IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 29 OF 2019

(From Criminal Case No.7 of 2010, the Resident Magistrate's Court of Shinyanga)

1. **KAPAMA HAMISI JUMA**
2. **MUSSA ATHUMAN BUBERWA**
3. **LUCAS VICENT MABELA** ..... **APPELLANTS**
4. **AMOS MATHAYO NDUHIYI**

VERSUS

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

JUDGMENT

27th July & 27th October, 2020

Mdemu, J.;

In Criminal Case No.7 of 2010, in the Resident Magistrate's Court of Shinyanga, the four Appellants and one Zainabu Abdallah Okeleky Mchau, who was the 5th accused person, were jointly and together charged with nine (9) counts , to wit; four counts of armed robbery contrary to the provisions of section 287A of the Penal Code, Cap.16; two counts of unlawful possession of firearms and ammunitions contrary to the provisions of section 4(1) and 34(2) of the Ammunition Act, Cap.223 and three counts of grievous harm contrary to the provisions of section 225 of the Penal Code, Cap.16

According to the substituted charge dated 16th of August, 2011, on or about the 23rd of June 2010, at the National Microfinance Bank, Maswa Branch,

in the 1st, 2nd, 3rd and 4th counts, the four Appellants and the then 5th accused person, jointly and together did steal: Tshs.100,000= and one motor vehicle make Toyota Landcruser with Registration No.T393 AHU, The property of Emmanuel Sitta; Tshs.7,974,454.68, the property of NMB Maswa Branch; two handset of mobile phones make sum sung valued at Tshs 200,000/= and one Nokia valued at Tshs.40,000/=the property of Neema Lusasi; and one wallet valued at Tshs.10,000/=the property of Queen Jonathan. Immediately before, in the course of and after stealing, they were armed with a pistol, guns, grenade and hammer and did threat and used violence to one Saka Bakari, Neema Lusasi, Oueen Jonathan, various Staff and customers of NMB Maswa Brach and police on guard in order to obtain and retain the said properties.

In the 5th and 6th counts, on or about the 23rd of June, 2010 at Maswa Town, the Four Appellants and the then 5th accused person, jointly and together did use, carry and in possession of firearms, to wit: SMG No. UC 09639988, SMG No. UC 14071998, Chinese Pistol with serial No.3009521 and grenade without license. In the 6th count they were found in unlawful possession of nine (9) rounds of SMG ammunitions and seven (7) pistol rounds of ammunitions.

With respect to the 7th, 8th and 9th counts, on or about the 23rd of June 2010 at NMB Maswa Branch, the Four Appellants and the then 5th Accused person, did unlawful grievous harm to Sada Kungulilo, Erasto Mang'ele, a police officer G. 2008 PC. Abbas. Previously, before the charge got substituted, Mussa Athuman Buberwa and Amos Mathayo Nduhiyi the 2nd and 4th Appellants respectively pleaded not guilty to the charge when got aligned for the first time in court on 6th of July 2010.

On 6th of July 2010 the court moved to Shinyanga Government Hospital where the 1st Appellant was admitted for plea taking. As said, he pleaded guilty to the 1st, 2nd, 3rd, 4th and 5th counts in which a plea of guilty was entered. The prosecution prayed an adjournment for preliminary hearing. Later on 20th of July 2010, the charge was substituted by adding Lucas Vicent Mabela, the 3rd Appellant. He also pleaded guilty thereby a plea of guilty was recorded.

On 6th of July 2011, another substitution of the charge was mounted following addition of the then 5th accused person. This time, all the Appellants and the then 5th accused person pleaded not guilty to the charge in all counts. After preliminary hearing, the trial commenced on 17th of August, 2011. Twenty-four (24) witnesses got assembled and twenty-seven (27) exhibits were tendered by the prosecution to prove nine (9) counts, whereas the Appellants and the then 5th accused called eight (8) witnesses and tendered twenty-six (26) exhibits defending their innocence.

Brief facts of the case are that, on the fateful day of 23rd of June, 2010 at about 11.30 hours a motor vehicle with Reg. No. T393 AHU Toyota Landcruser was seen by two police officers entering at the park yard in front of NMB Maswa bank premises. Bullets started being shot to the direction of the policemen and in the course, G.2008 PC. Abbas was injured. In the motor vehicle were Seleman Ghata, Mussa Athuman Buberwa and Emmanuel John@Mwana(deceased).

A day preceding the fateful day, Saka Bakari (PW1) while on his normal business, Mathias Sitta showed him a person intending to hire a motor vehicle to Kabondo for burial ceremony. They negotiated the hire price unsuccessful. They left and later through Emmanuel Sitta, it was agreed at Tshs. 150,000/= for six (6) passengers only as carrying capacity. After advance payment of Tsh.

70,000/=, the journey commenced. It was now 23rd of June 2010, after cancellation of the previous day following postponement of burial ceremony.

While on the way along Lalago road, Amos Mathayo Nduhiyi ordered PW1 to stop. He dropped for a short call, then the then 5th Accused in the course of journey, also ordered PW1 to stop as she wanted to seat in the rear seats. The journey continued and as they reached near the bush, PW1 got apprehended, tied with rope together with his friend (PW2) and placed in the rear seats of the vehicle. The one who was in front seat then took charge of the vehicle as a driver.

At NMB Maswa Branch, the Appellants invaded the bank and started shooting using firearms and a grenade. The police on guard, PW3 inclusive, also shot to the direction of the bandits. However, the bandits managed to enter the bank premises and by then there was disarray as customers and staff were ambushed by the bandits. Those around the bank started running randomly. They then managed to rob cash, and mobile phones as per the charge.

According to PW5 E.2494 D/Cpl. Elly, the bandits took the direction towards Primary Court and he, with others, arrested the 1st Appellant. A wallet and two mobile phones were also recovered. Other Appellants were arrested on different dates and charged accordingly.

Though denied, on 3rd day of September, 2014, the trial court found all the Appellants and the then 5th accused person guilty and accordingly, after conviction, they were sentenced as follows: In the counts of armed robbery, they were sentenced to thirty (30) years prison term. As to the count on unlawful possession of firearms and rounds of ammunitions, they were sentenced to five (5) years imprisonment. With respect to counts on grievous

harm, they were each sentenced to serve two years' imprisonment. In addition, save for the then 5th accused person, the Appellants were also sentenced to 12 strokes each. Sentences were ordered to run concurrently.

Aggrieved by that conviction and sentence, the Appellants appealed to this court which, on 3rd of June, 2016 allowed the appeal in respect of the then 5th accused person. The appeal in respect of the Appellants herein got dismissed. They further appealed to the Court of Appeal which then quashed the judgment of the High Court which proceeded to hear the appeal notwithstanding want of conviction and also quashed the judgment of the trial court for sentencing the Appellant without having convicted them and then directed the trial court to compose and deliver judgment in compliance with the law. This was on 28th of August, 2018.

In compliance with the order of the Court of Appeal, on 8th of March, 2019 Gassabile, Resident Magistrate delivered another judgment and this time she convicted the Appellants in the counts of armed robbery and sentenced them to thirty (30) years prison term with 12 strokes. As to the counts of unlawful possession of firearms and rounds of ammunitions, they were sentenced each to five (5) years imprisonment. With respect to counts on grievous harm, she sentenced each to serve two years' imprisonment. Sentences were ordered to run concurrently and to commence from the date the quashed judgment got delivered.

Though the trial magistrate did not indicate, the then 5th accused person was convicted in absentia, hopeful she is still at large following her appeal being allowed by this court. As they still consider themselves innocent, the Four Appellants appealed to this Court on a number of grounds, each having a

separate petition of appeal. The 1st Appellant Kapama Hamis @Juma Ramadhan@Kanoni @Bonge@Mkapa lodged seven (7) grounds of appeal and ten (10) grounds in the supplementary petition of appeal, the 2nd Appellant Mussa Athuman Buberwa@Abdalah Athuman Buberwa@ Mzee Mwenyewe lodged eleven (11) grounds of appeal, the 3rd Appellant Amos Mathayo@Nduhiyi@ Mkemia his are ten (10) grounds; while the 4th Appellant one Lucas Vicent Mabela@Best @Dogo White had also eleven (11) grounds of appeal. In total, there are forty-one (41) grounds of appeal which are summarized into the following:

One, the offence of armed robbery was not proved as no evidence that firearms got deployed; **two**, the evidence of visual identification is weak; **three** identification parade was illegal; **four**, forensic evidence such as ballistic and DNA reports are unreliable; **five**, vehicle registered T393 AHU was not robbed and the owner is unknown; **six,** exhibits P4 (a wallet), P5(two cell phones- NOKIA and SONY ERICSON) and P6 (one cell phone- SAMSUNG) were not identified by owners, thus the doctrine of recent possession was wrongly invoked;

Seven, exhibits P.7 and P.17 (search warrants) are unreliable; **eight,** the 1st Appellant was connected for his presence in Maswa town; **nine**, caution statements (confessions) were involuntary and also contravened sections 50 and 51 of the Criminal Procedure Act, Cap.20 and that the 4th Appellant was convicted on the confession of co-accused; **ten**, police detectives had no movement order for operating in areas outside their District and that, the Resident Magistrate's Court of Shinyanga had no jurisdiction to try the 4th

Appellant because he was arrested in Mwanza while the offence was committed at Maswa.

The four Appellants fended for themselves at the hearing of their appeal on 27th of July, 2020. The Respondent Republic had the service of Ms. Edith Tuka and Mr. Nestory Mwenda, learned State Attorneys. They resisted the appeal. The Appellants, on the other hand, each opted to submit his own grounds of appeal.

The **1st Appellant** submitted on each ground of appeal in both the main and supplementary petition of appeal. In the main petition of appeal, he submitted in the 1st ground of appeal that, the court erred in deploying the evidence of PW1 and PW2 without corroboration. It is incorrect as testified by the two witnesses that, on 22nd and 23rd of June, 2010 the 1st Appellant hired a vehicle for want of an agreement.

He added that, the 1st Appellant was not the only person who met the vehicle vendors as they first talked to another person and that, no evidence of the Appellant's presence in those two days. He concluded in this ground that, as the stolen vehicle was not tendered, thus the issue of ownership not established, it was relevant for the prosecution to call Kyanda Mbasha and Mathias Sitta who PW1 and PW2 named them to be present during hiring of motor vehicle because, in evidence, the owner of that vehicle is PW1 but later the said witnesses named one Salehe Seleman. Therefore, PW1 and PW2 should not have been trusted by the Court.

In the 2nd ground of appeal on identification parade, none of the nine participants in the parade were called to testify and the forms (IP) do not have entries to indicate how witnesses managed to identify. A declaration of one

Jumanne Mkwana alone is not evidence as this being a police form, anything can happen. Therefore, those mentioned by PW1 and PW2 could have attended the parade. The identification parade was therefore an afterthought, the 1st Appellant insisted.

As to the 3rd ground of appeal, the 1st Appellant was just suspected. All witnesses, including PW5, just believed that, the 1st Appellant committed the offence. He added that, during search, nothing was found, not even mobile phones alleged by the police. It was his further submission that, PW7 prepared a forged search warrant (P.7) as entry 2 was forged to read 1. There is no explanation that, what is in exhibit P.7 is the property of the Appellant or the alleged robbed mobile phones. The identity mark reads *Jesus life* displayed in the screen saver with a photo of American Musicians, was never described by PW9 before.

He also commented on the evidence of PW11 for failure to identify a wallet and that, passport size used for identify purposes may be placed by any person. He also insisted that, the testimony of PW8, PW13 and PW 10 on the testimony from the chief Government Chemist should not be trusted for want of evidence on how samples got collected from the Appellants. Even the person who tendered exhibits had no authority to do so. The 4th ground, the issue of DNA inclusive, has therefore been covered. He concluded in this ground that, exhibit P.7 complained in ground 5 and the whole of ground six has been covered.

With regard to supplementary grounds of appeal, in the 1st ground, there is no direct evidence that PW3 and PW4 being police officers did identify the 1st Appellant. Those who were in the bank, each one stated to be busy saving his

life. It was his further view that, he was arrested because of his stature at that time as he had some dusts.

In the 2nd supplementary ground of appeal, he submitted that, the evidence of PW1, PW2, PW5 and PW21 was incredible. Specific to PW21, this witness was not named during preliminary hearing and notice to add him as a witness was not lodged. It was wrong also for PW21 to testify on caution statement tendered by another person.

With respect to PW14 who recorded the caution statement of the 1st Appellant, he indicated that, the 1st Appellant's information led to the arrest of others through telephone numbers. But no any witness from cyber department or TCRA testified. This is fictitious because there is no evidence to connect them. He also disputed the evidence of PW5 who arrested him for want of death certificate of Issa Kalega who passed away. The said Issa Kalege is alleged to corporate with PW5 during arrest.

In the 3rd supplementary ground, the fact that the 1st Appellant was at Maswa, may not be the basis of his involvement in the offence. He stated not to be present at Maswa on 22nd -23rd of June 2010. He concluded in this point that, all those witnesses alleged to be in the guest houses were not assembled in evidence. In this, he cited the following cases: **Salehe Seleman V. R, (1972) HCD**; **Benedict Ajetu V. R (1983) TLR 194** and **Damain Petro and Others V. R (1980) TLR 260**.

Submitting on the 4th ground, PW23 stated to have identified one Seleman Daud thus the 1st Appellant was arrested on suspicion. He cited the following cases to support his assertion: **Omary Mussa Juma v R., Criminal Appeal No.73 of 2005** (unreported); **Hakimu Mfaume v R (1984) TLR 201**; **Bosco and Lucas**

Sungura v R. 1967 HCD No. 186 and **Abdallah Bin Wendo and Another v. R (1953) 20 EACA 166** at page **170.** He stated also that, this submission covers what is in the 5th ground of appeal on visual identification and also in 6th ground on exhibit P.7 but added the provisions of section 38 (3) of the Criminal Procedure Act, Cap. 20 for noncompliance.

In the 7th ground his view was that, RB book was to be tendered in evidence so as to verify the information supplied by PW1, PW2, PW8 and PW13. This is also the case to ground 8 of the supplementary petition of appeal. He also cited the provisions of section 50(1)(a)(b) and 51(1) of the Criminal Procedure Act and the following cases in support of the point that, the caution statement was involuntary and illegally obtained: **Ramadhan Mashaka v.R Criminal Appeal No.311 of 2015** (unreported); **Makumbi Ramadhan Makumbi &Others v. R, Criminal Appeal No.199 of 2010**(unreported) and **Ibrahim Issa and Two Others v. R, Criminal Appeal No.159 of 2006** (unreported)

He summed up in the 9th ground that, the prosecution did not prove their case as required in the provisions of section 110 and 112 of the evidence Act, Cap 6. He mentioned that, PW23 did not prove to have any weapon used or found in possession of the Appellant. PW22 and PW24 also have not testified credible evidence. It is also not shown on how PW23 recovered those exhibits in such a manner as to infer for DNA test. Equally, there is no evidence to show which bullet cartridges were fired from the Appellants and which were from police as the evidence on record indicates that, both fired at the *locus in quo.* He therefore prayed the appeal be allowed.

On his part, **the 2nd Appellant** filed eleven (11) grounds of appeal. Submitting together the 1st and 2nd grounds of appeal, he commented that, the

evidence of PW1 and PW2 be expunged because the vehicle was not tendered in court and its ownership was not established for want of any document. He added that, the alleged owner one Salimin Salehe was not brought in evidence and also the evidence of Emmanuel Sitta is not corroborated

In the 3rd ground of appeal, he stated that, the evidence of visual identification at the *locus in quo* was unreliable because according to PW3, the environment at the bank was tense. As to the 4th ground of appeal, the 2nd Appellant submitted that, in the DNA evidence (exhibit P.9), PW10 did not indicate in his evidence on how he came to the conclusion on DNA test.

With respect to identification parade complained in 7th ground of appeal, he submitted that, the evidence of the prosecution is shaking because according to PW20, the identification parade was in an open space for anybody to observe and those attended the parade were collected from nearby places, while the 2nd Appellant was from Lock-up, thus easily identified. He refuted in exhibit P.21 that, there is nothing showing to have been involved in any manner in the parade, thus rendering it illegal, more so because, witnesses did not describe his identity before the parade was conducted.

In the 8th ground of appeal regarding caution and extra judicial statements, he was of the view that, the same are afterthoughts because they were recorded out of the prescribed time. He also tendered a PF3 to show that he was tortured during procurement of the said statements. The court should have therefore not ignored that evidence.

As to the 10th ground of appeal, he submitted that, the evidence of PW15 and exhibit P.17 be expunged for want of corroborative evidence. He pointed specifically to Exhibit P.17, a search warrant indicating recovery of a pistol,

those named by PW15, for instance a wife of a chairman and the owner of the premises where the pistol got recovered should have been called in evidence to testify how such weapons got seized. He added that, the investigator was not called in evidence to clear some contradictions especially in the seized firearms as what is in the charge of unlawful possession of firearms and exhibit P.26 differs materially.

With respect to change of trial magistrate, he was of the opinion that, the file was handled by more than three Magistrates and the court did not guide itself as to whether the procedure was followed by successor magistrate. He concluded by submitting in the 11th ground of appeal that, the court should look at the totality of evidence and accept all the grounds of appeal to have merits and consequently set him free.

The **3rd Appellant** commenced by praying to have all his grounds of appeal be adopted as part of his submissions. He therefore submitted in grounds 1 and 2 on identification parade (exhibit P.23) that, the said exhibit was tendered by a public prosecutor who was not a witness on oath. He also stated that, witnesses never described the Appellant prior to the mounting of identification parade which was conducted in an open space. His view was that, as there were 10 participants, some should have been called to testify. He thought to have been easily identified due to blood stains in his clothes following injuries he sustained, the reason why on 6th of July 2010 he was taken to hospital. He added in the 3rd ground therefore that, the identification parade conducted on 5th of July 2010 had a special mission, hence illegal.

As to the 4th ground of appeal, he submitted generally that, the offence of armed robbery was not proved because even the vehicle got involved did not

form part of evidence. Therefore, he was of the view that, evidence regarding robbed vehicle is suspicion.

In the 5th ground, he submitted that, caution statements were illegally obtained and therefore illegally accepted in evidence. In his opinion, the trial magistrate should not have deployed that evidence without having evidence from justice of peace. It is also on record that; the statement was tendered by a public prosecutor who was not a witness.

On the 6th ground of appeal, as the 1st Appellant complained, there was no movement order authorizing police men to work outside their areas. As to the 7th ground of appeal, he submitted on the evidence of PW22 and PW10 to have not connected him with any offence. The court thus erred in basing its conviction on exhibit P.26 and P. 27, as among others, they were tendered by a public prosecutor and not witness on oath.

In respect of the 8th ground of appeal, the 3rd Appellant submitted that, there is no evidence to prove that vehicle No. T. 393 AHU was involved in commission of the offence. Equally, the owner of the vehicle was not identified. He also adopted what was submitted in ground eight (8) to be his submission in ground 9. He thus prayed the appeal on his part be allowed.

On his part, the **fourth Appellant** commenced by adding additional ground of appeal that, the trial court erred in not allowing the prosecution to supply the statements of witness regarding identification parade. He then submitted in ground one to have never been identified at the *Locus in quo* because, PW1 in the identification parade stated not to know him. He was therefore surprised to hear in court that PW1 knew him. In cross examination, PW1 simply testified that, the 4th Appellant just look like someone. It was

therefore difficult for the witness in a broad daylight, while looking outside, and in presence of many customers and other 12 co-workers to identify him. He added that, there is no any witness from a group of customers or any witness from those workers testified except PW13. As it is, the evidence of visual identification of PW13 needs corroboration.

He submitted in the 2nd ground of appeal that, the 4th Appellant participated in the identification parade with other participants who were not looking alike. He stated also to have not been given an opportunity to change his clothes from when he got arrested on 14th of July, 2010 to 19th of July, 2010 when the parade got conducted. As submitted by other Appellants, he also complained on want of evidence from those who participated in that parade and that, in the identification parade form/register, there is nowhere is indicated that he was consulted or informed about the parade

As to the caution statement comprised in ground 3 of the complaint, PW14 testified that, the 1st Appellant confessed and named the 4th Appellant as "Dogo White and that, telephone conversion of the 1st Appellant led to the arrest of other accused. However, up to his arrest, his seized phone was later returned to him and that, there is no print out from mobile companies to prove such communication. To his considered view, the reason for returning his mobile phones was want of communication between him and other Appellants.

He submitted in ground 4 of the appeal that, PW10 and PW22 did not have qualifications to deal with exhibits P.9 and P.27, therefore be expunged. As to ground 5 of the appeal, he submitted that, there was no any specimen collected/taken from the Appellant for DNA purposes. As to the 6th ground of appeal, he added that, there is no any expert opinion or evidence connecting

him with evidence in exhibits P.26 and P. 27 and that, he was not arrested with any weapon in presence of PW19.

With respect to the 7th ground of appeal, his view was that, there was no any person who medically attended PW2, PW3, PW8 and PW13 came to testify in court and that, in ground 8, there is no evidence to the effect that, the 4th Appellant took part in the robbery. He added that, even the robbed vehicle found at the police station was neither tendered in evidence physically nor its registration card in the name of Salimin Salehe or any other owner got tendered.

In the 9th ground of appeal the 4th Appellant questioned on the jurisdiction of the Resident Magistrate's Court of Shinyanga to try them. His view was that, as he was arrested in Mwanza and the offence was committed in Maswa; there was no reason as to why the District Court of Maswa did not hear the case. To his view, it was contrary to the provisions of sections 33, 177 and 378 of the Criminal Procedure Act, Cap. 20. He also stated to have noted some contradictions as per ground 10 of appeal.

In ground 11, the caution statement was illegally obtained as the statement was taken out of prescribed time. He stated to have been arrested on 14th of July, 2010 while the statement was recorded on 16th of July, 2010. He stated to have just signed the statement, and by then, he had already been beaten, thus he was issued with a PF3 before having the statement. He thus concluded that, the caution statement was involuntary and he was not taken to justice of peace.

In the additional ground of appeal, he requested recusal of the trial Magistrate before Gasabile took over, but ordered that, we should proceed with

other witnesses and after completion, we will revert back to the complained evidence. This promise was not complied. Like other Appellants, the 4th Appellant thought the appeal has merits thus prayed the same be allowed.

In reply, as said, the Respondent Republic under the service of Ms. Edith Tuka and Mr. Nestory Mwenda, learned State Attorneys, resisted the appeal. They adopted a style of responding to main areas of controversy rather than replying to submissions of the Appellants in every ground of appeal as submitted.

Mr. Nestory commenced. He submitted in the ground relating to change of Magistrates that, the matter was initially handled by Mr. Chaba who then recused himself following request of the Appellants. It was then assigned to Gassabile after recusal of Ms. Ilunda. On 8th of April, 2013, Gassabile thus took over. At this point, Appellants requested the matter to commence afresh. The trial magistrate however decided to proceed. His view was that, the magistrate complied with the provisions of section 214 of the Criminal Procedure Act, Cap. 20.

He added that, the question of recusal was as per their request and she informed them accordingly. Nonetheless, the provisions of section 214 of the CPA is discretionary to court. In that stance, the provisions of section 214 of the CPA were not violated.

As to failure to call witnesses named during preliminary hearing to testify, Mr. Mwenda thought the requirement to have all witnesses named during preliminary hearing to testify is lacking as stated in the case **Fadhili Bandoma @ Makalo v. R, Criminal App. No. 14/2015**(unreported). As to **ownership of the motor vehicle**, it was his submission that, the evidence of PW1

Saka Bakari and PW2 one Emmanuel Sitta stated that on 22nd day of June, 2010 they met the 1st Appellant and negotiated on the hiring of the vehicle. Under the circumstances, the need to call the owner in evidence is irrelevant more so because, the one who was robbed is PW1. In this, he added that, PW1 and PW2 were trusted by the court. He cited the case of **Goodluck Kyando V. R. TLR (2006) 363** which was also quoted in **Athanas Ngomai V. R, Criminal App. No. 57/2018** (unreported) insisting on the need for the court to trust witnesses.

In his further submission for not tendering the vehicle in evidence, Mr. Mwenda submitted that, PW3 DC. Abas confirmed that, the vehicle was involved in commission of the offence and got destroyed, thus, unable to have it in court. In **Flano Alphonce @ Singu and 4 Others, Criminal Appeal. No 366/2018** (unreported) it was stated that, failure to produce a stolen property in court as real evidence wont prejudice the Appellant, Mr. Mwenda added.

With respect to **contract to hire the motor vehicle**, his view was that, the allegation is unfounded because, in law, oral contract is also permissive. In this, PW1 and PW2 testified to court that, there was an agreement and in his view, the court rightly trusted those witnesses. Therefore, as to ownership of the vehicle, the evidence relied by the court as stated by PW1 and PW2 was watertight, the learned State Attorney added.

With regard to **expert evidence on DNA** and **forensic/ballistic evidence**, it be known that, such evidence is persuasive to court. Notwithstanding, PW10 one Gloria testified on various procedures on how she arrived at that conclusion. He however conceded to have not seen anywhere in the evidence if the Appellants had their specimen collected. The available evidence of PW24 F. 6841 PC. Seif according to the Learned State Attorney, just stated to have

taken the specimen to the Chief Government Chemists. We thus, in this, accept the version of the Appellants to expunge exhibit P.9.

Mr. Mwenda also submitted on **ballistic report** that, the evidence of the witness is credible as he testified on how SMG, pistol and bullet cartridges got sent to ballistic expert. He added that, according to exhibit P. 26 and P.27, bullet cartridge found at the *locus in quo* matched with those fired from the firearms. In his candid view, the evidence of PW3 corroborates that of PW15

Another area commented by the Learned State Attorney was the 2nd Appellant's confession, search warrant (P. 17) and sketch map (P.18). Specific to confession, he submitted that, the same led to discovery. In the case of **John Peter Shayo and 2 Others v. R. (1998) TLR 198** which was also quoted in **Tumain Daudi Mkera V. R Criminal Appeal No. 158 of 2009** (unreported), evidence of confession leading to discovery, in this case, a firearm, is relevant.

On the requirement to read an exhibit on being admitted in evidence, he conceded that exhibit P17 and P18 were not read in court. However, in **Annania Clavel Betela V. R Criminal Appeal. No. 355/2017** (unreported), it was stated that, such an irregularity does not make the evidence given in respect of such an exhibit incredible. He added that, in the instant appeal, the witness explained step by step on how he managed to have the statement of Appellant and hence recovery of the firearm.

On **visual identification** and **identification parade**, he was of the view that, according to the evidence of PW1 and PW2 met with the Appellant during day time after they first met on 22nd of June 2010.They had ample time to stay with the Appellant in a broad daylight, thus the question of mistaken identity may be rightly eliminated because, even in court, PW1 and PW2 described the whole

incident and participation of the Appellants. With respect to identification during broad day light, the case of **Anisius Mwita Marwa v. R. Criminal Appeal No. 306 of 2013** (unreported) and **Maulid Wajibu @ Hassan V. R. CR. App. No. 121 of 2009** (unreported) are relevant.

Another component is visual identification at the *Locus in quo*. In this, Mr. Mwenda submitted on the evidence of Erasto Jame Mang'ele and Saada Mohamed, PW8 and PW13 respectively who stated on how they identified the 1st and 2nd Appellant at the *locus in quo*. Also does to 3rd Appellant as it was in a broad daylight. He thought, under the circumstances, the question of mistaken identity would not have arisen.

Commenting on the arrest of the Appellants, he submitted that, the 1st Appellant was arrested on the sport as per the evidence of PW5 E. 249E D/Cpl. Elly who stated on how the 1st Appellant was rescued by him when surrounded by the crowed.

He added that, those witnesses also identified the Appellants at the identification parade prepared by ASP Mkwama. In that parade, the learned State Attorney added, the 1st Appellant was identified. Another parade was organized by PW20 ASP Pili Fobe in respect of 2nd, 3rd and 4th Appellants. The two witnesses (PW18 and PW20) explained procedures got complied by them before, during and after the parade, that means, exhibits PE.21 for the 1st Appellant and PE. 23 – 24 is in respect of the 2nd, 3rd and 4th Appellants may not be faulted.

Mr. Mwenda concluded in this ground that, evidence in respect of identification parade was relevant only to corroborate the evidence of visual

identification. It only has probative value and cannot stand alone in convicting the Appellants.

As to **seizure and search warrants**; the whole exercise complied with the provisions of section 38(3) of the CPA, Cap. 20. PW7 PC. Emmanuel testified on searching the 1st Appellant and tendered exhibits P.7, Wallet P4 and two cell phones (P5, P6) which were identified by owners that is PW1 Neema Salim Risasi who identified the two cell phones stolen at the *locus in quo*. There is also PW11 Queen Jonathan who identified a wallet (P. 4). He noted that, in view of the evidence of PW11 and that of the 1st Appellant, the allegation that the evidence was planted is an afterthought.

On her part, Ms. Edith Tuka submitted on the **evidence of confessions** (caution statement.) She commented on the evidence of the 1st and 4th Appellants that, their caution statements were recorded out of time. In this, PW14 tendered the caution statement of the 1st Appellant. There is also the evidence of PW15, PW16 and PW17 who tendered the caution statements of 2nd, 3rd and 4th Appellants respectively.

She observed that, according to the record, all statements were rejected, and upon inquiry, the court was satisfied that they were voluntary. In that stance, she was of the view that, the court, upon being satisfied that the confession is true, may rely on that evidence as was in the case of **Tuwamoi v. Uganda (1967) EACA 84**. She also referred me to the following cases regarding voluntariness of confessions: **Michael Mgowelo and Another V. R, Criminal Appeal No. 205 of 2017** and **Flano Alhphonce Masalu @ Singu V. R. Criminal Appeal No 366 of 2018** (both unreported)

Regarding the fact that the said statements were recorded out of time, Ms. Tuka submitted that, PW15 stated reasons for recording out of time. According to PW15, the 2nd Appellant was involved in another incident at Mwanza. With that explanation, her view was that, the provisions of section 50 of the CPA was thus complied. She also cited the case of **Chacha Jeremia Mrimi & Others V. R. Criminal App. No. 551 of 2015** (unreported) in which complexity of the matter was taken as a factor relevant to record the statement out of the prescribed time.

Ms. Tuka also commented on **the caution statement** of the 4th Appellant which is also alleged to have been taken out of time. In this, she faulted the 4th Appellant because the statement was taken the very same day he got arrested. She thus thought compliance of the provisions of section 50(2) of the CPA. She also faulted the 4th Appellant with his PF3 that, the statement was recorded after being tortured to be a new matter just raised it in this court on appeal.

Another fact in evidence of confession commented by Ms. Tuka is the evidence of co-accused raised by the 4th Appellant. Her view was that, that evidence of co-accused was corroborated by the evidence of 1st Appellant that lead to his arrest. She could therefore found no substance in the allegation and that, the court properly considered that evidence. As all the Appellants confessed, Ms. Tuka could not see any relevancy to have print out from TCRA on telephone conversations amongst the Appellants.

With regard to caution statement of the 4th Appellant being tendered by public prosecutors; Ms. Tuka cited the case of **Hamis Said Bakari V. R, Criminal Appeal No. 359 of 2017** (unreported) that, in case other procedures have been complied, as was to PW17 in this case, then the irregularity is curable.

As to **failure to call witnesses,** specific a doctor with respect to exhibits P.1, P.2, P.3, P.8 and P.11, Ms. Tuka dismissed this allegation basing on the fact that the Appellants were addressed in terms of the provisions of section 240 of the CPA but they all declined. She concluded that, all exhibits were properly received in evidence.

Replying to the **doctrine of recent possession**, Mr. Mwenda came in again. He submitted that, the 1st Appellant was found in possession of a wallet and cell phone which were identified by PW8 and PW11. These were the very articles stolen on the fateful day. Applying the case of **Aziz Mohamed and Another V. R. Criminal Appeal No. 15 of 2016** (unreported), Mr. Mwenda thought the doctrine of recent possession was properly deployed by the trial court.

As to difference in numbers in the firearm and the certificate, he thought to be an error which does not go to the route of the matter. He also submitted to be trite law that, not every contradiction goes to the route of the matter. In this, he added, the seizure certificate was signed by the 2nd Appellant.

He submitted generally on failure to comply with all requirements provided in the CPA by citing the case of **Bahati Makeja V. R, Criminal Appeal No. 118 of 2006** (unreported) that, omission of some of the requirements especially in complex cases, may not be fatal. He also cited the case of **Vuyo Jack V. DPP, Criminal Appeal No. 324 of 2016** (unreported)

As to the component of jurisdiction raised by the 4th Appellant; he commented to be baseless. He stated that, when the offence of armed robbery got committed, Maswa District was in Shinyanga Region. In that stance, the Resident Magistrate Court of Shinyanga had jurisdiction to try the Appellants. On the other hand, the learned State Attorney faulted the 4th Appellant on

requirement of the police to have movement order for them to perform their duty in other areas. He said, police have no limit. In the totality of all, he urged me dismiss the appeal as the prosecution proved their case.

In rejoinder, the 1st Appellant reiterated the contents of his petition of appeal and what he submitted in chief. He complained that, the offence was not committed by them and there is something behind the curtains, the reason why Police General Orders were not complied in holding an identification parade, and that, no investigator was called in evidence.

As to hiring a vehicle, it was his rejoinder that, a person who took him to PW1 and two other persons who were in the vehicle should have been summoned by the prosecution. He concluded in this that, the fact that the vehicle had mechanical defects may not be relevant. It was to be tendered in court. As it was not, his view was that, there was no robbery committed.

With respect to identification parade (P.21), he rejoined that, participants in the parade were 9 and not 10 and he was not given an opportunity to change his clothes which had blood stains. On visual identification (PW8 – PW13) he rejoined that, there is no description and that witnesses got guided on that identification. He then cited the case of **Afrika Mwamboko V. R, Criminal Appeal No. 37 of 1984** insisting that, those who attended the parade should have testified.

As to the doctrine of recent possession, his rejoinder was that, there must be proof of ownership, which, in this case, PW9 and PW11 did not establish to own mobile phone and wallet respectively. He cited the case of **Joseph Mutua and Another V. R. Criminal Appeal No. 116 of 2011**(unreported.)

He also insisted that, as he was arrested at 11.30 hours, there was no reason as to why his statement was recorded from 22.00 hours to 01.00 hours. He also faulted the ballistic evidence for it has not been stated which cartridges were fired by the police and which one were from the Appellants. He concluded to rejoin on difference regarding registration numbers of the firearm as contained in the firearms and those in the charge. To him, this indicates that, the charge of unlawful possession of firearm was not proved.

The 2nd Appellant reiterated his position on to change of magistrate and on failure to have the robbed vehicle tendered as ab exhibit. He also associated himself with the 1st Appellant on failure to tender the vehicle due to mechanical defects.

He also rejoined regarding the firearms that, PW15 who testified and tendered exhibit P.17 stated that, there is a civilian who witnessed, but none came to testify. On visual identification, PW8 and PW13, much as they never described the Appellants, but as in that place there were about 7 staff of the bank, they could also testify if at all they identified the Appellants. He also faulted the learned State Attorney that, the caution statement was recorded out of time because he was involved in another case in Mwanza without mentioning what the case was.

Rejoining on difference in numbers of the firearm, the 2nd Appellant did not trust that to be a typing error. He added that, the charge contains, SMG with Registration No. UC09639988, UC14072998 and Pistol 3009521. In exhibit P. 26, the numbers are UC01631998, UC14071998, Pistol Registration 30095216. This might not be a typing error, the 2nd Appellant added. He concluded by commenting on the identification parade that, according to PW20, the

Appellant was from Lock-up while others were gathered from streets and he had almost 9 days in custody, thus making it easy to identify him.

On his part, the 3rd Appellant rejoined as the 1st and 2nd Appellants did on identification parade, the robbed motor vehicle, caution statements, and ballistic report. Last in rejoinder was the 4th Appellant. He insisted on the need to have witnesses recalled following change of magistrates. The rest of his rejoinder on visual identification, identification parade and evidence from the confessions was as rejoined by the 1st ,2nd and 3rd Appellants. This was the end of lengthy submissions of the Appellants and the Respondent Republic.

I heard from what parties submitted at length. I also took into account the grounds of complaint raised by the Appellants and also considered the entire evidence on record. As stated above, the Appellants submitted a total of 41 grounds of appeal which, for avoiding unnecessary repetitions, they will be resolved through a summary of ten points enumerated above.

I should first resolve some procedural issues. **One** is complaint of the Appellants to have witnesses recalled following recusal of two trial magistrates on request of the Appellants. The basis of their complaint for recusal was in two fold, one is the feelings embedded in them that, justice won't be done and two that, the case has been dragging in court for quite some time. At page 83 of the typed proceedings, the learned trial magistrate made the following observation:

> ***Order;*** *accused prayer for the witnesses 1-13 to testify again, afresh to be considered at the date which the prosecution side want to close his case before the court closed the prosecution case.*

In my view, the order as quoted above is incorrect. She was supposed to determine prayers of the Appellants on whether or not the said witnesses be recalled or not. There is no procedure allowable to grant or deny the prayer to recall witnesses after the prosecution case has been closed. In law, what follows after closure of the prosecution case in a subordinate court is for the court to determine whether or not the accused person has a case to answer in terms of the provisions of section 230 and 231 of the CPA, Cap. 20.

The most she could have done, given the request was, in my view, basing on the complaint that there is delay in prosecution and the would be injustice, was to reject the prayer. Further discontentment of the Appellants, if any, would have formed grounds of complaint at the appellate level. As the question was on re-summoning witnesses on grounds not associated with change of magistrates in terms of the provisions of section 214 of the CPA, complaint of the 2nd Appellant on failure of successor magistrate to record reasons for taking over is a new matter raised on appeal, thus won't be considered.

Two, the question of jurisdiction. The 4th Appellant raised it such that, as he was arrested in Mwanza, and the offence was committed at Maswa District, the Resident Magistrate's Court of Shinyanga was not clothed with requisite jurisdiction. As correctly submitted by Mr. Mwenda, in the year 2010 when the offence was committed, Maswa District was in Shinyanga Region. It is so because, Simiyu Region in which now Maswa District is among the Districts, was established in the year 2012 vide GN No. 72 of 2012 dated 2nd of March, 2012. In that stance, the Resident Magistrate's Court of Shinyanga was vested with jurisdiction to try the Appellants.

Three is calling a witness in evidence whose name was not mentioned during preliminary hearing. At page 105 of the judgment, the learned trial Magistrate, citing the case of **Bandoma Fadhili Makaro and Fitina Kinago Bihemo v. R, Criminal Appeal No.15 of 2005** (unreported) stated that, in trials before subordinate court, the said requirement is lacking. In it therefore, it was permissive for PW21, a Ward Executive Officer who recorded extrajudicial statement of the 2nd Appellant to testify without being named in list of witnesses listed during preliminary hearing. I do not think if I have any justification to fault her.

Four, I have noted instances where some of the Appellants pleading guilty to the charge and the court entered a plea of guilty. Thereafter, nothing transpired only to have in the later date the prosecution substituting the charge. This was wrong. The law is clear in terms of the provisions of 228 (2) of the CPA, Cap.20 that:

> *(2) If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words he uses and the magistrate shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary.*

Five, I have further noted the style of prosecutions in many occasions, tendered documents instead of witnesses and also in instances where the trial magistrate recorded evidence in form of questions and answers during tendering of documents. This again was procedurally incorrect and violated the provisions of section 210 (1)(b) of the CPA, Cap. 20 which reads:

the evidence shall not ordinarily be taken down in the form of question and answer but, subject to subsection (2), in the form of a narrative.

Having noted so, such procedural irregularities as noted, are curable in terms of the provisions of section 388 of the CPA, Cap. 20. It is to say, whether or not the four Appellants are connected with the offences as they were charged and subsequently convicted and sentenced, will entirely depend on the substance of evidence as was at the trial court. I should also make it clear from the outset that, this being the first appellate court, the duty to make assessment of the evidence of witnesses on record may not be abdicated.

Now reverting to the grounds of appeal, I will begin with the **first ground on proof of the offence of armed robbery**. The Appellants' complained that, the offence of armed robbery was not proved. If I understood them correctly, they meant, what constitutes elements of armed robbery as provided in section 287A of the Penal Code as amended by Act No.10 of 1989, has not been met in the instant appeal. What constitutes armed robbery was stated in the case of **Michael Joseph v R (1995) TLR 278** such that:

(i) Though there is no express and specific definition of what constitutes armed robbery, it is clear that, if dangerous or offensive weapon or instrument is used in the course of robbery, such constitutes armed robbery in terms of the law as amended by Act No.10 of 1989.

In the jurisprudence of armed robbery, the slot has been on enhancement of punishment for aggravated robbery under Act No. 10 of 1989 where the particulars of offence give details of weapons used in committing robbery (See

Director of Public Prosecutions v. Salum Ali Juma (2006) TLR 193). This remained the case even with the amendment introduced by Act No.3 of 2011 which amended section 287A of the Penal Code in the following version:

> *287A. A person who steals anything, and at or immediately before or after stealing is armed with any dangerous or offensive weapon or instrument and at or immediately before or after stealing uses or threatens to use violence to any person in order to obtain or retain the stolen property, commits an offence of armed robbery and shall, on conviction be liable to imprisonment for a term not less than thirty years with or without corporal punishment.*

With this somewhat to be a defition of armed robbery, yet the precepts remain on what weapons have been used and or if the offender threatens on the use of violence or what also later came to be developed as to where the robbers are more than one. In the instant case, is clear that, on the 23rd of June 2010, the NMB Brach of Maswa witnessed a group of five persons armed invading the bank. Policemen on guard, G.2008 DC. Abas and G.4382 DC. Kelvin, PW3 and PW4 respectively identified the armed men possessing SMG and Pistol. PW3 on the other hand sustained bullet injuries (PF3 exhibit P3), being evidence of use of firearms violently, as was to Erasto James Mang'ere, PW8 (PF3 exhibit P8)

Other facts constituting armed robbery was the theft itself. It is in the evidence of Saka Bakari and Emmanuel Sitta PW1 and PW2 respectively that, the robbers threatened and injured them with firearms as indicated in their PF3 (exhibits P1 and P2 respectively) before they robbed a motor vehicle registered T.393 AHU Toyota Land cruiser. Some of the stolen properties such as, mobile

phones (exhibits P5 and P6) and a wallet (exhibit P4) were identified by Neema Salim Lusasi and Queen Jonathan Gao, PW9 and PW11 respectively to have been robbed on the fateful day.

On that account, as the bandits were armed with dangerous and offensive weapon in the cause of robbery and as there was violence all through stealing and retaining a vehicle, cell phones, wallet and some cash money, all it tells is that, the offence of armed robbery was committed. Who committed that robbery, the forthcoming grounds will determine this. Accordingly, this ground of appeal is therefore dismissed.

Now to **visual identification;** all the Appellants refuted to have been identified at the *locus in quo.* In evidence, it is not disputed that, the offence took place in broad day light, at bank premises during business hours. That means, customers, staff and police on guard should have witnessed the robbery. In this, the principle has been stated in a number of decisions in evidence of visual identification that, where the offence is committed in a broad day light, possibility of mistaken identity may be ruled out. In **Kanisius Mwita Marwa v R** (supra), the Appellant committed rape in broad day light. When circumvented with an issue of visual identification, the Court of Appeal at page 11 made the following observation:

> *Apart from what we have just said above, it is lain and certain that, the charged incidences occurred in a broad day light, to be precise, at around 12.15 hours, therefore ruling out possibilities of mistaken identity by PW1, PW2 and PW3 as was correctly submitted by Mr.Merumba. The evidence of those three witnesses was more than clear.*

This position was also considered in the case of **Maulidi Wajibu @Hassan v R** (supra), at page 7-8 which referred the case of **Gerard Lucas v R. Criminal Appeal No.220 of 2005**(unreported) enumerating the following:

> ***First,*** *how long did the witness had the accused under his/her observation;* ***second*** *what was the estimated distance between the two people;* ***third****, if it were at night as was in the instant case) which kind of light did exist;* ***fourth,*** *had the witness seen the accused person before the day and time of crime. If so, when and how;* ***fifth,*** *the whole evidence before the court considered, are there material impediments or discrepancies affecting the correct identification of the accused by the witness;* ***sixth****, in the cause of the observation of the accused by the witness, was there any obstruction experienced by the whiteness, obstruction which may have interrupted the latter's concentration.*

Having in mind this legal position, in the instant appeal, the prosecution called PW1 and PW2 who met the 1st Appellant on 22nd of June, 2010, a day before robbery got committed. They negotiated the price of hiring motor vehicle registered T393 AHU. PW1 was the driver and in his evidence at page 46 of the typed proceedings described the 1st Appellant as follows:

> *I had time to discuss with a person who wanted to hire my motor vehicle, the said person was a man, fat in physical appearance.*

Later at page 48, he stated the duration he stayed with the 1st Appellant as follows:

I recall that on the particular day I took about 10-15 minutes talking to the said man. When I was talking, or negotiating to the said man/client, my colleague one Mathias Sitta was cleaning the motor vehicle and later on he went to attend a certain bus with a view to get customers/passengers

PW1 also informed the vehicle supervisor PW2 and gave him the contact number of the 1st Appellant. The 1st Appellant then telephoned PW2. The following day, both PW1 and PW2 met the 1st Appellant. PW1 also identified the 2nd, 3rd and 4th Appellants as those whom they were together in the journey to Kabondo before he and PW2 got hijacked and tied with a rope. When examined on the criteria deployed in such identity, at page 58 of the proceedings, PW1 stated as follows:

Why I managed to identify them? It is because on 23/6/2010 we spent some hours with them.

PW2 also described the Appellants as persons whom they were together in the car and at page 78 -79 of the typed proceedings, he described the Appellants as hereunder:

Your honour the persons whom we were together with in the said car were as follows: one of them was a fat man, short and that particular day he was put on so called kibaragashia. That person is the one (1st accused) PW2 pointed his finger upon the 1st accused). the one who became a driver was fat by physical appearance, white but not tall. Herein the court/before the court he is not available.

The woman that I am talking about is white by physical appearance. She was looking like an old person. That woman I am talking about is that one (PW2 pointed his finger upon the 5th accused person.) the only woman in this case. Other bandits were as follows: one of them was a man, white in colour and tall. That bandit is that one (PW2 pointed upon the 4th accused person) other two bandits were black in color. One of them was small by physical appearance but not tall. The rest was black and small by physical appearance. That bandit is present before the court; he is that one. (PW2 pointed a finger upon or against the 2nd accused.)

With this evidence, and as observed by the learned trial magistrate, it is obvious that, those are the Appellants who robbed a motor vehicle on 23rd of June 2010. I am aware of the defence of the Appellants that the motor vehicle in question did not exist, the reason why it was not tendered in evidence. They also thought that, if it was real that they hired the motor vehicle, then the prosecutions should have tendered in evidence an agreement to that effect and that, the owner of the motor vehicle was not identified.

As observed by Mr. Mwenda, which I entirely agree, the nature of business PW1 and PW2 were doing, may not necessarily demand written hire agreement. The evidence of PW1 and PW2 established existence of the motor vehicle before and after the commission of the offence. The learned trial Magistrate at page 98 of the judgment commented as follows regarding existence of the motor vehicle:

However, PW1 and PW2 said on 25/6/2010 they were at Maswa Police Station to establish identity and that they managed to see

their motor vehicle T393 AHU make Toyota Land cruiser being there at the police station badly damaged its body, glasses and tyers burst.

As it is, PW1 and PW2 did not send the said vehicle to police station. As they were left unattended, thus could not know what happened after they were robbed, what however is clear is that, they had the said motor vehicle together with the Appellants who then robbed them. PW3 one G.2008 DC Abas, at page 101 of the typed proceedings, saw a motor vehicle entering the bank premises and identified its registration number to be T.393 AHU. He said also that, the motor vehicle got damaged at the bank premises during robbery. I am therefore of the firm view that, the prosecution managed to prove that, the Appellants were identified to have robbed a motor vehicle as contained in the 1st count.

Regarding the 2nd, 3rd and 4th counts of armed robbery, as there are facts indicating that the Appellants after they had robbed the motor vehicle, used the same to commit robbery at NMB Maswa Branch, then it should be established that, the Appellants were identified at Maswa NMB Brach to have invaded the bank and committed robbery thereto. This story is narrated by G.2008 DC Abas, G.4382 DC Kelvin, E.2494 D/Cpl. Elly, Erato James Mang'ere and Saada Mohamed Kungulilo, PW3, PW4, PW5, PW8 and PW13 respectively.

In this, there are matters to determine if the Appellants are connected in robbing the bank. One is the issue of visual identification and two, is whether the motor vehicle robbed by the Appellants to PW1 and PW2 is the very same motor vehicle identified to have entered at the bank premises. If this is

answered in the affirmative, then those who robbed a motor vehicle with Reg. No. T.393 AHU Toyota land cruiser, are the same persons robbed the bank.

I will begin with visual identification. In the first place, the 1st Appellant was arrested immediately, though not at the *locus in quo.* According to PW5 who heard gun shots in a distant, saw a man taking to his heals but managed to apprehend him. He was the 1st Appellant. He testified at page 117 of the typed proceedings that:

> *I recall that while on the way the "wananchi" whom I met with told me that I had to move quickly to the said Primary Court area as there was suspects whom was seen moving with that direction. It is true that I rushed up to Nyalikungu Primary Court area. But when I was about 50 to so meters far from the building, I saw the OC-CID one Issa Said Karega, the Superintendent (now the deceased) holdng the gun upwards. He was in possession of SMG. Again, I saw one person in front of the deceased who was (alikuwa amechuchumaa) and suddenly moved quickly upon the OC-CID. Seen that, I knew that the said person was dangerous and un-normal civilian. I gave him an order to remain in a previous .....it is true that, I managed to overpower the said person and thoroughly immediately searched him personally.....*
>
> *I order accordingly.*

Upon his arrest, as per PW6 Mbonea Salehe Mduma, the 1st Appellant was referred to police station. In his defence, from page 5-7, the 1st Appellant stated to have escaped in order to save his life as at that time, following bullet shots, everyone was running. This therefore, in my opinion, it is not disputed that the

1st Appellant was arrested immediately on commission of the offence. As admitted by him, he was running as others did. Why was he arrested and not others, in my view, is the suspicion by PW5 that he is not a good person. This suspicion later came to be a reality after being found in possession of stolen property. In his evidence, again it appears he started to run after the situation has become calm. In the proceedings he said that:

> *After some period then gun shots decreased. Then I started to see people running when I was slept down and all the body covered by dusts*

If it was so that the state of affairs was calm, why was he running? Again, in his submissions at the hearing of his appeal, the 1st Appellant said that,he was arrested merely because he was present at Maswa and not that he committed the offence. This may not be correct. He was also identified by PW8 one Erasto James Mang'enya when he testified that:

> *On that day I managed to establish the identity of one person, who was put on a cap on the fateful date. Uso mpana , maji ya kunde na mfupi mnene. I remembered him because by time when they entered into the main entrance, I saw him and that he was the one confronted /jumped to the place where I was and attacked me. Your honour, the one I am talking about is the 1st accused.....*

With this evidence, it is now settled that, the 1st Appellant was identified at the *locus in quo*, and was also arrested while on the move to escape. With regard to visual identification of the 2nd and 3rd Appellants, PW8 testified as follows as at page 137 of the typed proceedings:

I was surprised to see them. By physical appearance, one of them was short ni maji ya kunde na uso mpana, the other one was tall, black and small and who had a pistol and the 3rd person was short, small, put on a cap (disguised his face by using a cap) and had in possession of a gun/SMG

In this evidence along with description of the 1st Appellant just elaborated above, PW8 also managed to describe the identity of the 2nd and 3rd Appellants. At the identification parade, he also identified the 1st, 2nd and 3rd Appellants.

As to the 4th Appellant, PW13 one Saada Mohamed @Kungulilo, a bank teller present on the fateful day, along with identity of the 1st Appellant, she also identified the 4th Appellant to be the one who jumped at the counter. At page 197 of the typed proceeding, PW13 described the 4th Appellant was small, white in colour and tall. When cross examined by the 4th Appellant at page 206 she stated:

When the blast took place, it took one minute for you to jump at the counter following the gun fire, I saw you jumping over the counter. On that particular day you looked like a person with experience, because it took some seconds to step over the counter.

Later, as shall be stated in the fourth coming ground, PW13, remembering such features, identified the 4th Appellant in an identification parade. What I have gathered is that, PW 13 described the 4th Appellant and had some seconds to observe him before he jumped into the counter. I am therefore satisfied that, under the premises, there was no mistaken identity.

As to **identification parade**, all the Appellants complained that the identification parade was illegal. Their main complaint on illegality of the parade rests on the fact that; it was conducted in an open space; witnesses who lined up were not called in evidence and that, there was no description of the Appellants by the identifying witnesses prior to the identification parade. I agree with the version of the Appellants that, to closure of the prosecution case, SP Jumanne Nkwama and ASP Pili Fobe, PW18 and PW20 respectively who prepared identification parade, never involved in evidence those who lined up at the parade. Does that make the identification parade illegal? Will that also negate the fact that at the identification parade, the Appellants were identified?

In my view, an important factor to the value of evidence of identification parade is that, the identifying witnesses must have described the accused person prior to the identification of that witness in the identification parade. As I stated in the foregoing analysis of visual identification, all the identifying witnesses described all the four Appellants before they mounted another identification at the identification parade. It is not correct therefore as alleged by the Appellants that they were not described.

In evidence, PW1, PW2, PW8 and PW13 who identified the Appellants at the identification parade, have all described the Appellants on how they identified them at the *locus in quo* both at NMB Maswa Branch, during negotiations of hiring the vehicle and also at the place where PW1 and PW2 were left helpless. In either case, as stated in **Yusuf Abdallah Ally v. DPP, Criminal Appeal No.300 of 2009** (unreported), evidence of identification parade is not substantive. It has no independent probative value. The most it

does, as in this instant appeal, is to ascertain whether identifying witnesses may identify the person who committed the offence.

As I demonstrated above, attendance in the parade by PW1, PW2, PW8 and PW13 was to ascertain whether; **one**, they identified the 1st Appellant to be the one whom PW1 and PW2 entered into agreement to hire the vehicle on 22nd day of June, 2010. **Two,** whether, all the Appellants on 23rd of June, 2010 were in a vehicle with registration No. T393 AHU Toyota land cruiser with PW1 and PW2 and later robbed that motor vehicle. **Three**, whether, the Appellants on 23rd of June 2010 were identified to have robbed at NMB Maswa branch. In this, I have no doubt that, the witnesses managed to do that job in the parade. On that account, complaint of the Appellants on illegality of the identification parade is without substance.

Another ground of complaint by the Appellants is that, exhibits P4 (a wallet), P5(two cell phones-NOKIA and SONY ERICSON) and P6 (one cell phone- SAMSUNG) were not identified by owners. If I understood the Appellants, specific the 1st Appellant, is that, it was improper for the court to deploy the doctrine of recent possession without having in place the alleged stolen properties to have been identified by owners.

In application of the doctrine of recent possession, courts of law have over times, in many cases, one being the case of **Mussa Hasan Barie v.R Criminal Appeal No.292 of 2011** found at **page 277 in the Laws of Tanzania Through Cases, Dr. Steven J. Bwana and Mahauri K. Benjamin, Law Africa, 2016** stated that:

> *With regard to the doctrine of recent possession, the law is also settled. It is a rule of evidence, not of law, that unexplained*

possession by an accused person of the fruits of crime recently after it has been committed is presumptive evidence against the person in their possession not only of the charge of theft, but also for any other offence however serious (see Mwita Wamburav R, Criminal Appeal No.56 of 1992(unreported) Ally Bakari v R, Criminal Appeal No.47 of 1991(unreported)

But for the doctrine of recent possession to be invoked, the following must be proved: first that the stolen property must be found with the suspect. Second, the property must be positively identified to be that of the complainant. Thirdly, that the property was recently stolen from the complainant, and lastly, the subject matter must constitute the subject of the charge.

With that legal position, the state of affairs are such that, the 1st Appellant was found in possession of two mobile phones; sonny Ericson and Nokia. This is in accordance with his defence and insisted that, the two mobile phones are his own properties. On the other hand, the prosecution version is that, the Appellant was found with three mobile phones, the two alleged by him to be his and one Samsung. In the evidence of PW7 E.7119 PC Emmanuel Silasi, the 1st Appellant was searched on arrival at the police station and was found with mobile phones described above and one wallet containing two passport size of a female person.

In line with the principles stated in **Mussa Hasan Barie v.R** (supra), the prosecution need to establish who is the owner of the cell phones and a wallet and if at all they were recently stolen. On the other hand, the 1st Appellant need to have explanation on how he came to acquire the two cell phones. In his

defence, he stated generally that, Sony Ericson and Nokia belongs to him. He did not state how he came to possess them. When objecting to their reception in evidence, the 1st Appellant testified as hereunder:

> *I have no objection in respect of the two cell phones that is sony Ericson and nokia. But I do object the wallet and one cell phone make sumsung, black in colour as these things I don't know them*

In my view, by not objecting it does not mean that they are his properties, and by objection to the rest, it does not equally connote that, they were not found in his possession during search. He simply said he doesn't know them. It is to say, he has failed to explain on how he came to possess the said two mobile phones

On the Other hand, the said nokia and Samsung (P5 &P6) got identified by PW9 to be those she reported to have been stolen. Specific to Samsung, PW9 provided the following identity marks:

> *About Samsung it had silver colour, black and when you open it, had a welcome note namely, JESUS IS LIFE. And also contact numbers was one of the factor and about the wall paper or screen saver, had a picture of Musician Christina Nillan. Also there was some pictures therein*

With regard to the wallet, exhibit P4, PW11 one Queen Jonathan@ Gao identified to be the one stolen on the fateful day. She identified by the following marks stated in her evidence:

> *It is true that if it happened that the said wallet may be shown to me, I may identify it. The factors that may enable me to identify is,*

the physical appearance of it, it contains two picture passport size having my own face and that it has a small paper that contains written personal particulars.

As it is, there is no doubt that PW9 and PW11 managed to provide description of the said stolen properties to be theirs. On that account, it has been proved that, the 1st Appellant when searched was found in possession of exhibits P.4, P.5 and P.6 and that they were identified by PW9 and PW11 who initially complained to have been stolen. Importantly is the fact that, exhibit P4, P5 and P6 which were recently stolen constitute the subject of the charge of armed robbery in counts three and four. This complaint is accordingly dismissed.

Another ground of complaint raised by the Appellants is in respect of forensic evidence, that is DNA and ballistic report. Specific to DNA, the learned trial magistrate when analyzing the evidence of PW10 one Grolia Thom Machuve stated at page 107 of the judgment as hereunder:

Again, with regard to the evidence of DNA from PW10, exhibits P9 at page 6 and 7 shows that, the 2nd Accused person, 1st and 4th accused persons related with exhibits kofia aina ya pama, shati la drafti mchanganyiko na suluali moja rangi ya kaki. Also, PW10 said the DNA touched exhibits A1, A3,13 and C to the 1st and 4th accused persons

Mr. Mwenda, learned State Attorney considered this position and ultimately urged me to expunge exhibit P.9 for one reason that, in the evidence of the prosecution, it is not indicated if the Appellants had their specimen taken. I entirely agree with him. What PW 24 F.6841 PC. Seif testified is in respect of

reference of the specimen to the Chief Government Chemist. This may not however tell that, what was taken to the Chief Government Chemists comprised specimen taken from the Appellants. It was therefore not correct for the learned trial magistrate to deploy DNA evidence without having first established on compliance of procedures. This ground of complaint is therefore allowed.

As to forensic bureau report (ballistic report), exhibits P.26 and P.27, the Appellant complaint on the two exhibits is an afterthought because, they did not object the said document when it was tendered. There is evidence first from PW 23 one E.3076 D/Cpl. Jonath Isomba that, at the crime scene they recovered among others, two (2) SMG and 96 bullet cartridges. This witness rushed to the crime scene on hearing gun shots and in fact, found the 1st Appellant close to the crime scene surrounded by people. The said SMG and bullet cartridges together with a pistol (P.15) were taken to the forensic bureau by PW24 F.6841 D/C Seif and examined forensically by PW22 one Insp. Raphael Maila. With this, I am confident that, the Appellants had justification not to object the forensic report on firearm examination.

Another ground of complaint by the Appellants is with respect to exhibit P.7 and P.17. These are search warrants. Exhibit P.7 in particular is evidence on search conducted to the 1st Appellant immediately after he was arrested. In the first place, the 1st Appellant does not dispute to have been searched. He equally concedes to the existence of the search warrant, the reason why he said the said exhibit contains also his mobile phone, which he did not prove to own anyway. Under the circumstances, in my view, the complaint of the 1st Appellant that he did not sign in exhibit P.7 is unfounded.

Exhibit P.17 on the other hand, is evidence of search in the premises of Yustina Stanslaus under the directives of Mussa Athuman Buberwa, the 2nd Appellant that, he had hidden a pistol therein. In fact, the pistol (exhibit P.15) got recovered. What the Appellant submitted is that, the said exhibit be expunged for it is not corroborated by evidence of those who witnessed the search. Well, they were not called, but as he does not dispute to have been searched nor does he dispute to have signed the said exhibit, failure to call those who witnessed may not make that evidence incredible.

On that account, the provisions of section 38 (3) of the CPA, Cap. 20 has not been violated because the section only requires the police officer seizing the thing to issue a certificate, which is not the basis of the Appellant's complaint. For clarity, the section reads:

> *38(3) Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any.*

In the final analysis, the magistrate was justified to deploy in evidence exhibits P.7 and P.17. As observed by Mr. Mwenda, allegation of the Appellant that the evidence was planted may not be accommodated.

Last in the list, is **confessions of the Appellants.** The Appellants' main complaints are that, the confessions were involuntary and taken out of time. Taking that to be the position, my understanding is that, all the Appellants are not disputing that, their statements were recorded by police detectives. That

being the case, and as Ms. Edith Tuka observed, if the court believes that the contents of the confession is true, then may proceed to convict on the said confession.

I should however make it clear that, the Appellants were not convicted solely on their confessions. As detailed above, there is evidence of visual identification and also the doctrine of recent possession. As to confessions, the trial court talked very little on this. It is only at page 102 of the judgment when reference was made to confessions in the following manner:

> *However, PW15 said followed the caution statement of the 2nd accused person, then they managed to seize a pistol to place which the 2nd Accused person hidden it and the same received as exhibit together with search warrant and sketch map and marked as PE.15. PE.16, PE.17 and PE.18*

Notwithstanding, as submitted by Ms. Tuka, all confessions of the four Appellants had their way in evidence after the trial court got satisfied that they were voluntary through inquiries conducted. They are exhibits P.13, P.14, P.19 and P.20 for the 1st, 2nd, 3rd, and 4th Appellants respectively. As said, the trial court did not base conviction on this, thus I will not labour on this, save for the foregoing comment.

I should also determine other counts on unlawful possession of firearms and grievous harm. Starting with the former, in counts five and six, as said, the Appellants were charged with unlawful possession of two SMG and one pistol. in the evidence of PW15, Mussa Athuman Buberwa, the 2nd Appellant after his arrest, lead the police where a pistol, exhibit P.15 was retrieved. This exhibit was also taken to the ballistic expert for forensic investigation. In this, the

prosecution proved beyond reasonable doubt that the 2nd Appellant unlawfully possessed the said pistol.

As to the two SMG, PW23 testified that, at the scene of crime, he recovered the following as seen in the proceedings:

> *At the scene we found different shirts, caps, two sub machine gun, 96 spent cartridges of SMG and other spent cartridge of pistol.*

From this point, it is not known where the two SMG went as they were not tendered in evidence. Under the circumstances, the evidence of PW24 who sent the said two SMG to PW22 for forensic work, in my view, may not be evidence that the SMG found by PW23 at the scene are the same PW24 took to PW22 for forensic investigation. The said two SMG should have been tendered in court as real evidence. On that account, the trial magistrate was not justified to find the Appellants guilty for unlawful possession of two SMG. It has however been proved beyond reasonable doubt that, they unlawfully possessed a pistol and rounds of ammunition related to the said pistol (P.15)

On the 7th, 8th and 9th counts on grievous harm, the evidence is such that, on the fateful day,Sada Kungulilo(PW13),Erasto Mang'ere (PW8) and G.2008 PC Abbas (PW3) sustained injuries during the robbery engendered by the Appellants .Their PF3 tendered as exhibits P.3, P.8 and P.11 indicates that, the three prosecution witnesses had penetrating wound (PW3) and cut wounds (PW8 &PW13). In all, the doctor's recommendations were that the said wounds are dangerous harms.

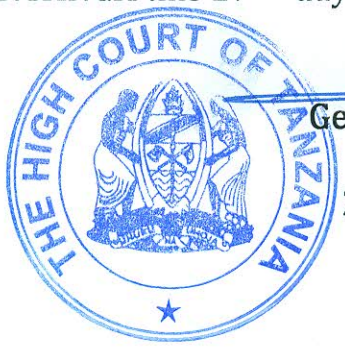
As there is no evidence that the said witnesses sustained such wounds anywhere other than at NMB Maswa Brach during the robbery, and since the

prosecution has proved that there is evidence connecting the Appellants with the robbery, then it has been proved that the Appellants caused grievous harm to the three prosecution witnesses. On that account, the trial court correctly found the Appellants guilty in the three counts of grievous harm.

With the foregoing analysis, I am of the firm view that the prosecution proved their case beyond reasonable doubt, the reason why my hands are tied to disturb the conviction and sentence meted by the trial court in all counts. Accordingly, this appeal is hereby dismissed. It is so ordered.

Gerson J. Mdemu
JUDGE
27/10/2020

DATED at **SHINYANGA** this 27th day of October, 2020.



Gerson J. Mdemu
JUDGE
27/10/2020