IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

DC CRIMINAL APPEAL NO. 51 OF 2012

(Appeal from the decision of the District Court of Sumbawanga in Original Criminal Case No. 10 of 2012)

RASHID MKONOWATEMBO
ROMWARD JEUSHA } ..... **APPELLANT**

Versus

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

19th March & 30th April, 2014

JUDGMENT

MWAMBEGELE, J.:

In the District Court of Sumbawanga, the appellants Rashid Mkonowatembo and Romward Jeusha were charged with two counts of armed robbery c/s 287A of the Penal Code, Cap. 16 of the Revised Edition, 2002 (henceforth "the Penal Code") and breaking into a building and committing an offence therein c/s 296 (a) and (b) of the Penal Code. They were convicted and each sentenced to ten years imprisonment in the first count and thirty years imprisonment in the second count. The sentences were ordered to run concurrently. Dissatisfied, the appellants have

lodged an appeal in this court each advancing a discursive nine ground memorandum of appeal.

This appeal was argued before me on 19.03.2014. The Appellant appeared in person and unrepresented under surveillance of the prison officers and had the services of Mr. Kampakasa, learned Counsel. Mr. Mwandoloma, learned State Attorney represented the respondent Republic.

Mr. Kampakasa, learned Counsel for the appellant, sought to condense the nine grounds of appeal into only three. These are; first, that the prosecution did not prove a case beyond reasonable doubt, secondly, that the trial court did not consider the appellants' defence of alibi and thirdly that the exhibits tendered in evidence were wrongly admitted.

On the first ground, as condensed, Mr. Kampakasa submitted that the evidence of the key witnesses were shaky and contradictory. Meka John PW1 who testified to have set the trap did not state how he participated in the said trap and worse more he did not identify any of the stolen items, he submitted. The learned Counsel submitted that Castro Alphonce PW2 who claimed to have been injured and his ear cut during the robbery did not tender any exhibit to verify that he was indeed injured. Mr. Kampakasa submitted further that there is a discrepancy between the testimony of these two witnesses in that while PW1 testified that they fought the robbers, PW2 testified that they tied him with a rope thus making him unable to fight them. On the testimonies of the rest of the

witnesses who are police officers, the learned Counsel dismissed them as being unreliable as they did not point to the guilt of the accused.

The learned Counsel for the appellants submitted in respect of the second ground that the trial court ought to have considered the fact that the appellant were coming from attending a sick sister who later passed away. Mr. Kampakasa blamed the court for saying the appellants said the said sister had died as the appellants feared that the court would call her as a witness; for, saying so was tantamount to requiring the appellants to prove their innocence. He submitted further that the appellants were under no duty to prove their alibi. To buttress the point, the learned Counsel referred to me the case of ***Sekitoleko Vs Uganda*** [1967] EA 531 which was cited with approval in the decision of this court of ***Pia Joseph Vs R.*** [1984] TLR 161.

On the last ground, as condensed, the learned Counsel for the appellants submitted that the allegedly stolen machine was tendered in evidence as Exh. P1 but wrongly admitted because the record shows that the appellants said "no objection" to its being tendered but later the court recorded that objection was overruled. That Exh. P5 was a photo through which the appellants, allegedly, cut the fence and used the opening to gain entrance to the camp. The learned defence Counsel submitted that the stolen items were not identified. Neither were the appellants.

The learned State Attorney attacked the submissions of the learned Counsel for the defence with some vigour. On the alibi not being

considered, the learned State Attorney submitted that, as the appellants did not give prior notice, the trial court, in view of section 194 (6) of the CPA, was right in according no weight to the same.

The learned State Attorney submitted that the appellants were caught red handed thus the question of identity of the items and identification of the appellants becomes irrelevant. On shifting the buck on the appellants, the learned State Attorney, submitted that as this was the question of alibi, it was the duty of the appellants to prove their alibi. The learned State Attorney was of the view that the convictions and sentence deserved.

In a short rejoinder, Mr. Kampakasa for the appellants submitted that the word used in section 194 of the CPA is "may" showing that it is not mandatory not to consider the appellants alibis which were not given prior notice of. The appellants being lay persons, he submitted, the court ought to have considered this fact and therefore consider their alibis instead of wondering how the appellants could be there at night.

I have dispassionately read the record of this case. I as well have keenly followed the arguments of both learned brothers; Mr. Kampakasa for the appellants and Mr. Mwandoloma for the respondent Republic during the hearing of the appeal. Indeed the three grounds of grievance as condensed by Mr. Kampakasa, learned Counsel for the appellants can further be condensed into only one ground of complaint and this is, really, the first ground which states that the prosecution did not prove the case beyond reasonable doubt. In resolving this main ground, let me, first, deal

with the question of alibi. The learned State Attorney submitted that in view of the fact that the appellant did not issue the requisite notice under section 194 of the CPA, the court was correct to accord no weight to the appellants' alibis. On the other hand, while the learned Counsel for the appellants seems to concede to the learned State Attorney's submission on this point, he contends that the word used in the subsection is "may"; not "shall" thereby connoting that its compliance is not mandatory. The learned Counsel submitted that as the appellants were laymen, the court ought to have taken due regard to this fact and therefore should have proceeded to consider their alibis.

It is the requirement of section 194 (4) of the CPA that an accused person who intends to rely on alibi in his defence must give prior notice to that effect. This section reads:

> "Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case".

But together with the requirement of notice of alibi under subsection (4) of section 194 of the CPA, the law took cognizance of the fact that some accused would bring about the defence of alibi during the hearing without issuing prior notice thereof. Subsection (5) of section 194 of the CPA was enacted to take care of such eventualities. This subsection requires such

an accused person to furnish the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed. This subsection provides:

> "Where an accused person does not give notice of his intention to rely on the defence of alibi before the hearing of the case, he shall furnish the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed".

And subsection (6) is intended to take care of situations where an accused person relying on an alibi in defence does not issue prior notice before the hearing in terms of subsection (4) of section 194 of the CPA, nor does he furnish the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed in terms of subsection (5) of the same section. This subsection provides:

> "If the accused raises a defence of alibi without having first furnished the prosecution pursuant to this section, the court may in its discretion, accord no weight of any kind to the defence".

The appellants in the present case are covered by the last situation; they did not give any notice of alibi as required by the provisions of section 194 (4) of the CPA. Neither did they furnish the prosecution with the

particulars of the same before the case for the prosecution was closed in terms of subsection (5) of the section 194 of the CPA. But the import of subsection (6) of this provision gives the court discretion to accord no weight to such a defence. It was therefore the duty of the trial court to see whether or not, in its discretion, it should accord no weight to the defences of alibi or not. This is what happened in the present case. The court should not be blamed for the manner in which it exercised its discretion. Mr. Kampakasa's argument to the effect that the court ought to have considered the appellant's alibis on account of their being laymen, is interesting but unacceptable. The import of subsection (6) does not put laymen under exception and it does not seem to me that that was the intention of the legislators, for, if it were so intended, it would have stated so in clear terms.

I understand that it is not the duty of the accused to prove his innocence. But in situations where, like in the present one, the accused person is depending on the defence of alibi, it is his duty to prove his alibi albeit on a balance of probabilities. In ***Masudi Amlima Vs R*** [1989] TLR 25 this court (I quote from the headnote) held:

> "The appellant's defence of alibi was properly rejected. He did not give the notice required under section 194(4) of the Criminal Procedure Act, 1985, and **he did not call the person he claimed was with him at the time of the commission of the offence**".

[Emphasis supplied].

I have given due consideration to the accused persons' alibi as raised and argued by the learned Counsel for the appellants. I do not see any reason why it was not raised from the outset. Neither do I see any reason why it was not raised at the hearing before the prosecution case closed its case. The appellants did not give the requisite notice as prescribed by section 194 (4) of the CPA and did not call any person they were with at the material time. The defence of alibi just surfaced during the hearing of this appeal. No picture of it could be suggested during cross examination of witnesses. I do not think that the defence of alibi on the part of the appellants was such that it could raise any reasonable doubt on the prosecution case. I find it to be just an afterthought and a statement from the bar which is not acceptable. I accordingly reject it. On this conclusion, I wish to associate myself with the decision of the Supreme Court of Uganda of ***Kibale Vs Uganda***, [1999] 1 EA 148 of in which it was held:

> "A genuine alibi is, of course, expected to be revealed to the police investigating the case or to the prosecution before trial. Only when it is so done can the police or the prosecution have the opportunity to verify the alibi. An alibi set up for the first time at the trial of the accused is more likely to be an afterthought than genuine one."

And to crown it all, the appellant were caught red handed at the *locus in quo*. The question of their identity therefore does not arise. The fact that they were caught during the robbery at the *locus in quo*, also diminishes the appellants' alibi - see ***Abdallah Mussa Mollel @ Banjoo Vs the Director of Public Prosecutions***, Criminal Appeal No. 31 of 2008 an unreported decision of the Court of Appeal.

On the identity of the item and appellants, I am in agreement with the learned State Attorney that the appellants were caught red handed at the *locus in quo* in possession of the item they had just robbed. In the circumstances the identity of the item does not arise.

The discrepancies in evidence as referred to by the appellants' counsel were of such a trivial nature that they can be ignored. The discrepancies unveiled by the Counsel for the appellants are particularly that PW1 and PW2 on what transpired during the apprehension of the appellants at the scene of crime. While PW2 testified to the effect that they fought the appellants, PW1 testified that he was roped but later stated that they apprehended the appellants with the help of other security guards. These discrepancies did not go to the root of the offence as to render them relevant to cast a doubt on the testimonies of witnesses.

There was the issue raised by the learned defence Counsel to the effect that the court shifted the buck on the appellants to prove their innocence. It is elementary law that the duty to prove a case against an accused person rests squarely on the prosecution. The standard of proof is one