

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)
AT DAR ES SALAAM
CRIMINAL SESSION CASE NO. 17 OF 2017
THE REPUBLIC
VERSUS

AGNES FIDELIS MATUTA.....ACCUSED

RULING

Date of last Order: 27th February, 2023

Date of ruling: 28th February, 2023.

E.E. KAKOLAKI, J.

“Mapenzi yanaua” is a Swahili saying reflecting a complex of thoughts or feelings generated by someone’s perception of potential attractions by the imaginary love rival threatening existence of his/her love or the quality of existing relationship with his/her partner. This is what allegedly happened to the deceased person one Msafiri Seleman, who was set ablaze with his lover one Nasra Salehe (PW1) in his room at Kidagaa Kimbiji area within Kigamboni District in Dar es salaam region on the night of 24th day of December, 2013.

Briefly it was prosecution case as per the facts read during the preliminary hearing, after the accused had not pleaded guilty to the charge of Murder, Contrary to section 196 of the Penal Code, [Cap. 16 R.E 2002], that, on the night of 24th day of December, 2013, at around 00.45 am at Kidagaa Kimbiji area within Kigamboni District in Dar es salaam region, the accused being ex-lover and heart-broken partner due to her love with the deceased coming to an end for being stolen by Nasra Salehe (PW1), accompanied with one **Mwarabu** (who is at large) revenged by setting fire on the deceased room where the two newly lovers were enjoying their sweet and peaceful love on that night. And that, prior to her execution of that unlawful mission, the accused had informed her friend one Fatuma that, that was their last day before setting them ablaze "Leo ndio siku yao ya kuwachoma moto" before the two were locked from outside of their room and set on fire while the arsonists saying "tumewakomesha."

Shortly thereafter it is alleged, the two woke up and shouted before one Kiyoma appeared and unlocked the door from outside only to find the deceased and his girlfriend Nasra Salehe (PW1) severely burnt before they were rushed to Muhimbili National Hospital for treatment, where the deceased surrendered to death on 20th July, 2014 due septicemia resulted

from burn wounds, after several months of fighting for his life as per the Post Mortem Examination Report (PMR exhibit P1) tendered by Dr. Paul M. Ng'alali (PW4). The incident was reported at Police and the victims issued with PF3 for treatment before the accused was arrested by WP 3715 Cpl. Gloria (PW3) at Vikiindu Mkuranga District within Coast Region interrogated and charged accordingly.

When called to answer her charge before this Court the accused person completely denied the accusations levelled against her, while raising a defence of alibi by filing the Notice to that effect. In proving or trying to establish prima facie case against the accused person the prosecution summoned four (4) witnesses who testified in Court namely Nasra Salehe (PW1), Peter Machume (PW2) and neighbour to the deceased, WP 3717 Cpl. Gloria (PW3) the arresting officer and relied on one exhibit which is the post mortem examination report (exhibit P1) which was tendered by PW4.

Having closed prosecution case, pursuant to the provisions of section 293(1) of the Criminal Procedure Act, [Cap. 20 R.E 2022] (the CPA), Mr. Job John Mrema, learned Senior State Attorney who represented the Republic, basing on the adduced evidence implored this Court to find the accused has a case to answer therefore call her to defence, the prayer which was not resisted

by Ms. Mwanahamisi Kilongo, learned counsel who is defending the accused person. It is the law under section 293(1) of the CPA that, this Court having heard both parties on the evidence submitted before it shall, if satisfied there is no evidence sufficient to convict him on the charged offence or any other offence of which, under section 300 to 309 of the CPA, would be convicted shall record a finding of not guilty. But if the Court finds otherwise that a prima facie evidence has been established to place the accused person to witness box to defend his/her witness shall inform of his/her rights as provided under section 293(2)(a) and (b) of the CPA. It is from that mandatory requirement of the law this Court is enjoined to look onto the evidence adduced by the prosecution side and answer the issued as to whether prima facie case has been made against the accused person enough to call her to enter defence.

As alluded to above the prosecution case is premised on evidence of four (4) witnesses and one exhibit PMR (exhibit P1) as tendered by PW4 proving that, the deceased death was due to **Septicemia** an infection caused by rotten burn wounds, the cause which is not disputed, save for the person who caused those burn wounds or set ablaze deceased room on 24/12/2013 at 00.45 am, the fact which the prosecution is duty bound to prove.

It was PW1's evidence and deceased girlfriend one Nasra Salehe that, on the fateful date and time they were asleep with the deceased in his room before the later awoke her up informing that, their room was set on fire and doors locked from outside, only to find the fire was all over the room. This witness said when questioned who was responsible for that unlawful act the deceased hinted it was the accused as he heard her voice from outside saying "tuonoke nimeishawaua" meaning let us go as I have already finished/killed them. That, the room was smelling petrol. It was her further evidence that when cried for help from neighbours the response was that could not help as they were locked from outside too like them, but later on were rescued by other neighbours one of them Peter Machume (PW3). According to her, both of them were burnt severely and it was the deceased who asked neighbours to assist them to be taken to the hospital at Kimbiji after passing to the Police station before they were later shifted to Muhimbili Hospital where the deceased was admitted and later on died. When subjected to cross examination whether she saw the accused on that day PW1 said, she could not see from outside but was told by the deceased that, it was Agnes (accused) as he heard her voice. And when further as to whether she had any lover before hooked into deceased love, she informed

the Court that, one Joachim was her lover whom they had peacefully parted with, without quarrel or grudges.

Next in testimony was Peter Machume (PW2) whose evidence essentially was regarding the rescue of the victims. He said on the night of the incident he heard a cry for help coming from the deceased's room in a distance of a pitch of football ground, and when he responded to find the deceased's house doors were closed from outside before he broke them and rescued the victims. According to him they were thereafter taken to hospital and at the scene there was a plastic bottle which seemed to have petrol gas. And further that, the fire started from the window. In short this witness had no clue of who was responsible for setting fire on that house.

Apart from PW4 whose substance of evidence is already described above through exhibit P1 on the cause of death which is not disputed, the last witness was WP 3715 Cpl. Gloria (PW3). Her evidence was to the effect that, on the fateful day having informed of the incident called at the scene of crime and is the one who issued the victims with PF3 so that they could be sent to the Hospital. As to who set fire on the said house it was her testimony that, she was informed by one Fatuma that it was Agnes (the accused) who was responsible and upon that information she managed to arrest the accused

under assistance of the said Fatuma together with councilor and vigilant group members. This witness also identified the accused person in Court as the person whom she arrested and handed to the police station for further action. When cross examined as to why they arrested the accused, PW3 said because she absconded from the village and that, she was reliably informed by Fatuma that, the accused had love relationship with the deceased hence responsible for the arson. That was the end of prosecution case.

It is the law under sections 110(1) and (2) and 112 of Evidence Act, [Cap. 6 R.E 2022] that, he who alleges must prove and the burden of so proving lies on him. See also the cases of **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2004, **Nathaniel Alphonse Mapunda and Benjamin Mapunda Vs. R** [2006] TLR 395 and **Zombo Rashid Vs. R**, Criminal Appeal No. 7 of 2012 (CAT-unreported). Evidence must therefore be led by the prosecution in proving that, the offence was actually committed and so committed by the accused person. It is also trite law that, in all criminal matters the standard of proof is that of beyond reasonable doubt as provided under section 3(2)(a) of Evidence Act, as conviction cannot be grounded on mere suspicion. The standard was

considered in the case of **Nathaniel Alphonse Mapunda and Another (supra)**, when the Court observed thus:

*"i) As is well known, in a criminal trial the burden of proof always lies on the prosecution. Indeed, in the case of **MOHAMED SAID V R** this Court reiterated the principle by stating that in a murder charge the burden of proof is always on the prosecution, and the proof has to be beyond reasonable doubt.*

(ii) Where circumstantial evidence is relied on, the principle has always been that facts which an inference of guilt is drawn must be proved beyond reasonable doubt.

(iii) In criminal charge, suspicion alone, however grave it may be is not enough to sustain a conviction, all the more so, in a serious charge of murder. "

From the above cited authority it is evident to this Court that, evidence must be led by the prosecution towards proving that, it is the accused and accused person only who is responsible for commission of the offence as per the charge laid before his/her door since suspicion alone however grave it may be is not enough to sustain conviction of the accused in such serious charge of murder. In this matter no doubt the offence being committed in the mid night visual identification is mandatory in proving the charge. Undoubtedly

it is learnt from prosecution evidence adduced in Court that, none of the prosecution witness identified the arsonist. The only available evidence is that of PW1 on voice identification. It is the law that, voice identification is one of the weakest kind of evidence and therefore great care and caution must be taken by the Courts before acting on it. The reason as why such care should be employed before the Court acts on such evidence is not far-fetched as there is a possibility of mistaken identity by voice where it is claimed that, the person identifying has never had face to face discussion with the person he identified. See the cases of **Kenedy Ivan Vs. R**, Criminal Appeal No. 128 of 2007, **Gozbert Henerico Vs. R**, Criminal Appeal No. 114 of 2015 (all CAT unreported) and **Godfrey Lusian Shilima Vs. R**, Criminal Appeal No. 40 of 2021. In the case of **Kenedy Ivan** (supra) on the weakness of voice identification the Court of Appeal stated thus:-

*"That voice identification is one of the weakest kind of evidence and great care and caution must be taken before acting on it. **This is so because there is always a possibility of a person imitating another person's voice. For voice identification to be relied upon it must be shown that the witness is familiar with the voice as being the same voice of a person of the scene of crime.**"*
(Emphasis supplied)

Similarly in **Gozbert Henerico** (supra) re-affirming its stance on the weakness of voice identification the Court of Appeal observed thus:

*"The prosecution eye witnesses had similarly testified that they identified the appellant by voice. We heed to the caution which was stated in the cases of **Nuhu Selemani v. Republic** (supra), **Gerald Lucas v. Republic** (supra) and **Stuart Erasto Yakobo v. Republic**, Criminal 15 Appeal No. 202 of 2004 (unreported) that great care must be taken before the court relies on evidence of voice identification because it is generally perceived as the weakest kind of evidence because there is always a possibility of a person imitating another person's voice. In **Stuart Erasto Yakobo Vs. R**, the Court stated that:-*

"...the issue is whether voice identification is reliable in law. In our considered opinion, voice identification is one of the weakest kind of evidence and great care and caution must be taken before acting on it... there is always a possibility that a person may imitate another person's voice. For voice identification to be relied upon, it must be established that the witness is very familiar with the voice in question as being the same voice of a person at the scene of crime..."
[Emphasis provided].

What is gathered from the cited decision above is that, before any court relies on the evidence of voice identification which no doubt requires

corroboration must satisfy itself that, the witness so identifying is familiar with the voice of the person identified so as to erode the possibility of mistaken identity as voice is capable of being imitated. In this matter PW1 was informed by the deceased that, he identified the accused by her voice. Unfortunately this Court was not availed with any evidence to the effect that, the deceased was familiar with the accused person. There is evidence from PW3 that, was reliably informed by one Fatuma that the accused and deceased had love relationship, but to the Court's dismay, the said Fatuma was not brought forth to testify in Court on such fact to the Court's satisfaction that the deceased was familiar with the accused voice. An adverse inference is therefore drawn against the Republic for its failure to parade such material witness without any justifiable reason. In absence of such evidence of familiarity of accused voice in which PW1 was also unable to testify on too, it is the findings of this Court that, the possibility of mistaken of accused voice under the circumstances cannot be overruled. Thus, it is unsafe to rely on voice identification. Even when the circumstances were favourable which is not true, still I would hold in absence of any other evidence to corroborate such evidence, no prima facie case would be said to have been established by the prosecution.

All said and done I find no prima facie case has been established by the prosecution to entitle this Court call the accused person to enter her defence on the charge at her door as per the requirement of section 293(2)(a) and (b) of the CPA. I therefore under section 293(1) of the CPA, find the accused person not guilty of the offence of Murder, contrary to 196 of the Penal Code, [Cap. 16 R.E 2002] as charged and proceed to acquit her accordingly.

It is so ordered.

Dated at Dar es Salaam this 28th February, 2023



E. E. KAKOLAKI

JUDGE

28/02/2023.

The Ruling has been delivered at Dar es Salaam today 28th day of February, 2023 in the presence of the accused in person, Ms. Mwanahamis Kilongo, advocate for the accused person, Mr. Job John Mrema, Senior State Attorney for the Republic and Mr. Oscar, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

28/02/2023.

