IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB- REGISTRY

AT TARIME

CRIMINAL SESSIONS CASE NO. 13 OF 2021

THE REPUBLIC

VERSUS

1. CHACHA S/O MWITA @ MARWA

2. BONIFACE S/O CHACHA @ NYANGURU S/O MWERA

RULING

8TH FEB. & 8th FEB, 2022.

BEFORE F.H. MAHIMBALI, J.

CHACHA S/O MWITA @ MARWA and BONIFACE S/O CHACHA @ NYANGURU S/O MWERA accused persons in this case are jointly charged under section 196 and 197 of the Penal Code Cap 16 for allegedly murdering one WAMBURA S/O MGONCHE CHORWA on 30th day of December, 2018, at Rhebu Street within Tarime District in Mara Region. When information on murder was read over to them, they pleaded not guilty and denied to have committed the offence they are charged with.

It has been alleged by the prosecution that on the 30th December, 2018 at night time, the accused persons while at Rhebu street (Market

place) were on guard and they had suspected the deceased person as thief to the shops they were guarding. They caught him and put him to high torture, beating him by logs and cutting him with pangas where he succumbed multiple wounds and eventually led to his untimely unnatural death.

In essence it has not been disputed that the said deceased WAMBURA S/O MGONCHE CHORWA died of unnatural death. What is disputed is whether the accused persons murdered the deceased.

In proving guiltiness of the accused persons, the prosecution summoned five witnesses. Of the five witnesses, PW2 appears to be the only possible eye witness of the incident who testified that on the night of the 30th December, 2018 while asleep at her home (around 03.00hrs), she heard someone crying for help. She got up and responded by opening the window of her house, only to find that a group of about fifteen people having surrounded one person and were brutally beating him by use of logs, pangas and spear. Out of the fifteen brutalists, she had managed to identify three persons, namely: Chacha Mwita, Nyanguru and Mr. Lukole. As to how she had identified only them at that night, she testified that she was closer to them (about eight paces), that there was bright electricity lights around the area and that she knows the three as watchmen of the area. It was herself then who

informed the Chairperson of the area (PW4) who then reported the incidence to police (PW5).

PW1 is the wife of the deceased whose testimony is to the effect that the deceased is her husband and on the date of the incident she was informed by her sister - in - law that her husband had been invaded at market street – Rhebu and was badly wounded. Where then she visited the scene, she saw him already dead there at the scene (Market street – Rhebu) and was puzzled as what had happened to him.

PW3 is the medical practitioner (AMO) who conducted the PME of the deceased who opined that the deceased died of multiple cut wounds by sharp objects on his head, chest, abdomen and hands which led to the acute blood loss occasioning heart failure (see Exhibit PE1 of the case).

PW4's testimony is to the effect that he being the leader of the street, he became aware of the murder incident on the morning of 30th December 2018 that Mr. Wambura had been murdered. He visited the scene and noted that it was very near to PW2 – Peruse who then hinted him that the murderers were Chacha, Nyanguru and Lukule. He then informed police whereby the first accused person was arrested and subsequently the second accused.

The testimony of PW5 is to the effect that he just drew sketch map plan of the scene of crime (PE2 exhibit) and that he arrested the second accused person.

That marked the end of the prosecution evidence/case and 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 basing on these facts and evidence.

It is a mandatory procedural requirement that after the closure of the prosecution case, the court is required under section 293(1) of the CPA Cap 20, to prepare a ruling on a finding as to whether the evidence adduced by the prosecution so far, has established the prima facie case for the accused person to answer it. If it finds that the prima facie case has been established, then the accused person will be called upon to defend himself, and inform him/her of his rights in terms of section 293 (2) of the CPA. If the same is not established, then the court will proceed to make findings that the same has not been established and proceed to acquit the accused person.

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 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 **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 of convicting 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 look at what section 110 and 112 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. These two concepts were once interpreted in the case of **Woodmington Vs OPP, (1935) AC**

462. The philosophy behind the principle of Prima facie case is actually premised on the principle enshrined in the case of **Christian Kale & Another Vs. The Republic** (1992) T.L.R 302 CAT and **John Makorobera & Another Vs. The Republic** (2002) T.L.R 296, which insistently held that the accused person should only be convicted of an offence he is charged with on the basis of the strength of the prosecution case and not on the weakness of the defence case. That is a reason as to why at the closure of the prosecution case, a case must apparently be proved already, beyond reasonable doubt. In line with this principle of burden and standard of proof, another important principle becomes necessary as enunciated in the case of **Mariki George Ngendakumana Vs The Republic,** Criminal Appeal No. 353 of 2014 CAT - Bukoba (unreported), which inter alia held that:

> "*It is the principle of 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*"

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

i. That the said WAMBURA S/O MGONCHE CHORWA, 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.

As per evidence on record (PW3 and exhibit PE1), it is undoubted that the deceased is dead and that he died of unnatural death. As per nature of his death, it is suggestive that the deceased was brutally murdered (Exhibit PE2), thus the murderers had malice aforethought in killing the deceased.

The central issue as per evidence on record so far is whether the accused persons are sufficiently implicated with the murder of the deceased in this case? The testimony of PW2 suggests that the accused persons are the ones who committed that offence of murder as charged. The evidence by PW2 is hardly sufficient and credible to rely on. I say so because reading her statement at police (DE1 exhibit) and what she has testified in court, there are notable gaps in establishing full and clear identification of the accused person in this case at the scene as real culprits.

It has been the settled position of the law that when considering the question of discrepancies and inconsistencies of evidence, Court

have to look at serious discrepancies and consider them in wholesome. (See: **Chukwudi Denis Okechukwu and 3Others Vs. Republic**, Criminal Appeal No. 507nof 2015, **Mohamed Said Matula Vs Republic** [1995] TLR 3, **Said Ally Vs Republic**, Criminal Appeal No. 249 of 2008, **George Maili Kamboge Vs Republic**, Criminal Appeal No. 327 of 2013 and **Dickison Elia Nsamba Shapwata and Another Vs Republic**, Criminal Appeal No.92 of 2007 (all unreported)).

In **Dickson Elia Nsamba Shapwata** (supra), the Court of Appeal relied on the works of the learned authors of Sarkar, The Law of Evidence 10th Edition, 2007 at page 48 thus:

> *"Normal discrepancies in evidence are those which are due to normal errors of observation normal errors of memory due to lapse of time/due to. mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case material discrepancies do."*

It is apparent from the words of the learned authors above that, to find people who have eye-witnessed the occurrence of one incident,

giving contradicting accounts of its occurrence. And, with lapse of time, the gap of contradiction may even widen. What is pertinent therefore, is to look at serious contradictions which go to the root of the matter as was held **in Said Aiiy Vs Republic** (supra) that:

> *"It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled"*

I am aware of some discrepancies as pointed out by Mr. Magwayega learned advocate against PW2 and rightly in my view invoked the provisions of section 154 and 164 of the Tanzania Evidence Act, Cap 6 R.E 2019. As the purpose of producing in court the previous statement of a witness is either to demonstrate inconsistence on the part of that witness according to section 166 of the Evidence Act, or impeach him according to sections 154 and 164 of the Act (see **Lilian Jesus Fortes V. Rep,** Criminal Appeal No. 151 of 2018 at page 24 and **Godfrey Maleko V. Thomas Mwaikaja,** [1980] T.L.R 112). Section 154 of the Evidence Act is couched in the following wording:

> *"A witness may be cross-examined on previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being proved, but if it is intended to contradict him by the writing, his attention*

must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him".

The relevant part of section 164 is coached as hereunder:

"164.-(1) The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the court, by the party who calls him-

a) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

b) by proof that the witness has received or received the offer of a corrupt inducement to give his evidence;

c) ***by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;***

d) when a man is prosecuted for rape or an attempt to commit rape, it may be shown that the complainant was of generally immoral character."

It is trite law that every witness is entitled to credence and must be believed and his/her testimony accepted unless they 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".

In the case at hand, the Mr. Magwayega learned advocate has clearly demonstrated cogent reason to make PW2 discredited by the court. However, with the passage of time, the notable diversion statement of PW2 appears only on the date of recording her statement which in her testimony says she recorded it on 31st December, 2018 but in DE1 exhibit (her recorded statement at police), appears to be recorded on 2nd January 2019. I consider this discrepancy as minor and immaterial to discredit the whole testimony PW2, taking into account that the said DE1 exhibit was recorded by police officer.

However, the testimony of this PW2 did not have an easy way to go, as she was bitterly cross-examined by Mr. Magwayega, learned advocate on her real knowledge of the said incidence against what she had recorded at Police Station. She was asked as to when exactly the incidence took place, who are the culprits and the victim. How she had been able to identify the culprits out of fifteen people as it was night time? Further, she was asked as to when she had recorded her statement at police. Her replies to all these questions did not put her at easy. Her steady and demeanor looked questionable on the knowledge

she was possessing on the said facts. On her attempts to reply the said questions, she was in many times stuck and in some questions she remained mute.

I have a doubt as to the credence of the whole of her testimony regarding the physical identification of the three persons at the scene out of fifteen people at that very night of 03.00hrs. This is not a suggestion that night offences are not proved, but the evidence of their commission must be irresistibly clear and free from any errors as to avoid mistake of identities. The credence of PW2's testimony on the manner she had been able to identify the three persons out of fifteen people raises more doubt on reliance. As the intensity of the said power lights had not been fully described and how the distance of eight paces from window looking (inside the house) had favoured her in actual identification of the said culprits including these two accused persons. I am hesitant to this because the evidence is wanting. The degree of night identification in respect of this murder incidence against the accused persons in my findings have not been descriptive enough to warrant them being responsible for murder and thus requiring them to give their defense as per law. The common factors to consider when dealing with visual identification for criminal incidences happening at night are: How long did the witness have the accused under

observation? At what distance? What was the source and intensity of the light? Was the observation impended in any way? What interval has lapsed between the original observation and the subsequent identification to te police. See **Waziri Amani vs Republic** (1980) TLR 250 and the case of **Shamir John vs Republic, Criminal Appeal no 166 of 2004.**

Neither during the examination in chief nor in cross – examination did PW2 clarify these important determining factors. A mere saying that she had been able to identify three culprits out of fifteen people at the night without a clear clarification on the manner of their identification raises more suspicions.

Should this Court then 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? To do so, in my considered view is to shift the burden proof to accused persons which is contrary to the Law and legal principles for accused persons to fill the gaps by the prosecution's case.

In this case, there is nothing sensible established connecting the accused persons and the charge of murder. 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 to be a proper case in which a 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].

It is so ordered.

DATED at TARIME this 8th day of February, 2022.

F.H. Mahimbali

Judge

08/02/2022

Court: Ruling delivered this 8th day of February, 2022 in the presence of the Mr. Isihaka Ibrahim learned State attorney for the Republic, Ms. Rebecca Magige, advocate for the 1st accused person, Mr. Leonard Magwayega, advocate for the 2nd accused person, both accused persons and Mr. Gidion Mugoa – RMA.

F.H. Mahimbali

Judge

08/02/2022