IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., KWARIKO, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 367 OF 2018

RICHARD OTIENO @ GULLO .....APPELLANT

VERSUS

THE PUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam District Registry)

(Mlyambina, J.)

dated the 27th day of September, 2018

in

(DC) CRIMINAL APPEAL No. 159 of 2018

JUDGMENT OF THE COURT

15th March & 14th April, 2021

KWARIKO, J.A.:

Richard Otieno @ Gullo, the appellant and one Omary Mohamed @ Saleh who was the second accused person at the trial but not a party to this appeal were arraigned before the Resident Magistrate's Court of Dar es Salaam at Kisutu. The two were charged with the offence of Armed Robbery contrary to section 287 A of the Penal Code [CAP 16 R.E. 2002 as amended by Act No. 3 of 2011 now CAP 16 R.E. 2019] (to be referred as the Penal Code). The particulars of the offence were that on 27th day of July, 2014 at Stanbic Bank Kariakoo Branch within Ilala District in Dar es Salaam Region, the two stole cash money TZS. 65,000,000:00,

the property of Stanbic Bank Tanzania Limited (the bank) and immediately before and after such stealing, they threatened one Paskas Marcel and Godknows Alininkumbu with a pistol in order to obtain and retain the said property.

The two denied the charge but at the end of the trial, the second accused was acquitted while the appellant was convicted and sentenced to thirty years imprisonment with corporal punishment of twelve strokes of the cane.

Aggrieved by that decision, the appellant unsuccessfully appealed before the High Court of Tanzania at Dar es Salaam. Undaunted, the appellant is before this court on a second appeal.

We shall begin with the facts of the case which led to this appeal. During the trial, the prosecution brought a total of eleven witnesses to prove the charge while the defence had two witnesses only. The prosecution evidence revealed the following. On 27th July, 2014, Moses Patrick Emanjuma (PW1) who was a security guard at the Bank called on duty at 6:00 am. Whilst on duty, at about 2:00 pm a car make Noah arrived at the bank area and one person of Indian origin alighted carrying two bags. At the bank's door step, that man asked for help

from PW1 to carry the bags inside to the counter. PW1 lent a hand and before he reached the bank teller a person appeared from behind and stuck a pistol at his neck. However, PW1 pushed the pistol causing it to drop down and he blew a whistle to call for help.

Meanwhile, a number of people followed inside and threatening bank employees including a bank teller Godknows Simikanga (PW2), Assistant Marketing Officer Francis Fundikira (PW3), another bank teller, Paskas Marcel (PW4) and Assistant Bank Manager, Eva Kombe (PW9). These employees complied to the order given by the bandits to lie down. While they were lying down, bandits took money and ran away using the same Noah car. The incident was reported to the Bank's headquarters and to the police where PW9 was ordered to inspect the robbery. After making calculations PW9 discovered that a total of TZS. 65,000,000:00 the property of the bank, had been stolen.

In the course of investigation, the appellant was arrested and an identification parade (the parade) was prepared and conducted by Assistant Inspector Raphael (PW5). In that parade, PW1, PW2, PW3 and PW4 allegedly identified the appellant as one of the bandits who invaded

the bank on 21st November, 2014. At the trial the parade register was admitted as exhibit P1.

Furthermore, since the bank had installed a CCTV Camera, the pictures of the robbery incident were recorded, and PW8 the bank's security analyst handed over the compact discs (CDs) to the police officers who visited the scene of crime on the material day.

Moreover, ASP Aristides (PW11) from the Forensic Bureau Department interpreted the CDs (exhibit P2) from the CCTV Camera. In his evidence, while playing the CDs, he identified the appellant as one of the bandits who invaded and robbed the bank by the appearance of his head, hair and the walking style as he was made to walk in Court. Among the fifteen clips, two of them failed to play in Court.

In his defence, the appellant relied on the defence of *alibi* about which he had notified the court before the commencement of the hearing of the case. He said he was in Nairobi Kenya on the material day, then proceeded to discredit the persecution evidence. For instance, he wondered why the identifying witnesses did not mention any of his birth marks on his mouth and right eye if at all they identified him at the scene of crime.

Moreover, he highlighted the contradictions between the witnesses and the CCTV Video such that, while the witnesses said the security guard struggled with the bandit over the pistol, the video did not show that scenario. Additionally, he said the CCTV Video was not clear to enable a clear identification and that the identification parade was improperly conducted.

At the close of the evidence from both sides, counsel for both parties were allowed to file final written submissions for and against the case.

In its judgment, the trial court found that robbery was committed at the bank and TZS. 65,000,000:00 was stolen from therein. Further, that court was satisfied that the appellant was sufficiently identified by PW1, PW2, PW3 and PW4 as one of the bandits at the scene and at the parade. The court reasoned further that, when the CCTV footage was displayed in court, the appellant was clearly seen by the court and spectators as one of the bandits in the bank. In the end the appellant was found guilty, convicted and sentenced as such.

As we said earlier, the appellant's appeal before the High Court was not successful. The Court found that the appellant was sufficiently identified by PW1, PW2, PW3 and PW4 as conditions for visual identification were favourable for proper identification. That, the identification through CCTV footage was clear and there were no any inconsistencies among the prosecution witnesses.

Before us, the appellant lodged an eleven-ground memorandum of appeal on 21st October, 2019 and a supplementary memorandum of appeal containing five grounds on 12th August, 2020. His counsel Mr. Nehemia Nkoko, learned advocate, lodged a six-ground supplementary memorandum of appeal on 4th November, 2019. We have consolidated the three memoranda of appeal and found the same raising the following paraphrased seven grounds of appeal:

(1) *That, the first appellate court erred in law and fact by upholding the conviction and sentence whilst the essential ingredients necessary to constitute the offence of armed robbery were not proved.*

(2) *That, the first appellate court erred in law and fact when it dismissed the appeal relying on improper evidence of identification.*

(3) *That, the first appellate court erred by ignoring the appellant's defence of alibi without assigning any reason.*

(4) *That, the first appellate court erred in law and in fact by shifting the burden of proof from the prosecution to the appellant.*

(5) *That, the first appellate court failed to hold that the trial court did not comply with section 210 (3) of the Criminal Procedure Act [CAP 20 R.E. 2002] in respect of PW2, PW3, PW4, PW5 and PW6.*

(6) *That, the chain of custody of exhibit P2 was not established.*

(7) *That, the first appellate Court erred in law and fact by dismissing the appeal without considering that the case was not proved beyond reasonable doubt as the trial Court failed to analyse the evidence brought before it.*

In terms of Rule 74 (1) of the Tanzania Court of Appeal Rules on 14th September, 2020 the appellant filed a written statement of his arguments in support of the grounds of appeal.

At the hearing of the appeal, the appellant was linked to the Court through Video Conferencing facility from Ukonga Central Prison. He was

represented by Mr. Nkoko whilst Mr. Simon Wankyo, learned Senior State Attorney appeared for the respondent Republic.

At the outset Mr. Nkoko abandoned the supplementary memorandum of appeal which he filed on 11th November, 2014 and argued the grounds of appeal which were filed by the appellant. He adopted the appellant's written arguments and made some clarification in relation to the grounds of appeal. The learned counsel also abandoned the sixth ground of appeal because it was not raised in the High Court. It is worth noting that the submissions made by the learned counsel essentially reiterated the appellant's written arguments.

In relation to the first ground of appeal, it was argued that in order to establish the offence of armed robbery there should be proof of threats by any dangerous or offensive weapon or instrument directed to a person and theft of property from its owner. That in the case at hand while the evidence shows that TZS. 65,000,000:00 belonging to the bank was stolen there is no proof of the existence of such amount of money prior to the alleged robbery.

The appellant argued further that PW9 who purported to prove theft of the said amount of money did not tender any documentary

evidence or computer print out to prove existence of that money. He added that, contrary to PW9, PW10's evidence was that the said amount of money belonged to the alleged Indian who did not testify. As to who the said threats were directed, the appellant argued that while the charge indicated that one Godknows Alininkumbu was threatened in order for the bandits to steal the money, this person did not testify. Instead, it was one Godknows Simkanga who testified that he was threatened by the thugs before they stole the money. To support the foregoing contentions, the appellant referred to the Court's decisions in **Mshewa Daud v. R**, Criminal Appeal No. 50 of 2018 and **Filbert Alphonce Mchalo v.R**, Criminal Appeal No. 528 of 2016 (both unreported).

In relation to the evidence of identification against the appellant which is the basis of the complaint in the second ground, the appellant has three major complaints in respect of his identification. Firstly, he submitted that PW1, PW2, PW3 and PW4 who said they were allegedly ordered by the thugs to lie down and in a state of shock could not have properly concentrated and be able to identify any of the thugs. Further, he argued that these witnesses differed in their description of the bandit whom they referred to as the appellant. This is so because, while PW1

and PW2 said he was black and tall, PW3 and PW4 said he was black and short. The appellant argued that these witnesses did not state the duration the incident took place and the distance between them and the suspect. To support the foregoing contention, the appellant cited the cases of **Waziri Amani v. R** [1980] T.L.R 250 and **Bushiri Amiri v. R** [1992] T.L.R 65.

Another complaint is in relation to the identification parade. It was argued by the appellant that the four identifying witnesses did not give prior description of the suspect before they were called upon to identify him at the parade which would have helped PW5 to compose the parade. To buttress this contention, the appellant cited the Court's earlier decision in the case of **Yosiala Nicholaus Marwa & Two Others v. R,** Criminal Appeal No. 193 of 2016 (unreported).

Coupled with the foregoing, it was argued that the parade register (exhibit P1) was not read over after admission thus deserving to be expunged from the record consistent with the decision in the case of **Robinson Mwanjisi & Three Others v. R** [2003] T.L.R 218.

Further, the appellant argued that he was not given his legal rights during the parade as per Police General Order No. 232. That, he was

not informed about his right to have in attendance, his solicitor or friend and was not placed between persons of similar descriptions. Additionally, the parade master did not explain the purpose of the parade, did not ask the witnesses to explain how they identified the suspect and the place where the parade was conducted was supposed to be away from the witnesses who had already identified the suspect as explained by PW6. It was also argued that there was delay to conduct the parade. This is because while the appellant was arrested on 8th November, 2014 the parade was conducted on 21st November, 2014 without giving any explanation for the delay. The foregoing contention was buttressed by the decision of **Mohammed Saleh Nyauba and Two Others v. R,** Criminal Appeal No. 128 of 2006 (unreported).

Another aspect of the evidence of identification was the CCTV footage contained in exhibit P2. The appellant argued that this piece of evidence was not reliable as reflected at page 95 of the record of appeal where PW11 said the pictures were not clear. Further, the alleged description in the CCTV footage differed with the one given by PW1, PW2, PW3 and PW4.

In the third ground of appeal, the appellant is complaining about his defence of *alibi*. He argued that at the trial, he informed the court that his passport was confiscated by the police upon his arrest but the trial Magistrate shifted the burden to him instead of the prosecution to verify the defence. In support of this argument, the appellant cited to us the case of **Shafii Abdallahaman Mbonja v. R**, Criminal Appeal No. 104 of 2017 (unreported). He thus contended that, since he had informed the trial court that his passport was in the hands of the police, it was the duty of the prosecution to find it and verify the information.

The appellant complained in the fourth ground of appeal that the High Court shifted the burden of proof to him contrary to the law. This is in relation to the CCTV footage where the learned Judge said had the appellant been dissatisfied with the explanation given by PW11, he was at liberty to bring his personal expert to analyse it. The appellant fortified the foregoing contention with the decision in the case of **Mohamed Said Matula v. R** [1995] T.L.R 3.

The fifth ground of appeal relates to non-compliance by the trial court with section 210 (3) of the Criminal Procedure Act [CAP 20 R.E. 2019] (the CPA). The appellant submitted that the trial Magistrate did

not inform the witnesses, namely; PW1, PW2, PW3, PW4, PW5 and PW6 about their right to have their evidence read over, which omission prejudiced the appellant's case. In support of this contention reference was made to the case of **Mussa Abdallah Mwiba and Two Others v. R**, Criminal Appeal No. 200 of 2016 (unreported). The appellant urged us to expunge the evidence of those witnesses from the record.

It was argued in the seventh ground of appeal that for the foregoing arguments, it is clear that the prosecution case was not proved beyond reasonable doubt. The learned counsel implored us to allow the appeal and order release of the appellant from prison.

In his reply, Mr. Wankyo made his stance clear that he was not supporting the appeal. He argued in respect of the first ground that one Godknows Alininkumbu was threatened by firearm during the robbery where TZS. 65,000,000:00 was stolen. He contended that after the incident, PW9 made calculations and found the said amount of money stolen.

He went on to submit that the said Godknows Alininkumbu is the same as Godknows Simkanga (PW2) who was among the four the

witnesses that identified the appellant at the scene and at the parade. He argued that the parade register also mentioned the name of Godknows Alininkumbu. Mr. Wankyo thus contended that the ingredients of the offence of armed robbery were proved.

As regards the evidence of identification which is the basis of the second ground of appeal, Mr. Wankyo submitted that PW1, PW2, PW3 and PW4 sufficiently identified the appellant at the scene of crime because there was enough light and the witnesses said they identified the appellant through his skin colour and height. He argued that even if the witnesses said they were shocked by the incident, it lasted for a long time though they did not mention the duration. The learned counsel went further to argue that the witnesses marked the description of the bandit that is why they managed to identify him at the parade. The learned counsel fortified his contention with the decision of the Court in **Chacha Jeremiah Murimi & Three Others v. R,** Criminal Appeal No. 551 of 2015 (unreported).

Regarding the parade register, the learned State Attorney submitted that there was no objection to its being tendered. He went further to argue that though the register was not read over after its

admission no injustice was occasioned. However, Mr. Wankyo conceded that PW3 and PW6 said that the parade participants were of different sizes and appearance which signifies that the parade was improperly conducted.

In relation to the CCTV footage, Mr. Wankyo referred to the testimony of PW11 who had initially stated that the footage was clear. This same witness later stated that the footage was faint and explained that condition as being a result of the transferring the pictures from the camera.

In response to the third ground of appeal regarding the appellant's defence of alibi, the learned Senior State Attorney argued that the appellant did not give particulars of the defence thus the courts below were right to accord no weight to it. He referred us to the case of **Shafii Abdallahaman Mbonja** (supra).

Regarding the fourth ground of appeal, the learned Senior State Attorney submitted that the burden of proof was not shifted to the appellant and the High Court analysed the entire evidence before it dismissed the appeal.

As to non-compliance with section 210 (3) of the CPA, Mr. Wankyo argued that no failure of justice was occasioned and the anomaly is curable under section 388 of the CPA.

Lastly, he contended in the seventh ground that the prosecution case was proved beyond reasonable doubt against the appellant. He finally urged us to dismiss the appeal for being unmerited.

In his rejoinder, Mr. Nkoko argued that since PW2 said he used electricity light to identify the thugs it signifies that there was no sufficient light at the scene for proper identification. He submitted further that the learned Senior State Attorney did not address contradictions between PW1, PW2, PW3 and PW4 in respect of the appearance of the appellant. Additionally, he submitted that the omission to read exhibit P2 caused injustice to the appellant.

In respect to section 210 (3) of the CPA, the learned counsel argued that the omission is not curable. Lastly, he submitted that Godknows Alininkumbu and Godknows Simkanga are two different persons.

We have considered the grounds of appeal and the submissions of the counsel for the parties. The main issue to decide is whether the appeal has merit. However, we would like to preface our deliberation by acknowledging the settled law that, unless there has been a misdirection or non-direction of the evidence occasioning a miscarriage of justice, the second appellate court as in this case, is not entitled to interfere with concurrent findings of the two courts below. See some of the Court's decisions in **Osward Mokiwa @ Sudi v. R,** Criminal Appeal No. 190 of 2014, **Nchangwa Marwa Wambura v. R,** Criminal Appeal No. 44 of 2017 and **The Director of Public Prosecutions v. Simon Mashauri,** Criminal Appeal No. 394 of 2017 (all unreported). We are thus going to determine whether the courts below have correctly appreciated the facts of the case and properly applied the relevant laws.

In relation to the first ground of appeal, the law says that for the offence of theft to be proved there must be established that something has been unlawfully and permanently taken from its owner. Section 258 (1) of the Penal Code which defines theft provides thus:

> *"A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person*

other than the general or special owner thereof anything capable of being stolen, steals that thing."

In the case at hand, while the particulars of the offence allege that TZS. 65,000,000:00 was stolen during the robbery incident, the prosecution evidence is lacking as to whether such amount of money existed. There is the evidence of PW9 who said that after the robbery, she made calculations and found such amount of money missing but there were no any documentary or electronic evidence to prove that assertion. We are of the view that evidence ought to have been led to show that the bank had that amount of money before the robbery and what remained thereafter.

Further, PW2 who said he was the bank teller where the stolen money was taken from did not give evidence to prove if he had such amount of money in his custody that day. On his part, PW10 implied that the stolen money belonged to the person of Indian origin who arrived carrying two bags but he did not testify in court.

Coupled with the foregoing, the offence of armed robbery was not established. This is so because the person upon whom threats were

directed in order to obtain and retain the stolen property was not proved. The particulars of the offence were that, one Godknows Alininkumbu was one of the persons who was threatened by a Pistol but this person did not testify to prove this allegation. Instead, one Godknows Simkanga (PW2) testified to have been the person upon whom the threats were directed before and after the stealing. We are not prepared to go along with Mr. Wankyo that these two names belong to one person without any proof to that effect. We are therefore of the decided view that Godknows Alininkumbu and Godknows Simkanga are two distinct persons and thus there is doubts as to the persons upon whom the threats were directed. Faced with a similar situation in the case of **Mshewa Daud** (supra), the Court stated thus:

> *"And armed robbery is committed when the accused who, at or immediately after the time of stealing, is armed with dangerous or offensive weapon or instrument and uses the same to threaten violence on the person of the complainant or is in company of one or more persons. On that account, where stealing/theft is not proved, like in the present case, the offence of armed robbery cannot stand."*

Applying the above authority, we have found in the case at hand that, although robbery incident may have occurred at the bank, theft was not proved because the owner, and existence of stolen property was not proved. Likewise, the offence of armed robbery was not proved as the person upon whom threats were directed was not ascertained. The first ground of appeal thus is merited. We could have stopped here but we shall proceed to the other grounds of appeal for completion.

The second ground of appeal relates to the issue whether the appellant was identified as one of the bandits at the scene of crime. The evidence to that effect is three folds. Firstly, the prosecution witnesses, PW1, PW2, PW3 and PW4 said they identified the appellant at the scene. It is our considered view that these witnesses could not have positively identified any of the bandits because their evidence shows that they were ordered to lie down soon after the invasion and they were in a state of shock. They also did not mention the duration of the incident and the distance between them and the bandits. These witnesses contradicted each other about the description of the bandit they alleged to be the appellant. This is so because while PW1 and PW2 said he was black and tall, PW3 and PW4 said he was black and short.

From the above analysis, it is our considered view that, although the incident occurred in the day time, other conditions for proper visual identification were not proved. In the case of **Waziri Amani** (supra), the Court stated *inter alia* that evidence of visual identification is of the weakest kind and most unreliable and should not be acted upon unless all possibilities of mistaken identity are eliminated and the evidence is absolutely watertight. The Court mentioned some factors to be considered in respect of the evidence of visual identification as question of duration of incident, distance of observation, time of the day, familiarity and existing impediment to sight.

The second aspect in relation to the evidence of identification is the parade. Since we have found that the witnesses did not identify the appellant at the scene, it goes without saying that they could not have identified him at the identification parade. These witnesses ought to have described the suspect before they were called upon to identify him at the parade. It is clear from the foregoing that they had no proper description of the suspect before the parade. When it was faced with similar situation in **Yosiala Nicholaus Marwa & Two Others** (supra), the Court stated thus:

"Therefore, in the absence of prior description of the 1st and 2nd appellants it is unknown as to how PW7 picked those who composed the purported parade."

Further, the parade register (exhibit P1) was improperly acted upon because it was not read over after admission for the appellant to know its contents. In the case of **Robinson Mwanjisi & Three Others** (supra), the Court stated thus:

"Whenever it is intended to introduce any document in evidence, it should ***first be cleared for admission, and be actually admitted, before it can be read out."*** (Emphasis supplied).

Now, because exhibit P1 was not read over after admission, it was incompetent and wrongly acted upon; it deserves to be expunged as we hereby do. Thus, in the absence of the parade register, there remains the evidence of PW5 who was the parade master. This witness did not comply with all the directions provided for under PGO 232. He did not inform the appellant of his right to have a solicitor or friend in attendance, did not task him to change positions after each identifying witness, the witnesses did not describe the suspect before the onset of the parade and the parade attendees were not of the same appearance

and size as testified by PW6. [See also **Yosiala Nicholaus Marwa & Two Others** (supra)].

The third fold in respect of the evidence of identification is the CCTV footage. Having given due consideration of this piece of evidence, we are in agreement with the appellant that it did not establish the identity of the appellant as the bandit who invaded the bank. This is so because PW11 who interpreted the pictures from the footage at the trial said that the same were not clearly visible. PW11 did not also explain further what he meant when he said he identified the appellant by head and hair. He did not say what the head or hair of the person in the pictures looked like in comparison with the appellant. We are also mindful of the fact that PWI said he struggled with the bandit for the pistol but PW11 did not explain this fact in the CCTV footage.

Apart from the foregoing we wish to say something about the trial magistrate's remarks on the CCTV and what he considered to be additional proof that the person in the footage was the appellant. We find it very inappropriate that the trial magistrate considered such extraneous matters as nods from the audience. The law is clear and settled that court decisions must be based on the evidence presented

before it. In the case of **Athanas Julias v. R,** Criminal Appeal No. 498 of 2015 (unreported) where in its judgment the trial court considered matters which were not testified by the witnesses, the Court stated thus:

> *"The second anomaly noted, is the act of the trial resident magistrate to include in his judgment, facts which are not reflected in the recorded evidence in the proceedings.....we are inclined to join hands with the contention of the learned counsel for both sides that, the irregularity was fatal, and did vitiate the entire proceedings of the trial court."*

Besides, the appellant was denied the right to impeach that piece of evidence.

With the foregoing analysis, we find the second ground of appeal meritorious in that the evidence of visual identification did not establish that the appellant was identified at the scene as one of the bandits who invaded the bank.

The appellant's complaint in the third ground of appeal is that his defence of *alibi* was not considered. In dismissing this defence, the trial court considered the *alibi* not proved because the appellant failed to

ensure that his passport which had been seized by the police, was tendered in court. It is our view that the appellant who had given a notice of *alibi* before the hearing of the case commenced, he had no duty to prove it. Section 194 of the CPA provides thus:

> *"194. (1) – N/A*
>
> *(2) - N/A*
>
> *(3) – N/A*
>
> *(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."*

Our understanding of these provisions of law is firstly that; if the accused intends to rely on the defence of *alibi*, he is required to give a notice to that effect to the court and the prosecution before the commencement of the hearing. The record of appeal in this case shows that, the appellant gave that notice 3/8/2015 before the hearing of the case commenced. The law does not give any prescription of the notice as per section 194 (4) of the CPA. It is therefore clear that the notice was sufficient and it did not need any further proof.

If the notice is given after the commencement of the hearing as per subsection (5) thereof, particulars should be furnished to the prosecution. Lastly, the provision tasks the trial court to consider the defence of *alibi* even if no such notice has been given to the prosecution (subsection 6). The law therefore does not require the accused to prove his defence of *alibi*. In our earlier decision in **Shafii Abdallahaman Mbonja** (supra) we quoted with approval the decision in the Court of Appeal of Kenya in **Jane Wanjiru v. R** [2006] eKLR where it was stated thus:

> *"Once again, the learned Judge clearly appreciated that once the appellant had raised*

the defence of alibi, the evidential burden shifted back to the prosecution to prove and beyond reasonable doubt that the appellant's alibi was false. We would repeat and we shall continue to assert that there is no burden upon the accused person who raises the defence of an alibi to prove the truth of that defence."

For the foregoing authority, we hold that the trial court erred to shift the burden of proof of the *alibi* to the appellant. Since the appellant gave notice of his *alibi*, the burden shifted to the prosecution. This ground has merit.

The appellant complained in the fourth ground of appeal that the first appellate court shifted burden of proof to him. Having considered this complaint, we agree with the appellant that the High Court shifted the burden of proof to him when it considered his dissatisfaction with PW11's evidence in relation to the CCTV footage. The High Court stated at page 198 of the record of appeal that:

"If the appellant was not satisfied with CCTV footage presentation, he was not precluded from seeking for another expert witness on CCTV

issues to contradict the already adduced evidence relating to such technical issues."

It is trite that in every criminal trial, it is the duty of the prosecution to prove the charge beyond reasonable doubt and it never shifts to the defence. It was therefore the duty of the prosecution to prove every aspect of its case beyond doubt and the appellant's defence was only to raise doubt on that evidence. See also the Court's decision in the cases **George Mwanyingili v. R,** Criminal Appeal No. 335 of 2016 and **Mohamed Haji Ali v. R,** Criminal Appeal No. 225 of 2018 (both unreported). This ground too has merit.

The appellant's complaint in respect of the fifth ground of appeal is that the trial court contravened section 210 (3) of the CPA. which says:

"The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence."

It is true that the trial court did not indicate if this provision of the law was complied with by the trial court and in the case of **Mussa Abdallah Mwiba & Two Others** (supra), we said that such an irregularity is fatal. However, upon consideration we have found that such irregularity did not occasion miscarriage of justice. This is because the said witnesses are the ones who would have complained of the irregularity and not the appellant. See for instance, the cases of **Jumanne Shaban Mrondo v. R,** Criminal Appeal No. 282; **Athuman Hassan v. R,** Criminal Appeal No. 84 of 2013 and **Flano Alphonce Masalu & Singu & Four Others v. R,** Criminal Appeal No. 366 of 2018 (all unreported). In the first case we said thus:

> *"The record of proceedings of the trial court shows that there was no compliance with section 210 (3) in the process of recording the evidence* of the witnesses. ***However, we do not see the substance of the appellant's complaint because it was the witnesses who had the right to have the evidence read over to them and make comment on their evidence. We do not even think that the omission occasioned a miscarriage of justice to the appellant."*** [Emphasis supplied].

Thus, because the appellant has not said how the irregularity prejudiced him, the same is curable under section 388 of the CPA. This ground thus fails.

From what we have shown in the preceding grounds of appeal, we find the last ground of appeal meritorious that the prosecution case was not proved beyond reasonable doubt.

Before we conclude, we find it dutifully proper to say a word concerning the trial magistrate's remarks when he sentenced the appellant. The record of appeal reveals the following at page 163:

> *"Tanzania is not "Shamba la Bibi" whereby citizens from other countries can come and do robberies for caring their big families.*
>
> *To give him a lesson the accused Richard Otieno @ Gullo is hereby sentenced to suffer 30 years imprisonment plus 12 strokes of the cane.*
>
> *Six strokes on entry and six on exit so that he may go home and show his wife."*

It is our view that such remarks were unnecessary and clearly outside the purview of the principles of sentencing. Those remarks show

that the trial magistrate was not impartial in his decision. We therefore think, that conduct should be discouraged.

Consequently, we find the appeal meritorious and accordingly allow it. As a result, we order the immediate release of the appellant from prison unless he is otherwise lawfully held.

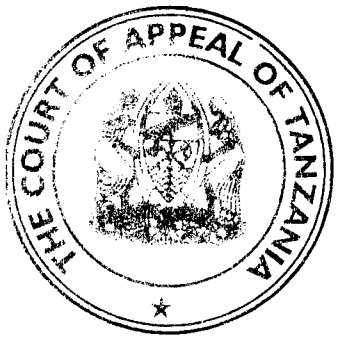
DATED at **DAR-ES-SALAAM** this 9th day of April, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgement delivered this 14th day of April, 2021 in the presence of the appellant in person linked to the court through video conference from Ukonga Prison and Ms. Debora Mushi, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL