IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: NSEKELA, J.A., RUTAKANGWA, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 31 OF 2008

ABDALLA MUSSA MOLLEL@ BANJOO..... APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS..... RESPONDENT

(Appeal from the Conviction of the High Court of Tanzania at Arusha)

(Othman, J.)

dated the 14th day of September, 2007
in
Criminal Appeal No. 37 of 2006

JUDGMENT OF THE COURT

9th & 19th February,2010

NSEKELA, J.A.

This is a second appeal. In Criminal case No.1062 of 2002 in the Resident Magistrate's Court, Arusha, the accused persons were (i) Justine Nyari (ii) Teddy Francis Goliama and (iii) Abdallah Mussa Mollel @ "Banjoo". They were jointly and together charged with the offence of armed robbery c/ss 285 and 286 of the Penal Code. The trial court acquitted the second accused person. The first and third accused persons were duly convicted and sentenced to a custodial

sentence of thirty years imprisonment each. Aggrieved with both their convictions and sentences, they appealed to the High Court. The High Court (Othman, J.) as he then was, allowed the appeal by the first accused. The third accused's appeal was dismissed, hence this second appeal.

Mr. Loomu Ojare, learned advocate for the appellant, preferred two grounds of appeal, namely that:-

> *"1. The first appellate court grossly misdirected itself and consequently erred in law in holding that the appellant was positively identified at the scene of crime on the basis of the weak, tenuous, contradictory and wholly unreliable evidence of PW 2 and PW3 .*
>
> *2. The first appellate court grossly misdirected itself and erred in law in rejecting the appellants defence of* ***alibi,*** *merely because he did not prove it".*

On the first ground of complaint, Mr. Loomu Ojare forcefully challenged the evidence of PW 2, Rose Simon Minja, and PW3, Edgar Minja as weak, contradictory and totally unreliable. He submitted that the learned judge gave five reasons in justification for the conclusion that their evidence of identification was made under favourable conditions eliminating all possibilities of mistaken identity. The learned advocate was quick to admit that the robbery happened at around 7.30 a.m in the morning. However under these circumstances, PW2 testified that two gentlemen entered their offices. When cross-examined the number increased to three. On the 7/12/2002, a day after the robbery, PW2 made a statement to the police, exh. D1, in which the number of people she saw became five. Another piece of contradictory evidence was the pistol. She testified that the appellant took it from the inside coat pocket but in her statement, it was taken from the appellant's trousers. The learned advocate also referred to the evidence of PW3 who opened the gate door. Mr. Ojare argued that PW3 was in a better position to know how many people entered their office, but he could not

remember how many people had entered. Yet another piece of evidence that the learned advocate doubted, was whether or not PW2 and PW3 knew the appellant as they alleged in their evidence. He contended that they made bare statements without elaborating how often they met and when. He added that these witnesses should have explained more as to how they came to know the appellant and how often. This was not done. On this point, the learned advocate referred to the case of **Shamir s/o John v. The Republic**, Criminal Appeal No. 166 of 2004 (unreported).

As regards the incident itself, he contended that it was fast and frightening. PW2 testified that it took about three minutes. PW2 and PW3 were apparently immobilized lying while facing the floor. He, therefore, submitted that the conditions were not favourable. In her evidence PW2 was not sure whether or not she was on the ground floor or upstairs. Her evidence was contradictory. The learned advocate concluded by submitting that PW3's evidence was unreliable and had material inconsistencies which rendered their story highly improbable. He referred the Court to the case of **Piason**

Mkombola v The Republic, Criminal Appeal No. 108 of 2007 (unreported) in support of his submission.

The respondent Republic was represented by Mrs. Arafa Msafiri, learned Senior State Attorney. From the outset, she supported the appeal essentially on the same reasons as articulated by Mr. Loomu Ojare. She lucidly articulated that there were a number of material discrepancies in the evidence of PW2 and PW 3. The prosecution was enjoined to prove its case beyond reasonable doubt. She added that if the appellant was positively identified at the scene of crime on the 6/12/2002, no efforts to trace and arrest the appellant were made until the 15/1/2003 when he was arrested. In support of her submissions on this point the learned Senior State Attorney referred to the case of **Matola v Republic** [1995] TLR 3 at page 6. On the appellant's defence of an ***alibi,*** she contended that the appellant had no obligation to prove his ***alibi*** but only raise doubt in the prosecution case. She submitted that the appellant pointed out where he was on the material date, at Moshono and this evidence was corroborated by DW10, the appellant's wife. As regards the

motor-vehicle TZL 9500, the learned Senior State Attorney submitted that there was evidence that the appellant had lent it to his friend, one Stephen Makoye who the prosecution did not call to contradict that piece of evidence.

Before we proceed on to consider and determine the merits or otherwise of this appeal, we are fully conscious of the fact that this is a second appeal and therefore we should not casually embark upon a re-evaluation of the evidence and findings of fact made by the courts below. Indeed this Court in **Amiratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores v A.H. Jariwalla t/a Zanzibar Hotel** [1980] TLR 31 stated at page 35 as under:-

> " *in my respectful view, where, as in the instant case, there are concurrent findings of facts by two courts, this court should as a wise rule of practice follow the long established rule repeatedly laid down by the Court of Appeal for East Africa, that is that an*

appellate court in such circumstances should not disturb concurrent findings of facts unless it is clearly shown that there has been a misapprehension of the evidence, a miscarriage of justice or violation of some principle of law or procedure".

And in the case of **Salum Mhando v Republic** [1993] TLR 170, this court re-stated the law in the following terms at page 174:-

"On a second appeal to this Court, we are only supposed to deal with questions of law. But this approach rests on the premise that the findings of fact are based on a correct appreciation of the evidence. If as in this case both courts completely misapprehend the substance, nature and quality of the evidence, resulting in an unfair conviction, this court must in the interests of justice intervene".

We have already, albeit briefly, summarized the submissions of the learned advocate for the appellant and the learned Senior State Attorney for the respondent. What did the learned judge say in his judgment regarding the identification of the appellant. He stated thus:-

> *"Having carefully scrutinized the whole evidence, I am of considered view that the identification conditions were favourable all possibilities of mistaken identification ruled out and the 2nd appellant was conclusively identified by PW2 and PW3.* ***First,*** *the incident occurred at 7.30 am, day time.* ***Second,*** *PW2 knew him before. PW 3 had seen him once. He came to the office for business transaction in the past (PW3). Of the two, PW2 knew him for long.* ***Third,*** *there was proximately (sic) in the encounter which took place inside the office. PW3 opened not only the office door or gate for*

them but also that of PW1 upstairs for the robbers (PW2, PW3, PW11). PW3 said: "I saw him by face." ***Four*** *the robbers did not cover their faces (PW11).* ***Fifth,*** *the 2nd appellant was named by them immediately after the incident to the police authorities, in particular PW6..."*

The appeal stands or falls on the issue of the appellant's identification at the scene of crime by PW2 and PW3. If the appellant was properly identified then his ***alibi*** must collapse. The learned judge was of the settled view that the appellant was positively identified at the scene of crime on the 6/12/2002. Mr. Loomu Ojare and the learned Senior State Attorney vigorously challenged this conclusion. The learned advocates agreed that the incident occurred at around 7.30 am. To that extent the conditions for visual identification were favourable. However, the credibility of the witnesses was savagely impeached. First, PW2 testified to the effect that on the 6/12/2002 at around 7.20 pm. (sic) two gentlemen

came in including the appellant whom he had known before hand. The appellant had a pistol. During cross-examination by Mr. Mughwai, PW2 said that three people came in. PW2 gave a different version to the police on the 7/12/2002, exhibit D1. This time there were five people. There is another aspect to her evidence regarding the pistol. In her statement to the police, the appellant took the pistol from his jeans trouser, whereas in her evidence in court, the appellant took it from the inside coat pocket. PW 11, Naurajain Pandya testified that three people entered his office and pointed a gun at him. The learned judge stated as follows on these discrepancies in the evidence:-

> *"...For my part on the whole evidence critically analysed, these discrepancies as to the precise number and movements of the robbers, those who entered or stayed outside or went upstairs to PW11's office or remained to guard PW2 and PW3 in the main office and at what point in time who was where must be*

appreciated in the attending circumstances and facts;..."

And he continued:-

"These circumstances considered it is understandable that the details of numbers by all the four witnesses (PW2,PW3,PW4 and PW1) each point in time the robbers were inside, upstairs and downstairs could not have been recounted with the same rhythm or any mathematical precision. Suffice it to say that that alone is insufficient to throw overboard the established fact that on 6/12/2002 at around 07.30 a.m. a group of armed robbers with a pistol physically entered River Gems (T) Ltd after the door was opened by PW3 and some went upstairs to PW11 office and others remained down stairs and in the main office and used force against PW2, PW3 and PW11. There is no need to magnify the point which should be

kept in view regard had to the totality of the evidence".

The learned judge emphatically concluded in his own language, that "the evidence of PW3 and PW11 are definitely credible, compelling and reliable" So was the evidence of PW2.

In the case of **Jaribu Abdalla v Republic** Criminal Appeal No. 220 of 1994 this Court stated thus:-

"...in matters of identification it is not enough merely look at factors favouring accurate identification. Equally important is the credibility of witnesses. The conditions for identification might appear ideal, but that is no guarantee against untruthful evidence".

In her statement, exhibit D1, PW2 stated that the appellant and an unnamed person entered the office and three others remained outside. Then the appellant pulled a pistol from his trousers, ordered

them to lie down facing the floor. In her testimony in court, PW2, testified that two gentlemen entered the office but when cross-examined by Mr. Mughwai learned advocate, the number increased to three. As regards the pistol, when cross-examined by Mr. Kinabo, PW2 stated that the appellant pulled the pistol from the inside coat pocket. These are glaring inconsistencies which undermine the credibility of PW2. The testimony of PW2 is also inconsistent with her statement exhibit D1. The question is, can such evidence be relied upon? In the case of **Shabani Daud v Republic** Criminal Appeal No. 28 of 2000 (unreported) the Court stated:-

> *"May be we start by acknowledging that credibility of a witness is the monopoly of the trial court but only in so far as demeanour is concerned. The credibility of a witness can also be determined in two other ways:* ***One, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses,***

> ***including that of the accused person. In these two other occasions the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court.*** *Our concern here is the coherence of the evidence of PW1." (Emphasis added)*

Our concern in this appeal is with the testimonies of PW2, PW3 and PW11. We have already demonstrated the discrepancies in the evidence of PW2, PW3 and PW11 as regards the number of robbers involved; the material inconsistency between PW2's evidence during the trial and her statement to the police, exhibit D1. With respect, we are not prepared to accept and elevate her evidence as credible and reliable. It was not worthy of belief and should not have been relied upon.

Next, PW2 and PW3 stated in their evidence that they identified the appellant whom they alleged to have known before the incident. They did not elaborate as to how they came to know each other.

The appellant testified that he did not know PW2 and did not even know she works. The point we are underscoring here is that it is not enough for PW2 and PW3 to blandly say they knew the appellant. They should have gone further to establish when and how often. The prosecution was duty-bound to elicit more from PW2 and PW3 so as to know how they knew the appellant. In the case of **Shamir s/o John v The Republic,** this Court observed as follows:-

> *"...recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the court should always be aware that mistakes in recognition of close relations and friends are sometimes made".*

We come to the incident itself. It was not a normal one. According to PW2, it took about three minutes and PW2 and PW3 had been put under arrest with their faces facing the floor. The event was fast and so the conditions for identification at the scene were not that favourable. The evidence of PW2 was still

contradictory, was she on the ground floor or upstairs in PW11's office?

We now come to another piece of evidence during the trial in connection with the second accused who was acquitted. This evidence was given by PW2 and PW3. PW2 testified that on the 4/12/2002 at around 10.am; 1.00 pm and then 3.00pm, Teddy (second accused during the trial) visited PW11, Naurajan Pandya, at their offices. There was another visit to PW11 by Teddy on the 5/12/2002 at around 9.40 am, and then at around 2.30 pm and they left together at 5.00 pm. Pw3 also testified that on 4/12/2002 Teddy came to see PW11 at around 10.00 am; at 1.00 pm and at 3.00 pm. Teddy paid another visit on 5/12/2002 at 3.00 pm. Apparently the second accused (Teddy) raised the defence of ***alibi*** during the trial. It was not discussed by the learned trial Magistrate, but on appeal to the High Court the learned judge stated:-

> *"Unfortunately, the trial court stopped short of dealing with the 2nd accused's* ***alibi*** *as she claimed to have left Arusha for Dar es Salaam*

*on 5/12/2002 with Saibaba Bus Service (Exhibit D27). If it had, I have no doubt it would have accepted it. The **alibi** was supported by DW8 the Hotel Manager, an independent witness who confirmed her departure or absence".*

Since the defence of ***alibi*** was accepted that is, on the 5/12/2002 the second accused Teddy was in Dar es Salaam, how was it possible for her to be in Arusha as well! The evidence of PW2 and PW3 on Teddy's presence in Arusha was pure fabrication. Now, the question is, if PW2 and PW3 were prepared to tell a lie of Teddy's presence in Arusha on the 5/12/2002, what assurance is there that they would not be equally prepared to tell a lie about the identification of the appellant? In Criminal Appeal No 93 of 1988 **Mt.38350 Pte Ledman Maregesi v The Republic** (unreported) this Court observed as under:-

"We think that where a witness is shown to have positively told a lie on a material point in the case, his evidence ought to be

approached with great caution, and generally the court should not act on the evidence of such a witness unless it is supported by some other evidence".

With respect, we uphold the first ground of complaint.

In this case PW2 and PW3 told a positive lie on a material point in relation to the presence of the second accused in Arusha whiles she was in Dar es Salaam. There is equally no assurance that their evidence of the appellant's identification at the scene of crime was not a pack of lies.

We now come to the appellant's second ground of complaint, his defence of an ***alibi.*** The learned judge in his judgment found that there was a discrepancy in the appellant's evidence. The appellant testified that he went to Moshono on the 1/12/2002 while in his statement (exh.P.4) he wrote he did so from 5/12/2002. The learned judge concluded that this was a material contradiction in that the two dates could not co-exist. In rejecting the defence of ***alibi,*** the learned judge had this to say:-

"...on an anxious consideration of the totality of the evidence and considering that it is possible for one to travel return journey from Moshono to Arusha the same day, PW2 and PW3's positive identification of the 2nd appellant at the crime scene on 6/12/2002 I would hold that the prosecution had conclusively placed him at the occurrence and participating in the commission of the offence charged. In these circumstances, but for different reasons, I would, like the trial court reject his ***alibi.*** *It is trite law that the identification at the scene of crime of the accused and the defence of alibi are mutually exclusive"*

As far as the appellant's ***alibi*** is concerned, the critical date was the date of the commission of the offence, that is, the 6/12/2002. It is trite law that an accused person is not required to prove his alibi. It is sufficient for him if the ***alibi*** raises a reasonable doubt **(see: Leonard Aniseth v Republic** [1963] EA 206; Ali **Salehe Msutu v Republic** [1980] TRL1). There is evidence to the

effect that on the 6/12/2002 the appellant was at Moshono. This evidence was supported by DW10. There was also the appellant's evidence that on the 5/12/2002 he had lent his Toyota Corolla Reg. No. TZL.9500 to his friend, Stephen Makoye. DW.10 confirmed that she had given the keys to Makoye on the 5/12/2002. The appellant did not drive the said vehicle or see Makoye on 6/12/2002. The prosecution did not call Makoye to dispute this vital piece of evidence. All that we are saying is that since PW2 and PW3's evidence of identification at the scene of crime has been discredited, there is no other evidence to locate the appellant on the scene of crime on the 6/12/2002.

In Criminal Appeal No. 117 of 1991, **Ali Amsi v The Republic** (unreported). This court observed:-

> *"... it is of course not the law that once the **alibi** is proved to be false, or is not found to have raised doubt, the task of proving the accused's persons guilt is accomplished.* ***There must still be credible and convincing prosecution***

evidence on its own merit, to bring home the alleged offence"

(emphasis added).

With respect, we think he have sufficiently demonstrated the material discrepancies and unreliability of the evidence of PW2 and PW3. The discrepancies go to the identity of the appellant and the credibility of PW2 and PW3. and cast a shadow of doubt on the prosecution case (see: Criminal Appeal No.252 of 2005, **Alex Kapinga and 3 others v The Republic** (unreported). Since the physical presence of the appellant at the scene of crime has been discounted is there any other prosecution evidence to that effect? The evidence of PW11 is equally unhelpful. He stated, ***inter alia:-***

"In actual fact I cannot remember the appearance of any person of the robbers who came into my office and robbed the gemstone."

And when PW11 was cross-examined by Mr. Mughwai, learned advocate for the appellant, he said:-

"The robbers did not cover their faces when they entered the office. I do not remember how they dressed."

In the result, we uphold the appeal. We do hereby quash the conviction and set aside the sentence imposed upon the appellant. The appellant is to be released forthwith from prison unless otherwise lawfully held in custody.

It is accordingly ordered.

DATED at ARUSHA this 19th day of February, 2010.

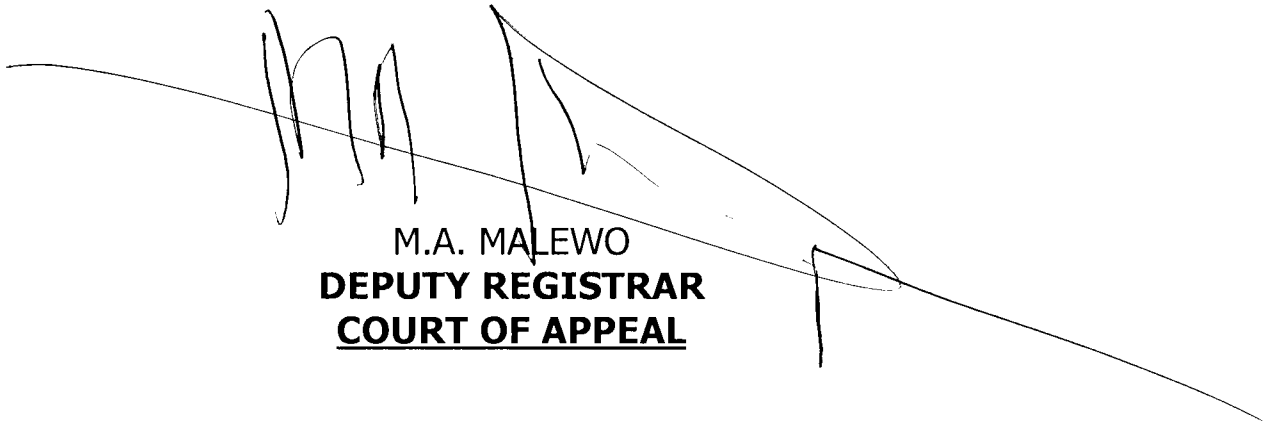
H.R. NSEKELA
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

W.S MANDIA

JUSTICE OF APPEAL

I certify that this is a true copy of the original.



M.A. MALEWO
DEPUTY REGISTRAR
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