

**IN THE HIGH COURT OF TANZANIA
TABORA DISTRICT REGISTRY
AT NZEGA**

CRIMINAL SESSION CASE NO. 59 OF 2019

REPUBLIC

VERSUS

OMARY MIHAMBO @ DOHOI

JUDGMENT

Date of Last Order: 26/10/2020

Date of Delivery: 06/11/2020

AMOUR S. KHAMIS, J.:

Omary Miambo @ Dohoi, the accused herein, was charged with the offence of murder contrary to Section 196 of the Penal Code, Cap 16, R.E 2002.

The particulars are that during night hours on 28th day of March 2016 in Senge Village, Kasela Ward, Mwakalundi Division, Nzega District, Tabora Region, he murdered one Pili D/o Makenzi @ Mwanasheshiwa.

The accused pleaded guilty and the case proceeded to a full trial.

From the commencement of trial to its conclusion, the accused enjoyed skilled services of Mr. Langa Mvuna, learned advocate.

The prosecution team consisted of Ms. Jane Mandago and Ms. Juliana Moka, learned senior state attorneys.

The prosecution paraded eight (8) witnesses and produced five (5) exhibits to discharge its burden of proof beyond reasonable doubts as provided for under Sections 3 (2) (a) and 110 (1) of **THE EVIDENCE ACT, CAP 6, R.E 2019**.

At the inception of its case, the prosecution featured Superintendent of Police Aziz Mussa Kalokola, former OC CID for Nzega District, as PW 1.

According to him, he learnt of the incident at 7.00 pm on 28/03/2016 and led a team of four policemen who went to the scene that same night.

The team was received by village leaders including Michael Renatus (Chairman) and Mr. Kidesera (WEO).

Villagers had converged at the scene and a suspect, Omary Mihambo Dohoi, was found under arrest.

As an experienced and specialized investigator, Aziz Mussa Kalokola, inspected the scene where the deceased's body was discovered underground and interviewed a suspect.

He also visited the deceased's house where it was believed that the killing took place and saw blood stains on the deceased's mattress and "kanga".

He said that the distance from the deceased's house to the scene where the body was discovered was about 520 paces.

He then interviewed the accused's wife (Regina) and neighbours to the deceased's house including Juma Kashinde and his wife, Ndalo Bundala Kasinda.

Having accumulated sufficient background information, he re - interviewed the accused who admitted to have killed the deceased on superstitious believes.

PW 1 said that the accused confessed to him that the deceased was involved in witchcraft and bewitched several children including his own son, Leonard Omary Dohoi, who passed on in questionable circumstances.

The witness stated that the accused named one Masanja, a witchdoctor and fortune teller who disclosed of the deceased's sorcery practices.

Acting on the collected information, the OC CID re- arrested the accused, Masanja the witchdoctor/fortune teller, some members of the deceased's family, namely: Juma Kashinde, Kashinde Dohoi, Regina (accused's wife), Ndalo Bundala Kasida (wife of Juma Kashinde) and one Mr. Makani.

He escorted the arrested persons to Nzega Police Station for further questioning.

Upon arrival at the Police Station, he questioned the accused on a weapon used to kill the deceased and his collaborators.

The Superintendent of Police said that the accused named Juma Kashinde as an accomplice and disclosed that he personally hit the deceased with a club (rungu) on the head and on the face.

On such disclosure, he instructed D/Sgt Cosmas to record the statement.

The next morning, the OC CID successfully processed a Court order for exhuming the body and asked Dr. Soronyo to accompany him to the scene.

This time around, Aziz Musa Kalokola led a team of DC Daniel, DC Winifrida and DC Said.

He added that the accused and other arrested persons accompanied him to the scene.

Villagers (wananzengo) assisted the team to exhume the body that was found naked.

The body was found with injuries on the face and the head which matched the accused's statement on interrogation.

Upon conclusion of a medical examination by the doctor, villagers were permitted to proceed with burial arrangements.

The witness said that before burial took place, the accused led a team of policemen and villagers to a greenish rice field (jaruba) where a club was hidden immediately after killing the deceased.

He narrated that the murder weapon measuring about one (1) meter long with blood stains was picked from the paddy field.

The witness said that at that point, he ordered DC Daniel to take pictures of the club and draw a sketch map of the scene.

Thereafter, PW 1 led his team to the deceased house where they picked up a stick and a kanga splattered with blood and left with them.

On further investigations, Police discovered that the accused had maliciously named Juma Kashinde as an accomplice just because the latter implicated him as a prime suspect.

On such developments, initial charges against Juma Kashinde were dropped.

On cross examination by Mr. Langa Mvuna, PW 1 recalled that on interrogation, the accused's wife disclosed that in the night of the incident, the accused frequently moved out of his house.

On further cross examination, the witness said that villagers arrested the accused following their own investigations before Police arrived in the village.

The witness further stated that the accused alone knew where about of the club and details given by him led them to find the weapon in the paddy field.

On re – examination by Ms. Juliana Moka, PW 1 said that the accused confessed to him on using the club to kill the deceased and promised to show its location.

On further re – examination, the OC CID said that the deceased's house was about five (5) paces away from the accused's house.

He gave further details on the accused's confession to the effect that at the time of killing, nobody heard noises made and that he cleaned the floor immediately after the incident.

The witness added that thereafter, the accused carried the body to a place he found suitable for "burial".

He explained that the accused carried the body from the deceased's house for about twenty (20) meters and thereafter, pulled it over the ground for some distance to a chosen "grave" site.

He added that pulling of the body over the grasses made plants of the area to fall down.

PW 2 G 3519 D/C Daniel, a policeman in Nzega, recalled that on 28/03/2016 at about 7.00 pm, he was in a team of policemen who accompanied SP Aziz Musa Kalokola to a scene of murder crime in Senge Village.

Upon arrival in the village, he saw a gathering of people and a suspect, Omary Mihambo Dohoi, under arrest.

Village leaders informed him that the deceased was buried at some location in the village.

His team visited the location where the body was buried and saw signs of a body buried underneath.

The OC CID tasked village leaders and other villagers to guard the suspected grave while police processed a permit to exhume the body.

That based on the preliminary investigation conducted at the scene, PW2 recalled that the accused and about six family members were arrested and transported to Nzega Police Station for further examination.

Upon arrival at the Police Station, the accused was interrogated as a result of which, he confessed to kill the deceased and undertook to show the whereabouts of a murder weapon.

The next day police obtained an order to exhume the body and visited the scene for the second time.

He said that upon arrival in the village, it was the accused who led them to all areas necessary for their investigations.

He disclosed that it was the accused who showed policemen a house wherein the deceased was killed and then the area where she was buried. Policemen saw blood between the two places.

Thereafter, the accused led them to a paddy field where the club used in the killing was hidden.

He explained that the club was found in a paddy field located about 292 paces away from where the body was exhumed.

He clarified that the club was pointed by the accused but it was him who picked it from the field.

He added that at a time of picking the club, he had put on gloves and that the accused and other villagers were present.

The policemen described the club as a one meter stained stick with a protrusion at its one end.

After picking the club, policemen returned to the deceased's house where they saw the mattress, a kanga (yellow and green in colour), and a thin stick all covered with blood.

According to him, blood found on the mattress, kanga and stick, was that of the deceased. Policemen carried away the stick and kanga.

The body was subsequently exhumed and looked fresh as it was buried just the previous night.

The witness was able to see blood oozing from the wounds on the deceased's face and the head.

Policemen also visited the accused's house wherein the accused showed them a hand hoe used to dig the "grave" and bury the deceased.

PW 2 drew a sketch map and took pictures of the scene of crime.

On cross examination by Mr. Langa Mvuna, PW 2 stated that it was the accused who disclosed that a stick and a club were used to kill the deceased.

On further cross examination, the witness said that the accused just showed location of the club but it was him who picked it from the rice field.

It was PW 2 evidence that the accused recorded a confession to police and before a justice of the peace.

On re - examination by Ms. Jane Mandago, the policeman stated that his team saw blood drops on the ground between the deceased's house and the place where the body was found suggesting that it was pulled over the ground.

PW 3 Michael Renatus Kayumbo, chairman of Senge Village, recalled that on 28/03/2016 at about 4.00 pm, was informed by Kashinde Dohoi that his aunt, Pili Makenzi, was missing from home and her bedroom found with blood.

He was told that such blood was in large quantity.

Immediately thereafter, the chairman instructed the commander of "Sungusungu" (local militia) to ring the bell (mwano) notifying wananzengo (villagers) to convene in emergency.

The chairman who celebrated Easter Holiday in Mwangoye Hamlet, rode a bicycle to Senge Village.

Upon arrival at the scene around 5.00 pm, he found a huge group of villagers waiting for him.

He inspected the deceased's house and witnessed a pool of blood on the bed.

After inspection, he telephoned Shaaban Kibesela, the ward executive officer for Kasela Ward and Saidi Hassan, chairman of Kasela Village and told them of the incident.

Thereafter, villagers constituted themselves in four search groups that moved towards south, north, east and western sides of the house.

When the northern group arrived at a groundnuts field located about 20 meters away from the deceased's house, they observed that glasses had fallen down as a result of something been pulled over them.

The northern search team also saw blood drops leading to the eastern and northern sides of the area.

The fallen grasses led the team to a small shamba in which tomatoes were grown adjacent to a water stream.

The team noticed that the water stream was blocked by a pile up of fresh soil (tuta).

The chairman bent over the soil pile up, removed the top soil by own hands until a human head was touched under the soil.

At that point, he telephoned Shaaban Kibesela (WEO) on such developments and the latter advised him to stop further digging.

Villagers questioned members of the deceased family including the accused and Juma Kashinde who were present at the “mwano” (gathering).

Juma Kashinde disclosed that upon return from his business around 1.00 am, he found the accused outside his (Juma Kashinde’s) house but the latter ran away from him.

He said that despite of calling him by name: Omar! Omar! the accused neither stopped not responded but ran towards his house.

Upon reaching the accused’s house, Juma Kashinde called his name again: Omar! Omar! But the latter did not respondent. Instead, his wife replied from inside that the accused was out of the house.

Thereafter, Juma Kashinde walked back to his house located near houses of the deceased and of the accused.

The chairman narrated that after Juma Kashinde’s accusations, the accused was asked to respond to the allegations.

According to him, the accused replied shortly that he did not kill the deceased but if he did, then Juma Kashinde was also responsible!

At that stage, the accused was arrested and kept under villagers' custody.

As a result of rain that fell a previous night, the village ground was wet which enabled a search team to see footsteps of a shoeless human being around the soil pile up.

Villagers followed up footsteps which led to the house of the accused.

It was PW 3 evidence that a disclosure by Juma Kashinde, the accused's questionable response to the accusation and presence of footsteps leading to his house, made villagers conclude that the accused was solely responsible for the murder.

Upon arrival of the WEO and Policemen around 9.00 pm, the accused was re- arrested together with other family members: Kashinde Dohoi, Juma Kashinde, Ndalo Bundala, Regina Muhoja, and Makani Kashinde.

Acting on the police instructions, villagers spent a night guarding a place where the body was discovered under the soil pile up.

The chairman also led policemen to the house of Masanja Shaaban, the witchdoctor who was arrested and interrogated in a police station.

The next day (29/03/2016) policemen arrived in the village at around 1.00 pm accompanied by a medical doctor.

The scene was inspected and necessary measurements were taken by policemen. Thereafter the body was exhumed with assistance from the villagers.

According to him, the naked body had wounds on the face and on the head, as well as on top of the left ear.

Villagers were told by SP Aziz Kalokola that the accused confessed to police on killing the deceased.

Thereafter, the accused loudly confirmed to villagers that the statement by SP Aziz Kalokola on his confession was true.

SP Kalokola also told villagers that the accused promised to show whereabouts of the club used to kill the deceased.

The chairman narrated that the accused led a group of policemen, village leaders and wananzengo (villagers) to the paddy field where the club was hidden.

Upon arrival at the exact point, the accused stopped and pointed to a place where the club was hidden.

At that juncture, SP Kalokola asked a policeman to pick the club from the paddy field as per the accused's direction.

He described the recovered club as short, thick and full of blood.

The witness further testified that after picking the club, the group returned to the deceased's house where policemen noticed a small stick inside the deceased's bedroom and took it away.

On cross examination by Mr. Langa Mvuna, PW 3 said that the footsteps of a suspect were not on the public road but on a new path established by the killer.

He clarified that the footsteps were not interfered for the whole day that the deceased went missing because were on an informal path.

On re – examination by Ms. Juliana Moka, the village chairman said that Juma Kashinde was not arrested because footsteps found at the scene belonged to one person and led to the house of the accused.

PW 4 Dr. Christian Soronyo Sasi, a retired medical doctor said that he examined the exhumed body in Senge Village on 29/03/2016.

He stated that the naked body of a female African had wounds on the head and bruises on the face.

He explained that the bones under the wounds were broken down and from their nature, formed an opinion that a blunt object was applied against the deceased.

He explained further that a blunt object caused spread wounds with no sharp ends.

He tendered a post mortem report that was admitted as Exhibit P 5.

According to him, the deceased died of serious injuries on the head.

PW 5 Shaban Nzobe Kidesera, the Ward Executive Officer for Kasera Ward, recalled that 28/03/2016 was an Easter Monday and he was at home in Kasera Ward.

Around 5.00 pm Michael Renatus (PW 3) telephoned to let him know about disappearance of Pili Makenzi whose bed was found with blood.

He arrived at the scene around 6.00 pm after a second call which updated him that the missing lady was found buried in a hidden grave.

He found the accused under arrest of the villagers and upon inquiry, was briefed by the village chairman (PW 3) on how he was suspected and arrested.

He notified Afande Mabula on the incident and then SP Aziz Kalokola, the OC CID.

The WEO was present when SP Aziz Kalokola and his team arrived at the scene on 28/03/2016 and accompanied them to the deceased's house.

He witnessed Police re – arresting the accused and five other members of the deceased's family.

He was also present at the scene when SP Kalokola and his group arrived on 29/03/2016 and participated in exhuming the body.

According to him, the body had wounds on the face and around the left ear.

He heard SP Aziz Kalokola informing the mass that Omar Mihambo Dohoi confessed to kill and offered to show the murder weapon.

SP Aziz Kalokola asked the accused in public whether he confessed to murder and the latter validated the statement.

Thereafter, SP Kalokola asked the accused to lead the way to where the weapon was hidden.

He recalled that Omar Mihambo Dohoi walked in front of the entire group of villagers and policemen for about 200 paces before stopping. He then pointed towards the paddy field.

He recalled further that the accused was handcuffed and therefore could not personally pick up the club.

The witness saw DC Danny pick up the blooded club from the rice field.

He estimated that the club measured about 2 to 3 feet long and resembled a handle of the hoe.

From the paddy field, the group walked back to the deceased's house.

Testifying on Exhibit P 4, the witness recognized it as the murder club recovered from the paddy field on the accused's own guidance.

PW 6 Cosmas Hiba Shija, a retired policeman, informed the Court that he recorded the accused's cautioned statement on 29/03/2016 at Nzega Police Station.

He narrated on how the accused was afforded his rights and cautioned in respect of the statement.

Thereafter, the accused willingly recorded the statement in which he confessed to kill the deceased because she bewitched their children.

Afterwards, he read contents of the statement to the accused who said that it was properly recorded and signed as required.

In a trial within trial, the statement was ruled to be below the legal threshold and thus not admitted.

PW 7 Ndalo Bundala Kasida, was the wife of Juma Kashinde and sister in law to the accused.

She knew the accused for ten (10) years as he lived in the same homestead though in a different house that was close to hers.

The deceased was a grandmother of Juma Kashinde and lived in a house owned by him and located closer to the accused's house.

She recalled that it started to rain in the night hours of 27/03/2016 which forced her to go out of the house in order to prevent uncovered firewood from wetting.

While outside, she saw a man stationed under a tree that was very close to her house.

She directed a torch towards the man and recognized him as Omar Mihambo, the accused herein.

Her evidence was that the torch light was very strong because she had just replaced it with new batteries.

She estimated that the accused was just 15 paces away and therefore could not mistake his identity.

Through the torch light, she saw the accused run away towards the eastern part of the area.

She remarked that the accused used to visit her house frequently and was well known to her since 2019.

Giving him a benefit of doubt as one of the villagers used to peep through other people's houses at night, she went inside the house.

Shortly afterwards, Juma Kashinde returned back home from his shop business.

Upon entering the house, Juma Kashinde questioned PW 7 on her relationship with the accused.

PW 7 replied that there was nothing fancy other than being a brother in law but demanded to know why the husband asked so.

At that point, Juma Kashinde narrated to her that while outside the house, he saw the accused peeping through their window and ran away when he drew closer.

Juma Kashinde followed the accused up to his residence and called his name. However, it was his wife who responded that Omar Miambo was outside the house.

The next morning was an Easter Monday and she prepared tea with maandazi for the breakfast.

When breakfast was ready, she went to the deceased's house to extend an invitation for the morning meal.

However, she found nobody in the house and the bed was empty. She suspected that the deceased had left early for personal business as used to do at times.

After breakfast with children, she was visited by Kashinde Maila, an aunt to Juma Kashinde.

The visitor demanded to know on whereabouts of the deceased and PW 7 explained that she was not in her house.

Kashinde Maila left and re-joined her for lunch. This time around Kashinde Maila visited the deceased's house where she found blood on the mattress.

On further inspection, Kashinde Maila noticed some clothes of the deceased were soaked in blood and kept under a bed sheet.

Upon learning so, PW 7 paired with Kashinde Maila to inform other people of the incident.

Subsequently, Kashinde Dohoi, the biological father of Juma Kashinde, and village leaders were notified.

PW 7 recalled that a village bell was rang (mwano) for an emergency village meeting which resolved to search for the missing old lady.

Consequently, the body was discovered under a heaped soil and later on exhumed.

She was arrested alongside other family members on 28/03/2016. However, they were released the next day except for the accused person.

On re – examination by Ms. Juliana Moka, PW 7 said that it was not possible to see blood in the deceased's house until Kashinde Maila inspected the house because it was neatly cleaned after the incident.

On further re – examination, the witness said that the accused had put on black clothes that were also worn by him during the day and thus easily identified.

PW 8 Kashinde Dohoi Mihambo, a patrilineal uncle to the accused, told this Court that prior to the incident, the accused

complained that the deceased and Kabula Mihambo had bewitched him.

The accused invited him to consult a witchdoctor allegedly because he too was bewitched.

He explained that the accused believed that his deceased son, Leonard Omar, was bewitched by the deceased.

Contrary to that belief, the witness said that Leonard Omar was diagnosed of sickle cell.

He recalled incidents of 27/03, 28/03 and 29/03/2016 particularly on how his son, Hamis Kashinde informed him of the disappearance of Pili Makenzi whereupon PW 8 notified the village chairman, Michael Renatus.

The witness went to the deceased's house and saw blood on the mattress and under the bed.

After a "mwano" was made, villagers resolved to search for the poor lady as a consequence of which the body was discovered under a heap of fresh soil that blocked the water stream.

Following discovery of the body, villagers questioned family members on circumstances of the death at the conclusion of which Juma Kashinde narrated events of a previous night when he saw questionable movements of the accused.

The witness said that the accused was questioned by villagers on why he was not at home when Juma Kashinde visited him in the fateful night.

On that question, PW 8 said that, the accused replied that he was in the toilet.

The accused was also asked by villagers on whether he heard Juma Kashinde knocking at his door. His reply was that he heard the knock from the toilet.

The witness was convinced that footsteps found at the scene belonged to the accused.

Asked as to why he believed so, PW 8 said that the footsteps of a person without shoes matched with the well known structure of the accused's feet.

He added that the footsteps led villagers to the house of the accused confirming that he was solely responsible for the incident.

PW 8 was arrested by policemen along other family members but released the next day after recording a statement.

He was present when the naked body was exhumed and found injuries on its face and on the head, near the ear.

He witnessed the accused leading policemen to the paddy field where the club used in the killing was recovered.

He said that soon after it was picked up, the club was shown up by policemen and appeared to have a layer of blood.

It was PW 8's testimony that the accused killed the deceased on belief that she and Kabula Miambo bewitched his deceased child.

On cross examination by Mr. Langa Mvuna on the footsteps, the witness said that the accused had special features in his legs that could not be mistaken with someone else's.

On further cross examination, he said that the footsteps led to the house of the accused.

Upon a ruling that the prosecution established a prima facie case, the accused took to the witness box and made a sworn testimony as DW 1.

His version was that he was at home in the night of 27/03/2016.

The next day, he celebrated Easter at home up to afternoon hours when Hamisi Kashinde told him of the missing grandmother, Pili Makenzi.

He went to the deceased's house and saw blood on the bed before arrival of his uncle, Kashinde Dohoi.

He was present when Kashinde Dohoi (PW 8) arrived at the scene and reported the incident to village leaders.

He narrated on how the village chairman notified the commander of "Sungusungu" to ring the bell (mwano) and shortly thereafter, villagers converged at the deceased's house.

Consequent to a decision of village leaders, search groups were constituted and tasked to move in all directions. The accused was in the eastern route group.

After a brief moment, news spread that the northern group had found clues that could lead to discovery.

Other villagers rejoined the northern group and that he personally saw a heaped soil that raised doubts.

According to him, the top soil was hand removed from the heap and exposed a human head buried underground.

At that moment, villagers questioned family members on a suspect for the murder.

Whereas Kashinde Dohoi expressed ignorance on the incident, Juma Kashinde named him as a prime suspect.

He stated that his naming resulted from a mistaken identity by Juma Kashinde of a person seen at his window the previous night.

DW 1 insisted that he did not get out of his residence to visit Juma Kashinde's house in the night of the incident.

He narrated on how village leaders telephoned police on the incident, his arrest by villagers and subsequent re – arrest by policemen at the scene.

He was taken to Nzega Police Station in the night of 28/03/2016 alongside other family members.

Upon arrival at the Police Station, he was questioned by SP Aziz Kalokola and subsequently handed over to a policeman identified as Cosmas to record a statement.

The accused told Cosmas that he did not kill the deceased. However, he was tortured and forced to sign a statement by a thumb print.

Subsequently, he was taken before a justice of peace where his statement was recorded on 30/03/2016.

He recalled that on 29/03/2016 policemen took him to Senge Village where he remained handcuffed throughout the day.

While in the village, some old men informed policemen that a “lidudu” (insect) was spotted at some place near the road.

The old men led the way to a paddy field where they pin pointed to a “lifimbo” (big stick).

He said that the old men pointed to a “gongo” (club) that was laid in a “Jaruba” (paddy field) whereupon a policemen picked it.

The accused said that the club picked from a paddy field was smeared with blood.

He added that immediately after it was picked up from the paddy field, the club was shown to him and he publicly disassociated himself from the killing.

The accused recalled that soon after it was shown to him, the club was kept in a police vehicle and he was escorted to the police station while villagers were allowed to bury the deceased.

On cross examination by Ms. Jane Mandago, DW 1 said that distance between his residence and the house of Juma Kashinde was about seven (7) paces.

He clarified that Juma Kashinde's compound had two houses: one for himself and the other used by the deceased.

On further cross examination, DW 1 said that his son, Leonard Omar Dohoi died in the year 2015.

The accused testified that Exhibit P 4 was the same club picked from the paddy field.

He admitted that the deceased mattress was found with blood and that Kashinde Dohoi (PW 8) was present when the body was exhumed.

On further cross examination by Ms. Mandago, the accused admitted to be out of the house when Juma Kashinde visited him in the fateful night.

Additionally DW 1 clarified that:

"I got out of the house that night and went to the toilet. Upon return to my house, I was told by my wife, Regina Muhoja that Juma Kashinde had visited my house when I was out of

the house. He did not disclose a reason of looking for me that night and therefore I decided to go back on sleeping..."

On further cross examination the accused stated that:

"I do not know why other family members were left and only myself was taken from police station to the village, to the scene of crime where the body was seen, to the "majaruba" where the "rungu" was seen with blood. I was then taken back to the police station while others were left in the village....."

On re – examination by Mr. Langa Mvuna, the accused testified that:

"In the night of 27/03/2016 I went out of my house in order to visit the toilet as I had a running stomach. The toilet is outside the house. I was within the precincts of my house."

On further re – examination, the accused stated that:

"I was a suspect and did not know why policemen took me from the station to the village, to the area where the body was exhumed, to the "majaruba" where the "rungu" was found and back to the police station."

On whole of the evidence, Ms. Jane Mandago for the Republic was optimistic that the Republic had proved its case against the accused.

Mr. Langa Mvuna for the defence felt otherwise. He contended that the prosecution evidence did not tally and gave examples of PW 1 and PW 2 testimonies.

He asserted that the prosecution evidence did not complement each other on who picked the club from a paddy field between the accused and a policeman.

He faulted the prosecution for tendering Exhibit P 4, a bloodless club whereas testimonies showed that it was smeared with blood at a time of its recovery.

The learned advocate criticized PW 7 for identifying the accused through black clothes which he allegedly donned that day.

As regards to confession, he contended that the prosecution failed to tender any recorded confession.

Addressing the rival contentions, I would state from the outset that for the prosecution to secure a conviction on a charge of murder, it must prove three ingredients against the accused.

In **REPUBLIC V MASUNGA NZENGO, CRIMINAL SESSION CASE NO. 46 OF 2019, HIGH COURT OF TANZANIA, TABORA DISTRICT REGISTRY AT NZEGA** (unreported) at page 13, this Court outlined the elements of murder as follows:

- a) That there is death of a person (deceased)
- b) That death was caused by an unlawful act or omission of the accused.

c) That in causing death the accused acted with malice aforethought.

I will now address these three elements in light of the evidence on record.

DEATH OF THE DECEASED was proved by PW 1 SP Aziz Musa Kalokola, PW 2 G 3519 DC Daniel, PW 3 Michael Renatus Kayumbo, PW 4 Dr. Christian Soronyo Sasi, PW 5 Shabani Nzobe Kidesera, PW 6 Cosmas Hiba Shija, PW 7 Ndalo Bundala Kasida, PW 8 Kashinde Dohoi Mihambo and DW 1 Omary Mihambo Dohoi.

These witnesses stated that they saw a naked dead body exhumed from a heap of soil with wounds on the face and on the head.

Dr. Soronyo Sasi who examined the body prepared a post mortem report that was admitted as Exhibit P 5.

According to the report, the body was positively identified by Kashindyeh Dohoi and Michael Renatus as being of the deceased.

The report confirmed that the deceased died of severe head injury.

I therefore find that Pili D/o Makenzi @ Mwanasheshiwa is dead.

PROOF THAT DEATH WAS CAUSED BY AN UNLAWFUL ACT OR OMISSION OF THE ACCUSED. The accused disassociated himself from the killing.

The definition of murder remains as that set out by Sir Edward Coke (See Coke's Institutes, 3 Co Inst 47) that it occurs where a person unlawfully kills any reasonable creature (a human being) with malice aforethought.

Unlawful killing implies causing death as per the normal rules of causation.

Section 196 of the Penal Code, states that causing death include acts and or omissions in which the accused may be held responsible for death of another person.

Section 203 of the Penal Code defines causing death of another person to include inflicting bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death, if he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living.

The section further defines causing death to include causing a person to perform an act which causes the death of that person by actual or threatened violence, if by any act or omission he hastens the death of a person suffering under any disease or injury which apart from that act or omission, would have caused death and lastly, if his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of another person.

In **REPUBLIC V MASUNGA NZENGO** (supra) it was stated that in establishing an actus reus of murder, the Court should consider whether:

- i) The accused did the act or omitted to do a legally recognized duty.
- ii) The act was deliberate
- iii) The act was unlawful as opposed to killing in self defence
- iv) The act was a significant cause of death
- v) The death was of a person (human being).

The prosecution had a duty to show that the accused executed an unlawful act intended to cause death or grievous harm on the deceased.

In the case at hand, there is evidence of PW 1 SP Aziz Musa Kalokola, PW 2 G 3519 DC Daniel, PW 3 Michael Renatus Kayumbo, PW 5 Shabani Nzobe Kidesera, PW 6 Cosmas Hiba Shija and PW 8 Kashinde Dohoi Miambo that the accused confessed to the killing.

These prosecution witnesses testified that upon interrogation by PW 1 and PW 6, the accused admitted that he committed the unlawful act that caused death of the deceased.

The six witnesses stated that on 29/03/2016, the accused led the way for policemen and villagers to relevant scenes of events in the village leading to discovery of a murder weapon (Exhibit P 4) from the paddy field.

Testimonies of these witnesses tallied on all important details as described herein before.

They all testified that it was the accused who led the way to the paddy field and signified them to stop upon arrival at the appropriate point.

Despite of distancing himself from leading the way, the accused admitted during cross examination and re – examination that he accompanied policemen to the area where the body was discovered underground and subsequently exhumed and to a paddy field where the club was recovered.

The accused further testified that the club was picked by a policeman from the paddy field because he was handcuffed.

That testimony corroborated the evidence of PW 2 G 3519 DC Daniel, PW 3 Michael Renatus Kayumbo, PW 5 Shabani Nzobe Kidesera and PW 8 Kashinde Dohoi Mihambo.

I also considered the evidence of PW 1 SP Aziz Musa Kalokola who stated that the club was picked up by the accused personally.

Considering that all other details given by this witness chronologically matched with those given by other witnesses who were present at the scenes on 28th and 29/03/2016, I formed an opinion that due to passage of time, he could not remember all the fine details of the incident.

I say so because the incidents took place on 28 & 29/03/2016 and PW 1 testified on 6/10/2020. That is over four years after the events.

My position is further supported by testimonies of PW 2, PW 3 and PW 5 who stated that the club was picked by DC Daniel (PW 2) from the paddy field on instructions of PW 1.

According to these witnesses, the accused could not pick the club as was handcuffed.

Additionally, records show that PW 2 was best suited for the task as he wore gloves that guaranteed protection from the blood stained club.

It is on record that Exhibit P 4 was blood smeared at the time of its recovery on 29/03/2016.

Being a liquid substance, blood was not expected to last for four years over a solid object like a club!

I therefore accept as true the evidence by prosecution witnesses who stated that blood found on Exhibit P 4 had washed away due to passage of time.

As demonstrated above, minor differences due to passage of time cannot be termed as contradictions in the prosecution set of facts.

In my view, such minor differences did not go to the root of the case and nor has it created a miscarriage of justice.

In the circumstances, I find no contradictions in the prosecution evidence.

Records show that the accused recorded confession statements before a police officer and a justice of the peace.

Mr. Mvuna invited this Court to hold that by failing to cause admission of such statements, the prosecution failed to discharge its duty as no confession existed.

I wish to differ from that assertion. Whereas the cautioned statement was overruled in a trial within trial due to its form, non-production of an extra judicial statement was not fatal in the circumstances of this case.

I hold that view in light of the Court of Appeal decision in **MABALA MASASI MONGWE V REPUBLIC, CRIMINAL APPEAL NO. 161 OF 2010** (unreported) at page 18, thus:

"In the instant case the record shows that the appellant in his extra judicial statement made before PW 8, the justice of the peace. He also orally confessed before PW 1, PW 2 and PW 3 as village officers which led to the discovery of the deceased graves. This was a confession leading to discovery. The trial Court was satisfied that the confession made before PW 8 was true and hence found the appellant guilty and convicted him. We have no reason to fault the findings of the trial judge....."

As demonstrated before, the accused confessed before PW 1 and PW 6.

Those confessions were repeated publicly in the village gathering on 29/03/2016 attended by PW 1, PW 2, PW 3, PW 5 and PW 8, among others.

Further to that, I am fully satisfied by the prosecution evidence that it was the accused who led the way to a paddy field and pin pointed an exact area where the club was hidden.

These physical acts by the accused corroborated the prosecution evidence that he voluntarily confessed for the crime of murder and that such confession led to discovery of the murder weapon.

Apart from that, the evidence of PW 7 Ndalo Bundala Kasida cannot be taken lightly.

This is a sister in law to the accused person whose house is just seven paces away from that of the accused.

The two lived in such close neighborhood from the year 2009 when PW 7 was married to Juma Kashinde until date of the incident on 28/03/2016.

That closeness sufficiently demonstrates that the accused and PW 7 knew each other well for almost seven years prior to the incident and she could not mistake him in identification.

According to PW 7, she saw the accused in the fateful night with assistance of strong light from a torch whose batteries were new.

It was PW 7 evidence that the accused ran away when she called his name.

PW 7's observations were confirmed by her husband, Juma Kashinde, who saw the accused in similar questionable circumstances around the same time and at the identical place.

I am aware that Juma Kashinde did not testify in this case rendering some pieces of evidence as hearsay.

Nevertheless, the accused's own testimony corroborated the evidence by PW 1, PW 3, PW 5 and PW 8 who recalled statements by Juma Kashinde given in the village "mwano" and thereafter, to the police.

The accused admitted that Juma Kashinde visited his house in the fateful night and did not find him inside.

He also admitted that upon that night visit, Juma Kashinde spoke to his wife, Regina Muhoja.

An allegation that during a visit by Juma Kashinde the accused was in a toilet did not find any corroboration.

I also reject that contention taking into account of the nature of relationship between the accused and Juma Kashinde and a close distance between their houses.

It is on record that the two are cousin brothers whose houses were about seven paces from each other.

From that background, a visit by Juma Kashinde in late hours of the night ought to have alerted the accused to inquire on why a brother visited him.

To the contrary, the accused treated everything normal and did not bother to act on details of a visit as informed by his own wife until arrested in the evening of the following day.

This suggests that he had something to hide from his brother and the family.

This circumstantial evidence adds more weight to the prosecution case and satisfies to the required standards that the prosecution established the actus reus for the offence of murder against the accused person.

The next element is on **MALICE AFORETHOUGHT**. This is the conscious intent to cause death or great bodily harm to another person before a person commits the crime.

In **REPUBLIC V MASUNGA NZENGO** (ibid), this Court revisited decisions of the Court of Appeal in **FADHILI GUMBO @ MALOTA AND 3 OTHERS V REPUBLIC (2006) TLR 50, ZABRON MSUA V REPUBLIC, CRIMINAL APPEAL NO. 7 OF 1979** (unreported), **TUNUTU S/MNYASULE V REPUBLIC (1980) TLR 204** and **MICHAEL THEODORY V REPUBLIC, CRIMINAL APPEAL NO. 69 OF 1980** (unreported) before drawing a conclusion at page 20 of the typed Judgment that:

“These cases propound the underlying principles that if evidence shows the nature of wounds, the weapon used to inflict the wounds, conduct of the accused before and after the incident and the mode of resentment adopted by the accused in reaction to the deceased’s action in the particular circumstances, then malice aforethought could well be manifested as per Section 200 of the Penal Code.”

In the present case, the accused attacked the deceased with a club, a very dangerous weapon on the face and on the head near the left ear.

The areas attacked are delicate parts of a human body and the attacks were so vicious. PW 4 stated that the inner bones of the deceased were broken down.

Immediately after the killing, the accused carried the body for some distance, pulled it over the grasses and then buried it over a heap of soil.

He also cleaned the deceased’s house by mopping its floor and arranging the bedding in order to hide the splattered blood.

He did all this in order to conceal the truth on the incident.

PW 1 SP Aziz Musa Kalokola and PW 8 Kashinde Dohoi Mihambo testified that the accused had consulted a witchdoctor who opined that Leonard Omary Mihambo, a son, was superstitiously killed by the deceased.

Prior to the incident, the accused informed an uncle, PW 8 that his periodic sickness was also due to the deceased's sorcery powers.

PW 1 further disclosed that in a confession, the accused admitted in killing the deceased because she was a witch.

This evidence on record points to the accused as an aggressor who was determined to get rid of the deceased in order to remain "safe".

The prosecution witnesses in this case were direct, reliable and credible. I found no weakness in them that could water down their respective testimonies.

For those reasons, the prosecution evidence is overwhelming and effectively dislodged the defence offered by the accused.

I am therefore satisfied that malice aforethought has been established in terms of Section 200 of the Penal Code.

Consequently, I hold that the prosecution proved its case beyond reasonable doubts and the accused is guilty of the offence of murder contrary to Section 196 of the Penal Code.

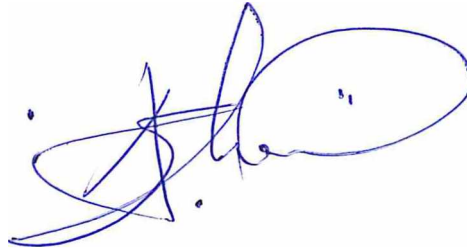
He is accordingly convicted for murder as charged. It is so ordered.



AMOUR S. KHAMIS
JUDGE
06/11/2020

COURT:

Judgment delivered in open Court in presence of Ms. Jane Mandago and Ms. Juliana Moka, Senior State Attorneys for the Republic and Mr. Langa Mvuna for the accused who is also present under custody.



AMOUR S. KHAMIS

JUDGE

6/11/2020

SENTENCE:

There is only one sentence for the offence of murder which is death. The accused is therefore sentenced to suffer death by hanging.



AMOUR S. KHAMIS

JUDGE

6/11/2020