

TANZANIA / JUDGMENT

the repuvblic vs happiness do aminiel rashid and two others 2023 tzhc 22694 17 november 2023

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TZHCDECIDED
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IN THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA (SUB-REGISTRY OF MOSHI) AT HAI CRIMINAL SESSIONS CASE NO. 98 OF 2022 THE REPUBLIC
VERSUS

1. HAPPINESS D/O AMINIEL RASHID
2. PETER S/O ERNEST FANUEL
3. JANE D/O AMINIEL MZIRAY

RULING

Date of Hearing: 16.11.2023 Date of Ruling : 17.11.2023 MONGELLA, J. This Ruling is on whether the prosecution, after closure of its case, has managed to establish a prima facie case against the accused persons, Happiness d/o Aminiel Rashid, Peter s/o Ernest Fanuel, and Jane d/o Aminiel Mziray, for them to be required to enter defence in terms of section 293 (2) of the Criminal Procedure Act, Cap 20 R.E. 2019. Under this provision, the court is required to call upon the accused person(s) if at the closure of the prosecution case it considers that there is evidence that the accused person(s) committed that offence or any other minor or alternative offences under the provisions of section 300 to 309 of the same Act. Page 1 of 10 If the court considers that there is no evidence that the accused person(s) or any one of several accused persons committed the offence or any other minor or alternative offence under the provisions of section 300 to 309 of the Act, it is required to record a finding of not guilty. Before embarking on the journey of ruling whether a prima facie case has been established by the prosecution, I wish first to expound on what amounts to prima facie case as ruled out by the courts in various cases. In the case of Republic vs. Kakengele Msangikwa [1968] HCD No. 43, it was held that: “A prima facie case at least must be one which a reasonable tribunal could convict if no evidence is offered by the defence.” The Court in this case followed with approval the principle laid down in the case of Ramanalal Trambaklal Bhatt vs. Republic [1957] EA 332 at page 334 whereby it was stated: “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 closure of the

prosecution, the case is merely one, 'which on full consideration might possibly be thought sufficient to sustain a conviction.' This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is 'some Page 2 of 10 evidence, irrespective of its credibility or 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. It is true, as Wilsin, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defense has been heard. It may not be easy to define what is meant by a 'prima facie case' but at least it must mean one in which a reasonable tribunal properly directing its minds to the law and the evidence could convict if no reasonable explanation is offered by the defense." In consideration of the above authorities, I can therefore say that a prima facie case can be said to have been established by the prosecution where in consideration of the prosecution case as a whole, a conviction can be entered against the accused person unless the said evidence is rebutted on defence. See also: The Republic vs. Samwel George Hiza @ Mwagavumbi & 3 Others (Criminal Sessions Case No. 122 of 2019) TZHC 4384 TANZLII. After setting the legal ground, the nagging question in the case at hand is therefore whether the prosecution has established a prima facie case against the accused persons. The accused persons Happiness, Peter, and Jane, are before this court arraigned for the offence of Manslaughter contrary to section 195 and 198 of the Penal Code, Cap 16 R.E. 2022. The facts as laid down in the charge are to the effect that, on 22nd day of October 2022, at Kadengele-Malala area within the district of Mwanga in Kilimanjaro region, did unlawfully Page 3 of 10 cause the death of Fatuma d/o Wahab Mjema, the sister-in-law of Happiness and Jane. In proving the offence, the prosecution mounted four (4) witnesses. PW1, one Dr. Alex Mremi from the Zonal Referral Hospital of KCMC, testified as to the cause of death of the deceased. He said that the deceased died of unnatural death whereby upon examining her body he discovered that she suffered "neurogenic shock" resulting from prolonged beating. He said that the deceased's body was found with bruises all over, except on the head and forehead. That, the internal parts of the body were found to be okay as there was no internal bleeding or bone fractures. That, all the internal organs were intact. He tendered a postmortem report to that effect, which was admitted as "exhibit P1." On cross examination, he agreed with Mr. Elia Kiwia, one of the defence counsels that "neurogenic shock" is a damage to the nervous system following spinal code injury, which can also lead to brain injury. When cross-examined as to whether the deceased had suffered any spinal code injury or brain injury, he said that the deceased was not found to have suffered any of that and the same was not included in his report. PW2, one, Philipo Halifa Msuya, a neighbour to Happiness and Jane's father's home, testified that on 22.10.2022 he was invited to Jane's (3 rd accused) engagement party at her father's house. He arrived there at 19hours and there were many other invited guests. The accused persons were there as well. That, when the party was going on, one Jenifer reported that a bottle of wine had disappeared. After a search the wine bottle was found with the deceased. That, later, Happiness (the 1 st accused) Page 4 of 10 lamented that her money that she had kept inside the house had been stolen. That, the deceased was suspected to be the

culprit, but by then she had already left the place. PW2 continued to state that him, one Ahadi Aminiel, and one Salehe Aziz were sent to fetch the deceased and bring her back. They did as they were ordered. They brought the deceased and handed her to Happiness and her husband Peter (the 2nd accused) He added that, the two took the deceased inside the house in a room which was near a corridor and started to cane her using a stick. He said that they canned her on the hands and shoulders while she was sitting down on the floor. That, there was no one else in the said room as the rest of the people, including him, were outside the house. When questioned as to how he managed to see the deceased being canned, he said that he saw the whole incident from a window which had grills whereby he stood at a distance of about 4 to 5 metres. Explaining the light as it was night time, he said that he managed to see through an electric light. That, he left the scene at around 22hours while the canning of the deceased by Happiness and her husband Peter was still going on. The next day at 13hours he heard the news of the passing on of the deceased. PW3, one G6772 CPL Graison, is a police officer who is the custodian of exhibits at Mwanga district police station. He tendered three pieces of broken sticks, a pair of black sandals/ open shoes, and one white curtain wire. These were said to have been collected at the house of Happiness and Jane's father where the beating allegedly occurred. The items were admitted in evidence as "exhibit P3 A, B, and C, respectively. He as well tendered the "Court Exhibit Register-P16" which was admitted as "exhibit P4." Page 5 of 10 PW4, was one, PF21535 Ass. Insp. Temba. He is the police officer who participated in the initial investigation at the crime scenes and arrested the accused persons. He said that on 23.10.2022 he was directed by his superior (the Head of Investigation-Mwanga district police station) to go to Kadegele-Malala area where an incident of murder of one Fatuma Wahab Mjema had occurred. He went there with a team of fellow investigators. Arriving at the area, they found the deceased's body laying on the road near the house of one, Fadhili Mohamed. The body was covered by a piece of "khanga." He inspected the body and found it had injuries on the back, thighs and buttocks. That, the injuries were from canning as they had swollen streaks. PW4 testified further that he questioned the said Fadhili who told him that the incident occurred yesterday night at the house of Mzee Aminiel Rashid. That, they had picked the deceased from the farm while she was still alive and wanted to take her to the hospital, but when they reached near his house, the deceased died and they called the police. He continued to state that after that they were led by the said Fadhili to Mzee Aminiel's place, which was not so far. At the house they interrogated Mzee Aminiel as to what happened the night of 22.20.2022. He told them that there was an engagement party of her daughter Jane Aminiel Rashid and at evening hours they realized his daughter's (Happiness Aminiel Rashid) money had been stolen from the house. That, they investigated and noted that it was the deceased who had stollen the money. A search for her was mounted whereby she was found and returned to Mzee Aminiel. That, thereafter he went inside to sleep and did not know what transpired. Page 6 of 10 PW4 continued to state that after the interrogations with Mzee Aminiel, they searched the house and collected sticks, a white curtain wire and sandals. They as well arrested 5 suspects which included the accused persons and took them to Mwanga police station. PW4 testified further that he was not the investigating police officer in the case and was just sent to the crime scene to collect the deceased's body and arrest the culprits. That, he did not interrogate the witnesses to the case. When questioned, on cross examination, as to what led him

to arrest the accused persons, he said that it was due to the information they got from their secret informer. The prosecution evidence as it appears hereinabove, in my view, contains a number of flaws in connecting the accused persons to the offence charged. First, there is a contradiction as to the injured body parts of the deceased. While PW1 stated that the deceased had bruises all over the body, except on the head and forehead; PW4 stated to have found the deceased with injuries on the back, thighs and buttocks. In addition, the medical evidence is in itself contradictory in the sense that; on one hand, the postmortem report (exhibit P1) and the testimony of PW1 shows that the deceased died of “neurogenic shock” following a prolonged beating. On the other hand, PW1 agreed with the defence counsel, Mr. Elia Kiwia that “neurogenic shock” “is a damage to the nervous system following spinal code injury, which can also lead to brain injury.” PW1’s evidence however, showed that there were no internal injuries or bleeding, no fractures, no brain damage in the deceased’s body. Despite those findings, PW1 did not clearly relate how the prolonged beating of the deceased that did not cause spinal code/brain injury led to the damage of the nervous system. Page 7 of 10 Further, the purported eye witness to the canning incident (PW2) contradicted as to the room in which he claimed the 1st and 2nd accused took the deceased for canning her. First, he said it was a room near a corridor, then he changed saying that it was in the sitting room. These contradictions, in my view, go to the root of the matter thus diminishing the credibility of the evidence adduced. The law is clear that material contradictions between the witnesses diminish the credibility of the witnesses and raises doubts as to the guilt of the accused. See: Amani Bwire Kilunga vs. The Republic (Criminal Appeal No. 372 of 2019) [2021] TZCA 467 TANZLII; and Jeremiah Shemweta vs. Republic [1985] TLR 228. Second, apart from the contradictions regarding the room in which the canning took place, PW2 did not describe in details as required under the law, the source of light that enabled him to see the incident. Taking into consideration that the offence was alleged to have occurred at night and the fact that he testified to have peeped from outside through a window and at a distance of 4 to 5 metres, PW2 had the obligation to describe the type of light used and the intensity the said light illuminated. However, he just stated that he managed to see with the help of electric light, which I find insufficient. See: Chacha Mwita and Two Others vs. Republic (2016) TSLR 359. Third, considering that the incident was alleged to have occurred in the presence of a number of people who were invited to the engagement party, and the fact that the accused persons had disassociated themselves with the offence, it was necessary for the prosecution to furnish another Page 8 of 10 witness to corroborate PW2’s testimony. PW4 mentioned one Fadhili Mohamed as the person who explained to him about the incident. However, this witness was not called to testify despite being material. PW4 also stated that he was not the investigating police officer in this case and never recorded any witness statement. This means that there was another investigating officer who interrogated the witnesses. However, he was not called. In my view, the investigating officer was also a material witness to the case. The law is trite to the effect that failure to furnish a key witness leads to an adverse interpretation against the party who was to furnish the said witness to the effect that if the witness was called, he/she would have adduced evidence in dis-favour of the party. See: Aziz Abdallah vs. Republic [1991] TLR 71. Fourth, PW4, who claimed to have done the initial investigation, did not link exhibit P3A, B, and C (sticks, white curtain wire, and black sandals) with the accused persons. He could not state how the items

seized were used by the accused persons to attack the deceased. Further, he could not establish what exactly led him to arrest the accused persons. When question about that by the defence, he just said it followed what he was told by a secret informer, but could not state exactly what it was. PW4, further failed to answer many relevant questions on cross examination that related into linking the accused persons with the offence charged. His response was mainly "I do not know" "I do not remember." He as well contradicted himself as to what he claimed to have been told by one Fadhili Mohamed. He first said that Fadhili told him that they were taking the deceased to the hospital and she died on the way causing them to call Page 9 of 10 the police; then on cross examination he said the said Fadhili told him that they found the deceased's dead body on the road. Last, with regard to the 3rd accused person, Jane Aminiel Mziray, it is clear on record that none of the prosecution witnesses mentioned her to be involved in any way in the offence. Specifically, PW2 who purportedly witnessed the incident, mentioned only the 1st and 2nd accused persons to be involved. The 3rd accused was not implicated at all. Having observed as hereinabove, in terms of section 293 (1) of the Criminal Procedure Act, Cap 20 R.E. 2019, I find that there is no sufficient evidence mounted by the prosecution that establishes prima facie case against the accused persons. Accordingly, I record the finding of not guilty against the accused persons, Happiness Aminiel Rashid, Peter Ernest Fanuel, and Jane Aminiel Mziray, and do hereby acquit them of the charge of Manslaughter. Dated and delivered at Hai-Kilimanjaro on this 17th day of November 2023. X L. M. MONGELLA JUDGE Signed by: L. M. MONGELLA Page 10 of 10

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