

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
BUKOKA DISTRICT REGISTRY
AT BUKOKA**

(PC) CRIMINAL APPEAL No. 05 OF 2023

(Arising from Bukoba District Court in Criminal Appeal No. 07/2022 an Org. from Katoma Primary Court in Case No. 04/2022)

FAJENSI LUKAMBUZI APPELLANT

VERSUS

THOMAIDES FELICIAN RESPONDENT

JUDGMENT

K. T. R, Mteule, J

5th June 2023 & 13th June 2023

This appeal arises from the Judgment from Bukoba District Court in **Criminal Appeal No. 07/2022** an originating from Katoma Primary Court in **Criminal Case No. 04/2022**. In Katoma Primary Court, the Appellant was charged with the offence of threatening to kill contrary to **section 89 (2) of the Penal Code Cap 16 of the RE 2019**. The complainant was the instant Respondent. The offence was alleged to have been committed in Kyamyosi village at Nyaga Ward in Bukoba Municipality.

It was alleged that the Respondent was being insulted by the appellant whenever he went to work in a farm, he (the respondent) bought from auction conducted by the court broker. According to his evidence in the Primary Court, on **19th January 2022** he went to the farm accompanied

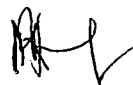
by his friend and while leaving, the appellant threw stones on them and as they were leaving, the Respondent went to take a bush knife hence they had to run away. The appellant had a defence of alibi in the Primary Court. According to him, on the fateful date, he was away, having travelled to his aunty in Izimbya from **17th January 2022** and returned to Kyamyosi where the incident took place on **20 January 2022**.

The Primary court heard the matter and convicted the appellant as charged and sentenced him to serve two months conditional discharge.

Being dissatisfied with the conviction and sentence of the Primary Court, the Appellant appealed to the District Court of Bukoba at Bukona with two grounds of appeal. In the first ground of appeal in the District Court, the appellant challenged the trial court disregard to his defence of alibi. In the second ground, the appellant asserted lack of proof beyond reasonable doubt in the Primary Court. The District Court upheld the conviction and the sentence issued by the primary Court and dismissed the appeal.

The respondent was further aggrieved hence this petition of appeal. The instant appeal contains two grounds of appeal which revolve around:-

1. First Appellate Court failure to evaluate the evidence adduced in the trial court.



2. Failure of the first appellate court to detect that the defense of alibi was wrongly dismissed and that there was a failure to know where the burden of proof lies in criminal matters once the defense of alibi is raised.

The Respondent herein filed reply to petition of appeal and disputed the grounds of appeal. According to the reply, the first appellate court has no duty to evaluate the trial court evidence and that the first appellate court properly appraised the record of the trial court reached at a justified decision. In the second ground of appeal, the Respondent stated that the first appellate court was correct to dismiss the defence of alibi because it was immaterial.

The Appeal was heard by oral submissions, where the appellant was represented by Gerase Reuben while the Respondent was present in person.

In his submission in Chief Mr. Gerase having adopted the grounds of appeal as part of his submission, started by arguing the second ground and then the first ground.

In the second ground, Advocate Gerase averred that the 1st appellate Court erred in dismissing the appellant's defense of alibi. According to him, the environment under which a defence of alibi can be given as a defence is

already described in law, that there must be a notice under **Section 194 of the Criminal Procedure Act Cap. 20 of 2019 R.E**, but if the notice is not given under this Section and instead given later, it does not mean that the Court ignores it completely. Referring to the judgment of Katoma Primary Court, Mr. Gerase stated that it is on record that the Primary Court was told that on the date of incident the Appellant was on safari and the ticket of travel fare was tendered and admitted as **Kielelezo B1** and that the complainant did not question that ticket. He further referred to the evidence of DW2 Ashim Abdunuru at page 4 of the judgment of Katoma Primary Court, who testified that he went to take the accused from his home and sent him to bus stand and he as well picked him from the same bus stand on 20/01/2022 and took him back to his home. DW3 one Monica Clemence told the Court that the accused person (Appellant) was on safari on that date of incident.

Mr. Gerase challenged the failure of the trial court to consider that alibi despite of fact that evidence of ticket and that of a bodaboda driver who sent him to the bus stop and picked him and that of Monica, yet the Magistrate ignored all of them.

On the first ground, Mr. Gerase is of the view that the prosecution did not prove the case beyond reasonable doubt. He averred that it is apparent in

the case of **Said Hemed vs. Republic 1987 TLR 117**, that the Court of Appeal stated that the prosecution has a duty to prove a Criminal Case beyond reasonable doubt. In his view, in this case, this standard of prove was not met because parties had land disputes before the case and that the Respondent in this Appeal claimed that appellant went to the disputed land and threatened him by a bush knife and threw stones upon him. He challenged the failure to call as a witness, the chairperson to whom the respondent claimed to have sent the report of the incident and get a letter to lodge criminal charge against the appellant. According to Mr. Gerase, this leaves a doubt as to whether the incident actually look place or it was a cooked story caused by the land disputes.

He therefore prayed for the court to allow the appeal and the decision of the Primary Court of Katema and all the orders thereof to be quashed and set aside.

In reply, the Respondent explained what he has explained in the Primary Court to have taken place from 15th October 2021 when he bought the land by auction vide Majemaje Court brokers. He added that the farm belonged to the mother of the appellant before it was sold to him. He continued to state what he stated in the primary Court alleging the appellant and his family to have thrown him stones took bush knife and threatened him and



how he complained to the chairman who referred him to the Primary Court of Katoma.

Commenting on the defence of the Appellant in the Primary Court, the respondent stated that the witness of the Appellant was not the resident of the village, and he did not witness him boarding the bus. He commented that picking him from the bus stop is something normal which does not mean that the appellant was away on the date of incident. According to respondent, the bus tickets were from town commuters and the Court considered all of them and found them to have no evidential strength. According to him, witness Monica was the appellant's wife and therefore she could say anything to protect her husband.

In rejoinder Mr. Gerase Advocate emphasized that the only thing which could, prove the travel was a bus ticket and that if the Court admitted it, it was a genuine one. He capitalized on the Respondent's explanation that they had a previous conflict which increased the doubt.

Having considered the record of the trial court and that of the 1st Appellate Court together with the grounds of appeal and the submissions of the parties one issue need to be resolved. The issue is **whether there are sufficient ground to allow the appeal and interfere with the**



decisions of the lower courts. In resolving this issue, the two grounds of appeal will be addressed.

Starting with the second ground of appeal concerning the notice of alibi, The Primary court considered the notice of alibi as a means of the appellant to rescue himself from guiltiness. The trial Magistrate brushed it out on the ground that the auntie to whom the appellant alleged to have gone was not called to testify. In the District Court, the notice of alibi was considered but it was found that it did not have sufficient weight to disprove the prosecution case. The 1st Appellate court did a good analysis of what constitute a notice of alibi while getting guidance from the case of **Oden Msengela and 5 Others versus The DPP, Consolidated Criminal Appeal No. 417 of 2015 and 223 of 2018, CAT at Mbeya (Unreported)**. The 1st Appellate court took note of the position that a defence of alibi must be raised before the closure of the prosecution case and when raised after the closure of the prosecution case, then the trial court shall have a discretion to give it evidential wight. This is the correct position of law as per Section 194 (4), (5) and (6) of the CPA which provide:-



"(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 case for the prosecution is closed.

(6) Where 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"

It is not disputed that the appellant did not comply with neither the position in subsection (4) nor in subsection (5) of Section 194 of the CPA. This means, he is covered by subsection (6) which gives the discretion to the court to consider the notice of alibi.

It is right that the Primary court had discretion to give weight to the defense of alibi given by the appellant after the closure of the prosecution case. However, it is a legal position that court discretion should be exercised judiciously. **(See Nyanza Roads Works Limited vs Giovanni Guidon (Civil Appeal No. 75 of 2020) [2021] TZCA 396).** In this case, the Court of Appeal had the following to say at page 12 of the judgment:-

"Firstly, it is long settled that the court's discretion must be exercised judiciously as opposed to capriciousness on the basis of material placed before it for consideration."

The above quotation makes it clear that the discretion of the court must be exercised judiciously basing on the material presented in court. In the Primary Court, the Appellant produced the receipt to indicate that he was in Izimbya on the date of incident. The trial court did not explain why it considered the bus tickets tendered by the appellant as a means to rescue himself from guiltiness and why it failed to consider the evidence of SU3 who was the wife of the appellant who testified that the appellant was not at home. The evidence given on oath can only be shaken by cross examination, otherwise, the trial court cannot brush it out on speculation. As to why did the trial court insisted on calling the auntie who was said to have been visited by the appellant was not made clear. The trial Magistrate did not even state why the evidence of SU2 who was the bodaboda motorist who took the appellant to the bust stand was disregarded. In my view, the material presented in court had to prompt the trial court to form doubt which could be cleared by the other evidence of prosecution. I therefore agree with Mr. Gerase that it was not right for the trial court to completely ignore the evidence given in the trial court due to the materials

presented and it was not right for the 1st appellate court to keep eyes closed on this aspect even though the notice of alibi was raised later. The first ground is found to have merit.

Now follows the first ground of appeal concerning prove beyond reasonable doubt. Mr. Gerase submitted that due to the previous conflict concerning the land ownership amongst the parties, there is a chance of having a cooked story, taking into account that the appellant failed to call the chairperson who received the letter to allow the Respondent to file a criminal case. I have considered this fact and the non consideration of the notice of alibi, I agree with Mr. Gerase that with that notice of alibi however weak its evidential weight, raised a doubt which should have been cleared by a clear identification evidence. In the Primary Court, no distance explained between where the respondent was and where the appellant was throwing stones from. How the Respondents identified the appellant was not made clear in the evidence and yet the 1st appellate trial court upheld the trial court position that the case was proved beyond reasonable doubt.

In criminal cases, as rightly submitted by Mr. Gerase, proof beyond reasonable doubt is inevitable. With the history of previous conflicts, there should have been stronger evidence from prosecution to prove that the



appellant was actually at the scene of crime. In absence of this evidence, I agree with Mr. Gerase that at least the village chairman could have appeared as a witness to explain what happened. Otherwise, I find this second ground as well to have merit and I differ with the holding of the 1st appellate court that the case was proved in the primary court beyond reasonable doubt.

From the above analysis, having found both grounds to have merit, the issue as to whether the appeal warrants interference of the decision of the lower courts is answered affirmatively. Consequently, the Appeal is allowed and the decisions in both the trial court and the 1st Appellate Courts and all orders arising therefrom are hereby quashed and set aside. The appellant is therefore released unless lawfully held for another offence.



KATARINA REVOCATI MTEULE

JUDGE

13/06/2023

Judgment delivered this 13th Day of June 2023 in the absence of of the Appellant and in the presence of the Respondent I person.



KATARINA REVOCATI MTEULE

JUDGE

13/06/2023

