

IN THE HIGH COURT OF TANZANIA
AT MBEYA

ORIGINAL JURISDICTION
(Mbeya Registry)

CRIMINAL SESSIONS CASE NO. 35 OF 2000
REPUBLIC
VERSUS

1. ZAKAYO SHUNGWA MWASHILINDI -
2. RAIS SHUNGWA MWASHILINDI
3. ABEL MWAMWEZI
4. ADAM THOMSON NZOWA.

JUDGMENT

MREMA, J.

The three accused, namely, Zakayo Shungwa Mwashilindi, Rais Sungwa Mwashilindi, Abel Mwamwezi (hereinafter referred to as the 1st, 2nd and third accused respectively), and two others not in court, were arrested on or about the 20th of January, 1999 jointly and together and then arraigned for the murder of one ENIKO EDSON SIMKOKO, in this preliminary hearing took place before this court (Moshi, J, as he then was) the prosecution filed nolle prosequi 20 certificate in respect of the 5th accused ADAM THOMSON @ NZOWA u/s 91 (1) of the Cr. P.A, 1985, hence his discharge by the court under the Law. On the same day the 4th accused EVAN SOKONI SIKAPIZYE was reported dead, hence abatement of the proceedings against the late accused. Therefore preliminary hearing and full trial were conducted in respect of the three aforementioned accused persons. Following the contentions raised by the defence either indirectly by way of cross-examinations or at the defence case, I think it is pertinent here to append what was then recorded as being "Memorandum of undisputed matters" on 15/4/2002 when preliminary hearing took place. 30 The recorded "undisputed matters" are as follows:

- (1) Eniko is a deceased person and that he was killed.

(2) That the deceased and 3rd accused resided at Ikonya village in Mbozi District.

(3) The first and 3rd accused were arrested at Vwawa in Tumaini Guest House.

Since the procedure relating to the conduct of preliminary hearing that took place before the Late Hon. Moshi, J, on 15/04/2002, has been attacked or criticized by the defence, I think it is worthwhile dealing with what appears to me to be a preliminary point of objection on point of Law against the agreed undisputed matters before dealing with the other issue in the main trial. In his written submission, 10
Mr. Mushokorwa, Learned Counsel for the three accused, submits that it is arguable whether Eniko is dead and if so, who killed him. In other words, the accused have disowned the Memorandum of undisputed facts mainly because the said Memorandum on matters not disputed was never read out and explained to them before they signed thereof. The omission by the Learned Judge to read and explained to them those facts, according to the learned counsel, contravened the provisions of s. 192 -- (3) of the Criminal Procedure Act, 1985. He further contends that since his clients cannot answer affirmatively whether or not the said Eniko is dead, this is another reasonable lacuna permeating the case 20
for prosecution. That being the case he contends, it is unsafe to rely on the testimony of SARAH SIMKOKO (PW2), Eniko's sister, particularly because the body that was exhumed on the 20th of January, 1999 was skinless coupled with the fact that the head (facial appearance) was no longer intact owing to decomposition. Identification of the said person was not possible due to such unfavourable conditions on the body, he opined. It is also Mr. Mushokorwa's submission that the testimony of the forensic expert (PW9) cannot also supply corroboration to PW's testimony relating to the identification of the body exhumed by the accused under the order and supervision of police on 30
20/01/1999 in the Village of Isenzenya. This is because PW9 admitted that he could not confirm in his evidence whether the samples he

analysed originated from a female person or were of a man, hence another reasonable doubt in favour of the accused persons.

The prosecution, through Mr. Boniface who was being assisted by Mr. Mwenda, both Learned State Attorneys, did not comment on Mr. Mushokorwa's criticisms leveled against the court's handling of the preliminary proceedings dated 15/04/2002.

With due respect, I think Mr. Mushokorwa's Criticism and or objection against the "Memorandum of undisputed matters" is not a voice wasted, but indeed he is right. The matters admitted in the preliminary hearing under section 192 -(3) of Act No.9/1985 have been 10 appended above for ease of reference. The law under which they were said to have been admitted read as follows, that is subsection (3) of section 192:

"At the conclusion of a preliminary hearing held under this section, the court shall prepare a memorandum of the matters agreed and the memorandum shall be read over and explained to the accused in a language he understands, signed by the accused and his advocate and by the public prosecutor, and then filed". 20

The Court of Appeal of Tanzania emphasized in the Case of MT.7479 SGT. BENJAMIN HOLELA v. REPUBLIC (1992) T.L.R, 121 at p.123 to the following effect:

"It is obvious from these provisions that the contents of the memorandum have to be read and explained to the accused, and that duty is mandatory. The record of the proceedings however does not indicate compliance with this duty. We take it that there was non-compliance".

The record of the preliminary proceedings in the present case does 30 indicate at the end of the matters agreed upon that the said memorandum was ever read and explained to the accused in terms provided under sub-section (3) of section 192 of Act No. 9/1985. The Law
... necessity to read and explain the memorandum to the

accused does not end up there; it was later elaborated by rules 4 and 6 of the Accelerated Trial and Disposition of Cases Rules, 1988 made under section 192 -(6) of Act No.9/1985 and published in the Government Notice No. 192 of 1st July, 1988. For ease of reference I append hereunder both Rules 4 and 6:

Rule 4: "The person prosecuting shall in every trial under those rules, prepare, as clearly as possible, the facts of the case which shall be read to the accused explained in a language he can understand".

Rule 6: "When the facts of the case are read and explained to the accused, the court shall ask him to state which of those facts he admits and the trial Magistrate or judge shall record the same".

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But the record of 15 - 4 - 2002 (containing the memorandum of undisputed matter or facts) is inconsistent with what the Law cited above provides. The memorandum of undisputed matters which are under attack by the defence were proposed and read out by the Late Mr. Mwangole, Learned Counsel on behalf of the accused persons. The proposed matters were then adopted and recorded by the court as being undisputed matters and immediately thereafter the learned Counsel for prosecution and defence, also the three accused signed - apparently indicating that they all agreed to those proposed facts as being matters not disputed.

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However, since that is not the whole procedure laid down by the Law (as already seen above), it is unsafe, in Law, in my opinion, to rely on the memorandum that was drawn by the court on 15/04/2002. This statement is not without support of judicial authority. In the case of SGT. B. Holela (supra), the Court of Appeal had the following pronouncement (at page 124):

"It is apparent that a statement by counsel or advocate for the accused to the effect that the matters raised are admitted is not sufficient under the Law. It is the accused himself who must indicate what matters he or she admits. In cases where the matters comprise documents, the contents of

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the documents must be read and explained to the accused in the event of a sketch plan or such like documents, the sketch plan must be explained and shown to the accused to ensure that he or she is in a position to give an informed response" (words under-lined - emphasis provided).

In the light of the above cited statutory provisions and the case authority, it is very clear that the said memorandum of undisputed facts cannot be used as evidence against the accused persons. The upshot of it all is that the relevant provisions cited above do not apply in circumstances where there has been a failure to read and explained the contents of the memorandum of undisputed matters to the accused. 10

I will therefore proceed to examine the evidence of the witnesses without putting into consideration any material point allegedly agreed upon as being undisputed matter on 15/4/2002.

During full trial nine (9) prosecution witnesses gave evidence in their effort to prove the allegations leveled against the accused persons; as for the accused persons all, except the third accused who brought one witness, entered the witness-box alone to defend himself. 20 The totality of the evidence reveals the following undisputed facts, or facts which cannot any longer be disputed. They are as follows:

- (1) One ENIKO S/O EDSON SIMKOKO was the resident of Ikonya, Mbozi District and his sister is Sarah Simkoko (PW2), also of Ikonya, Mbozi District. Eniko Simkoko left the home-
stead of her parents on 17/01/1991 in the company of the Late fourth accused Evani Simkoko Sikapizye and since then he has never been seen alive to-date.
- (2) The third accused Abel Mwamwezi is the resident of Ikonya Village, Mbozi District, while the first accused Zakayo Shungwa Mwashilindi and the 2nd accused Rais Shungwa Mwashilindi are brothers and both resided in the village of Isenzanya, Mbozi District. 30

- (3) A body of human (person) was exhumed on the 20th of January, 1999 in a bush near a Village river, in the Village of Isenzanya; all the three accused persons did the exhumation in the presence of police men, a doctor, village leaders and some villagers.
- (4) A skin of a human being was exhibited in public at Vwawa police Station in the presence of the accuseds and members of the public on 20/01/1999 (as per the video pictures - exhibit P.14).
- (5) Both the 1st and 2nd accused admit to have been arrested on 20/01/1991 and the arraigned for this homicide.
- (6) All accused admit to have given caution and extra-judicial statements but denied that they were obtained from them voluntarily.

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The rest of the facts are disputed and the question is, as I told the assessors, is whether the circumstantial evidence which the prosecution endeavoured to build on various pieces of evidence lead to the only reasonable inference, which is to the effect that the accused took part in the murder of the deceased Eniko as alleged by the prosecution. The court must also be satisfied from the inculpatory facts adduced against the accused, in that the person allegedly killed in the night of 19/01/1999 is the deceased Eniko Edson Simkoko whose body was said to be exhumed on 20/01/1999.

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At this juncture I would now start to consider the question, which is whether the body of the person that was exhumed on the 20th of January, 1999 was that of Eniko Edson Simkoko. The prosecution, through the Learned State Attorney Mr. Boniface, relies on the confessions of the three accuseds given to police under caution and the extra-judicial statements to the Justice of Peace (PW5).

According to Mr. Boniface, although the said confessions (exhibits P.VIII, P.IX, P.XII and P.XIII) are either repudiated or retracted, it is the prosecution's view that the said confessions are nothing but the truth. He came to this view after taking into consideration

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Shungwa Mwashilindi and the second accused Pais Shungwa Mwashilindi as per their confessions is that the deceased was taken from his home at Ikonya Village to Isenzanya Village, the accused's village, under the pretext that he (deceased) was going to work in a coffee farm. The two pieces of confessions, the Learned State Attorney said, tallies with the testimony of the deceased's sister Sarah Simkoko (PW2). The testimony of PW2 is positive to the effect that the deceased and one Ivani Sikapizye (the Late fourth accused in this case) went to Isenzanya to work as labourers in a coffee-farm. Second, that the first and third accused confessed that they consulted PW3 for a potential buyer of human skins and that they traveled all the way to Vwawa, Mbozi, where they lodged at Tumaini Guest House, a story that corroborates PW3's testimony. Third, that the first and third accused stated in their confessions that they were arrested at Tumaini Guest House while in possession of human skin. Fourth, it is contained in the confessions of the 1st and 3rd accused that one Chaula was contacted and he agreed to buy the human skin in the possession of the two accused and this statement is confirmed by the evidence of PW3 and PW6. Fifth, according to Mr. Boniface, the details in the confessions are clear, personal and uninterrupted so much that they cannot be told by persons other than the authors or architects of their own acts or doing, viz, the accused. Sixth, and above all, it is the evidence of PW1 and PW2 that it was the accused who led the police the way to a place where the deceased's body was buried after the brutal killing. The Learned State Attorney has also drawn our attention to the video tape (exhibit P.14) whereby the accused were recorded as saying that the 2nd accused and one Ivani Sikapizye are the ones who struck the fatal blows three times with a hammer (exhibit P.VI) on the deceased's head - a confession which is also reflected in the accuseds' cautioned and extra-judicial statements. He has also referred to the post-mortem exhibit P.1, saying that it confirms the brutal killing of the deceased, in that it

attributed cause of death as being head injury resulting from three deep wounds on the head. In sum, Mr. Boniface concluded, all these factors, most of which constitute corroborative evidence, show that the accuseds' confessions are nothing but the whole truth.

Turning to the other-side of the coin, the Learned defence Counsel, Mr. Mushokorwa, agrees in principle with the prosecution that the case for the Republic consists of circumstantial evidence read in conjunction with the retracted confessions by the accused made to the police (PW1) and (PW4), and to the Justice of the Peace (PW5). Indeed, with respect, I agree with both the Learned Counsel, the same theme being the assurance 10 I made to the assessors (in my summing up to them), in that there is no eye witness who saw the gruesome murder taking place - save the murderers themselves. My main concern here is whether the authoritative observation that was made in ALLY BAKARI & PILI BAKARI v. REPUBLIC (1992) T.L.R. 10 by the Court of Appeal is relevant and applicable to the circumstances of the present case. At page 15 the Court of Appeal had this to say:

"Also pertinent to this matter in the rule that in a case where the evidence against the accused is wholly circumstantially (sic); the facts from which an inference adverse to the accused is sought to be drawn must be proved beyond all reasonable doubt, and must be clearly connected with the fact sought to be inferred therefrom".

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That being the trite Law befitting a case hinged on circumstantial evidence, the question which needs to be considered and determined is whether the evidence adduced by the prosecution meets the test as observed in ALLY BAKARI (Supra).

This brings me to the kernal testimony relating to the manner and circumstances that led to the arrest of the accused. This is where the evidence of CLAUD SIMKOKO (PW3) is relevant. He told the court how the 1st accused Zukayo Shungwa Mwashilindi and third accused Abel Mwanwezi

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visited him at his home in Shiwinga Village prior to 19/01/1999. It is not controverted that these two accused and PW3 did not know each other before they met at PW3's home. It is also admitted, as a common ground, that PW3 is a driver by occupation and during that period (relevant to this case) he was employed by one Weston Ng'owela. It is the testimony of PW3 that the two accused told him that they had been directed to him for what was alleged that the latter is an experienced and fact driving driver; and when PW3 enquired from them as for what purpose they wanted to see him, the accused told him that they had a robbery mission at Shimunda Co-operative Society. This statement, according to PW3, made him more curious to learn about those strangers. Then he asked them as to what was really their main aim, their answer was to the effect that they wanted to raise money which would facilitate transportation of their business. At this juncture, the accused even told PW3 that they would be ready to admit him into their business if he would so wish. Then PW3 became more anxious and ask them what kind of business. The accused told the witness that they had two human skins, one of a male (man) and the other one of a female person, both of which had been dried up. The witness was further told that they got the skins from Sumbawanga and were looking for a buyer. Claud (PW3) then pretended to agree with them but, morally he was not, and that he did that to make it possible for their arrests. He then informed his wife secretaly as who those people went to his home. They (PW3 and his wife) then agreed to have the matter reported to the police. 10 20

The court was further told by PW3 that the report having reached the OCD at Vwawa Police Station, the latter (i.e. the OCD) provided fuel to PW3 to use in his motor-cycle to enable the witness go to to the home of Zakayo (1st accused) to inspect the alleged two skins. In otherwords, the OCD decided to use PW3 as police decoy so as to 30

make it possible for the police to arrest those persons in possession of the alleged human skins. According to PW3, as he had agreed with the 1st accused to meet him at Mwanjelwa - Itaka, Mbozi, PW3 drove to that place. He met both the 1st and 3rd accused at Mwanjelwa - Itaka. Both the 1st accused PW3 drove to the 1st accused's home but leaving the third accused at Mwanjelwa - Itaka. However, according to Claud Simkoko, the 1st accused Zakayo resisted to produce or show the alleged skins on an assertion by Zakayo that he would only do that after his partners agreed as what would be their "modus operandi" of their business. The dual then returned to Mwanjelwa - Itaka where the 1st accused was left by PW3 and the latter drove back to Vwawa and reported to the OCD on what transpired between him and the 1st accused. PW3 was then urged by the OCD to continue to pursue the matter to its finality and further that he should be very close to the suspects. During their last meeting (i.e. the accused and PW3), PW3 promised them that he would seriously look for a customer for them. 10

Then came a third meeting. This was on 19/01/1999 and according to PW3, the 1st and third accused visited him at his home to find out if he had secured a customer for them. It was in the morning time. Upon being told by PW3 that a customer was found, the two accused apparently rejoiced and said, using the very words told by PW3: "kwa bahati nzuri tumeongeza ya tatu na ni ya leo (it is a good-luck as we have increased a third one and it is of today)". PW3 who was working at his farm invited them at his home and as they claimed that they were hungry he asked his wife to cook food for them. After they ate food PW3 managed to secure a lift for the third accused in the m/v of one Lioni Zawila, while himself and the 1st accused rode on PW3's motor-cycle. PW3's arrangement was now to bring the accused to a false (pseudo) customer at Vwawa and in that process the OCD would be able to effect their arrest. At Mlowo township they stopped for a while and that enable PW3 to see the OCS who gave him shs.500/= to 20 30

enable him reach Vwawa. Out of the shs.500/- he gave shs.200/- to the third accused Abel so that he could board a bus to Vwawa. The 1st accused and PW3 continued to travel on the motor-cycle and when they reached Vwawa PW3 booked rooms for them at Tumaini Guest House. The witness left them there and then he went secretly to the OCD. One David Saibul was the then OCD of Vwawa District. This police officer, according to PW3, took him to Chaula (PW6) who would be used as another police decoy to pretend to be a potential customer interested in buying the human skins. Although Chaula resisted to accept the request after a tussle, however, PW6 agreed to join PW3 and the OCD to not the suspects. He 10 even offered 20 litres of petrol to the OCD to facilitate transportation between Vwawa and Isenzanya, the 1st accused's village. Thereafter PW3 went to Tumaini Guest House and brought the 1st accused to Chaula's place of business. The third accused is said by PW3 to have been also present because Chaula's petrol station is very near Tumaini Guest House. According to PW3, Chaula (PW6) offered to buy each skin at T.shs.four million (4,000,000/-). That Chaula agreed with them that he would pay the money against physical delivery of each skin. Again, Chaula gave PW3 fifteen (15) litres of petrol to enable PW3 go to Isenzanya and back to Vwawa to bring the said skins. 20

This time it was only Zakayo (1st accused) and Claud (PW3) who drove to Isenzanya; but upon reaching Shitungula PW3 hesitated to proceed to Zakayo's home. The 1st accused went to his home alone, traveling on a bicycle and he returned three hours later to join PW3. The first accused was seen carrying a bag but PW3 would not be able to identify its colour immediately as it was a dark night. Then they return to Vwawa via Mlowo and upon reaching Tumaini Guest House the first accused occupied room No. 10, the 3rd accused room No.11 and PW3 room No.9. The latter then stealthily reported to the OCD all that was done. PW3 was then instructed by the OCD to return to the Guest House to pretend 30 to the accused that he was preparing to take bath and then in that

process the police would ambush the culprits. According to PW3, that is exactly what took place and while the police were knocking very hard at at room No.10, PW3 was taken away to Abed Restaurant.

I propose to appraise the credibility of PW3's testimony along side with the evidence of Chaula (PW6). What are the facts relating to Chaula's testimony? His material testimony is to the effect that on 19/01/1999 he was approached by the OCD at his place of works. The OCD needed some co-operation and assistance from him. The witness was told by the OCD about the gruesome event that had taken place at Ise-nzenya Village and for that reason he desired to use PW6 as a decoy as 10 a police endeavour to net down the culprits. According to PW6, the information and the request excited as well as scaring him, particularly because it was his first time to hear that people kill other human beings, skin them and then sell their skins. Chaula did not readily welcome the request for fear of damaging his name as well as ruining his business. In the end, however, he agreed to co-operate especially after the OCD persistently urged him to agree.

On the same day (ie. 19/1/1999) Claud Lwenje Simkoko (PW3) and another person introduced to PW3 visited him. The said stranger was introduced by PW3 to the following effect: "Yule muuzaji wa ngozi ya 20 binadamu ni huyu". PW6 then told Lwenje (PW3) that he was ready to buy the said skin. It is also the testimony of PW6 that Lwenje Simkoko (PW3) had suggested to PW6 to put the price at shs.7,000,000/=, and that is the price PW6 offered. According to PW6, both Lwenje Simkoko and the seller (1st accused) never made any comment as to the amount of price offered. PW6 then asked them where was the skin, the answer by Lwenje (PW3) was at Itaka Village. PW6 (Chaula) was then told by PW3 that the problem was to get fuel to assist the 1st accused to travel to the the village to bring the skin. PW6 gave PW3 six (6) litres of fuel and that before they left Chaula assured PW3 that even if they would return after 30 mid-night they should not hesitate to wake him up; but that did not

happen as neither PW3 nor the said seller return to PW6. In the morning, however, PW6 was informed that the persons who were proposing to sell human skin to him were arrested for allegedly killing a person and skinned him. As ^{whether} PW6 saw the human skin, he confirmed in cross-examination that he did see it at Vwawa Police Station. There, he said, four people were paraded outside the police station and the human skin was spread on the ground near them.

I have born in mind the attacks or criticisms leveled against the testimonial credibility of PW3 and PW6 by Mr. Mushokorwa. By and large he complains that Claud Lwenje Simkoko (PW3) is not a person to be 10 trusted and believed. The reason is that it sounds really not credible for strange persons, such as PW3 and the 1st and 3rd accused who did not know each other before their meeting at Lwenje's home to simply talk friendly and freely about committing very serious offence, to wit, daylight robbery and trading in human skin business. The Learned Counsel also finds hard to believe PW3, on the latter's assertion that he freely and undisturbedly led the 1st and 3rd accused to Chaula, whom he (PW3) had not had such an affair with him before; to find out if he would be ready to buy the said skin(s). Equally, Mr. Mushokorwa wonders how possible that it was easy for PW3 to deal with the OCD in 20 a matter which PW3 was his first time to hear from the accused, also as it allegedly happened between the OCD and PW6!

The defence Counsel has also asked this court to doubt the credibility of PW3 and PW6 especially in view of their material contradictions relating to the price of the human skin offered by Chaula (PW6). Further that the story by Claud (PW3) that Chaula (PW6) offered to buy one human skin for shs.7,000,000/= cannot be the same story, as testified by PW6, in that Chaula offered to buy one skin for shs.4,000,000/= -- citing MICHAEL HAISHI v.R. (1992) T.L.K, 92, on the basis that the evidence of the two witnesses should be discredited. He also quizzed why PW2 had to play 30 such a daring role without any reward from the police!

With much more respect to Mr. Mushokorwa, I am in full agreement with the Learned State Attorney Mr. Boniface on the view that the role played by PW3 and PW6 is not a unique or an unfamiliar undertaking. From the evidence, it is quite implicit that the role that was played by PW3 and PW6 was nothing less than that of a decoy. They were used by the police to trick the accused into falling in that position of committing the crime so that they could be arrested by the police. As correctly submitted by Mr. Boniface, the law in this country enjoins upon every citizen, police or not, to prevent, detect and expose crime and, therefore, that is what PW3 and PW6 did in the instant matter as good citizens. It is not untrue that PW3 and the two accused (1st and 3rd) were the first time to meet when they discussed about possibility of PW3 driving them into a scene where the accused had planned to commit robbery. It has not been constructed ine evidence that PW3 is a driver and, according to PW3, the reason accused gave to him as why they picked him to drive them was because they were led into believing that he (PW3) was not only an experienced driver but also one of such drivers who drives very fast. This statement by PW3 stands unchallenged. It was in the course of that discussion that brought about another discussion, viz, the trade on human skin. It is not possible that the accused could have been arrested by the police out of nothing and in the blue sky. Their arrest and ultimately their being arraigned in court must have commenced on the basis of a story that links their conduct before the act and after the act; and I have nothing in the record that would justify me to disbelieve the testimony of PW3 relating to how he came into contact with the 1st and 3rd accused. A good and innocent citizen would entertain the same doubt or suspicion as PW3 did and I find it most difficult, if not hard, to water down the difficult situation he found himself, bearing in mind the words he used in examination in chief (quoting him verbatim):

"It was my first time to see them. They started to tell me by saying that they wanted to drive them to Shamunda Primary Society where they would way-lay a motor vehicle expected to be carrying large sums of money for the co-operative Society farmers. This arose my anxiety and suspection. I asked them what was their basic aim. They claimed that they wanted to raise money for the purpose of enabling them to transport their goods for sale. They further said that they would be ready to admit me into their business if I would so please. I ask them what kind of business? They said that they had two human skins, one for male and another one for female which were dried up. They further-told me that they got the skins from Sumbawanga. The two accused continued to tell me that they were looking for a customer. I pretended to agree with them but morally I did not. I called my wife and told her secretly why the two visitors came to our home. Both of us agreed to refer the matter to the Law organs" (emphasis supplied by underlining).

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In my own perceived mind, any innocent and good citizen would react the way PW3 did. The statement appears quite lucid, consistent and natural, hence a question of credibility on the part of PW3.

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But the role played by PW3 did not end up there. As already shown above, his decision to report the culprits to the Law enforcing machinery was executed timely; police investigation soon started and its conclusion saw the arrest of the 1st and 3rd accused at Tumwagile Guest House in the very early morning hours of 19/01/1999. With respect, I am inclined to sharing the view of the 1st Lady Assessor from Sumbawanga. The two accused continued to tell me that they were looking for a customer. I pretended to agree with them but morally I did not. I called my wife and told her secretly why the two visitors came to our home. Both of us agreed to refer the matter to the Law organs" (emphasis supplied by underlining).
circumstances of the case does not seem to bear out PW3 as an accomplice. 30

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This is so because we cannot find any evidence even from the accused that would show or tend to show that PW3 accepted the accused's offer to join them in that cruel and horrifying business; but, instead, he opted to have them arrested and brought them to the relevant Legal authority where they would be forced to give explanation about their natural, hence, question of credibility on the part of PW3.

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questionable behaviour. In the case of HATIBU GANHI v. REPUBLIC (1996) T.L.R, 12, p. 25, the Court of Appeal of Tanzania refused to agree with the Learned Counsel for the respondents that the witness for prosecution one Abdullah Shaban Mhando should be treated as an accomplice. The Court observed (at page 25), inter alia:-

"However, it is apparent from the evidence of PW1 that he was initially uncertain about the information given to him by the first appellant, and he decided to study the movements of the first appellant and his associates before reporting the matter to the authorities. Can such conduct on the part of PW1 be condemned in a country like ours where it is proclaimed as a part of the national policy that the defence and security of the nation is the responsibility of every Tanzanian and particularly of every patriot? We do not think that the Law of this Country condemns such patriotic conduct on the part of an individual citizen who decides to investigate a suspected treason before reporting to the authorities. Such conduct is commendable and certainly does not in criminal Law, make him an accomplice or a person with interest to serve" (the underscoring is mine).

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The situation in the present case was slightly different, in that PW3 did not have to take time to report the alleged criminal conduct of the accused persons following the blunt assurance the 1st and 3rd accused made to PW3 to the effect that they were selling human skins and that they were ready to absorb him (PW3) into their business if he would wish.

As regards the role played by Chaula (PW6), again with respect, I am unable to agree with the defence counsel that this witness should not be trusted. The only reason given for not trusting the witness is on the account of his alleged participation in such a horrifying criminal event and apparently for the first time; also his alleged conspiratorial meeting with PW3 for the first time when they discussed on the possibility of PW6 ready to buy human skin. The reason for not agreeing with Mrs. Mshabani

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as how he was involved in the matter. It is undoubted fact, indeed from the evidence, that the witness is a well known business man at Vwawa, in Mbozi District. It is an open secret, as per the revelation in evidence, that the sale of human skin was quite lucrative in terms of high price. Therefore it was more of a common sense than logic for the police to use a reputable and well known businessman at Vwawa, in Mbozi District, who would play the role of a pseudo potential buyer for human skins. The testimony of Chaula (PW6) is very explanatory in this regard. There is nothing in the evidence that suggests or tends to suggest that PW6 was a dealer in that business, not do I find 10 any thread of evidence inferring any malice, bad motive or any vice on the part of PW6 again any of the accused person which would have justified him to corroborate PW3's testimony relating to the meeting of PW3, who was in the Company of another person, with PW6 on 19/01/1999. That other person (in the company of PW3) was the 1st accused, according to Claud (PW3). The third accused, according to PW3, was also present. As I can find no reason, let alone good reason, given as to why PW3 and PW6 should give such strong evidence implicating the 1st accused as being the person who was brought to PW6 to negotiate the price for the human skin, I am satisfied that 20 PW3 and PW6 are independent witnesses. Therefore, I find their testimonies credible and I attach credence to their evidence much as they did the ladies assessors, notwithstanding their inconsistency as to the alleged price offered by Chaula (PW6). I am not convinced that I should discredit their evidence merely because PW3 said that the price offered by PW6 was shs.7,000,000/=, while PW6 said that it was shs.4,000,000/=. In my view, it is not unusual experience to find such inconsistency in evidence between two witnesses especially if the matter being contradicted by two witnesses occurred after a long passage of time such as in the present case. The incident under 30 discussion took place on 19/01/1999 and the witnesses, who were eye

witnesses, gave evidence after a period of four years. With such considerable lapse of time, I am lured to believe that it is human to make such errors due to slip of memory; and mark you individuals have different power of the mind by which things can be remembered. It may also be borne in mind that the price for the said human skin was negotiable coupled with the fact that the role the two witnesses were playing was not a true transaction of a seller and a buyer. The case of MICHAEL HAI SHI v. REPUBLIC (1992) T.L.R, cited by the Learned defence counsel relating to the kind of weight to be attached to contradictory evidence by prosecution witnesses is not of any assistance to the present circumstances of this case. In that case the witnesses were found to have contradicted themselves on vital details - particularly on the question of the appellant. The Court of Appeal (T) held, inter alia, that "Since the witnesses contradicted themselves on the question of identification of the appellant that evidence cannot remain unshaken". I am of the inclined view that contradiction in the identification of an accused is not synonymous to contradiction to a particular sum of money promised to be paid by a proposed buyer, the former instance contains material particular of the subject matter of a particular case, whereas in the latter case the matter allegedly contradicted does not form the central core of the matter or issue in dispute. In this regard, therefore, I am not prepared to accede to Mr. Mushokorwa's proposition that the said contradiction between PW6 and PW3 as to the amount of money offered to be paid affects the credit worthness of these two witnesses. Corollary to the testimony of PW3 and PW6 is the evidence of No. C.6987 Det. Sgt. Edward (PW1).

PW1's material testimony is to the effect that the OCD woke him up in the morning on 20/01/1999. He directed him to write the statement of one Abel Sanga (PW7). He was further instructed by the OCD to bring to him the 1st and 3rd accused who had then been arrested and were in the police lock-up. As the two accused were being led to the OCD's

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office the two accused were carrying a small bag in which the witness saw the human skin. Upon interrogation by the OCD David Saibul, according to PW1, the two accused said that the skin was of a person they killed at Isenzenya Village. PW1 identified the small bag and "sulphate bag" (exhibit P.III) in which the human skin was contained. As regards the human skin, it is PW1's testimony that this material substance (i.e. the skin) and some remains extracted from the person allegedly killed were sent to the Government Chief Chemist for analysis.

The court is further told by PW1 that the persons who led the OCD, himself (PW1) and other policemen to the spot where the body of the deceased was buried were the 1st and 3rd accused. When they reached some place in Mwanjelwa village the 1st and 3rd accused saw the 2nd accused Rais Shungwa Mwashilindi and another person (apparently) was the 4th accused Evani Sokoni Sikapizye) and thereupon they alarmed the police saying that the two persons were their collaborators in the said Murder; and according to PW1, the 2nd accused and his associate were told to identify their alleged collaborators whom they had simply told the police "Wenzetu wale". The 2nd accused and another one (now not in court) having been identified by the 1st and 3rd accused, the police arrested them formally and joined them with the two other accused to make four suspects. The four persons, according to PW1, freely and Voluntarily led the police to the spot where the deceased was mercilessly buried. But before doing that the police were led by the 1st accused Zakayo to his home whereat PW1 saw two house, one is thatched with corrugated iron sheets and the other one is thatched with grass. In the main house (thatched with C.F.S) the police did not see any unusual thing therein; but in the house whose roof is made of grass and its construction was semi-finished (in the course of search) the 1st accused showed the police the hammer (exhibit P.4) allegedly used by them to strike the deceased on the head twice thereby killing them. The hammer, according to PW1, was found hidden in the house ceiling

(i.e. the top inner surface of a room). Also four knives, (2 big knives - exhibit P.IV and small knives exhibit P.V) were unearthed by the 1st accused; that they are these four knives the accused used to skin the deceased. The witness made it categorically clear to the effect that neither the hammer nor the knives were found stained with blood. But the earth-floor, according to PW1, was fresh and the soil its top was loose and wet, though no traces of blood were seen. It is also PW1's testimony that when the 1st, 2nd and 3rd accused were interrogated by the OCD to explain why the knives were bloody-stainless, the explanation given was that they (accused) used special substance or material to wash the knives after they finished skinning the deceased. 10

Then from the 1st accused's house the accused told the police that they were ready to lead them to the deceased's burial place. The village leaders were summoned to join the police and to witness the spot at which accused claimed the deceased was buried. The leaders were told why they were summoned to that place. Accused were then directed to exculvate the area and after a short time a dead-body was seen; it was a shallow grave. That body was covered with a mat ("msenjele"). The body apparently was wrapped in another material and no sooner that wrapping material was removed than the body of the deceased was exposed out. The body had its skin removed; that it (the skin) was pilled off right from both the shoulders up to the two lower limbs (legs) -- except on the palms, feet and the head. It is also in evidence by PW1 that the accused had told police before reaching the burial spot that they knew the deceased by appearance and that his name was Emerico Simkoko. Also prior to the journey to the burial spot the villagers and the deceased's relatives had as yet not known of the death of the deceased. On the way to the burial spot the deceased's sister Sarah Simkoko (PW2) accompanied the police, but the deceased's father could not go there because he was blind. 20 30

PW2 identified the body as being that of the late brother Emerico Simkoko. PW1 drew the sketch map of the Scene (Exhibit P.7). He also witnessed the post-mortem on the deceased's body by one Dr. KAJOKA. The witness saw the Dr. extracting blood sample from the deceased's body, also a piece of flesh with its skin (removed from one of his feet). PW1 further noted the deceased's clothes wrapped in the said mat ("msenjele"), describing the shirt as being bluish in colour, also a pair of long trousers which, according to PW1, was identified by Sarah (PW2).

On the second day, that is, on 21/01/1999, PW1 recorded the caution statement of RAIS SHUNGWA MWASHILINDI (the 2nd accused). The police witness further told the court that after he warned the 2nd accused, according to Law, and accused having admitted to give his statement freely and without coercion, threats, promise or any other prejudice, PW1 continued to record his statement -- admitting the offence. That he narrated the entire story from conspiracy to the ultimate murdering of the deceased (caution statement admitted as exhibit P.8).

In cross-examination, the witness insisted that the 1st and 3rd accused were arrested in a Guest House.

More corroborative evidence is found in the testimony of SARAH FREDSON SIMKOKO (PW2). This witness reiterated that she knows the third accused Abel Mwanwezi because he is her blood relative, accused being the son of PW2's sister, and that both of them were living in the same village of Ikonya. As regards Michael @ Emeriko Edson Simkoko, now deceased, it is Sarah's testimony that he was her brother born of the same father and mother. Before Emeriko's death Sarah was living with him in the same house. PW2 has told the court how on 17/01/1999 the Late fourth accused Evani Sokoni Sikapizye approached PW2 at her home and solicited the deceased to go to work in a

Coffee farm. The Late Simkoko was married to Sarah.

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after two to three days. But as it turned out, the deceased did not return.

Then on the fourth day, i.e. on the 20th of January, 1999, while PW2 was working on her garden, she was called by police. She was asked if she knew Emerico and the answer was in the affirmative; and whether she knew where he (Emerico) was, the answer was that he went to work in a farm. She was then asked by the police to accompany them to identify the said Emerico and she did. She boarded motor-vehicle and on board she saw the three accused and the Late Sikapizye. She corroborates PW1's testimony on the evidence that the police participated the village leaders. Similarly she confirms PW1's testimony to the effect that it was the three accused and a fourth one not in court who led the police to a bush spot or area where the deceased's body was unearthed from a shallow grave after exhumation was done.

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In cross-examination she reiterates knowing the fourth accused Sikapizye because both were living in the same village of Ikonya, let alone her knowledge of Sikapizye's sister very well. The witness makes it very clear that Sikapizye assured her that they were going to work in a Coffee farm belonging to Zakayo (the 1st accused). She went on telling the court that Sikapizye never returned to her to tell her why the deceased did not return after two or three days as per his promise. The witness, however, admitted that she did not know Zakayo before 20/01/1999, also the deceased did not know him.

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On the evidence by the prosecution that the 1st and 3rd accused were arrested at Tumaini Guest House and were found in possession of human skin, the ten cell leader of the area, one Abel Sanga (PW7) confirmed seeing the human skin and the person possessing it in one of the rooms at Tumaini Guest House - although he was not now able to identify the person he saw in the early morning hours of 20/01/1999. According to PW7, he saw the skin which was hidden in "a sulphate bag" and the sulphate bag was in a bluish plastic bag. The bag, he said,

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was under a bed and the person in that room was ordered by police to take it out from under-neath that bed. The witness looked at the skin very closely and he was satisfied that it was human skin because it had human hair. He was then required by the OCD to write his statement, which he did.

Asked by the assessor as whether he saw some other suspects in that Guest House, the witness answered that he did not concentrate to make that observation because the whole place was fully covered with a crowd of curious people. He did not also have good opportunity to identify properly the person who was caught with the human skin in one 10 of the rooms.

These pieces of evidence do not stand alone because we find corroboration from the confessions given by the accused persons, first to the police (PW1) and PW4) and, second to the Justice of Peace (PW5). It is true that these confessions are either retracted or repudiated. Each accused claimed that the confessions were not freely and voluntarily obtained from the accused; that they were heavily and brutally tortured to procure the confessions.

The first accused Zakayo claimed that he was arrested on 20/01/1999 at his home, at about 6.30 A.M., by police who never told 20 him of the reason but assured him that he would be told upon reaching Vwawa Police Station; also arrested with him was his brother, the second accused Rais Shungwa Mwashilindi. Although the Law Casts burden on the prosecution to prove each and every material allegation against an accused person, this is not to say that an accused is not enjoined upon by the Law to give evidence which is reasonably acceptable regarding his defence. However, this is not to say that the court should capitalize on the Weakness of defence to ground conviction against him. What I am trying to ask myself here is whether it is true in fact that the 1st accused was arrested at his home at 6.30 a.m. on 30 20/01/1999? I do not agree with the accused's proposition. This is

because PW7 confirmed that he saw a person who was arrested in one of the rooms at Tumaini Guest House in the old hours of the night preceding the morning of 20/01/1999. That person was found with a human skin, was arrested and taken to Vwawa Police Station. PW1 confirmed seeing the 1st and 3rd accused as being the very persons who were arrested by the OCD and other police men at Tumaini Guest House. There is no good reason which would justify PW1 to lie against the two accused persons. They are these very accused who were tricked by PW3 on 19/01/1999 by bringing them to Chaula (PW6) under the pretence that Chaula was going to buy the human skin which the first accused had gone to fetch it from his home at Isenzenya Village on 19/01/1999. The two accused (1st and 2nd accused) led the police to Isenzenya Village to show them the person they admittedly killed and skinned him. It was when they were going to the burial scene that they met the 2nd accused and another one (Late fourth accused). Police did not know the latter two persons if it were not for the 1st and 3rd accused who remarked while on board the m/v "Wenzetu wale". In the same mission to Isenzenya the deceased's sister Sarah (PW2) was picked up by the police from her home. In the m/v PW2 saw the four accused and among them she identified the 3rd accused and the Late fourth accused. That was the morning hours of 20/01/1999. I can conceive nothing from the facts and circumstances of the case which would have justified PW2 to claim that she saw the 1st accused already arrested by the police and that the said accused and others were leading the police to Isenzenya Village to show them a place where they allegedly buried the deceased. The accused completely failed to inject doubt into the prosecution case, for he would have called a witness from his home area to confirm his statement that the police arrested him and his brother, the 2nd accused on 20/01/1999 at 6.30 a.m. I find his defence to be an afterthought. Equally, I refuse to agree with the 2nd accused that he was arrested at his home with his brother (1st accused) on 20/01/99

at 6.30 a.m., the reasons for doing so being the same.

The third accused Abel Mwanwezi raised the defence of Alibi, the defence being that he was arrested on 14/01/1999 by the police while he was on his way to Mbozi Hospital. He was informed by the police that he was in possession of a weapon unlawfully but without telling him what kind of weapon it was. He was then ordered to board their motor-vehicle and was whisked away to Vwawa Police Station. Then he was thrown into a police cell wherein he met four other suspects. one of them was YARED NASON who, according to the third accused, was the in-charge of the remandees. On 15/01/1999 he was removed from the lock-up and brought to an interrogating room. He was queried about the unlawful possession of weapon and he strongly denied to have any. Then he was returned to the lock-up where he stayed until 20/01/1999. It was on this latter date he saw the 1st and 2nd accused whom he did not know before that date. Surprisingly, he laments, a charge of homicide was preferred against all the three of them, jointly and together. He was told by one police man called JULUO that the offence of murder was preferred against him because of his obstinacy to admit the offence of possessing unlawful weapon.

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But as correctly submitted by the Learned State Attorney Mr. Boniface, the court has discretion under section 194 -(6) of the Criminal Prosecution Act, 1985 to accord no weight of any kind to such defence because of the accused's failure to comply with the mandatory provisions of section 194 -(4) and (5) of Act No. 9 of 1985. It was not explained to this court why the accused did not give notice of his intention to rely on his purported alibi, and particularly bearing in mind the fact that he was enjoying fully the legal services of his Lawyer -- to whom he could give instruction to issue the statutory notice of alibi. It is the testimony of the 1st accused Zakayo that while himself was held in the police cell, he was informed by Abel (third accused), who was also in the lock-up, that he (Abel) was

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being held in connection with house-breaking and stealing. But this piece of evidence is diametrically in contradiction with the third accused's own story that he was being held up in connection with the offence of illegal possession of fire-arm. Another contradiction, as per the third accused's particulars, is that the accused Abel and his defence witness (DW4) were being held up for murder, but in his own sworn defence he said that DW4 was being held for armed robbery; and that during the period they stayed together in the police lock-up, DW4 was a leader of his fellow in-mates. And, yet, DW4 vehemently denied meeting the third accused in the police lock-up, or being a leader at all. When all these material contradictions are put together, there is no doubt, and I respectfully agree with Mr. Boniface, that they boil down to one sentence, that is, speaking loudly in disfavour of the accused's alibi. The said accused's defence has not met the legal test observed in *ALI SALEHE SUTU vs. R.* (1980) T.L.R, 1, the test being whether the accused's alibi has introduced reasonable doubt into the case for prosecution. That burden to prove beyond all reasonable doubt that the accused's alibi is false always lies on the prosecution. As I have said above, no notice of such alibi was ever issued to the court and the prosecution and the defence was raised after the prosecution case was closed; and this means that the prosecution did not have opportunity and or advantage to prepare his defence to oppose particulars of the alibi (had they been raised before the case for prosecution was closed). Also the contradictions surrounding the alibi, as observed above, lessen the weight of credibility to be attached to that defence. In sum, having taken cognizance of the alibi of the third accused's defence of alibi, I am satisfied that this kind of defence came about as an after-thought and, therefore, I accord no weight to the accused's alibi (see *- DFF Vs. NYANGETA SOMBA AND TWELVE OTHERS* (1993) T.L.R, 69).

At this juncture, I think I am now in a good position to deal

with the accused's retracted and/or repudiated confessions.

The 1st accused Zakayo Shungwa (DW1) has told this court when police arrested him and the 2nd accused (DW2) on 20/01/1999 both of them were in good health; and when they found the third accused Abel (DW3) in the police lock-up on the same day (20/01/1999) he observed him (DW3) to be in good health. Then on the same day (20/01/1999) they were removed from the lock-up and brought to a small room wherein tortures commenced against them. That police used clubs and gun-butts to assault the accused with them. In the tortures room they were told that they were found in possession of human skin but they strongly 10 refuted the allegation. DW1 was hit heavily on his legs and hands with gun butts and as a consequence DW1 sustained wounds which caused him to bleed. DW1 noted that the third accused (DW3) was badly hit on his back causing him to bleed profusely as he was seriously hit with a stick, nick-named "Msauth". They were then removed from the interrogating room and brought back to the lock-up. In that lock-up they stayed for about ten minutes, then they were removed and boarded in Land-rover (one ten-defender).

After a journey to Isenzenya Vi Village (20/01/1999) they were brought back to Vwawa police Station. Then they were put in the 20 lock-up to 23/01/1999. But between 21/01/1999 and 22/01/1999 tortures on them continued as usual. Before they were brought to a room to make a statement police forewarned them that each one of them must sign a statement, but which contents no one of them knew what it was all about. Each one of them was brought to the said room separately. According to DW1, he decided to sign a document containing a statement in order to avoid more tortures on him. It took him not more than ten minutes to complete the exercise. He was the one who gave the statement first. Then on the same day he was taken to a Justice of Peace (PW5) by an armed police man. On the way he was warned that he should take 30 . no much time before the Justice of Peace, and further that he was

simply required before the Justice of Peace to simply sign against a document in a similar way as he did before the police. Both accused and the policeman entered in the Justice of Peace's Office, who was present, and the latter gave a document to DW1 urging the latter to sign it, meanwhile the armed police stood nearby. That he saw some writings on the document but were never read out to him. He took less than five minutes to accomplish the job. Thereafter he was returned to the police lock-up. According to him, he simply signed the document (exhibit P.II) to avoid any further harassment by the police on him.

As regards the video picture, DW1 stated that the pictures or 10
his images were shot from him against his will. Concerning the answers he was giving as per the video cassette (exhibit P.15), it is DW1's testimony that he was urged to answer all the questions put to him by the police in the affirmative (i.e. positive); and that he obliged to do so because he did not want to be tortured any more. As to why he was seen shaking in the video ~ film, it is DW1's explanation that he was seen in that condition as he was still fearing that police would repeat the tortures on him if he failed to answer the questions the way the police wanted them to be; and the reason why all the other accused were throwing a blame to him was on the 20
account that they were threatened to do so by the police. It is the accused's complaint that he felt humiliated when he was paraded before a large crowd and video pictures being shot against him, or them, so they were not free men. Accused denied strongly to have confessed the offence, nor did he commit it. The court is asked to believe the tortures because one of the prosecution witnesses Sarah (FW2) confirmed seeing them with blood stains on their bodies and clothes. He further referred the 12 bruises allegedly observed on the back of the third accused Abel by the Justice of Peace.

The 2nd accused's defence relating to his retracted or repudiated 30
confession is very much similar to that of the 1st accused, so it is

irrelevant to repeat again, save for few statements. According to him, police stabbed him with a gun-bionet on his left thigh. He was also wounded on his left leg and on his head-skull .. stating that he was struck with a "kirungu". On 23/01/1999 he was given a document to sign but he refused because he is illiterate, so could not write or read; that the police who escorted him to an interrogating room was the one who signed the document (exhibit P.8). Thereafter he was taken to a Justice of Peace (PW5) and on the way the police escorting him told him that he must sign a document before a Magistrate. DW2 told PW5 and the police man that he did not know how to write or read. Then DW2 heard 10 PW5 discussing with the police man on the possibility of killing him (DW2); but the Magistrate refused saying that the Law does not allow such a thing. He was urged by the Magistrate to sign but DW2 continued to insist that he was illiterate. Finally the Magistrate told the police man to sign the document. Accused (DW2) strongly denied before this court that the signature on exhibit P. 12 (extra-judicial statement) is his. That all the positive or affirmative answers he gave when being interrogated at Vwawa Police station and while video picture was being taken were not true; that they were not true because they were threatened and instructed by the police to answer them the way 20 they did. In short, DW2 denies to have confessed killing the deceased Emerico, nor did he participate to kill him.

The third accused Abel Mwamwezi (DW3) told the court that after the 1st and 2nd accused were brought to the lock-up on 20/01/1999 and found him there, one police man took DW3 to a room he has been charged jointly and together with the 1st and 2nd accused with "Kosa la ngozi". He was then taken to a room but while on the way the police man told him to Co-operate because everything was now known. Accused found another police man in that room. He was ordered to climb on to a table, which he did. His hands were then tied together with hand-cuffs. One of the 30 police men then climbed on to the table and ordered accused (DW3) to

stretch-up his tied hands towards a certain wooden beam ("kenchi") fastened on the room ceiling. His hands were then tied on that wooden beam with a sisal rope. The table was then removed thereby leaving accused hanging in the air from the beam. He was then interrogated by the police man found in the room, starting with the allegation of illegal possession of a fire-arm; then followed allegation of possession of human skin (ngozi ya mwanadamu). Then he was struck on his back with a police stick nick-named by the police "Msauth". The beatings were done several times and the alleged assaults continued for about thirty (30) minutes. Apart from the police called Jaluo who was using the "Msauth", the other policeman used a police baton and struck the accused on his knees several times thereby causing him severe pains. The assaults on his back caused bruises which resulted to bleeding. Despite of all these immense beatings, accused said, he continued to refuse the allegations.

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As regards the positive answers he was heard giving in the video filim (exhibit P.15), those were not his voluntary and true answers. He was given a similar document by police and instructed to answer those questions the way he did. He was threatened that he would be killed if he would not answer the questions positively/affirmatively the way he was heard in exhibit P.15. Accused had to submit to whatever police wanted him to do, he said. To make it worse, he said, the questions were put to him in the presence of multitude of people who were shouting at the accused by ridiculing them.

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On 23/01/1999 he was taken to a room where he was ordered to sign a letter ("barua"). He was warned not to become difficult, he should simply sign the document and then walk out. In that room DW3 found another police man wearing uniform. Accused refused to sign a document given to him because he did not know its contents. The other police man ~~and the accused~~ ~~and the accused~~ ~~walked out~~ of the room and then returned with a stick referred to as "Msauth". Upon seeing the "Msauth", and

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on further reflection of the previous tortures DW3 had faced, accused decided to sign the document referred to him as "barua" (exhibit P.10). The contents in exhibit P.10 were never read out to the accused, he complained. From there he was taken to the Justice of Peace (PW5). He was brought to him by a police man who had a pistol. The police man insisted on the accused to sign the document or else the tortures would be resumed. He showed the Justice of Peace the injuries he sustained as the result of police beatings in the police lock-up. DW3 then signed exhibit P.13, though not his statement, he told the court.

But the prosecution is maintaining that the confessions before the police (PW1) and PW4, also before the Justice of Peace (PW5), are nothing but the truth. That they were made voluntarily and there is no iota of evidence that shows or tends to show that the said confessions were obtained by threats, or upon promise or other prejudice held out by the police officers (PW1 and PW4) to the accused persons.

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The Learned Counsel for the accused, no doubt, correctly submitted that where there is clear evidence of torture or threats leading to confessions, the court should closely examine the circumstances prevailing to see if such acts of torture and threats do not rob the accused of their voluntariness leading to untrue admission of guilt, and if that be the case then corroboration is necessary - referring to R. vs. HASSAN (1983) T.L.R, 432 and MILOMO vs. R (1995) T.L.R, 1988. The Learned Counsel then gave his reasons as follows:

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- (a) that they were allegedly recorded more than 4 hours since the arrest of the accused in the early hours of 20/01/1999. That they were recorded on 21/01/99 well beyond the time limits imposed by section 50 and 51 of the Criminal Procedure Act, 1985; and that no extension of time was done by the CCS and the Magistrate, hence all these statement were illegally obtained and the court should not act on them.

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(b) All accused were treated under intensive tortures before they were made to sign them. That they consistently contended so before they (defence) let the statements to be admitted in evidence, the defence also relies on the evidence of PW2 corroborating accused's defence of torture, also the scars observed by the Justice of Peace (PW5) on the back of the third accused. Further that PW1 and PW4 did not adhere to the provisions of sections 57 and 58 of the Cr. P.A., 1985 which provide procedure for recording such caution statements.

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(c) That the public recorded confessions in the video tape (exhibit P.14) are no better than the cautioned statements - as nowhere any caution was seen administered to the accused before they were interviewed; the public interview was made in the presence of a jeering crowd, so the atmosphere was not conducive to have accused's statements recorded voluntarily and freely. That the alleged previous coaching or instructions by the police cannot be overruled.

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As regards the accused's extra-judicial confessions - exhibit P. 11, P.12 and P.13, it is Mr. Muthukorwa's opinion that they are not also free from weaknesses. First, that they were recorded on 23/01/99 when the accused had been under police custody for three full days, and, yet, he said, the delay is not explained. This failure of explanation, he contends, goes to confirm the accused's assertions that they were all along undergoing tortures. Also the time of ending the alleged recording is not recorded, hence confirming accused's contentions that the exercise did not take long. PW5 is also criticized for not enquiring from the accused as where they had been kept since 19/01/1999 before they were brought to him, nor did he enquire about the cause of the alleged scars on the accused persons.

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I start with the Law of confession. This has been correctly restated by Mr. Boniface in his submission, the guiding principle being the one enunciated in the case of *TUMAMOI vs. UGANDA* (1967) E.A., 84. The Law is that a confession which has been retracted or repudiated must be accepted with caution and before founding a conviction thereon, the court must be satisfied that the confession is true. However, as a rule of prudence corroboration is usually required. But corroboration is not necessary in law and the court may convict solely on a retracted or repudiated confession if it is satisfied that, in all the circumstances of the case that the confession cannot but be true - see the case of *SHIJA LUYEKO v. R* (CRIM. APPEAL NO. 43/1999 unreported) and *SHILIOBE SENI AND ANOTHER vs. R.* (1992) T.L.R., 330. 10

With respect, I agree with Mr. Boniface that if the defence were all out opposing the caution statements (exhibits P.8, P.9 and P.10) while the case for prosecution was going on, they should have opposed the tendering and admission of those exhibits to that a trial within a trial could be conducted to consider and determine their voluntariness, or the procedure taken to have the statements recorded from the accused persons. It is true, as rightly submitted by the Learned State Attorney that the Court of appeal endorsed the High Court decision in *Shija Luyeko's Case* (supra) for relying on a confession that was not objected to by the defence during the prosecution case. If it were true that the accused faced the alleged immense tortures the way they described in their defence testimonies, one would reasonably ask why then did the accused not instruct their legal counsel so that the latter could take that opportunity well in time to challenge the admissibility of the confessions - particularly on the ground of involuntariness? But to wait and introduce the allegations of ill-treatment either in cross-examination but at the same time allowing the statements to be tendered, or at the defence stage only tends to convince me to believe that the alleged defence 20 30

is a mere afterthought. Although the Law does not enjoin upon the accused to prove their defence beyond all reasonable doubt, sufficient doubt would only suffice, there remains another question regarding the alleged injuries or wounds allegedly sustained on the accused's body as the result of the alleged tortures on them by the police. But it is not shown anywhere in the evidence as how the accused were able to recover the alleged wounds: I cannot see how a stabbed wound through the left thigh of the accused could heal by itself without being treated, or the oozing blood stopped without any treatment. It also sounds incredible that a person could sustain a heavy blow struck on his head-skull either with a police baton or a butt of a gun without causing the assaulted person dangerous harm which would lead to that person to loose his consciousness, if not death? Indeed, I am satisfied and I agree with Mr. Boniface that the alleged ill-treatments came as a second thought and, therefore, I reject them in toto. 10

With respect, it may be true that the police witness (PW1) and (PW 4), also the justice of Peace (FW5), might not have complied with the Law relating to recording statements properly. But as it was reiterated in *HATIBU GANDEI v. R* (1996) T.L.R, 12, p. 35, that breach of the Judges' Rules does not automatically result in the exclusion of a repudiated or retracted confession. The breach may be one of the circumstances to assist the trial judge in deciding whether or not the statement is voluntary. 20

Again, I respectfully share the same view with Mr. Boniface that the confessions cannot but be true. This statement is supported with the consistent statements of the 1st and second accused: that the deceased was taken from his home at Ikonya Village to Isenzenya Village, the accuseds' village under the pretext that he was going to work in a Coffee-farm. Those statements have the support of PW2's testimony as already noted above. Also the first and third accused stated in their confessions that they consulted PW3 for a possible 30

buyer of human skins and that they traveled all the way to Vwawa, Mbozi, where they lodged at Tumaini Guest House, a story which is consistent with PW3's evidence. The 1st and third accused confessed in their statements that they were arrested with human skin at Tumaini Guest House, a story that gets corroboration from PW's testimony to the effect that the two accused were arrested at Tumaini Guest House while in possession of a human skin. It is also in the confessions of third accused that Chaula (PW6) was the buyer of the skin -- as testified by PW3 and PW6. And it is the evidence of PW1 and PW2 that these three accused led the police the way to the place where the deceased's body was buried after such brutal killing. From the totality of that account it is unequivocally clear that the confessions could not have been made or recited by a person or persons who did not know the full details of the episode. The police could not have known all those details including the personal particulars of the accused contained in the statements. Even the villagers, including PW2, had not known about the brutal killing of the deceased until accused led the police to burial spot. 10

Finally, I am satisfied from the evidence of the Forensic expert Andrew Magembe (PW9) that the body remains he analysed biologically and chemically were of a human being and originated from the body that was exhumed on 20/01/1999. PW7 identified the facial appearance of that exhumed body as well as the clothes found in the grave as being that of the deceased Emerico Edson Simkoko, her brother. The deceased left PW2's home on 17/01/99 and on 20/01/99 he was found dead. From the facts and circumstances of the case I am strongly satisfied that the body that was exhumed on 20/01/1999 could not have been of anybody else but that of the deceased Emerico. From the accused's confessions the deceased was struck twice on his head with a hammer (exhibit P.6). He was skinned and his body buried secretly. All these facts portray nothing more than evil intention on the part 20 30

of the accused to kill the deceased the way they did. With respect, I fully concur with the ladies assessors that all the three accused killed the deceased with malice aforethought c/s 196 of the Penal Code. Like the two Ladies assessors, I am satisfied that the prosecution's case left no stone unturned in establishing against the presumed innocence of the accused beyond reasonable doubt. In the result I convict each accused of Murder c/s 196 of the Penal Code. Accordingly it is ordered,

Sgd. A.C. MREMA

JUDGE

31/03/2005.

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S E N T E N C E

There is only one sentence provided in the Penal Code on a conviction of murder as per the provisions of section 196 of the Penal Code, read together with section 26 -(1) of the Penal Code. Accordingly to section 26 -(1) of the Penal Code, the sentence is death penalty by hanging. Accordingly, therefore, each accused person, namely, ZAKAYO SHUNGA MWASHILINDI, RAIS SHUNGA MWASHILINDI and ABEL MWAMWEZI, shall suffer death by hanging as provided for under section 26 -(1) of the Penal Code. It is so ordered.

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A.C. MREMA

JUDGE

31/05/2005

At Mbeya, in open court, before all the three accused persons, their defence counsel Mr. Musinokorwa, and the prosecution State Attorneys, Mr. Boniface and Mr. Mwenda, all Learned Counsel. The ladies assessors are thanked and discharged.

A.C. MREMA

JUDGE

31/03/2005.

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I Certify that this is a True Copy of the Original.

DISTRICT REGISTRAR