IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB- REGISTRY

AT MUSOMA

CRIMINAL SESSIONS CASE NO. 178 OF 2022

THE REPUBLIC

VERSUS

1. JOHN S/O JOSEPH @ JULIUS MGUSUI

2. MWITA S/O RHOBI @ MWITA

RULING

6th December, 2022.

BEFORE F.H. MAHIMBALI, J.

Mr. John s/o Joseph @ Julius Mgusui and Mwita s/o Rhobi @ Mwita, accused persons in this case are charged under section 196 and 197 of the Penal Code Cap 16 for allegedly murdering one NYAMHANGA S/O GIBAGRI. It has been alleged that the said murdering was done on 23rd day of December, 2021, at Rwamchanga Village, within the District of Serengeti in Mara Region. When information was read over and explained to them, each pleaded not guilty denying to have committed the alleged offence they are charged with.

It has been alleged by the prosecution that on the date of the incident i.e on the 23rd day of December 2021, the 2nd accused person (Mwita Rhobi @ Mwita) after had conspired with the 1st accused person (John Joseph @ Julius Mgusui) had murdered the deceased Nyamhanga Gibagri following the latter had earlier injured the 1st accused person (John Joseph @ Julius Mgusui) by a stone hit on his backbone on a claim of land dispute. On revange, the 1st accused person then conspired with the second accused person whereby he paid him 700,000/= for the execution of the said murder on revange of the hit injury by stone executed on his backbone. That conspiracy was executed on the 23rd day of December, 2021 by the 2nd accused person by cutting the deceased by use of sharp panga, separating the head from the rest of the body.

No body was suspected of the said murder until when the wife of the first accused person had blown the whistle by naming the first accused person and the second accused person before police officer (PW1) where then on different dates were arrested and interrogated. Each is said to have admitted the commission of the said offence by way of cautioned statements.

Both cautioned statements were attacked with high resistance from defense. Whereas the first cautioned statement for the first accused person John Joseph @ Julius Mgusui was attacked amongst other things for being recorded earlier than the date of the commission of the offence (i.e on 11th January, 2021 against 23rd December, 2022 which is the date of the commission of the offence). With the second accused person's confession statement suffered the admission test after it was recorded beyond statutory period after he was put under restraint. The reasons for its delay didn't suffice the legal test. Thus, both cautioned statements were not admitted as exhibits of the case.

The only available sensible evidence in respect of the case, remained only, exhibit PE1 (postmortem report of the deceased person) which established the cause of death of the deceased being due to the cut off neck, leading to the severe hemorrhage following the cut of cervical bones.

In essence, the only evidence to establish murder of the deceased person associating it with the accused persons was only by the cautioned statements (accused persons' own admission). There was no any direct evidence. The law is, the very best of witnesses in any criminal trial is an accused person who freely confesses his guilt (See **Mohamed**

Haruna @ Mtupeni v. The Republic, Criminal Appeal No. 259 of 2007, **Mabala Masagi V. Mongwa**, Criminal Appeal no. 161 of 2010, **Juma Jembu @Issa V. Republic,** Criminal Appeal No. 318 of 2019, all unreported). However, for it to mount conviction, there ought to have passed its admission test and further that there has been corroboration or warning that the said evidence is nothing but truthful. In this case, the admissibility test of the only evidence (cautioned statements) has been hard to pass following the legal weaknesses over the recorded statements. One, was not properly dated conflicting it with the date of commission of the said offence and the other being recorded out of the prescribed time.

Upon the closure of the prosecution evidence/case, this court is required in terms of section 293 (1) of the Criminal Procedure Act to make a finding if this evidence adduced has established a case to answer against the accused person as charged for the offence of murder.

It is a mandatory procedural requirement that after the closure of the prosecution case, the court is required under section 293 of the CPA to prepare a ruling, finding as to whether the evidence by the prosecution has established the prima facie case for the accused person to answer it.

The term prima facie case has not been statutorily defined. However in the case of **Director of Public Prosecution Vs Morgan Malik & Nyaisa Makori,** Criminal Appeal No 133 of 2013 CAT- (unreported) it was held inter alia 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"*

In **Ramanlal Trambaklal Bhatt Vs The Republic**, (1957) EA 332, defines prima facie to 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".*

This means, at the closure of the prosecution case, the prosecution must have given sufficient evidence capable to convict an accused person should the accused person be denied or forsaken the right to defend himself. That being the case, it is worthy and instructive at this stage, to

consider whether under section 110 and 112 of the TEA read together with section 3 (2) (a) of the Evidence Act [Cap 6 RE 2019] in as far as the burden and standards of proof is concerned the prosecution case has been made out.

In this case, the accused persons are jointly charged with an offence of murder contrary to section 196 and 197 of the Penal Code (supra). Under this law, the prosecution was supposed to prove the followings:

i. That the said NYAMHANGA GIBAGRI, was actually murdered.

ii. That those who murdered the deceased had unlawfully, or had knowledge that the act or omission of killing him (malice aforethought).

iii. That the said murder was actually caused by the accused persons in this case.

In this case PW2 suggests that the accused persons are the ones who committed that offence of murder as charged. The evidence by PW2 is hardly credible to rely on following the non-admission of the cautioned statements of the accused persons he relied on.

It is trite law that every witness is entitled to credence and must be believed and his/her testimony accepted unless there are good and cogent reasons for not believing a witness. This is as per the case of **Mathias Bundala vs Republic ,** Criminal appeal No. 62 of 2004 CAT at Mwanza where it approved the case of **Goodluck Kyando vs Republic** (2006) TLR 363, where the court held that:

> *"it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless they are good and cogent reasons for not believing a witness".*

Since relevancy of the cautioned statement in respect of the first accused person (John Joseph @ Julius Mgusui) lacks legal value, then credence to PW2 is questionable.

In the case at hand, after the admissibility test of the accused persons' cautioned statements have collapsed, there is nothing material evidence remaining with the case making the accused persons responsible. All that said by the PW2 is now nothing, but merely hearsay.

It is the trite law that an admission of an accused person in criminal trial is the very best evidence if that person freely confesses his guilty (see **Mabala Masagi V. Mongwa**, Criminal Appeal no. 161 of 2010). However,

for the said admission to be actionable/incriminating must be credible and truthful.

Should this Court exercising its full legal mind reach to a finding of guilty against the accused persons in the event they elect to remain mute in their defense? In this case, there is nothing tangible established connecting the accused persons and the charge. All that has been stated by the prosecution is the proclamation that, deceased person is dead but not otherwise. For that reason, I find this case to be a proper case in which prima facie case by the prosecution has not been established in the required legal standard.

That said, the accused persons are found to have no case to answer, consequent of which, they are accordingly acquitted under section 293 (1) of the Criminal Procedure Act [Cap 20 RE 2019].

Right to appeal is hereby explained to any aggrieved party.

It is so ordered.

DATED at MUSOMA this 6th day of December, 2022.

THE HIGH COURT OF TANZANIA
MUSOMA

F.H. Mahimbali

Judge