

IN THE HIGH COURT OF TANZANIA
DODOMA DISTRICT REGISTRY
AT DODOMA

ORIGINAL JURISDICTION

CRIMINAL SESSION CASE NO. 69 OF 2018

REPUBLIC

VS

1. TAIFA SIMON
2. MAKOMBITO KASONGOO

JUDGEMENT

22ND FEBRUARY 2021

MANSOOR, J.

Taifa Simon and Makombito Kasongoo herein referred to as **the accused people** are together and jointly charged with the offence of murder of one Said Athumani Mjungu (**"the deceased"**) contrary to the provisions of section 196 and 197 of the Penal Code, Cap 16 of the Laws Revised Edition of 2002. The offence was committed on 21st January 2016 at Segela Village, within Chamwino District in Dodoma Region. The deceased was an

Oldman, a trader in the village owning a shop and a Milling Machine. The deceased was residing only with his wife one Fatuma Omary.

The case for the prosecution is that on the night of the incident two bandits, one who was armed with an unidentified gun or pistol entered the deceased house, and robbed cash and vouchers at the shop, and they shot the deceased since he had recognized them. According to the evidence of eyewitness, who is Fatuma Omary, the wife of the deceased, that night at about 20.00 p.m. two bandits, armed with a small gun, raided the house. They entered through the door, which was open, and found her cooking at the small sitting room of the house. They asked her where her husband was, and at that time her husband was outside the house collecting the water container (pipa). Then, the husband entered the house, they forced her and the husband to take them to the Shop. At the shop, the husband showed them where he had kept the money i.e., on the drawer, the bandits pulled the drawer and took out all the cash, and mobile phone vouchers. Then, the bandits said that they must shoot the deceased as he had

recognized them. The bandits shot the deceased on the head, right side near the ear, the husband fell over her, and he died on the spot. The bandits left the scene, and she raised an alarm, thereby attracting to the scene many village people. The Village Executive Officer, the Ward Executive Officer, and the Police from Chamwino arrived at the scene. They found no weapon at the scene. Upon interrogating the wife of the deceased, she said she had recognized the bandits. She told the Village Executive Officers that the bandit's faces were not covered, and so she recognized them when she saw them. She mentioned their names as Taifa and Makombito. PW1 however told the police as well as the Court when she was testifying that the two bandits covered their faces by long coats or caps, and she could not see their faces. She had recognized them by their body appearance, voices, and the way they walk. She said she knew them before the incident as they hail in the same village. She said since the dacoits were not strangers, she mentioned their names and since there was light their features had been marked. She had described their features to the police.

Investigation by the police started without delay. Early morning of 22nd January 2016, both the accused persons were arrested, their houses were searched, the police took money, coats, and a pair of running shoes. No identification parade was held, no other suspect was arrested, out of the total five witnesses called by the prosecution, only PW1, the wife of the deceased was the eyewitness, and the entire case relies on her testimony. Rest of the prosecution witnesses came to tell the Court of what they have been told by PW1. The question to be decided in this case is only one. Whether PW1 was able to identify the accused persons, or whether she had implicated them falsely.

Inasmuch as the case rests purely on evidence of personal identification and recognition. PW1 said she saw their faces, but again she said their faces were covered and so she did not see their faces but recognized the voices and the body physique. Before the Court, the objections against identification evidence have been raised by the accused persons. The evidence of PW1, and what is particularly unfortunate is that her evidence is accentuated the difficulties of honesty, contradictions and hence truthfulness. This

type of evidence is a subject which peculiarly attracts the warning by the Court before it is used to convict a person for a serious crime of murder.

Facts which establish the identity of any person or thing whose identity is relevant are, by virtue of section 9 of the Evidence Act, always relevant. The identification must be clear to satisfy the Court, that the person arrested was the same person who committed the crime, and to satisfy the Court that the accused was the real offender. The Courts must be satisfied beyond reasonable doubts, and this duty is to be discharged by the prosecution. In this case the Court looks at the identification proceedings brought by the prosecution. The police believed the wife of the deceased as the only eyewitness and hence reliable. The police did nothing else to discover the truth. They held no identification parade during their investigation of the offence, it is obvious that they did not hold any parade since the witness pointed to no stranger and stated that they were the offenders.

The question to be determined is whether there would be guarantee of the truth of on the assertion of PW1. Consequently, to have some assurance of the truth PW1 ought to have given similar story to the village leaders, police and to the Court. Her story was full of contradictions. She told PW2, the Village Executive Officer that the bandits did not cover their faces, and so she saw the faces but again she told the police officers that the bandits covered their faces and so she recognized them by their voices, their body physiques and how they walk. Again, she told PW2 the Village Executive Officer a different story altogether from what she told the police as well as the Court. She told the Village Executive Officer that the bandits entered the house and went straight to the shop, and she heard the noises saying 'ua", meaning kill. This means that she did not see the bandits. Her story changed when she was interrogated by the police. She said the bandits entered the house and saw her first, and she was asked where her husband was, then all four of them went to the shop, and saw the bandits stealing and shooting her husband. She again contradicted herself when she mentioned about the gun. She told the court that she saw a white

gun, while she told the police that she saw a black gun. Again, she told the court that the bandits were wearing big hats that covered their faces, while she told the police that the bandits were wearing white leather coats.

Of course, the substantive evidence, i.e., evidence on which alone the Court can base its order of conviction or acquittal, is that given by PW1 before the Court, but the value of her deposition there of having identified the accused in the act of the crime, is of little consequence; before the Court can accept such identification as sufficient to establish the identity of the accused it is very necessary that there be reliable corroborative evidence, and the corroborative evidence which the Court is entitled to accept in such cases is that of recovery of the stolen items or a gun used to shoot the deceased or the expert report of the bullets extracted from the deceased body. These items were not recovered from the scene or from the residents of the accused persons, but if at all they were recovered, they were never tendered to court as evidence. Therefore, the witness' reliability has not been put to a test. In

short, there was no evidence to corroborate the evidence of PW1 tendered in Court.

Again, apart from the failure of the prosecution to discharge the burden of proving the guilty of the accused persons beyond reasonable doubt, the defense through their witnesses managed to cast a doubt in the prosecution case. The evidence of DW2, one Saidi Athumani Said managed to establish that the money recovered from the 1st accused is his own money and cannot be linked with the money stolen from the deceased. After all, there is no evidence to show that the deceased had any cash money kept in his drawer, and if any, it was not established by the prosecution how much money it was. DW2 managed to establish that the 1st accused a is a trader, a trustworthy trader, and on the date of the incident, he was with the truck, he went to Zajiwa Village to buy sunflowers from the farmers, and there was evidence that the sunflowers were purchased and kept in a truck. The truck loaded with sunflower was found parked outside the 1st accused house. This was confirmed by the police, who gave evidence as PW4, and PW5. There was nothing from the prosecution to link the money

recovered from the 1st accused to the money stolen at the crime scene.

With regards to the second accused, the wife of the 2nd accused who gave the evidence as DW4, managed to cast the doubt on the prosecution case, and the prosecution failed to discredit DW4 assertion that at the time the incident occurred, the 2nd accused was sleeping with his wife at home.

Looking to the deposition given by PW.1 – Fatuma Omary, who is the wife of the deceased, she has clearly narrated the fact that the accused persons, she mentioned by names came at her residence; they were in search of her husband (deceased); they never shot Fatuma Omary or injured her. She said they killed her husband since he had recognized them. She also says the bandits recognized her as well, but she was not killed or injured. This leaves a lot to be desired. If the bandits had killed her husband for the reason stated by her, she would also have been killed. I have carefully evaluated the evidence of this witness and see no truthfulness in her deposition. She has only proved the date of

occurrence, place of occurrence and time. She has failed to satisfy the court that she had properly identified the accused persons either by seeing their faces or body physique or voices or their style of walking. Here there is a danger of question of misidentification of the accused persons and a danger of convicting an innocent man. Although she has pointed out the weapon with which the murder was committed, she gave a very contradicting evidence regarding the size and color of the weapon used. She said, she herself was present but she was not injured, her clothes were not stained with blood although she says the deceased fell on her laps immediately after he was shot. One would expect to see her clothes fully stained by blood but the witnesses who saw her said, her clothes were clean. All these things make this witness untrustworthy and unreliable and as per her evidence, these accused persons have not been properly identified. Her deposition did not get corroboration at all apart from the medical evidence given by PW.3 Dr. Antoni Kaijage, who has carried out postmortem of the body of the deceased, and who confirmed that the death was a result of a gunshot on the head.

This is a criminal trial. The burden of proof always lies on the prosecution side and the proof must be beyond reasonable doubt. In this case the prosecution failed to prove the involvement or participation of accused persons in the murder of SAID ATHUMAN MJUNGU and that the case against the accused persons was also not proved beyond reasonable doubt.

The prosecution failed to establish that it was the accused persons or maybe one of them who participated in the robbery that resulted to the death of the deceased.

For those reasons, I find that there is no evidence adduced against the Accused persons to prove the charge against them. Categorically, and as opined by the Honorable Assessors unanimously, the Prosecution evidence is insufficient to warrant the conviction of the Accused persons for the Offence of Murder Contrary to Sections 196 and 197 of the Penal Code Act Cap 16, Vol 1 R: E 2002.

Accordingly, all the Accused persons cannot be convicted of the offence charged, and therefore I, ACQUIT all the Two Accused

Persons, you TAIFA SIMON, and MAKOMBITO KASONGOO, of the Offence of MURDER that you are all charged with and set you free unless there are other Charges against you all or any of you.



A handwritten signature in blue ink, appearing to read "Latifa Mansoor", is written over the printed name.

LATIFA MANSOOR

JUDGE

22ND FEBRUARY 2021