IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KILEO, J.A., KAIJAGE, J.A. And MUSSA, J.A.)

CRIMINAL APPEAL NO 263 OF 2014

JUMA SALIS @ JONAS.....APPELLANT

AND

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Moshi)
(Nyerere, J.)

dated the 14th day of April 2014

in
Criminal Session No.23 of 2012)

JUDGMENT OF THE COURT

11th & 18th February, 2015

KILEO, J. A.

The appellant Juma Salis @ Jonas was convicted on two counts of Murder contrary to section 196 of the Penal Code, Cap 16 R. E. 2002 in the High Court of Tanzania sitting at Moshi in Criminal Session Case No. 23 of 2012 and was sentenced to the penalty of death by hanging. Being aggrieved he has come before us on appeal.

The appellant filed a seven grounds memorandum of appeal which was argued on his behalf at the hearing by Ms Mariana Michael, learned

advocate. The appellant had also filed a written submission in support to his grounds of appeal which we were asked to adopt. The respondent Republic was represented by Mr. Augustino Kombe, learned State Attorney.

Basically the complaint against the decision of the trial court centres on whether the case for the prosecution was sufficiently proved. Ancillary to this is whether there was water-tight identification of the appellant at the scene of crime, whether it was proved that he was the one who fired the fatal bullets and whether the trial court was justified to take as credible and reliable the testimonies of the prosecution witnesses some of whom might have been drunk as they had been drinking beer at the time and place of the incident.

The facts of the case briefly show that on the day and time of the incident (which was 20/10/2004 at 7pm) the two deceased persons, namely, Timoth s/o Leon and Omary s/o Olekosovani along with other people including PW3 Paulo Malungu were at the premises of Shabani Rajabu (PW2) drinking some beer. It was alleged that the appellant got to the scene where some quarrel arose between him and the deceased Olesokosovani. According to PW3 they were separated however a short time later the appellant returned, peeped through the window went back

and returned later only to shoot Timoth Leon and Omari Olekosovani. It was alleged that the appellant shot Timoth through the window. There was evidence tendered suggesting that after the killing the appellant took the gun which he used in the commission of the crime to the house of PW4. The prosecution led evidence which the trial court found to have established that the gun owned by the appellant was the gun that discharged the bullets that took away the lives of Timoth and Omary.

Ms Michael argued that in view of the surrounding circumstances identification of the appellant at the scene of crime could not be said to have been watertight under the criteria laid down in **Waziri Amani v. Republic**– [1980] T. L. R. 250.Ms Michael also submitted that the learned trial judge placed too much burden on the appellant to prove his defence of alibi.

At first Mr. Kombe resisted the appeal but upon reflection he conceded that the case for the prosecution fell short of proof beyond reasonable doubt of the appellant's commission of the crime. He therefore refrained from resisting the appeal.

On the question of identification we agree with both the appellant's counsel and the learned State Attorney for the respondent Republic that the conditions for identification prevailing at the scene of crime were not conducive for water tight identification. Admittedly, the incident occurred at night- round about 7pm. It was in evidence that there was hurricane lamp burning in the room where the deceased Timoth Leon met his death. This shows that it was dark when the incident occurred. The witnesses claimed that they could identify the appellant as the person who shot the deceased as he was familiar to them;however that alone could not be enough for water tight identification. The witnesses were inside the room with a lamp burning therein. How could they identify someone who was outside in the darkness even if he was familiar to them? This Court, in **John Jacob v. R** – Criminal Appeal No 92 of 2009 (unreported) which was cited by the appellant had the following to say with regard to evidence of familiarity visa vis correct identification.*'..... the question of familiarity will only hold if the conditions prevailing at the scene of crime were conducive for correct identification.If the conditions are not conducive for correct identification, as in this case, then the question of familiarity does not arise at all. So when the question of familiarity especially during the night time is*

raisedthe Court must first satisfy itself whether the conditions prevailing are conducive for correct identification. It is not enough to give a bare statement that the witness knew his assailant before the incident. The witness must explain the circumstances which enabled him identify at the scene of crime.'

We are settled in our minds that in view of the circumstances prevailing at the scene of crime there was no watertight identification of the appellant.

Having found that the appellant was not sufficiently identified at the scene the next question that follows is whether there was other sufficient evidence connecting the appellant to the crime. Without the evidence of identification what remained for the prosecution case was purely circumstantial evidence. Can we in the circumstances say that the circumstantial evidence available pointed irresistibly to the guilt of the appellant? Was the evidence capable of any other explanation? In order for an accused person to be convicted on the basis of circumstantial evidence it must be established that the chain of circumstances linking the appellant to the death he is accused of having caused was unbroken. - see **Hamidu Musa Timotheo and Majid Musa Timotheo v. R**[1993] T. L. R 125.

One piece of evidence that the trial court found to have connected the appellant with the commission of the crime was the gun that was allegedly used in the shootout.This gun was said to have belonged to the appellant. The appellant in his defence did not dispute ownership of the gun which was tendered in court as exhibit P6 by PW8 ASP Rajab Ayub. In his defence he said that he had left the gun (which he owned legally) with his relative (PW4) when he travelled on 8/10/2004. He denied to have been in Kirya village on 20/10/2004 when the incident occurred. The crucial question however is, was it sufficiently established that the fatal bullets were fired from the appellant's gun? If the answer to this question is yes, was it proved that it was the appellant who fired the gun? We take cognizance of the fact that being a first appellate court we are entitled to re- assess the evidence and come to our own conclusions.

After a careful consideration of the evidence adduced at the trial we are settled in our minds that the evidence as tendered did not suffice to sustain a conviction in this case.We have arrived to this conclusion due to, among other factors, the incidences of inconsistencies which were apparent in the testimonies of the witnesses. In the first place, the investigator (PW8) testified to have picked three bullet cartridges at the

scene which he tendered in court as exhibits P1, P2 and P3. PW9, the ballistics expert however, claimed to have received only two cartridges B1 and B2 for examination. The immediate question that comes to mind is how come that only two cartridges were sent for ballistics examination while it was three cartridges that were picked at the scene? In addressing the inconsistencies between the testimonies of PW8 and PW9 the learned trial judgestated inter alia at page 137 of the record that she *was 'of the opinion that 'the tendering of exhibit P2 and P3 was done by mistake'.* This was a serious misdirection. Judges do not act on their opinions of what facts ought to be but upon evidence and facts presented beforethem. If only two cartridges were received by the ballistics expert for examination why were three cartridges tendered as exhibits? Why were not all the three sent for examination? How can we be sure that the two which were sent for examination were part of the three that were found at the scene of crime? This set of facts alone was sufficient to cast doubt on the case for the prosecution. Another aspect of the case that has puzzled us is the fact that the cartridges were picked at the scene in October 2004 and yet it was not until January 2006 that they were received by the ballistics expert. Why it took so long is anybody's guess. There is also no gainsaying the fact that

the chain of custody of the cartridges was broken in so far as there was no evidence on how the three cartridges or the two cartridges for that matter came back into the hands of PW8.

The glaring contradictions between the evidence of PW8 and PW4 (Penneth Kayoyani) who were key witnesses further weakened the case for the prosecution. At page 27 of the record PW4 stated:

'On 4/11/2004 I was at home, Njoro. I came from a journey from Kisiwani.....while at home I found Juma Salis has left a gun with my wife. My wife told me that Juma Salis has left a luggage here and he said he will come back. So looking at it I saw it was a gun. I had nothing to do I stayed waiting for Juma Salis to come. And police officers came to take it. I saw the gun in the morning and police officers came at 4.00pm. They were about five persons they came together with Juma Salis. And that is the first time I saw Juma Salis. That gun my wife kept it in the farm she feared to stay with it at home. ***Myself and my wife went to the farm with the police to show them where the gun is kept****. You can ask Juma Salis why he left the gun with my wife.....'* (Emphasis provided) PW4 repeatedly said that it was his wife who kept the gun at the farm. The wife

was not called in evidence so there was no evidence to establish when the gun was left with her.

PW8 on the other hand made the following statement:

> '.....*But Penneth was not pleased at all with the act of accused person taking a gun and hide it at his residence so he said he never wanted to keep that gun because he has never owned a gun of any kind. He continued to explain to us in Maasai customs woman has no say especially when an elderly man approaches her like the accused person. That is why her (sic!) wife admitted to keep that gun. Then together with that the woman denied to keep the gun in their residence.* ***So accused person hide It in a place he knew himself. Madam Judge that is when the accused person ied us into the bush shrubs where there was a hilly mountain (kichuguu) and he had covered the gun with dry grasses underneath we found soil which was somehow fresh.*** *We removed the dry grasses and that is when we succeeded to find a sulphate bag inside it there was a shotgun.....* (Emphasis provided).

From the quotations above it is quite obvious that the two witnesses who were present when the gun was traced gave very differing accounts of how the gun was recovered. PW4 claimed that it was his wife who hid the gun in the farm and that it was he and his wife who led the search party to the discovery of the gun. PW8 said it was the appellant who led them to where he had hidden the gun which was buried in the soil and covered by dry grass. One, between PW4 and PW8 (or both), must have been lying.

Unfortunately the learned trial judge did not address herself to the above contradictions which in the circumstances of this particular case we find to have gone to the root of the contention. Had she properly done so no doubt she would have resolved the inconsistencies in favour of the appellant and she would have found the case for the prosecution to have been wanting in sufficient proof of the charge of murder against the appellant.

We find the above considerations to suffice for disposal of this appeal which we find to have been filed with sufficient cause for complaint. Consequently, we allow the appeal by Juma Salis @ Jonas. We quash conviction entered against him and set aside the sentence of death

imposed. We order his immediate release from prison unless he is held therein for some lawful cause.

DATED at **ARUSHA** this 16th day of February, 2015.

E. A. KILEO
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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

Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL