

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA**

AT GEITA

ORIGINAL JURISDICTION

CRIMINAL SESSIONS CASE 153 OF 2017

THE REPUBLIC

VERSUS

JOSEPH PHILIPO 1st ACCUSED PERSON

MATHIAS KULWA 2ND ACCUSED PERSON

JOHN PASCHAL 3RD ACCUSED PERSON

RULING

10th October, 2022

Kahyoza, J.:

Joseph Philipo, Mathias Kulwa and **John Paschal** the accused persons, were charged with the offence of murder C/S 196 and 197 of the Penal Code, [Cap 16 R. E 2002, now 2019]. The prosecution alleged that the accused person did, on 21st day of September, 2016 at Burula village within the District and Region of Geita, murder **Mabula S/O Sikitiko**. The accused persons pleaded not guilty to the information. The prosecution summoned five witnesses and tendered six exhibits, certificate of seizure of an ignition key of a motorcycle (Exh. P1), ignition key of the motorcycle (Exh. P2), a

post-mortem examination report (Exh. P3), certificate of seizure of the motorcycle (Exh. P4), the motorcycle (Exh. P5) and a motorcycle registration card (Exh. P6), to establish the accused persons guilty of the offence of murder.

At the close of the prosecution's case, the defence refrained from submitting whether the prosecution established a *prima facie* case. I resolved to give myself time to make a finding whether the accused persons have a case to answer.

This ruling seeks to answer to the issue whether **Joseph Philipo, Mathias Kulwa** and **John Paschal** the accused persons, have a case to answer in terms of section 293(1) of the Criminal Procedure Act, [Cap. 20 R.E 2022] (the **CPA**).

Did the prosecution establish a prima facie case?

It is a duty of a court at this stage to review the evidence to find out whether the prosecution established a *prima facie* case. A *prima facie* case is such evidence as will suffice until contradicted and overcome by other evidence. (See **Black's Law Dictionary** 8th Ed). It is also stated that a *prim a facie* evidence is the evidence good and sufficient on its face; such evidence as in the judgment of the law, is sufficient to establish a given fact.

A *prima facie* case is said to be established where a reasonable tribunal, properly directing its mind to the law and the evidence on record, could convict if the accused is not called upon to defend himself. See the case of **DPP. V. Peter Kibatata**, Cr. Appeal No. 4/2015 CAT (unreported) where the Court of Appeal defined *prima facie* case as follows:-

*"What is meant by prima facie case has been, with lucidity, elaborated and articulated in the case of **Ramanlal Trambaklal Bhatt v Republic** [1957] EA 332-335 where it was stated 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 dose 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 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 may not be easy to define what is meant by a **prima facie**, but at least it must mean 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."*

I find that, there is enough evidence establishing beyond all reasonable doubt that **Mabula S/O Sikitiko** is dead. He died a violent death. According to Dr. **Joseph Malina (Pw2)** and the post mortem report Exh. P. 3, **Mabula S/O Sikitiko's** death was due to severe anaemia/ haemorrhage following *cut wounds inflicted to the deceased all over his body and to his neck*. The only task the prosecution was facing is to link **Mabula S/O Sikitiko's** death with the accused persons.

As sated above the prosecution summoned five witnesses, Insp. Zephania (**Pw1**), Dr. **Joseph Malina (Pw2)**, F. 3040 D/CPL Joseph (**Pw3**) Sara Pascal (**Pw4**) and Bahati Ngaye (**Pw5**). There is no single prosecution witness linked **Joseph Philipo**, the first accused person and **Mathias Kulwa**, the second accused person with the death of Mabula Sikitiko. The evidence of all five witnesses only point to John Pascal, the third accused person. The Court of Appeal in the case of **Director of Public Prosecution V. Morgan Maliki and Nyaisa Makori**, Criminal Appeal No. 133/2013 (unreported) referred to the case **Rammahlal Frambakkal Bhatt V. R** (1957) EA 332 and **Mrimi V. R** (1967) on when can the evidence on record be said to establish a *prima facie* case had the following to say;

"So, on the principles set out in BHATT's and MURIMI cases, we think 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. Which means that this stage, the prosecution is expected to have proved all the ingredients of the offence or minor, cognate one thereto beyond reasonable doubt. If there is any 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."

There is no evidence let aside sufficient evidence to establish a *prima facie* case against **Joseph Philipo**, the first accused person and **Mathias Kulwa**, the second accused person. It would be to abdicate my duty and also an error in law to call upon **Joseph Philipo** and **Mathias Kulwa** defend themselves. The defunct Court of Appeal of East Africa in **Murimi V. R** (1967) E.A 542, took a position that to put an accused person on defence, when the prosecution has not established a *prima facie* case is an error. It stated that-

".....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 is wrongly called on his defence then this an error of law...."

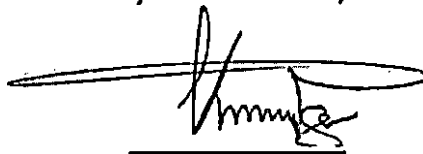
In short, without the prosecution establishing a **prima facie** there is no justification or legal basis for putting the accused through the trouble of

having to defend himself. Having considered the evidence on record as against **John Paschal** the third accused person, I find that he, **John Paschal** has a case to answer.

As to the evidence against **Joseph Philipo** and **Mathias Kulwa**, I find that the evidence does not establish a *prima facie* case against **them** to require them to enter a defence under S. 293 (1) of the **CPA**. Consequently, I dismiss the charge and acquit the first accused person, **Joseph Philipo**, and the second accused person, **Mathias Kulwa** of the offence of murder C/S 196 & 197 of the Penal Code [Cap. 16 R. E. 2019].

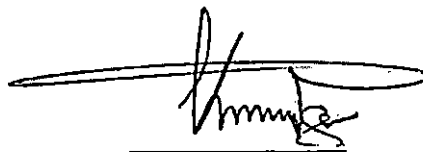
It is so ordered.

Dated at Mwanza this 10th day of October, 2022.



**John R. Kahyoza,
Judge**

COURT: Ruling delivered at 02:30 pm in the presence of Mr. Clemence, the prosecuting State Attorney and the accused persons and their advocate, Mr. Bugoti, B.A. Ms. Jackline present.



**John R. Kahyoza, J.
10/10/2022**