IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KOROSSO, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 414 OF 2018

1. BERNARD THOBIAS JOSEPH..... 1ST APPELLANT
2. YARAM LEONARD ..... 2ND APPELLANT

VERSUS

REPUBLIC..... ..... RESPONDENT

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

(Mlyambina, J.)

Dated the 8th day of November, 2018
in
Criminal Appeal No. 243 of 2018

.....

JUDGMENT OF THE COURT

17th March, & 14th April, 2021

KOROSSO, J.A.:

The appellants, Bernard Thomas Joseph and Yaram Leornard were convicted by the District Court of Kinondoni at Kinondoni of the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 Revised Edition 2002 (the Penal Code) and sentenced to thirty (30) years imprisonment. At the trial, the prosecution alleged that on the 7th November, 2016 at Mbezi Makonde area within Kinondoni District in Dar es Salaam Region, the appellant did steal one handbag the property of Baby Madaha Joseph (PW1) and immediately before and after such stealing threatened her with a knife in order to obtain and retain the

handbag. The stolen handbag contained various items including PW1's passport number AB711848, a wallet valued at Tshs. 15,000/-, two mobile phones one Samsung make Duos valued at Tshs. 650,000/- and another Samsung edge plus make valued at Tshs. 1,800,000/-, make up items valued at Tshs. 100,000/-, cash amounting to US$ 1000.0, a small purse worth Tshs. 60,000/-, a small wallet worth Tshs. 10,000/-, a phone charger valued Tshs. 10,000/- and some documents.

In her testimony, PW1 contended that on the 7th November, 2016 having been driven from the airport by her friend and stopped at Kepong'oso, Mbezi Makonde so as to buy chips which was at around 2200hrs. While standing, holding her handbag, waiting for the chips, two male persons in a motorcycle nearby flashed light towards her and then the 1st appellant who was holding a knife, came close to her saying "*achia pochi*", meaning handover the handbag. Subsequently, he strangled her and grabbed the handbag from her and then left the scene. Being very late at night at the time, PW1 left for home and it was until the next day that she reported the robbery incident at Kawe Police Station. On the 12th November, 2011 PW1 was called by Insp. Joyce to take part in the Identification Parade to identify the culprits and she managed to identify both appellants.

The prosecution alleged further that sometime in November 2016, Godfrey Wilson Mwampepo (PW2) met the 1st appellant. That he knew the 1st appellant, because of the motorcycle for hire he had and PW2 occasionally hired him to transport him to various destinations. That on meeting him, the 1st appellant sought to borrow Tshs. 100,000/- so that he can respond to a personal problem and offered PW2 as bond a mobile phone Samsung Duo make. PW2 accepted the deal and they exchanged the requested money with the Samsung Duo mobile phone as agreed. The evidence from E.483 D/C Ambele (PW3) and PW1 was that on the 12th November, 2016 the 1st appellant's house was searched and a motorcycle of Boxer make, red in colour was found and seized together with various items allegedly stolen from PW1, that is, a handbag, a novel, tape measure, spectacles, a charger and her passport. The appellants were arrested on the 11th November, 2016, starting with the 2nd appellant who was arrested at Mbezi Juu and then the 1st appellant who was arrested at Mbezi near the offices of Baraza la Mitihani and then subsequently arraigned.

In defence, the 1st appellant (DW1) categorically denied any involvement with the charges against him and testified on circumstances

pertaining to his arrest. The 2nd appellant also denied any knowledge of the offence charged and narrated how he was arrested and arraigned.

At the end of the trial, the appellants were found guilty as charged, convicted and each sentenced to a term of thirty (30) years imprisonment. Their appeal to the High Court was dismissed. Still undaunted, they preferred this second appeal faulting the judgment of the first appellate court on the following five (5) grounds of appeal which, paraphrased, read as follows: -

1. That, the learned 1st appellate Judge erred in law and fact in relying on the identification parade conducted un-procedurally by PW6 despite the fact there was no advanced detailed description of the appellants by PW1 nor any evidence to establish the intensity of light at the locus in quo.
2. That, the learned first appellate Judge erred in law and fact to uphold the trial court's decision based on unprocedural visual identification of PW2 against the 1st appellant in the identification parade while PW2 knew the 1st appellant prior to the incidence.
3. That, the learned first appellate Judge erred in law and fact to uphold the conviction and sentence relying on Exhibits PE2, PE5 and PE6 (certificate of seizure and identification parade register) which were admitted un-procedurally and were not read over in court after being admitted in evidence.
4. That, the learned first appellate Judge erred in law and fact to sustain the appellants conviction and sentence relying on the

evidence of PW1 who, when cross-examined by the defence, she had not been reminded that she was still on oath in contravention of the provisions of the Criminal Procedure Act, Cap 20 RE 2002.

5. That, the learned first appellate Judge erred in law and fact in upholding the conviction and sentence against the appellants while the prosecution failed to prove it's case beyond reasonable doubts.

At the hearing of the appeal before us, the 1st and 2nd appellants each appeared in person while linked from Ukonga Prison through video conferencing facility and unrepresented. Ms. Sylvia Mitanto and Mr. Benson Mwaitenda, both learned State Attorneys appeared for the respondent Republic.

When hearing commenced, each of the appellant fully adopted the memorandum of appeal and opted to allow the learned State Attorney to respond to their grounds of appeal first and to be allowed to rejoin thereafter.

Ms. Mitanto on her part, commenced by resisting the appeal supporting the conviction and sentence meted against the appellants. She then proceeded to respond to complaints from the appellants faulting the first appellate court for upholding the conviction and sentence against the appellants by relying on the evidence related to

their identification as fronted in the 1st and 2nd grounds of appeal. She argued that the prosecution evidence related to identification of the appellants as the culprits who robbed PW1 on the fateful date is watertight. She conceded that the alleged robbery occurred at night but argued that the evidence of PW1 was to the effect that on the fateful night there was adequate light to enable her identify the appellants as her attackers.

The learned State Attorney contended that PW1's evidence which was found to be reliable by both the trial and the first appellate courts, also provided description of the clothes the 1st appellant was wearing, that is a pink shirt and black jacket and that he had dreads. PW1 also stated that it was the 1st appellant who was holding the knife when he came near her, ordered to be given the handbag then managed to grab her handbag and left the scene. Ms. Mitanto urged us to find that the oral evidence of PW1 was reinforced by her identification of the 1st and 2nd appellants at the identification parade organized and supervised by PW6. A fact also confirmed by PW6 in his testimony in the trial court.

The learned State Attorney conceded that the identification parade register admitted as Exhibit PE5 was not read over in court upon being admitted and prayed that it be expunged from the record. Nevertheless,

she implored us to find that despite expunging Exhibit PE5, the prosecution case had ample oral evidence from PW1, PW2 and PW6 alluding that there was an identification parade which was conducted on the 12th November, 2016 and PW1 identified the 1st and 2nd appellants. She intreated us to be inspired by the decision of this Court in **Issa Hassan Uki vs Republic**, Criminal Appeal No. 129 of 2012 (unreported) and whose circumstances were similar to the present case, where having expunged an exhibit, the Court considered other relevant evidence related to the conduct of the identification parade to sustain conviction.

The learned State Attorney also conceded that since the 1st appellant was well known by PW2 prior to the incident, there was no need for the identification parade for him to identify the 1st appellant. Nonetheless, she contended that this did not affect the evidence of PW2 as against the 1st appellant, in that the 1st appellant had given him a mobile phone of Samsung Duo make alleged to have been stolen from PW1 by the appellants in exchange for Tshs. 100,000/-. The learned State Attorney urged the Court to find that the appellants were duly identified by PW1 and PW2. She implored the Court to dismiss the 1st and 2nd grounds of appeal for lack merit.

Elaborating on the 3rd ground of appeal, the learned State Attorney did not have anything additional to state on Exhibits PE5 and PE6, the identification parade registers, having conceded since earlier that since they had not been read out, they be expunged. She also prayed that the same feat should extend to exhibit P6 in view of the fact that the respective identification parade was unnecessary since PW2 knew the 1st appellant prior to the incident.

As regards exhibit PE2, the certificate of seizure, the learned State Attorney concurred with the appellants that it should be disregarded because it was not read out in court upon being admitted and in effect denied the appellants an opportunity to know and understand the contents for their arguments in building their defence. Nevertheless, she argued that even if all the exhibits are expunged, and also taking into consideration that Exhibit P1 was expunged by the first appellate court, this should not affect the weight of evidence against the appellants. This is so, in view of the evidence of PW1, PW2 and PW3 regarding the items stolen from PW1 found in the 1st appellant's house during the search she again referred us to the holding in **Issa Hassan Uki vs Republic** (supra).

Responding to complaints found in the 4th ground of appeal, the learned State Attorney agreed with the appellants' grievances that the trial court failed to remind PW1 that she was still on oath which she had taken at the start of her testimony, when she was called for cross examination after the trial had been adjourned for a few days. However, she asserted that the omission was minor since at the start of her testimony, PW1 had been sworn and thus failing to remind her of her oath did not constitute a fatal error nor prejudice the rights of the appellants.

On the 5th ground of appeal, the learned State Attorney argued that the prosecution had proved the case to the standard required and thus it was proper for the trial court to convict and sentence the appellants and for the first appellate court to uphold the conviction and sentence. She argued further that there was sufficient evidence from the prosecution through PW1's evidence who narrated the whole robbery incidence and her identification of the appellants at the crime scene, the dock and in the identification parade. She argued that her evidence was in line with all the requisite guidelines where conviction relies on identification evidence under unfavorable conditions, as guided by various decisions

including **Omari Iddi Mbezi and 3 Others vs Republic**, Criminal Appeal No. 227 of 2009 (unreported).

The learned State Attorney contended further that despite the fact that there was failure to comply with section 34B (1) of the Tanzania Evidence Act, Cap 6 Revised Edition 2002 (the Evidence Act) in admitting the evidence of one of the witnesses (a neighbour) to the seizure of the stolen items from the 1st appellants house, the evidence of PW1 and PW3 left no doubt that the said items were seized and identified by PW1 as items stolen from her by the appellants on the fateful night. The learned State Attorney urged the Court to uphold the conviction and sentence against the appellants and dismiss the appeal arguing that it lacked merit.

The 1st appellant's rejoinder was to reiterate his earlier submission and prayed that his appeal be allowed and he be set free. The 2nd appellant had nothing in rejoinder in addition to what was contained in the grounds of appeal in rejoinder and beseeched the Court to allow the appeal, quash conviction and set aside the sentence imposed.

We have heard and carefully pondered on the competing urgings. We shall start with the 3rd ground of appeal. Undoubtedly, as conceded by

the learned State attorney, exhibits PE2, PE5 and PE6, that is, the certificate of seizure and the two identification parade registers were not read over after being admitted into evidence. There are numerous decisions of this Court that have held that failure to read out admitted documentary evidence is a fatal irregularity since it denies an opportunity for parties to have knowledge of the contents of such evidence to effectively utilize the admitted documents (See **Robinson Mwanjisi and Others vs Republic** [2003] T.L.R 218, **Nkolozi Sawa and Another vs Republic**, Criminal Appeal No. 574 of 2016, **Jumanne Mohamed and Two Others vs Republic**, Criminal Appeal No. 534 of 2015 and **Mark Kasimiri vs Republic**, Criminal Appeal No. 39 of 2017 (all unreported). In line with the decisions above, we consequently expunge exhibits PE2, PE5 and PE6 from the record.

In addition, as rightly conceded by the learned State Attorney, since the 1st appellant was known to PW2 prior to incident, there was no need to conduct an identification parade for PW2 to identify the 1st appellant, and thus the said identification parade and Exhibit PE6 were unnecessary as held in **Jackson Kihili Luhinda and Another vs Republic**, Criminal Appeal No. 139 of 2007 (unreported). In that case, we relied on another decision of this Court in **Hassan Juma**

Kanenyera v. Republic [1992] TLR 106, in which we drew inspiration from Sarkar, Law of Evidence, 13th Edition to emphasize this stance, where at page 99 it states:

> *"An identification parade is useless if persons put on the parade to be identified are known to the person who is to make the identification."*

Indisputably, as rightly pointed out by the learned State Attorney with regard to exhibit PE6, that the identification parade served no useful purpose. Therefore, in effect the 3rd ground of appeal is partly allowed. However, we remain with the question whether upon expunging exhibits PE2, PE5 and PE6, the remaining evidence is sufficient to sustain conviction against the appellants.

Without doubt, consideration of the raised issue will lead to determination of the 1st, 2nd and 4th grounds of appeal. In the 1st and 2nd grounds of appeal the grievance being that the appellants were not properly identified and also that the identification parade was conducted un-procedurally and thus failed to reinforce the evidence of visual identification by the prosecution witnesses.

This raised issue is important in line with the holding of this Court in various decisions such as **Issa Hassan Uki vs Republic** (supra)

she implored us to find that despite expunging Exhibit PE5, the prosecution case had ample oral evidence from PW1, PW2 and PW6 alluding that there was an identification parade which was conducted on the 12th November, 2016 and PW1 identified the 1st and 2nd appellants. She intreated us to be inspired by the decision of this Court in **Issa Hassan Uki vs Republic**, Criminal Appeal No. 129 of 2012 (unreported) and whose circumstances were similar to the present case, where having expunged an exhibit, the Court considered other relevant evidence related to the conduct of the identification parade to sustain conviction.

The learned State Attorney also conceded that since the 1st appellant was well known by PW2 prior to the incident, there was no need for the identification parade for him to identify the 1st appellant. Nonetheless, she contended that this did not affect the evidence of PW2 as against the 1st appellant, in that the 1st appellant had given him a mobile phone of Samsung Duo make alleged to have been stolen from PW1 by the appellants in exchange for Tshs. 100,000/-. The learned State Attorney urged the Court to find that the appellants were duly identified by PW1 and PW2. She implored the Court to dismiss the 1st and 2nd grounds of appeal for lack merit.

Elaborating on the 3rd ground of appeal, the learned State Attorney did not have anything additional to state on Exhibits PE5 and PE6, the identification parade registers, having conceded since earlier that since they had not been read out, they be expunged. She also prayed that the same feat should extend to exhibit P6 in view of the fact that the respective identification parade was unnecessary since PW2 knew the 1st appellant prior to the incident.

As regards exhibit PE2, the certificate of seizure, the learned State Attorney concurred with the appellants that it should be disregarded because it was not read out in court upon being admitted and in effect denied the appellants an opportunity to know and understand the contents for their arguments in building their defence. Nevertheless, she argued that even if all the exhibits are expunged, and also taking into consideration that Exhibit P1 was expunged by the first appellate court, this should not affect the weight of evidence against the appellants. This is so, in view of the evidence of PW1, PW2 and PW3 regarding the items stolen from PW1 found in the 1st appellant's house during the search she again referred us to the holding in **Issa Hassan Uki vs Republic** (supra).

Responding to complaints found in the 4th ground of appeal, the learned State Attorney agreed with the appellants' grievances that the trial court failed to remind PW1 that she was still on oath which she had taken at the start of her testimony, when she was called for cross examination after the trial had been adjourned for a few days. However, she asserted that the omission was minor since at the start of her testimony, PW1 had been sworn and thus failing to remind her of her oath did not constitute a fatal error nor prejudice the rights of the appellants.

On the 5th ground of appeal, the learned State Attorney argued that the prosecution had proved the case to the standard required and thus it was proper for the trial court to convict and sentence the appellants and for the first appellate court to uphold the conviction and sentence. She argued further that there was sufficient evidence from the prosecution through PW1's evidence who narrated the whole robbery incidence and her identification of the appellants at the crime scene, the dock and in the identification parade. She argued that her evidence was in line with all the requisite guidelines where conviction relies on identification evidence under unfavorable conditions, as guided by various decisions

including **Omari Iddi Mbezi and 3 Others vs Republic**, Criminal Appeal No. 227 of 2009 (unreported).

The learned State Attorney contended further that despite the fact that there was failure to comply with section 34B (1) of the Tanzania Evidence Act, Cap 6 Revised Edition 2002 (the Evidence Act) in admitting the evidence of one of the witnesses (a neighbour) to the seizure of the stolen items from the 1st appellants house, the evidence of PW1 and PW3 left no doubt that the said items were seized and identified by PW1 as items stolen from her by the appellants on the fateful night. The learned State Attorney urged the Court to uphold the conviction and sentence against the appellants and dismiss the appeal arguing that it lacked merit.

The 1st appellant's rejoinder was to reiterate his earlier submission and prayed that his appeal be allowed and he be set free. The 2nd appellant had nothing in rejoinder in addition to what was contained in the grounds of appeal in rejoinder and beseeched the Court to allow the appeal, quash conviction and set aside the sentence imposed.

We have heard and carefully pondered on the competing urgings. We shall start with the 3rd ground of appeal. Undoubtedly, as conceded by

the learned State attorney, exhibits PE2, PE5 and PE6, that is, the certificate of seizure and the two identification parade registers were not read over after being admitted into evidence. There are numerous decisions of this Court that have held that failure to read out admitted documentary evidence is a fatal irregularity since it denies an opportunity for parties to have knowledge of the contents of such evidence to effectively utilize the admitted documents (See **Robinson Mwanjisi and Others vs Republic** [2003] T.L.R 218, **Nkolozi Sawa and Another vs Republic**, Criminal Appeal No. 574 of 2016, **Jumanne Mohamed and Two Others vs Republic**, Criminal Appeal No. 534 of 2015 and **Mark Kasimiri vs Republic**, Criminal Appeal No. 39 of 2017 (all unreported). In line with the decisions above, we consequently expunge exhibits PE2, PE5 and PE6 from the record.

In addition, as rightly conceded by the learned State Attorney, since the 1st appellant was known to PW2 prior to incident, there was no need to conduct an identification parade for PW2 to identify the 1st appellant, and thus the said identification parade and Exhibit PE6 were unnecessary as held in **Jackson Kihili Luhinda and Another vs Republic**, Criminal Appeal No. 139 of 2007 (unreported). In that case, we relied on another decision of this Court in **Hassan Juma**

Kanenyera v. Republic [1992] TLR 106, in which we drew inspiration from Sarkar, Law of Evidence, 13th Edition to emphasize this stance, where at page 99 it states:

> *"An identification parade is useless if persons put on the parade to be identified are known to the person who is to make the identification."*

Indisputably, as rightly pointed out by the learned State Attorney with regard to exhibit PE6, that the identification parade served no useful purpose. Therefore, in effect the 3rd ground of appeal is partly allowed. However, we remain with the question whether upon expunging exhibits PE2, PE5 and PE6, the remaining evidence is sufficient to sustain conviction against the appellants.

Without doubt, consideration of the raised issue will lead to determination of the 1st, 2nd and 4th grounds of appeal. In the 1st and 2nd grounds of appeal the grievance being that the appellants were not properly identified and also that the identification parade was conducted un-procedurally and thus failed to reinforce the evidence of visual identification by the prosecution witnesses.

This raised issue is important in line with the holding of this Court in various decisions such as **Issa Hassan Uki vs Republic** (supra)

which stated that upon expunging a documentary exhibit the court's duty is to determine whether there is ample evidence in its stead to sustain conviction. In the instant case, we have been invited by the learned State Attorney to find that there is ample evidence to sustain conviction against the appellants despite having expunged exhibits PE2, PE5 and PE6. She argued that the appellants were properly identified and all requisite requirements were fulfilled. That together with this fact, the Court should consider the fact that various items stolen from PW1 were found and seized from the 1st appellant's room as testified by both PW1 and PW3.

The Court has in numerous decision tested reliability of visual identification. The case of **Waziri Amani vs The Republic** [1980] TLR 250 provides guidelines to be followed when considering the evidence related to visual identification and the need to exercise ample care in reliance of such evidence. At page 251 the Court stated; "*The evidence of visual identification is of the weakest kind and most unreliable*".

In a recent decision, in the case of **Director of Public Prosecutions vs Mohamed Said and Another**, Criminal Appeal No. 432 of 2018 (unreported), the Court reiterated the observations in

Omari Iddi Mbezi and 3 Others vs Republic (supra) with respect to the test for reliable evidence on visual identification stating that:-

> *"the witness must make full disclosure of the source of light and its intensity, explanation of the proximity to the culprit and the witness and the time he spent on the encounter, description of the culprits in terms of body build, complexion, size and attire. Additionally, the witness must mention any peculiar features to the next person that person comes across which should be repeated at his first report to the police on the crime who, would in turn testify to that effect to lend credence to such witness's evidence of identification of the suspect at an identification parade and during the trial to test the witness's memory."*

In the instant case, what is in contention is whether the above tests were satisfied. To start with, claims that PW1 was attacked at night are in effect not challenged. To get the gist of PW1's evidence she stated:

> *"... On 7/11/2016 at 22.00 pm hours. I was from airport. I dropped at one chips shop, at Mbezi Makonde, known as Kepong'oso and I was with my friend in the car, but when I went to chips shop I was alone and seller of chips., when I was*

there, I did have my handbag brown in colour. In that handbag there was passport, yellow card, there were my makeup, brown wallet, goldish purse worth 1000 USD, phone charge, spectacles, tape measures and two cellphones, Samsung Duos (sic) and Samsung 6 edge plus galaxy.

While I was standing there, buying chips, near me, there were two persons who had a motorcycle near me. The compound had some electricity iight therefore it has enough light to see anything or any person. While I was buying chips, I saw motorcycle flashed me with the light of the motorcycle, but I replied to him that I am not going, suddenly the rider did a race and attacked me with that motorcycle and he had a big knife and told me, "Achia Pochi". He packed my handbag and runned (sic) away."

PW1's evidence outlines clearly that during the attack, the distance between PW1 and one of the attackers, that is, the 1st appellant was minimal. PW1 testified that the 1st appellant came near her to the extent of strangling her and telling her to hand over the handbag and then grabbed it from her and ran with it. Evidently at a certain time the two were in close proximity. On the part of the 2nd appellant, there is no

clear evidence on how close he was and nothing that showed whether at any time he came near her to facilitate positive identification. The doubt should thus benefit the 2nd appellant.

On the test related to intensity and brightness of light at the crime scene, PW1 testified that she managed to identify the appellants from the electricity light in the vicinity which was enough to enable her see the attackers there. Her testimony on this was not shaken even when cross examined by the 1st and 2nd appellants. It is settled that when it comes to the issue of sufficiency of light at a crime scene, clear evidence must be given by witnesses to establish that the light relied upon on by the witness was reasonably bright to enable identifying witnesses to see and positively identify the accused persons (see **Waziri Amani vs Republic** (supra) and **Juma Hamad vs Republic,** Criminal Appeal No. 141 of 2014 (unreported)).

We find that as rightly asserted by the learned State Attorney, PW1 copiously described the brightness of the light at the crime scene in her testimony stating that there was enough electricity light in the compound for her to see the persons who attacked her. Undoubtedly, this observation was not a mere assertion that there was light but a description of sufficiency of light at the scene to enable identification of

any person there. Thus, clearly with the available light, PW1 managed to identify a person who came close to her, that is, the 1st appellant as opposed to the 2nd appellant where there is no evidence showing he had been close enough to PW1 within the vicinity to be positively identified by PW1.

With regard to the duration the witness observed the attackers, one of the conditions considered when evaluating evidence of identification, can be gathered from PW1's evidence when being cross examined by the 2nd appellant. She stated that the incident took around five (5) minutes which we find to be reasonable time to identify a person under the peculiar circumstance in the instant case. Other evidence from PW1 on specific things that enabled her identify the 1st appellant, includes seeing him holding a big knife that he had on dreads and wore a red jacket and that he was the one who ripped the handbag from her and was the rider of the motorcycle they had when she first saw them. There was no such specific description with regard to the 2nd appellant.

On whether or not PW1 reported this to any person soon after the incident, there is no evidence that specifically highlights the contents of PW1 report to the police with regard to the robbery. Admittedly, we cannot conclude that all the factors highlighted in various decisions

when testing reliability of visual identification evidence against both the appellants were complied with fully. However, considering our earlier finding that there was sufficient light at the scene, and the fact that at one point in the robbery there was minimal distance between PW1 and the 1st appellant and the five minutes undertaken for the incident was adequate to facilitate proper identification of perpetrators of the robbery, there is no doubt that this further confirmed that the 1st appellant was identified by PW1.

We are also alive to the fact that to fortify the evidence on visual identification of the culprits, an identification parade must be conducted. PW1 testified that she did identify the 1st and 2nd appellant at the identification parade conducted on the 12th November, 2016. At this juncture, the issue for our determination is whether the identification parade was conducted in line with the established procedures. The first appellate court found that the identification parade was properly conducted.

The evidence of Inspector Abdallah (PW6) who conducted the parade shows that all the procedures were followed and that PW1 identified both the 1st and 2nd appellants. The 1st and 2nd appellants cross examination of PW6 was not on the procedure but on the fact that

the register was not stamped, a complaint which was dismissed by the first appellate court. The complaint on procedural irregularities in the identification parade was without doubt an afterthought. It is now settled that a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court not to rely on the evidence of the witness (see **Nyerere Nyegue vs Republic**, Criminal Appeal No. 67 of 2010, and **George Maili Kemboge v. Republic**. Criminal Appeal No. 327 of 2013/ CAT (both unreported)).

In the present case, exhibits PE5 and PE6 have already been expunged and thus the complaints against the identification registers is superfluous. What remains for us to consider is whether in the absence of the expunged exhibits the oral evidence on the identification parade is still intact. We agree with the learned State Attorney that the evidence of PW1 and PW6 with regard to the conduct of the identification parade reinforces the identification evidence especially against the 1st appellant. Consequently, taking all the evidence into consideration, we are of the view that there is ample evidence that the 1st appellant was identified at the crime scene. On the other hand, there is limited evidence with respect to the identification of the 2nd appellant at the scene for failing

to satisfy the guidelines set in determining the quality of evidence on visual identification. In the premises, the 1st and 2nd grounds of appeal have no merit on the part of the 1st appellant and are meritorious for the 2nd appellant.

The complaint in the 4th ground of appeal relates to the fact that on the 6th of March, 2017 when PW1 was called upon to continue her testimony, she was not reminded of the oath she had taken, a fact conceded by the learned State Attorney. It is pertinent to reproduce the provision governing taking of oaths for witnesses. Section 198(1) of the Criminal Procedure Act states:

> *"Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act."*

As stated earlier, in the instant case at the start of her testimony, PW1 who averred she is of Christian domain was sworn and then proceeded with her testimony. Taking into consideration all the factors surrounding the testimony of PW1, we agree with the learned State Attorney that since on the 20th February, 2017 (at page 14 of the

record) at the commencement of the trial, PW1 had been duly sworn, failure to be reminded of the oath before continuing with her testimony was a minor infraction under the circumstances and is a curable irregularity under section 388 of the CPA. This ground has no merit.

The 5th ground of appeal challenges the conviction of the appellants on the ground that the prosecution failed to prove the case beyond reasonable doubt. The respondent Republic argues that its case was proved as against the appellants to the required standard. The learned State Attorney implored us to consider the evidence on identification of the appellants at the crime scene together with the fact that the stolen items were found in the 1st appellant's house as proof that the appellants robbed PW1 on the fateful night. Other pertinent evidence we have been invited to consider relates to the search conducted at the 1st appellant's room on the 12th November, 2016. PW1's and PW3 evidence shows that upon searching the room, several items stolen from PW1 were found and seized therefrom. They included the handbag and contents which were inside it such as make up, phone charge, passport, a novel, tape measure, spectacles, wipes, a small wallet and purse found on the dressing table and the handbag under a mattress. The seized items were identified by PW1 as hers and stolen on

the fateful night of the robbery. We thus find that despite the fact that exhibit PE2 which had listed the items found in the 1st appellant's room during the search was expunged, the available oral evidence clearly outlines that the items seized include PW1's personal items such as her passport.

We are aware that neither the trial court nor the first appellate court considered application of the doctrine of recent possession in the instant case although both courts relied on the evidence that PW1's personal items were found in the 1st appellants house to sustain conviction against the appellants. However, our evaluation of the evidence leads us to also consider whether under the circumstances the said doctrine can be invoked in the present case.

The doctrine of recent possession has been discussed in numerous decisions of this Court. In **Joseph Mkumbwa and Another vs Republic**, Criminal Appeal No. 94 of 2007 (unreported) we stated that:

> *"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; and lastly, that the stolen thing constitutes the subject of the charge against the accused.... The fact that the accused does not claim to be the owner of the property does not relieve the prosecution to prove the above elements."

Our scrutiny of the record of appeal shows that the 1st appellant never queried PW1 and PW3 on the search or ownership of the seized items found at his room during the search. The said items were seized from the 1st appellants room on the 12th November, 2016 five days after the alleged robbery occurred on the night of 7th November, 2016. In fact, neither the 1st appellant nor the 2nd appellant registered any objection when passport no. AB 791848 and a yellow fever card no. MFH.10 with the name Joan Joseph Madaha were tendered and admitted as exhibit PE7 collectively (see page 66 of the record of appeal).

We have considered the tests on whether or not the doctrine of recent possession can be invoked found in numerous decisions of this Court. We are of the view that all the three tests expounded in **Joseph Mkumbwa and Another vs Republic** (supra) have been fulfilled.

The evidence of PW1 and PW3 shows that various items were found in the 1st appellant's room, including PW1's passport and a yellow fever card with her name and thus fulfilling the first test. The fact that PW1 identified the seized items as belonging to her and admitted as exhibit PE7 shows in effect that the second test was fulfilled. The third test, on the stolen items being subject of the charge is also fulfilled. The charge sheet at page 1 and 2 of the record of appeal reflects this and leaves no doubt that the seized items from the 1st appellant's house that belong to PW1 are listed itemized there, that is, passport number AB791848, one handbag, two mobile phones Samsung make to name a few. At no time in evidence did the 1st appellant provide any explanation on the items seized at his house and how they found their way there. Although PW1 did not outline any special marks, she is entitled to credence as expounded in **Goodluck Kyando vs Republic** [2006] TLR 363. Her credibility was never shaken during cross-examination. There were concurrent findings on her credibility and reliability by the trial and the first appellate courts on this.

In the premises, taking into consideration the evidence on identification of the 1st appellant at the scene of crime and in the identification parade together with the finding of items stolen from PW1

found in the 1st appellant's room, especially the passport belonging to PW1, we hold that the evidence against the 1st appellant is sufficient. Without doubt the prosecution proved the case against him beyond reasonable doubt. Therefore, on the part of the 1st appellant, the 5th ground of appeal lacks merit.

For the foregoing reasons, the appeal against the 1st appellant is dismissed.

On the part of the 2nd appellant, in the absence of any other evidence against him apart from the evidence related to his identification by PW1 at the scene of crime and in the identification parade, which as expounded and for reasons stated hereinabove, we have found that the evidence leaves some doubts. In the end we are of firm view that the available evidence is engrained with doubts on whether the 2nd appellant was properly identified as taking part in the said robbery as charged and thus he should benefit from the said doubts.

In the premises, we allow the appeal by the 2nd appellant, quash his conviction and set aside the imposed sentence. The 2nd appellant

should be released from custody henceforth unless otherwise held for other lawful purposes.

DATED at **DAR ES SALAAM** this 9th day of April, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered on this 14th day April, 2021, in the presence of appellants in person linked via video conference from ukonga prison and Ms. Debora Moshi, learned state Attorney for the respondent is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL