

**IN THE HIGH COURT OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)
AT MPANDA**

CRIMINAL JURISDICTON

CRIMINAL SESSIONS CASE NO. 15 OF 2011

THE REPUBLIC

VERSUS

- 1. TAGALA LUPUNJA**
- 2. ERNEST MWENDAPOLE**
- 3. KILIAN METHOD**
- 4. LUFUNGA JILAWISE**
- 5. NCHICHINGWA JILALA**

30th September & 30th December, 2014

JUDGMENT

MWAMBEGELE, J.:

The five accused persons – Tagala Lupunja, Ernest Mwendapole, Killian Method, Lufunga Jilawise and Nchichingwa Jilala – stand charged with two counts of murder contrary to section 196 of the Penal Code, Cap 16 of the Revised Edition, 2002 (henceforth “the Penal Code”). They are alleged to have killed with malice aforethought Bruno Method and Kashinde

Lushemeli on 30.07.2009 at Usevya Village within the then Mpanda District of Rukwa Region. All the accused persons pleaded not guilty to the charges.

The material facts of the case are not complicated and not difficult to comprehend. They go thus: the first deceased Bruno Method was married to three wives. One of his wives was Kashinde Lushemeli; the second deceased. She was his second wife. On the morning of 30.07.2009 the two deceased were found brutally murdered in the house they had slept. It was Maria Bruno PW1; daughter of the first deceased, then a standard six pupil who had gone to the house where the two deceased had slept only to find them lying in a pool of blood, they had been brutally killed.

The Postmortem Reports (PMRs) clearly show that their deaths were unnatural, they were murdered. Both PMRs show that both deceased died due to loss of blood. The PMR in respect of Bruno Method shows that the trachea and oesophagus were cut, mandible bone broken, a cut wound just above the eye and left side scrotum peeled. That of Kashinde Lushemeli shows that the anterior neck was cut; a wound extended to the left side. The carotid and jugular were cut off.

A report was made to the Police and after some relevant investigatory steps were taken, the police allowed the family to bury the bodies of the two deceased. There was no hunch as to the assailants initially but it is the prosecution case that after about two weeks after the murders, the first accused Tagala Lupunja called Sengerema Yela PW3 that there were

head of cattle for sale at Mirumba hamlet. PW3, who used to trade in cattle, bought the eight head of cattle and took seven of them for sale at Majimoto open market at which he was arrested in their possession under the pretext that they were stolen property. It was later revealed that the head of cattle were given to the first accused as payment for killing the two deceased; a plan which was allegedly hatched by the five accused persons. A search for the assailants was mounted and the five accused persons were finally arrested and charged with the murders of the two deceased. In contrast, it is the defence case that the head of cattle were not stolen. Neither were they payment to the first accused for killing the two deceased. Rather, they were sold to PW3 not by the first accused but by the second accused Ernest Mwendapole so that they could bail out Wilbroad Bruno PW2 and Peseveranda Elias (now deceased) who had been remanded for the murders. On the strength of either of the story, the accused persons were arrested and later information for the murders filed against them.

The trial of this case commenced on 14.11.2011 when Preliminary Hearing (PH) was conducted during which three matters were agreed to be undisputed. These were, first, the names and particulars of the accused persons, secondly, the names and particulars of the two deceased and their respective Post Mortem Examination Reports and thirdly, the arrests and arraignments of the accused persons.

In conformity with the dictates of section 265 of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002, in hearing this case, I had the

assistance of three assessors; Clara Kalunde, Mahamudu Shabani and Joseph Nyakasi. The prosecution fielded six witnesses in support of its case and tendered four exhibits in total while the defence fielded no witness except for the accused persons themselves and did not tender any exhibit. The trial was finalized on 30.09.2014 when summing up to assessors was done and the assessors, consequently, gave their respective opinions.

Before I embark on the journey to reach the justice of this case, I wish to state some legal principles which will guide me in this judgment and which I directed the assessors to give the court their opinions bearing in mind these guidelines.

First, is about the onus and standard of proof in criminal cases. Upon a criminal charge being preferred against an accused person, the onus is always on the prosecution to prove the case. The onus never shifts away from the prosecution and no duty is cast on the accused person to establish his innocence. The standard of proof is that which is beyond reasonable doubt. This standard of proof is provided for by the provisions of section 3 (2) (a) of the Evidence Act, Cap. 6 of the Revised Edition, 2002 and case law - see ***Okethi Okale and others Vs R*** [1965] 1 EA 555, ***Mohamed Said Matula Vs R*** [1995] TLR 3, ***Chandrakant Joshubhai Patel Vs R***, [2004] TLR 218 and the decision of this court in ***R Vs ACP Abdallah Zombe & 12 Others***, Criminal Sessions Case No.26 Of 2006 (unreported). Upon information for murder being preferred against an accused person, the onus is always on the prosecution to prove not

only the death of the deceased but also the link between the said death and the accused person.

While still on the burden of proof, I wish to underline that if the evidence adduced by the prosecution leaves the court with any reasonable doubt as to the accused person's guilt, the court must acquit the accused person even though it believes him to be guilty. In the premises, acquittal of an accused person does not always mean the accused person is innocent; it simply means that a case against him has not been proved to the required standard; that is, beyond reasonable doubt.

The second principle, by which I will be guided, is the doctrine of common intention. This doctrine is stated by section 23 of the Penal Code as follows:

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

As was held by this court [Massati, JK (as he then was)] in ***ACP Abdallah Zombe*** (supra), this section has been the subject of numerous judicial

decisions. These decisions include ***Tabulayenka s/o Kirya & Others Vs R*** (1943) 10 EACA 51, ***R Vs Mgundulwa s/o Jalu & Others*** (1945) 22 EACA 169, ***R Vs Selemani s/o Ngulu And Another*** (1947) 14 EACA. 94 ***Wanjiro d/o Wamello & Another Vs R*** (1955) 22 EACA 521 ***Lamambutu s/o Makalya And Another Vs R*** [1958] EA 706 ***R Vs Ngerera s/o Masaga & Others*** [1962] EA 766, ***Godfrey James Ihuya Vs R*** [1980] TLR 197 ***Alex Kapinga & Others Vs R*** Criminal Appeal No. 252 of 2005 (unreported) and ***Shija Luyenko Vs R*** Criminal Appeal No.43 of 1999 (unreported).

In the ***Tabulayenka*** case, the Court of Appeal of East Africa stated at page 52 as follows:

“ ... To constitute such common intention it is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. Their common intention may be inferred from their presence, their actions and the omission of any of them to dissociate himself from the attack”.

In ***ACP Abdallah Zombe*** (supra), the court, having addressed itself to case law at some length, came out with the principles as follows:

“From these decisions, the following principles can be carved out:-

- (i) For section 23 to apply it must be shown that an accused person shared with the actual perpetrator(s) of the crime a specific unlawful purpose which led to the commission of the offence charged.
- (ii) The offence committed must be a probable consequence of the prosecution of the unlawful purpose.
- (iii) To constitute a common intention it is not necessary that there should have been any concerted agreement between the accused persons prior to the commission of the offence. Common intention may be inferred from their presence, their actions, and the omission of any of them to dissociate himself from the offence.
- (iv) Mere presence at the scene of crime is not enough to infer common intention".

The third principle is about the lies of the accused persons. At law, an accused person cannot be convicted on the basis of his lies only. With or without lies of the accused person, the prosecution is still under legal duty to prove a case against an accused person beyond reasonable doubt. That this is the law was stated by the Court of Appeal in ***R Vs Mohamed Shedaffa & Three Others*** [1984] TLR 95 and ***Hamidu Mussa Thimotheo & Majidi Mussa Thimotheo Vs R*** [1993] TLR 125) and the decision of this court of ***Moshi Rajabu Vs R*** (1967) HCD no. 384.

On this aspect, Sudipto Sarkar and V. R. Manohar; distinguished authors of ***Sarkar, Law of Evidence***, 17th Edition Reprint 2011 have this to say at page 2837:

“When the credit of an accused-witness is attacked, the legitimate effect of impeaching his credibility is that he may be considered unworthy of belief as a witness, but this unworthiness must not be taken into account in determining the guilt of the accused in respect of the offence charged. As a witness he may or may not be credible; but his incredibility as a witness must not be used to infer his bad character and accordingly his guilt as an accused. It is important to bear this in mind. A jury [assessors in Tanzania] cannot be expected to appreciate this vital distinction and it is

essential that they should be warned of it".
[Emphasis supplied].

However, notwithstanding the foregoing, in the case of ***R Vs Erunasoni Sokoni s/o Eria and Another*** [1947] 14 EACA 74 the Eastern African Court of Appeal held:

"Although lies and evasions on the part of an accused do not in themselves prove the fact alleged against him, they may, if on material issue be taken into account along with other matters and the evidence as a whole when considering his guilt".

The above passage was quoted with approval by the Court of Appeal in ***Paschal Mwita and 2 others Vs R*** [1993] TLR. 295.

The fourth principle is about discrepancies in evidence of witnesses. It is the law in this jurisdiction founded upon prudence that the discrepancies in the testimonies of witnesses discredit the prosecution case. However, not every discrepancy will destroy the prosecution case; only those discrepancies which are major and go to the root of the case which will spoil the prosecution case. Thus in ***John Gilikola Vs R*** Criminal Appeal No. 31 of 1999 (unreported) the Court of Appeal ignored discrepancies which were on details and they may have been occasioned by the relatively long passage of time between the incident and the time when

the witness testified. And in ***Evarist Kachembeho & Others Vs R*** (1978) LRT 70 this Court observed:

"Human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story"

Likewise, in the case of ***Mathias Bundala Vs R***, Criminal Appeal No. 62 of 2004 where the Court of Appeal, restating the position of the law it earlier stated in ***Kiroiyan Ole Suyan Vs R***, Criminal Appeal No. 114 Of 1994 (Unreported) held:

"... when a witness gives evidence after a long interval, say six years, following the event, allowance ought to be given for minor discrepancies. In the case at hand the witnesses were testifying after a lapse of nine years. Such expected trifling contradictions should be appropriately ignored ..."

The fifth and last guidance is the law relating to circumstantial evidence. In the present case, as can be gleaned from evidence, there is no person who eye-witnessed the killing of the two deceased. The only connection between the accused persons and the deaths of the two deceased is the head of cattle episode as narrated by the witnesses. This case, therefore, is highly dependent upon circumstantial evidence. Circumstantial Evidence

is not weak evidence in criminal law; it is sometimes the best evidence. The court can convict depending exclusively on evidence if it is satisfied beyond reasonable doubt that the inculpatory facts are incompatible with the innocence of the accused and incapable of no explanation upon any other reasonable hypothesis than that of guilt. . That is to say, the circumstances of the case which the court uses to convict the accused must be such that they lead to certainty to the exclusion of every reasonable doubt - see the decisions of this court of ***Mlswahili Mulugala Vs R*** (1977) LRT n. 25 and the persuasive decision of the High Court of Uganda of ***Tumuheire Vs Uganda*** [1967] EA 328 and the binding decision of the Court of Appeal of ***Protas John Kitogole & Another Vs R*** [1992] TLR 51 and that of the erstwhile Court of Appeal for East Africa of ***Simon Musoke Vs R*** [1958] EA 715.

It was in ***Lezjor Teper Vs Reginam*** [1952] Ac 480, at 489 where it was said:

“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

The foregoing principle was followed in the ***Musoke*** case (supra) in which the following passage from the ***Lezjor Teper*** case was also quoted at page 719:

"Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another... It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference".

On the principle regarding the application of circumstantial evidence, I think it is Lord Chief Justice Hewart who enunciated it close to a century ago to the effect that circumstantial evidence is oft the best evidence and has the accuracy of mathematics in ***R Vs Taylor, Weaver & Donovan*** (1928), 21 Cr. App. R. 20. The principle was stated thus:

"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."

The above principle has been followed in many commonwealth jurisdictions – see the ***Tumuheire*** case (supra) and ***Uganda Vs Nabwire Jessica***, Criminal Session Case No. 35 of 2000; the decisions of

the High Court of Uganda and ***John Ndunda Mwaniki Vs R*** Criminal Appeal No. 365 of 2007 and ***Neema Mwandoro Ndurya Vs R*** Criminal Appeal No. 446 of 2007 also cited as ***N Vs Republic***, Criminal Appeal No. 446 of 2007 the decisions of the Court of Appeal of Kenya (both decisions available at www.kenyalaw.org) and ***Zinyemba Vs the State*** 2008 3 BLR 526; the decision of the High Court of Botswana (can be accessed at www.elaws.gov.bw/rep_export.php?id=3990&type=pdf), among many others.

In the ***Tumuheire*** case (supra) the principle was restated at page 331 by Sir Udo Udoma; the then Chief Justice of Uganda in the following terms:

“It should be observed that there is nothing derogatory in referring to evidence against an accused person as circumstantial. Indeed circumstantial evidence in criminal case is often the best evidence in establishing the commission of a crime by a person ...”

It is with the foregoing principles in mind that I will now, as I did to the lady and gentlemen assessors, summarise the evidence for the prosecution and defence, before applying the same to the present case.

The prosecution fielded six witnesses while the defence did not call any witness to testify other than the accused persons themselves. Maria Bruno Method PW1 was the first to testify for the prosecution. She testified that

she was a peasant resident of Mirumba village. In 2009 she was living at Ikuba village with her parents. She was a pupil at Ikuba Primary School. Her father was married to three wives. The first one was Peseveranda Elias; her mother. She did not know the names of her two step mothers.

PW1 went on to testify that on 30.07.2009 in the morning at about 0700 hrs, before going to school, she went to the house of the second wife to which her father had slept to ask for money to buy exercise books. The door to that house was ajar. She knocked but her efforts did not bear any fruitful results. She heard a child crying from inside. She decided to enter to see what was amiss, but alas! She found her father and step mother lying in a pool of blood. Her father's body had wounds on the neck and was lying in a supine position while his second wife's body was lying facing his face down; her body was lying on their bed.

PW1 thereafter rushed to the village to inform her uncle; a certain Aaron Method who lived in the village but did not find him there. The first deceased's residence was in the farms area. His wife was there. She told her what she had seen at home. She thereafter went to her brother Wilbroad Bruno PW2 who lived in Mirumba village. She also narrated to him the tragic incident.

PW1 and PW2 decided to go to the scene of crime at Ikuba village. On the way, they met another uncle of theirs one Albano Method and told him what happened but he was already aware of it. He advised that they should report the matter to the Police. Thus PW2 proceeded to the scene

of crime while PW1 and their uncle went to report the incident to the Police.

After reporting, they proceeded to the *locus in quo* to which they proceeded with burying the bodies after getting a go-ahead from the Police who had already gone there.

On being cross examined by Mr. Mwakyusa, learned counsel for the first accused, she testified that she rushed to report the incident to her uncle and PW2 because her mother and third wife of the deceased were not at home. Killian Method; the third accused was there but she did not tell him as she was in the state of confusion, she stated. On cross-examination by Mr. Kampakasa, learned counsel for the second accused, PW1 identified the second accused person Ernest Mwendapole as her uncle, the third accused person Killian Method as her brother and the fourth accused person Lufunga Jilawise as her brother-in-law as he is married to her sister. She added when cross examined by Mr. Mawalla, learned Counsel for the third and fourth accused persons that Killian Method was in standard six like her, and that she used to wake him up to go school but on the fateful day she did not do that. She added that on the afternoon of the fateful night, Lufunga Jilawise had visited them. She also stated that her mother Peseveranda did not sleep there that night as she had gone to Uzumbula Village and the third wife had gone to Mbugani area; some eight hours' walk away.

Wilbroad Bruno PW2 came second to testify in support of the prosecution case. He testified that he was a peasant resident of Mirumba village and that he is son of the deceased Bruno Kapiga and Peseveranda Elias. He testified that on 30.07.2009 in the morning, PW1 told him that their father and step mother had been killed. He went there and found them indeed dead. He did not know why they were killed. Thereafter the Police went to the scene of crime and took him and his mother Peseveranda Elias to the Police Station at Mpanda where they were locked up for twelve days. The Police told him they were investigating the murders. On the thirteenth day he was released on bail. He went home only to find his eight head of cattle missing. PW2 added that he is a peasant; after harvesting his crops he used to sell the harvest and buy head cattle to rear. That he had four head of cattle belonging to him and that the other four belonged to Manga Jisinza; his brother in law. Manga Jisinza's sister is married to him.

PW2 asked his wife as to the whereabouts of the eight head of cattle. She told him they were collected by his uncle Ernest Mwendapole; the second accused person. His wife told him that Ernest was in company of Lufunga Jilawise; the fourth accused person. His wife told him that they told her that they were taking the eight head of cattle so that they could bail him out of the lock-up. After receiving such report, PW2 proceeded to one lameck; a commander of the tradition guard vigilante group (commonly known as *Sungusungu*) where he told him of his uncle having taken his head of cattle. Lameck suggested that as the following day was an open market day at Majimoto village, they should go there and make a search.

On 14.08.2009 they went to Majimoto open market where they found his seven out of eight head of cattle in the hands of Sengerema Yela PW3. They told him that he was in possession of stolen head of cattle. PW3 told them that he bought them from Tagala Lupunja; the first accused person and that Tagala got them from Ernest Mwendapole; the second accused. Thereafter they took PW3 together with the seven head of cattle to the *Sungusungu* Chief. That one head of cattle had been left at the residence of Sengerema.

At the *Sungusungu* Chief, they found arrested Ernest Mwendapole and Lufunga Jilawise; second and third accused persons respectively. PW3 was the third to be arrested.

The *Sungusungu* told him that they had interrogated Ernest Mwendapole over the head of cattle and that he said that they took the head of cattle to pay Tagala Lupunja; the first accused for the killing of his father and his second wife. They said six people participated in the killing – Tagala Lupunja, Ernest Mwendapole, Lufunga Jilawise; Peseveranda Elias and Killian Method. PW2 could not remember the sixth. He was handed the eight head of cattle by the police at Usevya Police post and the same were in his possession the moment he was testifying.

On cross-examination, PW2 testified that Killian; the third accused was not schooling; he had stopped schooling and that he was married. PW2 also stated that he was not communicating with anybody while incarcerated. That his father's body was slashed by the neck. That the Police arrested

him and his mother Peseveranda and told them that they were investigating. Peseveranda died while still in remand. He added that his being released on police bail had no connection with his head of cattle being taken and that the head of cattle were taken by his uncle to pay Tagala Lupunja; the first accused as a fee for killing the two deceased.

Sengerema Yela PW3 was the third to testify for the prosecution. He testified that he was a resident of Mirumba village. That he is a peasant and traded in buying cattle from cattle keepers in the village and sold them in the open markets at Usevya and/or Majimoto. PW3 went on to testify that on 10.08.2009 while at home, he was called by phone by Tagala Lupunja; the first accused person that there were head of cattle for sale at Mirumba village. PW3 knew Tagala as he is his brother in law - his sister is married to Tagala's brother.

The first accused told him that he would take him to Mirumba village and show him where the head of cattle were being sold. He told him that they were at Lufunga Jilawise's residence. PW3 knew Lufunga as well and identified him in the dock as the fourth accused.

He waited for him and when he arrived he took him to Lufunga's residence. The head of cattle were there. Lufunga's and Wilbroad's families were there. The owner of the head of cattle was not there; he was reported to be at Usevya. They had to wait for him. Tagala told him that the owner of the head of cattle was one "Heneli" Mwendapole. When the owner arrived; the said Heneli, Lufunga and Tagala and another

person he could not identify, had a *tete-a-tete* which he did not have the advantage of hearing. Tagala, after the *te-a-tete*, left with the head of cattle and told him that the head of cattle were already his. He told him he would sell to him seven of them and remain with one.

He discussed business with Tagala. They were about four; Tagala, himself, his relative who is in the village and the fifth accused in the dock. That the fifth accused was also there at Lufunga's and participated in the *tete-a-tete*. PW3 agreed with Tagala that he should pay Tshs. 1,430,000/= for the seven head of cattle. He took the head of cattle to his *Kayemba*; father of the wife of his son Seni. He left the eight head of cattle at Seni's father-in-law as Lufunga said he should keep for them one head of cattle and promised to go and collect it later. Thereafter, he proceeded to Mirumba village to pay Tagala and that other person. There was no other person who witnessed the payment except his relative Salamba Kashindye.; a youth, who had accompanied him from the beginning.

On 13.08.2009 PW3 took the seven head of cattle to Majimoto open market which would be conducted on the following day; 14.08.2009. On 14.08.2009 at about 1000 hrs there came Lameck Jilumba; a *Sungusungu* commander of Usevya village. He was in company of other members of *Sungusungu*. There were several head of cattle but they counted only seven of them and said the seven head of cattle had been stolen. PW3 told them that he bought them from Tagala. They arrested him and took him to the *Sungusungu* Chief at Usevya. They also took the seven head of

cattle there. Heneli Mwendapole and Lufunga had already been arrested. The *sungusungu* went to arrest Tagala. He was not found on that day. He was arrested on 15.08.2009 at Ilalangulo village. PW3 went on to testify that when Tagala was arrested and brought to the *sungusungu* chief to which PW3 was still under arrest, he was interrogated as to whether he was the one who sold the head of cattle to him. That he first denied but later admitted that he sold the head of cattle to him. PW3 witnessed Tagala being interrogated.

On cross examination by Mr. Chambi, learned counsel for the fifth accused person, PW3 stated that he knew the fifth accused person since the previous day in the court precincts as he was told that he was also arrested in connection with the murders. He added that he would not have identified him in the court precincts as he had seen him only once.

Jigangama Mipawa PW4 was the fourth witness to testify for the prosecution. This is a resident of Ikuba Village and is a *sungusungu* commander of the village. On 14.08.2009 in the morning at about 1100 hrs his boss; one Lameck Kashinje, a *Sungusungu* Commander, ordered him to the effect that he should assemble other members of the *sungusungu* and go to arrest one Erne. Lameck told him that he had arrested PW3 with stolen head of cattle and that it was one Erne who gave them to Tagala who later sold them to PW3. PW4 and other members of *sungusungu* proceeded to Erne's residence and arrested him and took him to the *Sungusungu* Chief. PW4 identified the said Erne as the second accused in the dock.

PW4 went on to testify that on the way, they interrogated Erne. He told them that he knew he was being arrested in connection with his brother-in-law's death. That Erne said they had convened at his residence discussing to pay those who killed his brother-in-law. They proceeded to the *Sungusungu* Chief. The Chief also interrogated him in their presence and Ernest told them that they had planned the death of his brother-in-law together with his sister and his nephew Killian; the third accused. That he said that they had agreed to pay one Tagala who killed the deceased at a fee of four head of cattle. That Erne told them that Jiko told them that he knew what to do; that Jiko told them that Tagala was a killing specialist. PW4 identified Jiko as the fourth accused in the dock. Thereafter, Lameck Kashinje went to arrest the said Jiko. He ordered that Tagala should also be arrested. That it was Gidamawe, Lameck, Robert and himself who went to arrest Tagala. That they went to arrest Tagala after Jiko had been arrested. That they arrested Tagala at Ilalangulu village and that he confessed on interrogation by the *sungusungu* chief to have sold the seven head of cattle to PW3 and that he got them from Erne as payment for killing the late Bruno. That he was hired to kill Bruno and the head of cattle was his payment after the killing was done. PW4 went on to testify that the *sungusungu* chief realised at that point that the matter had taken other dimensions as it had turned into a murder case; a matter which was not within their powers to handle. The matter was therefore handed to the police at Usevya Police Post to which Tagala, Ernest, Killian and Jiko were taken.

When cross examined by Mr. Kampakasa, learned counsel for the second accused, he testified that Erne was a short form for Ernest; the name of the second accused. That he heard that the two deceased were slaughtered and the knife which was used to slaughter them was stuck into the private parts of the second deceased. On further cross examination by counsel for the fifth accused person, PW4 testified that the fifth accused was not present at the *sungusungu* interrogation and that he did not know when and how he was arrested.

Gidamali Jilumbi PW5, another member of the *sungusungu*, came fifth to testify for the prosecution. He testified that he was a resident of Ikuba village as a peasant and *Sungusungu* Commander. On 30.07.2009, at about 1100 hrs he got information that Mzee Bruno and his second wife Kashinje Lushemeli had been killed. He was told that they had been slashed with a knife. He went to the scene of crime and found that the two deceased had been buried already. That they did some investigations but could not find the assailant.

On 12.08.2009, Willy who had been arrested on the date of death together with his mother, returned at his home only to find his eight head of cattle missing. He reported at Uzumbula *Sungusungu* office. He said he did not know who had taken his head of cattle from his home. They went on separate directions to look for the cattle; others proceeded to Majimoto open market while others went to Chamalendi. It was Lameck who went to Majimoto open market and found the head of cattle in the hands of PW3. That they interrogated PW3 who told them that he bought them

from Tagala. That he said Tagala was not alone; he was with one Erne. That they therefore went to arrest Erne as well on 14.08.2009 who admitted that it was true that he had given the head of cattle to Tagala as payment for killing his brother-in-law. PW5 identified Erne as the one in the dock second from Tagala.

PW5 went on to testify that they arrested Tagala at Ilalangulu village and that he said that he knew why they were following him up; that it was because he had killed Mzee Bruno. That they took him to the *Sungusungu* office to which he admitted to have killed Mzee Bruno.

PW5 went on to testify that that Erne told them that his sister who was the first wife of Mzee Bruno was not in good terms with her husband. That he told them that Erne, Killian and Mzee Bruno's first wife planned to annihilate Mzee Bruno. That Killian, who he identified as third from the right hand side and second from the left in the dock, told them that they had made such plans and looked for a person to accomplish the mission. They thus looked for Tagala as they knew him.

That Killian was also arrested and, on interrogation, he admitted that they decided to kill the late Bruno Method because there were misunderstandings at home as the deceased used to kill their children through occult powers and that they killed Mzee Bruno's wife because she had identified them during the killing of Mzee Bruno. That Jigo was the one who was identified by the deceased's second wife and therefore he felt it safe to finish her up. He stressed that the second deceased said she had

identified Jigo and said Jigo had participated in killing his father-in-law and that that was when Jigo returned and killed her.

On cross-examination PW5 added that he knew Killian well and that he was not schooling at the material time. He was married then. He reiterated that Jigo killed the woman because she had identified him and shouted to have so identified him.

The last witness to testify for the prosecution was No. F106 D/Sgt Athanas who testified as PW6. This is a Police Officer who wrote down the cautioned statement of the second accused person Ernest Mwendapole. He testified that on 16.08.2009 he was assigned to write down a cautioned statement of a murder suspect. The suspect was Ernest Mwendapole. The cautioned statement was admitted in evidence as Exhibit 3 after the court, through a trial within a trial, was satisfied that it was voluntarily made.

That is all for the prosecution case.

All the five accused persons chose to give their evidence on oath or affirmation. The first accused, allegedly a Moslem and the fourth accused person, a self proclaimed Pagan, affirmed before testifying and the rest of the accused persons who were Christians took oath before giving their respective testimonies. None of them, as already alluded to above, called any witness. The defence case had the services of five learned brains - Mr. Mwakyusa; learned counsel represented the first accused, Mr. Kampakasa; learned counsel represented the second accused person, Mr.

Mawalla and Mr. Ruhinda, learned advocates, at different times, represented the third and fourth accused persons while the fifth accused person had the services of Mr. Chambi; learned counsel.

The first witness for defence was Tagala Lupunja who testified as DW1. In his defence, as led by his counsel, DW1 testified that he was a resident of Usevya Village before being remanded in connection with the present charges. That he knew that he was accused of the murders of one Bruno and one Kashinde Lushemeli. He testified that he was arrested on 15.08.2009 at Ilalangulu Village by a vigilante group of about fifty among whom were Chigangama PW4, Jidamali Jihumbi PW5 and one Lameck Kashinje. There was another person called Yohana Unela Kamuga. That he remembered Yohanna Kamuga and Madama Membo because in preceding days, he had sued them in the Usevya Primary Court because they had wrongly arrested him for stealing a plough and injured him on arrest. He filed a criminal case in the Primary Court at Usevya against those who injured him. He testified that Madama Membo was acquitted but the other two were convicted and sentenced to pay fine Tshs. 60,000/= each and each was ordered to compensate him Tshs. 200,000/=. That Jigangama, Jidamali and one John Kwilasa testified for the accused persons in that case.

After his arrest at Ilalangulu, he was taken to Ikuba village. It took them six hours trotting and that they were beating him on the way. At Ikuba, there were about two hundred members of *sungusungu*. They were armed with spears and sticks. The *sungusungu* chief asked those who

brought him there why they did not burn him to death before bringing him there. They replied that they were waiting for his order so to do. There, at Ikuba, they asked him if he knew some people who were there. They looked severely beaten. These were the second, third and fourth accused persons. Also under arrest was one Sengerema PW3 who was later released at the Police Station at Mpanda. He replied that he did not know them. They told Ernest Mwendapole; second accused to stand up and asked him if he knew him. He said he did not. The *sungusungu* chief told the members of *sungusungu* to take him somewhere to torture him. At that point in time, Policemen arrived. They were told to take them to the Police Station. He was jogged for two hours again to the Police Station.

On the testimony of Sengerema PW3; the first accused testified that he had never transacted with Sengerema in any business. That the said Sengerema stayed in custody with them for four or five days. He was thereafter released. He did not know why he was released but at one point, one Policeman going by the name Menace went to the cell and took out Sengerema and himself. That Policeman told them that he was the investigator of their case. He asked them to give him five million shillings so that he could release them. Sengerema agreed but that he; the first accused, refused under the pretext that he could not part with money on an offence he did not commit. He went on to testify that Sengerema told them that because they refused to contribute to the five million shillings, his relatives had done it and that therefore he would disentangle from the case alone and that he did.

The first accused denied to have killed Bruno Method and Kashinde Lushemeli. He denied to have known any of the accused persons in this case before the case commenced. Neither did he know Peseveranda Elias before the case.

The second person to testify for the defence was the second accused Ernest Mwendapole. He testified as DW2. He testified that he was a resident of Uzumbula hamlet of Ikuba village in Mpanda District. That he was faced with a murder charge it being alleged he killed Bruno Method and Kashinde Lushemeli. Bruno Method was his brother-in-law as he; the first deceased was married to his sister Peseveranda Elias. Kashinde Lushemeli was one of Bruno Method's three wives. On 30.07.2009 he was at home. His nephew, one Emmanuel Method arrived and informed him his father and one of his wives; Kashinde, had been killed. He told him that his sister Maria Method PW1 had gone to ask for money and found them in a pool of blood; they were already dead.

DW2 went there and met Paulo, Bruno's young brother who took him in the house in which he found the two bodies in a pool of blood. He told him that Killian; the third accused person had gone to make a report at the Police Station. The Police arrived at about 1600 hrs, examined the two bodies and allowed them to bury the bodies.

DW2 went on to testify that after four days Killian Method called him and told him that they were at Mpanda with his paternal uncle one Sukari and that they wanted to bail out Peseveranda Elias and Wilbroad Method PW2

who had been arrested in connection with the murders. They had been locked up to help the Police in the investigation of the murders. He told him to go to Lufunga Jilawise; the fourth accused and sell the head of cattle so that they could bail them out. The head of cattle were first kept at Wilbroad's but after the arrest, Wilbroad left them in the hands of Lufunga Jilawise; the fourth accused - Wilbroad's brother-in-law. They told him to sell seven head of cattle. He went to Mirumba village at Lufunga Jilawise's residence and took the head of cattle; seven of them, and sold them to Sengerema PW3 at Tshs. 1,430,000/=. That Killian told him that they were to bail them out for Tshs. 700,000/=. He gave Kilian Tshs.700.000/- and the balance was reserved for treatment of Peseveranda Elias who had ulcers. Thereafter the two - Peseveranda Elias and Wilbroad Bruno PW2 - were released on bail. After their release, Wilbroad went to his residence. Peseveranda remained at the Hospital where she was admitted for treatment.

DW2 went on to testify that after two days he was arrested by *Sungusungu* for stealing head of cattle the property of Wilbroad Method. He told them that he did not steal but took and sold them on instructions. They said he stole them. They tortured him. They ordered him to take some nettle (*upupu* in Kiswahili) and spread same all over his body. He obeyed and did spread the irritating substance on his body. He went on to testify that in the process of torturing him, they asked him if he knew Tagala Lupunja. After being tortured for a long while, he had to agree that he knew him. Having admitted to have known Tagala Lupunja, they

stopped torturing him. On the following day, they went for Tagala. He was brought there at about 1600 hrs.

On the testimony of Sengerema PW3, DW2 testified that it was not true that Tagala Lupunja; the first accused sold him the head of cattle. That it was him (DW2) who sold the head of cattle to PW3. PW3 did not speak the truth, DW2 testified. He went on to testify that he never made any statement at the Police, let alone the cautioned statement which was admitted in evidence as exhibit P3. That he was charged with this offence but never killed the two deceased.

Killian Method; the third accused person testified as DW3. That he was arrested in 2009 accused of stealing head of cattle belonging to Wilbroad PW2; his brother. That he was arrested on 14.08.2009 while coming from Majimoto where he had taken three head of cattle for sale. That he did not manage to sell them as he could not fetch a good price so he was returning home with them. The money was to be used to treat Peseveranda Elias; his mother who had stomach cancer. He was arrested by *Sungusungu* Chief at Uzumbula Hamlet, Ikuba village. There at the *sungusungu* chief, he found also arrested Ernest Mwendapole; second accused and his brother in law Lufunga Jilawise; the fourth accused person. They were being accused of cattle theft. They told them that they had stolen the head of cattle belonging to his brother Wilbroad Bruno PW2 while he was in remand.

On the murders of the two deceased, he testified that on 30.07.2009 at about 0600 hrs in the morning, Maria Method PW1 went to the house he was sleeping and told him that their father and step mother had been killed. That the house was about 50 paces away from the house he had slept. He went there and witnessed the bodies of the two deceased. He told her to go to Wilbroad Bruno, Anna Method and Lufunga Jilawise to tell them of the incident. In the meantime, he went to the Police Station to report.

On the bailing out episode, DW3 testified that Wilbroad told him that they talked with one Mkingila who was investigating their case that they could be bailed out at Tshs. 700,000/=. He and one Sukari bailed Wilbroad and Peseveranda out. He called Ernest Mwendapole; his uncle to sell seven head of cattle so that the proceeds could be used to bail them out. He told him to sell the head of cattle which were at Wilbroad's. They were kept at the homestead of Lufunga Jilawise after Wilbroad was locked up. That his uncle Ernest Mwendapole sold the head of cattle to Sengerema PW3.

Lufunga Jilawise; the fourth accused testified as DW4. He stated that before his arrest by the *sungusungu* on 14.08.2009 for stealing head of cattle belonging to PW2 which later culminated into the present charges, he was living at Mirumba village. The head of cattle were kept by Wilbroad at his homestead after he was remanded together with Peseveranda; his mother-in-law for the death of Bruno Method; his father-in-law. That the seven head of cattle were taken by Ernest Mwendapole

so that he could sell them and bail out Wilbroad and Peseveranda. That he knew the first accused Tagala Lupunja since this case started; he did not know him before. He knew the third accused person before; he is his brother-in-law as his sister is married to him. He knew the second accused person Ernest Mwendapole as well; he is the third accused person's uncle. He denied to have killed Bruno Method and his wife.

In cross examination he testified that he gave the head of cattle to the second accused person who sold them to PW3.

Nchiching'wa Jilala; the fifth accused person was the last witness to testify for defence, he testified as DW5. He stated in his testimony that his name is Nching'wa Jilala; not Nchinchingwa. Before being arrested, he was living at Chamalendi hamlet in Mwamapuli Village. On 22.09.2009 he was at Mabambazi Centre. He was in a bar drinking beer. While still in that bar, there arrived three Policemen from Ukingwaminzi. They entered the Bar. They had two suspects of a murder case. The suspects were not the ones in the present case. The Policemen ordered him to buy them beer. He refused. They thus ordered him to sit down; on the floor. He obeyed. One of them handcuffed him. One of the three Policemen was plain clothed. The other two were in uniforms. He knew them before; the three were indeed Policemen stationed at Usevya Police Station. He knew them by names as OCS Willy, *Afande* Mosha and *Afande* Salum. Mosha was the one in plain clothes.

Without telling him what wrong he had done, they took him to Usevya Police Station at which there was a Police Vehicle with about six Policemen aboard. OCS Willy had a *tete-a-tete* with three Policemen from Mpanda and thereafter Willy told him to board the Police vehicle. The other two suspects were not told to board. He was taken to Mpanda Police Station leaving the two suspects there at Usevya Police Station.

DW5 went on to testify that he was locked up at Mpanda Police Station from 22.09.2009 to 03.10.2009 and all along he was not told what offence he had committed. That he was interrogated after the fourth day. Policemen took him to the investigation room where they asked him what offence brought him there. He said he did not know. That he heard the Policemen discussing to "give" him a "nylon" case or "changarawe" case. He did not know what "nylon" and "changarawe" cases meant but came to learn later while in remand that "nylon" and "changarawe" cases had reference to murder and robbery cases respectively. That was at a point in time when he realized that they were discussing which case to frame him with. On 13.10.2009 he was taken to court where a murder charge was read over to him. He was alone. On the subsequent mention date, he was joined with the present accused persons in their case. He denied having a hand in the offences he was charged with.

The learned counsel who were assigned to represent the accused persons as well as the learned State Attorney, were accorded an opportunity to make their final submissions. The defence made their final submissions on 05.06.2014 while the prosecution made its submissions on 06.06.2014.

Mr. Mwakyusa, learned counsel for the first accused submitted that the prosecution fielded six witnesses whose testimonies were at variance. According to their evidence, he submitted, the motives behind the killings is said to be that the late Bruno Method used to kill his grand children through occult powers and secondly that he was not in good terms with the first wife Peseveranda Elias, now also deceased. He submitted that the witnesses testified that there was no child who was killed or died through occult powers and that the deceased and Peseveranda (who is also deceased) were in good terms all along.

He submitted that the point that the first accused was paid seven head of cattle for killing Bruno Method and Kashinde Lushemeli has not been proved at all. He demonstrated. The cautioned statement by the second accused person has it that the first accused was paid four head of cattle out of which one was an ox. However, PW4 and PW5 testified that the first accused was paid seven head of cattle for killing the two deceased. These seven head of cattle were identified by PW2 at Majimoto open market. It is in evidence that the seven head of cattle were indeed sold to PW3 but that it was not the first accused who sold the same; it was the second accused person. The discrepancy in the number of head of cattle paid to the first accused casts some doubt in the prosecution case. The learned counsel thus prayed that the doubt be resolved in favour of the first accused person as was the case in ***Mohamed Said Matula Vs R*** [1995] TLR 3; the decision of the Court of Appeal.

The learned Counsel addressed the court on the discrepancy in the testimonies of PW1 and PW2 as well. He submitted that PW1 testified that at the material time, the third accused was a pupil but PW2 testified that the third accused was not a pupil and that he was married. Likewise PW5 testified that the third accused was not a pupil and was married. Another discrepancy in the testimonies of PW1 and PW2 is that PW1 testified that Bruno Method and his wives were all living in harmony. But PW5 testified that the late Bruno was not in good terms with Peseveranda, his first wife.

Another discrepancy, Mr. Mwakyusa submitted, is found in the evidence of PW3 and PW4 to the effect that when interrogated before the vigilante group the first accused first denied but later agreed to have killed the two deceased and that he did not explain anything else. However, PW4 stated that the first accused confessed to have participated in the killing of the late Bruno Method and his wife.

Another discrepancy in the testimonies of PW4 and PW5 is that at Ilalangulu, the accused person had sat down and did not run away. That he was not tortured, that he was not beaten up and that he did not bleed. But PW4 testified that the first accused started to take to his heels immediately after seeing the vigilante group. He testified that the first accused was hit by a stone on his head inflicting a big injury and that he oozed a lot of blood from that wound. PW4 identified the scar of the wound here in Court. That it was him who told his colleagues to stop beating him.

Mr. Mwakyusa went on to submit that PW3 contradicted himself greatly. That, first he said the head of cattle belonged to Tagala but later he said he paid to two people; Tagala and another person who was also in the dock.

He submitted that one may ask why these discrepancies? The answer, he submitted, is found in the testimony of the first accused who testified that he had previously instituted Criminal Case No. 117 of 2006 in the Primary Court at Usevya against Madama Membo, Yohanna Kamunga and Yusuf Kamunga who were members of the *sungusungu*. The genesis of the case was that the first accused person was accused by the vigilante group that he stole a plough which was not true. PW4 confirmed the plough episode when examined by the second assessor. In that case Madama Membo was acquitted but the other two were convicted and ordered to pay fine Tshs. 60,000/= and compensation to the first accused of Tshs. 200,000/= each. PW4 and PW5 were witnesses for defence in that case in which Madama Membo, Yohanna Kamunga and Yusuf Kamunga were accused persons. That the vigilante group was in grudges with the first accused after that criminal case and that the *sungusungu* might have come back with avenges in this case for the criminal case previously instituted against them. He referred the court to the case of ***Marando Suleiman Marando Vs SMZ*** [1998] TLR 375 in which the accused was acquitted for his raising a reasonable doubt in the prosecution's case. He therefore prayed that the court considers these discrepancies in evidence and finds him not guilty of the two counts of murder against him.

For the second accused person, Mr. Kampakasa learned advocate, after addressing the court in some details on the discrepancies in the testimonies of witnesses like Mr. Mwakyusa, submitted that the cautioned statement tendered by PW6 implicates the second accused person but that he denied the contents thereof. That kind of evidence, he submitted must be corroborated. The learned counsel cited ***Jackson Mwakatoka Others Vs R*** [1990] TLR 17 to bolster this argument.

On the head of cattle episode, the learned counsel submitted that the second accused person was allowed to sell the head of cattle by PW2 so that he could bail him and Peseveranda out. And that PW2 admitted that he was bailed out by one Sukari. The second accused did not commit the murders, he stressed. The complaints against him were cattle theft. There is no evidence at all that the second accused person conspired with others to kill the deceased Bruno Method and his wife. In view of the fact that no one witnessed the killings but we depend on the cautioned statement of the second accused person, the evidence is circumstantial evidence. Therefore this kind of evidence would need corroboration. There is no such corroborating evidence, he submitted.

He submitted further that the second accused person testified how he received the instructions to sell the head of cattle so that PW2 and Peseveranda could be bailed out. The Republic has not proved the case against the second accused person and prayed that he be acquitted on account of being innocent.

Mr. Ruhinda, learned Counsel for the third and fourth accused persons, like Mr. Mwakyusa and Mr. Kampakasa, learned counsel, also addressed the court on the discrepancies in the testimonies of the prosecution witnesses. He submitted that the discrepancies made the witnesses unreliable. He reiterated that the prosecution was under a duty to prove the case beyond reasonable doubt throughout the trial. The learned counsel cited **Jonas Nkinze Vs R** [1992] TLR 213 to fortify the point that the prosecution must prove a case against an accused person beyond reasonable doubt.

The learned Counsel submitted further that the prosecution evidence had it that PW2's wife was present at the sale transaction. If the wife of PW2 was present at the sale transaction, it is surprising why she was not called to testify in support of the prosecution case, the learned counsel wondered. It could be that they did not call her in fear of the fact that she might have testified against the prosecution interest, he submitted.

The learned counsel also cited **R Vs Kamau** (1924) 10KLR 8 and **Manubhai Hira Vs the Crown** (1945) 7ZLR 4 which were applied in **ACP Abdallah Zombe** (supra) for the proposition that reliance by the prosecution on a confession by a cautioned statement only should be avoided. He therefore prayed that the third and fourth accused persons be released as the case against them had not been proved beyond reasonable doubt.

For the fifth accused person came Mr. Chambi, learned counsel who submitted that, except for PW3, the rest of the witnesses did not implicate

his client. He submitted that PW3 was initially arrested together with the first, second, third and fourth accused but was later released. He submitted therefore that this is an accomplice witness whose evidence, under section 142 of the Evidence Act may be used in convicting an accused person but prudence requires that such evidence must be corroborated. He cited ***DPP Vs Elias Laurent Mkoba & Others*** [1990] TLR 115 to support this proposition.

Like the other counsel for the rest of the accused persons, the learned Counsel for the fifth accused person addressed the court on the discrepancies in the testimonies of witnesses adding that his client is just implicated that he was present when the transaction was negotiated and that that alone is not enough to implicate him with the murders. Citing ***Jackson Mwakatoka*** (supra); the decision of the Court of Appeal the learned counsel submitted that mere presence at the *locus in quo* does not make the fifth accused person a participant to the killings. He insisted that the fifth accused person was arrested two months after the incident. It was in a bar. He was drinking beer. He was arrested after he refused buying policemen beer. He was not told why he was arrested but later he was joined with the present accused persons. He therefore submitted that this case has been manufactured against the fifth accused person and prayed that this court finds him not guilty and should acquit him.

For the prosecuting Republic, Mr. Mwashubila learned State Attorney was of the view that, through the six prosecution witnesses fielded and four exhibits tendered, the prosecution has proved the case to the hilt against

all accused persons. The learned State Attorney conceded to the glaring fact that there is no eye witness to the incident and that the strength of his case is in the confession of the co – accused; the second accused who implicated the other accused persons.

He added, however, that the court cannot solely depend on that kind of evidence, there must be corroborating evidence. The learned State Attorney submitted that the testimonies of PW4 and PW5 corroborate the cautioned statement. In addition, the testimony of PW3 who testified to the effect that he bought the head of cattle from the first accused in the presence of the second, fourth and fifth accused persons corroborates the cautioned statement.

On the aspect of inconsistencies of witnesses, especially the members of the *sungusungu*, PW4 and PW5 the learned State Attorney submitted that the inconsistencies are trivial and do not go to the root of the case. He cited ***Haji Ibrahim Vs R.*** [1975] LRT n. 56 to support the proposition that trivial discrepancies which do not go to the root of the case must be ignored. He finally submitted that the Republic has proved the case against the accused persons to the standard required by the law and prayed that the five accused persons be convicted as charged.

The assessors who assisted me in hearing this case gave me their opinions on 30.09.2014 after I summed up the case to them. Each one of them, after hearing the summing up, was of the view that the evidence adduced against the accused persons was not sufficient to prove the case against

them beyond reasonable doubt. They therefore opined that the five accused persons are not guilty and should therefore be acquitted.

I have carefully listened to and seen the prosecution witnesses as well as the accused persons testify in the witnesses' box. It is not in dispute that Bruno Medhtod and Kashinde Lushemeli are dead. This fact has been proved by the prosecution witnesses Maria Bruno PW1, Wilbroad Bruno PW2 as well as the accused persons Ernest Mwendapole DW2 and Killian Method DW3. PW1, PW2 and DW3 are kids of the late Bruno Method while DW2 is his brother-in-law. It is also no gainsaying that the two deceased did not die a natural death; they were killed and that whoever killed them did that with malice aforethought. The malice aforethought is deciphered from the nature of injuries inflicted. Malice aforethought is surmised from the manner in which the killings were carried out. Malice aforethought has a statutory definition under the provisions of section 200 of the Penal Code. The section provides:

"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that

person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;

(d) ...”

The PMRs clearly show that both deceased died due to loss of blood. The PMR in respect of Bruno Method shows in its summary as follows:

“Invaded (sic) by unknown people – sustained multiple cut wounds.

- Anterior neck (trachea and oesophagus cut)
- Mandible bone – broken and cut wound just above the eye
- Scrotum – peeled left side”.

And the PMR in respect of Kashinde Lushemeli reads in its summary as follows:

“Invaded (sic) by unknown people – sustained multiple cut wounds.

- Anterior neck – extends to the left side (carotid and jugular cut off)”.

I understand the summary of the PMR in respect of Bruno Method to mean that the trachea and oesophagus were cut, mandible bone broken, a cut wound just above the eye and left side scrotum peeled. And that of Kashinde Lushemeli to mean that the anterior neck was cut; a wound extended to the left side and that the carotid and jugular were cut off. Despite the fact that the PMRs, it seems, were inelegantly filled, the message coming out of their reading is clear – that these murders were but brutal of the highest degree. Suffice it to say that the two deceased met their deaths in cold blood.

And as good luck would have it, at the PH stage, the deaths of the two deceased were listed among the matters that were not contentious. Thus acting on testimonies of the witnessed and the PMRs coupled with the fact that the deceased's deaths are not disputed, I take it as proved that the two deceased – Bruno Method and Kashinde Lushemeli – are indeed dead and that they did not die a natural death; they died in cold blood.

The pertinent question from the moment the two deceased were brutally murdered and which made this trial take place and is the very question that has been lingering my mind throughout the trial up to this time I compose this judgment is, as usually is the case in cases of this nature, who killed the two deceased?

Let me, at this juncture and before going into the details of this judgment, comment on the statement of the medical practitioner who conducted the autopsies on the bodies of the two deceased to the effect that the two deceased were invaded by unknown people. With due respect to the medical personnel who conducted an autopsy of the two bodies, the statement that the two deceased were invaded by unknown people was an overstatement on the part of the medical practitioner. How did he know that the deceased were invaded? How did he know the assailants were unknown? It seems to me that this medical practitioner crossed borders in giving his medical opinion in the PMRs. The fact that the two deceased were invaded or that the assailants were unknown could not have been deciphered from only examining the bodies. He surely injected extraneous matters in the two reports. I think this was an unnecessary detail to be filled in the PMRs.

As an expert, in my view and in the light of the decision of the Court of Appeal in the case of ***Godi Kasenegala Vs R***, Criminal Appeal No. 10 of 2008 (unreported), the medical practitioner ought to have filled the PMRs basing on what he observed in his examination of the bodies of the victims. Commenting on the invasion and the assailants being unknown are findings falling within the exclusive preserve of the court after hearing evidence and considering all established facts of the case. I therefore expunge this detail from both PMRs. However, that said notwithstanding, I wish to state that this unnecessary detail in the PMRs, as expunged, does not, in my view, water down the strength or validity of the PMRs. That is to say, even without the unnecessary details, as expunged, the PMRs are

still valid and convey the requisite message respecting the causes of deaths of the two deceased and the nature of the wounds inflicted which ultimately drove them into mortality.

Let me now consider the extra-judicial statement (Exh. P3). The confession of the second accused person in his cautioned statement (Exh. P3) is highly implicative of all the accused persons; it implicates even the second accused himself. It narrates how the five accused persons hatched a plan to annihilate the late Bruno method because they were living in disharmony with his first wife Peseveranda; who, allegedly, died in remand prison in connection with the present murders and that he used to kill his grandchildren through witchcraft. The statement reads in part:

"Kwa muda mrefu kulikuwa na ugomvi baina ya watoto wa shemeji yangu kuwa shemeji Bruno s/o Method anahusika kuwaloga na kuua wajukuu wake na kati ya hao waliokufa ni Shigela s/o Bruno umri wa mwaka (sic) mitatu na Ana d/o Bruno mwenye umri wa mwaka mmoja. Vifo vya hao viliwafanya wazazi wao ambao ni Cliau s/o Method mzazi wa Ana d/o Bruno na Wilbroad s/o Method mzazi wa Shigela s/o Bruno waende kupiga ramli kwa mganga wa kienyeji na kuambiwa Mzee Bruno s/o Method ndiyo mchawi. Tarehe nisyokumbuka mwezi wa saba 2009, dada yangu Pensevelanda d/o Mwendapole

aliniambia ameamua kumtuma Cliau s/o Method ambaye ni mwanaye aende kutafuta wauaji ili wamuue mme wake kwa sababu anaendelea kuua wajukuu zake, mimi nilikubali tu ...”

And as to who actually did the killing, the confession goes on:

”Ndipo Cliau s/o Method akamtafuta Tagala s/o Lupunja mkazi wa Usevya ili afanye kazi ya kumuua shemeji akishirikiana na Ching’we. ... Basi mimi nikiwepo na dada yangu Pensevelanda d/o Mwendapole na Tagala s/o Lupunja, Ching’we s/o? Na Cliau s/o Method walielewana walipwe ngombe wanne ili watekeleze mauaji hayo na wakati huo shemeji alikuwa hajui kinachoendelea kwani tulifanya mipango hiyo kwa siri sana ... mimi nikabaki na dada kwa mama yetu mzazi kule Uzumbula. Tarehe 30/7/09 mimi nililala nyumbani kwangu na usiku ule ule ndipo shemeji Bruno s/o Method na Bi mdogo wake Kashinje Lushemeli waliuawa kwa kukatwa katwa na mapanga na aliyefanya mipango hiyo ni mimi, dada yangu Pensevelanda d/o Mwendapole, Cliau s/o Method na Lufunga s/o Jilawise ...”

The foregoing contents of the confession might sound convincing. It may sound convincing particularly bearing in mind the fact that the two deceased were killed in cold blood and no reason why has been brought out by other evidence. And the situation is exacerbated by the fact that there is no witness who testified if there were any items stolen after the killings which would suggest that the assailant's or assailants' aim was to take the lives of the two deceased; nothing else. However, the cautioned statement has some details which are diametrically opposed to what is in evidence. I shall demonstrate. First, is the motive behind the killing of the late Bruno Method. While the confession attributes the reason why the late Bruno Method was killed to his acts of killing his grandchildren and his being at loggerheads with his first wife Peseveranda, the evidence adduced by the prosecution is wanting on those aspects. If anything, the witnesses who testified on the relationship between the late Bruno Method and his first wife Peseveranda were categorical that they were living in harmony. This piece of evidence is testified to by PW1, PW2 and DW2 and DW3. As to the killings of grand children through witchcraft, the evidence adduced by the prosecution show that there was no such a thing. PW1 and PW2 testified that there were no such incidences. It was only PW5 who touched upon the first deceased and Peseveranda as living in disharmony. I am alive to the fact that motive in criminal law is not an essential element to prove a crime but in the case at hand it helps us to see the weight which can be accorded to the confession, for, it is a settled principle of criminal law that motive can be considered when weighing the prosecution case. See - ***R Vs K. Tindikawe*** (1940) 7 EACA 67 referred to

in ***Stanley Anthony Mrema Vs R*** Criminal Appeal No. 180 of 2005 (unreported); the decision of the Court of Appeal.

Secondly, the number of the head of cattle that were to be paid to the assailant is different. While the confession has it that the maker of the statement was assigned to pay the killers four head of cattle, the evidence has it that the alleged killer was paid eight head of cattle. PW3 testified that he bought eight head of cattle from the first accused and was caught in possession of seven of them. At least where there is reference by witnesses to the number of the head of cattle involved in the transaction the subject of this matter, the number has been mentioned as eight; not four as the confession suggests. It has not come out clearly in the testimonies of witnesses why, if at all, the first appellant was paid seven head of cattle instead of four as agreed as per the cautioned statement.

Thirdly, the confession is at variance with the evidence on record in respect of who consulted the killer. While the confession refers to the second accused Killian Method as being a person who went to the first accused to hire him, the evidence on record shows that it was the fourth accused Lufunga Jilawise who told them that he knew Tagala as a killing specialist and that he is the one who showed them where to get him.

The variance in prosecution evidence, makes the confession lacking necessary support from the evidence of record. The cautioned statement, being repudiated, renders the court very unsafe to rely on to found a conviction against the maker and/or those implicated in it without it being

corroborated in some material particular by some other independent evidence. As was held in *Tuwamoi Vs Uganda* [1967] 1 EA 84, the court may found a conviction depending on a repudiated confession if it is satisfied in all the circumstances of the case that it depicts but the truth but the rule founded upon prudence is that usually a court will only act on the confession if corroborated in some material particular by independent evidence. The principle was formulated at page 91 thus:

"We would summarise the position thus – a trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and **usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court.** But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true."
[My emphasis].

The foregoing principle was followed with approval by the Court of Appeal in ***Jackson Mwakatoka*** (supra) a case cited to me by the learned counsel for the second accused and the learned counsel for the fifth accused. One of the headnotes to this case reads:

“repudiated confession though as a matter of law may support a conviction, generally requires as a matter of prudence corroboration as is normally the case where a confession is retracted”.

In the instant case, such corroboration is wanting. As already alluded to above, it is not safe to rely on the repudiated confession of the second accused person amidst glaring variances on record. As stated by the learned State Attorney in his submissions, the strength of the prosecution case is in the confession of the second accused person. However, at criminal law, case law has urged the police not to be contented with a confession only in their investigations. The police, after obtaining a confession from an accused, they are supposed to go an extra mile to seek independent evidence which would corroborate such confession. To end investigation just after securing a confession might make an accused person being acquitted not because he did not commit the offence, but because the case has been inadequately investigated. I find fortification in this stance in the ***Kamau*** case (supra); a case cited to me by Mr. Ruhinda, learned counsel for the third and fourth accused persons, in which, Barth; then Chief Justice of Kenya observed:

"Shortcuts are usually inexpedient, and every effort should be made to prove the case alleged against an accused without a reliance on a confession which can as easily be retracted as made. **The police should not be satisfied that a confession having been obtained, a case is completed**".

[Emphasis added].

That principle was followed by the Eastern African Court of Appeal in the ***Manubhai Hira*** case (supra) as follows:

"The learned Chief Justice in ***R Vs KAMAU*** was in that case dealing with a confession, but what he then said applies with equal force to other statements made to the police by accused persons in custody. Such statements are as easily denied or retracted as made and the police should not be satisfied that their investigation is complete unless and until they have, apart from anything the accused person may have said, obtained the best and fullest evidence to support the charge."

The principle as enunciated by the ***Kamau*** case and restated in ***Manubhai Hira*** was followed and applied by this court [Massati, JK (as he

then was)] in the recent past in **ACP Abdallah Zombe** (supra) in which the case was filed by the prosecution relying almost entirely on the confessions of some of the accused persons. I, for one, fully associate myself with the reasoning enunciated some ninety years ago in the **Kamau** case, restated about seventy years ago in **Manubhai Hira** and followed and applied in the recent past by this court in **ACP Abdallah Zombe**. The same principle is applicable in the present case.

I also wish to discuss the question of reliability of witnesses in the present case. The learned counsel for the accused persons have attacked the prosecution witnesses left, right and centre that they are unreliable as their testimonies contradicted. Let me deal with PW2 separately. I keenly watched this witness testify in the witnesses' box. Surely, as I could observe her, she had much to conceal than reveal. It is not clear why after she learnt of her father and step mother having been killed, she rushed to make a report to his uncle some kilometers away without informing her brother; the second accused, who was also at home. I find too cheap to buy her statement to the effect that she was in a state of confusion when doing so. Applying the test of the reasonable man to the circumstances, it is my view that having seen the bodies of the two deceased in that state, she would have cried for help outrightly and would have rushed to his brother who was there at home to break the news. She did not do that and, in my view, any reasonable man would not have acted the way she did. This witness, as I saw her, was not credible and therefore unreliable in many respects. It appears, the way I see it, she aimed at exculpating his brother from the dangers of implicating him if she

testified the truth and in so doing, she found herself injecting lies to his testimony. I wish to borrow the words said by Judge Charles Byers in a case against Laura Campbell who was charged with perjury and perversion of justice (available at http://news.bbc.co.uk/2/hi/uk_news/6107780.stm) when sentencing her to four years imprisonment for lying in court in a bid to saving his brother; an accused person in a murder case, that lying in court is a very serious criminal offence; it taints the very fountain from which justice springs. PW1 has escaped this criminal wrath but let it be known to her (and other prospective liars in court) not to do that again as the law may not always spare her as happened in this case.

Another witness whose evidence I think is worth discussing separately is PW3. This witness also proved to be unreliable. I have in mind the reference to the fifth accused's participation in the commission of the present offence. While this witness testified in his examination in chief that the fifth accused person participated in the *tehe-a-tete* which took place at Lufunga's homestead and that he was present when he discussed business with Tagala, he completely moved the goal post in cross-examination. PW3 stated in cross-examination that he saw the fifth accused person for the first time in the court precincts one day before he testified and that he was told that he was also arrested in connection with the murders of the two deceased. In the premises, this witness could be credible but he turned to be unreliable because of this discrepancy.

As for the rest of the witnesses, more especially PW2, PW4 and PW5, having also closely watched them testify, I think they were but credible

and reliable. Their discrepancies in evidence were on minute details and did not go to the root of the matter. Such discrepancies may have been caused by long passage of time since the offence was committed in 2009 to the moment they testified in court in 2014; some five years after the offence was committed. As already stated above, discrepancies which will taint the prosecution case are those which go to the root of the case – see the ***Kiroiyan Ole Suyan, Evarist Kachembeho, John Gilikola*** and ***Mathias Bundala*** cases (supra).

Having found no corroborative evidence on the repudiated statement, this case, at this juncture, stands or falls on circumstantial evidence. This kind of evidence is as good as direct evidence. It is therefore not correct to say that this kind of evidence needs corroboration as Mr. Chambi, learned counsel for the fifth accused person seemed to suggest. As already said above, this kind of evidence can prove a case to the accuracy of mathematics. It is however, trite law that in a case depending exclusively upon circumstantial evidence, the court must find before deciding upon conviction that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt (see: ***Rex Vs Kipkering Arap Koske*** (1949) 16 EACA 135 and ***Teper Vs R*** [1952] AC 480). In the present case, there is a missing link between the killings and the involvement of the accused persons. The possibilities that the two deceased might have been killed by any person other than the accused persons are not eliminated.

Some statements in the present case were quite tantalizing to implicate the accused persons. Like the statement in the testimony of PW5 to the effect that the assailants intended to kill only the late Bruno Method but that the late Kashinde Lushemeli identified Lufunga Jilawise and shouted to that effect. The statement may sound convincing particularly that it is not clear in evidence the motive why Kashinde Lushemeli was also killed. But at law the same remains hearsay evidence (or at most a dying declaration) which has not been substantiated by evidence. Hearsay evidence is inadmissible at law and cannot be a basis of any conviction – see **Jones Ndunguru Vs R** [1984] TLR 284. If the hearsay would be elevated to a dying declaration, it would need someone to testify on and that would not be all; it would need corroboration - see **Pius Jasunga s/o Akumu Vs R** (1954) 21 EACA 331, **R Vs Mohamed Shedaffa & 3 Others** [1984] TLR 95 and **Africa Mwambogo Vs R** [1984] TLR 240.

I must confess that this case has caused me a lot of anxiety. There are a lot of questions that have been left unanswered by evidence. First, it has not been brought out by evidence, the hirers of the killers did not pay the head of cattle belonging to the deceased at his home and in its stead went to collect the head of cattle belonging to PW2. It appears there were some head of cattle at the first deceased's homestead as the third accused was arrested when coming from fetching a market of three head of cattle.

And even if we are to believe that the transaction was intended to bail out Peseveranda and PW2 why is it that they sold head of cattle whose proceeds exceeded the Tshs. 700,000/= required for the alleged bailout

process? As stated above, there is evidence from DW3 that he was arrested while coming from selling head of cattle? Why rush to sell the head of cattle at Mirumba? How much was needed for the treatment as there had been obtained some over 700,000/= from the Mirumba head of cattle proceeds, why sell another three head of cattle? Would the late Bruno Method have allowed that?

And to clinch it all? Why Sukari had not been called to testify. At one point I asked where was Sukari and DW3 said he was in town. Why was he not called? He was an important witness for both the prosecution and defence but neither the prosecution nor the defence bothered to call him. In such circumstances, the court is entitled to assume that the said Sukari was not called because it was feared he might have testified against the interests of whoever would have called him. I find fortification on this stance in the case of ***Aziz Abdallah V R*** [1991] TLR 71 whose one of the headnotes reads:

“the general and well known rule is that the prosecutor is under a prima facie duty to call those witnesses who from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution”.

[See also: ***Chacha Pesa Mwikwabe Vs R*** Criminal Appeal No. 254 'B' of 2010, ***Anyelwisye Mwakapake Vs R***, Criminal Appeal No. 227 of 2011 and ***Gallus Faustine Stanislaus @ Wasiwasi & Another VS R*** Criminal Appeal No. 231 of 2007; all are unreported decisions of the Court of Appeal].

I observed in court how the second accused person was scared of the first accused. If there is one person I keenly observed his demeanor every single moment during the trial is the second accused person. He always looked absent minded and innocent-looking as if he was dragged into this whole saga not only unknowingly but also innocently. Scared of the first accused as he was, he was quite emphatic and looked very evasive when it came to any inference that it was the first accused who sold the head of cattle to PW3. His demeanor was all suggesting that that aspect was strongly suppressed.

Be that as it may, everything in this basket is sheer suspicion which could have been cleared by evidence. The prosecution has not succeeded in this endeavour and my hands are tied but to depend on the evidence adduced in court. It is elementary criminal law that suspicion alone, however strong, cannot found a conviction.

In the end, I find and hold that the evidence led by the prosecution in the present case falls short of proof of the case against all the five accused persons to the standard set by criminal law; beyond reasonable doubt. In the premises, the accused persons - Tagala Lupunja, Ernest Mwendapole,

Killian Method, Lufunga Jilawise and Nchichingwa Jilala – are found not guilty of the murders of Bruno Method and Kashinde Lushemeli and I consequently acquit them. They should forthwith be released from remand custody unless otherwise held for some other lawful cause. Order accordingly.

DATED at MPANDA this 30th day of December, 2014.

J. C. M. MWAMBEGELE
JUDGE