

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

SITTING AT URAMBO

(TABORA REGISTRY)

CRIMINAL SESSION CASE NO.34 OF 2021

THE REPUBLIC

VERSUS

HAMIS S/O LUTENDE @ SANYIWA

**RULING IN TERMS OF SECTION 293 OF THE CRIMINAL PROCEDURE
ACT, CAP. 20 [R. E 2019]**

Date: 26/05/2022 & 27/05/2022

BAHATI SALEMA, J.

This ruling originated from the requirement of section 293 of the Criminal Procedure Act, Cap.20 [R.E 2019] to see whether the prosecution side has established a prima facie case against the accused persons and, as such, they have a case to answer.

In the present case, the accused person **Hamis s/o Lutende @Sanyiwa** is charged with an offence of murder contrary to section 196 of the Penal Code, Cap.16 on 22 day of February, 2021 at Legeza Mwendu Hamlet, Lutona village within Uyui District in Tabora region, for

murdering one Kole s/o Shija @Maganga. The accused person pleaded not guilty to the charge.

To prove its case, the Republic represented by learned State Attorney Miraji Kajiru summoned and marshalled a total of six witnesses and three exhibits, namely, the Post-Mortem Report, Sketch Map, and Caution Statement.

I have gone through the testimonies of the prosecution witnesses, especially PW1, Sindabakila Serejio, PW2, George M. Kasele, PW3, Dotto Kulehilwa, PW4, Lemi Mashaka, PW5 H. 9005 PC, and from exhibits, especially a post-mortem report, caution statement and sketch map, as admitted in this case against the accused person to make a finding if the prosecution has established a case to answer as against the accused person.

It is a mandatory procedural requirement after the closure of the prosecution case. The court calls upon the accused person or his advocate, if he is represented, to address it if he wishes as to whether he intends to submit that he has no case to answer.

Then, the court is required under section 293 to prepare a ruling, finding as to whether the evidence by the prosecution has established a *prima facie* case for the accused person to answer. If it finds that the *prima facie* case has been established, the accused persons will be

called upon to defend himself and informed of such right, in terms of section 293 (2) of the Criminal Procedure Act, Cap.20 [R.E 2019].

If the same is found to be not established, then the court will proceed to make a finding that the same has not been established and proceed to acquit the accused person.

Both parties made their final submissions. The prosecution side represented by Mr. Miraji Kajiru submitted that they had proved their case, although no witness testified to having seen the accused directly killing the deceased. He submitted that there is circumstantial evidence that the accused was involved in the killing.

He further submitted that the evidence of PW2, Village Executive Officer, PW3, Village Chairman, PW4, Lemi Mashaka, wife of the deceased, reveals that the deceased was killed at his shamba and his motorcycle was found along with him. He was butchered in different parts of his body.

He further submitted that the evidence of PW2, PW3 and PW4 is corroborated by the testimony of PW5 police, who drew a sketch map which is then corroborated by PW6 police, who recorded the statement of the accused as exhibit P3 where there is a full history of him being involved in the killing and the object he used to kill the deceased. He

further submitted that Section 27 of the Evidence Act, Cap. 6 [R.E 2019] provides that:

"A confession voluntarily made to a police officer by a person accused of an offence may be proved as against that person."

Also, he submitted that the evidence of PW1, the doctor explained clearly that the deceased was crushed with a sharp object which led to his death. The evidence of PW1, the doctor and the post-mortem report corroborate that the deceased was killed with a machete. Also, he submitted that the accused told this court that he was tortured while he was interviewed, thus involuntarily. However, he submitted that the accused had never proved this to the court on his torture. Hence, the prosecution is of the view that the accused has a case to answer.

Nevertheless, the defence side represented by Mr. Maganga submitted that during the trial the prosecution marshalled six witnesses. According to section 110 of the Evidence Act, Cap.6 [R.E 2019],

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

He submitted that the prosecution side had failed to prove beyond reasonable doubt. There was not a single witness who proved that he saw the accused person kill among all those present. The evidence of PW1, the doctor, is only the proof of the death, and it's not that the accused killed the deceased.

PW2, VEO and PW3 village chairman only testified to having seen the body of the deceased after being informed. Thus, this evidence does not make the prosecution prove their case.

Also, he submitted that the evidence of PW4, Lemi Mashaka his wife, while testifying, stated that she did not see any person except she was called by his son, telling him "*baba anauawa*". The statement of her wife does not show that the accused killed the deceased.

He further submitted that the evidence of PW5 9005 PC Mohamed, who is the police, is doubtful because while testifying he said that while interviewing the accused they were together with Saguda, Habibu, and George Foya. He said he was present at the police station while the accused was being interrogated. Hence, the evidence gives doubt on the legality of the caution statement, which this court should not rely upon for a case to answer.

Further PW5, Mohamed told this court they never arrested any person on that day, while PW6, H. 1623, Detective Saguda who

tendered a caution statement, testified that the accused confessed to having killed the deceased; however, the caution statement, which has been admitted, had no corroboration. If the accused confessed voluntarily, he was never taken to the justice of the peace. He submitted that failure to take him to the justice of peace creates doubt in respect of his voluntariness. Furthermore, he submitted that in the caution statement tendered, the accused mentioned the brother of the deceased, Kasanzu Shija, the man who hired him for the killing of his young brother was never brought before this court.

Having heard the evidence from the prosecution, exhibits, and submissions, the issue is whether the *prima facie case* has been established.

The burden of proof in criminal cases generally is always on the prosecution, and the standard of proof is beyond reasonable doubt. In the case of **DPP vs Peter Kibatala, Criminal Appeal No. 4 of 2015**, CAT at Dar es Salaam (Unreported), when the Court of Appeal held:

"This being a criminal case, the duty to prove the charge beyond doubt rests on the prosecution and the court is enjoined to dismiss the charge and acquit the accused if that duty is not discharged to the hilt. What essentially the court looks at is prima facie evidence

for the prosecution, which unless controverted, would be sufficient to establish the elements of the offence".

In order to answer this major issue, it is pertinent to address some legal issues involved in this case. **First**, a case must be *proved beyond reasonable doubt*. This requirement is stipulated under **Section 3 (2) (a) of the Evidence Act, Cap. 6**. The section reads:

'A fact is said to be proved when—

*(a) In criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the **prosecution beyond reasonable doubt** that the fact exists;'*

The above position is also stated in the case of **Hemed v. Republic [1987] TLR 117**, where the Court said that:

'... In a criminal case, the standard of proof is beyond reasonable doubt.'

Second, the prosecution has the onus of ensuring that the offence is proved to the required standard. This stand was fortified in the case of **Mohamed Matula v. Republic [1995] TLR 3**, where the Court insisted that:

"Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused; the onus never shifts

away from the prosecution and no duty is cast on the appellant to establish his innocence.'

Third, the accused is charged under section 196 of the Penal Code, Cap. 16 [R.E. 2019], which establishes the offence of murder. It is therefore pertinent for the elements of the offence to be proved before a conviction can be entered against the accused. The section provides:

"Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder."

Four elements must be proven for the offence of murder to stand:

1. There must be the death of a person;
2. Death must be a result of an unlawful act or by an unlawful omission;
4. It must be proved that the accused is the one who killed;
5. The killing must be preceded by a premeditated evil intention (**malice aforethought**).

I have carefully examined the evidence which was adduced by the prosecution as shown above and I am of the considered opinion that among all the witnesses who came to testify before the court no one

testified to have seen the accused person commits the offence. The evidence available to the prosecution is such that it cannot ground a conviction.

In this case, the Prosecution has mainly relied on the Caution Statement of the accused. The caution statement of the accused person was **retracted**.

The law governing **repudiated confession** is that, depending on the circumstances of the case, a conviction can be founded on such a statement after the court has properly directed itself on the evidence and is satisfied as to its truthfulness. In **Hatibu Gandhi and others Vs the Republic** [1996]TLR 12; similarly, in another case of **Tuwamoi Vs. Uganda** (1967) EA 84 on page 91 quoted with approval by the Court of Appeal of Tanzania in the case of **Umalo Mussa versus Republic**, Criminal Appeal No. of 2005 (unreported) stated that;

"A trial court should accept with caution a confession which has been retracted or repudiated or both retracted and repudiated and must be fully satisfied that in all the circumstances of the case that the confession is true."

However, it is dangerous to act on an uncorroborated, retracted, or repudiated confession. In the case of **Hemed Abdallah Vs. Republic** [1995] TLR 172, the Court stated that:

*"Generally, it is dangerous to act upon a repudiated or retracted confession unless it is corroborated in **material particulars** or unless the court, after full consideration of the circumstances, is satisfied that the **confession must but be true.**"*

In his evidence, Detective Saguda testified to this court that they arrested the accused person after being told by the informer of the police. No other witness was called to corroborate that. Had the accused person truly confessed before PW6, it would have been expected for him to be taken to the justice of the peace.

Furthermore, PW5, H 9005 stated that there were four police officers present during the interview, including Saguda, Habib George Foya, and himself. The statement evidence gives doubt as to whether the caution statement was taken voluntarily. In my view, only a caution statement that contains a true confession and has been legally procured can lead to the conviction of the confessor, even if retracted. In the case of **Michael Luhiye v. R [1994] TLR 181**, the court held that;

"It is always desirable to look for corroboration in support of a confession which has been retracted before acting on such a confession to the detriment of the accused person. There is no evidence either direct or circumstantial that corroborates the alleged confessions."

Since the accused repudiated their confession, this case has to be corroborated as a matter of practice and prudence; otherwise, it affects the exhibit on caution. Meanwhile there is no enough evidence to ground conviction if the accused person chooses to keep quiet in his defence, there is guidance in **Republic v Makuzi Zaid and Another** [1969] HCD No.249, Georges CJ quoting **Bamaulal P. Bhat v. Republic** [1957] EA 332.

"The case to be prima facie must be such that a reasonable tribunal properly directing its mind to the law and the evidence can convict if no explanation is offered by the defence."

In the upshot, it is my finding that no prima facie case has been established against the accused person. In this respect, I am compelled to apply the wisdom in **Murimi v Republic** [1967] EA 542 on page 546, in which the predecessor of the 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. "

I, therefore, rule that the prosecution has failed to establish a *prima facie case* against the accused person and he is accordingly acquitted under section 293(1) of the Criminal Procedure Act, Cap 20 [R.E. 2019].

Order accordingly.

Ruling delivered under my hand and seal of the court in the open court, this 27th day of May, 2022 in the presence of both parties.



A. BAHATI SALEMA

JUDGE

27/05/2022

Right to appeal is hereby explained.



A. BAHATI SALEMA

JUDGE

27/05/2022

