IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MMILLA J.A., MWANGESI J.A., And NDIKA J.A.)

CRIMINAL APPEAL NO. 9 OF 2016

1. **WILLIAM ONYANGO NGANYI @ DADII ---------- 1st APPELLANT**
2. **PATRICK MUTHEE MRITHI @ MUSEVU ---------- 2nd APPELLANT**
3. **GABRIEL KUNGU KARIUKI ---------- 3rd APPELLANT**
4. **JIMMY MAINA NJOROGE @ ORDINARY ---------- 4th APPELLANT**
5. **SIMON NDUNGU KIAMBUTHI @ KENEN ---------- 5th APPELLANT**
6. **JUMANNE KILONGOLA @ ASKOFU ---------- 6th APPELLANT**

VERSUS

THE REPUBLIC ---------- RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Moshi)

(Mwingwa, J.)

dated the 10th day of December, 2015
in
Consolidated Criminal Appeals No. 47 and 48 of 2014

JUDGMENT OF THE COURT

15th Apr & 03rd July, 2020

MWANGESI J.A.:

The appellants herein, alongside Boniface Mwangi Mburu @ Bonche, David Ngugi Mburu @ Davi, Michael Mbanya Wathigo @ Mike and Leon Nakisa Mushi, who are not parties to this appeal hereinafter referred to as their colleagues, stood jointly and together indicted for trial at the Resident Magistrate's Court of Kilimanjaro Region at Moshi, with two counts;

conspiracy to commit an offence contrary to section 384, and armed robbery contrary to section 287A, both of the Penal Code Cap. 16 R.E. 2002 **(the Code**) as amended by Act No. 4 of 2004.

It was the case for the prosecution in the first count, that on divers dates and places within Tanzania, the appellants and their colleagues, conspired to commit an offence to wit: armed robbery.

With regard to the second count, it was alleged by the prosecution that on the 21st day of May, 2004 at the National Bank of Commerce Limited (NBC), Moshi branch within the District of Moshi in the Region of Kilimanjaro, the appellants and their colleagues, did steal cash money amounting to Tanzanian Shillings Five Billion, Three Hundred and Nineteen Million, Seven Hundred and Seventy Seven Thousand, Seven Hundred and Twenty Two, and Eighty Two Cents (5,319,777,722/82), the property of the NBC, and immediately before or immediately after the time of such stealing, they did use offensive weapons to wit: firearms and knives, to threaten bank officials and customers, in order to obtain and retain the stolen property.

When the charges were put to the appellants and their colleagues, they all protested their innocence. It is worthy pointing out here, that before the case could be scheduled for hearing, it was reported that the ninth accused that is, Leon Nakisha Mushi was no more. Basing on the said information the case against him was marked abated in terms of section 224 A of the Criminal Procedure Act, Cap. 20 R.E. 2002 (**the CPA**).

To establish the commission of the offences by the appellants and their remaining colleagues, the prosecution paraded 24 witnesses whose oral testimonies were supplemented by 30 exhibits. The prosecution witnesses included, Assistant Inspector Honesty (PW1), Dora Godfrey (PW2), Getrude Paul Johnson (PW3), Senior Assistant Commissioner of Police (SACP) Absalom Mwakyoma (PW4), Christopher Mallya (PW5), Emanuel Reuben Katuma (PW6), Paul Ole Sadinaki (PW7), Hezron Kingondo (PW8), Yobu Melkizedeck Kimambo (PW9), Rodrick Mbasha (PW10), Mohamed Abdallah Twalib (PW11), Moses Kingori (PW12), Juma Hassan @ Kimaga (PW13), Inspector Nicobey Omari (PW14), Zephania Salash (PW15), Charles Omari (PW16), Raymond Samson Laizer (PW17), Israel Petro (PW18), Assistant Commissioner of Police (ACP) Daud Hiza (PW19), Inspector Oscar Filimbi (PW20), Mpaya Adellert Kamara (PW21),

Ernest Sakawa (PW22), Detective Corporal D. 6747 Juma (PW23) and Inspector Florian (PW24).

The exhibits were, a PF 186 (Identification Parade Registers) (exhibit P1 collectively), a contract between NBC and the Bank of Tanzania (BOT) (exhibit P2), a letter from Vodacom to NBC (exhibit P3), plywood boxes, hammer scissors and silver waterproof (exhibit P4 collectively), two hand written pieces of paper (exhibit P5 collectively), a summary of cash stolen from the strong room (exhibit P7), business card of Patrick Ingoi (exhibit P8), a hiring contract of a motor vehicle (exhibit P9), set of furniture (exhibit P10 collectively), sale agreement of a house (exhibit P11), cash sale receipts (exhibit P12 collectively), handing over certificate of a motor vehicle (exhibit P13), a motor vehicle with registration No. ARL 583 (exhibit P14), Booking register of Riverside shuttle (exhibit P15), Identity Card of Patrick Ingoi (exhibit P16), payment receipt for hiring a motor vehicle (exhibit P17), Ex Mint boxes of money delivered at BOT Arusha (exhibit P18), sketch map of NBC Moshi (exhibit P19), internal currency delivery form of BOT (exhibit P20), currency ledger book of BOT (exhibit P21), audit report (exhibit P22), local currency treasury register (exhibit P23), motor vehicle sales receipt (exhibit P24), handing over document of Police

Kenya (exhibit P25), properties of accused (exhibit P26 collectively), departure declaration forms (exhibit P27 collectively), a statement of Gadiel Sifael dated 20/01/2006 (exhibit P28), a statement of Gadiel Sifael Isanja dated 02/07/2004 (exhibit P29) and a statement of Boniface Mwangi Mburu (exhibit P30).

On their part in defence, all appellants raised defences of alibi. Then the first to the fifth appellants, relied on their own sworn or affirmed testimony, while the sixth appellant, in addition to his sworn testimony, summoned one Katambi Mtimba Katambi, to beef up his defence. There were also tendered three exhibits in reliance by the appellants that is, a statement of one Raymond Laizer (exhibit D1), a discharge form from KCMC Hospital of Kasimu Ombiel (exhibit D2) and a statement of Israel Petro Mwakabulo (exhibit D3).

To appreciate well the nature of the case of which its decision is being challenged by the appellants, we give its brief story as gleaned from the evidence on record. It goes this way, on the 21st day of May, 2004 a few minutes before 15:00 hours, while the employees of the NBC Moshi branch were in their ordinary course of business, they were invaded by bandits who at first, disguised themselves as ordinary customers and

queued up for service. Then after the front door to the bank was closed, which was at 15:00 hours as per routine, the bandits revealed their true colour by taking out the weapons which had been hidden in the clothes they wore and started to terrorize the employees of the bank as well as other customers who were still getting services therein. All of them were declared to be captives and ordered to lie down.

At gun point, all captives were thereafter ordered to go and assemble in the hall of the bank where they were thoroughly searched and all their personal belongings taken away. Also collected by the bandits included all the monies both local and foreign, from the tellers' compartments as well as from the strong room, all of which were stuffed in polythene bags and put into a motor vehicle make Toyota Land Cruiser, which had been parked near the rear door of the bank. And, upon accomplishing their mission, the bandits ordered all captives to move into the strong room of the BOT, wherein they were locked from outside and the bandits disappeared.

As luck would have it, one of the bank employees locked inside the strong room happened to have remained with her cell phone, which was used by the Manager of the Bank (PW6) who was among the captives therein to communicate and seek assistance from outside. At around 17:00

hours, information reached the Police Station of Moshi from where policemen went to rescue them by opening the strong room using spare keys, which had been preserved at the National Microfinance Bank (NMB), Mandela branch Moshi. Thenceforth, investigation commenced leading to the arrest of the appellants and their colleagues and charged as indicated herein above.

It was the contention of the prosecution during trial that the evidence which was led by its witnesses plus the exhibits tendered, sufficiently established the involvement of all appellants in committing the offence of armed robbery at the bank at issue save the sixth appellant, whom his involvement in the commission of the offences, was purely based on circumstantial evidence. All appellants strenuously distanced themselves from involvement in the alleged offences, each raising a defence of alibi.

As it happened after conducting a full trial the learned trial Resident Magistrate held each of the appellants herein culpable to both counts, and sentenced each to concurrent sentences of two years' imprisonment and thirty years' imprisonment, respectively. On the other hand, the evidence against their colleagues was found to be wanting in merit and they were therefore acquitted and set at liberty. The appellants' first appeals to the

High Court, were partly successful in that, their conviction on the first count was quashed and the sentence set aside while the conviction and sentences in the second count, were upheld.

Still undaunted, the appellants have preferred their second appeals to the Court, each lodging his own separate memorandum of appeal. From what we could gather from the eleven (11) grounds of appeal by each of the first and fifth appellants; ten (10) grounds of appeal by each of the second and fourth appellants; and nine (9) grounds of appeal by the third appellant, the complaints are almost similar with some minor variations. Essentially the complaints of all five appellants center on the following areas that is: -

(1) *Impropriety of the identification parade which was conducted at the Kilimanjaro International Airport (KIA) under the supervision of PW4;*
(2) *Weak/poor visual identification evidence, alleged to have been made against them by the prosecution witnesses;*
(3) *Discrepancies, contradictions and inconsistencies in the prosecution witnesses against them;*

(4) *Double standards by the trial court and the first appellate Court, in evaluating evidence from the prosecution witnesses against the appellants and their colleagues.*

(5) *Their defence evidence not being considered by both lower courts and in particular, their defences of alibi;*

(6) *Their abduction from Mozambique before being prosecuted in the court of Tanzania, not being considered by both lower courts.*

In regard to the sixth appellant, his memorandum of appeal is comprised of ten grounds of appeal and one ground in the supplementary memorandum. The complaints in all can be paraphrased to involve: -

(1) *Defect on the charge sheet;*

(2) *Insufficient circumstantial evidence against him;*

(3) *Discrepancies, inconsistencies and contradictions in the evidence against him from the prosecution witnesses.*

(4) *Improper and/or illegal admission of exhibits that were used to implicate him to the charged offence;*

(5) *The chain of custody of the exhibits tendered in the case against him, not being established;*

(6) Failure by the prosecution to conduct an identification parade against him;

(7) His defence of alibi not being considered by both lower courts;

The hearing of this appeal commenced at Arusha on the 26th March, 2019 whereupon, the appellants entered appearance in person as they were not legally represented, whereas the respondent/Republic was represented by Mr. Hashim Ngole, learned Principal State Attorney who was assisted by Mr. Martenus Marandu, learned Senior State Attorney. For unavoidable reasons, the hearing of the appeal had to be adjourned to another session.

When the hearing of the appeal resumed for continuation in Dar es Salaam on the 15th April, 2020 the appellants appeared in person without legal representation, whereas the respondent/Republic, was ably represented by Messrs Martenus Marandu and Ladislaus Komanya, learned Senior State Attorneys, who were assisted by Mr. Elia Athanas, learned State Attorney.

The first five appellants were the first to amplify their grounds of appeal, wherein they expressed similar views in regard to the illegal identification parade, which was conducted at KIA leading to their being identified as among the bandits who participated in robbing the NBC Moshi

on the fateful date. It was their common argument that there was non-compliance with the requirements as stipulated under the Police General Orders No. 232 (**the PGO**), in that: -

> *(a) The supervisor of the parade that is, PW4 was legally unqualified because he had participated in investigating the case;*
>
> *(b) The physical appearance of the people who participated in the parade, was not similar;*
>
> *(c) Some of the participants in the parade, kept on reappearing and thereby, giving chance to the identifiers to easily identify the intended suspects;*
>
> *(d) The witnesses who had identified the suspects, being permitted to communicate with those who had not yet identified.*

In view of the anomalies expressed above, the appellants urged the Court to do away with the evidence of the identification parade as it was flawed. In support of their argument, reliance was placed on the decisions in **Mussa Hassan Vs Republic,** Criminal Appeal No. 292 of 2011 and **MT 74 386 PTE Edwin s/o Katabalula Vs Republic**, Criminal Appeal No. 163 "A" of 2007 (both unreported).

The first appellant then proceeded to challenge the evidence of visual identification allegedly made against him by PW6 and PW7. He submitted that the visual identification purported to be made against him by PW6, had not to be acted upon because this witness had already seen him earlier in Nairobi and hence, he already knew him. As regards the visual identification allegedly made against him by PW7, he argued that the witness was a liar in asserting that on the 22nd day May, 2004 he ferried him in a Riverside shuttle from Arusha to Nairobi via Borogonja border, because on the said date he never happened to be in Arusha. It was from that reality that PW7 did not give any prior description of him before making his identification. To cement his argument, the first appellant referred us to the decision in **Mohamedi Bin Allui Vs Rex** [1942] 9 EACA 72, where it was held that, before a witness can identify a suspect in an identification parade, he has to give prior description of the suspect.

Submitting on other grounds of appeal, the first appellant argued that there were double standards applied by the trial court and upheld by the first appellate Court, in evaluating the evidence of prosecution witnesses against him. This was evidenced by the fact that while the same evidence was used to convict the appellants, the same evidence was used to acquit their colleagues. It was the argument of the first appellant that in

doing so the two lower courts did not do justice to them relying on the holding in **MT 74386 PTE Edwin s/o Katabalula's** case (supra).

This appellant also complained on the way the identifying witnesses were handled by the supervisor of the identification parade in that, those who had already identified the suspects were permitted to communicate with the witnesses who were about to pick the suspects the lineup. The communication of the identifying witnesses in the view of the first appellant, enabled them to plot on the type of suspects which they had to identify.

Also complained of by the first appellant in his grounds of appeal was the trial court's failure to consider his defence of alibi. He asserted that during the alleged time of commission of the offence, he was not in Tanzania but in Mozambique where he had gone to do some business. According to him, the said evidence was never given any weight by neither the trial court nor the first appellate Court. The failure to consider such aspect by the two lower courts did not do to him justice. On this basis he requested us to sustain his appeal by quashing his conviction, setting aside the sentence meted against him and let him free.

On his part, the second appellant joined hands with the first appellant's submission in regard to the identification parade that it was

flawed. He then challenged the visual identification which was made against him by one Gadiel Sifael, arguing that the said witness did not appear in court to testify and get cross-examined on the way he alleged to have identified him.

This appellant was again in agreement with the complaints raised by the first appellant that the evidence from the prosecution witnesses was tainted with serious contradictions and furthermore, in evaluating the said evidence the trial court used double standards which was erroneously upheld by the first appellant Court. And the fact that the only evidence which implicated him to impugned decision was that of Gadiel Sifael who as he earlier on stated did not testify in court, he urged us to allow his appeal and set him at liberty. Moreover, the second appellant requested us to order that his personal properties which were illegally seized by police and tendered as exhibit P26 collectively, be handed back to him.

The submission by the third appellant in addition to the impropriety of the identification parade, which was discussed above, he challenged the visual identification which was made against him by PW5, PW6, PW7 and PW18. According to him, those witnesses, were liars and that is why they failed to describe him before they made their purported identification. Relying on the decision of **Mohamed Bin Allui Vs Rex** (supra), he faulted

the first appellate Judge, for upholding the finding of the trial Resident Magistrate. To further challenge the credibility of the witnesses who purported to identify him, he cited the decision of **Dickson Joseph Luyana and Another Vs Republic,** Criminal Appeal No. 1 of 2005 (unreported).

It was the further submission of the third appellant that the two lower courts applied double standards in assessing the evidence from the witnesses who claimed to have identified him, for the reason that some of their colleagues who were also identified in the same identification parade by the same witnesses, were acquitted and set free. In support of this contention, reference was made to the holding in **MT 74386 PTE Edwin s/o Katabalula Vs Republic** (supra).

This appellant also complained in his grounds of appeal, that the witnesses who were called to identify him in the identification parade, were communicating to each other as could be reflected on page 276 of the record of appeal, where when cross-examined by the defence counsel, PW5 told the court that after a witness had finished his duty to identify the suspects in the identification parade, he was required by the supervisor to go and call another witness. Under such a situation it was his submission that the possibility for the witnesses to communicate as to who they had to

identify could not be eliminated and thereby, offending the stipulation of **the PGO.**

Lastly, the third appellant complained against the first appellate Judge for his failure to note that his defence evidence, was completely never considered by the trial Resident Magistrate. He gave an example of his complaint before the trial Resident Magistrate that, he was tortured and injured by Police Officers as evidenced by the summary of his discharge chit from KCM Hospital, which was admitted in evidence as exhibit D1 reflected on page 562 of the record of appeal. In support of this argument, the holding in **Hussein Idd and Another Vs Republic** [1986] TLR 166, was called upon.

On the part of the fourth appellant, he advanced similar views to those which were submitted by the first and third appellants, in regard to the impropriety of the identification parade. As regards to the visual identification wherein he was identified by PW7 and PW18, like his colleagues he argued that the two witnesses were not credible and therefore, their testimonies ought not to have been relied upon by the lower courts to ground his conviction for the charged offence. Placing reliance on the holdings in **Maloda William and Another Versus Republic**, Criminal Appeal No. 256 of 2006 and **Mulangalukiye**

Augustino Vs Republic, Criminal Appeal No. 318 of 2010 (both unreported), he argued that none of the witnesses who alleged to identify him, gave a prior description of him before making their identification.

Additionally, the fourth appellant complained that in holding him culpable for the charged offence, the trial court also used the evidence of one Mariana Mkisungo, whose evidence had been dropped by the prosecution. He submitted further that even though this complaint was raised before the first appellate Court, it was met with a deaf ear. He thus urged us to find merit in his complaint and sustain his appeal.

Submitting on the issue of double standards, the fourth appellant argued that he was identified by PW18 together with David Ngugi Mburu who stood as the third accused during trial, but to his surprise he was convicted basing on the said identification, while his colleague was acquitted and set at liberty.

Lastly, this appellant submitted that his defence was not considered by the two lower courts. Moreover, his challenge to the testimony of PW18 that it was mere lies as verified by the contradiction between his oral testimony in court and exhibit D3, which was the statement he gave at the Police Station a short moment after the incident while his memory was still fresh, was not given weight by the two lower courts. We were strongly

implored to note such anomaly and give it the weight it deserved and set him at liberty.

On the part of the fifth appellant, whose conviction was based on the visual identification made to him by PW7 in the identification parade, his submission was in the same line with his colleagues that the witness was not credible as he never described him before identifying him in the identification parade. According to this appellant PW7 just picked him for no apparent reasons, because they did not know each other and had never met anywhere before. Like his colleagues, he concluded his submission by praying the Court to allow his appeal.

When we turn to the sixth appellant, his amplification on the grounds of appeal was made generally. He introduced his submission by arguing that there was no evidence from the prosecution witnesses which directly linked him to the offence of armed robbery that he was charged with and convicted of. He contended that his involvement in the same was purely circumstantial. It was his argument that for circumstantial evidence to ground a conviction, there are principles that have to be met which in the instant appeal were not. The exhibits alleged by the prosecution to link him to the commission of the offence miserably failed to meet the standard

required. He proceeded to discredit those exhibits in the following sequence.

Starting with exhibit P9, which was a document purporting to be a contract between him and PW11 for hiring a motor vehicle; he submitted that the document ought not to have been acted upon by the court because of the following reasons; first, it was not prepared by a lawyer. Secondly, the one who prepared it, was not the one who tendered it in court. Thirdly, it was not read out after it was admitted in evidence.

With regard to exhibit P13, which was said to be a handing over note of a motor vehicle which had been in the hands of the court to PW 11, the sixth appellant argued that it was a useless document, because the said motor vehicle had no registration number, and further that the one making the handing over did not sign.

In regard to exhibit P14, which was said to be the motor vehicle used by the bandits to rob at NBC, the appellant urged us to disregard its evidential value for the reasons that one, PW1 who tendered it in court as exhibit did not explain as to where he had obtained it after it had been used in committing the offence. Two, PW2 who claimed to have seen it at the scene of crime failed to name its registration number so as to link it with the one which was tendered in evidence. Three, the said motor

vehicle had two registration numbers as reflected on page 434 of the record of appeal that is, ARL 583 and T. 844 ACR. And four, the tendering of the motor vehicle in evidence flouted the procedure in that, the court did not get out of the court room to be shown it.

And lastly, in regard to exhibit P11 which was a sale agreement over a plot of land dated the 24th May, 2004 between one Reglice Lyatuu and Mrs. Emiliana Kadulla, who was his wife the appellant argued that it had nothing to do with the offence under scrutiny, because it was in respect of a private transaction between those named therein. To that end, the appellant urged us to expunge all exhibits which were the only ones implicating him with the offence he was convicted of, and set him free. He referred us to the decision in **Emmanuel Saitoti Vs Republic,** Criminal Appeal No. 303 of 2016 (unreported) to fortify his submission.

The sixth appellant further faulted the first appellate Court for disregarding his defence of alibi which was corroborated by his witness one Katambi Mtimba Katambi with whom they travelled to Mwanza to attend a religious crusade which lasted from the 15th May, 2004 to the 24th May, 2004 the period in which the alleged armed robbery at Moshi NBC branch, took place.

This appellant, further complained in other grounds of appeal that the evidence of the witnesses who testified against him were contradictory. He as well argued that the FFU Police Officers who were on duty on the date when the incident occurred were not called by the prosecution to testify before the court. He asked us to draw an adverse inference against the prosecution for such failure. And lastly, it was his submission that no identification parade was conducted by the prosecution to let its witnesses identify him if at all on the date of the incident he was at the scene of crime. He concluded his submission by strongly urging us to find merit in his appeal and allow it by setting him at liberty.

In response to the submissions of the first five appellants, Mr. Komanya took over from where Mr. Ngole had ended by supporting the appeal by the second appellant, whose conviction was based on exhibits P28 and P29 which were statements of one Gadiel Sifael which were tendered under the provisions of section 34B of the Tanzania Evidence Act, Cap 6 R.E. 2002 (**the TEA**), because he was not procured to appear and testify in court. In the said statements, it was indicated that the witness identified the second appellant in the identification parade. It was however the view of the learned Senior State Attorney that for such evidence to

ground a conviction, it ought to have been corroborated by some other evidence, which was wanting in the instant appeal.

As regards to the common complaint of the other appellants on the impropriety of the identification parade, Mr. Komanya submitted that it was unfounded for the reason that there was complete compliance with the stipulation under **the PGO**. Starting with the supervisor (PW4) who was the OCD of Moshi District, even though he had previously visited the scene of incident a short moment after its occurrence he qualified to supervise the parade. The visit to the scene of crime by the witness was by virtue of his administrative role only which had nothing to do with the investigation of the case, which was done by other Police Officers being led by PW8.

The learned Senior State Attorney, submitted further that there was also compliance with **the PGO** in regard to the number of participants needed in the parade; the location of the ground where the parade was conducted; and the place where the identifiers were kept. In short, Mr. Komanya submitted that there was full compliance with paragraphs 2 (a), (e), (n) and 3 and 4 of **the PGO** 232 which are the ones concerned with the conduct of identification parade.

Responding to the complaint by the first appellant on the evidence of visual identification, the learned State Attorney was in agreement with this

appellant in regard to the identification which was made against him by PW6 that indeed, this witness had already seen him before in Nairobi. As such, the identification made to him at KIA was of no value. He thus prayed the evidence of this witness to be expunged. However, relying on the holding in **Tongeni Naata Vs Republic** [1991] TLR 54, Mr. Komanya argued that such evidence was not the only one to implicate him. There was evidence of PW7 who identified him as among the people he ferried in a shuttle of Riverside from Arusha to Nairobi via Borogonja border on the 23rd May, 2004. This evidence in the view of Mr. Komanya, sufficed to ground a conviction against him, placing reliance on the holdings in **Marmo s/o Slaa Hofu and Three Others Vs Republic,** Criminal Appeal No. 246 of 2011 and **Patrick Lazaro and Another Vs Republic**, Criminal Appeal No. 229 of 2014 (both unreported).

Mr. Komanya had similar submissions in regard to the visual identification against the third appellant by PW5, PW6, PW7 and PW18, and the fourth appellant who was identified by PW7 and PW18 as well as the fifth appellant who was identified by PW7. All the witnesses named above were believed by the two lower courts as credible witnesses whose identification could not be faulted. Relying on the decisions of the cases cited above, he urged us to uphold such finding.

On the complaint by the appellants that there were discrepancies, inconsistencies and contradictions in the evidence of the prosecution witnesses, Mr. Komanya submitted that the grievance was baseless. He reasoned that the appellants failed to point out the alleged discrepancies and contradictions. And even if they were to be pointed out, he argued that they were inconsequential as they did not go to the root of the matter. The decision of **Marmo s/o Slaa Hofu and Three Others'** case (supra) was cited in reliance.

In regard to the ground that their complaint about being illegally abducted from Mozambique before being charged with the case leading to the appeal at hand, the learned Senior State Attorney argued that the issue of the extradition of the appellants from Mozambique was dealt with in another forum as evidenced in Criminal Application No. 16 of 2006, which was lodged in the High Court of Tanzania at Moshi District Registry, of which its decision was delivered on the 26th September, 2008. That being the case the complaint has no place in the instant appeal, he concluded.

Lastly, Mr. Komanya conceded to the complaint by the appellants that their defences of alibi were not considered by the first appellate Court even though they were considered by the trial court as reflected on pages 773 to 774 of the record of appeal. He invited us to re-appraise the

defences and come out with our own findings. Similarly, the learned Senior State Attorney strongly urged us to find no merit in the entire appeal of all appellants in this group and sustain their respective conviction and sentences, save for the second appellant to whom he asked us to quash his conviction, set aside the sentence and set him at liberty.

On his part, Mr. Marandu rose to respond to the grounds of appeal by the sixth appellant. He prefaced his submission by conceding to the fact that the appellant was not seen at the scene of the incident on the date of the armed robbery. He was implicated with the charged offence by circumstantial evidence, which he grouped into three stages that is; one, circumstances prior to the commission of the offence; two, circumstances during the commission of the offence; and three, circumstances after commission of the offence.

Beginning with circumstances prior to the commission of the offence, the learned Senior State Attorney submitted that on the 19th day of May, 2004 the appellant while in Arusha Municipality, hired a motor vehicle (exhibit P14) with Reg. No. ARL 583 make Toyota Land Cruiser, Pick Up green in colour from PW11, who was its owner as per exhibit P9 which was drafted by PW9; for the purpose of using it to travel to Simanjaro where he was going to hold a religious crusade. It was their agreement that the said

motor vehicle for which a driver was not needed by the sixth appellant would be used for four days each being charged at TZS 80,000/=. An amount of TZS 160,000/= was paid on that date in advance.

The second stage of the circumstances, occurred on the 21st May, 2004 when the motor vehicle (exhibit P14), which had been hired by the appellant was seen by PW2 at NBC Moshi branch during robbery incident being used by the bandits, who went to rob the bank. The witness claimed to have clearly identified the motor vehicle. And, the fact that the sixth appellant on his part completely distanced himself from the said motor vehicle, in the view of Mr. Marandu, the denial by the appellant was aimed at evading something. He asked us to find that the identification made by PW2 of the motor vehicle was impeccable and that it was the very motor vehicle which had been hired by the appellant.

Discussing the circumstances in the third stage, Mr. Marandu mentioned the conduct of the appellant a short moment after the incident of robbery at NBC Moshi. According to the testimony of PW17, who was an agent of selling motor vehicles, on the 22nd day of May, 2004 the appellant went to his company and purchased a motor vehicle make Mitsubishi Pajero, which was registered in the name of his wife at the price of TZS

Ten Million, that was paid in cash. Such sale was verified by exhibit P24, which was tendered in evidence by the witness.

On the 24th May, the appellant entered into yet another deal whereby, his wife entered into a sale agreement (exhibit P24) to purchase a developed plot of land from one Reglice K. Lyatuu at the price of TZS Nineteen Million (19,000,000/=), which was paid in cash, a transaction that was concluded before an advocate (PW21).

In addition, PW10 a businessman trading in the name of Mbasha Holdings Limited based in Arusha, told the Court that in 2004 on a date which he could not recall, he was visited by the appellant at his shop along Uhuru road and purchased some furniture worthy about TZS 1,500,000/=, of which its payment was made after about two weeks later, through one Charles Kadura.

PW10, told the Court further that a short moment later, the appellant went again to his shop and ordered for a round table with its six chairs, a leather sofa set, and a set of round bed and a cupboard, all of which were worth more than TZS 10,000,000/=, which was paid through money transfer into his account. Those items were seized by the police before being collected by the sixth appellant and admitted in court un-objected as exhibit P12 collectively. Relying on the holding in **Nyerere Nyague Vs**

Republic, Criminal Appeal No. 67 of 2010 (unreported), Mr. Marandu submitted that the failure by the appellant to challenge the admission of those exhibits impliedly meant that the information contained therein was correct.

From the above circumstances, it was the submission of Mr. Marandu that the act by the sixth appellant to hire a motor vehicle on the 19th May, 2004 without needing a driver and the said motor vehicle being seen two days later being used by bandits to rob at the bank; and the spending spree which was exhibited by the appellant just a day after the robbery incident onwards irresistibly pointed out to the fact that even though the appellant was not at the scene of crime on the fateful date; he was fully involved in its planning and execution. In terms of the provisions of section 22 (1) (b) and (c) of **the Code,** he urged us to find this appellant culpable for the offence he was convicted of.

As regards the sixth appellant's defence of alibi that at the time the offence was committed, he was in Mwanza attending an international religious conference, which lasted from 15th to 24th May, 2004, Mr. Marandu was of the view that the same was sufficiently disproved by evidence from the prosecution witnesses. The first strand of evidence to disprove it came from PW11 and PW9, supplemented by exhibit P9, which

was to the effect that on the 19th May, 2004 the appellant was in Arusha, where he executed an agreement for hiring a motor vehicle, and not in Mwanza as he alleged.

Mr. Marandu submitted further that, the second strand of evidence came from PW17, which was corroborated by exhibit P24 to the effect that on the 22nd day of May, 2004 the appellant was in Arusha, where he purchased a motor vehicle make Pajero Mitsubishi, which was registered in the name of his wife one Emiliana Kadulla.

And, the third strand of evidence came from PW 21 and exhibit P11 which was to the effect that on the 24th day of May, 2004 the appellant was in Arusha where he purchased a developed plot of land in the name of his wife from one Reglice K. Lyatuu.

On the basis of the cogent evidence as shown above it was the submission of Mr. Marandu that it could not be doubted that on the 19th May, 2004 and the 22nd May, 2004 as well as the 24th May, 2004, the appellant was in Arusha. To that end, the contention by the appellant that from the 15th May 2004 to the 24th May, 2004 he was in Mwanza was nothing other than a blatant lie which was meant to shelter him from the offence he committed. He thus urged us to reject the alleged defence of alibi and dismiss the appeal.

Responding to the other complaints raised by the sixth appellant Mr. Marandu argued that they were unfounded. The only notable discrepancy in the evidence of the prosecution witnesses was in respect of the registration numbers of exhibit P14 which were two. The reason was given that during the change of registration numbers of motor vehicles which was being done countrywide, exhibit P14 was at the Police Station where it remained for a long time retaining its previous registration number ARL 583, while PW9, had already secured the new number that is, T 844 ACR. In any event, such anomaly did not go to the root of the case. And in regard to the tendering of exhibits, he argued that the record is clear that the appellant did not raise any objection when it was being tendered. He urged us to reject them basing on the holding in **Marmo s/o Slaa Hofu and Three Others Vs Republic,** (supra).

From the submissions of either side above, the germane issue which stands for our determination is whether the appeals by the appellants are founded. To begin with, we wish to extend our appreciation to the detailed oral submissions which came from both sides in amplification or opposition of the grounds of appeal. We have as well benefitted from a plethora of authorities which were cited in support of

either side. We will closely look at them and apply in our decision wherever possible.

Secondly, we wish to make it clear from the outset that, this being a second appeal, we will be very cautious in interfering with the concurrent findings of fact, which were made by the two lower courts based on the credibility of witnesses. This is pursuant to the settled jurisprudence of the Court, which has been cherished for quite long. In **Shauri Daud Vs Republic,** Criminal Appeal No. 28 of 2001 (unreported), for instance, we held that: -

> *"Assessment of credibility of witnesses in so far as the demeanour is concerned, is the monopoly of the trial court."*

A similar position to the above, was also expressed by the Court in the case of **Yohana Dionoz and Another vs Republic,** Criminal Appeal No. 115 of 2009 (unreported), where it was stated that: -

> *"This is a second appeal. At this stage, the Court of Appeal would be very slow to disturb concurrent findings of fact made by the lower courts, unless there are clear considerations or misapprehensions on the nature and quality of evidence especially if those findings are based on the credibility of a witness."*

See also: **Omari Ahmed Vs Republic** [1983] TLR 52 and **Salum Mhando Vs Republic** [1993] TLR 170.

In answering the germane issue posed above, we will adopt the approach which was taken by the learned Senior State Attorneys, that is; considering the grounds of appeal for the second appellant first, followed by the common grounds of appeal by the first to the fifth appellants; then the individual grounds of appeal of each of the first to the fifth appellants; and finally considering the grounds of appeal by the sixth appellant.

Starting with the second appellant, his conviction for the charged offence by the trial court was based on the evidence of visual identification which came from one Gadiel Sifael. This witness never appeared in court to testify, instead, the statements which he had given at the Police Station were tendered as exhibit P28 and P29 by PW23 and PW24 in terms of section 34B of **the TEA.** From what could be discerned from the record, we are fully in agreement with Mr. Komanya that the statement of a person who never appeared in court to testify, so as to be cross-examined by the accused and his demeanour assessed by the trial court; could not without corroboration, ground conviction against him. We are thus at one with Mr. Komaya that in this case there is no independent evidence to corroborate the said statement and hence, the second appellant's

conviction was unsafe. In consequence, his appeal is meritorious and we allow it.

With regard to the first, third, fourth and fifth appellants, there are grounds of appeal which are common and should be considered together. These are, impropriety of the identification parade; discrepancies and inconsistencies of prosecution witnesses; double standards of the lower courts in evaluating the evidence; the failure to consider their respective defences of alibi; and their abductions from Mozambique not being considered. The issue of visual identification, will be considered individually on each appellant.

Starting with the identification parade, the complaint by the appellants was pegged on the supervisor; type of participants in the parade; location of the parade ground and the handling of identifying witnesses after they had identified the suspects. Upon closely going through the record and considering the oral submissions which were made before us from either side, we were convinced that PW4, who supervised the parade, was not among the detectives who investigated the case. We as well failed to find any discrepancies in the way the parade was conducted. We are fully satisfied that there was compliance with what is stipulated in the PGO. In that regard, the authorities that were relied upon

by the appellants that is, **Maloda William and Another Vs Republic** (supra) and **MT. 73386 PTE Edwin Katabalula Vs Republic** (supra) are inapplicable to the circumstances of this case.

The appellants did as well jointly complain in their grounds of appeal that there were discrepancies and inconsistencies in the evidence of a number of prosecution witnesses. However, as it was submitted by Mr. Komanya, none of them did ever attempt to specify the alleged contradictions and discrepancies. Our efforts to trace them from the proceedings enabled us to note some contradictions which however were minor as they did not go to the root of the matter. The position of our law in regard to inconsistencies and/or contradictions in evidence tendered in court is that they are inevitable. The Court would only take interest, where they are serious. See: **Dickson Elia Nsamba Shapatwa Vs Republic,** Criminal Appeal No. 92 of 2007, **George Maili Kamboge Vs Republic**, Criminal Appeal No. 327 of 2013 and **Said Ally Vs Republic**, Criminal Appeal No. 249 of 2008 (all unreported). It was held in **Said Ally's** case (supra) that:

> *"It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is*

contradictory that the prosecution case will be dismantled."

In line with the position expressed above, we hold that the complaint of the appellants in respect of the alleged contradictions and inconsistencies is without merit and fails.

There was also a common complaint by all appellants that there were double standards by the lower courts in evaluating the evidence which was tendered by the prosecution witnesses against them. It was argued that some of their colleagues whose evidence against them were similar to them were acquitted and set at liberty. Nonetheless, from what we gathered in the record, in so far as the complaint relates to the 1st, 2nd, 4th and 5th appellants, the complaint is unfounded and we reject it. As regards the third appellant, the complaint is valid in that one David Ngugi Mburu whom they were identified together, was acquitted. That said, we hold this ground of appeal baseless save for the third appellant.

With regard to the complaint by the appellants that their illegal abduction from Mozambique when they were charged before the trial court was not considered by the lower courts, we agree with Mr. Komanya that the complaint was dealt with conclusively in another forum in Criminal Application No. 16 of 2006 in the High Court of Tanzania Moshi District

Registry whose decision was delivered on the 29th September, 2008. Thus the complaint lacks merit.

Lastly, the appellants' common grievance was in regard to their defences of alibi not being considered by the first appellate Court. Indeed, as conceded by the learned Senior State Attorney, while the trial court considered it and made a finding that it was without merit, the first appellate Court did not consider it. We were invited by Mr. Komanya to consider it and come out with our own findings. Upon accepting the extended invitation and doing the assignment, we are in agreement with the finding which was made by the trial Resident Magistrate as reflected on page 783 of the Record of Appeal where he stated that: -

> *"There is also raised a defence of alibi in regard to the rest of the accused. I have gone through the notices of alibi and the defence in support of the alibi. I must say that the same were mere notices which did not dislodge my finding that they properly identified to have been at the scene of crime."*

To that end, this ground of appeal also fails.

Having disposed of the common grounds of appeal we now embark on considering the evidence of visual identification for each appellant starting with the first appellant. His conviction for the charged

offence was based on exhibit P1 (identification parade), wherein he was identified by PW6 and PW7. PW6 claimed to have managed to identify the appellant in the identification parade because he saw him at the scene of crime on the date of the incident. On the other hand, PW7 claimed to have identified the first appellant in the identification parade because he ferried him and his colleagues in a shuttle belonging to Riverside from Arusha to Nairobi via Borogonja border on the 22nd and 23rd days of May, 2004.

To begin with the identification of the first appellant by PW6, we share the feelings expressed by Mr. Komanya that the fact that PW6 had seen the first appellant in Nairobi prior to the conduct of the identification parade which was held at KIA, his identification could not be acted upon because he already had seen him. See: **Tongeni Naata's** case (supra).

In regard to the identification that was made against this appellant by PW7, we find it convenient to discuss it together with the case of the fifth appellant whose conviction was also based on the identification made against him by PW7 only. Generally, we have failed to find any justifying grounds to make us fault the concurrent findings of the two lower courts that this witness was a credible one whose evidence could be properly acted upon. This stance is in line with what was held in **Shauri Daud's**

case (supra), that the assessment in regard to the credibility of a witness is in the monopoly of the trial court.

The foregoing notwithstanding, we do not find any linkage between the identification which was made against the first and fifth appellants in a shuttle and the incident of armed robbery which occurred at NBC Moshi branch. Under the circumstances, the basis of holding these appellants culpable for the offence they were convicted of was wanting. In that regard, we find merit in their respective appeals.

On the other hand, the third appellant was convicted based on the visual identification made against him by PW7 as well as that of PW5, PW6 and PW18. While PW7 claimed to identify this appellant because he was among the people he ferried from Arusha to Nairobi via Borogonja border on the 23rd day of May, 2004 on the part of PW5, PW6 and PW18 they identified the third appellant on account that he was among the bandits who carried out the robbery at NBC Moshi branch on the 21st May, 2004. While PW5 was at the material time at the bank premises as an ordinary customer, PW6 and PW18 were employees of the bank and eye-witnessed the incident.

On similar basis, the conviction of the fourth appellant was based on the evidence of visual identification made against him by PW7 for the

reason that he was among the passengers in the shuttle of Riverside which he drove from Arusha to Nairobi on the 23rd May, 2004. This appellant was also identified by PW 18 an employee of the bank, who was an eyewitness at the scene.

The third and fourth appellants on their part, strongly disputed the alleged identification and convinced us to disbelieve those witnesses. Nevertheless, after due consideration of the versions by these appellants on the one hand and that of the respondent on the other, we are reluctant to support the version of the appellants on account of the established principle exhibited in the holding in **Yohana Dioniz and Another's** case (supra), that there is no basis for us to challenge the concurrent findings of the two lower courts.

We are alive to the principle that the demeanour of a witness is not the only factor applicable in assessing the credibility of a witness in that, sometimes the credibility can be assessed by looking at the coherence of the testimony of the witness as well as its relationship with other received evidence as it was held in **Shauri Daud Vs Republic** (supra). To satisfy ourselves on this, we took the trouble of looking at the coherence of the testimonies of the witnesses as well as their relationship, but failed to find any incoherence or contradictions. In the circumstances, we are inclined to

join hands with the findings of the two lower courts that the identification of the third and fourth appellants was impeccable.

Having done away with the first five appellants, we now venture to consider the fate of the sixth appellant. In discussing his grounds of appeal, we will also adopt the procedure which was applied by the learned Senior State Attorney that is, starting with the grounds concerning circumstantial evidence; followed by the defence of alibi raised by this appellant; and lastly, discussing the rest of the grounds.

Beginning with circumstantial evidence, as it was correctly submitted by the sixth appellant in his submission, for circumstantial evidence to ground the basis of conviction the law is settled that the facts inferring to the guilt of the accused must be irresistible. In **Aneth Kapazya Vs Republic,** Criminal Appeal No. 69 of 2012 (unreported), the Court stated that: -

> *"The facts from which an inference adverse to the accused, is sought, must be proved beyond reasonable doubt and must be connected with the facts which inference is to be inferred."*

In yet another case of **Justine Julius and Others Vs Republic,** Criminal Appeal No. 155 of 2005 (unreported), the Court gave a detailed

account of the circumstances which can ground conviction to an accused, when it held that: -

> *"The circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established, and that those circumstances, should be of a definite tendency unerringly pointing towards the guilty of the accused, and that the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else."*

While considering the circumstantial evidence which implicated this appellant with the offence which he was convicted of, the learned Senior State Attorney divided it into three stages. The first stage was in regard to the circumstances which happened on the 19th May, 2004. Upon closely considering the testimony of PW11 as corroborated by the testimony of PW9 and exhibit P9, we are convinced beyond doubt that on the 19th day of May, 2004 the sixth appellant hired a motor vehicle with registration No. ARL 583 make Toyota Land Cruiser, Pick Up green in colour from PW11.

As regards the circumstances in the second stage, there was the testimony from PW2 who was among the eye witnesses at the scene that

the motor vehicle which was being used by the bandits had registration No. ARL 583 make Toyota Land Cruiser Pick Up, green in colour. Since the testimony of this witness was not challenged in any way by the sixth appellant, who in view of the circumstances under the first stage above would have been expected to account for its whereabouts, we entertain no doubt that the testimony of this witness was correctly believed and relied upon.

The circumstances in the third stage related to the spending spree exhibited by the sixth appellant from the 21st day of May, 2004 onwards. Besides the same being established by the testimonies of PW10, PW17 and PW21 as well as exhibits P11, P12 and P24, such spending spree was not denied by him. He simply told the Court that the same had nothing to do with the alleged armed robbery at NBC Moshi branch.

Basing on the above exposition by Mr. Marandu, the question which we had to ask ourselves is whether the circumstances in the instant appeal were consonant with what was discussed in the decisions cited above. After having held above that on the 19th May, 2004 the sixth appellant hired a motor vehicle from PW11 without needing a driver, a fact which was denied by him; similarly, that the said motor vehicle was involved in the offence for which they were convicted of; and further that the sixth

appellant conceded that he expended about TZS 40,000,000/= while the debt of TZS 160,000/= to PW11 for hiring his motor vehicle was yet to be paid, we are in agreement with Mr. Marandu that those circumstances irresistibly pointed out that the sixth appellant was behind the armed robbery incident.

From the above, the emphatic denial by the sixth appellant that he was not involved in the incident which occurred at NBC Moshi, and that the motor vehicle alleged to have been used thereat had nothing to do with him, was sufficiently established to the contrary by the evidence from PW9 and PW11 as well as exhibit P9 and thereby, rendering his version to be a pack of lies. This is what we had occasion to comment in **Twaha Elias Mwandugu Vs Republic** [2000] TLR 277 on the impact of lies given by an accused person in court. We stated therein that: -

> *"...Of course, we recognize that a conviction cannot be based on the accused person's lies, but if material, such lies may be taken into account in determining whether the alleged guilt of the accused has been proved."*

We interpose for a moment, to look first on the defence of alibi raised by the sixth appellant. He said in his defence that the period when

armed robbery took place in Moshi he was away in Mwanza where he stayed from the 15th to 24th May, 2004. Nonetheless, as rightly submitted by Mr. Marandu, that contention by the appellant was sufficiently disproved by the testimonies of PW9, PW11 and exhibit P9 which established that on the 19th May, 2004 he was in Arusha. Also, PW17 and exhibit P24 proved that on the 22nd May, 2004 he was in Arusha. And finally, there was evidence from PW8, PW21 and exhibit P11 which proved that on the 24nd May, 2004 he was in Arusha. This fact implies that the assertion by the sixth appellant that at the material time he was in Mwanza and not Arusha was yet another lie.

The lies said by the sixth appellant in court, were further supplemented by his own concession before us whereby, when we probed him as to when he returned to Arusha from Mwanza, his answer was that it was on the 21st May, 2004. And, when we asked him further as to why his statements were contradictory, he had nothing to tell us other than remaining silent.

As we stated in **Twaha Elias Mwandungu's** case (supra), even though lies expressed by an accused in court cannot be the basis for convicting him, such lies if material will be taken into account in determining the guilt of the accused. In the same vein, even though the

lies said by the sixth appellant in court as exemplified above were not the basis for his conviction, they assisted in establishing that they were just cover up aimed at exculpating him from the crime of armed robbery which he had fully participated in its commission.

The other grounds of appeal by the sixth appellant were in respect of the charge sheet which he alleged to be defective; the failure by the prosecution to conduct identification parade on him; failure by the prosecution to summon the police who were on guard on the date of incident; and the issue of the chain of custody of exhibits. These grounds however, were not pursued by this appellant. His failure notwithstanding, we had a look on those grounds and found that, they were irrelevant in so far as the appeal by him was concerned. As it was stated earlier, his involvement in the charged crime was purely based on circumstantial evidence which was sufficiently established as indicated herein above.

Ultimately, in view of the cogent circumstantial evidence which was led by the prosecution to implicate the sixth appellant with the offence of armed robbery as expressed above, even though he was not at the scene of the crime, it is evident that he actively facilitated its commission. In the circumstances, in terms of section 22 (1) (b) and (c) of **the Code**, he was

rightly found guilty and convicted of the offence of armed robbery. This provision states that: -

> *"22. (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing namely –*
>
> *(a) n/a*
>
> *(b) every person* ***who does*** *or omits to do* ***any act for the purpose of enabling or aiding another person to commit the offence;"***
>
> *(c) every person* ***who aids or abets another person in committing the offence;***
>
> [Emphasis supplied]

The import of the above provision is that any person who enables, aids or abets the commission of an offence is deemed to have taken part in committing the offence.

That said, we hold that the appeals by first, second and fifth appellants are merited and we allow them. Thus, we quash and set aside their respective convictions and sentences, and order their immediate release from prison unless lawfully held for some other cause. On the other

hand, the appeals by the third, fourth and sixth appellants, are devoid of merit and we dismiss them in their entirety.

Order accordingly.

DATED at **DAR ES SALAAM** this 29th day of June, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered this 03rd day of July, 2020 in the presence of the appellants in person via Video Conference from Ukonga Central Prison and Mr. Martenus Marandu, Mr. Ladslaus Komanya both learned Principal State Attorneys and Mr. Adolph learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL