IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

CRIMINAL SESSIONS CASE NO. 163 OF 2016

THE REPUBLIC

VERSUS

MUSSA S/O KANYERERE ..... ACCUSED

JUDGMENT

1st – 5th June, & 25th June, 2020

ISMAIL, J.

The accused herein, stands charged with murder, contrary to sections 196 and 197 of the Penal Code, Cap. 16 [R.E 2002]. He pleaded not guilty to the charged offence, as a result of which the matter proceeded to a full trial during which the Court three witnesses testified for the prosecution, while the defence had a sole witness.

Facts contained in the statement filed prior to the preliminary hearing, had the Prosecution allege that the deceased met his death at the hands of the accused at 5.00 a.m. on 18th November, 2014. The allegation is that the accused person unlawfully murdered Helena Hilomeji, and that

the incident allegedly occurred at Sese village, Magu district, in Mwanza region. The incident was perpetrated at the accused's homestead where the deceased was putting up, and in the presence of the accused's wife. The accused allegedly strangled the deceased on the neck and died of suffocation. Following the incident, information was disseminated to villagers, through the area's ten cell leader and the village chairperson. The deceased's body was then buried and the family continued to grieve. Through an informer and the village leadership, police officers at Kisesa police station were tipped off and visited the scene of the crime where the accused was apprehended and put under restraint. The autopsy revealed that the deceased died of suffocation and had her cervical spine cord broken as a result of being strangled. To prove the allegations, the prosecution called three witnesses.

Before commencement of the trial, three gentlemen assessors, namely; Fransisca John; Jesca Bandio; and Shumbana Juma were appointed to sit with me. These assessors were present during the whole of the trial proceedings and performed their roles appropriately, except when trial within a trial proceedings were conducted.

Worthy of a note, is the fact that when the facts were read during the preliminary hearing, the accused disputed all the facts save for his names, his arrest by the police and that he stood charged with the offence of murder. Save for ***exhibit P1***, a Sketch map of the scene of the crime which was tendered and admitted during the preliminary hearing, two of the three documentary exhibits produced by the prosecution i.e. a Postmortem Examination Report (***exhibit P2***); and the accused's Cautioned Statement (***exhibit P3,***) were tendered during trial, through PW2 and PW3, respectively, in respect of ***exhibit P2*** and ***exhibit P3***.

Trial proceedings saw the prosecution side procure attendance of three witnesses in proof of its case, whereas the defence case had the accused as its sole witness. The prosecution's case opened with the testimony of **Insp. Emmanuel Rogers** who testified as PW1. He testified that on 20th November, 2014, while serving as Officer Commanding Station in Kisesa, he received information that in Sese village, an elderly woman had been buried but her death was suspected to be unnatural. On concurrence of the OC-CID Magu, he visited the scene of the crime where he met villagers and village leaders. He testified that the person at whose residence people had gathered saw the police officers and he ran away.

The police ran after him and after about three kilometres, they apprehended him and conveyed him to Kisesa for interrogation. They also interrogated the accused's wife who disclosed that the deceased had been killed by the accused. The witness testified further that the matter was then transferred to Magu police station on 24th November, 2014, where an investigation file was opened. He then received information that the court had ordered that the body be exhumed for examination and he was in attendance during the examination. He testified that the deceased's tongue was out and her mouth was wide open.

Dr. Gloria Mahendeka was PW2 and her testimony is that she is Medical Officer stationed at Magu district hospital and that she recalls that on 27th November, 2014, she was instructed by her supervisor to join the Police to a scene of crime in Sese village, where she performed a postmortem of the body of a female deceased. After the examination, he prepared a postmortem examination report which was tendered and admitted in court at as ***exhibit P2***. The witness testified that she performed the examination after exhuming the body from the grave and that the deceased had finger prints on the neck and the head. She also realized that the deceased had her 6th and 7th cervical spines broken and

separated from one another. She said that this suggested that the deceased had been strangled and that it was because of suffocation that her tongue was out and the mouth was wide open.

E2496 D/CPL. Magesa testified as PW3. His testimony was to the effect that he interrogated the accused who confessed that he killed the deceased, his mother in law, on a feud of farm lands, and that incident occurred at his homestead where the deceased was staying, and in the presence of his wife, Sabina. He further confessed that after the incident the police came to the scene and he attempted to flee but was apprehended and conveyed to the police station. The confessional statement was admitted as ***exhibit P3***.

The accused who gave his evidence on oath denied having participated in killing the deceased at Sese village, within Magu district on 18th November, 2014, or at all. The accused denied making any confession while in interrogation or in police custody, or at all. He testified that he was only coerced into appending his thumb print on the papers whose contents were not made known to him. He testified that he was duped into signing them after being told that they were papers which would let him be freed from the suspicion he was facing. He also stated that signing of the said

papers was done at Kisesa Police Station and not at Magu Police Station. At neither of the stations, was the accused interviewed and had his statement recorded. Cross-examined as to whether his memory may have faded as not to remember PW3, the accused stated that that may be the case. He maintained that the deceased, his mother in law, died a natural death, coming from long illness, during which he battled tuberculosis and leprosy both of which she finally succumbed to. He refuted the claim that the deceased died of suffocation or that her mouth was open and her tongue was out. He maintained that he had no reason to kill the person he loved so much and had taken care of for quite a long time. Recalling his days at Kisesa police station, the accused testified that during his incarceration, he was subjected to torture that inflicted serious injuries on him. He admitted, however, that he was not tortured when he was incarcerated at Magu Police Station. The accused also testified that when the deceased's body was exhumed he was not there and he wouldn't know the state of the body when the same was subjected to an autopsy.

It is customary, in all criminal trials that, once evidence of the prosecution and that of the defence is heard and taken, the next big question for the court's consideration and determination is, whether the

prosecution's evidence has proved the charges against the accused, at the standard set for proof in criminal cases. This onus arises from the fact that conviction of the accused person of an offence he is charged with should never be based on the weakness of his defence. Instead, such conviction must arise from the strength of the prosecution's evidence, and after meeting the evidential threshold set by the law *i.e.* ***beyond reasonable doubt***. The accused person's duty is merely to deny his involvement in the offence he is charged with. This is an ancient canon of law as highlighted in the legendary commentaries made by Sarkar on Sarkar's Laws of Evidence, 18th Edn., ***M.C. Sarkar, S.C. Sarkar and P.C. Sarkar***, published by Lexis Nexis. At page 1896 of the said commentaries, the learned aptly state as follows:

> ***".... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof.*** *It is ancient rule founded on consideration of good sense and should not be departed from without strong reason .... Until such burden is discharged the other party is not required to be called upon to prove his case.* ***The Court has to examine as to whether the person upon whom the burden lies has***

been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..." [Emphasis added].

In respect of criminal cases, this principle is as old as the criminal law itself, and courts have, on countless times, laid an emphasis on its observance. In ***Joseph John Makune v. Republic*** [1986] TLR 44, it was held:

> *"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case. The duty is cast on the accused to prove his innocence. There are few well known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities ...."*

The mighty significance of this requirement was accentuated, yet again, in ***George Mwanyingili v. Republic***, CAT-Criminal Appeal No. 335 of 2016 (Mbeya-unreported), wherein it was reaffirmed as follows:

> *"We wish to re-state the obvious that the burden of proof in criminal cases always lies squarely on the shoulders of the prosecution, unless any particular statute directs otherwise. Even then however, that burden is on the balance of probability and shifts back to prosecution."*

This being a murder charge, the prosecution's mammoth responsibility is to prove, not only that the accused unlawfully caused death of the deceased and, but also that the accused was equipped with an ill intent of causing the said death. In legal parlance, this ill intent is known as malice aforethought.

It is incontestable from facts gathered in this trial, that none of the three prosecution witnesses adduced evidence to the effect that he saw the accused committing the offence of murder. This means that, by and large, the prosecution's case is heavily predicated on the confessional statement (***exhibit P3***) allegedly made by the accused and one whose contents were put to the fore by PW3. This is so because the evidence adduced by PW2, the medical personnel who conducted an examination and the maker of ***exhibit P2***, offers nothing valuable to create link between the accused and his involvement in the death of the deceased. Her testimony merely describes the state of the body that she examined, injuries that it sustained, and what she considered to be the cause of the death. Neither she nor ***exhibit P2*** provided a clue or resolved the grand issue as to whether the accused had culpable role in the deceased's death. A slightly different description can be said with respect to PW1. This

witness was involved in receiving a tip off that led to the visit to the scene of the crime where the accused was apprehended as he attempted to evade the police who were unsuspecting about the accused's culpability. Up until the accused's arrest, the said witness was clueless about the accused's involvement in the murder incident that ultimately terminated the deceased's life.

This, therefore, leaves PW3 as the most decisive witness whose testimony has a significant bearing on what the accused is accused of. Such significance lies in the fact that he is the person before whom the accused made a confessional statement that he killed the deceased. As stated earlier on, the accused's cautioned statement was tendered as ***exhibit P3***. I will discuss the probative value of ***exhibit P3*** in not too long a time. Testimony of PW3 is to the effect that the accused made a confession that gave an eloquent blow by blow account on how he planned and executed the killing of the deceased, in order to wrestle control of the farm fields which were in the ownership of the deceased. The testimony further revealed that the incident was committed in the full glare of the deceased's daughter, the accused's wife who reportedly reported it to a local council leader. From the testimony of PW3, what is gleaned is that he,

himself, was not at the scene of the crime to witness the accused committing the offence.

My attention turns to ***exhibit P3***, which I described and reiterate that it is the most decisive piece of evidence on which the prosecution case hangs. Sufficiency or otherwise of this document provides the basis upon which this Court will convict or acquit the accused. As stated earlier on, this is a confessional statement, and it is trite law, under section 27 (1) of the Evidence Act, Cap. 6 [R.E. 2002], that where an accused voluntarily makes a confession to a police officer, such confession may be proved against him. Alive to this trite position, the prosecution tendered a cautioned statement (***exhibit P3***) allegedly recorded on 24th November, 2014, before PW3. This statement was admitted after a grueling trial within a trial session, which was conducted after the accused's objection to its admissibility, on a trio of grounds. Firstly, that the accused was not a free agent when he recorded the confession. Secondly, the defence contended that such confession was taken outside the time prescription set out in section 50 (1) (a) of the Criminal Procedure Act (CPA). The final limb of the defence's contention is that, since the accused can neither read nor write, the statement was not read over to him and that the statement was not

recorded consistent to section 57 (1) (2) of the CPA. The Court took the view that, in the absence evidence which would suggest, albeit remotely, that there was any inducement or threat or any act of involuntariness, the contention of involuntariness is baseless. The Court took the view that, after all, the confession is not untruthful. In respect of other anomalies, the Court was convinced that the same are remedied by invoking the provisions of section 169 of the CPA, which require the Court to allow admission of the evidence whenever it satisfied that doing so would benefit public interest and that the accused person will not be prejudiced. In arriving at that conclusion, this Court considered the fact that the offence with which the accused person is charged is grave and its investigation was bound to take some time.

It should be noted that the question of admissibility is settled at the point of production of the confession in court, and the test is whether such confession conformed to the provisions of the CPA and the Evidence Act (supra). The settled legal position is that admission of a confession is one thing while the weight to be attached to is quite another. In ***Abdul Farijala & Another v. R***, CAT-Criminal Appeal No. 99 of 2008; and ***Hassan Said Nundu v. R***, CAT-Criminal Appeal No. 126 of 2002 (both

unreported), the Court of Appeal emphasized that since a confessional statement is essentially an admission, reliance on it must only be done where it is proved that the accused against whom the statement is sought to be proved has admitted to all ingredients of an offence. This would then qualify the statement as an admission under section 3 (1) of the Evidence Act (supra).

In ***Juma Magori @ Patrick & 4 Others v. R***, CAT-Criminal Appeal No. 328 of 2014 (unreported), ascertainment of confessional statements amounting to admission was in contention. The upper Bench made reference to the decision of the Supreme Court of Nigeria in ***Ikechukwu Okoh v. The State*** (2014) LPER-22589 (SC), which quoted with approval, a UK decision in ***R v. Sykes*** (1913) 1 Cr. App. Report 233. This decision propounded key principles that should be applied in determining probity and weight to be accorded to confessional statements. The relevant part of the latter case's reasoning, as quoted with approval by the Court of Appeal, reads as follows:

> *"The questions the court must be able to answer it can rely on a confessional statement to convict an accused person were set out in the case of R v. Sykes (1913) 1 Cr. App. Report 233 are as follows: (a) Is there anything outside it to*

show that it is true? (b) Is it corroborated? (c) Are the factors stated in it true as can be tested? (d) Was the accused the man who had the opportunity of committing the offence? Is the confession possible? (f) Is it consistent with other facts which have been ascertained and proved? (at 22) ..."

In underscoring the importance of this requirement, the Court of Appeal made reference to the case of ***Emmanuel Lohay and Udagene Yalooha v. Republic***, CAT-Criminal Appeal No. 278 of 2010 (unreported). It was stressed that a confessional statement must:

"... shed some light on how the deceased concerned met his death, role played by each of the accused person, such details as to assume the courts concerned that ***the maker of the statement must have played some culpable role in the death of the deceased."*** [Emphasis is supplied.]

Deducing from the foregoing guidance, the pertinent question for determination is: Does ***Exhibit P3*** pass the threshold set out in the cited cases? A scrupulous review of the said exhibit provides an answer to this question. Save for general narrations as recorded from the accused person, the crucial part in ***Exhibit P3*** is quoted as hereunder:

"... Ninaishi kijiji cha Sese kwenye mashamba ya mama mkwe ambaye amefariki jina lake ni HELENA D/O HILOMEJI.

Kabla ya kifo chake alikuwa anaishi nyumbani kwangu na nimeishi naye kwa kipindi cha miaka mitatu, katika kipindi chote nilichokaa naye hapo kwangu tulikuwa hatuelewani kwa sababu alikuwa hataki mimi nilime mashamba yake, na mimi sikuwa na eneo iingine ia kulima hivyo niiikuwa nalima kwa kulazimisha, hata mke wangu ambaye ni mwanae pia alikuwa hataki alime mashamba hayo. Mnamo tarehe 18/11/2014 majira ya saa 05:00 hrs tuiiamka mimi na mke wangu tukaenda kwenye nyumba alimokuwa mama mkwe wangu amelala, tulifungua mlango na mimi nikanyonga shingo hadi akafariki dunia sababu ya kumnyonga ni ugomvi wa mashamba sikuwa na eneo jingine ia kulima tofauti na mashamba yake aliyokataa nisiyalime, nilifanya hivyo ili niwe huru kulima hayo mashamba yake. Jambo hili hata mke wangu SABINA D/O MAGOBE anafahamu. Kwa hiyo nakiri kumuua mama mkwe wangu aitwaye HELENA D/O HILOMEJI kwa kumnyonga na kumkaba shingo kwa kutumia mikono yangu ndiyo maana siku askari wamekuja hapo msibani nilikimbia ndipo walifukuza na kunikamata ...."

The authorities cited earlier on serve to guide that, for one to qualify as a confession which can be relied upon to prove an offence, the same must show that the accused admitted commission of all ingredients of the offence he stands charged with. Where the charged offence is murder, the

confessional statement should explicitly and unequivocally quote the accused as admitting that he caused death of the deceased and, that he did so with malice aforethought (consistent with the reasoning in ***Emmanuel Lohay's case).*** The accused's statement states nothing less than that. ***Exhibit P3*** carries a fabulous story that provides a blow by blow account of how the deceased met his death and the culpable role the accused played in the death of the deceased. The level of precision and material particularity demonstrated by the accused in the said confessional statement is nothing short of spectacular. He has narrated all what he did before, during and after he heinously terminated the deceased's life. The accused's coherent account of events relating to his involvement in the death of the deceased have left little or no flicker of doubt that death of the deceased was planned and executed by the accused himself and that such execution was done in the full glare of his wife, the deceased's daughter.

The accused's confession has also talked about the manner in which the accused terminated the deceased's life. It was through strangling of the deceased's throat which suffocated her to death. It is the same pattern that PW2 and ***exhibit P2*** described as the cause of death of the deceased.

PW2 has described that the body of the deceased was found with fingerprint marks on the neck and that the 6th and 7th cervical parts of the spine cord had been broken and separated as a result, and that the deceased's mouth was wide open and her tongue was out of the mouth. Parts of the body which were aimed at during attack, as described in ***exhibit P3,*** bed very well with what the accused stated was the motive of the attack. It was a killer attack.

There is also a question of the accused's actions or behavior after the incident as described by PW1. These relate to the accused's attempted evasion of police when they visited the scene of the crime. They portrayed the accused as culpable person who chose to separate himself from the innocent. The hurried manner in which the deceased was buried was indicative of and brings an irresistible conclusion that the deceased's death was unnatural and that the accused knew of what befell the deceased, and it is what raised concerns which led to conveyance of information to the police (see ***Mathias Bundala v. Republic***, CAT-Criminal Appeal No. 62 of 2004; ***Amitabachan Machaga @ Gorong'ondo v. Republic***, CAT (DSM)- Criminal Appeal No. 271 of 2017 (both unreported).

The accused maintained that he did not kill the deceased and that the confessional statement relied upon was obtained in a manner that was marred by trickery and after he had been tortured. He also alleged that he was linked to this case after he had refused to give bribery ot TZS. 700,000/- to the police officers. He contended further that the papers on which he was told to append his signature were not read out to him. He asserted further that the deceased, who he loved so much, died after a long illness and that her death was not unnatural. He admitted however, that when the body was exhumed and examined he was not present. As such, he would not tell how the said body looked like. This defence, which I consider to be mightily important in exculpating himself from the alleged wrong doing, featured during cross examination. No specifics were given on why and for what the police would demand money from him and not from any of the other bereaved members of the family. I consider this to be a casual talk that was not intended to bring any impact on his defence. A serious defence would be coined in a manner that would conform to the requirements of the law and be presented without any probing by the Court. Generally, nothing impressive came out of the defence testimony to be considered as lethal enough to punch holes in the prosecution's case.

With respect to the alleged flaws in the recording of the accused's confession, my humble view is that the same is inapplicable, in the circumstances of this case, because the question of admissibility was determined at the trial within a trial during which it became apparent that the recording of the confessional statement was consistent with the law, and that the question of involuntariness was proved to be non-existent. In view thereof, nothing persuades me that ***exhibit P3*** lacked legitimacy which would render it worthless.

While still on the confession and its reliance in determining the accused's guilt or otherwise, further test is whether such confession carries with it a true account of facts. Ascertainment of this is done by glancing through the confessional statement itself with a view to seeing if what is revealed is truly what happened with respect to the deceased's demise. This astute principle has been propounded by the Court of Appeal in a multitude of its decisions. In ***Hemed Abdallah v. Republlc*** [1995] TLR 173 the Appeal Court held that:

> *"A conviction can be based on a retracted cautioned statement provided the trial judge is convinced that the said statement is true."* (See also the case of ***Mlchael Luhiye v. R*** (1994) TLR 181).

It is a leaf which was borrowed from a landmark decision in the case of ***Tuwamoi v. Uganda*** [1967] EA 84 in which it was held, at 91, thus:

> *"What this passage says is that in order for any confession to be admitted in evidence, it must first and foremost be adjudged voluntary. If it is involuntary that is the end of the matter and it cannot be admitted. If it is adjudged voluntary and admitted but it is retracted or repudiated by the accused, the court will then as a matter of practice look for corroboration. But if corroboration cannot be found, that is, if the confession is the only evidence against the accused,* ***the court may found a conviction thereon if it is fully satisfied that the confession is true.****"*

Since its adoption in our jurisprudence, the said principle has been consistently applied to decisively determine if confessions sought to be relied to secure convictions are a set of truth of what the accused actually committed (See the case of ***Umaio Mussa v. R***, CAT-Criminal Appeal No. 150 of 2005 [unreported]). My unflustered reasoning, informed by a critical review of the testimony of PW3 and ***exhibit P3,*** gives me a combined ammunition that cements my conclusion that what is contained in the accused's confession is nothing but absolute truth about how the deceased was killed and who the perpetrator of the incident were. It revealed what

was otherwise the most veiled story that the accused never shared with anybody else. It told a story about how the deceased's life was placed on the line by person who has no respect for humanity and the deceased's right to life. This emboldens my resolve and justification for relying on this confession to make a finding.

My view is reinvigorated by the fact that the accused's defence has not been formidable enough to shake the prosecution's case or raise any reasonable doubt which would move the Court to hold that the accused's guilt has not been proved. It was full of evasive denials even on basic issues.

Further review of the defence evidence justified my legitimate conclusion that the same was less convincing, and contained some fits of blatant lies. This did little to aid the accused's case. For instance, while PW2 and exhibit P2 and P3 all point out to the fact that the deceased's death was a result of suffocation that came with strangling of her neck, the accused contended that the deceased died of long illness, citing particularly that he died of TB and leprosy. This statement alone proved that his side of story is nothing but a bunch of fabricated set of words. The accused was oblivious to the fact that these needless and thinly veiled lies would return

to haunt him. The suicidal nature of indulging in lies and misrepresentation was highlighted in the case of ***Felix Lucas Kisinyila v. Republic***, CAT-Criminal Appeal No. 129 of 2009 (unreported), in which it was held as follows:

> *"Lies of the accused person may corroborate the prosecution's case."*

This is what the accused did albeit unknowingly. He buried himself into a bottomless pit, not knowing that the effort to let himself off the hook is daunting.

After surmounting the huddle on the weight of the evidence relied in proving the accused's involvement in the death of the deceased, and the effect of the defence testimony to the case, the next question is whether there is evidence to prove that the accused person's act was done with malice aforethought.

In plain meaning, malice aforethought means the conscious, premeditated intent to kill another human being. It means the killer had the full intent to kill someone and planned the killing and carried it out. Typically, it requires proof that the killer thought about it ahead of time, took the necessary steps in furtherance of the act and committed the act (See: ***Study.com***).

It implies, therefore, that malice aforethought is an inseparable side of the same coin and it constitutes a key ingredient in proving the offence of murder. Malice aforethought is, more often than not, inferred from the circumstances of a particular case. Proof of malice aforethought takes the path guided by section 200 (1) (a) and (b) of the Penal Code which provides as follows:

> *"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following-*
>
> *(a) An intention to cause the death of or to do grievous harm to any person, whether that 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."*

Inference of malice aforethought in this case arises from the accused's own account of facts and testimony of PW2 and ***exhibit P3***. Whereas ***exhibit P2*** provides details of the injuries sustained by the deceased and body parts which were targeted to instantly terminate her life, the accused's confessional statement confirms that death of the

deceased was planned or pre-meditated, and that the accused participated at every stage of its planning and execution. Part of the cautioned statement states as follow:

> *".... sababu ya kumnyonga ni ugomvi wa mashamba sikuwa na eneo jingine la kulima tofauti na mashamba yake aliyokataa nisiyalime, nilifanya hivyo ili niwe huru kulima hayo mashamba yake. Jambo hili hata mke wangu SABINA D/O MAGOBE anafahamu. Kwa hiyo nakiri kumuua mama mkwe wangu aitwaye HELENA D/O HILOMEJI kwa kumnyonga na kumkaba shingo kwa kutumia mikono yangu ndiyo maana siku askari wamekuja hapo msibani nilikimbia ndipo walifukuza na kunikamata ...."*

The accused's admission that he killed the deceased in order to wrestle control of the farms reveals malice aforethought that he was equipped with. By his own confession, the accused executed the killing by strangling the deceased on the neck to death. The accused's account matches with the description given in ***exhibit P2,*** to the effect that the deceased died of suffocation and damage of cervical spine cord. The description went further to reveal that the deceased's tongue was out and the mouth was wide open and that fingerprint marks were found around the neck.

The part singled out for the attack was vulnerable and it carries the human life and it is indicative of malice aforethought.

Position of the law in that respect is quite settled, and several court decisions have built a solid foundation on this established position. In ***Makungu Misalaba v. Republic***, CAT-Criminal Appeal No. 351 of 2013 (unreported), the Court of Appeal borrowed its reasoning in the earlier case of ***Enock Kipela v. Republic***, CAT-Criminal Appeal No. 150 of 1994, CAT (unreported). The Court held:

> *"... usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various, including the following: (1) the type and size of the weapon, if any used in the attack; (2) the amount of force applied in the assault; (3) the part or parts of the body the blow were directed at or inflicted on: (4) the number of blows, although one blow may, depending upon the facts of the particular case, be sufficient for this purpose; (5) the kind of injuries inflicted; (6) the attackers utterances, if any, made before, during or after the killing; and (7) the conduct of the attacker before and after the killing."*

This reasoning was replicated in a landmark decision in ***Hatibu Gandhi and Others v. Republic*** [1996] TLR, in which the following observation was made:

> *"In our considered opinion, the issue whether or not the appellants pretended to be free agents before the magistrates, cannot be resolved in a court of law by other means except by reference to the conduct and physical appearance of the persons concerned. Only the Almighty God, or perhaps those who claim to have what is known in psychology as Extra Sensory Perception (ESP), can tell directly what goes on in another person's mind without reference to the conduct or physical appearance of that other person. For most humans, including this Court, what goes on the minds of another person can reasonably be ascertained only by reference to the conduct or physical appearance of that person."*

Another succinct reasoning was made in ***Juma Ndege v. Republic***, CAT-Criminal Appeal No. 41 of 2001 (Mwanza-unreported), wherein it was held as follows:

> *"As was observed by this Court in the case of **Elias Sefu v. Republic** (1984) TLR 244, existence of malice aforethought could also be found from the nature of the weapon used and the location of the injury sustained. In the instant case, the*

use of the stick on a vulnerable part of the body was indicative of malice aforethought. We may add that even the force used was excessive as to infer malice .... Excessive force may also be inferred from the fact that the deceased did not wake up after the attack."

Inspired by the foregoing, I make no reservation in holding that the; accused's own account of facts, through ***exhibit P3***, testimony of PW2 and description of ***exhibit P2***, collectively, provide a justified conclusion that malice aforethought has been sufficiently proved as an essential ingredient of the offence of murder, thereby satisfying the requirements set under section 200 of the Penal Code.

This finding brings me to a point of divergence with two of the three lady assessors, who held the view that the accused person is not guilty of the charged offence of murder. I am convinced that the assessors' position took a narrow view of the totality of the evidence adduced which, in my humble view, justifies my conviction that the accused committed the offence with which he is charged. In this respect, I find convergence with the 1st assessor who held the view that guilt of the accused had been established.

I therefore, convict him of murder, contrary to section 196 of the Penal Code, and sentence to face death by hanging.

Right of appeal explained.

M.K. Ismail
JUDGE
25.06.2020

Date: 25th June, 2020

Coram: Hon. M. K. Ismail, J

Ms. Gisela Alex: State Attorney for the Republic

Mr. Alfred Daniel: Counsel for the Accused

Accused: (name) **Mussa Kanyerere -** is present under custody and

represented by **Mr. Alfred Daniel, Advocate.**

Interpreter: Leonard: English into Kiswahili and vice versa.

Notice of trial on information for **Murder** contrary to **sections 196 & 197** of the Penal Code was duly served on the accused, now before the Court on **25.06.2020.**

Assessors:

1. Francisca John 56 years
2. Jesca Bandio 52 years
3. Shembona Yohana 38 years

Ms. Alex:

The matter is for judgment and we are ready.

Sgd: M. K. Ismail
JUDGE
25.06.2020

Mr. Daniel:

We are ready.

Sgd: M. K. Ismail
JUDGE
25.06.2020

Court:

Judgment delivered in open Court in the presence of Ms. Gisela Alex, State attorney for the prosecution and in the presence of the Assessors, this 25th June, 2020.

Right of appeal explained.

M. K. Ismail
JUDGE

At Mwanza
25.06.2020