IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL SESSIONS CASE NO. 122 OF 2019

THE REPUBLIC

VERSUS

1. **SAMWEL GEORGE HIZA @ MWAGAVUMBI**
2. **JACKSON TUKAE MWACHA @ JJ**
3. **MICHAEL ATANAS**
4. **OBEID SELEMANI CHIZA @ WANCHOPE**

RULING

Ebrahim, J.

After closing of the prosecution case, this court finds it apt to appraise the entire prosecution evidence for the purpose of satisfying itself as to whether prosecution side has managed to establish a prima facie case against the accused persons to require them to enter their defence under **Section 293 (2) of the Criminal Procedure Act, CAP 20 R.E. 2002 (The Act)**.

Section 293 (2) of the Act, requires the court to call upon the accused person(s) to defend himself/herself if at the conclusion of the prosecution case the court considers that there is evidence that the accused person(s)

registration no. and the colour but he was not sure that it is the same because when he was handed the same it was new and he had used for only six days before it was stolen.

PW3 was Rehema Irene Mwakapila, the owner of the alleged stolen motor -cycle. She tendered in court Sales Agreement which was admitted in court as **exhibit "PE3".** She testified in court that she bought the motor cycle with registration no. T639 CDS for Tshs. 1,990,000/- on 01.11.2012 and handed over to PW2 for bodaboda business on 02.11.2012. She said she was called by PW2 in the morning of 09.11.2012 telling her that the motor cycle was stolen. She identified the motor cycle at the police after being called by one police officer called Kushoka on 12.11.2012. She said she recognised the motor cycle from the documents she had tallying with the documents on the motor cycle. She also recognised it by the registration no. T639 CDS. She further told the court that according to registration no. it is the same motor-cycle only that it is now worn out.

The fourth prosecution witness was **Dr. Saidi Omari Mkwachuu (PW4)** who performed post mortem examination of the body of the deceased on 10.11.2012. He tendered Report on Post-Mortem Examination which was

admitted as **exhibit "PE4".** He explained the cause of death was severe bleeding caused by multiple cut wounds and fracture of the skull.

The last prosecution witness was E6052 Detective Corporal Kushoka. He testified that he was assigned to investigate the instant criminal case on 09.11.2012. On the same day together with his fellow police officers at around 2300hrs they went to Buguruni to apprehend a suspect after being informed that the motor cycle is at Buguruni. They went to Buguruni sokoni together with PW1. He said, when they went to the house where the second accused was living, it was the landlord Mzee Kidile who opened the door and they found the accused at the backyard. At the corridor, they found **exhibit PE2.** He testified further that when they asked the second accused about the motor cycle, he told them that he bought the motor cycle for Tshs. 600,000/- from Athanas Michael and Obeid Selemani from Kigamboni whom he has already paid Tshs. 200,000/- and the remaining balance was Tshs. 400,000/-. On the next day they set a trap and apprehended them at Buguruni. He said upon interrogating them, the accused persons told them how they plotted the crime. He said George Hiza was apprehended by police officer Mathew.

As it can be clearly observed, the evidence implicating the accused persons to the charged offence is circumstantial evidence on the basis that the second accused person was found with the motor-cycle believed to have been stolen in the commission of the offence. Thereafter the second accused person mentioned the 3rd and the 4th accused persons.

The position of the law regarding circumstantial evidence is that circumstances must be incapable of more than one interpretation than the guilty of the accused persons. This principle was enunciated by the Court of Appeal in the case of **Mathias Bundala V R**, Criminal Appeal No. 62/2004 where it was held that;

> *"In a case **depending conclusively** on circumstantial evidence the court must before deciding on a conviction, find that the **inculpatory facts are incompatible** with the innocence of the accused and are **incapable of explanation upon any other reasonable hypothesis than of guilty**".* (emphasis is added).

Now, would the above pieces of evidence by prosecution witnesses suffice to form unbroken chain in such a way that the inculpatory facts are incompatible with the innocence of the accused?

The issue now will be as to whether looking at the evidence produced; the accused persons can certainly be incriminated.

In determining the same, the underlying principle here is that before the accused persons can be asked to enter their defence, there must be adequate evidence that the accused person can deny or traverse. Otherwise it would be requiring the accused persons to fill in the gaps in prosecution case which is contrary to the spirit of **section 293 (1) of Cap 20, RE 2019**.

Beginning with the testimony of PW1, according to his testimony, he was only called to assist on the arrest of the second accused and seizure of exhibit PE2 which he later handed over to PW5.

As for PW2, he testified to have handed the motor cycle to the deceased and knew about the death of the deceased on the second day. He was not sure if exhibit PE2 was the same motor cycle he was handed by PW3. If at all, from the evidence adduced in court, he was the last person to be seen with the deceased alive.

PW3 was called to confirm her ownership of the motor-cycle alleged to have been the source of the commissioned offence.

PW4 confirmed the cause of death of the death whose evidence would corroborate and prove death upon finding who murdered the deceased.

PW5 also testified that he was involved in the arrest of the 2nd, 3rd and 4th accused persons whom they told him how they plotted the incident leading to the death of the deceased.

Conspicuously therefore there is no evidence linking directly the accused persons as the persons who were to be seen with the deceased alive. The evidence implicating them is the motor-cycle found in the house where the second accused was found; and that they told their plot to PW5.

Beginning with the motor-cycle, testifying here in court PW5 told the court that when they apprehended the 2nd accused, he told them that he bought the motor cycle from the 3rd and 4th accused persons. He also said that it was the 2nd accused who assisted them in apprehending the 3rd and 4th accused persons. Responding to cross examination questions PW5 admitted that PW5 told them he bought the motor-cycle. Further to that we have received no other evidence to suggest otherwise in so far as the involvement of 2nd accused is concerned.

As for the rest of the accused persons, PW5 said that they told him how they plotted the whole incident. Nevertheless, as I am going to discuss the issue to the police later, the court was not availed with the complete story of how the plot was executed and the details of the said plot. All in all save for the

fact that the said motor-cycle was said to be the property of PW3 which was being used by PW2 who handed over the same to the deceased on the fateful night, there is no direct evidence linking the accused persons with the commission of the offence murder and the said motor cycle. In fact, no one saw either of the accused persons being with the deceased in possession of exhibit PE2 before he met his death.

It follows therefore that, there is only the very unsubstantiated story of PW5. PW5 is a police officer. He told the court that the accused persons admitted before him the whole plot which led to the death of the deceased. This means that the accused persons confessed before him their involvement of the alleged offence. The question now comes why didn't he reduce their confession into writing in terms of **section 57(1) and (2) of the Criminal Procedure Act, Cap 20 RE 2019**? Should the court merely take the oral evidence of PW5 in so far as the admission of the offence by the accused persons is concerned?

Section 57(1) and (2) of the Criminal Procedure Act, Cap 20 RE 2019 reads as follows:

*"**57**.-(1) A police officer who interviews a person **for the purpose of ascertaining whether the person has committed an offence shall,***

unless it is ***in all circumstances impracticable to do so, cause the interview to be recorded.***

(2) Where a person who is being interviewed by a police officer for the purpose of ascertaining whether he has committed an offence makes, ***during the interview, either orally or in writing, a confession relating to an offence, the police officer shall make, or cause to be made****, while the interview is being held or as soon as practicable after the interview is completed,* ***a record in writing****, setting out–*

(a) so far as it is practicable to do so, the questions asked of the person during the interview and the answers given by the person to those questions;

(b) particulars of any statement made by the person orally during the interview otherwise than in answer to a question;

(c) whether the person wrote out any statement during the interview and, if so, the times when he commenced to write out the statement;

(d) whether a caution was given to the person before he made the confession and, if so, the terms in which the caution was given, the time when it was given and any response made by the person to the caution;

(e) the times when the interview was commenced and completed; and

(f) if the interview was interrupted, the time when it was interrupted and recommenced".

From the above position of the law, it is clear that once the accused person is interviewed by the police on ascertaining the commission of the offence, then the accused person be it orally or in writing confesses to the offence;

the law requires the police officer to immediately reduce such confession into writing unless it is impracticable to do. It follows therefore that, an investigating officer or a police officer cannot produce the contents of confession orally in court unless there was an admitted cautioned statement in court first, then his oral evidence would only corroborate the documentary evidence already admitted in court i.e. the cautioned statement of the accused person. PW5 told the court that he interviewed the accused persons at the police station Kigamboni. As the law requires, unless he had tendered their cautioned statements, the contents of their admission would not be orally admitted here in court as it would be giving evidence of the cautioned statements through the back door. The law does not allow that.

This position has been extensively illustrated by the Court of Appeal in the case of **The DPP V Sharifu Mohamed@ Athumani and 6 Others**, Criminal Appeal No. 74 of 2017 when discussing the similar situation as the present one cited with approval the case of **Mashaka Pastory Paulo Mahengi@ Uhuru and 5 Others V Republic**, Criminal Appeal No. 49 of 2015 (unreported) and held that:

"It seems to us clear that the learned trial judge was articulating the position settled by this Court in ***Mashaka Pastory Paulo Mahengi*** *(supra) when she said that the prudence of Section 57(1) of the CPA requires that if the accused person admits to an offence, the same should be reduced in writing and the narration of the contents only to be made after the same has been cleared for admission".*

Thus, much as the evidence of PW5 on its own does not state any inculpatory facts connecting the accused persons with the alleged offence, still his testimony in so far as the confession of the accused persons is concerned does not pass the condition put by the law. I accordingly discard his piece of evidence.

More so I need no go further to discuss the contradictions apparent between the testimony of PW1 and PW5 on their night of arrest. I would put that it as a memory lapse occasioned after a passage of time.

All in all, the evidence adduced by prosecution witnesses serve no relevance in this case as they do not directly link with the acts of the accused persons in the alleged commission of the offence. The finding of the motor-cycle alone without proof of inculpatory facts does not conclusively forms guilty of the accused persons.

I am inspired by the decision of the Court of Appeal in the case of **Nathaniel Alphonce Mapunda and Another V R** [2006] TLR 395 where it was held that ;-

> *"Where circumstantial evidence is relied on the principle has always been that* ***facts from which an inference is drawn must be proved beyond reasonable doubt****". (emphasis is mine).*

I find that the circumstances from which an inference of guilt is sought to be drawn have not been established beyond reasonable doubt. Those circumstances neither form a chain of guilty nor conclusive tendency unerringly pointing towards the guilty of the accused persons. All this court can find are a lot of hypothesis which would be unsafe to lay a conviction of murder or even of a lesser offence to the accused persons.

I would wish to refer to the case of **Attorney General V Ally Kleist Sykes** [1957] 1EA 257 where it was held that:

> *"The discretion lies entirely with the court. If a magistrate finds an accused has no case to answer, then he must acquit the accused..."*

From the above stance, and in the absence of any other evidence by prosecution side, this court cannot put the accused persons to their defense

Court: Right of Appeal explained.

In terms of **Section 312 (4) of the CPA** accused persons should avail their permanent address and the same shall be coordinated by the Deputy Registrar of this court.

R.A. Ebrahim
Judge
09.11.2020

Dar Es Salaam
09.11.2020