IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA

CRIMINAL SESSIONS CASE NO. 104 OF 2016

REPUBLIC

VERSUS

1. **IMANI JAPHET MBUKWA**
2. **INUKA NGONYA**

RULING

Dated 21st March, & 25th April, 2022

KARAYEMAHA, J

Imani Japhet Mbukwa and **Inuka Ngonya** the accused persons herein, stand charged with murder, contrary to ***sections 196*** and ***197*** of the **Penal Code, Cap. 16 [R.E 2002]** [now R.E. 2019] (hereinafter the PC). They pleaded not guilty, necessitating the matter to go on full trial. The particulars of the charge are that on the 18th day of October, 2015 at Kapelekesi village within Ileje District in Mbeya Region, the accused person murdered Numpege d/o Sinon @ Mkubwa.

Before commencement of the trial, two gentlemen and one lady assessors, namely; Amina Alfan, Asubisye Nyalile and Osward A. Mwaituka were selected to sit with me. These assessors were present

during the whole of the trial proceedings and performed their roles appropriately.

The facts and circumstances of the death of the deceased are substantially provided in the testimony of PW1 one Etson Sambo who was with the deceased on the night of 18th October, 2015 sleeping. The deceased woke him up and saw fire and smoke in the house. Whereas the deceased run to the seating room, PW1 escaped from the house through the window. According to him he saw the accused persons at the scene running away from the house by help of the moonlight. When he returned inside, he found the deceased under the chair seriously burnt. She was rushed to the hospital but died on the next night while undergoing treatment at Isoko Hospital. It was his further testimony that after the funeral he saw the 1st accused passing at his house running and saying that the deceased was appearing to him complaining why he burnt her. He insisted that PW5 (Bahati Etson) heard the 1st accused saying those words while running and called him (PW1) to hear them and indeed heard them but by then the 1st accused was running. PW1 testified further that Ikungasya travelled from Chalinze and talked to the 1st accused in his absence and the latter admitted to burn the house. PW1 candidly testified that he knew the accused persons very well because they were neighbours and lived in the same village.

Responding to cross examination questions, PW1 testified that on the fateful night he saw the 1st and 2nd accused persons on the road running when he got out of the house and were almost 15-20 meters and identified them from the back but didn't identify clothes' colours. He responded further that he didn't see the accused persons on that date otherwise he could report to authorities to have them arrested. Of course, PW1 testified that after the incident of arson, the accused persons were in the village and identified them by help of moonlight.

PW1 testified on re-examination that he didn't see the accused persons on the material night but it was the 1st accused who went at their house and confessed while passing. He said the 1st accused was living in the village in the material time but didn't know where the 2nd was living.

When questioned by the Court, PW1 stated that he was not present when the 1st accused admitted to burn his house at the village office after being taken there by PW2 (Ikungasya). He replied further that the 1st accused told them that a woman was appearing to him in his dreams complaining why he burnt her but didn't mention the woman's name. PW1 said that the 1st accused uttered those words while passing near their house.

PW2 Ikungasya Etson Sambo testified that on 20/10/2015 was in Chalinze Dar es Salaam. PW5 informed him that the 1st accused had confessed to have burnt their house. So he travelled and got to Kapelekesye village on 24/12/2015 and arrested the 1st accused who was in the village. Upon arresting him, the 1st accused confessed to burn their house and was intending to apologize to them. Following that confession he took him to the Michael Mjwanga the hamlet chairman whereby he confessed. On account of the hamlet chairman's advice, PW2 took the 1st accused to the village office whereby they met the village Chairman and Village Executive officer (henceforth the VEO). Following his admission that he burnt the house, on 27/12/2015 the village leaders took the 1st accused to Itumba police station.

On cross-examination PW2 testified that he was informed on 20/12/2015 by PW5 that the 1st accused had apologized. When he went to Kapelekesye and arrested him, he (1st accused) confessed. All that time he knew there was a police station but though not an arresting officer, arrested him. It was his further testimony that the 1st accused person's confession was recorded in the presence of the Village Chairman and VEO. PW2 testified further that the 1st accused is his village-mate and school-mate but the 2nd accused lived in Kasumulu Boarder.

PW3, G. 1954 DC Filtan went to the scene of the crime at Kapelekesye village and drew the sketch map (exhibit 2) and later to Isoko Hospital on 19/10/2015. On 20/10/2015 was assigned the duty to investigate the case but the accused persons were not yet arrested. He testified that the 1st accused was arrested on 27/12/2015 and taken to police station by PW2 and militiamen. When he interrogated him, the 1st accused confessed to have burnt the house with Brayson Sambo, Juhudi, Jospehat and Inuka Ngonya on the reason that PW1 was a witch. On interrogating PW1, PW2 and PW5, PW4 learnt that the 1st accused went to their house and apologized and admitted to commit the offence. According to him other suspects escaped from the village. He succeeded to arrest Inuka after trapping him from Kasumulu on 06/01/2016.

Responding to cross-examination questions, PW4 admitted that he did not state in his statement at police that he talked with PW2 about the 1st accused apologizing to his family. He testified that on 19/10/2015 PW1, while recording his statement, mentioned the 1st accused. He informed this court that the 1st accused confessed to him orally. It was his testimony that PW1 and PW5 told him that the 1st accused went to apologize at their house and were there at.

PW3 testified further that they could not arrest the suspects on 19/10/2015 because they were not in the village. He said that if PW1 testified that they were in the village it was a challenge because he (PW1) was a cumbersome person and was adamant to come to court to testify until when he was forced. He round up by testifying that PW1's statement was recorded by D/C George, not him.

PW4, Bahati Sambo informed this Court that the deceased and PW1 are his parents. She testified that following the death of her mother on 18/10/2015, on 19/12/2019 around 9:00pm at night the 1st accused went to his house to apologize for killing her mother and mentioned his companions to be Juhudi Lwinga, Braison Sambo, Inuka Ngonya (2nd accused), Pent Sambo and Josephat Mkumbwa. According to her, the 2nd accused wanted PW1 dead because he was an obstacle in his business. So he pledged Tshs. 85,000/= for those who could kill PW1. However, the 2nd accused didn't pay them on the reason that they killed a wrong person. Wanting for a witness, PW4 called his father (PW1) who went where the two were. While there the 1st accused narrated what he told her. On 20/12/2015 she informed PW2 who went to Kapelekesye on 24/12/2015 and interrogated the 1st accused on 26/12/2015. It was her testimony that on being arrested by PW2, the 1st

accused confessed for killing the deceased. Following that confession, PW2 took him to the village Chairman.

Answering cross-examination questions, she first denied going to Itumba police station and make a statement. On regaining her senses, she admitted to make one to PW4 on 27/12/2015 at home but declined to append her signature. She insisted that on the date the 1st accused went to their home, PW1 was there and on calling him, the 1st accused confessed to him (PW1). She stated that the 1st accused was arrested on 26/12/2015 and taken to police on the same date.

On re-examination, PW5 testified that she went home in December, 2015 from school for both her mother's death and leave. Regarding a date of arrest, PW4 changed her testimony that the 1st accused was arrested on 26/12/2015. Testifying on inconsistency in her evidence, PW5 said that her memory had diminished because the incident happened long time ago. She informed this Court further that she knew the 1st accused for 20 years.

At the closure of the prosecution case, this court has sat to ascertain whether the accused persons have a case to answer or not.

In my firm view the prosecution evidence has not established a prima facie case. The evidence of PW1, PW2, PW4 and PW5 and exhibits P1 and P2 will bear witness.

By way of admission, there is no dispute that Numpege d/o Simoni Mkubwa died on 19/10/2015 at 8:00 pm and her death was unnatural. According to PW3 and the PF3 (exhibit P2) the cause of death was severe body burns, loss of body liquid and endedui in hypovalaenic and neurogenic shock. PW1, PW2, and PW5 proved that their house was burnt and the deceased was burnt to death. With such evidence I am at one with the prosecution that the death of the deceased and the cause of death were proved beyond reasonable doubt.

The major question for determination is who burnt PW1's house resulting into the deceased's death. I have read the evidence before me keenly and it unerringly points at two individuals, that is, the 1st and 2nd accused persons.

The prosecution case rests on two major aspects. **Firstly,** visual identification and **secondly**, oral confessions. On identification PW1 had two versions. His first version was that when the house was on fire he got out through the window and saw the accused persons running from the scene of crime. Although they were at a distance of 15-20 meters,

assisted by the moonlight he was able to identify them from the back but could not identify their clothes colours. Perhaps it was because he knew them very well.

PW1's second version was that he did not see the accused persons on the material night and stressed that if he saw them he could have reported and has them arrested. This was during cross examination. On re-examination PW1 testified that he didn't see the accused persons on the material night. When he was questioned by the assessors he stated that he could not identify the two running people.

After anxious consideration of PW1's evidence, I think, he deserves credence in denying that he could not identify the accused persons at the scene of the crime. I say so because conditions were not favourable for unmistaken identity. Apart from that it is conspicuous that PW1 was inconsistent on whether he identified the accused persons at the scene of crime or not. That is why he was unable to name them at the earliest opportunity. PW1 said in his evidence that if he saw them he could report so that they could be arrested instantly. He, however, told PW3 that he saw them when his statement was being recorded. A principle enunciated in the case of ***Marwa Wangiti Marwa & another vs. Republic***, [2002] TLR 39 is that the ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his

reliability, in the same way as unexplained delay or complete failure to do so should put a prudent Court to inquiry.

On identification the higher Court of Tanzania has laid guiding principles that when the case depends solely on identification in unfavorable condition, Court needs to satisfy itself that all possibilities of mistaken identity are eliminated. In that regard, this court must consider the following guidelines: **One,** the time the witness had the accused under observation; **two,** the distance at which he observed him; **three**, the conditions in which the observation occurred, for instance if it was day time or night time; **four,** whether there was good or poor lighting and **five,** whether the witness knew or had seen the accused before or not. See ***Waziri Amani vs. Republic*** [1980] T.L.R 250, ***Raymond Francis vs. Republic*** [1994] T.L.R 100, ***Chokera Mwita vs. Republic***, Criminal Appeal No. 17 of 2010 (Unreported) and ***Baya Lusana vs. Republic***, Criminal Appeal No. 593 of 2017 (unreported). Similarly, the Court of Appeal of Tanzania drew an inspiration from the case of ***Waziri Amani*** (supra) in the case of ***Chally Scania vs. Republic***, Criminal Appeal No. 69 of 2005 (unreported) having underscored the following:

> *"We think that where a witness is testifying about another in unfavourable circumstances like during the night, he*

must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all aids to unmistaken identification like proximity to the person being identified, the source of light, its intensity, the length of time the person being identified was within view and also whether the person is familiar or a stranger."

In the present case PW1 had no time to observe the perpetrators. There was a big distance between them and it was night. There was poor illumination. In that situation even if PW1 knew the 1st accused person very well no evidence is led to prove that it him he saw that night. Going by his evidence, there is no sweet language can be used than saying he lied.

It is also a general rule that, evidence on visual identification during night to perpetrators of an offence made by a single witness is unsafe to be acted upon unless there is other corroborative account. See ***Hassan Kanenyera and others vs. Republic*** [1992] T.L.R 100, ***Shamir John vs. Republic***, Criminal Appeal No. 166 of 2004 and ***Baya Lusana*** (supra) (unreported).

This principle was loudly pronounced in the case of ***Waziri Amani vs. Republic*** [1980] TLR 250 that:

1. *Evidence of visual identification is of the weakest kind and most unreliable;*
2. *No court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is water tight.*

Though factors set out in ***Waziri Amani vs. Republic*** (supra) and expounded in many decisions after it are not intended to be exhaustive in determining credible identification, I am unable, on my part, to hold that identification was in this case proved beyond reasonable doubt in the absence of any report against the accused persons.

The remaining evidence now is that of oral confession. PW1, PW2, PW4 and PW5 testified that the 1st accused confessed orally to them. The story of the 1st accused confessing begun with PW5. In view of her evidence, the 1st accused went to their house on 19/12/2015 around 9:00pm at night to apologize and mentioned his accomplices. In her testimony PW5 stated as follows:

> *"Imani also said that, he was told by Inuka Ngonya, that, Etson Sambo was an obstacle in his business. Inuka thus, wanted Imani and others to kill him (Etson) and would pay them Tshs. 85,000/=. Imani also told me that, Inuka,*

refused to pay the money because they killed my mother instead of my father. I called my father who was inside the house to hear by himself from Imani. My father came. The said Imani narrated the words he had told me."

It appears that PW1 also heard the 1st accused person's confession he made to PW5. His testimony is to the effect that:

"After the funeral, accused No.1 (Imani) passed near my home. Imani was uttering some words that a woman (mama) had come to him and complained that he (Imani) had burnt her with fire. I also heard those words from Imani who was also running. That was after the burial. When Imani mentioned a woman (mama) he meant my deceased wife.... It was my boy (Bahati Etson) who heard Imani talking those words and running and called me to hear the words and heard those words and saw Imani running".

On cross-examination PW1testified categorically that:

"My son Bahati saw and heard Imani saying that a woman (mama) was complaining to him that he had burnt her. He heard those words when Imani was passing near our house".

The evidence in this case indicates conspicuously that PW1 and PW5 heard two different confessions from the 1st accused at the same time. The question that comes to the fore is who is speaking the truth. Apart from that after the 1st accused had confessed to PW1 and PW5, PW5 phoned and reported to PW2. According to PW2, PW5 told him that the 1st accused confessed to burn their house. On getting in the village, the 1st accused told him that a woman (mama) visited him in the sleep and failed to sleep and apologized for burning their house and killing their mother.

The 1st accused also confessed to PW4. According to PW4 the 1st accused confessed orally to burn the house because they suspected Etson to be a witch.

The evidence from these four witnesses reveals nothing than substantial contradictions. While PW5 said the 1st accused confessed to have burnt the house on the instructions of the 2nd accused and on promise to pay them Tshs. 85,000/= if PW1 was dead but refused paying them because they killed a wrong person, PW1 heard a different confession. He heard the 1st accused saying that a woman (mama) had come to him and complained that he had burnt her with fire. The contradiction goes deep on where they were standing when the 1st accused was confessing. While PW1 testified that he was uttering those

words passing at their house running, PW5 said he was standing by the door and she held a lump.

Apart from that, it is also apparent that the 1st accused made a different confession to PW2. He didn't confess that he was sent by the 2nd accused with other people to kill PW1 and were promised Tshs. 85,000/=. The 1st accused didn't tell PW2 that he was apologizing because the 2nd accused refused to pay them.

Two features from the evidence are disturbing. First, is a confession after the 2nd accused had refused to pay the promised amount. It is indeed doubtful on how the 1st accused could expose himself to murder charges in order to unbar the 2nd accused. This is unbelievable. Secondly, is a confession that the deceased was appearing on the 1st accused in dreams and complaining why he burnt her? PW1 didn't believe this contention. Although it was believed by PW2, I think PW1 had logic in doubting. I too do share PW1's doubts.

Another aspect which raises doubt is a delay by PW1, PW2 and PW5 to report the matter to police. I have subjected the evidence of PW1 and PW5 to a thorough scrutiny. These witnesses informed this court that the 1st accused confessed to them. Both knew the 1st accused very well. They said he did not leave the village after the incident. What

troubles me is why they didn't report to either the police or the local leaders immediately. I am also troubled with PW5's decision to report to PW2 on 20/12/2015 and then wait for him till 24/12/2015 when he called in the village. My take of this is that the family had a hidden agenda of incriminating the 1st accused rather than putting a criminal justice system in place to deal with criminals. If my reasoning is misplaced, it would stand so if PW1 and PW5 reported to the authorities to have the 1st accused person arrested immediately after his confession than reporting to PW2 who was neither a police officer nor a local leader. PW2 on his part had to advise PW1 and PW5 to report to the authorities before the 1st accused could change his mind and disappear from the village. I don't think the family had a second thought of forgiving the 1st accused person for the grave offence he committed. The unexplained delay to report the 1st accused to police immediately after confessing to PW1 and PW5 and a delay for PW2 to report too, render the alleged oral confession questionable. The gist of prosecution evidence reveals that the 1st accused person was in the village for 8 days after confessing and never left to anywhere. I am strengthened in that account by the holding in the case of ***Wangiti Marwa Mwita and others*** (supra) quoted in the case of ***Baya Lusana vs. Republic***, Criminal Appeal No. 593 of 2017 (unreported) that:

"The ability of the witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same was as an unexplained delay or complete failure to do so should put a prudent court into inquiry."

The vexing question at this juncture is whether or not evidence on oral confession can be relied upon in making a finding on the guilty or otherwise of the accused persons.

The provisions of section 3 (1) (a), (b) and (c) of the Law of Evidence Act [Cap. 6 R.E. 2019] guide that, in criminal cases, confession to a crime may be oral, written, by conduct, and or a combination of all these or some of these. The prosecution's lone duty is to prove that there were confessions made and the same was made freely and voluntarily. In fact, I respectfully borrow the words of wisdom by Rutakangwa JA (as he then was) in ***Mohamed Haruna Mtupeni & another vs. Republic***, Criminal Appeal 259 0f 2007 (Unreported (CAT – Tabora) at page 7 that:

"... the very best witness in any criminal trial is an accused person who freely confesses his guilt."

The same spirit was also expressed in the decision of ***Posolo Wilson @ Mwalyengo vs. Republic***, CAT-Criminal Appeal No. 613 of 2015 (unreported), the CAT gave the following position:

> *"It is settled that an oral confession made by a suspect, before or in the presence of reliable witnesses, be they civilian or not, may be sufficient by itself to found conviction against the suspect [**D.P.P vs. Nuru Mohammed Gulamrusul** [1998] TLR 82]."*

Oral confession as authorities have it is sufficient to amount a conviction against the maker. See the case of ***Akili Chaniva vs. Republic***, Criminal Appeal No. 156 of 2017. However, in principle the oral confession must be made by a suspect before or in the presence of reliable witnesses including civilians. Glancing through the prosecution evidence, as deeply and widely analysed above, I have one major and definite conclusion that PW1, PW2, PW4 and PW5 are unreliable witnesses. That settled I find the oral confession have no value to implicate the accused persons in the death of the deceased.

In arriving at a conclusion, and in response to the grand question, the Court has to determine if the evidence adduced by the prosecution establishes a case that warrants the accused to put his defence on the matter. This is done by assessing the qualitative ability of the prosecution evidence to secure a conviction against the accused persons, if no explanation is offered in defence. This is what is called, in legal terms, a *prima facie* case. It is the level of evidence that should be established in order to require the accused persons to offer their

defence. This is a mandatory requirement of the law long established. In our case, this principle was accentuated by the defunct East Africa Court of Appeal in ***Ramanlal Trambaklal Bhatt vs. Republic***, (1957) 1EA 332, where the following remark was made:

> *(a) It may not be easy to define what is meant by a "prima facie" case, but 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.*
>
> *(b) The question whether there is a "case to answer" cannot depend only on whether there is "some evidence" irrespective of its credibility of weighing 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.*
>
> *(c) The onus is on the prosecution to prove its case beyond reasonable doubt, and a "prima facie" case is not 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."*

In this case, the nature of evidence adduced by the prosecution, by and large, is built on the visual identification of PW1 and oral confessions to PW1, PW2, PW4 and PW5. There is no doubt in my mind that identification was not water-tight. Similarly, witnesses who said the 1st accused confessed orally are incredible.

Then, there is exhibit P1 which is a report on the post-mortem examination which revealed the cause of the deceased's death. Nothing, as far as exhibit P1 is concerned, connects the accused persons to the commission of the offence they stand charged. The same cannot also be said to exhibit P2. This is just a map of the scene of crime which lays out the sketch outlook of where the incident was perpetrated on the fateful day. It doesn't go further than that in building up the prosecution's case.

From the totality of the testimony, can it be said that a *prima facie* case has been made out by prosecution to be able to sustain a conviction against any or all the accused persons? My direct answer to this question is in the negative. No court or tribunal would properly directing its mind found a conviction based on what is otherwise an extremely deficient set of facts which have done nothing to connect the accused persons to the offence that they stand charged with.

In view of the foregoing, it is my finding that no *prima facie* case has been established against the accused persons. In this respect, I am compelled to apply the wisdom in ***Murimi vs. Republic***, [1967] EA 542 at page 546, in which the predecessor Court of Appeal stated:

> *"... 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 person is wrongly called on for his defence *then this is an error of law..."* [Emphasis supplied]

See also cases of ***Tete Mwamtenga Kafunja & 2 others vs. Republic,*** CAT- Criminal Appeal No. 102 of 2005 and ***Jonas Bulai vs. Republic,*** CAT-Criminal Appeal No. 49 of 2006 (both unreported).

Consequently, pursuant to the provisions of 293 (1) of the Criminal Procedure Act, Cap 20 RE 2019, I find and hold that the accused persons have no case to answer and, therefore, not guilty of the offence of murder. Accordingly, I order their acquittal and that be set at liberty, unless held for other lawful reasons.

It is so ordered.

Dated at **Mbeya** this **25th April, 2022.**

J.M.KARAYEMAHAHA
JUDGE