

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE DISTRICT REGISTRY OF KIGOMA)**

**AT KASULU**

**ORIGINAL JURISDICTION**

**CRIMINAL SESSION CASE NO. 36 OF 2020**

(PI NO. 17 OF 2019 OF KASULU DISTRICT COURT)

**THE REPUBLIC**

**VERSUS**

- 1. NURU S/O VENEVAS**
- 2. SETH S/O SIMON**
- 3. EZEKIEL S/O KAROBEZI**

**J U D G M E N T**

*14/06/2021 & 15/06/2021*

**A. MATUMA, J.**

The accused persons herein, ***NURU S/O VENEVAS, SETH S/O SIMON,*** and ***EZEKIEL S/O KAROBEZI*** are charged of murder contrary to section 196 and 197 of the Penal Code (Cap.16 R.E. 2002). They are alleged to have murdered one ***RICHARD S/O CHIJA*** at night of the 2<sup>nd</sup> day of October, 2016 at Kwaga Village within Kasulu District in Kigoma Region. It was further



alleged that they assaulted the herein above deceased with a sharp object allegedly a bush knife (panga) on the head, shoulder and leg. He sustained multiple cut wounds leading to severe bleeding and subsequently death due to loss of blood.

The brief facts of the matter are that; the deceased person was a watchguard in the Chinese Road Construction Company which was carrying on construction of the road from Kasulu to Kidahwe. The first accused Nuru Venevas was an employee of the said Chinese Company as an operator of the Excavator Machine (dereva wa Mtambo wa kuchimbia mitaro). On the night of the incident, the deceased together with his two fellow watchmen were on duty as usual. Thereat, they were invaded by a group of thugs allegedly the accused persons herein for the purposes of stealing a control box of the Excavator. While the two other watchmen succeeded to escape and run away, the deceased resisted the stealing and decided to fight against the thugs. He managed to inflict a wound to the 3<sup>rd</sup> accused herein on the head. The thugs became furious, assaulted him to death as herein above stated. They then stole the control box of the excavator and fled away.

The incident was reported to police who in the early morning arrived at the crime scene, found the deceased already murdered and the control box



stolen. The first accused also arrived at the crime scene and according to him he was attending to work as usual. The police suspected him as the excavator he used to operate was the one whose control box was stolen. They thus took him to Police Station for initial interview. Having been initially interviewed he admitted to have participated in the stealing of the control box and named the other two accused persons among others as his companions in the crime.

The two other accused persons were traced and arrested on different dates and places whereas the second accused was alleged to have been found with the alleged stolen control box. It is from this background the three accused persons were charged of this homicide offence.

On their party the accused persons denied completely to have committed not only the murder but also the alleged stealing of the control box.

At the hearing of this case, the Republic/Complainant was represented by Mr. Robert Magige and M/S Edna Makala learned State Attorneys while the accused persons enjoyed the services of Mr. Sadiki Aliko and Mr. Denis Katambo Kayaga learned Advocates.

On my part, I sat with the aid of two lay assessors namely M/S Sanyu James Kihungu and Mr. Bathromeo Josephat Furugutu.



As a cardinal principle in criminal trials, it is the prosecution side which has the duty to prove the charges against the accused person beyond any reasonable doubts. It is not for the accused person to establish his innocence. This responsibility never shifts throughout.

Since the accused persons, as already indicated herein above, stand charged of murder c/s 196 and 197 of the Penal Code, the prosecution had a duty to prove beyond reasonable doubts; ***That, death was caused to the deceased person i.e the alleged deceased person Richard S/O Chija is indeed dead;*** ***That, his death was not natural;*** ***That, the death was caused by an unlawful act or omission;*** ***That, it were the accused persons who did the unlawful act or omission leading to the said death and, That, the death was caused with malice afore-thought in the meaning that the accused persons intended to cause such death or grievous harm.***

To execute such burden against the accused persons, the prosecution arraigned a total of eight witnesses while the accused persons were the only witnesses for the defense. The witnesses called by the prosecution were PW1 (Inspector Amran Msangi); PW2 (H. 3564 DC Ibrahim); PW3 (Paschal Bahezwa); PW4 (Noel Ndas); PW5 (E. 3420 CPL Charles); PW6 (Bonite Kalist), PW7 (E. 7627 D/CPL Magambo) and PW8 (H.8662 D/Sgt. Eliah.

**PW1** Inspector Amran Msangi, testified to the effect that in the year 2016 he was Incharge of Anti- homicide offences in the office of the Regional Crimes Officer-Geita Region. That on 11/10/2016 a troop of Police Officers from Kasulu in Kigoma Region arrived at RCO's office in Geita Region for arrest and search the second accused Seth Simon who was reported to have taken refuge at his brother's apartment one Malaki at Mwatulole street. The search was intended to find out the stolen Control box of the Excavator. According to him they went at Mwatulole area and surrounded the house in question, called the ten-cell leader one Noel Ndasu and some other people who were there. They found the accused Seth Simoni sitting at the sitting room. He told the accused that they were there to arrest him and search for the excavator's control box.

He further testified that the second accused told them that he had the said control box kept inside the room. He led them to the room where the control box was found in the black bag commonly known as ***begi la Bob Marley***. He seized the bag and on opening it they got such Control box which was in two pieces referred them as "two ways" and its fuse. He named after refreshing his memory the serial numbers of the two pieces of the control



box to be S/N G3G -KS 1B8/1002/15289/APC150 C/100/10 M50.00.13 and S/N 13X05751.

He further testified that he prepared the seizure certificate and witnesses signed it including the second accused. He then tendered the Certificate of seizure No. B 0525601 as exhibit P1. He also tendered as exhibit P2 collectively; two pieces of items and a fuse he seized which he explained that they are in pieces but it is a single control box as for them to work they are connected as one. The witness then identified the second accused as Seth Simon whom he went to arrest and search.

During cross examination as to why they didn't bother with Malaki the brother of the second accused whose house was searched he admitted that; "*Mshikwa na Ngozi ndiye mwizi au mla nyama*" but that in the instant matter Malaki whose house was searched was not a suspect, the target was Seth who was said to have the said exhibit at the home of his brother Malaki.

**PW2**, H. 3564 DC Ibrahim, testified to the effect that he participated in the arrest of the accused persons. He also explained in detail on how they detected the thugs of the crime leading to the arrest of each of the accused



persons. He testified that on their arrival to the crime scene, he saw the dead body and three road making vehicles.

To detect whether everything was okay he directed each driver (Operator) of the vehicles to start the engine of their respective vehicles. Two of the drivers complied but Nuru Venevas the first accused hesitated. He directed him to climb his excavator and start it. Nuru got in and tried to start it but it did not start. He then told PW2 that the Excavator had no control box. As it was him (Nuru Venevas) who was the operator of that machine, he took him for interview so that the said accused tells at what time he parked the machine (excavator), to whom he handled it and in which condition he parked it.

The witness went on that at the initial interview, the first accused told him that he knew the crime and the thugs involved including himself, but that they did not intend to kill. He then named one Seth (the second accused), Ezekiel (the third accused), Mfipa and himself as the persons who conspired to steal the control box. That they went to the crime scene at night just for stealing the control box and he himself stood as a Guard for his fellows to accomplish the mission but did not know that in the process the security



guard thereof now the deceased was murdered. He only thought that he has been merely assaulted.

On 5/10/2016 at night he arrested Ezekiel at about 23:00 hours being led by the first accused Nuru Venevas. After they arrested Ezekiel, brought him in the Police station, locked him in and started another movement with the first accused for an attempt to trace out the other suspects as they had no time to stop because they wanted to rescue the control box before it could be disposed of. That the first accused told them that Ezekiel who was in the lock up knew the whereabouts of Seth. They thus returned the first accused into the Lock up and interviewed Ezekiel. Ezekiel told them that Seth had the control box and went to Ngara Benaco, but through phone tracing, the location was reading that Seth was at Ushirombo. They rushed to Ushirombo and Ezekiel led them to the home of Seth at Ushirombo. At Ushirombo they got Seth's wife who told them that his husband the second accused has left to his brother at Geita and on further interview she told them that her husband took with him a small Bob Marley bag. She mentioned the brother of Seth as Malaki. They thus took her to escort them to Geita and show them the said Malaki.



He went on that, at Geita they found Malaki who told them that Seth was his young sibling and has visited him and that at that time he was at his home. Malaki then led them to his home where they found Seth. They arrested him and called the ten-cell leader for the search. Seth himself directly led them to the point where the control box was. Inspector Amran seized it and they went off.

About Malaki he explained that he did not arrest him as he was not a suspect, to them he was a third party. He left him free but told him that whenever he shall be needed, they shall call him.

That on 11/10/2016 in the evening they started the journey back to Kasulu and stopped at Nyakanazi because Seth had named someone else at Benaco who sent them to steal the control box but at the end they did not succeed.

**PW3**, PASCHAL BAHEZWA an Assistant Medical Officer examined the deceased's body on the 3/10/2016 which was identified to him as being that of Richard Chija. According to him the deceased had several cut wounds on the head, shoulder and on the leg. He concluded that the cause of death was severe bleedings due to the cut wounds. He then tendered in evidence the Post mortem report of the deceased exhibit P3.



**PW4**, NOEL NDASA who was the Mtaa chairman of Mwatulole street in Geita Region. He testified to have witnessed the search at the house of Mama Antonia where Malaki Simoni had rented. Malaki Simon was the brother of the 2<sup>nd</sup> accused herein Seth Simon. According to him, Seth the second accused led them into the room and took a black bag marked Bob Marley and handed it to Police. When the bag was opened, two iron items were found which the Police officers identified to him as a control box. There was also another item which he was informed that it was a fuse. He identified exhibit P1 the Certificate of seizure and exhibit P2 the stated control box and its fuse which were seized in his presence. He finally identified Seth Simon the 2<sup>nd</sup> accused as the person who was arrested with those items. As to the whereabouts of Malaki, this witness stated that he shifted from the street and did not know his where about.

**PW5** EX E. 3420 CPL CHARLES testified that he was Exhibit keeper at Kasulu Police station. On 12/10/2016 in the evening hours he received exhibit from D/C Ibrahim which related to a murder case with reference no. KAS/IR/3360/2016. He named the exhibit to be a control box and its fuse. He registered the exhibit and marked them KAS/EXH/REG/126/2016 in the Exhibit Register.

He then tendered in evidence a certified copy of Exhibit Register as exhibit P4. Reading out the contents of exhibit P4, PW5 revealed entry No. 126 in respect of reference KAS/IR/3360/2016 and explained that in that entry he received control box make KATO G3G KS 1B 100215289/KATO APC 150C10010M50.0013 S/N 13 x05751, a wire or fuse which were in one black bag. He then identified the exhibits and the black bag.

**PW6**, BONITE KALIST a Medical Doctor testified to the effect that on 13/10/2016 at Kasulu District Hospital attended the 3<sup>rd</sup> accused Ezekiel Karobezi who was a suspect under the custody of Police Officers. According to her, the 3<sup>rd</sup> accused had a wound on the head (anterior) nearest fontary. She inspected the wound which was not fresh but appeared to have been sustained more than a week approximately 8 to 9 days prior to her examination. She further testified that the patient (3<sup>rd</sup> accused) was stable, walking alone and speaking well. The wound according to her was a cut wound which was caused by a sharp object. She then tendered the PF-3 of Ezekiel Karobezi the 3<sup>rd</sup> accused reflecting her evidence as herein above.

According to the prosecution, the 3<sup>rd</sup> accused sustained the wound in the course of confrontation with the deceased but the 3<sup>rd</sup> accused on the other



hand explained that he sustained the wound at the time of his arrest and it were the Police officers who inflicted him such wound.

**PW7** E. 7627 D/CPL Magambo a Police officer investigator, gave a length evidence and the role he played in the investigation of this case. He testified that on 3/10/2016 was appointed to join a Police team under inspector Mshana to go to the crime scene. At the crime scene he saw the deceased body and three Excavators.

He observed the deceased's body to have several cut wounds on the head, right shoulder and on the right leg. He drew the sketch map of the crime scene which he tendered in evidence as exhibit P6. He then gave similar evidence to that of PW2 supra in relation to the initial interview of the first accused, the tracing and arrest of the accused persons. His extra role was the interrogations and recording of Cautioned Statements of the three accused persons. When he attempted to tender the three statements, defense advocates objected their admissibility on both factual and legal grounds. The legal ground was that two of the statements that of the first accused and the 2<sup>nd</sup> accused were recorded out of the prescribed four hours and thus inadmissible for contraventions of section 50 of the Criminal Procedure Act, Cap. 20 R.E. 2019. The factual ground of objection was that

the three statements were procured out of torture, threat and promise. For there having been legal grounds of objection, I conducted a trial within trial in which I found that the statements were legally admissible. This was due to the fact that I was satisfied with plausible explanations given by PW7 for the delay in recording the two statements as it was held in various cases among them the case of ***Salum Said Kanduru versus Republic, Criminal Appeal No. 205 of 2010 (CAT)***.

The explanation given which I found to be plausible was that; immediate after the arrest of the 1<sup>st</sup> accused person, the investigation hurry or urgency was to arrest the remaining suspects and rescue the control box which was about to be sold in case of any delay. The 1<sup>st</sup> accused was thus leading the police troop none stop until when the 3<sup>rd</sup> accused was arrested. As the 3<sup>rd</sup> accused after his arrest had no emergency role to play in the investigation process, his statement was soon recorded within the required time in law. The 1<sup>st</sup> accused continued with the troop in the investigation process for the same purpose. It latter turned to be known that it was him (3<sup>rd</sup> accused) who knew where to get the second accused who was in actual possession of the control box. He was thus taken to lead the troop and the 1<sup>st</sup> accused dropped from the movement whereas soon thereafter his statement was

recorded but it was already out of the prescribed time supra. The 2<sup>nd</sup> accused was arrested out of Kigoma Region. He was thus to be transferred to Kasulu Police station which took them almost two days but immediately after reaching to the Police Station his statement was recorded. No doubt that Police officers refrained from interviewing these suspects in writing as they were curious to make further arrest and seize the stolen property before it could have been evacuated. Those were acts connected with the investigation. With all these I found that the same were reasonable and plausible explanations as herein above stated and thus the delay in recording the two statements was excusable as per **Salum Said Kanduru's** case supra and within the meaning of section 50 (2) of the CPA supra which provides that;

*'In calculating a period available for interviewing a person who is under restraint in respect of an offence, there shall not be reckoned as part of that period **any time the Police officer investigating the offence refrains from interviewing the person, or causing the person to do any act connected with the investigation**.'*

About allegations of torture, threat and promise to procure the statements, I overruled the same for there was no any tangible evidence to support the

allegations on the strength of the Court of Appeal decision in the case of ***Samwel Mkika versus The Republic***, Criminal Appeal No. 47/2001 Court of Appeal at Mwanza (Unreported) which held that;

*'apart from the bare claim by the Appellant which has been repeated by Mr. Makowe (his advocate) in this appeal, no substance of some back up evidence has been shown at least to indicate that the appellant was in fact subjected to torture'.*

The statement of the first accused Nuru Venevas was thus admitted as exhibit P7, that of the 2<sup>nd</sup> accused Seth Simon as exhibit P8 and that of Ezekiel Karobezi as exhibit P9.

In the statement of the first accused Nuru Venevas, it is recorded that he admitted to police to have conspired with his fellow accused persons along with others not in court to steal the control box from the excavator he was operating. They went at the crime scene on the material date in execution of their plan but it turned a misery as the deceased stood firm to obstruct them by hitting the 3<sup>rd</sup> accused with an iron bar on the head. According to his statement, the first accused observed his fellows applying physical force/assaults against the deceased to death. He thus thought to withdraw himself from the execution of their stealing mission but his fellows did not



allow him. The 2<sup>nd</sup> accused Seth Simon struck him by the side of the panga to compel him to cooperate fully in the crime. They thus stole the control box and fled away.

In the second accused's statement, it is recorded that he told the recording officer that it was Nuru the first accused who informed him of the mission to steal the control box as he had found a customer at Kigoma. He was involved in the plan and on the crime date they went to the crime scene. Thereat, the deceased did not surrender and started to confront them by assaulting their fellow the 3<sup>rd</sup> accused on the head. They thus decided to attack him. He himself held the deceased tight and Ezekiel cut him with a panga. After the killing they stole the control box and he took it for sale in Uganda but on the 11/10/2016 he was arrested with the same at Geita being at the homestead of his brother one Malaki.

On his part the 3<sup>rd</sup> accused is recorded in his statement to have said that together with his fellows conspired to steal the spare in the excavator which was being operated by the first accused Nuru. They then on the crime date at night went there, invaded the watchguards and killed the deceased. He was also injured on the head but they succeeded to steal the said spare.



Then it was **PW8 H. 8662 D/Sgt Eliah**. His evidence was to the effect that he recorded the additional statement of a witness namely Jack Yan who was previously recorded the first statement by his fellow officer namely G.5362 D/C Musa. He tendered the statement of the said witness as exhibit P12 because the witness is in China and could not be procured without undue delay. The notice to tender the statement of the said witness under section 34B(1) and (2) (a), (b), (c), (d), (e), and (f) of the Evidence Act, Cap. 6 R.E 2019 was already been given in the required time and on the prescribed conditions or requirements.

In the said exhibit P12 the witness who was the General Office Manager, identified the control box exhibit P2 to have been the very one stolen on the material date. He identified it by Serial numbers G3G KS1B1002 – 15289, APC 150-100-100M50.0013 S/N 13X05 751 and brand name "KATO". The prosecution then closed its case.

The accused persons in their respective defenses, denied completely not only to have committed the crime but even to have been on the crime scene that material night. Their respective defenses were given at length on the manner they were arrested. They denied even to have made any statement before

the police each stating that his respective Cautioned Statement was a false document which he never made nor signed.

The first accused for instance testified that he was arrested at Muzye Village within Kasulu District where he lived and it was on 03/10/2016 when he reported on duty as usual. That he only got informed of the death of Richard Chija at the site when he arrived there. Thereat, he was arrested together with Saidi and Shuashua fellow operators of the Dosser and Roller respectively. He defined the *Excavator as; mashine inayochimba, Dosser as; mashine inayosukuma au kurunda mchanga* and *Roller as mashine inayoshindilia barabara*.

According to him all operators of these vehicles were arrested because it was suspected that thieves who used to steal fuels/diesel from these vehicles might have been the assailants in the murder and they were suspected to have been cooperating with those thieves to steal fuel/diesel. He denied to have at any time ordered to climb the machines to start the engine and that they did not even get closer to them.

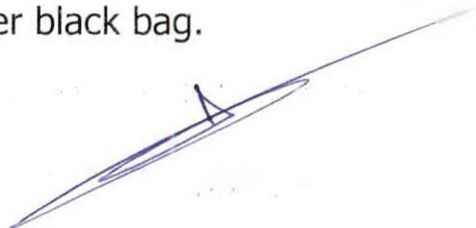
The second accused on his part fended himself that on 2/10/2016 the date of which the crime was alleged to have been committed he was at Ushirombo to his home with his wife one Godriver Nashoni and his children. He also

testified that he does not know what is a control box as the vehicles he used to drive have no control box. For the first time when he heard the word "Control box" was herein court.

On how he was arrested the second accused testified that his brother Mr. Malaki Simon phoned him to know his whereabouts. He told him that he was at Geita at a certain garage. The said Malaki arranged for them to meet so that he could take him to see where he lived. They met near the Bus stand but suddenly some people dropped out of the nearby vehicle and introduced themselves as police officers. He was then arrested and handcuffed together with his brother; *"Tulifungwa pingu moja mimi na kaka yangu"*.

They were then taken at his brother's home for search. During the search he was left in the vehicle while the police and Malaki entered in.

About the exhibits which were tendered, he only admitted to have seen the black bag of Bob Marley at the time of his arrest and that it was PW2 Ibra who had carried it but didn't know what was inside it. That inside Malaki's home, police officers entered with that bag and on their coming out they had it along with another black bag.



That after the search they handled a certain paper to Malaki but he was not given any paper. He completely denied to have signed the certificate of seizure. The second accused then testified that on their way the police gave Malaki a phone to call his wife and inform her that he was being taken to Kasulu; "*Wakampa simu Malaki, wakamwambia ampigie simu mke wake amuage kuwa anapelekwa Kasulu*".

That Malaki's wife being phoned she rushed to them on a bodaboda. Then the police, Malaki and his wife started a talk just two meters from the vehicle in which he was. Malaki was then released. The host police officer was also left and he was taken direct to Ushirombo as they said they wanted to search his home. At Ushirombo they locked him at Ushirombo Police station where he slept for one day. He was then taken to Kasulu through Runzewe – Nyakanazi on the 7<sup>th</sup> October, 2016. From Ushirombo to Kasulu he was joined with the 3<sup>rd</sup> accused Ezekiel but at Kasulu Police they were separated into different lockups.

The 3<sup>rd</sup> accused in his defence stated that on 5/10/2016 at 23:00 hours in the night at Muzye village in Kasulu District while asleep at the home of his friend one Stanslaus heard people knocking "*Fungua*". Those people then broke the door and entered in. They thought the people were thieves as they

did not introduce themselves. In that respect they tried to revenge against them and it is when he got injured on the head by those people. They were then arrested and handcuffed. They were taken out where the people who arrested them introduced themselves as police officers from Kasulu.

He therefore accounted for his wound on the head that it was inflicted to him by police officers at the time of his arrest and not the deceased as alleged.

On the basis of the evidence on record as herein above reviewed, the lady and gentle assessors unanimously opined that there is no dispute that Richard Chija is indeed dead and was murdered. They however had unanimous opinion that the prosecution failed to prove their case beyond reasonable doubts as far as the identity of the real culprits is concerned.

They thus opined for acquittal of the three accused persons because; the weapons used in the murder were not traced and tendered in evidence, Malaki the brother of the second accused whose room was searched, Godfrey Juma who led the police officer in drawing the sketch map of the crime scene and the deceased's co-watchman who survived the attack by running away were all not brought as a material witnesses for the prosecutions, none of the witnesses witnessed the crime and identified the

accused persons committing the crime, prosecution evidence was only suspicions, no body witnessed that it was indeed the second accused who took the control box into Malaki's home, the first accused was merely arrested because the stolen control box was from the Excavator he used to operate and at the crime scene he appeared worrying the condition which can happen even to innocents depending on how one perceives the crime, documents for the ownership of the control box were not tendered in evidence, there was no evidence on whether the said control box could have not been used interchangeably with other vehicles, and the cautioned statements of the accused persons were doubtful because had the same been true, the confessions thereof could have been used to find out the weapons used in the crime.

Now it is my turn to scrutinize the herein evidence for both sides and determine whether the prosecution case has been proved beyond reasonable doubts against each of the accused persons and or whether the defence case has in any way casted reasonable doubts to the prosecution case in lines with the ingredients of the offence of murder supra.

First and foremost, there is no dispute that the deceased person Richard S/O Chija is actually dead and that he faced a violent death as rightly opined by



the two lay assessors. PW2 and PW7 gave undisputed evidence that they witnessed the dead body of the deceased in question sustained with several cut wounds. Their respective evidence was corroborated by the Post mortem examination report of the deceased exhibit P3 and the evidence of PW3 the Assistant Medical Officer who examined the dead body, observed the cut wounds on the head, shoulder and on the leg and finally established the cause of death to be severe bleedings due to the cut wounds. Therefore, there is no doubts that the prosecutions have sufficiently and beyond reasonable doubts proved the death in question and that the same was not natural.

Also, in the circumstances of the evidence of the prosecution as herein above reviewed, it is undisputed fact that whoever caused the death in question, caused it unlawfully and with malice aforethought as again rightly opined by the lay assessors. The only dispute therefore is on who killed the deceased.

To the prosecutions, it was the accused persons who brutally murdered Richard S/O Chija while to the defense, the accused persons are not in any way responsible for the alleged attack and murder.



None of the prosecution witnesses witnessed the commission of the offence and therefore there is no question of visual identification of the accused persons at the crime scene. The accused persons are incriminated as perpetrators of the crime in question by circumstantial evidence alone and their respective Cautioned statements.

The circumstantial facts tend to incriminate the accused persons in this case are to the effect that; the deceased a watchguard was murdered in the course of the murderers stealing of the control box from the excavator machine which was being operated by the first accused. That the first accused was suspected and having interviewed he confessed the stealing and named the other accused persons, that the third accused was arrested after being named by the first accused and he too confessed and informed the police that the stolen control box was in physical possession of the 2<sup>nd</sup> accused who was about to sell it. That they traced the 2<sup>nd</sup> accused and arrested him with the control box which was identified to be the very stolen property at the crime scene. In that respect the accused persons are incriminated by the doctrine of **Recent Possession**.

For circumstantial evidence to be the ground of conviction, it must be incapable of more than one interpretation, i.e unbroken chain of



circumstantial evidence proving the offence beyond reasonable doubts against the accused person can legally ground the conviction against him. See among other decided cases by the Court of Appeal; ***Protas John Kitongole & Another versus Republic (1992) TLR 51, Makungire Mtani versus Republic (1983) TLR 179 and Majidi Mussa Timotheo versus Republic (1993) TLR 125.***

**Recent Possession** as a circumstantial fact against the accused persons has also its own ingredients as per the case of ***Alhaji Ayub Msumari & Others versus Republic, Criminal Appeal no. 136 of 2009 CAT*** which held that;

*'Before the court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case....it must positively be proven, **first**, that the property was found with the suspect, **secondly**, that the property is positively the property of the complainant, **thirdly**, that the property was stolen from the complainant and **lastly** that the property was recently stolen from the complainant'*

In the instant case in respect of the first element ***whether the property (the control box for that matter) was found with the suspect***, the prosecution lined up three witness PW1, PW2 and PW4. PW1 and PW2 were



the arresting officers who explained as per their reviewed evidence herein above that after it was established that the death in question was a result of a violent theft in which the control box was stolen, they obtained a clue that the stolen control box was in possession of the 2<sup>nd</sup> accused herein. They traced him and managed to arrest him at Mwatulole street in Geita Region at his brother's rented house. They informed him that they were there to arrest him and search for the control box. They further testified that having informed the 2<sup>nd</sup> accused as such, he did not want to trouble them. He quickly informed them that he had the said control box and led them into the room, picked the black bag namely Bob Marley and handed to them in which they found the stated control box and PW1 seized it as per the Certificate of seizure exhibit P1. PW2 for instance testified that;

*'We arrested Seth and searched the house where we got the stolen control box. It was Seth himself who directly sent us to the point where the control box was. Hatukufanya upelelezi ule kama wa kutafuta, sindano, ni yeye mwenyewe Seth alitupeleka na kutuonyesha control box, hakutaka taabu'.*

The evidence of PW1 and PW2 was corroborated by that of PW4 the Mtaa chairman at the homestead where the 2<sup>nd</sup> accused was allegedly arrested. In his evidence PW4 stated that he was involved in the search in which the

control box exhibit P2 was seized from the 2<sup>nd</sup> accused. He identified such exhibit in Court as well. In his own words PW4 testified;

*'Inside there, Seth who was the accused led us into the room where I saw Seth taking a black bag marked Bob Marley and handled it to Police. We got out of the room to the sitting room where the bag was opened and two iron items were found which the Police officers identified to me as a control box and something which I heard them saying it was a fuse'.*

The 2<sup>nd</sup> accused on his part did not offer any explanation on how he became into possession of exhibit P2. Instead he completely denied not only to have been found with it, but also to have been arrested at his brother's residence. He testified that he was arrested at the Bus stand with nothing connected with any crime. With such evidence of the 2<sup>nd</sup> accused the only question that calls for its determination is the credibility of the three witnesses. This is due to the fact that his evidence tends to suggest that the three witnesses were lying against him in respect of the search and seizure.

A well settled principle for credibility of witnesses is that; Every witness is entitled to credence and have his evidence accepted unless there are good and cogent reasons for not believing him. See; ***Goodluck Kyando versus Republic (2006) TLR 363.***

Frankly speaking, I don't see any suggestive fact to disbelieve the three witnesses. This is because neither of them was familiar to the 2<sup>nd</sup> accused nor there was any grudge between them. PW1 was merely assigned to lead the team to the arrest of the 2<sup>nd</sup> accused for an offence which was not committed in his Region of work. His role was thus a mere host police to his fellow police officers from a far Region in Kigoma. I do not see any suggestive ground that would instigate them to conspire for lies against the 2<sup>nd</sup> accused on account of his evidence.

PW2 as well travelled all the way to Geita through Ushirombo in search of the second accused whom he did not even know. Likewise, PW4 who was a local authority in the locality. The three witnesses had no interest to serve in the instant case. It would be wrong to disbelieve them on that fact and I therefore find them credible and reliable to the fact that the second accused was actually found in possession of the control box in question. With such finding, I differ with the lady assessor who doubted whether the second accused was the one who brought the control box at Malaki's home. The legal question is not who brought it there but who was found with it. That alone is sufficient and it turns to the person so found, to explain how he became possessed of it, in which he may offer explanation as to how the

same got there and ultimately into his hands. The defense of the 2<sup>nd</sup> accused to the effect that he was not found in possession of the property is thus rejected.

The second element for determination on the doctrine is ***whether the property was positively proved to be the property of the complainant***. For this matter, whether exhibit P2 was positively proved to be the control box allegedly stolen in the course of the murder in question.

Here we have the evidence of PW2, PW7, PW8 and exhibit P12. PW2 and PW7 testified that on their arrival to the crime scene they found the control box of the excavator stolen. They realized as such after the operators of the three vehicles including the 1<sup>st</sup> accused were ordered to start their engines to ascertain whether everything was okay as up to that time it was yet known the reasons for the murder of the watchguard herein. Two of them quickly climbed their respective vehicles and started their engines. The 1<sup>st</sup> accused hesitated and on being commanded he climbed his excavator and acted to start the engine in vain. He then told them that the control box was stolen. The same was traced and found as herein above explained. Having been found, PW8 tendered in evidence exhibit P12 which was the statement of Jack Yan a Chinese National who was the General Office Manager of the

victim company whose control box was stolen. In the statement the said Manager identified exhibit P2 to be the very control box which was stolen from the excavator on the night of the brutal killing of the deceased. They even fixed it to the relevant excavator to take it off the corner it was parked and the same operated. They then retook it off back to police for their necessary steps.

There was no serious dispute that exhibit P2 was not a control box and that it belonged to the Excavator in question at the crime scene. There was no any evidence from the defense suggesting to the contrary of what was stated by the prosecution witnesses in that respect. In that regard it would be wrong to reject the prosecution evidence on that account as by doing so it would be allowing speculative views to affect my decision. Allowing speculative views to affect the decision making is bad in law as it was held in various cases including that of ***Shishir Shyamsingh versus Republic, (DC) Criminal Appeal no 54 of 2020***, High Court at Kigoma and ***Materu Leiosn & J. Foya versus R. Sospeter (1988) TLR 102***.

I therefore have no doubt that exhibit P2 was properly and sufficiently proved to be the very control box which was stolen at the time the deceased herein was murdered. To that extent the third element on ***whether the***

***property was stolen from the complainant*** is answered in the affirmative as well.

The last element is ***whether the property was recently stolen from the complainant.***

On this the gentle assessor was of the view that exhibit P2 was a small item which could change hands easily. Digesting this opinion, I find that the assessor was of the view that from the time it was stolen to the time it was retrieved, it could have been changed hands for its smallness and thus it was not recently stolen.

The crime incident occurred on the night of 2<sup>nd</sup> day of October, 2016 and the stolen control box was found in the morning of the 11<sup>th</sup> day of October, 2016. It is hardly 7 or 8 days from the time it was stolen.

According to the second accused, he admitted to have been at a time at the homestead of the first accused at Kasulu and explained that he left therefrom to Ushirombo and then to Geita. With this movement, it is my firm finding that this was a recent time taking into account the nature of the stolen property being a spare part of the excavator which is not a normal vehicle owned for private drive. Its changing of hands therefore depends on the

need to other excavators. The question whether exhibit P2 could be used interchangeably with other vehicles does not therefore arise as even the 2<sup>nd</sup> accused did not claim any lawful possession which would at least necessitate determination on the possibility of the property to have changed hands from the real culprits into his him as an innocent possessor. His general denial to have been found with it negates any possibility of the property to have changed hands from the crime date and thus the period remains to be short and recent. In that respect I differ with the gentle assessor that exhibit P2 was small enough to change hands quickly as he adjudged on its physical appearance rather than its capacity and usedness.

With the herein analysis, the doctrine of **Recent Possession** has been sufficiently proved against the second accused Seth Simon, and it alone even in the absence of any other evidence suffices to find him guilty of the murder in question.

Having so found, the next question is; can the doctrine of recent possession against the second accused herein apply *mutatis mutandis* against the 1<sup>st</sup> and the 3<sup>rd</sup> accused persons as well? The answer to this question is found under section 5 (b) of the Penal Code, Cap. 16 R.E 2019 which defines the state of one **being found in possession of**, to the effect that;

*'I there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them'*

In the circumstances of the herein definition of what amounts to be; **being in possession or found in possession**, a person can be criminally liable for possession although he was not found in physical possession. It suffices that there is positive evidence to the effect that he had knowledge of the presence of such property somewhere, had some sort of control in it, and or the presence of the property at the place it was found was albeit for his arrangement. That is what in law is known as **Constructive Possession** as was defined in various cases including that of ***Moses Charles Deo versus Republic (1987) TLR 134, Mniko Gisengi Romara & Others versus Republic, criminal Appeal no. 213 & 214 of 2012*** and ***Paul Joachim Sambwe versus Republic, criminal appeal no. 132 of 2013.***

In the instant matter, it was the first accused who informed the police officers that the stolen property was in possession of the second accused and that the same was about to be sold. The 3<sup>rd</sup> accused was the one who knew where the second accused was and it is him who according to the

evidence of the prosecution led them to the arrest of the second accused.

Finally, the second accused was arrested with the said stolen exhibit.

Since the said exhibit was stolen in the mid night of 2<sup>nd</sup> October, 2016 and just on the next morning the 3<sup>rd</sup> day of October, 2016 the 1<sup>st</sup> accused gave such information and the 3<sup>rd</sup> accused gave the information on the 5<sup>th</sup> October after his arrest just two or three days after the homicide the information of which was reliable to the extent that it led to the discovery of such stolen item, it cannot be said that they had mere knowledge. They had guilty knowledge of the presence of the stolen property to their fellow accused and had **constructive control** over the same. In fact, the exhibit was in possession of the second accused under joint arrangement between them all. They are thus liable for Recent Possession as well.

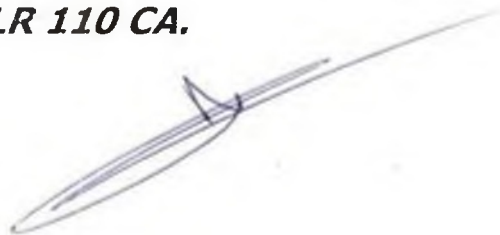
As I have said earlier, Recent Possession in this case in itself suffices to find all accused persons guilty of murder as they stand charged. But that is not the only circumstantial evidence against them. The prosecutions are still armed with the cautioned statements of all accused persons.

In their respective statements, each gave a detailed information relating to the commission of the offence and the motive behind it.

In the case of ***Janta Joseph Komba and others v. Republic***, Criminal Appeal No. 95 of 2006, CAT at Dar es salaam it was held that;

*'It is common knowledge that for a confession to be found voluntary on the basis of having contained detailed information, **such detailed information must be in relation to the particular crime itself** and not to the history of the accused persons'*

In the light of the herein authority the statements of the accused persons are incriminatory enough against themselves as they are so detailed on the crime itself, the manner it was committed, the stealing of the control box, the manner it was handled after the stealing and even some detailed information which led to its recovery. Therefore, the statements herein can justifiably be relied upon to convict all the accused persons although they were repudiated. In law, the uncorroborated repudiated or retracted confessions can be acted upon to convict provided that the court is satisfied that they contain nothing but the truth and warns itself of the danger of convicting on such statements. See; ***Shihobe Seni & Another versus Republic (1992) TLR 330 CA*** and ***Hamis Athumani and two others versus Republic (1993) TLR 110 CA***.



As I find the three statements to contain nothing but the truth in relation to the commission of the crime and after warning myself of the danger to act on them without corroboration as if the Recent Possession is not there, I find that on the basis of the statements of the accused persons alone, as herein above reflected the conviction of the accused persons is inevitable.

Even though, if I have to apply the practice that retracted or repudiated confessions should be corroborated in order to form the basis of the conviction, those statements are well corroborated by the recovery of exhibit P2 which was stolen at the incident of the murder in question. The recovery of exhibit P2 resulted on the detailed information in the statements as I have earlier on explained above.

Further corroboration is the wound of the 3<sup>rd</sup> accused in his head. He does not dispute to have sustained it at the confrontation. He only dispute confrontation with the deceased but with the police at the time of his arrest. I am far to believe him because going by the evidence of the 2<sup>nd</sup> accused, the police officers introduced themselves before they arrested him. Why should I believe that they didn't do the same to the 3<sup>rd</sup> accused? After all, and as I have said in the ruling during trial within trial, should have the police taken the 3<sup>rd</sup> accused to hospital to obtain evidence against themselves,

particularly when the wound was about to heal even without any treatment as evidenced by PW6 the Medical doctor who attended him? Logic does not dictate.

I thus find that the 3<sup>rd</sup> accused sustained the wound in the course of committing the current crime as well detailed in all the three statements, thus corroborating them.

The first accused in his statement tried to exonerate himself from the murder admitting his intention to steal alone but under section 22 (1) (b) of the Penal Code supra, he is held liable for the stabbing wound which was inflicted to the deceased by his fellow under the doctrine of common intention as it was held in the case of ***Deogratias Nicholaus @ Jeshi And Joseph Mukwano versus Republic, Criminal Appeal no. 211 of 2010 CAT (unreported)***. In that case, the Court of Appeal at Mwanza referring to the case of ***Godfrey James Ihuya v R (1980) TLR 197*** held that:

*'To constitute a common intention to prosecute an unlawful purpose ... it is not necessary that there should have been any concerted agreement between the accused persons prior to the attack of the so-called thief. Their common intention may be inferred from their presence, their actions, and the omission of any of them to dissociate himself from the assault.'*



In the instant case each and every accused was active in the execution of their unlawful purpose i.e to steal. It doesn't matter who inflicted which blow. The act of each constituted execution of the crime under common intention regardless that the ultimate result was not the planned crime.

The defense evidence as I have demonstrated herein above is nothing but a general denial. The same has not casted any reasonable doubt to the prosecution case. It has instead created doubts in its own. Thus, for example; the second accused during trial within trial testified to have been arrested on the 11/10/2016 just like the prosecution evidence but in the main trial testified that he was arrested on the 06/10/2016. All the three accused persons during trial within trial alleged to have given the statements under torture, threat and promise but in the main trial they completely repudiated them. They have each denied to have even signed the respective Cautioned statements while during trial within trial it was established that indeed they signed the same even by way of comparison.

I thus differ with the lady and gentle assessors in their findings that the accused persons are not guilty. The none calling of Malaki has been well explained by the prosecution witnesses that they treated him as a third party, was not their suspect and currently is nowhere to be seen as he shifted from



red. The surviving watchguard had nothing missing in the instant  
roy it. Even though in the statement of the second accused Seth  
clear that the two surviving watchguards were part to their  
ept the deceased;

*mlinzi aliyekimbia na yule mwingine ambaye tulimkamata  
hatukumjeruhi wote wawili walikuwa wanafahamu  
hoendelea kwani nao walikuwa mpango wote wa kuiba  
usika kupanga..... mlinzi huyo mwingine ambaye  
kamata na kisha tukamuua ..... hajahusika na mpango na  
maana alikuwa anazuia mali isiibiwe na kisha kumjeruhi  
nzetu'.*

spect those watchmen were useless to the prosecution case.  
e person who led the police to draw the sketch map of the crime

e of the prosecution to trace and tender the weapons used in the  
of the offence, there is no legal obligation that in every case in  
apon has been used the same must be found and tendered in  
uch necessity would depend on the circumstances of each case.  
tant case where the accused committed the offence and  
fled away from the crime scene, the weapons used were not

necessary exhibits. Also, although it is true that the investigation started with the suspicion against the first accused, the case did not rest in it. The suspicion was investigated and independent evidence obtained. The question of suspicion does not therefore arise as the accused are incriminated by evidence as herein elaborated and not suspicion. Again, documents are not the only evidence required to prove possession, oral evidence also suffice.

I therefore, find that all the three accused persons are guilty of the offence of murder and I accordingly convict the first accused Nuru s/o Venevas, the second accused Seth s/o Simon and the third accused Ezekiel s/o Karobezi for the offence of murder contrary to section 196 and 197 of the Penal Code, Cap. 16 R.E. 2019.



**A. MATUMA,**

**JUDGE**

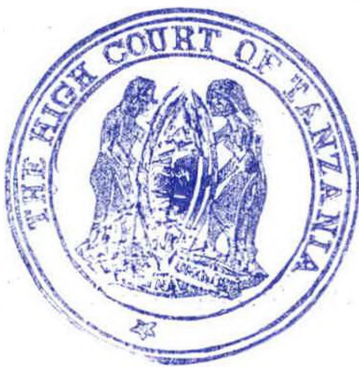
**15/06/2021**

**Court.** Judgment delivered in the open court in the presence of the accused persons and their advocates Mr. Sadiki Alik and Denis Katambo Kayaga and in the presence of Mr. Robert Magige and M/S Edna Makala learned State Attorneys.

## SENTENCE

About the sentence both the learned State Attorneys and the defense Advocates had the observation that there is only one sentence under the Penal Code for a person convicted of the offence of Murder. I agree with them.

As there is only one sentence against the person convicted of murder, under section 197 of the Penal Code Cap. 16 R.E. 2019, I sentence each of the accused persons, that is Nuru s/o Venevas, Seth s/o Simon and Ezekiel s/o Karobezi to suffer a death penalty, and in accordance to section 322 (1) and (2) of the Criminal Procedure Act, Cap. 20 R.E. 2019 I direct that they shall each suffer death by hanging. It is so ordered.



  
**A. MATUMA,**

**JUDGE**

**15/06/2021**

**Court.** Sentence uttered to the convicts Nuru s/o Venevas, Seth s/o Simon and Ezekiel s/o Karobezi in their presence and their advocates Mr. Sadiki Alik

and Mr. Denis Katambo Kayaga and in the presence of Robert Magige and Edna Makala learned State Attorneys.



**A. MATUMA,**

**JUDGE**

**15/06/2021**

**Court;** Under section 323 of the CPA supra the convicts are hereby informed of their right to appeal to the Court of Appeal of Tanzania against the conviction and sentence in this judgment and that the period available for them to lodge the notice of appeal is sixty days from the date of this conviction.

It is so ordered.



**A. MATUMA,**

**JUDGE**

**15/06/2021**