

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOROGORO REGISTRY
AT MOROGORO

CRIMINAL SESSIONS CASE NO. 155 OF 2020
(Originating from P.I. No. 51, in the Resident Magistrate's Court of
Morogoro, at Morogoro)

REPUBLIC
VERSUS
LUCK GODSON MAKWETA

R U L I N G

Last Order: 23rd February, 2022
Date Ruling: 04th March, 2022

CHABA, J.

This ruling is in respect of whether the accused person, **Luck Godson Makweta** has a case to answer or not. According to the information which was filed before this court on the 12th day of November, 2020, the accused was arraigned before this court facing murder case contrary to Sections 196 and 197 of the Penal Code [Cap. 16 R.E. 2002] now [R.E. 2019] (the Penal Code). The prosecution alleged that on the 12th day of December 2019 at Shuleni Juu area, Chabima Village within Kilosa District in Morogoro Region, the accused murdered one **Ludovick Laurent Mnyang'ali**. The accused denied the charge by entering a plea of not guilty to the charge.

During trial, Mr. Diaz Makule being assisted by Mr. Raymond Kimbe, both learned State Attorneys entered appearance for the Republic /

Prosecution, whereas Mr. Mandela Kisawani, learned advocate represented the accused person. The accused person as well appeared in person.

In a bid to secure conviction of the accused person, the Republic / Prosecution paraded a total of four (4) witnesses to establish a case to answer against the accused person and tendered one documentary exhibit, herein Exhibit P.1.

The evidence by PW1, a police officer with Force No. F. 610 D/SGT Hamisi working in the CID department shows that on 13/12/2019 at 06:30 hours while at home was informed by the OC-CID at Kilosa one Afande Minja to report at his work as quick as possible so that could attend one incident of murder that was reported to have been occurred at Chabima village, in the Ward Masanze. After he had reported at Kilosa Police Station, he met the OC-CID, the Assistant Medical Doctor one Julius Chiduo and other policemen attached in the department of CID.

His evidence reveals further that, together they moved to Chabima village and received by the Chairman in the village and other leaders who took them up to the scene of crime. Upon reach at the scene of crime, they found the deceased's body beside the road lying on its back. Thereby, were informed by the deceased's close relatives that the deceased's names are Ludovick Laurent Mnyang'ali. PW1 said, they observed the deceased's head having dented/injured on the left front side close to the eye, blood oozing from nostrils and mouth and the deceased's left eye looked red in color due to blood clot.

The Assistant Medical Doctor conducted medical examination of the body in the presence of the deceased's relatives, the OC-CID, police

officers and the deceased's close relatives. Afterwards, the Assistant Medical Doctor allowed the relatives to collect the body for burial services. His evidence shows that after completion of the medical examination, he asked his colleagues who are police investigators to record the statements of the key witnesses and drew the sketch map. He also recorded the statement of the Assistant Medical Doctor.

He went on stating that on 16/12/2019 while at his workplace at Kilosa Police Station, The OC-CID gave him a Police Case File (the PCF) with Reference No. KIL/IR/1602/2019 concerning the instant murder case. He said, upon receiving it he had an opportunity to peruse and read the same. He found that the suspect, who is the accused person already had been apprehended and interviewed as well. However, the accused denied his involvement to murder the deceased, Ludovick Laurent Mnyang'ali. According to PW1, he later realized that the statements of other prosecution witnesses linked the accused with the instant offence of murder, and he so believed as well.

In cross examination and upon questioning by wise assessors for further explanations and clarification, PW1 explicated that he was told by PW4, Anzeni Mkongogo that the accused was responsible for the death of the deceased person. He said, the death was instigated by a fight when the deceased, PW4 and the accused person were at pombe shop taking local brew and later the fight took place along the road while getting back home.

The second prosecution witness is Mr. Majaliwa Khasimu, herein featured as PW2 and the neighbour to PW4 (Anzeni Mkongogo, his uncle and the deceased). His testimony is to the effect that on 12/12/2019 around 21:30 hours, while at home slept in a deep sleep, he heard

someone knocking the door and calling from the main door. He then recognized that the voice did belong to his uncle Anzeni Mkongogo. When he opened the door and get out, he asked him, uncle what is wrong? (mjomba vipi?). In response, Anzeni Mkongogo (PW4) told him (PW2) that they were suddenly attacked by Mr. Makweta (the accused person) who started assaulting (beating) the deceased using a club (rungu). PW2 said, the distance between his home and the crime scene is 40 meters by estimation.

Upon receiving that information, he and PW4 rushed to the place where the fight took place. Thereby he managed to see the accused, Makweta having in possession of a club (rungu) meanwhile fleeing from the crime scene. He tried to call and tell him to come back, but the accused did not heed (he was defiant). In the meantime, he saw the deceased, Ludovick Lameck Mnyang'ali lying on the ground. He was bleeding from the mouth and nose. Explaining how he managed to establish the identity of the accused person, PW2 told this court that he managed to identify him because he was in a distance of about 2 paces, secondly, he was assisted by the solar powers whose light was illuminating through bulbs from his home, and thirdly, he said he knew the accused for the past three (3) years.

The court record shows that, PW2 and PW4 testified in common that while at PW2's home and or the crime scene, they agreed to report the matter to the Chairperson in the village one Mr. Julius Magungu who advised them to report the incident to the Suburb Chairperson. Without delay, they reported the incident to Happymark Kassim, the Suburb Chairperson. From there, all went direct to the crime scene and found that Ludovick Laurent Mnyang'ali already dead.

Explaining how the accused person was apprehended, PW2 and PW4 again testified in common that the Chairperson in the village formed three groups to search for the accused who by then was at large. Both participated to search the accused and eventually the accused was arrested in the same night at around 02:00 hours.

Another witness called by the prosecution is Julius Chiduo (PW3), the Assistant Medical Officer and an employee to Kilosa District Hospital. His evidence centered on medical examination of the deceased's body. He testified that before conducting medical examination, one of the deceased's relatives called Mr. Claud Mnyang'ali told him that the deceased's names are Ludovick Lameck Mnyang'ali. By then the dead body was lying on the ground meanwhile the blood was coming from its nose and mouth. His evidence shows that after he conducted medical examination, he revealed that the deceased was hit with a heavy blunt object as a result he sustained head injury and brain contusion. At the end of the day PW3 tendered in evidence the report on post-mortem examination and admitted as Exhibit P.1.

The last witness is Anzeni Mkongogo (PW4) who introduced himself as a peasant, illiterate person and a resident of Chabima village. He claimed that he is a close friend to the deceased person. He testified that on 12/12/2019 at around 21:00 to 22:00 hours he moved from pombe shop to his home while in company of the deceased. When they reached at PW2's residence (Majaliwa's residence), he gave them maize flour so that could make ugali for dinner. Some few minutes they began to cook their food meanwhile continuing to exchange some stories. Abruptly, one person called Makweta appeared and started to assault the deceased using a club commonly known as rungu. When he asked

him why he was assaulting his colleague, the accused threatened him too to this effect; Au unataka na wewe nikumaliza? Frightened, he opted to run away. The accused using the said club, continued to assault and beat the deceased around his left side of the eyes and head as well. The accused also assaulted the deceased on the left side of his ribs. His evidence shows that he then rushed to PW2 aiming to report the incident. As PW2 was asleep, he knocked the door to awaken him. When he woke up, he explained to him how Makweta (the accused) attacked them and finally assaulted the deceased.

He continued to state that when PW2 woke up, the accused did run and fled away from the scene of crime heading to King'wenyu village meanwhile holding the club that he used to assault the deceased. He testified further that they managed to see and identify the accused through the light of solar power/light that illuminated from the house of Majaliwa, PW2. He said, after he saw the deceased lying on the ground while bleeding from nose and mouth, he knew that his friend was no longer alive.

He told the court that, Makweta was apprehended on the same day after the chairperson ordered some groups of men to go and hunt for him. After arrest, the accused was sent to the village office and later the police came and fetched him. He said, the accused is responsible for the deceased's death.

In cross examination, PW4 told this court that the incident took place at the end of the year. He admitted that when he informed PW2 about the incident, both went direct to the Village Chairperson and reported the matter. He said, the distance from the house of PW2 to the residence of the Village Chairperson is about 5 to 10 meters. His

evidence shows that when he reported the matter to PW2, already the accused had fled from the crime scene. Therefore, PW2 did not see the accused. More so, PW4 stated that while continuing to prepare and cook their food inside their house, the deceased was outside. Thereby, he was attacked by the accused and beaten up. After the beating he later fell to the ground and died within their home compound. He denied the fact that the deceased was found dead along the road. He further testified that, by estimation the distance from Majaliwa's home (PW2) to the place where he was cooking food is 5 paces.

Moreover, the accused explicated that on the fateful date, he and the deceased they went to a certain pombe shop where they enjoyed their local brew. The accused was also present sitting somewhere alone. As to the question of identification, PW4 explained that on the fateful date the accused was put on a black suit. He identified him through the solar power whose lights illuminated from the house of PW2. All in all, PW2 performed his duty as a witness by advancing his testimony, but frankly speaking, with full of uncertainties.

From the foregoing summary of the prosecution evidence, the burning question is whether or not the evidence adduced by the prosecution witnesses is sufficient to establish a case to answer against the accused.

In an attempt to answer the above question, I find it apposite to commence with the spirit of the provisions of the law under section 293 of the Criminal Procedure Act [Cap. 20 R.E. 2019] (the CPA) and precedents. A case to answer is what is, in the legal parlance called *prima facie* case. As to what this *prima facie* case entails, we have the academia and precedents of this Court and the Court of Appeal of

Tanzania among others. I wish to refer to the 8th Edition of Black's Law Dictionary, at page 1228 wherein the word *prima facie case* is interpreted to mean:

"A party's production of enough evidence to allow the fact trier to infer the fact at issue and rule in the party's favour."

In **R v. Makuzi Zaid and Another [1969] HCD n. 249** which also sought wisdom from the landmark case of **Ramaulal Prambakali Bhatt v. R. [1957] E.A. 332**, the court held:

"The case to be called prima facie must be such that, a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defense".

Therefore, even though we may not have a rigid interpretation of what *prima facie* means, the gist is what various sources above have entailed and there is a mandatory legal requirement long established that *prima facie* must be tested at the closure of the prosecution's case as it was expounded by the court in the case of **Republic v. Malimi Elisha**, Criminal Sessions Case No. 164 of 2015, HCT (Mwanza) where it was stated that a *prima facie case* should be established in order to require the accused to offer his defence.

Having observed the legal position, I am now prepared to determine whether the evidence adduced by the prosecution witnesses did manage to establish a *prima facie case* against the accused, Lucky Godson Makweta. As hinted above, the accused is charged with the offence of murder contrary to sections 196 and 197 of the Penal Code

[Cap. 16 R.E. 2019] (the Penal Code) The offence of murder is committed when an accused person kills another with malice aforethought. Under section 200 of the Penal Code, malice aforethought has been defined as an intention to cause death or grievous harm to a person whether such person is the person actually killed or not or acting with knowledge that the act or omission causing death will probably cause the death or grievous harm or an intention to commit the offence.

Relying on the above provisions of the law, I find it appropriate to be guided by the following three questions: **One;** whether the deceased one Ludovick Laurent Mnyang'ali is proved to be dead. **Two;** whether the deceased's death was unnatural and so connected to murder, and **Three;** whether the evidence before hand points finger to the accused as the one who murdered the deceased person and so requires him to enter his defence.

To answer the above issues, it is appropriate to revert to the evidence adduced by the prosecution witnesses and Exhibit P.1. According to the evidence at hand which is supported by the Exhibit P.1, there is no doubt that Ludovick Laurent Mnyang'ali, now the deceased died on the 12th December, 2019 at Chabima Village within Kilosa District in Morogoro region. According to the Exhibit P.1, the summary report on post-mortem examination dated 13th December, 2019 reveals that the deceased's body was found on his back with injuries on his left eye with blood coming from his mouth and nose. Giving his expert opinion on the external appearance of the deceased's body, PW3 commented that the body had red left eye with the fracture of the lateral wall of the orbit due to fluctuation noted on palpation, blood

oozing on nose and mouth because of brain contusion after (being) hit by blunt object on the left eye.

With the methodology applied and stated by the witness albeit briefly, PW3 with the rank of an Assistant Medical Doctor formed an expert opinion that the death of the deceased, Ludovick Laurent Mnyang'ali was caused by head injury termed as brain contusion. In my opinion, the above findings positively responded to the 1st and 2nd questions that the death of Ludovick Laurent Mnyang'ali actually occurred and that the same was unnatural death as suggested by PW3 via Exhibit P.1. However, as hinted above, the burning issue is, *who by prima facie evidence is pointed to be responsible for the deceased's death.*

It is evident from the testimonies of the PW1, PW2 and PW3 that neither of the three witnesses knew exactly what culminated to the death of the deceased. It is apparent on court record that all these witnesses were devised in a style that their main duty was to prove that the deceased met an unnatural death, but Anzeni Mkongogo, herein PW4 was a material witness as he knew all the facts and had into his mind what actually transpired before and after the death of the deceased. I say so because this witness enlightened that on the material date he was in company of the deceased before and after the incident. In short, he alleged to have witnessed the assault and mentioned the names of Makweta to be a person who is responsible with the deceased's death.

However, as we all noted during hearing/trial of this case, the evidence by this key witness was full of deficiency thus fronted with depreciation. The witness was able and capable to change his testimony

or statements in a chameleon style. Hence, without wasting time, I wish to point out my observations.

During trial, I noted that there was serious discrepancy in the testimony of PW4 in two aspects; **One;** his testimony was inconsistent and contradictory in some material facts; **Two;** his statements were seriously contradicting the testimonies of all other prosecution witnesses on some material facts. For instance, the place where the attack and assaults occurred, the place where the deceased fell on the ground after he was assaulted, the place where the body of the deceased was found, to mention a few. More so, whereas other prosecution witnesses, in particular PW1 and PW2 testified with confidence that PW4 was an eyewitness to the incident, the purported eyewitness (PW2) seemed to have double tongue. In examination in chief, he stated that he was present when the assault took place, but in cross examination, he recounted that when the deceased was attacked, he was inside the house cooking food (ugali) while the deceased was outside the house. Again, he gave a different story on this aspect when he told this court that, he and the deceased were together under the mango tree cooking and chatting and sometimes he refined his story and stated that when the accused was assaulting the deceased, he ran away from the crime scene and reported the matter to PW2. In addition, he stated that the distance from the place they used to stay to the house of PW2 (their Boss) is a distance of 5-10 paces, and later changes to 15 meters, whereas PW2 recounted that the distance from his house to the crime scene is 40 meters by estimation, which is squarely similar to the measures indicated in a sketch plan.

Further, whereas all other prosecution witnesses recounted that the deceased's body was found beside the road, a fact which was proved by the sketch map, as it appears in the court record, this key witness (PW4) testified that the deceased's body did not lie on beside the road, instead it was found lying on the ground within their home yard near the mango tree. Frankly speaking, these versions of narrations are not similar and unclear as well. In my opinion, whether there was a fight or simply an assault, or even an exchange of bitter words between the deceased and the accused, or whether the fight and assault took place along the road as suggested by some pieces of evidence or at the deceased's home yard/place, I think that the purported key witness was placed in a better position to clear all these doubts. But to the contrary, the key witness (PW4) engrossed more perplexity than giving clarity to this court.

I am pointing out these discrepancies while abreast of the general rule on handling contradiction and inconsistency of testimonies. The Court of Appeal of Tanzania in the case of **Shukuru Tunugu v. The Republic, Criminal Appeal No. 243 of 2015** which referred to the decision of **Said Ally Seif v. R. Criminal Appeal No. 249 of 2008** (All unreported) categorically held:

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

In our case, there are huge discrepancies and contradiction in respect of specific place of the incident, the place in which the deceased's body was found, the first person who arrived at the crime scene, also what

they observed and the general trend of events. The Court of Appeal of Tanzania was faced with the similar situation in the case of **Mapambano Michael @ Mayanga v. Republic**, Criminal Appeal No. 268 of 2015, DOM (Unreported) and it held inter-alia that:

"On our part, we do not think that failure on the part of the complainant (PW1) to indicate in her statement whether she was attacked by the appellant while she was inside her house or outside is a minor omission that does not go into her credibility. The evidence of PW1 clearly brings out the contradiction."

In this case there is a contradiction or rather a confusion as to whether PW4 was inside the house when the attack was mounted against the deceased, or they were together outside the house under the mango tree. As hinted above, it is unclear whether the deceased was attacked while along the road where the dead body was found or at his home as it was claimed by PW4. In the circumstance, there are a lot of slats to clear in the prosecution's evidence.

Besides from the above discussion, I have in mind that the issue of identification of the accused person has all along been revolving around the prosecution witnesses. However, I see no need to dwell on discussing it for one reason that the same have been shrouded by great controversy among the witnesses.

Before I conclude, I feel that in the circumstance of this case, I cannot do better than finding an inspiration in the case of **Director of Public Prosecution v. Morgan Maliki and Nyaisa Makori**, Criminal Appeal No. 133 of 2013 (unreported) which also referred the cases of

Bhatt v. R (supra) and **Mrimi v. R (1967) E.A. 542** on when can the evidence on record be said to establish a *prima facie* case and the appropriate remedy. The Court held:

*"So, on the principles set out in BHATT's and MURIMI's 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. The Court of Appeal stated in **Murimi v. R (1967) E.A 542** 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 was an error of law...." (Emphasis supplied)*

More so, I am attentive of the remedial meditation by this court in the case of **Republic v. Samson Giba**, Criminal Session Case No. 39 of 2021, HCT, Musoma (Unreported) while borrowing persuasion from a Kenyan case in **R. v. Elizabeth Nduta Karanja & Another** (2006) KLR Criminal Case No. 52/2005 to which I also subscribe. Without such *prima facie* justification, there is no legal basis for putting the accused through the trouble of having to defend himself.

In the results, and to the extent of my findings, I am satisfied in my mind that the prosecution failed to establish a *prima facie* case on the

offence of murder levelled against the accused person, Luck Godson Makweta. It is my holding that the accused cannot be called on to make any defence pursuant to Section 293 (1) of the CPA (Supra). As the accused person has no case to answer, I dismiss the charge and acquit the accused, Luck Godson Makweta of the offence of murder under Sections 293 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2019].

It is so ordered.

DATED at MOROGORO this 4th day of March, 2022.



M. J. CHABA

JUDGE

04/03/2022

Court:

Ruling delivered under my hand and the Seal of the Court in open Court this 04th day of March, 2022 in the presence of Mr. Diaz Makule being assisted by Mr. Raymond Kimbe, both Learned State Attorneys for the Republic / Prosecution and Mr. Mandela Kisawani, Learned Advocate for the accused person. The accused person is also present in person.



M. J. CHABA

JUDGE

04/03/2022

Right of the parties fully explained.




M. J. CHABA

JUDGE

04/03/2022

Assessors:

1. Jovitha Z. Rutta.
2. Rhoda E. Kashindi.
3. Methodia S. Tibinula