

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MWANZA

AT MWANZA

CRIMINAL SESSIONS NO. 97 OF 2019

THE REPUBLIC..... PROSECUTOR

VERSUS

MISIBU S/O MSOBI @ SINGU..... ACCUSED

RULING

19th May&10th June, 2022

Kahyoza, J

Misibu S/O Msobi @ Singu, 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 20th day of December, 2017 at Malya village within Kwimba District in Mwanza Region, murder **Noel S/O Gerald**. The accused pleaded not guilty to the information. The prosecution summoned four witnesses and tendered two exhibits, a sketch map (Exh. P1) and a post-mortem examination report (Exh. P2) to establish the accused guilty of the offence of murder. The prosecution's efforts to tender the accused person's cautioned statement (Exh. P3) proved futile.

At the close of the prosecution's case, the defence refrained from submitting whether the prosecution established a *prima facie* case. I resolved to give myself time to make a finding whether the accused person has a case to answer.

This is a ruling as to whether **Misibu S/O Msobi @ Singu**, the accused person, has a case to answer in terms of section 293(1) of the Criminal Procedure Act, [Cap. 20 R.E 2019] (the **CPA**).

Did the prosecution establish a prima facie case?

The task of this Court at this stage 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* case 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 miaht possiblly 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 find that, there is enough evidence establishing beyond all reasonable doubt that **Noel S/O Gerald** is dead. He died a violent death. According to **Yohana John (Pw2)** and the post mortem report Exh. P. 2, Noel Gerald's death was due to severe anaemia following *fracture of the skull of the frontal face*. The only task the prosecution was facing is to link Noel Gerald's death with the accused.

The prosecution evidence is that **Yohana John (Pw2)** and other villagers found dead body on 20.12.2017. At first, they could not identify the dead person. Later, they identified the dead person as Noel Gerald. After the dead body was recovered, **Yohana John (Pw2)** got a telephone call from Isiaka Mbugwa instructing him to go to Igwata Uwanja wa Ndege and give a ride to people who were at that place. **Yohana John (Pw2)** was riding a motorcycle ferrying for a living, commonly referred to as "bodaboda". **Yohana John (Pw2)** obliged. He went to Igwata Uwanja wa

Ndege were he found two persons, the accused person being one of them. He deposed that after he reached the place the accused emerged from the bush to take the ride.

Yohana John (Pw2) rode them up to the place called Kinamweli, where he fuelled his motorcycle. As he finished fuelling, he heard the accused telling his friend that they had finished one remaining with one (tumemaliza mmoja bado mmoja). He became suspicious that his passengers may have been responsible for killing a person whose body was recovered at Malya. While taking off at Kinamweli, **Yohana John (Pw2)** saw the accused person with a panga. He tied it along his hip. He went up to Lugulu where the accused and his friend paid only Tzs. 15,000/= instead of Tzs. 35,000/=, which they had agreed to pay. They told him to get a balance from Isiaka Mbugwa. He went back to Malya.

Police arrested **Yohana John (Pw2)** on the day he gave the accused person and his friend a ride. He was released on the following day after police interrogated him.

Yohana John (Pw2) narrated how Noel Gerald, the deceased who was a militiaman, arrested accused's younger brother on 5.12.2017 for stealing. He also deposed that the accused's younger brother threatened Noel Gerald that, his life had come to an end as he would not celebrate 2017 Christmas holiday. Noel Gerald was killed on 20.12.2027. **John Masumbuko Juma (Pw3)** supported **Yohana John (Pw2)**'s evidence that Noel Gerald was a militiaman and arrested the accused person's younger brother for stealing. **John Masumbuko Juma (Pw3)** confirmed

Yohana John (Pw2)'s evidence that Noel Gerald and the accused person's brother exchanged words. The accused person's brother threatened Noel Gerald.

The police suspected the accused person to murder Noel Gerald. On 2.1.2018 **G. 7612 D/CPL Frank (Pw1)** went to Simiyu to trace and arrest the accused person. He arrested him and submitted him to Bariadi police station.

On the 3rd of Jan. 2018, **F. 1331 D/SGT Matete (Pw4)** interrogated the accused person at 10.00Am. **F. 1331 D/SGT Matete (Pw4)** deposed that, he did not interrogate the accused person within four hours of his arrest as the accused person desired to be interrogated in the presence of his brother. He interrogated him after the accused person's brother failed to appear. He averred that, before he interrogated the accused person he cautioned him. He further deposed that he told him that he was required to be mentally upright and that, he had a right to be interrogated in the presence of a relative. The accused person volunteered to give his statement despite the absence of a relative. **F. 1331 D/SGT Matete (Pw4)** sought to tender the accused cautioned statement. The defence objected.

After concluding a trial within trial case, it was found that there was no evidence to establish that the police tortured the accused person or that, he did not make the statement at all. The Court rejected accused person's objection that the police obtained his cautioned statement involuntarily.

Before I admitted the cautioned statement, the defence raised several objections, which I upheld that; **one**, the statement was tempered with as the date of making the statement was erased using correcting fluid and a new date inserted; **Two**, the statement was recorded in contravention to the provisions of subsection (4) of section 58 of the CPA. The police who recorded the accused person's cautioned statement did not read or cause the accused to read the statement before signing the statement. The defence advocate referred to section 58(3) (a) (i) and (b) and subsection (4) of the same section.

I also upheld the objection that, the statement was recorded out of time provided by law. The police arrested the accused on 2.1.2018 at 02.00pm and recorded his statement on 3.1.2018 from 10:25 to 13:03 hrs. The prosecution did not give evidence to prove that time within which to interrogate and record the accused person's statement was extended.

Lastly, I upheld the objection that, the accused person's right to record the statement in the presence of his relative was violated. The prosecution witness deposed that, the accused requested the police to record his statement in the presence of his relative named Jackson Kisura, the police did not call him or account for the failure to summon that person.

After upholding the objections, I desisted from admitting the statement. Based on the evidence narrated above, I am called upon to determine whether the prosecution linked the accused person with the death of Noel Gerald. 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, the only evidence to link the accused person with the death of Noel Gerald, after rejecting the cautioned statement, is that of **Yohana John (Pw2)**. **Yohana John (Pw2)**'s evidence raises suspicion. It is highly suspicious that, the accused person may have killed Noel Gerald as a revenge for Noel Gerald's act of arresting his brother for stealing. It is also on record that, **Yohana John (Pw2)** head the accused person telling his friend that they eliminated one and one person remained. It is also on record that, **Yohana John (Pw2)** gave a ride to the accused person and his friend enabling them to escape from Malya to Lugulu after Noel Gerald's death.

The prosecution evidence raises suspicion that the accused person may have murdered Noel Gerald, however, I do not find that evidence cogent enough to link the accused with the death of Noel Gerald. Suspicion alone, however strong, is not enough to ground a conviction. (See **Thobias Mbilinyi Ngasimula V R.** (1980) TLR 129.) I considered an argument that, the prosecution evidence was circumstantial evidence. Indeed, circumstantial evidence in a criminal case is often the best evidence in establishing the commission of a crime by an accused person. **Tumuheire V. Uganda (1967)** EACA 328 AT 331. It is settled that circumstantial evidence can lead to conviction only and only when the following are proved, see **SARKAR ON EVIDENCE, Fifteenth Edition, Reprint 2004** at pages 66 to 68:-

1. *That in a case which depends wholly upon circumstantial evidence, the circumstances must be of such a nature as to be capable of supporting the exclusive hypothesis that the accused is guilty of the crime of which he is charged. The circumstances relied upon as establishing the involvement of the accused in the crime must clinch the issue of guilt.*
2. *That all the incriminating facts and circumstances must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other hypothesis than that of his guilt, otherwise the accused must be given the benefit of doubt.*
3. *That the circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected with the fact sought to be inferred therefore.*
4. *Where circumstances are susceptible of two equally possible inferences the inference favoring the accused rather than the prosecution should be accepted.*

5. *There must be a chain of evidence so far complete as not to leave reasonable ground for a conclusion therefrom consistent with the innocence of the accused, and the chain must be such human probability the act must have been done by the accused.*
6. *Where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated.*
7. *Circumstances of strong suspicion without more conclusive evidence are not sufficient to justify conviction, even though the party offers no explanation of them.*
8. *If combined effect of all the proved facts taken together is conclusive in establishing guilt of the accused, conviction would be justified even though any one or more of those facts by itself is not decisive.*

The prosecution did not prove a chain of events leading to the accused person's guilt. The prosecution established reasons to suspect the accused person to murder Noel Gerald but it did not join dots to connect the accused person with Noel Gerald's death.

In addition, I find the evidence of **F. 1331 D/SGT Matete (Pw4)** is so weak and it was rendered weaker by cross-examination. **F. 1331 D/SGT Matete (Pw4)** was unable to explain with certainty at police station he recorded the accused person's cautioned statement. He was not able to explain why the date he recorded the statement was erased using correction fluid and another date entered. **F. 1331 D/SGT Matete (Pw4)** was unreliable witness. For that reason, **F. 1331 D/SGT Matete (Pw4)**'s evidence was too weak to link the accused person with the offence of murder or to corroborate the evidence of **Yohana John (Pw2)**'s evidence.

It is the position of the law that a *prima facie* case is not established where one of the elements of the offence is not proved or where the

evidence of the prosecution is rendered weak 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"

I am of the firm view that the prosecution's evidence is so weak that it would not lead to the accused person's conviction, even in the absence of his defence. It would amount an error in law, as stated by the defunct Court of Appeal of East Africa, to put the accused person 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...."

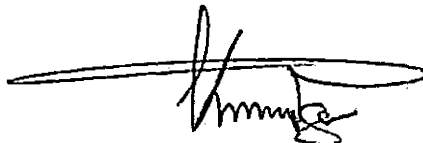
In the end, I have been highly persuaded by a position in Kenyan case of **R. Vs Elizabeth Nduta Karanja & Another** (2006) KLR Criminal Case No. 52/2005 that:-

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

In the end, I find that the prosecution did not establish a *prima facie* case against the accused person, to require him to enter a defence 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. 2019].

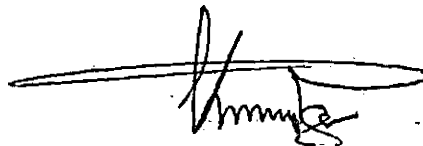
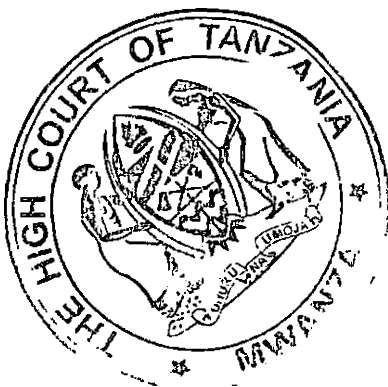
It is so ordered.

Dated at Mwanza this 10th day of June, 2022.



J. R. Kahyoza
JUDGE

COURT: Ruling delivered in the virtual presence of the accused person, Ms. Marina, the accused person's advocate and Mr. Moris, the State Attorney virtually.



J. R. Kahyoza
JUDGE
10/6/2022