification parade is, *inter alia*, to enable a witness identify the assailant whom he/she has not seen or known before the incident (See **Abdul Farijala and Another vs Republic**, Criminal Appeal No. 99 of 2008 and **John Paulo @ Shida and Another vs Republic**, Criminal Appeal No. 335 of 2009 (both unreported). For instance in **Joel Watson @ RAS vs Republic,** Criminal Appeal No. 143 of 2010 (unreported) the Court stated that:-

> *"Furthermore, since PW1 had deposed that he identified the appellant at the scene of crime,*

from a distance of about one metre, using a strong torch light and that he knew him before the incident, the conduct and outcome of the parade was, in our view, not necessary and should not, therefore, be accorded any weight."

We, on the authorities above, entirely agree with the learned Senior State Attorney that the conduct of the parade in respect of the first appellant was unnecessary. Exhibits P7 and P8 ought not to have been accorded any weight in the determination of the first appellant's guilt. On that account, exhibits P7 and P8 are worthless. In respect of the second appellant, on account of the identification report (Exh. P9) not being read out in court after being admitted as conceded by the learned senior State Attorney, on the authority of **Mohamed Juma @ Mpakama vs Republic**, (supra) and **Robinson Mwanjisi and Three Others vs R (supra),** we fully agree that it should, as we hereby do, be expunged from the record of appeal.

Having disposed of the complaints on the conduct of identification parades and admissibility of the second appellant's cautioned statement which formed the basis of the appellants' convictions in favour of the appellants, we are left with the crucial complaint whether the visual identification of the appellants by PW1,

PW2 and PW5 was sufficient. Our determination of this ground is going to be decisive on the appellants' fate in this appeal.

Ms Ally's submission on this ground was that the first appellant visited PW1 and PW2's office twice before the incident date for business mission during which time the first appellant introduced himself as a business man dealing with sell of motorvehicles and pressed a deal of securing a buyer of tanzanite in Dubai. According to Ms Ally, during these meetings and the time taken to travel all the way from Kariakoo to Summik Kuduchi in a saloon car and the time spent thereat when the minerals were being verified enabled PW1, PW2 and PW5 to properly see and identify the first appellant. She added that even PW5 told the court she saw and identified the first appellant on whose name the certificate was issued because the verification of the tanzanite took enough time (from 11:oohrs to 02:00hrs). In respect of the second appellant, Ms Ally argued that PW1 and PW2 boarded a saloon car driven by the second appellant, the time taken to go to Summik Kunduchi and then on the way back and before the incident was enough for PW1 and PW2 to see and identify him. Stressing on the point, she argued that a saloon car is small hence the driver (second appellant), first appellant, PW1 and PW2 set closer to each other hence were able to see each other. In

addition, she argued that one Sele and Ustadhi were produced before PW1 and PW2 for identification but neither of them was identified as being the one who drove them that day. That it was until when the second appellant was arrested when the two (PW1 and PW2) identified him to be the one. These assertions were seriously attacked and criticized by the appellants. Common to both was that their descriptions were not explained to the police when the matter was first reported. Particular to the first appellant was that PW1 and PW2 gave different names of the person who allegedly visited their office and later took them to Summik Kunduchi. That while PW1 said it was Othman Edward, PW2 said Athuman Mohamed. As for the second appellant, he contended that the sitting arrangement in the said saloon car such that PW1 and PW2 could see and identify him was not explained. In their respective views, those deficiencies go to impinge upon the credibility of the evidence of PW1 and PW2.

The law on visual identification is well settled. The court should not act on such evidence unless all possibilities of mistaken identity are eliminated and that the court is satisfied that the evidence before it is absolutely water tight (See: **Waziri Aman v. The Republic,** (1980) TLR 250, **Gerald Lucas v. Republic supra; Raymond Francis v. Republic** (1994) TLR 100; **Emmanuel Luka and Others**

v. Republic, Criminal Appeal No. 325 of 2010; **Ramadhani Vincent v. Republic**, Criminal Appeal No. 240 of 2009**; Emmanuel Mdendemi v. Republic** Criminal Appeal No. 16 of 2007- all unreported).

In the instant case, there is clear evidence by PW1 and PW2 that the first appellant visited and had business talks in their office twice before the incident and on the incident date in their office and later when going to and from Summik Kunduchi. In all those days, the first appellant went to their office at 09:00hrs. It was during the day time hence in broad day light. We are of a decided view that PW1 and PW2 had ample opportunity of seeing the already familiar first appellant very clearly. Apparently, the anomalies expressed by the first appellant are discernible in the record of appeal. We are also grateful to Ms. Ally for her concession of that fact. The question now is whether the anomalies impact negatively to the prosecution evidence such that it is rendered highly implausible. We are alive of the settled principle that naming the assailant to the police officer enhances the credibility of a witness (See **MARWA WANGITI MWITA AND ANOTHER vs Republic**, Criminal Appeal No. 6 of 1995 (unreported). But this does not mean that failure to do so render the witness's evidence incredible or is discredited. However,

the first appellant's complaint is two-fold; first it is directed on failure by the witnesses to give his description to the police and second; different names given by PW1 and PW2 during trial. We share views with the learned Senior State Attorney that the record vividly shows that PW1 and PW2 admitted not giving the descriptions of both appellants to the police when they reported the robbery incident to the police. It is trite law that giving description of the assailant eliminates the possibility of a mistaken identity, but this is necessary in situations where the question of identification is in respect of a stranger. The principle was enunciated in the case of **R vs Mohamed B. Allui** [1942] 9 EACA 72 that:-

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

That position was followed in the case of **Cosmas Chaula vs Republic**, criminal appeal No. 6 of 2010 (unreported) where the Court went further to explain what constituted descriptions thus:-

"We are of the view that there is no doubt that the matter took place at day time. But, the question is who did the act to PW1? As the record shows, the trial court and the first appellate court relied on the evidence of PW3 to prove that the appellant was identified at the scene. However, it is now settled that a witness who alleges to have identified a suspect at the scene of crime ought to give a detailed description of such a suspect to a person whom he first reported the matter before such a suspect is arrested. The description should be on the attire worn by a suspect, his appearance, height, colour and/or any special mark on the body of such a suspect."

Given the clear evidence by PW1 and PW2 that the first appellant was known to them prior to the incident, the above principle does not apply to him but to a stranger only. The first appellant's complaint is baseless.

In respect of the contradiction in name given by PW1 and PW2, the issue here is whether the contradiction go to the root of the case or not because contradictions in cases are unavoidable (see **Armand Guehi vs Republic**, Criminal Appeal No.242 of 2010 and **Dickson**

Elia Nsamba Shapwata and Another vs Republic, Criminal Appeal No. 92 of 2007 (both unreported). In the latter case the Court stated that:-

> *"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter."*

On the submission by the first appellant, it is apparently clear that the contradiction is simply on the name not on the person seen and identified. PW1 and PW2 gave evidence on the person they saw and identified. The issue of the name is not very material for as the evidence goes and the nature of the offence committed there was no possibility of the first appellant giving his real name that would make him easily traceable. In that view, the contradiction had no bearing with the very person identified. The discrepancy was, utmost, a slip of the tongue by PW1. The contradiction was, accordingly, a minor contradiction not going to the root of the case. We therefore have no hesitation to hold that the evidence by PW1 and PW2 was strong, credible and reliable. Thus, the first appellant's conviction was

properly anchored on the identification evidence by PW1 and PW2. On the same reasoning, we find that the complaint that the prosecution side did not prove the case against the first appellant beyond reasonable doubt is without basis. Thus, this ground too is dismissed.

In respect of the second appellant, the identification evidence relied on is that the first appellant, PW1 and PW2 boarded the car (Exhibit P3) driven by the second appellant from Kariakoo to Summik Kunduchi and on the way back. Ms Ally was emphatic that exhibit P3 being a salon car coupled with the long-time taken in that trip, passengers therein set closer to each other hence it was possible for each one to see and identify the other. That view was seriously criticized by the appellant for failure to explain the sitting arrangement in that car. Much as we appreciate that the sitting arrangement was not explained the fact remains that that car is small and the passengers set closer to each other as rightly argued by Ms Ally. The record is clear that the journey from Kariakoo to Summik Kunduchi started at 09:00 hrs and they arrived at about 10:45hrs and 11:hrs according to PW2 and PW5. The journey took about one and half hours. For people sitting close to each other, that time is sufficient for them to see and identify each other. Besides, after verification of the minerals the first appellant, PW1 and PW2 boarded the same car

driven by the same driver and they covered about 500 meters on the way back to Kariakoo before the robbery incident took place. This was yet another opportunity for PW1 and PW2 to see and identify the driver. So much so good, but PW1 and PW2, as demonstrated above did not disclose to the police the description of the second appellant who they had met on the fateful day for the first time. He was a stranger to them hence a need to give the description to the police before he was arrested. That would have dispelled the possibility of a mistaken identity. Failure to give description, on the authority of **R. vs Mohamed B. Allui** and **Cosmas Chaula vs Republic** (supra) raises doubt on the identification evidence by PW1 and PW2. Such doubt is resolved in the second appellant's favour. We are, unlike both courts below, satisfied that the identification evidence against the second appellant was not watertight. It was unsafe to act on such evidence to found his conviction.

For the foregoing reasons, the appeal against the first appellant (Maulid Juma Bakari @ Damu Mbaya) is devoid of merit and is hereby dismissed. Further, we find merit in the second appellant's (Fikiri joseph Pantaleo) appeal and we allow it, quash the conviction and set aside the sentence meted by the trial court and sustained by the first

appellate court. We order his (the second appellant) release from prison forthwith unless held for another lawful cause.

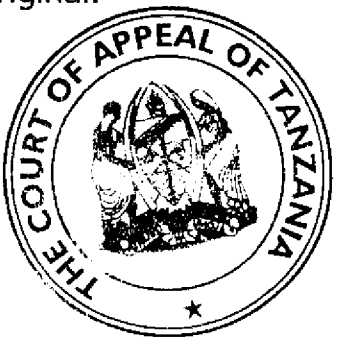
DATED at **DAR ES SALAAM** this 21st day of May, 2020.

S. A. LILA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 13th day of July 2020, in the Presence of the Appellants in person and Ms. Daisy Makakala State Attorney for the Respondent is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL