

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB - REGISTRY OF SHINYANGA**

AT SHINYANGA

CONSOLIDATED CRIMINAL SESSION CASES NO. 27 & 91 OF 2022

REPUBLIC

VERSUS

1. KIDAYI KIDENYA @ YOHANA FABIAN

2. LINDE SAYI KULABYA @ FABIAN SIMON

3. KIDENYA SAYI @ TUNGU

RULING

2nd & 7th November, 2023.

S.M. KULITA, J.

The accused persons, namely, Kidayi Kidenya @ Yohana Fabian, Linde Sayi @ Fabian Simon and Kidenya Sayi @ Tungu who are the 1st, 2nd and 3rd Accuse Persons respectively, stand charged with two offences, to wit, ***Murder*** contrary to Section 196 and 197 of the Penal Code [Cap 16 RE 2019] and ***Attempt Murder*** contrary to section 211(a) of Penal Code [Cap 16 RE 2002]. Particulars of the offence provide that, all accused persons on the 12th day of August, 2021 at Ngala village, within Bariadi District in Simiyu Region did murder one Gulasa s/o Mashauri and unlawfully attempted to murder one Kwezi d/o Nyanda.

The facts presented by the prosecution which gave rise to this trial are the following; that, on 12th August, 2021 during the night time the family of the victim/deceased, Gulasa s/o Mashauri was invaded by a gang of four people who were armed with pangas, cut him to death and attempted to murder the his (deceased's) wife, Kwezi d/o Nyanda. The facts further state that, through the torch lights which were used by the invaders, the deceased's wife managed to identify the invaders being their relatives whom they used to visit each other. Facts provide further that, the Police Force was informed of the incident, whose officers, after reaching at the scene of crime, drew the sketch map. The deceased's body was investigated by a Doctor and the cause of death was revealed to be hemorrhage due to the multiple cut wounds that the deceased had sustained. The remaining victim was sent to Ngulyati Healthy center for treatment. Following such accusation, accused persons were arrested and arraigned to court.

When the information of Murder was read over to the accused persons during the Plea Taking and Preliminary Hearing, they pleaded not guilty to it. Further, on 23rd October, 2023 when the case came up for trial, both charges were reminded to the accused persons who maintained their Plea of not guilty. The prosecution case was heard to its finality whereby 9 (nine) witnesses testified for that side.

This now is a ruling to decide as to whether the accused persons have the cases to answer for the counts that they have been charged with of their cognate offences, hence required to enter their defense as per **Section 293(2) of the Criminal Procedure Act [Cap 20 RE 2019]**. The said section 293(2) of the Act, requires the court to call upon the accused persons to defend themselves if at the conclusion of the prosecution case, the court considers that there is evidence that the accused persons committed the offence or any other minor or alternative offences mentioned under the provisions of section 300 to 309 of the Act.

Also, under **section 293(1) of the Criminal Procedure Act**, if the court considers that, there is no evidence that the accused or any one of several accused persons committed the offence or any other minor or alternative/cognate offence, the court should record a finding of not guilty.

In the case at hand, after closure of the prosecution case, both prosecution and defense counsels left the matter for the court to decide on the ruling as to whether the accused persons have a case to answer or not.

This provide an opportunity for the Court to appraise the entire proceedings for the purpose of satisfying itself as to whether the evidence

by the prosecution left no stone unturned so as to require the accused persons to enter their defense.

In doing so, the court becomes in the safest side to revisit the historical background of the case albeit in a nut-shell. As stated herein before, in proving their case, the prosecution side called a total number of 9 (nine) witnesses. The evidence of the prosecution side can be summarized as follows;

The 1st witness for Prosecution was Kwezi Nyanda who testified that, she is the wife of the deceased Gulasa Mashauri and that they were living together at Ngala village. She told the court that, on 12th August, 2022 during the night some people invaded them and started cutting her husband with pangas. She said that two people engaged into cutting the deceased while the remaining two were at the back of their house. She said that, through the torch lights of the invaders which had sufficient lights she managed to identify the invaders Kidenya Sayi and Linde Sayi. She added that, the same the invaders beat her by the flat part of the panga on her head and ribs. She said that the said invaders had worn black coats and that she knows them as they had been living together at Mpanda. Apart from Kidenya Sayi and Linde Sayi who had killed the deceased, PW1 also mentioned and identified Kidayi Kidenya as among the invaders. She said that Kidayi Kidenya was among the two bandits

who were behind the house watching for safety in commission of the crimes.

PW1 said that following the said incident she had to go to her neighbor whom in turn made calls to her (PW1's) relatives. On the torch lights, PW1 said that the same were directed to the deceased and other directions. When cross examined, she responded that, by the time the deceased was invaded she was inside the house. She added that, she did not make alarm as she was also injured.

Kwangu Manangwa testified as PW2. Her testimony was to the effect that, on 12th August, 2021 while sleeping with her children she heard the entrance door knocked. She added that, it was her neighbor Kwezi (PW1) who was knocking and that she was crying. The witness said Kwezi told her that, they had been invaded by bandits and her husband was cut by pangas. Upon hearing that, PW2 said that, she made an alarm. PW2 further stated that, Kwezi Nyanda (PW1) told her that the invaders were her in-laws. PW2 added that, Kwezi Nyanda mentioned the invaders' names but she has forgotten them. She however added that, Kwezi Nyanda had identified the invaders using their torch lights which were moving from one direction to another.

Responding the questions put by the Defense Advocate, Masige, PW2 stated that, she never witnessed the farm conflict between the

deceased and his relatives. On the further cross examination PW2 stated that, Kwezi did not tell her the nature and quality of the torch light the invaders had. The witness added that, she together with Kwezi Nyanda never gone to attend mwano (alarm) as they had fear of their safety.

Daudi Michael (PW3) testified that he was the Village Executive Officer (VEO) of the area by the time of the invasion. He said that, he was informed of the killing incidence during the same night. He attended and found the deceased been cut by pangas to death. He went on telling the court that, at the scene he found no family member, meaning the deceased's wife and children. He decided to go where they had run to. PW3 stated that, having reached at the neighboring house where the victims had run to, he interrogated that, the deceased's wife told him that, she had not identified the invaders at the scene. When cross examined, PW3 stated that, they were not told as to who were the killers even when they asked the remaining victims. When further cross examined, PW3 stated that, the victim alleged to be invaded by three bandits but did not mention their names.

MG 39221 Msafiri Bundala who testified as PW4 stated that he is a Militia at Katoro Police Station. He stated that on 22nd September, 2021 he was ordered to arrest Linde Sayi for the offences he is charged with. He said that he actually did so on that same date 17:30 hours.

Sanabu Mashauri testified as PW5. His testimony is to the effect that he has been living at Katavi since 2009. He said on 12th August, 2021 at 2030 hours he received a call from his young brother Ngobo Mashauri telling him on the killing of the deceased herein. PW5 told the court that, upon receiving that information he decided to call the deceased's wife who informed him that, the deceased had been cut by pangas to death. He said that the deceased's wife told him that she had identified the killers being Kidenya, Linde, Kidayi and Nyungu and that she identified them through the lights of their own torches. PW5 stated that, he decided to report the matter at Mpanda Police Station as the suspects live at Mpanda. He said that thereat he got the RB (document used as the permit to arrest the suspect of crime) and proceeded by going to the residential premise of Kidenya Sayi at Sibwesa. He added that, Kidenya Sayi was not found, he escaped after seeing him approaching his house with other persons. PW5 added that, they however managed to arrest his son, Kidayi Kidenya (1st accused).

PW5 further stated that, he later on received a call from his grandfather telling him that he should be careful as he is also being hunted for his follow up of this case. PW5 told the court that, the source of the killing is the land conflict that the accused persons had with the deceased. The witness testified that the deceased's wife identified the

killers through the solar light that was situated above the house entrance. When cross examined the witness stated that, there is no bus that travels during night, directly from Bariadi to Mpanda where the suspects reside.

J 1985 DC Abdulrahman testified as PW6. His testimony is to the effect that, he is a Police Officer who went at Katoro and collected the 2nd accused person namely Linde Sayi @ Fabian Simon on the 26th day of September, 2021. PW6 said that, he together with the said suspect arrived at Bariadi Police Station at 1708 hours.

Dr. Martha Mbelwa (PW7) testified that she is a Doctor at Ngulyati Health Centre in Bariadi District. She said that on 13th August, 2021 she conducted autopsy for the deceased body. She said that, she observed the cause of death of the deceased, whose name she mentioned to be Gulasa s/o Mashuri, being loss of blood due to body cut wounds. The said witness tendered to court the Post Mortem Examination Report for the autopsy she had conducted and the same was admitted as Exhibit P1.

Dr. Jahula Method testified as PW8. His testimony is to the effect that, she is a Clinical Officer attached at Ngulyati Health Centre in Bariadi District who on 13th August, 2021 attended the victim Kwezi Nyanda. The witness testified that in her examination she found the victim's body with injuries on different parts. PW8 stated that, after attending the victim whose name was Kwezi d/o Nyanda, she filled the PF3 (Medical

Examination Report) which she prayed to tender to court and the same was actually admitted as Exhibit P2.

INSP. Gaudent Lawrent (PW9) testified that, he is a Police Officer whom together with other Police Officers, on 13th August, 2021 went to the scene of crime for investigation purposes. He said that, they witnessed the deceased's body with cut wounds and the Doctor whom they had gone together conducted post mortem investigation. He added that, the deceased's wife too was injured on different parts of her body. She was assaulted when she was escaping. He said that, the deceased's wife told them that, she identified the invaders as they had torch with intense light. PW9 went on mentioning the invaders names as he was told by the deceased's wife being Kidayi Kidenya @ Yohana Fabian, Linde Sayi @ Fabian Simon and Kidenya Sayi @ Tungu.

Further, PW9 stated that, on 26th September, 2021 he interrogated the second accused person Linde Sayi and confessed to have participated in killing the deceased. He therefore noted down his caution statement. The witness stated that, in his confession the 2nd accused told him that in executing their killing mission they hired a motor vehicle to and from Bariadi. He sought to tender caution statement of the 2nd accused person

but due to the objections raised by the Advocates for the opponent (defense) side the same was rejected in court.

The prosecution evidence ended up here whereby 9 (nine) witnesses testified for that side and two exhibits were tendered. It is now the venue for the court to determine if all or any of the Accused persons have a case(s) to answer, that, ***a prima facie case*** has been established by the Prosecution.

At this juncture I find it pertinent to establish what amounts to a ***prima facie case***. The meaning of prima facie case has been defined in the case of **Ramanalal Trambaklal Bhatt V. R (1957) EA 332** at page 334 that;

"Remembering that the legal onus 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 would not be prepared to convict if no defense is made, but rather hopes the defense 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 defense. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. It is true, as Wilson, J, said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively, that final determination can only properly be made when the case for the defense has been heard.

It may not be easy to define what is meant by a prima facie case, but at least it must mean one in which a reasonable tribunal properly directing its minds to the law and the evidence could convict if no reasonable explanation is offered by the defense"

Ramanalal Principle was applied in the case of **Republic V. Kakengele Msangikwa [1968] HCD No. 43** where it was held that;

"a prima facie case at least must be one which a reasonable tribunal could convict if no evidence is offered by the defense".

It was also held by the High Court in the case of **Republic V. Edward Mongo (2003) TLR 45** at page 46 that;

"A submission of no case to answer may properly be upheld when there has been no evidence to prove an essential element in the offence charged, or where the evidence adduced by the prosecution has been so discredited as a result of cross examination or is so manifestly unreliable that no reasonable tribunal (if compelled to do so) would at that stage convict".

According to the above principles, the issue is whether by looking at the evidence produced, the accused persons can certainly be incriminated, also the principle is clear that before the accused persons is asked to enter defense, there must be adequate evidence that the accused person can deny or traverse. Otherwise, it would be requiring the accused persons to fill in the gaps in prosecution's case which is contrary to **section 293(1) of the Criminal Procedure Act [Cap. 20 RE 2002]**.

In the matter at hand, in determining whether prosecution side have made a prima facie case or not, I am first going to deal with the issue of identification of the invaders at the scene of crime. On this, I am guided with the issue as to whether the invaders were properly identified at the scene of crime. On this issue of identification, the only eye witness PW1 testified that, he knows the invaders as she ever lived with them at Mpanda. She identified them through the torches with intense light which the invaders had come with. She also told the court that, they were invaded by four people, whereby two of them engaged in cutting the deceased with panga and two were at the back of their house. She said the invaders' torch light were directed towards the deceased and other directions. The question is, under those situations can we say with certainty that PW1 properly identified the invaders?

Knowing that even if witnesses purport to have identified invaders whom they claim to know, yet, mistakes may also happen in those identifications. See **Issa Mgara @ Shuka V. Republic, Criminal Appeal No. 37 of 2005, CAT, at Mwanza** where it was held;

"This is because, as occasionally held, even when the witness is purporting to recognize someone whom he

knows, as was the case here, mistakes in recognition of close relatives and friends are often made”

With the presence of the above holding, this court has been given an obligation to ascertain as to whether the testimony of PW1 shows that there were favorable conditions that takes away all the possibilities of mistaken identity.

Deeping down to the testimony of PW1, she told the court that she identified the accused persons through their own torches. Here it should be known that, the invaders carried torches for their own goal of pointing to the one they needed to kill. No one will think that, the invaders carried torches so as to point on his fellow invaders. However, I agree that there are some situations of running and cutting when hands are unstable to make the torch lights pointing to the victim alone. On these circumstances, the light may be pointed to his fellow bandit's. But when this happens, it will take a very short time for the same reason of not exposing their fellow invaders.

In the testimony of PW1, this court has not been told, for how long the invader's light fell on their fellow invaders to allow PW1 keenly observe and identify the accused persons without mistakes. This is among the conditions set in the famous case of **Waziri Amani vs Republic**

(Criminal Appeal 55 of 1979) [1980] TZCA 23 (6 May 1980). Had PW1 testified on the duration the light fell on the accused persons, the court would have been in a position to determine whether she properly identified the accused persons.

As PW1 did not tell this court the duration which she had spent in observing the invaders, further, taking into consideration that PW1 testified that during the invasion she was inside the house and that she was also assaulted to the point of tendering PF3 to this court; under such situations, I find the conditions were not favorable for her to properly identify the invaders.

Further, my stand that PW1 failed to properly identify the invaders is cemented with the testimony of PW3 who was VEO of the area. This witness told the court that, during the same night of incident he visited the scene of crime and went to the residential premise of PW2 where PW1 had ran to. This Government Official testified that, upon interrogating the deceased's wife, PW1, she told him that she never identified any of the invaders. The law goes that, early naming of the bandits is all an assurance that the witness is reliable and actually had properly identified the bandits, likewise, unexplained delay makes the court to take it as an afterthought. This was also held by the Court of Appeal case namely

Marwa Wangiti Mwita and Another v. The Republic (Criminal Appeal 6 of 1995) [2000] TZCA 4(12 June 2000) as follows;

"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as an unexplained delay or complete failure to do so should put a prudent court to inquiry. "

Further the evidence of PW5, muchly contradicted with the evidence of PW1 on the issue of identification. While PW1 stated that she identified bandits through their torch lights, PW5 stated that, PW1 identified bandits through solar light that was situated at the entrance of the deceased's house.

These above shown pieces of evidence as alluded earlier cement the conclusion that, PW1 did not properly identify the invaders but it seems the invaders were mentioned because of the land conflict that the two sides had. That, the accused persons were incriminated on suspicion. But the law is quite clear that, suspicion, however grave it is, does not lead to conviction. On that account, I am settled that the testimonies of prosecution side, is of full of doubts in incriminating these accused persons particularly on the issue of identification.

All said and done, as shown above, that the prosecution evidence has failed to establish a prima facie case against the accused persons, under **section 293(1) of the the Criminal Procedure Act [Cap 20 RE 2019]**. I find these accused persons have no case to answer. I thus proceed to find them **not guilty of Murder nor Attempt Murder** that they have been charged with. Consequently, I hereby acquit them forthwith. They should thus be released forthwith from remand custody, unless they are held for any other lawful cause.



S.M. KULITA
JUDGE
07/11/2023

DATED at **BARIADI** this 7th day of November, 2023.



S.M. KULITA
JUDGE
07/11/2023

