

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT SUMBAWANGA

CRIMINAL JURISDICTION

CRIMINAL SESSION CASE NO. 17 OF 2018

REPUBLIC

VERSUS

1. DOTTO S/O SAID @ NGALU

2. MALAJA S/O LUPIGA

3. YUSUPH S/O MASANJA

Date of last Order: 12/11/2020

Date of Ruling: 13/11/2020

RULING

C.P. MKEHA, J

The information filed against the accused persons, Dotto s/o Said @ Ngalu, Malaja s/o Lupiga and Yusuph s/o Masanja, is that, on 27th day of August, 2015 at Katandala Area within Sumbawanga Municipality in Rukwa Region, the accused persons did murder one Leonard s/o Stephano @ Mtuka. When the information was read over to the accused persons, they all protested their innocence. Whereas Mr. Mwandoloma and Ms. Marietha represented the Republic, Mr. Kamyalile and Sanga learned advocates represented the accused persons.

In view of proving the case against the accused persons, the prosecution examined three witnesses before this court. The prosecution has now closed its case. Following closure of the prosecution case, I am called upon to rule out whether the prosecution has managed to establish a prima facie case in terms of section 293 (2) of the Criminal Procedure Act.

To be able to give out the said ruling, evaluation of evidence adduced by the prosecution witness is necessary. The first prosecution witness (PW1) testified to have recorded the deceased's dying declaration on 27/08/2015. In the deceased's statement to PW1, which was admitted into evidence as Exhibit P2, there is the following story: That on 27/08/2015 at about 02:00hrs while at Katandala Milling Machines where the deceased was working as a night watchman, the deceased saw MALAJA S/O?, Dotto s/o Said and Yusuph s/o Masanja. That, the deceased knew the three persons as he used to see them coming at his place of work for purposes of selling paddy (Mpunga). That, upon seeing the deceased, the three persons started chasing him where upon DOTTO s/o SAID hit him (the deceased) using a piece of Iron bar as to render him unconscious. That, DOTTO s/o SAID hit the deceased onto his head and as he was rendered senseless, the three persons continued carrying away sacks of paddy from the deceased's place of work. Although PW1 had testified to have recorded the purported dying declaration on 27/08/2015, the same indicates that, it was actually recorded on 28/08/2015. Upon being cross examined, the witness changed his story that, actually, the deceased's dying

declaration was recorded on 28/08/2015. The witness further testified that, although the deceased was in a bad condition on 27/08/2015 in the morning, he was able to talk as to be able to give his statement.

PW2, Mr. Domician Stephano Mtuka who happened to be the deceased's blood brother testified under oath that, when he learnt that his young brother had been admitted at the Regional Hospital, he immediately visited him at the hospital. PW2, testified that, it was until the 30th August, 2015 when his young brother regained his senses as to be able talking.

PW2 then got time to ask the deceased as to what had befallen him. PW2 told the court that, the deceased told him that he was invaded at his place of work during the night at Katandala Milling Machines Area. That, as he was entering in one of the buildings he was watching, he found a door open. He then abruptly met one person who was coming from the said building. As the deceased was fighting the said person, he was hit on his head from behind, through the use of a piece of iron bar. That, he was hit by a different person from the one he was fighting with. PW2 told the court that, the deceased informed him that, he only managed to identify Mr. Malaja whom he confronted as he attempted to enter one of the buildings at his place of work (deceased's). The witness insisted that, the deceased identified only one person at the scene of crime.

The third prosecution witness happened to be one Beatus Stolalo Uleti. This witness testified that on 26/08/2015 Mlaja Lupiga and Dotto Said approached him in view of seeking market for some sacks of paddy. PW3 was a person trading in maize, paddy and cattle. He however told the two persons that, he had stopped trading in paddy (mpunga).

On 27/08/2015 PW3 visited Katandala Milling Machines Area. When he arrived there, he heard a story that one nightwatchman had been invaded by some people who wanted to steal paddy and that, the said nightwatchman had been injured. PW3 visited the injured person (the deceased) at the Regional Hospital. Later on, PW3 learnt that the two persons who earlier approached him in view of selling to him sacks of paddy, had been associated with the nightwatchman's invasion at Katandala Milling Machine. PW3 declined testifying on who actually invaded the deceased as he did not witness the event. He either renounced to be the one who mentioned the accused persons to the police. It is against the foregoing evidence, I have to determine whether a prima facie case has been established by the prosecution against the accused persons.

When can it be said that a prima facie case/case to answer has been established by the prosecution? In the case of **Bhalt Vs. Republic (1957) EA 332**, the Court of Appeal for Eastern Africa defined a prima facie case in the following terms at pages 334 – 335:

"Remembering that legal anus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of prosecution, the case is merely one" which on full consideration might possibly be thought sufficient to sustain a conviction". This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes that the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends on whether there is; "some evidence irrespective of credibility or weight, sufficient to put the accused on his defence." A mere scintilla of evidence can never be enough, or can any amount of worthless discredited evidence. It is true as Wilson, J. said, that the court is not required at that stage to decide finally whether the evidence is worth of credit, or whether if believed it is weighty enough to prove the case conclusively; that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by "a prima facie case" but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the defence could convict if no explanation is offered by the defence."

As indicated hereinabove, the prosecution's case rests on the deceased's dying declaration purportedly made to PW1 No. H. 29 D/C Julian on either 27/08/2015 or 28/08/2015 and afterwards to PW2, Domician Stephano Mtuka.

In the first place, D/C Julian testified that, he recorded the dying declaration on 27/08/2015 in the morning. He later on changed his story during cross examination that, actually, the same was recorded on 28/08/2015. The said statement (Exhibit P2) indicates that, it was recorded on 28/08/2015 at 10.00hrs. PW1 testified that, although the deceased that, although the deceased was in a bad condition on 27/08/2015 in the morning, he was able to talk and thereby offering his statement. PW1 testified that, the deceased had associated all the three accused persons, by naming them, to be responsible of the event of his (deceased's) invasion at the night of 27/08/2020. And that, it was Dotto Said who hit the deceased with a piece of Iron bar onto his head on the fateful night.

Then from PW2's lips the story is that, since when the deceased was injured on the fateful night, he was rendered senseless until the 30th day of August, 2015 when he regained his senses. And that, upon regaining senses, the deceased told his blood brother (PW2) that, he only identified one Mr. Malaja at the event and that, he was unable to identify the one who hit him using a piece of iron bar onto his head, the reason being that, he was hit from behind. Is the purported dying declaration reliable as to invite the accused persons to make their respective defence on it?

In the case of the **Republic Vs. Magiligita s/o Lumije (1974) LRT No. 57** it was held that one of the two tests which a dying declaration must

satisfy before it have any evidential value is that the said dying declaration was in fact made.

In the case of **Rex Vs. Mwinyimbegu and Another (19933) 2 EACA 70** the Court of Appeal for Eastern Africa stated categorically that it was not prepared to rule that in no circumstances can a conviction proceed upon evidence consisting of a dying declaration only. By necessary implication a conviction may therefore be founded solely on a dying declaration.

The same court however, warned in **Republic Vs. Ramazan bin Mirandu (1934) 1 EACA 107**, that too a great value should not always be attached to dying statements and they should be received with caution, and, in the case of **Rex Vs. Mnyovya bin Msuma (1939) EACA 128**, it was held that a careful direction must always be given by the trial judge as to the nature of evidence of dying statements and the caution with which it should be received.

In Tanzania, the current position is that corroboration is required as a matter of practice before a dying declaration can be acted upon as proof of the content therein. **See Republic V. Ally (1971 HCD No. 306, R.V Mailijita s/o Lumije (supra) and Republic Vs. Joseph Ngaikwamo (1977) TLR No. 6.** Careful reading of the above cited authorities suggests that, the following can be stated to be the law on dying declaration.

Though a dying declaration is entitled to great weight, it is worthwhile to note that an accused has no power of cross examination and this is the reason that the courts insist that dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. However, it cannot be laid down as an absolute rule of law that the dying declaration cannot form sole basis of conviction unless corroborated. Certain principles governing dying declaration can be laid down thus:

- (i) There is no rule of law that dying declaration cannot be acted upon without corroboration.
- (ii) If it is found to be true and voluntary, the court can base the conviction on such a declaration.
- (iii) The court has to scrutinize the dying declaration carefully that it is not a result of tutoring
- (iv) If dying declaration is suspicious it cannot be acted upon without corroboration.
- (v) Merely because a dying declaration does not contain details is no good ground to reject it and no it can be rejected if it is a brief statement.
- (vi) Normally the court look upon, where that is necessary and practicable, medical opinion to satisfy itself that the deceased was in a fit mental condition to make the declaration.

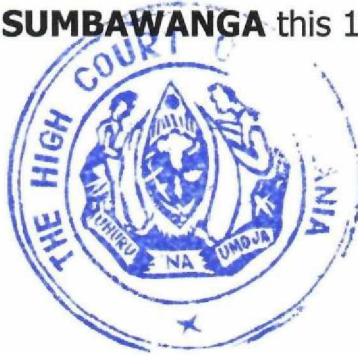
- (vii) When the prosecution version differs from the version in the dying declaration, the same cannot be acted upon.

In the present case, there are two different accounts of how the deceased identified his assailants. From PW1's testimony, the deceased managed to identify all the accused persons at the scene of crime. That, he also identified DOTTO s/o SAID as the one who hit him onto his head using a piece of iron bar. Then, from the testimony of PW2 the story is that, the deceased only identified one Mr. MALAJA and no one else and that he did not identify the one who hit him as he was hit from behind. Whereas PW1 testified that the deceased was able to talk on 27/08/2015 in the morning, PW2 testified that, since when the deceased was admitted on 27/08/2015 he regained his senses, as to be able talking, on 30/08/2015. Again, whereas PW2 had testified in chief to have recorded the deceased's statement on 27/08/2015 in the morning, Exhibit P2 indicates that, the same was actually recorded on 28/08/2020.

Therefore for reasons that the purported dying declaration is highly suspicious, whereby the prosecution version differs with the version in the dying declaration, the same cannot be acted upon as to require the accused persons make their defence in the circumstances of this case. Doing so, would be similar to hoping that the defence will fill the gaps in the prosecution case which is against the principle in **Bhatt's case** (supra)

For the foregoing reasons, I hereby make a finding in terms of section 293(1) of the Criminal Procedure Act that, the prosecution has not managed to establish a prima facie case as against any of the accused persons. As such, the court acquits all the accused persons for having no case to answer under section 293(1) of the Criminal Procedure Act.

Dated at **SUMBAWANGA** this 13th day of November, 2020




C.P. MKEHA

JUDGE

13/11/2020

Court: Ruling is delivered in the presence of Mr. Mwandoloma learned State Attorney for the Republic, all the accused persons, Mr. Kamyalile and Sanga learned advocates for all accused persons.




C.P. MKEHA

JUDGE

13/11/2020

Court: Right of Appeal to the Court of Appeal of Tanzania fully explained




C.P. MKEHA

JUDGE

13/11/2020