IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., AND MASSATI, J.A.

CRIMINAL APPEAL NO. 267 OF 2006

MKAIMA MABAGALA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mihayo, J.)
dated 22nd day of September, 2006
in
Criminal Appeal No. 8 of 2006

JUDGMENT OF THE COURT

18 & 24 FEBRUARY, 2011

RUTAKANGWA, J.A.:

The appellant with one Selemani Masatu (deceased), were jointly charged with the offence of Armed Robbery c/ss 285 and 286 of the Penal Code, Cap. 16. R.E. 2002 in the District Court of Musoma. They were convicted as charged and sentenced to thirty years imprisonment. They were also ordered to pay Tshs.100,000/= to the victim of the robbery, PW1 Hamis Ramadhan, for injuries sustained by him. However, the learned trial Resident Magistrate

refrained from making an order of compensation in respect of the robbed properties. He thus reasoned:-

> *"... the evidence as to the proof of the value thereof was not sufficient enough and even the amount of cash allegedly stolen was not consistent between the one mentioned by PW1 and that mentioned by PW2 in their evidence...."*

Dissatisfied with the conviction and sentences, the appellant and his deceased colleague appealed to the High Court. In its judgment dated 22nd September, 2006, the High Court sitting at Mwanza, dismissed the appeal in its entirety. Convinced of their innocence they jointly lodged this appeal.

While this appeal was still pending, the appellant Selemani Masatu, unfortunately, passed away on 9th October, 2007 at Bugando Consultant Hospital. His appeal, therefore, abated in terms of Rule 78(2) of the Tanzania Court of Appeal Rules, 2009. We are accordingly left with one appellant, Mkaima Mabagala. However, this fact alone will not prevent us from referring to Seleman Masatu in this judgment where it will be necessary and unavoidable to do so.

In this appeal, fortunately, each appellant had lodged his own memorandum of appeal. The appellant's memorandum of appeal lists nine (9) grounds of appeal. All the same the gravamen of his complaint is that the two courts below erred in law and fact in basing his conviction on the unreliable visual identification evidence of the two key prosecution witnesses, which evidence was contradictory, incoherent and not worthy of belief. As a result, it did not disprove his watertight defence of alibi, he is contending.

The appellant appeared before us in person and unrepresented. The respondent Republic was represented by Mr. David Kakwaya, learned State Attorney, who supported this appeal.

Before deciding on the merits or otherwise of the appeal, we find it desirable to look, albeit briefly, at the evidence which led to the conviction of the appellant and the deceased Selemani. It was short and, admittedly, not without patent fundamental shortcomings.

At the appellant's trial, it was not disputed that on the night of 1st September, 2004, bandits invaded the home of PW1 Hamisi Ramadhan. The bandits were armed with offensive weapons, i.e. a

gun, a machete, etc. It was also admitted fact that the appellant, his co-accused and PW1 Hamisi Ramadhan resided in the same village and knew each other. Indeed, the distance in between the house of PW1 Ramadhan and the deceased Selemani was put at 200 meters.

On the material night, at about 8.00 p.m. about six people arrived at the home of PW1 Ramadhani. They flashed torchligh at him. He was at the door of the house, as he put it. Without any ado they fired a shot which struck his right leg. He fell down inside the house, but managed to run into the bathroom. The bandits entered the house in search of him. In the process, they came across his daughter PW2 Mwajuma Hamisi. They demanded money from her. She told them that she had no money. When eventually they got PW1 Ramadhani, they fired another shot in the air and demanded money from him. He gave them Tshs.500,000/= (although PW2 said that they took Tshs.300,000/=). The bandits also took what PW1 Ramadhani described as *"other things such as one Disc radio sony, electric stabilizer, two small radios, one video deck and a antenna decoder,"* as well as a bicycle. After cutting PW1 Ramadhani with a

panga on the head, the bandits vanished into the darkness of the night.

After the departure of the robbers, PW2 Mwajuma raised an alarm. Many people assembled at the scene of the crime. As PW1 Ramadhani had been injured, he was taken to Musoma Central Police station, from where he was sent to Musoma government hospital. He was hospitalized until 9th September, 2004.

On 2nd September, 2004, PW3 No. B 9752 Det. S/Sgt. Aloyce, visited PW1 Ramadhani at the hospital. PW1 Ramadhani's statement was taken. In his statement PW1 Ramadhani stated that out of six bandits, he had recognized the appellant, Seleman and one Chikole, who was never apprehended. The deceased Selemani was arrested on 3rd September, 2004 while the appellant was arrested later. Both were charged accordingly.

The appellant and Selemani denied the charge. The appellant told the trial court that he had left his home village of Kulwaki on 27th July, 2004 for Kiliba village to nurse his sick wife. He stayed there, at the home of Sabato Majibo, until 3rd September, 2004 when he

returned home. On 6th September, 2004 he said, the goats of PW1 Ramadhani strayed into his cassava shamba. This incident provoked a misunderstanding between him and the family of PW1 Ramadhani. On the morning of 7th September, 2004, he was arrested by policemen from Mugango police post and taken to Musoma Police station. At Musoma he gave his statement to the Police wherein he told the police that he was at Kiliba village on the 1st of September, 2004. The appellant's defence of alibi was supported by the said Sabato Majibo, who testified as DW3.

In his judgment, the learned trial Resident Magistrate, rightly found that the fact that an armed robbery was committed at the home of PW1 Ramadhani was not disputed. Indeed, this fact had been confirmed by the deceased Selemani and his witnesses, DW1 Masatu Magwegwe and DW2 Nyabina Malegesi, who all testified that they went to the home of PW1 Ramadhani in response to the alarm raised. He then found, again rightly in our opinion, that the crucial issue for determination was the identity of the robbers.

After properly addressing himself to the law governing visual identification evidence, but before making any attempt to evaluate

the **entire** evidence of record, the learned trial magistrate reached this conclusion:-

> *"From the evidence of PW1 and 2, I am convinced that the sub-issue (i.e. whether or not the two accused persons were properly identified), must be answered in the affirmative to effect that they were properly identified and I will justify my finding as follows ..."*

Thereafter, he revisited the evidence of PW1 Ramadhani and PW2 Mwajuma looking for a justification for his early, or premature, conclusion. At the end of this brief exercise, he concluded thus:-

> *"Having considered all these reasons, I have detected no (**sic**) any reason as to why the PW1 and 2 should have mistaken the identity of the two accused persons, and I believe their evidence is of truth for they did not pretend to have identified all the robbers (said to be 6 at the scene) except the two accused persons and the escapee Chikore. This evidence thus meets the standards set in the case of **WAZIRI AMANI v. REPUBLIC** cited*

above so as to warrant conviction to the accused persons."

The above extract tells it all. The learned trial Resident Magistrate found the appellant and Selemani guilty as charged without considering their defence case at all. This, to us, was a gross error of law which led to a miscarriage of justice. We are saying so without any inhibitions. This is because after he had so held, he proceeded immediately to reject outright the defence case. He gave two reasons for this. **One,** as each accused had relied on a defence of alibi, they failed to give notice of this defence in terms of section 194(4) and (5) of the Criminal Procedure Act, Cap. R.E. 2002. **Two,** the prosecution evidence was *"tight enough to warrant"* the trial *"court to neglect the defence."* He was, of course, of this view because he had considered the prosecution in isolation of the entire defence case.

We are mindful of one established salutary principle of law, which will guide us in deciding this second appeal. This is that a first appeal is in the form of a re-hearing. The first appellate court, therefore, has a duty to re-evaluate the entire evidence on record by

reading it together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusions of fact. This is imperative where the trial court failed to discharge this duty as was the case here. See, for instance, **D.R. PANDYA v. R.** [1957] E.A. 336 and **IDDI SHABAN @ AMASI v. R.,** (CAT) Criminal Appeal No. of 2006 (unreported).

In view of the above, we would have expected the High Court in this case, to have scrupulously carried out this duty in the determination of the appellant's appeal. Unfortunately, it did not do so. With all due respect, it fell into the same error as the trial court. After a recap of the prosecution evidence, the learned first appellate judge said:-

> *"In a carefully constructed and reasoned judgment, the trial magistrate found that circumstances were favourable and therefore the identification of the two appellants was watertight. The trial magistrate also,* ***rightly in my view,*** *rejected the defence of alibi for failure to comply with section 194(4) of the Criminal Procedure Act (Cap. 20 R.E. 2002]."*

Thereafter, the learned judge reproduced section 194(6) of the Criminal Procedure Act, to justify his concurrence with the decision of the trial court. After rejecting the appellants' defence of alibi, the learned first appellate judge proceeded to hold that the truthful evidence of PW1 Ramadhani and PW2 Mwajuma placed them at the scene of the crime. Like the trial magistrate, he convinced himself that the two witnesses could not have mistaken the two appellants, as they were well known to each other, being villagemates, and there was light illuminating the scene from *"two chimney lamps and a rechargeable electric lamp."*

The finding that the trial court's judgment was *"carefully constructed and reasoned"* has, in view of our earlier observations, greatly exercised our minds. The word *"reasoned"* is defined at page 1101 of Oxford Advanced Learner's Dictionary of Current English, 6th edition as:-

> *"(of an argument, opinion etc.) presented in a logical way that shows careful thought."*

In our considered view, an opinion or judgment cannot be held or said to be logical if it has not considered in an objective balanced

manner all the facts. If one view of the issue has been considered and the other view left out, the resulting opinion cannot be said to be logical and/or a "*carefully constructed and reasoned*" one.

For a judgment of any court of justice to be held to be a reasoned one, in our respectful opinion, it ought to contain an objective evaluation of the entire evidence before it. This involves a proper consideration of the evidence for the defence which is balanced against that of the prosecution in order to find out which case among the two is more cogent. In short, such an evaluation should be a conscious process of analyzing the entire evidence dispassionately in order to form an informed opinion as to its quality before a formal conclusion is arrived at. Using this legal benchmark, we respectfully and confidently say that the two courts below did not live up to this requirement: See, for instance, **D.R. PANDYA v. R** (supra), **SHANTILAL MANEKAL RUWALA v. R** [1957] E.A. 570 and **IDDI SHABAN @ AMASI v. R** (supra). It now behoves us to discharge this duty.

We may as well begin with a brief discussion of the issue of alibi. Long before the introduction of section 194 into our Criminal

Procedure Act (Code), the law on alibi was well established and for that matter it was not radically changed by the provisions of s. 194. It was and it still remains to be that an accused person putting forward a defence of alibi does not assume any duty of proving it. It will be sufficient to secure an acquittal for him if the alibi raises a reasonable doubt: See, **LEONARD ANISETH v. R.** [1963] E.A. 206, **ALI SALEHE MSUTU v. R** [1980] T.L.R. 1, **and ABDALLA MUSA MOLLEL @ BANJOO v. D.P.P.,** (CAT) Criminal Appeal No. 31 of 2008 (unreported).

Even where an accused person's alibi is proved to be false that would not mark the end of the world. As this Court succinctly decided in **ALI AMSI v. R.,** Criminal Appeal No. 117 of 1991 (unreported):-

> *"... 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 person guilt is accomplished.* ***There must still be credible and convincing prosecution evidence on its own merits to bring home the alleged offence."***

See also **LUDOVICK SEBASTIANI v. R.,** Criminal Appeal No. 318 of 2007 (CAT) (unreported).

In the present case, the appellant's defence of alibi was not found by the two courts below to have been false. It was rather rejected simply because he did not issue prior notice of it and further that it was not convincing. In our considered opinion, the courts below erred because that strict outlook is not the prevailing stance of the law. This Court in **CHARLES SAMSON v. R.,** [1990] T.L.R. 39, lucidly held:

> *"On a proper construction of the section.. the court is not exempt from the requirement to take into account the defence of alibi, where such defence has not been disclosed by an accused person before the prosecution closes its case. What this section means is that where such disclosure is not made, the court, though taking cognizance of such defence, may in its discretion accord no weight of any kind to the defence. Where the court fails to take cognizance of an alibi it amounts to a mistrial and a miscarriage of justice."*

We have had the opportunity of reading carefully the entire evidence on record, in our desire to reach at the truth of this matter. We have learnt that contrary to the concurrent findings of the two courts below, the appellant did not fail to comply with the mandatory provisions of s. 194. This is because he stated in his evidence, which the courts below never considered at all, that following his arrest on 7th of September, 2004, he made a statement to the police on the same day. He stated therein that on the day the robbery was committed, he was not at Kulwaki village but at Kiliba village. This piece of evidence was not contradicted in any way by the prosecution, and to us that information to the police constituted sufficient notice of the defence of alibi. Not only that. The appellant called DW3 Sabato Majibo to support his alibi. DW3 Sabato unequivocally told the trial court that although it is possible to make a return journey from Kiliba village to Kulwaki village on the same day, the appellant never left Kiliba on the day of the robbery. Again this piece of evidence, which remains uncontradicted, was never considered by the two courts below.

In view of the above, it is our considered opinion, that had the two courts below not misdirected themselves on the law and/or not failed to consider the undiscredited evidence favourable to the appellant, they would not have rejected the appellant's defene of alibi.

The appellant's claim that he was not at Kulwaki village on the night of the robbery is augmented by these two undisputed facts. One, no single resident of Kulwaki, particularly those who responded to the alarm, testified to have seen him at the village on that day. Two, no witness testified to have heard either PW1 Ramadhani or PW2 Mwajuma that night mentioning the appellant to have been identified among the robbers. Indeed, PW2 Mwajuma admitted not to have named any bandit to anybody that night. The reason she gave that she feared to name them as they would have escaped is very unconvincing. It is unconvincing because PW1 Ramadhani claimed in his evidence that he mentioned the appellant and Selemani to those people, who included one Fadhili Chobero. Neither Fadhili Chobero nor any other independent witness including the village government leaders testified at the trial. Instead, DW1

Masatu Magwegwe and DW2 Nyabina Malegesi testified for the defence supporting the defence of Seleman and belying PW1 Ramadhani and PW2 Mwajuma.

DW1 Masatu confirmed that the robbery took place indeed. He was also categorical in his evidence that he rushed to the scene of the crime accompanied by Seleman Masatu and Swalehe Hamisi, in response to the alarm. He went further and tellingly said:-

> *"...The village leader (Mtendaji) asked the complainant if he identified the robbers and he said he did not identify them. Policemen also came and asked if the complainant knew the robbers he said he did not know them as it was dark. The complainant was then taken to hospital."*

That DW1 Masatu was telling the truth gains support from PW2 Mwajuma. While being cross-examined by the 2nd appellant, she said:-

> *"... and policemen came at the same night at about 8.30 p.m. and took my father to hospital. I did not tell them about your*

identification. I told the police about you on the next morning ..."

If PW2 Mwajuma failed to tell her fellow villagemates the names of the three bandits she had recognized out of fear that they might have escaped, what prevented her from naming them to the law enforcement officers? If she had done so, the "recognized" robbers, who were their neighbours, would have been sought immediately and apprehended. That she did not do so leads to only one inevitable conclusion. This is that she never identified any robber at this scene of the crime. This is one of the reasons relied on by Mr. Kakwaya in his brief submission in support of the appeal.

Again, according to the sketch map of the scene of the crime, drawn by PW3 D/Ssgt. Aloyce on 2/9/2004 (exh P2), the home of the deceased Selemani was only **17 paces away** from the spot where the robbers shot him on the leg. If then, PW1 Ramadhani had mentioned the appellant and Selemani, his villagemates and/or the policemen who arrived at the scene but whom he conveniently avoided mentioning in his evidence, would not have failed to mount an immediate search for them. The fact that this was not done is

indicative of the fact that PW1 Ramadhani never mentioned the names of the robbers to anyone on that night. His failure to do so leads to only one reasonable inference. He was not sure of the identities of the robbers. His naming of the appellant and Selemani, the next day while in hospital and not to the ones who drove him to hospital that night was, in our view, a mere afterthought and ought not to have been taken seriously by the two courts below.

In the case of **FESTO MAWATA v. R.,** Criminal Appeal No. 299 of 2007 (unreported), this Court drawing inspiration from its earlier decisions in **AZIZ ATHUMANI @ BUYOGERA v. R.,** Criminal Appeal No. 222 of 1999 and **JUMA SHABANI @ JUMA v. R.,** Criminal Appeal No. 108 of 2004 (both unreported), held:-

> *"Delay in naming a suspect without a reasonable explanation by a witness or witnesses has never been taken lightly by the courts. Such witnesses have always had their credibility doubted to the extent of having their evidence discounted."*

We subscribe wholly to this holding and we shall apply it here as we were urged to do by Mr. Kakwaya.

In the case under scrutiny, PW1 Ramadhani and his daughter PW2 Mwajuma, not only delayed in naming the appellant and Selemani, "*without a reasonable explanation.*" The delay, in our respectful finding, was accompanied by prevarications, holding back of evidence favourable to the defence and/or open lies.

That PW1 Ramadhani lied in his evidence is further proved by exh. P2. While in his evidence he stated that he was shot at while at his house's door and he fell down into the house, the undisputed exh. P2, shows that he was 17 paces from the door of the house. Both witnesses testified that there was light at the scene of the crime. They never described the intensity of the said light. But more damning were the contradictions on the number of lamps illuminating the scene and their positions. PW1 Ramadhani said that there were two kerosine lamps which were in his room and a rechargeable lamp which was in the sitting room. On this he was contradicted by PW2 Mwajuma. On her part, she said that there was a rechargeable lamp

which was in the corridor, and two kerosene lamps which were in the sitting room. She went further and said:-

> *"... one of the three lamps was outside the house..."*

Contrary to the holding of the trial court that these were minor contradictions, we share the view of Mr. Kakwaya that these were fundamental contradictions affecting the credibility of the witnesses on what aided them to impeccably identify some of the bandits. Due to these irreconcilable contradictions we entertain genuine doubts on whether or not there was any light at all at the scene of the crime. For this reason, we cannot share that certitude of the two courts below to the effect that the appellant was identified among the robbers by PW1 and PW2 by the aid of the light produced by the alleged or indeed imagined lamps.

All said, we hold that the evidence of PW1 Ramadhani and PW2 Mwajuma, bristling with lies and discrepancies, was sufficiently wanting in cogency to prove the offence of armed robbery. The appellant who set up a very convincing defence of alibi was wrongly

convicted. He deserved to be acquitted and we accordingly acquit him. The appeal is accordingly allowed by quashing and setting aside the conviction and the sentences imposed on him. He is to be released forthwith unless he is otherwise lawfully held.

DATED at MWANZA this 21st 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