**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF MBEYA**

**AT MBEYA**

**CRIMINAL APPEAL NO. 131/2019**

(*Arising from Cr. Case No.84/2017, Court of the Resident Magistrate of Mbeya at Mbeya*)

**1. SHABANI S/O ADAMU MWAJULU ..... APPELLANT**

**2. BARAKA MSAFIRI MWAKAPALA..... APPELANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

*Date of Last Order 28. 2.2020*

*Date of Judgment: 28.02.2020*

**Dr. A.Mambi, J.**

In the Resident Magistrate of Mbeya at Mbeya, the appellants (**SHABANI S/O ADAMU MWAJULU & BARAKA MSAFIRI MWAKAPALA)** were jointly charged, with armed robbery. They were alleged on 26/2/2017 to have stolen two phones from one of their close relatives. They were found guilty, convicted and sentenced to serve 20 years imprisonment for each.

The appellants were aggrieved by convictions and sentences where they appealed to this court preferring twelve related grounds:

During hearing, the appellants were unrepresented while the respondent (Republic)) was represented by the learned State Attorney Ms Rozemary.

The appellants briefly submitted that they rely on their grounds of appeal they have advanced.

In response, the respondent through its learned State Attorney Ms Rozemary briefly submitted that the republic supports the grounds of appeal as the prosecution did not prove the case beyond reasonable doubt at the trial court. She argued that the evidence pf PW1, PW2 and PW3 show that the witnesses were not reliable as they filed to link the appellants with the charges. She argued that few days prior to the arrest of the appellant, his relative had family conflict with him and this was also indicated by PW1. She further submitted that all witnesses did not identify the second appellant and there was no any identification parade conducted. She was of the view that the case against the appellant was just cooked due to family conflict. She also wondrrs as to why the trail magistrate failed to consider the defence evidence as the appellant raised an alibi.

I have carefully perused and considered grounds of appeal, the evidence on record and submissions from both parties. There are two main issues to be addressed namely whether the defence evidence was considered and whether the prosecution proved the case beyond reasonable doubt. Briefly the respondent conceded

with the grounds of appeal basing on two main issues that is the prosecution proved the case beyond reasonable doubt. The prosecution also doubted that the trial magistrate failed to consider defence evidence. I will strata addressing the issue on defence evidence.

The appellants in their grounds appeal indicated that their defence evidence was not considered and the court mainly relied on the prosecution evidence. This was supported by the respondent.

In my considered view, this was wrong since the court is duty bound to consider defence evidence whether properly raised or not. This in my view vitiated the justice on the part of the appellant. Worth noting that the alibi defence is raised by a suspect who states that he was not at the scene of the crime at the time the crime was alleged to have been committed. For more understanding of the alibi defence I wish to refer the case of ***Karanja v Republic [1983] KLR 501 [1976 – 1985] EA*** as found in the book titled *"Criminal law"*, 2015 at page 159 (by William Musyoka) where the court stated that the ***alibi*** is a Latin verb meaning 'elsewhere' or at another place. The accused ideally raises the defence when he says that he was at a place other than where the offence was committed at the time when the offence was committed. General, The court has the duty to consider an alibi defence where it is raised and the court need to evaluate the evidence presented in support of it before accepting or dismissing as failure to consider an alibi where properly raised may be fatal to the conviction. The Court in

***CHARLES S/O SAMSON V. THE REPUBLIC [1990] T.L.R. 39***
which held that:-

> *" The court is not exempt from the requirement to take into account the defense of alibi, where such a defense has not been disclosed by an accused person before the prosecution case closes its case"*

The records show that the appellant raised the dfence of alibi but the magistrate simply ignored on the ground that such defence was not raised at the earlier stage. I wish to reproduce the wards of the magistrate in his judgment at page 4 as follows:

> *"the said defense did not follow the procedures under section 194(4) of the criminal Procedure Act [Cap 20 R.E 2002] neither witness nor exhibits was brought in Court by the appellant to support his alibi".*

Reading between the lines on the above paragraph it appears that the trial Magistrate did not considered the defence evidence and he was shifting the burden of prove from the prosecution to the defence which is contrary to the principles of the law. This means he convicted the appellant on the defence weakness contrary to the law. The Court in ***CHRISTIAN S/O KALE AND RWEKAZA S/O BENARD v REPUBLIC (1992) TLR 302*** as correctly cited by the appellant counsel observed that:

> *"an accused ought not to be convicted on the weakness of his defense but on the strength of the prosecution"*

The general rule in criminal cases is that the burden of proof rests throughout with the prosecution, usually the state (See ***Ali Ahmed Saleh Amgara v R [1959] EA 654)***. The state indeed has the primary duty of proving that the accused has committed the *actus reus* elements of the offence charged, with the *mens rea* required for that offence. The standard of proof is neither shifted nor reduced. It remains, according to our law, the prosecution's duty to establish the case beyond reasonable doubts.

Indeed the appellant having raised the defence that he was not in the scene as he was somewhere else and he was not taking care of his cattle. In this regard, the trial court ought to have properly considered the appellant's evidence and weight that evidence vis-à-vis the prosecution evidence to satisfy itself if the prosecution proved the charges against the appellant. The law is clear that and it has occasionally held so by the court in various cases that before any court makes its decision and judgment the evidence of both parties must be considered, evaluated and reasoned in the judgment. This has been emphasized in various authorities by the court. If one look at the judgment and proceedings it is clear that the Magistrate did not consider the defence evidence apart from just basing on the prosecution evidence. This is bad in law is as it can lead to injustice to the other party that is the appellants in our case. Such omission had in many occasion been found fatal by the court of appeal as seen in ***Hussein Iddi and Another Versus***

***Republic [1986] TLR 166,*** where the Court of Appeal of Tanzania observed and held that:

> *"It was a serious misdirection on the part of the trial Judge* ***to deal with the prosecution evidence on it's own*** *and arrive at the conclusion that it was true and credible* ***without considering the defence evidence****".*

Reference can also be made to the decision of the Court f Appeal in ***Ahmed Said vs Republic C.A- APP. No. 291 of 2015,*** the court at Page 16 which highlighted on the importance of the court to consider the defence evidence**.**

As correctly submitted by the learned State Attorney, failure to consider defence evidence denied the appellant their legal rights. Worth also referring the decision of the court that in ***Leonard Mwanashoka vs Republic Criminal Appeal No. 226 of 2014 (unreported),*** cited in ***YASINI S/O MWAKAPALA VERSUS THE REPUBLIC Criminal Appeal No. 13 of 2012*** where the Court warned that considering the defence was not about summarising it because:

> *"It is one thing to summarise 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. It is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis."*

The Court in ***Leonard Mwanashoka vs Republic*** (supra) went on by holding that:

> *"We have read carefully the judgment of the trial court and we are satisfied that the appellant's complaint was and still is well taken.* ***The appellant's defence was not considered at all by the trial court in***

> ***the evaluation of the evidence which*** *we take to be the most crucial stage in judgment writing. Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or inferences resulting in miscarriages of justice.* ***It is unfortunate that the first appellate judge fell into the same error and did not re-evaluate the entire evidence as she was duty bound to do. She did not even consider that defence case too****. It is universally established jurisprudence that failure to consider the defence is fatal and usually vitiates the conviction."* [Emphasis added].

The position of the law is clear that that the judgment must show how the evidence has been evaluated with reasons. The record such as the Judgment does not show the point of evaluating evidence and giving reasons on the judgment In this regard, the trial court ought to have properly considered the appellants; evidence and weight that evidence vis-à-vis the prosecution evidence to satisfy itself if the prosecution proved the charges against the appellant. The law is clear that and it has occasionally held so by the court in various cases that before any court makes its decision and judgment the evidence of both parties must be considered, evaluated and reasoned in the judgment. This has been emphasized in various authorities by the court. If one look at the judgment and proceedings it is clear that the Magistrate did not consider the defence evidence apart from just basing on the prosecution evidence. This is bad in law is as it can lead to injustice to the other party that is the appellants in our case. Such omission had in many occasion been found fatal by the court of appeal as seen in ***Hussein Iddi***

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The position of the law is clear that that the judgment must show how the evidence has been evaluated with reasons. The record such as the Judgment does not show the point of evaluating evidence and giving reasons on the judgment. It is also the settled principle of law that the judgment must show how the evidence has been evaluated with reasons. It is trait law that very judgment must be written or reduced to writing under the personal direction of the presiding judge or magistrate in the language of the court and must contain the ***point or points for determination, the decision thereon and the reasons for the decision*** **,** dated and signed. The laws it is clear that the judge or magistrate must show the reasons for the decision in his judgment. This can be reflected from section 312 of CAP 20 [R.E.2002] on the mode and content of the judgment which provides as follows:

> *"(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and* ***shall contain the point or points for determination,*** *the decision thereon and the*

***reasons for the decision**, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court.*

*(2) In the case of conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced.*

*(3) .....*

*(4) ...."*

The record such as the Judgment does not show the point of evaluating evidence and giving reasons on the judgmentI am of the settled view that the trial court did not subject the defence evidence to any evaluation to determine its credibility and cogency. The court in ***Jeremiah Shemweta versus Republic [1985] TLR 228,*** observed and held that:-

*"By merely making plain references to the evidence adduced without even showing how the said evidence is acceptable as true or correct, the trial Court Magistrate failed to comply with the requirements of Section 171 (1) of the Criminal Procedure Code Section 312 (1) of the Criminal Procedure Act, Cap 20 [R.E.2002] which requires a trial court to single out in the judgment the points for determination, evaluate the evidence and make findings of fact thereon".*

Reference can also be made to the authorities from other jurisdiction. In a persuasive case of ***OGIGIE V. OBIYAN (1997) 10 NWLR (pt.524***) at page 179 among others the Nigerian court held that:

*"It is trite that on the issue of credibility of witnesses, the trial Court has the sole duty to assess witnesses, form impressions about them and evaluate their evidence in the light of the impression which the trial Court forms of them".*

Judgment delivered in Chambers this 28th day of February 2020 in presence of both parties.

**Dr. A. J. Mambi**

**Judge**

**28.02. 2020**

Right of appeal explained

**Dr. A. J. Mambi**

**Judge**

**28.02. 2020**

It is clear from the evidence available that the prosecution failed to meet the standards required under the law as also opined by hon assessors.

The Court of in ***Christian s/o Kaale and Rwekiza s/o Bernard Vs R [1992] TLR 302*** stated that the prosecution has a duty to prove the charge against the accused beyond all reasonable doubt and an accused ought to be convicted on the strength of the prosecution case.

I agree with the appellant and prosecution that the case against the appellant was not proved beyond reasonable doubt that the burden of proof is in the prosecution side. The general rule in criminal cases is that the burden of proof rests throughout with the prosecution, usually the state. The state or prosecution has the burden of proof in criminal cases and it includes the burden to prove facts which justify the drawing of the inference from the facts proved to the exclusion of any reasonable hypothesis of innocence. Since the burden is proof of most of the issues in the case beyond reasonable doubt, the guilt of the accused must be established beyond reasonable doubt. In my firm view, the prosecution had to establish beyond any reasonable doubt that it was the Appellant who invaded the shop. This is in line with the trite principle of law that in a criminal charge, it is always the duty of the prosecution to prove its case beyond all reasonable doubt (See ***ABEL MWANAKATWE VERSUS THE REPUBLIC, CRIMINAL APPEAL NO 68 OF 2005.***

Failure to do so left a lot of questions to be desired. That should benefit the appellant. It appears as rightly stated by the learned State Attorney that the accused is not supposed to be convicted basing on his defence or evidence weakness rather on the prosecution weakness. It is trait law that that in criminal law the guilt of the accused is never gauged on the weakness of his defence, rather conviction shall be based on the strength of the prosecution's case. See ***Christina s/o Kale and Rwekaza s/o Benard vs Republic, TLR [1992***] at p.302. The standard of proof is neither shifted nor reduced. It remains, according to our law, the prosecution's duty to establish the case beyond reasonable doubts

For the reason, I am of the firm view that the guiltiness of the appellants were not proved beyond reasonable doubt, thus the prosecution had not established the guiltless of the appellants beyond all reasonable doubt. I am satisfied that the evidence by the prosecution side was not strong enough to convict the appellants. In the circumstances, conviction quashed and sentence is set aside resulting in the immediate release of the appellants. The appeal is allowed. I order that the appellants should forthwith be released from prison unless they are otherwise being continuously held for some other lawful cause.

**Dr. A. J. Mambi**

**Judge**

**28.02. 2020**

Judgment delivered in Chambers this 28th day of February 2020 in presence of both parties.

**Dr. A. J. Mambi**

**Judge**

**28.02. 2020**

Right of appeal explained


**Dr. A. J. Mambi**

**Judge**

**28.02. 2020**