IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

(ORIGINAL JURISDICTION)

CRIMINAL SESSIONS CASE NO. 44 OF 2019

REPUBLIC

VERSUS

PETRO S/O SULE

SULYU S/O JINASA

MWANDU S/O HOTELI

BODE S/O HAMISI @ MAGUSHI

JUDGMENT

8th – 14th July, & 03rd August, 2020
ISMAIL, J

Petro Sule, Sulyu Jinasa, Mwandu Hoteli and Bode Hamisi @ Magushi are joint accused persons who stand trial on an offence of murder, contrary to the provisions of sections 196 and 197 of the Penal Code, Cap. 16 [R.E 2019]. They all pleaded not guilty to the charges levelled against them. As a result of this plea of not guilty, a full trial was conducted,

during which oral and documentary testimony was adduced by the parties to these trial proceedings.

Gathering from the information, the prosecution's allegation is that on 5th November, 2012, at around 19.30 hours, at Shirima village within Kwimba District, in Mwanza Region, the accused jointly and together murdered the deceased, one Kulwa Makalwe. It was alleged that the accused committed the said offence at around 19.30 hours when the 2nd, 3rd and 4th accused persons and another assailant who is still at large, allegedly operating under the instruction of the first accused person, attacked the deceased with machetes and slashed her on the head and severely injured her. The deceased died shortly on arrival at the Ngudu hospital where she was rushed for treatment. The deceased met her death at her home outside their house, where she and her husband were seated, waiting to have dinner. It was also alleged that the assailants executed the killing at the consideration of the sum of TZS. 1,500,000/- paid by the 1st accused, who allegedly hired them as a revenge of what was alleged to be the deceased's act of bewitching the 1st accused's son.

The deceased's body was subjected to a postmortem examination, carried out at Ngudu hospital. It was revealed that cause of the deceased's

death was brain injury due to cut wound that damaged the skull. The matter was reported to the police who conducted a swoop which led to the accused persons' arrest.

On interrogation, the accused severally confessed that they were involved in the death of the deceased. The 1st accused confessed that he hired by the accused persons to kill the deceased as a revenge for the deceased's witchery activities which cost life of the 1st accused's life. As a consideration for this assignment, the sum of TZS 1,500,000/- allegedly changed hands. The 2nd, 3rd and 4th accused persons similarly confessed that they, together with a certain Mr. Butitili Maliganya, were hired by the 1st accused person to carry out the attack which eventually killed the deceased. The accused's confessional statements were recorded by **F 56 D/S/SGT Jones** testified as PW5; **F 9940 D/SGT Peter** PW7; **F 8850 D/C Leonard** PW6; **F 758 D/CPL Mgaya** who was PW 8, for the 1st, 2nd, 3r and 4th accused persons, respectively.

Commencement of the trial was preceded by selection of three assessors, two gentlemen and a lady namely; Mathayo Mahende, Fabian Mugwe and Suzana Petro. These assessors sat with me, and they were all present throughout the trial proceedings, except when trial within a trial

proceedings were conducted. The assessors performed their roles appropriately.

It is worth of a note that when the matter was called for preliminary hearing, conducted on 12th March, 2020, the accused persons disputed all facts read by the prosecution, save for their names and the fact that they were arraigned in court in connection with the murder of the deceased. At the trial, the prosecution tendered five exhibits all of which were admitted. These are a Postmortem Examination Report (***Exhibit P1***), the accused's cautioned statements (***Exhibits P2, P3, P4*** and ***P5)***. Alongside the documentary evidence, the prosecution marshalled eight witnesses. On its part, the defence side had four witnesses, composed of the accused persons themselves, without any documentary evidence to rely on.

The prosecution's case opened with the testimony of **Thomas Sule,** the deceased's husband who testified that the deceased was one of his three wives. He testified that the deceased was killed on 5th November, 2012, outside their house where they were sat waiting for dinner which was being cooked by one of their daughter. He testified that while seated, they saw two people coming to their home and he welcomed them. As he was preparing to give them chairs one of them, the 2nd accused, unleashed

a machete ("***panga***"). This alerted him and the deceased who attempted to scamper for safety. Luck eluded the deceased. The attackers got the better of her as one of them landed the ***panga*** heavily on her head. She was severely injured and one of her ears was chopped off. PW1 stated further that he was able to identify Sulyu Jinasa who held the panga and Mwandu Hoteli, having been helped by a bright moonlight that shone at the scene. He also stated that it was still early into the night, making the identification easy, since they were both from the same village and were known to him very well. While Sulyu Jinasa was dressed in a black jacket and a black hat, Mwandu Hoteli wore a green long sleeved shirt. PW1 went further to testify that he ran to his neighbor, Mussa Chenya (PW2) to whom he narrated the story and named the assailants both of whom fled. He stated that, together with PW2 they took the deceased, who was unconscious, to the Ngudu hospital where she died shortly on arrival. He then reported the matter to police, recorded his statement, and arranged for the funeral and burial of the deceased's body. He testified further that after a week, the assailants called him to the auction and told him that he should not blame them for the incident as they were hired by PW1's brother, Petro Sule who accused the deceased of her witchery conduct. He

said they threatened to kill him if he disclosed the matter. He testified that he reported the matter to the Village Executive Officer (VEO). PW1 recalled that the accused were persons subsequently arrested by the police. He identified the accused persons who were in the dock.

Next in the list was **Mussa Chenya**, who featured as PW2. He testified that he lives in Shirima village in Kwimba district, and he is a neighour of Thomas Sule whose wife was killed on 5th November, 2012. He testified that on the fateful day, he was at his home. At around 19.30 hours, he saw Thomas (PW1), his daughter and wife who said that they had been invaded. He said he went to the scene where he found the deceased lying down. They rushed him to hospital but she died on arrival. He testified that PW1 told him that the assailants were Sulyu and Mwandu who live in Shirima. PW2 stated that he knew them as they live in the same village. He identified the 2nd and 3rd accused as they were seated in the dock.

G 510 D/C Baraka testified as PW3. He testified that we was stationed at Ngudu Police Station at the time. He recalls that they were informed of the death incident by PW1, the deceased's husband. He stated that they prepared a team of police officers that went to arrest the accused

persons. He stated that their mission took them to Kikubiji, Mwabayanda and Shirima villages where they arrested three of the four accused, while the 4th accused and an assailant known as Butitili Maliganya went into the hiding. PW3 testified further that on 19th May, 2013, they were informed that the 4th accused, Bode Hamisi, had been seen. They went, arrested and joined him in the instant matter. He testified that Butitili Maliganya, believed to be a gang leader is yet to be apprehended to-date.

Dr. Suke Kubita Magembe was lined up as PW4 and he identified himself as a medical doctor, currently based in Butiama where he serves as an acting Medical Doctor in charge. He performed a postmortem examination of the deceased's body on 6th November, 2012. He concluded that the deceased died of excessive bleeding and brain damage because of the injuries inflicted by a sharp object on the head. The examination report that he prepared was admitted as ***exhibit P1***.

F 56 D/S/SGT Jones testified as PW5. His involvement in the matter entailed recording a cautioned statement of Petro Sule, the 1st accused person, which was recorded on 23rd December, 2012 at Ngudu Police Station. Having accorded the 1st accused all the rights under the law, he recorded the 1st accused confessing to being involved in the murder of

the deceased and that he hired the assailants. The confessor said that the motive for the killing was a revenge because he believed that the deceased had bewitched his son. The 1st accused's statement was received as ***exhibit P2***.

The next witness was **F 8850 D/C Leonard**, PW6, whose testimony is to the effect that he recorded the 3rd accused's cautioned statement. The statement was recorded on 23rd December, 2012 at Ngudu police station. The statement which was tendered as ***exhibit P3*** recorded the 3rd accused person as having confessed to his involvement in the murder of the deceased and that he shares the spoils of the consideration which was paid to them by the 1st accused person. The witness testified that the 3rd accused confessed that he was at the scene of the crime and participated in the murder.

F 9940 D/SGT Peter was next in the list and he testified as PW7. His role was to record the statement of Sulya Jinasa, the 2nd accused. The witness testified that he interviewed the said accused person who confessed that he and his colleagues went to kill Kulwa Makalwe, the deceased, and that he did that at the behest of the 1st accused person who hired them at a fee of TZS. 1,500,000/- which he shared with other

assailants. The statement which was recorded on 23rd December, 2012, was tendered in Court as ***exhibit P4***.

The last witness was **F 758 D/CPL Mgaya** who was PW 8. He said that he is a police officer who is based at Ngudu Police Station and that he was involved in the matter by recording the statement of the 4th accused person, Bode Hamisi@ Magushi. He testified that he recorded the said statement on 19th May, 2013 at Ngudu Police Station. The statement was tendered and admitted as ***exhibit P5*** and it recorded the 4th accused confessing that he was involved in the matter of Kulwa Makalwe, the deceased. He testified that he was in the company of the 2nd and 3rd accused persons and one more person who is still elusive.

The Accused gave their evidence on oath and called no additional witnesses. They denied having participated in killing the deceased at Shirima village, within Kwimba district, on 5th November, 2012, or at all. In the case of the 1st accused person, his defence was that his relations with the deceased, his sister in law were as cordial as they were with the deceased's husband, his young brother. He testified that he attended the funeral and condoled with the bereaved. He denied ever having any vengeance with the deceased or that he had a deceased son who was

bewitched by the deceased. He testified that he has six children and none of them is sick or deceased. On whether he knew the other accused persons, the 1st accused testified that he met them they when were incarcerated at Ngudu, before they were joined in the instant matter. He denied ever hiring them to carry out the murder of the deceased or at all. He suspected that PW1 was not happy with the way the 1st accused handled the issue of family farms which were yet to be distributed amongst the siblings. He, however, stated that that was his own guess as he has never quarreled with him.

The 2nd accused has also distanced himself from the incident. He denied ever telling PW1 that they killed the deceased at the behest of the 1st accused person or at all. While admitting that on the day of the incident he was in Shirima village, he testified that he heard the alarm on the day that followed the incident and that he went to the scene to condole with the bereaved. He, however, testified that he did not know the deceased or her husband despite having lived in the village for 25 years. He cited the expansiveness of the village as the reason for not knowing PW1 and the deceased. With respect to his co-accused, the 2nd accused testified that he came across them when he was incarcerated and that they were all

strangers. He denied being hired by the 1st accused to carry out the murder incident.

The 3rd accused staged more or less the same defence. He stated that on the day of the incident he went to graze the family cattle and came back to their family home at around 19:00 hours, after which he did not get out of their home. He testified that he was not aware of any murder incident in the village, adding that none of the co-accused was known to him prior to his arrest and conveyance to the police. It was his defence that he was not involved in the incident that claimed the life of Kulwa Makalwe who he did not know. He denied knowing PW1 either.

The 4th accused took a similar path. Coming from a different village, he contended that he has been to Shirima village before but on the occasions he had visited there, his movements ended at the centre of the village where he shopped a few merchandise and returned back to his village, a three hour ride on a bicycle. With respect to the allegations of murder, the 4th accused flatly denied any involvement in the planning or execution thereof, denying that he knew any of the co-accused or the elusive assailant, Butitili Maliganya. He admitted that he recorded a cautioned statement while in police custody.

In general terms, the accused persons distanced themselves from the accusation and prayed for their acquittal.

It is customary, in all criminal trials that, once evidence of the both sides is heard and taken, the next crucial 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 enduring principle is predicated on 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***. Aware of the fact that he is innocent until proven guilty, the accused person's duty is limited to denying his involvement in the offence he is charged with. This ancient canon of law has been widely discussed by various authors of no mean repute. These include the legendary authors of 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 authors 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].

With respect of criminal cases, this principle is as old as criminal law itself and courts have, in innumerable 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 not 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 the Court of Appeal 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."*

Remembering that this is a murder charge, the prosecution's mammoth responsibility entails proving, not only that the accused unlawfully caused death of the deceased but also that the accused persons were, at the time of committing the offence, equipped with an ill intent of causing the said death. In legal parlance, this ill intent is known as malice aforethought. Gathering from the testimony adduced by the prosecution, it is undisputed that the deceased died an unnatural death. It is also a fact that out of the eight witnesses who testified for the prosecution, one (PW1), adduced a direct visual evidence that he saw two of the four accused persons committing an attack that resulted into the demise of the deceased. It is his testimony, as well, that a few days later, the assailants (2nd, 3rd and 4th accused) met and told him that they killed the deceased at the instance of the 1st accused who hired them. This means, therefore, that

evidence relied upon by the prosecution is partly direct and partly confessional.

Reverting back to the grand issue with respect to the accused's culpability or otherwise, the question to be resolved is whether there is any evidence that leads to an inference of guilt against any or all of the accused persons. The answer to this question is in the affirmative. Through PW1, the prosecution has linked the accused persons to the murder incident. Furthermore, through PW 5, PW 6, PW 7 and PW 8, the prosecution tendered ***exhibit P1,*** a Postmortem Examination Report, which described the cause of the deceased's death and the pattern of the attack, and ***exhibits P2, P3, P4*** and ***P5***, being the cautioned statements for all of the accused persons. In their totality, these are the testimony on which the prosecution relies heavily. With respect to cautioned statements, the same were admitted with relative ease, save for ***exhibit P5*** whose admissibility was objected to on the contention that the confessor, in this case the 4th accused person, was not a free agent. Admitting the said exhibits, the Court took that recording of the confessional statements conformed to the requirement of section 50 (1) of the Criminal Procedure Act (supra) and, that the same were recorded voluntarily. It was ruled,

therefore, that the same were admissible under section 27 (1) of the Evidence Act, Cap. 6 [R.E. 2002].

Whereas ***exhibit P1*** provides an expert position with respect to the deceased's cause of death, it offers nothing of probative value to link the accused with death of the deceased person. The same applies to PW2 and PW4 whose testimony did not have anything that puts the accused in a strong blemished position. PW2's testimony is to the effect that, on the fateful evening PW1 ran to his house, along with his other wife and child following an attack carried out by the 2nd and 3rd against the deceased. He also testified on how he participated in rushing the deceased to hospital.

PW4's account of facts is that, at the instance of the police, he examined the deceased's body and described the cause of the death. Generally speaking, none of these two witnesses and ***exhibits P1*** untangled the question of the accused's culpability to the deceased's death. The same cannot be said, however, with respect to the testimony of PW1, PW5, PW6, PW7 and PW8, together with ***exhibits P2, P3, P4*** and ***P5***. These pieces of evidence carry a cumulative significance to the matter, chiefly because they touch on the eye witness account of a person (PW1) who was at the scene of the crime and confessions made by the accused

persons. The importance that these pieces of testimony carry will be a matter that will be discussed at length shortly.

The witnesses who recorded the accused's confessional statements (PW5, PW6, PW7 and PW8) testified, with a high degree of similarity, how the accused persons provided a blow by blow account on the manner in which death of the deceased was masterminded and executed; and the consideration or price allegedly paid by the 1st accused to have the 2nd, 3rd, 4th accused persons and their elusive accomplice execute the killing. This testimony went to the extent of revealing how the amount which was paid by the 1st accused was shared amongst the assailants.

As hinted earlier on, the prosecution's case stands on two pillars, one of which is the visual evidence which was adduced by PW1. He testified that he identified two of the accused, 2nd and 3rd accused who he knew very well as they live in the same village. This is why he welcomed them. The witness stated that he was able to identify the accused because of the bright moonlight that lit the scene of the crime to the extent of being able to describe the colour of the attire they put on. He testified further that he immediately named them when he met PW2.

It is a trite position, in this country, that evidence of visual identification can be the basis for founding a conviction against an accused person, if such evidence is watertight and leaves no possibility of errors. This astute position was accentuated in ***Mwalim Ally and Another v. Republic,*** CAT-Criminal Appeal No. 39 of 1991 (DSM-unreported), in which it was held as hereunder:

> *"where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely watertight to justify a conviction."*

Subsequent decisions of the Court of Appeal have built on this well founded principle. In the recent decision of ***Demeritus John @ Kajuli & Others v. Republic***, CAT-Criminal Appeal No. 155 of 2013 (unreported) the superior Court made the following finding:

> *"In a string of decisions, the Court has stated that evidence of visual identification is not only of the weakest kind, but it is also most unreliable and a Court should not act on it unless all possibilities of mistaken identity are eliminated and it is satisfied that the evidence before it is absolutely water-tight (See,* ***Waziri Amani V.R.*** *(1980) TLR 250;* ***Raymond Francis V.R.*** *(1994) T.L.R. 100; R.V. Eria Sebatwo (1960) EA 174;* ***Igola Iguna and Noni @ Dindai Mabina V.R.,*** *Criminal Appeal No. 34 of 2001, (CAT, unreported). Eye witness identification, even when wholly*

*honest, may lead to the conviction of the innocent (**R. v. Forbes**, (2001) 1 ALL ER 686). It is most essential for the court to examine closely whether or not the conditions of identification are favourable and to exclude all possibilities of mistaken identification."*

Noting that identification is fraught with serious challenges which, as highlighted above, may lead to errors, stringent conditions have been imposed. Thus, in ***Ally Mohamed Mkupa v. Republic***, Criminal Appeal No. 2 of 2008 (unreported), the superior Bench held that ***"where one claims to have identified a person at night there must be evidence not only that there was light, but also the source and intensity of that light. This is so even if the witness purports to recognize the suspect"*** (see ***Kulwa s/o Mwakajape & 2 Others v. Republic***, CAT-Criminal Appeal No. 35 of 2005 (unreported)).

A more exquisite position was laid in the decision of ***Chacha Jeremiah Murimi v. Republic***, CAT-Criminal Appeal No. 551 of 2015 (Mwanza-unreported). In this case, the Court of Appeal came up with a raft of questions that should be posed by a trial court in assessing if the identification in question was proper and reliable. These are:

"...To guard against the possibility the Court has prescribed several factors to be considered in deciding whether a witness has identified the suspect in question. The most commonly fronted are: how long did the witness have the accused under observation? At what distance? What was the source and intensity of the light if it was at night? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally had he any special reason for remembering the accused? What interval has lapsed between the original and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses, when first seen by them in his actual appearance? Did the witness name or describe the accused to the next person he saw? Did that/those other person/s give evidence to confirm it?"

Having gathered sufficient guidance from the quoted excerpts, the next question for the court's determination is whether conditions for identification in the present case were met. PW1 has stated that he identified both of her assailants, not only because he was helped by the bright moonlight that lit the scene of the crime, but also on account of the fact they (the assailants) were known to him thoroughly well, they being residents of the same village of Shirima. PW1 testified that he named them to PW2 to whose home he scampered for his safety. This testimony is corroborated by the testimony of PW2, Mussa Chenya, who testified that PW1 identified both of the assailants. PW1 did the same when he reported

the matter to the police. Looking at this testimony, a nagging question arises, and this is whether intensity of the light was strong enough to allow an unmistakable identification of the accused persons. The view taken by the prosecution is that the light was bright and intense enough to serve the purpose and PW1 has not shown any sense of uncertainty about what he witnessed. I am equally convinced that the illumination that was emitted by the moonlight was so intense that it left no room for mistaken feeling that the assailants would be different from the 2nd and 3rd accused. The description and circumstances given by PW1 fit into or are akin to the circumstances which bred the reasoning of the Court of Appeal in ***Kenedy Ivan v. Republic***, CAT-Criminal Appeal No. 178 of 2007 (unreported), in which moonlight was considered as bright enough to help in making visibility easier and be able to identify an assailant who was very close and well known to the identifier. Similar to what obtains in the instant case, in that case, none of the assailants was masked.

Overall, PW1 demonstrated an impressive demeanor and exhibited a composure which often goes with honesty and truthfulness. He was consistent and unshakable, even during cross examination, on who the attackers were. PW1 has stated that he named the accused persons.

Naming of the accused persons was instantaneous, meaning that PW1 was certain about who the perpetrators of the attack were. His position has remained consistent and unwavering hence forth. In my considered view, conditions which exist in present case are consistent with the position of the law as it currently holds, as propounded and restated in a number of decisions. In ***Marwa Wangiti Mwita and Another v. Republic***, [2002] T.L.R 39 the Court of Appeal held the following view: -

> *"The ability of the witness to name a suspect at the earliest possible opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry"*(Emphasis supplied).

This position was reaffirmed in the subsequent decision in ***Jaribu Abdallah v. Republic*** [2003] TLR 271, it was observed as follows:

> *"In matters of identification, it is not enough merely to look at factors favouring accurate identification, equally important is the credibility of the witness. The conditions for identification might appear ideal but that is not a guarantee against untruthful evidence. The ability of the witness to name the offender at the earliest possible moment is in our view reassuring though not decisive factor."*

In ***Minani Evarist v. Republic*, CAT**-Criminal Appeal No. 124 of 2007 (unreported), the Court of Appeal made reference to the earlier

decision in ***Swalehe Kalonga & Another v. Republic,*** Criminal Appeal No. 45 of 2001 (unreported) and expressed a similar stance by holding that:

> *"... the ability of a witness to name a suspect at the earliest possible opportunity is an all-important assurance of reliability."*

PW1 described, quite sufficiently in my view, that the distance between accused and the deceased was quite short and both were able to identify them because the assailants were people who are known to one another for many years. This is consistent with the requirements as set out in the decisions cited above, all of which were cited with approval in ***Chacha Jeremiah Murimi's case*** (supra).

In addition to what has been stated above, the trite position is that *"Where the witnesses were close to allow proper identification and were not contradicted that they knew the appellants before the date of the incident, identification by name cannot be faulted."*

See also: ***Fadhili Gumbo Alias Matola & 3 Others v. Republic*** [2006] TLR 52 (CAT-DSM).

As held in ***Chacha Jeremiah Murimi*** (supra), demeanor of the witnesses is also of a decisive importance in arriving at a conclusion that identification was impeccable, and on this, my unfleeting assessment of the

demeanor of PW1, gave me nothing short of a glowing impression that he was a witness of the truth whose story was consistent, not only on identification of the accused persons, but also on how he subsequently met them and admitted their involvement in the matter at the behest of the 1st accused person. PW1's testimony on identification complements well with what the 2nd, 3rd and 4th accused persons told him when he met them at the auction. Being the same persons he identified at the scene of the crime, the said accused owned up and told him to blame the whole matter on his brother, the 1st accused person on whose instruction the murder incident was committed. It is actually a validation of what he testified with respect to identification of the accused persons at the scene of the crime.

As stated earlier on, admissibility of exhibit P2 and P5 was met with some objections which were surmounted. They, along with exhibits P3 and P4, were eventually admitted. The post-admission issue that arises relates to the weight to be attached to the said exhibits, in proving the guilt or otherwise of the accused persons. It is trite law, under section 27 (1) of the Evidence Act, Cap. 6 [R.E. 2019], that a confession voluntarily made by an accused to a police officer may be proved against him. This postulation derives its legitimacy from a long established and persuasive principle of

criminal evidence that was propounded in ***S (an infant) v. Manchester City Recorder and Others*** [1969] 3 All E.R.1230, in which Lord Reid stated as follows:

> *"the desire of any court must be to ensure so far as possible that only those are punished who are in fact guilty.* ***The duty of a court to clear the innocent must be equal or superior in importance to its duty to convict and punish the guilty. Guilt may be proved by evidence. But also it may be confessed."*** *[Emphasis is mine]*

The quoted excerpt was taken a notch higher by the Court of Appeal in its recent decision in ***Hamis Juma Chaupepo @ Chau v. Republic***, CAT-Criminal Appeal No. 95 of 2018 (DSM-unreported), in which it relied on its own reasoning in ***Mathias Bundala v. Republic***, CAT-Criminal Appeal No. 62 of 2004 (unreported), and held that it is not the requirement of the law that every killing has to be eye-witnessed. One such way is through the accused's own confession in which he admits to the commission of the offence with which he is charged. The superior Court was inspired by the decision in ***Paul Maduka & 4 Others v. Republic***, CAT-Criminal Appeal No. 110 of 2007 (unreported) in which it was held at p. 11:

"There is no doubt that a confession to an offence made to a police officer, is admissible in evidence. The very best of witnesses in any criminal trial is an accused person who confesses his guilt. However, such claims of the accused persons having made confessions should always not be treated casually by courts of justice. The prosecution should always prove that there was a confession made and the same was made freely and voluntarily. The confession should have been free from blemishes of compulsion, inducements, promises or self-hallucinations."

Worthy of note is that fact that, before it is relied upon and, cognizant of the fact that a confessional statement is essentially an admission, the court must satisfy itself that the accused against whom the statement is sought to be proved has admitted to all ingredients of an offence to qualify to be an admission under section 3 (1) of the Evidence Act. This position was aptly expounded in the case of ***Juma Magori @ Patrick & 4 Others v. Republic***, CAT-Criminal Appeal No. 328 of 2014 (unreported), in which the Court of Appeal discussed, amongst others, ascertainment of confessional statements amounting to admission. The upper Bench was inspired by the holding of the Supreme Court of Nigeria in ***Ikechukwu Okoh v. The State*** (2014) LPER-22589 (SC). The latter decision borrowed a leaf from the holding of an English court in the old

case of ***R v. Sykes*** (1913) 1 Cr. App. Report 233. In the latter, basic principles necessary for ascertaining probity and weight to be accorded to confessional statements were propounded. The relevant part of the passage in the Nigerian case provides 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 drawing a conclusion in ***Juma Magori's case,*** the Court of Appeal got an inspiration from its earlier decision in ***Emmanuel Lohay and Udagene Yalooha v. Republic,*** CAT-Criminal Appeal No. 278 of 2010 (unreported), wherein a criterion was set, for a confession to constitute the basis for reliance in founding a conviction. The Court held that such confession must be able to:

> *"... 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." *(at p. 22.)*

See also: ***Abdul Farijala & Another v. Republic,*** CAT-Criminal Appeal No. 99 of 2008 and ***Hassan Said Nundu v. Republic,*** CAT-Cr. Appeal No. 126 of 2002 (both unreported).

A more illustrative position with respect to reliance on the retracted or repudiated confession was made in the landmark decision of the East African Court of Appeal in ***Tuwamoi v. Uganda*** [1967] EA 84. At p. 91. The predecessor superior Court observed:

> *"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."***

The view in ***Tuwamoi's case*** was adopted in the subsequent decision in ***Kashindye Meli v. Republic*** [2002] T.L.R. 374 (CA), wherein it was held as follows:

"It is now settled law that although it is dangerous to act upon repudiated or retracted confession unless such confession is corroborated, ***the court may act upon such confession if it is satisfied that the confession could not but be true."***

To be able to rely on the accused persons' confessional statements two questions beg for answers. ***One,*** whether the confession meets the threshold set under section 3 (1) of the Evidence Act (supra) and underscored in ***Juma Magori's case;*** and ***two,*** whether the contents of ***Exhibits P2, P3, P4*** and ***P5*** are a true account of the what happened with respect to the deceased's death. PW5, PW6, PW7 and PW8 who recorded these confessional statements quoted the accused separately, giving a detailed plan and execution of the murder, and the manner in which money changed hands and how it was shared amongst the assailants who included the accused. These confessional statements, though recorded separately, revealed the assailant's pre-meditated intent to claim life of the deceased and how such intent was put into action. Save for a divergence on the consideration paid to the assailants, especially the 2nd and 3rd and 4th accused persons, all of the confessors were unanimous on the motive for the killing. Their narrations drew a striking resemblance in substance and they told the same story about the deceased's death and

how it was planned and executed to a good effect. It comes out clearly that these narrations are nothing but a shared truth. Corroborating this story, is PW1's testimony on how he identified the accused at the scene of the crime and the conversation that followed the event, at which the accused were allegedly quoted telling him what motivated the killing. To appreciate the import brought by these confessional statements, it is apposite that crucial parts thereof be quoted as follows:

Exhibit P2:

"Namfahamu KULWA D/O MAKALWE kuwa alikuwa shemeji yangu, kwa sasa ni marehemu baada ya tarehe 05/11/2012 majira ya saa 19:30 hrs kuuawa kwa kukatwa mapanga. Huyo shemeji yangu aliuawa na BUTITILI s/o MALIGANYA, MWANDU s/o HOTELI, SULYU s/o JINASA, BODE s/o HAMIS na YUNGE s/o? wote wakazi wa SHILIMA. Hao wakata mapanga niliwakodi mimi wamuue huyo shemeji yangu na niliwapa pesa kiasi cha Tsh. 1,500,000/= kama gharama za kufanya kazi hiyo. Na niliyempa pesa hiyo ni SULYU s/o JINASA ambaye yeye anajua walivyogawana pesa hizo. Sababu za kumuua huyo shemeji yangu ni kutokana na yeye kumpa chakula mtoto wangu aitwaye JUMA s/o PETRO na huyo mtoto wangu kuugua hadi kufa, hivyo alimloga kupitia chakula hicho kwani mara tu baada ya kula chakula hicho alianza kuugua hadi kufariki. Hiyo ilikuwa nl mwaka jana yaani 2011 na amefariki mwezi November 2012 .... Aliyeanza kufa kati ya huyo shemeji yangu na mtoto wangu ni KULWA d/o MAKALWE, baada ya kuona hali ya mtoto wangu inazidi kuwa mbaya ndipo niliamua kutafuta wakata mapanga na kumuua KULWA d/o MAKALWE .... Hivyo mimi

nakiri kwa hiari yangu kuwa ndiye niliyehusika kuwakodi wakata mapanga ili wamuue shemeji yangu ambaye niliamini ndiye aliyemroga mtoto wangu ... Hizo pesa Tsh 1,500,000/= nilizowapa wakata mapanga nilizipata baada ya kuuza dengu."

Exhibit P3:

"Mnamo mwezi Novemba 2012 tarehe 5 majira ya saa 1900Hrs nikiwa Shilima Centre alikuja BODE s/o HAMIS na kunieleza kuwa kuna kazi ya kwenda kuua kwa kukata mapanga huko kijiji cha migongwa – Shilima. Tuliondoka tukiwa watu wanne ambao ni SULYU s/o JINASA, YANGENI s/o? na BODE s/o HAMIS. Lakini kiongozi wetu kabisa ambaye ni BUDITTILI s/o? yeye alibaki hakwenda eneo la tukio. Mtu aliyetukodisha katika kazi hiyo ni PETRO s/o SULE ambaye naye ni mkaazi wa Mwabayanda alitoa pesa kiasi cha Tsh 1,200,000/= milioni moja na laki mbili. Katika tukio hili mimi nilipewa pesa kiasi cha Tsh 50,000/= Elfu Hamsini tu. Mtu tuliyemuua ni mwanamke ambaye ni shemeji yake na PETRO s/o SULE anaitwa KULWA s/o MAKALWE. Tulimkuta akiwa amekaa nje pamoja na watoto wake wadogo. Mapanga yalikuwa yamebebwa na SULYU s/o JINASA na YANGENI s/o na ndiyo waliomkata mapanga KULWA s/o MAKALWE na kumuua mimi sikuwa na silaha yoyote pia BODE s/o HAMIS naye hakuwa na silaha yoyote ile .... Ni wazi kabisa mimi pamoja na akina SULYU s/o JINASA, BODE s/o HAMIS na YANGENI s/o ndiyo tuliomuua KULWA s/o MAKALWE kwa kumkata mapanga...."

Exhibit P4

".... Nakumbuka kuwa mimi nimewafundisha watu wawili kukata mapanga ambao ni BODY s/o HAMISI Msukuma wa Shirima na MWANDU s/o HOTELI naye ni Msukuma mkulima wa Shirima. Baada ya kuwafundisha watu hawa kwa mara ya kwanza nilienda nao kukata

panga KULWA d/o MAKALWE kwa ujira wa fedha Tsh 1,500,000/= MILIONI MOJA NA LAKI TANO TU. Na katika tukio hilo mfadhiri aliyetukodi na kutoa fedha ni PETRO s/o MWANASULE. Sababu ya kutuma tumuue ni kwamba KULWA s/o MAKALWE amemuua mwanae JUMA s/o PETRO. Hivyo mimi niliongozana na BODY s/o HAMISI, MWANDU s/o HOTELI wote tukiongozwa na BUDITTILI s/o MALIGANYA na katika tukio hilo nilipewa Tsh 200,000/= LAKI MBILI TU. Nakumbuka katika tukio hili hakuna aliyekamatwa...."

Exhibit P5:

".... Kuhusu tukio hili ni kwamba nakumbuka siku ya tukio majira ya 1800 hrs karibia majira ya 19:00 hrs nikiwa nyumbani kwangu nilipigiwa simu ya mkononi na BUTITTILI s/o MALIGANYA na namba ya simu nimeisahau alinieleza kuwa niende eneo la center waliodai kuwa wako eneo la barabarani kweli niliondoka kwangu na kwenda mahali waliponielekeza na niliwakuta ambapo niliwakuta MWANDU s/o HOTELI, SULYU s/o JINASA na BUTITTILI s/o MALIGANYA ambapo walinieleza kuwa kuna kazi ya kukata mapanga mama mmoja ambaye mimi simfahamu lakini mke wa THOMAS s/o SHULE huko kitongoji cha (Mizanza) Migongwa, kijiji cha Shilima. Hata hivyo Butitili s/o Maliganya alieleza kuwa kazi hii imetolewa na mkodishaji Petro s/o Shule ambaye namfahamu kuwa anaishi kijiji cha Mwabayanda, hata hivyo huyu mama ambaye alitakiwa kukatwa mapanga mimi binafsi simfahamu, baada ya kunieleza hivyo na kudai kuwa kuna Tsh 1,500,000/= zilikuwa zimetolewa ambapo Butitili alinikabidhi Tsh 300,000/= hili nimkabidhi mwenzangu MWANDU s/o HOTEL Tsh 150,000/= kama mgao wake na mimi kubakiwa na Tsh 150,000/=. .... Baada ya kupewa ujira majira ya 19:00 hrs tulikwenda pamoja nyumbani kwa THOMAS s/o SULE ambapo tulimkuta THOMAS s/o SULE, mkewe na watoto wao waliokuwa kwa nje, ingawa THOMAS s/o SULE na mkewe walikuwa

karibu kwa nje, baada ya wao kuona mapanga au waligundua au kuhofu ndipo mke wake THOMAS na THOMAS naye waliofu na kukimbia THOMAS hata hivyo BUTITILI na SULYU walimfuata na kumkata mapanga mimi kwa kuwa nilikuwa karibu nilimkata panga kichwani, sababu za mimi kumkata panga ni kutokana na mama huyu kupiga kelele na kutaka kukimbia ...."

As introduced earlier on, the cautioned statement on 4th accused's confession was subsequently retracted on the ground of involuntariness. In that instance, however, the Court held the view that the statement was a true confession made voluntarily and consistent with the law, and, therefore, admissible. On aggregate, these statements present a unanimous story which is consistent with truth as told by prosecution's witnesses, especially PW1, PW5, PW6, PW7 and PW8. The statements are in sync with ***exhibit P1,*** the Postmortem Examination Report which described the cause of the deceased's death. The targeted part of the body is the same as that which was described by the 4th accused person, PW1, PW2 and PW3. It is my justified conclusion that the confessional statements made by the accused persons possess the quality described in section 29 of the Evidence Act (supra) which is to the effect that:

"No confession which is tendered in evidence shall be rejected on the ground that a promise or a threat has been held out to the person confessing unless the court is of the opinion that the

inducement was made in such circumstances and was of such a nature as was likely to cause an untrue admission of guilt to be made."

The import of the quoted provision was amplified in ***Kashindye Meli v. Republic*** (supra) and all other authorities cited above. These confessional statements fall in the description of an admission defined by section 3 (1) of Cap. 6, and, as such, the Court is justified to rely on them, taking into consideration that the same meet the threshold of weight of evidence required of them.

A scrupulous evaluation of the confessional statements, further again, reveals a couple of contradicting stories. These contradictions mainly reside in the accused's narration on the sum which was paid as a consideration for carrying out the 1st accused's instructions; the quantum which was shared by each of the assailants, in this case the accused persons; and who informed who about the attack they intended to carry out. While ***exhibit P2, P4*** and ***P5*** quoted the 1st, 2nd and 4th accused persons saying that the sum to be paid for the assignment was TZS. 1,500,000/=, the 3rd accused stated through ***exhibit P3*** that the agreed sum was TZS. 1,200,000/=. With respect to the sum that each of the assailants pocketed, the 3rd accused is quoted as saying (***exhibit P3***) that

the amount paid out to him was TZS. 50,000/=, as opposed to the 4th accused who was quoted (***exhibit P5***) that the duo shared TZS. 300,000/- equally between them. Once again, the 2nd accused stated (***exhibit P4***) that the amount paid to him was TZS. 200,000/- while it was reported by the 4th accused that the 2nd accused was paid TZS. 500,000/-. Needless to say, these are a contradictory narration on the same set of facts. The narrations are manifestly disharmonious with one another and glaringly discrepant. But the question to be posed is: are the discrepancies and contradictions impactful to the case?

It is a trite position that the Court is vested with powers to disregard the evidence of one or more witnesses for being contradictory or inconsistent. However, the inconsistency must be material to the case and one which affects the central story. Minor or trifling contradictions which do not go to the root of evidence are inconsequential and ignorable. See: ***Mohamed Said Matula v. Republic*** [1995] TLR 3 followed in ***Mwita Chacha Kabaila v. Republic***, CAT-Criminal Appeal No. 356 of 2013, ***Shukuru Tunugu v. Republic***, CAT-Criminal Appeal No. 234 of 2015; ***Bikolimana s/o Odasi @ Bimelifasi v. Republic***, CAT- Criminal Appeal No. 269 of 2012 and ***Simon Cleophace Bangilana & Another v.***

Republic, Criminal Appeal No. 442 of 2015 (all unreported). In the same vein, in ***Luziro s/o Sichone v. Republic***, CAT-Criminal Appeal No. 231 of 2010 (unreported), the Court of Appeal observed:

> *"We shall remain alive to the fact that not every discrepancy or inconsistency in witness's evidence is fatal to the case,* ***minor discrepancies on detail or due to lapses of memory on account of passages of time should always be disregarded. It is only fundamental discrepancies going to discredit the witness which count."***

Significantly, the position in the foregoing matter was derived from the superior Bench's own fabulous decision in ***Disckson Elia Nsamba Shapurata & Another v. Republic***, CAT-Criminal Appeal No. 92 of 2007 (unreported), in which a passage from ***Sarkar's Code of Civil Procedure Code*** was quoted as hereunder:

> ***"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time,*** *due to material disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected of a normal person.* ***Courts have to label the category to which a discrepancy may be categorized.***

While normal discrepancies do not corrode the credibility of a parties' case material discrepancies do."

In its earlier decision in ***Mukami w/o Wankyo v. Republic*** [1990] TLR (CA), the Court of Appeal took the view that contradictions which do not affect the central story, especially in confessions, are considered to be immaterial.

Assessment of the impact of the said contradictions inevitably tuned my focus to identifying the central story in this case, and whether the same is affected by the pointed discrepancies. What comes out as a central story in these confessions is the accused's involvement in masterminding and executing death of the deceased. Has it been affected by these contradictions? I hasten to answer this question in the negative. Contradictions that revolve around who got what or who, among the assailants, engaged who to execute the murder plan are measly and of peripheral effect, while the central story is that the 1st accused engaged the assailants at a fee and the latter planned and executed the murder that claimed the deceased's life. I hold that the discrepant part of the testimony has not corroded the purity of the evidence that establishes the central

story and the accused's culpability. In view thereof, I choose to give them less weight and attention.

The accused persons have vehemently protested their innocence and have denied that they were ever engaged in any conspiracy that culminated into a common intention to kill the deceased. Each of them has denied that he knew other co-accused persons, maintaining that they came to know each other when they were arraigned in court in connection with this murder incident. In the case of the 4th accused, the contention is that what is considered as the basis for his culpability is a confession which was extracted through torture. On his part, the 1st accused denied harbouring any grudge with the deceased who he described as a person who was very close to him. He has even denied that he had a son going by the name of Juma Petro. In the case of the 2nd and 3rd accused persons, they both stated that though they both lived in Shirima, they neither knew the deceased nor her husband, PW1. In general, they all present a rallying call that the Court should find that the prosecution has not presented a credible case against them. These are general and casual denials which I find to be highly suspect and lacking in any cutting edge or probity worth of any reliance. It does not click into anybody's mind that in a village where

a person like the 2nd accused has spent 25 years, or one in which the 3rd accused was born and raised would fail to know or be known to other villagers who are as senior as PW1 or PW2, both of whom testified that they knew both of the accused persons. It doesn't make sence either, that the 3rd accused was not aware of the death incident as dreadful as that of the deceased's murder while it happened in the same village. The 3rd accused's defence ignored the practice in the Sukuma society, where an alarm is raised to alert and inform members of the village of unusual any incidents that occur in their midst. It makes no sense to me that the police who were not known to any of the accused persons and with no interest to serve would concoct a story against them. This gives me the impression that the testimony of the accused persons is a bunch of blatant lies, evasive denials, and needles concealments, on basic harmless matters. One instance of such lies and denials is where the 1st accused denied that he had a deceased child called Juma Petro, opting to give names of other children which are at variance with the names he gave when he recorded ***exhibit P2***. Same pattern was adopted by the rest of the accused persons on a number of issues. The suicidal consequence of these outright lies and needless concealments has been a subject of discussion by Court through

multitude of the decisions. One of such decisions is the case of ***Felix Lucas Kisinyila v. Republic,*** CAT-Criminal Appeal No. 129 of 2009 (unreported) in which the Court of Appeal held that ***"Lies of the accused person may corroborate the prosecution's case."***

The defence's obsession with these unnecessary denials and concealments preoccupied them so much that they cast a blind eye on some of the stunning revelations made by PW1, PW5, PW6, PW7 and PW8. For instance, PW1's contention that the accused persons, save for the 1st accused, called him subsequent to the incident and revealed that they executed the killing at the instance of the 1st accused, was left unquestioned. As a result, this testimony, along with their own confessional statements were left undented and sharp edged.

Their alleged culpability in the offence they are charged with has been exposed by the prosecution and the accused have done little or nothing to controvert any of that, even when they were given a chance to cross examine witnesses who testified against them. The accused's sole focus was to impress upon the Court that some of these confessional statements were procured irregularly. The potency of these statements went unchallenged, meaning that no cross-examination was conducted

with a view to impeaching credibility of what is contained in those statements. The accused's focus and emphasis was on the procedural aspects of recording the statements. The defence's patent failure to impeach the prosecution on the veracity of the contents of the statements or the oral testimony of PW1 and other witnesses compels me to be enjoined by the Court of Appeal's reasoning in ***Nyerere Nyague v Republic,*** CAT-Criminal Appeal No. 67 of 2010 (Arusha, May 2012), wherein it was held thus:

> *"As a matter of principle a party who fails to cross- examine a witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the trial court to disbelieve what the witness said."*

I am convinced that the testimony adduced by the prosecution witnesses reveals ***a culpable role played by them in causing the death of the deceased and that the accused were clothed with malice aforethought,*** consistent with the reasoning propounded in ***Emmanuel Lohay's case*** *(supra).* Accordingly, I take the view that the accused's defence lacked the spine that would shake the prosecution's case or raise any reasonable doubt which would move the Court to hold that the accused's guilt has fallen short of being proved. In view of that deficiency,

I choose to attach insignificant weight to this defence evidence. Consequently, it is my considered view that the prosecution has presented a credible and convincing case which has revealed that the accused's conduct is not consistent with innocence.

Having disposed of the first limb, my focus turns to another equally important pillar in a murder trial. This entails making a determination in respect of whether actions of the accused were done with malice aforethought, an indispensable ingredient in a proof of murder.

Malice aforethought may be plainly defined to mean 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, by the prosecution, 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***).

Akin to all cases which rely mostly on an indirect evidence, proof of malice aforethought is also something to be inferred. It requires some inference which entails looking at the circumstances under which the death incident occurred. Section 200 (1) (a) and (b) of the Penal Code (supra)

provides a thorough guide on what malice aforethought is and how the same can be proved. It states:

> *"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."*

A cursory glance at the evidence reveals circumstances which bring out no different conclusion than that of pre-meditation by the perpetrators. The evidence contains a thinly veiled fact that the accused, met, planned, put the deceased's life on sale and, finally, executed the plan. Revelation of this chain of events through the evidence tendered by the prosecution, by PW1; the accused's own confessions and exhibit P1, tell nothing short of the fact that the assailants, the accused in this case, harboured a known ill-intent that arose from the 1st accused quest for revenge for what was perceived to be the deceased's witchery acts that harmed the 1st accused's son. Whereas ***exhibit P1*** provides details of the injuries sustained by the

deceased and body parts which were targeted to instantly terminate her life, the accused's confessional statements and testimony of PW1 confirm that death of the deceased was planned or pre-meditated, and that the accused participated at every stage of its planning and execution. The totality of all this exemplifies what malice aforethought is all about. A quick round of the accused's confessional statements highlights portions which typify the 1st accused's long held grudge, and the way that grudge bred a resolution that was conveyed to the 2nd , 3rd and 4th accused and the other elusive assailant. The latter offered a methodology of execution. The following excerpts, quoted from the 1st, 2nd, 3rd and 4th accused persons, respectively, lend credence to my view:

Exhibit P2:

".... Aliyeanza kufa kati ya huyo shemeji yangu na mtoto wangu ni KULWA d/o MAKALWE, baada ya kuona hali ya mtoto wangu inazidi kuwa mbaya ndipo niliamua kutafuta wakata mapanga na kumuua KULWA d/o MAKALWE .... Hivyo mimi nakiri kwa hiari yangu kuwa ndiye niliyehusika kuwakodi wakata mapanga ili wamuue shemeji yangu ambaye niliamini ndiye aliyemroga mtoto wangu ... Hizo pesa Tsh 1,500,000/= nilizowapa wakata mapanga nilizipata baada ya kuuza dengu...."

Exhibit P3:

"Mnamo mwezi Novemba 2012 tarehe 5 majira ya saa 1900Hrs nikiwa Shilima Centre alikuja BODE s/o HAMIS na kunieleza kuwa kuna kazi ya kwenda kuua kwa kukata mapanga huko kijiji cha migongwa – Shilima. Tuliondoka tukiwa watu wanne ambao ni SULY s/o JINASA, YANGENI s/o? na BODE s/o HAMIS. Lakini kiongozi wetu kabisa ambaye ni BUDITILI s/o? yeye alibaki hakwenda eneo la tukio. Mtu aliyetukodisha katika kazi hiyo ni PETRO s/o SULE ambaye naye ni mkaazi wa Mwabayanda alitoa pesa kiasi cha Tsh 1,200,000/= milioni moja na laki mbili. Katika tukio hili mimi nilipewa pesa kiasi cha Tsh 50,000/= Elfu Hamsini tu. Mtu tuliyemuua ni mwanamke ambaye ni shemeji yake na PETRO s/o SULE anaitwa KULWA s/o MAKALWE.

Exhibit P4:

".... Sababu ya kutuma tumuue ni kwamba KULWA s/o MAKALWE amemuua mwanae JUMA s/o PETRO. Hivyo mimi niliongozana na BODY s/o HAMISI, MWANDU s/o HOTELI wote tukiongozwa na BUDITILI s/o MALIGANYA na katika tukio hilo nilipewa Tsh 200,000/= LAKI MBILI TU...."

Exhibit P5:

".... baada ya kunieleza hivyo na kudai kuwa kuna Tsh 1,500,000/= zilikuwa zimetolewa ambapo Butitili alinikabidhi Tsh 300,000/= hili nimkabidhi mwenzangu MWANDU s/o HOTEL Tsh 150,000/= kama mgao wake na mimi kubakiwa na Tsh 150,000/=. .... Baada ya kupewa ujira majira ya 19:00 hrs tulikwenda pamoja nyumbani kwa THOMAS s/o SULE ambapo tulimkuta THOMAS s/o SULE, mkewe na watoto wao waliokuwa

kwa nje, ingawa THOMAS s/o SULE na mkewe walikuwa karibu kwa nje, baada ya wao kuona mapanga au waligundua au kuhofu ndipo mke wake THOMAS na THOMAS naye waliofu na kukimbia THOMAS hata hivyo BUTITTILI na SULYU walimfuata na kumkata mapanga mimi kwa kuwa nilikuwa karibu nilimkata panga kichwani, sababu za mimi kumkata panga ni kutokana na mama huyu kupiga kelele na kutaka kukimbia ....."

What is deduced from the above excerpts is the accused's intention and preparedness in committing the murder and how that intention was perfected. It is an admission of their active participation in terminating the deceased's life. These confessions have been bolstered by ***exhibit P2*** which conveys the same consistent message. In their combined effect, these pieces of testimony, especially the choice of weapon used and the targeted parts of the body convey the same message as that gathered from ***exhibit P1*** which describes the cause of the deceased's death. It tells that a lethal weapon was used to inflict injuries which caused the deceased's death. Parts of the body targeted for the attack were carefully singled out knowing that they carry the human life.

Issues relating to malice aforethought as a prerequisite set out in section 200 of the Penal Code have featured in a plethora of decisions made by this Court and the Court of Appeal of Tanzania. One of such

instances is with respect to the decision in ***Makungu Misalaba v. Republic***, CAT-Criminal Appeal No. 351 of 2013 (unreported). In this case, the Court of Appeal, borrowed immensely from its own wisdom in ***Enock Kipela v. Republic***, CAT-Criminal Appeal No. 150 of 1994, (unreported). In the latter, the superior Bench observed:

> *".... 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."*

In ***Juma Ndege v. Republic***, CAT-Criminal Appeal No. 41 of 2001 (Mwanza-unreported), the Court of Appeal made the following succinct reasoning 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."

Significance of a confessional statement in proving the accused's malice has been accentuated in the decision of ***Shida Mwinuka v. Republic***, CAT-Criminal Appeal No. 209 of 2007 (both unreported), in which the Court of Appeal concluded as follows:

"All in all therefore, taking into account all the circumstances of the case; the details in the confessional statements given by the appellant of the killing, the weapon used and the injuries sustained, the post mortem examination report (Exh. P1) we have no flicker of doubt in our minds that the appellant killed the deceased with malice aforethought."

See also: ***Hatibu Gandhi and Others v. Republic*** [1996] TLR (CA).

Applying the principles accentuated in the foregoing passages, I hold no glimmer of doubt that the totality of the prosecution's evidence points to an irresistible conclusion that malice aforethought, an essential ingredient in a charge of murder, has been proved sufficiently, thereby satisfying the requirements set under section 200 of the Penal Code.

This holding draws a convergence with gentlemen and a lady assessors, all of whom were convinced that the accused's guilty has been established by the prosecution. Their view mirrors mine, based on the fact that the evidence adduced by the prosecution was strong and carried the probity that left a real and justified impression that it is the accused, and none else, who committed the offence with which they stand charged. Consequently, I convict them of murder, contrary to section 196 of the Penal Code. Following the conviction, the accused shall suffer death by hanging.

Right of appeal explained.

It is so ordered.

M.K. ISMAIL
JUDGE
03.08.2020

Date: 03rd August, 2020

Coram: Hon. M. K. Ismail, J

Mr. Kidando and Ms. Lilian Meli: State Attorneys for the Republic

Mr. Mussa Nyamwelo: Counsel for the 1st Accused

Mr. Geofrey Sangana: Counsel for the 2nd Accused

Ms. Jenipher Kahema: Counsel for the 3rd Accused

Mr. Emmanuel John: Counsel for the 4th Accused

Accused: (name) **1. Petro Sule**

2. Sulyu Jinasa

3. Mwandu Hoteli

4. Bode Hamisi @ Magushi – All are present under custody and **represented** by **Mr. Nyamwelo, Mr. Geofrey Sangana, Ms. Jenipher Kahema** and **Mr. Emmanuel John, Advocates.**

Interpreter, Leonard Tibinula: 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 **03.08.2020.**

ASSESSORS:

1. Mathayo Mahenda - 59 years

2. Fabian Mugwe - 58 years
3. Suzana Petro - 49 years

Mr. Kidando:

The matter is for judgment and we are ready.

Sgd: M. K. Ismail
JUDGE
03.08.2020

Mr. Sangana:

We on the defence are ready.

Sgd: M. K. Ismail
JUDGE
03.08.2020

Court:

Judgment delivered in open Court, in the presence of the accused persons their Counsel and Counsel for the prosecution, and in the presence of the Assessors, this 03rd day of August, 2020.

Right of Appeal explained.

M. K. Ismail
JUDGE

At Mwanza
03.08.2020