IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

(ORIGINAL JURISDICTION)

CRIMINAL SESSIONS CASE NO. 227 OF 2016

REPUBLIC

VERSUS

SITTA S/O JAMES

ALEXANDER S/O MASANJA @ MWAHU

JUDGMENT

20th – 22nd July, & 3rd August, 2020

ISMAIL, J.

Sitta James and **Alexander Masanja @ Mwahu**, the accused herein, are jointly and together charged with murder, contrary to sections 196 and 197 of the Penal Code, Cap. 16 [R.E 2002], to which they both pleaded not guilty.

Facts, as gleaned from the statement filed prior to and read by the prosecution at the preliminary hearing, are to the effect that the deceased,

a resident of Ibinzamata within the municipality of Shinyanga, met his death at the hands of the accused persons and another assailant who is not in Court. It was alleged that on 3rd July, 2012, at unknown hours at night, at Bukandwe village in Mbogwe District, in Geita Region, the accused persons, jointly with another assailant who is still at large, murdered Meshack s/o Kapesa. It was further alleged the accused persons and an assailant who is still at large beheaded the deceased. The body of the deceased, which was separated from the head was recovered on the roadside, along the Masumbwe – Kahama road, near Kanegele prison. The deceased's head was recovered a day later near a sand quarry site. After the incident, the accused persons, together with the elusive assailant disappeared. It was further alleged that in the evening that preceded his death the deceased was hosted by the 1st accused where it was alleged that the 2nd accused and the elusive assailant put up.

The murder incident was reported to police at Masumbwe police station who conducted a swoop which succeeded in apprehending the suspects who are the accused persons.

A Postmortem examination was carried out in respect of the body, and the doctor who performed it opined that cause of the death was due to severe head injury due to hamoerrhgic shock.

Commencement of the trial was preceded by appointment of three assessors who sat with me and aided me in the conduct of the trial. These were; Mathayo Mahenda, Fabian Mugwe and Suzana Petro. These assessors were present during the whole of the trial proceedings and performed their roles appropriately.

Going by the prosecution's account of facts, after reporting the incident, police officers visited the scene of the crime, drew a sketch map of the scene of the crime, took the body for a postmortem examination, and carried out a swoop that led to the arrest of the accused persons, on diverse dates. While the 1st accused was arrested at his Mzambarauni home in Masumbwe on 14th July, 2012, the 2nd accused testified that he was arrested in the morning of 16th July, 2012, as he was riding a bicycle along the Kanegele road, in Masumbwe. They were then conveyed to Masumbwe police station where they were questioned. Whilst the 1st accused recorded a cautioned statement in which he allegedly confessed to have killed the deceased, as contended by PW4, a police officer, 2nd

accused recorded did not record any statement or none was tendered in Court. The 1st accused's subsequent confessional statement made before the Justice of the Peace (PW 5) was not admitted as evidence owing to pregnant inconsistencies with the Guidelines and Instructions issued by His Lordship the Chief Justice on recording of extra-judicial statements. It is the 1st accused person's cautioned statement (***exhibit P3***) that contained his confession to the effect that he took part in killing the deceased, along with the 2nd accused person and a Mr. Paul whose whereabouts are yet to be established. Out of the facts read during the preliminary hearing, the accused persons denied everything except their personal particulars.

At the preliminary hearing, two exhibits were admitted. These are: the Report on Postmortem Examination (***exhibit P1)*** and a Sketch map of the Scene of the Crime (***exhibit P2***). The trial proceedings were treated to one exhibit which is the 1st accused's Cautioned Statements (***exhibit P3***).

The trial proceedings had a total of seven witnesses, five for the prosecution while two were for the defence. Breaking the ice for the prosecution was **Martha John Maganga,** who featured as PW1 in these proceedings. She testified that she is a retired teacher who is the deceased's widow, and a resident of Ibinzamata in Shinyanga Municipality.

She stated that the deceased Meshack Kapesa who died on 2nd July, 2012 was her husband who met his death by beheading. Recalling the incident, PW1 testified that she received news of the death through a police officer called Kapufi of Masumbwe police station, in Mbogwe, who asked a few questions before he broke the news that the Meshack Kapesa had been killed. Testifying on the deceased's movements, PW1 testified that the deceased left for Kahama on 29th June, 2012, where she went to pick raw materials for soap making. On his return he reportedly met Sitta Shamba James, the 1st accused, who convinced him to partner with him in the maize business sourced from Urambo, Tabora. Convinced of the viability of the business, PW1 withdrew TZS. 1,000,000/- from her bank account, out of which she gave him TZS. 970,000/-, as a startup capital for the business. She recalled that the deceased left for Masumbwe on 1st July, 2012, and that they communicated on his arrival, at which point he also had time to talk to the 1st accused who was the deceased's host. The latter confirmed that the deceased had arrived safely in Masumbwe and they were together. On 3rd July, 2012, the date on which the deceased and 1st accused planned to leave for Urambo, PW1 called but none of them could be reached. She stated that she kept on waiting for the elusive call until

she was informed of the death of the deceased. She testified that after the burial of the deceased's body she went to Masumbwe where she was led to identify the 1st accused person who was in custody in connection with the murder incident.

With respect to the 2nd accused, PW1 testified that he knew him as their neighbor who was a regular visitor to their home as he is related the deceased. She testified that she had even taught his children and grandchildren.

Next in the line was **Henry Alphonce,** PW2, who identified himself as the Ward Councilor for Bukandwe Ward who served at the time of the murder incident. He recalled that on 3rd July, 2012, he was at home and he was visited by a young man who informed him that he saw a dead person whose body was lying along the road from Masumbwe to Kahama, close to Kanegele prison. PW2 testified that he gathered people and visited the scene of the crime. Along the way, he saw two chopped fingers and then blood streams led them to the forest where the deceased's body was lying. He testified that body had been beheaded. He then informed the police at Masumbwe police station whose officers visited the scene of the crime. PW2 further testified that when the deceased was searched they found a

note book which had numerous phone contacts. They also found a voter's registration card and NHIF membership card, both of which bore the deceased's name. PW2 testified that they gathered that his name was Meshack Kapesa. It is at that point in time, PW2 testified, that the Police picked one number and called. Incidentally it was picked by one of the family members who was a woman and said that he knew the deceased. The body was taken to Masumbwe Police Station as the search for his head continued. He testified that on 4th July, 2012, the head was recovered at a sand quarry site. The same was handed to the police.

H. 811 D/C Busilili, testified as PW3 and he introduced himself as a detective police officer who is based at Masumbwe Police Station in Mbogwe District. He stated that on 3rd July, 2012, they received news that the deceased had been killed, following which he was instructed to carry out a swoop which would facilitate the apprehension of the perpetrators. He recalled that on 10th July, 2012, he was informed that Sitta James of Mzambarauni, Masumbwe, was the culprit. He testified that he laid a trap that eventually led to his apprehension at noon on 14th July, 2012.

PF 19817 A/Insp. Kalilo was PW4 who, on 17th July, 2012, was assigned with the responsibility of recording the 1st accused's cautioned

statement. The confessor was Sitta Shamba James who was in police custody. He stated that he took him from the lock up to the interview room. Having explained his rights, the accused stated that, the 1st accused said that he did not wish to have his statement recorded in the presence of his relative, friend or a lawyer. The witness stated that the 1st accused confessed that he was involved in the murder incident in which Meshack Kapesa was killed in Masumbwe, in the night of 3rd July, 2012, and that the perpetrators of the incident were himself, Alexander Masanja @ Mwahu and a certain Mr. Paul of Ushirombo. The 1st accused's statement was tendered and admitted as ***exhibit P3.*** After that, PW4, recalled, he took the 1st accused to the Justice of the Peace to record an extra-judicial statement in which his confession to the offence was re-affirmed.

The prosecution closed its case with **Alex Makoye,** PW5, whose role was to serve as the Justice of the Peace, who allegedly recorded the 1st accused's extra-judicial statement. As he led in evidence, his attempt to tender the extra-judicial statement was thwarted when the defence challenged its admissibility. Following the Court's decision not to admit the said statement, the witness's involvement was truncated by the prosecution who felt that he had nothing useful to offer.

The accused, who both gave their evidence on oath, denied having participated in killing the deceased at Bukandwe village, within Mbogwe district on 3rd July, 2012 or at all. They have denied, either, that they knew each other prior to their arrest, incarceration and eventual arraignment in Court in respect of these charges. The 1st accused, whose cautioned statement (***exh. P3***) is relied upon as the basis for their involvement in the murder incident, denied making any confession while in interrogation or in police custody or at all. He testified that he was only coerced into appending his signature on the papers whose contents were not made known to him. He stated that this happened after he had given particulars of his family members at gun point. He testified that he was threatened with a gun whose barrel was inserted into his mouth with a threat that he would be killed. With respect to the deceased's death, the 1st accused testified that he was informed of the deceased's death on 2nd July, 2012, at a coffee shop where he heard one person talking about it. The 1st accused stated that he was arrested at 11.00 am on 14th July, 2012, at his home and that he was conveyed to Masumbwe police station where he was joined by the 2nd accused who he had not met before. He denied knowing Meshack Kapesa or his wife, and that at no point in time did he make or

Kahama. He admitted that at the time of the murder incident he was at his Mkweni base and he heard about the deceased's death but could not attend the funeral, though he planned to do so in due course.

With respect to his arrest, he stated that he was arrested at 6.00 pm on 14th July, 2012 while he was riding a bicycle along Kanegele road. He denied that he knew or visited the 1st accused who he stated he met in the police cell. On how he got connected to the offence, the 2nd accused stated that he was informed while in police custody that the deceased's wife told the police that he suspected him because of his being based in Masumbwe, the area at which the death of the deceased occurred. He denied ever being in business association with the deceased or knowing what the deceased was engaged in. He admitted that on 15th July, 2012, he and the 1st accused were arraigned together in court in Ushirombo on the charges of the murder incident that he did not participate.

Customary of all criminal trials, once evidence of the prosecution and that of the defence is heard and taken, the issue which normally falls for the court's consideration and determination is, whether the prosecution's evidence has proved the charges against the accused, beyond reasonable doubt. This burden has been cast upon the prosecution through numerous

receive any call from the deceased's wife. He also denied knowing Paul, the alleged elusive assailant as much as he denied hosting any of the alleged assailants at his home. While acknowledging that some of the information in ***exh. P3*** may be true, the 1st accused stated that some of that information was given by him when he was held at gun point in the forest. He stated, however, that the rest of that information may be inaccurate or misleading. He maintained that the deceased was a person he had never met or heard of, and that the alleged business mission to Urambo, Tabora, was not his area of occupation. He stated that there may be several other Sittas one of whom may be the real culprit and not him.

The 2nd accused denied that he was involved in the murder incident in which Meshack Kapesa was killed. While admitting that he knew the deceased, his neighbor at his Ibinzamata residence in Shinyanga, he maintained that he and the deceased's family had no quarrels and they used to visit one another. To affirm the cordial relations with the deceased's family, the 2nd accused stated that the deceased's wife taught his children at Buhangija school where she served as a teacher.

He stated that he is a charcoal dealer who had set up a base in Mkweni forest in Masumbwe, Mbogwe district, 20 kilometres off the road to

decisions of this Court and the Court of Appeal. In ***Joseph John Makune v. Republic*** [1986] TLR 44, observed:

> *"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 ...."*

This ominous responsibility of the prosecution was re-stated, yet again, in ***George Mwanyingili v. Republic***, CAT-Criminal Appeal No. 335 of 2016 (Mbeya-unreported), in which it was underscored 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."*

As unanimously held by both parties during trial, none of the witnesses for the prosecution adduced direct evidence to have seen the accused committing any act that culminated into the deceased's death. As such, evidence that the prosecution relies on is partly circumstantial, and partly confessional. Circumstantial evidence in this case arises from the

testimony adduced by PW1, Martha John Maganga, who testified on how the 1st accused met the deceased, arranged the business trip and the communication that came after the deceased left for and arrived at Masumbwe. It meant that the deceased met his death while he was with the 1st accused as his host. This means, in the mind of PW1, that death of the deceased occurred while he was in the control of the 1st accused as a host. It is for this reason that the murder incident in which the deceased was ghastly killed drew the inference and impression, by the prosecution, that the accused persons were the culprits and perpetrators of the incident. The other form of testimony which draws inference of culpability arises from the testimony of PW3, P/C Busilili who testified to the effect that the 1st accused was said to have moved the family from Mzambarauni and that he was disposing of his house. In the prosecution's view, this was an act of evasion which is consistent with culpability.

In law, an accused person's guilt may be founded and conviction in respect of an offence can be sustained based on circumstantial evidence. To be able to do that, however, such evidence must be capable of irresistibly leading to no other conclusion than that it is the accused - and no one else - who committed the crime. This means, in other words, the

inculpatory facts, as adduced by the prosecution, must be incapable of any other interpretation than that the person in the dock, the accused, is guilty of the offence charged. This position is as old as criminal law itself and it traces its history a couple of centuries ago. Its invaluable importance has been restated often times, through in a litany of decisions pronounced across jurisdictions, including our very own.

In ***R v. Sadrudin Merali,*** Criminal Appeal No. 220 of 1963 (unreported), the High Court of Uganda (Sir Udo Udoma, C.J), made the following groundbreaking observation:

> *"... It is no derogation to say that it was so for it has been said that circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by undersigned coincidence is capable of proving a proposition with the accuracy of mathematics".*
> *Expressing identical sentiments over a century before in 1850 Henry D. Theory the American transcendentalist best known for his ant-materialist philosophy had this to say:*
> ***"some circumstantial evidence is very strong, as when you find a trout in the, milk".***
> *The dicta are as true in this third millennium as they were in the second millennium and command the allegiance and respect of us all."*

In ***Seif Seleman v. Republic***, Criminal Appeal No. 130 of 2005, CAT (unreported) the Court of Appeal reasoned as follows:

> *"Where evidence against an accused person is wholly circumstantial, the facts from which an inference adverse to the accused is sought to be drawn must be clearly connected with the facts from which the inference is to be inferred. In other words, the inference must irresistibly lead to the guilt of an accused person."*

A much wider perspective to the reasoning in ***Seif Seleman*** (supra) was accentuated in a later decision in ***Sadiki Ally Mkindi v. The D. P. P.***, Criminal Appeal No. 207 of 2009 (Arusha Feb, 2012), wherein the Court of Appeal laid down elaborate rules on circumstantial evidence:

> *"We would therefore set out the general rules regarding circumstantial evidence in criminal cases as elucidated in* ***SARKAR ON EVIDENCE****, Fifteenth Edition, Re-print 2004 at pages 66 to 68. These are:*
>
> 1. *That in a case which depends wholly upon circumstantial evidence, the circumstances must be of such a nature as to be capable of supporting the exclusive hypothesis that the accused is guilty of the crime of which he is charged. The circumstances relied upon as*

establishing the involvement of the accused in the crime must clinch the issue of guilt.

2. *That all the incriminating facts and circumstances must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other hypothesis than that of his guilt, otherwise the accused must be given the benefit of doubt.*
3. *That the circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected with the fact sought to be inferred therefore.*
4. *Where circumstances are susceptible of two equally possible inferences the inference favoring the accused rather than the prosecution should be accepted.*
5. *There must be a chain of evidence so far complete as not to leave reasonable ground for a conclusion therefrom consistent with the innocence of the accused, and the chain must be such human probability the act must have been done by the accused.*

6. *Where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated.*
7. *Circumstances of strong suspicion without more conclusive evidence are not sufficient to justify conviction, even though the party offers no explanation of them.*
8. *If combined effect of all the proved facts taken together is conclusive in establishing guilt of the accused, conviction would be justified even though any one or more of those facts by itself is not decisive."*

See also: ***Elisha Ndatamye v. Republic,*** CAT-Criminal Appeal No. 51 of 1999 Mwanza (unreported); ***Simon Musoke v. R*** (1958) E.A 715 at p. 718; and ***Mswahili v. Republic*** [1977] *LRT 25;* ***Bahati Makeja v. Republic,*** CAT-Criminal Appeal No. 118 of 2006; ***Mathias Bundala v. Republic,*** CAT-Criminal Appeal No. 62 of 2004; ***Wallii Abdallah Kibutwa & 2 Others v. Republic,*** CAT-Criminal Appeal No. 127 of 2003 (all unreported).

A thorough review of the testimony of the prosecution, reveals that the testimony that falls in the category of circumstantial evidence is that which is contained in the testimony of PW1, which, as stated earlier on, drew the inference by the prosecution that the accused persons were the culprits and perpetrators of the incident. The other is that of PW3 which attested to the 1st accused's abrupt decision to relocate from the village and the efforts to alienate his house by way of sale.

Gauging from this testimony, we need to ask if the testimony of PW1 and PW3 lays down circumstances capable of supporting the exclusive hypothesis that the accused, in this case, one or both of the them, are guilty of the offence they are charged with. My unflustered answer to this question is in the negative. Nothing in the said passage comes close providing incriminating facts and circumstances which would be said to be incompatible with the innocence of the accused. None of it, alone, can ever draw any hypothesis of guilt. PW1 could not state, with any semblance of precision, if death of the deceased occurred at the instance the accused persons. In fact, she stated during cross-examination that she, up until her day in court, did not know her deceased husband's killers. As for PW3, the position is even gloomier. He did not provide anything useful out of his

suspicion that stems from the 1st accused's hurried disposal of his property and relocation from his Mzambarauni home. This testimony, alone, has failed to establish circumstances which provide any link or ability to knit the accused to a common intention. Nothing definite or decisive was adduced to enable this Court to draw a conclusion that this testimony falls in the threshold which is propounded in ***Sadiki Ally Mkindi*** (supra) or any other cited authorities.

Further scrutiny of the prosecution's case appears to take the trajectory that introduces the principle of the "*last person to be seen with the deceased*", the intention being to inculpate the 1st accused for what was testified by PW1, that he was the last person who was seen with the accused person. While this principle is quite renowned in criminal proceedings, a serious caution ought to be exercised in its application. The legal position, as it currently obtains, is to the effect that, PW1's narration, is not sufficient evidence to hold 1st accused guilty of the murder of a deceased. I am fortified in my view having been inspired by the decisions in a number of cases. In ***Rajwali v. State*, A.I.R** 1959 J. SCK 66 at P. 67: 1959 Cr. L.J. 839, the Supreme Court of India had this to say:

"In a murder trial the circumstances that the deceased was last seen with the accused and the fact that after the murder the accused disappeared may be the circumstances which may create great suspicion against the accused but they cannot be sufficient to hold accused guilty of murder of the deceased. In a criminal prosecution the burden of proof, on the whole, remains, on the prosecution and in order to succeed the prosecution must produce evidence to substantiate its case. Normally it cannot take advantage of the weakness of the defence."

In an earlier decision of ***In re Dauget Saitaya*, 1955 W.R. 863,** the accused was charged with the murder of the woman who had been living with him as his wife. The circumstances established were that he and the deceased were seen together on the day of the occurrence. He subsequently made himself scarce in the neighborhood. These circumstances were held to be insufficient to sustain a conviction of the accused for murder.

A stance, similar to the foregoing was taken in ***Richard Matangule and Another v. Republic*** [1992] TLR 5 (CA), at p.9 in which the Court held as follows:

"...the appellants were the last known persons to have been with the deceased. This fact, without any doubt, casts a very

good suspicion on them. But this in is itself is not conclusive proof that the appellants killed the deceased".

It is quite fair, in view of the cited decisions, to hold that PW1's testimony would not solely be the basis for holding the 1st accused responsible for the death of the deceased. The resultant consequence of this is to render the circumstantial evidence adduced PW1 and PW3 probatively deficient to base a finding of guilt thereon. In such circumstances, the only legitimate and plausible conclusion is to give benefit of the doubt to the 1st accused in respect thereof.

Having disposed of the issue on the weight of circumstantial evidence, the next question is whether there is any other evidence, let alone or together with the circumstantial evidence, worthy of consideration in determining guilt or otherwise of the accused. The answer to this question is in the affirmative. It is mainly the testimony PW4 and ***exhibit P3***, which is the 1st accused's cautioned statement. This is the testimony on which the prosecution has put all its hope. ***Exhibit P3*** was tendered when PW4 took the witness box and it was admitted without any opposition from the defence. While admissibility of an exhibit is one thing and weight to be attached thereto is quite another, my unenviable task, to

be performed in earnest involves making sense of the alleged confession with a view to seeing if the same presents a credible case that inculpates the accused persons. A dispassionate review of the confessional statement brings a singular message. This is to the effect that the accused persons were jointly involvement in the death of the deceased, and that the death was allegedly pre-meditated and executed by none other than the accused persons themselves, the main architect being the 2nd accused who is alleged to owed money by the deceased. The said exhibit gives a blow by blow account of the build up to the event and the manner in which execution of the plan apparently hatched by the 2nd accused was carried out to the perfection. This means that the 2nd accused's involvement in the instant matter is solely linked by ***exhibit P3***, since the prosecution has not appraised the Court as to why no statement was recorded and tendered in respect of the 2nd accused person. In law, this is permissible under section 33 (1) of the Evidence Act (supra) which provides as follows:

> *"When two or more persons are being tried jointly for the same offence or for different offences arising out of the same transaction, and a confession of the offence or offences charged made by one of those persons affecting himself and some other*

of those persons is proved, the court may take that confession into consideration against that other person."

But before I delve into the depth of the impact of the confession the 1st accused on the 2nd accused, it behooves me to assess the probative value of exhibit P3 to the prosecution's case against the 1st accused person.

As stated earlier on, PW4 serves 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 PW4 is to the effect that the accused made a confession that gave an eloquent blow by blow account on how he hosted the deceased and two other persons, including the 2nd accused person who masterminded the killing of the deceased. He also narrated how on 1st July, 2012, he met the 2nd accused who informed him that he had seen the deceased and how the 2nd accused came to his home on 2nd July, 2012, and was later joined by the deceased who later slept in his house only to

be taken by the 2nd accused and Paul to a place where they were later joined by the 1st accused and, at the instance of the 2nd accused, they attacked and beheaded the deceased.

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. The law is quite clear that a confessional statement made voluntarily by an accused person to a police officer may be proved against him. This requirement is enshrined in section 27 (1) of the Evidence Act, Cap. 6 [R.E. 2019]. It is in realization of this trite position, that the prosecution tendered a cautioned statement (***exhibit P3***) allegedly extracted from the 1st accused person on 16th July, 2012. This statement was recorded by PW4, and was admitted with ease as its admissibility was not challenged by the defence. But, as intimated earlier on, while admissibility of ***exhibit P3*** was not contested, what matters the most is the probative value or weight that it ought to be attached to. This is in conformity with the holdings in ***Abdul Farijala & Another v. Republic***, CAT-Criminal Appeal No. 99 of 2008; and ***Hassan Said Nundu v. Republic***, CAT-Criminal Appeal No. 126 of 2002 (both

unreported), wherein the Court of Appeal underscored that since a confessional statement is essentially an admission, reliance on it must only be placed 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, then, would qualify the statement as an admission within the meaning ascribed to it under section 3 (1) of the Evidence Act (supra).

A similar issue arose in ***Juma Magori @ Patrick & 4 Others v. Republic***, CAT-Criminal Appeal No. 328 of 2014 (unreported), in which the question of ascertainment of confessional statements amounting to admission was at stake. In arriving at a conclusion in respect thereof, superior Court drew an inspiration from the decision of the Supreme Court of Nigeria in ***Ikechukwu Okoh v. The State*** (2014) LPER-22589 (SC). The latter quoted with approval, the UK decision in ***R v. Sykes*** (1913) 1 Cr. App. Report 233, wherein key principles that should be applied in determining probity and weight to be accorded to confessional statements were propounded. The Court of Appeal extracted the following excerpt:

> *"The questions the court must be able to answer before 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 an effort to cement the significance of this imperative 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].

Construing 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. Excluding the general narrations as recorded from the accused person, the crucial part in ***Exhibit P3*** is quoted as hereunder:

> *"... Nakumbuka kwamba mnamo tarehe 01/7/2012 kwenye muda wa saa 16:00 jioni mimi nikiwa porini Mkweni nakata miti ya*

kuchomea mkaa, alikuja huyo MASANJA @ MWAHU, akitokea Mzambarauni, kuuza mkaa na kunieleza kuwa amekutana njiani na MESHACK KAPESA na kumweleza kuwa atakuja kwangu siku ya jumatatu tarehe 02/7/2012. Mimi nikamkubalia tu. Ndipo siku hiyo ya jumatatu tarehe 02/7/2012, mimi na MASANJA @ MWAHU tulirudi nyumbani kwenye saa 17:00 jioni, tukitokea huko porini kuchoma mkaa. Hapo tulikaa nyumbani na ilipofika saa 20:00 usiku tulianza kula chakula cha jioni na ndipo wakati tunakula alikuja MESHACK s/o KAPESA, hapo naye alitengewa chakula na kuanza kula na baada ya kumaliza kula tuliongea kidogo na ndipo baada ya muda kidogo mke wangu aliwatayarishia sehemu ya kulala, katika nyumba aliyokuwa akilala MASANJA @ MWAHU. Baada ya mke wangu kumaliza kutandika niliwapeleka kwenda kulala: Na ndipo muda kidogo MASANJA @ MWAHU alifata tena na kuniambia kuwa ameshindwa kulala humo ndani kwani kunguni wamezidi sana, na ndipo akaomba waende kulala sehemu nyingine na huyo MESHACK s/o KAPESA. Hapo mimi nilikuwakubalia tu kasha huyo MASANJA @ MWAHU, MESHACK s/o KAPESA na PAUL s/o? waliondoka hapo nyumbani na kwenda kulala huko waliposema na muda huo ilikuwa kama 22:00 usiku. Ndipo kabla ya kupitiwa na usingizi mara nilimsikia MASANJA @ MWAHU akiniita tena na nilipotoka nje aliniambia twende huku, na ndipo tulipoenda naye na tulifika sehemu moja hivi na kuwakuta huyo PAUL akiwa amekaa na MESHACK s/o KAPESA. Hapo MASANJA @ MWAHU aliniambia kuwa huyo MESHACK s/o KAPESA namdai pesa zangu, hivyo leo lazima tumshughulikie sana na hata kumuua ndipo hapo MASANJA @ MWAHU alimwambia

PAUL amkamate MESHACK s/o KAPESA na kweli alimkamata na kumuangusha chini na mimi niliambiwa na MASANJA nimshikilie miguu, kweli tulimshikilia na ndipo mimi niliona MASANJA na PAUL wakimkata shingo MESHACK s/o KAPESA na walimkata kwa panga yaani walimchinja kabisa na kutoa kichwa. Mimi kwa kweli kuona hivyo ikabidi nikimbie kwenda nyumbani kwani niliogopa sana. Baada ya kufika nyumbani muda kidogo na kuniambia kuwa kama nitasema hiyo siri watakuja kunichinja mimi na watoto wangu na waliniambia nisiseme kwa mtu yeyote yule. Hapo walianza kufungasha mizigo yao na kasha waliondoka hapo kwanza na kuniambia nilale nisitoke.... Kwa kweli nasema kuwa hata mimi nilishiriki kabisa kumuua MESHACK s/o KAPESA pamoja na MASANJA na PAUL ingawa mimi nilishikilia miguu wakati akichinjwa na kwa kweli walitenganisha kiwiliwili na kichwa. Na pia tuliweza kunyang'anya pesa Tsh 900,000/= alizokuwa nazo na tuligawana kila mtu Tsh 300,000/=...."

The quoted part of the 1st accused's confession takes into account, as guided in ***Emmanuel Lohay's case,*** the fact that a confessional statement can only be relied on to prove an offence if the same shows that the accused has admitted commission of all ingredients of the offence he stands charged with. In respect of a murder charge, such a 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. That is what ***Exhibit P3*** has done. It carries a

fabulous story that gives a detailed account of how the deceased met his death and the culpable role the 1st accused and other assailants, including the 2nd accused, played in the death of the deceased. The level of material particularity demonstrated by the accused in the ***exhibit P3*** is remarkable and meticulous. It tells what the accused persons did before, during and after they heinously brought the deceased's life to an abrupt end. The 1st accused's coherent description of the role he played in the death of the deceased has left little or no speck of doubt that death of the deceased was planned and executed by the killers that he hosted and that his involvement in the executing the plan was actual and significant.

The manner in which the deceased's life was robbed was not veiled in the 1st accused's confession. It was through beheading that saw the head completed separated from the rest of the body, the same way PW1 and PW2 described in their testimony, and as lucidly expressed in ***exhibit P1***. PW2 stated how the body of the deceased was recovered, headless, only for the head to be recovered a day later and at a different location, some distance from where the body was found lying. The style adopted by the assailants to execute the killing left no doubt as to what they intended to achieve. It was an outright killer attack.

There is also a question of the accused's actions or behavior after the incident as described by PW3. These relate to the accused's sudden disappearance, relocation of the family and attempt to dispose of the house. All these portrayed the accused, especially the 1st accused, as culpable persons who chose to separate themselves from the innocent and evade the long arm of the State. Every action was so hurried that it raised concerns which led to the suspicion that the police had about his movements.

The accused maintained that they did not kill the deceased, and that the confessional statement relied upon was obtained in a manner that was marred by trickery and threats of tortured. In the case of the 1st accused, he has denied knowing or ever meeting the deceased at any time before his death that he was not involved in. He has also denied that he knew the 2nd accused any time prior to their arrest, incarceration and arraignment in court. Denied, as well, is the contention that he was about to dispose of his house in order to flee to an undisclosed location. On his part the 2nd accused has also denied participating in the killing. Admitting that he knew the deceased, he denied meeting him at the 1st accused's house in Mzambarauni. He, too, said he did not know the 1st accused. He admitted

that he heard about the death of the deceased. I find that this defence to lacks the spine that can make it stand. The allegation of torture was not raised when the prosecution was seeking to have ***exhibit P3*** tendered and admitted as evidence. The denial was so casual and I am not persuaded that such denial would create any impact to the defence. I hold the view that 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.

Speaking of reliance on the confession, yet again, one more test is whether such confession carries with it a true account of facts. The answer to this question can be obtained by reviewing ***exhibit P3*** to see if what is revealed is truly what happened with respect to the deceased's demise. Thus, even if we were to give credence, just for the sake of argument, to the 1st accused's contention that ***exhibit P3*** was procured involuntarily, the same would still be bound by the incisive principle restated by the Court of Appeal in many a decision, one of which is ***Hemed Abdallah v. Republic*** [1995] TLR 173, in which 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 ***Michael Luhiye v. R*** [1994] TLR 181).

The foregoing decision borrowed a leaf 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.***"

The application of this principle has been wide and consistent in determining if confessions sought to be relied to secure convictions are a set of truth of what the accused actually committed (See the case of ***Umalo Mussa v. R***, CAT-Criminal Appeal No. 150 of 2005 [unreported]). With respect to the testimony of PW4 and ***Exhibit P3***, my unflustered conclusion is that what is contained in the accused's confession is nothing but absolute truth on how the deceased was killed and who the

perpetrators of the incident were. The testimony presents a revelation of what was otherwise the most veiled story that the accused never shared with anybody else. 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. My assessment of the defence testimony is that it was full of evasive denials even on basic issues.

The defence evidence was not only less convincing, but also contaminated with some fits of blatant lies which weakened the defence case. For instance, while PW1 testified that she spoke with the 1st accused who assured her that the deceased was with him at his Mzambarauni home, the 1st accused has denied all of that, just as he denied that he spoke with PW3 about sale of his house and that the price had been agreed. This statement alone proved that his side of story is nothing but a bunch of fabricated set of words. The accused had no clue that his indulgence in needless lies had a suicidal effect. In ***Felix Lucas Kisinyila v. Republic***, CAT-Criminal Appeal No. 129 of 2009 (unreported), it was

held that *"lies of the accused person may corroborate the prosecution's case."* This is what can be said of the 1st accused's conduct. He, unknowingly, laid himself a trap that he was unable to let himself off it. Accordingly, I am of the view exhibit P3, is an admission which has what it takes to be relied upon in determining guilt or otherwise of the accused persons.

Having disposed of this critical issue, I revert back to the nagging question of whether the 1st accused's confession can be the basis of determining the 2nd accused's culpability. As stated earlier on, exhibit P3 is the only testimony that creates a link between the 2nd accused, the co-accused, with the offence with which they are charged. As indicated above, section 33 of the Evidence Act (supra) is amenable to that. This legal position has been underscored in many decisions across jurisdictions. The Supreme Court of India (Justice M.B. Shah and R.P. Sethi), in Criminal Appeal Nos. 238-239 of 2001, laid down circumstances under which a confession of a co-accused may be admitted. These are:

(i) More persons than one are being tried jointly;

(ii) The joint trial of the persons for the same offence;

(iii) *A confession made by one of such persons (who are being tried jointly for the same offence; and*

(iv) *Such a confession affects the maker as well as such persons (who are being tried jointly for the same offence); and*

(v) *Such a confession, if proved in court, the court may take into consideration such confession against the maker thereof as well as against such persons (who are being jointly tried for the same offence).*

Noteworthy, however, is the fact that the latitude provided in the cited provision is not without limitation. Sub-section 3 is to the effect that, as a general rule, no conviction should be solely based on a confession of a co-accused. This requirement has been emphasized in various decisions of the Court and the Court of Appeal. In ***Republic v. ACP Abdallah Zombe & 12 Others***, HC-Criminal Sessions Case No. 26 of 2006 (DSM, unreported) this imperative requirement was stated thus:

> *"It is also a truism that whether in the form of a confession, or any other types of evidence of a co-accused, to ground a conviction, it must be corroborated as a matter of law (in case of confessions) (s 33 (2) of the Evidence Act) or of practice in any*

other types of evidence of a co-accused (see Pascal Kitigwa v. R (1994) TLR (CA)."

The exception to the general rule was stated in ***Pascal Kitigwa*** (supra). The Court of Appeal stressed the fact that, it is not illegal to convict an accused person based on an uncorroborated testimony of the co-accused, provided that the convicting court warns itself of the dangers of relying on such testimony. Corroboration may be in the form of circumstantial evidence or based on the accused's conduct or words. The superior Court went ahead and held thus:

"However, as correctly observed by the trial magistrate and the learned judge, even though the law is such that a conviction based on uncorroborated evidence of an accomplice is not illegal, still as a matter of practice, the then Court of Appeal for Eastern Africa and this Court have persistently held that it is unsafe to uphold a conviction based on uncorroborated evidence of a co-accused. In this case, the trial magistrate as well as the learned judge on first appeal apart from warning themselves of the danger of convicting on uncorroborated evidence of the second accused (DW2), went further to look for other evidence implicating the appellant. It is common ground that corroborative evidence may well be circumstantial or may be forthcoming from the conduct or words of the accused."

In ***State v. Nalini***, Criminal Appeal No. 325 of 1998 a 3-Judge Bench of the Supreme Court of India considered that question and it was unanimously held that, what weight should be attached to such evidence is a matter in discretion of the court, and as a matter of prudence, the court may look for some more corroboration if confession is to be used against a co-accused.

My scrupulous review of the testimony as presented by the prosecution does not give me any semblance of the feeling that there exists any circumstantial evidence or any inference that the 2nd accused's conduct or words were consistent with the culpability which can be said to corroborate the testimony of the 1st accused person regarding his involvement in the murder incident. Not even the testimony of any of the prosecution witnesses can be said to have injected any corroborative influence in the said co-accused's confession. This means that guilt of the 2nd accused has to be decided by the 1st accused's confessional statement alone. Assessing the dangers that are associated with such reliance, I get the impression that doing that can only be unsafe and fraught with dangers of convicting the 2nd accused while doubts still linger in my mind. At this point, I join hands with the 1st assessor who held that guilt of the

2nd accused which solely depended on exhibit P3 has not been established at the required standard of proof. Consequently, I find the 2nd accused person not guilty of the charged offence and I acquit him. My finding is premised on the following principles as elucidated and quoted from the case ***Republic v. ACP Abdallah Zombe*** (supra):

(i) *The burden of proof in criminal cases generally is always on the prosecution and the standard is beyond reasonable doubt. When the said burden shifts to the accused, the standard is on, a balance of probabilities (See **OKARE v R** (1955) EA 555, **SAID HEMED v R** (1987) TLR 117, **MOHAMED SAID MATULA v R** (1995) TLR. 3; and **(MSWAHILI v R** (1997) LRT. 25).*

(ii) *A mere aggregation of separate facts all of which are inconclusive in that they are as consistent with innocence as with guilt, has no probative value (**CHHABILDAS D. SUMAIYA v. REGINA**(1953) 20 EACA 14.*

(iii) *That a conviction should always be based on the weight of the prosecution case and not the weakness of the defence case.*

(iv) *It is not the quantity but the quality of the evidence which matters in deciding on the guilt or innocence of an accused person.*

(v) *Suspicion, alone, however strong cannot be the basis of a conviction (**SHABANI MPUNZU @ ELISHA MPUNZU v R** (Criminal Appeal No.12 of 2002 (Mwanza) unreported)."*

Having disposed of the matter with respect to the 2nd accused, I now revert to the second but equally important matter. This relates to ascertainment on whether there is evidence to prove that the 1st 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. In a typical sense, this 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***).

Simply stated, 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 is 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."

In this case, malice aforethought arises from the accused's own account of facts, through ***exhibit P3***, the testimony of PW4 and ***exhibit P1***. Whilst ***exhibit P1*** provides details of the injuries sustained by the deceased and body parts which were targeted to instantly terminate his life, the 1st accused's confessional statement confirms that death of the deceased was planned or pre-meditated, and that the accused participated at the stage of its execution. Part of the cautioned statement states as follow:

".... Pia nakumbuka kabla ya kufanya tukio hilo siku ya tarehe 02/7/2012 jumapili niliweza kuongea na mke wake MESHACK s/o KAPESA kupitia simu yangu .... Baada ya kuwa yeye amepiga kuulizia kama MESHACK s/o KAPESA amefika kwangu na mimi nilimweleza kuwa amefika. Na hata jumatatu tarehe 03/7/2012

pia tuliongea naye kwenye saa 22:00 usiku, kabla ya kwenda kumuua. Kwa kweli sisi ndiyo tumehusika kumuua huyo MESHACK s/o KAPESA, ... na kwa kweli marehemu alifikia kwangu.... Na kwa kuwa wao walikimbilia porini na mimi niliamua kukimbia na kweli nilianza kuhamisha mizigo na familia yangu ndipo tarehe 14/7/2012 saa 14:00 mchana nilikamatwa nikiwa nataka kuuza kiwanja ili nitoroke ...."

The 1st accused has not stated why the deceased and the assailants had put up at his residence but the inference that may be drawn is that the deceased's arrival had been alerted to other assailants, knowing that he had money that the 1st accused admits they robbed him of after they killed him. This reveals that there was a premedltation among the assailants and this is what proves malice aforethought. The 1st accused's account of how the deceased was killed matches the description given in ***exhibit P1*** and PW2 to the effect that the deceased had his head chopped.

Significant, as well, is the fact that after the incident the 1st accused relocated his family and their belongings to a secret location as he was hurriedly working to dispose of his house.

These conducts marry so well with the established position of the law with respect to proof or inference of malice aforethought. 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."

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

*"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."*

I am profoundly indebted to the foregoing decisions and hold that the 1st accused's own account of facts, through ***exhibit P3***, testimony of PW4, description of ***exhibit P1***, and the 1st accused's conduct shortly before the incident and subsequent to the incident, collectively, provide a justified conclusion that malice aforethought has been sufficiently proved as an essential ingredient of the offence of murder, and that the

mandatory requirements set out under section 200 of the Penal Code have been met.

The totality of these finding brings me to a point of convergence with all the assessors, who unanimously held the view that the 1st accused person is guilty of the charged offence of murder.

Consequently, I convict the 1st accused of murder, contrary to section 196 of the Penal Code. Accordingly, the 1st accused shall suffer death by hanging.

It is so ordered.

Right of appeal explained.

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. Erick Mutta: Counsel for the 1st Accused

Mr. Mwanaupanga: Counsel for the 2nd Accused

Accused: (name) **1. Sita James**

2. Alexander Masanja – All are present under custody and **represented** by **Messrs. Mutta,** and **Mwanaupanga, 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:

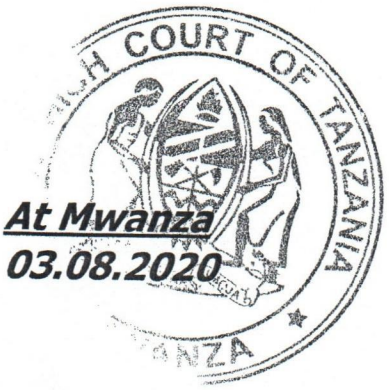
The matter is due for judgment and we are all ready.

Sgd: M. K. Ismail
JUDGE
03.08.2020

Court:

Judgment delivered in open Court, in the presence of the accused, their Counsel and the Counsel for the prosecution, and in the presence of assessors and Mr. Leonard B/C, this 03rd August, 2020.

Right of appeal explained.



M. K. Ismail
JUDGE

At Mwanza
03.08.2020