

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT MOROGORO
ORIGINAL JURISDICTION
CRIMINAL SESSIONS CASE NO. 46 OF 2015
REPUBLIC
VERSUS
1. GEOFREY KITUNDU @ NALOGWA
2. MICHAEL JOSEPH

JUDGMENT

The two accused persons; GEOFREY KITUNDU @ NALOGWA and MICHAEL JOSEPH stand jointly and together charged with the offence of Murder contrary to section 196 of the Penal Code [Cap 16, R.E. 2002]. The prosecution had alleged that on or about 31/8/2013 at the CocaCola Depot, Mtawala area, Morogoro Region, the two accused persons murdered a guard by the name of Elisha Paulo. The prosecution's central story is that the two accused persons were among ten people who plotted to carry out stealing at the CocaCola depot at Mtawala area, the plot however aborted due to what happened at the scene whereby one of them got shot.

From the contents of the Post Mortem Report - exhibit P4, deceased's cause of death was due to severe head injury and severe hemorrhage. The Doctor who performed the postmortem examination observed multiple deep cut wounds on the head and the brain matter was coming out. Undoubtedly from such cause of death deceased died a very violent death. When the charges were read over to the accused persons, they all disputed the charges and pleaded their innocence.

To prove its case, the prosecution called a total of six witnesses. The 1st prosecution witness was Otto Oscar Sakala, one of the guards from Omega Neutro Security Solution which used to guard the Coca-Cola depot who was on duty the fateful night. He told the court that ordinarily the night shift is manned by two guards and for that day it was himself and Elisha Paulo. With regard to weapons, he had a "kirungu" (guarding stick) and a gun which was held by Elisha Paulo. Elisha positioned himself at the main gate and he was about 20 paces away. In the course of the night he heard a gunshot followed by a call for help coming from his colleague who was saying "wezi tumevamiwa" (thieves we have been invaded). He followed up the call cautiously, squeezing himself beside the wall of a room that stores empty crates. In the cause, he was able to see what was happening; he saw a person lying on the ground fretting in agony holding his left leg and he identified him as Kitundu (the 1st accused). He said he managed to identify him because he knew him well before as he previously worked with him in Omega company for about one month as a fellow guard and also there was sufficient light. At the same time, he saw about eight people attacking Elisha Paulo with machetes and iron bars. He explained that the area was well illuminated by the light from 150 wats electric bulbs affixed on the guards' room close to the main gate and he was about 3 paces from the person lying down. PW1 identified the 1st accused as Kitundu, the person he saw at the crime scene and said he could not identify the rest because they had hidden their faces with black masks. Upon seen the way his colleague was been attacked he got scared and attempted to flee by jumping the wall but the robbers saw and pursued him and he too was attacked viciously, PW1 pointed to several scars on his head which he said resulted from the wounds inflicted on the fateful day. He thereon lost conscious until the next day when he woke up and found himself in Morogoro Hospital. Upon regaining conscious the police who he saw around pointed to him another patient who he identified was Kitundu he person he had seen at the scene of crime.

Upon being cross examined by Mr. Mfinanga, learned counsel, PW1 maintained that he had the courage to pursue the call for help despite the gunshot because he knew his colleague had a gun. He said he identified the 1st accused because there was enough light just like daylight, insisting that the bulbs were giving out very clear light because they were of 150 – 200 wats which is written on the bulbs, adding that he inspected the bulbs before he began his shift. He insisted that Kitundu was not wearing a mask that is why he managed to identify him when he saw him and also because he had worked with him for a while in the past.

Upon being cross examined by Mr. Tarimo, learned counsel, PW1 insisted that at the scene of crime he only identified Geoffrey Kitundu because the rest had hidden their faces. He maintained that normally guards look for strategic points during guard so as to shield themselves as well as seen the area they are guarding well. He said Elisha was assaulted close to the main gate.

PW2 was F. 3170 D/Cpl. Mshihiri, a police detective in the Anti Robbery Unit, RCO's Office since 2007. He told the court that on 31/8/2013, in the course of his duties at Kihonda area in the company of D/Cpl. Elfes and D/Cpl. Benard and their driver, they learnt of a murder incident that occurred at the CocaCola Depot the previous night. At around 9.00am he received a phone call from one Jeffa who told him he had important news but wanted to meet face to face with the police. Together with his colleagues followed up the call and went to the Dodoma bus stop where they had agreed to meet Jeffa. The latter informed them that at his house he had a visitor who was brought by a bodaboda driver called Michael with a bleeding wound and that the explanation he gave regarding how he got the wound sounded suspicious so he wanted the police to follow up the issue. As he wanted to remain anonymous, Jeffa gave the police another bodaboda driver to take them to Michael's house. They left and upon arrival at Michael's house, they found him with his wife who was washing clothes soaked in blood, they also found a motorcycle, Sunlag,

Reg. No. T. 169 BXM. They arrested Michael and took with them the motorcycle and the soaked clothes. PW2 went on that on their way to the station, Michael volunteered to tell the truth and admitted before the police that he was the one who ferried one Geof also known as Ngosha together with another passenger to a house at Msamvu during the night and was ready to take police to the place. Michael also informed them that on the way at a certain bush those people hid a gun, pump action MV 65552 together with 2 machetes and one hammer. In court, PW2 identified the 2nd accused as the Michael they arrested and that later Michael led the team to the area where the said weapons were hidden in a bush behind the CocaCola Depot and the police recovered them from the spot shown and the same were hidden under some grass.

After the said recovery of the weapons, Michael agreed to take the police to the house he sent the bleeding person where they found Jeffa. On getting into the room they found the 1st accused wrapped in a white bed sheet soaked with blood and upon inspecting his body they noted that he had a big wound on his upper left thigh near the waist (nyonga) which appeared like a bullet wound. PW2 identified the 1st accused as Geof whom they arrested at Jeffa's house and joined him with Michael and both were taken to the police station. PW2 said efforts to arrest other suspects under the guidance of Michael failed as every place where Michael took them they found the suspect had already fled. The retrieved weapons were handed over to the exhibit keeper for safe keeping as per the procedures and the same were assigned reference No MORO/ER/4783/2013. Through the said reference number, PW2 identified a shotgun MV 65552 pump action and the same was admitted in court as exhibit P2.

Upon being examined by Mr. Mfinanga, learned counsel, PW2 said that he knew Jeffa before the incident as he used to buy chips from his stall. He said he acted on the information without going back to the station as in his assessment it required

immediate attention and the police procedures permits such a move where the information received required urgent attention. PW2 confirmed that Michael admitted that he ferried the bleeding person and his colleague to Jeffa's house in a "mshikaki" form.

On being cross examined by Mr. Tarimo, learned counsel, PW2 admitted that what Michael told them was that the roles he played related only to transporting those people to Jeffa's house together with leading the police to the area where the weapons were recovered from in a bush behind the CocaCola depot.

PW3 was Salehe Nuhu Iddi, an ex-guard of Omega Security Company in 2013. He told the court that he was the leader of the guards at CocaCola Depot Mtawala area. In that regard, on 30/8/2013 he assigned Otto Oscar (PW1) and Elisha Paulo Simangwa for the night shift and they had the usual guarding tools i.e. a guarding stick - "Kirungu" held by Otto Oscar and a gun - pumpaction, the only firearm which was handled by Elisha Paulo. He went on that on 31/8/2013 at 6:00 am when he reported for duty he found the place locked and very quiet upon calling there was no answer. He thus peeped and managed to see a person lying on the floor soaked in blood. He thus realized that there were problems. He phoned the Stock controller, one Jacob Selemani Kerenge and informed him about the condition and thereafter the matter was reported to the police. Upon coming, the police arranged to open the gate and what they found inside was shocking as they saw Elisha Paulo lying on the floor soaked in blood and Otto Oscar (PW1) sitting unconscious. They found the gun - shotgun MV 65552 which Elisha Paulo had missing together with a mobile phone - Nokia Obama. The police took the body of Elisha Paulo in their car and himself and the Stock Controller took Otto Oscar to the hospital. At around 17.00pm, they received information from the police that there were people arrested and a gun recovered. Himself and Jacob Selemani pursued the information and at the police station they found the gun which he

identified through its numbers - MV 65552 as their shotgun taken from the scene of crime.

Upon being cross examined by Mr. Mfinanga, learned counsel, PW3 maintained that the gun was handed over to Elisha and that he was among the guards who did the handing over to the evening guards i.e. Elisha and Otto and they had only one gun.

Answering to questions from the Lady Assessors, PW3 said that during the hand over, the gun was handed to Elisha Paulo but he did could not tell what injured him.

PW4 was F. 91 D/Cpl. Rajab, a police detective, currently stationed at Mvuha Police Station, Morogoro Rural. He told the court that on 31/8/2013 he was an investigator at the Central Police Station Morogoro. Around 4:00 pm he was assigned to record the statement of a suspect he did not know but he later learnt his name was Geoffrey Kitundu. He took him to one of the interview rooms but before he started the interview he noted he had a fresh wound on his left leg at the upper thigh (nyonga). After the initial familiarization, PW4 administered the usual caution regarding the offence he was facing together with informing him about his rights, thereafter he said he was ready to tell what happened at the scene of crime alone without the presence of any person. The 1st accused then narrated to PW4 the sequence of events regarding how they met and planned to steal from the CocaCola depot. He told him that upon entering the premises he got shot and the plan ended up there. PW4 then recorded the 1st accused's cautioned statement from 4:00 pm to 5:30 pm after which he gave the same to the 1st accused to read and the latter confirmed its correctness and they both signed. Upon being shown the statement, PW4 identified it as the statement he recorded and prayed to tender it. Its admission was however objected to by the defence on the ground that the 1st accused was not in good health condition. The court thus conducted a trial within trial to establish the state of health and the voluntariness of

the 1st accused while recording the statement. After the trial within trial, I was satisfied that the 1st accused was in a good health status and that he offered the statement voluntarily. The cautioned statement was accordingly admitted as exhibit P3 and PW4 read it aloud in court.

On being cross examined by Mr. Mfinanga, learned counsel, PW4 maintained that the 1st accused confessed to him that he took part in the incident in which they had planned to steal and that in total they were ten people but only two were arrested because the rest fled to Dar es Salaam soon after the incident.

Upon being cross examined by Mr. Tarimo, learned counsel, PW4 said that the 1st accused told him that the 2nd accused was one of those who took part in the incident but did not tell him the roles each participant played. He added that the 1st accused also told him that he was shot at the scene the reason why their plot aborted.

Answering to questions from Lady Assessors PW4 said that 1st accused informed him that the weapons they used at the scene of crime were machetes and a hammer.

PW5 John Alfred Ndumbaro, was the doctor who examined the body of Elisha Paulo. He said the body was soaked in blood and it had multiple cut wounds on the head that appeared to have been inflicted by a sharp object and the brain matter was coming out. He was of the opinion that the cause of death was due to head injury and severe hemorrhage. He said all the other organs were intact. He tendered the postmortem report which was admitted as Exhibit P4.

The last witness for the prosecution was Jacob Selemani Kerenge – PW6, he is the Stock Controller with CocaCola Depot, Mtawala area Morogoro. He told the court that in that capacity on 30/8/2013 he left his workplace at around 20:00pm leaving behind Otto Chakala and Elisha Paulo as the night shift guards; Otto

Oscar had a "kirungu" and Elisha Paulo had a gun. He went on that he knew Geof Kitundu as he once worked in Omega security as a guard as such he worked with him for about 3 to 4 months. He said Geof got suspended because he was implicated in some theft incidents that occurred at the depot. On 31/8/2013 at around 6.00am as he was leaving for work he received a phone call from Salehe Nuhu informing him that at the depot there were problems and as he was the custodian of the keys to the main gate he rushed there. Upon arrival he beeped in the compound and saw Elisha Paulo lying on the ground soaked in blood. The matter was reported to the police who came to the scene promptly and the gate was opened; in the compound they found Elisha Paulo lying still on the floor soaked in blood with a lot of cut wounds on his head. Likewise, Otto Chakala was unconscious close to the guards' room. They also noted that the gun was missing together with a mobile phone otherwise the rest of the stock was in order. The body of Elisha Paulo was taken by the police while himself and PW3 took Otto Oscar to Morogoro hospital for treatment. Later that day they learnt from the police about a gun recovered and people arrested and upon going to the station with Salehe Nuhu (PW3), they found Geof who was wrapped in a bed sheet and a gun which was identified by PW3 through its number as the shotgun they normally use at the depot in the guard.

Answering a question from the Lady Assessor, PW6 said at the time he left for home in the evening of 30/8/2013, he left the guards with only one gun.

With above, the prosecution closed its case and the same was marked closed.

Upon assessing the totality of the evidence presented by the prosecution, I was satisfied that it was sufficient to require the two accused persons to enter their defence. Consequently, in terms

with the provisions of section 293(2) of the Criminal Procedure Act, the accused persons were required to enter their defence.

The defence case was comprised of three witnesses. The first accused Geoffrey Nalogwa Kitundu testified as DW1 and had no witness to call. He told the court that he lives at TAZARA, Dar es Salaam and that on 29/8/2013 he travelled to Morogoro to attend his case; Criminal Case No. 86 of 2013 which was coming for hearing on 30/8/2013 before Hon. Nassary, RM. He said after the case he went to his relative one Jefta Jared who lived at Msamvu Mbuyuni where he spent the night. On 31/8/2013 he woke up in good health and hanged around his relative's residence until around 2.00pm when three people came and identified themselves as police and one of them introduced himself as Capt. Kidila. Thereafter they announced to him that "Ngosha uko chini ya ulinzi na unahitajika uende kituo cha polisi: (Ngosha you are under arrest and you are required at the police station). He was then taken to a special room in the old police station where he found two police men in civilian clothes who put cuffs on his hands and legs and he was then subjected to a severe assault, hitting him with iron bars on his feet. The assault was accompanied by utterances that he knew about a murder incident which he disputed any knowledge. He said the assault caused him to bleed a lot and left scars. After the assault and while bleeding profusely he was taken to the lock up in the new building. At that time, he was in a bad condition as he was feeling dizzy. He was later moved to another room but at that time he was not aware of his surroundings until he found himself in Morogoro Hospital where he was receiving treatment for the injuries he had suffered. He said he remember recording a statement on the same day of arrest at the police station. He disputed knowing Michael Joseph before, he came to know him on 6/9/2013 when he was brought to Morogoro hospital and the two were jointly informed that they were charged with murder and charges were read over to them. He disputed any knowledge about those charges or even

knowing Elisha Paulo the deceased. He concluded his testimony by asking the court to acquit him because he was not involved in the commission or had any knowledge of the offence that is leveled against him.

Upon being cross examined by Mr. Bantulaki, learned State Attorney, DW1 conceded that he was arrested on 31/8/2013 and taken to Morogoro Police Station where his statement was recorded on the same day. He also admitted that he gave evidence in a trial within trial but hastened to say that he did not remember what he told the court under oath regarding how he was taken to the police station or the manner in which he was interrogated by the police. He maintained that when he was taken to hospital he was not aware of his surroundings due to the injuries in his feet. He conceded that on 19/2/2018 during the trial within trial he told the court that he was bleeding on two areas on his upper left thigh but in his defence on 21/2/2018 he gave a different version i.e. he was bleeding from his feet after being assaulted by the police. He also admitted that the issue of having injuries and scars on his feet is a new story that he brought up only in his defence. He admitted also that he did not at any time raise a defence of alibi to dispute his presence at CocaCola depot on 31/8/2013 insisting that he was at Jeffa's place.

In a further cross examination by Mr. Kapinga, learned State Attorney, DW1 conceded that it is true he had two wounds above the left thigh which were bleeding when he was arrested but disputed that they resulted from bullet injury. He also admitted that those injuries were not inflicted by the police.

Answering to a question posed by the court, DW1 admitted that Jeffa he mentioned in his cautioned statement is the same person he made reference in court in court in his defence. Also that when he was taken to the police he had the wound on his upper thigh which he got from bodaboda accident.

Mr. Mfinanga, learned counsel rested the 1st accused's case which was accordingly marked closed.

The 2nd accused Michael Joseph testified on oath as DW2 and had one witness to call. He told the court that before his arrest he was a motorcycle "bodaboda" driver since 2009 and he used to park at Msamvu – Dodoma bus stand, opposite Kobil filing station. On 31/8/2013 he reported at their parking lot where he also found their Chairman. He moved on with the daily errands in the course of which he got a passenger who wanted to be taken to town. On the way to town at Masika area his motorcycle was knocked from behind by a certain car and it fell down. The car owner blamed him for the accident and wanted to be paid 300,000/= Shs to compensate for his broken lights. In the fracas that ensued, traffic police arrived and they sided with the car owner thus requiring him to pay the said money. DW2 said as it was morning he had no such money hence he could not pay as a result he was taken to the Police Station. At the police he decided to call his bodaboda colleagues to come for his rescue and their Chairman came to the station and pleaded for his bail but the police declined and asked him to come the following day. He was then locked up until 6/9/2013 when he was taken out on the understanding that he will get bail in court. It was not the case as he was taken to Morogoro Hospital where he was joined with the 1st accused and a charge of murder was read over against both of them by a magistrate, after which he was returned to the lock up. He disputed any knowledge about the charges he is facing and prayed to be acquitted.

On being cross examined by Mr. Kapinga, learned State Attorney, DW2 refuted claims that he lived at Nanenane area as stated in the information. He admitted that he was arrested alone with his Felkon motorcycle on 31/8/2013 by the traffic police and that he had ridden several types of motorcycles before including Sunlag. He said the night of 31/8/2013 around midnight up to 8:00 am he

was at his home where he lived with his mother and young sister and that he had no wife.

On further cross examination by Bantulaki, learned State Attorney, DW2 mentioned one Fadhili as the Chairman of their "bodaboda" group. He maintained that the motorcycle Felkon he was driving that day was not his property and he could not tell whether it is still at the police station to date.

Answering to questions by Lady Assessors, DW2 said he was not aware of those mentioned by the 1st accused in his statement and did not know even the 1st accused himself.

DW3 was Fadhili Matimbwa witness called by the 2nd accused. His testimony was to the effect that in 2013 he was the Chairman of a group of bodaboda drivers at Msamvu area – Dodoma bus stop close to ATN filing station. He knew Michael (2nd accused) as a member of that group from 2009 up to 2013 when he got involved in the present problems. He said on 31/8/2013 around 5:00 pm he learnt about the arrest of Michael and upon discussing it with the other group members they settled on making a follow up on the following day. The next day he went to the police station and upon inquiring about the issue, the police informed him that Michael was accused of Murder, he thus left the matter there.

Upon cross examination by Bantulaki, learned State Attorney, DW3 said Michael used to park close to ATN filing station which previously was known as Kobil, close to the Dodoma bus stop. He affirmed that he did not go to the police on 31/8/2013 nor did he see Michael that day until the next day. He maintained that Michael used to drive a motorcycle - make Sunlag and not Felkon, further that at the police he learnt that Michael had murder charges and not traffic charges.

With the above evidence, Mr. Tarimo, learned counsel rested the defence for the 2nd accused and the same was marked closed.

By consent, counsel prayed to present oral submission for their respective cases which prayer I granted.

Mr. Mfinanga invited the court to find that from the totality of the evidence presented, there was no sufficient evidence to ground a conviction against the 1st accused. The learned counsel argued that there was no clear evidence to support the allegation that PW1 identified the 1st accused positively at the scene of crime as the circumstances were not favourable considering it was night time and it was chaotic, relying on the case of **Waziri Amani V R, (1980) TLR 250**, he argued that there was no positive identification. Mr. Mfinanga also contended that the evidence of PW3 contradicted that of PW6 with regard to how the incident was reported to the police arguing that while PW3 said it was by phone, PW6 said he went there physically. Relying on the cases of **Jeremiah Shimweta V R (1995) TLR 228** and **Wilfred Lukago V (1989) TLR 189**, the learned counsel argued that the two authorities support the proposition that discrepancies in witnesses' evidence entitles the accused person an acquittal.

Mr. Mfinanga, learned counsel challenged the credibility of PW2's evidence with regard to the weapons alleged to have been recovered on the assistance of the 2nd accused on the ground that only the gun - shotgun MV 65552 was tendered leaving untendered the two machetes and a hammer. He argued further that no evidence was adduced to show that the said gun was used by the guards on the fateful night of 30/8/2013 or that it caused the injury on the 1st accused.

With regard to the cautioned statement, Mr. Mfinanga argued that since it was the major evidence relied by the prosecution, it was disturbing that from the ten people mentioned therein only 2 people were arrested and charged with the offence. He also challenged the Prosecution for their failure to call material witnesses while they had listed a big number of witnesses. In that

regard he invited the court to draw adverse inference against the prosecution.

The learned counsel argued that the defence advanced by the 1st accused was plausible as he gave reasons why he came to Morogoro. Further that he explained that in recording the cautioned statement, he was beaten by the police that is why he wrote the statement. He insisted that in court the 1st accused retracted the cautioned statement and disputed having taken part in the incident which resulted in the death of deceased. Further no witnesses said they saw 1st accused killing or attacking deceased. He thus urged the court to find that prosecution had not proved its case to the required standard, on this he relied on the case of **Cathbert Hyera V R, Criminal Appeal No 57 of 2003** (unreported). Consequently, he prayed the court to acquit the 1st accused person.

Mr. Tarimo, learned counsel joined hands with Mr. Mfinanga, learned counsel on the proposition that prosecution had not proved its case to the required standard against both the 1st and 2nd accused persons. He argued that while it is not disputed that, the decease - Elisha Paulo is dead and his death was violent, there is no evidence proving that the 2nd accused was involved in killing him. The learned counsel argued that from the totality of the prosecution evidence and the exhibits tendered nobody identified the 2nd accused person at the scene of crime. He contended that among the 6 prosecution witnesses, the only witnesses who implicated the 2nd accused were PW2 and PW4 together with the 1st accused's cautioned statement; this was, he argued was not enough to ground a conviction in a murder charge.

The learned counsel, argued that PW2 was categorical that the 2nd accused told the police that the only role he played in the incident was to transport some people during the night, adding that even PW4 who recorded the 1st accused's cautioned

statement did not tell the court the role played by the 2nd accused at the scene of crime. He argued further that since the 1st accused retracted the confession he made, in law prosecution was required to present corroborative evidence which was lacking. Mr. Tarimo challenged the prosecution for their failure to call Jefta who he argued was a material witness and would have provided the necessary corroboration, he relied on the case of **Hemed Said V Mohamed Mbilu (1984) TLR 223**.

The learned counsel thus concluded that the prosecution did not prove its case against the 2nd accused to the required standard in that he was not identified at the scene or implicated in any way. He thus prayed for the acquittal of the 2nd accused.

On his part, Mr. Bantulaki, learned State Attorney resisted strongly the submission by both counsel maintaining that prosecution had discharged its duty of proving the case against both accused to the required standard. With regard to the contention that prosecution failed to call material witnesses, he argued that the contention lacked merit because the issue regarding which witnesses to call falls within the prosecution's prerogative to determine the appropriate witnesses to prove its case. He argued further that under Section 143 of the Evidence Act, what matters is the quality of evidence presented and not the quantity. He thus insisted that prosecution called its material witnesses as it considered appropriate, adding that the reason why they failed to call Jefta was because he could not be traced and when prosecution attempted to introduce his statement under section 34B of the Evidence Act, they met an objection from the defence.

With regard to the issue whether deceased's death has been proved, Mr. Bantulaki contended that from the testimonies of PW1, PW3, PW5, PW6 and exhibit P4 – it was sufficiently proved that Elisha Paulo is dead and his death was unnatural and violent as revealed by the contents of exhibit P4. He thus argued that the

only issues that remain unanswered are; who killed deceased and whether the killers did so with malice aforethought.

With regard to the 1st issue as to who killed deceased, he argued that there was clear evidence from PW1 that he identified the 1st accused positively at the scene of crime where they had invaded for the purposes of stealing. He insisted that the circumstances obtaining as explained by PW1 were favourable for positive identification and they met the guidelines set by the Court of Appeal in the case of **Waziri Amani** (supra) relied upon by the defence counsel. He argued further a court could convict if it satisfies itself that the witness is telling the truth about identification even if under horrifying circumstances, he cited the case of **Hassan Juma Kanenyela and others V R (1992)** as supporting his proposition. He added that the credibility of PW1 was good as he had nothing to hide and he knew the 1st accused well before the fateful day, citing the cases of **Christian Kale and Rwekaza Benard V R (1992) TLR 302** to support his proposition.

With regard to the complaint on the cautioned statement, the learned State Attorney argued that the same was admitted in evidence after a successful trial within trial therefore it is a credible piece of evidence. While admitting that the requirement for corroboration is desirable, he argued that the law allows courts to convict where it warns itself that the confession is truthful, he cited the case of **Paschal Kitigwa V R (1994) TLR 65** in support of his position. He argued however that in the instant case there are sufficient circumstances providing corroboration to the cautioned statement including the conduct of the 1st accused which comprised of lies that he told the court under oath. He contended that under oath, the 1st accused gave two different versions of what befell him on 31/8/2013; in the 1st version during trial within trial he said he did not know how he got to the police station due to the extent of bleeding he was having from a wound he had on his left upper thigh (nyonga); in the 2nd version he told the court during his defence that he was viciously beaten in his feet by the

police at the police station pursuant to his arrest and from the beating he bled from the wounds inflicted to the extent of becoming disoriented. Relying on the case of **Felix Lucas Kasinyila V R, Criminal Appeal No 120 of 2002** (unreported) he argued that lies of an accused person may be used as corroborative circumstances to a confession.

On whether the 1st accused's cautioned statement could be used against the 2nd accused, the learned State Attorney answered the question in the affirmative arguing that the provisions of section 33(2) of the Evidence Act allow the usage of such statements as long as there are other corroborative circumstances. He argued that PW2's testimony together with exhibit P3 corroborate sufficiently the 1st accused's cautioned statement against the 2nd accused person. Adding that DW2 himself told lies in his defence because his evidence conflicted materially with his witness DW3 with regard to the circumstances surrounding his arrest and the cause of his arrest. He thus argued that on the strength of the case of **Felix Lucas Kasinyila**, his lies too should be used to corroborate the 1st accused's cautioned statement. He argued that as the 2nd accused was acting in unison with the 1st accused, he is also liable in the same level. He cited the case of **DPP V Abdallah Zombe and 8 others, Criminal Appeal No 358 of 2013** (unreported) as supporting the proposition that malice aforethought could be inferred against both the 1st and 2nd accused under the circumstances of this case.

With regard to the involvement of the 2nd accused, Mr. Bantulaki argued that PW2 told the court that the 2nd accused took the police to the area where exhibit P3 was recovered, he thus invited the court to find that this conduct constitutes sufficient corroboration to Exhibit P3 in which 2nd accused had been mentioned as one of the participants. He argued that when taken together with the contradiction obtaining between DW2 and DW3's evidence, it is clear that DW2 told lies to the court in his

defence and under oath. In that regard his credibility is questionable and could be used as corroborative circumstances.

With regard to whether the accused persons had malice aforethought, he argued that from the provisions of Section 23 of the Penal Code, the two accused persons who plotted to go and steal together, they are responsible for the murder that resulted as a probable consequence of their purpose. He argued that malice aforethought and common intention could be inferred from the nature and extent of the wounds inflicted on the deceased as testified by PW5 and contents of exhibit P4.

With regard to the complained discrepancies, he argued that the alleged discrepancies were not material as they do not go to the root of the case, on this proposition, he relied on the case of **Dixon Elias Nsamba Shapwata and another V R, Criminal Appeal No 92 of 2007** (unreported).

Mr. Bantulaki thus urged the court to find that prosecution had proved its case to the required standard against both accused person and prayed the court to convict both of them as charged.

I wish to thank the learned counsel for their very lucid submission and the insightful authoritative decisions they cited. On my part I have keenly considered the totality of the evidence presented in court by both sides with a view of determining the criminal culpability of each accused person on the charges preferred by the prosecution.

Through the testimonies of PW5 and PW6 together with the contents of exhibit P4, there is no doubt that deceased Elisha Paulo is dead and his death was unnatural and a very violent one. PW5 told the court that deceased had deep multiple cut wounds on his head to the extent that his brain matter was coming out. With such factual revelations, whoever inflicted those cuttings on the deceased's head must have done so with malice aforethought. So to that extent, the issues of nature of deceased's

death, identity and date of death have been successfully proved by the prosecution.

The main issue is whether the two accused persons are the ones who killed deceased. One piece of evidence relied upon by the prosecution was the issue of identification of the 1st accused at the scene of crime. While prosecution maintained that the circumstances were favourable for positive identification as testified by PW1, both defence counsel disputed the same strongly. I have closely looked at PW1's testimony who was the only person present at the scene of crime the fateful night. In his evidence PW1 explained that he hid himself on the sides of a room with empties and observe for a while what was going on. At his hiding point he observed what was going on as there was sufficient light which he described its intensity to be just like day light. He said there were two bulbs of about 150 wats lighting the main gate area which were fixed on the guard's room close to the main gate where deceased was positioned. He said he witnessed when deceased was being assaulted by a group of people while the 1st accused who he identified by face was lying down fretting in agony holding his left leg. He said from the area where he hid himself was only about 3 paces to the area the attack was taking place and 1st accused lying down. In addition, PW1 said he knew the 1st accused well as he once worked with him before the incident as a co guard in the same security company. From the circumstances of identification, explained by PW1, I am satisfied that they meet the guidelines set by the Court of Appeal in the case of **Waziri Amani** (supra), additionally, PW1 knew well the 1st accused before the incident. I observed PW1 while testifying, he appeared to me a credible witness, I thus find the evidence regarding the 1st accused's identification credible and sufficient.

Another piece of evidence relied upon by the prosecution was that deposed by PW2 regarding the arrest of both accused persons. PW2 told the court that they arrested the 1st accused at

Jefta's house the same day with a wound that appears to be from a gunshot. So there are circumstances that corroborates PW1's testimony of seeing 1st accused fretting with agony holding his leg at the scene of crime. In my view the fact that PW2 and his team found 1st accused with a wound on his upper left leg (nyonga) on the same day is a fact consistent with what PW1 saw at the scene of somebody who had been wounded and it lends credence to the story that 1st accused was shot at the scene. PW2 who arrested both accused persons informed the court that he found the 1st accused wrapped in a white bed sheet bleeding and took him to the police station in that same state.

Another piece of evidence relied upon by the prosecution was the 1st accused's cautioned statement recorded by PW4 on 31/8/2014. Due to an objection raised by Mr. Mfinanga, learned counsel for the 1st accused, the court conducted a trial within trial and upon being satisfied that the same was recorded voluntarily and the 1st accused was in a good state of health, the same was admitted as exhibit P3 and PW4 who recorded it read it over loud. In the said statement, accused gave a detailed narration of how himself and nine others plotted to carry out stealing at the CocaCola depot in Morogoro on the fateful night and how they got into the area. In my view, the explanation given is too detailed to have been concocted by PW4 who recorded it. For instance, in part he explained as follows:

"SWALI Je baada ya hapo ulifanya kazi wapi? JIBU Baadaye nilijiunga na kampuni ya ulinzi Omega Neutron kuanzia mwaka 2012-2013 mwezi 7/2013 baada ya kuwa na kesi ndipo walinifutia mkataba. SWALI Je ukiwa kwenye kampuni ya Omega Neutron umefanyia kazi maeneo gani? JIBU Nimefanyia kazi CocaCola makao Makuu Dar es Salaam na hapa Morogoro Depot iliyopo mtaa wa Mtawala. SWALI Je umedai kuwa umevunjiwa mkataba wako wa kazi baada ya kuwa una kesi ni kweli wewe ulihusika na unyang'anyi uliotokea hapa Morogoro tarehe 23/4/2013 katika kampuni

ya CocaCola? JIBU Ndiyo nilivunjiwa mkataba baada ya tukio hilo SWALI Je wewe kwa sasa upo hapa kituoni kwa kosa gani? JIBU Mimi nipo hapa kituoni kwa kosa la mauaji SWALI Je hayo mauaji unayotuhumiwa nayo yalitokea wapi na lini? JIBU Hayo mauaji yalitokea Depot ya CocaCola Morogoro tarehe 31/08/2013 majira 0100Hrs SWALI Je katika hilo tukio la mauaji hayo mmemuua nani? JIBU Mimi simfahamu kwa jina ila namfahamu kuwa ni mlinzi. SWALI Je katika tukio hilo mmefanikiwa kuchukua nini? JIBU Tumechukua silaha aina ya short Gun ambayo alikuwa nayo huyo mlinzi aliyefariki SWALI Je katika tukio hili mlikuwa watu wangapi? JIBU Katika tukio hili tulikuwa watu 10 ambao ni Michael s/o Joseph mkaazi wa Nane Nane Morogoro Jephuta s/o? anaishi Msamvu, Sainesi s/o Emanuel anaishi Kinondoni DSM Frank s/o? anaishi Morogoro ambaye ni dereva wa Bodaboba, Muhidin s/o? anaishi Kihonda yeye ni dereva wa Tax anapaki kalibu na baa ya Teminal Pub, Thomas s/o Urasa anaishi Ilala Karume Dar-es-Salaam, Dicksons/o Swebe anaishi Kihonda, Hassan s/o? anaishi Chamwino na Jumas/o ambaye nimemuona jana baada ya kuletwa na Jephta s/o? SWALI Je wewe umetoka Dar-es-Salaam lini kwa ajili ya kuja kufanya hili tukio JIBU mimi nikia na Saines s/o Emanuel, Dicksons/o Swebe na Thomas s/o Urasa tulitoka Dar-es-Salaam tarehe 29/08/2013 baada ya kuambiwa na Saines SWALI Je mlifikia wapi? JIBU Tulifikia Kingorwira tukiwa wane SWALI Je Kingorwira mlifika majira ya saa ngapi? JIBU Tulifika majira ya 0800Hrs. SWALI Je mlifikia wapi? JIBU Tulifikia Guest iliyopo karibu na njia ya kuelekea Pangawe.....SWALI Je kuhusu mpango wa kuvamia Coca Cola jana mlikutania wapi na ilikuwa saa ngapi? JIBU Tulikutana kwa Jephta s/o dukani majira ya 2000Hrs. SWALI Je kwenye tukio mlifika saa ngapi? JIBU kwenye tukio tulifika majira ya 0100Hrs. SWALI Je baada ya kufika mliingiaje? JIBU Tuliingia kwa kutumia ngazi SWALI Je ngazi mliyotumia mlitolea wapi? JIBU Hiyo ngazi alileta Juma s/o? SWALI Je

mliingia watu wangapi ndani? JIBU Tuliingia watu saba na watatu walibaki nje SWALI Je wakati mnaingia hapo mlikuwa na silaha gani? JIBU mimi sikuwa na silaha yeyote lakini wenzangu walikuwa na mapanga, nyundo moja iliyotumika kumuulilia marehemu SWALI Je baada ya kuingia au kufika eneo la tukio ni kitu gani kilitokea? JIBU Mimi nilipigwa risasi kwenye nyonga mguu wa kushoto. SWALI Je baada ya kupigwa risasi ulifanya nini? JIBU Mimi nilianguka chini na wenzangu ndipo walimshambulia mlinzi aliyekuwa na silaha na kumpiga hadi kufa SWALI Je katika tukio hili baada ya kumuua mlinzi na kumjeruhi mlinzi mwenzake mlifanikiwa kuchukua nini? JIBU Tulichukua silaha aina ya Short Gun SWALI Je wewe unadai kuwa ulipigwa risasi na kuanguka chini kwenye tukio uliondokaje? JIBU Nilibebwa na wenzangu SWALI Je baada ya kubebwa walikupeleka wapi? JIBU Walinipeleka nyumbani kwa Jephuta s/o? SWALI Je walikubeba kwa kutumia usafiri gani? JIBU Walinipakia kwenye pikipiki ya Frank s/o? SWALI Je ulifikishwa kwa Jephtha s/o? saa ngapi? JIBU Nilifikishwa majira ya 0200Hrs SWALI Je wewe umekamatwa saa ngapi? JIBU Mimi nimekamatwa tarehe 31/08/2013 majira ya mchana nikiwa nyumbani kwa Jephu s/o? SWALI Je kwa sasa wenzako wapo wapi? JIBU Mimi baada ya kukamatwa nilipelekwa kwenye gari ndipo niliwakuta Jephu s/o? na Michael s/o Joseph nao wameshakatwa na askari SWALI Je wakati unafikishwa kwenye gari ulikuta wenzako wamekamatwa wakiwa na nini? JIBU Walikamatwa na silaha aina ya short gun tuliyoichukua kwenye tukio pamoja na mapanga. SWALI Je wenzako wengine wapo wapi? JIBU Thomas s/o Urasa, Saines s/o Emanuel na Dickson s/o Swebe wameondoka usiku huohuo baada ya tukio kurudi Dar es Salaam.....”

From the detailed information contained in the above excerpt of the 1st accused's cautioned statement, I have no doubt the

statement contains the truth of what happened at the scene of crime. It contains details that incriminates the maker; 1st accused together with naming others who took part in the invasion of the CocaCola premises. In it the 1st accused admits to have been shot at the scene of crime at his upper left leg (nyonga) a fact which is consistent with what PW2 and his team of detectives observed when they found him at Jephtha's place and also what PW4 observed before he recorded his statement. From the details contained therein I am satisfied that the statement is telling nothing but the truth of what happened on 31/8/2013. In that regard I could use the confession contained therein to ground a conviction against the 1st accused. From the statement, the 1st accused was arrested at Jephtha's house as deposed by PW2 and he admitted in it that when he was taken into the police car he found therein Jephtha and Michael Joseph who were already arrested together with the shotgun they stole from the scene.

Mr. Bantulaki, learned state Attorney invited the court to find that with such details, the court could safely convict on the confession without corroboration. I have considered the invitation and indeed in law I could do so see the case of **Shija Luyeko V R (2004) TLR 254** If need be however, in the instant case there are sufficient corroborative circumstances, including the 1st appellant's conduct in court whereby he appeared so unsettled and he told apparent lies demonstrated by his contradictory versions he gave under oath when he testified before the trial within trial and during his defence. The versions were different with regard to what befell him at the police station and what made him bleed. While in the trial within trial he said, he was bleeding from a wound at his upper left thigh (nyonga) in his main defence during trial he claimed that the bleeding was from the injuries he sustained at the police after being subjected to hitting in his feet by the police. Considering these lies, I do subscribe to the learned State Attorney's view that in line with the case of **Felix Lucas Kasinyila**, the 1st accused's lies in court constituted sufficient

corroboration to the cautioned statement. In that regard, when the cautioned statement is taken together with the fact that PW1 identified the 1st accused at the scene, evidence which was not challenged much and which I have already found credible, I am satisfied that the 1st accused was sufficiently incriminated. Mr. Mfinanga and Mr. Tarimo were of the view that there was no corroborative evidence, as I have demonstrated, I find sufficient corroboration.

With regard to the complaint that there were discrepancies between PW3 and PW6's testimonies regarding how the matter was reported to the police, I agree fully with Mr. Bantulaki that it is not all the discrepancies that are material, it is only those that go to the root of the matter or the central story of the prosecution case as per the **Dickson Elia Shampatwa's** case (supra). With regard to the complaint that only the gun was tendered in evidence, I cannot comment why the prosecution omitted the machetes and the hammer alleged to have been recovered with the gun as what was brought before the court was only the shotgun MV 65552 - exhibit P3 which was tendered by PW2 who was very assertive that it was the gun recovered after the 2nd accused led the police to the area. PW3 who was the leader of the guards identified exhibit P3 as the gun stolen from their guards on 31/8/2013.

The defence advanced by the 1st accused comprised of a complete denial to the accusation leveled against him. Apart from retracting his confession, he claimed that the reason for coming to Morogoro was only to attend his Criminal Case No 86 of 2013 which was coming for hearing on 30/8/2013. He said after the case he went to his relative one Jephtha where he spent the night until the following day when the police arrested him in the afternoon of 31/8/2013. I have considered this defence and found it too flimsy in the light of the contents of exhibit P3 which I have found credible and truthful. I reject it as constituting naked lies. In addition, the 1st accused did not appear credible when testifying.

Further, he gave two different versions of what befell him on 31/8/2013, one on 19/2/2018 and another one on 21/2/2018 and both versions were given under oath, in that regard, he cannot be trusted. I noted that throughout the trial he resisted the existence of a shot wound on his upper leg (nyonga), however when he was being cross examined by Mr. Kapinga learned counsel and also answering a court's question, he admitted that he had such a wound at his upper hip (nyonga) when he was arrested and the same was not inflicted by the police.

With regard to the culpability of the 2nd accused, it is undisputed that he was not identified at the scene of crime. According to PW2, the 2nd accused was arrested pursuant to the information they received from Jephtha that he was the one who sent the 1st accused with a bleeding wound to Jephtha's house. Upon following up the information, they arrested the 2nd accused and he was the one who facilitated the recovery of the shotgun stolen from the scene of crime and also led the detectives to the place where he dropped the 1st accused during the night – which was Jephtha's house. From PW2's evidence, it is clear that the 2nd accused was arrested at his house and not at Masika area as portrayed in the 2nd accused's defence. The pieces of evidence incriminating the 2nd accused includes; showing the detectives the area from where the shotgun –exhibit P3 was recovered and the house he sent the 1st accused on the fateful night, these facts are consistent with what the 1st accused said in exhibit P3.

The next issue is whether the 1st accuser's cautioned statement could be used against the 2nd accused to ground a conviction. I have considered the contents of exhibit P3 in which the 2nd accused is mentioned as a participant of what took place on 31/8/2013. In my view, having found exhibit P3 to be credible and drawing authority from the dictates of section 33(1) of the Evidence Act and section 23 of the Penal Code, I am inclined to the view that the same could be used against the 2nd accused person. The case of **DPP V Abdallah Zombe** and others (supra)

also supports this proposition. Having closely considered exhibit P3, it is apparent that the 1st accused in addition to incriminating himself, he also mentioned the 2nd accused as one of those ten people who took part in plotting to steal at Cocacola depot and the 2nd accused was arrested the same day. Upon arrest he led the police to recover the stolen firearm, it is thus clear that if not for his lead, the jigsaw could not have been easily unraveled. It is discernable from exhibit P3 that when the 1st accused was taken to the police car from Jefta's house, he found his colleagues Jefta and the 2nd accused already arrested together with the shotgun.

In his defence the 2nd accused disputed any knowledge over the charges leveled against him. He claimed that he was arrested in relation to a traffic offence on 31/8/2013 that occurred at Masika area and upon failing to pay 300,000/= he was taken to the police station where he was locked up until 6/9/2013 when he was charged with murder. He brought a witness to support his defence; this witness however, testified contrary to what DW2 had told the court. DW3 said he did not go to the police station on 31/8/2013 as claimed by DW2 and also that upon going there the next day, he was informed by the police that DW2 was facing a murder charge. It is thus clear that DW3 contradicted the defence relied upon by the 2nd accused as he gave an account completely different from what DW2 gave which to me rendered the 2nd accused's defence untrustworthy. I thus find the defence relied upon by the 2nd accused to comprise more of lies than anything else and I reject it and I find him also not credible.

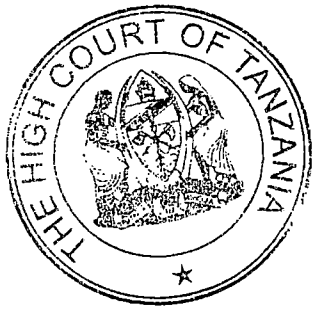
In my view, the circumstances leading to the arrest of the 2nd accused which included discovery of exhibit P3 and his admission that he dropped and showed the police the place where the 1st accused was found together with his lies in court constitute sufficient corroboration to exhibit P3 within the authority of **Felix Lucas Kisinyila's** case. In that regard it lend credence to the contention that the 2nd accused was one of those who took part in the stealing plotted by the gang of ten people as such

criminally culpable within the meaning of section 23 of the Penal Code.

The Lady Assessors who sat with me in this case were of the unanimous view that the offence of murder was not proved. Two of them thought the evidence presented by the prosecution established that the accused persons only intended to commit stealing unfortunately somebody got killed. In that regard, it was their considered view that since the accused persons had no intention of killing anybody they should only be found guilty of manslaughter. The other Lady Assessor was of the view that since the two accused persons were not identified as the attackers at the scene, they should only be found guilty of stealing. With respect, I differ with the Lady Assessors mainly because, apart from what I have already explained, if the Lady Assessors are in agreement that the two accused persons went to the scene of crime on 31/8/2013 for the purposes of stealing, undoubtedly they put the two accused persons at the scene of crime at the time when the killing occurred. In that regard under the framework of section 23 of the Penal Code they are taken responsible for those acts that result as a probable consequence of prosecuting their purpose.

In the final analysis and from the foregoing discussion, I am satisfied that there the prosecution has proved sufficiently that the two accused persons plotted to go to the CocaCola depot to carry out stealing and in the fracas that ensued a guard named Elisha Paulo got killed on 31/8/2013. I have also found as flimsy the defence put forward by the 1st and 2nd accused which I find to have casted no doubt on the prosecution evidence. Consequently, I find that the prosecution has proved its case against both accused persons to the required standard. Accordingly, I convict **Geofrey Kitundu @ Nalogwa** and **Michael Joseph** for the offence of murder contrary to section 196 of the Penal Code, the offence they stand charged.

It is so ordered.



A. Munisi
A. Munisi
JUDGE
5/3/2018