

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(TABORA DISTRICT REGISTRY)**

AT TABORA

DC CRIMINAL APPEAL NO. 34 OF 2021

*(From the decision of the District Court of Tabora, Original Criminal Case No. 25 of 2020,
before Hon. S. I. Mzige, RM)*

HAMIS S/O ATHUMAN @ HAMIS CHAUREMBO APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

*Date of Last Order: 24/04/2022
Date of Judgment: 22/05/2023*

KADILU, J.

In the District Court of Tabora, the appellant was charged with two counts, house breaking contrary to Section 294 (1) (a) and stealing contrary to Sections 258 (1) & 265, both of the Penal Code [Cap. 16, R.E. 2019]. At the conclusion of the trial, the appellant was convicted for the offence of stealing by agent contrary to Section 258 (1) (*sic*) of the Penal Code. He was sentenced to serve seven (7) years imprisonment. Dissatisfied with the conviction and sentence, he preferred the instant appeal based on the following grounds:

- 1. That, the prosecution did not prove the case against the appellants beyond reasonable doubt as required by the law.*

- 2. That, the circumstantial evidence relied upon by the trial court to convict the appellant is not complete, reliable and cannot support irresistible inference of guilty of the appellant.*
- 3. That, the learned trial Magistrate erred in law and fact for failure to take cognizance of the defence of alibi put forth by the appellant in his defence.*
- 4. That, the cautioned statement, exhibit "P1" allegedly made by the appellant before PW4, was made upon expiry of the time prescribed under Sections 50 and 51 of the CPA [Cap. 20 R.E. 2019].*

The appellant prayed this court to allow the appeal, quash the conviction, set aside the sentence and order his release from the prison.

On the day of hearing, the appellant appeared in person, unrepresented and reiterated the contents of petition of appeal. He prayed the grounds of appeal in his petition to be adopted by the court. Being a lay person, he had nothing substantial to submit apart from his grounds of appeal. The respondent was represented Mr. Joseph Makene, learned State Attorney. He generally objected the appeal and stated that all the grounds of appeal are baseless. He prayed the appeal to be dismissed and conviction of the lower court as well as the sentence to be upheld or enhanced and sentence the appellant accordingly.

Mr. Joseph submitted on the 2nd and 3rd grounds of appeal jointly. The learned State Attorney stated that it is not true that the appellant was

convicted based on circumstantial evidence because PW1 proved orally that he saw the appellant and his fellows entering the house and committed the offence therein. In his 3rd ground of appeal, the appellant has raised the defence of *alibi*. He contended that he was not in Tabora Region on the date in which the offence is alleged to be committed. On this point, Mr. Joseph responded that the appellant did not comply with Section 194 (4) of the Criminal Procedure Act, [Cap. 20 R.E. 2019] which requires the accused to give notice of *alibi* before he seeks to rely on it.

According to Mr. Joseph, the appellant was identified in the scene of the crime by PW2 so, the defence of *alibi* cannot stand on his side. He said however, that the court has discretion on how to treat the defence of *alibi* where it was raised without giving prior notice.

In resolving the question on the defence of *alibi* raised by the appellant, but disputed by the respondent, I will briefly set out the procedure for raising a defence of *alibi*. Sections 194 (4), (5) and (6) of the Criminal Procedure Act provides as hereunder:

(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) Where the accused person 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.

Therefore, for the defence of alibi to stand, the law requires **firstly** that; the accused should give a notice to that effect to the court and the prosecution before the commencement of the hearing. The law does not give any format of the notice. **Secondly**, if the notice is given after the commencement of the hearing, particulars of alibi should be furnished to the prosecution. **Lastly**, the law permits the trial court to consider the defence of alibi even if no such notice has been given to the prosecution. The law does not require the accused to prove his defence of alibi.

It is sufficient for him if the *alibi* raises a reasonable doubt. See the case of ***Ali Salehe Msutu v. R.***, [1980] TLR1. Thus, for defence of *alibi* to succeed, the accused person should show inconsistencies in the prosecution case. This was stated in the case of ***Hamisi Saidi Butwe v. R.***, Crim. App. No. 489 of 2007, Court of Appeal of Tanzania at Mtwara. The records in the instant appeal are silent about the notice of alibi by the appellant during the trial in the subordinate court. Nonetheless, it was the testimony of PW1 that he realized that he was robbed in the morning of 17/4/2017 when he opened his shop. The complained incident is said to have occurred on Sunday, 16th April, 2017 when PW1's shop was closed.

PW2 who is said to have identified the appellant in the scene of the crime, testified that he rented the appellant a room close to PW1's shop.

PW2 stated that on the fateful day, he saw the appellant and three other persons repairing the room which was rented to the appellant. As per exhibit "P1" admitted during the trial, the maintenance started from 8:00hrs to 17:00hrs on 16/4/2017. PW2 stated as follows:

"On 16/4/2017 I was in my shop, then I saw Hamis coming with three technicians. They set the ceiling board so that no one would see what they were doing. I heard them continuing with the maintenance into the shop. Revocatus's (PW1's) shop was closed. On 17/4/2017, I went to my shop at 6:00hrs in the morning. I was called by Revocatus's employee to see their store. There was a hole in the wall towards Revocatus's shop. The hole was drilled in Hami's shop."

When PW2 was cross examined by the appellant as to whether he had the alleged lease agreement with the appellant, he responded that he had it, but it was taken by the police after the incident. It was the testimony of PW3 that he arrested the appellant at Mlandizi in the Coastal Region on 8/2/2020. He brought the appellant to Tabora on the 9th February, 2020 whereby his cautioned statement was recorded on 11/2/2020, as testified by PW4. In his defence, the appellant informed the court that it was his first time to be in Tabora and that he never had any room or business in Tabora as contended by the prosecution witnesses.

Having examined the records in the case file and submissions of the parties, the task before me is to resolve the question whether or not the appeal is meritorious. To start with the defence of alibi as raised by the appellant, it is my finding that the defence was improperly raised. However,

bearing in mind that the appellant is a layman, the trial court was not supposed to ignore the appellant's assertion that he was not a resident of Tabora and that he was in Tabora for the first time when he was brought by PW3 after being arrested in Mlandizi. In my views, the appellant raised a reasonable doubt as to whether he was in the scene of the crime at the time the alleged offence was committed. Worse still, the offence was committed in April, 2017 whereas the appellant was arrested in February 2020, three years after the alleged offence was committed.

For the above reasons, I subscribe to the view by the appellant that his conviction and consequential sentence were based on circumstantial evidence. Whereas circumstantial evidence is acceptable, it should meet certain conditions in order to be relied upon to justify conviction of the accused. In the case of *Awadhi Gaitani @ Mboma v R.*, Criminal Appeal No. 288 of 2017, the Court of Appeal laid down six conditions to be fulfilled before basing conviction of the accused on circumstantial evidence.

Firstly, the circumstances from which an inference of guilty is sought to be drawn must to be cogently and firmly established. Those circumstances should be of a definite tendency precisely pointing towards the guilty of the accused and that, the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and no one else. **Secondly**, the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable

hypothesis than that of guilt; and that before drawing inference of guilt from circumstantial evidence, it is necessary to be sure that there are no existing circumstances which would weaken or destroy the inference.

Thirdly, the accused person is alleged to have been the last person to be seen with the deceased in absence of a plausible explanation to explain away the circumstances leading to death, he or she will be presumed to be the killer. **Fourth**, each link in the chain must be carefully tested and, if in the end it does not lead to irresistible conclusion of the accused's guilt, the whole chain must be rejected. **Fifth**, the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person. **Sixth**, the facts from which an adverse inference to accused is sought must be proved beyond reasonable doubt and must be connected with the facts which inference is to be inferred.

Considering the circumstances in which the alleged offence was committed and the evidence adduced by the prosecution witnesses, it is undisputed that the above conditions were not met so as to justify the conviction of the appellant. Indeed, the offence was committed but there was not cogent evidence presented before the trial court to link the appellant herein with the said offence. That said, the second and third grounds of appeal have succeeded. Since the discussed weaknesses are critical, it infers that the whole decision of the District Court was reached at, from inadequate evidence against the appellant.

Having established so, I see no reason to deal with other grounds of appeal as they will not serve any meaningful purpose. In view thereof, I allow the appeal, quash the proceedings of the District Court of Tabora and set aside the conviction and sentence meted on the appellant. I order the appellants' immediate release from the prison unless he is lawfully held for some other reasons.

Order accordingly.


KADILU, M.J.,

JUDGE

22/05/2023

Judgement delivered in chamber on the 22nd Day of May, 2023 in the presence of Hamisi Athumani, the appellant and Ms. Joyce Nkwabi, State Attorney, for the respondent.




KADILU, M. J.

JUDGE

22/05/2023.