IN THE HIGH COURT OF TANZANIA

AT MOROGORO

(ORIGINAL JURISDICTION D'SALAAM – REGISTRY)

CRIMINAL SESSION CASE NO. 39 OF 1999

REPUBLIC

VERSUS

1. **Ally Iddi Shomari**
2. **Mikidadi Shomari**
3. **Maneno Chambuli Hassan**
4. **Safari Hussein @ Taksi**

JUDGMENT

ORIYO, J.:

The accused, Ally Iddi Shomari @ Kijohunga, Mikidadi Shomari Mwingu and Maneno Chambuli Hassan are charged with murder contrary to Section 196 of the Penal Code. It is alleged that on or

about 22/9/97 at Kibungo Kungwe area within the District and Region of Morogoro, the accused, jointly and together murdered one ASIA SAID. The accused have denied the charge.

At the preliminary hearing some facts were undisputed. There was a consensus that Asia Said was dead and that the cause of her death was as detailed in the Postmortem Report exhibit "A"; haemorrhage and injury to liver. It was also not disputed that the accused were arrested and charged with the murder. The Republic was represented by Ms A. Ndunguru assisted by Ms Choma, learned State Attorneys and the learned Mr Mbezi, advocate, appeared for all the accused.

The prosecution had five witnesses who testified on its behalf. PW 1, Ramadhan Hussein, a grandson and PW 2, Juma Ramadhani Kisangile, a son-in-law lived with the deceased. On the material date, past 10 pm at night, PW 1 and PW 2 testified that while they were sleeping they heard people knocking at the door asking for drinking water. The witnesses moved near the door and required them to identify themselves. The accused had a torch and PW 1 had a torch as well. They shone their torch through a hole in the door and insisted that the door be opened. When PW 1 shone his light at them through the same opening in the door they shot at him in the arm. He escaped to his uncle's, PW 3; after identifying the accused by their voices and confirmed their physical identities with the help of his torch because he knew them as residents of the area and had

seen them before. PW 2, was forced into hiding after PW 1 escaped. PW 2 testified to have known the first accused only as a resident in the area and had seen him before. Both witnesses identified their respective accused in the dock.

PW 3, Hamis Mohamed Biwi, another son-in-law to the deceased, visited the scene after receiving the information from PW 1. The accused names were also mentioned to him by the witness. PW 3 testified that on reaching the scene, he found the accused gone and the deceased body lying on the floor, bleeding from bullet wounds. The witness also knew the accused from before because they reside in the same area.

PW 5, Aziza Ramadhani also lived in the deceased neighbourhood. Her evidence was that she met the accused carrying a torch but without the gun, on her way to the deceased place in response to cries for help. She testified that she identified the accused as people she knew from before who resided in the same area. She further stated that the accused forced her to go back to her house for fear of the witness naming them as they had come from the direction of the deceased house. She said that she only went to the deceased place after the accused left.

After the prosecution case, the accused were informed of their legal rights under Section 293, Criminal Procedure Act, 1985. They all opted to testify on oath. In addition, the first accused called two

witnesses, DW 4 and DW 5 while the second accused called one witness, DW 6. The third accused did not call any witness.

The first and second accused, DW1 and DW2 respectively, put up the defence of ALIBI. DW1 testified that he had taken supplies (sugar cane) for sale to Dar es Salaaam's Tandale Market on 20 September 1997 and returned home on 25 September 1997. He was arrested in connection with the murder on the same day of his return. On cross examination on why he was arrested as suspect, he testified that he had no grudges with the deceased and / or any member of her family. But, he stated further that there is a possibility of Hamis Salum, deceased son, to have named him. He informed the court that way back in 1994 he had divorced one of his wives when he discovered that she had an affair with Hamis Salum. DW4, was Habiba Yahaya, one of the three wives of DW1. Her testimony was to confirm that DW1 left from her residence on 20 September 1997 and travelled to Dar es Salaam on business. She was later informed by other people that DW1 delayed his return from Dar es Salaam until 25 September 1997 and that he was arrested on the same day he had returned. DW 5; Ramadhani Kome, is a close friend and a business partner of DW1. He testified that his last business trip with DW1 to Dar es Salaam started on 20 September and ended on 25 September 1997 when they returned home and DW1 got arrested on the same day.

The second accused, DW2 testified that he had left the village on 20 September 1997 to Dar es Salaam to fetch his wife to testify for him in another Criminal charge of armed robbery that was facing him at the Morogoro District Court. He returned to Morogoro on the following day and spent the night at his sister's place, DW6. He appeared in court for the case on 22 September 1997. Thereafter he spent the night at his sister's place again until 24 September when he returned to his home. He was arrested at the court premises when he was attending the armed robbery case again on 8 October 1997 after one Juma Ramadhani, the complainant in the armed robbery case, pointed him out to the police. There is a conflict of dates between his statement to the police and his testimony in court . Whereas he told the police that he was home for the night of 22/9 he testified that he spent that night at his sisters place. DW 6, Asha Shomari, is a sister of DW2. Her testimony was basically is support of Dw2's in that the latter was at her place at Mwembesongo. Morogoro, on the fateful night. They only differ on when DW2 returned home. Whereas DW2 testified that he returned on 24/9. DW6 testified that he returned on 23/9/97.

DW3, the third accused testified that he actually participated in the funeral of the deceased. Thereafter he went on about his usual business in the village although he knew that his name was among the suspects, he was not arrested until 8 months after the incident on his way from Morogoro to Dar es Salaam. He did not wish to call any witnesses to testify on his behalf.

It is the duty of this court to determine, upon the foregoing evidence, whether the accused persons killed the deceased and if so, whether the killing was with malice aforethought.

There was exhaustive and industrious submissions made by learned counsel on both sides citing several authorities thereon. The defence was of the view that the prosecution failed to prove the case beyond all reasonable doubts against the accused persons for a number of reasons. Firstly the credibility of the prosecution witnesses was attacked on two fronts – their testimonies contradicted material facts in their statements to the police and secondly that they were lying and / or their testimonies were a fabrication. It was the defence contention that PW1, PW2 and PW5 who testified to have seen the first and second accused at the scene did not tell the truth because of the accused defence of ALIBI. The accused were not in the area on the fateful night for the witnesses to see or identify.

On the other hand it was the prosecution submission that it had proved its case beyond all reasonable doubts that it is the accused who murdered the deceased. On the defence of Alibi, the prosecution prayed that it be rejected because the defence contravened the provisions of Section 194 (4), (5) and (6) of the Criminal Procedure Act, 1985.

After summing up to the two ladies and gentleman assessors they unanimously returned the verdict of not guilty. They stated that they were convinced of the defence of Alibi put up by the first and second accused persons. They were of the view that the prosecution evidence failed to satisfy the standard of proof required.

Having summarised the evidence tendered in court; it is clear that the prosecution evidence was solely circumstantial. There was testimony that the accused were seen at the deceased place with a weapon; but there was no testimony that the accused or any of them was seen firing the fatal bullets at the deceased. Further, the alleged weapon was not found to compare or verify whether the fatal bullets were fired from the weapon of the accused or not. I will now proceed to determine whether there is sufficient circumstantial evidence to prove that it could only be the accused persons and not anyone else who murdered the deceased to warrant a conviction of murder.

The law on circumstantial evidence is well settled; and trite. A court of law will not ground a conviction solely based on circumstantial evidence unless such evidence irresistibly lead to the accused as the person who committed the offence charged, with no possibility of another person having committed the deed. What has to be emphasized here, however, is that the alternative possibility must not be fanciful; but plausible. (See CHANDRAKANT JOSHBHAI PATEL VS R. Criminal Appeal No. 13/98, Court of Appeal of Tanzania, unreported.)

Who murdered Asia Saidi in cold blood in the night of 22/9/97? According to PW1, the murder was committed by the accused who visited the deceased premises while the second accused was carrying a gun which he used to shoot at the witness in the arm. He was able to identify them with the assistance of the light from his own and the accused torches and from their voices as well. He identified first accused because he knew him from before as he lived in the neighborhood. He identified the second and third accused as people he had interacted with in his day to day business. He failed to identify a fourth accused because he ran away. PW2 saw four people but only able to identify the two who went inside the house. He named them as the first accused who had a torch and Tebweta (now deceased) who was carrying the gun. He could not identify the other two who remained outside. PW5 met 4 people on her way to the deceased house. Of the four people, three of them were the accused in the dock. She could identify them by assistance of light from the moon. The first accused carried a torch; but none of them had a weapon. That was the totality of the evidence of the prosecution witnesses who eye witnessed the accused immediately before and after the murder.

Before proceeding further, let me look at the defence of ALIBI put up by the first and second accused. The first accused testified that he was in Dar es Salaam on a business trip from 20/9/97 to 25/9/97; so he could not have participated in the murder on 22/9/97.

The wife of the first accused, (DW4); and a business associate, (DW5), testified to corroborate the first accused defence of ALIBI. However, the first accused, failed to furnish any documentary evidence on the alleged trip to Dar es Salaam such as tickets from transporters who ferried the goods from Morogoro to Dar es Salaam; levy receipts from the market in Dar es Salaam where the goods were sold etc. Similar defence was put up by the second accused that he spent the night of the murder away from the village, at his sisters place (DW6), and could not have participated in the murder. DW6 testimony corroborated his evidence to that effect. But the first and second accused raised the defence of ALIBI without NOTICE as required under SECTION 194 (4) and (5) Criminal Procedure Code. SECTION 194 (6) provides for the consequences in the following language:-

> " *If the accused raises a defence of alibi without having first furnished the particulars of the alibi to the court or to the prosecution pursuant to this section, the court may in its discretion, accord no weight of any kind to the defence. (emphasis supplied).*"

As correctly submitted by the learned State Attorney; under the circumstances of this case, the court is entitled to reject such defence; as I hereby do and reject the defence of ALIBI as raised by the first and the second accused persons for failure to comply with the mandatory provisions of the law.

On the totality of the prosecution evidence, there is no doubt that it created a high degree of suspicion against the accused. However, it is a trite legal principle that suspicion alone, however strong, is not enough to ground a conviction. On perusal of the record some of the incriminating testimonies against the accused were full of contradictions and inconsistencies. For example, the two key prosecution witnesses, PW1 and PW2, who lived with the deceased in the same house on the fateful date; had various contradictions and inconsistencies in their testimonies. Whereas PW1 stated that there were only three robbers at the scene; the fourth robber, namely Juma Tebweta, had run away. PW1 further stated that, Mikidadi Shomari, the second accused, was holding the gun and shot at PW1. This piece of evidence contradicted that of PW2 who stated that he was able to identify only two of the robbers at the scene, that is the first accused and Tebweta who went inside the house with Tebweta carrying the gun. PW5, another witness who saw all the four robbers that night and identified them also contradicted PW1 testimony that Tebweta had run away. A further contradiction was in the testimony of PW3 who stated that PW1 did not mention the third accused, Maneno Chambuli as one of the robbers at the deceased house. An additional contradiction came from PW5 who testified that on the fateful day, there was moonlight which assisted her to identify the accused when she saw them during that night. But PW1 told the court that he was able to identify the

accused using light from his torch; implying that the night was dark on that particular date.

It is a well settled legal principle that wherein a trial, there are inconsistencies and contradictions in the testimonies of witnesses; it is the duty of the trial court to consider and try to resolve them where possible. Otherwise the trial court is required to decide on whether the inconsistencies and contradictions are only minor or whether they are such as to go to the root of the matter; see MOHAMED SAID MATULA vs REPUBLIC (1995) T L R 3 . In its subsequent decision, the Court of Appeal held as follows in the case of OMARI MSOKOWARE vs REPUBLIC, Cr. A. No. 84/99, DSM Registry (unreported):-

> " *Due to the inconsistencies in the testimonies of PW2 and PW3, we find the said discrepancies created doubts in the prosecution case. For that reason we are not satisfied that the guilt of the appellant was proved at the required standard, i.e proof beyond doubt."*

In the case at hand, the contradictions, inconsistencies and discrepancies are not minor but of a fundamental nature which go to the root of the matter.

Turning to the issue of the identification of the accused; it is on record that the murder took place in the night when the deceased,

PW1 and PW2 were already asleep. They were woken up by the loud bang on the door and the voices asking for drinking water. PW1 testified that he identified the accused using the light from his torch which he directed at the accused outside through a hole in the door. He did not state the size of the hole or the location thereof which enabled him to see the accused persons properly and be able to identify each of them correctly. PW5 identified them using light from the moon whereas other testimonies state that the night was dark.

Our laws on the evidence of visual identification is well settled. In the case of WAZIRI AMANI vs REPUBLIC (1980) TLR 250, the Court of Appeal held (late Mwakasendo, J. A.):-

> " *No court should act o n evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight."*

On the strength of the principle in WAZIRI AMANI above on the visual identification of the accused and taking into account the discrepancies in the prosecution testimony, I am of the considered view that it would be dangerous to accept that PW1, PW2 and PW5 properly identified the accused merely because they knew them from before. Their mode of identification did not pass the test set out in WAZIRI AMANIs case. The evidence tendered on the identification of the accused was not watertight and it created doubts in the

prosecution case. The doubts has to be resolved in favour of the accused.

Having stated the foregoing and for the reasons given the circumstantial evidence tendered by the prosecution was not sufficient to prove the charge of murder against the accused beyond reasonable doubt.

I therefore find the three accused persons; namely Ally Iddi Shomari @ Kijohunga, Mikidadi Shomari Mawingu and Maneno Chambuli Hassan not guilty of the murder of ASIA SAID on 22/9/97; and I acquit them of the charge of murder. The three accused persons are to be immediately released unless otherwise legally held.

Accordingly ordered.

K. K. Oriyo

JUDGE

14/6/2005