

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
SUMBAWANGA DISTRICT REGISTRY
AT SUMBAWANGA
DC CRIMINAL APPEAL NO. 62 OF 2021**

*(Originating from Criminal Case No. 162 of 2020 of District Court of
Sumbawanga at Sumbawanga)*

IBRAHIM MUSSA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 12TH April, 2022

Date of Judgment: 23rd May, 2022

NDUNGURU, J

On 12/04/2022 the parties herein appeared before me in view of arguing the present appeal. The appellant appeared in person whereas the respondent was represented by Mr. Simon Peres Senior State Attorney.

Way back on 24/06/2021, the appellant had been convicted at the District Court of Sumbawanga at Sumbawanga of robbery with violence contrary to Section 285 and 286 of the Penal Code Cap 16 R.E. 2019 (Penal Code).

It was alleged by the prosecution side that, on the 27th day of September, 2019 at Bomani area within Sumbawanga Municipality in Rukwa Region the appellant did steal cash money Tshs. 1,200,000/=, one mobile phone make TECNO valued at Tsh. 220,000/, one mobile phone make NOKIA valued at 45,000/= and different vouchers all making the total value of Tshs. 2,405,000/= the properties of one Sabina Alex and immediately before and after such stealing did use actual violence to the said Sabina Alex in order to obtain and retain the said properties. The appellant pleaded not guilty to the offence charged.

However, upon full trial the appellant was found guilty and he was then convicted of the offence charged against him and he was sentenced to serve five years imprisonment.

Aggrieved, the appellant filed a Petition of Appeal before this court consisting of the following grounds:

1. That, the learned Resident Magistrate erred in law and fact by not properly evaluating the weight of the prosecution evidence and reasons wherefore he failed to reach a finding that the prosecution side failed to prove its case beyond all reasonable doubt in respect of the offence of which the Appellant was charged and convicted.

2. That, the learned Resident Magistrate erred in law and fact by according no weight to the defence of alibi raised by the accused person, whereas there was relevant evidence to establish that fact.
3. That, the learned Resident Magistrate grossly erred in law and fact by disregarding in totals the defence evidence.

As he was invited to submit in support of his grounds of appeal, the appellant did submit that he has filed this appeal with three grounds and that he prays for this court to adopt his grounds of appeal. However, he added, that he has four supplementary grounds of appeal and he prayed to explain them.

Unfortunately, this court viewed what the appellant tested to be additional grounds of appeal some are just explanations to the grounds of appeal in the petition he filed and others have been captured in the petition of appeal.

In responding to the submission made by the appellant, Mr. Peres Senior State Attorney argued that they resist the appellant's appeal. That the trial court had evaluated the prosecution and was satisfied that the case was proved on the following basis.

Mr. Peres continued submitting, that the victim met the appellant at a liquor bar where the latter was parking his motor cycle (bodaboda). He said, the victim told the court that as it was night hours, the victim called his friends, (PW2 and his friend) that she met at the liquor bar so that they witness a bodaboda rider that she takes home. Her friends, Mr. Peres continued, knew the appellant and they assured her about her safety. She then recorder the registration number of the bodaboda. That having left with the appellant, the latter robbed her, her belongings.

The learned State Attorney furtherly submitted that; the arrest of the appellant was due to the registration number of the bodaboda that the victim had recorded. He added, her evidence was supported by the evidence of PW2 (Andrew Mugane) who knew the appellant and witnessed the him leaving with the victim.

Mr. Peres submitted on the 2nd ground that the court took into consideration the appellant's defence of alibi but did not accord it with weight as it appeared to be an afterthought. He added, the gist of the appellant's defence was that on the material date he was hospitalized at Kilimani Dispensary, but he did not have any medical document, thus the trial court did not believe it to be the truth.

The learned State Attorney winded up by submitting on the 3rd ground that, the appellant's defence was considered by the trial court as seen on page 4 of its judgement which it did discuss the appellant's defence and cited relevant authorities, consequently he prays for this appeal to be dismissed.

In rejoinder, the appellant submitted that it is the prosecution side that implicated him. He added, when PW1 was asked how did she identify the bodaboda, she answered that she recorded the number on her arm and while PW2 told the trial court that the victim recorded the number on a note book. The appellant argued that the trial court denied his exhibits, therefore he prays his appeal be considered and be allowed.

Principally, having heard the submissions of both sides, the role of this court in this appeal as it has been over emphasized time and time again, is to discuss the evidence and make its own evaluation. In other words, on first appeal, it is the appellant's legitimate right to have the entire evidence re-evaluated by the appellate court and have appellate court's own consideration and views of the entire evidence and its own decision thereon. See the following cases; **Kasema Shindano @ Mashuyi v. The Republic, Criminal Appeal No. 214 of 2006, Court of Appeal of Tanzania (unreported)** and **Salim Petro**

Ngalawa v. The Republic, Criminal Appeal No. 85 of 2004

(unreported).

In disposing of this appeal, I will make a thorough consideration of the grounds of appeal as filed by the appellant one after the other.

Starting with the 1st ground of appeal, which if I rephrase it is that the appellant questions his conviction over the offence which was not proved beyond reasonable doubts. The prosecution side had 3 witnesses. PW1 was the victim herself. After hiring the appellant who works for gain as a bodaboda rider, was robbed and had her belongings stolen. Whereas in her testimony, she said before hiring the appellant she had her two friends watch her leave with the appellant and she also recorded the registration number of the bodaboda. The incident happened on the night of 27th day of September, 2019.

The victims testimony was supported by PW2, he told the trial court that as he was having liquor at a liquor bar known as 'Kwa Ngusa' with his friend, the victim arrived as she wanted to buy food. They invited her but she refused, as she was hiring a bodaboda, she called them to witness, and they saw the appellant and recognize because they knew him and that particular place has electric bulb, so it is easy to see another person and recognise him or her. PW2 said, the appellant

always parks his bodaboda at the same liquor bar. He then added, the victim and the person he was with at the bar, both recorded the registration number of the bodaboda, though he never said where did they record them. He winded up that, moments later they received a call from the victim that she has been robbed by the appellant and they told her to wait until morning so that they report to the police station as they knew the appellant.

PW3 was a police officer who investigated the incident and arrested the appellant. He said, he was assigned the case on the 9th day of October, 2019. It involved robbery with violence. As he began investigation, he interrogated 3 witnesses, who were the victim and two others. As the incidence was revealed to him, the witnesses named the culprit by one name as Musa and that he rides a bodaboda with registration number T398 BXH. PW3 then found the suspect and arrested him and seized the bodaboda.

The term beyond reasonable doubt is not statutorily defined but case laws have defined it, and luckily, I got one at my fingertips. In the case of **Magendo Paul & Another v. Republic (1993) TLR 219**, it was held that;

"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed."

At this point, I firm that the prosecution proved the case to the hilt. The contradiction which was attempted to be raised by the appellant as to where was the registration number recorded did not shake the fact that he was recognized by the witnesses and also arrested for the offence by a person (PW3) who just used the details he was given by the witnesses and he ended up at the appellant's feet. It was not a coincidence for that to happen. I therefore dismiss this ground for it lacks merit.

Coming to the 2nd ground of appeal. According to the Black's Law Dictionary, an alibi is a defence based on the physical impossibility of a defendant in a location other than the scene of the crime at the relevant time. It is a form of defence whereby a defendant/respondent attempts to prove that he or she was elsewhere when the crime in question was committed.

In Tanzania, **Section 194 (4)** of the **Criminal Procedure Act Cap. 20 R.E. 2019, (CPA)**, makes it mandatory for an accused person

who intends to rely on an alibi in his defence to furnish a notice of his intention to rely on such a defence to the court and the prosecution before the hearing of the case. However, in cases where an accused person fails to furnish a notice of his intention to rely on the defence of alibi, he or she must provide the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed, otherwise, the court may in its own discretion accord no weight of any kind to such defence of alibi. The appellant herein did not adhere to any part of the statutory as required.

The burden of proof in a plea of alibi is on the accused. The burden of proof is often associated with the Latin maxim that *semper necessitas probandi incumbit ei qui agit*, the best translation of which seems to be: "the necessity of proof always lies with the person who lays charges."

The statement of the accused that he was not present at the place of incident is not enough. To successfully raise the defence of alibi the accused must give particulars of his whereabouts at the particular time and must adduce strong evidence to support his or her claim. The accused must be so far away at the relevant/material time that he could not be present at the place where the crime was committed.

In **Anangisye Masendo Ng'wang'wa v Republic 1993 TLR 202 (CA)**, it was held that the appellants' defenses of alibi did not raise any reasonable doubt on the prosecution case and were properly rejected.

In this case at hand, the appellant did raise the defence of alibi and summoned a witness who testified that two weeks before the appellant was arrested, he was hospitalized. Neither did the appellant nor his witness testified in court that he was hospitalized suffering from which sickness and for how long was he hospitalized or specifically on which date was he admitted and which date was he released. Generally, his defence did not cast a doubt to the evidence of the prosecution, therefore I dismiss this ground for lack of merit.

In the last ground of appeal, it is the position of the law that, generally failure or rather improper evaluation of the evidence leads to wrong conclusions resulting into miscarriage of justice. In that regard, failure to consider defence evidence is fatal and usually vitiates the conviction. The case of **Leonard Mwanashoka v R Criminal Appeal No. 226 of 2014** (Unreported), avails useful guidelines on what is to be considered in the evaluation of evidence:

"It is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. Furthermore, it is one thing to consider evidence and then disregard it after proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation and analysis"

In the case at hand, the defence case was highly considered, evaluated and reasoned thereof by the trial Magistrate. This is evidently seen on pages 3, 4 and 5 of the typed judgement. I therefore see no reason to hold more of my time on this 3rd ground for it does not bare any merit, and consequently it is dismissed.

At this juncture, am fortified not to interfere with the findings of the trial court, to that effect, this appeal is dismissed for lacking merits. The decision of the trial court is upheld.

It is so Ordered.




D. B. NDUNGURU

JUDGE

23.05.2022