IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MFALILA, J.A., SAMATTA, J.A., And LUGAKINGIRA, J.A.)

CRIMINAL APPEAL NO. 8 OF 1998

BETWEEN

C. 7874 D/CPL JUMA MSIWA)
E. 3479 D/C MATABA MATIKU) ..... APPELLANTS

AND

THE REPUBLIC ..... RESPONDENT

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

(Chipeta, J.)

dated the 26th day of January 1998

in

Criminal Sessions Case No. 51 of 1996

JUDGEMENT OF THE COURT

MFALILA, J.A.:

The two appellants, both police officers, were charged with the offence of murder before the High Court sitting at Moshi (Chipeta, J.). The particulars of the charge alleged that the two appellants namely No. C.7874 D/COPL. Juma Msiwa 1st appellant, but was 3rd accused at the trial and No. E.3479 D/C Mataba Matiku 2nd appellant, he was 5th accused at the trial and four others who were acquitted at the end of the trial, on or about the 30th day of June 1996 at Maili Sita Village in Hai District Kilimanjaro Region murdered one Lt. General Imrani Hussein Kombe. The four other accused who were acquitted, three of whom are also police officers are No. C. 4246 D/Sgt. Thomson Mensah (1st accused), No. D. 5283 D/Copl. Elisante Daniel Tarimo (2nd accused), No. D. 8853 D/C Chediel Elinisafi (4th accused) and the only civilian Ismail Mohamed Katembo (6th accused) who died while

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in custody. We want to comment and correct the record in respect of the sixth accused the late Ismail Mohamed Katembo. Upon it being confirmed that he was dead, the Senior State Attorney purported to enter a nolle prosequi under Section 91 (1) of the Criminal Procedure Act 1985. Thereupon without much ado the presiding judge (Nchalla, J.) discharged the late Katembo. Under that section, the Senior State Attorney as well as the Court should have realised from the wording and consequences of any act taken thereunder that it can only apply to living accused persons. That section stipulates that a discharge under it is not a bar to future prosecution for the same offence. After his death, the sixth accused was effectively placed beyond the reach of human power. Therefore as a dead person, he cannot be discharged. We note that there is no specific provision in the Criminal Procedure Act dealing with accused persons who die before their cases are completed and that the general practice has been to call in aid section 91 whereby the prosecution enters a nolle prosequi and the accused is then discharged by the Court. As we have shown, this section is inappropriate to use in cases of dead accused persons for the reasons we have given. We therefore wish to take this opportunity to indicate a more appropriate method of dealing with dead accused persons both in the subordinate and High Courts. Both the Penal Code and the Criminal Procedure Act are essentially codified law and rules from the common law. Where there is a gap in the codified law as in situations where accused persons die before the completion of cases against them, a resort is made to the common law.

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Under the common law the case against a dead accused abates In the circumstances, it is more appropriate in such cases for the prosecution to inform the Court that the accused is dead and after production of the written evidence to that effect, the Court marks the case against the dead accused as abated.

In the present case, we wish to revise the discharge order entered by the High Court in respect of the Sixth accused Ismail Mohamed Katembo. Using our revisional jurisdiction under Section 2 (2) of the Appellate Jurisdiction (Amendment) Act 1993, we set aside the discharge order and in its place record that as the Sixth accused Ismail Mohamed Katembo is dead, the case of murder against him abates.

Reverting now to the case in hand, the evidence on th record reveals that the deceased Lt. General Imrani Hussein Kombe was killed because he was mistaken for what was described as a notorious bandit, Ernest Joseph Sambua Mushi @ White. The background to the tragic killing of the innocent Lt. General Imrani Hussein Kombe was as follows: This tragic event was triggered by the stealing in Dar es Salaam on 24/6/96 of a motor vehicle registration No. TZG. 50 a Nissan Patrol the property of one D.W. Ladwa. The police authorities in Dar es Salaam region seem to have been activated to full swing for in their zeal, they detained a motor vehicle a Nissan Patrol belonging to the deceased. The deceased and his family were then on a visit to Dar es Salaam. Although the family has a house in Dar es Salaam, they ordinarily lived in Moshi.

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It was however soon established that the vehicle TZD. 8592 although similar in colour and make to the stolen Ladwa vehicle, was not the one, it was therefore released and returned to the owners. The suspected thief of the Ladwa vehicle was the notorious Ernest Joseph Sambua Mushi @ White who was believed to have taken the vehicle to Kilimanjaro region. Acting on this belief, police authorities in Dar es Salaam decided to despatch two detectives to Moshi to trace the vehicle. These were D/Sgt. Thomson Mensah (1st accused) and D/Copl. Juma Msiwa (3rd accused). They travelled to Moshi in a vehicle provided by the complainant Ladwa and driven by his own driver the late Ismail Mohamed Katembo who was also to be used to identify the stolen vehicle. The party arrived in Moshi on 27/6/96 and reported at the regional police headquarters. They were received by the Kilimanjaro Regional Crime Officer who decided to strengthen the search team by adding to it another three detectives. These were D/C Elisante Daniel Tarimo (2nd accused), D/C Chedieli Elinisafi (4th accused) and D/C Mataba Matiku (5th accused). For this purpose, the party was issued with a weapon, a sub-machine gun (SMG) N. 1270 with 30 rounds of ammunition. This gun was carried by D/C Mataba Matiku. The other accused members of the investigating team, D/Copl. Juma Msiwa and D/Sgt. Thomson Mensah, had a pistol each with eight bullets. D/C Elisante Daniel Tarimo and D/C Chediel Elinisafi were not armed. The investigating team thus constituted, embarked on the search for the stolen vehicle using the complainant's vehicle TZB 7209. On 30/6/96 at about 4 p.m. while on the same mission at Shiri Njoro Village

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and driving towards Arusha on the Moshi-Arusha highway, they saw ahead of them driving in the opposite direction i.e. towards them, a motor vehicle registration No. TZD 8592 Nissan Patrol. Their driver, the late Ismail Katembo, exclaimed that the vehicle in front of them was the stolen vehicle and he signalled the driver by flickering his lights to stop, but the driver did not stop, instead after passing them he turned into a side road and drove on. The police party turned their vehicle and pursued the fleeing vehicle firing as they went. The other vehicle which turned out to have been driven by the deceased, stopped when it hit a stump. The firing by the 3rd and 5th accused persons some of whose bullets hit the deceased killed him on the spot. After the killing, the report was sent to the Kilimanjaro Regional Crime Officer that the stolen vehicle had been recovered and the notorious thief killed. But soon thereafter the Regional Crime Officer received information by telephone from one Iwisi Shoo that the stolen vehicle had not been recovered and that the person whom the police officers had killed was not a bandit but Lt. General Kombe. All the accused persons including the driver of the Ladwa vehicle were arrested and charged with this killing.

The deceased's widow Roselene Kombe PW4, gave evidence to the effect that during the relevant period they were in Dar es Salaam. While in Dar es Salaam, a motor vehicle similar to theirs in both make and colour was stolen, it was for this reason that their vehicle was on suspicion seized by police to be the stolen vehicle, but it was later released to them. She went on to narrate that on 30/6/96 she returned to Moshi and found her husband the deceased

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at their home in Maili Sita Village. At about 4 p.m., she and the deceased left home and drove towards Moshi town. They had an appointment at some point on the way to meet their prospective employees. After driving for some time, she added, she saw in front of them a motor vehicle in which there were about four people. Before they reached the vehicle, her husband, who was driving, indicated that he was turning left into a side road which he did. But they had not gone far when she heard blasts of gun fire. The firing was persistent and one of the bullets hit the deceased on the shoulder. She heard him cry "Jiii" and she advised that they should get out and run. She herself got out of the vehicle and started running. She fell down, got up and ran on. She added that she heard her pursuers say "tena wako wawili". All this time, she said, she and her husband were under the impression that they had been ambushed by bandits who were after their vehicle. She ran on until she reached a certain house and hid behind a vehicle. She remained there until she was certain that matters had calmed down. She heard people saying "Majambazi mengi sana, upoteze maisha kwa sababu ya gari." It was then, she said, when she realized that her husband was dead.

In their respective defences, all the accused including the two appellants gave evidence. The third a accused No. C. 7874 D/Cpl. Juma Msiwa (1st appellant) described the events from the day he and the 1st accused left Dar es Salaam for Moshi in search of the stolen Ladwa vehicle, their arrival in Moshi and their encounter with the suspected vehicle on 30/6/96 at about 4 p.m., and how

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they pursued the suspect vehicle into a side road leading to a maize field. He added that when their vehicle stopped, the 1st accused who was their leader ordered them to get out and fire into the air. That he and 5th accused did so and without explaining how the deceased was killed, he added that their shooting into the air did not make the driver of the suspect vehicle to stop, they decided to shoot at the tyres although it was difficult to aim due to the terrain in the maize shamba. But he said that the deceased had a wound on the left shoulder and three other gun shot wounds. This in his view proves that they had no malice when firing at the motor vehicle. The third accused admitted that the deceased was not armed, but that when the suspect vehicle stopped and the left passenger door flew open, he fired to prevent the man's escape and he saw him fall down. He denied firing at the deceased or at the car, but he saw the deceased come out of the car, run a few steps and fall down. He concluded his evidence as follows:-

> "When the deceased came out he did not surrender. He simply ran away and later fell down."

He was sure however that none of the bullets from his gun touched the deceased because he only aimed at the tyres.

The 5th accused No. E. 3479 D/C Mataba Matiku (2nd appellant) also gave his version of the events of that fateful day as they were chasing the suspect vehicle on a side road. We shall let him tell his own story:

"When the motor vehicle (theirs) stopped after hitting a heap of sand I was ordered by the 1st accused to jump out. We did so. Then he ordered us to fire into the air so that the suspect motor vehicle could stop. I came out and the 3rd accused followed. Then I fired one shot in the air. When I cocked it, I do not know how many bullets went off. I knew there was some fault with my gun. I corrected the fault. That motor vehicle did not stop. We started chasing it and firing at it aiming its tyres. The motor vehicle was going fast and it was bumpy. I did not count how many bullets I fired as I was running. When I was aiming at its tyres, I was about 25 metres away from it. I decided to aim at its tyres to slow that vehicle's motion so that we could arrest the suspect and seize the property. I could not have done so by any other means as I was on foot. By then 3rd accused also fired two shots in the air. I heard the shots from behind me. It was just about 5 paces behind me.

Later it hit a stump and stopped. I did not continue firing after it stopped. Then I saw left door open. Then he came out and fell down. He stood up and ran. Then 3rd accused fired a shot in front of him so as to alert the

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> deceased to stop. Then the deceased fell down. He did not stand up again. I do not know if his shot hit the target or not. He was dead. We examined the deceased's body ... ..."

At the trial, the prosecution case was that the accused were guilty of murder because the nature of fetal wounds inflicted on the deceased, shows that they had only one intention, to kill the notorious bandit and rid society of his nefarious activities. There is no other explanation for pumping four bullets into the human body, on the chest and abdomen. The defence case was that they were pursuing a dangerous criminal who was usually armed and that they aimed all their shots in the air and at the tyres of the suspect vehicle and that therefore the killing was accidental.

After a careful analysis of the evidence, the learned trial judge made the following findings:

> "It is a fact that at the time the third and fifth accused persons started firing into the air and later at the deceased's motor vehicle, they genuinely believed that the person in that motor vehicle was an armed bandit. But when the deceased came out of the motor vehicle, both accused persons knew that he was not armed. Besides, the deceased did not even attempt to challenge them or charge at them. Instead,

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> he was running away with his left facing the accused persons and running awkwardly. By then the 3rd and 5th accused persons were not more than 30 metres from the evidence of PW3 or even less from the additional statement of the 5th accused. The two accused persons, therefore, had every opportunity of arresting him without the use of a lethal weapon. On the evidence and in these circumstances, I am satisfied and find as a fact that the third and fifth accused persons deliberately and for no lawful cause whatever, aimed at and shot the deceased dead, perhaps to get rid of a notorious bandit. That in my view, was killing with malice aforethought."

With these clear findings, the learned trial judge found the two appellants guilty of the offence of murder for which they stood charged and convicted them. In accordance with the law, he sentenced both of them to suffer death by hanging. These two appeals are against the convictions and the sentence of death.

At the hearing of this appeal, the first appellant was represented by Mr. Itemba learned Advocate who had filed a four point memorandum of appeal, while the second appellant was represented by Mr. Sandi who had also filed a four point memorandum of appeal on his behalf. We note that ground 2 in the first appellant's memorandum of appeal is the same as the ground 3 in the memorandum of appeal

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of the second appellant, so they will be dealt with together. We shall start with the first appellant's memorandum of appeal.

In ground 1, the first appellant complained that the trial court erred when it left undecided the question whether or not the appellants in leaving the motor vehicle and follow up the deceased's motor vehicle did so on the instructions of their leader one D/Sgt. Thomson Mensah or acted on their own and contrary to his express order not to leave the motor vehicle or to fire their guns.

In support of this ground, Mr. Itemba submitted that it was accepted at the trial that the first accussed ordered the other accused persons to get out of the vehicle in pursuit of the suspect motor vehicle, and that therefore his client the first appellant left the vehicle on the instructions of his team leader and that for this reason his action of firing three shots to frighten the occupants was lawful.

In reply Miss Munisi learned Senior State Attorney who appeared for the Republic, said that a specific finding on this question was not necessary in view of the judge's findings of fact that the appellants deliberately fired the fatal shots at the deceased. We agree. If indeed the first accused ordered the other accused persons to get out and fire into the air, he did not order them to shoot and kill the deceased. In fact if he had done so, that would have been as unlawful order which the appellants were not obliged to obey or could obey only at their own peril. The learned trial judge specifically held and found

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as a fact that the appellants "deliberately and for no lawful cause whatever aimed at and shot the deceased dead ..." He held this after his earlier findings that in the circumstances the appellants had every opportunity of arresting the deceased without the use of lethal weapons. These views by the learned judge appear to be in accord with those of the team leader who said in his evidence:

> "If a suspect is fleeing, you do not use a gun unless he is armed. You must look for other means to arrest him. If you shoot at him, you might kill him. You can shoot in the air to warn him. You cannot shoot him in the leg if he is not armed. You only use other reasonable force to arrest him. Since they saw him come out unarmed, it was not wise to shoot the deceased. It is not correct to say they used reasonable force in effecting an arrest because they killed him. [When he was unarmed]

And he added:

> "After the motor vehicle had stopped the accused persons could easily have chased the deceased and arrested him."

We hasten to add that the chase and arrest of the deceased by the appellants could have been more easily accomplished because the deceased had already, as it were, been crippled by an earlier shot, that is why he was seen running awkwardly. For these reasons we find no merit in the complaint on this ground and we dismiss it.

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In ground 2, the first appellant complained that the trial court erred when it held that when the deceased came out of the motor vehicle the appellants knew that he was not armed. The second appellant raised the same complaint in ground 3 of his memorandum of appeal.

In support of this ground, Mr. Itemba submitted that there was no way the appellants could have known that the deceased was unarmed. Mr. Sandi in support of his ground 3 added that it should be remembered that the appellants were pursuing an armed bandit. But we think that this was only a belief on their part which should have been dispelled when they saw that the man they had been pursuing was not the aggressive type they had thought him to be, but a man virtually crippled by their earlier shots who could only manage an awkward trot. Both appellants contended that the deceased did not in any way threaten them. We are therefore satisfied as was the learned trial judge that the appellants knew or should have known from the surrounding circumstances that the deceased was unarmed when he came out of the vehicle. Accordingly we dismiss the complaints in ground 2 and 3 in the respective memorandum of appeal.

In ground 3, the first appellant complained that the trial court erred when it convicted him with the offence as an aider and abettor of the second appellant when there was no proof that the two appellants had a common evil intention at the time. We agree with this complaint that the learned judge was wrong to convict the first appellant as an aider and abettor when he specifically found that the third and fifth accused persons (the present appellants) "deliberately and for no lawful cause whatever aimed at

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and shot the deceased dead." There is evidence which was accepted that both accused persons fired at the deceased. with their respective weapons and the pathologist could not differentiate which of the nine bullet wounds he found on the deceased was caused by which weapon. There was no room in the circumstances to treat one as an abettor and the other as a principal. Indeed, we think in the end that is what the learned judge did, for he found both of them guilty of the killing of the deceased and that they did so with malice aforethought.

Lastly in ground 4, the first appellant complained that the trial court erred when it held that the killing of the deceased was deliberate despite the strong evidence on the defence that the deceased was shot accidentally.

At the hearing of the appeal, Mr. Itemba submitted in support of this ground that this was without prejudice to the first appellant's denial that he did not shoot the deceased, but that if the court finds that the first appellant shot the deceased, then he invited the court to find that the shooting was accidental.

We can dispose of this complaint by looking at the postmortem examination report and the evidence of the doctor who prepared it to see the nature and position of the fatal wounds. Dr. Ndetiyo Pallangyo told the trial court that he examined the body of the deceased postmortem, and made the following findings: Externally, he saw nine wounds four were entry wounds, four exit and one superficial. The entry bullets tore through lungs, heart, intestines, liver and caused extensive bleeding externally and internally

He also traced the track of each bullet and found that the entry and exit wounds matched, and that this explained why no spent bullets were found in the body. He added that the fact all spent bullets came out, means that they were at high speed shot from either an SMG or a pistol and they exited singly with some bullets passing through bones. He explained that the bullets must have passed through the body at high speed because bullets slow down with distance, so the shooters could not have been more than 30 metres from the deceased. From these injuries, Dr. Pallangyo concluded that the cause of death was heavy bleeding due to bullet wounds.

From this report, we note that the deceased was shot four times in the chest and abdomen area. These could not have been caused by shots in the air or while aiming at the tyres. The four shots which hit the deceased in the chest and abdomen area were fired from a range of thirty metres, or less. So we asked ourselves; what kind of accident was this? The nature of the bullet wounds inflicted in front of the body and clearly at short range wherein all the bullets exited, prove a clear intention to kill. We find on this analysis that the complaint in this ground has no merit and we dismiss it.

We now turn to the appeal of the second appellant. In ground 1, the second appellant complained that the trial court erred in law in finding that on the agreed facts and the evidence that was adduced in court during trial, the killing of the deceased does not amount in law to justified homicide.

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We shall at the same time deal with ground 4 because at the hearing of the appeal, Mr. Sandi informed us that he intended to argue these two grounds together. In this ground, the second appellant complained that the trial court failed completely to appreciate all circumstances surrounding the case per the evidence adduced in court and hence ended up in making findings on inferences, speculations and imports thereby neglecting to abide by the law of burden of proof in criminal proceedings.

Elaborating on these two grounds, Mr. Sandi submitted that taking all the circumstances prevailing at the time, the second appellant was trying to effect the arrest of an armed robber and recover the motor vehicle. The appellant believed that the suspect was a hardcore criminal who was armed, and that he was the notorious "White" who was at the time being sought by police for murder in Moshi. With all this in mind, he said, the appellants were obliged to use their guns. The complaint in ground 4 is so vague that it was no surprise to us that Mr. Sandi made no effort to elaborate it.

To make the killing of the deceased in this case "justified", it had to be established that the appellants shot him in self defence or that the force they employed in effecting his arrest was reasonable. In his evidence in defence, the second appellant painted a picture of himself and his colleague the first appellant of very careful and responsible police officers. He said:

> "Later it (deceased's vehicle) hit a stump and stopped. I did not continue firing when

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> it stopped. Then I saw the left door open. Then he came out and fell down. He stood up and run. Then 3rd accused (first appellant) fired a shot in front of him so as to alert the deceased to stop. Then the deceased fell down. He did not stand up again. I do not know if his shot hit the target or not. He was dead. We examined the deceased's body ..."

In our view this innocent and responsible picture of themselves does not explain how the deceased fell down if all their bullets missed him as they were aimed either in the air or at the tyres, or how the deceased received the multiple gun shot wounds in the chest and abdomen. The second appellant went on to explain further:

> "You can use a gun if it is difficult to arrest a robber, it is written in the PGO (Police General Orders) allowing use of guns. I used a gun because he refused to stop. I had to use a gun to arrest him. "White" is dangerous."

But considering the fact that the vehicle had stopped and the man was coming out of the vehicle unarmed and was just running away, what justification was there to use the gun in the way he used it even if the PGOs allow it? He himself said that the use of guns is allowed by the PGOs only in circumstances where it is difficult to arrest an armed robber. In this case, the deceased was not armed and in fact as he had been shot in the shoulder he could,

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as has been observed earlier, only manage an awkward run. In this position, the deceased was neither a threat nor a difficult subject to arrest. We also think that as the police party never identified themselves and were in civilian clothes in a civilian vehicle, the deceased and his wife Roselene (PW4) were entitled to think and believe that their pursuers were bandits who were after their vehicle a Nissan Patrol, apparently very much sought after by motor vehicle thieves. They were therefore entitled to refuse to stop and run for their dear lives. This belief was confirmed by the attitude of neighbours when they saw the deceased's body. They believed the deceased had been killed by bandits who wanted his motor vehicle. Roselene, PW4 heard them say:

> "Majambazi mengi sana. Upoteze maisha kwa sababu ya gari."

So people thought the deceased should have surrendered his vehicle to the bandits and save his life.

We are therefore satisfied that since the deceased was not in any way a threat to their lives, and it was not difficult to arrest him, we fail to see how his killing could be justified. The team leader PW1 said and we quote him again:

> "Since they saw him come out unarmed it was not wise to shoot the deceased. It is not correct to say they used reasonable force in effecting an arrest because they killed him."

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We might add, "When he was unarmed."

As we did not see anywhere in the record where the learned judge indulged in speculations and imports, we also find the complaints in both grounds 1 and 4 have no merit and we dismiss them.

Ground 2 was abandoned and we have already dealt with ground 3. On the whole therefore we find no merit in the appeals of both the first and second appellants and we accordingly dismiss them in their entirety.

DATED AT ARUSHA THIS 16TH DAY OF MARCH, 1999.

L. M. MFALILA
JUSTICE OF APPEAL

B. A. SAMATTA
JUSTICE OF APPEAL

K.S.K. LUGAKINGIRA
JUSTICE OF APPEAL

I certify that this is a true copy of the original

(A.G. MWARIJA)
DEPUTY REGISTRAR