

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(SUB REGISTRY OF SHINYANGA)
AT SHINYANGA**

CRIMINAL SESSION NO. 59 OF 2023

REPUBLIC

VERSUS

1. BARAKA PETER SABINI

2. ROBERT EMANUEL @ SAKIRA

RULING

7th & 10th may 2024

MASSAM, J.:

The accused persons, Baraka Peter Sabini and Robert Emanuel Sakira are charged with the offence of Murder contrary to Section 196 and 197 of the Penal Code Cap. 16 R: E 2019.

The information was read over and explained to the accused persons who were required to plea thereto, on their particular plea, they pleaded not guilty to the information.

It was alleged that, on 27th day of March 2023 during night hours at Kakola village in Msalala District Council within Kahama district in Shinyanga region did murder one Ester Juma

The brief facts of the case are such that, on 27/3/2023 deceased was in her working place at Matara building no 2, the accused person with the aim of stealing reached to the deceased working place it was early in the morning, deceased saw them and started to interrogate them what they were doing in that place, 1st accused person had a scissor so he used it to assault the deceased and 2nd accused person had a knife which he used to cut the deceased and strangulated her to death. After a while one Tereza Augustino on her way to work she saw the body of deceased full of blood where she informed the neighbors and police who started the investigation. On the same date at night hours the accused were arrested in connection with the offence of murder upon interrogation both confessed to commit the said offence. On 28/3/2023 at different times the search was conducted and 1st accused person was found with the scissor, t-shirt and jacket all having the blood. At the house of the 2nd accused person they found a knife with blood stains. The body of deceased was examined and it was found that the cause of death was brain hydroxylation due to strangulation. Investigation was completed and the accused were arraigned to the court of the charge of murder. When the matter was

called for plea taking and preliminary hearing, the information of murder was read out and explained to them, and both pleaded not guilty.

The matter was called for hearing, the Prosecution side was represented by Mr. Katandukila Kadata and Ms. Mboneke Ndimubenya learned state Attorneys, while the accused persons were represented by Mr. Themistius Sulusi advocate for the 1st accused person, and Ms. Veronika Chamu advocate for the 2nd accused.

In proving their case, prosecution called (5) five witnesses and tendered 5 (five) exhibits.

The prosecution evidence was basically as follows, **PW1**, one ASP Abdalla Mbwana Iddi, who testified that, on 27/3/2023 he was working at Msalala while at the office he received a call from Mkolani hamlet chairman that there was person who was a security to the shops of Matala, he informed the OCD who informed doctor of Bugarama health center to go with him to the scene ,he went to the scene and found many people gathered, he saw the body with some wound on her heard ,neck and on his right ear. At the scene some people mentioned two persons which they suspected to be connected in that killing. He directed some policemen to draw the sketch map and on 27/3/2023 he arrested Baraka

Peter who was in the computer shop, he interrogated him and he confessed to be connected in that killing with his fellow 2nd accused person.

On 28/3/2023 he arrested 2nd accused person and decided to go and search to their house, in the house of 1st accused person he found scissor while in the house of 2nd accused person, he found a knife all were used in the commitment of the offence. He filed the certificate of seizure of all items and pray to admit them as exhibits and it was admitted as exhibit P1-P4 Collectively. When he was cross examined, he said that it was not a crime to possess the scissor or knife at our home. Again, he said that he found a t-shirt with blood in the house of 1st accused person but he did not mention it in his testimony. He added that he was not the one who wrote accused persons caution statement but he just interrogated them. Lastly, he said that he had no any proof that accused persons did admit to him to be connected in that killings, and no one told him that accused persons connected in that murder.

The PW.2, Silas Zablun Kayanda (doctor) testified that he is a doctor working at Bugarama health center his duties is to treat patients, preparation of hospital daily reports and conduct post mortem. That on 28/3/2023, he was working place at Bugarama Health Center, one

policeman came and asked him to go and conduct a postmortem of the dead body which was at the mortuary. He went to the mortuary and found a dead body of one Ester Juma which was identified by her relatives. The body was covered with blood and it had some wounds on her head, neck and on her right eye. He added that after his examination he found out that the death of deceased was caused by strangulation. He filled the postmortem and handed over to the policeman and he prayed to this court to tender it as exhibit and it was admitted as exhibit P5. When he was cross examined, he said that he did not inform this court the size of the wound which he found in the body of the deceased. Also, he said that he did not find out what was used to strangle the deceased that is why he ordered more medical examination to be conducted.

One Abdala Joseph Kombo WEO of Bulyanhulu testified as **PW3** as follows that on 28/03/2023, he was at his office and received a call from Pw1 one Abdala Mbwana who told him to escort him to go to search the house of two suspects of murder case, he escorted him to the house of 1st accused person where they found one scissor and in the house of 2nd accused person they find a knife. He added that he don't know who killed the deceased and he prayed that his statement to admitted even though it

is different with that of PW1 who was were in the scene together. Lastly, he said that he doesn't know how the said killing happened that is why he failed to connect the said exhibits with the case.

No F. 564 D/SGT Mbwana testified as **PW4** testified that he is investigator of criminal cases his duties are to arrest, search, and taking suspects to the court. That on 27/3/2023 at night hours he was at Bugarama police station. He was directed by his in charge to record caution statement of 1st accused person, he gave him his rights before starting to record his statement in his statement he admitted to be connected with the murder of the said deceased as they went at Matala Street with his fellow 2nd accused person after they had realized they had finished their money they decided to go to steal in order to get money. He added that he went at shop and started breaking it and when the deceased saw them she stopped them. They started to assault her by scissor and knife to death.PW4 added that he was not around when accused persons were arrested.

PW5 H.5720 D/C Moses told this court that he is a policeman stationed at Bugarama police station, that on the 27/3/2023 he was at the office when he was told by his boss to record his statement of 2nd

accused person, who confessed to him to be connected to the said offence. He said before recording his statement he gave him his right. 2nd Accused person told him that he was with his friend 1st accused person and they cut her with a scissor and knife and cause her death. Their aim was not to kill but to steal to the shops in order to get money for drinking as they were at the bar drinking. He added by saying that he wrote what 2nd accused person told him. Also, he had no proof that 2nd accused person confessed to him as he had no exhibit to proof the same.

Having heard the evidence from prosecution witnesses and closed their case this court is required in terms of section 293 (1) of criminal procedure Act to make a finding if this evidence adduced has established a case to answer against the accused persons as charged for the offence of murder. The same required the court to prepare a ruling if the court finds that a prima facie case has been established then the accused will be required to defend himself/themselves by informed their rights but if the same was not established the court will proceed to make findings that the same has not been established and proceed to acquit the accused person/s. The term prima facies case is not been defined statutorily but however there are some cases which elaborated the same ,in the case of

DPPvs. Morgan Malik & Nyaisa makori in criminal appeal no 133 of 2013 court of appeal (unreported) held that

"a prima facie case is made out if unless shaken ,it is sufficient to convict a accused person with the offence with which he is charged or kindred cognate minor one-----the prosecution is expected to have all the ingredients of the offence or minor cognate one thereto beyond the reasonable doubt. If there is a gap it is wrong to call upon the accused to give his defense so as to fill it in, as this would amount to shifting the burden of proof."

According to this means that at the closure of the prosecution case the prosecution have a duty to make sure that the evidence given to the court is strong without any gap capable to convict an accused person ,the prosecution always had a duty to make sure that a case must be proved beyond reasonable doubt as started to the case of **Mariki George Ngendakumana vs the Republic** in criminal case no 353 Of 2014 court of appeal also as elaborated in the section 110 and 112 and section 3(2) of evidence act Cap 6 R.E 2019. Again, in criminal matters it is the duty of prosecution to discharge the said duties of proving its case beyond the reasonable doubt. And in order for this court to convict an accused

person of offence of murder, the following key ingredients must be properly proved,

- (i). That, the victim of the crime mentioned in the charge is actually died,**
- (ii). Whether the death was not natural,**
- (iii). Whether it was the accused person who caused the death of the deceased,**
- (iv). Whether the killing of the deceased was with malice aforethought,**

With regard to the first question, **if the victim of the crime mentioned in the charge is actually died**, it is from the evidence testified by both parties that, the victim is actually dead. Also it is from the testimony of PW1 who was a policeman who went to the scene ,he said that he saw a body of the deceased lied down to the ground covered with blood and when they decided to call PW2 to examine the body if the victim was dead or not.PW2 who was a doctor testified that he was the one who examined the body of deceased which had some wound on her head, neck and on her ear and find out that the cause of death was lack of fresh air oxygen which caused by strangulation, this also was supported

by exhibit P 5 which was tendered by him all make this court to believe that the victim one EsterJuma Daudi died.

Regarding to the second ingredient, that **if the death was not natural**, is that, since the first issue was answered in affirmative way, this means that, the death of the deceased was unnatural death, as it was caused by strangulation as confirmed by the Pw2 who was the doctor together with exhibit P5 which was postmortem report.

In answering the third issue as to Whether it was the accused persons who caused the death of the deceased, it is from the evidence testified by prosecution starting with Pw1 that he got the information of the death of the victim and went to the scene with their fellows and saw the body of the victim, he said that after the investigation he was the one who arrested the accused persons and search to their houses after been told at the scene that they were suspected them.

On that search with their direction in the house of 1st accused person they found a scissor while in the house of 2nd accused person they found knife which they told him to be connected with that murder, when Pw1 was cross examined concerning the condition of the said knife he said it

was normal and clean, Pw3 who was in that search said that the scissor which was found in the house of 1st accused was incomplete one as it was just a one piece and the knife which was found in the scene had a blood stain, when he was cross-examined if he knows who killed the victim he said that he knows nothing about it.

He also admitted that his statement is different with that of PW1 even though they were at the scene together. Lastly, he said that he failed to connect the said exhibits with the case. PW4 and PW5 said that they were the ones who recorded the statement of accused persons and in their statement, they confessed to be connected with the murder of the deceased by using a scissor and knife, Also, PW3 who was the WEO and he was in the search said that he failed to connect the exhibits which was found at the scene and the offence. The evidence of PW1, PW3, and PW4 is different with the evidence of PW2 who was a doctor who said that the cause of death was strangulation and not the wounds which were found in the body of deceased.

The important issue to consider is that if the said evidence which brought by prosecution has been sufficiently established to require them to enter to the defense the court finds out that there was no objection in

issue no 1 that the victim was deceased and his death was unnatural, the issue is who killed the said deceased and what was the cause of that death.

In perusing the evidence of Pw1 he said that he arrested accused persons and interrogated them and confessed to be connected with the said offence, but PW4 and PW5 was the ones who recorded the statement of accused persons and confessed to be connected with the said offence but they brought nothing to proof the same. This court finds out that there was contradictory evidence concerning the exhibits which were found in the house of the accused persons, PW1 said that they found scissor, knife, t-shirt and jacket with was covered by the blood but PW3 who was in the search mention only scissor and knife, Also PW1 said that the said knife was normal and clean but the Pw3 said that the said knife had a blood stain so this court is asking itself which of the statement to believe. This court also finds out that among all witnesses no one said that he/she saw the said accused persons killing the deceased except PW4 and PW5 who said that accused person confessed before them but they brought nothing to proof, if there was one could help this court to proof that the accused persons are the ones who killed the deceased, also could help us to know

the cause of death as the evidence of PW1, PW4 and PW5 said that the cause of death was wounds which was caused by scissor and knife which were found in the house of accused persons but the same is countered by the PW2 who was a doctor who said that the cause of the death was strangulation, but PW3 who was the WEO said that he don't know the murderer and he failed to connect the exhibits which was found in the scene with the charge which accused persons are charged with.

It is a trite law that onus of proving in criminal cases is always in the side of the prosecution, as elaborated in the case of **Joseph John Makune v Republic** (1986) TLR 44 at page 49 where the court of appeal held "*the cardinal principle of our criminal law is that the burden is on the prosecution to prove its case, no duty is cast on the accused to prove his innocence. There are a few well known exceptions to this principle one example being where the accused raises the defense of insanity in which case he must prove it on the balance of probabilities.*" Since it is not clear as who killed the deceased person and connectivity of the exhibits which was found in the house of the accused persons and charge against them. This court found out that the issue no 3 that the said murder was caused by accused persons is failed as there was no connectivity between them

and the charge which was charged with, so this court finds out that a prima facie case has not been established in the required standard of law, that said the accused persons are found to have no case to answer consequently they are all acquitted under section 293(1) of the criminal procedure Act cap 20 R.E 2019.

It is so ordered.

DATED at **SHINYANGA**, this 10th day of May, 2024.



R.B. Massam.

JUDGE

10/5/ 2024

Right of appeal explained to the parties.



R.B. Massam.

JUDGE

10/5/ 2024

