IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A; And MASSATI, J.A.)

CRIMINAL APPEAL NO. 255 OF 2007

JUMANNE MASHAMBA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision/Judgment of the High Court of Tanzania at Mwanza)

(Sumari, J.)

dated the 1st day of June, 2007
in
Criminal Appeal No. 90 of 2006

RULING OF THE COURT

15 & 18 FEBRUARY, 2011

MASSATI, J.A.:

The appellant was convicted by the District Court of Kwimba, of the economic offence of being in unlawful possession of a firearm, contrary to section 13(1) of the Arms and Ammunitions Ordinance (Cap. 223) read together with paragraph 20 of the First Schedule to and sections 56(1) and 59(2) of the Economic and Organised Crimes

Control Act No. 13 of 1984. He was sentenced to 15 years imprisonment. This conviction and sentence was confirmed by the High Court (Sumari, J.), who dismissed his appeal. Still protesting his innocence, the appellant has sought this Court's audience by way of a second appeal.

The appellant had initially filed a *"petition"* of appeal containing 4 grounds of appeal. That was on 14/4/2009. But on 7/2/2011, he filed another *"Memorandum of Appeal"*, that also contained 4 grounds.

At the hearing, the appellant appeared in person, but Mr. David Kakwaya represented the Republic/respondent.

When the appeal was called on for hearing, Mr. Kakwaya rose to argue a preliminary objection, notice of which he had filed previously and served the appellant. The objection was that:-

"The Notice of Appeal is time barred as per Rule 61(1) of the Tanzania Court of Appeal Rules, 1979."

Elaborating his point, the learned counsel submitted that since the judgment of the High Court was delivered on 1/6/2007 and since Rule 61(1) of the Court of Appeal Rules 1979, required that such Notice be filed within 14 days of the date of such decision, and since the Notice in this appeal was filed on 20/6/2007, it was 5 days late. He also pointed out that although the appellant signed the notice on 9/6/2007; in the absence of an endorsement by the prison officer in charge as to the date and time of receipt of the said notice the situation could not be salvaged. He therefore, prayed that since the notice of appeal institutes an appeal, and since the notice is incompetent, so was the appeal. So, it should be struck out.

In response, the appellant pleaded that he presented his notice of intention to appeal to the prison officer in charge on 9/6/2007 well within time but had no control over when the prison officer

forwarded it to the High Court, and could not overbear him to endorse the date and time of receiving the notice. He was helpless, and sought the indulgence of the Court to do justice to him.

A criminal appeal to this Court is instituted when an intending appellant files a written notice of appeal in the prescribed form under Rule 61(1) of the revoked Court of Appeal Rules, 1979 (old Rules) (or Rule 68(1) of the current Court of Appeal Rules, 2009). Under the old Rules the Notice had to be filed within 14 days of the date of the decision. (Under the current Rules the prescribed period is 30 days). Since the present appeal was instituted prior to 1/2/2010 when the 2009 Rules came into operation (see GN 36/2010) the applicable Rules, were the 1979 Rules, as saved by Rule 130(a) of the current Rules.

Under Rule 68(1) and (2) of the old Rules, it was provided that where an appellant is in prison all the appellant had to do, was to intimate his written intention to the prison officer in charge and if the latter endorses in the said Notice of Appeal, the date and time of receiving it, all the period that the prison officer took to file it in the

High Court or the Court, would be excluded in the computation of time for lodging such notice. This was the gist of Rule 68(3) of the old Rules. If this provision is not complied with, the appellant would not benefit from that exclusion of time.

In the present case, we note that the appellant signed his Notice of Appeal on 9/6/2007, but since the prison officer in charge did not endorse the date and time of receiving the said Notice before forwarding it to the District Registrar of the High Court, the Court is disabled from ascertaining on what date and time was the Notice received by the prison officer in charge. So, the date of filing the appeal which was 20/6/2007 prevails, and must be used for the purposes of reckoning the prescribed period of limitation. This strict interpretation of Rule 68(3) of the old Rules is, in our view necessary, for the purposes of ensuring that the same formula is applied in all similar cases.

For all the above reasons, we are settled in our mind and we agree with Mr. Kakwaya, that in the present case, the Notice of Appeal was filed out of time. Consequently it was incompetent.

who was their neighbor. It was Gabriel who called the police. Gabriel was not called as a witness by the prosecution.

The next point for consideration is the complaint raised by the appellants on the inconsistencies and contradictions obtaining in the prosecution case which rendered their alleged identification not worth of belief. The pertinent question we need to ask ourselves is whether the discrepancies in the testimonies of PW1, PW2 and PW3 are so material as to render their evidence unreliable. This point need not detain us. There were, indeed, a number of contradictions in the case.

To start with PW1 and PW3 told the Court that they identified only the first appellant. In sharp contrast to the evidence of PW2 who told the Court that she identified all the appellants as she knew them well because they were neighbours. PW3 who is the husband of PW2 did not recognize or identify the so called neigbours. The action taken by the police to conduct an identification parade where PW2 was also called upon to make an identification leads to the

conclusion that PW2 did not know the people who committed the robbery. PW4 a police man who went to the scene of crime testified that it was PW1 who mentioned to him the names of the second and third appellant as having been involved in the robbery. PW2 did not name the three appellants to the said officer. Surely, if the witnesses were describing incidents relating to the same event, it was not to be expected that they would differ so much on important areas of the case. In our considered view, if the witnesses contradicted themselves so much, it was very likely that even in their evidence of identification the appellants were not necessarily truthful and reliable. Unfortunately, the two courts below did not address themselves to these contradictions and flaws in evidence.

We are of the view that the inconsistencies and contradictions among the prosecution witnesses, PW1, PW2 and PW3 left questions unanswered, thus creating doubts as to whether the prosecution side proved its case beyond reasonable doubt. See **Mohamed Said Matula** (supra) and **John Gilikola v. Republic**, Criminal Appeal No.31 of 1999 CA (unreported). We think that those lingering doubts

in the prosecution case should be resolved in favour of the appellants.

We are, therefore, inclined to agree with both counsel that the inconsistencies and contradictions went to the root of the matter. Therefore the evidence of PW1, PW2 and PW3 cannot be relied upon.

The last point for consideration and decision in this case concerns the defence of alibi raised by the appellants at the trial. All the appellants raised the defence of alibi. The trial court discarded it because it was identical and was not well presented. It also took into account that the appellants contradicted themselves in explaining in which village they live and how far they were from the residences of the victims. The first appellate court did not fault the finding of the trial court since the appellants failed to bring evidence to support their alibi.

Given the nature of evidence on record, and the simultaneous raids which took place at an interval of five minutes each, it is not probable that the appellants were present at all the scenes of crime

within a short span of five minutes. The cardinal principle that an accused person is innocent until proven guilty should have been observed.

In **Ali Amsi v. The Republic**, Criminal Appeal No. 117 of 1999 CA (unreported) this Court observed as follows:-

> *"It is of course not the law that once the **alibi** is **proved** to be false, or is not found to have raised doubts, the task of proving the accused person's guilt is accomplished. **There must be still credible and convincing prosecution evidence, on its own merit to bring home the alleged offence."*** (Emphasis added).

The appellants had only to raise doubts on their presence at the scene of crime and the prosecution had to prove its case beyond reasonable doubt. The appellants' story need not be believed. They had only to raise a reasonable doubt and not to prove anything.

In the result, and for the foregoing reasons, we allow the appeal, quash the conviction and set aside the sentence imposed upon the appellants. They are to be released immediately unless otherwise lawfully detained in custody.

It is so ordered.

DATED at MWANZA this 15th day of February, 2011.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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

J.S. MGETTA
DEPUTY REGISTRAR
COURT OF APPEAL