

IN THE HIGH COURT OF TANZANIA
AT SHINYANGA
CRIMINAL SESSION CASE NO. 62 OF 2017
THE REPUBLIC
VERSUS
1. LUKAS MABILIKA
2. MAGULYATI MABILIKA @SHEMU
3. SHIPEMBA MABILIKA @ SHEMU
4. GADULA SIMON
5. MAKININA CONSTANTINE
6. DIONIZ HENRY

RULING

8th & 9th February, 2022

S. M. KULITA, J.:

This ruling is to decide as to whether the Accused Persons namely Lukas Mabilika, Magulyati Mabilika @ Shem, Shipemba Mabilika @ Shem, Gadula Simon, Makinina Constantine and Dioniz Henry are required to enter their defense as per Section 293 (2) of the Criminal Procedure Act Cap 20, Revised Edition 2019 (The Act).

Section 293 (2) of the Act, requires the court to call upon the accused persons to defend themselves if at the conclusion of the prosecution case the court considers that, there is evidence that the accused persons committed the offence charged or any other minor or

alternative offences under the provisions of section 300 to 309 of the Act.

Also, under section 293 (1) of the Act, if the court considers that there is no evidence that the accused or any one of several accused persons committed the charged offence or any other minor or alternative offence, the court shall record a finding of not guilty.

In our case at hand, after closing of the prosecution case, both parties, prosecution and defense counsels left the matter for the court to decide on the ruling as to whether the accused persons have a case to answer or not.

This has provided opportunity to the Court to appraise the entire proceedings for the purpose of satisfying itself as to whether the evidence by the prosecution left no stone unturned so as to require the accused persons to enter their defense.

In doing so, it is in the safest side to revisit historical background of the case albeit in a nut-shell. To prove their case, prosecution side called a total number of four witnesses.

Sayi Elisha, Christian, a 43 years' peasant living at Ngasamo who testified as PW1 stated that, the victim Manoni Elisha is his brother who is also the second born in their family. He stated further that, on

14/11/2016 he was at Manchester bar taking alcohol together with his friends, Pesa Lushika and Kaguga Lushika. He added that, he was also together with his brother Manoni Elisha who gave him Tanzania Shillings ten thousand and then, five thousand.

He informed the court that, following an employment the victim secured thereat. For five years Manoni Elisha had been living at Bulanga in Bunda District. He testified that, on 14/11/2016 Manoni Elisha went to Ngasamo village just to pay a visit to his relative which he normally does.

PW1 went ahead stating that he left for home at 17:00 leaving his brother Manoni Elisha at Manchester bar. PW1 further added that, at about 2000 hours he heard a voice alarm and decided to go where it was raised. PW1 stated that the alarm was at Manchester bar where he was before.

PW1 told the court that during the arrival he met with one Anthony who informed him that if he enters the Manchester bar he would be affected as his brother. He went ahead stating that upon his entering, he found the counter door broken and the premises covered with blood. While wondering, PW1 stated to have heard the victim lamenting that he bought beer for Ngasamo villagers but they kill him.

PW1 added that, the victim was lamenting by the time he was passing away. He stated to have observed that the victim had been wounded at the left arm, right ribs and the back part of the head. He stated that, the wounds were due to stone hits and the stick beats. He testified further that, Lukas Mabilika, Chipemba Mabilika, Magulyati Mabilika had beaten the victim. Thereafter, PW1 successfully pointed to the 1st, 2nd and 3rd accused persons in court.

PW1 stated further that, the first three accused persons collectively beat the victim on the back part of the head, whereas Gadula Simon beat the victim on the left hand, Dioniz Henry hit on the wrist and Makinina Constantine hit at the right ribs. PW1 successfully pointed to the 4th up to 7th accused persons at the court.

PW1 stated further that, he observed the accused persons beating the victim while he was about to arrive in 10 feet away from the scene. He added that, he used a torch which had enough light to identify the accused persons who took about 15 minutes to accomplish their deed. PW1 stated to have known the accused persons for about 30 years as they are his fellow villagers while Lukas, Magulyati and Chipemba are his uncles.

He again informed the court that the victim had a case against Lukas Mabilika at Magu District Court. PW1 testified further that, the

victim had no problem with the villagers. A little while he added that, it happened the victim received stolen goats and slaughtered them. On that occasion PW1 stated that, the victim was fined and they paid for the same.

He stated that the victim death was caused by Dioniz Henry who spoke to have expelled the victim from their village, thus his coming back thereat was wrong. PW1 stated that, those words by Dioniz Henry were spoken at Manchester pub on 14/11/2016.

When cross examined PW1 stated that, the victim was the first one who went to the Manchester bar before him. But when he was shown his statement, he made at the police station he agreed that, according to it, he was the first one to go to Manchester bar. Again, when asked PW1 stated that he does not know if his brother was a thief. When PW1 was referred to his police statement he agreed that he made that statement that his brother is a thief.

When further cross examined PW1 stated that following an alarm, he went at Manchester bar and found his brother dying. He added that he found no body at the scene than the one he met at the door. According to him, he found the deceased wounded at the wrist, head and arms. He insisted that he saw the bandits as he was 7 meters from the scene aided by a torch. He added that, he observed the crime act

while he was at their home. Again, PW1 said that, he found the deceased inside the bar at the open space.

When cross examined by Agustino Advocate PW1 stated that, he was drunk on that date but he knew all what was going through. PW1 further prayed that, the court should consider what he is testifying but not the police statement.

When cross examined by Shabani Advocate PW1 stated that, he saw six people at the scene through a torch he had lighted while at home. On another move PW1 stated that, he saw the bandits while they were going to their homes.

When cross examined by the assessors PW1 stated that, he witnessed the bandits killing the victim on the spot while he was 7 meters away from the scene. Further he stated that the distance from their house to Manchester bar is 15 meters. He added that, their house is the third one from Manchester bar. He went further showing that at the scene he met only the bandits.

Gerald Charles Mabula, 33 years of age, Christian living at Ngasamo in Busega sworn and testified as PW2 that, he is a doctor by profession and owner of Manchester bar at Ngasamo. He testified further that, on 14/11/2016 while at his working place he heard the

"mwano" voice (alarm) inviting people towards his bar, Manchester. He said, he had to go there too. He added that, at the scene he found no electricity and that the servants told him that, one of their customers has hidden himself at the counter in escape for the mwano people's attack.

PW2 stated that, he went at the counter and found people throwing stones, bottles and other things in attacking the victim. He added that he found the counter locked from inside. He further stated that, while at there, Makinina Constantine approached him and asked whether they should break the counter door. He told the court that Makinina had a stick in his hand. PW2 stated that, all over a sudden a group of people invaded the counter, he had to escape it by moving away. While standing away he heard the counter door being broken. The witness stated that, the only person he saw was Makinina whom he testified to have not seen him doing anything. PW2 successfully pointed by pointed to Makinina at the court.

PW2 went further stating that he is familiar with Makinina and that he is the one who informed the police about the incidence of attacking Manoni Elisha.

While cross examined by Mr. Frank PW2 stated that, he had no knowledge of the victim's bad behavior. He added that the Mwano had

about 300 people gathered at the premise. PW2 stated that he did not see what Makinina did with the stick he was holding. He said that he does not know who actually participated in the killing of the deceased. While cross examined by Agustino PW2 stated that the distance between Manchester bar and the home of Manoni Elisha is about 300 meters.

Ayubu Ismail Mwiyo, 35 years of age, Muslim, affirmed and testified as PW3 that, he is a doctor with experience of 7 years. He is working at Nassa Dispensary. He testified further that on 15/11/2016 he received a call from OC-CID Busega wanting him to go for post mortem investigation. He stated to have gone at the scene together with police officers. PW3 stated that, the deceased was Manoni Elisha and that he had wounds on different parts of his body. He told the court that, the cause of his death was a severe bleeding. PW3 stated further that, after the investigation he prepared a report. PW3 tendered the post mortem report which was admitted as an exhibit P1.

When cross examined by Mr. Frank the witness stated that he does not know the weapons that have been used to beat the victim.

F7041 D/CPL Mwaluko, 40 years of age, Muslim, affirms and states as PW4 that, on 15/11/2016 while working at Nasa he was ordered to go to Ngasamo village where there was a murder incident. He stated that, they went as a team and that the deceased was one Manoni Elisha.

That they met the victim's body at their home. He told the court that, as the accused persons had already been arrested his duties were to collect evidence and exhibits. He said further that he collected the sketch map of the scene that was drawn by D/SGT Adam who has passed away in 2018.

PW4 tendered the sketch map it was admitted as Exhibit P2. Concerning that map PW4 stated that, there are normally two maps drawn. One is drawn roughly at the scene and the other which he called proper one is drawn at the office while seated.

When cross examined, he stated that the map that has tendered in court is the one that has been drawn at the scene of crime. PW4 when asked he stated that there are some questions in respect of the map he can not answer as he is not the maker of it. He added that, by the time of drawing the he does not know where the victim's body was. The prosecution evidence ended up here.

Before determining the issue as to whether the prosecution evidence has established a prima facie case, I find it pertinent to establish what amounts to a prima facie case. The meaning of prima facie case has been defined in the case of **Ramanalal Trambaklal Bhatt V. R (1957)** EA 332 at page 334 that;

Remembering that the legal onus 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 defense is made, but rather hopes the defense 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 defense. 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 applied in the case of **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 defense."

It was also held by the High Court in the case of **Republic 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".

According to the above principles, the issue is whether by looking at the evidence produced the accused persons can certainly be incriminated, also the principle is clear that before the accused persons can be asked to enter defense, there must be adequate evidence that the accused person can deny or traverse. Otherwise, it would be requiring the accused person to fill in the gaps in prosecution case which is contrary to section 293 (1) of the Criminal Procedure Act, Cap. 20, RE 2002.

This now is the right time to find out as to how each of the prosecution witnesses' testimonies has incriminated the accused persons.

Starting with PW4, the investigator of the case. As we have seen in his testimony that, his main duties were to record statements, collecting evidence and exhibits as well. In his testimony he stated clearly that, he went at the scene of crime on the second day after the incident. That means, he was not present during the commission of the crime.

The sketch map exhibit which PW4 tendered in court, normally does not state who actually killed the victim. Thus, with the testimony of PW4 alone, does not in itself incriminate the accused persons, on the murder of Manoni Elisha.

Concerning the testimony of PW3, the Doctor who conducted the post mortem (Exhibit P1). The same, intend to show what actually caused the victim's death. Again, both the testimony of PW3 and Exhibit P1 do not show who killed the victim. The same applies that, in themselves alone, do not incriminate the accused persons herein.

Now coming to the testimony of PW2, the owner of the Manchester bar where the crime incident took place. According to his testimony he said, it was night and electric power was off. There was a crowd of approximately 300 people in a space of a half-acre. He identified only Makinina Constantine whom they exchanged words before the crowd invaded the counter where the victim took a shelter. It was the time when PW2 was terrified and ran away. From there, PW2 stated to have heard the crowd breaking the door and a voice of assaulting the victim.

The question is, does that testimony incriminate the accused persons herein? When cross examined the same PW2 testified that, despite the fact that he saw Makinina Constantine with a stick, yet he did not witness him beating the victim. He went further showing that, he did not identify any other person on that material date leave alone the rest of the accused persons herein.

Now, in a crowd of 300 people invading the victim, can anyone say with certainty that Makinina Constantine got a chance to inflict a blow upon the victim? The answer is certainly not, the testimony of PW2 has not identified who actually inflicted blows to the victim and caused death to him. That testimony too has neither incriminated Makinina Constantine nor the rest of the accused persons.

Further, if at all the testimony of PW2 has incriminated Makinina Constantine, can we say with certainty that the witness properly identified Makinina Constantine? The testimony of PW2 did not even state how he came to identify Makinina Constantine in that electric powerless dark night. PW1 did not mention any source of light he used, its intensity, duration of conversation and the distance they had in between when they were talking. See, **Waziri Amani v. R. [1980] T.L.R. 250**. These could help us to determine that with no mistake, at least PW2 identified Makinina Constantine to be among the people who visited Manchester bar at that time.

Lastly, is the testimony of PW1. This acted as an eye witness who witnessed the killing of Manoni Elisha and identified the accused persons as well. As we have seen the testimony of PW1 earlier, the issue is whether PW1 is a credible witness to warrant this court use his testimony to convict the accused persons herein in absence of defense.

In his testimony PW1, in the first time he stated to have heard an alarm and started to follow it up to Manchester bar to see what was all about. His testimony shows that, he did not know what was happening at Manchester bar until when he was told by one Antony, that if he enters the bar, he would be inflicted as what had been inflicted to his brother. But the same PW1 when cross examined, testified to have witnessed what was happening at Manchester bar while he was still at their home. This casts doubt on PW1's credibility.

Then PW1 testified that, he met no one at the scene but only the victim who was lamenting that he was going to be dead for being beaten by Ngasamo villagers. The same PW1 changed during examination in chief and stated that, he met the accused persons at the scene and witnessed the first three accused persons lifting and hitting the victim with a stone at the head and the others beating the victim on other parts of his body. Still PW1 casts doubts on his credibility.

On another occasion PW1 testified that he observed the incident while he was 7 meters away. Meanwhile he stated that, he observed the killing incident while at their home which is 15 meters away from Manchester bar. Here the doubt is at what distance actually PW1 was when observing the killing incident.

On the same point of distance PW1 testified that there are three houses between their house and Manchester bar where the incident took place. On this one will wonder as to how the two houses can be built within 15 meters that PW1 has stated to be between their house and Manchester bar. The credibility of PW1 is doubtful.

Also how the light he had managed to lighten the scene from his home which is separated with other 2 houses from the scene premise.

The sketch map of the scene of crime shows that Manchester bar is fenced. To see what is inside one has to enter first. This is verified by the testimony of PW1 himself that he was told by one Antony that if he enters, he would be inflicted. If that is the situation, how can we believe that PW1 observed the killing that took place inside the fence while he was at their home? Doubtfully indeed.

On those situations, can we say with certainty that PW1 identified with no mistakes the ones who killed the victim? In the case of **FIKIRI JOSEPH PANTALEO @ USTADHI v. THE REPUBLIC, CRIMINAL APPEAL NO 323 of 2015 CAT, DAR ES SALAAM** it was stated that; -

Beginning with the first issue of identification, the position of this Court is well established that trial courts, and by extension courts sitting on first appeals

*must take great caution before relying on the evidence of visual identification when conditions for positive identification are difficult: see- **Waziri Amani v. R.** [1980] T.L.R. 250. Visual identification evidence was in **Yustin Adam Mkamla vs. R.**, Criminal Appeal No. 206 of 2011 (unreported) described to be the weakest kind and most unreliable evidence, requiring great care before being acted upon.*

On that account, I am settled that, the answer is not. PW1 did not identify the killers on the material date.

Taking into account that PW1's credibility is doubtful, I find it doubtfully too to believe that the accused persons were properly identified by PW1. On that account, I am settled that the testimony of PW1 too, is of full of doubts in incriminating these accused persons.

All said and done, as shown above, the prosecution evidence has failed to establish a prima facie case against the accused persons. Under section 293(1) of the Act, I find these accused persons have no case to answer. I thus proceed to find them not guilty of murder nor any of its cognate offence, hence acquitted. They should be released forthwith, unless held for some other lawful course.

It is so ordered.



He
S.M. Kulita
JUDGE
09/2/2022

DATED at **Shinyanga** this 9th day of February, 2022.



He
S.M. Kulita
JUDGE
09/02/2022