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

CONSOLIDATED CRIMINAL SESSIONS CASE NO. 64 OF 2022 &

CRIMINAL SESSIONS CASE NO. 2141 OF 2024

THE REPUBLIC

VERSUS

HAMALA KIDANA .....1ST ACCUSED

NYENYE GATA KIDANA .....2ND ACCUSED

KIDANA GATA.....3RD ACCUSED

SITA GATA .....4th ACCUSED

KISANGA KAZILO.....5th ACCUSED

NYIGA KIDANHA.....6th ACCUSED

SITTA KIDANA @ SITTA .....7TH ACCUSED

RULING

7th February & 12th February, 2024.

BEFORE F. H. MAHIMBALI, J.:

The accused persons in this charge which is consolidated criminal sessions case no. 64 of 2022 and criminal sessions case no. 2141 of 2024 are jointly charged to have murdered one Masanja Mahalaja Kidana

confessed before PW7 that after they had abducted the said Masanja Mahalaja Kidana, they killed him by strangulating his neck by the use of the shuka dress he had been taken with and later hired one Mabula and Limbu Kazilo to throw his body far away not to be recovered by any one.

The said cautioned statement unfortunately didn't pass the legal test on its admissibility for want of authenticity of the recorded statement whether it was recorded early on 25th June 2020, it being altered the recording date from 27th June 2020 to 25th June 2020. As it was a retracted recorded confession, I refrained from admitting it for want of authenticity of the recorded confession within time stipulated by the law. What then is the legal consequence of the recorded statement taken out of time? In the case of **Geophrey Isidory Nyasio Vs. Rep,** Criminal Appeal No. 270/2017 CAT at Dar es Salaam at page15. The court denied the statement recorded out of time contrary to Section 50 (1) of CPA.

Nevertheless, that evidence could still be material on oral aspect if there is material substance linking the accused persons and the charge (see the Court of Appeal in the case of **Chamuriho Kirenge @ Chamuriho Julias V. The Republic**, Criminal Appeal No. 597 of 2017,

Masagi V. Mongwa, Criminal Appeal no. 161 of 2010). However, for the said admission to be actionable/incriminating must be credible and truthful.

The prosecutions case being built by the evidence of its totality of seven prosecution witnesses which on my thorough digest, the only credible witnesses are PW2, PW1, PW4, PW5 and PW7. The rest had nothing material to tell the court but only hearsay evidence. On their evidence, the prosecution's case was closed

The issue for consideration now after the closure of the prosecution's case is whether under section 293(1) of the CPA, the prosecution's case has been established sufficiently to require the defense to enter their defense. I say so, because it is a mandatory procedural requirement that after the closure of the prosecution case, the court is required under section 293 of the CPA to prepare a ruling, finding as to whether the evidence by the prosecution has established the prima facie case for the accused person to answer it. If it finds that the prima facie case has been established, then the accused person will be called upon to defend himself, and he will be informed of his rights in terms of section 293 (2). If the same is not established, then the court will proceed to make findings that

"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".

This means, at the closure of the prosecution case, the prosecution must have given sufficient evidence capable of convicting an accused person should the accused person be denied or forsakes the right to defend himself. That being the case, it is worthy and instructive at this stage, to look at what section 110 and 112 read together with section 3 (2) (a) of the Evidence Act [Cap 6 RE 2019] in as far as the burden and standards of proof is concerned. These two concepts were interpreted in the case of **Woodmington Vs OPP, (1935) AC 462**. The philosophy behind the principle of Prima facie case is actually premised on the principle enshrined in the case of **Christian Kale & Another Vs. The Republic** (1992) T.L.R 302 CAT and **John Makorobera & Another Vs. The Republic** (2002) T.L.R 296, which insistently held that the accused person should only be convicted of an offence he is charged with on the basis of the strength of the prosecution case not on the weakness of the defence case. That is a reason as to why at the closure of the prosecution case, a case must apparently be proved already, at the required standard

In this case, the accused persons are charged with an offence of murder contrary to section 196 and 197 of the Penal Code (supra). Under this law the prosecution was supposed to prove the followings:

i. That the said Masanja Mahalaja Kidana, was actually murdered.
ii. That those who murdered the deceased had unlawfully, or had knowledge that the act or omission of killing him (malice aforethought).
iii. That the said murder was actually caused by the accused persons in this case.

In this case, the testimony of PW2, PW1 and PW7 suggests that the accused persons are the ones who had taken the missing Masanja Mahalaja Kidana. And as he is missing, basing on the oral confession of the 1st accused person before PW7, the said Masanja Mahalaja Kidana has been murdered because of the existence of land disputes involving the siblings.

From their testimonies, the following pertinent questions follow: Is murder established in this case? Are the accused persons connected in this murder as charged?

seeing the accused persons killing/murdering the missing Masanja Maharaja Kiadana. And, for the circumstantial evidence to mount conviction, it must prove the alleged facts beyond reasonable doubt. This was as well stated in the case of **Jimmy Lunangaza Vs. Rep,** Criminal Appeal No. 159/2017 at page 9.

The vital question here is whether the case has been proved beyond reasonable doubt as per legal standards set? To achieve this, it is the Republic's duty to prove the alleged accusations against accused person. The defence, has no any legal duty to establish his innocence but only raise reasonable doubt. This burden has never been shifted to the accused person. The Court of Appeal of Tanzanian in **Thobias Vs. Rep,** Criminal Appeal No. 31/2017 at page 14 is very elaborative on this. That for circumstantial evidence to mount conviction, it must establish a case without leaving any legal doubt. The evidence must irresistibly point to the accused person and should not lead to any other interpretation. In the case of **Ndalahwa Shilanga Buswelu & another vs. Rep,** Criminal Appeal No. 62/2004) at page 19 & 20 that circumstantial evidence is like a chain. It must be connected.

Maharaja Kidana to unknown have not been called in court to testify on that fact. We are not told by the Republic, where are those people, and why have not been called. The legal consequences for that are as explained by Court of Appeal of Tanzania sitting at Iringa in the case of **Bashiri John Vs. Rep,** Criminal Appeal No. 486/2016:

> *"It is the duty of the Republic/Prosecution to call material witnesses who can prove essential facts/issues of the case".*

Yes, it is the law under Section 143 of TEA, there is no particular number of witnesses in the proof of the prosecution's case. However, the material witnesses must always be called for the proof of the case. I agree with the prosecution that in proof of the case, a particular number of witnesses is immaterial but the quality of their testimonies. Apart from this legal requirement under Section 143 of the TEA, it is the duty of the prosecution to call only material witnesses and not otherwise (See also **Musa Yusuph & Others Vs. Rep,** Criminal Appeal No. 186 of 2016 – at page 17). The important witnesses missing are the experts who conducted the DNA test to establish if those alleged remains being of human being

Mwanza where it approved the case of **Goodluck Kyando vs Republic** (2006) TLR 363, where the court held that:

> *"it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless they are good and cogent reasons for not believing a witness".*

In the current case, a careful scan of PW1 and PW2 and PW7's testimony, there is nothing of credence this Court can firmly rely on. Had there been evidence by PW7 or any other witness to lead to the discovery of the said remains believed to be of human being and that it is established that the said remains are of human being and connected to that of missing Masanja Maharaja Kidana, credence and cogency would have stood. In the absence of it, remains a reasonable doubt and the Court cannot act on such a reasonable doubt. It is sufficient by itself to raise a reasonable doubt in benefit of all the accused persons.

All that the prosecution side has said with their alleged witnesses in this case is the proclamation that the said Masanja Maharaja Kidana has gone missing. Legally speaking, in the absence of clear and cogent evidence, there is nothing established that the missing Masanja Maharaja

"A witness may be cross-examined on previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being proved, but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him".

The relevant part of section 164 is coached as hereunder:

"164.-(1) The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the court, by the party who calls him-

a) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

b) by proof that the witness has received or received the offer of a corrupt inducement to give his evidence;

c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;

d) when a man is prosecuted for rape or an attempt to commit rape, it may be shown that the complainant was of generally immoral character" [emphasis supplied].

horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties' case material discrepancies do."

In **Mukami w/o Wankyo v. Republic** [1990] TLR, the Court of Appeal took the view that contradictions which do not affect the central story are considered to be immaterial. See also: **Biko/imana s/o Odasi@Bim elifasi v. Republic,** CAT- Criminal No. 269 of 2012. Looking at the contradictions raised by the PW1, I am tempted to hold that they are, by their very own nature, ones that are so fundamental that they affect the central story. In my considered view, the PW2 and PW1's evidence on this, though not so material as reasoned above, I can hardly impeach them as incredible witnesses but only that what they testified is not credible by itself unless there was DNA report and other relevant evidence for that testimony.

Back to the main issue, should this Court exercising its full legal mind reach to a finding of guilty against the accused persons in the event the

Court: Ruling delivered in this 12th February, 2024 in the presence of Miss. Rehema Sakafu and Francisca Ntemi, learned state attorneys, for the Republic, Mr. Frank Samuel, Rugumira, Sulusi, Tuli, Audax, Veronica and Elizabeth learned advocates for the Accused persons respectively, all accused persons and Ms. Beatrice Mbeta - RMA.

Right of appeal against this ruling is explained to any aggrieved party.

F. H. Mahimbali

JUDGE