

IN THE HIGH COURT OF TANZANIA

DODOMA SUB - REGISTRY

AT DODOMA

ORIGINAL JURISDICTION

CRIMINAL SESSION CASE NO. 20 OF 2023

REPUBLIC

VERSUS

1. SIRAJI RASHID BENI

2. IJUMAA RASHID BENI

3. AMIRI IDD HUSSEIN @ KIDARE

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.....RESPONDENTS

RULING

03.05.2024

HASSAN, J.:

Now Middle-aged men, one Siraji Rashidi Beni (1st accused); Ijumaa Rashidi Beni @ Magufuli (2nd accused) and Amiri Iddi Hussein@ Kidare (3rd accused), all residents of Iyoli village within Kondoa District in Dodoma Region, are jointly standing charged with the offence of Murder contrary to section 196 and 197 of the Penal Code, Cap. 16 R.E 2022.

It was alleged from prosecution evidence that, on 5th day of August, 2022 thereat Iyoli village within Kondoa District in Dodoma Region, the accused persons jointly and severally murdered one Saidi Juma, also resident of Iyoli village. In brief, facts leading to the commission of the alleged offence are, on the fateful day, the 2nd accused suspected the deceased of stealing 20 litres of cooking oil in his shop. Together with his co-accused, they apprehended the deceased and started to assault him to death. Thereafter, they took the corpse to the unfinished house of Fatuma Salumu Bahe. It was a night time around 01:00 hours of 6th August, 2022 when one Fatuma Salumu Bahe found the accused persons in her unfinished house together with the deceased who was seriously injured on his head. Fatuma Salumu Bahe claimed to have identified all three accused persons due to the electric lighting emanating from her neighbour's house, one Saidi Rosi.

Seeing that, Fatuma Salumu asked the accused persons to leave her place in order not to cause her any problem. At that point, she averred that one Amiri Iddi Hussein left and came back with blue tarpaulin. They wrapped up the deceased and left with him. Her statement was supported by the statement of one Shabani Yussufu. On his part, he stated in his statement that on 6th August, 2022 at about 01:15 hours he was at Iyoli village. And on

his way coming from his grandfather's home, one Nyanya where he was attending prayer "dua", he saw the 1st accused person and the 2nd accused person with the 2nd accused's car. He did not acknowledge the third person though. Shabani Yussufu alleged to have witnessed the 1st and 2nd accused persons together with the 3rd person to have loaded a person who was rapped with tarpaulin in the 2nd accused's car. He alleged to have identified them because, there were two houses which has electric lamp that enabled him to see and identify them. After that, they left heading to Kingale village. Thus, in the morning of 6th august, 2022, news about the murder erupted following discovery of the dead body which was abandoned along the road.

Owing to the incident's profiling, the accused persons were arrested interrogated and finally, they were jointly charged for murder. During trial, to prove their case, prosecution called upon a total of five (5) witnesses who were sporadically led by Ms. R. Mgimba, Senior State Attorney, Ms. R. Tuli and Ms. V. Njau, in some point, all are learned State Attorneys. To wit, Saidi Abdallah Katanga (PW1), Salum Ally Minga (PW2), Inspector Waziri Ahmad Nangawa (PW3), G. 9529 D/cpl Joseph (PW4) and finally F. 3262 D/cpl Joseph (PW5). Whereas, on another side, the 1st

accused was defended by Ms. S. Gabriel, 2nd accused by Ms. J. Paul and 3rd accused by Ms. C. Wambura, all leaned counsels.

PW1, Saidi Abdallah Katanga, in nut shell, affirmed and testified that, he is 58 years old. And that, he is human being doctor who works at Kondoia township hospital. He has 32 years' experience on duty. A holder of an Advance Diploma in Medicine which he acquired from Mbeya Institute of Medicine. That, he remembered on 07/08/2022 while he was at his work place, he conducted an autopsy of the deceased. He was escorted by the deceased's relatives and investigator Joseph.

On that, he observed that the deceased has died in more than an hour before. And his shirt was painted by blood stains and that he had a wound at his forehead. He observed that, a wound was caused by blunt object. The deceased's neck was rotating to show that, his neck vessels were mislaid (fracture of the neck with muscle disfunction). Upon his examination, he observed that the cause of death was due to head injury which also showed a sign of Aphasia.

And that after he completed examination, he filled a police form No. 3 (herein after referred PF3) which he could identify by his signature, his hand

writing and stamp of the doctor incharge. He identified the dead body that he conducted an autopsy to be of one, Said Juma. At the end, he prayed to tender a Post Mortem Examination Report which was rejected for admission by the court after upholding the objections raised by defence side. The objections were basically to the effect that, PW1 had testified about PF3 and not a Post Mortem Report which eventually he wanted to tender. Thus, he was about to tender a different document from which, he testified to have filled an autopsy result. Again, the instant Post Mortem report was disputed that, it violates provision of section 11 of the Inquest Act, Cap. 24 for not yielding a registration number of the Medical Practitioner who had filled the report as provided under PGO 225 paragraph 8 and 9, as well as section 11 and section 2 of the Inquest Act, Cap. 24. Thus, the impugned report was disputed to be less authentic.

PW2, Salum Ally Minga, 75 years, a resident of Iyoli village. He affirmed, and stated in brief that, he was a village chairman of Iyoli village. His main duty with his position is to keep security of his people. And that, on 6th August, 2022 at about 16:00hours he received information that there was deceased body found along the road which comes from Dodoma to Arusha. He also heard that Saidi Juma was missing. Thus, at 18:00hours he went to

Kondoa Police Station where they were informed that a corpse is at the mortuary. He went to the mortuary and he confirmed that the corpse was of the deceased. And that, on 17th august, 2022 at about 22:00hours he was approached by the police officer, in order to show and witness the arrest of the 2nd accused. Also, on 24th August, he was similarly involved in the arrest of the 3rd accused person at mama Sarah pombe's hut. He further identified all three accused persons on the dock. During cross examination, PW2 also revealed that he did not guide police to draw a sketch map of the crime scene. He further revealed that on 19/08/2022 police went to his house and asked him to participate on the search of the 2nd accused's house. That, search was conducted and police took out of 2nd accused's house a car and two tarpaulins to police station. He also admitted that he never visited a crime scene. And that people who caused murder were not known but they are only suspected.

PW3, Insp. Waziri Ahmad Nagawa, 42 years of age, who during the incident, he was working in the department of criminal investigation at Kondoa Police Station, sworn and stated that, on 17/08/2022 at 22:00hours he was at PW2's house, who was a chairman of village council. He added that, on that day upon his help, they were abled to arrest the 1st and 2nd

accused persons suspects of murder. And that, on 24/08/2022 at about 15:00hours they went to PW2 again and with his support arrested the 3rd accused and joined him with his fellow suspects at Kondo Police Station. He further identified all three accused persons on the dock.

PW4, G 9529 D/CPL Joseph. 32 years old, police officer and investigator who is working at Kondo Police Station, sworn and testified that, on 09/08/2022 at 8:00hours, he was at his work place, and at that time, he was given a police case file No. **Kon/IR. 1012/2022** to proceed with investigation. And that, he participated in the arrest of the accused persons together with his fellow police officers. He further testified, that, he was convinced that, the accused persons were responsible for the murder because of evidence adduced by one Fatuma Salumu Bahe and Shabani Yussufu.

Coming on 03/04/2024, PW4 was further called to testify, and to tender a witness statement of Fatuma Salumu Bahe. He testified to have recorded that statement himself on 23/08/2022 at 19:00hours. He also tender a death certificate of Fatuma Salumu Bahe which was admitted in evidence as PE1. However, his attempt to tender Fatuma Salumu Bahe's statement of evidence under section 34B of the TEA, failed. Thus, Fatuma's

statement was rejected for admission by the court following objection raised by defence counsels. The point for rejection was as such, that the said statement was deceitfully tempered with by putting a thumb print in the certification space, of which, as per records, it was earlier observed blank. And thus, the statement lacks validity as to whether they were the late Fatuma Salumu Bahe's genuine statements or not.

Needless to say, though in a nut shell, and regrettably, I must rebuke the deceitful act committed on the part of prosecution. That is to say, to alter or rather temper the deceased's statement of evidence wilfully and deceitfully was not only an unethical act, but also an abuse of legal process. Thus, I sincerely hope, that there will be no repeat in the future.

PW5, F. 3262 D/SGT Joseph. A police officer, 47 years of age. During the incident he was working in the department of criminal investigation at Kondoa Police Station. Sworn and in brief stated that, with respect to the charge at hands, he took Shabani Yussufu Mohamed's statement following the murder case involving the deceased Saidi Juma, a resident of Iyoli village in Kingale ward.

However, owing to the objections raised by defence counsels, a witness statement of Shabani Yussuf was rejected its admission in evidence. The reasons leading to rejection were that, PW5 has violated the provision of section 34B (2) (a) of the Tanzania Evidence Act (TEA) for his failure to take reasonable steps to procure attendance of the said witness. In his evidence, apart from making a phone call to the witness, which anyway went in vain, PW5 did not make any other effort to procure an attendance of witness in spite of the fact that, he had business and residential address of the witness in his statement. And no justification was unveiled as to why PW5 did trace him on the same.

That was all on the prosecutions' case who prayed to close their case. After conclusion of the prosecutions' case, the court was retained with the duty to ascertain as to whether the accused persons had case to answer or not, before allowing them to enter their defence.

Thus, moving forward, the guiding principle at this juncture is that, an accused is always entitled to have the charge firmly considered by the judge at the end of the prosecution's evidence. And if there is insufficient evidence to provide a *prima facie* case on a count, the judge should have the accused

acquitted. In **DPP V. Peter Kibatala**, Criminal Appeal No. 4 of 2015 (unreported) this principle was cemented. In its verdict, the court said:

"What essentially the court looked at, is prima facie evidence for prosecution is, unless controverted, the evidence would be sufficient to establish the element of the offence."

Further to that, the court went on to say that, what is meant by prima facie case has been, with lucidity, elaborated and articulated in **Ramanlal Trambaklal Bhatt v. Republic** [1957] EA 332-335, where it was stated that:

"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 be thought sufficient to sustain conviction. This is perilously near, suggesting that the court will fill the gaps in the prosecution case. Nor can we agree that whether there is a case to answer depends

on whether there is some evidence, irrespective of its credibility, or weight sufficient to put the accused in his defence. A mere scintilla 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 prima facie. Still, 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.”

See also, **Mwita Chacha & others v. Republic**, Criminal Revision No. 1 of 2007 CAT (unreported) which has cited with approval the East African case of **Murimi v. R** [1967] EA 542 where it was provided that:

“It requires a trial court to acquit an accused person if a prima facie case has not been made out by the prosecution.”

That said, it will be noticed that in our law the offence of murder is established under section 196 of the Penal Code, Cap 16. The provision provides:

"Any person who, with malice aforethought, causes the death of another by an unlawful act or omission is guilty of murder."

Thus, from the dictum of section 196 hereunder, to constitute an offence of murder, three elements ought to be proved beyond reasonable doubt. **One**, existence of an alleged assailant; **two**, death of another person caused by unlawful act; and **three**, malice aforethought. This being the case, to determine whether there is, or there is no evidence that the crime alleged has been committed by the defendant, the judge should direct his mind to observe the aforementioned elements.

Given the yard stick set forth above, to analyse whether these three accused persons were responsible for the alleged murder. It is clear from the testimony of all five prosecution's witnesses including PW1, PW2, PW3, PW4 and PW5 respectively, that out of them, there was no a single eye witness. Similarly, there was no circumstantial evidence adduced by prosecution witnesses which can point a finger to the accused persons. Therefore, in such a case, and in the absence of other evidence capable of founding a case, the judge is left with no other option except to acquit the accused persons from the count.

With respect to the question as to whether the deceased has actually died. At this juncture, to proceed with analysis on the death of the deceased, will serve as an academic pleasure. That being so, as always in this branch of law, if it appears in the prosecution evidence that there is insufficient evidence to prove a *prima facie* case against the accused persons, the case must stop. And thus, there will be no obligation for the accused person to enter defence.

In the circumstance, under section 293 (1) of the criminal procedure act, Cap 20 R.E 2022, I hereby find the accused persons not guilty to the charge and consequently, they are all acquitted.

Accordingly ordered.


DATED at DODOMA this 3rd day of May, 2024.

S. H. HASSAN

JUDGE


03/05/2024

Right of appeal well explained.



S. H. HASSAN
JUDGE
03/05/2024

This Judgment delivered this 8th day of April, 2024 in the presence of the parties and their advocates.



S. H. HASSAN
JUDGE
03/05/2024