IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MNZAVAS, J.A., MFALILA, J.A., And LUBUVA, J.A.)

CRIMINAL APPEAL NO. 57 OF 1994

BETWEEN

KAMANDO CHISIMA ..... APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Dodoma)

(Ruhumbika, J.)

dated the 2nd day of October, 1992

in

(PC) Criminal Case No. 26 of 1992

JUDGEMENT OF THE COURT

LUBUVA, J.A.:

Before the Primary Court of Mwitikira within Dodoma Rural District the appellant was charged with and convicted of the offence of robbery contrary to sections 285 and 265 of the Penal Code. He was sentenced to a term of imprisonment for fifteen (15) years. On appeal to the District Court, the appeal was dismissed but the sentence was enhanced to thirty (30) years imprisonment. Again, he unsuccessfully appealed to the High Court at Dodoma. Dismissing the appeal, the learned judge held that there was ample evidence in support of the charge against the appellant who was sufficiently identified. This is thus a third appeal.

The appeal before this Court has been lodged with a certified point of law. That is, whether failure by the learned judge on second appeal to consider the defence of alibi raised by the

appellant was fatal. The appellant appeared in person at the hearing of this appeal. He had filed six grounds of appeal which in sum total challenge the learned judge's failure to consider the appellant's defence of alibi. This, we think, is the only legal point for consideration in this appeal. In ground two of the memorandum of appeal, the appellant inter alia complains:

> "That the Honourable Appellate Judge misdirected himself in law and fact in failing to evaluate any defence testimony and that of any witnesses as regants (sic) my where-abouts on the material day."

On record, the evidence which was accepted and believed as truthful by all the courts below was that of PW1, PW2 and PW3. According to the evidence, on 4.5.1991 at about 5 p.m. while PW1 and PW2 were on their way home from Dodoma, on arrival at Mpunguzi village they were joined by KASIANI NDUNGURU (PW3) a teacher at the locality. As PW1, PW2 and PW3 proceeded to their home village Mtita, the appellant in the company of other bandits who were not traced, waylaid them (PW1, PW2, PW3). In the process, GRACE MALOLELA (PW1) was robbed shillings 6,000/=, a piece of khanga and a watch. The appellant and the other bandits were armed with a gun, clubs and a bush knife. In the course of the robbery, PW1 and PW2 were also manhandled. In his defence at the trial, the appellant denied his involvement in the commission of the offence in that he was not at the scene of crime when the offence took place. The trial magistrate rejected the appellant's defence of alibi and found it as a fact that the appellant was sufficiently identified in his participation in the robbery. He was therefore found guilty as charged.

On appeal to the District Court Dodoma, the learned District Magistrate dismissed the appeal on the ground that the identity of the appellant was clearly established from the evidence of PW1 which was corroborated by PW2 and PW3. Secondly, the learned District Magistrate held that the appellant was found in possession of PW1's piece of khanga and PW2's local rate receipt which had been stolen in the course of the robbery and that the appellant also produced shillings 2,220/= as the balance of the money robbed. As already indicated, on second appeal to the High Court, the appeal was dismissed because the learned judge held that it was amply proved that the appellant was involved in the robbery in which PW1 and PW2 were the victims.

At the hearing of this appeal before us, the appellant who appeared in person, opted not to add anything more to the memorandum of appeal filed. For the respondent/Republic Mr. Kifunda, learned State Attorney addressed us briefly. He submitted that this being a third appeal and there being no point of law involved, the appeal should be dismissed. He further submitted that there was no merit in the point of law certified because the issues of the defence of alibi was not raised before the High Court. Mr. Kifunda, learned State Attorney finally submitted that the fact that the defence of alibi was not considered by the learned judge on the second appeal was not fatal. There was sufficient evidence on which to sustain the conviction, Mr. Kifunda concluded.

Now we will examine the merits of the points of law certified to this Court. As seen from the ground of appeal extracted, the gravamen of the complaint against the learned judge is that the defence of alibi raised by the appellant was not considered on

appeal before the High Court. Upon our scrutiny of the judgment, we agree that the issue of alibi was not with respect, expressly dealt with by the learned judge. But then we ask ourselves whether the learned judge can be faulted on that. In our considered view, the answer to that is categorically in the negative. This is for the simple and obvious reason that appeals in any court are a creation of procedure. It is common knowledge that the Civil Procedure Code 1966 and the Criminal Procedure Act, 1985 provide a procedure to be followed in the processing of civil and criminal appeals respectively. Under such laid down procedure it is provided as to what issues are to be raised and dealt with on appeal. In this case, the issue of alibi was not one of the issues brought before the learned judge to deal with on appeal. Furthermore, even in the seven point memorandum of appeal filed before the High Court, the question of alibi was not raised. In that situation, we are with respect, in agreement with Mr. Kifunda, learned State Attorney that the defence of alibi not being part of the memorandum of appeal filed, there was no basis upon which the learned judge on second appeal could deal with this issue. At this juncture it is pertinent for us to make it clear that a judge on appeal is not there to fish around for any point that may be raised, suggested or thought of at any time in the course of hearing an appeal. He is guided by procedure to deliberate on issues or points raised at the appropriate time through the memorandum of appeal. This was not the case here, the issue was not before the learned judge on appeal. In these circumstances, we are with respect, satisfied that no point of law was involved.

On the other hand, even granted that a point of law was involved upon a close scrutiny of the judgment of the High Court on appeal, it seems to us clear that the learned judge dealt with

the issue of alibi indirectly. In our view, the learned judge addressed himself on this issue when dealing with the evidence of PW1 (Grace Malolela). He stated:

> "The evidence on record clearly shows that PW1, GRACE MALOLELA identified the appellant, whom she knew by name as KAMANDO, as one of those people who invaded them as they were on their way home from Dodoma." (emphasis supplied)

Again it is on record that the learned judge alludes to the identity of the appellant when he dealt with the evidence of PW3 (KASIANI NDUNGURU). There, he stated:

> "The old man rushed back on hearing the alarm raised by the girls. He recognised the appellant as they were dashing away from the girls after robbing them." (emphasis supplied).

This, to our minds, clearly shows that the learned judge addressed himself on the crucial issue of the identification of the appellant. That is, that from the evidence, the appellant was properly identified as a participant to the crime. From this it is apparent to us that the learned judge addressed on the fact that the appellant as identified could not be elsewhere at the time when the crime was committed at the sametime when he was seen at the scene of crime. This, to us, was clearly nothing but a concerted effort on the part of the learned judge to deal with the identity of the appellant which aspect indirectly as pointed out covers the issue of alibi.

In the result, we are satisfied that in the circumstances of the case, there was no point of law involved warranting consideration of this Court on a third appeal. We are also satisfied that the offence having taken place during day time, the identity of the appellant was proved satisfactorily. There was ample evidence upon which to sustain the conviction. We dismiss the appeal in its entirety.

DATED AT DODOMA THIS 24TH DAY OF APRIL, 1995.

N. S. MNZAVAS
JUSTICE OF APPEAL

L. M. MFALILA
JUSTICE OF APPEAL

D. Z. LUBUVA
JUSTICE OF APPEAL

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

(M. S. SHANGALI)
DEPUTY REGISTRAR