

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
CRIMINAL SESSION CASE NO. 54 OF 2020**

REPUBLIC

VERSUS

MSIGWA MATONYA.....1st ACCUSED
MIANDA SALUWAA MLEWA @WHITE.....2nd ACCUSED
PAULO JAILOS MDONONDO.....3rd ACCUSED
LONGISHU SEMALIKI LOSINGO.....4th ACCUSED
JUMA HAMIS KANG'UNGU.....5th ACCUSED
JOHN IKONDYA MAYUNGA @NGOSHA.....6th ACCUSED

JUDGMENT

Date of Last Order: 10/08/2020

Date of Judgment: 17/09/2020

S.M. KULITA, J.

The above named Accused Persons stand charged with Murder contrary to Sections 196 and 197 of the Penal Code [Cap 16 RE 2002]. It is alleged that on the 3rd day of November, 2013 at Kibwegere Msakuzi, Mbezi area within Ubungo District in Dar es Salaam Region the Accused Persons did cause death of one

Edmund Sengondo Adrian Mvungi. The Accused persons pleaded **Not Guilty** to the charge.

During trial the prosecution paraded a total number of 16 witnesses. As well they tendered the following exhibits marked No. 1 to 15;

1. Sketchmap of the scene (Exh. P1)
2. Death Certificate for Edmund Sengondo Adrian Mvungi (P2)
3. Certificate of Seizure (Exh. P3)
4. Handing Over Report for the Exhibits tendered at Kisutu RM's Court (Exh. P4)
5. Pistol make Revolver (Exh. P5)
6. The 21 Ammunitions, 5 parcels of Gun Powder, 2 Ammunitions Connector @tambi – (Exh P6 collectively)
7. Will made by Helene Eichers Mbagala (Exh. P7)
8. Caution Statements for all Accuseds (Exh. P8 – P13)
9. CD/DVD involving the 6th Accused (Exh. P 14)
10. Medical Examination Report for the late Dr. Edmund Sengondo Mvungi (Exh. P 15).

The Accused Persons had no witnesses to call, as such they testified sole. The Prosecution side was represented by Mr. Credo Lugaju -Senior State Attorney, Ms. Lilian Rwetabura -State

Attorney, and Ms. Veronica Mtafya- State Attorney. The Accused Persons were represented by the following Advocates;

Ms. Hashim Mziray and Nasra Mashaura for the 1st Accused,

Mr. Faraji Mangula for the 2nd Accused,

Mr. Kelvin Isack for the 3rd Accused,

Ms. Modesta Medard for the 4th Accused,

Ms. Dyness Simkoko and Ms. Caroline Kigembe for the 5th Accused,

Ms. Abbrietty Kivea for the 6th Accused.

Ms. Janevera Lema and Ms. Mwadawa Selemani; Assessors were there to assist the court.

The 1st witness for prosecution one Anna Sengondo Mvungi (PW1) testified that she is the deceased's wife. She said that on the material date, 03/11/2013 at the night hours, while sleeping with her husband in their residential house at Kibwegere Msakuzi, Mbezi together with her family they heard the ammunition hit which was followed by the inversion of bandits in their residential house. She shouted for help but there was no respond. Upon making a follow up she met the bandits about 6 in number along the corridor. They were holding machetes. She said that the said bandits demanded money from her, she went into her bedroom and gave them an

envelope with Tsh. 2,000,000/= inside. She was then detained and kept her lying down. PW1 said that the bandits searched the room and found a pistol in the bed's drawer. She stated that the said pistol was the property of one Hellen Eshers who was her late husband's client in the legal issues. The said client is a deceased and the pistol was there for the probate administration purposes. She said that it was black colored with two barrels. PW1 further stated that apart from the money and pistol the bandits also robbed the deceased's laptop and 4 mobile phones. She stated that she never identified any of them. While the bandits had already left she woke up and found her husband sitting in the kitchen. He was bleeding and unconscious. He had a big cut wound on his head. He also had a swell on his face. They took the victim to Tumbi Hospital at Kibaha where the wound was snitched, he was then referred to Muhimbili National Hospital. He was admitted at the Intensive Care Unit (ICU) for three days and transferred to South Africa for further treatments. PW1 said that the victim was escorted by their family member namely DEO MWARABU. She said that on the 12/11/2013 she was informed that her husband had passed away.

In the cross examination by the 6th Accused's, Ms. Abbrietty Kivea Advocate PW1 stated that apart from being a Lecturer at the

University of Dar es Salaam the deceased was also the practicing Advocate.

The 2nd witness one SEME ASUKILE MWAIKENDA (PW2), a Police Officer at Kimara Police Station in Dar es Salaam testified that by 03/11/2013 he was the head for the Criminal Investigation (OC-CID) for Kimara Police District. He said that on that day while on duty at Kimara Police Station at about 0500 hours he received the information that there was Armed Robbery incident at the residential premise of Dr. Mvungi. He went thereto with other police officers. Thereat he visited the scene and drew a sketch plan of the scene. PW2 said that he found the kitchen door broken. He also found blood stains in the kitchen. The witness was shown the sketch map that he had drawn and identified it. The said map was received and admitted as Exhibit P1 during the Preliminary Hearing. In the cross examination by Mr. Hashim Mziray, Advocate for the 1st Accused the witness stated that by the time he went to the scene the victim had already been taken to hospital.

F 59 D/Cpl Revocatus Andrew Kamugisha (PW3), a Police Officer attached in the Criminal Investigation Department in the RCO's office at Zanzibar testified that by 2013 he was working in the Task Force Section in the RCO's office for Kinondoni Police Region. He

said that while he was on duty at Oysterbay Police Station on the 04/11/2013 the Regional Police Commander assigned him and other police officers the duty of making a follow up of the Armed Robbery incident committed at Dr. Mvungi's resident where the computer, firearm and cash money were stolen.

He stated that they started the task by consulting their informers. On 06/11/2013 at about 1630 hours they managed to arrest one suspect namely Hamadi at Mwananyamala who denied to have participated in the commission of the alleged crime but he mentioned one Matonya Msigwa (1st Accused) and one Chibago as the persons who participated in commission of the said crime. PW3 said that Hamadi further told them that they had a promise to meet each other on the next day. They ordered him to make a call and request them to meet at Kinondoni Biafra on that same day at 2030. The said Matonya (1st Accused) and Chibago actually arrived at that said time and arrested by the said Police. PW3 identified the 1st Accused at the dock.

PW3 further stated that during the interrogation the said 1st Accused admitted to have committed the offence and that the firearm (pistol) was in possession of Ngosha (6th Accused). He also told them that he would have a meeting with Ngosha on the next day at Vingunguti. At about 2330 hours they went to Oysterbay

Police Station. While they were there Matonya's phone rang, it is somebody Paulo (3rd Accused) who was calling. PW3 said that they ordered Matonya to set a loud speaker and promise to meet with him at Vingunguti as well on the next morning. At about 0200 hours on 07/12/2013 Paulo again called Matonya and told him that he would go to Vingunguti with Mihanda (2nd Accused) at 0900 hours.

PW3 stated that at about 0900 hours the Regional Task Force team was already there at Vingunguti with Matonya and Chibago. At about 1030 hours Paulo and Mihanda arrived, PW2 and his fellow team members arrested them upon been shown by Matonya and Chibago. PW2 successfully identified Paulo (3rd Accused) and Mihanda (2nd Accused) in the dock.

PW3 stated that they took the detainees to Vingunguti Police Station for interrogation. In the course of interrogation to the 3rd Accused (Paul) the 1st Accused told Paul to state the truth as they had already disclosed the whole issue to police.

It is the further testimony of PW3 that at about 1115 hours Paulo's phone rang, it is somebody Masai who was calling according to the name read on the screen. Paulo told them that the caller is their fellow bandit and he was at TAZARA area on the way to meet with him at Vingunguti. They all left the Police Station for the bus stand

so as to arrest him. The said person, Maasai (4th Accused) dropped from the town bus (daladala) together with one other person namely Hamis Juma Kang'ungu (5th Accused). PW3 stated that they arrested all the two and took them to Vingunguti Police Station. PW3 successfully identified the 4th Accused (Longishu Semaliki Losingo) and the 5th Accused (Juma Hamis Kang'ungu).

PW 3 testified that upon interrogating the 5th Accused he confessed that he is the one who had taken the laptop and sold it at Vingunguti to somebody Chief at Tsh. 200,000/= . Upon been asked about the firearm he replied that it was in possession of somebody Ngosha (6th Accused). PW3 said that they tried to trace him through the mobile phone unsuccessfully. They then decided to go back to Oysterbay Police Station. It was about 1330 hours on that 07/12/2013. They reached at Oysterbay Police Station at about 1700 hours. They informed the RCO and handled the said seven suspects to him for further interrogation. He also wrote his statements in respect of the task he had done.

He concluded by saying that he later on came to know that somebody Ngosha (6th Accused) who was mentioned to them by the 5th Accused was also arrested by police in connection with the matter at hand.

In the cross examination by Dyness Simkoko (Advocate) PW3 stated that they didn't know that the 4th Accused (Masai) would be accompanied with Juma Hamis Kang'ungu (5th Accused). He also said that it is the 5th Accused himself who had told them that he had sold the computer to somebody Chief.

The 4th witness for Prosecution SP. ALBERT LAMECK KATUNDU (PW4) testified that by 2013 he was the head of Criminal Investigation Department (OC-CID) for Central Police Station in Dar es Salaam. He said that on the 12/11/2013 at about 1730 hours when he was at Msimbazi Police Station he did receive a call from the Head of Anti-Robbery section for the Central Police Station, Sgt. Abdallah Koba Kimanga. He was informing him that they had arrested a suspect for Armed Robbery incident that took place at the residential premise of Dr. Sengondo Mvungi. He instructed them to bring the person to Msimbazi Police Station. PW4 stated that at 1830 hours they took the said suspect to his residential premise at Kiwalani Migombani for the purpose of conducting a search. PW4 was together with Sgt. Alistides Kasigwa who is an expert in video and picture taking, D/Sgt Koba Abdallah Kimanga and three other police officers. Having so reached there at the accused's resident at Kiwalani Migombani they called Saidi Ally Mlekwa who is the Land Lord for the detainee, John Ikondya

Mayunga @Ngosha (6th Accused) to witness a search in the 6th Accused's room. For the same purpose they also called Ten Cell Leader namely Mzee Abdallah Ally. One tenant namely Emmanuel Mwakipusa was also called to witness a search.

Before the search the 6th Accused was asked to open the door and he actually did so. PW4 said that he instructed the camera man, Sgt. Alistides Kasigwa to take videos for the exercise that would be conducted therein. PW4 stated that upon asking him about his name the detainee replied that his name is John Ikondya Mayunga @Ngosha and he knows the witnesses who were there to witness a search. PW4 informed the said John Ikondya Mayunga @Ngosha (6th Accused) the aim of conducting a search in his room. Before the said search being conducted the 6th accused himself admitted that he is in unlawful possession of a pistol. He showed them a place where he had put it, that is in a plastic bag hidden under a piece of block at the corner where two walls meet. For the sake of safety they found it proper for the police officer to take it from there instead of the accused himself. The said plastic bag was actually taken by police from the said place and opened. The pistol was actually recovered therein. PW4 said that it was AIRWEIGHT REVOLVER by model with a serial no. 38SPL/CTG/BDN6111. He further said that they continued with a search and succeeded to

find 21 ammunitions, 5 parcels of gun powder, 2 connectors for exploding the gun powder. PW4 said that the Accused had no permit to hold those things. They filled a search warrant and signed by him (PW4), 6th accused and Sgt. Abdallah Kimanga. He said that the search was completed at 2100 hours. PW4 tendered the said Search Order (Certificate of Seizure), it was received and admitted as exhibit P3. After the search they left with the 6th accused and exhibits for Msimbazi Police Station. He then called the Investigation Officer D/Sgt. Ndege from Kinondoni Police Region and handled the said 6th accused and the exhibits for his necessary actions.

PW4 further testified that he ever tendered the said exhibits at Kisumu Resident Magistrate Court on 23/7/2014 in the Criminal Case No. 78 of 2013 in which the 6th accused was charged with the offence of Unlawful Possession of Firearm. He said that those exhibits were later on returned back to him by the Court Clerk namely Zuhura through the handing over report (Exh. P4).

Upon been shown the pistol PW4 failed to read properly some of the numbers for the reason that it is shaded by rust because it has been stored for a long time, about seven years without a proper care, it was supposed to be cleaned by special oil. The said pistol was received and admitted as Exhibit P5. PW4 also tendered to

court the said 21 ammunitions, 5 parcels of gun powder and 2 connectors for exploding the gun powder. They were received and collectively admitted as Exhibit P6.

In the Cross Examination by Mr. Kelvin Isack and Dyness Simkoko, Advocates PW4 said that Exh. P4 (Handing Over Report) shows that he had received 18 ammunitions and 3 empty cases.

The 5th witness for Prosecution one ABDALLAH KOPA KIMANGA (PW5) who is a retired Police Officer testified that by 2013 he was the In-Charge for the Task Force in the Anti Robbery Section at the Central Police Station in Dar es Salaam. The witness stated that on 12/11/2013 at about 1730 hours while at his working place he did receive a call from his informer that one of the persons who have participated in the commission of Armed Robbery at the residence of Dr. Mvungi was by that time watching the football exercise by the Young African Football Club at Jangwani play grounds in Dar es Salaam. He went thereto with the other Police Officers and the said informer who showed them a place that he had stayed. As he had already described to them his physical appearance and the prescriptions of the clothes he had worn they managed to arrest him and took him into the police car. PW5 said that before the arrest they identified themselves to him that they are Police Officers and the reasons for the arrest. PW5 further said that while

under custody of police the said person admitted to have participated in the commission of Armed Robbery at the residential premise of Dr. Mvungi. He also promised to cooperate with them to show the firearm that they had stolen therefrom of which he was holding at his resident. PW5 pointed the 6th Accused as the person whom they had arrested at the said Playground for Young African team at Jangwani.

PW5 testified that by that time, about 1800 hours, as the day time had already gone, it could be illegal for them who were all Rank and File Police Officers to conduct a search. He therefore made a call to the Head of Criminal Investigation for Central Police Station (OC-CID) namely ASP ALBERT KITUNDU. PW5 said that the OC-CID ordered them to bring the suspect at the Police Station. He was actually taken thereto and interrogated by the OC-CID. In the course of interrogation the said suspect admitted to have participated in the commission of Armed Robbery at the residential premise of Dr. Mvungi and he holds the firearm at his residence and that the said firearm was stolen in the said Robbery incident.

After the interrogation the OC-CID left with them and the suspect to Kiwalani Migombani where the suspect lives. Among the persons whom they went together is the Police Photographer namely

ALISTIDES. It is the 6th Accused himself who led them to reach at his residential place.

The witness stated that OC-CID identified himself and his team to the persons who were called as witnesses. He said that before the said search being conducted the 6th Accused showed the police a point where he had put the pistol in the room. Thereafter the search was conducted in the presence of those two witnesses, Mr. Ally Saidi who is the Landlord and Mzee Ally Abdallah, the Ten Cell Leader. The witness then narrated the same story as to what PW4 had stated in respect of how the search was conducted and handling of the 6th Accused to the Oysterbay Police Station in Kinondoni Regional Police. He was shown Exhibits P4, P5 and Exh. P6 and identified all of them.

PW6 one DEOGRATIAS MWARABU testified that he is working with the South Law Chamber Advocate as an Advocate. He said that he had joined the said chamber as a clerk in 1996, he is now the Advocate as well. Among the persons he used to work with is Dr. Sengondo Mvungi who was his uncle and Chacha Werema Changwili. The witness stated that on the 03/11/2013 he went to Muhimbili Hospital to visit Dr. Mvungi after receiving the information that the said person has been seriously injured by the bandits. He could not see him as he had been taken to ICU

(Intensive Care Unit). Later on, he was notified by Hon. Joseph Sinde Warioba who was Dr. Mvungi's fellow member in the Constitutional Reform Committee that the victim is referred to South Africa, and he was to escort him. PW6 said that on the 07/11/2013 at about 1500 hours they left together with Dr. Kamugisha and one Nurse for South Africa where they were received by the Tanzania Ambassador, Radhia Msuya. The patient, Doctor and Nurse entered into the ambulance while he used the embassy vehicle. They all went to MILPARK HOSPITAL where the patient was admitted, he was still unconscious. He had a big wound on the head. On the 12/11/2013 at about 1200 hours the patient passed away. The death certificate was prepared and supplied to him. Three days later they took the deceased's body. On the 17/11/2013 he travelled with the body to Dar es Salaam, Tanzania. It was stored at Lugalo Hospital and later on buried at Kisangara Juu, Mwanga District in Kilimanjaro Region. PW6 was shown the death certificate and identified it.

PW6 also stated that he knows somebody HELLEN ESHERS MBAGALA who is now a deceased as one of the clients in their Law Chambers. He said that Hellen was a Belgian by nationality and used to work in the Belgian Embassy at Dar es Salaam. PW6 said that Hellen used to acquire her legal service from their legal firm.

Among the legal services they used to provide to Ms. Hellen includes renewal of her residential permit, handling her cases in court including one adoption case as she had no child. Before she had passed away in 2007 she had prepared a will and appointed Dr. Mvungi and Chacha Werema Changwili to be the administrators for her estates when she dies. PW6 said that as one of the members in the firm where Dr. Mvungi and Chacha Werema Changwili work he was tasked to prepare the will and the same as actually drawn by him. He said that among the properties she was holding according to the said will was one pistol. One of the will copies was supplied to Dr. Mvungi while the Belgian Embassy was also supplied with one copy as well. PW6 further said that he was there during the handing over of the will. He tendered the said will to court. It was received and admitted as exhibit P7. PW6 stated that among the things that Ms. Hellen he had submitted to the together with a will is the said pistol whose Registration Number is BDN 6111, but it also has the other numbers read CPL 38. He further said that it was black in color. He was shown the said pistol and identified it.

The witness concluded that on the later days while the deceased was already buried he (PW6) was called by police that he was to go to Oysterbay Police Station to identify the pistol which was

recovered in the cause of their investigations. He went thereto with a copy of the will as it was related to the pistol that was handled to them and taken by Dr. Mvungi. He did notice that it was the one handled to them by Ms. Hellen.

In the cross examination by Nasra Mashaura (Advocate) PW6 stated that he was told by the deceased's wife that the said pistol had been robbed by the bandits. He also said that the same was in the deceased's possession because he was the administrator of estates for the late Hellen. In the cross examination by Abbriety Kivea (Advocate) PW6 stated that by the time the said properties including pistol were handled to Dr. Mvungi Ms. Hellen was already sick.

SAIDI ALLY MLEKWA (PW7) testified that he is a Landlord for Ngosha (6th Accused) at Kiwalani Migombani. He said that on 12/11/2013 at 2000 hours he found that tenant under custody of the persons who identified themselves as Police Officers. He said that those Police Officers were intending to conduct a search in Ngosha's room. They wanted him to call the Ten Cell Leader witness a search together with him. PW7 said that before the search being conducted Ngosha told the police that he is in unlawful possession of the firearm make pistol. He was asked to show its whereabouts, he actually showed it nearby the upper part

of the corner of the walls. It was at that same place but under the piece of block kept over there. He said that while the search was conducted one police officer was recording a video. This witness also narrated the same story concerning the said search as stated by PW4 and PW5. He added that he did sign the Search Warrant (Exhibit P3). He was shown it and identified it including his signature. He was also shown Exhibits P6 and identified them as well.

A Police Officer No. D 7312 D/Sgt JUMANNE who testified as PW8 stated that on the 07/11/2013 while he was working at Oysterbay Police Station he was assigned a duty of interrogating one of the suspects of Armed Robbery incident committed at the residential premise of Dr. Mvungi. The said suspects were at Mwananyamala/Mabatini Police Station. He went thereat and the suspect given to him was MSIGWA MATONYA (1st Accused). PW8 said that the Accused confessed to have committed the offence. PW8 was therefore required to note down his caution statements and he actually did so. PW8 said that he gave him all the rights that he deserves including identifying himself to him (suspect), giving him the caution that he is not compelled to say anything unless for his own wishes and whatever he says is recorded and that it can be used as evidence before the court of law. He also

informed the suspect his right to call a relative, friend or lawyer to be present during the interrogation. PW8 said that he was ready to adduce his statements in the absence of either of those persons. PW8 said that he thereafter noted the accused's caution statement. He prayed to tender the said cautioned statements but it was disputed by his Advocate for the reason that they were taken contrary to the law, and they were not freely and voluntarily made. As for the issue of law it was ruled out that there was no violation of law in taking them. As for the issue of voluntariness it was ordered after the trial within a trial that the same would be considered during the judgment. The Caution Statement was therefore received and admitted as exhibit P8. The witness then read over the said caution statement before the court.

The other Police Officers were also assigned the same duties and recorded the caution statement for the other accused persons through the same procedures done by PW8 as follows; D 7849 D/Sgt BEATUS (PW9) did take the caution statements for the 2nd Accused (MIANDA SALUWAA MLEWA) at Mwananyamala Police Station on the 7/11/2013. It was received and admitted as Exhibit P9. E 7846 D/Cpl ERNEST (PW10) recorded the caution statements for PAULO JAILOS MDONONDO (3rd Accused) at Mwananyamala Police Station on the 7/11/2013. It was received and admitted as

Exhibit P10. F 642 D/Cpl Sixmund (PW11) recorded the caution statements for the 4th Accused (LONGISHU SEMALIKI LOSINGO) at Mwananyamala Police Station on the 7/11/2013. It was received and admitted as Exhibit P11. PW12 one BAKARI ATHUMAN MBELWA, a retired Police Officer recorded the caution statements for JUMA HAMIS KANG'UNGU (5th Accused) at Kijitonyama @Mabatini Police Station on the 7/11/2013. It was tendered to court and admitted as Exhibit P12. Ms. SIKI d/o MWAMBAJU (PW13) an Ex-Police Officer did take the caution statements for JOHN IKONDYA MAYUNGA @NGOSHA (6th Accused) at Oysterbay Police Station on the 12/11/2013. It was received and admitted as Exhibit P13.

PW14 one A/INSP. ALISTIDES EUSTADIUS KASIGWA testified that by 2013 he was working with the Forensic Bureau at Police Headquarters in Dar es Salaam. Among the duties he had was taking pictures and preparing reports for evidence before the court. He said that he has an experience of 30 years in that job. He said that he is an expert in that section. He has been publicized in the Government Gazette GN 272 A. PW14 stated that on the 12/11/2013 he did receive a call from his boss SP. KITUNDU. He had assigned him the duty of taking photos/videos in the inspection which was about to be conducted at Kiwalani Migombani. He went

to Msimbazi Police Station where he joined with the other Police Officers including the said SP. Katundu and the suspect. He said that his duty at the scene was to take videos during the search and he actually did so. He said that in the video taking he used to record pictures and audio/sound. He had been using the **Samsung ipad**. As for the other evidence in respect of the search by PW14 it is equivalent to what the PW4, PW5 and PW7 had stated. PW14 said that in May, 2014 he did put the clip into the DVD. He put the Reference Number (IR No.), signed and stamped it. Lastly, he sealed it and sent it to SP KITUNDU through S/Sgt Ndege. PW14 identified the 6th Accused as the one whose room was searched and he recorded the video. PW14 further stated that the DVD was unsealed when it was played at Kisutu Resident Magistrate Court during trial in another case. PW14 also identified the said DVD/CD when he was shown before the court. He tendered it to court and the same was admitted as Exhibit P14. The said DVD was played before the court and witnessed by all persons who were there in the open court.

Another witness for Prosecution Dr. MUGISHA CLEMENT MAZOKO (PW 15) testified that he is a Doctor by profession working at Aga Khan Hospital in Dar es Salaam. He said that by 2013 he was working at Muhimbili Hospital attached in the Orthorpedic Institute

(MOI). PW15 testified that he deals with the brain and back injuries. He said that on 3/11/2020 he did attend Dr. Sengondo Mvungi who had been injured on three parts of his head. He said that the wound had gone 6 cm down. He said that the said victim was unconscious. The brain was swollen and the blood was clot in the head. He was admitted at ICU (Intensive Care Unit). As the victim was seriously injured he was referred to MILPARK HOSPITAL in South Africa. He escorted the victim to the said hospital accompanied with one Nurse. He and the Nurse came back to Tanzania by the same hired vehicle leaving the victim at hospital. PW15 said that a few days later he got the information that Dr. Mvungi had passed away. The witness said that on 8/3/2016 he was summoned by police wanting him to prepare a report in that respect. He actually prepared the said report and signed on it. Upon being shown the said report PW15 identified it. He tendered it to court and the same was admitted as Exhibit P15.

The last witness for prosecution A/Insp GASTON NDEGE (PW16) who said that in 2013 he was attached in the CID department at Kinondoni Police Region. As for the matter at hand PW16 testified that he was the Investigation Officer for this case. He narrated the whole story in a summary form from the time of commission of offence to the arrest of the suspects whom among them are the

Accused Persons. He said that he is the one who had been handed over the 6th Accused after being arrested, as well as Exhibits P4, P5 and P6 at Msimbazi Police Station. He was shown those exhibits and identified them. He also identified the CD/DVD (Exhibit P14) and the Medical Report (Exhibit P15). PW16 also identified the said 6th Accused at the dock. The witness stated that some exhibits ever been taken to Kisutu Resident Magistrate's Court for the other cases.

That was the end of prosecution case. **The accused persons were found to have a case to answer in MURDER contrary to sections 196 and 197 of the Penal Code.** They were therefore asked to defend their case. Upon being addressed under Section 293(1) of the Penal Code all Accused Persons opted to give sworn evidence.

In his defense the 1st Accused, MSIGWA MATONYA (DW1) who was enjoying the service of Nasra Mashaura, Advocate testified that he is a Butcher at Gongolamboto. He and other six persons were arrested by police at Gongolamboto while having drinks in a bar on the 06/11/2013 at about 1700 hours. DW1 said that he was not informed on the reasons for the arrest. They were taken to Kijitonyama Police Station. On the next day, 07/11/2013 he was handled to a Police Officer namely Emmanuel. The said Police

Officer took him from lock-up at about 1830 hours for noting down his statements. When he took him into the investigation room for that purpose the said Police Officer gave him the sheets of paper to sign. DW1 said that he refused as he had not known what was written therein. The said Police took the truncheon and beaten him on the knees, legs, feet and mouth. DW1 said that he did lose his four teeth in that incident. DW1 said that the said police tortured him by handcuffing his hands and legs one side each, then inserted a bottle into his (DW1's) anus. He stated that for those tortures he had to sign the papers. Later on, he was taken to court together with other persons for Murder.

In the cross examination by Mr. Credo Lugaju, State Attorney DW1 stated that he had no evidence to prove that he was injured because he was not taken to hospital in spite of giving a notification.

The 2nd witness for defense one MIANDA SALUWAA MLEWA (DW2) who is represented by the Learned Counsel Robert Kumwembe, Advocate testified that he is a Petty Trader at Kigogo Sambusa area. He stated that he lives at Kigogo. It is his testimony that on the 07/11/2013 at about 1000 hours while on the way back home from his business he met the Police Officers at who had arrested some people, they arrested him as well. He and those other persons were taken to Mabatini Police Station. They were locked-

up. At about 1900 hours a Police Officer took him into the Investigation room and gave him some papers to sign. He asked about those sheets but the said Police just insisted him to sign and he actually did so. He said that on 22/11/2013 he and other persons not known to him were taken to Kisumu Resident Magistrate's Court for Murder case, the offence which he had never committed.

In the cross examination by the State Attorney, Credo Lugaju DW2 stated that the statements in the caution statements are not authored by him.

PAULO JAILOS MDONONDO (DW3) stated that he is a businessman engaging himself in grilling meat at Tabata Darajani. He said that on the 07/11/2013 while he was at his business place some persons who identified themselves as Police Officers told him that he was conducting business at the wrong place and destruct the environment. They therefore arrested him and took him to Mabatini/Kijitonyama Police Station. There at the Police Station where they arrived at about 1000 am. At about 1700 hours one Police Officer took him from the Lock-up to the Investigation Room. Thereat he was handcuffed and tortured by beats on legs, back and hands. He was compelled to mention the people whom he used to corporate in the commission of crimes. DW3 replied that he

doesn't know. DW3 further stated that the police took him back to the lock-up. Later on, at the night hours the said police officer went back to the lock-up with some pieces of paper and asked him if he knows to read and write. DW3 replied that he doesn't know. The police told him that they were for bail purposes and that his relatives were there to bail him out, he gave them to DW3 so that he could sign them. DW3 actually signed without knowing that it was the caution statement purported to have been made by him. He said that on 22/11/2013 he was taken to Kisumu Resident Magistrate's Court for Murder case the offence which he had didn't commit. He therefore prays to be acquitted.

In the cross examination by the State Attorney DW3 stated that he has no documentary evidence to prove that he was actually wounded by police.

Another witness for defense one LONGISHU SEMALIKI LOSINGO (DW4) who is represented by Ms. Modesta Medard, Advocate testified that on 07/11/2013 he was taking soup as a breakfast at Mashujaa Bar located at Vingunguti. While he was there he conflicted with the Bar Attendant who had sold soup to him, that led him to be arrested by the citizens and taken to MECO Police Station located at Vingunguti. At about 1800 hours he was transferred to Kijitonyama Police Station. He said that later on, at

about 19-20 hours he was taken out of the lock-up and told to sign some papers so as to be released on bail. DW4 said that he actually signed the papers without the same being read over to him. He was then taken back to lock-up and informed that the bail consideration was in progress. However, he was not released. On 22/11/2013 he was taken to Kisumu Resident Magistrate's Court for Murder case, the offence which he had never committed. He said that he had never known his co-accuseds before. He therefore prays the court to acquit him.

In the cross examination by Mr. Credo Lugaju, Senior State Attorney DW4 stated that he is the Standard VII leaver and knows to read and write.

JUMA HAMIS KANG'UNGU the Accused who is represented by the Learned Advocate Dyness Simkoko testified as DW5. This witness testified that he is a Petty Trader dealing with selling shoes at Buguruni. He said that on the 07/11/2013 at about 0900 hours while conducting his business at his working place about six persons who had identified themselves as Police Officers from Central and Mabatini Police Stations arrived and arrested him. They alleged him being a drug dealer. That the said police officers conducted a search at his business premise but nothing wrong was recovered. At about 0900 hours they took him to Mabatini Police

Station. DW5 said that at about 1900 hours he was taken to the investigation room by a Police Officer namely Bakari (PW13) who gave him the papers to sign. He was told by the said Police Officer that his relative had come to bail him out, and that those papers were for bail purpose. DW5 said that he knows to read and write, he prayed to read those sheets before he signs but the Police denied for the reasons that he had many tasks to conduct. DW5 said that he therefore signed the papers, caution statements. He said that on 22/11/2013 he was taken to court where he was joined with the persons he had never known before alleged to have committed Murder. He concluded by praying the court to acquit him as he never committed the crime.

The 6th and last witness for Defense one JOHN IKONDYA MAYUNGA (DW6) who is represented by Ms. Abbrietty Kivea testified that he is a Businessman at Temeke Stereo Market. He said that on 10/11/2013 he was watching soccer exercise at Jangwani play grounds. While he was there two persons who identified themselves as Police Officers arrived and arrested him. They took him to Msimbazi Police Station at about 1600 hours. Thereat he was alleged to have been engaging in drugs business. At about 1930 hours he went with the Police at his residential premise, Kiwalani Migombani by using the police vehicle. He said that when

they reached thereat three Police Officers dropped from the Motor Vehicle and went to the house while he remained in the vehicle with other Policemen. About one hour later those three policemen came back and they all went to the premise. DW6 said that having so reached thereat he found the door broken, hence they entered direct into the room. Upon conducting a search one pistol with a black color barrel and silver base was found, it was before the arrival of the said Ten Cell Leader who was to witness a search.

As for the DVD/CD DW6 said that he doesn't know it. He also stated that it was played but some of the words are not properly heard, and that some of the words are not made by him, they were inserted by somebody else. He also stated that the pistol was not found in his residence. DW6 added that as well the pistol tendered to court as exhibit (Exh. P5) looks different to that seen in the CD, he said that the one looks in the CD is black colored while exhibit P5 has two colors which are black on the barrel and brown on the base.

DW6 also challenged that he was beaten and hanged upside down by police before his caution statements being noted down. The aim was compelling him to confess. He was then made to thumb print the sheets of paper of which he had not known what was written thereon.

DW6 further stated that on the 22/11/2013 he was taken to the Resident Magistrate's Court at Kisumu for Murder case. On 05/12/2013 he was taken to the same court for Unlawful Possession of Firearm which had ended up with acquittal. As the offence of Unlawful Possession of Firearm was not proved DW6 prayed for the court to acquit him.

In the cross examination by the State Attorney DW6 stated that he doesn't know whether he was discharged or acquitted in the said case of Unlawful Possession of Firearm and doesn't know the legal impact of discharge order.

That was the end of defense case.

From the evidence that have been adduced there is no dispute that Dr. Adrian Sengondo Mvungi died. In proving the offence of MURDER under Section 296 of the Penal Code the following elements should be considered;

1. That, there is a death of a person and it is unnatural.
2. That, the killing has been done by a person(s) possessing an evil mind (*Malice Aforethought*)
3. That, it is the accused(s) and not any other person(s) is/are responsible for the killing.

Therefore, the issues for determination are the following;

1. Whether the death was unnatural.
2. Whether the cause of death was intentional.
3. Whether the Accused Persons are responsible.

The first issue that is **“whether the death was unnatural”** is hereby analyzed as follows; PW1 one ANNA SENGONDO MVUNGI (deceased’s wife) testified to the effect that on the material date and place while sleeping with her husband they were invaded by bandits about six in number who were armed with machetes. Before they were attacked, she and her husband left their bedroom for watching what was going on. According to PW1 apart from robbing Tshs. 2,000,000/= and various properties of the family the bandits also robbed one pistol which had been in the possession of her husband (the deceased) through the execution of estate of late HELLEN HEICHER MBAGALA, his client in the Probate matter. She further testified that the said bandits injured the deceased on head. They left him bleeding and unconscious. The said victim was taken to the Hospital but he passed away in South Africa where he had been referred for further treatments as it was so stated by the deceased’s wife (PW1) and Deogratias Mwarabu (PW6) the one who had escorted the victim to South Africa for treatments. The said witness testified that while they were there at Milpark Hospital

the deceased was still unconscious until he met his death on 12th day of November, 2013. The death report (Exh. P2) from Milpark Hospital which was tendered during the Preliminary Hearing reveals that the source of death is unnatural causes.

Before being referred to South Africa PW15 a Doctor at Muhimbili Hospital attached in MOI (Muhimbili Orthopedic Institute) department attended Dr. Mvungi by examining him and filling the Medical Report (Exh. P15). In the said report it was revealed that by the time he was examining him the deceased was unconscious with various bruises on his body and cut wound on the head.

The said evidence of PW1, PW6 and PW15 is enough to prove that DR. SENGONDO ADRIAN MVUNGI is now dead and his death was unnatural. The 1st issue has therefore been proved in affirmative.

The 2nd issue "**whether the cause of death was intentional**" is hereby analyzed as hereunder;

In order to prove the offence of Murder, apart from unnatural death the cause of death must be accompanied with *malice aforethought*, that is an evil mind on the person(s) who have caused death of the deceased. In Murder cases like this one the malice aforethought which is a *mens rea*, for this particular crime is an "**intention to kill**". Section 200 of the Penal Code [Cap 16

R.E. 2019] provides that Malice Aforethought is deemed to have been established in evidence by proving at least one of the following circumstances;

- (a) *An **intention to cause the death of or to do grlevous harm** to person, whether that person is the person actually killed or not;*
- (b) ***Knowledge that the act or omission causing death will probably cause the death of or grievous harm** to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*
- (c) *An intention to commit an offence punishable with a penalty which is graver than imprisonment for three years;*
- (d) *An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence. **(emphasis is mine)***

It is provided under the above cited provision that malice aforethought can be established inter-alia where the intention to cause death or grievous harm is proved; or knowledge that the act done could cause death or grievous harm to a person is proved.

In the matter at hand PW1 testified that on the material date they were invaded by bandits who were armed with machetes and she found the deceased lying down while bleeding on the cut wound at his head. Also, the testimony of a Doctor (PW14) who examined the victim and the Report he had tendered (Exh. P14) reveals that the deceased had a cut wound on his head which is a vulnerable part of the body. In **BOMBOO AMMA & ANOTHER V. REPUBLIC Criminal Appeal No. 320 of 2016, CAT at Arusha (Unreported) at page 14** while quoting the case of **ELIAS PAUL V. REPUBLIC Criminal Appeal No. 7 of 2004 (Unreported)** it was held;

"Malice may also be inferred from the nature of the weapon used and the part or parts of the body where the harm is inflicted. In this case a stone was used and was hit on the head, chest and abdomen which are vulnerable parts of the body"

The evidence shows clearly that the weapon used, that is machete is dangerous and part of the body which was inflicted, that is a head is vulnerable. Therefore, the act would obvious cause grievous harm or death to the victim. That evidence is sufficient to prove that the killing was intentional, hence Malice aforethought proved.

As for the 3rd issue **“whether the Accused Persons are responsible”** the Assessors opined for the Republic. Upon going through the evidence that have been adduced as well as the opinion of assessors I have this to say in respect of the 3rd issue; In proving this issue death of the deceased must have been caused by the accused persons and not any other person. PW1 (deceased’s wife) testified that among the things which were stolen from the deceased’s resident on the material date was a pistol (Exh. P5) which had come into possession of the deceased through the execution process for the estates of the late HELLEN HEICHER MBAGALA, who was the deceased’s client in her legal issues. This evidence was supported by the evidence of PW6 (deceased’s relative and workmate) who is also aware of that issue and described the particulars of the said pistol being Revolver by model/make with Serial No. BDN 6111 and SPL 38. This witness had seen the said pistol at their office at the time it was given to the deceased by the late HELLEN HEICHER MBAGALA. He is also the one who had prepared the Will (Exh. P7) for HELLEN HEICHER MBAGALA. Furthermore, the said Will which was tendered to court by PW6 mentions the said pistol as among the properties she was holding. This is a proof that the pistol was in possession of the deceased at his resident before it was robbed by the bandits.

It is evident that on 12th day of November, 2013 PW5 one ABDALLAH KOBA KIMANGA received information from his informer that the 6th accused was among the suspect who had participated in the robbery incident at Dr. MVUNGI's home place. Upon receiving that information, in corporation with other police officers they trapped and succeeded to arrest the 6th accused at the playgrounds of Yanga Sports Club, Jangwani. After the arrest the said accused was taken to Msimbazi Police Station which was the progress towards the search at his resident, Kiwalani Migombani.

It is the evidence of ALBERT KITUNDU (PW4) who had led the search task at the 6th Accused's resident that the said 6th Accused Person admitted during the preliminary interrogation that he participated in the commission of Armed Robbery at the deceased's resident and he was in possession of the pistol that he and his fellow bandits had robbed from the scene. It is undisputable that the 6th Accused's resident located at Kiwalani Migombani was actually searched by PW4 and other police officers including PW5, in the presence of two witnesses namely SAID ALLY MLEKWA (PW7) who is the Landlord for the 6th Accused and the Ten Cell Leader Mzee Abdallah Ally. It is also undisputable that during the search INSP. ARISTEDIUS KASIGWA (PW14), the forensic expert was recording video. The evidence reveals that among the other

things the said 6th Accused was found in possession is a pistol make Revolver with Reg. No. 38 SPL/CTU/BDN 6111. PW4 tendered the certificate of seizure (Exh. P3) for the search conducted at the 6th Accused's resident. He also tendered the above mentioned pistol and various ammunitions whereby the pistol was admitted as Exh. P5. This evidence creates no doubt that the pistol found in the residential premise of the 6th Accused, John Ikondya Mayunga @ Ngosha (DW6) is the one that was robbed at the deceased's resident on the material date, hence he must be among the persons who had committed Armed Robbery which led to the death of Dr. Mvungi.

PW14 testified that during search he is the one who was recording video during the search, as well as at the time when the 6th accused was confessing to have been found in unlawful possession of a pistol and commission of Armed Robbery. PW14 prepared a video CD thereafter which was tendered to court and admitted as Exh. P14. DW6 never disputed that PW14 actually recorded the said incident save for the picture and sound being not properly seen/heard. But when the CD was played in court, to the great extent the said video was properly seen and the pistol looks to be the same, that is the one tendered to court and admitted as Exh. P5.

The doctrine of recent possession of property suspected to have been stolen spins around proof that an accused person is found in possession of the property which is recently stolen or he committed the crime which have connection to the said property: In **HASSAN RASHID GOMELA V. REPUBLIC, Criminal Appeal No. 271 of 2018 CAT at Mtwara at Page 10** while quoting the case of **DPP V. JOACHIM KOMBA (1984) TLR 213** it was held;

“The doctrine of recent possession provides that if a person is found in possession of recently stolen property and gives no explanation defending on the circumstances of the case, the court may legitimately infer that he is a thief, a breaker or a guilty receiver”

The evidence of **PW1**, **PW6** (Exh. P7-*Will*), **PW5** and **PW14** are sufficient enough to prove that the said pistol make Revolver with Registration No. SPL 38/CTT/BDN 6111 was in possession of the deceased at the time it was stolen/robbed. The evidence of **PW4** (Exh. P3-*Certificate of seizure* and Exh. P5-*Pistol*, Exh. P6), **PW5**, **PW7** and **PW14** also prove that the said pistol was found in possession of the 6th accused. Generally, the evidence transpires that the pistol was recently stolen from the deceased's house/home during the robbery incident. In the Cross Examination by Mr. Kelvin Isack and Dyness Simkoko, Advocates PW4 said that Exh. P4

(Handing Over Report) shows that he had received 18 ammunitions and 3 empty cases. Actually, the said witness mentioned 21 Ammunitions without empty cases in his examination in chief. However, the Pistol (Exh. P5) being found in the 6th accused's resident is a sufficient proof for his participation in the commission of the crime even in the absence of the said ammunitions or empty cases.

The accused persons narrated in their confessions that their motive of invading the deceased's home was stealing but the fact that in the cause of stealing death occasioned, there is no way the wrong doers can exonerated from the liability regardless the motive/intention or roles that each of them had played during the commission of robbery. What the law considers is that they had a common intention. In **ELIZABETH ELIAS @ BELLA V. REPUBLIC, Criminal Appeal No. 293 at page 16** it was held;

"It is trite law for the doctrine of common intention to apply under section 23 of the Penal Code there must be cogent positive evidence to establish that one or more persons had shared with the accused a common intention to pursue an unlawful act and that in the execution of the said pre conceived plan an offence was committed by both or some or all of them"

In this particular case the proof that the accused persons had common intention prior to the commission of the offence can be revealed in their confessions as per the Caution Statements (Exh. P8 – P13) and the video clip (Exh. P14) in which the 6th accused is seen confessing on how they pre – conceived the plan prior to the commission of the offence.

In his testimony F 59 D/Cpl Revocatus Andrew Kamugisha (PW3), testified that on the 6th day of November, 2013 through the informer they managed to arrest the 1st accused (DW1) and another one who is now a deceased (CHIBAGO). It is the testimony of the said Police Officer (PW3) that it is the information they acquired from those said persons which enabled them to arrest the 2nd, 3rd, 4th and 5th accuseds. Upon being interrogated all six accuseds are said to have confessed before the police officers; PW8, PW9, PW10, PW11, PW12 and PW13 that they actually committed the crime at the deceased's house located at Kibwegere, Mbezi Msakuzi in Dar es Salaam. They also explained their roles in that robbery incident that had occurred on the material date and place. They also admitted to have harmed the deceased. The accuseds' caution statements noted down by those Police Officers were tendered to court and admitted as Exhibits P8, P9, P10, P11, P12 and P13. The police officer who had participated in arresting

them, PW3 produced sufficient evidence which proves participation of the accuseds save for the 5th Accused, for the reasons I am going to state, in the commission of Armed Robbery at the residential premise of Dr. Mvungi. Thus, the evidence reveals that the deceased was assaulted by the 1st, 2nd, 3rd, 4th and 6th accuseds whose caution statements have been dully corroborated with other evidence including that of PW3.

The evidence that the 6th accused confessed (Exh. P13) before PW13 and that he was found in possession of the pistol which was evidenced to have been robbed from the deceased's resident, as well as the fact he was recorded confessing to have committed the said crime as per the CD/DVD (Exh. P14) connects him with the allegations that he did participate in assaulting the deceased.

In their defense which was made in sole the Accused persons relied on the general denial that they never committed the crime and that they never known each other before they were charged, but this evidence collides with the words of the 6th Accused in the CD and the caution statements made by them which have been proved to have been legally taken by police save for that of 5th Accused which has not been corroborated.

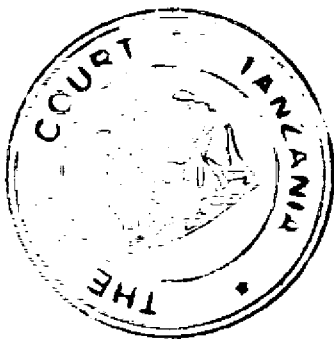
The 6th accused's evidence in trial within a trial reveals that at the time the search was conducted in his bedroom nothing wrong was found, but during the defense case he admitted that the pistol was found but it was not black, that it was silver in color. However, the same pistol (Exh. P5) was seen being black in color with some light brownish at the base when the video clip-CD/DVD (Exh. P14) was played in the open court and infact that is the real color of the said pistol. I find that challenge has no legal weight. The truth is that he is talking about the same pistol (Exh. P5) which was found in his possession.

In their challenge on the admissibility of their caution statements the accuseds stated that they were not freely and voluntarily made. While DW1, DW2, DW3 and DW6 stated that they were taken under the influence of torture, DW4 and DW5 said that the Police Officers misled them that the papers they (Police) had supplied to them for signature were for bail purposes while not. However, neither of them submitted sufficient proof on the said allegation. They all relied on the mere statements made by themselves. The court was therefore right to receive and admit them as exhibit. Save for that of the 5th accused (DW5) which was not corroborated, each caution statement that was tendered to court and admitted can be used to convict the author.

From the six caution statements I have some comments on the authenticity of the one purported to have been made by the 5th Accused (Juma Hamis Kang'ungu). PW3 stated while replying questions from Ms. Dyness Simkoko, Advocate for the 5th Accused that while waiting for the 4th Accused one Longishu Semaliki Losingu (Maasai) to arrive at Vingunguti Bus Stop they didn't know that he would be accompanied with the 5th Accused. PW3 also testified that it is the 5th Accused himself who had told them that he had sold the computer to somebody Chief. There is a doubt on the PW3's testimony in the connection with the 5th Accused because nobody had mentioned him before as it was for the other Accused persons. The evidence of PW3 shows that the said 5th Accused was arrested by police together with the 4th Accused (Maasai) just because he was found dropping from the town bus at Vingunguti with the said Maasai, the person whom the police were waiting for, regarding the information they had which was narrated to them by Paulo (3rd accused). Unlike the other five accuseds, the police had no prior information about this person before they arrested him. It therefore makes me to consider that the caution statement purported to have been made by him is not corroborated. There is no other evidence which connects the 5th Accused with the matter. I say so because the evidence by PW3 that the 5th Accused had

admitted before him immediately after the arrest that he had taken the stolen computer and sold it to somebody Chief, also needs corroboration, the same cannot be used to corroborate the caution statement. Be it noted that neither the computer nor the said person, Chief had been found at least to clear this doubt.

Conclusively, I find the Prosecution side has failed to prove its case beyond all reasonable doubts against the 5th Accused. I find him not guilty, hence I acquit him forthwith. As for the remaining, that is the 1st, 2nd, 3rd 4th and 6th Accused Persons the case has been successfully proved beyond all reasonable doubts by the prosecution. I find them guilty for the offence of MURDER, contrary to sections 196 and 197 of the Penal Code as charged, hence I convict them accordingly.



A handwritten signature in black ink, appearing to be "S.M. Kulita".

S.M. KULITA

JUDGE

17/09/2020