Citation	Parties	Legal Principles Discussed
CRIMINAL APPEAL NO 108 OF 2007 – COURT OF APPEAL OF TANZANIA AT DODOMA Coram: RUTAKANGWA J.A, KIMARO J.A AMD MBAROUK J.A	**PIASON MKOMBOLA VS THE REPUBLIC** (Appeal from the decision of the High Court of Tanzania at Dodoma) – **Criminal Appeal No.17 of 2006** (Masanche, J)	- Defence of Alibi, an accused does not in law assume any duty of proving it. - Where an accused had not given prior notice of the defence of Alibi in terms of section 294 of the criminal Procedure Act, Cap.20 R.E 2002 as clearly held in Charles Samson V [1990] TLR 39 in respect of S.194)4) (5) and 6 of the CPA. Followed by Rashid Seva VR, Criminal Appeal No.95 pf 2005 and Alfeo Valentino VR, Criminal Appeal no.92 of 2006 (both unreported)

IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: RUTAKANGWA, J.A., KIMARO, J.A., And MBAROUK, J.A.)

CRIMINAL APPEAL NO. 108 OF 2007

PIASON MKOMBOLA ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Masanche, J.)

dated the 19th day of March, 2007
in
Criminal Appeal No. 17 of 2006

JUDGMENT OF THE COURT

3 & 5 December, 2008

RUTAKANGWA, J.A.:

The appellant Piason Mkombola was convicted as charged by the District Court of Mpwapwa of the offence of armed robbery contrary to sections 285 and 286 of the Penal Code, Cap. 20, Vol.1, R.E. 2002 and sentenced to serve a prison term of thirty (30) years. He was also ordered to pay Mola Bakari (PW4), the victim of the robbery, Tshs. 420,000/-. Being dissatisfied with the conviction and sentences he appealed to the High Court, at Dodoma. The High Court found the appeal totally wanting in merit and dismissed it in its

entirety. Undaunted, he has come to this Court by way of this appeal urging us to find him innocent.

The appellant's memorandum of appeal contains seven grounds of appeal. However, in our view, these can without any prejudice, be conveniently reduced to four as others are mere prayers. **One**, the two courts below erred in law and on the facts in grounding the conviction for robbery on unsubstantiated visual identification evidence. **Two,** the High Court erred in law in relying on his retracted confessional statement (exhibit P3) to No. 97459 D/Sgt Ramadhani. **Three**, the courts below erred in law in rejecting his defence of alibi. **Four**, the trial court erred in ordering that the money seized from him, be given to PW4 and further that the High Court erred in upholding this order.

In the appeal, the appellant appeared before us unrepresented as was the case in the courts below. The respondent Republic, which resisted the appeal, was represented by Mr. Anselm Mwampoma, learned Principal State Attorney.

Before we canvass the grounds of appeal and the submissions made before us, we have found it apposite first to give a general outline of the evidence which led to the conviction of the appellant. It was as follows:-

PW3 Ashraf Juma is a driver of an Isuzu lorry registration No. T.204 AAE, the property of one Shabani of Dodoma. On the morning of 14th August, 2004, PW3 in company with PW4 went to Nana Village, Mpwapwa District, with the lorry to buy maize grains. They stayed at the village for the whole day and bought, "various bags of maize", as PW3 put it. At around 8.00 p.m., as they were eating food at one of the village 'hotels' they were approached by the appellant. He had forty (40) bags of maize to sell to them. They requested him to wait until the following morning. He urged otherwise. As he could not convince them, he left only to return shortly later, but PW3 and PW4 would not budge. All the same he returned to them at 03.00 a.m. This time PW3 and PW4 were persuaded and together with Isaya Chitowa (PW5), they decided to go with the appellant. They boarded the lorry and took off. However, when they reached a wooded slope they were stopped by

a man who was wielding a gun. The appellant, on his part, ordered the lorry occupants to lie down which they did and proceeded to order them to give money to the bandit. PW4 who had Tshs. 550,000/- with him handed over the same to the appellant who in turn passed the money over to the armed bandit. Then the appellant jumped out of the lorry and vanished with his fellow bandit. That was the end of their mission.

PW3, PW4 and PW5 returned to the village and reported the incident at the Village offices and later to the police. The appellant was arrested at his home village of Mingowi in Mpwapwa District by No. E 9168 D/C George (PW1) on 18.8.2004 and he was found to be in possession of Tshs. 123,000/-. He was sent to Mpwapwa police station, where on 19.8.2004 in a cautioned statement (exhibit P3) recorded by No. C 7459 D/Sgt. Ramadhani (PW2), he allegedly confessed to the robbery. He was then charged.

In his sworn evidence, the appellant denied committing the offence. He admitted being arrested by policemen who were accompanied by a number of people at his home village on 18.8.2004. He was beaten, searched and his Tshs. 130,000/- seized.

Without being told the reason for his arrest, he was taken to Mpwapwa police station where the following day he was forced to confess the robbery by Cpl. Komba. Cpl. Komba, he said, threatened to shoot him.

The learned trial Senior District Magistrate believed the evidence of PW3, PW4 and PW5 whom he took to be witnesses of truth. Upon accepting their evidence, and without relying on exhibit P3, he found the guilt of the appellant proved beyond reasonable doubt. He was of the firm view that these witnesses could not have mistaken the appellant because he was their companion on the lorry. The appellant's appeal to the High Court was dismissed for two reasons. **One**, "the appellant was no stranger to Ashraf PW3" as he had visited him "three times, trying to lull him into the trap." **Two**, the appellant made an "absolute admission" in his cautioned statement to PW2.

Both the trial court and the first appellate court reached a concurrent finding that the appellant had colluded with the unidentified gunman and eventually jointly robbed PW4 of his Tshs. 550,000/- at gun point. The two courts below reached that finding

particularly, after believing the evidence of PW3, PW4 and PW5. It is established law that issues of credibility of witnesses are issues of fact. It is also settled law that this Court will rarely interfere with concurrent findings of fact of the courts below. It can only do so when satisfied that there had been a miscarriage of justice, a violation of some principle of law or practice or a misapprehension of the evidence. Has anything of the sort been shown in this appeal? This pertinent question will be answered later in the course of our discussion of the appellant's grounds of appeal.

When the appeal came up for hearing, the appellant adopted his grounds of appeal and had nothing of substance to say in elaboration thereof.

On his part, Mr. Mwampoma, vigorously urged us to dismiss the appeal in its entirety as the charge against the appellant was proved beyond a reasonable doubt. To him the guilt of the appellant was proved by the credible evidence of PW3, PW4 and PW5. Mr. Mwampoma was of the firm view that once the evidence of these witnesses was believed and he found no reason why it ought not to be believed, then this appeal against conviction finds no leg to stand

on. After all, he urged, the evidence of these three witnesses was supported in every material particular by the confession of the appellant himself to PW2. Mr. Mwampoma further pressed us to find and hold that the three witnesses could not have mistaken the identity of the appellant because **they had been with him earlier at Nana Village where they had gone to buy maize and were with him** in the lorry driver's cabin at the time of the robbery. Once the conviction is upheld, he contended, the compensation order should remain undisturbed. On the issue of alibi, he was of the view that since the appellant had not given prior notice of it, it was rightly ignored.

As already shown in this judgment, the appellant is complaining that the courts below erred in law, firstly, in not considering his defence of alibi and secondly, in giving weight to his retracted confession (exhibit P3).

We have indeed found that the appellant in his evidence said that on the night of 15.8.2004 he was at his home at Mingowi Village and that he was not involved in any criminal activity. In essence, he was raising a defence of alibi. It is true that the two courts below did

not consider this defence which he had, first raised at the preliminary hearing.

It is trite law that where an accused person raises a defence of alibi, he does not in law assume any duty of proving it. It will suffice to earn him an acquittal if it introduces an element of reasonable doubt in the mind of the court. This, in our view, cannot be achieved if the court does not consider that defence at all or makes a fleeting reference to it because it is already convinced that the accused committed the offence. This Court has in the past made it abundantly clear that such an omission may be fatal and would result in a conviction being quashed. This would be the case even where an accused had not given prior notice of the defence in terms of section 294 of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the C.P.A. hereinafter).

In the case of **CHARLES SAMSON V. R.** [1990] TLR 39, the High Court held that the defence of alibi was not available to the appellant as it had been disclosed after the prosecution closed its case. On appeal to this Court, the Court had this to say in respect of s. 194 (4), (5) and (6) of the C.P.A.:-

> " ... *[0]n a proper construction of the provisions of this section ... the court is not exempt from the requirement to take into account the defence of alibi, where such a defence has not been raised by an accused person before the prosecution closes its case. What this section means is that where such a disclosure is not made, the court, though taking cognizance of the defence "may in its discretion, accord no weight of any kind to the defence." Where the court fails to take cognizance of an alibi it amounts to a mistrial and a consequential miscarriage of justice."*

This discretion, we should emphasize here, is a judicial one. It cannot be said to have been so exercised until the defence evidence has been considered vis-à-vis the rest of the evidence.

The holding in **CHARLES SAMSON** (supra) was followed by this Court in the cases of **RASHID SEBA V. R**., Criminal Appeal No. 95 of 2005 and **ALFEO VALENTINO V. R.,** Criminal Appeal No. 92 of 2006 (both unreported). In **RASHID SEBA** (supra), the Court put this further emphasis:-

> *" Section 194 (6) of the Criminal Procedure Act, 1985 does not say that if an accused person raised an alibi without disclosing the intention to do so to the court and to the prosecution, then it will not be considered..."*

In these cases, as in many others, it was held that failure to consider a defence of alibi is a serious error of law. In the case before us, the error amounted to a serious miscarriage of justice as the appellant had disclosed it even before the trial started. We accordingly uphold the appellant's fifth ground of appeal in the memorandum of appeal.

The complaint against the High Court's reliance on the retracted confession (exhibit P3) merits our serious consideration too. No one can gainsay that exhibit P3 was retracted. But that is not of moment now. The issue is on the manner of its admission in evidence.

The confessional statement was tendered in evidence by PW2. After he had read the appellant's statement in court, the trial court

admitted it as evidence without ceremony, contrary to established practice. The law, as we understand it, is that before such a piece of gravely incriminating evidence is admitted in evidence, its voluntariness must first be established. This is because under section 27 of the Evidence Act, Cap. 6 R.E. 2002, a confession before a police officer is admissible in evidence only if it was voluntarily made. The onus of proving the voluntary nature of such a confession is placed by the law on the prosecution. An accused person assumes no duty to prove that it was not made or that it was not voluntarily made: see section 27 (2) of the Evidence Act, Cap. 6. Mr. Mwampoma has conceded this omission and left it to the court to decide the legal consequences of the same.

We are, all the same, aware that it is not the law that there is a presumption that a confession or statement was not made voluntarily until the contrary is proved. It is usually presumed to have been made voluntarily until objection is made to it by the defence. See, **N. V. LAKANI V. R.** [1962] EA 644, which was cited with approval by this Court in **TWAHA s/o ALLI & 5 OTHERS V. R.,** Criminal Appeal No. 78 of 2004 (unreported). Following **LAKANI V. R.** (supra), in **TWAHA V. R.** (supra), this Court lucidly said:-

> *"... if that objection is made after the court had informed the accused of his right to say something in connection with the alleged confession, the trial court must stop everything and proceed to conduct an inquiry (or a trial within a trial) into the voluntariness or not of the confession.* ***Such an inquiry should be*** *conducted before the confession is admitted in evidence." (Emphasis is ours).*

The Court further said:-

> *"... The omission committed by the trial court was, in our view, a fundamental and incurable irregularity and it greatly prejudiced the appellants as is evident from the judgments of both the trial court and the High Court. We are accordingly constrained to discount the confession evidence of the appellants."*

On identical grounds, this Court discounted the cautioned statements containing confessions, in the case of **BENARD MASUMBUKO SHIO & ANOTHER V. R.**, Criminal Appeal No. 213 of 2007 (unreported).

Exhibit P3 was retracted by the appellant and the trial court admitted it in evidence but without informing him of his right to raise any objection, if any, and without making any inquiry into its voluntariness or otherwise. This was an incurable irregularity and it is accordingly discounted. Ground no. 4 in the memorandum of appeal, therefore succeeds. This leaves us with the general complaint that the conviction was based on unsubstantiated visual identification evidence. This complaint was forcefully resisted by Mr. Mwampoma. To him, the evidence of PW3, PW4 and PW5 was impeccable, cogent and watertight.

In his evidence, the appellant not only denied having been near to the scene of the crime on the material day, but also knowing or being known to PW3, PW4 and PW5. Was he being disingenuous? In order to answer this question satisfactorily we had to go back to the evidence of these witnesses and subject it to a close and objective scrutiny a task, which we respectfully find, not to have been done by the two courts below.

It has already been shown in this judgment that the conviction of the appellant was based by the trial court only on the evidence of

PW3, PW4 and PW5. That conviction was upheld by the High Court which found the story of the three witnesses was lent credence by the appellant's alleged confession which has just been discounted. The prosecution had a duty to prove that not only a robbery was committed at Mwenzele Village in the early hours of 15th August, 2004, but also that it was committed by the appellant. It attempted to do so through the evidence of PW3, PW4 and PW5. But were these witnesses of truth?

A cursory reading of the evidence of PW3 – PW5 leaves an impression that the appellant not only participated in the robbery to the hilt but that he was the brain behind it. But when it is subjected to an objective scrutiny, it becomes too clear that these witnesses were lying after all. We shall supply a few instances to demonstrate this.

The evidence of PW3 shows that he had been at Nana Village on 14.8.2004 since "early morning with Mola Bakari." They had gone there to buy maize. The evidence of PW4 is silent on why and at what time they had gone to Nana. His story begins when they "were having food in one Hotel" and the appellant who was a stranger to

them, approached them, introduced himself and told them that he had 40 bags of maize for sale. While PW1 testified that he was with PW4 only, the evidence of PW3 shows that they were with one Gibson. Indeed PW3 did not mention Gibson at all in his evidence. The two witnesses also differ in their evidence as to why the appellant had insisted on completing the transaction that very evening (of 14th August, 2004). PW3 testified that when they told him to wait until the next morning he left. But PW4 testified that the appellant told them that he could not wait as he would be leaving "for Kidete to water his onions" early in the morning of 15.8.2004. Whereas PW5 testified that he went with Gibson to awaken Isaya (PW5) when the appellant went back to them at about 4.00 a.m., PW3 said that he was the one who went with PW4. Although PW4 claimed that PW5 was their host at Nana, PW5 told the trial court that he knew only PW5 casually as Mola Mkopi as he used to buy maize. Worse still, PW3 testified that their host was one Mola Bakari. Both PW3 and PW4 impressed upon the trial court that they succumbed to the appellant's entreaties or lulls, as the learned judge on appeal put it, because PW5 had assured them that the appellant

was known to him as a "peasant farmer" in that area who owned a maize farm. This was contradicted by PW5.

PW5 testified that he was awakened by PW4 and requested to accompany him to 'Kwa Mwaka' street where "there were 40 bags of maize to be measured." He went with him up to the place where the lorry was parked. He found PW3 together with the appellant. PW4 asked him if knew the appellant and he replied:-

"Yes, I know him."

Thereafter, they left.

The evidence of PW5 further differs with that of both PW3 and PW4. Whereas PW3 and PW4 testified that as they left Nana Village they were four in total, PW5 testified that there was "another fellow from Mwanzele." It is at Mwanzele where the robbery allegedly took place. Taken in isolation these would appear to be minor inconsistencies not going to affect the root of the matter. But these were not all. Their evidence was flawed by more fundamental inconsistencies which rendered their story highly improbable. Their

story on what took place at the scene of the crime is totally unbelievable.

As alleged, the three witnesses were together in the lorry's driver's cabin at the time of the alleged robbery. They, therefore, would have been of accord with one another on the fundamental aspects of the robbery. They were not, unfortunately.

PW3 testified that when they were stopped by the gunman, the appellant rose to his feet and ordered them to lie while brandishing a knife. Then the gunman ordered the appellant to "cut their throats." At that command PW4 gave the appellant Tshs. 550,000/-, which was in a bag, at one go, who instantly jumped out of the lorry, joined the gunman and the two disappeared. On his part, PW4 never saw a knife nor did hear the command to have their throats slashed. All he heard was the order of the appellant to give out money which he did and thereafter he disappeared with the money and the gunman. The evidence of PW5 was the most discrediting. He said:-

> "*.. after a distance of about 1½ miles at the road side we saw a person holding a gun wearing mgambo uniform ... The driver stopped the lorry. He (i.e. PW3) managed to*

> *flee. I remained there with Msuya. That person stood near the driver seat pointing the gun to Mola ordering "toa fedha". Mola took money which were under the seat. After that the person who was with us got up raised a 'sime' beating Mola and ordering him to give him money. Mola then handed money to the accused. Accused insisted to be given more money. Mola then gave him other more money from the seat. Accused received it. Person (accused) climbed down and joined that man who had a gun ... After sometime the driver returned. We told him that the robbers took money. He then drove to the Village office where the matter was reported at police station."*

The glaring irreconcilable contradictions need no elaboration. To us, these are not negligible inconsistencies. These are blatant lies which overwhelmingly overshadow any semblance of truth.

On top of the fact that no single person from the village government testified to bear out these witnesses, the blatant lies and patent embellishments accompanying them, reduce the evidence of the three witnesses to the level of an outright concoction. Had they

witnessed the incident since they were together, they would not, in our considered opinion, have so fundamentally belied each other. Had the two courts below addressed their minds to these discrediting contradictions, in our settled opinion, they would not have so readily found PW3, PW4 and PW5 as witnesses of truth. We, therefore, respectfully differ with them on this crucial finding upon which the conviction was premised. It is our conclusion that these were not witnesses of truth at all as urged by Mr. Mwampoma. If the two courts below had considered the defence of alibi of the appellant they would not have rejected it in the face of this truth.

All said, we are satisfied that the conviction of the appellant was based on apparently contrived evidence. It would be unsafe and an affront to justice to sustain it. We are accordingly constrained to allow this appeal.

For the foregoing reasons we allow this appeal in its entirety. The conviction of the appellant for robbery is hereby quashed and set aside. We also set aside the sentences of imprisonment and compensation and the order of the trial court directing the appellant's Tshs. 123,000/- to be handed to PW4. The said money to be

returned to the appellant. It is so ordered. The appellant is to be released forthwith from prison unless he is otherwise lawfully detained.

DATED at DODOMA this 4th day of December, 2008.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

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

(S.S. MWANGESI)
SENIOR DEPUTY REGISTRAR