IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB- REGISTRY

AT MUSOMA

CRIMINAL SESSIONS CASE NO. 58 OF 2021

THE REPUBLIC

VERSUS

NJILE S/O MASUNGA

RULING

9TH NOV. & 10th November, 2021.

BEFORE F. H. MAHIMBALI, J.:

NJILE MASUNGA, the accused person in this case is charged under section 196 and 197 of the Penal Code Cap 16 for allegedly murdering one PASKAL S/O MAREGESI on the 10th day of March, 2018, at Nyarusurya, within the District and Municipality of Musoma in Mara Region. When the information was read over to him, he pleaded not guilty and denied to have committed the offence he is charged with.

It has been alleged by the prosecution that on the 10th March, 2018 at 16.00hrs, the accused person while at Bweri area with his friend Nyanda, saw the deceased wearing a T-shirt which he identified as one of

the items stolen from his house six days ago. He stopped the deceased and asked him where he got the T-shirt from. The deceased replied that he bought it from one person at Bweri. The accused person asked the deceased to take them to that person who sold the T-shirt to him. The deceased hesitated and started running towards the lake. People started throwing stones at the deceased. The deceased ran into the lake drowned and died. People took the body from the lake, they informed the police, who took the dead body and arrested the accused. The dead body was examined and it was found that the death was caused by severe traumatic brain injury and severe bleeding.

During the preliminary hearing, as the above facts were not in dispute, the following exhibits were admitted without any objection; Postmortem examination report (Exh. P1), the sketch map plan (Exh. P2), the cautioned statement of the accused person (Exh. P3), and the confession statement (Exh. P4).

In essence it was not disputed that the said deceased PASKAL S/O MAREGESI on the 10th day of March, 2018, at Nyarusurya, within the

District and Municipality of Musoma in Mara Region died of unnatural death.

In proving guiltiness of the accused person, the prosecution summoned one witness (PW1) by the name of Leilat Juma (32yrs) who testified that on the material date of 10th March, 2018 while at her home – Nyarusuli which is closer to the Lake Victoria, around 16.00hrs, she saw three young men who were fighting. Two young men (accused person being inclusive) were fighting against the deceased. She was closer, the weather was clear, sunny and unclouded. She saw the accused person with his friend beating the deceased by use of legs, fists, sticks and throwing stones against the deceased on various parts of his body. The deceased later ran into Lake Victoria in efforts to escape the accused person but got drowned. His whose body was later evacuated by the fishermen while already dead. In essence, her testimony is to the effect that it was this accused person and his friend who caused the death of the deceased.

The testimony of this PW1 did not have an easy way to go, as she was squarely cross-examined by Mr. Makowe, learned advocate on her real knowledge of the said incidence against what she had recorded at Police

Station. She was asked as to when exactly the incidence took place, she replied that it was on 10th March, 2018 around 16.00hrs and that she had keenly observed it. As to when she had recorded her statement at police Station Musoma, she replied that she does not remember. Whether what she had testified in court is replica or identical to what she had recorded at the Police Station, she replied that it is not, denouncing that what she had explained at Police appears to have been mis recorded despite the fact that she had signed it. On the way forward, Mr. Makowe learned advocate having passed her through her recorded statement at the Police Station against what she has testified in court, the learned advocate was deeply persuaded that the witness's credence was questionable, he thus prayed that her former statement be admitted as exhibit of the case for defense case which the same was admitted as exhibit DE1 as the same was not objected.

As there was no any witness to call following the defense side abandoning their rights of cross examining the two witnesses (Doctor who conducted the Postmortem Examination and the police officer who drew the sketch map plan), the prosecution closed their case. That marked the end of the prosecution evidence/case and this court is required in terms of

section 293 (1) of the Criminal Procedure Act to make a finding if the evidence adduced has established a case to answer against the accused person as charged for the offence of murder.

It is a mandatory procedural requirement that after the closure of the prosecution case, the court is required under section 293 of the CPA to prepare a ruling, finding as to whether the evidence by the prosecution has established the prima facie case for the accused person to answer it. If it finds that the prima facie case has been established, then the accused person will be called upon to defend himself, and he will be informed of his rights in terms of section 293 (2). If the same is not established, then the court will proceed to make findings that the same has not been established and proceed to acquit the accused person.

The term prima facie case has not been statutorily defined. However in the case of **Director of Public Prosecution Vs Morgan Malik & Nyaisa Makori,** Criminal Appeal No 133 of 2013 CAT- (unreported) it was held inter alia 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 e or kindred cognate minor one ... , the*

prosecution is expected to have proved all the ingredients of the offence or minor cognate one thereto beyond reasonable doubt. If there is a 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 **Ramanlal Trambaklal Bhatt Vs The Republic**, (1957) EA 332, defines prima facie to 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".

This means, at the closure of the prosecution case, the prosecution must have given sufficient evidence capable to convict an accused person should the accused person be denied or forsakes the right to defend himself. That being the case, it is worthy and instructive at this stage, to look at what section 110 and 112 read together with section 3 (2) (a) of the Evidence Act [Cap 6 RE 2019] in as far as the burden and standards of proof is concerned. These two concepts were interpreted in the case of **Woodmington Vs OPP, (1935) AC 462**. The philosophy behind the principle of Prima facie case is actually premised on the principle enshrined in the case of **Christian Kale & Another Vs. The Republic** (1992) T.L.R

302 CAT and **John Makorobera & Another Vs. The Republic** (2002) T.L.R 296, which insistently held that the accused person should only be convicted of an offence he is charged with on the basis of the strength of the prosecution case not on the weakness of the defence case. That is a reason as to why at the closure of the prosecution case, a case must apparently be proved already, at the required standard of beyond reasonable doubt. In line with this principle of burden and standard of proof, another important principle becomes necessary as enunciated in the case of the case **of Mariki George Ngendakumana Vs The Republic,** Criminal Appeal No. 353 of 2014 CAT - Bukoba (unreported), which inter alia held that:

> *"It is the principle of law that in Criminal Cases the duty of the prosecution is two folds, one to prove that the offence was committed, two that it is the Accused person who committed it"*

In this case, the accused person is charged with an offence of murder contrary to section 196 and 197 of the Penal Code (supra). Under this law the prosecution was supposed to prove the followings:

i. That the said PASKAL S/O MAREGESI, was actually murdered.

ii. That those who murdered the deceased had unlawfully, or had knowledge that the act or omission of killing him (malice aforethought).

iii. That the said murder was actually caused by the accused person in this case.

In this case PW1 suggests that the accused is the one who committed that offence of murder as charged. The evidence by PWI is hardly credible to rely on. I say so because reading her statement at the police (DE1 exhibit) and what she has testified in court, these are two different stories which ought to have been uttered by two different persons. It is a wonder why the prosecution opted for her testimony in which she was so inconsistent with her original story at the police. Mr. Makowe learned advocate in my view rightly invoked the provisions of section 154 and 164 of the Tanzania Evidence Act, Cap 6 R.E 2019 as the purpose of producing in court the previous statement of a witness is either to demonstrate consistence on the part of that witness according to section 166 of the Evidence Act, or impeach him according to sections 154 and 164 of the Act (see **Lilian Jesus Fortes V. Rep,** Criminal Appeal No. 151 of 2018 at page 24 and **Godfrey Maleko V. Thomas Mwaikaja**, [1980]

T.L.R 112). Section 154 of the Evidence Act is couched in the following wording:

> *"A witness may be cross-examined on previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being proved, but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him".*

he relevant part of section 164 is coached as hereunder:

> *"164.-(1) The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the court, by the party who calls him-*
>
> *a) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;*
>
> *b) by proof that the witness has received or received the offer of a corrupt inducement to give his evidence;*
>
> *c)* ***by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;***

d) when a man is prosecuted for rape or an attempt to commit rape, it may be shown that the complainant was of generally immoral character" [emphasis supplied].

It is trite law that every witness is entitled to credence and must be believed and his/her testimony accepted unless they are good and cogent reasons for not believing a witness. This is as per the case of **Mathias Bundala vs Republic ,** Criminal appeal No. 62 of 2004 CAT at Mwanza where it approved the case of **Goodluck Kyando vs Republic** (2006) TLR 363, where the court held that:

"it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless they are good and cogent reasons for not believing a witness".

In the case at hand, the Mr. Makowe, learned advocate has clearly demonstrated cogent reason to make PW1 discredited by the court. The PW1's court version is materially a clear departure from the original version at the police. The said statement which is made under section 34B (2) (c) of the TEA is quoted:

"Mimi ndiye mwenye jina na anuani hapo juu na shughuli zangu ni Bibi shamba hapa Manispaa ya Musoma na Mkoa wa Mara. Mnamo tarehe 10/03/2018 majira ya saa 16.30hrs,

nilikua nyumbani kwetu huko maeneo ya Nyarasurya ambapo nyumba nianyoishi inatazamana na Ziwa Victoria na ndipo wakati nikiwa huko niliona kundi la watu wakiwa wanamkimbiza mtu na wakiwa wanapiga yowe la mwizi. Huyu mwizi walikua wanamshambulia kwa silaha za mawe, Pamoja na fimbo sehemu mbalimbali mwilini mwake. Mimi Pamoja na watu baadhi tulishauri waache wasimshambulie. Hao watu siwezi kujua idadi yao maana lilikua ni kundi la watu wengi... Kuhusiana na idadi ya watu hao, watu ambao walikua wanamshambulia siwezi kuwafahamu maana walikua ni wengi sana. Hayo ndiyo maelezo yangu.

With this statement purported to be recorded at the police station materially differs from the evidence at hand in which the witness strongly avers that it is the accused person who murdered the deceased. Considering the incidence occurred on 10th March 2018 and the statement was recorded on 27th September, 2019 (i.e 18 months later), the divergence is so vivid with the testimony given on 9th November, 2021. In law contradictions and inconsistencies in the witness's statement or testimony can only be considered adversely if they are fundamental. Errors of observation, memory failure due to passage of time, panic and horror are considered to be of trifling effect and those are to be ignored

(see **Sylivester Stephano v. Republic,** CAT-Criminal Appeal No. 527 of 2016 (Arusha-unreported). In **Luziro s/o Sichone v. Republic,** Criminal Appeal No. 231 of 2010 (unreported), the Court of Appeal held:

> *"We shall remain alive to the fact that not every discrepancy or inconsistency in witness's evidence is fatal to the case, minor discrepancies on detail or due to lapses of memory on account of passages of time should always be disregarded. It is only fundamental discrepancies going to discredit the witness which count."*

The foregoing position underscores the splendid position propounded by the Court of Appeal of Tanzania in **Dickson Elia Nsamba Shapurata& Another v. Republic,** CAT - Criminal Appeal No. 92 of 2007 (unreported) in which the learned Justices quoted the passage in Sarkar's Code of Civil Procedure Code. It was held as follows:

> *"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to material disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies*

do not corrode the credibility of a parties' case material discrepancies do."

In **Mukami w/o Wankyo v. Republic** [1990] TLR, the Court of Appeal took the view that contradictions which do not affect the central story are considered to be immaterial. See also: **Biko/imana s/o Odasi@Bim elifasi v. Republic,** CAT- Criminal No. 269 of 2012. Looking at the contradictions raised by the PW1, I am tempted to hold that they are, by their very own nature, ones that are so fundamental that they affect the central story. They corrode the credibility of the prosecution's case which was built on the evidence of one witness who also said to have seen the accused person fighting the deceased. I am not persuaded by PW1's testimony at all. Should we credit such a witness? What is she going to tell next year suppose we make a guess? She is hardly a material witness to rely on, worse enough in a capital charge of murder. She is discredited as a material witness for the prosecution case.

What remains in the prosecution case are exhibits PE3 and PE4 (Cautioned and confession statements of the accused person respectively). Examining the Extra judicial statement – PE4 (admitted during PH proceedings), the relevant part has the following words:

"Nakumbuka ilikua tarehe 9/03/2018, majira ya saa11.00 jioni nikiwa maeneo ya Kariakoo nilimuona mtu mmoja aliyekuwa amevaa nguo niliyohisi ni ya kwangu, kati ya nguo zangu ambazo nilikua nimeibiwa. Nguo hiyo ilikua ni Tshirt iliyokuwa na alama ya ufunguo kifuani. Niliamua kumwita mtu huyo na kumuuliza alikoipata nguo hiyo. Yeye alinieleza kuwa aliuziwa na akasema kuwa aliyemuuzia hamjui. Nilimtaka anipeleke kwa mtu aliyemuuzia lakini akaendelea kusema kuwa hamjui. Baadae alikimbia. Wakati namuhoji na baada ya mtu huyo kukimbia tulikuwa na Nyanda ambae ni Jirani yangu hapo machinjioni. Baadae kuna mtu mmoja alikua anapita eneo hilo jina simjui, niliamua kumuuliza kama anamfahamu mtu huyo aliyekimbia. Nae alinieleza kuwa ni mvuvi wa Nyarusurya. Tuliondoka na Nyanda kuelekea huko alikokimbilia eneo la Nyarusurya. Tulimkuta mwalo wa Nyarusurya amekaa. Nilimtaka anipe Tshirt yangu, lakini yeye aliamua kukimbia na kuingia ziwani kuanza kuogelea kama anaelekea kisiwani. Wakati huo hapo ziwani hapo Nyarusurya kulikua na watu wengi, baadae mimi na Nyanda tuliamua kuondoka na kwenda nyumbani kabla ya kufika nyumbani maeneo ya barabara kuu ya Nyerere ndipo nikashtukia ninashikwa na askari polisi na kunipeleka kituoni nikiwa natuhumiwa kwa kosa la mauaji."

In no way can one find relevancy of this evidence as self-incriminating against the accused person, instead it is exonerating evidence

in favour of the accused person. This statement as quoted is not legally speaking a guilty admission of an accused person.

What remains in the prosecution case is contents of exhibit PE3 – cautioned statement of the accused person recorded at police station. What is contained in the said cautioned statement is this:

> *"...Ndipo tulipomuomba atupeleke kwa huyo mtu aliemuuzia. Palepale yowe ikawa imepigwa na akawa amekimbilia ziwani na alikua amepigwa na mawe ndipo akawa amekimbilia ziwani maeneo ya Nyarusurya. Ndipo baada ya kuwa tumemfukuza na kukimbilia ziwani tukamkuta amekufa."*

It is the trite law that an admission of an accused person in criminal trial is the best evidence if that person freely confesses his guilty (see **Mabala Masagi V. Mongwa**, Criminal Appeal no. 161 of 2010). However, for the said admission to be actionable/incriminating must be credible and truthful. In my consideration, the above excerpts as quoted do not suggest clearly that the accused person admits guilty of murder as charged. The said cautioned statement appears to be vague in the eyes of the law, thus dangerous to rely upon unless it was corroborated.

Should this Court exercising its full legal mind reach to a finding of guilty against the accused person in the event he elects to remain mute in his defense? In this case, there is nothing tangible established connecting the accused person and the charge of murder leave alone the malice aforethought to amount his conviction. All that has been stated by the prosecution is the proclamation that deceased person is dead but not otherwise. For that reason, I find this case to be a proper case in which prima facie case by the prosecution has not been established in the required legal standard.

That said, the accused person is found to have no case to answer, consequent of which, he is accordingly acquitted under section 293 (1) of the Criminal Procedure Act [Cap 20 RE 2019].

It is so ordered.

DATED at MUSOMA this 10th day of November, 2021.

F. H. Mahimbali

JUDGE

10/11/2021

Court: Ruling delivered in this 10th November, 2021 in the presence of Miss. Agma Haule and Mr. Malekela learned state attorneys, for the Republic, Mr. Baraka Makowe for the Accused person, Njile Masunga (Accused person) and Gidion Mugoa - RMA.

Right of appeal is explained.

F. H. Mahimbali

JUDGE

10/11/2021