

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[DAR ES SALAAM REGISTRY]
AT DAR ES SALAAM

CRIMINAL SESSIONS CASE NO. 31 OF 2017

REPUBLIC

VERSUS

- 1. SHIDA LWANDA AIDAN @ BIG**
- 2. KELVIN LUAMBANO @ ANOLD**
- 3. NASSER HAMIS MBIAJE**
- 4. MOHAMED SALUM @ MAULED**
- 5. MT 75808 CPL IDD MBARUKU**

12/3/2018 & 16/3/2018

JUDGMENT

KITUSI, J.

On 27 October 2010 at Salasala RTD area within Kinondoni District in Dar es Salaam Region one Emmanuel Rukala Kamalamo was shot dead by bandits who raided the house of Samson Kamalano, the deceased's elder brother. Five people have been charged for the murder of the said Emmanuel Rukala Kamalamo, the deceased, under section 196 of the Penal Code, [cap 16 R.E. 2002]. The accused persons are Shida Lwanda Aidan @ Big, Kelvin Luambano @ Anold, Nasser Hamis Mbiaje, Mohamed Salum @ Maulid and MT 75808 CPL Iddi Mbaruku, to whom I shall be referring to as first, second, third, fourth and fifth accused respectively.

They all pleaded not guilty to the charge.

The prosecution sought to prove the guilt of the accused by calling seven witnesses whose tale goes thus; there was no water supply at Salasala at the residence of Samson Kamalano (PW1) on the fateful date. He therefore requested his younger brother the deceased to supply him water from Mikocheni "B" where the said young brother lived. Fadhili Mhapa (Pw5) a servant at the residence of the deceased's parents at Mikocheni "B" accompanied the deceased to Pw1's residence to deliver the water.

When the deceased and Pw5 were at Pw1's residence at night offloading the water containers, armed bandits wearing dark long coats jumped in through the short fence wall that is built around the house and ordered all people at the house including Pw1, Pw5 and the deceased to lie down, which the victims obeyed by lying down. The assailants demanded money, however according to Pw1 there was none. The bandits forced Pw1 into the house where they believed money must have been hidden. Pw1 testified that as he was entering the house he ran into his wife who had been in the house but was getting out to find out what was happening outside. She immediately fell victim of the bandits' assaults aimed at making her disclose where the money was. After a search into Pw1's bedroom, the bandits took Shs 40,000/= from Pw1's wallet, and cameras and laptops from the wardrobe. They also took from the hand bag of Pw1's wife the ignition key for their car, earrings and a wedding ring.

Pw1 stated that while in the house he could identify the second and third accused persons out of the three who went in with him. PW1 described the quality of light around and inside his house. He testified that there were enough security light around the house and plenty of it in the house where he was taken by the assailants, and he identified the second accused as the person who was holding a gun and third accused as the one who was holding a machete. While that was happening in the house, a gunshot was fired outside and a female voice cried out; "WAMEMUUA!!"

When the bandits left and Pw1 got out he realized that it was his brother who had been shot dead. The bandits took with them the vehicle belonging to Pw1 whose key they had earlier taken from his wife's handbag. Pw5 testified that outside the house he was among those who were lying down in obedience to the orders, and the deceased was lying next to him. He said that the deceased was shot when he attempted to confront the bandits during which he rose, and the man behind, who was described by Pw5 as the first accused, fired at him. Pw5 stated that he rose to take a look at the first accused after the latter had shot the deceased dead.

The rest of the witnesses were all police officers. SSP Daniel Shilla (Pw2) was the officer who arrived at the scene of crime very early. He traced and collected the cartridge and ordered the deceased taken to Mwananyamala Hospital. D/CPL William Mnara Bega (Pw3) was on night patrol at Tazara area on 11/12/2010, more than a month later. At around midnight he received a radio message warning him that there were

fugitives in a run away motor vehicle from Kinondoni area. Pw3 and his colleagues waited in alert. Then shortly after that Pw3 and his colleagues saw a white motor vehicle approach their point at a high speed but it capsized before reaching them, causing a huge dust. As the dust was settling the police saw three people get out of the car and run along the nearby industrial buildings. Suspecting the three people to be the fugitives, the police on patrol ran after them and apprehended them. Pw3 identified the first accused as the man he apprehended.

Later during his defence the first accused will be heard testifying that he was arrested at the scene as described by Pw3 but that he was mistaken for the fugitive.

D/Sgt Paul (Pw4) interrogated second accused and recorded his cautioned statement which he tendered in evidence as Exhibit P2. It is alleged by the prosecution that Exhibit P2 amounts to a confession. D/CPL Evans(Pw6) recorded the cautioned statement of the first accused, while D/CPL Masumbuko(Pw7) recorded the cautioned statement of the third accused. However these two statements were inadmissible for contravening procedural laws, so they are not part of the evidence for consideration.

Each accused testified on oath denying the allegations. In addition to his testimony, the third accused called Stella Samwel (DW4) to support his story.

To begin with, the first accused, whose testimony I had earlier touched on, explained why he was around Tazara Industrial area on

the night of 11/12/2010. He stated that he had been at Mbagala area during the day where he had gone to work as a Mason. On his way back home he intended to stop by Alaf Industries to pick his wife or girlfriend with whom he had a child. The said woman was working there on a shift that was coming to an end at around that time.

The first accused supported PW3's story that there was a car accident around the area where he was arrested, but he invited the court to find this shred of evidence as being of no consequence for two reasons. The first reason is that he was not in the car that capsized. The second reason is that according to Pw3, the car that capsized was a white Toyota Mark II while according to Pw1 the vehicle stolen from his residence on the night of the robbery was a Toyota Premio. He further testified that he was in police custody from 11/12/2010 to 21/12/2010 when he was charged with 13 different cases of Armed Robbery after a long period of tortures in the hands of policemen. The charge in relation to this case was read over to him on 16th August, 2016.

The second accused's account was that he was a victim of random arrest of "*Wapiga Debe*" meaning people who work as brokers by calling passengers into commercial buses. After his arrest he was taken to Mbagala police station and kept in the same cell with suspected criminals who were strangers to him. At some point the stranger inmates broke out of the cell leaving the second accused alone. The second accused's alarms to notify the police on the escaping inmates did not cause any restraint on the part of those suspects, and the lone police who was around on duty was helpless. The next day, the second accused was

transferred to another station known as Stakishari where he was badly tortured by the police who accused him of having been part of the suspects who escaped, and forcing him to confess to crimes he had not committed. He was finally taken to Kijitonyama Police Station where he was also tortured. Second accused's defence is that the police tortured him into accepting the name of Kevin Luambano instead of his known name of Anold Semu, and that this is the only statement he ever made at every police stations where he was taken to. He was, if anything, very dramatic on the issue of his name being Anold Semu, especially when the Prosecution called upon him by way of cross examinations, to prove that his name was indeed Anold Semu. His response was that not every Tanzanian, especially those born in the villages like him, has a birth certificate. The second accused has denied killing the deceased in this case because, he stated, he has never even been at Salasala where the alleged murder took place.

The third accused stated that he was a taxi driver working on temporary basis, popularly known as 'Day Worker.' His involvement with the police and eventually this case was that on 28 November, 2010 at about 6.45 am he got involved in a car accident as a result of a fault of another motorist. Thereafter he was taken to Kijitonyama Police Station where on learning from him that he was a Taxi Driver, the police accused him of working in team with bandits. He was charged along with the accused he had never known before. Third accused's mother (DW4) testified that she lived in the same house with her son and that on 27 October, 2010 the said son was at home from 8.00 pm and retired to bed

at 10.00 pm. There were contradictions as regards when was the third accused last seen at home before his arrest, and one of the Lady Assessors who sat in this case attached relevance to it.

The fourth accused testified that he was a victim of a fabricated case the reason being his refusal to offer bribes to the police. He testified that he worked as a "Mpiga Debe" at a bus stop where police men frequented to demand bribes, but he was notorious for not heeding to their demands. He testified on oath that while in remand prison he has ever written a letter of complaint to the police about being kept in remand for no reason, and their response was that; **Tunakuweka ndani mpaka uzeeke, wewe mbishi**, meaning that they would make sure he stays in custody till old age because he was stubborn. Like the other accused persons he ended up at Kijitonyama police station before he was charged with the murder he knew nothing about.

The defence of the fifth accused was that he was not at the scene of the murder on the date and time it allegedly took place, because he was at his duty station at Msata area within the Coastal Region, he being a soldier employed by the People's Defence Forces. He underlined the fact that none of the seven witnesses for the prosecution implicated him with the murder. Testifying as DW6, the fifth accused discredited the testimony of PW2 for the fact that there was no report by a Ballistic expert linking the cartridge, which was not tendered, with any gun. When cross-examined as to proof of the fact that he was on duty at Msata area on 27/10/2010, DW6 said the attendance register which would have provided that proof belongs to his employer and he could not access it.

This case was prosecuted by Ms. Mwasiti Athumani learned Senior State Attorney assisted by Ms. Agnes Mtaki learned State Attorney, for the Republic, and each accused was represented by an advocate. Mr. Methodius Tarimo, learned advocate represented the first accused, Mr. Paul Seni and Ms. Dainess Simkoko learned advocates jointly represented the second accused. Mr. August Mramba and Mr. Ibrahim Shinene, learned advocates represented the third and fourth accused respectively. Mr. Longino Myovella and Ms. Agatha Fabian learned advocates jointly stood for the fifth accused. The Lady Assessors who sat in this case unanimously advised me to find all accused persons guilty of murder.

To begin my deliberations, I have no doubt that Emmanuel Rukala Kamalamo, the deceased, died an unnatural death on 27th October 2010 by a gunshot discharged by armed bandits. I am satisfied, on the evidence of PW1 and PW5, that this happened at PW1's residence at night when the deceased and PW5 had gone to deliver water on PW1's request. I have no doubt that the bandits made away with a few properties such as money, cameras, laptops, rings and a motor vehicle Reg No T 646 BBX Toyota Premium. The million dollar question is the identity of the assailants, and specifically is; whether the accused persons are the ones who invaded into the house of PW1 and caused the deceased's death in the course.

The case for the prosecution is that the first accused was identified by PW5 as the man who pulled the trigger and shot the deceased to death. Then the second and third accused were identified by PW1 allegedly when they had forced him into the house while demanding money. In addition it is alleged that the second accused confessed before PW4, the said

confessional statement forming part of evidence as Exhibit P2. As regards the fourth and fifth accused there is the said cautioned statement of the second accused in which he named some people as having been with him during the commission of the alleged murder at PW1's residence.

It is convenient for me to begin by dealing with the evidence against the fourth and fifth accused. There is simply no evidence to implicate these two accused persons because even Exhibit P2 just makes casual reference to second accused's associates as Ndiyo, Mudy, Big, Ndevu, Boke, Iddy ambaye ni mwanajeshi...There is no evidence to link the fourth and fifth accused with those names, because even the fact that the fifth accused's name is Idd and he is a soldier, does not eliminate the possibility that there may be other people fitting that description. In addition however the fifth accused's defence of alibi, notice of which was made during the Preliminary Hearing, casts doubt in the prosecution case as far as he is concerned. Consequently for the reason that there is no evidence against them I find the fourth and fifth accused not guilty and acquit them.

I now turn to the first accused and the prosecution evidence suggesting his guilt. There are two pieces of evidence against him, that of visual identification at the scene and the other is in respect of his involvement in the runaway car at Tazara. I do not think I should make findings on the details of events at Tazara where the fifth accused was arrested because I just cannot see the connection between this incident and the murder at Salasala that had taken place two weeks previously. I agree with the first accused's defence that the Tazara event would only have been connected with the alleged murder if the vehicle that was

involved in the accident at Tazara was the same as the one which was stolen during the robbery and murder at Salasala.

There is the evidence of PW5 that he identified the first accused at the scene of crime and this happened when the first accused had allegedly shot the deceased who had been lying next to him. I think I should restate the law regarding visual identification in unfavourable conditions. Suffice here to quote the Court of Appeal in **Said Chaly Scania V Republic**, Criminal Appeal No 69 of 2005 (unreported) cited in **Mohamed Shaban V. Republic**, Criminal Appeal No 41 of 2009 CAT (unreported) where it was stated;

"... We think that where a witness is testifying about identifying another person in unfavourable circumstances, like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable."

Where the encounter between the witness and the culprit is sudden and violent, the requirement for caution is all the more critical. [See **Juma Nyamakinana V Republic**, Criminal Appeal No 133 of 2011 CAT (unreported)].

In this case the testimony of PW5 on how he identified the first accused leaves a lot to be desired. The deceased who had been lying next to him, was shot dead for defying the order requiring all captives to lie down, yet PW5 would like to be believed that he had the nerve to raise and

take a look at the very man who had just shot his neighbor dead. This is hard to figure out and I find it too fictitious to believe, so I do not accept this part of PW5's testimony. It is my finding that his evidence that he identified the first accused is unreliable.

While still on the evidence of visual identification, I shall now discuss the evidence of PW1 that he identified the second and the third accused. He stated that there was enough light in the house both along the corridor and in the bedroom where the bandits spent some time ransacking. The fact that there was enough light, that the witness was at close range from the culprits and that they spent a considerable length of time would appear to eliminate possibilities of mistaken identity. However, one immediate question leaps to mind; why did PW1 not identify the third bandit who was in the room with the second and third accused when there is no suggestion from him that he knew these two accused before? What is the assurance then, that the two people PW1 saw in October 2010 are the same as those he identified on the dock when he testified on 26th February 2018, more than seven years after the alleged incident?

Fortunately the law regarding this aspect is settled. In the case of **Musa Elias & 2 Others V Republic**, Criminal Appeal No 172 of 1993, CAT, (unreported), cited in another case of **Annes Allen V The Director of Public Prosecutions**, Criminal Appeal No 173 of 2007, CAT (Unreported), it was held;

"...Furthermore, PW3's dock identification of the 3^d appellant is valueless. It is a well-established rule that dock identification of an accused person by a witness who

is a stranger to the accused has value only where there has been an identification parade at which the witness successfully identified the accused before the witness was called to give evidence at the trial.”

And so it is with the testimony of PW5 that he identified the first accused at the scene and he was able to pick him on the dock. In my conclusion therefore the evidence of PW1 and PW5 regarding their identification of the first, second and third accused is valueless for the reason that after identifying strange victims at the scene, they did not have the occasion to identify them in a parade before testifying in court, in this case. I think the way this case was investigated leaves a lot to be desired and many questions beg for answers. There is no explanation, for instance, why the prosecution did not disclose how PW1 recovered his stolen motor vehicle although he admitted, during cross examinations, that the same was handed over to him by the police. Instead they brought a witness to testify on a motor accident whose connection with this case is just hard to see.

As regards the second accused there is yet evidence of the cautioned statement to consider. The second accused has repudiated the statement because he has stated during his defence that he did not make any statement apart from mentioning his name. Since the statement was admitted in exhibit after it was resolved that it was voluntarily made, I shall proceed to evaluate it as it is done with any other evidence. [See **Manyangu Mang’wena @ Mlugaluga & Another V Republic**, Criminal Appeal No 227 of 2012, CAT (Unreported)].

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Part of the statement states that the second accused came to Dar es Salaam in early November 2010, after being set free in a case of Armed Robbery that had been before Same District Court. Within the same statement the second accused is recorded as confessing that he took part in the murder of Emmanuel Kamalamo that took place on 27th October 2010. This means that the prosecution has tendered a statement which, if believed, amounts to saying that in October the second accused had not come to Dar es Salaam from Same, but he participated in the robbery and murder at Salasala, Dar es salaam on 27th October 2010. In my conclusion this statement does not support the prosecution case and has no evidential value.

For the reasons discussed I find all accused persons not guilty and hereby acquit them.




I.P. KITUSI
JUDGE
16/03/2018