

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA**

**AT TARIME
(ORIGINAL JURISDICTION)**

CRIMINAL SESSIONS CASE NO. 25 OF 2020

**THE REPUBLIC
VERSUS
WEREMA BHOKE ANTONY**

RULING

10th and 10th February, 2021

KISANYA, J:

The accused person, Werema Bhoke Antony is charged with offence of murder contrary to sections 196 and 197 of the Penal Code [Cap. 16, RE 2019]. It was alleged by the prosecution that, on the 4th day of March, 2019 at Borega Village within Tarime District in Mara Region, the accused person murdered one, Omary s/o Chacha Juma.

When the matter came up for preliminary hearing, the accused person pleaded not guilty to the charge. He also disputed the facts read over to him save for particulars as to his names and address and that Omary Chacha Juma is dead. He also denied the charge during the hearing of this matter.

Determined to prove that Omary Chacha Juma was murdered by the accused person, the prosecution paraded one witness and tendered one exhibit (the report on post mortem examination Exhibit PE1).

Pursuant to evidence adduced by the prosecution, the following account was unveiled: On 4th April, 2019 at 7000 hours, a mob of about 70 villagers hailing from Nyabisaga Village arrived at Borega B Village. The mob was armed with local weapons namely; panga, clubs and arrows. It was after Nyamakomo Muhabe who was conducting a bar business. He was suspected of stealing some properties from Nyabisaga Village. Upon arriving at Borega B village, the mob went straight to Nyamakomo's bar. He was not found at the bar. This driven the mob resolving to set the bar on fire.

The deceased, Omary Chacha Juma who happened to be the Chairman of Borega B Village arrived. He pleaded them to refrain from burning the bar the reason that Nyamakomo was a mere tenant. He asked them to burn the properties therein which belonged Nyamakomo's. The mob listened to the deceased. The properties to wit, crates of beers and plastic chairs were removed from the bar and burned. Thereafter, the mob matched back to Nyabisaga village. However, they changed their mind and returned after learning that, the deceased had gone to report them to the police. The mob inquired of the deceased house. In the course of this incident, one plastic chair was been found at the deceased premises.

- Mniko Turuka identified the said chair to be his. The mob became angry of the deceased. Therefore, when he arrived in companion of two armed police officers, he was stoned two times. The police officers tried to disperse the angry mob but in vain. The deceased ran to secure a refuge in a nearby house. The entrance door to the house was broken and the deceased attacked. The accused was first to stab him at the head by using panga. His ear was also cut by Mniko Turuka and his leg injured by unknown person.

When the mob left Borega B Village, the deceased was taken to Magoto Health Centre and later to Tarime District Hospital for medical treatment. He met his demise few hours later. The report on post mortem examination tendered during the preliminary hearing established the cause of death to be acute blood loss due multiple wounds on his body at scalp, left ear and multiple fractured on the right lower extremities. As the matter was reported to the police, the investigation implicated the accused person as among of the persons who attacked the deceased thereby causing to his death.

The prosecution case is based on evidence of PW1 Paulo Marwa Mwita who introduced himself as deceased's biological brother. He recalled to have witnessed the whole incident. In a nutshell, PW1 heard the mob's alarm (*yowe*) when he was cutting trees for timber. He proceeded to the scene which was at Nyamakomo's bar where he identified the accused person, Mniko Turuka and other persons from

Nyabisaga Village at a distance of 6 meters. PW1 informed us that he witnessed the mob removing the properties from the bar before burning them. He deposed further that, it took one hour for the mob to break into the house where the deceased had gone to hide and that the accused person was the first person to attack the deceased by stabbing him at the head using panga. PW1 deposed further that, the deceased was cut on his ear by Mniko Turuka and stabbed by another person whom he did not identify. He adduced that the accused person was known to him before the incident and that he identified him at a distance of 5 paces.

When cross examined, PW1 stated that Nyabisaga village is the third village from Borega B. He claimed to have lived in Nyabisaga village at his sister's house. However, conceded that he had never lived with the accused person. Although (PW1) the deceased claimed to have identified the accused at bar, he could not state the role played by him. Further to that, PW1 stated to have recognized many people who were at the bar on account that some of them were his relatives. However, he failed to name few of them.

Upon closure of the prosecution, this Court is required under section 293 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2002] (the CPA) to consider whether evidence adduced by the prosecution is sufficient to call the accused to enter his defence. In other words, a ruling as to whether the accused person has a case to answer has to be made. This is done by assessing whether the conviction can be

- sustained basing on evidence adduced by the prosecution if he does defend himself. See the case of **DPP vs Peter Kibatala**, Criminal Appeal No. 4 of 2015, CAT at Dar es Salaam (unreported), when the Court of Appeal held:

"A natural and ordinary meaning makes it plain that, this being a criminal case, the duty to prove the charge beyond doubts rests on the prosecution and the court is enjoined to dismiss the charge and acquit the accused if that duty is not discharged to the hilt. What essentially the court looks at is prima facie evidence for the prosecution which unless controverted would be sufficient to establish the elements of the offence."

The Court of Appeal went on to cite with approval the case of **Ramanlal Trambaklal Shaff vs Republic** (1957) 1 EA 332. In that case, the then East African Court of Appeal held as follows:

*"Remembering that the legal onus 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 the 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 will fill the gaps in the prosecution case. Nor can we agree***

that the question whether there is a case to answer depends only on whether there is some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence. It may not be easy to define what is meant by a prima facie, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence." (Emphasis added)

In the present case, it is not disputed the deceased was attacked by a mob and that the incident happened during broad day light. The crux of the matter is whether the accused person was properly identified at the scene of crime. The law is settled that evidence of visual identification is one of the weakest kind and unreliable evidence. Such evidence can be acted upon to convict the accused if it is watertight and all possibilities of mistaken identity eliminated. This position was stated in the celebrated case of **Waziri Amani vs R** (1980) TLR 250 when the Court of Appeal held:

"(i) Evidence on visual identification is of weakest kind and most unreliable;

(ii) No court should act on evidence on visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight.”

In determining whether the evidence on visual identification is watertight and qualifies to be acted upon, the following factors set in **Waziri Amani** (supra) and **Chacha Jeremia Mrimi and 3 Others vs R**, Criminal Appeal No. 53 of 2015 (unreported) have to be considered:-

- (a) How long did the witness have the accused under observation?
At what distance?
- (b) What was the source and intensity of the light if it was at night?
- (c) Was the observation impeded in any way?
- (d) Had the witness ever seen the accused before? How often? If only occasionally had he any special reason for remembering the accused?
- (e) What interval has lapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses, when first seen by them and his actual appearance? Did the witness name or describe

the accused to the next person he saw? Did that /those other person/s give evidence to confirm it?

In this case, PW1 did not tell the Court the time he had the accused under observation. Such evidence was vital due to the fact that the angry mob was constituted by 70 persons. The fact that the incident took more than one hour does not necessarily mean that, the accused person remained under PW1's observation for one hour. Since the mob was angry and moving from one place to another, PW1 ought to be specific on the time under which he identified the accused person.

It is also not disputed that the angry mob hailed from Nyabisaga Village, a third village from PW1's village. PW1 claimed to know the accused person before the incident. However, in his evidence in chief, PW1 did not adduce evidence as to how the accused was known to him or seen before the incident. It was during cross-examination when PW1 stated to have lived at his sister's house in Nyabisaga village and that he used to visit his relative in that village. In my opinion, this fact is not in itself sufficient to conclude that PW1 knew the accused before the incident. More evidence was required to be extracted from PW1 to prove this necessary factor for determining identification.

Another factor is whether the accused was identified is the ability of the witness to name the accused at the earliest possible opportunity. It is trite law that

- ability to name the accused at earliest possible time gives assurance of his credibility. See **Swaleh Kalonga and Another vs R**, Criminal Appeal No. 45 of 2001 (unreported) where it was held that:.

"..the ability of a witness to name a suspect at the earliest possible opportunity is an all-important assurance of his reliability."

PW1 did not depose evidence as to the time which he named the accused person as among of the persons who attacked the deceased. No other witness was called to testify that the accused was named by PW1 immediately after the commission of offence. Although PW1 claimed to have identified many people, he was not able to name other persons apart from the accused and Mniko Turuka. The said Mniko Turuka was not charged and the Court was not informed of his whereabouts.

Lastly, PW1 did not state whether he was not impeded in anyway at the time of observing the accused person. Such evidence was required because, there were many people who after the deceased on the material day.


At this juncture, I am of the considered view that the available evidence on visual identification is not sufficient to sustain the accused person's conviction. This is because the necessary factors for determining whether the accused person was

properly identified were not proved by PW1. Such gaps cannot be filled in by calling accused person to make his defence. That would amount to requiring him to prove his innocence or assist the prosecution case.

In the final analysis, I find that a prima facie case has not been made out against the accused person. In terms of section 293(1) of the CPA, I hold that the accused person has no case to answer and that, he is not guilty of the offence of murder. I proceed to order his acquittal and immediate release unless held for other lawful cause.

DATED at TARIME this 10th January, 2021.




E.S. Kisanya
JUDGE

Court: Ruling delivered this 10th January, 2021 in the presence of Ms. Monica Hokororo, learned State Attorney for the prosecution, Mr. Leonard Magwayega, defence counsel and the accused in person. B/C Jovian –RMA and the lady and gentleman assessors present.




E.S. Kisanya
JUDGE
10/02/2021