IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(BUKOBA DISTRICT REGISTRY)

SITTING AT BUKOBA

ORIGINAL JURISDICTION

CRIMINAL SESSION CASE NO. 21 OF 2017

THE REPUBLIC

VERSUS

GIDIUS S/O PROTAZ @MHOZA.....1ST ACCUSED

GERALD S/O BASIGABO @BYELA.....2ND ACCUSED

GERALD S/O KADOGO@ BYARUGABA .....3RD ACCUSED

RULING

07/12/2022 &13/12/2022
E. L. NGIGWANA, J.

This is a ruling to determine whether from the evidence adduced, the prosecution has made out a primafacie case against the accused persons to warrant them being called upon to make their defence.

It is a mandatory procedural requirement stipulated under the provisions of section 293 (1) of the Criminal Procedure Act Cap. 20 R: E 2022, that upon the closure of the prosecution case, the court is duty bound to determine whether the prosecution has established *a primafacie case* sufficiently to require the accused person/persons to enter a defence.

At this stage, the Judge is ought to consider whether the evidence, when taken at its highest, is such that the court properly directing its mind to the law and the evidence adduced before it, could not properly convict upon it.

If the answer to that is **yes,** the Judge should make finding of not guilty and proceed to dismiss the charge and acquit the accused person accordingly. The High Court of Kenya in the case of Republic **versus Elizabeth Nduta Karanja and another [2006] KLR** Criminal Case No.52/2005 stressing on this position had this to say;

"Without such primafacie justification, there is no legal basis for putting the accused through the trouble of having to defend himself."

If the answer to the question above is **no**, the Judge must make a finding that a primafacie case has been established against the accused person/persons to warrant the accused to give out his or her defence, and he/she must address him/her/them the rights in the terms of section 293 (2) of the Criminal Procedure Act Cap 20 R:E 2022.

Since this ruling is to determine whether the prosecution has managed to establish a primafacie case, it is apposite to know the meaning of the term primafacie case. The term *primafacie case* has not been defined in the statutes, however, in the case of **Ramanlal Trambaklal Bhatt versus R** [1957] EA 332, the term primafacie case was defined 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. In the case of **Director of Public Prosecution Versus 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 e 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 the case at hand, the accused persons Gidius s/o Protaz@ Mhoza, Gerald s/o Basigabo@ Byela and Gerald s/o Kadogo@ Stand charged with two counts of Murder contrary to section 196 and 197 of the Penal Code cap. 16 R: E 2002, now R.E 2022.

In count one, the particulars of the information state that; the accused persons on 28th day of June 2016 at Ruhita Village within Karagwe District in Kagera Region, did murder one Valelia w/o Thobias.

On count two, the particulars of the information state that; the accused persons on 28th day of June 2016 at Ruhita Village within Karagwe District in Kagera Region, did murder Riziki d/o Thobias.

On arraignment, each accused person pleaded not guilty to the information. In the efforts to prove the allegations, the prosecution summoned six (6) witnesses and tendered three (3) exhibits to wit; two Postmortem Examination Reports (Exh.P2 and P3 respectively) and sketch map of the crime scene (Exh.P1)

In this case, Mr. Erick Shija and Mr. Noah Mwakisisile, both learned State Attorneys appeared for the Republic while the accused had the legal service of Mr. Samwel Angelo, learned advocate.

The evidence of all prosecution witnesses; Anaclet s/o Anator@ Banana (PW1), Mustafa s/o Makolenda (PW2), E.6902 D/Sgt Peter (PW3), Innocent

s/o Paul (PW4), Nyange s/o Julius (PW5), and Albart s/o Thobias (PW6) is to the effect that death of the deceased persons occurred on 28/06/2016 and their death was unnatural as they were assaulted and burnt to death. **In the case of Guzambizi Wesonga versus Republic (1948) 15 EACA, it was held that;**

"Every homicide is presumed to be unlawful except where the circumstances make it excusable or where it has been authorized by the law. For homicide to be excusable, it must have been caused under justifiable circumstances, for example in self-defense or in defence of property'.

The postmortem reports on examination of the bodies of the deceased persons were duly produced and admitted as **Exh. P2** and **P3** respectively. PW4 who conducted an autopsy confirmed that the deceased persons died and the cause of death **was severe burn of their bodies.**

The next issue is whether there is cogent evidence that the accused persons were properly and correctly identified as persons who murdered the deceased persons?

PW1 told this court that he identified three persons namely; **Museven Katto, Kipusi Katto and Bwenge Antony**, and heard them saying let us burn these people " *Hawa watu tuwachome"* . There is no doubt the persons named by PW1 are not here in court, therefore, it cannot be said that the accused persons were identified by PW1.

PW2 confirmed that the incident occurred but he did not see the accused persons assaulting the deceased persons or burning their bodies. He just said he saw the following people beside the burnt bodies; Museven Katto,

Byera Byarugaba, Kipusi Katto, Bwenge Anatory, Gidius Protaz (1st accused) and Kadogo (3rd accused).

The evidence of PW3 is to the effect that the incident of murder took place but gave no evidence linking the accused persons with the offence of murder. He just played the role of drawing the sketch map of the crime scene which was admitted as Exhibit P1.

PW4 carried out postmortem examination and prepared Reports on Postmortem Examination which were admitted as Exh.p2 and P3 respectively. He had no evidence linking the accused persons with the offence.

The evidence of PW5 was to the effect that he arrested the accused persons on 20/07/2016 and other persons who are not here in court on allegation that they are the persons who killed the deceased persons. He added that he relied on the statement of one Albart Thobias, therefore according to him, the key witness who can connect the accused person with the offence is Albart Thobias.

Reading the evidence of PW1, PW2, PW3, PW4 and PW5, it goes without saying they are not the identifying witnesses. Their evidences apart from proving the two persons were murdered and finally burnt; it does not go further to link the accused persons with the offence of Murder.

In that premise, the only witness who is alleged to have witnessed the accused persons committing the offence of murder is PW6. PW6 who is the son of the deceased Valeria Thobias testified that on the material day, more than 80 people gathered at the scene of crime, and started assaulting the deceased person using sticks on allegation that it was

confirmed by the traditional doctor called Manyiriza that they were witches who had hidden and finally killed the child namely Jordan Mabweso who went on missing and finally recovered dead. PW6 added that, he managed to see and identify three persons namely Gidius, Byera and Kadogo as they were not strangers to him since they live in the same Village.

However when asked whether he knows the accused persons, he said he knows them by face and names, and he identified the 1st accused by the name of "**Kadogo**" and the 3rd accused by the name of **"Gidius"**. He added that Gidius and Kadogo had sticks and had used the same to assault the deceased persons. He added that he heard one person (though he could not mention his name) saying**" Kale Katoto ka huyu mama kako wapi tukaue",** therefore he decided to run away from the scene of crime and hide himself in the house of one Benjamin and later came back after the arrival of the police and found that both deceased were already burnt.

When cross-examined, he said that he did not mention the accused persons in his statement recorded at police that they had sticks. He added that he did not mention the names of the accused persons in his statement because he was very young and sympathetic. He also said, he saw and identified the accused persons from the back but could not remember how they dressed on that day. He also admitted that the area had banana plants and coffee trees to make the identification difficult. He said that in their village, whenever there is a drum beat calling people to assemble, everyone has the duty to assemble therefore, since there were drums beat, the accused persons gathered like other villagers.

In his oral final submissions, Mr. Erick Shija, learned senior State Attorney relied on the evidence of PW6 and submitted that, the prosecution has managed to establish a primafacie case against the accused persons because they were correctly identified by PW6 considering the fact the incident took place during the day, the accused persons were not strangers to PW6. He made reference to the case of **Shamir John versus the Republic,** Criminal Appeal No.166 of 2004 (Unreported) held that where the accused persons are well known to the identifying witness, there is no need for of conducting an identification parade. He added that the accused persons were mentioned to the police by PW6.

On his side, Mr. Samwel Angelo, defence counsel submitted PW6 who was alleged by the prosecution as their key witness is not reliable and credible witness because what he stated in his statement which was recorded at police is different from what he testified here in court as in his statement, PW6 did not mention the accused persons as persons who had sticks and who assaulted the deceased persons and when cross-examined as to why he did not mention them, he said he did not do so because he was young. The learned counsel referred this Court to the case of **Kibwana Salehe v. Republic** (1968) H.C. D 391 where it was held that the law is clear that, if a witness has previously made a statement contradictory to his statement at the trial, his testimony should be viewed with great suspicion and shall only be acted upon where the witness has given sufficient explanation for changing the story. He went on submitting that, the evidence of visual identification by PW6 was not water tight since as per PW6, there were banana plants and coffee trees in the scene of crime and he said he saw the accused persons from the back, and could not even describe how the

accused persons were dressed and which role did they exactly play in the commission of the offence. The learned defence counsel made reference to the case of **Waziri Amani versus R.** [1980] TLR 250 where it was emphasized that the evidence of visual identification has to be absolutely watertight. He further submitted that PW6 could not even identify the accused persons by their names here in court despite his evidence that they do live in the same Village.

The question which needs to be addressed is whether the accused persons were properly and correctly identified by PW6 as the persons who committed the offence Murder? In the case of **Waziri Amani v. Republic (Supra)** it was held that;

"Evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight."

The Court further stated that,

"Although no hard and fast rules can be laid down as to the manner a trial Judge should determine questions of disputed identity, it seems dear to that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would, for example, expect to find on record questions as the following posed and resolved by him: the time the witness had the accused under observation;

the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not."

In **Raymond Francis v. Republic** [1994] TLR 100, the Court of Appeal had this to say;

"It is elementary that a criminal case whose determination depends essentially on identification evidence on conditions favoring a correct identification is of utmost importance."

In the case of **VITALIS BERNARD KITALE VERSUS REPUBLIC,** Criminal Appeal No. 263 of 2007, (CAT) Arusha, (unreported) the Court of Appeal held that;

"*We do not think that knowing the appellant alone is sufficient. There should be more concrete detailed description of the appellant. The witness should have given a description of the appellant as he saw him at the time of the incident*".

In the instant case, the evidence of PW1, PW2, PW5 and PW6 confirms that the deceased persons were the victims of the mob justice or injustice perpetrated by a group of Villagers of Ruhita Village who according to PW1 and PW6 were more than eighty (80), who decided to prosecute, judge and punish the deceased persons on allegations they are witches and they murdered a child called Jordan Mabwezo who went on missing from 27/06/2016 and on 28/06/2016, his body was recovered few meters from their house with the edge part of the tongue, nails and genital organs missing.

The High Court of Kenya at Busia in the case of **Republic versus Folrence Kola and Another** [2021] eKLR, when addressing a murder case in which the deceased was murdered in a mob justice incident had this to say.'

"In situations where the death of the deceased is attributed to "mob justice" it is difficult if not impossible to pinpoint which person in the mob administered the killing or fatal blow."

Furthermore, the High Court of South Africa in the case of **Zingeleza Mzwempi versus the State, 284/04** it was held that;

"The participation of each accused in the death of the deceased must be analyzed separately. If it cannot be said that a particular accused actively participated or associated him or herself with the conduct which caused the death or other crime, then the action of those who caused death cannot be imputed to the particular accused and must be acquitted. "

As per the case of **Lidumula s/o Luhusah @Kusaga versus the Republic,** Criminal Appeal No. 352 of 2020, CAT (Unreported), the Court emphasized that it is participation which is punishable by law. A mere presence at the scene of crime does not constitute one a party to an offence. See **Damiano Petro and Jackson Abraham v. R** [1980] TLR 260.

Being guided by the herein above Court of Appeal decisions and drawing inspiration from the herein above persuasive cases, considering the circumstances of the commission of the offences and the number of people gathered at the scene of crime, it goes without saying that it was difficult if not impossible to pinpoint which person in the mob administered the

killing, and in absence of cogent evidence on how each accused participated himself in the killing of the deceased persons, it is also difficult to link them with the offence, and establish malice aforethought as well as common intention.

The evidence which is attempting to link the accused person with the offence of murder is the evidence of PW6. I am alive as per the case of **Goodluck Kyando versus Republic [2006] TLR 363** that every witness is entitled to credence and be believed unless there are reasons to disbelieve him/her. Applying the principle to the matter at hand, it is the finding of this court that PW6 is not a credible identifying witness because in his statement which was recorded at police which admitted in court as **S1** for the purpose of contradicting him, he stated that the deceased were assaulted by Severen Katto@ Museveni, Datius Elizeus, Mchunguzi Felician@ Lusoha, Byera Basigabo@Gerald, Bwenge Anatory, Mhoza Protaz@ Elgidius, Kipus Kato, Chabona Razari. He also stated that the one who had a stick was Kipusa Kato.

When cross-examined, he said he did not mention the accused persons at police because he was young. When further cross-examined he said he identified the accused persons from back. He also said people were more than 80 and the scene of crime was not an open place due to banana plants and coffee trees. He did not explain how he managed to identify the accused persons in the group of more than 80 people but also failed to explain the role played by each accused.

According to him, the accused persons were well known to him by face and names, but here in court, he failed to identify them by names. On

further cross examination, he disputed to have ever given his statement to the police. He also said the accused persons were there like other villagers.

Indeed, the deficiencies in identification evidence are very basic and they render the evidence of identification by PW6 highly suspect, hence unreliable. As a matter of law, where the prosecution evidence has been so discredited as a result of cross examination or is so unreliable like in our case as it appears herein above, a submission of no case to answer may be upheld by the court. This position was set by the Court of Appeal In the case of **Republic versus Edward Moango**, Criminal Appeal No.103 of 1999 (Unreported) where was held that;

"A submission of no case to answer may properly be upheld where there is 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 it is so unreliable that no tribunal (if compelled to do so) would at the stage convict". See also the decision of the Supreme Court of Seychelles in R ***versus Ahmed and Others (CO 69/2017) [2018] SCS C.8661.***

In the persuasive case of the High Court of Kenya; **Republic versus Robert Zippor Nzilu**, Criminal Case No. 14 of 2018, court while addressing the issue of primafacie case, cited with approval the case of **Public Prosecutor versus Saimin and Others** [1971] 2 MLJ 16 where it was held among other things that;

"It is the duty of the prosecution to prove the charge against the accused beyond reasonable doubt and ***the court is not entitled merely for the sake of the joy of asking for explanation or the gratification of***

knowing what the accused have got to say about the prosecution evidence to rule that there is a case for the accused person to answer."

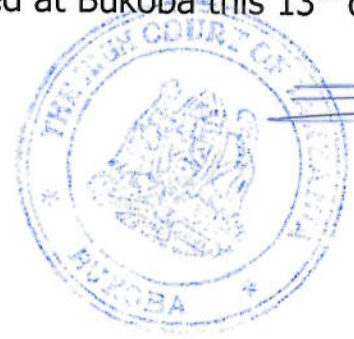
Generally, in order to decide that the accused person has a case to answer, the prosecution must have given sufficient evidence capable to convict an accused should the accused person forsakes the right to defend himself or herself. The court is not entitled merely for the sake of the joy of asking for explanation or the gratification of knowing what the accused have got to say about the prosecution evidence to rule that there is a case for the accused person to answer. In other words, where the trial court is satisfied after the closure of the prosecution case that there had been no evidence to prove the essential element of the of the crime or that the evidence had been discredited as a result of cross-examination or that the evidence was so manifestly unreliable that no reasonable tribunal could safely convict upon it, the accused should be relieved of the responsibility of defending himself.

In this case, I agree with the prosecution and the defence side that there is cogent evidence establishing that, Valelia w/o Thobisa and Riziki d/o Thobias really died unnatural death. I also agree with both prosecution and defence the only evidence linking the accused persons with this offence is the evidence of PW6 whose evidence has been so discredited as a result of cross examination but also it is so unreliable that no tribunal (if compelled to do so) would at the stage convict. It is worth noting that the evidence of PW6 that the accused persons were present at the scene of crime and formed part of the crowd, without any cogent evidence of their participation in the events which resulted in the death of the deceased

persons, is insufficient to warrant a finding of active participation. So however sympathetic this court may be to the circumstances under which the lives of the deceased persons were eliminated, it is bound by the confines of the law because courts are not courts of sympathy but courts of law and procedures.

Having said all, I find that the prosecution has failed to establish a primafacie case against the accused persons to require them to enter a defence. Consequently, I hereby under the terms of section 293 (1) of the Criminal Procedural Act, Cap. 20 R: E 2022 dismiss the charge and acquit the accused persons of both offences of Murder contrary to section196 and 197 of the Penal Code Cap 16 R: E 2022. It is so ordered.

Dated at Bukoba this 13th day of December, 2022.



E .L. NGIGWANA

JUDGE

13/12/2022

Ruling delivered this 13th day of December, 2022 in the presence of the accused persons, Mr. Samwel Angelo, defence counsel, Mr. Erick Shija and Mr. Noah Mwakisisile, both learned State Attorneys for the Republic, Hon. E. M. Kamaleki, Judges' Law Assistant and Ms. Lonsia Kyaruzi, B/C.

E. L. NGIGWANA

JUDGE

13/12/2022