

**IN THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**(DISTRICT REGISTRY OF MBEYA)**  
**AT RUNGWE**  
**CRIMINAL SESSIONS CASE NO. 65 OF 2020**  
**THE REPUBLIC**  
**VERSUS**  
**ANDREA MALUNGANO @ KALUMBWE**

**RULING**

Date of Hearing: 07.12.2022  
Date of Ruling : 07.12.2022

**MONGELLA, J.**

This Ruling is on whether the prosecution, after closure of its case, has managed to establish a prima facie case against the accused person, Andrea Malungano @ Kalumbwe, for him to be required to enter defence in terms of **section 293 (2) of the Criminal Procedure Act, Cap 20 R.E. 2019**. Under this provision, the Court is required to call upon the accused person if at the closure of the prosecution case it considers that there is evidence that the accused person committed that offence or any other minor or alternative offences under the provisions of section 300 to 309 of the Act.

If the Court considers that there is no evidence that the accused person or any one of several accused persons committed the offence or any other minor or alternative offence under the provisions of section 300 to 309 of the Act, it is required to record a finding of not guilty.

Before embarking on the journey of ruling whether a prima facie case has been established by the prosecution, I wish first to expound on what amounts to prima facie case as ruled out by the courts in various cases. In the case of **Republic vs. Kakengele Msangikwa** [1968] HCD No. 43, 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 defence."*

The Court in this case followed with approval the principle laid down in the case of **Ramanlal Trambaklal Bhatt vs. Republic** [1957] EA 332 at page 334 whereby it was stated:

*"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 closure 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 defence is made, but rather hopes the defence 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 is true, as Wilsin, 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."**

In consideration of the above authorities, I can therefore say that a prima facie case can be said to have been established by the prosecution where in consideration of the prosecution case as a whole, a conviction can be entered against the accused person unless the said evidence is rebutted on defence. See also: **The Republic vs. Samwel George Hiza @ Mwagavumbi & 3 Others**, Criminal Sessions Case No. 122 of 2019 (HC at DSM, unreported). In the case at hand therefore, the question is whether the prosecution has established a prima facie case against the accused person.

The accused person, **Andrea Malungano @ Kalumbwe**, is before this Court arraigned for the offence of Murder contrary to **section 196 and 197 of the Penal Code, Cap 16 R.E. 2002**. The facts as laid down in the charge are to the effect that, on 28<sup>th</sup> September 2019, at about 20:00 hours, at Ilundo village within the district of Rungwe in Mbeya region, did murder one Tausi d/o Katela, his step mother.



In proving the offence the prosecution mounted five (5) witnesses. PW1, one Dr. Justine Malekela, testified as to the cause of death of the deceased. He said that the deceased died of unnatural death where upon examining her body he discovered that she was cut on the back of her head and hands with a sharp object, thus died out of severe bleeding. In fact there is no dispute regarding the death of the deceased.

PW2, one Debora Sambo Mwakipome, testified that she was approached by two children who told her that their grandmother is being cut at home by some people. As she was heading to the church, she went and informed other church members who together went to the crime scene and saw the deceased taken out of the house and rushed to hospital. She categorically said that she did not see the person who committed the offence and does not know who the person is.

PW4, the investigating police officer, said that he interrogated the accused at the crime scene in the presence of the hamlet chairperson (Simoni) and other police officers. That in the interrogation the accused confessed to have a conflict with the deceased on family inheritance properties/farms and that he accused the deceased of witchcraft whereby he claimed that she killed his biological mother and two children. That, seeking for revenge, the accused involved one named "SHORT" in planning to kill the deceased and to rob her properties, including a TV.

The statements adduced by PW4 in his testimony are the exact statements contained in the cautioned statement tendered by PW5, and

which the accused objected on assertion that he never made such statements. That, they were added by the police. In my Ruling on the Trial within Trial, I reserved my deliberation on this complaint with intent to revert to the same in this Ruling and or Judgment whereby I shall consider the claim in relation to the rest of the prosecution evidence. I find this being the opportune moment to deliberate on the same to establish whether the statements were really made by the accused to render a prima facie case established against him by the prosecution. This is because this is the only piece of evidence purportedly linking the accused with the offence as there was no any eye witness to the commission or planning of the offence charged.

As stated earlier, PW4 stated that when he interrogated the accused at the crime scene, the hamlet/village chairperson was among the persons present. This was also admitted by the accused during Trial within Trial. The said hamlet chairperson named Simoni Mwashibanda testified as PW3. In his testimony however, he never stated that the accused gave such statement. He said that he was aware of the fact that the accused had a conflict with his late father, one Mzee Malungano, concerning a farm that he gave the accused and later took it back and sold it. That, he was involved in resolving the said conflict but in vain. He added that the buyers of the said farm have already erected buildings thereat and are residing there, but the accused has never bothered them.

When specifically asked as to the conflict between the accused and his step mother, the deceased-Tausi Katale, PW3 categorically stated that there is no any conflict between them. He said that the conflict was only

between the accused and his late father regarding a farm. He never testified to have heard the accused confess at the crime scene on existence of any conflict between him and the deceased (his step mother) or on any plan to kill the deceased. PW3 in fact stated that he failed to understand why the accused and her sister Margret were arrested in connection to the murder.

In my considered view, there is material contradiction between the testimony of PW4 and that of PW3 as to whether the accused confessed before them of planning to rob and kill the deceased following a conflict on properties and witchcraft accusations. The contradictions, in my view go to the root of the matter thus diminishing the credibility of the evidence adduced. The law is clear that material contradictions between the witnesses diminish the credibility of the witnesses and raises doubts as to the guilt of the accused. See: **Amani Bwire Kilunga vs. The Republic**, Criminal Appeal No. 372 of 2019 (CAT at DSM, found at Tanzlii); and **Jeremiah Shemweta vs. Republic** [1985] TLR 228.

The prosecution through PW5, presented evidence that one Simon Malungano (a sibling to the accused) gave a statement, recorded by him (PW5), to the effect that there was a conflict between Tausi and the accused and between him and the accused. That the conflict resulted from witchcraft accusations to the effect that the deceased (Tausi) was a witch and she killed the accused person's mother and two children through witchcraft. PW5 added that the said Simon told him that he had a conflict with the accused and was defending the deceased-Tausi Katale. In my view, in the absence of the said Simon Malungano testifying





in court, the assertions by PW5 remain hearsay and unfounded. Simon in the circumstances becomes a key witness. The law is trite to the effect that failure to furnish a key witness leads to an adverse interpretation against the party who was to furnish the said witness to the effect that if the witness was called, he/she would have adduced evidence in disfavour of the party. See: **Aziz Abdallah vs. Republic** [1991] TLR 71.

PW4, the investigating officer, when probed by the Court as to whether, after interrogating the accused person at the crime scene, recorded a cautioned statement and took him to a justice of peace to have his extra-judicial statement recorded; testified that the accused was taken to the justice of peace and gave an extra judicial statement after his cautioned statement was procured. In the circumstances whereby the accused denies making the incriminating statements, which link him to the offence, the extra-judicial statement was a crucial piece of evidence to corroborate the prosecution evidence and refute the accused person's claim that he never made the incriminating statements and that the same were added by the prosecution.

The Court, in my view, would have been in a position to see if the accused maintained the statements he purportedly averred in the cautioned statement or not. However, for reasons best known to the Prosecution, no justice of peace or extra-judicial statement was tendered in evidence. This situation is in fact interpreted against the prosecution. See the case of **Bernard Masumbuko Shio & Another vs. Republic**, Criminal Appeal No. 213 of 2007 (CAT at Arusha, unreported) in which the Court

held that failure to tender an exhibit in possession of the prosecution is interpreted to the detriment of the prosecution.

PW5, categorically stated to have read the cautioned statement to the accused person as he cannot read properly. Considering the contradictions between the prosecution witnesses as to what the accused exactly confessed and considering the circumstances that, in the absence of the testimony of a third party as to whether each and every statement was read before him, I am of the view that the benefit of doubt should be accorded to the accused to the effect that he never made the incriminating statements in the cautioned statement and that the said incriminating parts of the cautioned statement were probably not read to him, despite him signing the verification.

Lastly, I wish to remark that I find it implausible that the police never bothered to search for the said "SHORT" if at all he was mentioned by the accused to have been sent by him to rob and kill the deceased. In my considered view, if the accused indeed told the police that "SHORT" took the TV, it surprises that they never bothered to even interrogate the accused to find out where he resided and go to him to collect evidence and arrest and charge him as well.

Having observed as above, in terms of **section 293 (1) of the Criminal Procedure Act, Cap 20 R.E. 2019**, I find that there is no sufficient evidence mounted by the prosecution that establishes prima facie case against the accused person. Accordingly, I record the finding of **not guilty** against the





accused, **Andrea Malungano @ Kalumbwe**, and do hereby **acquit** him of the charge of murder.

Dated at Mbeya on this 07<sup>th</sup> day of December 2020.

  
**L. M. MONGELLA**

**JUDGE**

**Court:** Ruling delivered at Rungwe in open court on this 07<sup>th</sup> day of December 2022 in the presence of the accused and his advocate, Mr. Ezekiel Mwampaka and Ms. Rehema Mgeni, learned state attorney for the Republic.



  
**L. M. MONGELLA**

**JUDGE**