IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: KILEO, J.A., ORIYO, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 269 OF 2015

MAJUTO LUNGWA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from a decision of the Resident Magistrate Court of Dodoma at Kongwa)

(Rutta, PRM - Ext. J.)

dated the 8th April, 2015
in
PRM Criminal Session Case No.8 of 2011

JUDGMENT OF THE COURT

25th & 28th April, 2016

JUMA, J.A.:

The main point upon which this appeal turns is whether the appellant, Majuto s/o Lungwa was found by the police in possession of the gun that killed the deceased Zawadi s/o Nguto on 8th day of January, 2009. In the Resident Magistrate's Court of Dodoma (at Kongwa) where Rutta-PRM presided on Extended Jurisdiction, the appellant and six others were charged with murder c/s 196 of the Penal Code, Cap. 16. The particulars of the offence alleged that around 20.00 hours on the material day at

Lumuma-Mafene village within the district of Mpwapwa in Dodoma Region, they jointly and together murdered the deceased.

After hearing eight witnesses brought by the prosecution, the trial court found that two of the seven accused persons who were charged— Yared s/o Mnadi (second accused) and Maliki s/o Lucas (sixth accused) had no case to answer. The remaining five accused persons including the appellant were called upon to defend themselves. At the conclusion of their trial, the appellant was convicted whereas the Juma s/o Njole (third accused), Ezekiel s/o Zebedayo (fourth accused), Juma s/o Ndajilo (fifth accused) and Denis s/o Anthony (seventh accused) were acquitted. The appellant was sentenced to suffer death by hanging.

The bandits who killed the deceased were not identified at the scene of crime. On that material night which was the last day of his life, the deceased returned home and headed straight to the kitchen where he joined his two wives, Merisiana Zawadi (PW3) and Rose Zawadi. It was Rose Zawadi who was preparing the family dinner. A few moments later there was a voice which sounded like that of a woman, asking to be invited in. Although the purported visitor was asked to walk in, he remained outside. When PW3 went out to check out on the visitor, she met a young

man at the door who she invited in. PW3 was joined with her husband who walked the visitor to the living room which was lighted by a lamp branded *"chimney lamp".*

It turned out that this young man who was wielding a machete, suddenly kicked the lamp off and began the attack. According to PW3, her husband emerged stronger in the resulting skirmishes, prompting the visitor to loudly call out for outside help. Other bandits rushed in and ordered PW3 to drop on the ground facing down. Things moved fast for they soon heard sound of gun shots. A man who wielded a machete forced PW3 to stand up and hand-over her husband's money. She surrendered her own money, Tshs. 300,000/=. When matters calmed down, PW3 went out calling her co-wife's name who had escaped to the nearby bush.

When police officers, SSP Linus Mnyambwa (PW4), D/SGT Edwin (PW5), DC George and DC Masaba arrived at the scene of crime they found the body of the deceased outside the house but inside the fence. They recovered a spent cartridge. After interviewing members of the deceased's household, PW4 learnt that a day before he met his violent death the deceased had sold 106 bags of onions. After a brief observation of the body, PW4 surmised that only one bullet was discharged killing the

recognized.

On 13/1/2009 which almost five days after the death of the deceased, PW4 received a tip from an informer who mentioned the appellant who had recently been released from prison as the bandit who killed the deceased. The informer even divulged to PW4 how the rifle used had earlier before the shooting been stolen from one Khasian Kayanda. The police visited Pwaga village to follow up on the information.

Once at Pwaga, PW4 sought the assistance of the then Ward Executive Officer (Lemwai) and Janeth Sijila (PW2) were amongst the people who witnessed the search of the house where the appellant lived. A search warrant which the police prepared was witnessed, signed and was later admitted in court as exhibit P4. The search discovered a rifle with the caliber of 458 and registration number 8936 had its shock butt and barrel cut off. It was admitted as exhibit P1. PW4 also found 7 bullets at the appellant's house and some days the exhibits were tested by the Police Forensic Bureau Department in Dar es Salaam.

PW2 testified on how she came to participate in the search of the appellant's house during the night of 13/1/2009. She was asleep at her home when she heard voices outside and she thought it was the voice of a police officer she knew earlier when she was living in Mpwapwa. She realized that all the noise was coming from the house belonging to the appellant. Apart from the police officer she knew from her days in Mpwapwa, she found many other people like the Village Executive Officer, the Ward Secretary and police officers. PW2 and another woman were appointed by the Village Executive Officer to accompany them to witness the search conducted inside the house. PW2 testified that the police recovered a gun under one of the beds. They also found seven rounds of ammunition.

Another piece of evidence which the prosecution directed against the appellant was that of Zipola Magubi (PW1). She recalled that around 23.00 hours on 12/01/2009 the appellant, whom she described as her former lover, knocked at her door. The appellant was in the company of another person. The two visitors brought a gun and a saw. They cut off the shock butt and barrel from the gun. On orders of the appellant, PW1 threw the cut off pieces of the gun into a pit latrine. She was warned not divulge

what the two visitors had just done. Because she feared her former lover, PW1 could not gather courage to directly inform the police. Instead, the following morning, she informed her neighbour Meshack Mtoyo.

It was PW5 in the company of four other policemen who visited the toilet into which pit PW1 threw pieces of the rifle which the appellant had sewn off the rifle. They demolished the toilet and used a basket and a long pole to fish out the metals which PW5 later tendered in court. The piece of the butt of the rifle was admitted as exhibit P5 and the piece of metal cut from the barrel was admitted as exhibit P6.

The rifle recovered from the appellant's house, pieces of metal sewn from the rifle and the spent cartridge left at the scene of crime were taken for ballistic examination by A/I Gilbert Lukaka (PW8) of the Police Forensic Bureau Department in Dar es Salaam. PW8 recalled how he received a rifle with registration number 8936 whose base and barrel had been cut off. In his examination report (admitted as exhibit P11 and P12) PW8 concluded that the spent cartridge that was found beside the body of the deceased with caliber 458 was fired from the rifle with serial number 8936 whose barrel and butt had been sewn off.

In his defence the appellant stoutly denied the charge. He recalled the day of his arrest on 12/1/2009 when the police invaded his house at midnight while he and his wife were asleep. The police forced him out of his house and beat up. He was standing outside when the police carried out a search of the house before they came out holding a gun they allegedly found inside his house.

At the hearing of this appeal before us Rev. Kuwayawaya Stephen Kuwayawaya, learned advocate, appeared for the appellant. The respondent Republic was represented by Mr. Morice Sarara learned State Attorney.

The appellant's appeal is premised on two grounds, which fault the judgment of the trial court in the following terms:

> *(1) THAT, the trial court erred in law and in fact in convicting the appellant without proof of his guilty on a required standard, i.e. beyond reasonable doubts.*
>
> *(2) THAT, the trial court erred in law and in fact in failing to properly evaluate the evidence tendered before it.*

Submitting why he thinks that the prosecution did not prove the offence of murder beyond reasonable doubt against the appellant, Rev. Kuwayawaya contended that the evidence of the alleged finding of the gun of murder and ammunition in the appellant's possession is riddled with so many unresolved doubts and contradictions making it unsafe to convict the appellant. He took exception to the conclusion made by the trial Principal Resident Magistrate (EJ) contending that the appellant was found in possession of murder weapon and ammunition.

Rev. Kuwayawaya highlighted shortcomings in the evidences of PW4, PW1 and PW2 which singly or collectively created doubts on whether the prosecution's case was proved against the appellant to the required criminal standards of proof. On the first doubt, the learned advocate pointed at the evidence of the main prosecution witness (PW4). This witness, according to the learned advocate, was all out prepared to frame up the appellant with a crime he did not commit. He referred us to page 62 where PW4 testified that he knew the appellant had just been recently released from prison. We were also referred to page 63, where PW4 testified that he knew the appellant well before the deceased was murdered because he had once faced an offence of armed robbery. Rev.

Kuwayawaya therefore urged us to treat the evidence of PW4 with circumspection because he was all out to pin down the appellant on the basis of his past criminal activities.

Rev. Kuwayawaya similarly urged us to treat with great caution the evidence of the appellant's former lover, PW1. He submitted that the evidence of PW1 had doubts around it which were not evaluated by the trial court. In particular the learned advocate wanted us to doubt and disbelieve the evidence of PW1 suggesting that at around 11 pm on 12/1/2009, which was a few days after the death of the deceased, the appellant could muster the courage to bring the murder weapon at PW1's house. Rev. Kuwayawaya doubted the credence of PW1 wondering why this witness gave a different version of evidence when she was answering the questions put across by the 2nd assessor, wherein she stated that it was the police who told her that the appellant had dumped the pieces of metal into pit latrine.

The learned advocate also urged us to attach little weight on the evidence of PW1 because if the pieces of metal cut off a murder weapon were found in her toilet, she was as much a suspect as the person who threw the metals into the latrine.

With regard to doubts created in the evidence of PW2, Rev. Kuwayawaya referred us to page 51 of the record of this appeal where PW2 testified to confirm that she knew the main prosecution witness, PW4.

Rev. Kuwayawaya also submitted that there were major contradictions between the evidence of PW2 and that of PW4. He insisted that when read together, the evidence of PW2 and PW4 show the extent the police officers led by PW4 were prepared to go to implicate the appellant to the crime he did not commit. He referred us to page 52 of the record where when she arrived at the appellant's house, PW2 found the VEO and the Ward Secretary. The learned advocate submitted that the police could well have planted the gun under the appellant's bed before they invited in witnesses. The learned advocate submitted that in the circumstances, PW2 who was friendly to PW4 should not be taken to have been an independent witness who could give objective evidence. He wondered why Mama Mgwando who together with PW2 had been invited to witness the search, did not testify as an independent and objective witness with not tie to any police officer. He similarly expressed his surprise why the Village Executive Officer (VEO) who is alleged to have witnessed the search, was not called to testify as an independent witness. He

submitted that PW4 and other police officers had already been inside the appellant's house where they planted the gun before they invited witnesses inside the house.

Submitting next on the second ground of appeal, Rev. Kuwayawaya faulted the trial court for failure to evaluate the evidence as whole and at specific levels. Apart from relying on contradictory evidence claiming that the appellant was found in possession of the gun and ammunition, there is no other piece of evidence remotely linking the appellant with the death of the deceased, he submitted. The learned advocate contended that had the trial Principal Resident Magistrate (EJ) evaluated the evidence of PW1, he could have concluded that PW1 was not a credible witness.

Rev. Kuwayawaya wrapped up his submission by reiterating that the prosecution's case was not proved beyond reasonable doubt as law require.

In response to the submissions made on the appellant's behalf, Mr. Sarara took a stand of supporting the conviction of the appellant and the mandatory sentence of death by hanging which he received. The learned State Attorney regarded PW1 as a key witness for prosecution because it

was her evidence that set into motion the journey to the appellant's house where the gun and ammunition were recovered from the appellant's possession. He elaborated that after she had witnessed the cutting off the gun barrel and its shock butt, it was PW1 who informed his neighbour Meshack Mtoyo. Meshack in turn alerted the police. The learned State Attorney did not agree with the learned advocate for the appellant regarding contradictions between the evidence of PW4 and PW5. These two witnesses, he added, were members of the same police team that searched the appellant and recovered a gun and ammunition. The evidence of PW4 and that of PW5 complement, he submitted. He in addition argued that there is no evidence that remotely proves that PW4 and PW5 fabricated evidence against the appellant by planting the gun and ammunition in the appellant's house.

Mr. Sarara considered the testimony of the ballistic expert, PW8, to be a strong piece of evidence that linked up the bullet that killed the deceased and the gun which was found in possession of the appellant. He similarly referred us to the certificate the police officers prepared after search (exhibit P4) as another piece of evidence that linked the appellant with the possession of the murder weapon. According to the learned State

Attorney, the evidential weight of the certificate of search was considerably enhanced when the appellant signed it. Mr. Sarara concluded by reiterating that the pieces of evidence he has highlighted irresistibly point at the appellant and supported the trial court for concluding that prosecution had proved its case beyond reasonable doubt.

In rejoinder, Rev. Kuwayawaya reiterated his position that PW1 was not an important prosecution witness and neither did her evidence lead the prosecution towards the appellant's house. He referred us to page 77 of the record to prove that information about cutting off parts of the gun was received several days after the police had already searched the appellant's house. In his evidence, PW5 stated it was on 19/1/2009 which was after police had searched the appellant's house, when the police obtained information that the appellant had cut off barrel and shock butt from a gun. He similarly wondered why exhibits P5 and P6 which were allegedly recovered from PW1's toilet were not taken to the ballistic expert (PW8) to be scientifically linked with the gun the expert examined.

From submissions of the two learned Counsel, we shall premise our determination of the grounds of appeal from the perspective of the role expected of a first appellate court like we are in the instant appeal. We are

expected to conduct a re-hearing of the evidence, and to re-evaluate the same in order to determine for ourselves whether, the conclusion reached by the learned Principal Resident Magistrate who heard the trial part on extended jurisdiction, should after our re-evaluation, be left to stand. –see for example: **Siza Patrice vs. R.,** Criminal Appeal No. 19 of 2010; **Mwita Sangali vs. R.,** Criminal Appeal No. 266 of 2011; **Oscar Lwela vs. R.,** Criminal Appeal No. 49 of 2013 (All unreported); etc.

There was no eye-witness who came forward to confirm that it was the appellant who shot and killed the deceased. In that respect, the evidence which was used to convict the appellant is circumstantial evidence. Mr. Sarara revisited several pieces of circumstantial evidence which he submitted proved the prosecution case against the appellant. The pieces of circumstantial evidence began with evidence of PW1. This witness recalled that she was already in bed asleep around 23 hours on 12/1/2009, when the appellant, who was once her lover, and another person, knocked at her door. The appellant had a gun and a metal saw. The two visitors proceeded to cut off the barrel and but shock of the gun. The appellant ordered PW1 to throw the pieces of metal into a pit latrine.

The next piece of circumstantial evidence according to Mr. Sarara is the testimony of PW1 that on 13/1/2009 she informed her neighbour Meshack Mtoyo about her two visitors of the previous night, and what they had done with the gun. According to PW1 she told Meshack to report the incident to the police, which he did.

Next event in the series of circumstantial evidence took place at around 21:00 hours on 13/1/2009 when PW4 who was then the OC-CID of Mpwapwa received a call from his informer. The caller mentioned the appellant as the bandit who killed the deceased and that he had used a gun that had earlier been stolen from Khasian Kayanda. Police officers led by PW4 and including PW5, travelled to Pwaga village where the appellant was suspected to be residing. Once at Pwaga village they first went report their presence and mission at the home of Charles Lemwai who was then the WEO of Lumuma Ward. The police officers and WEO went to the house where the appellant lived. They searched it and discovered a gun and 7 bullets. The search was in the presence of witnesses, who included the police officers and PW2. After the search, a certificate of the search was prepared (exhibit P4).

Mr. Sarara also cited the evidence of PW5 in the chain of circumstantial evidence. PW5 testified that sometime on 19/1/2009 the police received information on how the appellant visited PW1's home and used a saw to cut off barrel and butt shock from the gun. PW5 was in the company of several police officers when they demolished the pit latrine and recovered the barrel and butt shock. The learned State Attorney similarly underscored the linkage to the appellant from the evidence of the exhibits that were recovered from possession of the appellant. These exhibits were sent to the Police Forensic Bureau Department and were examined by PW8. He argued that the report which PW8 prepared and photographs which he took were admitted as exhibits P11 and P12 to link the appellant to the murder weapon.

Rev. Kuwayawaya in his submissions on the two grounds of appeal has taken a very different interpretation of the above evidence.

After hearing the submissions of the two learned Counsel, and re-evaluating the evidence on our own; we are not in any doubt about the position of the law where there is no eye-witness account on who actually killed the deceased and left no personal trace evidence to link the perpetrators to the crime. The law demands the exercise of caution before

convicting on basis of circumstantial evidence. There are several decisions of the Court urging such caution when the outcome of a trial hinge on circumstantial evidence.

In **Mohamed Selemani vs. R.,** Criminal Appeal No. 105 of 2012 (unreported) the Court approved the statement which was made by the Supreme Court of India in **Balwinder Singh v State of Punjab,** 1996 AIR 607:

> *"In a case based on circumstantial evidence the court has to be on its guard to avoid the danger of allowing suspicion to take the place of legal proof and has to be watchful to avoid the danger of being swayed by emotional considerations, however strong they may be, to take the place of proof (See, also* ***SARKAR ON EVIDENCE,*** *19'1 Ed, p.65).*

One clear message that emerges from all cases which dealt with circumstantial evidence is the need for the courts to exercise caution and to be on guard to avoid the danger of allowing suspicion, emotions to factor the final outcome of a trial that depends on circumstantial evidence.

The Court has developed guidelines that may assist the courts in the exercise of the caution. In **Hassani Fadhili v Republic 1994 TLR 89** the

Court stated that in *"a capital offence the evidence has to be watertight and to ground conviction on circumstantial evidence must be incapable of more than one interpretation."* Words of caution where a case depends on circumstantial evidence were also echoed in **John Magula Ndongo vs. R.,** Criminal Appeal No. 18 of 2004 (unreported):

> *"...In principle we agree with Mr. Ndolezi in his submission, and as supported by the above authorities, that in a case depending entirely on circumstantial evidence before an accused person can be convicted the court must find that the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt. And it is necessary before drawing the inference of guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. Indeed, this principle is well enunciated in the case of* ***Ilanda Kisongo v. R*** *(1960) EA 780 at page 782."*

Guided by the need for caution, the main question for our determination is whether the evidence of PW4, PW5 and PW2 irresistibly

prove that the appellant was found in possession of the murder weapon that night of 13/1/2009.

We shall straight away point out that Rev. Kuwayawaya is right to fault the Principal Resident Magistrate (EJ) for entering the conviction without evaluating the evidence of these key prosecution witnesses who testified on the issue of the appellant being found in possession of the murder weapon. This lack of evaluation of evidence and exercise of caution comes out clearly in the judgment of the trial court on page 232 of the record of appeal:

> *"...The second limb of the case was based on the gun. I said that it was not disputed that the gun was taken from the house of the 1st accused. That gun had a cut buttock (sic) and the cut barrel. PW1 said that the said gun was cut by the 1st accused and that was done at her home in her presence. The cut pieces were handed to PW1 to throw them in the toilet. These pieces were fished out by PW5 who went at home of PW1 and demolished the toilet. PW2 the sister in law of the 1st accused also saw the said gun being taken from the bedroom of the 1st accused and under the bed."*

The learned Principal Resident Magistrate (EJ) similarly brushed off the defence evidence which tended to raise doubt on the prosecution's version of evidence on possession. The trial court stated:

> *There was no strong defence to offer some explanation how the said gun went in the bedroom of the 1st accused. It is clear to me beyond doubt that the cut (sic) which was found under the bed of the 1st accused was in his full possession."*

There is also apparent contradiction in the evidence of PW4, PW5 and PW2 which was not subjected to evaluation. PW4 testified how the police knocked at the appellant's door and it was the appellant's wife who opened the door. The appellant was still in bed. Once inside, PW4 handcuffed the appellant and used his torch to carry out a search beneath the bed. The police found a rifle (its base had been cut). The gun had no ammunition so PW4 asked the appellant to produce the ammunition. Appellant showed the police 7 bullets for rifle gun. It was not stated where the appellant had hidden the ammunition. This search which PW4 narrates about was apparently conducted exclusively by the police without the presence of witnesses. According to PW4, The police asked the appellant

where the gun was. He replied that it was under his bed, whereupon the police flashed their torch and saw a gun.

Although PW4 and PW5 were in the same team of police officers who searched the appellant's house, PW5 gave a different account from PW4 when he suggested that other witnesses to the search came much later after the police had discovered the murder weapon. PW5 spoke of a lengthy interrogation before the gun was found:

> *"...We asked him to show the gun. At first he did not show. We interrogated for some hours. Then he admitted that [he] had that gun in the house. Then the procedure was followed. We called witnesses like Janeth Sijila....and then we entered and conducted a search. In the course of the search we found a gun rifle which had a cut base and a cut barrel. It was hidden under the bed."*

In her evidence, PW2 recalled how she and one Mama Mgwando were selected to witness the search. When she arrived at the appellant's house, she found the appellant and his wife Elieth (PW2's sister) outside their house. PW2 and others who were outside all went inside the house. Although PW4 and PW5 had in their respective testimonies stated that the

police had already found the gun and ammunition, PW2 testified how when she was invited to witness the police search, she saw *"7 ammunitions (risasi) and from under the bed the police took a gun"*. Like Rev. Kuwayawaya, we also wonder why the village leaders like the VEO who were at the scene when the appellant's house was searched, were not called on to testify.

Apart from the apparent contradictions in the evidence of PW2, PW4 and PW5, the trial Principal Resident Magistrate (EJ) did not evaluate the evidence of the appellant in order to eliminate all aspects of the doubt in the prosecution's version of evidence that the appellant was found in possession of a gun. In his defence, the appellant testified on the force which the police employed to gain access to his house. They fired warning gunshots. He was handcuffed and taken out of the house. He and his wife shouted for help which attracted neighbours to the scene. The appellant claims that he remained outside, handcuffed while police went inside his house and came out with the gun:

> *"Then I heard a bullet being fired. Then the door to my room was forcefully opened. About 4 people entered. They put me under power. They pointed a gun to me*

and said that be calm otherwise you will be killed. Then I was beaten and taken out of the house. There outside they proceeded to beat me, then they introduced themselves that are police officials. While outside together with my wife the police went inside the house. Then we raised alarm.-Rwangi people came. Then those people who had entered came out and introduced themselves that are police from Mpwapwa....The police called the people and together with them entered in the house. I did not go in the house.... then the police came out with a gun. I don't know the type of that gun. Then they told the people that have searched and found a gun with me."

Without resolving contradictions in the evidence of witnesses on how the gun and ammunition was actually found in possession of the appellant we cannot say that the evidence on possession was proved beyond reasonable doubt.

In the upshot of the unresolved cloud of doubt over the prosecution evidence that the appellant was found in possession of the murder weapon and ammunition, there remains no other circumstantial evidence which irresistibly links the appellant with the murder of Zawadi s/o Nguto to justify his conviction.

hereby quashed and the sentence of death by hanging is set aside. The appellant is to be released forthwith from prison unless he is otherwise lawfully held.

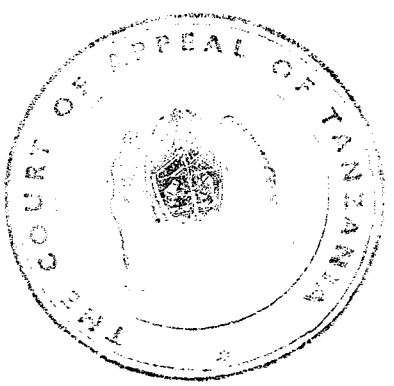
DATED at **DODOMA** this 27th day of April, 2016.

E.A.KILEO
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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



E.F. FUSSI
DEPUTY REGISTRAR
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