

IN THE HIGH COURT OF TANZANIA

AT MWANZA

ORIGINAL JURISDICTION

CRIMINAL SESSION NO. 109 OF 2014

THE REPUBLIC

VERSUS

LYOCHI S/O MATEMANI & ANOTHER

RULING

Date of last order: 17.03.2021

Date of Ruling: 19.03.2021

A.Z. MGEYEKWA, J

Following the closure of the prosecution case on the 19th March, 2021, I am obliged to determine, in terms of the provisions of section 293(1) of the Criminal Procedure Act, Cap. 20, whether the accused persons, Lyochi S/O Matemani and Kashinje S/O Tungu Bilia @ Shinje were charged for the Attempted Murder of Lucy Zakaria, have a case to answer. During the

preliminary hearing, the accused persons pleaded not guilty to the charge. They also disputed the facts read over to them save for particulars as to their names and address.

After the closure of the prosecution case, the learned State Attorney for the Republic and defense counsels, left the matter to court to decide whether there is evidence on record to have the accused persons in the witness box to answer the charge of murder.

Upon closure of the prosecution, this Court is required under section 293 (1) of the Criminal Procedure Act, Cap. 20 [R.E. 2019] to consider whether the evidence adduced by the prosecution is sufficient to call the accused to enter his defence. This is done by assessing whether the conviction can be sustained based on evidence adduced by the prosecution if he does defend himself. As it was held in the case of **DPP v Peter Kibatata**, Criminal Appeal No. 4 of 2015, at Dar es Salaam (unreported), the Court of Appeal held that:-

“ 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."

In the present case, it is not disputed the deceased was injured and admitted in Bugando hospital for some days. In order to call the accused persons to submit into the witness box and enter a defence in terms of section 293 (2) of the Criminal Procedure Act, Cap. 20 [R.E 2019], I must be satisfied that the evidence on record are corroborated.

In support of the charge, the prosecution called four witnesses; Sayi Lusendamila (PW1), Kang'wa Juma (PW2), D6814 DC Someke (PW3) and Gabriel Sidani (PW4). The nature of their evidence as testified in Court is that:-

PW1 testified that Lyochi Matemani and Kashinje Tungu invaded her and Mashaka Tungu and Sukuru Bamia and John Tungu were standing outside. In her statement which she recorded at the Police Station dated 31st July, 2013 PW1 testified that the persons who invaded and injured her with bush knives are Shinde Tungu and Sulubulu Baluhya. PW1 went on to testify that Subululu Baluhya told Shinje Tungu to leave because they have accomplished their task while Shilinde Tungu and Lyochi Matemani were in the sitting room.

During cross examination PW1 stated that Sulubu is not Lyochi and Shinde Tungu is not Kashinje. His statement was admitted and marked as Exh.D1. I have examined closely the testimony of PW1, it is clear that there is a variance of names. PW1 was very clear that Shilinde Tungu was not Kashinje and Sulubu was not Lyochi. In my view, there was a need for the prosecution to clarify the names of the 2nd accused which was not done.

In criminal jurisprudence, a witness must give evidence as appears in his/her statement which was recorded at the Police Station, the statement which is based on investigation document. I am so because that statement is the base of the witness testimony. It is settled that, if a witness state inconsistent statements on oath, his credibility is completely destroyed. I understand that contradictions are unavoidable because of the time when the witness recorded her/ his stamen to the time when the case was called for hearing.

The Court of Appeal of Tanzania in its numerals decisions has stated that where there are contradictions in evidence the court is duty bound to reasonably consider and evaluate those inconsistencies and see whether they are minor or major. Minor discrepancies and contradictions do not jeopardize the credibility of witnesses but major discrepancies and contradictions do jeopardize the credibility of witnesses considerably. This

was held by the Court of Appeal of Tanzania in the case of **Dickson Elia Nshamba Shapwata & Another v R**, Criminal Appeal No. 92 of 2007 (unreported) and in the case of **Lusungu Duwe v R**, Criminal Appeal No. 76 of 2014 (Unreported). In the case of **Sahoba Benjuda v R**, Criminal Appeal No.96 of 1989, it was held that:-

“ Contradiction in the evidence of a witness affects the credibility of the witness and unless the contradiction can be ignored as being minor and immaterial the court will normally not act on the evidence of such witness touching on the particular point unless it is supported by some other evidence.”

Based on the above legal authority, it is my considered view that in the present case; this was a major contradiction that affected the case at hand.

Apart from PW1 evidence, there is no any other witness who witnessed the brutal act. PW2, Kang'wa Juma in his testimony testified that he was informed that PW1 was invaded and injured but he did not recognize the bandits. PW3, D6814 DC Stg. Someka, a Police Officer is the one who drew the Sketch Map. He did not witness when PW1 was injured.

PW4, Gabriel Sidoni Kisandiko, a retired Police Officer is the one who recorded the cautioned statements of the accused persons. In his testimony,

he admitted that he recorded the statement under both sections 57 and 58 of the Criminal Procedure Act Cap.20. The cautioned statements were not admitted because the cautioned statement was recorded under both sections 57 and 58 of the Criminal Procedure Act, Cap. 20,. This was contrary to the requirement of the law.

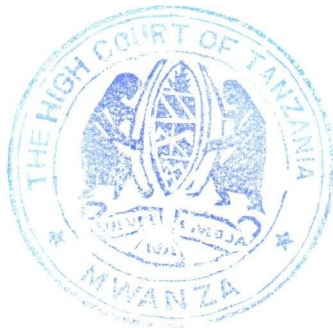
Therefore, PW1, Sayi Lusendamila was the only eyewitness and the key witness, however, she was not sure who injured her which means she failed to prove her case. Taking to account that there is no any other evidence and documents which proves that the accused persons are the one who injured Sayi Lusendamila.

Since I have left with no any evidence to implicate the accused persons in terms of section 293 of the Criminal Procedure Act, Cap. 20 [R.E 2019]. Therefore, there is nothing on record to defend. The spirit of section 293 (1) of the Criminal Procedure Act, Cap. 20 [R.E 2019] is such that, the accused can only stand in a witness box if a *prima facie* case has been established and also that, the Court may convict him of the offence charged even where he opts not to defend. In the instant case, there is no such a case established.

That said, the two accused persons; LYOCHI MATEMANI JIGELELE @ MOSES and KASHINJE TUNGU BILIA @ SHINJE are not guilty of attempted to cause death of SAYI D/O LUSENDAMILA and accordingly they are acquitted. I order their release unless they are lawfully held.

Order accordingly.

DATED at Mwanza this date 19th March, 2020.




A.Z.MGEYEKWA

JUDGE

19.03.2021