IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM.

CRIMINAL APPEAL NO. 170 OF 2004

AMIN MOHAMED ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

Dated of the Order: 14/8/2006

Dated of Judgment 17/8/2006

JUDGMENT

MLAY, J:

The appellant AMIN MOHAMED was jointly charged with 5 others with the offence of Breaking into a building and committing a felony therein, contrary to section 296 (2) of the Penal Code. The particulars of the offence alleged that, the appellant who was the 6th accused, together with the other 5 accused persons, *"jointly and together ..... On 16th day of July 2000, during the night times at the building of 6 AK Patel within Ilala District in Dar es Salaam Region, did break the office of Luft Travellers and Cargo and steal cash USD 100,000 and cash Tshs. 40,000,000/= therein the property of said Luft Travellers and Cargo".*

An alternative 2nd count for an offence under section 383 of the Penal Code was also preferred against the 3rd, 4th and 5th accused but for the purpose of this appeal, the alternative court is not relevant.

The appellant together with the 1st and 2nd accused were convicted of the 1st count and sentenced to three (3) years imprisonment. Being aggrieved by the conviction and sentence, the appellant through the service of Safari Law Chambers, has appealed to this court on the following grounds:

> *"1. THAT the learned Magistrate erred in Law convicting the Appellant in the absence of proof beyond reasonable doubt.*
> *2. That the sentence imposed is excessive in the circumstance.*

At the hearing of this appeal counsels for both sides were allowed to file written submissions on the appeal.

In the written submissions filed on behalf of the appellant by Safari Law Chambers, the 2nd ground of appeal was abandoned. On the remaining ground, the appellant's counsel made three arguments to support it. The first argument is that there was lack of analysis of evidence by the trial magistrate. The counsel quoted from page 18 of the judgment where the trial magistrate stated.

"I am convinced by the evidence of prosecution that ..... 6th accused Amin Mohamed did commit the offence and the prosecution has proved the case beyond reasonable doubt."

The learned counsel submitted that the magistrate has no attempted to demonstrate why and how she was convicted by prosecution that the appellant was guilty of the offence. He argued that the law [Section 312 CP. 20] required that each decision be supported by firm reasons. He submitted that there were clear doubts in the prosecution's case.

The second argument made is that there was a plausible defence of alibi. He referred to page 66 of the proceedings where the appellant had testified that when the offence was committed on 16th July 2000, he was in Moshi. The counsel contended that the prosecution did not challenge this evidence of alibi.

The last argument is based on circumstantial evidence. The Appellants counsel submitted that the criterion for proof of circumstantial evidence was not complied with. He cited the case of SIMON MUSEKE vs. [1958] E.A 715 page 716 to the effect that, in case of circumstantial evidence the court must ensure that such evidence provides irresistible inference on the guilt of the accused. The learned counsel gave two reasons to show that this standard was not reached in the case under consideration. The first reason is

that the appellant was no known to the other accused person and being a Telecommunication Engineer, was of a different professional background from the other accused persons. He contended that those circumstances exonerated the appellant of the offence. He referred to section 122 of the Evidence Act 1967. The second reason given is that the mere fact that the appellant was found in possession of dollars that the appellant had committed the offence with the other accused persons. He submitted that thee trial magistrate erred to say that "possession cases burden of proof shift to the breaking into a building and not of being found in unlawful possession of stolen property. He contended that there are many plausible explanations as to how the appellant came in possession of the burnt dollars. He argued that the appellants evidence that the purchased US dollars 1,000 from proceeds of money paid to the appellant while working at Arusha in one of the many Bureau de change in Arusha, was not challenged by the prosecution. Finally the learned counsel contended that the prosecution failed to reconcile the possession of the dollars with the commission of the offence.

For these reasons the learned counsel submitted that the prosecution had failed to establish their case beyond reasonable doubt and prayed that the appeal be allowed.

On behalf of the Republic/ Respondent, it was submitted that the prosecutions case was proved beyond reasonable doubt. The case of MAGENDO PAUL AND ANOTHER vs. REPUBLIC 1993 TLR 219 [CAT]

was sited for the proposition that, *"If the evidence is so strong against an accused person as to leave only a remote possibility in his favour which can easily be dismissed, the case is proved beyond reasonable doubts."* The learned State Attorney stated that the evidence established that the appellant was arrested at a Bureau de Change changing 200 USD with a firemark and also during search in his house, was found with another USD 100 having the same mark. On the defence of alibi, the learned State Attorney submitted that the appellant did not plead the defence of alibi as required by section 194 of the Criminal Procedure Act, 1985 and also that, he did not offer evidence to support it. He referred to the case of TONGENI NAATA Vs REPBULIC [1999] TLR 54 at page 58 (CAT) where it was stated:

> *"The appellant raised the defence of alibi under section 194 of the Criminal Procedure Act, 1985, he claimed that he had been busy the whole of the fateful day building his Boma at Mtoni and that he never left to anywhere. But the appellant did not bring any evidence to support his claim, the court givens no weight of any kind to the defence".*

The State Attorney submitted further that the appellant was convicted after being connected to the offence after being arrested changing USD 200 with fire mark and also being found with USD 100

at his home with the sane fire mark, recently after the commission of the offence on 16/07/2000, in which the total sum of USD 100,000/= was found in possession of the money 16 days after the offence was committed is recent and the appellant failed to give a reasonable explanation as where he got the total sum of USD 300 with the same fire mark. Reference was made to the case of MWITA WAMBURA vs. REPUBLIC Mwanza Criminal Appeal No. 56 of 1992 (unreported) where it was held inter – alia, that:

> *" ..... the appellant failed to explain to the court how he acquired the possession by an accused person of the fruits off crime recently after it has been committed is presumptive evidence against the accused not only on the charge of theft or receiving with guilty knowledge but of any aggravated crime like murder, when there is reason for concluding that such aggravated and minor were committed in the same transactions."*

The State Attorney submitted that the offence of breaking into a building was committed on 16/07/2000 and in the process of breaking the safe by using fire, the money in the safe was slightly burnt and on 2/8/2000 the appellant was found with money with the same fire – mark. He contended that this evidence is highly connecting the appellant with the offence committed on 16/07/2000.

The case of MSWAHILI M. Vs. REPUBLIC 1977 LRT 25 was cited for the proposition that:

> *"In a case where facts are based solely on Circumstantial evidence corroborating each other a conviction is possible if the circumstantial evidence leads irresistibly to inference of guilt should be incapable of any other reasonable explanation.*

The state Attorney submitted that in this case the evidence on record corroborated each other against the appellant. In a rejoinder the appellants counsel submitted that the appellant gave plausible submitted that the appellants defence of alibi was supported by the evidence of the appellant during trial and that the prosecution did not dare to cross examine the appellant on it. He further argued that the circumstantial evidence did not irresistibly implicate the appellant.

The facts of the case are not in dispute and they can be stated briefly. On the might of 16th July 2006 the building of 6 AK Patel was broken into and a safe in that building containing USD 100,000 and some Tshs. 40,000,000/= was broken into using fire and the money stolen therefrom.

On 2/8/2000 the appellant was arrested in a Bureau de change while trying to change USD 200 and the notes were found to contain

burnt marks. Upon arrest the appellant's house was searched and another USD 100 was found having the same burnt – marks. The appellant together with other persons were charged with breaking into the building and stealing the money therefrom. The prosecution brought three witness one of whom was the owner of the stolen money who testified on the sum of money which was stolen from the safe. The evidence connecting the appellant with the offence was that of the police officer who arrested the appellant and who also searched his house, and found the appellant with the USD 300 bearing burnt marks. In his defence the appellant testified that he had bought USD 1000 at Arusha from a Bureau de change which he did not remember and that he had lost the receipt for the purchase of the USD 1000. The appellant testified that he purchased the dollars from various sum of money paid to him by his employer on divers accessions, as imprests and subsistence allowance while on duty in Arusha. The appellant also alleged that when the offence was committed on 16/7/2006, he was in Moshi.

It was on this evidence that the appellant was convicted of the offence. The main issue is whether the prosecution evidence irresistibly point to the guilt of the appellant.

Having perused the copy of the judgement of the trial court, I agree with the appellant's counsel that the trial magistrate did not analyse the evidence to arrive at the decision that the appellant was guilty of the offence charged. As the learned appellants counsel

pointed out in submissions, after narrating the prosecution's evidence and the appellant's defence, the trial magistrate merely concluded at page 18 of the judgement as follows:-

> *" I am convicted by the evidence of prosecution that 1st accused, Ibrahim Said, 2nd accused Mustaph Hussein Makaono and 6th accused Amini Mohamed (appellant) did commit the offence and the prosecution has prove (sic) the case beyond all reasonable doubt".*

As the trial magistrate did not analyse the evidence as the first appellate court, this court is entitled to look at the evidence and make its own conclusions.

As I have stated earlier, it was not in dispute that the building was broken into on 16/7/200 and a safe in that building was also broken into using fire – material. It was not also in dispute that money including USD 100,000 was stolen from the safe. It was not further in dispute that the appellant was arrested some days after that the breaking in and the stealing, while trying to change USD 200 and that the notes contained burnt – marks. It was not further in dispute that the appellant's house was searched and another USD 100 with the same burnt marks found on the USD note. The appellant offered the defence that he bought USD 1000 while in Arusha but did not remember form which Bureau de change he

purchased the USD and did not have the receipt for the said purchase, which receipt was allegedly lost.

Does the evidence of mere possession of the USD 300 bearing burnt marks prove that the appellant participated in the breaking in and stealing from the building on 16/7/2000? It has been argued on behalf of the republic that being found in possession of the money suspected to have been stolen from the building merely 16 days after the breaking in, is recent enough to invoke the doctrine of recent possession to connect the appellant with the offence. I think considering that USD, foreign currency which cannot be freely used without being converted into the local currency, having possession of that foreign currency which bears burnt marks, within 16 days of the breaking in and stealing, where fire was used to break open the safe, is recent enough to invoke the doctrine of recent possession to connect the appellant with the offence, unless the appellant offered a plausible explanation how the obtained the possession of the money.

The appellant has offered the explanation that he brought USD 1000 in Arusha from proceeds of imprests and subsistence allowance paid to him while on duty in Arusha. He produced vouchers from the payment of sums of money from which he could have purchased such an amount of USD. However, the fact that the USD notes found in his possession had burnt marks like the other currencies found in the possession of some of the other accused persons, where there was evidence that fire was used to break open the safe from which

the money was stolen, in the city of Dar es Salaam, renders the appellants explanation highly improbable that the USD notes found in his possession was purchased in Arusha from proceeds of his imprests and subsistence allowances.

If the trial magistrate had analysed the evidence she would have n doubt reached the same conclusion. It has been argued that it was improbable for the appellant who was a Telecommunication Engineer, a profession different form those of the other accused, to have been involved in the commission of the offence. I do not find any evidence or other basis for this proposition. On the contrary, it can also argued probably with more force that, the breaking of the safe with fire, may have required the skills of an engineer. So the submission that the appellant was of a different profession is of no consequence.

It has been submitted that the appellant put up a defence of alibi which was not challenged by the prosecution. It is clear from the record that the appellant testified that he was in Moshi when the offence was committed. The trial magistrate did not make any reference to this evidence. However the provisions of section 194 of the Criminal Procedure Act 1985 are very clear. Subsection 4 and 5 of that section state:

"(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 is 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 particulars of the alibi at any time before the case for the case for the prosecution is closed."*** *(Emphasis mine)*

The appellant neither gave notice nor furnished the particulars of his alibi to the prosecution. Subsection (6) provides that *"if the accused raised defence raised defence of alibi without having furnished the particulars of the prosecution pursuant to this section the court may in its discretion, accord no weight of any kind to the defence."*

In the present case, the appellant neither gave notice to the prosecution or to the court that he intended to raise the defence. He merely raised the defence after the prosecution had closed its case. Although the trial magistrate did not consider the defence, which she should have, if she had, she was entitled to give it no weight as the law had not been complied with, before the defence was raised. Secondly, the appellant merely alleged that he was in Moshi. He

provided no evidence at all to substantial the alibi that he was in fact in Moshi. In the circumstances I do not find that failure to consider the defence of alibi raised by the appellant caused any injustice.

All considered, the circumstantial evidence that the appellant was found in possession of USD 300 with burnt marks just 16 days form the date the building was broken into and money including USD 100, 00 stolen from the safe, which was also broken into by using fire, irresistibly led to the inference that the appellant look part in the breaking in and stealing of the money. The currency bearing burnt marks makes it highly improbable that the appellant purchased the currency for the unknown Bureau de change in Arusha.

In the final analysis this court finds that the appellant was properly convicted. The appeal is accordingly dismissed.

J. I. Mlay

JUDGE

Delivered in the presence of the appellant and Ms Matiku State Attorney this 17th day August, 2006.

Right of Appeal is explained.

J. I. Mlay

JUDGE

17/08/2006

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