IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF TABORA

AT TABORA

CRIMINAL SESSION CASE NO. 11 OF 2022

ORIGINAL CASE NO. P1 NO. 32/2020 URAMBO

REPUBLIC

VERSUS

1. **ISACK OBED @ MBOGO**
2. **SAID ZUBERI @ MWAMBA**
3. **ABEL S/O AMOS @ KAYOYA**

RULING ON A CASE TO ANSWER

Date: 5/5/2023 & 5/5/2023

BAHATI SALEMA,J.:

ISACK OBED @ MBOGO, SAID ZUBERI @ MWAMBA and ABEL S/O AMOS @ KAYOYA the three accused, have been jointly charged with offence of murder contrary to sections 196 and 197 of the Penal Code [Cap. 16, R.E. 2019], It is the case for the prosecution that, on the 5th day

of August, 2020 at Ufukutwa within Kailua District in Tabora region with malice aforethought jointly and together killed Deogratius Vicent Kambona and Siginecha Vicent Kambona.

When the charge was read over to the accused persons, they pleaded not guilty to the counts. According to the record, the undisputed facts agreed to by the parties during the preliminary hearing were particulars as to the accused's names, addresses and occupations.

To prove their guilt, the prosecution marshaled a total of six witnesses namely, PW1 Sizya Kambona Pesambili, PW2, Monica Deo, PW3, Yahaya Said Mgaya, PW4, G. 329 Detect. Corp. Rocki, PW5, H.4279 DC. Josia and the PW6, Daniel Ezekiel, the doctor who examined the bodies. The oral testimonies of the prosecution witnesses were supplemented by 5 exhibits to wit, two Post Mortem Reports, cautioned statement of Isack Mbogo and 2 sketch maps were admitted.

After the evidence of the last witness PW6, the prosecution prayed to close its case. Ms. Lucy Kyusa, learned State Attorney and defence counsels Frank Kavishe and Zugumi Herbert left it to the Court to decide whether the accused have a case to answer.

Following the closure of the prosecution case on 5/5/2023, I am obliged to determine, in terms of the provisions of section 293 (1) of the

Criminal Procedure Act, Cap. 20, if the evidence adduced by the prosecution is sufficient to call the accused persons to enter their defence. In other words, a ruling as to whether the accused persons have a case to answer has to be made. In the case of **DPP vs Peter Kibatala**, Criminal Appeal No. 4 of 2015, CAT at Dar es Salaam (Unreported), when the Court of Appeal held:

> *"This being a criminal case, the duty to prove the charge beyond doubts rests on the prosecution and the court is enjoined to dismiss the charge and acquit the accused if that duty is not discharged to the hilt. What essentially the court looks at is prima facie evidence for the prosecution which unless controverted would be sufficient to establish the elements of the offence."*

The Court of Appeal went on to cite with approval the case of **Ramanlal Trambaklal Shaff vs Republic (1957) 1 EA 332.** In that case, the then-East African Court of Appeal held as follows:

> *"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 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 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 iota of evidence can never be enough, nor can any amount of worthless discredited evidence. It may not be easy to define what is meant by a prima facie, 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."

Guided by the above position, the issue under consideration can be addressed as to whether the prosecution has proved the elements of the offence of murder to put the accused on the defence.

In terms of section 196 of the Penal Code (supra), the prosecution was duty bound to prove the following three elements of the offence of murder: One, that there is a person who died of an unnatural death and that the killing was unlawful; two, that the accused persons arraigned before the Court are the ones who killed the deceased; three, that the accused had malice aforethought. All elements must be proved cumulatively.

Starting with the first element, I have indicated earlier that, the fact that the two deceased are dead was not disputed during the hearing. In

terms of section 192(4) of the CPA, that fact is deemed to have been proved by the prosecution. It was proved further, through the evidence of PW6, the doctor that the deceased's death was caused by severe bleeding. In that regard, the prosecution proved that the deceased's death was unnatural. Therefore, the first element of the offence of murder was duly proved. The next and crucial question is whether the deceased were killed by the 1st,2nd and 3rd accused persons.

Having heard the evidence adduced by the prosecution, this court is obliged to give a ruling on whether the evidence so adduced is sufficient to require the accused persons to give their defence.

I have perused the evidence adduced by the prosecution, I find no iota of evidence that implicates the accused persons in the case at hand. Starting with PW1's evidence, he did not establish the persons who killed the deceased. As to PW2, Monica Deo evidence was not direct evidence. She adduced hearsay evidence which is not admissible under 6 section 62(1) of the Evidence Act, Cap. 6 [R.E.2022). As that was enough, her evidence did not incriminate the accused persons. The evidence of PW5 H.4279 DC Josia is also based on a caution statement of the 1st accused person Isack Mbogo.

During the hearing, no one witnessed the accused persons committing the offence but they were suspicious of Abel Kayoya who

was said to have a conflict with the deceased. I am asking myself whether the evidence of the prosecution is enough to render this court find that the accused persons have a case to answer. The answer is negative since our courts have severally held that suspicion alone, no matter how strong, cannot form the basis for a conviction. There must exist tangible and concrete evidence adduced to remove issues in dispute from the realm of suspicion and into the realm of proven facts. Having inspected the evidence of the prosecution's evidence, it is clear that the evidence on record is based on suspicion. In the case of **Ntinda v R, Criminal Appeal No. 17 of 1991 (unreported),** the court held that:-

> *"There was, we agree, a lot of suspicion against the appellant as a person who killed the deceased. The trial judge will no doubt agree with us that suspicion, no matter how grave, cannot be the basis of a conviction on a criminal charge."*

Also, the prosecution's case hinges on the 1st accused person, Isack Mbogo cautioned statement. However, it is a settled principle of law that a retracted or repudiated confession generally requires corroboration. In the case of **Ali Salehe Msutu v R** [1980] TLR 1 the court held that:-

> *"A repudiated confession, though as a matter of law may support a conviction generally requires as a matter of prudence corroboration as is normally the case where a confession is retracted."*

Equally, the law on the evidence of confession of the co-accused is very clear. The law is settled that the evidence of a co-accused requires corroboration. No corroboration was provided. If the said confessions contained in Exhibits P3 were voluntarily made, I am of the view that given the clear provisions of section 33(2) of the Evidence Act, Cap. 6 which provides that:-

> "*Notwithstanding subsection (1), a conviction of an accused person shall not be based solely on a confession by a co-accused*".

Guided by the law above there remains no speck of evidence to corroborate such statement, even if it was voluntarily made.

In this matter, even a confession by an accused person which is not extensively corroborated with other independent evidence cannot be outright used against the co-accused persons. As a matter of practice, a confession by an accused person can only be used as a lending assurance to other evidence against the co-accused but not to be used as the basis for prosecution. The Court is supposed to use such evidence with extreme caution before acting upon it. Again, in the case of **Bushiri Amini Vs. Republic** (1992) TLR 65 it was emphasized that the evidence of a co-accused is on the same footing as that of an accomplice, that it is admissible but must be treated with caution and as a matter of

prudence, would require corroboration. In **R. v. Konsenta Chaligia and Another** [1978] LRT No. 11 the court held that:

> *"If there is more than one accused person, the testimony of one accused person cannot lead to the conviction of the other unless there is another evidence which is related."*

Guided by the above principle to call the accused person to submit into the witness box and enter a defence in terms of section 293 (2) of the Criminal Procedure Act, Cap. 20 [R.E 2022], I must be satisfied that the caution statement is corroborated. The issue for determination is whether this degree has been met. Having heard the evidence of PW5, H. 4279DC Josia and PW3, Monica Deo, I have to say that there is no cogent evidence that would have corroborated the cautioned statement of the 1st accused person. First, PW5 testified that he managed to arrest the 1st, 2nd and 3rd accused persons. During cross-examination, he admitted that he did not arrest the accused persons with any exhibit therefore it is not known how they were arrested. The other statements that could have corroborated the evidence on the record but the same was not tendered in court. PW5 testified that he was informed by the 1st accused, Isack Mbogo although there is no supporting evidence. Lack of it renders the cautioned statement of no probative value. The link between the accused persons and the incident

of murder equally scatters. Besides the cautioned statement which has not been corroborated, there is no evidence to implicate the accused persons in terms of section 293 of the Criminal Procedure Act, Cap. 20 [R.E 2019]. Therefore, there is nothing on record to defend. The spirit of section 293 (1) of the Criminal Procedure Act, Cap. 20 [R.E 2019] is such that, the accused persons can only stand in a witness box if a prima facie case has been established and also that, the Court may convict them of the offence charged even where he opts not to defend. In the instant case, there is no such case established.

Since there is no enough evidence to ground conviction if the accused persons choose to keep quiet in their defence, there is guidance in **Republic v Makuzi Zaid and Another** [1969] HCD No.249, Georges CJ quoting **Bamaulal P. Bhat v. Republic** [1957] EA 332.

> *"The case to be prima facie must be such that a reasonable tribunal properly directing its mind to the law and the evidence can convict if no explanation is offered by the defence."*

It is my finding that no prima facie case has been established against the accused persons. In this respect, I am compelled to apply the wisdom in **Murimi v Republic [1967] EA 542** at page 546, in which the predecessor of the Court of Appeal stated:

".. The law required a trial court to acquit an accused person if a prima facie case has not been made out by the prosecution. If an accused person is wrongly called on for his defence then this is an error of law. "

For the reasons I have endeavored to state, I am of the considered view that the evidence adduced by the prosecution is not sufficient to put the accused persons in their defence. I hold therefore that the accused persons **ISACK OBED @ MBOGO, SAID ZUBERI @ MWAMBA and ABEL S/O AMOS @ KAYOYA** have no case to answer. In consequence, I hereby acquit the accused persons of the offences of murder and order for immediate release unless held for other lawful cause.

Order accordingly.

THE HIGH COURT OF TANZANIA
UHURU NA UMOJA

A. BAHATI SALEMA

JUDGE

5/5/2023