IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MAKAME, J.A., KISANGA, J.A., And LUGAKINGIRA, J.A.)

CRIMINAL APPEAL NO. 107 OF 1999

BETWEEN

RIDAS ELIPHASI ..... APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgement of the RM's Court of Arusha with Extended Jurisdiction)

(Kapaya, PRM, Ext. Jurisdiction)

dated the 27th day of October, 1998

in

Criminal Appeal No. 26 of 1998

J U D G E M E N T

KISANGA, J.A.:

The appellant was convicted by the District Court at Arusha of armed robbery contrary to sections 285 and 286 of the Penal Code and sentenced to 30 years' imprisonment. His appeal to the High Court was unsuccessful, hence this second appeal. He appeared before us and argued the appeal in person while Mrs. Sumari, learned Principal State Attorney, appeared for the respondent Republic.

In his lengthy memorandum of appeal the appellant raises mostly points of fact. However, he raises one point of law which we consider to be relevant. In paragraph 11 of his memorandum he complains that he was denied the right to call his witness at the trial. In his oral submission to us he stated that this witness

.../2

called Asinati d/o Metili would have supported his defence that at the time of the alleged offence he was not at the scene of crime; he was elsewhere. He had raised this complaint in his first appeal to the High Court as contained in paragraph 6 of his petition of appeal to that court but in its judgement the High Court made no mention of it at all.

The appellant is supported by the record which shows that he informed the trial court of his intention to call one Asinati d/o Metili who on one occasion attended court but for reasons quite unconnected with the appellant her evidence was not taken. This was then followed by adjourning the case on four occasions because the appellant was not brought from the lock-up. The record is silent on whether his witness, the said Asinati, was in attendance on those occasions but eventually the appellant, no doubt due to frustration, gave up and is recorded to have withdrawn his intention to call his witness. It is clear that the appellant seriously intended to call his witness but his intentions were frustrated by factors other than himself. The High Court failed to consider whether had the witness been called she would not have supported the appellant's story. For our part we are unable to say for certain that had the court heard the evidence of that witness it would necessarily have rejected the appellant's story.

Mrs. Sumari contended that in terms of section 194 (6) of the Criminal Procedure Act the Appellant's alibi should not be accorded any weight because he gave no

.../3

prior notice of it. The point being made, however, is that in deciding whether or not to attach weight on the appellant's alibi the court failed to consider what the appellant's witness might have said if she were called, and we are saying that we are unable to say for certain that the court would have necessarily rejected the appellant's alibi if it had before it the evidence of the said witness Asinati d/o Metili. And had the High Court directed itself along these lines we could not say that it would necessarily have upheld the appellant's conviction.

In the light of such doubt we allow the appeal, quash the conviction and set aside the sentence with an order for the appellant's immediate release from prison unless he is otherwise lawfully held there.

DATED at ARUSHA this 14th day of September, 2001.

L. M. MAKAME
JUSTICE OF APPEAL

R. H. KISANGA
JUSTICE OF APPEAL

K.S.K. LUGAKINGIRA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(F.L.K. WAMBALI)
DEPUTY REGISTRAR