

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT KOROGWE

CRIMINAL SESSION CASE NO. 40 OF 2019

THE REPUBLIC

-VERSUS-

JUMA SALEHE @ MWINJUMA

JUDGMENT

Last order: 01/12/2021

Judgment: 02/12/2021

AGATHO, J.:

The accused person, Juma Salehe Mwinjuma was arraigned before this court facing a charge of murder c/s 196 and 197 of the Penal Code [CAP 16 R.E. 2002]. The prosecution alleged that on 26/03/2017 at Pozo Village, Handeni District, Tanga Region he murdered George Kwaluda by shooting him on his head with a Gun (*Gobole*). The accused person pleaded not guilty to the charge. To prove the charge the prosecution brought ten (10) witnesses PW1 – Sgt. Abiah, PW2- Chui Kamunga, PW3- Athumani Juma Dege, and PW4 – Gamba Kamunga, PW5 – Dr Maulidi Makongo, PW6 – Alphayo Laizer (Magistrate, and justice of peace), PW7 – D/C Joshua, PW8 – D/C Flavianus, PW9 – D/Coplo Hafidhi and PW10 – Insp. Edwin Musiba and they also tendered seven exhibits: exhibit P1 – accused caution statement. P2 - post-mortem report, P3 – sketch map of the crime scene, exhibit P4 – a locally made gun (*Gobole*), and exhibit P5 – ballistic report, P6 – Seizure Certificate (2 mobile phones: 1 itel, and 1 tecno and 4 SIM

Cards: 1 Vodacom and 3 Airtel), and exhibit P7 – seizure report: 1 gun (*Gobole*), 2 strings of sisal fibre, gun powder, and 3 metal pieces/local ammunition/bullets. The defence side brought two witnesses, DW1 – Juma Salehe Mwinjuma, the accused person himself, and DW2 – Abdi Mwinjuma. The defence did not tender any exhibit.

In the conduct of the trial, the prosecution was led by Mr. Paul Kusekwa learned State Attorney who was assisted by Ms. Sarah Wangwe learned State Attorney. The Accused was represented by the learned counsel Mathias Nkingwa and Moses Ebenezer.

To prove their case beyond reasonable doubt as required by the Law as per Section 3(2)(a) and 110(1) of the Evidence Act [Cap 6 R.E 2019] the prosecution brought ten (10) witnesses.

The prosecution case commenced with the testimony of PW1: Sgt. Adiha. He investigated the murder incident at Pozo village which occurred on 26/03/2017 and was involved in arresting the Accused. He was among those who conducted search and seizure of the two mobile phones and four SIM cards and one gun (*Gobole*) at the Accused's house. He also wrote the Accused statement and tendered it and it was admitted in evidence as exhibit P1. He admitted that he corrected the dates on the exhibit P1. He went on stating that on 30/03/2017 he did not write in the Accused's cautioned statement that he read or told the Accused his rights because he referred to what he wrote on 29/03/2017. He also testified that after searching the house they left nobody to guard it and the house had only *Komeo*. It was not with a padlock.

PW2 – Chui Kamunga, this was the eyewitness who said was present when the Accused shot the deceased with the *Gobole*. He said he was at the crime scene when the incident occurred. He testified that he was with the deceased, and they went together to graze the cattle, and when they reached the Accused farm, they saw him cultivating his farm. According to PW2, the deceased greeted the Accused, and the Accused asked the deceased why they are grazing in his farm and that is when the Accused took his *Gobole* and shot the deceased on his head. He contradictorily stated that the Accused asked the deceased why he is grazing on his farm and asked him to pay TSH. 50,000 and the deceased said he did not have that money. Then the accused went on asking for the phone and the deceased refused and as a result the Accused shot the deceased on the head and died. The PW2 also told the Court that after the gun shot the deceased cattle randomly dispersed into the nearby farms. However, he said when he heard a gunshot, and the Accused was thereafter pointing the gun at him he ran into the bush hiding. He added that his cattle did not run anywhere. He then used his bed sheet and waved at them, and they all ran to the Mzungu's shamba/farm. He also said he saw the Accused taking the deceased phone. On cross examination he said the gun was on the ground but also, he also told the Court that the Accused carried the gun on his back. PW2 told a contradictory story that they (PW2 and the deceased) found the Accused in his shamba, but he also stated that the Accused found them grazing nearby his shamba.

Another prosecution witness was PW3, Athumani Juma Dege. He was Pozo Village chairperson who attended the search of the Accused house and witnessed the seizure of mobile phones, four SIM cards, the gun and

locally made ammunition. He stated that after completing the search they filed the seizure form and he signed them. Thereafter the police left with the accused. And on 30/03/2017 the police came back and searched the Accused's house, and he signed the seizure form again. The police left with the exhibit (the gun/Gobole) and the Accused. The door was shut and locked with komeo and there was no padlock, and nobody was left to guard the house on 29/03/2017.

PW4 was Gamba Kamunga. His testimony was brief. He told the Court that he went to Pozo Village office to collect the deceased's cattle arrested after they were dispersed or spread over into the villagers' farms following the gun shot at the crime scene.

PW5, Dr Maulidi Makongo, a medical doctor was also the prosecution witness. He testified that he conducted postmortem and confirmed that the death was unnatural as there was wound on the deceased head and lost a lot of blood leading to his death. He tendered the postmortem report exhibit P2. He said the deceased body had a stab wound on the head close to the left ear. There was no exit wound. But he also said the wound was big and was caused by blunt object. He also made a distinction between stab wound and blow wound.

The PW6 was Alphayo Laizer (a magistrate and justice of peace). He told the Court that he who wrote the Accused's confession which was not admitted before this Court due to it being in contravention of the law. It was written in a normal paper, not being in the form required by Chief Justice guide to Justice of Peace in writing extra judicial statements. Briefly, it was in improper format. The PW6 stated that the Accused

confessed to have killed the deceased. The latter was said to have killed the Accused's brother. The PW6 went on testifying that the Accused was brought to him on 31/03/2017. He had no form to record the confession, so he wrote on the normal paper. He told the Court that the Accused confessed to have shot the deceased after being provoked by him as he was boasting (while grazing in his shamba) that he killed his brother (Mgaza Salehe).

PW7 was D/C Joshua. He drew the sketch map of the crime and saw the deceased body with wound on the head. He tendered it, and it was admitted as exhibit P3.

The PW8 – D/C Flavianus took the exhibits from Handeni to the Forensic Bureau of the Police in Dar es salaam for forensic examination. He also took the mobile phones and SIM cards to the Cybercrimes Unit for examination. He transported by Hajeez bus. He was given a letter that he handed to PW9, D/C Hafidhi. He said the results for gun examination was returned but the results for mobile phones was not returned. He tendered the gun which was admitted as exhibit P4.

PW9 was Detective Coplo Hafidhi. He did forensic examination of the gun (*Gobole*) and the metal pieces (used as local ammunition). He confirmed the gun is functioning. He tendered forensic/ballistic report for the gun/|Gobole and metal pieces (local ammunition) as exhibit P5. He said he did not do fingerprint examination because he was not asked to do so.

The last prosecution witness was PW10, Insp. Edwin Musiba. He was the OCS of Mkata Police station when the murder incident occurred on 26/03/2017. He told the Court that he supervised the search at the

Accused's home and seized the exhibits, he completed the seizure forms. He tendered two seizure certificates exhibit P6 (two mobile phones and four SIM cards) and P7 (the gun/Gobole, 2 sisal fibre strings, three metal pieces/bullet and gun powder). He testified that on 29/03/2017 at night they arrested the Accused at his home. They conducted search at that night in the Accused's one roomed house, and they were five or six policemen. They found two mobile phones and four SIM cards hidden under the mattress. They also saw the house to have ceiling made of twigs/wood/timber. On 30/03/2017 following information they got from the Accused they went back to the Accused house and seized a *Gobole* that was wrapped in a piece of cloth and hidden on the ceiling. He testified further that the search was conducted in the presence of the Village Chairperson and Kitongoji chairperson. He also added that when they finished searching the house they locked the door with a padlock, and he gave the key to the village chair (PW3) who then gave it to the Kitongoji Chairperson (DW2). He went on testifying that they left the Village Chairperson to guard the house.

On cross examination he stated that they did conduct fingerprints examination on the gun. But he did not have any report. As for the mobile phones and SIM cards he said they were lost at the Cybercrimes Unit of the Police in Dar es salaam, but he did not have any report for that. The PW10 also when answering a question from the Assessors he stated that he knew George Kwaluda, and three days before his death he came to the Mkata police station, and he reported that he went to Pugu cattle auction in Dar es salaam where he managed to catch people who stole his cattle and he recovered about 28 cattle. Those people were taken to Handeni

District Court facing cattle stealing case. In a nutshell, that was the prosecution evidence.

Turning to the defence side, it was under representation of learned counsel Mathias Nkingwa and Moses Ebenezer. They called two witnesses, the accused person himself, Juma Salehe Mwinjuma and Abdi Mwinjuma (DW2) tendered no exhibit.

DW1 – the Accused testified that on the date of incident he was not at Pozo Village he was at Sapula Pangani District at his brother Kondokaya's home. He testified that though he is a peasant he also worked there as carpenter. He went to Sapula on 24/03/2017 and returned to Pozo on 29/03/2017. He stated he does not own a gun. He heard the news about death of the Mang'ati pastoralists when he came back. He stated further that he had a brother (Mgaza Salehe) who was killed by Mang'ati George Kwaluda (deceased) in 2016. He stated that on 29/03/2017 the police broke open his door when he was asleep and took him out of his house and started searching. They came out with two mobile phones and four SIM card lines. They arrested him and took him to Mkata police station where he was tortured, and the police wanted him to admit to have killed the deceased to avenge the death of this brother. He also said the police tortured him so that he could tell where the weapon used to kill the deceased is. On 29/03/2017 when they were leaving for the police station, the door was locked with a komeo as it had no padlock. And he said nobody was left at his home. He went on stating that on 30/03/2017 the police went took him back to his house and while he was left outside the police went in and came out with the gun/gobole. He was taken back to Mkata Police station the police where taken his statement. On 31/03/2017

he was taken to the Court to PW6 (Alphayo Laizer). He was asked to write his confession. He said since he was beaten and had cut wound on his hand due to handcuffs and he was hanged upside down, his head was not clear and was he could not understand what he said to PW6.

DW2 – Abdi Mwinjuma was Kitongoji Chairperson. He is the Accused uncle. He said had houses in Handeni and Kwa Msisi as well. On 29/03/2017 he was at his home after arriving from Handeni. He heard about the death of the Mang'ati from the village chair (PW3). They went to the crime scene but they could not reach there as they were attacked by the Mang'ati pastoralists. He stated that he did not witness any search. But on cross examination he admitted to have signed both seizure certificates. He added that the Accused door was locked by *Komeo* as there was no padlock, and nobody was left to guard the house when the Accused was taken to the police station.

Regarding the learned counsel's final submissions both directed themselves to the facts (evidence) and the law. Ms. Sarah Wangwe, State Attorney submitted that they brought the Accused facing the charge of murder C/s 196 and 197 [Cap 16 R.E 2002]. They brought 10 witnesses.

She submitted that in any criminal charge there must be two elements: *actus reus* and *mens rea* (malice aforethought). They have proved that the deceased died unnatural death. They have also shown that the accused is the one who murdered the deceased. She added that the Accused killed the deceased (George Kwaluda) intentionally.

The learned State Attorney submitted that there was death of deceased, the *actus reus* of murder is killing of a person. Under Section 62 of the

Evidence Act [Cap 6 R.E 2019] the law requires oral evidence to be direct. In the present case the prosecution has brought the eyewitness PW2 - Chui Kamunga. He told the Court how he knew the deceased and the Accused. He testified when the incident occurred, the distance between himself and the Accused at the crime scene. He also told the Court about the conversation he heard between the Accused and the deceased.

She invited the Court to consider the case of **Waziri Amani v R [1980] TLR 250** in which it was held that the evidence of visual identification of weakest kind and no Court should rely on it unless it is absolutely sure that all possibilities of mistaken identity has been eliminated. In the case at hand the witness (PW2) had told the Court that the incidence occurred during the daytime and the distance was close. The witness knew the deceased and the accused before the incident. There is no possibility of mistaken identity. They pray that the PW2 be believed and that it is the Accused who shot George Kwaluda. The testimony of PW2 was neither unshaken nor discredited.

The State Attorney submitted that the testimony of PW2 was corroborated by the PW5's testimony that the deceased had a wound on the left side of his head near the ear. Both witnesses testified that. In the case of **Goodluck Kyando's case (supra)** at page 363 it states that every witness is entitled to credence. They pray that this witness be believed as his testimony is credible.

She thereafter proceeded to submit on another ingredient of murder which is malice aforethought provided for under Section 200 of the Penal Code

[Cap16 R.E 2002] in the case of **Chrizant John v R, Criminal Appeal No. 313 of 2015** at page 27, the CAT stated that:

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

It was the learned State Attorney submission that from the above we see that the PW2 stated that the weapon used was a gun (Gobole). The gun was recovered from the Accused house as also testified by the PW10. She submitted that the weapon (gun) targeted the head of the deceased. The same was corroborated by PW5 who conducted postmortem examination. She concluded that the prosecution proved the charge because the Accused used the gun and shot the deceased on the head.

She also submitted that the prosecution brought PW1 Sgt. Adiha who tendered the caution statement of the Accused exhibit P1, the statement was not objected and hence it was admitted in evidence. As per PW1 the Accused statement lead, to the discovery of the weapon (dangerous weapon). At this point she referred the case **Mabala Masasi Mongwe v**

R, Criminal Appeal No. 161 of 2010 at page 10 where the CAT held that the confession of the Accused may lead to discovery or recovery of the weapon (Gobole). The State Attorney argued that since the exhibit P1 lead to the discovery of the gun then it was their prayer that such exhibit be considered and be given weight because the said statement is true. The accused statement leading to discovery of fact (weapon) is relevant as provided for under section 31 of the Evidence Act [Cap 6 R.E 2019].

She supported her argument with the case of **John Peter Shayo and 2 Other v R [1988] TLR 198** in which the CAT held that confessions that are otherwise inadmissible under 31 of the TEA [Cap 6 R.E 2019] are admissible if they lead to discovery of material or weapon used in the commission of the offence. Looking at the testimony of PW1, PW2, and PW5 and their testimonies have been corroborated by DW1's statement.

As for the PW6 – Aphayo Laizer, the justice of peace who testified about the the confession of the Accused, the State Attorney submitted that the PW6 recorded the Accused confession though it was not admitted before this Court he testified about what he was told by the Accused. As per section 3 of the Evidence Act [Cap 6 R.E 2019] it defines what is oral evidence. It means all statements given orally by the witnesses before the Court. PW6 testified that he did not induce the Accused. Meaning the Accused told him the story voluntarily. Even during cross examination, the PW6 testimony was not shaken. In the case of **Patrick Sanga v R, Criminal Appeal No. 213 of 2008 CAT** at page 7 it held that the confession may be oral, written, by conduct. And it can be made to anybody provided the same is made voluntarily. They pray that the testimony of PW6 be relied upon because his testimony was not discredited

by the defence. The PW6 testimony is corroborated by testimonies of PW1, PW2 and the caution statement. The learned SA argued that since the PW6 has no interest to save and because he was competent witness as it was held in **Posolo Wilson @Mwalyego v R, Criminal appeal No. 613 of 2015 CAT** at p. 7. Oral confession made by a suspect, before or in the presence of reliable witness be they civilian or not may be sufficient by itself to found conviction against suspect. It is a valid confession as long as the suspect was a free agent when he said the words imputed to him. The same was held in the case of **Director of Public Prosecutions v Nuru Mohamed Gulamrasul [1988] TLR 82**. The pray that the testimony of PW6 was credible because the Accused confessed to him orally without any inducement.

Th learned State Attorney also submitted on PW10 who tendered exhibit P6 (two mobile phones and four SIM Cards) – seizure certificate of 29/03/2017 and exhibit P7 (Gun/Gobole and 3 metal pieces, two sisal fibres and gun powder), – seizure certificate of 30/03/2017. And these exhibits were admitted in evidence without any objection from the defence. These exhibits showed items that were seized from the Accused's house. These exhibits were corroborated by the testimonies of PW1, PW3 and DW2 who confirmed that the items were seized from the Accused's house. These witnesses testified that the door was shut after the search.

Ms. Wangwe, the State Attorney, highlighted the contradictions in the testimonies of the prosecution witnesses. She asked who shut the door? With what was it shut/locked? She then submitted PW10 testified that he locked the door with a padlock and then he gave the key to PW3 who in turn gave it to DW2. The PW3 testified that he does not remember that he

was give that task but he said the door was locked with *Komeo*. The DW2 also said that the door was shut but neither he nor PW3 was given responsibility to guard the house. It was the submission of the State Attorney that although PW3 and PW10 were present at the house, and tells contradictory story, this contradiction is minor and does not go to the root of the matter and has not violated or discredited the search conducted on 29/03/2017 and 30/03/2017. The defence has not anyhow shown how the contradiction has prejudiced the Accused. The Accused himself told the Court that the house was shut with komeo, and when they came on 30/03/2017 they found everything intact. In the case of **Chrizant John (supra)** at page 20 the Court of Appeal held that it undesirable to pick some sentence in isolation of others, the Court should determine whether the contradiction goes to the root of the matter or not. Ms. Wangwe State attorney prayed that the Court consider that the contradictions are minor and should not pick this contradiction as going to the root of the matter in isolation of the rest of prosecution evidence.

The State Attorney submitted that PW9 - Detective Coplo Hafidhi, he tendered the exhibit exhibit P5 – ballistic report. He explained how Gobole works and considering that PW1 is the one who discovered the Gobole from the Accused house, and PW2 who testified that the deceased was shot by the Accused with Gobole. She submitted that it is clear that the prosecution has managed to link the Accused as the person who killed George Kwaluda and the Gobole was found in his house. She said the prosecution therefore has proved the charge against Juma Salehe that he is the one who killed George Kwaluda using the Gobole.

She also referred to Detective Coplo Hafidhi (PW9) who told the Court that when *Gobole* is shot on a person it can leave a wound (hole). And this is corroborated by the PW5 who did postmortem examination and the report and also testimony of PW2 who saw the *Gobole* being shot on the deceased head.

The State Attorney went on arguing that it is true that there were two mobile phones and four SIM Cards these were not brought before this Court. And PW10 told the Court why the same were not tendered. The seizure of the mobile phones was confirmed by PW1, PW3 and PW10 and even the DW1 has not disputed that those phones were found in his house. The testimony PW8 DC Flavianus show that the exhibits were taken to Cybercrimes Unit Dar es salaam, and he was given the number for the Gun but for the mobile phones he was not given any number. The seizure certificates were brought before this Court although the items seized (two mobile phones and four SIM Cards) were not tendered.

She (the State Attorney) argued that despite these weaknesses the testimonies of PW1, and his exhibit P1, PW2 (eyewitness), PW6 (got oral confession), PW9 (who tendered the gun and ballistic report) and PW 10 (tendered two seizure certificates exhibit P6 and P7) are enough to convict the Accused without the said phones being tendered before this Court. As per section 110 of the Evidence Act, they have proved the charge and have discharged the burden that was on our side.

Ms. Wangwe, the State Attorney turned to the defence, she submitted that they gave notice to rely on defence of alibi. It is true that the law has not imposed duty on the Accused to prove that he is innocent. However as per

section 194(4) of the Evidence Act [Cap 6 R.E 2019] the Court of Appela has directed that the Accused should demonstrate on the balance of probabilities that he was not at the crime scene. This was also stated in **Kubezya John v R, Criminal Appeal No. 488 of 2015, CAT** at page 23. It was her argument that in the case at hand the Accused gave notice to rely on alibi. But again, the Accused did not bring any person from Sapula Pangani to support his alibi. The State Attorney submitted that the DW1's defence is therefore without merit as it was held in **Kubezya John (supra)** and the **Masudi Amlima v R [1989] TLR 25**. She also argued that the Accused told the Court that the distance between Sapula and Pozo is not very far that it is possible for a person to go and return.

The learned State Attorney submitted that the PW2 has clearly demonstrated how he identified the Accused at the crime scene, PW5 – Dr Maulidi Makongo testified how he saw the deceased body, he also stated testified that he did not see a metal piece on the deceased body. If the Court finds these witnesses are contradictory, the Court of Appeal has given guidance in **Abdul Bahad Timim v SMZ [2006] TLR 189** the issue before that Court was whether the opinion of expert can override the testimony of a credible and trustworthy, the Court of Appeal held that the when the eyewitness has given credible testimony and the medical expert opinion pointing alternatives possibilities is not accepted as conclusive. Therefore, in our present case the PW2 has testified that he saw the incident, and the *Gobole* used, the PW5 testimony on the wound corroborates that testimony. Also, the testimony of PW9 corroborated the testimony of PW2.

Ms. Wangwe concluded the prosecution's submission by submitting that they have proved the charge beyond reasonable doubt. And they pray that the Court find the Accused guilty and convict him.

The defence lead by advocate Mathias Nkingwa and assisted by advocate Moses Ebenezer had rather engaging final submissions. It was the submission of the learned counsel Nkingwa was that the accused Juma Salehe Mwinjuma stands charged with murder C/S 196 of Penal Code [Cap 16 R.E 2002]. And the penalty is death as provided for under Section 197 of Penal Code [Cap 16 R.E 2002].

Advocate Nkingwa submitted that this is a serious penalty and care must be exercised. He went on submitting that, to prove the charge of murder there are several ingredients that need to be proved:

1. Was there a death of a person?
2. Was the death natural or unnatural?
3. Who caused the death?
4. Did he have malice aforethought?
5. Did the prosecution prove the charge beyond reasonable doubt?

Advocate Nkingwa submitted that as per Section 110 of the Evidence Act it is the duty of the prosecution to prove the charge and not the Accused to prove his innocence. To be found guilty of any offence it must be proved beyond reasonable doubt. That is found under Section 3(2)(a) of the Evidence Act [Cap 6 R.E 2019]. Again, under section 112 of the same Act, the law provides that burden of proof lies on the person who wish the Court to believe his allegation. The prosecution has that burden in our case.

As to the first ingredient there is no dispute that George Kwaluda is dead. This was confirmed by the exhibit P2 - postmortem tendered by PW5 (Medical Doctor).

Was the death of the deceased natural or unnatural? It is undisputed that the death of the deceased was unnatural. It was caused by the wound on his head, leading to massive loss of blood as shown in the exhibit P2.

Who has caused death or who murdering the deceased (George Kwaluda)? All the ten (10) prosecution witnesses none of them proved that it was the accused who murdered George Kwaluda. Moreover, even the seven exhibits did not show that it was the Accused who murdered the deceased.

Advocate Mathias Nkingwa argued that apart from PW2, PW1, PW3, PW4, PW5, PW6, PW7, PW8, PW9 and PW10 all gave hearsay testimony. The only witness who could be believed by the Court is PW2 (Chui Kamunga) who testified that on 26/03/2017 he was with the deceased at the crime scene. The learned advocate argued that the testimony of the PW2 is doubtful for the following reasons. This is the only witness who claims that Juma Salehe after shooting the deceased he ran away with the mobile phone of the deceased. The phone that PW2 saw the Accused taking and the PW1 saw it being seized at the Accused house was not tendered before this Court as evidence. The PW2 is undoubtedly a trained liar. Since the PW2 is the only witness who saw the murder incident, it is unclear why the prosecution did not tender the bullets collected from the crime scene.

The deceased was shot with a gun, but the bullet did not go through the deceased head out. If the bullet was on the deceased head then why was it not removed and brought before this Court.

The PW1 testified that the Gobole (gun) seized at the Accused house was wrapped in some piece of cloth. We expected that the prosecution could have taken the finger print in that gun and also match the same with the Accused finger prints.

The defence counsel emphatically argued that the prosecution have failed to bring things connected with the offence as per section 39 of Criminal Procedure Act [Cap 20 R.E of 2019]. They have failed to tender the mobile phones, the bullets, and the fingerprints.

He submitted that the PW2 testimony mentioned some items as above stated, those items were not tendered before this Court to prove that the offence was committed by the Accused.

Advocate Nkingwa submitted that the other ingredient is whether the Accused had malice aforethought. As for the evidence given by the prosecution none has proved that the Accused had not only malice aforethought but also did the act (*actus reus*) of killing he did not do it.

The last ingredient is whether the prosecution witnesses have proved the charge of murder beyond reasonable doubt.

Flanking Mr. Nkingwa was Mr. Moses Ebenezer Advocate who submitted that PW1 – DC/Sgt. Adiha in his testimony tendered the caution statement of the Accused. The caution statement violated Section 50(1) Criminal Procedure Act, [Cap 20 R.E 2019]. That section requires the statement to be recorded/ be taken four hours after the Accused was arrested. He was arrested on 29/03/2017 at 21:00PM, and his statement was recorded on 30/03/2017 at 16:00PM. When PW1 was testifying, he did not testify what made him not to record the statement in time as required by the law. It is

our prayer that although the statement was admitted as evidence it will be given less weight.

Mr. Ebenezer submitted that as for PW2 Chui Kamunga, he is the only witness who was brought by prosecution to prove the charge. This witness claims that he witnessed the Accused killing by shooting with the gun the deceased. The PW2 had contradicted himself more than four times. First, the PW2 was asked when he went to the crime scene whether they found the Accused there or not. The first time he said they found the Accused cultivating land in his farm. When he was asked again, he said the Accused found them grazing nearby his (Accused) farm. It is unclear whether the PW2 and deceased found the Accused in the farm, or the Accused found the PW2 and deceased grazing near his farm.

He pointed to another contradiction that is the issue of number of cattle and what transpired at the crime scene. The learned counsel submitted that the PW2 said he was grazing his 80 cattle and the deceased had 120 cattle. He said he was standing about 15 metres and he heard what the Accused and deceased were talking. He first said he heard Juma Salehe asking George Kwaluda (deceased) why he is grazing in his farm. And they argued that is why the Accused took his gobole and shot the deceased. The same PW2 told the court another story on the source of quarrel, he said the Accused Juma Salehe asked the deceased to give him money because he killed his brother and that was the reason why he shot the deceased. When the PW2 asked which story is true, the PW2 said both stories are true.

The third contradiction which the defence counsel earmarked is regarding PW2 is when he was asked about the gun, that where was the gun when he shot the deceased on his head. PW2 said the Gobole was on the ground. He later changed the story that the Accused has the gun on his back. He has left us with doubts as to where exactly the Gobole was.

The fourth contradiction the counsel pointed out is that, the PW2 said when the Accused shot the deceased he ran into the bush to hide himself. He also said only the deceased's cattle were dispersed on hearing the gun shot. The PW2 said that his cattle did not disperse into the farms. It is confusing how come George Kwaluda's cattle dispersed into the farms and his (PW2) cattle stood still, and he the PW2 took his bed sheet and waved them to run. It is unclear why his cattle did not run into the farms. He claimed that he took his cattle to Mzungu's farm.

It was the counsel Ebeneze's argument that this witness who was standing about 15metres and heard everything they talked about, and they (deceased and accused) faced each other why then the gun shot was on the left side and not on the forehead. The Medical doctor testified that the deceased wound was on the left side of his head close to the ear. The PW2 did not tell how come the wound is on the left side of the head and not on the forehead.

He questioned, what conclusion can we draw from PW1 is that, the PW2 is a liar and was not present in the crime scene. Since the incident took place some years back it is allowed in the law that he could have forgotten little details. But if the PW2 had forgotten key/basic information, then such witness is not credible. The witness could have forgotten about colour,

time, etc. These are minor inconsistencies. He cannot forget basic or key information. In the case of **Mohamed Haji Ally v DPP, Criminal Appeal No. 225 of 2018 Court of Appeal**, where it held that the witness to forget minor things/details is normal and that cannot to the root of the matter. But if the witness forgets key things/information or has contradicted himself in such basic information then his testimony will become incredible and damaged.

Moreover, advocate Ebenezer invited the Court to determine whether the above contradictions go to the root of the matter (testimony of PW2) or are minor ones. These contradictions go to the root of the matter, and it is my prayer that such contradiction as held by the Court of Appeal in **Mohamed Haji Ally's case** such witness' evidence is incredible and has been damaged.

It was advocate Ebenezer's expectation that the prosecution attorneys during re-examination could have mended the damages that was done in the testimony of the PW2 especially with regards to the PW2's cattle that did not disperse into the farms. The prosecution did not mend again on the contradictory of PW2 on the issue of the source of the quarrels before the deceased was shot. The PW2 said the Accused was mad because of the deceased grazing in his farm but another story was that the accused wanted to revenge the death of his brother.

At this point advocate Ebenezer to referred the case of **Cheyonga Nyambari v R, Criminal Appeal No. 510 of 2019 Court of Appeal at page 14** where the Court of Appeal in that case had faced similar scenario like the one at hand. It held that the prosecution did not re-examine

properly its witness to clear the doubt. In so doing the Court of Appeal held that the prosecution had agreed with the contradictory stories given and hence making the witness's testimony unreliable.

He submitted that considering the doubts that has been left out by the testimony of Chui Kamunga (PW2) we pray that the Court should disregard his testimony because he was not at the crime scene.

The learned advocate also submitted on PW3 Athumani Juma Dege. He said that the witness mentioned three key things. These corroborates the testimony of the Accused (DW1). First, he mentioned that the Police did thorough search in the Accused's house, which is a one roomed house, and the police were about five or six. He also testified that when the police did the thorough search on day one, they seized two mobile phones and four SIM card. This witness also said after the police completed the search, they left the house was locked with a *Komeo* and not a padlock. And that there was nobody to guard it. And third, the PW3 corroborated the DW1 evidence when he said that it was George Kwaluda he killed the Accused's brother.

The learned defence counsel went further to submit on PW5 – Dr Maulidi Makongo he did the examination of the deceased George Kwaluda. However, his testimony left us with questions. He said when he examined the deceased wound, he said it was caused by a blunt object. He also testified that the wound was a stab wound. When he was asked to differentiate stab wound and blow wound, he said former is caused by a sharp object, and the latter is caused a gun shot. From the testimony of the PW5 it is clear that the deceased's wound was caused by a blunt

object. Meaning the wound was not caused by the gun shot. The PW5 also said when one is shot by a gun then the bullet may go through (exit) or may remain in deceased/victim body. The PW5 did not tell the Court whether there was any bullet in the deceased's body or he could have testified that he saw another wound (exit). This witness has left us with doubts as to the wound found on the deceased body.

He also submitted on PW6 – Alphayo Laizer. According to advocate Ebenezer PW6 testified that he was a justice of peace in 2017. He testified that on 31/03/2017 he took the Accused's confession, and he claimed that the Accused confessed to him. According to the defence counsel, this witness was bound by the guidelines on writing confession issued by the Chief Justice. He also failed to follow the law and hence the said confession was not admitted as exhibit. The advocate submitted that this witness is of no value because what he wished to tender as evidence was rejected. He failed to record the confession properly and as per the guidelines given by the Chief Justice.

Regarding PW7 DC Joshua, the defence counsel submitted that PW7 testified that he was the one who drew the sketch map of the crime scene. Unfortunately, the map did not show the names of the owner of the farm in which the deceased body was found. He did not show who are neighbours, and boundaries. The map therefore is not useful to tell on whose farm the deceased died, or the body was found. It is unfortunate the PW7 was guided by the Village chairperson, we expected that the farm would be properly identified and even the boundaries and neighbours.

On PW8 DC Flavianus, advocate Ebenezer submitted that the PW8 told the Court that he was the one who transported the weapon and two mobile phones and four SIM Cards to Forensic Bureau, and Cybercrimes Unit in Dar es salaam. He kept the gun in sulphate bag, and he transported these exhibits in the Hajeez bus from Handeni to Dar es salaam. He told the Court that he was given the exhibits by the OC CID Sang'wa. He testified that he was told that the exhibits concern two accused persons. He went on stating he does not know the Accused persons. The PW8 identified and recognized the gun (*Gobole*). As for the mobile phones and the four SIM Cards he said he does not know their whereabouts. He said the one who know where they are is the OC CID Sang'wa. When asked where the documentation for these exhibits he said it is the OC – CID Sang'wa who knows the documentation about them.

Advocate Ebenezer did also submit on PW9 – D/Coplo Hafidhi, who testified that he is the expert of ballistic and ammunitions. He told the Court that he received a gun (*gobole*) to examine whether it was functional. He stated that he did the examination and found that it was functioning. He said further that the gun could be dangerous if used badly. He also tendered the report and the gun. These were admitted in evidence. The PW9 was asked whether he did fingerprint examination he said he was not told to do so. He however said had he been asked to so he would have done the fingerprint examination. It is unclear why he was not asked to do fingerprint examination if the gun is said to be of Juma Salehe (the Accused). I leave this to Court to decide.

The defence counsel continued to submit on prosecution case, by pointing to the testimony of PW10 Insp. Edwin Musiba. PW10 testified that when

the incident occurred, he was the OCS of Mkata Police Station. He was the one who lead the team that arrested the Accused. The testimony of PW10 has left many doubts:

First, he (PW10) said when they went to arrest the Accused, they found him getting out ready to go hiding. He also said they searched the one roomed house of the Accused, and they police) were six. He also stated that they seized two mobile phones and four SIM cards only. He further told the Court that thereafter they went to Mkata Police station, they interrogated the Accused and he told them that they should go back to his house to fetch the gun (Gobole). The PW10 when asked why they did not ask the Accused about the gun when they arrested him at his home. The testimony of PW10 corroborates the testimony of DW1 that he was tortured and that is why he said the gun was in his home. It is illogical to have asked him without torture at the station while that could have been done at his home.

Advocate Ebenezer mentioned another doubt about PW10, that he said he locked the house with a padlock, and that he found or took this padlock from the Accused because he was trying to lock it so that he could go hiding. This testimony contradicts the testimony of PW1 Sgt. Adiha and PW3 who testified that the house had no padlock. The defence counsel argued that the PW10 also lied on oath when he said they left the house under the guard of the village chair (PW3 – Athuman Juma Dege) who later left it to the DW2 (Abdi Mwinjuma - *Kitongoji chairperson*). The advocate Ebenezer submitted that PW3 and DW2 both stated that the house had no padlock, and it was left under the guard of nobody after the Accused was arrested and take to the police station. They said the house

door was shut with Komeo but there was no pad lock. The PW3 said that since the house was locked with padlock anything could have been done, anybody could go in there and sleep there or put anything.

The defence counsel argued that PW10 was lying on oath. The witnesses (PW3 and DW2) were telling the truth. The other doubt that PW10 left is that he recognized the gun (Gobole) that they seized on 30/03/2017. He failed to tell the Court how come six policemen in one roomed house failed see or seize the gun alleged to have been hidden on a ceiling considering the gun is 1.5 Metres long.

Yet another doubt that advocate Ebenezer was quick to mention that the PW10 Insp. Edwin left was the issue of fingerprints. He was asked if they did fingerprints examination, he said they did. But when asked where the results are, he said he does not know. The PW10 also said on 30/03/2017 they seized the gun powder, sisal fibre, and three metal pieces. He was asked if he had tendered them before the Court, he said he had not done so. He also said they have not been tendered before the Court. It is unclear where the sisal fibre and gun powder are.

The two mobile phones and four SIM cards were another doubt painted on the PW10. He is the one who tendered the seizure forms. He testified that one of the mobile phones belonged to the deceased - George Kwaluda. He stated that they took the mobile phones and four SIM cards to the Cybercrimes Unit. However, he told the Court that the two mobile phones and SIM Cards are lost. They got lost in Dar es salaam at the Cybercrimes Unit. When asked where the letter or police loss report are, and to show that they were lost he said he does not have them.

Advocate Ebenezer argued that to prove that the Accused is the one who had the gun in his house, then it was expected for the Inspector Edwin (PW10) that he would properly handle the gun and send it to the Forensic Bureau to do forensic examination and identify whose fingerprints were there in the gun (*Gobole*). It was important to establish whether the Accused fingerprints were in the gun.

It was the defence counsel's argument that if the prosecution claimed that the mobile phones were taken to the Cybercrimes Unit, then an expert from that Unit should have been brought here as a witness to establish whether the mobile phones belong to the deceased George Kwaluda and the other one is of the Accused Juma Salehe. Unfortunately, there was no letter from the Cybercrimes Unit to confirm that the mobile phones and SIM cards were lost. These doubts should benefit the Accused.

Finally, he submitted on the testimony of PW4 which was brief. PW4 said he saw the deceased body, and that he went to the village to take the deceased cattle that were loitering in the villagers' farms. This witness is of no value because he did not see the Accused shooting the deceased. He did not see the Accused the crime scene and he did not see the Accused with anything that belong to the deceased.

Advocate Ebenezer submitted that it is apparent that the prosecution have failed to prove the charge beyond reasonable doubt. There are many doubts as pointed out herein above. They have contradicted the principle that the prosecution has a burden of proof. The defence has no duty to prove his innocence, and he only required to raise doubt in the prosecution

evidence. This was held by the Court of Appeal in the case of **Joseph John Makune v R [1986] TLR 44.**

"the guiding of principle in criminal trial is that the burden is on the prosecution to prove its case beyond reasonable doubt. No doubt is casted on the accused to prove his innocence."

The learned counsel Ebenezer lengthy submissions continued by turning to Defence case. The DW1 told this Court that on the material date he was not at Pozo village. Rather he was at Sapura, Pangani District since 24/03/2017. He came back to Pozo on 29/03/2017. He told the Court that there is a long distance from Pozo to Sapula Pangani the bus fare is TSH. 5,000/= and by motorcycle is TSH. 15,000/=. The DW1 told the Court that he is a peasant but also carpenter. He testified that he makes wooden beds, and he does this at Sapula Pangani District. He also told the Court when he came back to his Village, he was told that there was a person (pastoralist) who was killed in the farms. He did not know who deceased was. He heard the news at the Pozo Village. DW1's testimony is corroborated by the PW3 testimony that they went to the crime scene, but they did not reach there because the pastoralists chased them, and they returned to village office.

He submitted that the DW1 also stated that on 29/03/2017 at around 21:00hrs when he was sleeping the police came kicked the door open and they took/arrested him and kept him outside his house. thereafter the police went inside the house and conducted search. After the search the police came out with the two mobile phones and four SIM

cards. He told the police that he only knows one phone which is his. He does not know the other. The police took him to the police station (Mkata), where they tortured him. He was hanged upside down while handcuffed. The police forced him to admit killing George Kwaluda because he will be revenging the death of his brother Mgaza Salehe who was killed by George Kwaluda (deceased) in 2016. The DW1 told the Court that he told the police that he was not at Pozo when the incident occurred. The police kept torturing him they were forcing him to admit that he has a gun (*Gobole*). The DW1 told the Court that on 30/03/2017 which was the second day the police and himself went to his house, and while he sitting outside they came out with the gun (*Gobole*). After that they took to the police station where they forced him to write a statement. He was tortured while handcuffed and the cuffs did injure him, he showed the scars on his hand. The DW1 further testified that on 31/03//2017 in the morning he was tortured and taken to the Court to the justice of peace to write his confession statement. Thereafter he was taken back to the custody. On 04/04/2017 he was taken to Handeni District Court and committal began.

DW2 – Abdi Mwinjuma, he said he was the *Kitongoji* Chairperson. He told the Court that he was called by the police to sign the seizure forms. He said that in all occasion he found the accused being under arrest and the search was already conducted. He never witnessed any search. He said he was simply called to sign seizure forms.

According to advocate Ebenezer the defence evidence was not shaken or discredited. And basing on the decision of **Goodluck Kyando v R**

[2006] TLR 363 the Court of Appeal of Tanzania held that every witness is entitled credence and must be believed unless there is cogent reason for disbelieving them. He prayed that the testimonies of defence is credible and should be believed unless the Court has reason not to believe them.

Following the closure of the learned counsel's final submissions, the Court proceeded to sum up the case to the Hon. Assessors. All three Assessors were unanimously of the opinion that the prosecution case was doubtful and hence the Accused is not guilty. They pointed out to some weak points (failure to bring mobile phones before the Court; failure to examine fingerprints; failure to lock the Accused's door and left it with nobody to guard, failure to find the gun on the day one (26/03/2017) at the Accused's house; contradictions of PW2 who said the gun was on the ground later said it was on the Accused back, that his cattle were not dispersed after the gun shot; that he was running and he the Accused taking the deceased's mobile phone).

Before evaluating the evidence of both sides and considering the submission done by the learned counsel, it is worthy to note that in murder trial like the present one, where there is no dispute that the deceased is dead, and his death is unnatural the key issues for examination are:

1. Whether there was murder?
2. Whether the accused is the one who committed the offence with malice aforethought?
3. Whether the case has been proved beyond reasonable doubt?

With regards to information for murder C/S 196 of Penal Code [Cap 16 R.E 2002]. To prove the charge there are several ingredients that need to be satisfied: There must any person who is charged; who with malice aforethought; have caused the death of another person; without lawful justification; and he shall be guilty of murder.

The learned counsel for both parties submitted on the above ingredients. And it is the law that for a person to be found guilty of any offence it must be proved beyond reasonable doubt that he committed the offence. That is found under Section 3(2)(a) of the Evidence Act [Cap 6 R.E 2019]. Again, under Section 112 of the same Act, the law provides that a burden of proof lies on the person who wish the Court to believe his allegation. The prosecution has that burden in our case.

Murder is a serious offence which attract death penalty. Therefore, the prosecution must prove the charge beyond reasonable doubt. This was held in the case of **Nathaniel Alphonse Mapunda and Benjamin Alphonse Mapunda v R, [2006] TLR 395** at page 396. The burden of proof in murder charges is always lies on the prosecution. And the standard is beyond reasonable double. In criminal charges suspicion alone however grave cannot be the base of conviction. This was held in **Nathaniel Alphonse Mapunda and Benjamin Alphonse Mapunda v R, [2006] TLR 395**.

The issue before this Court is whether the prosecution proved the charge beyond reasonable doubt as required by the law? It was stated in **Jonas Nkize v Republic [1992] TLR 213 at page 214** that in any criminal trial the prosecution has a duty to prove the charge beyond reasonable

doubt. To warrant conviction in a murder charge the prosecution must prove the ingredients of the offence as per Section 196 of the Penal Code [Cap 16 R.E 2002]. It was also stated in **R v Masunga Nzengo Criminal Session No. 14 of 2019, High Court of Tanzania, Tabora District Registry at Nzega** (unreported) at page 13 that the ingredients of murder are:

1. That there is death of a person
2. That the death was caused by an unlawful act or omission of the accused.
3. That in causing the death the accused acted with malice aforethought.

The ingredients are also relevant in the present case. There is no doubt that the deceased (George Kwaluda) is dead. The exhibit P2 (the post – mortem report) showed that the deceased is dead. The prosecution witnesses (PW1, PW2, PW3, PW4, PW5, PW7 and PW10) all confirmed that they saw George Kwaluda's dead body. Some of these witnesses testified that they saw a wound on the deceased's head. The cause of death as shown in the exhibit P1 is that the deceased had wounds on the head, and lead to massive loss of blood leading to multi organs failure and death. The immediate cause of death as per exhibit P1 and PW5's testimony was severe loss of blood. Briefly, the evidence adduced as hereinabove showed proved that the deceased, George Kwaluda is dead.

The next issue is whether the death of the deceased was caused by an unlawful act or omission of the accused. For that matter a proof is required to show that the death was caused by unlawful act of the accused. We are

examining the causation of the death. Under Section 196 of the Penal Code [Cap 16 R.E 2002] the accused may be held responsible for causing death if his act or omission led to the death of deceased. Under Section 203 of the Penal Code [Cap 16 R.E 2002] causing death is defined. It includes an act of inflicting grievous body harm on another person and consequently the victim undergoes surgery, and which ultimately may cause his death.

In establishing actus reus for murder it was held in **R v Masunga Nzenge** (supra) that the Court should consider:

- (a) Whether the accused did the act or omitted to do a legally recognized duty.
- (b) Whether the act was deliberate
- (c) Whether the act was unlawful as opposed to killing in self defence
- (d) Whether the act was a significant cause of death; and
- (e) Whether the death was of a person (human being).

In the case at hand the prosecution had a duty to prove that it was the accused who unlawfully caused death or grievous harm on the deceased. In that regard, the Court has to examine the evidence adduced and ask itself whether the accused used a gun/*gobole* (exhibit P4) to inflict injury on the deceased? This issue should be addressed because there is only one eyewitness PW2 who testified that he saw the accused shooting the deceased with a *gobole*. All other prosecution witnesses (PW1 – PW10) gave a hearsay account of the incidence.

Without beating around the bush, the law as restated in **Goodluck Kyando v R** (supra), every witness is entitled to credence. The prosecution attorneys equally submitted that the PW2, the eyewitness of

the murder incident should be entitled to credence for what he testified. But the PW2's testimony is contradictory and doubtful in several fronts: He had contradicted himself in several occasions. First, the PW2 was asked when he went to the crimes scene whether they found the Accused there or not. The first time he said they found the Accused cultivating his farm. When he was asked again, he said the Accused found them grazing nearby his (Accused) farm. It is unclear whether the PW2 and deceased found the Accused in the farm or the Accused found the PW2 and deceased grazing near his farm.

Another contradiction is regarding number of cattle and what transpired at the crime scene. The learned defence counsel rightly submitted that the PW2 said he was grazing his 80 cattle and the deceased had 120 cattle. He said he was standing about 15 metres, and he heard the Accused and deceased's conversation. He said in the first instance that he heard Juma Salehe asking George Kwaluda (deceased) why he was grazing in his farm. They then had arguments, and that is why the Accused took his *gobole* and shot the deceased. The same PW2 told the court another story on the source of quarrel. He said the Accused, Juma Salehe asked the deceased to give him money because he killed his brother, he refused. The witness said that was the reason why the Accuse shot the deceased. When the PW2 asked which story is true, the PW2 said both stories are true.

The third contradiction regarding PW2's testimony is when he was asked about the gun, that where was the gun when the Accused shot the deceased on his head. PW2 said the *Gobole* was on the ground. He later changed the story that the Accused has the gun on his back. He has left us with doubts as to where exactly the *Gobole* was.

The fourth contradiction is that the PW2 said when the Accused shot the deceased, he ran into the bush to hide himself. He also said that only the deceased's cattle were dispersed into the nearby farms on hearing the gun shot. The PW2 said that his cattle did not disperse into the farms. It is confusing how come George Kwaluda's cattle dispersed into the farms and the PW2's cattle stood still, and he managed to take his bed sheet and waved them to run. It is indeed unclear why his cattle did not run into the farms. He claimed that he took his cattle to Mzungu's farm.

There are also other contradictions on prosecution evidence. With regards to testimony of PW1, PW2, PW5 and PW10 and exhibit P4 (gun). There were contradictions in the testimony of PW2 and PW5. The PW2 said that he saw the Accused shooting the deceased with the gun. Surprisingly, the PW5 said he did neither see any bullet in the deceased head, nor an exit blow wound which could be regarded as being caused by a bullet. While citing **Mohamed Said Matula's case (supra)** the prosecution argued that this was a minor contradiction.

Before proceeding further, I should say that I agree with the defence counsel's argument that the exhibit P4 (*the Gobole*) has left a lot to be desired. To the Court's surprise the exhibit P4 was sent to the Police Forensic Bureau in Dar es Salaam for checking whether it was functioning, and not to examine the fingerprints, which could have confirmed whose fingerprints are in the *Gobole* (exhibit P4). This point was confirmed by the PW9 who testified that he was never asked to examine the fingerprints in the gun. The fingerprints finding could have either corroborated or contradicted the testimony of PW2. Although the law does not require corroboration of testimony of eyewitness, it is my view that the

circumstance of this case and contradictions and doubts found in PW2 evidence required such corroboration.

As for PW1 – Sgt Adiha, he tendered exhibit P1 (Accused's caution statement). The said exhibit though depicted Accused's details about his family and his whereabouts and was admitted in evidence it has several shortfalls. It was submitted by the defence counsel that the interview was conducted beyond the four hours prescribed under Section 50(1) of the Evidence Act [Cap 6 R.E 2019]. But upon scrutiny of exhibit P1, it became apparent that that was not the case. There were two interviews conducted (the main, and a supplementary one). In the main interview, the PW1 interviewed the Accused on 29/03/2017, and it started at 23:00 and ended at 24:30; and the supplementary interview started on 30/03/2017 at 16:30 and ended at 17:00. The problem with exhibit P1 is in terms of dates. The PW1 has altered these dates on the second page of exhibit P1 the date written was 30/03/2017 and the PW1 altered to read 29/03/2017. The same was done on pages, 3, 5 and 6 of exhibit P1. This raises doubt as to the date of interviewing the Accused. The Accused testified that he was interviewed on 30/03/2017. The alteration on the dates makes it highly probable that the Accused was interviewed on 30/03/2017 contrary to Section 50(1) of the Criminal Procedure Act [Cap 20 R.E 2019]. **In Lubinza Mabula, Emmanuela Maswali & Dotto Kachembele@Loza v R, Criminal Appeal No. 226 Court of Appeal**, it was held that:

"As we are aware it is settled law that non-compliance with provisions of section 50(1) of the Criminal Procedure Act is fundamental irregularity that goes to the root of the matter and

renders illegality the obtained evidence and one that cannot be acted upon by the Court."

Moreover, on page 6 of the exhibit P1 where the supplementary interview began, the PW1 did not tell the Accused his rights. On his testimony PW1 said he referred to the rights stated on page 2 of exhibit P1. It should be remembered that in the second interview the Accused ought to be told his rights. This is fatal as the reference to the rights cannot be done impliedly. That is without indicating that fact in the cautioned statement.

As for the testimony of DW1, the Accused, on his side he raised a defence of alibi, that he was not at the crime scene. He went to Sapula Pangani to his brother (Kondokaya Salehe) where he does his carpentry works. He went on 24/03/2017 and returned to Pozo 29/03/2017. On the same day 29/03/2017 at around 21:00 he was arrested at his home.

The issue at this juncture is whether the Accused's alibi is with merits? On the defence of alibi, reference is made to the case of **Kubezya John v R Criminal Appeal No. 488 of 2015 Court of Appeal of Tanzania at Tabora** at pages 24-25 where the CAT held that:

*"we have given due consideration to the Accused person alibi he has raised, we see no plausible reason why it was not raised at the very outset at the time of the arrest on 22/04/2007. In that case the CAT quoted the case of **Kibale v Uganda (1999) 1 EA 148**, where it was held:*

That a genuine alibi is of course expected to be revealed to the police investigating the case or prosecution before trial. When it is so done, can the police or prosecution have the opportunity to

verify the alibi. The alibi set up for the first time at the trial is more likely to be an afterthought than the genuine one."

In the case at hand, the alibi notice was given verbally before commencement of the trial, and hence the law (section 194(4) of the Criminal Procedure Act [Cap 20 R.E. 2019]) was complied with. However, the DW1's alibi was not supported by any other witness. Making such alibi untenable. Nevertheless, it was held in **Yassini Rashidi @Maige v R., Criminal Appeal No. 461 of 2007, Court of Appeal of Tanzania** (unreported) that it is not the law that once alibi is proved to be false then the task of proving the Accused person's guilt is accomplished. I am of the view that despite the aforesaid weakness in the Accused's defence of alibi, the prosecution still has a duty to prove the charge beyond reasonable doubt. And as it was stated in **Nathaniel Alphonse Mapunda and Benjamin Alphonse Mapunda v R, [2006] TLR 395** that suspicion however strong cannot be used as a base for conviction. Moreover, it was stated in **R v Kerstin Cameron [2003] TLR No. 84** at page 85 also held by the Court of Appeal in **Zabron Msua v R, Criminal Appeal No. 7 of 1979** that the Accused can be convicted based on strength of prosecution case and not because of his weak defence. Thus, although the Accused may be a liar that cannot be used to convict him. However, the Accused's lie could strengthen the prosecution case.

In concluding the second issue as to whether the Accused caused death of the deceased, apart from PW2 who testified that he saw the Accused killing the deceased by shooting with a Gobole, other witnesses (PW1, PW3, PW4, PW5, PW6, PW10) gave hearsay testimonies regarding the Accused killing the deceased (George Kwaluda). They did not see the Accused killing the

deceased. As for PW7, PW8 and PW9, their evidence is circumstantial. They had no clue whether accused killed the deceased. Therefore, from the evidence adduced by these witnesses it is difficult to conclude with certainty that the Accused killed the deceased. Apart from the testimony of PW2 which has several contradictions and doubts we are left with circumstantial evidence. It was stated in **R v Shinon Nkwabi Criminal Session Case No. 144 of 2016, High Court of Tanzania Mwanza District Registry at Geita (unreported)** that to warrant conviction in a case where the large portion of evidence is circumstantial the Court must be satisfied that the circumstantial evidence adduced is devoid of any other explanation other than the guilty of the Accused. This is hardly so in the present case. The danger of convicting Accused based on circumstantial evidence was also amplified in the case of **Shaban Mpunzu @Elisha Mpunzu v R, Criminal Appeal No. 75 of 2002, the Court Appeal of Tanzania** (unreported).

I should add that the evidence adduced by PW2 poses several challenges as rightly pointed out by advocate Ebenezer in his submissions. I have hereinabove already highlighted the contradictions in PW2 testimony. Indeed, it was held in the case of **Deogratius Deemay Gurtu v R, Criminal Appeal 553 of 2016 Court of Appeal at page 3**, where the Court of Appeal held that in the cases the inconsistencies are unavoidable. The Court of Appeal cited the case of **Emmanuel Josephat v R** (supra) where it was held that

"We would like to begin by expressing the general view that contradictions by any particular witness or witnesses cannot be escaped or avoided in any particular case."

The Court of Appeal went on citing its own cases of **Dickson Elia Nsamba Shapwata & Another v R, Criminal Appeal No. 92 of 2007;** and **Lusungu Duwe v R, Criminal Appeal No. 76 of 2013 Court of Appeal (unreported)** which held that:

" In all trials normal contradictions and discrepancies are bound to occur in the testimonies of the witnesses due to normal errors of observation, or errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence."

As could be seen from the Court of Appeal decisions contradictions in testimonies as a rule are likely to arise. However, it is the duty of the trial court to determine whether such contradictions are minor or major.

Thus in the case at hand it is worthwhile to ask whether the contradictions and inconsistencies in PW2, PW3, PW5 and PW10 testimonies are minor or they go to the root of the matter. Ms. Wangwe, State Attorney rightly referred the Court to the case of **Mohamed Said Matula (supra) at p.3** where it was held that there is a duty on the court to determine whether the inconsistencies and contradictions are minor, or they go to the root. The learned State Attorney submitted that the inconsistencies are minor. They do not go to the root.

I am aware of the case of **Chrizant John v R Criminal Appeal 313 of 2015 CAT** at page 20 where the Court of Appeal held that it is undesirable to pick a sentence and leave others in deciding whether the contradiction or inconsistencies are minor or major. I am further alive regarding the case of **Vincent Ilomo v R, Criminal Appeal No 337 of 2017 CAT at**

Iringa at pages 29 – 30 where the Court of Appeal cited the case of **Chandrakant Joshbhai Patel v R Criminal Appeal No. 13 of 1998 at page 18** (unreported) where the CAT held that:

*"As this court said in **Magendo Paul and Another v R [1993] TLR 219** quoting Lord Denning's view in **Miller v Minister of Pensions (1947) 2 ALL ER 372**, also quoted by the learned trial judge in the instant case, remote possibilities in favour of the accused cannot be allowed to benefit him. If we may add fanciful possibilities are limitless, and it would be disastrous for administration of criminal justice if they were permitted to displace solid evidence or dislodge irresistible inferences."*

To begin with, I am of the settled view that the contradictions and doubts recorded in the testimony of PW2 go to the root of the matter because they discredit his testimony. They turn PW2's evidence incredible and untrustworthy. While witnesses are entitled to their credence as it was held in the case of **Goodluck Kyando v R [2006] TLR 363**, such credence is given to a credible and truthful witness. It does not extend to the witness who gives contradictory and doubtful testimony. Thus, I am afraid the testimony of PW2 seems to defeat logic and reasoning that the gunshot will make the deceased cattle run into the farms with awe while mysteriously the PW2's cattle who were also close by remained stand still. This is a mystery. Moreover, it is unclear how can a person who is terrified with a sound of the gunshot will be able to look back and manage to see the Accused taking the deceased mobile phone. As that is not enough that the PW2 got out of hiding and waived or signalled his cattle with his bed

sheet and then he led them to Mzungu's shamba. This evidence is incredible and unbelievable.

The third ingredient of murder that the Court examined is malice aforethought. The *mens rea* of murder is what is termed malice aforethought. It is the intention or knowledge of the wrongful act that constitutes an offence. Section 200 of the Penal Code [Cap 16 R.E 2002] provides for ingredients of malice aforethought:

- (i) There was an intention to kill or to cause grievous body harm regardless that the person is killed or otherwise.
- (j) That the person who did the act know that the act will cause death or grievous body harm.

The Court of Appeal has held in among other cases in the case of **Chrizant John v R Criminal Appeal 313 of 2015 Court of Appeal** at Bukoba that in murder case malice aforethought is established by considering the following:

- (i) Weapon used
- (ii) Force used
- (iii) Body part attacked
- (iv) Number of blows
- (v) Nature of wounds inflicted on the victim
- (vi) Attitudes or behaviour of the Accused before and after the incidence.

In the present case, a weapon used as per exhibit P4 is the *Gobole*. That is a dangerous weapon. The force used may be immaterial but considering the postmortem report (exhibit P1) which indicated that there was a wound

on the deceased head which the PW5 called stab wound led to massive loss of blood and ultimate death. The body part attacked is also sensitive area, the head. The wound on the left side of the head close to the ear. It was visible. Despite the presence of traces of *mens rea* drawn from weapon used, body parts attacked and nature of wounds visible on the deceased's head, there is still an unsettled issue as to who did the unlawful act (murder). As already stated hereinabove and as will continue to unfold here in below, it can hardly be held that the prosecution has managed to tie the elements of *mens rea* with the Accused.

At this juncture I should turn to the next ingredient of murder. As to whether the Accused murdered the deceased with malice aforethought. In that regard, we turn to the Accused's attitude before and after the incident. It is difficult to say with certainty because the Accused claimed alibi, which was not clearly displaced. The DW1 alibi was not discredited by the prosecution save for the fact that the said alibi was not corroborated by any other defence witness. For that reason, the alibi is given less weight. But the weakness on the defence cannot be a ground for conviction. It is trite law as was held in **R v Kerstin Cameron [2003] TLR No. 84** at page 85 that an accused can be convicted based on strength of prosecution evidence and not weakness in the defence testimony.

The PW10 testimony was another centre of attention in this trial. He testified that they arrested the Accused when he was locking his door to go hiding. The testimony that he was about to go hiding was refuted by the DW1 who testified that the Police came to his home at night (21:00) he was asleep, and they smashed his door and stormed into his house while fully armed and shone the torch upon him. The fact that the Accused was

arrested at his home is corroborated by the testimony of PW1, PW3, and DW1. However, since the incident occurred on 26/03/2017 in the farms, the Accused had ample time if had he chosen to hide or travel somewhere. If he had committed the offence and knowing that the PW2 had seen him how would have fled somewhere else. It is doubtful if he would have returned home on 29/03/2017.

Regarding the testimonies of PW1 who tendered exhibit P1 -the Accused caution statement, and PW6 may raise suspicion that the Accused might have killed the deceased to revenge the death of his brother (Mgaza Salehe) who was killed in 2016. The killing of Mgaza Salehe was confirmed by PW3 and DW1. In **Nathaniel Alphonse Mapunda's case (supra)**, it was held that suspicion however grave cannot be the base of conviction. In our case there was suspicion of revenge. That the Accused as testified by PW6 (who recorded the Accused's confession) wanted to avenge his brother's death who was said to have been killed by the deceased George Kwaluda. Regarding PW6 testimony, the prosecution brought PW6 to testify as a justice of peace who recorded the Accused's confession. The PW6 had intended to tender the accused's confession but since the said written confession did not comply with the law it was inadmissible. The prosecution cleverly wanted the testimony of PW6 to turn into oral confession of the Accused. The oral confessions are admissible as it was held in **Patrick Sanga v R, Criminal Appeal No. 213 of 2008 CAT** at page 7; **Posolo Wilson @Mwalyego v R, Criminal appeal No. 613 of 2015 CAT** at p. 7. However, in the case at hand, PW6 wanted to tender written confession of the Accused which had flaws and hence inadmissible. In my view to make the PW6 testify on oral confession was improper

because there was no oral confession. I respectfully think that if the witness comes to testify regarding written confession, he cannot all over sudden and upon inadmissibility of his document (written confession) he wished to tender become a witness to testify on oral confession. That is not only improper practice but also unfair because what he ought to have testified about is the document. If the said witness proceeds to testify on a purported oral confession less weight ought to be given to such testimony.


From the foregoing, I must admit that it has been difficult to establish with certainty that the Accused murdered the deceased (George Kwaluda). And since PW2's testimony was incredible and unreliable, according less weight to such evidence would sound fair, and in doing so as it was held in the case of **Manyanda Ncheya v R, Criminal Appeal No 437 of 2017** at page 11) we are left with unreliable circumstantial evidence. The PW10 also testified that he knew the deceased George Kwaluda and that the deceased went to Pugu auction and recovered several of his stolen cattle. And the people suspected of stealing his cattle were being prosecuted before Handeni District Court. This gives rise to possibility of having other people having grudges with the deceased. Thus, it was not just the Accused's unproven zeal for revenge against the deceased for killing his brother but there were also other people who might have been interested to hurt the deceased which could be inferred from the PW10's testimony.

Therefore, despite my keen consideration of the prosecution evidence, I have noted that the apparent doubts and contradictions go to the root of the matter and can hardly be ignored. As shown herein above there are still doubts on the prosecution evidence. The PW2's incredible story, the PW10 also presented unbelievable evidence that they did fingerprint

examination on the gun, that six policemen failed to find the *Gobole* hidden on a ceiling of a single room house of the Accused, but mysteriously they found two mobile phones and four SIM Cards hidden under the mattress. The PW10 also lied that the door was locked with the padlock, and that he gave the key to the PW3 who in turn gave to the DW2 (the Accused's uncle), and that the two mobile phones were lost at the Cybercrimes Unit of the Police in Dar es salaam. All these doubts and contradictions damaged the prosecution case. I am of the view that it is unsafe to convict a person while there are such doubts. I therefore hold that the prosecution has failed to prove the charge against the Accused beyond reasonable doubt. I concur with the Hon. Assessors who found him not guilty. And I acquit him from the charge of murder. I order the Accused be immediately released unless otherwise held for other lawful reasons.



DATED at KOROGE this 2nd Day of December 2021.


U. J. AGATHO
JUDGE
02/12/2021

Date: 02/12/2021

Coram: Hon. Agatho, J

Accused: Present with his advocates Mathias Nkingwa and Moses Ebenezer

Republic: Paul Kusekwa and Sarah Wangwe State Attorneys

B/C: Jumanne

Court: Judgment delivered on this 2nd day of December, 2021 in the presence of the Accused person, his advocates Mathias Nkingwa and Moses

Ebenezer, and Mr. Paul Kusekwa and Ms. Sarah Wangwe prosecution State Attorneys.




U. J. AGATHO
JUDGE
02/12/2021

Court: Right of Appeal fully explained.




U. J. AGATHO
JUDGE
02/12/2021