

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF MUSOMA**

AT TARIME

CRIMINAL SESSIONS NO. 39 OF 2021

**THE REPUBLIC..... PROSECUTOR
VERSUS
MOSES SAMSON GIBA ACCUSED**

RULING

12th October, 2021

Kahyoza, J

Moses Samson Giba, the accused person, is charged with the offence of murder C/S 196 and 197 of the Penal Code, [Cap 16 R. E 2019]. The prosecution alleged that the accused person did, on the 9th day of December, 2017 at Mwangaza street within Tarime District in Mara Region, murder Ester Molinyi @ Chacha. The accused pleaded not guilty to the information. The prosecution summoned three witnesses and tendered three exhibits, a post-mortem examination report (Exh. P1) a sketch map (Exh. P2) and the cautioned statement (Exh. P3) to establish the accused guilty of the offence of murder.

At the close of the prosecution's the defence submitted that the prosecution has not established a *prima facie* case.

This is a ruling whether the accused person Moses Samson @ Giba has a case to answer in terms of section 293(1) of the Criminal Procedure Act, [Cap. 20 R.E 2019] (the **CPA**).

Mr. Obwana, the defence counsel, submitted that the prosecution failed to establish a *prima facie* case against the accused person. He had it that there was no doubt that Ester Molinyi @ Chacha is dead and that according to DR. Kahima (Pw1) she died on 19/12/2017. DR. Kahima (Pw1) proved that Ester Molinyi @ Chacha died unnatural death. The defence advocate submitted regarding Lilian Pw2, that she was called to tender the extra-judicial statement which was not admitted, hence her evidence had no any substance.

The remaining witness was **Ass. Inspector Dominic** (Pw3), the investigator of the case at hand. **Ass. Inspector Dominic** (Pw3), tendered a sketch plan Exh. P2 and the accused's caution statement (Exh. P3). He submitted that **Ass. Inspector Dominic** (Pw3), violated the provision of section 53 (b) of the **CPA** before he recorded the statement. He did not inform the accused the offence under which he was under put restraint. He contended that while **Ass. Inspector Dominic** (Pw3), told this Court that he never interrogated the accused in relation to the offence of murder, the accused's caution statement reads that he informed the accused that he was restrained with the offence of murder.

He contended that the statement was recorded after the expiry of time required. He prayed the exhibit to be expunged from the record. He

cited the case of **Lubinza Mabula & 2 Others V. R.** Cr. Appeal No. 226/2016.

He concluded that the accused person has no case to answer.

The prosecuting State Attorney opposed the submission that the accused has no case to answer. He supported the defence counsel that there is no dispute that Ester Molinyi @ Chacha is dead and that her death was unnatural one. He contended that the first prosecution witness proved the fact that Ester Molinyi @ Chacha died unnatural death. The issue before this Court, he submitted, is who killed Ester Molinyi @ Chacha.

He contended that the prosecution's witnesses, Lilian Pw2 and **Ass. Inspector Dominic** (Pw3) answered to the question who killed Ester Molinyi @ Chacha. He submitted that much as the evidence Exh. P3 the accused's cautioned statement had irregularities, errors or short comings, the errors did not affect the contents. To support his position, he cited the case **Jeremial Murimi and 3 others V. R.** Cr. Appeal No. 55/2015 where the court quoted the holding in the case of **Nyerere Nyangue V. R.** Cr. Appeal No. 67/2010 (unreported). In **Nyerere Nyangue V. R.**, (supra) the Court of Appeal considered the issue whether the failure to record the said cautioned statements within a period of four hours prejudiced the appellant. It stated-

"It is not therefore correct to take that every apparent contravention of the provisions of the CPA automatically leads to the exclusion of the evidence in question."

He contended that what was contravened was procedural matter which does not affect the substance of the accused's cautioned statement. He added that the accused explained how he caused the death of Ester Molinyi. He concluded that the prosecution established a *prima facie* case against the accused person.

Did the prosecution establish a prima facie case?

This Court's task is to review the evidence to find out whether the prosecution established a *prima facie* case. A *prima facie* case as defined by **Black's law** Dictionary 8th Ed. is such evidence as will suffice until contradicted and overcome by other evidence. It is also stated that a *prima facie* evidence is the evidence good and sufficient on its face; such evidence as in the judgment of the law, is sufficient to establish a given fact....."

A *prima facie* case is said to be established where a reasonable tribunal, properly directing its mind to the law and the evidence on record, could convict if the accused is not called upon to defend himself. See the case of **DPP. V. Peter Kibatala**, Cr. Appeal No. 4/2015 CAT (unreported) where the Court of Appeal defined *prima facie* as follows:-

*"What is meant by prima facie case has been, with lucidity, elaborated and articulated in the case of **Ramanlal Trambaklal Bhatt v Republic** [1957] EA 332-335 where it was stated that:-*

"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 dose 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."*

I totally agree with both the prosecuting State Attorney and the defence advocate, that there is no disputed that Ester Molinyi is dead. She died a violent death. According to **DR Kahima** (Pw1), Ester Molinyi's death was due to severe head injury due to blunt object leading increased subdual *Haematoma*. The only task the prosecution was facing is to link the death of Ester Molinyi with the accused.

The prosecution summoned Lilian (Pw2) to tender the accused extra-judicial statement. The statement was not admitted as Lilian (**Pw2**), the Justice of Peace's failed to observe the **Chief Justice's Instructions to the Justice of Peace**. The Court of Appeal's position is that it is mandatory for the Justice of Peace recording the extra judicial statement to

observe the Chief Justice's Instructions to the Justice of Peace to the letter, failure renders the statement not to have been taken voluntarily. See the case of **Japhet Thadei Msigwa V R.**, Criminal Appeal No. 367 of 2008 (CAT Unreported) and **Mpulji Mtogwashinge V R.**, Criminal Appeal No. 156 of 2015 (CAT Unreported). In the former the Court of Appeal stated that-

"So, when Justices of the Peace are recording confessions of persons in the custody of the police, they must follow the Chief Justice's Instructions to the letter. The section is couched in mandatory terms. Before the Justice of the Peace records the confession of such person, he must make sure that all eight steps enumerated therein are observed."

For that reason, Lilian (Pw2)'s extra judicial statement was not admitted. The last prosecution witness was **Ass. Insp. Dominick** (Pw3). **Ass. Insp. Dominick** (Pw3) recorded the cautioned statement of accused and tendered a sketch map Exh. P2. The sketch map was admitted without objection. He tendered also exhibit, Exh. P3, the accused 's cautioned statement, which was admitted after the defence strongly objected to its admissibility as the accused alleged he was tortured. The Exh. P3 was therefore a retracted confession.

The prosecution's principal witness **Ass. Insp. Dominic** (Pw3) testified during cross-examination that he did not interrogate the accused in relation to the offence of murder, however, Exh. P3 shows that he informed the accused that he was restrained for the offence of murder.

Thus, he interrogated the accused person in relation to the offence of murder. The statement reads;

*"Onyo: **Mimi H. 5912 PC DOMINIC** nakuonya wewe **MOSES SAMSON GIBA** kwamba unatuhumiwa kwa kosa la Mauaji chini ya kifungu 196 cha sheria K/A hivyo basi hulazimishwi kusema neno lolote kuhusiana na maelezo yako yanaweza kutumika kama ushahidi mahakamani pia unayo haki kisheria kuwa na Wakili wako, ndugu yako ili aweze kushuhusia wakati unatoa maelezo yako.*

***JIBU LA ONYO: Moses Samson Giba NIMEONYWA** kwamba natuhumiwa kwa kosa la Mauaji chini ya kifungu 196 cha sheria K/A na kwamba silazimisihwi kusema neno lolote kuhusiana na tuhuma hizi isipokuwa kwa hiari yangu mwenyewe na kwamba lolote nitakalolisema litaandikwa hapa chini ya maelezo yangu yanaweza kutumika kama ushahidi Mahakamani, pia ninayo haki kisheria kuwa na Wakili wangu, jamaa yangu, ndugu yangu au rafiki yangu ili aweze kushuhudia wakati natoa maelezo yangu."*

Exh. P3. indicated twice that the accused was restrained for the offence of murder. **Ass. Insp. Dominic** (Pw3) stated that he interrogated the accused on the 10/12/2017, if it is true that he interrogated the accused person on the 10/12/20217, the accused was not restrained with the offence of murder, as Ester Molinyi was still alive. Ester Molinyi died on the 19/12/2017 as per the evidence of DR. Kahima (Pw1) and as demonstrated by Exh.P.1. It goes without saying that when **Ass. Insp.**

Dominic (Pw3) interrogated the accused did not inform him the reason of why he was restrained or he did not interrogate him at all. It also raises a reasonable doubt whether **Ass. Insp. Dominic** (Pw3) interrogated the accused person and recorded Exh.P.3. **Ass. Insp. Dominic** (Pw3) violated the clear provision of S. 53 (b) of the CPA.

S. 53 (b) of the **CPA** stipulates that:-

"Where a person is under restraint, a police officer shall not ask him any questions, or ask him to do anything, for a purpose connected with the investigation of an offence, unless-

(a)N/A;

*(b) the person has been informed by a police officer, in a language in which he is fluent, in writing and, if practicable, orally, **of the fact that he is under restraint and of the offence in respect of which he is under restraint;** and"*

(c) N/A

I am of the firm view that Exh. P3 could not be acted upon when the same contravened the mandatory provisions of the law and it raises doubt whether it was ever recorded. It is on record that **Ass. Insp. Dominic** (Pw3) was the investigator of the case in question, he had all facts of the case. He knew or he had reasons to know when Ester Molinyi met her demise. Why did he inform the accused that he was interrogating him regarding the offence of causing death of Ester Molinyi on the 10/12/20217 when he knew that Ester Molinyi was alive? The irregularity was not a procedural error but a grave mistake which raised doubts if the statement

was ever recorded and whether it was recorded on 10/12/20217 or recorded after Ester Molinyi died and backdated.

As if the above was not bad enough, the defence challenged the prosecution that the caution statement recorded was after the expiry of 4 hours from the time the accused was arrested.

Ass. Insp. Dominick (Pw3) did not establish when the accused was arrested. He deposed that the accused was arrested at 10:00AM and he took him from police lock up and interrogated him at 11:00AM. I was not convinced that the accused was arrested at 10:00AM. **Ass. Insp. Dominick** (Pw3) was not among the police who arrested the accused person nor was he at the police station when the accused was put in the police lock up. It remained a reasonable doubt whether the accused was arrested on 10/12/2017 at 10:00 AM or on 9/12/2017.

It is also on record that Exh. P2 was drawn on the 10/12/2017 and the same is titled "**RAMANI YA TUKIO LA MAUAJI YA ESTER MWILINYI CHACHA**". The sketch, which was drawn on the 10th day of December, 2017, would not have referred to Ester Molinyi as the deceased. Ester Molinyi was still alive. She met her demise on the 19/12/2017.

The discrepancies or say the underperformances in the evidence of **Ass. Insp. Dominick** (Pw3) left much to be desired. Such evidence cannot be relied upon by a reasonable tribunal to convict the accused person. It connotes that the evidence of **Ass. Insp. Dominick** (Pw3) was fabricated to suit the situation. The Court of Appeal in the case of **Director of Public Prosecution V. Morgan Maliki and Nyaisa Makori**, Criminal Appeal

No. 133/2013 (unreported) referred to the case **Rammahlal Frambaklal Bhatt V. R** (1957) EA 332 and **Mrimi V. R** (1967) on when can the evidence on record be said to establish a *prima facie* case had the following to say;

"So, on the principles set out in BHATT's and MURIMI cases, we think that a prima facie case is made out if, unless shaken, it is sufficient to convict an accused person with the offence with which he is charged or kindred cognate minor one. Which means that this stage, the prosecution is expected to have proved all the ingredients of the offence or minor, cognate one thereto beyond reasonable doubt. If there is any gap, it is wrong to call upon the accused to give his defence so as to fill it in, as this would amount to shifting the burden of proof."

In the present case, I am not able to rely on the uncorroborated retracted confession of the accused person. I find the evidence of **Ass. Insp. Dominck** (Pw3) that the accused confessed highly doubtful. It is not likely that the accused person confessed to cause the death of Ester Molinyi on 10/12/2017 when Ester Molinyi was still alive. Ester Molinyi died 9 days after **Ass. Insp. Dominck** (Pw3) recorded the accused's confession. Thus, I do not find cogent evidence to link the accused with the death of Ester Molinyi which is the element of the offence of murder and do so beyond reasonable doubt.

The evidence of **Ass. Insp. Dominck** (Pw3) is so weak and it was rendered weaker by cross-examination.

This Court held in case **R. V Edward Moango** Cr. Appeal No. 103/1999 that:

"A submission of no case to answer may properly be upheld where there is no evidence to prove an essential element in the offence charged or where the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so unreliable that no tribunal (if compelled to do so) would at the stage convict"

A submission of no case to answer may be properly upheld, where there is no evidence to prove that an essential element in the offence charged or where the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so unreliable that no tribunal (if compelled to do so) would at that stage convict.

The evidence on record would not lead to the accused's conviction. It is therefore an error in law as stated by the defunct Court of Appeal of East Africa, to put the accused on defence, when the prosecution has not established a *prima facie* case. The Court of Appeal stated in **Murimi V. R** (1967) E.A 542 that-



".....The law requires a trial court to acquit an accused person if a prima facie case has not been made out by the prosecution. If an accused is wrongly called on his defence then this an error of law...."

In the end, I have been highly persuaded by position Kenyan case of **R. Vs Elizabeth Nduta Karanja & Another** (2006) KLR Criminal Case No. 52/2005 that:-

*"without such **prima facie** justification, there is no legal basis for putting the accused through the trouble of having to defend himself."*


In the same vein, I find that the prosecution did not establish a *prima facie* case against the accused person, to require him to enter a defence, if, he so wished under S. 293 (1) of the **CPA**. Consequently, I dismiss the charge and acquit the accused person of the offence of murder C/S 196 & 197 of the Penal Code [Cap. 16 R. E. 2017].

It is so ordered.



J. R. Kahyoza
JUDGE
12/10/2021

COURT: Ruling delivered in the presence of the accused person, and his advocate and the presence of Mr. Tawab, the State Attorney.



J. R. Kahyoza
JUDGE
12/10/2021