

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA REGISTRY)

AT MWANZA

CRIMINAL SESSION NO. 110 OF 2012

THE REPUBLIC

VERSUS

MASUMBUKO MAKELEZE @ KOSOVO

RULING

Date of Last Order: 04/10/2022

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M. MNYUKWA, J.

The accused person stands charged with murder contrary to sections 196 and 197 of the Penal Code, Cap. 16 [R.E 2002 now R.E 2022]. It was alleged that, on 10/2/2009 at Kayenze Bugogo village within Geita District in Mwanza Region by then, the accused person murdered Neema d/o Katumani. The accused person denied the charge against him.

It was gathered from the court file that, during the preliminary hearing, the following were the Memorandum of undisputed facts;

1. The accused is called Masumbuko Makeleze @ Kosovo.



2. The accused is a resident of Kahama Maringa.
3. The deceased is one Neema Katumani.
4. The deceased was living at Buyogo Village.
5. The contents of the Post Mortem Examination Report.
6. The contents of the Sketch Map of the Scene of Crime.

To prove its case, the prosecution marshalled the total of two witnesses. The substances of their testimony are summarized here under:

Breaking the ice for the prosecution was Zakayo Samwel who testified under oath as PW1. His evidence is to the effect that, he is a retired police officer who retired when he was under the rank of Staff Sergeant in 2018 with police force No D. 8307. He testified that, on 1/3/2009 he was at Geita police station and he received the file concerning murder of one Neema Katumani from the head of the District Investigation. As he was the investigator by then, he was instructed to investigate the case and arrest the suspect of murder on the incidence that occurred at Bukoli village in Kayenze. PW1 testified that, the accused who was mentioned in the file was called @ Kosovo.

PW1 testified that, as an investigator, he went to the scene of crime and interviewed some witnesses who were living in the deceased's



residence. That he interviewed Martha Levi and Thomas Barnaba. PW1 stated that he got the narration about the death of the deceased from Martha that, on the day of the incidence around 8:00 hours in the morning, the accused @ Kosovo parked his bicycle a distance of one pace from where Martha stood. He narrated that, Martha described the accused as he was wearing a jacket and a sweater cap. PW1 went on that, he was told by Martha that, the accused who carried an axe in his waist left his bicycle and headed where the deceased was. PW1 stated that, Martha told him that, she heard the accused arguing with the deceased when she was asked about his whereabouts of her husband and the deceased replied that her husband was away from home.

It is PW1 testimony that, he was told by Martha that suddenly she heard a bang voice as if the person was splitting a log and Martha managed to see the accused running from the deceased home. When the accused was about to take his bicycle, Martha wanted to shout and the accused silenced her by threatening her with an axe. Then Martha went to the place where the deceased (her mother-in-law) was, she found her kneeling down and had severe bleeding in the head and she immediately raised an alarm for help.



PW1 testified that, he didn't take the statements of the witnesses as the same was taken by his fellow Corporal Abel. He further testified that on 13/04/2009 he got information that the accused escaped to Kahama and he sent the informer and the militiaman to arrest the accused person and they managed to arrest him at Kahama bus stand with his bicycle and he was wearing the same sweater cap.

PW1 testified that, at the time when the accused was arrested, they used a trick by telling him that, he was arrested because he was owed Tshs. 90,000/= and they took him to Bukoli police station. When they reached there, he was informed that, he was arrested because he is suspected to have committed the offence of murder and he was kept at lock-up. PW1 added that, the accused was then transferred to Geita police station for interview in which he denied to be involved in the commission of the offence charged. PW1 concludes his examination in chief by stating that on 03/05/2009 the identification parade was conducted at Geita police station whereby Martha Levi and Thomas Barnaba identified the accused.

When he was cross examined, PW1 stated that it took about 16 days to interview the accused and he know that the accused was supposed to be interviewed within 24 hours. PW1 stated that, they also arrested other



person to whom they were suspected to have killed the deceased and those persons were Mashaka Daudi and Christopher Mashauri and that, those persons were not called @ Kosovo. PW1 testified that they have arrested other persons apart from Kosovo as they were told that they were involved in killing the deceased and that they were not in good terms with the deceased. PW1 stated that, Thomas Barnaba who identified the accused, was herding goats outside the house when the incidence of murder happened. PW1 concluded by stating that he didn't witness when the accused murdered the deceased as he received that information as an investigator of the case.

Another prosecution witness, PW2, was Jeremiah Mayala who affirmed and testified that he was the chairman of the Bugogo village at the time when the incidence occurred. He testified to know Neema Katumani who is now a deceased. PW2 stated that, on 10/02/2009 around 9:00 hours he was at his office and he heard a shout for help, *yowe* coming on the west side of his office. He went to the house of Mr. Gervas Mkeuzi who is the husband of the deceased and it was the scene of crime as he found many people gathered including the Chairman of the small village of *Kayenze B* namely Zakaria. He said that, he was told by Zakaria that Neema Katumani was murdered and he went to see the body of the



deceased and found that, it was cut by an axe on the neck and head and that the deceased was kneeling down.

PW2 went on that, he made a call to the police station and to Bukoli Health Center and the personnel from those offices went in the scene of crime. PW2 stated that, he interviewed the grandchild of the deceased called Gervas and her daughter in law and both of them mentioned Masumbuko Makeleze @ Kosovo as the culprit. He finalized his evidence in chief by stating that, he didn't know if there is any grudge between the accused and the deceased and that, he had never reconciled any dispute between the two.

In cross examination, PW2 stated that, he didn't witness the accused @ Kosovo murdering the deceased and he was told by the grandchild of the deceased and her daughter in law that, it was the accused who murdered the deceased. PW2 stated that, he knew @ Kosovo because he was one among the *wananzengo* and that last time he met @ Kosovo was two weeks before the incidence. PW2 testified that he also knew that, the other suspect Christopher Mashauri and Mashaka Daudi were arrested but he didn't know the reason for their arrest because by that time he was not the Chairman of the village and he knew that Christopher Mashauri passed away. That was all in prosecution evidence.



After the closure of the prosecution's case and pursuant to the provision of section 293(1) of the Criminal Procedure Act, Cap 20 R.E 2019, I am required to consider if the accused have a case to answer considering the evidence adduced by the prosecution side in this court.

In answering the above question, the Court has to look in its totality the evidence of the prosecution if, in any how implicate the accused person who is before this Court, for this Court to require him to put his defence on the charged offence. It is through the thorough analysis of the available evidence of the prosecution side in its totality and it is by weighing it, when the Court can rule out if the prosecution case can secure a conviction without the accused entering his defence. This is what in criminal law and in particular in criminal cases is known as *Prima Facie Case* which is not defined in our Legislation but it is clearly defined in a number of case decisions including the case of **Director of Public Prosecution v Morgan Malik & Nyaisa Makori**, Criminal Appeal No. 133 of 2013, CAT where it was pointed out that:

"a prima facie case is made out if unless shaken, it is sufficient to convict an accused person with the offence with which he is charged or kindred cognate minor one... the prosecution is expected



to have proved all the ingredients of the offence or minor cognate one thereto beyond reasonable doubt. If there is a gap, it is wrong to call upon the accused to give his defence so as to fill it in, as this would amount to shifting the burden of proof."

To my understanding, the logic behind establishing of a prima facie case lies on a well long-established principle of criminal law that, the accused is only convicted on the strength of the prosecution case and not on the weakness of the defence case, that's why the burden of proving the guilty of the accused person lies on the prosecution and the defence side is not mandated to prove his innocence as he is required only to raise reasonable doubt. It is my considered view that, a reasonable doubt can be raised by the accused if and only if the prosecution has discharged its duty of adducing the evidence that could convict the accused if no explanation is offered by the defence as it was held in the case of **Ramantalal Trambaklal Bhatt v Republic** (1957) EA 332 when defining what is prima facie case when the Court stated that:

"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.”

Furthermore, it is a settled position of law that, in murder case the prosecution not only has the burden to prove that, the offence was committed but has the duty to prove that, it is the accused who is before the court who had actually committed that offence and the case is proved against him on the required standard. In the case of **Mariki George Ngendakama v R**, Criminal Appeal No 353 of 2014, Court of Appeal when sitting at Bukoba among other things stated that:

"It is the principle in law that in criminal cases the duty of the prosecution is two folds, one to prove that the offence was committed, two that it is the accused person who committed it".

The same position was also stated in the case of **Mohamed Matula v R** [1995] TLR 3 where the Court had the following observation:

"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.'

Also, in the case of **Paschal Yoya @ Mganga VS Republic, Criminal Appeal No. 248 of 2017(Unreported)** The Court of Appeal reiterated his stand and had this to say:

" It is a cardinal principle in our jurisdiction that, in cases such as one at hand, it is the prosecution that has a burden of proving its case beyond reasonable doubt. The burden never shifts to the accused. An accused only needs to raise some reasonable doubt on the prosecution case and he need not to prove his innocence"

In our case at hand, the prosecution case is built up by the evidence of PW1 and PW2 who are not eye witness as they received information about who was involved and took part in the murdering of the deceased from the third party. It is a well settled position of law as far as the Law of Evidence is concerned that, oral evidence must be direct as it is provided for under section 62 of the Law of Evidence Act, Cap 6 R.E 2022. It is also the general principle of law that, the evidence of the third party which is commonly known as *hearsay* evidence is not admissible as it denotes the type of evidence which is derived from what is spoken by

another person which goes contrary to the provision of section 62 cited above which requires oral evidence to be direct.

Reverting to our case at hand, the evidence of PW1 and PW2 was narrated to them by the witnesses who did not come in this court to testify. It is a settled principle of law that, hearsay evidence is inadmissible unless it is corroborated by other pieces of evidence. (See the case of **Daimu Daimu Rashid (@) Double D vs Republic**, Criminal Appeal No.5 of 2018). In our case, PW1 and PW2 evidence lack corroboration as both are hearsay evidence. PW1 testified that, he was told by the daughter in law of the deceased that, it is the accused who is before the court who killed the deceased but his evidence was not corroborated by her, who is alleged to be an eye witness who witnessed the accused when he murdered the deceased.

Furthermore, PW1 testified that, the identification parade was conducted and the accused was identified, but nothing in this court exhibit that the identification parade was conducted and the accused was identified as there was no identification parade register that was tendered and there is no single witness who participated in that parade came to testify on his participation. In addition to that, PW1 evidence proves that, the accused was arrested, but this fact has no value to add in the



prosecution case and therefore in its totality his testimony adds no weight to the prosecution case.

Turning to the evidence of PW2 who narrated that he was told by the grandchild of the deceased and the daughter in law of the deceased that, it was the accused who killed the deceased but no evidence to corroborate his testimony as he testified that, different suspects were arrested in connection with the murder of the deceased. This leaves a lot of doubt in the prosecution case because, if there was an eye witness who witnessed the murder of the deceased, why other suspects were arrested in connection with the charge facing an accused person who is before the court.

Coming back again to the evidence gathered in the court file in which the sketch map of the scene of crime was drawn and admitted as Exhibit P2, which lays out the sketch outlook of where the incident happened on the day in which the alleged offence is said to have been committed. The sketch map of the scene of crime, Exhibit P2 does not describe further to build up the prosecution case. The same goes to Exhibit P1 which was tendered and admitted during the preliminary hearing in which the prosecution targeted to prove that the deceased death was unnatural. It is true that, the cause of death was not natural



as it was caused by *haemorrhage shock due to excessive blood loss*. There is no doubt that, the assailant had malice and contemplated to kill, but still the said Exhibit did not by any chance implicate the accused person who is before the court.

Before I wind up, I find it pertinent to refer the case of **Siaba s/o Mswaki v R**, Criminal Appeal No. 401 of 2019, CAT when sitting at Dar es Salaam, among other things pointed out that:

"... it is upon the prosecution to call material witnesses to prove a case beyond reasonable doubt and in exercising this noble task they are not limited in terms of number of witnesses whom they should call. Section 143 of the Law of Evidence Act, Cap 6 R.E 2019 provides in clear terms that there is no particular number of witnesses that is required in proving a case. What is important is the credibility of a witness and weight of evidence."

As highlighted above, in the present case the prosecution called two witnesses to whom their evidence is hearsay evidence which resulted to have failed to prove the case on the required standard to compel this



Court to require the accused person to enter his defence. In other words, the prosecution failed to call material witness to prove the case against the accused person.

In fine, the accused person MASUMBUKO S/O MAKELEZE @ KOSOVO is hereby acquitted to the charge of murder contrary to section 196 and 197 of the Penal Code Cap. 16 Revised Edition 2002 Now 2022, as the prosecution failed to adduce the evidence which could help this Court to find that the accused has a case to answer.

Consequently, pursuant to the provision of section 293(1) of the Criminal Procedure Act, Cap 20 R.E 2022 I find and hold that the accused person has no case to answer and therefore is not guilty of the offence of murder as charged. I order him to be acquitted and the accused person to be immediately released from custody unless lawfully held for other lawful reasons.

It is so ordered

DATED at Mwanza this 04th day of October, 2022.




M. MNYUKWA.
JUDGE
04/10/2022

Right to appeal fully explained.



M. MNYUKWA.

JUDGE

04/10/2022

Court: Ruling delivered in presence of both parties.



M. MNYUKWA.

JUDGE

04/10/2022