

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

AT TARIME

(ORIGINAL JURISDICTION)

CRIMINAL SESSIONS CASE NO. 76 OF 2021

THE REPUBLIC

VERSUS

CHACHA S/O KIGUSA @ NYAHEGERE

RULING

9th and 9th November, 2021

KISANYA, J:

Chacha s/o Kigusa @ Nyahegere stands charged with offence of murder contrary to sections 196 and 197 of the Penal Code [Cap. 16, R.E. 2019]. It is the case for the prosecution that, on the 11th day of November, 2020 at Kobori Village within Tarime District in Mara Region, the accused murdered one, Yusuph Machugu Mwita (the deceased).

When the charge was read over to the accused person, he pleaded not guilty. In terms of the record, the undisputed facts agreed to by the parties during the preliminary hearing were, particulars as to the accused's names, address and occupation; and the fact that Yusuph Machugu Mwita is dead.

To prove his guilty, the prosecution marshalled a total of four witnesses namely, Emmanuel Kisinda Damas (PW1) doctor who examined the body of the

deceased, Gesaya Chacha Getema (PW2) the deceased relative, Sara Gimaho (PW3) potatoes' vendor and the deceased neighbor, and G. 7499 DC Abel (PW4) a police officer. The oral testimonies of the prosecution witnesses was supplemented by two exhibits to wit, the Report on Post-Mortem Examination (Exhibit P1) and the statement witness of PW2 Sara Gimaho (Exhibit P2).

The evidence adduced by the prosecution can be summarized as follows: Emmanuel Kisinda Damas (PW1) is a clinical officer stationed at Tarime District Council Hospital, formerly known as Nyamwaga Hospital. He testified that on the 12th day of November, 2020, he was summoned by the police officers to examine the deceased body. According to PW1, the deceased body found in the forest located at Koberi Village within Tarime District. He testified that the examination was conducted in the presence of police officers and deceased relatives whereby, the latter identified the body as being that of Yusuph Machugu Mwita. PW1 told the court that the examination of the deceased body revealed, *inter-alia*, that the deceased had fingers' mark around the neck, bruises at the left arm above elbow joint, food discharge, bites at tongue, urethral and sperm discharge, bruises on the left leg. In that regard, PW1 testified that he formed the opinion that the cause of death "suffocation secondary to robbing" (sic), meaning, suffocation secondary to strangulation.

The second witness is Gesaya Chacha Getema (PW2). He told the Court that the deceased was the son of his niece. PW2 testified that he received information about the deceased's death on the 12th day of November, 2020 when his wife who received a call from one Lucia. PW2 was firm that, it is his wife who went to the scene of crime and that the latter confirmed to him that the deceased was dead. PW2 deposed further that the accused was arrested by his son. He testified further that he was not aware of the cause the deceased death. When cross examined by the defence counsel, PW2 stated that he did not see the accused killing the deceased.

There came Sara Gimaho (PW3). She testified to have met the deceased for the last time, on the 11th day of November, 2020 at 1800 hours. She recalled that on that day, she met and walked with the deceased until when they parted each other at the office of Mariba Ward. In her examination in chief, PW3 denied to have seen the accused beating the deceased on fateful day. Therefore, the prosecution was given leave to cross-examine, PW3 because her evidence that she did not see the accused beating the deceased was inconsistent with her statement recorded at the police station. PW3 accounted that the statement (Exhibit P2) was not read over to her by the police officer who recorded the same.

The last witness is G. 7499 DC Abel (PW4), a police officer who recorded the statement of Magige Songa Chacha. He prayed to tender the said statement under section 34B (1) and (2) (a) of the Evidence Act (Cap. 6, R.E 2019). However, the Court upheld the objection that the statement was inadmissible for failure to comply with the provision of section 34B (2) (a) of the Evidence Act (supra).

After the evidence PW4, the prosecution prayed to close its case. Mr. Paul Obwana, learned advocate for the accused and Mr. Tawabu Yahya, learned State Attorney left it to the Court to decide on whether the accused has a case to answer.

Therefore, in this ruling, this Court is called upon to address whether the evidence adduced by the prosecution is sufficient to call the accused to enter his defence. This issue is based on section 293 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2002] (the CPA). The law is settled that the court is enjoined to dismiss the charge and acquit the accused if the prosecution has not discharged its duty of proving the elements of the offence. This stance was taken by the Court of Appeal in **DPP vs Peter Kibatata**, Criminal Appeal No. 4 of 2015, CAT at Dar es Salaam (unreported), when it was 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 yet another case of **Ramanlal Trambaklal Shaff vs Republic** (1957) 1 EA 332 which was cited with approval in **Peter Kibatala** (supra) the above named case, the then East African Court of Appeal held as follow:-

"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)

Guided by the above position, the issue under consideration can be addressed by addressing the question whether the prosecution has proved the elements of the offence of murder in order to put the accused on the defence.

In terms of section 196 of the Penal Code (*supra*), the prosecution was duty bound to prove the following three elements of the offence of murder: *One*, that there is a person who died of an unnatural death and that the killing was unlawful; *two*, that the accused person arraigned before the Court is the one who killed the deceased; *three*, that the accused had malice aforethought. All elements must be proved cumulatively.

Starting with the first element, I have indicated earlier that, the fact that Yusuph Machugu Mwita is dead was not disputed during the preliminary hearing. In terms of section 192(4) of the CPA, that fact is deemed to have been proved by the prosecution. It was proved further, through the evidence of PW1, that the deceased death was caused by suffocation secondary to strangulation. In that regard, the prosecution proved that the deceased death was unnatural. Therefore, the first element of the offence of murder was duly proved.

The next and crucial question is whether the deceased was killed by the accused, Chacha Kigusa Nyahegere. Having gone through the evidence adduced by the prosecution, I find no piece of evidence which implicates the accused person in the case at hand. Starting with PW1's evidence, he did not establish the accused killed the deceased. As to PW2, his evidence was not direct evidence. He adduced hearsay evidence which is not admissible under

section 62(1) of the Evidence Act (Cap. 6, R.E.2019). As that was enough, his evidence did not incriminate the accused person.

The prosecution intended to rely on the evidence of PW3 who had stated in Exhibit P2 that the accused was seen beating the deceased on the fateful day. However, nothing suggesting that the police officer who recorded Exhibit P2 read it to PW3 as required under section 10(3B) of the CPA. In that regard, it is my considered view, Exhibit P2 cannot be used to impeach her credibility. In the result, I find no cogent reason to disregard, PW3's evidence that she did not see the accused person beating the deceased on the 11th day of November, 2020. This is so when it is considered that her statement (Exhibit P2) was recorded after three months (on 25/02/2021). There is no plausible explanation given by the prosecution on the delay to record the statement of PW3. That being the case, there remain no evidence to prove the second and third elements of the offence of murder. PW4's evidence has no weight because the statement of Magingo Songo Chacha who recorded to have seen the accused person and the deceased heading to the forest was not admitted in evidence.

For the reasons I have endeavored to state, I am of the considered view that the evidence adduced by the prosecution is not sufficient to put the accused on his defence. It is therefore, hold that the accused person has no case to answer and that he is not guilty of the offence of murder. In


consequence, I acquit the accused Chacha Kigisa Nyahegere of the offence of murder and order for the immediate release unless held for other lawful cause.

DATED at TARIME this 9th November, 2021.





E.S. Kisanya
JUDGE

Court: Ruling delivered in open court this 9th day of November, 2021 in the presence of Mr. Peter Iole, learned State Attorney for the Republic, the accused person, Mr. Paul Obwana, learned advocate for the accused person, and lady and gentleman assessors.


E.S. Kisanya
JUDGE
09/11/2021

Court: (i) Right of appeal explained.

(ii) Assessors thanked and discharged.


E.S. Kisanya
JUDGE
09/11/2021