IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

CRIMINAL SESSIONS CASE NO. 164 OF 2015

REPUBLIC

VERSUS

MALIMI ELISHA ..... ACCUSED

RULING

ISMAIL, J

The accused person stands charged with murder, contrary to sections 196 and 197 of the Penal Code, Cap. 16 [R.E 2002]. It was alleged that on 31st October, 2013, at Nyambiti village in Kwimba District, in Mwanza Region, the accused person murdered Grace Joseph. It was further alleged on the fateful day, at 05.00 hours, the deceased, was sleeping in her house when she was invaded by two assailants who cut her on the neck and on the head using a machete ("***panga***"). The deceased screamed for help which alerted her father who was sleeping in a nearby house. When he got out of his house he saw the assailants and he identified them as the accused and his friend, the deceased's husband. His pursuit of the assailants proved elusive. The deceased's father got into the deceased's

house and found that the deceased had been fatally injured and was carrying multiple wounds in her body. The deceased's father raised an alarm that gathered neighbours and other villagers who helped to rush the deceased to a nearby police station where they got a PF3 that enabled them to take the deceased to Ngudu district hospital where she died shortly after her arrival. News of the death of the deceased was conveyed to the police who visited the scene of the crime and drew a sketch map (exh. P2) and carried out an investigation of the matter. A swoop managed to apprehend the accused while his suspected co-assailant, the deceased's husband remains at large. The accused was subsequently arraigned in court on murder charges that he is presently facing.

To prove its case, the prosecution marshaled the attendance of two witnesses. The substance of their testimony is as summarized hereunder:

Breaking the ice for the prosecution was **Elisha Dickson Yusuph,** PW1 in these proceedings. He is a resident of Nyambiti and a neighbor of Joseph Bahebe, the deceased's father. He testified that at 05.00 hours on 31st October, 2013, he was asleep at their family home when he was awakened by the said Joseph Bahebe and informed them that his daughter, the deceased, had been attacked by assailants and had slashed

her using a ***"panga"***. The witness testified that he and other family members visited the scene of the crime and found that the deceased severely injured and unconscious. She carried deep wounds on the neck. The witness further stated that they rushed the deceased to Nyambiti police station where they were issued with a PF3 and proceeded to Ngudu hospital where the deceased was admitted as they waited outside. He stated further that the deceased's father who was in the ward informed them that the deceased had passed away. PW1 further recalled that the deceased's father told them that perpetrators of the murder incident were the deceased's husband by the name of Pastory and his friend, the accused who he identified by the name of Elisha. Responding to cross-examination, PW1 admitted that what he testified on is what he was told by the deceased's father, stating further that the deceased father did not see the assailants.

G4742 D/C Michael was PW2. His testimony is to the effect that he was an investigator of the matter. As his responsibility, he oversaw the postmortem report carried out on the deceased's body on 31st October, 2013. He also visited the scene of the crime on and drew a sketch map which was tendered and admitted in Court as exh. P2. Narrating the

version told by the deceased's father, PW2 testified that the incident occurred at 05.00 hours on 31st October, 2013, while the deceased was sleeping. The assailants were Malimi Elisha, the accused, and Pastory Joseph, the deceased's husband. The witness went on to testify that the accused was arrested on 13th March, 2014, and conveyed to Ngudu police station on the following day. He recalled that he interrogated the accused on 24th March, 2014 and confessed his involvement before he retracted, alleging torture and involuntariness. On cross-examination, PW2 admitted that the deceased's father did not see when the assailants, including the accused, allegedly attacked the deceased, though he saw them as they left the deceased's house and tried to have them apprehended. PW2 described the wounds sustained by the deceased as very deep and inflicted by a sharp object that he suspected to be a "***panga***". Responding to a question from the Court on whether conditions were favourable for positive identification, the witness testified that 05.00 hours was still dark but bright enough to identify the assailants and, in this case, he was aided by bright moonlight that lit the area.

Before the closure of the prosecution's case, the counsel for the prosecution rose to address the Court on the prosecution's intention to

invoke the provisions of section 34B (2) of the Evidence Act, Cap. 6 R.E. 2002 (now R.E. 2019), with a view to urging the Court to allow tendering of the statement of Joseph Bahebe, the deceased's father who has sadly passed away. This prayer was opposed by the counsel for the defence. On account of the prosecution's failure to fulfill the cumulative conditions set out in the said provision, the prayer was rejected. Consequently, the Court ruled that the statement was not admissible.

Brought to the Court's attention, as well, is the application of section 291 (3) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (now R.E. 2019). This was in respect of ***exh. P1*** which was admitted during the preliminary hearing.

After the closure of the Prosecution's case and, pursuant to the provisions of section 293 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002, I retired to consider if the accused have a case to answer, taking into consideration the testimony adduced in court.

In arriving at a conclusion, and in response to that grand question, the Court has to determine if evidence adduced by the prosecution establishes a case that warrants the accused to put their defence on the

matter. This is done by assessing the qualitative ability of the prosecution evidence to secure a conviction against the accused persons, if no if no explanation is offered in defence. This is what is called, in legal parlance, as a *prima facie* case. It is the level of evidence that should be established in order to require the accused to offer their defence. This mandatory requirement of the law is long established. In our case, this principle was accentuated by the defunct East African Court of Appeal in ***Ramanlal Trambaklal Bhatt v. Republic*** (1957) 1 EA 332, wherein the following remark was made:

> (a) *"It may not be easy to define what is meant by a **"prima facie"** case, but it must mean one on which a reasonable tribunal, properly directed its mind to the law and the evidence could convict, if no explanation is offered by the defence.*
>
> (b) *The question whether there is a **"case to answer"** cannot depend only on whether there is "some evidence" irrespective of its credibility of weight sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence.*
>
> (c) *The onus is on the prosecution to prove its case beyond reasonable doubt, and a **"prima facie"** case is not 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".*

Uncharacteristic of most murder cases of this nature, evidence adduced by the prosecution in case is, by and large, built on the hearsay narration on which the prosecution witnesses testified that they were told when they visited the scene of the crime, and other intelligence information they received. None of the persons from whom the witnesses drew the information came and testified for the prosecution. This means that what the Court was treated to was a third party account known in other words as hearsay testimony.

Testimony of PW1 was to the effect that he went to the scene of the crime after the incident had occurred and that information about perpetrators of the incident is a matter which was narrated to him and other people by the late Joseph Bahebe, the deceased's father, who alleged that he saw the assailants, as he rushed to the deceased's rescue. He was quite unflinching when he conceded during cross-examination that he never saw any of the suspected assailants and he was at pains to state the name of the accused person. With respect to PW2, his own account is to the effect that he recorded a witness statement whose maker was not, owing to the reasons beyond the prosecution's control, procured for testimony. As fate would have it, even his statement was not tendered in

evidence. He also admitted that anything that connects the accused to the incident he stands charged with was a hearsay account narrated to him by the deceased's father, the late Joseph Bahebe.

Then there is ***exh. P1*** which is a report on the post-mortem examination which revealed the deceased's cause of death and parts of the body were targeted for attack. Nothing, as far as ***exh. P1*** is concerned, connects the accused to the commission of the offence he stands charged. The same can also be said with respect to ***exh. P2***. This is just a map of the scene of the crime which lays out the sketch outlook of where the incident was perpetrated on the fateful. It doesn't go further than that in building up the prosecution's case.

Reverting back to the testimony of PW1 and PW2, which is substantially a third party account, it is a general rule that evidence can only be admissible in court if the same is direct. This simply means that whatever else that is not direct is hearsay and, principally inadmissible. This is the spirit of section 62 of the Evidence Act, which lays a general condition that oral evidence must be direct.

In ***Subraminium v. Public Prosecutor*** [1956] W.L.R. 965, the Privy Council defined hearsay evidence is to mean an assertion of a person

other than the witness testifying, offered as evidence of the truth of that assertion rather than as evidence of the fact that the assertion was made. Illustrating further on the hearsay rule, the said Court held:

> *"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made."*

See also ***Mpemba Mponeja v. Republic***, CAT-Criminal Appeal No. 256 of 2009 (unreported).

The just quoted passage in ***Subraminium*** (supra) clearly demonstrates that the hearsay rule is simply an exclusionary principle in the sense that it casts away any testimony other than that given by a person who directly perceived it. This is what PW 1's and PW2's testimony is. It is bunch of narration which carries little or no probative weight to convince the Court that the accused who stands trial before this Court is the culpable assailant who should be held to account. It is my considered

view that this testimony advances no new frontiers that would get close to establishing a *prima facie* case.

Before I wind down, it is pertinent, in my view, to drop a line or two on what was considered by PW2 as an identification of the assailants, including the accused, by the late Joseph Bahebe. The latter was quoted by PW2 as saying that the incident occurred at 05.00 hours and yet he was able to identify the assailants. PW2's account is that the identifier was aided by the moonlight which lit at the time. This is visual identification of the assailants at dawn hours of the day. PW2 admitted that save for moonlight that illuminated that early morning, it is usually dark and identification of a person, though not impossible, would be problematic.

It is worth of note that evidence of visual identification can be the sole basis for founding a conviction against an accused person if such evidence is watertight and leaves no possibility of errors. This position was stated in ***Mwalim Ally and Another v. Republic*** CAT-Criminal Appeal No. 39 of 1991 (unreported) in which it was held:

> *"where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely watertight to justify a conviction."*

This requirement has been emphasized in a plethora of other decisions of the Court of Appeal, the most recent being in ***Demeritus John @ Kajuli & Others v. Republic***, CAT-Criminal Appeal No. 155 of 2013 (unreported), in which it was observed as follows:

> *"In a string of decisions, the Court has stated that evidence of visual identification is not only of the weakest kind, but it is also most unreliable and a Court should not act on it unless all possibilities of mistaken identity are eliminated and it is satisfied that the evidence before it is absolutely water-tight (See,* ***Waziri Amani v.R.*** *(1980) TLR 250;* ***Raymond Francis v.R.*** *(1994) T.L.R. 100; R.V. Eria Sebatwo (1960) EA 174;* ***Igola Iguna and Noni @ Dindai Mabina v.R.,*** *Criminal Appeal No. 34 of 2001, (CAT, unreported). Eye witness identification, even when wholly honest, may lead to the conviction of the innocent (****R. v. Forbes****, (2001) 1 ALL ER 686). It is most essential for the court to examine closely whether or not the conditions of identification are favourable and to exclude all possibilities of mistaken identification."*

In ***Ally Mohamed Mkupa v. Republic***, CAT-Criminal Appeal No. 2 of 2008 (unreported), it was reiterated that *"where one claims to have identified a person at night there must be evidence not only that there was light, but also the source and intensity of that light. This is so even if the witness purports to recognize the suspect"* (See: ***Kulwa s/o Mwakajape***

& 2 Others v. Republic, CAT-Criminal Appeal No. 35 of 2005 (unreported)).

A more fortified position on identification was laid down in ***Chacha Jeremiah Murimi v. Republic***, CAT-Criminal Appeal No. 551 of 2015 (unreported), in which the Court of Appeal came up with a raft of questions which ought to be posed in assessing propriety and reliability of identification. It was held:

> *"...To guard against the possibility the Court has prescribed several factors to be considered in deciding whether a witness has identified the suspect in question. The most commonly fronted are: how long did the witness have the accused under observation? At what distance? What was the source and intensity of the light if it was at night? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally had he any special reason for remembering the accused? What interval has lapsed between the original and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses, when first seen by them in his actual appearance? Did the witness name or describe the accused to the next person he saw? Did that/those other person/s give evidence to confirm it?"*

In the light of the foregoing guidance, the question is whether conditions for identification in the present case were met. PW2 has stated

that the murder incident with which the accused are charged occurred at a time when darkness was fading and that there was bright moonlight that lit the scene of the crime and aided visibility. My hastened answer to this question is in the negative. Intensity of the light has not been explained nor has the distance between the identifier and the assailants. PW2 was also economical with facts with respect to time that the identifier used while observing the assailants. These unanswered questions undoubtedly cast serious doubt on the veracity of such testimony, were it to be used to establish the accused's culpability.

From the totality of this testimony, can it be said that a prima facie case has not been made out by the prosecution to be able to sustain a conviction against any or all of the accused person? My unflustered answer to this question is in the negative. No court or tribunal would properly direct its mind and found a conviction based on what is otherwise an extremely deficient set of facts which have done nothing to connect the accused to the offence that they stand charged.

In view of the foregoing, it is my finding that no *prima facie* case has been established against the accused person. In this respect, I am

compelled to apply the wisdom in ***Murimi v Republic*** [1967] EA 542 at page 546, in which the predecessor of the Court of Appeal stated:

> *"... the law required a trial court to acquit an accused person if a prima facie case has not been made out by the prosecution.* ***If an accused person is wrongly called on for his*** *defence then this is an error of law ..."* [Emphasis is ours].

See: ***Tete Mwamtenga Kafunja & 2 Others v. Republic***, CAT-Criminal Appeal No. 102 of 2005; ***Jonas Bulai v. Republic***, CAT-Criminal Appeal No. 49 of 2006 (both unreported).

Consequently, pursuant to the provisions of section 293 (1) of the CPA, I find and hold that the accused person has no case to answer and, therefore, not guilty of the offence of murder. Accordingly, I order his acquittal, and that he be set to liberty, unless held for other lawful reasons.

It is so ordered.

Right of appeal explained.

M.K. Ismail

JUDGE

08.06.2020

Date: 08th June, 2020

Coram: Hon. M. K. Ismail, J

Ms. Gisela Alex and **Lilian Meli:** State Attorneys for the Republic

Mr. Alfred Daniel: Counsel for the Accused

Accused: (name) **Malimi Elisha -** is present under custody and

represented by **Mr. Alfred Daniel, Advocate.**

Interpreter: Leonard: English into Kiswahili and vice versa.

Notice of trial on information for **Murder** contrary to **sections 196 & 197** of the Penal Code was duly served on the accused, now before the Court on **08.06.2020.**

Assessors:

1. Francisca John 56 years
2. Jesca Bandio 53 years
3. Shumbana Juma 38 years

Ms. Meli:

My Lord, the matter is for ruling and we are ready.

Sgd: M. K. Ismail
JUDGE
08.06.2020

Mr. Daniel:

I am ready my Lord and so is the accused.

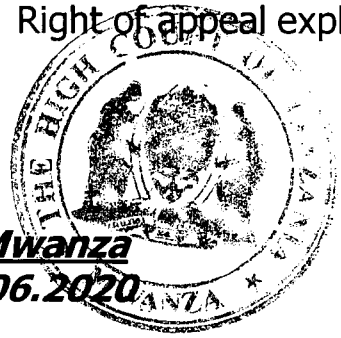
Sgd: M. K. Ismail
JUDGE
08.06.2020

Court:

Assessors have taken their seats and ruling of no case to answer is delivered in the presence of the Counsel for both parties, the accused and in the presence of the assessors, this 08th June, 2020.

Sgd: M. K. Ismail
JUDGE
08.06.2020

Right of appeal explained.



M. K. Ismail
JUDGE

At Mwanza
08.06.2020