

IN THE HIGH COURT OF TANZANIA

AT GEITA

ORIGINAL JURISDICTION

CRIMINAL SESSION NO.19 OF 2016

THE REPUBLIC

VERSUS

1. YOHANA S/O MABIRIKA

2. SHIJA S/O JUMA @ SHIJA

3. SIMONI S/O MABIRIKA

4. PENDO S/O MATHIAS @ MASBA

5. MACHIBYWA S/O MABIRIKA

RULING

Date of last order: 04.05.2021

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A.Z. MGEYEKWA, J

Following the closure of the prosecution case on the 04th May, 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; Yohana S/O Mabirika, Shija S/O Juma @ Shija, Simoni S/O Mabirika, Pendo S/O Mathias @ Masba and Machibywa S/O Mabirika have a case to answer for the murder of one Manugwa D/O Lupambe.

After the closure of the prosecution case, this court calls upon the Republic, accused persons, or their Advocate to address if they intend to submit whether the accused have a case to answer. In this instant case, Ms. Monica, learned State Attorney for the Republic and Mr. Otieno, learned counsel on behalf of all 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, Yohana S/O Mabirika, Shija S/O Juma @ Shija, Simoni S/O Mabirika, Pendo S/O Mathias @ Masba, and Machibywa S/O Mabirika are alleged that on 02nd May, 2014 at 19:30 hours at Nyakamwaga

village in District of Geita within Geita Region jointly and together did murder one Manungwa D/O Lupambe. All five accused persons denied the charge.

In support of that charge, the prosecution called THREE witnesses; Christopher Johana Matola (PW1), F2642 D/C Boniface (PW2), Benson Mashongole (PW3). The nature of their evidence as testified in Court is that:-

PW1, a medical Doctor testified that on 03rd May, 2014 he was instructed to go to Nyamalimbe village. On his arrival, he examined a female body of an old woman. During the examination, PW1 found that the deceased had injuries on her head and the brain was lying out of her skull. PW1 confirmed that Manungwa D/O Lupambe was dead and died an unnatural death. PW1 prepared a Post Mortem Examination Report which was tendered in court and admitted as exhibit P1.

F2642 D/C Boniface was the second witness. He testified that on 03rd May, 2014 he was instructed to go to Nyamalimbe village where there was murder. PW2 testified that he was accompanied by other two Police Officers on their arrival at the scene of the crime they found the deceased body lying outside her house. PW2 testified that he drew a Sketch Map. PW2 tendered a Sketch Map, the same was admitted and marked as exhibit P2.

Apart from drawing a Sketch Map, PW2 also recorded the statements of one witness named Emmanuel Lutambi and he also wanted to tender a statement of Katarina Tuli which was prepared by D/C Mohamed. The learned counsels for the accused persons raised six objections. After determining two objections I proceeded to admit the statement of Emmanuel Lutambi and I found that the statement of Katarina was prepared contrary to section 34B 2 (f) of the Evidence Act, Cap.6 [R.E 2019] the witness could not read. Therefore, D/C Mohamed was required to read to her before she signs it or accompanied by D/C Mohamed's declaration that he has read it. For ease of reference, I reproduce section 34B 2 (f) of the Evidence Act, Cap.6 [R.E 2019] hereunder:-

“ 34B 2 (f) if, where the statement is made by a person who cannot read it, it is read to him before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read.”

Applying the above provision of the law, I found that Katarina's statement was recorded contrary to the law therefore the same was not admitted. However, I overruled the objection raised by the learned counsels against Emmanuel's statement after noting that section 34B (2) (f) of the Evidence Act, Cap.6 [R.E 2019] was complied with.

PW3, D 9899 D/C Benson Mashongole was summoned by the prosecution to tender the cautioned statement of the first accused person. Benson testified to the effect that he recorded the first accused person's cautioned statement on 03rd May, 2014 at 17 hours. When PW3 wanted to tender the cautioned statement of the first accused person, the learned counsels raised five objections. This court sustained one of the objection after noting that the first accused statement was recorded contrary to section 34B (2) (f) of the Evidence Act, Cap.6 [R.E 2019].

Section 34B (2) (f) of the Evidence Act, Cap.6 [R.E 2019] requires all if the statement is made by a person who cannot read it, it is read to him before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read. I have examined the cautioned statement of the first accused he stated that he cannot read that means he was illiterate. Therefore PW3 was required to read the statement or even accompany a declaration that he has read over the cautioned statement.

The purpose of reading the cautioned statement is to allow the suspect to make any corrections or add anything to the cautioned statement. In the case of **James Kazungu Ntambara and Another v Republic**, Criminal Appeal No. 177,178 of 2011 the Court of Appeal of Tanzania observed that the

cautioned statement was recorded contrary to section 57 (4) (b) and (c) of the Criminal Procedure Act, Cap. 20 that after the cautioned statement being read the accused person was not informed whether he wanted to make corrections or add anything to the statement. The same was a fundamental glaring defect as a result the cautioned statement was expunged from the court record. Therefore, the first accused person cautioned statement was not admitted because it was recorded contrary to section 34B (2) (f) of the Evidence Act, Cap.6 [R.E 2019] and section 57 (4) (b) and (c) of the Criminal Procedure Act, Cap. 20 [R.E 2019].

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 cautioned statement of the first accused was not admitted for failure to meet the conditions under section 57 (4) (b) and (c) 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.

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 five accused persons are found to have no case to answer. They are not guilty of the murder of Manungwa D/O Lupambe accordingly they are acquitted under section 293 (1) of the Criminal Procedure Act, Cap. 20 [R.E 2019]. I order their release unless lawful held.
Order accordingly.

Dated at Mwanza this 04th May, 2021.

A.Z.MGEYEKWA
JUDGE
04.05.2021