

**IN THE HIGH COURT OF TANZANIA
TABORA DISTRICT REGISTRY
AT NZEGA**

CRIMINAL SESSION CASE NO. 9 OF 2019

REPUBLIC

VERSUS

- 1. SHIMBI S/O DAUD @ KULWA.....1ST ACCUSED**
- 2. HAMIS S/O ADAM @ MDODO.....2ND ACCUSED**
- 3. NGADULA S/O MAYALA @ KITULA.....3RD ACCUSED**
- 4. JUMANNE S/O LUBELA @ SANANE.....4TH ACCUSED**
- 5. HARUNA S/O SHABAN @ MTANI.....5TH ACCUSED**

JUDGMENT

Date of Last Order: 30/10/2020

Date of Delivery: 06/11/2020

AMOUR S. KHAMIS, J.:

Shimbi Daud Kulwa, Hamisi Adam Mdodo, Ngadula Mayala Kitula, Jumanne Lubela Sanane and Haruna Shaban Mtani hereinafter referred to as the accused, are charged before this Court with two counts of murder contrary to Section 196 of the Penal Code, Cap 16, R.E 2002.

In the first count, the prosecution alleged that on 29th day of January 2017 during night hours, the accused jointly murdered one Athuman Shaban at Kapilimula Village, Nzega District, Tabora Region.

The particulars in the second count were that on 29th day of January 2017 during night hours, the accused jointly murdered one Tabu D/o Shija at Kapilimula Village, Nzega District, Tabora Region.

The accused pleaded not guilty to the charge and the case proceeded to trial.

Throughout trial, Shimbi Daudi Kulwa, Hamis Adam Mdodo and Ngadula Mayala Kitula were represented by Mr. Edward Malando, learned advocate.

Jumanne Lubela Sanane and Haruna Shaban Mtani had services of Mr. Saleh Makunga, learned advocate.

Ms. Jane Mandago assisted by Ms. Juliana Moka, learned senior state attorneys, prosecuted the case.

The prosecution called a total of ten (10) witnesses in order to prove the ingredients of the offence beyond reasonable doubts.

The substance of the prosecution evidence can be summarized as follows:

PW 1 JACOB SALU CHALAMILA was the Executive Officer for Kipilimuka Village at the time of the incident.

In the night of 29/01/2017, he was at Ilumilo Hamlet, Kipilimuka Village when Mabula Bundala (Chairman for Iyombo Hamlet) and Gaspar Shija Kisanga informed him of the incident at Iyombo Hamlet where Athuman Shabani and his wife, Tabu Shija, were invaded by bandits and killed.

Upon arrival at the scene, he found a gathering of villagers including Mr. Shabani Silani, biological father of the late Athuman Shabani who narrated on how they learnt of the incident.

He said that prior to his arrival a team was dispatched to follow footsteps of suspects that were vivid on the ground.

After sometime, a team that had motorcycles including Masanja Shija, William Charles and Mika John was tasked to search for suspects.

He contacted OC – CID Aziz Kalokola and the Mwantumu Ward Executive Officer, Mr. Daniel Vincent on the incident.

Policemen arrived in the village at 12.00 noon, inspected the scene and questioned relatives of the deceased persons.

At 3.00 pm villagers and policemen who were still at the scene learnt that suspects were arrested which opened communication between policemen and the search team.

PW 1 was present when three suspects were brought to the scene carried over motorcycles. According to him, they were handed over to policemen immediately upon arrival.

With permission from the OC - CID, the three suspects were questioned by villagers and confessed responsibility for the killing.

The OC CID showed an axe used in the killing that was found in possession of the suspects at the time of arrest.

The witness further learnt that the time of the incident, the deceased persons were in the company of their daughter, Pili Athuman.

He identified the three suspects as the first, second and third accused in this case.

PW 2 G 3519 D/C DANIEL, a policeman working in Nzega Police Station, told this Court that on instructions from the OC CID, Aziz Kalokola, he travelled to Urambo District on 14/03/2017.

Upon arrival at Urambo Police Station, he was instructed to interrogate and record statement of a suspect, Jumanne Lubela Sanane, arrested in Kaliua District on 13/03/2017 and subsequently transported to Urambo.

Upon cautioning the suspect in accordance with the law and procedures, he reduced a confessional statement to writing.

After a trial within trial, the statement was admitted as Exhibit P 1.

PW 3 DR. AMOS RICHARD PETRO, Assistant Medical Officer with Nzega District Hospital conducted a post mortem examination on the dead bodies.

He testified that the dead bodies of a man and a woman were found in a room at Kipilimuka Village with multiple deep cut wounds caused by a sharp object.

He established causes of death as circulatory failure. The post mortem reports were admitted as Exhibits PE 2 and PE 3.

PW 4 SP AZIZ MUSA KALOKOLA, was the OC CID for Nzega District at the time of the incident.

He testified that on 29/01/2017 while at home in Majengo area - Nzega, received a call from Kipilimuka Village Executive Officer, Jacob Chalamila, on a murder incident at Iyombo Hamlet, Kipilimuka Village, Mwantundu Ward, Nzega District.

Upon informing the OCD and RCO, he went to Nzega Police Station and selected a team of policemen to visit the scene.

He went to the scene in the company of DC Rajab (driver on duty), DC Dilu, WP DC Rebecca, DC Said and Dr. Amosi Richard Petro (PW 3).

On arrival at the scene around 11.00 to 12.00 noon, found two dead bodies of a man and woman in a bedroom.

The bodies had several cut wounds and were on pools of blood.

He was briefed by Jacob Chalamila (VEO) and Daniel Vincent (WEO) that villagers had followed footsteps and bicycle marks of the suspects.

He questioned Pili Athuman, daughter of the deceased, on circumstances of the killings. Pili did not recognize the killers but stated that one of them had put on a red T-Shirt.

He also learnt that the killers did not take anything from the deceased's house.

By 2.00 PM, Jacob Chalamila informed him that villagers had arrested one suspect and were following up on others.

Around 5.00 PM, three suspects were brought to the scene by villagers. Those were Shimbi Daud, Hamis Adam and Ngadula Mayala.

The villagers who brought the suspects in motorcycles were William, Mika and others he could not remember.

The suspects were kept in the back of a police land cruiser, PT 1838 whereupon policemen examined a bag found with the suspects at the time of the arrest.

The bag had a picture and name of Bob Marley and carried a short axe believed to have been used in the killing.

Other items in the woolen bag were a black bed sheet, one pair of yeboyebo shoes, two head caps (red and black) and two battery torches.

The police officer said that the red cap was written Manchester.

The bag was handed over to policemen by Mr. William, a villager involved in arresting the suspects.

Subsequently, PW 4 spoke to the suspects who were kept in the police vehicle.

He informed this Court that Shimbi Daudi Kulwa confessed on the suspects' involvement in killing the deceased persons and also disclosed that another suspect had run away.

On further questioning, Shimbi Daudi said that the deceased were believed to be witches and thus his team was engaged by Moshi Lugedeja to end their lives.

Shimbi Daudi further disclosed to PW 4 that Ngadula Mayala and Hamis Adam had entered the house at the time of the killing while Jumanne Lubela and he (Shimbi) remained outside to ensure security of the scene.

PW 4 said that Ngadula Mayala informed him that the axe did not have any blood because it was washed with water immediately after the incident.

PW 4 informed villagers at the scene that suspects confessed on the incident and requested them to be patient as Police complied with the due process.

Policemen re-arrested the suspects and placed them in the cell for their protection.

Upon arrival at the Police Station PW 4 informed the RCO on developments found at the scene and on a suspect who ran away.

On 14/03/2017, the witness received a call from RCO on arrest of another suspect Jumanne Lubela, at Kaliua District, Tabora.

Due to sensitivity of the case, PW 4 drove to Urambo District in the company of DC Daniel (PW 2) and Coplo Mohinda in follow up of the arrested suspect.

He explained that the police team drove to Urambo and not Kaliua because the suspect was moved to Urambo Police Station for necessary Court appearance.

PW 4 visited Kaliua and spoke to Saguda, a policeman who arrested Jumanne Lubela Sanane at King'wang'oko Village, Kaliua District.

Upon return in Urambo, he instructed DC Daniel to record the suspect's cautioned statement.

Immediately after recording a cautioned statement, the suspect was transported to Nzega Police Station where he was kept in the cell.

On 15/03/2017 Jumanne Lubela Sanane was taken to a justice of the peace by a policeman known as DC Omar. Thereafter he was charged for murder.

According to PW 4, investigations revealed that the accused were engaged to kill the deceased at a fee of Tshs. 5,000,000/= and Tshs. 1,500,000/= was paid up front.

Investigations further revealed that apart from Moshi Lugedeja, Haruna Shabani had also paid the first, second, third and fourth accused in order to kill the deceased.

He testified that at the time of arrest, Jumanne Lubela Sanane was found in possession of a bicycle given to him by Haruna Shabani @ Mtani as part payment of the instruction fees.

The Bob Marley bag was admitted as Exhibit P 4 while its contents: Manchester red cap (Exhibit P 5), black cap (Exhibit P 6), iron axe (Exhibit P 7), yeboyebo sandals (Exhibit 8), black bed sheet (Exhibit P 9), metals sharpener (Exhibit P 10), pink torch (Exhibit P 11) and light blue torch (Exhibit P 12).

On further examination, PW 4 stated that all the five accused orally confessed to him of their collusion to kill the deceased couple.

On re – examination by Ms. Juliana Moka, the witness said that Shimbi Daudi, Hamis Adam and Ngadula Mayala were arrested at Ishimurwa Village, Uyui District, Tabora Region.

PW 5 MASANJA SHIJA MHOJA, a resident of Iyombo Hamlet, Kipilimuka Village, Nzega District, told this Court that he was at home in the night of 29/01/2017.

From his residence, Masanja heard an emergency piercing voice (mwano) alerting villagers of an impending danger.

In accord with the village customs, he woke up and followed up the “mwano” to the house of Athumani Shabani.

He found several villagers gathering at the residence and learnt that Athuman Shabani and his wife, Tabu Shija were killed.

The deceased’s daughter, Pili Athuman was questioned about the incident and said that one of the killers was in a long sleeved red shirt and a red head cover.

On inspection of the house, villagers noticed that killers’ footsteps were left on the ground largely because it had rained and the soil was wet.

The village gathering resolved that some villagers should follow the footsteps.

PW 5 was in a team that traced suspects’ footsteps. Others included William Charles and Mabala.

The search team tracked down footprints to the bushes with assistance of hand torches.

After some time, they detected footsteps turning up to a particular bush and thereafter, marks of bicycle tyres appeared alongside footfall suggesting that killers picked up bicycles that were left in the bush.

The footmarks led them to several villages and trading centers along the way including Itinabhusalu and Ishihimulwa where three suspects were arrested in possession of a Bob Marley bag.

He named those arrested as Shimbi Daudi Kulwa and Ngadula Mayala Kitula.

He explained that the first accused to be arrested was dressed in a red long sleeved shirt and named Shimbi Daudi Kulwa and Ngadula Mayala Kitula who were arrested after him.

PW 6 PILI ATHUMAN SHABANI, is daughter of the deceased couple and was in company of her parents at a time of the attack.

According to her, a strange man wearing red shirt and red cap with yellow flowers printed on it entered her parents' bedroom and cut them with small axe.

PW 6 was just three paces away from where the killer hit her parents. She sufficiently saw the chain of events as the room had a solar torch.

She witnessed a second intruder standing at the door of the parents' bedroom holding a panga and a torch. The second man was six paces away from her.

The man in red shirt and cap warned her not to walk out of the room or risk being chopped as her deceased parents.

Immediately after warning her, the killer in red shirt got out of the house and was heard talking to his colleagues who were outside.

When killers' voices faded, she got out of the house and walked to her grandparent's house located about 100 meters away.

After narrating the ordeal to her grandparents, the grandfather notified other villagers hence a "mwano".

She recognized Exhibit P 5 as a red cap that was worn by the killer on the fateful night. The yellow flowers referred to was a logo of Manchester United printed on the cap.

The witness also identified an iron axe (Exhibit P 7), a torch (Exhibit P 11) as items that were used by the killers on 29/01/2017.

On cross examination by Mr. Edward Malando, PW 6 stated that while killers were chopping her parents, the axe accidentally fell on her head and thus realized that its handle was made of iron.

On re - examination by Ms. Mandago, the witness said that with assistance of a solar torch, she noticed that the entire Exhibit P 7 was made from iron.

PW 7 WILLIAM CHARLES NDILA, a resident of Kipilimuka Village, was one of the villagers who arrested the first three suspects after following up their footsteps.

His testimony was similar to that of PW 5. He stated that upon being arrested at Ishihimulwa Village, a suspect dressed in red shirt disclosed that they killed a man and his wife in Kipilimuka Village.

He identified the suspect in red shirt as Hamis Adam Mdodo who showed where about of the other two suspects, namely: Shimbi Daudi Kulwa and Ngadula Mayala Kitula.

He said that Shimbi Daudi Kulwa and Ngadula Mayala Kitula were arrested under a cashewnut tree and in possession of a Bob Marley bag (Exhibit P 9).

The witness said that upon arrival at Kipilimuka, the three suspects showed contents of a Bob Marley bag to the villagers.

He named those contents as an axe, two torches, a black and red caps, one black bed sheet and an iron sharpener.

He said that the three suspects were kept in a police vehicle for sometimes but subsequently released for questioning by villagers.

Upon questioning, the suspects confessed to killing the two deceased.

On cross examination by Mr. Edward Malando, PW 7 stated that at the time of arrest, Shimbi Daudi Kulwa and Ngadula Mayala Kitula were in possession of two bicycles.

He explained that the arresting team opted to leave the bicycles behind in order to rescue the suspects who risked killing by villagers who gathered under the tree following their arrest.

He added that another suspect ran away at a time of arresting Hamis Adam Mdodo.

On re – examination by Ms. Juliana Moka, William Charles Ndila stated that the Bob Marley bag was found in the laps of Shimbi Daudi Kulwa.

PW 8 SEVERINA NICODEMUS BIDEBERI, was a Primary Court Magistrate and Justice of the Peace who recorded an extra judicial statement for Hamisi Adam Mdodo on 30/01/2017.

She testified that the suspect was brought to her office by Sargent Hilu and placed under custody of Leonard Mswaya, Court Office Attendant.

Upon ascertaining that the suspect could speak Kiswahili, Leonard Mswaya was released whereupon justice of the peace questioned the suspect if he had injuries or wounds on the body.

On external examination and with assurance from the suspect himself, the justice of the peace concluded that Hamis Adam Adam Mdodo was free from injuries, wounds and or scratches on the body.

The suspect further assured the magistrate that he was ready and willing to record an extra judicial statement.

On that note, the magistrate warned him in accordance with the law and recorded a statement that was duly read over to him before it was signed as true and correct.

In the statement, the suspect confessed to kill the deceased in association with other accused in this case.

He explained that his group was engaged by Moshi Lugendeja at a fee of Tshs. 5,000,000/= in order to get rid of the deceased who were believed to be witches.

The suspect further disclosed that Tshs. 1,000,000/= was paid in advance to the team members.

The extra judicial statement was admitted as Exhibit PE 13.

The witness further testified that on 15/03/2017 she recorded an extra judicial statement of a suspect, Jumanne Lubela at Nzega Urban Primary Court.

The suspect was introduced to her by a policeman, one Omar from CID office, Nzega.

The suspect was placed under custody of Omar Mtinginya, Court Office Assistant as the policeman was asked to leave Court premises.

Upon satisfaction that there was no need of an interpreter, the magistrate released Omar Mtinginya and remained with a suspect.

She asked him as to whether he had bruises, wounds and or injuries on the body.

The suspect said that bruises on the left arm was a result of beatings by “wananchi” at a time of arrest.

The magistrate examined the suspect who was in short sleeved shirt and saw the alleged bruises.

Thereafter the suspect was warned in accordance with the law and expressed willingness to record the statement voluntarily.

In the statement, Jumanne Lubela Sanane revealed that he took part in killing the deceased at Kipilimuka Village on instructions from Moshi Lugendeja.

The statement was admitted in evidence as Exhibit PE 14.

PW 9 H 1623 D/C SAGUDA, was a policeman who arrested Jumanne Lubela Sanane on 4/03/2017.

He stated that the suspect was arrested in Konanne Village, Kaliua District, following information that he was involved in killings that took place in different parts of the district.

He said that when policemen approached Mama Sofia Saanane’s house, Jumanne Lubela Sanane ran away to the nearby farms.

Despite of attempt to obstruct arrest and injure policemen with a hoe, Jumanne Lubela Sanane was arrested and handcuffed.

He was kept in a cell at King'wang'oko Police Station before being transferred to Kaliua Police Station and then Urambo Police Station.

In the course of interview with Police, the suspect disclosed that he took part in killing a couple at Kipilimuka Village, Nzega District.

He named the deceased as Athumani @ Suma and his wife and disclosed that his associates: Bulandu Lusamula, Ngadula Mayala and Benjamin Komesha were arrested by "wananzengo" (villagers) immediately after the incident.

PW 9 further said that in the course of an interview, Jumanne Lubela Sanane disclosed that he escaped from arrest at a time when others were arrested by "wananzengo".

PW 9 said that apart from that disclosure, the suspect was questioned on incidents that took place in Kaliua District.

The OC CID Kaliua was informed on the suspect's confession regarding the Nzega incident and arrangements were made for policemen from Nzega to inquire on it.

On 15/03/2017, the policeman was instructed by the OC CID Kaliua to accompany other policemen to King'wang'oko regarding investigation on Jumanne Lubela Sanane.

He was connected to Major Sabato, then OC Ulyankulu Police Station, D/C Dilu from Nzega Police Station and other policemen from Tabora Central Police Station.

The said officers were in a vehicle together with a suspect, Jumanne Lubela Sanane.

Upon questioning, PW 9 was told by Jumanne Lubela Sanane that he came back to show a bicycle involved in the Kipilimuka murder incident.

The suspect further disclosed that the bicycle was given to him by one Haruna Shabani, a resident of Taba area, Ulyankulu Division, Kaliua District as a fee for the murder of the two deceased in this case.

Jumanne Lubela Sanane introduced PW 9 to Haruna Shabani who was also in that vehicle as a fellow suspect and said that the bicycle was kept in the house of Mama Sofia Sanane in King'wang'oko Village.

Thereafter, Jumanne Lubela Sanane led the way to the house of mama Sofia Sanane where the team successfully retrived the bicycle with assistance of Sofia Sanane.

The search in the house was witnessed by Sofia Sanane and another civilian, Alex Yohana.

The bicycle NELAM - MIG 1 make, green in colour was found parked in the seating room of the house.

When questioned by policemen, Haruna Shabani admitted that the bicycle was truly given by him to Jumanne Lubela Sanane.

Haruna Shabani further told policemen that the total fee for the killing was Tshs. 5,000,000/= that was to be shared with his brother, Moshi Lugedeja.

It was also disclosed that apart from the bicycle, Tshs. 1,000,000/= was paid in advance.

The bicycle was admitted in evidence as Exhibit PE 15.

On cross examination by Mr. Edward Malando, PW 9 said that Bulendu Lusamula, Ngadula Mayala and Benjamin Komesha were not known to him.

On further cross examination he said that the first, second and third accused were not known to him.

On re – examination by Ms. Juliana Moka, PW 9 said that the three names of arrested suspects were given to him by Jumanne Lubela Sanane after his arrest.

He identified the fifth accused as Haruna Shabani who was present at a time when Exhibit PE 15 was seized.

PW 10 F 1592 D/SSGT SABATO was the Commanding Officer (OC) for Ulyankulu Police Station in May 2017.

He recalled that in the afternoon of 13/05/2017 fellow policemen from Tabora; Dilu, Thobias, D/C Khalifa and a suspect, one Jumanne (Lubela Sanane) visited his office.

Policemen requested for help in arresting a suspect named Haruna (Shabani Mtani), a resident of *Barabaya Ya 10* (Street No. 10) – Taba area, within his administrative area (Ulyankulu).

On account of his experience in the area, he advised that the arrest be carried during night hours.

He led the team which arrived in Taba area at 7.30 PM and found the suspect seated outside the house in a company of other people.

On identification by Jumanne Lubela Sanane, Haruna Shabani Mtani was arrested and transported to Ulyankulu Police Station where he was kept in a cell.

Following a request by Dilu, on 15/03/2017 PW 10 accompanied D/C Khalifa, Dilu, D/C Saguda and Constable Moses to Konanne area where a bicycle given to Jumanne Lubela Sanane by Haruna Shabani Mtani was kept.

Two suspects, Jumanne Lubela Sanane and Haruna Shabani Mtani accompanied them.

Led by Jumanne Lubela Sanane to the house of Mama Sofia, where policemen conducted a search witnessed by Mama Sofia Sanane and another civilian, one Alex.

The witness said that the bicycle was not hidden but conspicuously parked in the seating room of the house.

He described the bicycle as a NELAM make and generally green in colour.

A seizure certificate was prepared by PW 10 and signed by those present including two suspects and civilian witnesses, Mama Sofia and Mr. Alex.

The witness identified Exhibit PE 15 as a bicycle seized from the house of Mama Sofia as well as the fourth and fifth accused as Jumanne Lubela Sanane and Haruna Shabani Mtani respectively.

The search order and seizure certificate was admitted in evidence as Exhibit PE 16.

The accused gave their defence on oath and denied killing the deceased.

DW 1 SHIMBI DAUDI KULWA said that he was a peasant and resident of Zaire Hamlet, Ishihimulwa Village, Uyui District.

He said that in the night of 29/01/2017, he was at home in the company of a young brother, Elisha Daudi Kulwa and his three children. His wife was away to her parents' village where she expected to deliver a new born.

He prepared dinner and served it to the children and retired to bed at 9.30 pm (28/01/2017).

In the morning of 29/01/2017, Shimbi Daudi Kulwa walked to a paddy field where he carried cultivation up to 11.00 am when a stranger showed up and requested for temporary work.

The stranger introduced himself as Ngadula (Mayala Kitula), a resident of Konanne Village (Kaliua District).

Pleased to offer the work, he assigned him to plant the paddy field a job that was well done up to 2.00 pm.

From 12.00 noon DW 1 left Ngadula Mayala Kitula in the farm and went back home to prepare lunch.

Around 2.00 to 3.00 pm, DW 1 returned to the farm with the meal and invited Ngadula for lunch.

The two sat under a Jamun (purple) tree where they enjoyed the meal with cold water.

Immediately after lunch, Ngadula slept under the tree while DW 1 remained seated.

Suddenly, DW 1 saw three people arriving on a motorcycle that stopped near him. The travelers asked for a direction to Bulima Village and requested for drinking water.

As he served water to them, other people on bicycles and motorcycles thronged the place.

When the group bulged, DW 1 and Ngadula were arrested and severely beaten.

They were roped, placed on different motorcycles. Each motorcycle carried two other people and moved away from Ishihimulwa Village.

According to DW 1 Ngadula Mayala Kitula was badly beaten and fainted.

The two were driven to an unknown village where a group of people including policemen were found waiting. Two vehicles were parked at the area.

Upon arrival, DW 1 was led to a Police vehicle in which Ngadula and another stranger were kept.

Immediately thereafter, the trio were driven to Nzega Police Station where they were kept in a cell. Ngadula regained consciousness while in Nzega Police remand.

On 30/01/2017 DW 1 recorded a statement before a Police officer where he denied any connection to the murder incident.

Nevertheless, he did not sign the papers allegedly because its contents were not read over to him.

He was arraigned for murder on 6/02/2017. Others charged with him were Ngadula and a stranger found in a Police vehicle after their arrest.

On cross examination by Mr. Saleh Makunga, DW 1 denied knowing the fourth and fifth accused in this case. He said that the two became known to him after his arrest.

On cross examination by Ms. Jane Mandago, Shimbi Daudi Kulwa said that the stranger found in a Police vehicle was not charged in this case.

On re – examination by Mr. Edward Malando, DW 1 said that he did not know name of a stranger found in a Police vehicle at Kipilimuka Village.

DW 2 HAMIS ADAM MDODO, a resident of Ulyankulu Division, Kaliua District introduced himself as a peasant and businessman dealing with sale of cattle.

He sold some cows in a public auction conducted in Ishihimulwa Village on 28/01/2017. Thereafter he walked to Mambali Village where he arrived at 6.00 pm.

He spend a night in Mambali Village and proceeded to an auction in that village the next day.

He sold four cows in Mambali Village on 29/01/2017 and was left with one cow.

He took off from Mambali to Ulyankulu at 1.00 pm on 29/01/2017.

As he neared Ishihimulwa Village, a cow got scared of an approaching vehicle and ran to the bush. As he ran after it, found a group of people chasing him with noises.

He was stopped and questioned on his movements. Thereafter, DW 2 was beaten and carried away on a motorcycle to an unknown destination.

On arrival to the unestablished village, the second accused found a gathering of people including policemen.

DW 2 was kept in a Police vehicle and subsequently moved to Nzega Police Station where was kept in a remand.

Afterwards, a Policeman recorded his statement under duress. Despite of refuting allegations on murder incidents, the policeman forced him to sign some papers.

On 30/01/2017, Policeman Dilu led him to a justice of the peace where an extra judicial statement was recorded.

According to him, contents of the statement were not read over to him but signed the papers under coercion.

He was arraigned for murder on 30/01/2017 and fellow accused were not known to him.

DW 3 NGADULA MAYALA KITULA, a resident of Konanne Village, Kaliua District, testified that he was arrested at Ishihimulwa Village on 29/01/2017 where he had gone to ook for temporary work.

He left Konanne in the morning hours of 29/01/2017 and walked to Ishihimulwa.

He secured a job from one Shimbi (Daudi Kulwa) and worked with him in the paddy field.

At 3.00 pm, Shimbi invited him for lunch under shed of a big tree.

As he took a nap, three strangers arrived on a motorcycle and requested for water to drink. The strangers also asked for a road to Bulima Village.

As strangers drank water and Shimbi explained on the road network, other people arrived on motorcycles and bicycles.

Subsequently, the group stormed on them. DW 3 was beaten such that he fainted.

He woke up later to find himself in Nzega Police Station. He was arraigned for murder on 6/02/2017.

On re-examination by Mr. Edward Malando, DW 3 said that Konanne and Ishihimulwa were neighboring villages as a person could walk from one village to another within a day.

DW 4 JUMANNE LUBELA SAANANE, a resident of Konanne Village, Kaliua District was arrested on 4/03/2017 at his residence.

He was arrested by a Policeman named Saguda and remanded at Konanne Police Station.

On 5/03/2017, he was moved to Kaliua Police Station where was kept in a cell up to 14/03/2017 when moved to Urambo Police Station.

According to him, his brother Frank Mathias Saanane with whom he was remanded, was taken out of the lock up on 14/03/2017 to an unknown destination.

On the same date, DW 4 was transported from Urambo Police Station to Nzega Police Station by three policemen including one Danny (Daniel).

On 15/03/2017 Jumanne Lubela Saanane was questioned by Danny and a woman police. He denied knowledge on the murder incident.

DW 4 said that Danny and a woman police mistreated and severely beat him up in order to make a confession statement.

From the harassment and pressure exerted on him, the fourth accused signed the papers that were not read over to him.

Eventually he was taken to a justice of the peace by “Afande” Dilu and another policeman.

At the Court, a woman magistrate and unknown gentleman attended to him after receiving an envelope from Dillu.

Despite of informing the magistrate that he was severely beaten and could not seat properly, she went ahead to record the statement that was not read over to him but forced to sign.

Thereafter, he was arraigned for the charge of murder. He said that other accused in the case were not known to him prior to the charge.

On cross examination by Mr. Edward Malando, DW 4 denied escaping from arrest by villagers on 29/01/2017. He reiterated that Hamis Adam Mdodo was unknown to him prior to this case.

On cross examination by Ms. Juliana Moka, the fourth accused said that Saguda and other policemen did not disclose a reason for his arrest.

DW 5 HARUNA SHABANI MTANI, a resident of Ulyankulu Division, Kaliua District, was arrested on 13/05/2017.

According to him, he was arrested at home during night hours when he had dinner with a family and neighbours.

Immediately after arrest, he was transported to Kaliua Police Station while two of his neighbours, Joseph Marko and Kombe Kasita were left at Ulyankulu Police Station.

He stayed in remand up to 17/05/2017 when was transported to Nzega Police Station.

On 18/05/2019, DW 5 was interrogated by Dilu who wrote down his particulars.

He was arraigned in the District Court of Nzega for the charge of murder on 20/05/2017.

On cross examination by Ms. Juliana Moka, the fifth accused denied knowing the two deceased in this case.

It was DW 5's testimony that he met Jumanne Lubela Sanane in Uyui Central Prison after his arrest.

Both the prosecution and defence counsel in this case did not make final submissions on the case.

Consequent to summing up, the three assessors in this case, namely: Mr. Mrisho Japhary, Ms. Grace Damson and Ms. Zubeda Omary, opined that the prosecution case was proved beyond reasonable doubts.

The assessors unanimously concluded that the five accused are guilty as charged.

The issue is whether the prosecution has discharged its burden of proof beyond reasonable doubts in respect of the five accused persons.

In ***JOHN NYAMHANGA BISARE V REPUBLIC (1980) TLR 6*** the Court of Appeal of Tanzania held that it is well established on the authorities that the onus and burden of proof in all criminal cases lies on the prosecution to establish their case beyond reasonable doubts.

In ***REPUBLIC V MASUNGA NZENGO, CRIMINAL SESSION CASE NO. 46 OF 2019*** (unreported), this Court highlighted the four elements of the offence of murder that are to be proved in terms of Section 196 of the Penal Code.

The said elements are: that there is death of a person, death was caused by an unlawful act or omission, in causing death the accused acted with malice aforethought and that it is the accused who caused death of the deceased.

Before I address these ingredients, I find it prudent to point out that the information (charge) filed in this case show that the incident took place at Kapilimula village, Nzega District.

However, the prosecution and defence witnesses referred to Kipilimuka village – Nzega District. The question is whether such a difference is fatal to the prosecution case.

I have carefully considered this query. Owing to a minor difference in the two nouns, I am of the view that the confusion was brought by a clerical error that was cured by the evidence on record.

Such a position is not new. It was stated by the Court of Appeal in **DPP V. SHIDA MANYAMA @ SELEMAN MABUBA, CRIMINAL APPEAL NO. 285 OF 2012** (unreported) where at Page 22 it was held that:

“... The charge in the first count in our respectful opinion, was defective as it disclosed no known offence in law under Section 335 (d) (i) of the Penal Code and also lumped two offences under (a) and (d) (i) together. Mr. Marungu has conceded this. This defect notwithstanding, we have found it in the interest of justice to dispose of the appeal on the assumption that that defects were cured by the evidence adduced at the trial.”

I will now test existence of material facts for each of the four elements starting with proof of death.

PW 3 Dr. Amos Richard Petro testified that when he was called in to perform postmortem at Kipilimuka Village, he found that there

were several deep cut wounds on the bodies of Athuman Shabani and his wife, Tabu Shija.

In his opinion the two deceased died of circulatory failure due to multiple deep cut wounds.

The bodies were identified by ASP Aziz Kalokola, D 6123 D/SGT Dillu and Daniel Vincent (Ward Executive Officer). Exhibits PE 2 and PE 3 are postmortem reports prepared and duly signed by PW 3.

The facts contained in Exhibits PE 2 and PE 3 are similar to the testimony of PW 3.

The same were also endorsed by testimonies of PW 1 Jacob Salu Chalamila (Village Executive Officer), PW 4 SP Aziz Musa Kalokola, PW 5 Masanja Shija Mhoja, PW 6 Pili Athuman Shabani and PW 7 William Charles Ndila.

Bearing in mind that proof of death is either through medical evidence and or circumstantial evidence (See **BOMBO TOMOLA V REPUBLIC (1980) TLR 254**), it is secure to find that the postmortem reports, testimony of a medical doctor (PW 3), testimonies of police officers, village leaders and other residents of Kipilimuka Village who saw and or examined the bodies, proved that Athuman Shaban and Tabu Shija are dead.

The next element is whether death was caused by an unlawful act(s). This is the actus reus for the offence of murder.

Causing death of a person include acts and or omissions that may lead to a person's loss of life (See Section 196 of the Penal Code).

Section 203 of the Penal Code defines causing death of another person to include infliction of bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death and causing another person to perform an act which causes death of that person by actual or threatened violence.

It also includes acts or omissions that hasten death of a person suffering under any disease or injury which apart from that act or omission, would have caused death.

According to Section 215 (1) of the Penal Code, a person is deemed to have killed another if death of that person take place within a year and a day from the date of the happening of an act leading to death.

In this case, PW 6 Pili Athuman Shabani testified on how two men invaded her late parents' bedroom on the fateful night.

She led detailed evidence on how the two men cut the deceased with a short iron axe. According to her, one of the men was dressed in a red shirt and a red headwear with yellow flowers.

She identified among others, Exhibit P 7 as an axe used in the killing of her parents and Exhibit P 5 as a headwear that was put on by the invader/killer.

Upon examination of Exhibit P 5, I noted that the yellow flowers on it referred to by PW 6 is a logo of Manchester United.

PW 7 William Charles Ndila, told this Court that the suspect arrested in a red shirt as per PW 6's description was Hamis Adam Mdodo, the second accused.

The witness further testified that Shimbi Daudi Kulwa and Ngadula Mayala Mdodo were arrested at Ishihimulwa Village in possession of a Bob Marley bag (Exhibit P 9).

According to him, the iron axe (Exhibit P 7), a red headwear with a Manchester United Logo (Exhibit P 5) that was worn by the killer and other detailed items were found inside the Bob Marley bag, Exhibit P 9.

These facts were corroborated by PW 5 Masanja Shija Mhoja and PW 4 SP Aziz Musa Kalokola.

PW 5 and PW 7 stated that at a time of arresting the first, second and third accused, another suspect ran away.

This testimony was corroborated by PW 9 H 1623 DC Saguda who recorded a cautioned statement by Jumanne Lubela Sanane, the fourth accused.

According to him, Jumanne Lubela Sanane confessed to have participated in the killing at Kipilimuka Village and disclosed that he ran away when his partners in crime were arrested.

There is also evidence of PW 8 Severina Nicodemus Bideberi, a justice of the peace. She recorded extra judicial statements by Hamis Adam Mdodo and Jumanne Lubela Sanane.

Hamis Adam Mdodo confessed before PW 8 that he participated in killing the deceased in association with others.

He disclosed that the group was engaged by one Moshi Lugendeja to kill the two deceased for witchcraft belief at a fee of Tshs. 5,000,000/=

It was further confessed that the team of killers was paid a sum of Tshs. 1,000,000/= as advance towards the illicit assignment.

Jumanne Lubela Sanane equally confessed to PW 8 that the group was engaged by Moshi Lugedeja to kill the deceased.

I have also examined Exhibits PE 13 and PE 14, the confession statements by Hamis Adam Mdodo and Jumanne Lubela Sanane respectively.

In Exhibit PE 13, Hamis Adam Mdodo confessed that:

“Mnamo 26/01/2017 nilikuwa nyumbani kwangu Makazi Ulyankulu Barabara ya tisa (9)/Tabora, muda wa saa 2.00 asubuhi nilipigiwa simu na Jumanne s/o Lubela wa Kona nne – Mwangoko Kaliua alinieleza kuwa Moshi s/o Lugedeja wa Kona nne – Kaliua alimtafuta kuwa akamfanyie kazi ya kuua mtu (hakumtaja jina) sehemu ya Kipilimka – Nzega, kwamba walikuwa wameelewana amlipe shilingi Milioni tano

(5,000,000/=). Niliposikia niliona nami nipate hela, nilimwambia nami tuungane naye hivyo nilisema nakwenda kwake. Siku hiyo hiyo nilienda kwa Jumanne s/o Lubela nilifika muda wa saa 8.00 mchana nilimkuta na Shimbi s/o ?, Ngadule s/o Mayala na Jumanne s/o Lubela mwenyewe. Jumanne s/o Lubela alisema alinipigia simu kwa hiyo tulitakiwa twende kwenye dili lenyewe. Tulipanga twende siku ya Ijumaa 27/01/2017, siku hiyo tulilala pale wote, siku ya Ijumaa tuliondoka muda wa saa 4.00 asubuhi tulikwenda kwa kutumia Baiskeli mpaka Kipilimka tulifika muda wa saa 3.00 usiku tulikaa mtoni huko huko Kipilimka, wakati tunaanza safari tulikuwa na shoka ambalo alilibeba Jumanne s/o Lubela, tulipofika pale mtoni shoka hilo alimpa Ngadula s/o Mayala.

Tulilala pale pale mtoni, kesho yake asubuhi tulienda Center ya Mboga tulikuwa tunatembea tembea, hadi saa 12.00 jioni tulielekea Kipilimka tulifika muda wa saa 5.00 usiku nyumbani kwa wale waliokodiwa kuna zizi la ng'ombe, Shimbi s/o ?, Jumanne s/o Lubela na Ngadule s/o Mayala walisema mimi nibaki pale kwa kuwa ni mwanafunzi nilinde nyumba moja jirani wasije wakaja maana walikuwa bado hawajalala.

Nyumba mauaji yalipofanyika walikuwa wameshalala, sijui walifunguaje mlango, waliingia wote watatu, walikaa mle ndani kama nusu saa, walitoka wakinikuta nilipokuwa walisema twende kwa kasi, baiskeli tulikuwa tumezificha mbali machakani. Tuliondoka tunakimbia tulizipitia baiskeli

tuliendelea na safari ya kurudi kwetu, tulipofika Shishimulwa mwano ulikuwa unafuata tulikamatwa mimi, Shimbi s/o ? na Ngadule s/o Mayala, Jumanne s/o Lubela alikimbia mpaka sasa hajakamatwa. Pesa tulikuwa hatujalipwa maana alikuwa nazo Jumanne s/o Lubela.”

In Exhibit PE 14, Jumanne Lubela Sanane revealed that:

“Mnamo 26/01/2017 muda wa saa 2.00 asubuhi nilikuwa kwa mtu aitwae Saliboko s/ohuwa nafanya biashara ya kuuza maziwa pale. Walifika Hamis s/o Lusamla, Ngadula s/o Mayala na Benja s/o....?. Hamis s/o Lusamla aliniambia kulikuwa na dili la hela Nzega, walikuwa wamepata kwa Moshi s/o Lugedeja la kwenda kuuwa watu wawili Kipilimka Nzega. Na kwamba walikuwa wamepatanisha Shilingi Milioni Tano (5,000,000/=) mimi wangenipatia milioni moja (1,000,000/=). Waliniomba niwasindikize nilikubali.

Muda wa saa 2.00 asubuhi tulianza safari ya kuja Nzega tulifika Mtoni Mboga kuelekea Kipilimka saa 12.00 jioni. Tulikaa pale mtoni mpaka usiku, muda wa saa 4.00 usiku tulianza tena safari kuelekea kwa Athman s/o Shaban, Ngadula s/o Mayala alikuwa ameshika shoka, Benja s/o ?... na Hamisi Lusamla walikuwa na marungu, mimi nilishika tochi ya simu.

Tulipofika kwa Athman Shaban, Ngadula s/o Mayala alikanyaga mlango ukafunguka, ndani waliingia watatu

Ngadula s/o Mayala, Hamis Lusamla na Benja s/o...? Mimi nilibaki nje kulinda watu wasisogee.

Walikaa mle ndani kama dakika kumi (10). Mle ndani nilisikia mwanamke analia nilikimbia, niliwasubiri njiani walipofika Ngadula s/o Mayala alisafisha shoka kwenye mchanga, aliweka kwenye mfuko wa Bob Marley alibeba Benja s/o....? Tulianza safari ya kurudi Konanne Kaliua.

Tulipofika mnada wa Ishimulwa/Uyui niliona pikipiki mbili zimewasha taa zilipofika zilisimama mbele ya mwenzangu ambaye alikuwa mbele alikamatwa mimi nilipita njia nyingine ya kuelekea Ishimulwa Center.

Nilienda mpaka nyumbani Konanne Kaliua nilikaa mpaka nilipokamatwa tarehe sikumbuki mwezi huu wa tatu 2017. Ilikuwa mara ya kwanza kusindikiza wauaji. Wakati tunaenda wenzangu waliniambia kuwa Athman s/o Shaban na Tabu s/o Shija ambao ni marehemu walikuwa ni wachawi, na kwamba walikuwa wamemroga mama yake Moshi s/o Lugedeja wa Konanne Kaliua.”

Exhibit PE 1 is the cautioned statement of Jumanne Lubela Sanane recorded by G 3519 D/C Daniel (PW 2).

In this statement the fourth accused (Jumanne Lubela Sanane) divulged that in September 2016, he was contacted by Moshi Lugedeja, a resident of Shindine Hamlet, Ilege Village and assigned a deal to kill a man in Kipilimuka Village.

That two days later, Moshi Lugedeja informed him that his uncle was also interested to kill the wife of a targeted man. Moshi Lugedeja and his uncle jointly undertook to pay him Tshs. 5,000,000/=.

Giving particulars of Moshi Lugedejas's uncle, Jumanne Lubela Sanane blew the lid off that he was a resident of Makazi, Street No. 10 and added that:

“Nilifika kwa MOSHI S/O LUGEDEJA na tulielekea kwa mjomba wake huko MAKAZI Barabara ya Kumi kwa kutumia usafiri wa pikipiki. Tulifika na kumkuta mjomba wake akiwa nyumbani kwake. Mjomba wake MOSHI aliendelea kuisitiza kuwa anataka mke wa ATHUMAN @ JUMA auawe na atatoa pesa Shilingi 2,500,000/= (Milioni Mbili na Laki Tano).

Pia MOSHI S/O LUGEDEJA alikuwa anataka ATHUMAN @ SUMA auawe. Hivyo, kwa pamoja walihitaji kuua watu wawili ATHUMAN @ SUMA na mkewe na watatoa pesa Tshs. 5,000,000/= (Milioni Tano). Baada ya maongezi hayo tulirudi nyumbani kwangu KONANNE KALIUA.”

PW 9 H 1623 D/C Saguda testified that on 15/03/2017, Jumanne Lubela Sanane led him and other policemen (including Major Sabato and D/C Dillu) to Konanne Village where a bicycle given to him by Haruna Shabani as part of the fees for murder was seized.

The bicycle NELAM make, was admitted as Exhibit PE 15.

PW 10 F 1592 D/SSGT Sabato recalled that on 13/05/2017 Jumanne Lubela Sanane ushered him and other policemen: D/C Dillu, D/C Thobias and D/C Khalifa in arresting Haruna Shabani Mtani at Street No. 10, Taba area, Ulyankulu Division, Kaliua District.

It was the prosecution evidence that Haruna Shabani Mtani was the referred to uncle of Moshi Lugeleja who hired the first, second, third and fourth accused to eliminate the deceased.

Reviewing the evidence at length, I am satisfied that the two deceased were attacked by the first, second, third and fourth accused who were armed with a very dangerous iron handled axe.

I am equally satisfied that Moshi Lugeleja who is still at large and Haruna Shabani Mtani, the fifth accused herein, jointly retained the first, second, third and fourth accused to do the dirty task at a fee.

In these circumstances, the prosecution successfully linked the five accused to the actus reus.

The next element is on malice aforethought. This is the intention or knowledge of wrongdoing that constitutes part of a crime, as opposed to the action or conduct of the accused.

The detailed definition of mens rea is covered in Section 200 of the Penal Code, Cap 16, R.E 2019.

In **REPUBLIC V MASUNGA NZENGO, HIGH COURT OF TANZANIA AT TABORA, CRIMINAL SESSION CASE NO. 46 OF**

2019 (unreported), this Court having reviewed several decided cases on malice aforethought, concluded that:

“These cases propound the underlying principles that if evidence shows the nature of wounds, the weapon used to inflict the wounds, conduct of the accused before and after the incident and the mode of resentment adopted by the accused in reaction to the deceased’s action in the particular circumstances, then malice aforethought could well be manifested as per Section 200 of the Penal Code.”

PW 3 Dr. Amos Richard Petro, PW 1 Jacob Salu Chalamila, PW 4 Aziz Musa Kalokola, PW 5 Masanja Shija Mhoja, PW 6 Pili Athuman Shabani and PW 7 William Charles Ndila testified that the two deceased were attacked with a sharp object on several parts of their bodies.

According to the medical doctor who examined the bodies (PW 3), the deceased had several deep cut wounds on various parts.

An assault on another person with a deadly weapon like an axe is certainly meant to produce death or serious bodily harm.

When the assault is violently done and repeated on several parts of the body, the expected results would be nothing other than death.

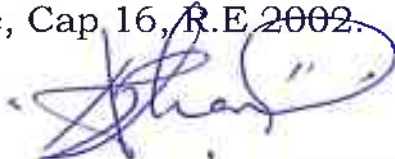
As earlier on stated, the evidence before me show that the prosecution discharged its burden of proof in terms of Section 200 of the Penal Code.

The deceased were invaded and attacked at night in their own house. There was no evidence of the deceased being armed. In attacking the two deceased, the accused persons formed the necessary malice intended to cause death.

I am convinced that the gravity of the injuries suffered by the deceased and the unreasonable force used by the accused persons, the parties of the bodies targeted and the nature of weapon used implies malice aforethought.

I have equally reviewed the versions advanced by the five accused persons geared to exonerate themselves from the offence. In totality, I do not find any substance in it that could outweigh the strong prosecution evidence in this case.

As a result, I agree with the unanimous opinion of the assessors. I find the five accused persons guilty as charged and hereby convict them for the offence of murder contrary to Section 196 of the Penal Code, Cap 16, R.E 2002.



AMOUR S. KHAMIS

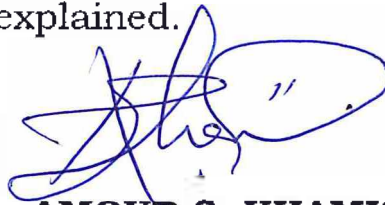
JUDGE

06/11/2020

SENTENCE:

The law prescribes only one sentence for a person convicted for the offence of murder. In view of that, the five accused persons are sentenced to suffer death by hanging. It is so ordered.

Right of appeal explained.



AMOUR S. KHAMIS

JUDGE

06/11/2020

Judgment delivered in open Court in presence of Ms. Jane Mandago and Ms. Juliana Moka, Senior State Attorney for the Republic.

The defence team is composed of Mr. Edward Malando and Mr. Salehe Makunga, learned advocates. All accused are also present.



AMOUR S. KHAMIS

JUDGE

06/11/2020

