

IN THE HIGH COURT OF TANZANIA  
AT NJOMBE

ORIGINAL JURISDICTION  
(Iringa Registry)

CRIMINAL SESSION CASE NO. 36 OF 2010

THE REPUBLIC  
VERSUS

1. MAJUTO S/O GOHAGE
2. ESSAU S/O MUHAMEDZI
3. TIMOTH S/O MUHAMEDZI

2/7/2014 & 4/7/2014

**R U L I N G**

MADAM SHANGALI, J.

The accused person in this case, namely MAJUTO S/O GOHAGE (1<sup>st</sup> accused); ESSAU S/O MUHAMEDZI (2<sup>nd</sup> Accused) and TIMOTH S/O MUHAMEDZI (3<sup>rd</sup> Accused) stand charged with the offence of Attempted Murder c/s 211 (a) of the Penal Code, Cap. 16, R.E. 2002. It has been alleged by the prosecution that on the 17<sup>th</sup> March, 2008 at Saja village, within Njombe District the aforementioned accused persons jointly and together unlawfully attempted to cause the death of one Dickson s/o Lupenza. All accused persons denied the

charge laid against them.

In the hearing of this case the prosecution/Republic whose case was advocated upon by Mr. Riziki Matitu, learned State Attorney assisted by Mr. Yahaya Misango, learned State Attorney called four witnesses namely PW.1, PW.2, PW.3 PW.4, in support of their case and then closed the prosecution case. Mr. Mussa Mhagama learned counsel for the all accused persons principally submitted to the effect that there was no sufficient evidence adduced by the prosecution witnesses to require the accused persons to make their defences. He asked the court to allow him to make a submission on no case to answer. There was no objection from the prosecution side.

Before I turn to the counsel submissions let me albeit briefly reproduce the available prosecution evidence. PW.1 Dickson Lupenza a resident of Saja village testified to the effect that on 17<sup>th</sup> March, 2008 in the morning he was heading his three heard of cattle (*maksai*) to his farm which was about seven kilometers away. He was accompanied by one Adam Kivale who escorted him up to river Sesi and returned back to the village. That while on his safari with his cattle and when he reached at Muluisa farm he heard a sound of a gun shot and suddenly realized that he was shot with a bullet on the stomach. He fell down. He tried to wake up but ended kneeling down. Suddenly he saw four people in front of him. He was able to identify three of them being Majuto Gohage (1<sup>st</sup>

accused), Essau Muhamedzi (2<sup>nd</sup> accused) who was holding a gun and Timoth Muhamedzi (3<sup>rd</sup> accused). He was not able to identify the fourth person. The said people were at a distance of 10 paces and that he knew the accused persons before the incident because the 3<sup>rd</sup> accused Timoth is his son in-law married to his daughter Christina Lupenza, while the 2<sup>nd</sup> accused Essau is the brother of the 3<sup>rd</sup> accused hence his son in-law and the 1<sup>st</sup> accused Majuto is the brother in-law of Timoth Muhamedzi. PW.1 stated that after the incident he was able to crawl down slowly to the village where he was assisted and taken to the police station and eventually Ilembula Hospital for treatment.

He further testified to the effect that he had a long standing quarrel with the accused persons which was caused by the long illness of the 3<sup>rd</sup> accused father and the 3<sup>rd</sup> accused started to spread rumours within the village that it was him who was bewitching his father. As a result the 3<sup>rd</sup> accused vowed that he (PW.1) should be shot with a gun. PW.1 complained that he reported the matter before the village authority but the 3<sup>rd</sup> accused denied the allegations stating that he had heard the same rumours within the village.

PW.2, Dr. Owden Mwalumuli is the Medical Doctor who treated PW.1 at Ilembula Hospital. He testified to the effect that on 17/3/2008 at about 11.00 hours he received and treated PW.1 who had a penetrating wound on his left side of

the stomach. He stated that the wound was bleeding profusely but the patient (PW.1) appeared stable. That when he questioned PW.1 about the cause of the wound, he replied that he was shot with a gun. PW.2 stated that he conducted a surgical operation and stitched the small intestine which was ruptured. PW.2 stated that in his observation the wound was caused by a sharp object/instrument. Then he filled a PF.3 which was produced in court as Exhibit P.1 during the preliminary hearing of the case.

PW.3 Christina Lupenza, the daughter of PW.1 and the ex-wife of the 3<sup>rd</sup> accused testified to the effect that she was married to 3<sup>rd</sup> accused in 1999 and were blessed with two children. Then in 2008 they started to quarrel extensively. That her husband started to beat her claiming that it was her father (PW.1) who was bewitching his sick father. PW.3 claimed that following the misunderstanding she decided to go home and reported the matter to her father (PW.1). She also claimed that there was a time when the 3<sup>rd</sup> accused claimed that he will hire bandits from Mbeya to deal with her father. She stated that due to that misunderstanding and accusations that her father was a witch, their marriage broke down.

PW.4, Medrack Chogo is the Village Executive Officer of Saja village. He testified to the effect that on 10<sup>th</sup> November, 2007 he received complaints from PW.1 alleging that his son-in-law Timothy was threatening to kill him on allegation

that he (PW.1) was bewitching his father who was sick for a long time. That on 11/11/2007 he called a meeting between both sides. That when the 3<sup>rd</sup> accused, Timothy was questioned about the matter he denied the allegations but admitted that there was such rumours in the village being spread by other people to the effect that it was PW.1 who was bewitching their sick father. PW.4 testified that at the end of the meeting the matter was resolved but PW.1 stated that he has already discovered a conspiracy against him and that if anything happened to him, then Timothy (3<sup>rd</sup> accused) will be responsible.

PW.4 stated that on 17<sup>th</sup> March, 2008 he was informed by one Mariam that PW.1 had been shot with a gun in the farm. He rushed to the scene of crime but met several people carrying PW.1 who could not walk. That PW.1 lamented to him that what he has been saying has happened. He was shot on the stomach with a gun. That PW.1 told him that the people who shot him were Majuto Gohage, Essau, Bernard and Timothy Muhamedzi. That later the accused persons who were living within the village were arrested by the police although Bernard Muhamedzi was not arrested.

Having received the above evidence and having cross-examined the prosecution witnesses it was the stance of the defence counsel that the prosecution has not made out a *prima facie* case against any of the three accused persons

before the court. In support of his proposition he invited this court to be guided by the decision in the case of **R. Vs. Makuzi Zaid and another** (1969) HCD 249 where the court quoted with approval the decision in the case of **R.T. Bhatt Vs. R.** (1957) EACA stating that for a case to be called prima facie case it must be of such that a reasonable court properly directing its mind to the law and evidence could convict if no explanation is offered by the defence side.

Mr. Mussa Mhagama strongly submitted that there is no such evidence to meet the criteria because of two main grounds. The first ground is that the prosecution side has failed to prove its case to establish that PW.1 was actually shot with a gun. Secondly, the prosecution evidence has failed to connect the accused persons with the alleged offence.

On the first ground the defence counsel submitted to the effect that apart from the allegations of PW.1 that he was shot with a gun, there is no other evidence to support the claims. That even the evidence of PW.2, the Doctor who treated PW.1 stated clearly that he witnessed a penetrating wound on the stomach of PW.1 caused by a sharp object. Mr. Mussa Mhagama submitted that even the alleged sound of gun shot was heard by PW.1 only despite the fact that there were other people around attending their farms including those who responded to PW.1's alarm. Mr. Mussa Mhagama argued that if several people were able to hear and respond to the alarm,

why the gun shot sound was heard by PW.1 only.

The defence counsel submitted further that there is no evidence of the police officer who investigated the case and arrested the accused person. He contended that such a witness should have testified about the scene of crime and produce a sketch map of the scene of crime which could assist the court to understand the environments of the area and its visibility.

Mr. Mussa Mhagama submitted further that there is no forensic evidence to show that there was any investigation conducted at the scene of crime to discover any bullet shell. He contended that PW.1 claimed that he was at a distance of 10 paces from the bandits who shot him but during the cross-examination he claimed that when they shot him they were at a distance of 20 paces. He argued that PW.1 was not telling the truth because he claimed that he was able to see and identify his assailants when they approached him and after shooting him. That means after falling down and unable to stand up. That, according to his evidence he knelt down and started to crawl while shouting for help.

Mr. Mussa Mhagama submitted that there is significant disparity between the facts of the case presented by the prosecution side during the preliminary hearing of the case and the testimony of PW.4. That, the facts indicate that while

PW.1 was crawling back home he met PW.4 who was weeding his peanut farm with his father and assisted him. PW.4 in his testimony claimed that he was called by one Mariam. Mr. Mhagama argued that such contradictions makes the testimony of PW.4 questionable.

On his second ground, Mr. Mhagama submitted to the effect that apart from the evidence of PW.1, there is no other evidence to connect the accused persons with the alleged offence. That it is only PW.1 who claimed that he saw and identified the accused persons who were familiar to him. Mr. Mhagama submitted that the evidence of PW.1 ~~should~~ be treated with caution because he was not telling the truth and was not able to identify his assailants. The defence counsel stated that PW.1 admitted that the incident happened during the rainy season and that although the farm was not cultivated with maize there were grasses and trees around the area. At the same time PW.1 was seriously injured and was unable to stand up. In the circumstances Mr. Mhagama argued it was impossible for PW.1 to identify three of his assailants who were at a distance of 10 paces.

Mr. Mhagama contended that the visual identification by PW.1 was very weak and dangerous to rely upon. He cited the case of **Waziri Amani Vs. R.** (1980) TLR 250 and **Shiku Salehe Vs. Rep.** (1987) TLR 193. He further argued that the evidence of PW.1 was cooked up because of the previous



family ill relationship between PW1, PW 2 and accused persons. He stated that, if anything, the evidence of PW.1 requires corroboration because it is very weak evidence of a single witness. He cited the case of **Hassan Juma Kanenyela and others Vs. Rep.** (1992) TLR 100 where it was held that it is a rule of practice not of law that corroboration is required of the evidence of a single witness of identification of an accused made under unfavourable conditions; but the rule does not preclude a conviction on the evidence of a single witness if the court is satisfied that the witness is telling the truth.

Mr. Mhagama stressed that the evidence of the police investigator, the sketch map of the scene of crime and forensic evidence from a ballistic expert would have assisted the prosecution case. He prayed the court to find that there is no case to answer against any of the accused persons as it was held in the case of **Jonas Nkize Vs. Rep.** (1992) TLR – 213 that the trial court is enjoined to direct its minds to the evidence by the prosecution when it has closed its case, and if it appears to the court that the case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the charge and acquit the accused persons.

Mr. Riziki Matitu, learned State Attorney responded to the effect that both grounds submitted by the defence counsel have no merit. He argued that there is sufficient prosecution

evidence from PW.1, PW.2 and PW.4 that PW.1 was shot with a gun and suffered serious injuries on his stomach. That PW.1 was able to stand up and identify his assailants because the incident occurred in the morning at about 7.30 hours. He argued that if the court decides to believe the testimony of PW.1, it is obvious that he was injured by a shot gun which was in the possession of the 2<sup>nd</sup> accused. He stressed that the evidence of PW.1, PW.3 and PW.4 is sufficient to require the accused persons to make their defences. He further contended that the issues of gun sound and distance should not be taken serious because at that time PW.1 was only with cattle at the farm. He conceded that there was no bullet shell found at the scene of crime nor bullet remains found in the stomach of PW.1 and therefore there was no need to call the police investigator or ballistic expert. He argued that PW.4 stated clearly that when the accused persons were searched they were not found with any weapon in their possession.

Regarding the requirement of a sketch map of the scene of crime, the learned State Attorney countered that the scene of crime was well explained by PW.4 that although it was raining season with grasses and trees he was nevertheless able to identify the accused persons. Touching on the contradictions between the statement of facts and the testimony of PW.4, he contended that the contradiction is a minor one which ought to be ignored by the court. He cited the case of **Kessi s/o Bagome Hande and 3 others Vs. R.**

Criminal Appeal No. 121 of 2003, Mwanza Registry (*unreported*) where it was held that not every contradiction will vitiate the merit of the case. The bottom line is always whether the contradictions are material. Minor contradiction will normally be of no serious consequences.

Mr. Riziki Matitu submitted that there is sufficient prosecution evidence from PW.1, PW.3 and PW.4 to connect the accused persons with the offence if the court decides to believe them. He stressed that PW.1 was able to identify the accused persons when they approached him after being shot because he was able to surpass fear and confronted his assailants by shouting for help. He argued that the case of **Waziri Amani** (*supra*) is not applicable in this case because there were favourable conditions for identification. Finally the learned State Attorney stated that once PW.4 is held to be a credible witness, there would be no need of corroboration evidence but if there is a need of such evidence, then the evidence of PW.4 is sufficient to corroborate the evidence of PW.1.

At this juncture the crucial question is whether the available prosecution evidence may possibly be considered sufficient to sustain conviction against the accused persons. Whether there is *prima facie* case. I hasten to answer the question in negative. I significantly depart from the view of the

learned State Attorney that there is sufficient prosecution evidence to establish a prima facie case.

In my considered view the defence counsel has said it all. He has amply analysed and evaluated the available prosecution showing its serious weaknesses, shortcomings and yawning gaps. As I have pointed out above, it is a principle in criminal law that a prima facie case at least must be one on which a reasonable court could convict if no evidence is offered by the defence. It is also a principle of criminal law that the burden is on the prosecution side to prove its case beyond reasonable doubt.

Based on the available prosecution evidence one can hardly say there is any plausible and sufficient prosecution evidence worth a possible conviction. There are two serious issues in this case. The first one is the credibility of the prosecution witnesses and the second is the sufficiency of prosecution evidence to establish prima facie case.

Having personally seen and heard PW.1, PW.3 and PW.4 giving their testimonies, I am certain that their testimonies are seriously wanting in demeanor and credibility. The same should be treated with caution. It must be noted that the existence of this case is a long standing family grudges, misunderstandings and conflicts. As a result the testimonies of PW.1, PW.3 and PW.4 are full of hearsay, assumption,

suspicion, probabilities, rumours and personal vendetta calculatively aimed to find the accused persons guilty at any rate. A good example is the testimony of PW.3 who claimed that her marriage with the 3<sup>rd</sup> accused started to climb rocks in 2007. That was when the 3<sup>rd</sup> accused started to associate her father with witchcraft practices against 3<sup>rd</sup> accused father. However; during cross-examination it was revealed that the marriage between PW.3 and the 3<sup>rd</sup> accused was officially resolved back in 2003. PW.3 who had serious grudges with her ex-husband was the one who was spreading rumours in the village that the 3<sup>rd</sup> accused was intending to kill her father PW.1. At the witness box, PW.3 appeared to avenge her wounded feelings against 3<sup>rd</sup> accused. In my assessment the only credible witness in this case was PW.2.

Nonetheless, let me now resort to the counsels submissions. Mr. Mussa Mhagama has thoroughly and correctly submitted on the second issue of insufficiency of prosecution evidence to establish a prima facie case on two grounds. **One**, showing the shortcoming, weaknesses and gaps in the prosecution evidence and **two**, failure by the prosecution evidence to directly connect the accused persons with the alleged offence.

I totally and completely agree with the defence counsel that there is no evidence to establish that the victim, PW.1 was actually shot down with a gun or at least showing that his

wound was caused by a live ammunition from a gun. The only available prosecution evidence on the issue of use of a gun is that of PW.1 who is not an expert in gun matters. Amazingly PW.1 was the only person who heard the sound of the alleged gun shot despite the fact that there were other people attending their fields and who responded to his own shouts. The prosecution should have at least produced forensic evidence from a ballistic expert to prove that PW.1 was actually shot with a gun.

It also appears that there was no police investigator who was assigned to investigate this case because there is no evidence to show whether the scene of crime was visited and searched to detect any presence of a spent cartridge and/or to draw a sketch map of the scene of crime. As a result such a serious case was left in the hands of PW.4 who posed as an investigator but gave a sketch and suspect testimony. PW.4 claimed that when the accused persons were arrested and searched they were not found with any weapon. He did not say who searched them, how and when.

It is interesting that PW.4, a Village Executive Officer and his Village Government failed or neglected to immediately arrest the culprits who were mentioned by PW.1 and who were present with the village. When PW.4 was cross-examined on this issue he shifted the matter to the police claiming that it was the police who arrested the accused persons. PW.4

dodged to mention the date of arrest because he was aware that the accused persons were arrested several days after the incident meaning that PW.1 did not mention the names of his assailants to PW.4 on the alleged day. This position is strengthened by the apparent contradiction statements from PW.1 and PW.4 about the identified culprits. PW.1 claimed to have seen four bandits who approached him but was able to identify only three of them namely 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused persons. PW.4 claimed that he was told by PW.1 that he was attacked by four bandits and was able to identify and mention all of them.

Apposite to the position of this case, it is not surprising to find significant disparity between the facts of the case presented during the preliminary hearing and the testimony of PW.4 as pointed out by the defence counsel. Although the learned State Attorney referred the disparity as minor contradiction, but all the same they depict a serious lack of coherence on the part of prosecution case and enhance doubts on the testimony of PW.4.

On the issue of identification, it is curious the way PW.1 was shot down around his stomach, fell down bleeding profusely, attempted to stand up but ended kneeling down and at the same time identify three of his assailants who approached him after shooting him. In here there is a question of distance and environments of the scene of crime. I

agree with the defence counsel that the question whether there was conducive and favourable condition of identification would have been resolved by the presence of a sketch map of the scene of crime drawn by the competent police investigator showing the alleged distance, vegetation and available crops and trees at the period of commission of the offence. In other words the evidence of PW.1 require corroboration as stated by the defence counsel and directed in the case of **Hassan Juma Kanenyela and others** (*supra*).

It has been stated time and again that the evidence in every case where visual identification is what is relied on must be subjected to a careful scrutiny, due regard being paid to all prevailing conditions to see if, in all circumstances there was really sure opportunity and convincing ability to enable the witness to identify the person correctly and that every reasonable possibility of error has been dispelled – See the cases of **Philip Rukaiza Vs. R.**, Criminal Appeal No. 215/1994 (CAT), Mwanza Registry (*unreported*); **Waziri Amani** (*supra*) and **Shiku Salehe** (*supra*).

In his submission it appears that Mr. Riziki Matitu, learned State Attorney appreciated the apparent weaknesses and shortcomings in the prosecution case but urged the court to believe the prosecution witnesses. In my view, this is not a matter of believing or not believing the witnesses. It is a matter of fulfilling the requirements of the law namely to prove



the case beyond reasonable doubt by adducing credible, reliable, truthful, cogent and sufficient evidence. PW.1 could have been shot by any other person not necessarily his relatives who had a long standing grudges with him, or could have been wounded by any other sharp object not necessarily a gun.

In the light of the foregoing reasons I am satisfied that the prosecution side have failed to establish a prima facie case against any of the accused persons to require them to make their defences. I hereby pronounce all of the accused persons not guilty and acquit them. They are all acquitted and set free.

M. S. SHANGALI

JUDGE

4/7/2014

Ruling delivered todate 4/7/2014 in the presence of Mr. Riziki Matitu assisted by Mr. Yahaya Misango learned State Attorneys representing the Republic and Mr. Mussa Mhagama, learned advocate representing the accused persons. Assessors thanked and discharged.

M. S. SHANGALI

JUDGE

4/7/2014