IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CRIMINAL SESSIONS CASE NO. 32 OF 2022

(Originated from P.I No. 16/2021 in the District Court of Sumbawanga at Sumbawanga)

REPUBLIC

VERSUS

EVERATHA SALEZI SUNGURA.....ACCUSED

RULING

27th June & 01st July, 2024

MRISHA, J

The accused **Everatha Salezi Sungura** was charged before this court with the offence of Murder contrary to section 196 and 197 of the Penal Code, Cap 16 R.E. 2019(the Penal Code). The facts of the case can be stated that on 18th January, 2022 at Matanga village within Sumbawanga Municipality in Rukwa Region the said accused did murder one Prosper Kasumbi henceforth the deceased person.

The accused person pleaded not guilty to the charge, thus compelling the prosecution to summon a total of four witnesses and tender one exhibit which is a Postmortem Examination Report.

In her testimony, PW1 testified that she lived at Matanga near to her parents Prosper Kasumbi and Everatha Salezi Sungura, on 18th January, 2023 she went to her parents to great them, she found her father sitting inside the house, he was not well, and he was getting some heat from the fire and trembling. His left leg was swelling and he had a wound from his limb to the left leg; when she questioned him what had happened to him, he responded by mentioning the accused person, her mother, as the one who poured some hot water to him.

She further stated that his father told her that he was also burned on his private part; however, she did not examine him. Thereafter, she went to his brother called Pius Kasumbi and informed him about the incident; later his father was taken to the hospital by Pius Kasumbi for some treatments, but died on the same day which was 18th January, 2023.

Again, she testified that her mother (accused person) denied to have burnt her father by pouring some hot water on his body parts, until when she was forced to tell the truth, thus she confessed to have poured the hot water to the

deceased body parts. During cross examination, PW1 testified that she found her father sitting in the house surrounding the fire and aside him there was a local brew. They had been a fight between the deceased and accused, as a result accused person poured out some hot water to the deceased person.

PW2 testified to have been informed about the death of deceased by his son Pius Kasumbi. He went to the funeral ceremony in the morning and talked to PW1 who informed him that the accused person caused the death of deceased by pouring some hot water to his body parts. He informed the village leaders about the incident, then the said leaders convened the meeting and questioned the accused person about the incident. At first, she denied, but later she confessed to have committed the offence. In cross examination, PW2 replied that the two children Pius Kasumbi and PW1 were in the meeting, he and other people in the meeting questioned the accused person and promised to help her, then she confessed to have committed the offence.

PW3, a police officer who investigated this case, testified that she recorded the statement of Folio "B" one Pius Kasumbi and two statements of PW1 and PW2. PW3 was in hospital with deceased relatives for post mortem examination. She testified that the deceased body had a wound on the private part, on his limb

and on the left leg. Then PW3 recorded the caution statement of the accused, but the latter denied to have committed the offence.

Lastly, PW4 a clinical officer, testified that he conducted the post mortem examination of the deceased body, the deceased body was affected by wound in the right lower limb, appearance of blisters in the private part. He filled the post mortem examination report and tendered it in court and it was admitted as Exhibit P_1. He testified further that the cause of death of the deceased person was due to severe burnt injury which causes dehydrated result to death.

Upon the closure of the prosecution case in relation to the information of murder, the learned counsel for the defence left the court to decide whether the accused person before the court has a case to answer or not.

For the accused person to have a case to answer, it must be shown that a prima facie case has been established by the prosecution Republic. A prima facie case, as known to the law, is a cause of action or defence sufficiently established by a party's evidence to justify a verdict in his or her favor, provided the other party does not rebut such evidence.

Again, a prima facie case is not made out if, at the closure of the prosecution case, the case is merely one *"which on full consideration, might possibly be*

thought sufficient to sustain a conviction", this position was amplified in the case of **Ramanlal Trambaklal Bhatt v Republic** [1957] 1 E.A 332.

It was also stated in the case of **DPP v Peter Kibatala**, Criminal Appeal No. 4 of 2015 (unreported) whereby the Court of Appeal held inter alia, that what essentially the court looks at prima facie evidence for the prosecution is, unless controverted, the evidence would be sufficient to establish the elements of the offence.

Furthermore, the Court of Appeal added by elaborating the meaning of the prima facie case by referring the case of **Ramanlal Trambaklal Bhatt v Republic** [1957] 1 E.A 332 where it was stated that:

> *"Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubts, 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 a 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 only on whether there is some evidence, irrespective of 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 defence." *[Emphases mine]*

Back to the present case, I have carefully analyzed the evidence of the four prosecution witnesses and found out that there is no doubt that the deceased person Prosper Kasumbi died unnatural death, whereas the testimonies of PW1 and PW2 who are relatives of the deceased, and PW4 medical doctor have spoken out about that kind of death.

The issue is who caused the death of the deceased. PW1 testified that she went to her parents' house and found his father sitting inside the house, he was not well, and was surrounding the fire and trembling. His left leg was swelling and he had some wounds from the limb to the leg; his father mentioned her mother as the one who poured the hot water to him. She informed his brother about the incident and his brother Pius Kasumbi took his father to the hospital. Also, the PW2 testified that the accused person confessed in front of the village leaders

and two children, PW1 and Pius Kasumbi, that she is the one poured some hot water to the deceased.

However, the evidence of PW1 was shaken during cross examination when the learned counsel for defence was given chance cross examine her; she replied that there was a fight between deceased and accused person as a result of which the accused poured deceased some hot water. Again, PW2 in his testimony stated that they questioned accused about the incident and she denied, but after they promised to help her, she confessed to have committed the offence. It is the position of the law that the onus of proof is on the prosecution, at all events where there are any reasons to suspect that a confession has been improperly induced, to prove that it was voluntary made. This position was clearly stated in the case of **The Republic v Mitilande** [1940] 7 EACA 46, where the court held that:

> *"The onus is upon the prosecution to prove affirmatively that a confession has been voluntarily made and not obtained by improper or unlawful questioning or other improper methods and that any inducement to make the same had ceased to operate on the mind of the maker at the time of making."*

From the above position, the confession by an accused person induced by coercion, promises, unlawful questioning or other improper methods to induce the accused, that confession was improperly made and the onus of proving that a confession by an accused person was voluntary made is upon the prosecution; See **Njugura Kimani and Others v Republic** (1954) 21 EACA 316.

In this case the accused person was promised by the members of the meeting including PW2, to be helped if she could tell the truth. However, on the first time, the accused denied to commit the offence until when they promised her to be helped, perhaps her life was endangered due to the gathering with number of people in the funeral ceremony.

In my view, the confession made by the accused person was not voluntary made because, **one**, she was promised to be helped if she could confess, **two**, if the confession was voluntary, she would have confessed before PW3, a police officer recorded her cautioned statement; at least that could show that the accused was freely and her life was not endangered, and **three**, the accused person would have a chance to confess before the court, but she still denied the offence upon it been read over and clearly explained to her.

For the above-mentioned circumstances, it is my settled view that the confession made by the accused person was induced by promise and unlawful questioning by the members of the meeting including PW2.

During hearing of their case, the prosecution case dropped a witness called Pius Kasumbi; the said witness according to PW3's testimony, is the one reported the incident to the police station, he is a folio "B", he took his father to the hospital, he informed PW2 about the death of the deceased, he was there at the mortuary when the post mortem examination was conducted by PW4 and he also participated in the meeting in which it is alleged that the accused person confessed.

With the role he participated, Mr. Pius Kasumbi was a material witness in this case. Dropping him with the reasons that his evidence will be monotonous, is not a good reason to drop him.

I am aware that the prosecution has no obligation to call every witness. However, the act of dropping such material witness leaves some serious doubts in the prosecution case which constitutes failure of justice. The aspect of failure of justice was stated in the case **Peter Mwafrika v Republic**, Criminal Appeal No. 413 of 2013 where the Court of Appeal held that:

"They would have, in our opinion, given independent evidence on what actually transpired at the scene of crime. Failure to call them without good cause being down did, in our view, prejudice the course of justice in this case. The prosecution therefore, needed to produce more evidence implicating the appellant, given the serious nature of the offence with which he was charged. The loopholes left unanswered...should be, in the interest of justice, interpreted in favour of the appellant."

The omission to call a material witness may also be consistent with an adverse inference that this witness would have offered evidence favorable to the accused person. The prosecution in this case dropped the material witness who participated in so many activities in this case than witnesses who testified in court; that left so many desires. In **Kasema Sindano @ Mashuyi v Republic,** Criminal Appeal No. 214 of 2006, the prosecution did not call material witness to whom the incident was reported first. The Court held that the omission called for an adverse inference that the prosecution intended to negate the accused innocence.

More so, the evidence of PW1, PW2 and PW3 contradicts with the evidence of PW4, a medical officer who conducted the post mortem examination. The evidence of three witnesses testified that they saw wounds on the left leg of the

deceased while PW4 in his testimony said that the infected wound was on the right lower limb and this evidence was supported by documentary evidence, a Post mortem examination report which was admitted as Exhibit P_1. In my view, such contradiction though may not go the root of the case, but it leaves a lot to be desired, taking into account that the testimonies of the three witnesses shows that they were there when the post mortem examination was conducted by the PW4.

After reviewing the prosecution evidence, I am confident that a prima facie case has not been made out to necessitated calling the accused person herein to enter her defence. The prosecution evidence relied on the PW1 and PW2, where the evidence of PW1 was shaken by defence counsel and her evidence needed to be corroborated by another witness, however, his evidence was not corroborated, that left a lot to be desired. Whereas, the evidence of PW2 proves that the accused was induced to confess for a promise to be helped which is contrary to the procedural law.

In the up short and in the light of the foregoing reasons, I am satisfied that the prosecution side has miserably failed to establish a prima facie case against the accused person to require him to make his defence. I hereby pronounce that the accused person has no case to answer and therefore not guilty of the charged

information of murder. The accused person is to be released from custody forthwith unless held on some other lawful cause.

Order accordingly.

A.A MRISHA
JUDGE
01.07.2024

DATED at **SUMBAWANGA** this 1st day of July, 2024.

THE HIGH COURT OF TANZANIA
UHURU NA UMOJA

A.A MRISHA
JUDGE
01.07.2024