IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA
AT MUSOMA

CRIMINAL SESSIONS CASE No. 132 OF 2021

THE REPUBLIC
Versus
BINA OGANGA @ SPANA &
NASHON SIMBA

RULING ON PRIMA FACIE CASE UNDER SECTION 293 OF THE CRIMINAL PROCEDURE ACT [CAP. 20 R.E. 2019]

18.07.2022 & 18.07.2022
Mtulya, J.:

This ruling emanates from the requirement of the law in section 293 of the **Criminal Procedure Act** [Cap 20 R.E 2022] (the Act) to see: *whether the prosecution has produced relevant materials to require the accused persons, Mr. Bina Oganga @ Spana and Mr. Nashon Simba (the accused persons) to reply the charge of murder of Mr. Kiaka Magori (the deceased person) which occurred on 22nd day of January 2017 at Nyabikondo Village within Rorya District in Mara Region.*

The accused persons are prosecuted for murder under the provisions of section 196 and 197 of the **Penal Code** [Cap 16 R.E. 2019] (the Code) and were arraigned in this court on 15th day July 2022 to reply the accusation against them on the murder of the

deceased person. The facts and evidences produced by the prosecution side during the prosecution case show that the body of the deceased was found at Haraka Kihuya's residence and the attackers were witnessed by Haraka Kihuya and Pawa Haraka whereas Mr. Phinias Sango @ Ogweno and Mr. Soroma Adundo witnessed the deceased person after the attack and death of the deceased. In order to establish its case against the accused persons, the prosecution had invited in this court Mr. Phinias Sango @ Ogweno (PW1), Mr. Soroma Odundo (PW2), and a medical doctor, Dr. Erick Alphonce (PW3).

The testimonies produced by three (3) prosecution witnesses show that PW1 was called by use cell-phone on 22nd January 2017, as a Village Chairman, and was informed by Haraka Kihuya on the attacks and death of the deceased person and took steps to inform the police. PW2 on his part testified that on the evening hours of 22nd of January 2017, as Hamlet Chairman, was told by Haraka Kihuya on the attacks and death of the deceased person and took steps to inform the police and visited the scene of the crime and found the deceased had already expired and the attackers had already escaped from the scene of the crime.

Finally, in order to prove death of the deceased undoubtedly occurred the prosecution invited PW3. In his brief testimony, PW3 testified that he had examined the deceased person on 23rd January 2017 around 14:00 hours in presence of Fabian Marita and police officer Hamis and during cross examination he stated that the body of the deceased was examined by Dr. Chrispin Mosabi in the presence of Michael Matata and police officer D/C Hamisi.

However, in a surprise move, PW3, initially stated the signature in P.1 was his and during cross examination he stated it belongs to Dr. Chrispin Mosabi. This move undermined the credibility and reliability of PW3 per established practice of the Court of Appeal in the precedent **Onesmo Kashonele & Others v. Republic,** Criminal Appeal No. 225 of 2012. It is established law of this country that major inconsistencies or contradictions in evidences of witnesses completely destroys his credibility and reliability. There are multiple precedents on the subject (see: **Kibwana Salehe v. Republic** (1968) HCD 391; **Surdeyi v Republic** (1971) HCD 316; and **Sahoba Benjuda v. Republic**, Criminal Appeal No. 96).

In the present case, the facts and evidences produced in this court by the prosecution witnesses PW1, PW2 and PW3, it is

obvious that there is a mere scintilla evidence without pointing any finger to the accused persons. The established practice in this court and Court of Appeal is that a mere scintilla of evidence can never be enough to invite the accused persons to reply the charge of murder of the deceased persons (see: **The Director of Public Prosecutions v. Peter Kibatala,** Criminal Appeal No. 4 of 2015 and **Ramanlal Trambaklal Bhatt v. Republic** [1957] E.A 332-335]. In the precedent of **Republic v. Edward Moango,** Criminal Appeal No. 103 of 1999, the Court of Appeal stated 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.*

In the present case, the evidence on record would not, in any case, lead to conviction. They have both weaknesses in materials registered by PW1 and PW2 and the cross-examination by learned counsel Mr. Emmanuel Gervas to PW3, totally discredited the materials of PW3. In such circumstances, the remedy as explained

in the decisions of **Murimi v. Republic (1967) E.A 542** and **Republic V. Elizabeth Nduta Karanja & another** (2006) KLR Criminal Case No. 52 of 2005, is that;

> *The law requires a trial court to acquit an accused person of 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 present case, I see there is no legal basis for putting the accused persons through the trouble of having to defend themselves in the present case. However, before I decide to acquit the accused persons, I had an opportunity to enjoy the interpretation of facts and evidences in this case from two (2) learned minds of Mr. Gervas and Mr. Niko Malekela, learned State Attorney, who appeared for the Republic.

According to Mr. Gervas, the prosecution failed to produce water-tight evidence as PW1 heard the killing from another person and had produced contradictory statements in court and in his cautioned statement whereas PW2 did not connect the accused persons with the death of the deceased person. With the evidence of PW3, Mr. Gervas contended that he produced contradictory

statements during cross examination on his signature and participation in examining the deceased's body.

On his part, Mr. Malekela being officer of the court, supported the move taken by Mr. Gervas. According to him, prosecution witnesses had produced hearsay evidence without any corroboration. In his opinion, two (2) key eye witnesses, who saw the event of killing and participation of the accused persons, had declined to show up for testimonies in the case. On evidence of PW3, Mr. Malekela stated that he contradicted himself during the examination in chief and cross-examination on two (2) important matters on his participation during examination of the deceased's body and signature in exhibit P.1. Finally, both learned mind agreed that it is obvious that the present case against the accused persons cannot established beyond reasonable doubt as per directives of the Court of Appeal in the precedent of **Waziri Amani v. Republic** [1980] TLR 250.

On my part, I have nothing to add. It is vivid from the record that the prosecution failed to establish a *prima facie* case against the accused persons, to require them to enter their defence under the provision of section 293(1) of the Act. There are no evidence on record pointing a finger to the accused persons. Having said so,

I dismiss the charge against them and acquit both accused persons, Mr. Bina Ogunda @Spana and Mr. Nashoni Simba of the offence of murder of the deceased person, Mr. Kiaka Magori, contrary to section 196 and 197 of the Code.

It is so ordered.

F. H. Mtulya

Judge

18.7.2022

This ruling was pronounced in open court in the presence of the accused persons, Mr. Bina Oganga @ Spana and Nashon Simba and their learned counsel Mr. Emmanuel Gervas and in the presence of the learned State Attorney, Mr. Niko Malekela for the Republic.

F. H. Mtulya

Judge

18.07.2022