

**IN THE COURT OF APPEAL OF TANZANIA  
AT MBEYA**

**(CORAM: MUGASHA, J.A., NDIKA, J.A., And SEHEL, J.A.)**

**CONSOLIDATED CRIMINAL APPEALS NO. 417 OF 2015 & 223 OF 2018**

<b>1. ODEN s/o MSONGELA .....</b>	<b>1<sup>ST</sup> APPELLANT</b>
<b>2. PHILBERT s/o ABEL @ MAJALIWA.....</b>	<b>2<sup>ND</sup> APPELLANT</b>
<b>3. EDWIN s/o SIMBA.....</b>	<b>3<sup>RD</sup> APPELLANT</b>
<b>4. WENCESLAUS s/o KAKWALE.....</b>	<b>4<sup>TH</sup> APPELLANT</b>
<b>5. MICHAEL s/o CHILANGA SIMFUKWE.....</b>	<b>5<sup>TH</sup> APPELLANT</b>
<b>6. SABAS s/o ALFRED.....</b>	<b>6<sup>TH</sup> APPELLANT</b>

**VERSUS**

**THE D.P.P..... RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania at Sumbawanga)  
(Sambo, J.)**

**dated the 21<sup>st</sup> day of August, 2015**

**in**

**Criminal Sessions Case No. 23 of 2013**

.....

**JUDGMENT OF THE COURT**

**14<sup>th</sup> & 28<sup>TH</sup> August, 2019**

**SEHEL, J.A.:**

The appellants, namely Oden Msongela, Philbert Abel @ Majaliwa, Edwin Simba, Wenceslaus Kakwale, Michael Chilanga @ Simfukwe, and Sabas Alfred, herein to be referred to as the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> appellants, respectively, were jointly and together charged with Gilbert s/o Mwanandenje and Meres s/o Namazali, in the High Court of Tanzania sitting at Sumbawanga with an offence of murder contrary to section 196 of the

Penal Code, Cap. 16 RE 2002. It was alleged that on 13<sup>th</sup> May, 2012 in Lusaka Village within Sumbawanga District in Rukwa Region, the appellants did murder one Michael s/ George @ Hussein (the deceased).

After a conduct of the full trial, the appellants were convicted and sentenced to death while Gilbert s/o Mwanandenje and Meres s/o Namazali were acquitted. Dissatisfied with the conviction and sentence, each of the appellants filed their notices of appeal that led to the filing of the Criminal Appeal No. 417 of 2015 containing three grounds, namely:

1. That the trial High Court erred in law and fact in holding that the appellants had been sufficiently identified at the scene of crime when there were inadequate and insufficient conditions for the proper identification of the assailants;
2. That the trial High Court erred in law and fact in dismissing the appellant's defence of alibi;
3. That the High Court erred in law and fact in ignoring the contradictions of the prosecution witnesses.

On 6<sup>th</sup> February, 2018 when the Criminal Appeal No. 417 of 2015 was called for hearing, this Court found and held that the notice of appeal filed by the 6<sup>th</sup> appellant was defective. Consequently, it struck it out and

adjourned the hearing of the appeal to another date to wait the processing and filing of a fresh appeal by the 6<sup>th</sup> appellant. After obtaining leave to file a proper notice of appeal, the 6<sup>th</sup> appellant lodged his notice thus led to the institution of the Criminal Appeal No. 223 of 2018 containing fifteen grounds memorandum of appeal which essentially boil down to the complaints of identification, witness credibility, alibi, and contradictions on the evidence of the prosecutions' witnesses.

At the hearing of the appeals, Mr. Saraji Iboru, learned Senior State Attorney, appeared to represent the Republic (the Respondent) in assistance with Ms. Irene Mwabeza and Marietha Maguta, learned State Attorneys prayed and it was agreed by Messrs Victor Mkumbe and Simon Mwakolo, learned advocates representing the appellants to consolidate the appeals. On our part, we acceded to the prayer since the appeals arose from the same proceedings and judgment of the High Court. In that respect, we invoked Rule 69 (1) of the Tanzania Court of Appeal Rules of 2009 and consolidated Criminal Appeals Nos. 417 of 2015 and 223 of 2018 to be one appeal.

Before going to the grounds of appeal, it is necessary to give a factual background giving rise to the present appeal. On 13<sup>th</sup> May, 2012 at about 9.30 pm, Odeni Emmanuel PW1 was at home and suddenly he heard shouts

saying "kill, kill Mr. Odeni, is amongst the witches/soccerers". He saw a group of people armed with machete, iron bars, clubs, panga, and a pestle approaching his house. Having seen the people, he helped his children and wife to escape through a rear door and himself went to hide at the neighbouring house.

From his hideout which was about six metres away, PW1 claimed to have identified the appellants with the aid of a light coming from the burnt items taken from his house and he knew them before as they all lived in the same village and sometimes they worked together in various activities. The people he identified were Edwin Simba, Odeni Msongela, Gilbert Majaliwa, Alfred Mwanandjenje, Sabas Alfred, Wenceslaus Kakwale, and Michael Simfukwe.

Narrating on how he managed to witness the killing, PW1 said he moved from his neighbour's house to his father's house (the deceased) to hide but he then saw the group coming to his father's home still shouting "kill the witch, kill the witch". He asked his father to leave the home but the father was too late. He, therefore, ran and hid at the banana plantation that was eight metres away from the deceased's house. He also claimed to have seen the persons who beat and burnt the deceased body. He mentioned them as Odeni Songela, Gilbert Majaliwa, Edwin Simba, Sabas Alfred,

Wenceslaus Kakwale, Michael Simfukwe and Philbert Mwanandenje dragging the deceased outside his house and started beating him by using hoes and panga. They beat him to death and then burnt his body at Mwazembe's farm which was about ten meters away from the deceased's house. Having seen that PW1 slowly walked to the second village of Mshani and later to Sumbawanga town and made a report to the Police Station.

Mapinduzi Sokolo PW2 recounted to have heard shouts that were approaching to his house, saying "we must kill all the witches". He ran for his safety and hid at the neighbour's house. From where he was hiding, PW2 claimed to have seen a group of people armed with machetes, iron bars, clubs, and pestle surrounding his thatched house. They set it on fire. They then broke into his other house roofed with iron sheets where they took out his belongings. He identified Edwin Simba, Odeni Msongela, Wenceslaus Michael, Sabas, Michael Sham Katete and Ambokile Gambi. It was his evidence that he was able to see the type of weapons some of them were holding. He said Edwin Simba had a panga, Oden had an iron bar, Sabas had a club, Wenceslaus had an axe and Michael had an iron bar. It was his evidence that the light from the burning houses enabled him to identify the appellants.

He also said he overheard Edwin Simba saying "let us kill Kawawa also". Upon hearing that, PW2 decided to go and awaken Kawawa but he was too late. The group was already there and the house was burning. He had to remain a bit far though he over-heard a command saying sit down but he did not see who was being commanded. Later he heard them saying he has run away. He saw the appellants chasing the deceased, got hold of him, and Edwin cut him with panga. PW2 further said he heard the man complaining "Edwin you have decided to kill me". In his cross examination, he explained that he was about five paces away from his house and that the people took almost 20 to 30 minutes on his house. He claimed in his re-examination that about five houses were put on fire.

Winfrida Jackson PW3, the wife of the deceased narrated that on the fateful night, she was at home with the deceased. She heard a knock on the door. The deceased wanted to go and see what was happening but suddenly he was ambushed with a group of people. The wick lamp that was in the sitting room, helped her to identify three appellants who were familiar to her. She named the identified persons as Kafwimbi (a listener), Edwin whom she said was the 5<sup>th</sup> accused person, and Sabiti was, according to her, the 3<sup>rd</sup> accused. While inside the house, she observed the appellants dragging the deceased by his shirt outside the house whereas she was beaten by

Simfukwe and Oden then chased out the house. Thus, she went to hide at Mwazembe's farm that was closer to the scene. She said she saw the deceased trying to escape but the group got hold of him, Edwin cut the deceased with panga on his head and then they burnt his body. PW3 claimed to have identified other appellants from the light of the burning house started by Katua but she did not name the other people.

Venance Manyema PW5, on his part, said on 13<sup>th</sup> May, 2012 two major incidents occurred at their village. The first was a football match to which he was a Secretary to Lusaka Football Club thus attended the match. And secondly, at night at about 9.00 pm to 10.00 pm he received a warning call from unknown person that there is a group of people coming to kill him on allegation of being a witch. He was horrified and ran for a distance of about 12 to 13 paces to hide at the neighbouring house in order to see as to what was going to happen. He said he saw Edwin Simba setting fire on his house and it was Edwin Simba who ordered the group to destroy houses. Due to the light from the fire, he identified some of the members in the group because they lived in the same village. He mentioned Wenceslaus Kakwale, Oden Msongela, Philbert Majaliwa, Sabas and Michael Simfukwe. He also alleged to have seen Edwin Simba holding a panga and a piece of wood with

fire while others held clubs and axes. It was his account that the light from the burning house went as far as 30 metres.

PW5 further said he saw the group shifting to Mr Oden Mlyate and he secretly followed them in order to identify them. They broke and set the house on fire. Thereafter, they went to the home of Michael Hussein and he also followed them secretly, they broke the house, dragged the deceased outside and set the house on fire. They beat him. The deceased tried to escape but the group apprehended him near Mwazembe's farm and continued beating him. Finally, Edwin Simba cut his head with panga. Because of the fearful incident, PW5 ran from the scene. He went to Sumbawanga where he arrived at around 2.00pm and reported the matter to the police, OCD.

PW4, F. 1854 D/Sgt Alfred was an investigating officer. He said on 14<sup>th</sup> May, 2012 in the morning he went with OC-CID to the scene of the crime. He drew the sketch map (exhibit P2). And on 15<sup>th</sup> May, 2012 he interrogated many people and arrested some suspects including Oden Songela and his friends but some of them ran away and on 20<sup>th</sup> May, 2012 he arrested Edwin Simba and his friends.

In their defence, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> appellants raised a defence of alibi. On record, the notice of the defence of alibi was issued by



the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> appellants at the preliminary hearing conducted on 5<sup>th</sup> May, 2014. The 3<sup>rd</sup> appellant said he was at Tunduma where he went to sell beans, the 4<sup>th</sup> appellant was at Kilyamatundu cattle market, the 5<sup>th</sup> appellant was at his place of abode in Kaoze village, and the 6<sup>th</sup> appellant was at Kaoze Rukwa where he went to do casual labour of harvesting rice.

At the end of the trial, the trial judge accepted the evidence of PW1, PW2, PW3 and PW5 to be true and as earlier stated, convicted all the appellants as charged. He did so after finding PW1, PW2, PW3 and PW5 to be credible and reliable witnesses. On the issue of *alibis* raised by the appellants, the learned trial judge ruled it out and branded that defence as “fallacies of the accused persons”. In the upshot and, as we have already indicated, the appellants were found guilty, convicted and sentenced to suffer death.

At the hearing of the appeal, Mr. Mkumbe adopted both memoranda of appeals filed initially by all appellants on 31<sup>st</sup> January, 2018 and the one filed by the 6<sup>th</sup> appellant on 25<sup>th</sup> April, 2019 that contained fourteen grounds together with the written submissions. In expounding his written submissions, he opted to narrow the grounds of appeal into two issues, namely *alibi* and identification.

For the defence of *alibis*, he faulted the trial judge for placing a burden of proof on the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> appellants and for outrightly dismissing the one raised by 2<sup>nd</sup> appellant. Mr. Mkumbe submitted that the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> appellants issued notice of their defence and each of them explained to the trial court their whereabouts on the date the alleged murder had taken place. He further said each appellant supported their defence by documentary exhibits that were admitted as exhibits D2 and D3. Mr. Mkumbe submitted since the appellants had properly raised their defence of alibi and had established their whereabouts the trial court erred when it held that the appellants ought to have brought the authors of the documents in order to establish their case. In doing so, Mr. Mkumbe argued, the trial court shifted the burden of proof to the appellants whereas it was the duty of the prosecution to prove its case beyond reasonable doubt.

Moreover, he contended that the trial judge acted contrary to the clear provision of section 194 (6) of the CPA that required him to consider the defence of alibi of the 2<sup>nd</sup> appellant even though he did not issue notice as required by section 194 (4) of the CPA but instead, the trial judge rejected it out-right. To support his submission, Mr. Mkumbe cited the cases of **Ally Salehe Mrutu v Republic** [1980] T.L.R and **Marwa Wangiti Mwita and Another v Republic**, [2002] TLR 40.

For the identification, Mr. Mkumbe contended that the appellants were not properly identified by the four prosecution witnesses as the witnesses failed to give any description of the appellants rather they gave a general account by naming them without further description in terms of their physique or attire. He pointed out that PW3 who alleged to have identified the appellants failed to name the appellants before the trial court and instead she mentioned names of the people who were not before the trial court and mismatched the names of the appellants. Mr. Mkumbe also wondered why the witnesses failed to name the person who started the fire if they truly saw the appellants burning the houses.

Mr. Mkumbe discredited the four identifying witnesses by trying to show apparent contradictions in their evidences. He said the distance explained by PW2, PW3, and PW5 that they managed to see the appellants from a distance between 8 to 10 metres from where they were hiding that is, at Mwazembe's farm to the burnt houses is contrary to what is indicated in Exhibit P2, the sketch map. Exhibit P2 shows the distance is 300 metres and not 8 or 10 meters. Further, PW1 alleged to have taken refuge at banana plantation but the sketch map, exhibit P2 shows there was a maize plantation and not banana plantation. PW2 said he heard Edwin Simba saying "let us kill Kawawa also" but the deceased name is not Kawawa and

we are not told whether there was another person killed in the name of Kawawa. Based on his submission, he urged the Court to allow the appeal.

On his part, Mr. Iboru supported the appeal. He concurred with Mr. Mkumbe that there was no proper identification of the appellants. He said PW1, PW2, PW3 and PW5 did not correctly identify the appellants. He elaborated that PW1 and PW2 alleged that they went to the neighbouring house which was not enough. He argued, the witnesses ought to have explained whether they were inside or outside the house for the trial court to be satisfied with the position they were. The intensity of the light was not explained by PW1 apart from alleging that the light came from the burning fires but there was no explanation of the burnt items since there is a possibility that they might have emitted dim light. He joined hands with Mr. Mkumbe that PW1 is not a reliable witness as the alleged banana plantation is not shown in the sketch map. The sketch map has maize plantation which PW4 said its crop had been harvested. He also submitted that the intensity of the wick lamp that was inside the room which helped PW3 to identify the appellant was not explained by PW3.

On the other hand, Mr. Iboru submitted that though PW5 said he saw Edwin Simba and travelled to Sumbwanga to report to the police but the record shows, PW4 interrogated many people on 15/5/2012 and arrested

many including Oden Songela and his friends. In that respect, Mr. Iboru argued that the witnesses did not properly identify the appellants that is why there were random arrests as the conditions for proper identification were not explained by the witnesses thus their respective identification cannot be relied upon. In this submission, he relied on the cases of **Frank Joseph @ Sengerema v Republic**, Criminal Appeal No. 378 of 2015, CAT (unreported) and **Waziri Amani v Republic** [1980] T.L.R. 250.

Ms. Mwambeza added that PW1, PW2, PW3 and PW5 belatedly recorded their statement at the police and there is no explanation why there was a delay in doing so. She pointed out that PW1 and PW5 recorded their statements on 20/5/2012; PW2 on 24/5/2012 and PW3 on 26/5/2012 while the incident took place on 13/5/2012. There was a lapse of almost one week and there is no explanation for the delay. She contended, the only inference to be drawn is that there was no proper identification of the persons who murdered the deceased as it is supported by the evidence of the investigator, PW4 who said he had to interrogate many people. To cement her argument she relied to the cases of **Frank Christopher @ Malya v. Republic**, Criminal Appeal No. 182 of 2107 (unreported) and **Jaribu Abdallah v. Republic** [2003] TLR 271.

Ms. Maguta addressed the Court on the inconsistency of the prosecution witnesses where PW1 alleged to have gone to his father's house to hide but PW3 never mentioned PW1 in her evidence as logically, if PW1 had truly gone there then PW3 would have mentioned him. Ms. Maguta acknowledged that the trial court at page 150 of the record considered the issue of inconsistency but it was ruled out by branding it "minor inconsistency" while the inconsistency goes to the root of the case. She referred the case of **Shukuru Tungu v. Republic**, Criminal Appeal No. 243 of 2015 (unreported) and **Michael Haishi v. Republic** [1992] TLR 92.

As regards to the defence of *alibis*, Mr. Iboru conceded that the trial court erred in law by shifting the burden of proof and by rejecting the defence of the 2<sup>nd</sup> appellant while he was supposed to consider it though he may not have accorded it any weight.

Having heard the submission and considered the grounds, we wish to adopt the approach taken by the learned State Attorney, by starting with the issue of identification. In the present appeal, the incident of murder took place at night, at around 09.30 pm. PW1, PW2, PW3 and PW5 said the deceased was killed by a group of people, more than fifty. These people were looking for witches to kill thus they were armed with various weapons including machete, panga, axes, and pestle. They destroyed houses and

burnt some household items. They set on fire the houses of the deceased, PW2 and PW5. Appellants are said to be identified by PW1, PW2, PW3 and PW5 from the group that killed the deceased. The ensuing question is whether under the prevailing conditions and circumstances at the scene of crime there was an ideal condition for an unmistakable identity?

Indeed, the evidence of identification by recognition has been held by courts to be more reliable than an identification of a stranger. However, caution is made that even when a witness is purporting to have recognized someone he/she knew before, mistakes cannot be ruled out. (See **Issa s/o Ngara @ Shuka Vs Republic**, Criminal Appeal No 37 of 2005; **Magwisha Mzee Shija Paulo Vs Republic**, Criminal Appeal No. 465 and 467 of 2007, (both unreported)).

In the case of **Dadu Sumano @ Kilagela v. Republic**, Criminal Appeal No. 222 of 2013 (unreported) this Court laid down several factors to be considered in order to guard against the possibility of mistaken identity. We said:

*"The Court has prescribed several factors to be considered in deciding whether a witness has identified the suspect in question. The most commonly fronted are: How long did the witness have the accused under observation? At what*

*distance? What was the source and intensity of the light if it was at night? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally had he any special reason for remembering the accused? What interval has lapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses, when first seen by them and his actual appearance? Did the witness name or describe the accused to the next person he saw? Did that/those other person/s give evidence to confirm it."*

Counsels are in agreement that none of the four identifying prosecution witnesses made an elaboration on how they managed to identify the appellants apart from providing names. They did not give details on the appellants' body physique, size, attire, or any peculiar body features that enabled them to identify the appellants from the group of more than fifty people, the group that terrorised the villagers that they were looking for witches to kill. The mentioning of name is not the determining factor for proper identification. This Court has held that a credible identifying witness would be expected to give description of the suspect in the relation to



physique, attire, size etc. (See the case of **Mussa Hassan Barie and Another v. Republic**, Criminal Appeal No. 292 of 2011 (unreported)).

Since the incident took place at night, it was expected for the identifying witnesses to disclose the source and intensity of the light. In the present appeal, each of the identifying witnesses disclosed the source of light however they failed to explain the intensity of the light. PW1 disclosed that he was aided by the light coming from the burnt items taken from his house but did not specify the burnt items for the Court to be satisfied on whether the intensity of the light illuminated therefrom was enough to rule out the mistaken identity. Equally, PW5 said he was aided by the fire coming from the burnt houses but did not disclose the intensity of the light. The same applies to PW3 who claimed to have been aided by the light illuminated from the wick lamp that was inside the room.

One would have expected the witnesses to disclose the intensity or otherwise of the light in issue but the witnesses were silent. It was important for the witnesses to say whether the light was bright enough to allow the correct identification of the appellants. This point was amplified in the case of **Magwisha Mzee and Another v. Republic**, Criminal Appeals Nos. 465 and 465 of 2007 (unreported) thus:

*"This Court has consistently held that when it comes to the issue of light, clear evidence must be given by the prosecution to establish beyond reasonable doubt that the light relied on by the witnesses was reasonably bright to enable the identifying witnesses to see and positively identify the accused person. Bare assertions that "there was light would not suffice."*

Moreover, Mr. Iboru submitted and we agree with him that PW1 and PW2 said they hid at their neighbours' houses but they failed to state their exact position whether they were inside or outside the house for the Court to be satisfied that there was nothing obstructing their line of vision. They should have given clear evidence which leaves no doubt that their identification was correct and reliable especially when they were in unfavourable conditions like in the matter at hand, fearful gang invaded the village armed with dangerous weapons.

In similar vein, there is an issue of credibility of the prosecutions' witnesses in identifying the appellants. PW1 and PW2 described the distance between them and the point where the deceased was killed. PW1 said he was hiding in the banana plantation, about 10 meters away from the house of the deceased. The statement of PW1 does not tally with exhibit P3, the sketch map and the testimony of PW4. The sketch map shows that there

was a maize plantation and not banana plantation which were already harvested as per the evidence of PW4. With respect, it is inconceivable for one to hide in the harvested plantation. Also the distance shown in the sketch map between the maize plantation and the houses is 300 meters and not 10 meters. Therefore, PW1 was not a credible witness. The same applies to PW2 who alleged he was at a distance of 5 paces away from his house.

If PW1, PW2, PW3 and PW5 had identified the appellants and named them to the police, why did PW4 interrogate many people and not just the appellants? This means that the appellants were not named at the earliest opportunity. It is now settled that the ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry. (See **Marwa Wangiti Mwita** (supra)).

We now turn to the issue relating to the defence of alibi. As rightly, pointed out by Mr. Iboru, the provision of section 194 (4), (5), and (6) of the CPA provides guidance on the defence of *alibi*. They read as follows:

*"(4)-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.*

*(5)-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.*

*(6)- 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.”*

It is clear from sub-section (4) of that section that a person intending to rely on the defence of alibi is required to furnish a notice thereof before the hearing of the case. But if he fails to furnish the notice under subsection (4) then he is required under sub-section (5) to furnish the prosecution with particulars of alibi at any stage before the prosecution closes its case. Further where no notice is given but the accused raised it in his defence, the trial court is required to consider the defence of *alibi*, though it may not accord it any weight. (See the cases of **Charles Samson v. Republic** [1990] T.L.R. 39 and **Marwa Wangiti Mwita and Another v. Republic** (supra) and **Leonard Mwanashoka v. Republic**, Criminal Appeal No. 226 of 2014, CAT (unreported)).

In **Leonard Mwanashoka v. Republic** (supra) the Court restated the principle that the trial courts ought to have considered the defences of

*alibi*, but had the discretion, on the basis of the advanced explanations, to accord weight or disregard the same.

In this appeal, on 5<sup>th</sup> May, 2014, during the preliminary hearing, the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> appellants had through their advocate Mr. Budodi tendered a notice of the defence of alibi under section 194 (4) of the CPA. This piece of evidence appears at page 42 of the record of appeal. Consistent with the notice, they stated in their defence that they were not at the scene of the crime. The 3<sup>rd</sup> appellant was at Tunduma from 11<sup>th</sup> May, 2012 to 15<sup>th</sup> May, 2012 to sell beans. His two bus tickets, for Mbeya express and Sumry were admitted as exhibits D2 without any objection from the respondent. The 4<sup>th</sup> appellant was at Kilyamatundu cattle market from 12<sup>th</sup> May, 2012 to 17<sup>th</sup> May, 2012. Permits issued by the local authority authorizing the 4<sup>th</sup> appellant to transport his two cows and a market receipt were collectively admitted as exhibit D2 without any objection from the respondent. The 5<sup>th</sup> appellant was at Kaoze village in Kaoze Ward within Kipeta Division in Sumbawanga his place of abode but on 20<sup>th</sup> June, 2012 he went to Lusaka to purchase maize but on 27<sup>th</sup> June, 2012 he was arrested for the murder of the deceased. His introductory letter issued by his village chairman was admitted without any objection as exhibit D3. The 6<sup>th</sup> appellant was also at Kaoze village from 25<sup>th</sup> April, 2012 to 10<sup>th</sup> June, 2012

to do casual labour of harvesting rice. Thus, the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> appellants complied with the provisions of section 194 of the CPA. The prosecution made no attempts to disprove it.

Unfortunately, the trial judge after considering their defence of alibi rejected it on the reason that the appellants failed to bring witnesses to support their case and labelled their defence as “fallacies of their own”. It was with respect wrong for the High Court to shift the burden of proof to the appellants. The law is very clear that where an accused person puts forward a defence of alibi, he does not thereby assume the burden of proving such alibi. It is sufficient if such alibi introduces reasonable doubt in the prosecution's case. The appellants having properly raised the defence and having established their whereabouts, had no further duty to prove the truthfulness of their alibi. The burden was on the prosecution to disprove it. (See the cases of **Lusanya Siaten v. Republic**, [1988] T.L.R. 275 and **Chacha Pesa Mwikwabe v. Republic**, Criminal Appeal No. 254 of 2010 CAT (unreported)).

Even for the case of the 2<sup>nd</sup> appellant who raised his defence without issuance of prior notice, the trial judge was supposed not to reject it outrightly even though he could, at the end, have accorded it no weight. (See the case of **Charles Samson v. Republic** (supra)).

With what we have demonstrated above, we are satisfied that the appeal has merit. We allow the appeal, quash the conviction, set aside the sentence and order for the immediate release of the appellants from prison unless they are held for other lawful purpose.

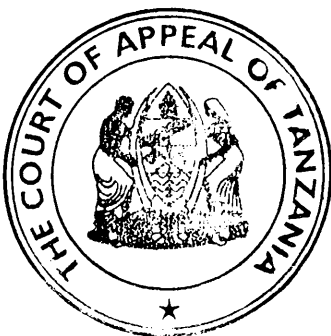
**DATED** at **MBEYA** this 27<sup>th</sup> day of August, 2019

S. E. A. MUGASHA  
**JUSTICE OF APPEAL**

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

B. M. A. SEHEL  
**JUSTICE OF APPEAL**

The Judgment delivered this 28<sup>th</sup> day of August, 2019 in the presence of Ms. Safi Kashindi Amani, learned State Attorney for the respondent Republic and Mr. Gerald Msegeya for the appellants is hereby certified as a true copy of the original.



  
B. A. MPEPO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**