

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
AT SUMBAWANGA
CRIMINAL SESSIONS CASE NO. 36 OF 2020**

REPUBLIC

VERSUS

**MASANJA MAGISHI.....1ST ACCUSED
KAMUGA NTEMI @ KUMUSU.....2ND ACCUSED
LULENGANIJA LWIZA @ JILALA.....3RD ACCUSED
SENI NHUGIJO.....4TH ACCUSED**

JUDGMENT

Date of last order: 18/05/2021

Date of Judgment: 28/05/2021

NDUNGURU, J.

The accused persons, Masanja s/o Magishi, Kamuga s/o Ntemi @ Kumusu, Lulenganija s/o Lwiza @ Jilala and Seni s/o Nhugilo (herein known as accused persons) stand charged of the offence of Murder contrary to Section 196 of the Penal Code, Cap 16 (Revised Edition 2019 by then 2002).

It is alleged by the prosecution that on 13th day of October, 2018 at Kianda Igonda Village within Sumbawanga District in Rukwa Region the accused persons murdered one **SHINJE s/o GADI**.

The facts as presented by the prosecution giving rise to this trial is that; on 13/10/2018 at about 20.30 hours at Kianda Igonda Village the deceased was with James Luguya sitting outside the deceased house, in a hut. Two people who were known by face who were Lulenganiya Lwiza @ Jilala and Kamuga Ntemi arrived pretending to ask for the direction/way to Kikwale Village. The deceased stood up giving them direction to Kikwale Village. As he was giving direction to Kikwale suddenly the accused person one Masanja Magishi appeared, he removed the gun which was hidden on his back and shot the deceased on the hand and right side ribs. That having shot him, the three person escaped.

That the deceased person cried for help, his neighbours rushed to his rescue. That the deceased mentioned Masanja s/o Maghishi as the person who shot him. The deceased was taken to Kamsamba Health Centre. Later referred to Mbeya Zonal Referral Hospital for further treatment but finally on 30th October, 2018 he passed away. That the accused person were arrested charged for this murder offence.

That during preliminary hearing the accused persons admitted their names only and disputed all the rest of facts.

During trial, Mr. Njoloyota Mwashubira and Fadhili Mwandoloma learned State Attorneys while Mr. Mathias Budodo; learned advocate served as defence counsel.

In discharging its duty of proving the guilty of the accused persons, the prosecution paraded seven (7) and ten (10) exhibits. The prosecution and defence testimony can best be summarized as hereunder:

Lusasu Lutaila, testified as PW1. His testimony was to the effect that he is living at Kaoze Village. He is a peasant. He said on 13/10/2018 at about 20.00 hours while at his home received a call from the deceased mother telling him about the gun blast. PW1 told the court that he immediately rushed to the scene of the crime. He said when he was close to the scene of the crime, heard a cry of a person asking for assistance as went near found the deceased lying hopelessly (anagalagala) on the ground. That the deceased was bleeding right side and had shot wounds on the ribs. That James Lunguya was there where the deceased laid. That James Lunguya told him that deceased told him to have been shot by Masanja Magishi. PW1 said as Shinje was not yet dead, told him to have been shot by Masanja Magishi. PW1 told the court that he knows Masanja Magishi (touching the 1st accused) saying they lived together at Kaoze. PW1 went on telling the court that he took

the victim to Kaoze Dispensary, where he was told to sent him to Kamsamba Mission Health Centre. That on the way to Kamsamba he passed at Kibete Police Station to collect PF3. At Kamsamba Health Centre, the victim was referred to Mbeya Zonal Referral Hospital. That while on the way to Mbeya Shinje was unconscious. That on 20/10/2018 Shinje (deceased) started coming back to his senses. On 21/10/2018 he became back to his normal senses.

PW1 further told the court that, the deceased while on his senses told him that it is his uncle on Bulugu who hired Masanja Magishi to kill him because they were fighting for cattles and farms. The witness went further saying that on 23/10/2018 he went back to Kaoze to collect the needs so that he could go back to take care of the deceased. That in process on 30/10/2018 he got informed that Shinje (the victim) has died. That the deceased was buried at Morogoro where his father was living.

Upon cross examination, PW1 said from his home to where the deceased was living is not far it is almost 30 minutes walking distance. That at the scene he found the deceased lying down the ground. James stood near. It was outside the house. It is James who talked to him first saying Shinje (the deceased) told him he was shot by Masanja Magishi. James was working to the deceased. He was grazing the deceased's

cattles. James worked to the deceased for two years. That he met the deceased lying hopelessly but was able to talk. The deceased lost conscious while on the way to the health centre. That at Kibete Police Station, PW1 named Masanja Magishi being a person who shot the deceased. When re-examined, PW1 said the deceased named Masanja Magishi twice, at the scene of the crime and at the hospital on 21/10/2018.

Insp. Emmanuel Muhandi testified as PW2. His testimony was to the effect that on 09/11/2018 while at Laela Police Station got informed that the 1st accused person Masanja Magishi who was a suspect in the murder which happened at Kianda Igonda is on the way from Sumbawanga to Laela. That he made a trap and the 1st accused was arrested at Laela Bus stand at about 06.00 p.m. PW2 went on telling the court that formerly the file was on causing grievous harm but later it turned into murder. He said when interrogated Masanja Maghishi (1st accused), he named Kamuga s/o Ntemi (2nd accused) and Lulenganiya Lwiza Jilala (3rd accused) to have participated in the commission of the crime. PW2 said it is the 1st accused who assisted the arrest of 2nd accused, because it is Masanja Magishi who phoned to him. The 2nd accused (Kamuga Ntemi) was arrested at the home of the 1st accused. PW1 said when interrogated the 2nd accused admitted to have involved

and named one Lulenganiya s/o Lwiza Jilala, that when interrogated further, Masanja s/o Magishi (1st accused) said it is Seni s/o Nhugijo who employed them to kill Shinje s/o Gadi. PW2 said it is Masanja who led them to Kikwale Village where Seni (4th accused) was living. Then Seni (4th accused) was arrested at his home. PW2 went further saying when he interrogated the 2nd accused on the way the crime was committed, the 2nd accused told him where he hired the gun which was used. That the second accused sent them to Itumba Village in Momba District to one Malembe Simtanda where they got the shotgun and five bullets. PW2 tendered the Search Order as exhibit (Exhibit P1) the shotgun with No. 1144 as exhibit "P2" and five bullets (Exhibit P3). PW2 further said the 2nd accused sent them Igonda Village where he said to have hidden other bullets but they did not get them. When cross examined PW2 said was a leading officer in the arrest of the accused. He is the one who also led initial interrogation. That interrogation of the 1st accused led to the arrest of the 2nd accused. That the said Simtanda escaped. The he did not torture the accused.

PW3 was H. 728 D/C Rostam. His evidence was to the effect that he is a Police Officer. That he is the investigator of the case. He said when assigned the file for investigation on 16/10/2018 the victim was at the Mbeya Zonal Referral Hospital. That on 21/10/2018 he went to

Mbeya Referral Hospital to interrogate the victim. That the victim told him that on 13/10/2018 at 20.00 hours while he was at his home with James there passed two persons who as had him to way to Kikwale Village. That as he was directing them the way suddenly Masanja Magishi appeared with a gun which he had hidden on his back and shot him. That on 30/10/2018 he got informed that the victim had died. PW3 went on saying on 09/11/2018 they arrested Masanja Magishi. That when interrogated him Masanja Magishi (1st accused) admitted to have been involved in the commission of crime, he named and assisted the arrest of the 2nd accused one Kamuga Ntemi who was arrest at the home of Masanja Magishi. PW3 told the court that Masanja Magishi named the 2nd accused, 3rd accused and 4th accused to have involved in the killing of Shinje s/o Gadi. PW3 told the court that as the 1st accused had admitted to have committed the offence he recorded cautioned statement which he tendered as exhibit (Exhibit P4).

PW3 went on testifying that during interrogation, the 1st accused and 2nd accused told him that they were employed by Seni Nhugijo. That the 1st accused sent him to kikwale Village where Seni Nhugijo was arrested. That the 1st accused having named the 3rd accused one Lulenganija Lwiza Jilala, he phone him telling him to come to Laela to collect their payment for the job. It is when the 3rd accused was

arrested. The witness said the 2nd accused told them to had hired the gun. That the 2nd accused sent them to Itumba Village to one Malembe Simtanda where they discovered shortgun and five bullets (referred exhibit P2 and P3 respectively). The witness said further, on 11/11/2018 the 2nd accused told him to have hidden some of bullets at Kianda – Igonda Village. He with the 2nd accused and some Police Officers went to Kianda Igonda but could not get the said bullets. He further said on 12/11/2018 sent the 1st and 2nd accused to the Justice of Peace to record Extra Judicial Statement. When cross examined PW3 told the court that he witnessed postmortem examination at Mbeya Zonal Hospital. The event was first reported at Kipata Police where PF3 was issued. He is the one who recorded cautioned statement of the 1st accused. That the 2nd accused was arrested on 09/11/2018. Seni Nhugijo was arrested on 10/11/2018. The gun was found to one Malembe Simtanda not in the house of the accused.

Nickson Kimangano Temu testified as PW4. His testimony was to the effect that, in 2018 he was working at Laela as a Primary Court Magistrate. That being a Primary Court Magistrate he was a Justice of Peace. That on 12/11/2018 in the afternoon he recorded Extra Judicial Statement of the 1st accused Masanja s/o Magishi and the 2nd accused Kamuga Ntemi. That having brought to the officer he told the Police to

get outside with the 2nd accused and remained with the 1st accused alone. PW4 said the accused person admitted to have committed murder. PW4 said having completed, the 1st accused was taken out and he then recorded Extra Judicial Statement of the 2nd accused who also admitted to have involved in the commission of the offence. PW4 tendered the Extra Judicial Statement of the 1st accused as exhibit (Exhibit P5) and Extra Judicial Statement of the 2nd accused as exhibit (Exhibit "P6").

PW4 went on testifying that on 13/11/2018 in the morning hours while in the office, the Police Officer one Nadhir sent two accused persons for recording Extra Judicial Statements. That the accused were Lulenganiya s/o Lwiza Jilala and Seni s/o Nhugijo. PW4 went on saying as they were two, he told the Police to take out Seni Nhugijo and remained with Lulenganiya s/o Lwiza Jilala. That having introduced himself and told him if he is at will to record the statement or not upon showing his will, he recorded the statement of Lulenganiya Lwiza Jilala (3rd accused). PW4 said the accused admitted to have involved in the commission of the offence. That having completed he handed him to the Police and started recording the statement of the 4th accused one Seni s/o Nhugijo in the same manner. PW4 tendered the Extra Judicial

Statement of Lulenganija Lwiza Jilala as exhibit (Exhibit "P7") and Extra Judicial Statement of Seni Nhugijo as exhibit (Exhibit "P8").

When cross examined, PW4 told the court that when the accused persons are sent to the Justice of Peace they are free to record their statement or not. That when the Police handed the accused to him the Police was ordered to get away from the office and leave the accused with the Justice of Peace alone. That the Police signed when he is taken the accused to acknowledge the receipt of the accused person. That he inspected the 1st accused he was physically fit. The 1st accused admitted to have involved in killing. That by time (2018) he was alone at the station.

When re-examined, PW4 told the court that what is important in recording the statement is the willingness of the accused to offer their statements. That when recording the statement Police gets away. The Police is called to take the accused after recording of the statement is completed.

G. 231 D/C Nadhir testified as PW5. His testimony was of the effect that he is a Police Officer, investigation department. He is stationed at Laela Police Station. The witness said on 09/11/2018 he was one of the arresting officers of the 1st and 2nd accused. He said the 1st accused was arrested at Laela Bus stand while the 2nd accused was

arrested at the home of the 1st accused. PW5 said on 10/11/2018 he was assigned to interrogated the 3rd accused person. That during interrogation, the accused admitted to have involved in the killing, he then recorded the cautioned statement. The witness tendered cautioned statement of the accused as exhibit (Exhibit P9).

When cross examined, PW5 told the court that he was not present when the 1st accused was interrogated. He was involved in arresting the 2nd and 3rd accused. It is the 1st accused who assisted in arresting the 3rd accused.

PW6 was one Dr. William John Mulla. His testimony was that Medical Doctor. He is working at Mbeya Zonal Consultant Hospital. That on 30/10/2018 while on duty, conducted postmortem examination of the body of one Shinje s/o Gadi. He said in his investigation he revealed that the cause of death was due to **PERITONITIS**. He said it is the penetrating wounds in the tendancy holding tissues in the stomarch.

The witness said the body had penetrating wounds at the right side of the ribs. He further said the wounds appeared to be of the bullet of the shotgun. The witness tendered the Postmortem Report as exhibit (Exhibit "P10). PW6 went further saying the wounds penetrated from the right side to the intestine. The penetrating wounds were caused by sharp object.

When cross examined, PW6 said the wound did not go throughout the other side. It is from the pattern of wounds which makes him to suggest/conclude to have caused by bullet of the short gun. Primarily he focusing on the cause of death. That the Postmortem examination was conducted on 30/10/2018. The deceased was called **SHINJE s/o GADI.**

PW7 was one G. 5540 D/C Daud. In his testimony he told the court that he is a Police Officer at investigation department. He is working at Kipeta Police Station. PW7 told the court that on 13/10/2018 at night hours he was at the Police Station. While there, there went three persons, rider of the Motorcycle, Lusasu Lutaila (PW1) told him that they wanted PF3 for sending Shinje to the hospital. That Shinje was shot by Masanja Magishi. PW7 told the court by then Shinje Gadi was unconscious. He said he issued them PW3.

DW1 one Masanja Magishi testified to the effect that in 2018 he was living at Laela. That he started living at Laela in 2016. That on 09/11/2018 he was arrested by the Police Officer who sent him to the Police Station he was told to had involved in murdering Shinje Gadi, that he denied saying he did not know the deceased. That he was forced to admit to have involved, having denied he was beaten seriously. DW1 went on telling the court that on 15/11/2018 he was sent to the

investigation room, where Rostam (PW3) took one page paper which had no writing nor date and forced him to sign. That he signed by thumb print.

DW1 told the court that on 17/11/2018 he was sent to the court building with his fellow accused. One of them remained outside. That in the office he saw PW3 (Rostam) giving the paper to the person they met in the office. The person copied what was in the paper given by Rostam and required him to sign. That he signed as he was still suffering from the beatings he signed. He identified the exhibit P5 to be the document he signed. That he was arrested because of the name Masanja, while Masanja who was looked at is from Kaoze while he is living at Laela. That he did not know fellow accused persons he has come to know them in court. When cross examined DW1 told the court that before 2016 he was living at Sumbawanga town. That he was arrested because of the name of Masanja. That he signed the document at the court room. He denied that it was not true that the 2nd accused was arrested following his call.

DW2 one Kamuga Ntemi, testified to the effect that he is living at Mlowo. He said he was not involved in killing Shinje Gadi. That he was arrested at Laela at the bar, where there is guest where he hired the room. That he was arrested at 05.00 p.m. by the Police. At the Police

Station he was beaten from about 05.00 p.m. to 21.00 hours forcing him to admit to have killed Shinje Gadi. DW2 went further saying on 15/11/2018 he was sent to the court building to the Justice of Peace. He said the Police who sent him talked with the Justice of Peace in the language he did not understand, later he was told to sign the paper that he signed knowing that if he did not he will be beaten. That he has known the fellow accused person while in court. He denied to have sent the Police Officers to Itumba Village. That there is no witness who saw him at the scene of the crime. Nobody testified to have witnessed search. When cross examined DW2 told the court that he was from Mlowo going to Miyangalua, the vehicle got breakdown he decided to attend night at Laela. That he did not tell the Justice of Peace that he is the one who hired the gun. That he has come to know Masanja Magishi here in court. At the bar there were many people he did not know why he was arrested. Justice of Peace did not beat him. He signed the statement at the Justice of Peace.

DW3 one Lulenganija Lwiza Jilala testified to the effect that he is living at Matali Village. He was arrested at Laela at the bar because he was taking alcohol before the time allowed for drinking alcohol. He said at the Police he was told to have involved killing Shinje Gadi. DW3 said as he denied he was severely beaten. That on 16/11/2018 he was sent

to the other room where he was forced to sign something did not know to save his life. DW3 said he signed. DW3 said he did not know the Justice of Peace because the clothes of the people were similar. He said what made him to be arrested is because he was at the bar at the time not allowed to take alcohol.

DW4 one Seni s/o Nhugijo, testified to the effect that he was not involved in killing the deceased, he was arrested because of the name Seni, because, the one Seni who was wanted is who is living at Kikwale Village while he is living at Makala Village. DW4 told the court that he was arrested on 10th November, 2018 at night. It was about 23.00 hours. While at the Police Station he was interrogated about the killing of Shinje Gadi. That following his denial he was severely beaten. He said he signed the document because he was severely beaten. That he did not know the person known as Justice of Peace. That he has come to know the accused one Masanja Magishi while in the lock up. He neither knew the 2nd and 3rd accused persons before. He does not know the person called Bulugu. When cross examined, DW4 told the court that he was arrested at Makala Village. He did not know Masanja Magishi before. He said PW4 told the court to have recorded his statement. This is the end of the summary testimony of the prosecution and defence.

From the evidence on record it is not in dispute that the Shinje s/o Gadi who is the subject of this trial is actually dead. This is as per evidence of PW1 who was taking care of the deceased while at Mbeya Zonal Consultant Hospital, who told the court that when he was back from the hospital to collect the needs he was informed that Shinje Gadi has passed away. Further the same was the testimony of PW4 who attended the postmortem examination of the deceased body. It was a further testimony of PW6 the Medical Officer who conducted Postmortem examination of the body of Shinje Gadi having been identified to him by the relatives of the deceased.

Further it is not in dispute that the death of Shinje Gadi was unnatural one. That the deceased faced untimely and violent death. This is testimony of PW1 who told the court that he went to the scene of the crime where he found the deceased lying down being shot by gun. PW1's evidence is corroborated by the evidence of PW6, the Medical Doctor who conducted Postmortem examination. His evidence was that the cause of death was due to multiple penetrated wounds caused by sharp object. The same is contained in exhibit "P10" the Postmortem Examination Report which that the cause of death was **"PERITONITS"**.

The most contentious issue of determination for that matter is whether or not it is the accused persons who murdered the deceased.

My carefully security of evidence available to me, no any prosecution witness who testified to have seen the accused persons at the dock killing the deceased. The evidence of PW1 is that when he arrived at the scene of the crime, found the deceased lying on the ground, while James Lunguya stood aside. The only person who was at the best position to tell the court that he witnessed the killing is James Lunguya who was not available to testify. It is my finding therefore that the evidence before me is entirely circumstantial. I am aware the court has been greatly been cautioned to be careful when convicting on the basis of circumstantial evidence. In **Said Bakari vs. Republic**, Criminal Appeal No. 422 of 2013 Court of Appeal of Tanzania (Unreported) it was held:

*"....In determining a case commented on circumstantial evidence, the proper approach by the trial court and appellate court is **to critically consider and weight all the circumstances established by evidence in their totality, and not to dissect and consider it piecemeal or in cubicles of evidence or circumstances**"*

[Emphasis added]

From the above direction, I shall evaluate the incriminating circumstances in the chain of circumstantial evidence to determine whether they irresistibly point at the guilt of the accused persons or not.

The evidence of PW1 offers the first link of incriminating circumstance. PW1 once phoned informing him of the gun blast rushed to the scene of the crime. When arrived at the scene of the crime found the deceased lying on the ground being shot. It is his evidence that he met the deceased alive. That not only that James Lunguya told him that it is the 1st accused Masanja Magishi who shot him, also the deceased himself told PW1 that he was shot by Masanja Magishi. The same statement was made by the deceased when he was on his senses while at Mbeya Consultant Hospital. The evidence of PW1 is strengthened by the evidence of PW3 who told the court that he visited the deceased at Mbeya Zonal Consultant Hospital to interrogate him. That during interrogation, the deceased told him that it is Masanja Magishi who shot him. Such statement of the deceased is admissible under **Section 34 (a) of the Evidence Act Revised Edition 2019.**

The evidence of PW1 and PW3 is supported further with the evidence of PW2 who told the court that upon arrest of the 1st accused person when interrogated he admitted to have committed the offence and named the 2nd accused who also was arrested at the house of the 1st accused by the assistance of the 1st accused who communicated with him. I am inclined to believe that PW1 was a witness of truth, and that the deceased named the 1st accused to be the person who shot him.

The next pieces of incriminating circumstantial evidence which the prosecution case centers on are cautioned statements of the 1st and 3rd accused (exhibit P4 and P9); Extra Judicial Statements of all the accused persons (exhibits P5, P6, P7 and P8); information the Police received from the accused persons, which led to the discovery of the gun and Postmortem Examination Report (exhibit P10).

Starting with information the Police received from the appellants. It was the evidence of PW2 that having arrested the 1st accused, when interrogated, the accused admitted to have been involved and named the 2nd accused. From the evidence of PW2, it is the 1st accused who led to the arrest of the 2nd accused as he phoned him calling him to come to his home whole it was a trap. Further it is the prosecution evidence that the 2nd accused was arrested at the home of the 1st accused.

Further that it is the 1st accused who told PW2 that it is Seni Nhugijo (4th accused) who employed them to murder Shinje s/o Gadi. It is the 1st accused who led the Police to Kikwale Village to the home of Seni Nhugijo, where he was arrested. Not only that, it was the 2nd accused who named Lulenganiya Lwiza Jilala (3rd accused) to have participated in killing the deceased. PW2 told the court that it is the 1st accused who assisted the arrest of the 3rd accused. That it is the 1st accused who phoned to him telling him to go to Laela to receive the

payment of their job. The 3rd accused went to Laela where /he ultimately was arrested.

Again PW2 told the court that when interrogated the 2nd accused person, it is the accused who told him that he is the one who hired the gun at Itumba Village to one Malembe Simtanda. PW2 told the court that it is the 2nd accused who sent them to Itumba Village in Momba District where they discovered the shotgun (exhibit P2) and five (5) bullets (exhibit P3). The evidence of PW2 is corroborated with that of PW3 who interrogated the 1st accused and that of PW5 who interrogated the 3rd accused person.

Though the accused persons denied some of the facts but as far as the arrest is concerned, the 1st, 2nd and 3rd accused persons in their defence admitted to have been arrested at Laela, on the very date the prosecution witnesses specifies and the time. It is only the 4th accused who denies to had been arrested at Kikwale but admits to have been arrested at night as stated also by PW2. Looking critically chronology of events; the arrest, discovery of gun and bullets (exhibit P2 and P3). I am inclined to believe and indeed I do that the chain of events are so closely connected. The chain of event is not broken. Therefore there is reality in it. It cannot be a concocted story by Police.

Regarding the aspect of the confessional statements which the accused (1st and 3rd) made, which they are invariably repudiated and retracted during the trial. The test to determine whether a confessional statement was involuntary is provided under Section 27 (3) of the Evidence Act. The test is to the effect that a statement shall be regarded as involuntary where the court believes that it was obtained by any threat, promise or other prejudice held by any member of the Police Officer to whom it was made or by any member of the Police Force or other person in authority. See **Michael Mgowole & Another vs. Republic**, Criminal Appeal No. 205 of 2017 Court of Appeal of Tanzania (Unreported).

In their respective defences the 1st and 3rd accused persons stated that they never gave cautioned statement and that they were forced to sign something they did not know. I have strived to understand the circumstances surrounding the confession and ask if it gives rise to a reasonable doubt as to the confession's voluntariness, taking into account all the aspects of the law; Section 27 (3) of Evidence Act. I have not found any matter of facts from the surrounding circumstances, to suggest involuntariness of the cautioned statements. Both the statements describe the circumstances in which the deceased met his death. They are so detailed that the events described therein could have

only be given by people who had knowledge of how the deceased met his death. In other words they (cautioned statements) contain many details and elaborate circumstances which only those directly responsible for the death of the deceased could know. Further the statements also show the role played by each of them. The cautioned statement of the 1st accused (Exhibit P4) gives detailed range from being employed to kill, planning to kill, where weapon obtained and the way killing was executed. The details fit into the complete picture and oblige me to conclude that the accused statement was truthful and voluntary. The same is the statement of the third accused (Exhibit P10). In **Emmanuel Lohay & Udagene Yatosha vs. Republic**, Criminal Appeal No. 287 of 2010 Court of Appeal of Tanzania (Unreported) the court restated that detailed narrative and elaborate account in confessional statements lend credence to their truthfulness. See also **Michael Mgowole and Another** (supra), **Peter Mfalamagoha vs. Republic**, Criminal Appeal No. 11 of 1979 Court of Appeal of Tanzania (Unreported)

The accused persons cautioned statements gained further credence from the information which the accused persons (all of them) separately gave to the Police leading to the arrest of each other and which led to the discovery of the gun said to have been used in

murdering the deceased. That the information given to the Police is relevant under Section 31 of the Evidence Act, Cap 6. The said information lead credence to the detailed incriminating facts to the appellants made them and make them believable. In **Ibrahim Yusuph Calist @ Bonge & 3 others vs. Republic**, Criminal Appeal No. 204 of 2011 Court of Appeal of Tanzania (Unreported). The Court of Appeal restated the position that information to the discovery of the subject matter of the offence serves to assure the truthfulness of the facts contained in the confessional statement.

The evidence available is that the deceased was shot. The information is to the effect that it is the 2nd accused who hired the gun. At the sametime, the 2nd accused led the Police to the place where he hired the gun and the gun was discovered. Though there is no ballistic expert evidence to show that it is the very gun which was used on the eventful date but the finding of the gun which from the information of the accused persons themselves provides that it is the same gun which was used, I have no reason to disbelieve that it is the very gun which was used. Not only that PW6 explained the nature of the wounds which a penetrating wounds and from his expertise explained the pattern of the wounds, and suggested that from pathologic study of the nature

of wounds he also suggested the shot might be a short gun. Though I am not bound with his evidence but I am persuaded.

Regarding Extra Judicial Statements of the accused persons. The evidence available is to the effect that all the accused persons recorded Extra Judicial Statements. The evidence at hand shows that only the 1st and 3rd accused recorded cautioned statements and Extra Judicial Statements. The 2nd and 4th accused recorded only Extra Judicial Statements.

In their defence all the accused persons denies to have recorded Extra Judicial Statements. Further that they were just told to sign and they signed the statement which they did not know what was it. For instance DW1 said he was sent to the court building like and having entered in the office, the Police who escorted him to the building gave the person they met a paper and that person just copies what was in the paper given to him by Police and then told him to sign. From his version DW1 (the 1st accused) portrayed the message that he was not aware if he was at the offence of the Justice of Peace. The same was contained in the defence of the 2nd accused who told the court that he was sent to the building like court building when the Police talked in with the Justice of Peace in the language he did not understand and later was told to sign, he said he signed knowing that if he refuse he

would undergo beatings when returned back to the Police Station. The version of the 3rd accused was that as the Police kept on changing the rooms he did not know at what point he was before Justice of Peace as even the clothes of the people met in the rooms were similar. The 4th accused's version was that he did not know the Justice of Peace he has heard in court.

With due respect, the statements made to the Justice of Peace are so detailed, elaborate and thorough that no any other person would have known such details but the accused persons. Thus the accused persons retracting confessions are clumsy attempts to evade the consequence. See **William Mwakatobe vs. Republic**, Criminal Appeal No. 65 of 1995 Court of Appeal of Tanzania (Unreported).

I am satisfied that the accused Extra Judicial Statement were truthful. First I can see no reason at all why the accused person did not tell the PW4 (Justice of Peace) of any torture by the Police if they had been tortured. Secondly and more importantly, in the statements the details pertaining of events leading to the death of the deceased are such that no one else other than a participant to the murder could do so. By the nature of the statements I am satisfied that the Extra Judicial Statements were true and freely made by the accused person. See

Kashindye Meli vs. Republic, Criminal Appeal No. 12 of 1996 Court of Appeal of Tanzania (Unreported).

The piece of defence evidence is that Extra Judicial Statements made by the accused to a Primary Court Magistrate (PW4) was just a reiteration of the admission allegedly exerted from them at the Police Station, I am satisfied that even if there was prior exertion, PW4 succeeded to reassure the accused that they were agents at the time they made their statement before him. See **Athman Hussein vs. Republic [1988] T.L.R 246** (Court of Appeal of Tanzania). Even the question of torture is nothing but an afterthought. See **Hemed Abdala vs. Republic [1995] T.L.R 171**.

As far as Extra Judicial Statements are concerned, the piece of defence evidence is that Justice of Peace did not introduce himself to the accused persons, but DW4 Justice of Peace in his testimony told the court that he introduced himself to the accused persons to be the Justice of Peace and that they are at will to give or not their statements. It was a further defence evidence that they were sent to the building which is court like. It means they were not aware that they were sent to the court for recording Extra Judicial Statements. In the case of **Nywamweko Boman vs. Republic**, Criminal Appeal No. 35 of 2001

(Unreported). The Court of Appeal facing such a ground of complaint had this to say:

"....It is incredible that Mr. Rutaisire raises the argument that PW5 did not identify herself to the appellant when it is abundantly clear from the statement Exhibit P.8 that it was indicated to the appellant that PW5 was a Justice of Peace. That the appellant being a villager could not understand who a Justice of Peace was, is to say the least absurd. In today's Tanzania, it is indisputed that generally even people in the villages where the Primary Courts are located, know who a Magistrate or Justice of Peace is. They know the difference between the Policeman and a Magistrate. We see no reason for the appellant being taken as such an exceptional Tanzanian who could not tell the difference between the Policeman and a Justice of Peace".

With the above wisdom of the Supreme Court of the land, in the instant case, DW1 told the court that he is living at Laela, and has been there from 2016. The prosecution evidence is that he was sent at Laela Primary Court to the Magistrate, it does not click in my mind that the 1st accused did not know or could not differentiate the Police Station with the Court premises. The same is with other accused persons. To my view the kind of defence the accused person are giving on the Extra Judicial Statement to me is like a kick of a dying horse.

I with due respect to the defence counsel, agree that Extra Judicial Statement cannot be used to corroborate cautioned statement, because

it is the type of evidence which also needs to be corroborated. To my view the evidence of PW2 which is basically the information from the accused persons themselves corroborates what is contained in the statements of the accused. Even in the absence of corroboration, confession alone can ground conviction. See **Tuwamoi vs. Uganda (1967) EA 84**, **Hemed Adballa** (supra) and **Michael Luhiyo vs. Republic (1994) T.L.R 181**.

Further I am aware that Extra Judicial Statement is always the repetition of what the accused person had confessed to the Police Officer in the cautioned statement. In the case at hand, the 2nd and 4th accused seem to have not made confession to the Police Officer but to the Justice of Peace. I was very curious to know the reason, but neither the prosecution nor defence illuminated me on that. But apart from the confession before Justice of Peace, there are other pieces of evidence which link the 2nd and 4th accused to the offence. This includes the information they themselves offered to the Police Officer (PW2) and what is contained in the statements of other accused persons and the way they detailed their statements are.

Having so scrutinized the evidence at hand, I am satisfied that it is the accused persons in this case responsible with the murder of one Shinje Gadi.

The last nagging issue is whether the act of the accused persons were actuated with malice aforethought.

It is a cardinal principle of law in murder cases, that conviction cannot stand unless the prosecution has successfully established both overt act (*actus reus*) and malice aforethought (*mens rea*). Circumstances/evidence on which malice aforethought can be deemed to have been established is provided under Section 200 of the Penal Code. The section is not exhaustive. In **Moses Michael Alias Tall vs. Republic [1994] T.L.R 195**, discussing the situation which may infer malice aforethought Court of Appeal of Tanzania has this to say:

"Malice aforethought may be inferred from the amount of force which the offender employs in inflicting fatal injury".

Not only that type of weapon, the part of the body the blow or blows were directed at or inflicted, motive or reason for killing and many others are sufficient to infer the existence of malice aforethought. See **Enock Kapela vs. Republic**, Criminal Appeal No. 150 of 1994, **Mold Msangule vs. Republic**, Criminal Appeal No. 173 of 1991 and **Betram Ngoji vs. Republic**, Criminal Appeal No. 5 of 1989 (Court of Appeal of Tanzania all unreported).

In the case at hand, the accused used gun which is a lethal weapon, the weapon which is dangerous by itself. Its inflict leads to

either mortal or great bodily harm. The injuries inflicted to the deceased are well explained in the Postmortem Examination Report (Exhibit P10) internal and external. From the facts and evidence of the prosecution, I am of the strong view that in killing the deceased, the accused persons were actuated with malice aforethought. In the premises I find myself to be at variance with the unanimous opinion of the assessors who opined that the accused are not guilt of murder.

In the premises I find all the accused persons guilty of murder. I hereby convict the accused persons for the offence of murder contrary to Section 196 of the Penal Code (Cap 16 Revised Edition 2019).

It is so ordered.




D. B. NDUNGURU
JUDGE
28/05/2021

SENTENCE

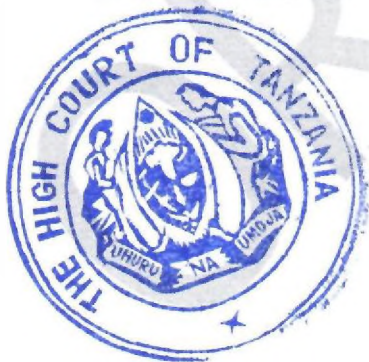
The offence of murder has only one sentence. It is a mandatory sentence not optional one. The sentence is provided under Section 197 of the Penal Code. It Section 197 provides:

"197 A person convicted of murder shall be sentenced to death".

That being the position of law I have no alternative rather to pronounce the statutory sentence. I hereby sentence the accused persons Masanja s/o Magishi, Kamuga s/o Ntemi @ Kumusu, Lulenganija s/o Lwiza @ Jilala and Seni s/o Nhugijo to suffer death.

I further direct that you shall suffer death by hanging as provided under Section 26 (1) of the Penal Code, (Cap 16 Revised Edition 2019).

It is so ordered.




D. B. NDUNGURU
JUDGE
28/05/2021

Right of Appeal explained.