IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA
(CORAM : KIMARO,J.A., MANDIA,J.A., And JUMA,J.A.)

CRIMINAL APPEAL NO. 150 OF 2014

MATINDA LESAITO.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Arusha)

(Massengi,J.)

dated the 11th day of March, 2013
in
Criminal Sessions Case No.18 of 2010

JUDGMENT OF THE COURT

17th & 27th June, 2014

KIMARO,J.A.:

The appellant was tried and convicted by the High Court of Tanzania at Arusha, (Massengi, J.) for intentionally killing MT. 69610 CPL IZENGO on 27th October, 2008 at Makungusi Village within Kiteto District, Manyara Region. He was sentenced to suffer death by hanging, the mandatory sentence for the offence of murder.

Being aggrieved by the conviction and the sentence, the appellant filed ten grounds of appeal challenging the legality of his conviction and the sentence. His learned advocate Mr. Alute Mughwai, filed a supplementary memorandum of appeal under Rule 73(2) of the Court of

Appeal Rules, 2009 containing five grounds. He also filed written submissions under Rule 74 to support the appeal.

During the hearing of the appeal, the appellant was present. His advocate also appeared to represent him. The respondent / Republic was represented by Ms. Ellen Rwijage, learned State Attorney. In his written submissions on the grounds of appeal, and elaboration thereto, the learned advocate only concentrated on the supplementary grounds of appeal. This being his position, we will determine the appeal on the supplementary memorandum of appeal.

The grounds of appeal on the supplementary memorandum of appeal are:

1. That, the circumstantial evidence that the Honourable the High Court used to convict the Appellant did not lead to the irresistible conclusion that he was the person that actually shot and killed the deceased; one MT. 69610 CPL IZENGO MCHINYA.
2. That the Honourable the trial High Court erred in fact in finding that the appellant was found in possession of the shot-gun that was used to fatally shoot the deceased merely because he showed the police where the gun was hidden.

3. That, the Honourable the trial High Court erred in law in failing to consider the appellant's denial that he showed the Police where the murder weapon (Exh. PE 4) was hidden.
4. The Honourable the High Court erred in law in failing to consider and resolve the conflicting evidence between the prosecution side and the defence on the issue whether or not the appellant led and showed the police where the murder weapon was hidden.
5. That, the Honourable the trial Judge failed to exercise her discretion judicially in rejecting the Appellant's "alibi" defence on the ground only that he did not prove it.

What transpired on the fateful day on which the deceased lost his life is found in the evidence of the prosecution witnesses. That day was on 27th October, 2002. On that day at around 7.00 a.m. one Athumani Hamisi Msimbazi (PW2) was carrying a woman who was taking his sick child to hospital on a motor cycle. He reached at a place where he was blocked to proceed because of a road block. He stepped down from the motor cycle to find how he could negotiate his way in that road block. While that process was taking place, he was confronted by a person who had a gun. The person with the gun asked PW2 if he knew him. PW2

replied in the negative. The person with the gun allowed PW2 to proceed to hospital for treatment of his child but he remarked to PW2 that he knew him and also mentioned his name that he was Msimbazi. According to PW2 the person with the gun was not known to him before. What he remembered about him was that he was slim with a Masai intonation.

Apparently there is a missing link between the evidence of PW2 and that of Masanilo Hamisi Chaya (PW1). This witness was the Ward Executive Officer of Matui Village. His testimony was that he was informed by Msimbazi (PW2) that he was invaded by robbers while going to Langatani area. The witness said he received the information through a phone about the road block. (PW1) requested CPL IZENGO MCHENYA a military trainer to accompany him to the road block. The two proceeded to the area where the road block was. They too used a motor cycle. CPL IZENGO was armed. When they arrived at the road block two persons came from the bush and one of them was armed. At that time IZENGO shot at the persons. The one who was not armed ran away. The other who was armed also fired at IZENGO. Izengo shot until he ran out of bullets. The other person was also shooting. At that time Izengo requested PW1 to give him another magazine. PW1 crawled to the

motorcycle and took a magazine and threw it to IZENGO. As PW1 was taking the magazine, the person who had a gun continued shooting. PW1 was shot at his cheeks. PW1 took about five minutes nursing the wound to prevent excessive bleeding. In the meantime, IZENGO was not heard by PW1 shooting anymore after PW1 threw to him the magazine. The person who had a gun ran away after IZENGO stopped shooting. At that time PW1 called IZENGO but there was no response from him. He decided to go back to the village and reported the incident to one Luna, a military Instructor.

Hamisi Hemedi Saidi, (PW4) was a driver who with others went to the scene of crime to collect IZENGO. ASP Mathias Nyange (PW3) went to the village dispensary of Sunye Village where he found the body of IZENGO already dead. At that time (PW1) was admitted in hospital. (PW4) said at the time he collected IZENGO from the scene of crime he was still alive but was in a critical condition. Dr. Fadhili Mshana (PW7) who conducted medical examination on the body of the deceased to establish cause of death confirmed that the deceased died because he was shot by a bullet which fractured his left temporal bone and the bullet remained

inside his cranial cavity. The Post mortem examination report was admitted in court as exhibit PE3.

At the scene of crime (PW3) recovered spent cartridges of nine bullets, six of them shot from one gun and the other three from a different gun. In the process of investigation on who committed the offence, (PW3) said informers reported to him that they suspected the appellant to be the killer because he possessed a gun. In the process of tracing the appellant they went in the company of PW4 to the appellant's house where they met his parents. The appellant was not present. One of the villagers told (PW3) that the appellant had a gun. A certain girl led them to a place where they found a bag containing a cover of a gun and it was hidden. While (PW3) was at the appellant's residence, he received a telephone call from Malanda Bakari (PW8) the Street Chairman of Lengatai Village that the appellant was arrested in their village for being a stranger. He was arrested by Bakari Mwenda (PW 6) when the appellant was at a kiosk eating food. (PW3) went to Langatia Village where he collected the appellant. According to his testimony (PW3) was in the company of the appellant's parents. At the time of his arrest the appellant had a cell phone. (PW3) said the appellant told him to release his parents on a

promise that he would show him the gun. It was after (PW3) had complied with his request that the appellant took the witness to the bush where he showed him a shotgun REMINGTON make C 222222A which had one bullet. (PW3) said the appellant was not the owner of the gun. The owner was found. Fees for ownership of the gun was paid for three weeks before the commission of the offence of the murder the appellant was charged with. The owner was charged for mishandling the gun and was convicted and sentenced accordingly.

Investigation to relate the use of the gun to the killing of the deceased was done by A/Inspector Peter Paulo (PW9). He sent what was found at the scene of crime to a Ballistic expert. This was ASP Godfrey Luhamba (PW5). What (PW9) sent to him were three empties of bullets fired from a shot-gun pump action that PW3 said the appellant showed them. In his investigation he fired from the gun sent to him three bullets of the same bullets as the spent cartridges of the bullets sent to him. When he did a microscopic examination of the two sets of spent cartridges his expert knowledge drew him to the conclusion that the three spent cartridges of the bullets that were sent to him were fired from the same gun. The report prepared by (PW5) was admitted in court as exhibit PE2,

the shotgun exhibit PE4, one shotgun bullet exhibit PE5, and the spent cartridges of the six bullets exhibit PE6. That was the substance of the prosecution evidence.

In his defence the appellant denied the commission of the offence. He admitted being arrested at Lengatia Village on 29th October, 2008 by PW6 and handed over to PW8. He also admitted being arrested at a kiosk while taking food and the only thing which was in his possession at the time of the arrest was a cellphone. He admitted being a stranger in that village. His explanation was that he was returning home on foot from Gitu Village where he had gone to attend to his farm. According to the appellant he went to his "shamba" on 27th October, 2008. He denied possessing a gun and also showing (PW3) a gun.

In her evaluation of the evidence, the learned judge made a finding that there was no direct evidence to prove the commission of the offence. She said the evidence relied upon by the prosecution was circumstantial and that evidence led irresistibly to the appellant as the only person who committed the offence. The chain of events she used to convict the appellant was the road block at the scene of crime, the death of the deceased that was caused by shooting, the spent cartridges of

bullets that were recovered at the scene of crime, and the evidence from a ballistic expert that the spent cartridges of bullets that were submitted to (PW5) for investigation proved that they were fired from the gun that was sent to him for examination. Finally, was the evidence by PW3, PW4 and PW8 that the appellant was the one who led to the recovery of the gun. She concluded that malice aforethought on the part of the appellant could be positively inferred from the manner the events took place from the time the deceased went at the road block until the deceased was shot by the appellant. It was then the appellant was convicted as charged and sentenced as aforesaid.

This is a first appeal. The appellant is entitled to have the evidence adduced in the trial court re-evaluated by this Court with a view of ascertaining whether the appellant was properly convicted.

Citing the case of **Simon Musoke V R** (1958), the learned counsel for the appellant said that the learned trial judge rightly held that the case for the prosecution was based on circumstantial evidence. However he did not agree with the learned trial judge that the circumstantial evidence that was led by the prosecution proved the case against the appellant on the standard required in criminal cases. He also relied on the case of

Teper V R (1952) AC 480 and submitted that there was evidence which weakened the circumstantial evidence.

Referring to the evidence on the road block, the learned advocate said neither PW1 nor PW2 identified the appellant at the road block. As to the cause of death of the deceased he admitted that the post mortem report (exhibit PE3) proved that the deceased died from bullet shooting, but he said the post mortem report did not establish who did the shooting. On the spent cartridges found at the scene of crime (exhibit PE5) and that they were fired from the shot gun (exhibit PE2) the submission by the learned advocate was that that evidence did not prove that it was the appellant who did the shooting using that shotgun. He said the shortfall in this aspect is drawn from the fact that there was no palm or finger print marks taken from the appellant and compared with those found in the murder weapon. That being the position, that evidence did not eliminate the possibility of somebody having fired the gun and killing the deceased.

On the last aspect of the evidence that the appellant led to the recovery of the murder weapon, the learned advocate said this was the only evidence that could have incriminated the appellant with the commission of the offence but the appellant disputed that evidence. He

said it was not even true as found by the learned trial judge that PW2 and PW3 said they were witnesses to the recovery of the weapon. Rather, it was PW3 and PW4 who gave that evidence. He concluded on this ground on the evaluation of the evidence by the learned trial judge that, the aggregate of the facts were disconnected and were not conclusive that it was the appellant and nobody else who shot the deceased to death.

Pointing out other exculpatory evidence that weakened the prosecution case, the learned advocate said PW1 and PW2 did not identify the appellant at the scene of crime. They did not even give a description of his features or the apparel of the gun that was used to shoot the deceased. The real owner of the gun was found but there was no evidence led to show how the weapon parted from him and landed in the hands of the appellant. It was further submission of the learned advocate that there was no evidence to show that the appellant handed the gun before he was arrested by PW8. He said the appellant did not even run away. The offence was committed on 27th October, 2008 at Makungusi area of Sunye Village, and on 29th October, 2008 the appellant was arrested at a neighboring village of Lengatei. He said the incriminating and the exculpating factors considered together cannot lead

to an inference that the appellant committed the offence and should have given a benefit of doubt to the appellant for his acquittal. He prayed that this ground of appeal be allowed.

The learned State Attorney supported the conviction and the sentence. She opted to reply to the grounds of appeal generally. She admitted that the learned trial judge relied on circumstantial evidence to convict the appellant. Her considered opinion was that the evidence led at the trial proved conclusively that it was the appellant who shot at the deceased. She admitted that the appellant was not identified at the scene of crime but she said the appellant was not seen in his village for two days after the crime was committed and he was found roaming about in another village where he did not know anyone in that village. She also linked the appellant with the cartridges that were found at the scene of crime. She said there was exchange of shooting at the scene of crime and it involved only two persons, the deceased and the appellant. Since the appellant showed where the gun was, and the ballistic report confirmed that the deceased was shot by that gun, contended the learned State Attorney, the appellant was the one who shot the deceased. She prayed that this ground of appeal be dismissed.

On our part, and with respect to the learned trial judge, we agree with the learned advocate for the appellant, that the circumstantial evidence that was led by the prosecution did not conclusively point an accusing finger at the appellant as being the person who committed the offence. First, the appellant was not identified at the scene of crime. This is undisputed evidence. Neither PW1 who went to the road block with MT. 69610 CPL IZENGO who later died in the exchange of shooting, nor PW2 who passed at the road block earlier identified the person who fired and killed the deceased. Second, as pointed out by the learned advocate and we agree with him, the evidence of the cartridges being found at the scene of crime, the gun that was used in making the shooting, and the shooting itself that killed the deceased did not conclusively prove that the appellant was the one who did the shooting that led to the death of the deceased. The case of **Simon Musoke V R** (supra) is clear on how circumstantial evidence can be relied upon to convict an accused person. The evidence must be irresistible to the commission of the offence by somebody else apart from the accused person. See also the case of **Georgina d/o Masala V R** Criminal Appeal No. 128 of 2014(unreported). Third, in this case the appellant disputed showing the police the gun which

was taken for ballistic examination. Fourth, as for the submission by the learned State Attorney that the appellant absented himself from the village for two days and he was found in a village where he was a stranger, we must say with respect to the learned State Attorney that there was no such evidence led to link the appellant with the commission of the offence. Fifth, it is difficult to ascertain that there was no likelihood of the deceased being shot by (PW1). We say so because it is not clear what prompted (PW1) to go at the road block, the scene of crime. Although PW1 said it was (PW2) who notified him through telephone, (PW2) did not corroborate his evidence. In his evidence he never mentioned to have informed (PW1) of such an incident. Moreover, (PW2) said he was with a woman when passing at the road block but the woman was not summoned to testify. Sixth, the denial by the appellant that he was not found in possession of a gun, casted doubt on the evidence of the prosecution. As such the evidence was not conclusive to find the appellant guilty. We have this ground have merit and we allow it.

On the second ground of appeal the learned advocate for the appellant submitted that the appellant disputed being found in possession of the gun. He faulted the finding of the learned trial judge that the

deceased was shot dead by the appellant using a gun found in his possession and that the appellant did not give explanation. He said the finding was not supported by the evidence and it was mere inference. He said the evidence of PW8 showed that at the time the appellant was arrested he was found with a cell phone and not a gun. Even when the house of the appellant was searched, said the learned advocate, no gun was found there. He said even the case of **Ally Bakari v R** Criminal Appeal No. 47 of 1991(unreported) relied upon by the learned trial judge is distinguishable from this case. In that case, said the learned advocate, the appellant was found in possession of goods that were stolen from the house of the deceased. He prayed that this ground too be allowed.

On this ground the learned State Attorney said there was no contradiction in the evidence of PW8 and PW3. With respect to the learned trial judge her finding is not correct. The evidence of PW3 was that he went to the house of the appellant. He was with other policemen who were not called to testify. PW4 said he joined the policemen who went to the house of the appellant. This witness did not say that the appellant was found with a gun. The appellant was not found at his home. Only his parents were present. His parents did not even tell PW3

that the appellant possessed a gun. According to PW3 it was informers who told PW3 that the appellant had a gun. Even PW8 did not tell the Court in his evidence that the appellant was arrested with a gun. PW3 said it was when they were at the house of the appellant with his parents that PW8 phoned PW3 and informed him of the arrest of the appellant. So the finding by the learned trial judge that the deceased was shot by a gun in possession of the appellant and that he had not given any explanation for his possession of the gun lacks basis. This ground therefore has merit.

The learned advocate for the appellant argued grounds three and four of the appeal together. He focused mainly on the defence of the appellant and how the learned trial judge dealt with the same. He faulted the learned trial judge for failing to consider the defence of the appellant which he said raised two points. One, he was not at the scene of crime when the offence was commited. Two, he did not show where the gun was hidden. He said the learned trial judge did not make any analysis of the appellant's defence before reaching her conclusion.

He cited the case of **Hussein Idd and Another V R** [1986] T.L.R. 166 and said that if the learned trial judge made a proper evaluation of

the defence of the appellant he would arrive at a different finding. Pointing out what he considered to be missing gaps in the prosecution evidence, the learned advocate said while PW3 said the appellant was handed over to him on 29th October, 2008, PW8 said he was handed over to the police on 30th October, 2008. Again there was evidence by PW3 that the appellant agreed to show the gun on condition of the police first releasing his parents but PW8 who handed the appellant to PW3 did not mention anything about the parents of the appellant. The learned advocate urged us to find that this appeal has merit.

The response by the learned State Attorney was that the testimony of PW3, PW4 and PW8 was that it was the appellant who showed where the gun was hidden. She argued that if the appellant did not know where the gun was hidden he would not have shown the police the same. She said the defence of the appellant that he did not show the police the gun was an afterthought.

The evidence of PW3 on this aspect was that it was the appellant who took the gun from the bush and handed it over to them. PW4 testified to the same effect. PW8 testified on the same thing that the appellant went to the bush, took a gun and gave it to the police. We do

not find the conflict on dates being a fatal matter in this case. It is also true that PW8 did not say anything about the presence of the parents of the appellant. However we agree with the learned advocate for the

appellant that the evidence on this aspect did not favour the prosecution side. PW9 also dealt with investigation of the prosecution case. He said he recorded a cautioned statement of the appellant and the appellant admitted being arrested on 29th October, 2008 and was handed over to the police on 30th October, 2008 and that he admitted also showing the police the gun. However, the caution statement of the appellant was not tendered in court as exhibit. The omission by the prosecution to tender the caution statement of the appellant is a drawback on the prosecution case in the circumstances of this case. If it was tendered it would have shown the court the position of the appellant and his defence vis a vis the gun. That is to say whether the appellant showed the same to the police or not. Failure to tender the statement created a gap in the prosecution case. Moreover, there was evidence by PW3 that the owner of the gun was found and charged and convicted. What surprises us is that he was not summoned to explain how the gun moved out of his possession and landed on the appellant. His evidence was important to clear doubt on

the defence that was raised by the appellant. There is also a missing link in the prosecution case in as far as the evidence of PW1 and PW2 was concerned. While PW1 said he was informed of the road block by PW2, PW2 did not say so in his evidence. Why was the person in the village of the appellant who informed PW3 about the appellant possessing a gun not summoned to testify? His evidence was important to show what sort of a gun the appellant possessed. Was it the one which the police said he led to its recovery? There was also evidence by PW3 that a certain girl in the village showed PW3 a place where a bag containing the cover of the gun was recovered. Yet this witness was not summoned. The learned advocate also questioned the sketch plan which was admitted without objection at the stage of preliminary hearing. We do not support him on that argument as he is barred by the provisions of section 192(4) of the Criminal Procedure Act [CAP 20 R.E. 2002. All the same with such missing gaps in the prosecution evidence, it is doubtful whether the appellant showed the gun to the police. The third and fourth grounds of appeal have merit.

In the last ground of appeal, the learned advocate challenged the learned trial judge for failure to consider the defence of "alibi" raised by

the appellant. The learned advocate for the appellant said the learned trial judge directed herself extensively on the defence of the appellant and relied on several decisions. He faulted her for failure to exercise her discretion as required by section 194(6) of CAP 20 and the direction that was given in the case of **Mwita Mhere and Ibrahim Mhere V R** [2005] T.L.R. 107 where the Court held that:

> *"Where a defence of alibi is given after the prosecution has closed its case without any prior Notice that such a defence would be relied upon, at least three things are important under the provisions of section 194(6) of the Criminal Procedure Act , 1985:-*
>
> *(a) The trial court is not authorized by the provision to treat the defence of alibi like it was never made,*
>
> *(b) The trial court has to take cognizance of that defence and,*
>
> *(c) It may exercise its discretion to accord no weight to the defence."*

The Court in its decision in the case of **Mwita Mhere** (supra) had also made reference to the case of **Charles Samson v R** [1990] T.L.R.39 decided earlier where it said:

> *"When we said in the case of **Charles Samson V R** that a trial court should take into account the defence of alibi which was raised for the first time at the defence stage, it must have meant that the court acknowledges that the defence has been raised, albeit belatedly, then it proceeds to the next stage, to exercise judicial discretion whether or not to accord any weight to it."*

The learned trial judge in making her finding on the defence of alibi raised by the appellant said:

> *"In the same line with the case of **Tongoni Naata Vs R** and **Ally Salehe Msutu Vs R** cited above I find that apart from the accused failed to give prior notice that he will raise the defence of alibi before the closure of the prosecution case but he failed to bring any evidence to support his alibi. After*

taking cognizance of the defence of alibi raised by the accused without prior notice as required by the law, I hereby reject that defence".

Full citation of the cases referred to by the learned trial judge in the quotation made by the learned advocate for the appellant is **Tongeni Naata Vs R** [1991] T.L.R 54 and **Ally Salehe Msutu Vs R** [1990] T.L.R 275.

The learned advocate said if one goes through the judgment of the trial court, there is no indication that after taking cognizance of the appellant's plea of "alibi" she was alive to the fact that she had to exercise her discretion judicially and make a decision on whether or not to accord it any weight. He said there is no mention of the word discretion let alone judicial discretion before the trial court arrived at its decision.

The learned advocate also made another quotation from the judgment of the trial court made by the learned trial judge when she arrived at her decision in convicting the appellant:

"Now after rejecting the accused's defence of alibi, I find no other inference which can disprove or

(shake) the circumstantial prosecution evidence which establishes that it was accused person through his unlawful act of firing caused the death of CPL Izengo."

Another authority cited by the learned advocate is the case of **Abdulla Mussa Mollel @ Banjoo Vs R** Criminal Appeal No. 31 of 2008 (Unreported). In that case the Court held:

"It is of course not the law that once the alibi is proved to be false or is not found to have raised doubt, the task of proving the accused person's guilty is accomplished. There must be credible and convincing prosecution evidence on its own, to bring home alleged offence."

The learned advocate said to find a conviction for murder on circumstantial evidence implicating an accused person, the evidence must be compelling, credible and convincing. He referred to his analysis of the prosecution evidence and said the prosecution evidence lacked the qualities mentioned in the case of **Abdulla Musa Mollel @ Banjoo** (supra). He prayed that the appeal be allowed.

As stated earlier the learned State Attorney chose to answer the ground of appeal as indicated earlier generally and she said there was sufficient circumstantial evidence to convict the appellant.

We have already re-evaluated the evidence that was produced in this case. We are alive to the position of the law in proving criminal cases. It is always the duty of the prosecution to prove the case against the accused person beyond reasonable doubt. See the case of **Nathaniel Alphonce Mapunda and Another v. R.** [2006] T.L.R. 395. The only obligation which lies on the accused person is to cast doubt on the prosecution case. It is true that in rejecting the defence of the appellant the learned trial judge did not mention the word discretion. However she said why she rejected the defence of the appellant. She first noted that the defence was raised by the appellant without giving a prior notice. Second, she relied on the case of **Tongeni Naata and Ally Salehe Msutu** (supra) and found that the appellant was a liar because he mentioned in his defence that he went to his farm with persons whom he failed to summons as his witnesses to support him. As mentioned in the case of **Abdulla Musa Mollell @Banjoo** (supra) it is not the truthfulness of the defence of "alibi" which exempts the prosecution from

accomplishing the duty of proving the accused's guilty. In this case we gave six reasons when making our finding in grounds three and four why it was doubtful that the shooting that caused the death of the deceased was done by the appellant. We do not think that it is worthy repeating them here. It suffices to say that there was no credible and convincing evidence to prove the offence against the appellant on the standard required. We allow the appeal, quash the conviction and set aside the sentence. We order the release of the appellant from prison unless he is held there for other lawful purpose.

DATED at ARUSHA this 26th day of June, 2014.

N.P.KIMARO
JUSTICE OF APPEAL

W.S.MANDIA
JUSTICE OF APPEAL

I.H.JUMA
JUSTICE OF APPEAL

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

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL