

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)  
SITTING AT KIBAHA**

**CRIMINAL SESSION CASE NO 139 OF 2020  
REPUBLIC**

*Versus*

**1. MAINA ZEPHANIA @BAKARI**

**2. MDEE ATHUMANI SPANU@MZEE**

**RULING**

*22<sup>nd</sup> & 25<sup>th</sup> May 2023*

**MKWIZU J:-**

The deceased MBARUKU MBWANA ALLY, resident of Mbala village on 23/4/2019 during night hours was invaded by the accused who was armed with a gun and knives. They threatened him before they demanded money. The deceased gave them Tanzania shillings seven hundred and sixty thousand (Tshs. 760,000/-). While at the scene the deceased asked the accused to allow him to go for a short call. He on the way, attempted to rescue himself by running before he was shot by a gun. He raised an alarm and PW2 and Pw3 came to his rescue. The incident was reported at Chalinze police station, the victim was taken to Tumbi Hospital for treatment and passed away on 26th April 2019 while on treatment.

The scene of the crime was visited by D. 7606 D/SGT. Dickson who drew the sketch map plan. The 1st Accused was arrested on 26/4/2023 whereby he mentioned his fellows and led the Police to the arrest of the

2nd Accused. On 27/4/2019 the deceased body was examined, and the post-mortem examination report revealed the cause of death to be Peritonitis Secondary to Multiple Penetrating Abdominal wounds and Visceral Injury followed by the indictment of the accused person for murder contrary to sections 196 and 197 of the penal code Cap 16 RE 2019.

When the matter came for hearing, the accused persons pleaded not guilty to the information of murder prompting the prosecution to summon six witnesses namely F. 5588 D/CPL Masoud of Kibaha (PW-1), Asha Juma (PW-2), Ally Mbwana Ally (PW-3), Dr. Bernard Philip Magoda of Tumbi Hospital (PW-4), PF 20056 A/INSP Uledi of Chalinze (PW-5) and D. 7606 D/SGT Dick Bita Kabanze of Chalinze (PW-6). They also tendered three exhibits to wit Dying Declaration of the deceased Mbarouk Mbwana Ally (Exhibit P-1), the postmortem examination report (Exhibit P-2), and the sketch map of the scene (Exhibit P-3). Ally Mbwana Ally's witness statement was also admitted as Exhibit D1.

During the trial, the learned State Attorneys, Ms. Elizabeth Olomi and Seif Ally appeared for the republic whereas Mr. Jerry Masomanga and Hawa Tursia were for the 1st accused and Ms. Ziada Mkwazu advocate was for the 2nd accused person.

PW1 is F5588 D/SSG MASOUD, a police officer. His evidence was on his participation in recording the dying declaration of the deceased just before his death at Tumbi Hospital on 23/4/2019. Testifying on this assignment, he said, on the material date the RCO Awadhi Chiko, had instructed him to go to Tumbi Hospital for recording the victim's statement, Mbaroruk

Mbwana Ally. At Tumbi Hospital, he managed to get the victim through his relatives in the emergency section. The victim had sustained an injury on the right side of the abdomen, complaining of serious pain. He introduced himself to the victim and informed him of the intention of his visit, which was to record his statement. He informed the victim of his rights and responsibilities and finally managed to record the victim's statement. At the end, he read the statement to the victim, and they both signed the statement. It was PW1's evidence that he last took the statement to Chalinze Police for further steps. The statement was admitted as exhibit P1. During cross-examination, PW1 notified the court that the dying declaration was recorded at around 8.30 hrs. He admitted that section 128 (7) of the PGO requires a person in attendance while recording the dying declarations to sign the statement clarifying that in this case, a deceased relative who was present was busy assisting in locating medical investigation services at the Hospital.

PW2 is Asha Jafari Juma, a resident of Mbala, a deceased neighbour, and a sister to the deceased friend Juma Jafari. She said, on 23/4/2019 at around 00.00hrs Mbarouk was invaded by robbers. She had him crying, calling her brother Juma Jafari for help claiming to have been shot by a gun. They opened the door and covered the deceased wound with a bed sheet. This witness told the court that the deceased had named to them one Maina as one of the bandits that had invaded him. The information was relayed to the deceased brother (PW3). The Deceased was rushed to the police Chalinze, issued with the PF3, and attended at Chalinze Hospital before he was transferred to Tumbi Hospital where he died while receiving treatment on 26/4/2019.

The above evidence was supported by that of PW3, ALLY MBWANA ALLY, deceased blood brother and resident of Mbala Chalinze who informed the court that on 23/4/2019 at 00.00, he received a call from Juma, the deceased's friend, telling him that Mbarouk has been invaded by thugs. He organized the transport and rushed to the scene, where he found the deceased with a wound bleeding furiously. They covered the wound with a cloth and rushed him to Chalinze police, Chalinze Hospital, and later to Tumbi Hospital. While on the way to the hospital, he asked the deceased whether he knew the person who had invaded him, and he mentioned one Maina.

PW3 also informed the court that the deceased passed away on the third day of his admission at Tumbi Hospital and that one Eddy Hatibu and Hamisi Mbwana witnessed the post-mortem examination. He during cross-examination affirmed that after naming Maina, the deceased lost his consciousness which he regains later in the afternoon while at Tumbi Hospital. And that the dying declaration was recorded after the victim had gained consciousness in the afternoon. Explaining this fact, the witness said, he left for Botch for some medical investigations leaving the victim at Tumbi still unconscious and came back in the afternoon and found the police recording the victim's statement. He denied having assisted the police in drawing the sketch map.

On 27/4/2019 the deceased's body was examined by Doctor BENARD PHILIP MAGODA, a surgeon at Tumbi Hospital. He found the deceased's stomach swollen with a round stitched wound at the center of his stomach

and other 10 small wounds on the right side of the stomach, from the area and back area of the right stomach. According to his examination, the wound was a result of a sharp object that was forced inside the body from the backside to the front side of the stomach. The Postmortem report was finally admitted in evidence as exhibit P2. According to that exhibit P2, the cause of death is a severe infection caused by damage to the stomach and its wall. He admitted during cross-examination that his statement was recorded by a police officer on the same date at 11.00 hrs at Tumbi Hospital after the completion of the post-mortem examination which began at 11.20 hrs.

Inspector Uledi Pembe, PW5, testified that on 23/4/2019 a robbery incident was reported to Chalinze Police in which one Mbarouk Ally was the victim. They opened a murder case via IR No 898/2019. He on 26/4/2019 received a call from ASP William Sola, notifying him that the accused person of the reported incident was at Mbala Kijiweni. That he was to arrange a team for arresting the accused Maina. He together with DC Faraji, DC Diku, and DCP Elias headed to Mbala Kijiweni and managed to arrest the 1<sup>st</sup> accused. They took the accused to Chalinze Police for interrogation. And again on 27/4/2019, he was informed that Maina has mentioned his two fellows. Assisted by Maina, 1<sup>st</sup> accused they managed to arrest Mdee Athumani and Makame Athumani.

This evidence was as well supported by the investigator of the case (PW6) DICK BITA KABANZE, who apart from narrating how the incident was reported, and the processes entailing the arrest of the accused persons, told the court that on 23/4/2019 in the morning hours while at Chalinze police he was required by the OCCID to go to the scene to inspect

the Robbery incident at Mbala Kijiweni. He visited the scene and drew the sketch map plan (exhibit P3) assisted by the deceased brother called Ally Mbarouk(PW3).

This witness narrated further that, he later learned through the victim's statement that one Maina was mentioned as the culprit. He informed the OCCID and was given a team of police officers who managed to arrest the 1<sup>st</sup> accused at the Mbala stand. Having been arrested, PW6 said, 1<sup>st</sup> accused admitted the commission of the offence and mentioned his associates, Mdee and Makame and he assisted the police in their arrest.

From there, PW6 said, he also supervised the post-mortem examination of the deceased body conducted at Tumbi Hospital on 26/4/2019 where the examination revealed that the victim was shot by a gun leaving him with a wound on his stomach. During cross-examination, PW6 informed the court that the file was assigned to him on 23/4/2019 at around 6.00hrs. He left for the scene at around 6.00 and drew the sketch map plan on the same date 23/4/2019 at 6.00 hrs assisted by one Mbwana Ally the deceased's brother who was at the scene at around 6.00 hrs.

At the closure of the prosecution case, the party's counsels were ordered to file their submissions on a case to answer to enable the court to give a ruling pursuant to section 293(1) of the CPA. I thank the parties' counsel for their timely submissions which I have fully considered in this ruling.

At this juncture, the court in terms of section 293 of the CPA is required to consider the evidence and make a finding as to whether the prosecution had sufficiently made out a case against the accused person to require

them to mount their defence. This is the essence of this ruling. Section 293(1) of the CPA cap 20 RE 2022 says:

*"293.-(1) Where the evidence of the witnesses for the prosecution has been concluded, and the statement, if any, of the accused person before the committing court has been given in evidence, the court, if it considers after hearing the advocates for the prosecution and the defence, that there is no evidence that the accused person or any one of several accused person committed the offence or any other offence of which, under the provisions of sections 300 to 309 of this Act he is liable to be convicted, shall record a finding of not guilty."*

Examining what entails a prima facie case, the Court of Appeal in **DPP V. Morgan Maliki and Nyaisa Makori** Criminal Appeal No. 133 of 2013 (unreported) held: -

*"We think that a prima facie case is made out of 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 at this stage, the prosecution is expected to have proved all the ingredients of the offence or minor, cognate one thereto beyond a 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" ( emphasis added)*

This tenet, in my view, is rooted in the general rule that the prosecution bears the legal onus of proving its case beyond a reasonable doubt, meaning that it is useless to call the accused for defence if the prosecution

has, in the first place failed to discharge its duty. Underlining the above rule, the Court in **Ramanlal Trambaklal Bhatt v. R** [1957] E. A 332 at 334 and 335, stated as follows:

*"Remembering that the legal onus is always on the prosecution to prove its case beyond a reasonable doubt, we cannot agree that a prima facie case is made out if, at the close 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 may not be easy to define what is meant by a "prima facie case", but at least it must 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."*

I have considered the evidence so far from the prosecution's side. There is no eyewitness of the incident under scrutiny. The prosecution case is mainly banked on a dying declaration (exhibit P1) recorded by PW1 before the deceased death on 23/4/2019 at 8.30 am at Tumbi Hospital emergency section.



As to dying declarations, the law is very clear that where a dying declaration is admitted in evidence it should be scrutinized carefully and in order to be acted on corroboration is highly desirable. See **Tembo Hussein V R**, Criminal appeal No 430 of 2013(CAT unreported).

The prosecution evidence has two versions of the deceased dying declaration, written declarations admitted as exhibit P1, and oral dying declarations made before PW2 and PW3. And in both versions of the story, the deceased is said to have named the 1<sup>st</sup> accused as one of the thugs who had assaulted him on the night of 23/4/2019.

PW3 was specific in his evidence that he asked the deceased who had assaulted her at the scene and the deceased named MAINA. This answer was also heard by PW2 who was also in the same vehicle rushing the deceased, victim by then to the hospital after the incident. PW1 also conforms to have recorded the deceased declarations (exhibit P1) before his death in which he named one MAINA as one of his assailants. The cropping question here is does this amount to a valid dying declaration linking the accused persons with the offence at hand?

Unreserved analysis of the prosecution testimonies, however, reveals inconsistency between the testimony flaking the coherence and weight of the prosecution evidence. **First**, prosecution evidence is not certain as to when the dying declaration was recorded. PW1's evidence is to the effect that the dying declaration was recorded at 8.30 in the morning in the presence of PW3, (Ally Mbwana Ally,) the deceased brother who was taking care of the victim at Tumbi Hospital. Contrarywise, Ally Mbwana ally says the deceased was unconscious as they were heading to the

hospital, and he became conscious in the afternoon. Answering questions during cross-examination PW3 said:

*"Yes, having named Maina as one of the bandits, he lost consciousness. He regained consciousness later afternoon that day. He fell unconscious while in the car he came to regain consciousness during the afternoon. He could not even after regaining consciousness explain himself well."*

And further that

*"... the dying declaration was recorded after the victim had gained consciousness in the afternoon... I came back in the afternoon and found the police recording the victim's statement...."*

It should be remembered that PW3, is the deceased blood brother who was all along with the deceased from the scene to 26/4/2019 when he passed away at Tumbi Hospital. He was thus a person acquainted with the deceased's condition from the initial stage of the incident to the end. His evidence above raises doubt as to whether the deceased made any declarations at all and if yes whether he was in a fit mental condition to make the said declaration.

**Second**, the identification of the accused persons is vague. PW6 's testimony suggests that the 1<sup>st</sup> accused was arrested after he was mentioned by the deceased and the information obtained from the deceased's dying declaration (Exhibit P1). The contents of exhibit P1 not only omit to describe the named MAINA but also have no details of the source of the light that aided the deceased in that identification. The relevant party of the dying declaration on this point says;

*“Baada ya kufungua mlango wa nyumba huku taa ikiwaka ndipo akaingia huyu MAINA akiwa na watu watano jumla yao sita wakati huo katika watu hao mmoja alikuwa na bunduki na kupitia mwanga wa taa nilimtambua huyu MAINA, mwenzake ambaye aliniweka chini ya ulinzi akiwa ameshika bunduki ambaye wajibu wake mrefu ana nywele za rasta fupi huku akiwa amevalia mavazi ya kimasai...” (The bold is mine)*

In that statement, the deceased had only named a person called Maina without more. PW2 and PW3 have also confirmed that the victim (Now deceased) mentioned Maina without further description. Would this Maina mentioned by the deceased be MAINA ZEPHANIA @ BARAKA, the 1<sup>st</sup> accused in this case? And if yes why? When probed by the defence counsel to tell how they identified Maina during his arrest, PW5 said they were led by a secret informer without disclosing the description given to them for proper identification of the 1<sup>st</sup> accused during the arrest. This identification evidence, in my view, is weak. It is evident that the deceased was invaded at midnight at around 1.00 hrs. The mentioning of light without explaining its source and intensity raises doubt if there was at all a proper and unmistakable identity if any by the deceased during that hour.

The 1<sup>st</sup> accused alleged cautioned statement that led to the arrest of the 2<sup>nd</sup> accused would have assisted the court in linking the accused persons with the incident at issue. The prosecution evidence, particularly that of PW5 and PW6 suggests that the 1<sup>st</sup> accused had confessed to the commission of the offence and named his associates including the 2<sup>nd</sup> accused and he assisted the police in the arrest of the 2<sup>nd</sup> accused.

However, there is no statement by either the 1<sup>st</sup> accused or even the person before whom the confession was made was brought to court to confirm this fact. The prosecution was, under the circumstances, expected to parade the person before whom the 1<sup>st</sup> accused had confessed and /or the accused's confession statements. Unfortunately, this wasn't done, leaving the statement uncorroborated with legal qualities for it to be acted upon by the court.

*Third*, the contradiction between the dying declaration and the PW4's evidence and the postmortem examination reports. The Doctor (PW4) characterized the wounds sustained by the deceased as different from what the dying declaration portrayed. Describing the wound, the doctor said, the deceased body had one round big wound at the center of the stomach and other multiple wounds (10 small wounds) over the right side of the abdomen believed to have been caused by bullets. This evidence contradicts the dying declaration in which the victim mentions only one gun shot that was directed at his right ribs and the evidence by PW2 and PW3, the first persons to see the deceased wound immediately after the incident. The dying declaration was recorded thus:

*"...ndipo nilitaka kujinasua kwa kukimbia naye alinipiga risasi kwa nyuma upande wa kulia kwenye mbavu nikaanguka chini huku damu zikivuja."*

PW2, the deceased neighbour, and PW3 the deceased brother who assisted the deceased from the scene to the hospital pointed to the deceased wound as one, located on the right side of the abdomen.

*Four*, while the deceased dying declaration shows that he remained at the scene after he was shot until when he was rescued by neighbours,

PW2 and PW3's evidence shows that the victim ran from the scene to PW2's house.

It is a well-settled law that only true and voluntary dying declarations are worth consideration by the court and that suspicious dying declarations cannot be acted upon without corroboration. See: **Hemsi Nzuunda and two Others v Republic**, Criminal Appeal No.34 of 1995(unreported) where the Court of Appeal held: -

*"As a general rule, a court can act upon a dying declaration if it is satisfied that the declaration was made if the circumstances in which it was made give assurance to its accuracy, and if is in fact true.*

The pointed-out issues above reveal that the dying declaration is not only suspicious but also is at variance with the prosecution evidence that ought to have corroborated the same.

**Five** are the contradictions in the prosecution evidence that affect the entire prosecution case. I will try to enumerate a few of them. The prosecution evidence places PW3 in two different places at the same time performing different tasks. PW6 tells the court that he visited the scene at 6. 00 hrs and was at that time assisted by Ally Mbwana Ally (PW3) in drawing the sketch map plan (exhibit P3). Answering questions by the 1<sup>st</sup> accused counsel, PW6 said:

*"I was assigned the file on 23/4/2019 at around 6.00hrs. I left the office to the scene, and I arrived at the scene at around 6.00. The sketch map plan was drawn on 23/4/2019 at 6.00 hrs. It is Mbwana Ally who assisted me in drawing the sketch map*

*plan. Mbwan Ally is the deceased's brother who was at the scene at around 6.00hrs in the morning."*

Conversely, PW3 denies having assisted the police in drawing the sketch map plan. PW3's evidence coupled with that of PW2 suggests that Ally Mbwana Ally was at Tumbi Hospital on that morning taking care of the deceased.

Connected to the above is the sketch map plan of the scene of the crime (Exhibit P3) relied upon by the prosecution. While the deceased is said to have died three days after the incident on 26/4/2019, the details of the sketch map plan drawn on 23/4/2019 mention the deceased person and not a victim. The relevant part of the sketch map plan reads:

***"RAMANI YA TUKIO LA KUJERUHIWA MBAROUKU S/O MBWANA ALLY AMBAE NI MAREHEMU TUKIO AMBALO LILITOKEA TAREHE 23-04-2019 SAA 01.00 HRS HUKO MBARA STEND IMESHORWA NA D 7606 D/SGT DICK KWA KUELEKEZWA NA MBWANA ALLY TAREHE 23-04-2019 SAA 06.00HRS***

....

***A. Alipoangukia marehemu***

***B. Marehemu alipopigiwa risasi***

***C. Duka ambalo marehemu alikuwa amelala..."( emphasis added)***

One would wonder how the sketch map could refer to the victim by then as a deceased person even before his death. The only safe conclusion

here is that either the sketch map brought before the court was referring to another incident or was manufactured to facilitate the inculcation of the accused in this case.

Another point raising an eyebrow is the genuineness of the prosecution evidence. While admitting to having recorded his statements at the police on 23/4/2019, the details of PW3's statement admitted in court as exhibit D1 contradicts his own version of evidence adduced in court. I will let the portion of PW3's statement in exhibit D1 recorded on 23/4/2019 speak for itself. The statement reads:

*"Mimi ninaishi Mbala stend kata ya Vigwaza Wilaya ya Chalinze Mkoa wa Pwani. Mimi shughuli zangu ninajishughulisha na duka la Nyanja maeneo ya Mbala stend. Pia maeneo hayo ya Mbala kuna mdogo wangu ambaye na yeye ana duka la kuuza vyakula na pia ana panda la kuonyeshea mpira pamoja hata taarifa ya habari. Mimi ninakumbuka kuwa mnamo tarehe 23/4/2019 majira ya saa 01:30 hrs mimi nikiwa nyumbani kwangu nilisikia kelele mtu anadai nakufa wakati huo kelele hizi kizitokea kwa mdogo wangu MBARUKU s/o MBWANA @ ALLY. Nami niliamua kutoka nje ndipo nilipigiwa simu na JUMA S/O MRANGI ambae na yeye ni jirani na mdogo wangu MBARUKU S/O MBWANA na kuniambia kuwa mdogo wako amevamiwa na majambazi nakuniambia nitafute gari ili tumchukua tumwaishe hospitali nami niliamumbia mtoto wangu ambae anaishi Chalinze MAJIDI S/O KUDURA na yeye alikuja kumchukuwa na kumpeleka Chalinze zahanati ambapo pia tulipewa PF 3 hapo alipata huduma ya kwanza kisha kumrufaa hospital ya Tumbi baada ya hali yake*

*kuwa siyo nzuri. Mimi niliendelea kumuguza mdogo na kufikia tarehe 26/4/2019 saa 12:30 hours mdogo wangu Mbaruku akawa amefariki dunia. Lakini kabla ya kufariki kwake marehemu alitoa maelezo kwa askari akiwa bado yupo hospital na kudai kuwa mnamo tarehe 23/4/2019 majira ya saa 01:30 hrs akiwa nyumbani kwake aligongewa dirisha lake na mtu aliyejitambulisha kuwa ni MAINA kwani na yeye ni mkazi wa Mbala na kumweleza nahitaji mahitaji ya dukani yeye kaka yangu aliamka na kuchungulia dirishani kwake na kumtambua kuwa ni MAINA kwani anamfahamu hupendelea kwenda dukani kuchukua mahitaji hivyo aliamua kwenda kufungua mlango ndipo wakaingi majambazi hapo wakiwa na silaha na kumwamuru tupatie pesa. Marehemu aliwapa kiasi cha sh. 400,000/- walimwambia hatizoshi akawaongezea sh. 360,000/-. Waliendelea kupekuwa humo ndani na ndipo yeye MBARUKU aliomba kwenda kujisaidia vyoo vya nyuma ya nyumba yake yeye katika maelezo yake alidai vyema kujjepusha na kuamua kukimbia na ndipo alipopigwa risasi ya mbavu za kulia. Hayo ndiyo maelezo yangu.” (Bold is mine)*

PW3's statements above contain three doubtful portions. *One*, in his evidence, PW3 denied having heard the victim (deceased) screaming for help on the material night contrary to his statements recorded at the police immediately after the incident. Testifying on this point PW3 said,



*"I did not hear any gunshots or the deceased cries. I only received a call from Juma, the deceased's friend."*

*Two*, while the second bold part of PW3's admitted statement reveals that PW3 knew of the incident and identified Maina through the dying declaration contrary to PW3's own testimony in court where he informed the court that the said MAINA was mentioned to him by the deceased himself.

**And thirdly**, though, PW3's statement was recorded on 23/4/2019, the statement contains information relating to the death of the deceased that happened three days after from 23/4/2019 to 26/4/2019: *See for instance:*

*"Mimi niliendelea kumuguza mdogo na kufikia tarehe 26/4/2019 saa 12:30 hours mdogo wangu Mbaruku akawa amefariki dunia. Lakini kabla ya kufariki kwake marehemu alitoa maelezo kwa askari akiwa bado yupo hospital..."*

It genuinely requires a psychotic mind to uphold the above prosecution evidence against the accused person.

PW4's evidence is as well contradictory with his testimony and the rest of the prosecution's evidence. While testifying that he recorded his statement before performing a post-mortem examination, his evidence shows that his statements were recorded by the police at 11.00 hrs. before he commenced a postmortem examination 20 minutes later at 11.20 hours.

The pointed-out contradictions, in my view, are not minor to be absolved by the court, especially in a serious murder case like this. They flake the

credence of the entire prosecution evidence leaving the prosecution case unestablished to require the accused person to enter their defence.

For the foregoing reasons, I hold that the prosecution has failed to establish a prima facie case against the accused persons in terms of section 293(1) of the Criminal Procedure Act. I proceed to acquit the accused persons **MAINA ZEPHANIA @ BAKARI AND MAKAME ATHUMANI @ SPANU** for having no case to answer with an order for their immediate release from prison unless otherwise lawfully held.

**DATED** at **DAR ES SALAAM** this **25** day of **May** 2023.



**E. Y Mkwizu**  
**Judge**  
25/5/2023

**COURT:** Right of appeal explained

**E. Y Mkwizu**  
**Judge**  
25/5/2023