

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(TANGA DISTRICT REGISTRY)**

AT KOROGWE

CRIMINAL SESSIONS CASE NO. 42 OF 2019

(ORIGINAL JURISDICTION)

THE REPUBLIC

-VERSUS-

RAJABU ATHANASIO @ SHANI

JUDGMENT

Last order: 08/12/2021

Judgment: 10/12/2021

AGATHO, J.:

The accused person, Rajabu Athanasio@Shani 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 10/08/2016 at Swagilo area, Nyasa Village, Handeni District, Tanga Region he murdered Matata Respidi@Mangi by hacking various parts of his body with panga. The accused person pleaded not guilty to the charge. To prove the charge the prosecution brought five (5) witnesses PW1 – Dr Hudi, PW – Hon. Grace Mwaikono Resident Magistrate and justice peace; PW3 – Mwajuma Shabani; PW4 – Ramadhani Shabani; and PW5 - Sgt. Beda, and they also tendered three exhibits: exhibit P1 - post-mortem report, P2 – Accused's confession; and P3 – sketch map of the crime scene. The defence side brought one witnesses, DW1 – Rajabu Athanasio@Shani. He did not tender any exhibit.

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

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 five (5) witnesses.

PW1 – Dr Hudi conducted post-mortem examination of the deceased body on 10/08/2016 at Handeni District Hospital. He examined the deceased body. He observed three big cut wounds and two small wounds. The big wounds were on the arm and shoulder. There was one between shoulder and elbow. The bone was fractured. Another cut wound was on the head which fractured the skull. It was fractured. Another wound was on the neck on the back side. Which did reach the backbone. There were small wounds on the right shoulder and the chest.

He testified that after the examination he found that the deceased death was caused by hemorrhage – massive loss of blood. He also filled out the postmortem report that the police brought.

He added that the big wound on the arm was deep and it went into the bone. The bone was cut. It means the force used was big and a sharp object was used. He went on stating that the deceased body he examined was of Matata Respidi.

PW1 tendered the postmortem report which was admitted as exhibit P1.

On cross examination the PW1 said the wound is normally measured by measurement or by looking at the extent of the wound. It is difficult to measure a size of wound with fractured the bone. The small wounds were on the right shoulder and chest on the left side. The PW1 also admitted that in the post mortem report he did not write his name.

PW2 – Hon. Grace Mwaikono (justice peace) she was the Resident Magistrate was working at Chanika Primary Court, in Handeni District. She was also a justice of peace who took confessions of various accused persons that were brought before her.

She testified that on 16/08/2016 while at the Court, came D/C Beda (now Sgt. Beda) together with the Accused Rajabu Athanasio @Shani. The Sgt. Beda told her that the Accused came wanted to write his confession. The Sgt. Beda left, and PW2 remained with the Accused. She asked him where is from that day, when was he arrested, and where is from when he was brought to Court. She asked if he came to her voluntarily. She asked him if he knows that the confessions can be used in the Court. According to PW2 the accused said he was willing, and he has nothing else to say.

She asked him to undress himself so that she can check if he had wound. She found some scars and wounds on his body. He told her how he got those scars and he explained each of them. She asked him what happened, and he told her the whole story and she wrote everything he said according to what he said.

PW2 testified that the Accused told her that together with his three friends planned to kill and they actually killed the deceased with pangas (machete). Each of them had his own reason/motive of killing him. He wanted to kill him because he suspected him of cheating with his wife. After recording the confession, PW2 asked the Accused to write his name and signature, she then signed, and my assistant (court clerk) also signed. The PW2 recognized the Rajabu Athanasio@shani who was at the docket.

She said further that after they have signed, and he (Accused) has signed she the extra judicial statement and the Accused to D/CPL (Sgt.) Beda.

The PW2 recognized the accused confession (extrajudicial statement) she tendered, and it was admitted as exhibit P2.

The PW2 – Continued to testify that she wrote the confessions under the Magistrates' Courts Act [Cap 11 R.E. 2002], and the Chief Justice's Guidance on recording of confessions (extra judicial statement) by justice of peace.

The PW2 went further testifying that the answer to the question whether the Accused wanted to give statement. The answer is in B: where the statement is. She said she got the form from the Court. She stated that it is true she asked the accused that the confession may be used in Court as evidence. It was her testimony that there was no place in the form to fill that. She said she truly asked him. Regarding his voluntariness, the PW2 said the answers are found on page 1 of the confession. These are found in the Chief Justice's Guideline to

justice of peace in recording Accused persons' confessions. She insisted that the Accused confessed to have killed the deceased by slashing him with the Pangas.

On cross examination PW2 said that she came here to give testimony not about the deceased but about what she was told by the Accused. She went on stating that the Accused mentioned the deceased as Mangi. The Accused told her that he was arrested on 10/08/2016. He was brought to her on 16/08/2016. She added that the accused is male. She testified that she examined the Accused body. She said she asked him to take off all his clothes.

The PW2 went on to testify that the law does not provide any guidance on whether male accused should be inspected by male justice of peace. She said she is female, but she asked him to undress, and he did, and she checked if he had wounds and scars. She testified that she does not remember how long he stayed naked before me. But it does not exceed five minutes.

She said she found several scars and some fresh scars. The fresh scars were two. There were on the head. And the other one was on the neck. She added that the Accused gave confession in written form. Everything was supposed to be written.

In her testimony, the PW2 said that there is nowhere in the first page of the form/confession which shows the answers included were signed by the Accused. It is only her who signed.

The PW2 said that on the first page there is nowhere where the Accused said he is ready to give his confession. Also, there is nowhere on the first page where she told the Accused that the confession will be used before the Court of law as evidence.

As for the second page of the confession, the PW2 said the question is "are you ready to give any statement." And she said that the accused did not say anything than proceeding to give a statement.

With regards to the last page, she said that there is nowhere where she asked or told him that the confession may be used in Court as evidence.

The PW2 emphasized that the Accused confessed that he killed Mangi. She said the Court will decide whether he killed Mangi or Matata Respidi.

On cross examination by advocate Zaudia Jacob, the PW2 said that she did not tell him what charge he was facing but he told her what he did.

She said that she after completing writing the confession, she did not show or write if she read it out to him. She said she also does not remember if she did that. She said she recorded it in 2016. She went further, yes, that was a written confession.

The PW2 said after asking the Accused if he is ready to give the statement, he started giving narrating the story. She wrote what he was telling her. She knew he was ready to give the statement because he seemed like wanted to tell the story as soon as possible.

The PW2 said on page 1 there was nowhere she was supposed to write whether he knows that the statement will be used in Court as evidence. She said she did not write that because the form has no such question.

She testified that on page one there nowhere the accused was supposed to sign. There is only a portion for the justice of peace to sign.

She added that the Accused told her everything the scars: the head scar was beaten by drunkard. The accused said the neck scar was cut by the broken glass bottle. The PW2 stated that she does not remember if she gave the Accused the written confession to satisfy himself as to what she has recorded.

PW3 – Mwajuma Shabani testified that the accused Rajabu Athanasio @Shani is her husband. They got married in 2016. They were living at Swagilo in their house in her father's compound. They do not have any child.

She continued to testify that they have minor problems, but they were reconciled. She said he is noisy person. She was patient with him as he is her husband. She said she knows Mangi. He had a shop nearby. He has never said anything to her father about Mangi. The PW3 said on 09/08/2016 early in the morning at 06:00 she found her husband already woke up and left. And at around 11:00AM, she went to borrow a mortar and pest (kinu na mchi) from Mzee Nkambale. On the way she met Rajabu who told her that they should relocate to another place. She told him that they cannot relocate that fast. He said if she does not want to relocate fine. He will move alone. The PW3 continued to testify that at around 15:00 her husband came back. He told her

that he wants to relocate. She testified that he did not say to where they will be moving to. She told him that he knows that the family has celebrations at home the next day. She said her husband said that he has already spoken. It was her testimony that after that the accused took his sweater and torch. He left. He was wearing black sweater and sneakers (black and white). The PW3 testified that later when she was about to go to the river to fetch water, she heard that Mangi has been murdered. She said that they went to the crime scene. She stated that she did not move close. She returned home. She said that the crime scene is the roadside at Swagilo Kitongoji in Nyasa village, Handeni District. She identified the accused was sitting at the docket.

The PW3 said after her husband (Rajabu) left on the 09/08/2016 and he returned on the next day at 14:00PM. She added that he did not stay, he left again for Magambazi – mining area, Handeni District.

On cross examination PW3 said that her husband is a small miner at Magambazi. He usually goes mining at Magambazi. He comes with some money. He gave her TSHS. 10,000/= for expenses. After marrying her he started mining in 2016. She concluded her testimony by stating that she did not see her husband killing Mangi.

PW4 was Ramadhani Shabani. He testified that he lives at Swagilo area Nyasa village. He stated that on 09/08/2016 he was at his home when the accused came he knocked the door and said he has some issues to discuss me. PW4 said he told him to wait as he was coming. He said when came out the accused

asked for PW4's phone to put his SIM card. The PW4 said he does not know why he asked for his phone. He testified that he rejected his request.

The PW4 continued with his testimony that the accused then asked him about the accused's wife. He asked how is his wife living with neighbours. The PW4 told him that he does not know, and he does not have time to follow up on other people's business. The PW4 stated that he took breakfast and thereafter went to his vegetable garden. On the way he found the accused at the neighbour's house. It was at around 08:00 to 9:00AM. Then the PW4 greeted the neighbour then he went to his garden. After reaching his garden and doing his job and then in the afternoon he went to eat and then he met the accused again at around 15:00 or 15:45 PM. He then asked if he has vegetables. He told him that he has. The accused said he is going to take a plastic bag from Siasii, and they will meet at the garden. The PW4 went to Mangi's shop and found one window open the other is closed. He decided to continue to go to the garden. He met one person whose motorcycle was not working. The PW4 said that at that time the accused started calling him.

The PW4 testified that the distance between Mangi's shop and my garden is about 210 feet to 280 feet. He went there and found the accused washing himself, he was washing his legs while wearing shoes. The PW4 asked him why he was washing his legs without taking the shoes off. He said the shoes were dirty and they are smelling bad. Then they went to the garden to pick vegetables. The PW4 picked the vegetables but he found the accused uprooting

the vegetables. He stopped him because he was destroying the vegetables. He told him his TSH. 500 vegetable was ready, and he asked the accused to give him the money. He gave him the money and he said he did not get the bag, so he put the vegetables on his sweater. The PW4 testified that the sweater was black and smelled blood and he did not know for sure. The PW4 put the vegetable on the accused's sweater. He added that the shoes he was wearing were sneakers (black and white).

The PW4 said that the accused then asked for the path to Magambazi. That was on the eastern side. He told the accused there is no way/path. There is a valley. He advised the accused to go back to Mangi's shop then go round to Magambazi. The PW4 said that they started arguing, and there was a woman (Nkambale's wife) who was passing by she said if he wants to pass on the bush and valley just give him the direction. The accused then left. It was about 16:00PM. After his departure they came two young men. One is called Siasii and Paskali. They told the PW4 that there is a person has fallen down. He has been hacked by Panga. He is bleeding everywhere. They said the person is Mangi. The PW4 testified that they then went together to the crime scene. On the way they met many people and they phoned the Kitongoji chair and they phoned the police.

The PW4 said that at the crime scene there were two old men and one militia and he (PW4) told them about Rajabu (the accused) and the doubts he had. The Militia and the police started looking for him. The PW4 said that before the

incident he saw the accused for some days. He stayed at his in laws. The PW4 identified the accused who was at the docket.

The PW4 said he saw Mangi's body. He was butchered with Panga on the back of the neck, shoulders, and arms.

On cross examination the PW4 said the accused is his neighbour. He knew him before the incident. He knows he was working at Magambazi in the mines. The PW4 testified that when he met the accused in the afternoon, he saw him wearing sweater and sneakers (black and white). He did not see him carrying anything. The PW4 said he did not see any blood stains in his shoes. The witness said the smell of the blood that he got from the accused is like the one he got from a piece of cloths he covered on the wound when he injured himself some years back. The PW4 added that the smell of the blood is the same as the one from animal blood. He said he has slaughtered animals before. The smell is the same.

Asked other cross examination questions the PW4 said that the accused's sweater had no blood, and his shoes too did not have any blood stains.

The PW4 said in the morning the accused was wearing a bed sheet. He went on testifying that the time they he had conversation with the accused was short about 10 minutes.

The PW4 said he did not see Rajabu killing Mangi. He added that it is just suspicion. The PW4 said he got the information that Mangi was murdered just 2

– 3 minutes after the accused has left from the vegetable garden. The PW4 also said in picking vegetables they spent like 3 minutes to do that.

PW5 – Sgt. Beda was a police officer at Handeni Police station. He investigated the case. He testified that on 09/08/2016 he was called by Inspector Lusajo and other policemen, and he told them that there was murder incident at Swagilo area Nyasa village. Together with inspector Lusajo who was the head of the team they went to the crime scene at Swagilo Nyasa village. They reached there at night. They found the deceased body on the ground on a footpath and nearby was his bicycle. They were told the deceased name is Matata Respidi @ Mangi. His body has a big wound on the back of his neck, on the head close to the left ear, on both arms. The wounds showed that they were caused by a sharp object. The PW5 said that he looked for the witnesses, those who saw the body lying on the ground. He took their statements, and then they took the body to Handeni Hospital Mortuary.

The PW5 testified further that on 10/08/2016 together with OC- CID ASP Kimaro we went to the crime scene for investigating and to draw the sketch map of the crime scene. The PW5 said that he drew the map of the crime scene. He was assisted by Filbert Athony, a relative of the deceased. PW5 drew the map to indicate the area where the deceased died, the houses of Shabani Rashid Mzungu, and a house of Mangi, and a farm. The PW5 recognized, he tendered it and it was admitted as exhibit P3.

The PW5 continued testifying that After drawing the sketch map we went to the villagers. They got information from Rmadhani Shabani@Digwana. He told us that in this incidence he suspects Rajabu Athanasio@Shani who is the in-law of Mzee Mzungu because he saw him washing his legs while wearing the shoes. PW5 said that when Ramadhani (PW4) asked him, why was he washing his shoes like that, he said they were smelling bad. After washing his legs, the accused asked Ramadhani to sell him vegetables. He saw him being in a hurry. And he was uprooting the vegetables, and he was also smelling blood.

The PW5 continued to state that after getting such information, ASP Kimaro phoned the Magambazi mining because it was said the accused was hiding there. He asked them when they see him, they should apprehend him and bring him to Handeni Police Station. The PW5 said that after that they went back to the police station, and the post moterm was done. According to PW5 the accused was arrested on 10/08/2016 at night. He said in the morning of 11/08/2016 he found him in the police custody. After that he was called by OC – CID, together before them (OC-CID, Sgt. Joyce and PW5) the Accused confessed that he killed the deceased because Mangi was cheating with his wife. The PW5 testified that the accused said they killed him by hacking him with pangas. He said that the accused mentioned the co-suspects to be Toba and another person that PW5 could not remember his name. After confessing the OC-CID instructed WP 6632 Sgt. Joyce to write the accused statement. The PW5 testified further that on 16/08/2016 he took the accused to Hon. Grace Mwaikono as justice of peace. He said that in between 11/08/2016 to

16/08/2016 they were occupied with other duties they could not take him to the justice of peace. The PW5 said that he handed him to Hon. Grace. He, the witness was asked to stand outside. He continued to state that the accused confessed again before the justice of peace, that he murdered Mangi because he was cheating with his wife (Mwajuma Shabani PW3). The PW5 said the deceased is also known as Mangi. He recognized the accused who was at the docket.

On cross examination the PW5 said they were told by Ramadhani Shabani, PW4 that he suspected the accused to have killed Mangi. The witness said that the informer (PW4) told them that the Accused was in a hurry and wanted to cross the bush. The PW5 said that the Accused was wearing a black jacket.

The PW5 admitted that the map of the crime scene has no official stamp of Handeni police station. It also does not show where the Accused was standing. And it does not have my signature, but it has the PW5's number E.5285.

The PW5 said he found the Accused in the police custody. He reported at work at 07:30AM. He was the one who took the Accused from the police cell. He took him to OC -CID. They were Sgt. Joyce, OC – CID ASP Kimaro and PW5. The PW5 said that the OC – CID was doing preliminary interrogation. And then WP Sgt. Joyce took him to another room to write his statement. He said that in the preliminary interrogation normally OC – CID starts, and at that stage there was no rights which was given to the Accused. The PW5 added in his testimony that the OC – CID interrogated him when they were there, and it is not a normal

practice. The PW5 he is supposed to be alone, but he called them. The witness stated that he knows that the accused was arrested at night, and in the morning, he found him in the police cell. The statement is in the file.

The PW5 said that he does not know for what time the statement was recorded but it was in the morning. It was his testimony that, from Handeni Police station to Chanika Primary Court. It is about 2 KM. It takes less than 3 minutes. The PW5 said that he was arrested on 10/08/2016 and he was taken to the justice of peace on 16/08/2016.

The PW5 said in preliminary interrogation the OC – CID wanted to know the accused and inquire if the Accused is involved in the murder. The Accused confessed to have murdered Mangi. The witness said he was there in the OC – CID office.

As for the map of the crime scene, the PW5 said he drew it, but there was no indication where the Accused was standing because normally the suspect hide or ran away after the incident. What is required to be shown in the sketch map is the PW5 numbers and his name. These stand as my signature.

Regarding the jacket, PW5 said that the information about jacket he got it from PW4. He did not see the Accused wearing it. He said the PW4 told him that the jacket is black. That was prosecution evidence.

Turning to the Defence evidence, it was comprised of the testimony of the accused person alone. The DW1 was the Accused person. He testified that he is

a peasant and a miner. He does mining activities. He also does agricultural activities at Swagilo area, Nyasa village, Handeni District. He does mining at Magambazi, Handeni District. He started mining on 02 May 2016. On 09/08/2016 he was at Swagio area, Nyasa village. He was there from 08/08/2016 in the evening. He went to greet my family. He stayed there until 09/09/2016. On that day in the afternoon, he went to Magambazi to continue with mining activities. He reached there at around 14:00PM. After reaching there he continued with my mining activities. On 10/08/2016 he was at the mining site. Around 14:00PM he bought a chicken and took it home. He said he is here facing murder charge. He was arrested was arrested at Magambazi - mining site on 10/08/2016 at 20:00PM. After being arrested, he was taken to Handeni police station at 24:30AM. During that night at the police station, He found three police officers, and they asked me what you are going to write/report and what is your name. They did not tell him why he was arrested.

On 11/08/2016 in the morning at around 08:00AM one police officer took me to another room. In that room he found two police officers. The number of officers now became three. These three police officers one of the dressed in civilian he asked me to tell them regarding the death of Mangi. He told them he does not know anything regarding Mangi's death. They did not tell or give him any of his rights. The DW1 told the Court that the police officer dressed in civilian said he will tell them because they already have information about him. He stated that the police officer then took him out of the room to another one where there was two tables and one chair. DW said in that room he was with two policemen and

one WP Sgt. Joyce then came another police officer (Lusajo) and he came with handcuffs.

The DW1 went on testifying that after that the police officer called Sgt. Beda told him that they have been asked by their boss to ask him to tell them about the murder of Mangi. He said, then Sgt. Beda said that "so you do not know." He testified that thereafter the police officer Lusajo said "wewe utasema tu" (you will tell us). He (DW1) then told them that he does not know. He said one of them Sgt. Beda kneeled and took out iron pipe/bar. Then Lusajo told DW1 to raise his arms and he handcuffed him. He asked the DW1 to put his knees on the handcuffed arms. Then Sgt. Beda placed the iron bars onto his (DW1) arms. He told them that it hurts, and he feels pain. They said he will tell them about Mangi's murder. Then the table was moved close, and they lifted DW1 up and the ends of iron bar was placed on the tables, and he was swinging. DW1 testified that they started hitting him with kicks on his thighs, shoulders and on his neck. The police officers' boots cut his backside of his neck, and on his head close to the forehead. He said the police officer kicked him that caused a cut wound, and it was bleeding. The handcuffs did cut him on his right arm. When the police were kicking him, they were asking him who killed Mangi. The DW1 told them he does not know about Mangi's killing.

The DW1 testified that they continued to torture him, and after seeing too much blood was coming out on his forehead, the WP Sgt. Joyce told them that they should leave him alone because they will injure him. The DW1 told them that

they have injured him he asked them if they could take him to the hospital or give him medicine. They did not give him any medical attention.

DW1 narrated that after that he was taken to another room. They remanded him, and other people in the lockup asked him what happened there as they saw him bleeding. DW1 said there was water jar and he used it to wash his wounds. Thereafter he tied himself his head with the vest to stop bleeding. After that they left him locked up on 11/08/2016. They neglected him there until on 16/08/2016 when they took him to the justice of peace.

The DW1 testified further that when they reached to the justice of peace, he found the justice of peace who was a woman sitting in her office. She ordered him to take off his clothes. He took off his vest. She then ordered him to remove all the clothes. He took off all the clothes and he remained naked. She started touching him and moved around. She said she was looking for wounds and scars. He wondered can't she see his wounds. He stayed naked for about 10 minutes. After dressing up the justice of peace asked him what he do for living. He told her that he is a small miner. She did not ask him any other question other than that. The confession tendered by the justice of peace is not his statement. It was not read over to him after she asked him what he does for living. He did not even sign that statement. When the justice of peace finished the policeman took the papers and we left. But when we arrived at the Court, one of the police officers went with the papers inside the justice of peace office. He was left outside with another police officer.

The DW1 said that on On 19/08/2016 he was taken to Handeni District Court. He did not kill Matata Respidi@Mangi. There was not any witness who said he saw him killing Mangi or anywhere or statement that he confessed that he killed Mangi. He prayed that the Court dismiss the case, because he was tortured, and he did not kill Mangi.

The DW1 stated that he started mining activities on 02/05/2016. When the incident occurred, he has already been going to Magambazi mining site for about three months. He was working there and there are days he was going home to greet his family. There are people whom they were doing mining activities together. From Magambazi to Swagilo is about 5 KMs. To Magambazi there is a short curt but there is also a road where you can go with motorcycle. If one takes a motorcycle, he can use 1 hour or 30 minutes. By walking one can use 2 hours or 1hr:30 minutes. He admitted that on 09/08/2016 in the morning he was at Swagilo and he left at around 13:00PM. He ate lunch at home. He left his family home. His wife was home. He went on foot to Magambazi on the material date. He did not meet Ramadhani. He did not meet anyone on the way to Magambazi. He reached Magambazi at 15:00PM.

He also said that it was Sgt. Beda who tortured the accused. He said it is true that Sgt. Beda came to testify before this Court. It true that the Defence advocates cross examined Sgt. Beda when he was testifying. His advocates did not ask Sgt. Beda any question regarding the torture they did to him.

The DW1 further stated that on 16/08/2016 he was taken to the justice of peace. He said that the two of them justice of peace and himself were left in the office. The justice of peace asked him what he does for living and he told her that he does small mining activities. The DW1 said on 09/08/2016 he left home, and his wife was there. His wife (PW3) said he left home in the afternoon.

The DW1 testified that it is true that, the justice of peace asked him what he does for living. He told her that he is a small miner. After that she went to sit, and he started dressing up. Thereafter, she called the police officer to take him. She spent like 10 minutes to check his whole body while naked. It took like 2 minutes for me to dress up. It was like 12 minutes that he spent at the justice of peace office.

The DW1 stated that he knows how to read and write. He normally uses his thumb stamp as signature. He does not have handwriting signature. He has not reached secondary school. He has ended at standard seven. He finished his standard seven in 2008. When asked about Fatuma Athanasio Shani, he said he does not know her. He added that in their family they are many. They are twelve siblings. The Female are 5 and male 7. His sister living in Dar es salaam her name is Rahel Athanasio Shani. The DW1 said he lived with her in Dar es salaam in 2012 to 2014. He does not know Lucas Kitiyanga. He added that Shabani Mzungu is his in-law. He does not know Toba Athumani. He does not know Athumani Shabani. They asked him if he have married Shabani Mzungu's

daughter. He said it true that he got married in April 2016. He admitted the incident took place four months after he got married.

The DW1 testified that he had quarrels with his wife at least twice. He does not remember the dates. He had a quarrel in June 2016. It is just normal quarrels. He was asking her to move to Magambazi and she did not like it. On 09/08/2016 he told her again to move to Magambazi. In their quarrels it was not like they were fighting it was just normal quarrels he wanted his family to move to Magambazi. He normally told his wife to move to Magambazi when they are at home.

The DW1 rejected that he tells her about moving to Magambazi on the road. He heard his wife saying that that he asked while they were on the way. He said he knows Mangi. He had a shop in our Kitongoji. He protested the claim that Mangi cheated with his wife. He said his friend is Ramadhani Shabani. He came to testify. He has built his house close to his shamba. It true that on 09/08/2016 he asked for his handset (mobile phone). He said it is not true that he asked him about his wife's behaviour. He heard him saying that he asked him about his wife. He added that he does not have any quarrels with Ramadhani Shabani. The DW1 said that not everything PW4 (Ramadhani) said here is true. He said for example, asking him (DW1) about his wife is not true. Also, the PW4's story about vegetables, and showing him (DW1) a way to Magambazi, and allegation that he found him washing his arms and legs without removing the shoes is equally untrue. The DW1 testified that on that day he met Ramadhani Shabani

(PW4) in the morning only. When he was going to Magambazi, he was wearing a t-shirt and a black sweater. And he was wearing grey and white boots written Nike. He admitted having heard his wife testifying here at the Court that he left in the afternoon. He said it is true that he was wearing a black sweater, and he does not remember if she said he was wearing black and white sneakers (raba). He admitted also that Ramadhani Shabani (PW4) said he was wearing black sweater. The DW1 said Ramadhani Shabani's house is on the roadside. DW1 said that is not what he was wearing when he left home. What he remembers is that he was wearing grey and white boots. When he was passing on the way he (Ramadhani Shabani) was at his home. He saw him. But he did not meet him on the way.

The DW1 said that he does not know why Ramadhani Shabani (PW4) decided to say all this before this Court. DW1 went on testifying that he has three pairs of shoes. He said his advocate asked his wife (PW3) about the shoes. She said she remembers the shoes he was wearing were black and white. The DW1 said further that he reached Magambazi at around 15:00PM. Asked whether there is anybody resembling him, the DW1 said nobody in the village resembles him.

In Re-examination he was asked whether his clothes were used to kill Mangi DW1 testified that the clothes he was wearing were not used to kill the deceased. He said he does not know who killed the deceased. Ramadhani Shabani (PW4) did not say who killed the deceased. The DW1 continued to testify that the police tortured him.

He also said that the distance between his home and Mangi's home is about 450 metres. Theirs houses are separated by the neighbours' houses. He got information about Mangi's death when he was at Magambazi

The issues are: is there a death of a person? Was the death unnatural? Was the death caused by the Accused? Did the accused kill the deceased with malice aforethought?

Turning to the final submissions of the parties' learned counsel, both directed themselves to the evidence and the law. Ms. Sarah Wangwe, State Attorney, submitted that the prosecution brought the Accused facing the charge of murder C/s 196 and 197 [Cap 16 R.E 2002]. They brought five 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 (Mangi) intentionally.

The State Attorney submitted that the testimony of PW1 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 v R [2006] TLR 363** it states that every witness is entitled to credence. They prayed that PW5 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."

The weapon (panga) targeted the neck, shoulders and arms of the deceased. The same was corroborated by PW1 who conducted postmortem examination. The Prosecution witness PW1 and PW5.

In the case of **Patrick Sanga v R, Criminal Appeal No. 213 of 2008 Court of Appeal** 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. The learned State Attorney argued that since the PW2 has no interest to save and because he was competent witness, and as it was held in **Posolo Wilson @Mwalyego v R, Criminal Appeal No. 613 of 2015 Court of Appeal** at p. 7 that 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 PW2 was credible because the Accused confessed to him orally without any inducement.

Ms. Wange, the State Attorney, highlighted the contradictions in the testimonies of the prosecution witnesses (PW4 and PW5) in particular with regard to the clothes the Accused was wearing. A black sweater or a black jacket? She then submitted on PW4 who testified that the accused was wearing a black sweater. That is what the DW1 also testified. The PW5 testified that the Accused was wearing a black jacket. The State Attorney argued that this contradiction is minor and does not go to the root of the matter. She added that the defence has not anyhow shown how the contradiction has prejudiced the Accused. She then cited the case of **Chrizant John (supra)** at page 20 where 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 prayed that the Court to 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.

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 CAT 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, Court of Appeal** 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 Magambaz. His 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 Magambazi and Swagilo, Nyasa village is not far that it is possible for a person to go and return.

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.

On the defence side the final submissions were made by the lead advocate Mathias Nkingwa who was assisted by advocate Zaudia Jacob. Advocate Nkingwa submitted that, the accused Rajabu Athanasio stands charged with murder charge c/s 196 of Penal Code [Cap 16 R.E 2002]. And the penalty is death as provided for under 197 of same Act].

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

1. There must 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 TEA 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 TEA [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 Matata Respidi @Mangi is dead. This was confirmed by the exhibit P1 - postmortem tendered by PW1 (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 the back of his neck, shoulders and arms, leading to massive loss of blood as shown in the exhibit P1.

Who has caused death or who murdering the deceased (Mangi)? All the 5 prosecution witnesses none of them proved that it was the accused who murdered Mangi. Moreover, even the seven exhibits did not show that it was the Accused who murdered the deceased.

Advocate Mathias Nkingwa argued that all gave hearsay testimony. The only witness who gave an attractive story is PW4 who again based on suspicion.

The defence counsel emphatically argued that the prosecution has failed to bring things connected with the offence as per section 39 of the CPA [Cap 20 R.E of 2019]. They have failed to tender the weapon (panga).

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 even the actus reus (the act) of killing he did not do it.

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

Ms. Zaudia Jacob Advocate who assisted Mr. Nkingwa, submitted that PW2 – Hon. Grace Mwaikono RM (justice of peace) testified to have recorded the Accused's confession. The purported confession not only contravened Chief Justice's Guidelines, but it was also neither read out to the Accused nor was he asked to read it himself. The PW2 admitted not to have read out the written confession to the Accused. She also breached the law when she asked the Accused to undress before her, and she inspected the Accused body for the wounds while he was naked. This was not only embarrassing but also illegal. The defence further argued that the PW2 is female, and the Accused is male. She could have used common sense.

The learned counsel went on submitting that the PW5 also failed to explain why they failed to take the accused to the justice of peace timely. They detained him and tortured him for six days from 10/08/2016 to 16/08/2016. In the case of **Awadh Gaitan @ Mbona v R, Criminal Appeal No. 288 of 2017 Court of Appeal** at p.17 where the Court was confronted with a similar scenario like the one at hand it held that the delay of six days to take the Accused to justice of peace is fatal and corroborates the Accused testimony that he was tortured.

Moreover, the PW2 saw fresh wounds on the back of the Accused neck and on the forehead. But she (the justice of peace) surprisingly wrote in the confession that the wound on the back of the neck was the injury caused by a broken glass bottle. And the one on the forehead she was injured by a drunkard. There was no evidence that the Accused was arrested at a Pombe shop. This sounds like a made-up story. The Accused testified that he does not have a signature he simply uses his thumb print as signature. The prosecution did not contradict this by any document to show that he has a handwritten signature which could be compared with the one on the written confession. We ask where did the justice of peace got the Accused handwritten signature? Although every witness is entitled to credence as it was held in **Goodluck Kyando v R [2006] TLR 363** but this does not extend to witnesses who give incredible and unbelievable testimonies.

I agree with the defence counsel that although the written confession was admitted as evidence (as exhibit P2) it is worth to be expunged from the Court

record for contravening the Chief Justice Guideline. And I proceed to expunge it from the records.

Moreover, the PW2 stated that she forgot if she read the confession to the Accused or not. The witness could have forgotten minor details such colour, time, etc. These are minor inconsistencies. She cannot forget basic or key information. In the case of **Mohamed Haji Ally v DPP, Criminal Appeal No. 225 of 2018 Court of Appeal**, it was 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 information or has contradicted himself in such basic information then his testimony will become incredible and damaged.

Moreover, the above contradictions go to the root of the matter (testimony of PW2). Such contradiction as held by the Court of Appeal in **Mohamed Haji Ally's case** (supra) renders the witness' evidence incredible and damaged.

Also considering **Cheyonga Nyambari v R, Criminal Appeal No. 510 of 2019 CAT at page 14** where the Court of Appeal 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. Regarding the present case, this is what happened with the testimony of PW2.

The learned advocate also submitted on the defence evidence. He submitted that it is apparent that the prosecution has 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 CAT 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."

Following the closure of the learned counsels' final submissions the Court proceeded to sum up the case to the Hon. Assessors. All three Assessors opined that the prosecution case was doubtful and hence the Accused is not guilty. They pointed out to some weak points in the prosecution case.

Before evaluating the evidence of both sides and considering the submission done by the learned, 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 id unnatural the key issues for examination are:

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

With murder charge C/S 196 of Penal Code [Cap 16 R.E 2002]. To prove their charge there are several ingredients that need to be proved:

1. There must any person who is charged
2. Who with malice aforethought

3. have caused the death of another person
4. without lawful justification
5. he shall be guilty of murder

Learned counsel from both sides submitted that basing on the above ingredients, and a person 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.

Murder is a serious offence which attract death penalty, 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 case (supra)**.

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 R [1992] TLR 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 Nzenge 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.

In the present case there is no doubt that the deceased (Matata Respidi @ Mangi) is dead. The exhibit P1 (the post – mortem report) showed that the deceased is dead. The prosecution witnesses (PW1, PW3, PW4, and PW5) all confirmed that they saw Mangi's dead body. They also testified that the deceased had a wound on his neck, shoulders and arms. The cause of death as shown in the exhibit P1 is that the deceased had wounds on the backside of the neck, shoulders and arms, and lead to massive loss of blood leading to multi organs failure and death. The immediate cause of death as per exhibit P1 was severe loss of blood. Briefly, the evidence adduced as hereinabove showed proved that the deceased, Mangi 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 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) The act was as a significant cause of death
- (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 pangas to inflict injury on the deceased? This issue should be addressed because there is no eyewitness, and no weapon (panga) tendered to prove the same. It is PW4 only who suspected the Accused because he smelled blood from the black sweater he was wearing, and because he saw him washing his legs at the well while he was wearing shoes. Such story which is based on suspicion requires corroboration. There is no corroborating evidence adduced as there was no blood stains found on the accused's clothes. The PW4 did not even see the water having mixed with blood. On their side PW2 and PW5 gave a hearsay account of the incidence. And PW1 and PW3 did not know who killed Mangi.

The PW4 and PW5 contradicted themselves on whether the Accused was wearing a black sweater or a black jacket. The PW4 said he saw the Accused wearing a black sweater which was corroborated by DW1 evidence that he wore a black sweater. But the PW5 said he was told by PW4 that the Accused was wearing a black jacket. A jacket and a sweater though both are clothes they are dissimilar. This is incredible testimony. While this may seem to be a minor contradiction, but such contradiction may imply that this was a made-up story.

Again PW5's testimony left a lot to be desired. He failed to explain why the so-called pre-interrogation by the OC – CID ASP Kimaro was not conducted according to the law. Again, his testimony was loaded with information extracted from the Accused person's cautioned statement which was not tendered before this Court. Worse still the person (WP Sgt. Joyce) who recorded the cautioned statement was not brought to testify. The PW5 was not a competent witness to testify regarding the cautioned statement which he did not write. Furthermore, PW5 admitted that they did not give the Accused any right during interrogation. The PW5 did not explain why it took them six days to take the Accused to the justice of peace. Surprisingly he knew that from the police station to Chanika Primary Court is about 2 kilometres. It means it is too close that they may have sent him there even by walking. The PW5 simply said they were occupied with other duties. Such abdication of legal duties cannot be condoned by this Court. It may be added that the delay of six days confirms the Accused's allegation that he was tortured. It may be that they were waiting for the wounds to be cured. The evidence of such torture are the wounds and scars

that were seen by PW2 when inspecting the Accused's body before writing the extra-judicial statement.

The testimony of DW1, the Accused on his side was that on the material date he was at home, and then went to mining site at Magambazi where he does his mining activities. The PW3 and PW4 both confirmed that the Accused was doing mining activities for some time. The DW1 said on the date of the incident, he was home with his wife (PW3), and later was seen by or he met PW4. On 10/08/2016 at night he was arrested at Magambazi, Nyasa Village, Handeni District. He denied having bought vegetables from PW4, he also rejected allegation that he was seen again by PW4 washing his legs without removing his shoes. It is also confusing that PW4 knew that the DW1 normally does mining at Magambazi meaning he is familiar with the ways to Magambazi. How come the same DW1 could have asked PW4 for the shortcut to Magambazi? It is the DW1 who is more familiar with ways to Magambazi than PW4. While a witness is entitled to credence as was held in **Goodluck Kyando's case** (supra), but the story given by PW4 is incredible.

On the defence of *alibi* reference may be made to the case of **Kubezya John v R Criminal Appeal No. 488 of 2015 CAT 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 and hence the law was complied with. However, the DW1's *alibi* was not supported by any other witness. Despite such weakness, suspicion however strong cannot be used as a base for conviction. This was stated in **Nathaniel Alphonse Mapunda case** (supra). Moreover, it was stated in **R v Kerstin Cameron [2003] TLR No. 84** at page 85 also held by the CAT in **Zabron Msua v R, Criminal Appeal No. 7 of 1979** (unreported) that the Accused can be convicted based on strength of prosecution case 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.

To conclude on the second issue as to whether the Accused caused death of the deceased, apart from PW4's suspicion of DW1(the Accused) because of his sweater smelling blood and washing his legs while wearing shoes, other witnesses (PW1, PW2, W3 and PW5) did not know who killed the accused or gave hearsay testimony regarding the allegation of the Accused killing Mangi. They did neither see the Accused killing the deceased nor had any credible evidence. I am saying so because, since the confession (exhibit P2) was

expunged from Court records for contravening the law, we remained with weak circumstantial evidence. Furthermore, the PW4's epic story was mere suspicion which lacked corroboration. As it was held in **Nathaniel Alphonse Mapunda's case** (supra) suspicion cannot ground conviction. Therefore, there is doubt if the Accused killed the deceased. The testimony of PW3 does little to in supporting the prosecution case. although she said her husband wore black and white sneakers, she denied of having an affair with the deceased. She also refuted the allegation that her husband killed Mangi. Thus, apart from the testimony of PW4 which is based on uncorroborated suspicion, we are left with incredible circumstantial evidence of PW5. It was stated in **R v Shinon Nkwabi Criminal Session 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 evidence the Court must be satisfied that the circumstantial evidence adduced is devoid of any other explanation other than the guilty of the Accused. Indeed, in the present case there is suspicion and weak circumstantial evidence. The danger of convicting Accused based on circumstantial evidence was reiterated in the case of **Shaban Mpunzu @Elisha Mpunzu v R, Criminal Appeal No. 75 of 2002, the Court Appeal of Tanzania** (unreported).

Before proceeding further, it worthy to turn to contradictions and inconsistencies in testimonies. It was held in the case of **Deogratius Deemay Gurtu v R, Criminal Appeal 553 of 2016 CAT at page 3**, where the CAT

held that in the cases the inconsistencies are unavoidable. The CAT cited **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 CAT (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."

Ms. Wangwe, the State Attorney in supporting the above position cited 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 are minor, or they go to the root. She submitted that the inconsistencies are minor. They do not go to the root.

I am informed of the caution given in the case of **Chrizant John v R, Criminal Appeal 313 of 2015 Court of Appeal at page 20** that it is undesirable to pick a sentence and leave others in deciding whether the contradiction or inconsistencies are minor or major. I am also familiar with the case of **Vincent**

Ilomo v R, Criminal Appeal No 337 of 2017 Court of Appeal at Iringa at pages 29 - 30, in which the Court of Appeal cited the case of **Chandrakant Joshubhai Patel v R Criminal Appeal No. 13 of 1998 at page 18** (unreported) where it 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."*

I am of the settled view that the contradictions between the PW4 and PW5 are to their discredit. They turn their 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**, in my view such credence is only 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 testimonies of PW4 and PW5 are incredible. That while PW5 stated that the accused wore a black jacket, the PW4 testified that the Accused wore a black sweater. The testimony of PW2 is equally doubtful. She said she saw the accused with fresh wounds, they were from broken glass bottle, and another wound resulted from the Accused being hit by a drunkard. The PW2 also did not read the confession out to the Accused. Moreover, the Accused's written confession (exhibit P2)

contravened the Chief Justice's Guideline, as it was held **Petro Teophan v R, Criminal Appeal No. 58 of 2012 CAT at page 8** that the justice of peace ought to ask the Accused:

"...(v) whether the Accused he really wishes to make the statement of his own free will.

(vi) that if he makes a statement, the same may be used as evidence against him..."

Since the exhibit P2 has contravened the Chief Justice's Guideline it is expunged from the Court records, as it was held in **Petro Teophan's case** (supra) at page 9. The same was held in the case of **Japhet Thadei Msigwa v R, Criminal Appeal No. 367 of 2008 Court of Appeal at page 10.**

To say the least this evidence lacks credibility. Generally, the PW2 and PW5 testimony left a lot to be desired. The PW4's evidence is a mere uncorroborated and unsubstantiated suspicion. He said the sweater smelled blood, and he saw the accused washing his legs while wearing shoes. But he did not see any blood in the sweater or in the water in which the accused was washing his legs.

The third ingredient of murder 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) That 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 held in the case of **Chrizant John v R Criminal Appeal 313 of 2015 Court of Appeal** at Bukoba that in murder 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 is said to be panga. That is a dangerous weapon. The force used is big as the postmortem report (exhibit P1) reveals, the deceased body had deep cut wounds on the shoulders, neck, head and arms and fractured or cut bones were visible. These wounds led to massive loss of blood and ultimate death of the deceased. The body parts attacked were also sensitive areas, the head, neck, shoulders, and arms. But despite the presence of traces of *mens rea* drawn from weapon used, body parts attacked and nature of wounds the deceased sustained, there are still doubts as to who murdered him. It can hardly be held that the prosecution has managed to tie these elements of *mens rea* with the Accused.

At this juncture, I should turn to the next ingredient of murder that is malice aforethought. The issue is whether the Accused murdered the deceased with malice aforethought. In that regard, we turn to the Accused's attitude before, during and after the incident. It is difficult to say with certainty because the Accused claimed alibi, which was not clearly displaced. The PW3 and PW4 saw the accused at the village on the material date. However, they did not see him at the crime scene. Thus, the DW1 *alibi* was not contradicted or discredited by the prosecution save for the fact that the said *alibi* was not corroborated by any other defence witness. I am of the settled view that such weakness 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.

Regarding the testimonies of PW4, he had suspicion that the Accused might have killed the deceased because of suspecting the deceased cheating with Accused's wife. In **Nathaniel Alphonse Mapunda case** (supra), it was held that suspicion however grave cannot be the base of conviction. In the present case there was uncorroborated story that the Accused might have killed the deceased because he suspected him of cheating with his wife. The PW2 wrote the Accused's confession but the same was expunged for contravening the law and Chief Justice's Guideline.

From the foregoing, I hold that the prosecution has failed to prove that the Accused murdered the deceased Matata Respidi (Mangi). They banked on the

uncorroborated and unjustifiable suspicion of the PW4. It is the law that suspicion cannot be the base of conviction (**Alphoce Mapunda's case** (supra)). And since exhibit P2 was expunged from Court records, and because the PW2 and PW5 testimonies were incredible and unreliable, the same is accorded less weight. We are left with weak and unreliable pieces of circumstantial evidence of PW3, and PW4. Having said so, and since there was not eyewitness, the prosecution relied on circumstantial evidence that I held to be unreliable. The danger of grounding conviction basing on unreliable circumstantial evidence was amplified in the case of **Manyanda Ncheya v R, Criminal Appeal No 437 of 2017** at page 11.

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 cannot be ignored. As shown herein above there are still doubts on the prosecution evidence. The PW2, PW4 and PW5 adduced incredible and doubtful evidence. All these doubts damaged the prosecution case. I am of the view that it is unsafe to convict a person basing on suspicion and weak and uncorroborated circumstantial evidence. 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 **KOROGWE** this 10th Day of December 2021.



U. J. AGATHO

JUDGE

10/12/2021

Date: **10/12/2021**

Coram: Hon. Agatho, J

Accused: Present with his advocates Mathias Nkingwa and Zaudia Jacob

Republic: Paul Kusekwa and Sarah Wangwe, State Attorneys

B/C: Jumanne

Court: Judgment delivered on this 10th day of December, 2021 in the presence of the Accused person, his advocates Mathias Nkingwa and Zaudia Jacob, and Mr. Paul Kusekwa and Sarah Wangwe prosecution State Attorneys.



U. J. AGATHO

JUDGE

10/12/2021

Court: Right of Appeal fully explained.



U. J. AGATHO

JUDGE

10/12/2021

