IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL SESSIONS CASE NO.85 OF 2020

REPUBLIC

VERSUS

SOMANI S/O NKONA @ KATENDE

RULING

Ebrahim, J.:

After closing of the prosecution case, this court finds it apt to appraise the entire prosecution evidence for the purpose of satisfying itself as to whether prosecution side has managed to establish a prima facie case against the accused person to require them to enter their defence under **Section 293 (2) of the Criminal Procedure Act, CAP 20 R.E. 2019 (The Act)**.

Section 293 (2) of the Act, requires the court to call upon the accused person(s) to defend himself/herself if at the conclusion of the prosecution case the court considers that there is evidence that the accused person(s) committed the offence or any other minor or alternative offences under the provisions of **Section 300 to 309 of the Act**.

On the other hand, under **section 293 (1) of the Act,** if the court considers that there is no evidence that the accused person committed the offence or any other minor or alternative offence, the court shall record a finding of not guilty.

Somani Nkona Katende is charged with the offence of murder contrary to **section 196 and 197 of the Penal Code, Cap 16 RE 2019.** The mentioned accused person is alleged to have murdered one Bahati s/o Mwanguku on the 3rd day of March 2015 at Mpora Village within Chunya District at Songwe Region.

Before appraising the evidence on record, I find it pertinent to firstly establish as to what amounts to a prima facie case. The meaning of prima facie has been defined in the case **of Ramanalal Trambaklal Bhatt V R** [1957] EA 332 at page 334 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 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 would not be prepared to convict if no defence is made, but rather hopes the defence 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 is true, as Wilson, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defense has been heard.* ***It may not be easy to define what is meant by a 'prima facie case', but at least it must mean one in which a reasonable tribunal properly directing its minds to the law and the evidence could convict if no reasonable explanation is offered by the defense".***

Ramanalal principle was further applied in **Republic V Kakengele Msangikwa** [1968] HCD No. 43 where it was held *that a prima facie case at least must be one which a reasonable tribunal could convict if no evidence is offered by the defence*. It was again held by the High Court in the case of **R V Edward Mongo** [2003] TLR, page 45 at page 46 that:

"A submission of no case to answer may properly be upheld when there has been 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 manifestly unreliable*** *that no*

reasonable tribunal (if compelled to do so) would at that stage convict"

From the above established principles, the question now is whether the accused person in this case should be called to enter his defence?

To prove their case prosecution called a total of three witnesses.

The first prosecution witness **(PW1)** was **Huruma Wiliad Simfukwe.** He told the court that in 2015 he was living at Mpona Village in Chunya which is now at Songwe Region. During that time, he was working at the Bahati's farm (the deceased – VEO of Mpona Village) weeding maize. He said he was working together with one Juhudi whom he found at the deceased's house. He testified that the incident occurred around 0200hrs on the night of 03.03.2015. PW1 and Juhudi were sleeping at the quarter outside the main house. He said people came flashing their torch towards him wanting him to wake the deceased. He told them to wake him themselves. He could hear them talking with the deceased who deceased told them to come back in the morning. It was then that those people went to where he was and kicked him and tied him with a rope on his hand, legs and used a sheet to tie him on the neck and put him inside Bahati's house under the sofa. Suddenly, he heard the deceased crying for help in the room that he

is dying. He testified further that he heard children escaping and the motor-cycle being taken but he could not raise an alarm. Later, he had a whistle and soon after one Mawazo (PW2) saw him and untied him. After being untied he went into the room and saw the deceased dead with head wounds. He recorded his statement at the police and admitted before the court that there were two people whom he could not recognize because it was dark and the torch was blinding him.

Responding to cross examination questions he said he did not know the accused in the dock and he had never seen him anywhere before. He responded also that he did not see those people killing the deceased. When asked about the whereabouts of Juhudi, he said when those people were tying him and taking him inside the house, Juhudi was asleep outside and he did not witness anything nor did he see those people. **PW2, Mr. Mawazo Linson** was a militia man at Mpona village. He said on the night of 03.03.2015, he was awaken around 0200hrs by two children of the deceased namely Gervas and Irene telling him that they have been invaded. He blew a whistle and when they got at the crime scene, they found the deceased already dead with injuries on the neck, head and the hand. He said they also found a person named Huruma (PW1) tied with a

bed-sheet on the neck and untied him. He said he was assigned by the police later to go and arrest the accused in the dock at Msanyila village. Responding to cross examination questions, he said Irene and Gervas whom he recognized were accompanied another person whom he did not recognize. He said he knew the deceased casual laborers who were Huruma and Juhudi and when they arrived at the crime scene, he only saw Juma Mwanguku and Nashela. He admitted not knowing the accused before arresting him.

Prosecution side called the third witness **PW3: F. 577, Dt/Sgt Godfrey** to tender the statement of Juhudi Mwanda under **section 34B (1) and (2) (a) to (e) of the Evidence Act, Cap 6 RE 2019** which was admitted as **exhibit PE1.** Responding to cross examination questions, he said there was no identification parade that was conducted and he did not participate in arresting the accused. He also admitted that he did not know the accused before and according to the witness statement, there is nowhere that he stated to have seen the accused murdering the deceased.

As it can be clearly observed from the evidence of PW1 and PW2, neither of them witnessed the accused killing the deceased nor identified him at the incident night. In-fact, they did not even know him before his arrest. The only evidence that is relied upon by prosecution to incriminate the

accused is the statement of Juhudi Mwanda , **exhibit PE1** who is said to have identified the accused on the incident night.

The issue now will be as to whether looking at the evidence produced; the accused persons can certainly be incriminated.

In determining the same, the underlying principle here is that before the accused persons can be asked to enter their defence, there must be adequate evidence that he can deny or traverse. Otherwise it would be requiring the accused persons to fill in the gaps in prosecution case which is contrary to the spirit of **section 293 (1) of Cap 20, RE 2019**.

The law, i.e., **section 34B (1) of the Evidence Act, Cap 6 RE 2019** *provides as follows:*

"In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written statement by any person who is, or may be, a witness shall subject to the following provisions of this section, be admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evidence".

From the above provision of the law, it follows that the law recognises a proof of the relevant by a written statement of a person in lieu of direct oral evidence. However, such evidence like any other evidence must pass the truthful test and the court must believe it to be credible and not contradictory or weak.

As alluded earlier, exhibit PE1 is geared to prove that one Juhudi Mwanda recognised the accused at the incident night as the person who knocked at the house of the deceased and later heard him crying for help.

The Court of Appeal said in the case of **Mengi Paulo Samweli Luhanga and Another V Republic**, Criminal Appeal No. 222 of 2006 (unreported) that:

> *"eyewitnesses testimony can be a very powerful tool in determining a person's guilt or innocence".*

From that position of the law and on the basis of the powerful nature of eyewitness, Court of Appeal again in the case of **Salim S/O Adam @Kongo @ Magori V Republic**, Criminal Appeal No. 199 of 2007 illustrated the salutary principles of law on eyewitness identification that:

> *"(a) Evidence of visual identification is of the weakest character and most unreliable which should be acted upon cautiously when court is satisfied that the evidence is watertight and that all possibilities of mistaken identity are eliminated (**Waziri Amani V Republic** (1980) T.L.R 250 and **Nhembo Ndalu V Republic**, Criminal Appeal, Criminal Appeal No. 33 of 2005 (unreported));*
>
> *(b) In a case depending for its determination essentially on identification be of a single witness or more than witness. Such evidence must be watertight, even if it is evidence of recognition (**Hassan Juma Kanenyera V Republic** (1992)*

T.L.R 100 and Mengi P.S. Luhanga & Another V Republic (supra)) and,..."

As the law requires, the identification/recognition of a single witness particularly done at night time should have no glitches.

I have read the statement of Juhudi Mwanda – exhibit PE1. Juhudi said he recognized the accused from a torch that he lightened when he heard people knocking at the deceased house. He recognized the accused because he had lived with him at Msambile Village in 2002. This particular piece of information made this court look at the age of the witness in 2015. Exhibit PE1 reveals that by then Juhudi was 19 years old which makes him six (6) years old when he lived with the accused in 2002! More so, Juhudi said he knew the accused by the light from the torch but he did not describe how strong was the light to enable him recognize a person whom he had not seen in more than a decade and more still he was six years old! Surely it is surreal considering that Juhudi did not say how close he was to the accused to enable him recognize him at night at un-explained length of time he looked at the accused, extent of the light and most of all he had just woken up from the sleep. I out-rightly find that Juhudi was making a

make believe story. The fact that Juhudi was making a make believe story is supported by the testimony of PW1 who testified under oath that when the whole incident happened Juhudi was asleep and he did not witness anything. If anything it is clear that prosecution evidence is so damaged by contradiction. Again PW2 said, he received two children of the deceased and another person whom he did not recognize much as he said that he knew Juhudi as one of the casual laborers of the deceased. PW2 even said that he was the one who blew the whistle to call for help and people gathered and when they arrived at the deceased place they only found two people, Juhudi not being one of them. Furthermore, PW1 said those people blinded him with the light of their torch that he could not identify them. Surely as their testimonies reveals, if both of them were sleeping in the same hut, what time did Juhudi get the chance to lighten his torch as it seems that they were taken by surprise because they were both asleep.

From the above observation, it is clear that there is no evidence of recognition of the accused from prosecution to establish that he was at all present at the crime scene. PW1 did not identify any of the perpetrator; PW2 arrived after the incident; and exhibit PE1 tells the make believe story of Juhudi which is contradicted by the testimony of PW1. All in all, the

statement of Juhudi as contained in exhibit PE1 does not prove a relevant fact in issue which is identification of the accused. Rather, it has so many gaps and raises a lot of reasonable doubts.

I would wish to refer to the case of **Attorney General V Ally Kleist Sykes** [1957] 1EA 257 where it was held that:

> *"The discretion lies entirely with the court. If a magistrate finds an accused has no case to answer, then he must acquit the accused..."*

From the above stance, and in the absence of any other evidence by prosecution side, this court cannot put the accused person to his defense so as to fill the gaps left by prosecution. That would be making the accused person prosecute his own case, an act which is censured by law.

That being said and in terms of **Section 293 (1) of the Criminal Procedure Act, CAP 20 RE 2002**, I find that there is no sufficient evidence brought by prosecution that establishes prima facie case against the accused person. Accordingly, I record the finding of not guilty against **Somani s/o Mkona @ Katende** and do hereby acquit him. For that reason, I order the accused person to be released from custody forthwith unless otherwise lawfully held.

R.A. Ebrahim

Judge

16.06.2022

Court: Right of Appeal explained.

In terms of **Section 312 (4) of the CPA** accused person should avail his permanent address and the same shall be coordinated by the Deputy Registrar of this court.

R.A. Ebrahim

Judge

16.06.2022

Mbeya

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