

IN THE HIGH COURT OF TANZANIA

AT MWANZA

ORIGINAL JURISDICTION

CRIMINAL SESSION NO162 OF 2016

THE REPUBLIC

VERSUS

1. JOSEPH S/O MSETI @ SUPER DINGI
2. RAPHAEL S/O ANGAYO
3. JOHN S/O MICHAEL @ MACHO
4. OMARY S/O JUMA @ SUMBWI @ TALL

RULING

Date of last order: 16.03.2021

Date of Ruling: 17.03.2021

A.Z. MGEYEKWA, J

Following the closure of the prosecution case on the 17th 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, Joseph S/O Mseti @ Super Dingi, Raphael S/O Angayo, John S/O Michael @Macho, and

Omary S/O JUMA @ SUMBWI @ TALL were charged for the murder of one ROBA S/O MWITA, have a case to answer.

After the closure of the prosecution case, the court calls upon the accused persons or their Advocate to address if they intend to submit whether the accused has a case to answer. In this instant case, the learned State Attorney for the Republic and defense counsels for the accused persons, 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.

In terms of provisions of section 293 of the Criminal Procedure Act, Cap. 20 [R.E 2019], my duty is to assess the evidence of the prosecution to find out whether the prosecution has established a *prima facie* case sufficiently to require the accused persons to enter a defense.

According to the charge, Joseph S/O Mseti @ Super Dingi, Raphael S/O Angayo, John S/O Michael @Macho, and Omary S/O JUMA @ SUMBWI @ TALL on or about the 18th April, 2014 at Rwegasore Street within Nyamagana District in Mwanza Region jointly and together did murder one ROBA S/O MWITA KIGOCHA. All four accused persons denied the charge.

In support of that charge, the prosecution called NINE witnesses; E 1242 CD Sanghai (PW1), E. 9795 DC, Christopher (PW2), Thobias Nyakega

(PW3), Hashim Ramadhani (PW4), Huseein Shaban (PW5), Philimon Blackweb, (PW6), Peter Fabian (PW7), Pastory Maboto (PW8) and Abubakar (PW9). The nature of their evidence as testified in Court is that:-

Breaking the ice for the prosecution was E1242 D/C Sanghai, PW1 in these proceedings. He testified that he is the one who seized the phone which was not admitted. PW1 named Raphael S/O Angayo, the 2nd accused person is the one who delivered the phone to Ikulu for sale. PW1 was told by one Ikuli and 2nd accused was found in possession of the said phone mark HTC. A certificate of seizure was admitted as Exh.P1 which was seized at Ikuri' house.

PW2, E 9795 DC Christopher, testified that on 18.04.2014 he was informed that there was an incident of theft and murder. PW2 wanted to tender a phone the learned counsels for the accused persons objected for the reason that the IMEI number appearing on the phone is different from the number stated in the Certificate of seizure thus the alleged stolen phone was not admitted. For that reason the things stolen were not found in possession of the 2nd accused.

PW2 tendered a certificate of seizure whereas the learned counsels for the accused persons raised an objection claiming that the signature of PW2

appearing in the certificate of seizure does not resemble the signature in exhibit P1 and Peter Emmanuel the person who leads the Police Officer to the 1st accused house did not append his signature. Peter Emmanuel was an important person to sign the seizure certificate in order to justify PW2 testimony.

Section 38 (3) of the Criminal Procedure Cap. 20 [R.E 2019] requires all witnesses to sign. I have examined the certificate of seizure Exh.P2 and found that many witnesses appended their signatures except Peter Emmanuel. Contrary to PW2 testimony who insisted that Peter Emmanuel appended his signature. I have also noted that the handwriting of (PW2) the author appearing in exhibit P1 and the author of exhibit P2 thereof differs. Likewise, the signatures of PW2 that is to say, E 9795 D/C Christopher signature appearing on exhibit P1 and exhibit P2 are quite different. With this view, I am doubtful whether the documents were tendered by a Police Officer who seized the items. Therefore, I proceed to expunge the exhibits P1 and P2 from the court records. That means the court is left with no any cogent evidence against the allegation that the 1st accused was caught in possession of the seizure properties.

PW2 testified that the Identification Parade were conducted and the 1st accused person and Peter Emmanuel were identified. In the second Identification Parade, the 2nd accused person and John Michael 3rd accused were identified. Peter Emmanuel identified the 3rd and 4th accused but there is no any evidence to support PW2 evidence since there is no any statement made by Peter Emmanuel nor was he charged for murder. PW2 testified that Peter Emmanuel escaped but the Prosecution entered nolle against this accused. In my view, Peter Emmanuel was an important witness to corroborate PW1 evidence.

PW3, Thobias Nyakega, PW4 Hasim Ramadhani, and PW5, Huseein Shabani testified that on 18.04.2014 they were invaded by bandits. PW3 identified the CDs and CPU. PW4 identified the blower machine. PW5 identified his properties; Deck LG, Keyboard, Video bag, Camera bag, cables, and electronic wires. All of them did not know who murdered the deceased.

PW6 testified that on 18.04.2014, he was among the people who lined up in the Identification Parade and the 3rd accused was identified but he did not know the chargers which he was facing. PW2 testified that the Identification Parade took place on 08.05.2014 and PW9 testified that the Identification Parade took place on 18.04.2014. As per the identification Parade Registry,

the exhibit P22 was recorded on 08.05.2014 therefore PW6 might have been lined up in a diverse Identification Parade.

PW7, a medical Doctor testified that he examined the deceased body on 19.04.2014 and confirmed that he was dead and died an unnatural death.

PW8 testified that he is a guardsman, he identified the 1st and 3rd accused persons. In the second round, he identified the 2nd accused. PW8 statement was admitted whereas in his statement PW8 testified that the police is the one who recorded the statement and the Police Officer is the one who filled in the accused names because he did not know the accused names. PW8 testified that he did not remember what they were wearing. PW8 denied having recorded a statement at the Police Station and requested this court to disregard it. PW8 testified that he identified the suspect by using a tube light, electric light. However, he did not describe the intensity of light at the scene of a crime. PW8 testified that in 2014 he started to lose his memory.

In criminal jurisprudence, it is a legal requirement that a witness must give evidence in accordance with a statement made at the Police Station, the statement which is based on investigation documents. The credence of testimony is based on the statement made at the Police station. Otherwise, he has no basis to give testimony. In the case at hand PW8 denied to have

recorded any statement at the police station. There is no record that the Republic declared PW8 a hostile witness. In this situation, it was important for the prosecution to summon the other two witnesses who witnessed the Identification parade to testify failure to that the whole procedure of conducted identification parade is unreliable. Therefore for the reasons stated above I have to say, PW8 was not a credible witness therefore PW8 evidence is disregarded.

Another shortfall is the credibility of a witnesses, in circumstances where witnesses stated inconsistency statements on oath, their credibility is completely destroyed. It is settled 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 ones that go to the root of the matter. While 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).

Similarly, in the case of **Sahoba Benjuda v The Republic**, Criminal Appeal No.96 of 1989, it was held that:-

" Contradiction in the evidence of a witness's effects 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 authorities, it is my considered view that in the present case; apart from minor contradiction there were major contradictions which affected the case.

Reverting back to the testimony of PW9, the one who conducted the Identification Parade on 08.05.2012. To substantiate his testimony he tendered the Identification Parade Registry which was admitted as exhibit.P22. PW9 in his testimony stated that he was not the one who recorded the witnesses' statements. PW9 admitted that the Police Officer who conducted the Identification Parade is the one who is required to record the witness statement of the suspects. Although in the in instant case PW9 is not the one who recorded the witnesses' statements.

Moreover, PW9 testified that the people who lined up for the Identification Parade were of the same height, however, PW6 testified that the suspects

were of different height. PW9 testified that the 1st, 2nd, and 3rd accused persons were identified, however, his testimony was not supported by any other evidence since PW8 was not a credible witness because he turned hostile. After I have scrutinize the prosecution evidence, there is a lot to be desired, with the above-mentioned contradictions which goes to the root of the case the same have affected the credible of witnesses.

Having heard and analysed the evidence of the Prosecution witnesses I have to say that there is no any cogent evidence that would have corroborated the evidence on record. The prosecution have failed to prove if there is any connection to the murder case since the offence of theft and possession of stolen items by itself is not proved. The cautioned statement of the first accused was not admitted for failure to meet the conditions under section 50 of the Criminal Procedure Act, Cap. 20 [R.E 2019]. The rest accused persons cautioned statements were not tendered in court the same could have corroborated the evidence on record. The same renders the remaining evidence of no probative value. The link between the accused persons and the incident of murder equally dissipates.

From the totality of the prosecution evidence, it can be said that a prima facie case has not been made out to sustain a conviction against the accused

persons. No court would properly direct its mind and found a conviction based on what is otherwise an extremely deficient set of facts which have done nothing to connect the accused persons to the offence that they stand charged. Since I have been 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 four accused persons are found to have no case to answer. They are not guilty of the murder of ROBA S/O MWITA KIGOCHA, accordingly, they are acquitted under section 293 (1) of the Criminal Procedure Act, Cap. 20 [R.E 2019], accordingly they are acquitted. I order their release unless lawfully held.

Order accordingly.

Dated at Mwanza this 17th March, 2021.




A.Z.MGEYEKWA
JUDGE
17.03.2021