"ORIGINAL"

IN THE HIGH COURT OF TANZANIA
DODOMA DISTRICT REGISTRY
AT DODOMA

CRIMINAL APPELLATE JURISDICTION

DC CRIMINAL APPEAL NO. 07 OF 2020
(Originating from the District Court of DODOMA Criminal Case No. 218 of 2018).

THE DIRECTOR OF PUBLIC PROSECUTION (DPP) ..... APPELLANT

VERSUS

ANJISON BONIPHACE AMOS.....1ST RESPONDENT
JETSON BONIPHACE AMOS.....2ND RESPONDENT

JUDGEMENT

Date of Judgement- 14TH AUGUST, 2020.

Mansoor, J:

The appeal is against the judgement of the District Court in which the respondents herein have been acquitted of the charges of burglary c/s 294 (1) (a) and (2) of the Penal Code, Malicious damage to property c/s

326 (1) of the Penal Code, and theft c/s258 (1) and 265 of the Penal Code, Cap 16 R:E 2002.

On July 17, 2018 Dr. Jane Nyamsenda, a resident of Makulu Area within Dodoma City lodged at the Dodoma police station an information of house-breaking/burglary malicious damage to her car and theft in the car. After investigation, a charge-sheet was submitted by the police against Anji son Boniphace Amos and Jetson Boniphace Amos, the respondents herein. The two were arrested and tried but acquitted by the trial Court on 30th October, 2019, the Director of Public Prosecution was aggrieved with the acquittal, he filed the appeal in the High Court on 15th January 2020; Section 379 (2) of the Criminal Procedure Act, Cap 20 R:E 2002 requires an appeal by the DPP to be filed within 45 days from the date the order of acquittal was passed, this section reads:

> 379.-(1) Subject to subsection (2), no appeal under section 378 shall be entertained unless

the Director of Public Prosecutions or any person acting under his instructions in terms of sections 22 and 23 of the National Prosecutions Service Act–

(a) has given notice of his intention to appeal to the subordinate court within thirty days of the acquittal, finding, sentence or order against which he wishes to appeal, and the notice of appeal shall institute the appeal: and

(b) has lodged his petition of appeal within forty-five days from the date of such acquittal, finding, sentence or order; save that in computing the said period of forty-five days the time requisite for obtaining a copy of the proceedings, judgment or order appealed against or of the record of

proceedings in the case shall be excluded.

(2) The High Court may, for good cause, admit an appeal notwithstanding that the periods of limitation prescribed in this section have elapsed.

On record, there is the Notice of Intention of Appeal which was filed in Court on 12th November 2019, the notice was filed in time, and the appeal was instituted. However, the Petition of Appeal was filed beyond the period of limitation, it was filed on 15th January 2020, beyond the 45 days prescribed under Section 379 (2) of the Criminal Procedure Act, and the appellant, the DPP did not plead the exclusion of the time he has spent in obtaining the copy of proceedings and judgment, thus the court is not even aware as to when the DPP was furnished with the copy of proceedings and judgment to enable the court to exclude in computing the 45 days the time the DPP has

spent for obtaining the copy of proceedings and judgment. The appeal was lodged beyond the 45 days and it is time barred. However, the Court has employed the provisions of Section 379 (3) of the CPA and admitted the appeal notwithstanding the period of limitations which have already lapsed.

Now coming to the merits of the appeal, the Learned Magistrate acquitted the respondents after considering the case on the merits and came to the conclusion that on facts also there was room to doubt the guilt of these respondents on the charges. In this view of the law and facts the learned Magistrate of the Trial Court acquitted these Respondents of the charges framed against them.

The offence under section 294 (1) (a) is for housebreaking and the sentence for this offence is 14 years imprisonment, and the offence in section 294 (2) is burglary since it is committed at night and the

punishments for burglary is 20 years imprisonments. This section 294 reads as under:

294.-(1) Any person who–

(a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit an offence therein; commits an offence of housebreaking and is liable to imprisonment for fourteen years.

(2) If an offence under this section is committed in the night, it is burglary and the offender is liable to imprisonment for twenty years.

A person cannot be charged under section 294 1(a) and 294 (2) at the same time, as subsection (1) creates the offence of housebreaking, and it is different from the offence created in subsection 2 of section 294, which is

burglary. The charge sheet was therefore unclear, and defective. A defective charge sheet denies the right of fair trial to the accused persons, and they did not understand the charge of whether the alleged offence they were charged with was housebreaking or burglary, and they were denied a chance to prepare for a defense. As held in the case of **Mussa Mwaikunda vs. R (2006) TLR** page 387, and also the case of **Isidori Patrice vs. R, Criminal Appeal No. 224 of 2007** Court of Appeal sitting at Arusha, at page 11 of the **Isidori case**, the Justices of the Court of Appeal observed the following:

"It is a mandatory statutory requirement that every charge in a subordinate court shall contain not only a statement of the specific offence with which the accused is charged but such particulars as may be necessary for giving reasonable information as to the nature of the offence charged : See section 132 of the Act. It is now trite law that the particulars of the charge shall disclose the essential elements or ingredients of the offence. This

requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution must prove that the accused committed the actus reus of the offence charged with the necessary mens rea. Accordingly, the, to give the accused a fair trial in enabling him to prepare his defense, must allege the essential facts of the offence and any intent specifically required by law. We take it as settled law also that where the definition of the offence charged specifies factual circumstances without which the offence cannot be committed; they must be included in the particulars of the offence.".

The particulars of the charge in this case contradicted the charge itself as in the particulars the alleged offence is said to have been committed at night hours around 23.00 hours while the appellants were charged with housebreaking an offence which is committed during the day.

The charge of malicious damage to property attracts a sentence of seven years imprisonments, Section 326 (1) of the Penal Code, reads as under:

> 326.-(1) Any person who wilfully and unlawfully destroys or damages any property commits an offence, and except as otherwise provided in this section, is liable to imprisonment for seven years.

And the offence of theft under section 265 of the Act attracts a sentence of seven years, as hereunder:

> 265. Any person who steals anything capable of being stolen commits an offence of theft, and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen, some other punishment is provided, to imprisonment for seven years.

The ingredients of these three charges were not proved on the required standard, hence the respondents were acquitted. The DPP filed the Petition of Appeal raising two grounds of appeal in that:

1. The Trial Magistrate erred in law and fact by acquitting the respondents by relying on the defense of alibi raised during defense case contrary to section 194 of the CPA.

The State Attorney argues that the defense of alibi was an afterthought as the respondents did not give the notice as required under section 194 (4) of the Criminal Procedure Act, and did not furnish the prosecution with the particulars of the alibi before the case for the prosecution was closed c/s 194 (5) of the CPA. To buttress her arguments, the State Attorney referred to the case **of Kubezya John vs Republic, Criminal Appeal No. 488/2015,** CAT, sitting at Tabora, when the

Court quoted with approval the case decided by the Supreme Court of Uganda, the case of **Kibale vs Uganda (1999) 1 EA** at page 148, in which it was held that:

> *"a genuine alibi is of course, expected to be revealed to the police investigating the case or to the prosecution before trial. Only when it is so done can the police or the prosecutions can verify the alibi. An alibi set up for the first time at the trial of the accused is more likely an afterthought than genuine one."*

First as provided in subsections 6 of section 194 of the Criminal Procedure Act, it is within the court discretion to accept the defense of alibi even though the notice under Section 194 (4) was not given or particulars of alibi was not furnished to the prosecution as required under section 194 (5) of the Criminal Procedure Act. The sections read:

194.- (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.

Since section 194 (6) of the CPA gives the discretion to court on whether to accord weight of the defence of alibi even though the accused did not give notice or furnish the particulars of alibi to the prosecution, and in the circumstances of the case before him, he exercised the discretion, and he exercised it justifiably. As submitted by the respondents, the judgement referred by the appellant on the defence of alibi, the case of **Kubezya John v R** (supra), at page 23, the Court noted the provisions of subsection 6 of Section 194 of CPA and said:

"provided that subsection 6 of the provision give the court discretion to accord no weight to such defence if it wishes. It was therefore the duty of

the trial court to see whether or not, in its discretion, it should accord no weight to the defence of alibi by the appellant or not."

I have noted with concern the proceedings in which during the preliminary hearing no memorandum of undisputed facts was recorded, see page 10 and 11 of the proceedings, and the respondents were not given a chance to record the facts which they do not dispute, and again they were not given a chance to know the names and the particulars of the witnesses before trial, as the names and particulars of the prosecution witnesses also were not given during the preliminary hearing, this irregularity amounts to unfair trial. The prosecution at page 12 of the proceedings only informed the court that they intend to bring 8 witnesses during trial, but they did not give the names or particulars of the witnesses during the preliminary hearing as required by the law, in short the appellants although they were acquitted, they were denied a chance of fair

trial. Again, during preliminary hearing, the court did not give a chance to the respondents to mention the names and particulars of their witnesses, and the trial proceeded while the preliminary hearing was not completed. The respondents if given a chance would have furnished the prosecution with the particulars of alibi during the preliminary hearing, but the court did not give them that chance.

The first ground of appeal therefore fails, the court acted within its discretion to accept and accord weight to the defence of alibi raised by the respondents through its witnesses.

Regarding Ground No.2 of the appeal, that the Trial Magistrate erred in law and fact by holding that the prosecution failed to prove the case beyond reasonable doubt.

I have carefully analysed evidence of the prosecution, there were three witness who claimed to have seen the respondents herein breaking the fence, entering the house, and breaking the car windows, and steal some items in the car. The three witnesses PW1, PW2, and PW3 all resides in the same house of the victim and slept in different rooms facing different directions. I have not seen any sketch map of the crime scene which would have enabled the trial Magistrate to ascertain whether these three witnesses are telling the court the truth, as it cannot be possible for the three rooms of the same house to face the same directions, thus making it impossible for the three witnesses to see the appellants stealing or breaking the fence and the windows of the car at the same time while each was in her own room facing probably a different direction. There was no sketch map or evidence of the wall, which was broken by the respondents and so it is not clear whether the respondents broke the door of the wall or broke the fence. It is the duty of the prosecution to

prove the offence beyond reasonable doubt, and in this aspect the prosecution completely failed to discharge its burden, that of proof beyond reasonable doubt.

Again, there was doubt raised by the defence witnesses in particular the evidence of DW6 who told the court that at 22.30 he was at the victim's house and the people who broke into the house were not the respondents but there were the other people who were not prosecuted. This was enough to shake the prosecution case and created doubt in the mind of the Magistrate. Again, the 1st respondent raised doubt with regards to his relationship with the victim, in which he testified before the Court that the victim wanted the 1st respondent to marry her, and when he refused, the victim planted a false case against the 1st respondent, this testimony also had shaken the strength and credibility of the prosecution case, and there is high chances that the allegations of false implication of the respondents in a serious offence of burglary whose

sentence is severe by the complainant could be true and the prosecution had a duty to clear the doubt of these allegations in the minds of the Magistrate.

Again, there was no proof by PW1, PW2 and PW3 that the respondents used to fetch water at the victim's house. This fact should have been proved beyond reasonable doubt so as to rule out wrong or mistaken visual identification or recognition of the respondents by PW1,PW2 and PW3; and as held in the case of **Emmanuel Chigoji vs R, Criminal Appeal No. 355 of 2018** Court of Appeal sitting at Dodoma (unreported), in which it was held that recognition may be more reliable than identification of a stranger, but when the witness is purporting to recognise someone who he knows , the court should always be aware that mistakes in recognition of close relatives and friends are sometimes made.

In this case there was no enough corroboration brought to court to support the version of PW1, PW2,

and PW3 that they knew the respondents since they used to go to their house to fetch water, making the recognition doubtful.

Again, the cautioned statement which were not read out aloud before the court were wrongly admitted, and the court ought to have expunged such evidence from records, see the case of **Issa Hassan vs R. Criminal Appeal No. 129 of 2017**, Court of Appeal sitting at Mwanza.

Again, the ingredients of the offence of theft was not established, as there was no proof of ownership of the items stolen in the car at all. There was no proof that the books and diaries were in the car, and again there was no proof that PW1, PW2 and PW3 had seen the respondents running away from the scene while carrying the heavy books and the diaries, the property of the victim.

As held by the Trial Magistrate, the prosecution failed miserably to prove the charges on the required standard, that of proof beyond reasonable doubt.

Consequently, this appeal fails, and the order of acquittal of the appellants passed by the Trial Magistrate in Criminal Case No. 218 of 2018 is hereby confirmed.

PRONOUNCED IN OPEN COURT AT DODOMA THIS 14TH DAY OF AUGUST 2020

L. MANSOOR

JUDGE

14TH AUGUST, 2020

Judgement delivered in Court today in the presence of the Appellants, Ms. Mgoma, State Attorney for the Respondent Republic and MRS. MARIKI the Court Clerk.

L. MANSOOR

JUDGE

14th August, 2020