**THE UNITED REPUBLIC OF TANZANIA**
**JUDICIARY**
**IN THE HIGH COURT OF TANZANIA**
**MBEYA DISTRICT REGISTRY**
**AT MBEYA**
**CRIMINAL SESSIONS CASE NO. 65 OF 2021**

**REPUBLIC**

**VERSUS**

1. **ISAYA JOSEPH @ CHUNGU**
2. **JAMES MWAIKUKA MASANJA @ RASI**

# JUDGMENT

*Dated: 17th & 24th September, 2021*

**KARAYEMAHA, J**

On 16/2/2013 when Zaituni Samsoni (the deceased), Janeth Joseph Chungu and Isaya Joseph Chungu (the 1st accused) were from the funeral, stopped at Maria Paulos' (PW8) pombe club to have drinks known as *"komoni"*. At about 18:00 hrs or so, the triple started a journey back home. Half way, it started raining heavily. Since Janeth Joseph Chungu carried a child, the deceased advised her to run home quickly to protect him against rain. Janeth left the deceased and the 1st accused walking together. Shortly after, the 1st accused went home alone asking whether the deceased had arrived. It is the prosecution

evidence that that question triggered Janeth and the 1st accused to ask Paulos Ludisha Mhewa (PW4) who told them that he had not seen her. Smelling danger, Esther Sinkala, Jumanne and Janeth run following the road she used with the 1st accused. PW4 and the 1st accused, who took the local weapons, too, followed them. When they approached the scene of the crime, they met Esther carrying the deceased at her back. They all went to PW4's house. It is uncontested that the deceased was vomiting alcohol and scum, and blood was oozing through her nose, mouth and private parts. Since she was in critical condition and unconscious, they immediately set on a journey to hospital. Sadly, she did make it to hospital. She died on the way. On examining her, PW4 found out that her neck was very loose, flexible and on rotating it, it could move to any direction without difficult. Following that incident, the escort decided to return at PW4's house.

On 17/2/2013 Kasimu Wilson (PW1), PW4, the 1st accused person and other Undindilwa villagers went to the scene of the crime at 7:00 hrs. In view of PW1's and PW4's uncontroverted testimony, they saw signs of commotion, something being pulled and laid grass. In addition PW4 testified that he saw his wife's damaged bracelet and waste beads. The 1st accused was mentioned as the murderer. PW1 reported the incident to PW4. The two decided that the 1st accused person and

Janeth Joseph Chungu be taken to the Ward Office. The police were informed and later converged at the scene of the crime in a company of a doctor, Dr. Wedson Mastara Sichalwe (PW3). There was also Nicas Theodory Tarimo (PW7). The doctor examined the dead body and reported that the deceased was strangled to death because her neck was very loose and rotated to any direction very easily. On further observation he found out that the deceased's neck jugular veins were fractured. Consequently, the deceased bled excessively hence her death. PW7 informed this Court that on 17/02/2013 in the evening, they went to the scene of the crime. Since it rained that day and there was mud, they saw thereat foot prints, laid grass and the signs of commotion. He also saw signs intimating that something was being pulled.

Since it was found out that the deceased met her death at the hand of the 1st accused and Janeth Joseph Chungu, they were both arrested. When PW7 held a preliminary interview with the 1st accused, the latter, apart from explaining what happened, mentioned the James Mwaikaku Masanja @ Rasi (2nd accused) to be his accomplice. Subjecting the situation in which the deceased met her death to thorough assessment and considering the gathered evidence, the investigators formed an opinion to release Janeth Joseph Chungu and

put much effort to trace the 2nd accused who, according to E8265 D/CPL Roman (PW5) was arrested on 24/03/2013.

Investigation into the matter also revealed that both accused persons orchestrated death of the deceased in order to gain control of her medicine they claimed was instilling business fortune. Both accused persons were henceforth charged with the offence of murder contrary to sections 195 and 197 of the Penal Code [Cap. 16 R.E. 2002] (hereinafter the Penal Code) (now R.E. 2019). The indictment is that on the 16th day of February, 2013 at Udindilwa village within Mbarali District in Mbeya Region jointly and together the accused persons murdered one **Zaituni d/o Samson**. The accused denied the charge hence this trial.

The 1st accused do not deny to had been with the deceased and Janeth Joseph Chungu on 16th February, 2013. He also agrees that after having drinks (komoni) at PW8's club, he left with them going back home. He again does not refute the fact of being left with the deceased after Janeth Joseph Chungu had run home to protect her child from the heavy rain fell when they were half way. He, however, testified that after Janeth had left them and the duo were walking slowly, he decided to run too because he was not ready to get wet. He contended that the way had stems and feared dangerous wild animals. So he left the

deceased on the way heading home. According to him, he did not know happened to her later.

The second accused distanced himself from the incident contending that he was in usangu – in Mwatenga village where he worked as a casual labour since 2007. He contended that one day when they run out flour, they went to the village to buy maize and other needs. He said that after getting what they needed they went to the pombe club to have local drinks commonly known as *"komoni"* where two people arrested him alleging that he killed a certain person in the forest and took him to Igurusi police station, then to Chimala and finally at Rujewa police station and interrogated. On 14th March, 2013 he was taken to Mbarali District Court where he saw the 1st accused for the first time. On cross examination he admitted that he never knew or had quarrels with E 4210 D/SGT Gosbert (PW6) who interrogated him on murder allegations. He did not refute the fact that the deceased's death was not natural but due to strangling her by neck as per the doctor's evidence. He admitted further that the 1st accused was living with the deceased and Mr. Mahewa who reared and brought him up properly. He, however, denied cooperating with Gosbert (PW6) the police officers.

After the closure of the defence case, Counsels made final submissions. The accused persons were represented by Mr. Chapa

Alfred and Mr. Stewart Ngwale, learned Counsels. Mr. Chapa Marshaled the submission for the defence. In brief, he submitted there was no direct evidence linking the accused persons with the commission of the offence of murder. Guided by the case of ***R v Kerstin Cameroon*** [2003] TLR 105, the learned counsel argued that the prosecution evidence being circumstantial was not to have more than one interpretation. He contended that since the evidence of PW1, PW2, PW4 and PW8 mentioned Esther Sinkala to have found the deceased in the bush and carried her while vomiting her evidence was important. He said that there was also a dire need of the sketch map of the scene. Regarding Janeth Joseph Chungu who was mentioned by PW1, PW2 PW4 and PW8, Mr. Chapa contended quite vehemently that she was to testify on the amount of the drinks they took and answer the question whether they got drunk or not. To him failing to produce these witnesses, the prosecution case created more than one interpretation.

Mr. Chapa further maintained that the prosecution evidence failed to produce evidence which linked the accused persons with the commission of the offence. He argued, for instance, that PW7 and PW9 who alleged to interrogate the 1st accused person failed to tender the cautioned statement and extra judicial statement respectively. He contended further that the 2nd accused was not mentioned by PW1,

PW2, PW4 and PW8 in their respective evidence. He observed that the only evidence linking the 2nd accused to the commission of the evidence is exhibit P2.

Mr. Chapa submitted further that the prosecution evidence was not cogent and compelling one proving the case of murder. He observed that the prosecution failed to produce Esther Sinkala and Janeth Joseph Chungu who, according to him, their connection with the transaction in question could justify material facts. He referred this court to case of ***Azizi Abdallah v R*** [1991] TLR 71 and ***Hemed Issa v Mohamed Mbilu*** [1994] TLR 12.

The learned Counsel argued that the evidence linking the 1st accused with this case is the 2nd accused's cautioned statement (exhibit P2) which is not corroborated by any prosecution evidence. The defence has cautioned this court to act on co – accused evidence cautiously. He reinforced his position citing the case of ***Paschal Kitwanga v R***, [1994] TLR 65.

Mr. Davis Msanga, learned State Attorney, represented the Republic and argued at length the case for the prosecution. Concisely, he argued that the prosecution case was proved to the hilt through PW3, PW4, PW6, PW7 and PW8. He contended that PW3 confirmed the death of the deceased and proved that it was unnatural. As to who killed

him, the learned counsel submitted that the 1st accused was the last person who was with the accused person after Janeth Joseph Chungu had left them together. He held the view that the 1st accused had a duty to explain what befell on the deceased. He buttressed his argument with the aid of the case of ***Emmanuel Conrad Yosipati v. R,*** Criminal Appeal No. 296 of 2017 (unreported) pages 18 – 19.

Mr. Davis argued strongly that PW7 (Nicas Theodory Tarimo) should be trusted because he had no fight with the 1st accused. He held the view that the 1st accused on preliminary interrogation by PW7 mentioned the 2nd accused. It was his contention that his cooperation facilitated the arrest of the 2nd accused who in turn mentioned the 1st accused in his confessional statement made voluntary before PW6 (D/SGT Gosbert). He was exceedingly of the view that exhibit P2 was credible evidence which gives a clear picture of what transpired and ultimately who killed the deceased. In this, the learned State Attorney took refuge to the case of ***Mohamed Haruna Mtupeni & another v R,*** Criminal Appeal 259 0f 2007 (Unreported (CAT – Tabora).

Mr. Davis has pressed this Court to ground conviction against the accused persons on exhibit P2 in terms of section 33 (1) and (2) of the Law Evidence Act, (Cap 6 R.E. 2019) which was elaborated in the case

of ***Hassan Said Nondo v R,*** Criminal Appeal No. 128 of 2002 (unreported) at Page 5, 6 and 7.

The learned State Attorney concluded his arguments by observing that the 1st accused being the deceased's son could not leave her alone in the bush. He therefore, held the view that the 1st accused was telling naked lies which conversely corroborated the prosecution case.

Upon summing up, the Lady Assessors entered a verdict of guilty on three major reasons. Firstly, the deceased's death was unnatural. Secondly, the 1st accused was the last person left with the deceased. Thirdly, the 2nd accused confessed to the Police Officer that they killed the deceased by strangling her with the 1st accused to lay hand on the deceased's medicine which showered business luck to whoever got it.

This is a murder case. A cardinal principle is that the burden is on the prosecution to prove beyond reasonable doubt that the accused persons murdered Zaituni Samson. It is not upon them to prove their innocence or even that she was killed by someone else except where the law expressly provides so. It is the law of our land that in cases of this nature the accused can only be convicted of the offence on the basis of the strength of the prosecution case and not on the basis of the weakness of the defence case. Even suspicions, however ingenous or strong can never be a basis of a criminal conviction or a substitute for

proof beyond reasonable doubt. This is equally true even where an accused person is proved to have told lies either in Court or prior to that in connection with the facts in issue. This is because there are many circumstances which can lead an accused to tell lies even when she/he is innocent. See ***R. v Kerstin Cameron*** (supra).

Of course Mr. Davis has submitted that the 1st accused's lies have corroborated the prosecution's case. I entirely agree with this submission fortified by the case of ***Nkanga Daudi Nkanga v R***, Criminal Appeal No. 316 of 2013 where the Court Appeal of Tanzania speaking through Mmila, JA (as he then was) that:

> *"As the rule goes, we wish to point out that lies of an accused person may corroborate the prosecution's case."*

However, what is gleaned from that holding is that lies alone can never be a proof of guilt beyond reasonable doubt. They only tend to implicate or incriminate the accused person or subject him to suspicion and cause cases needing corroboration be successfully used as such. That is why in ***Elizabeth Shomari v. Republic***, Criminal Appeal No. 64 of 1990 (unreported) the Court of Appeal rightly held that:

> *"Even if for the sake of argument the appellant had told lies that alone could not be a basis of a conviction."*

It is imperative to add that, lies cannot be a substitute to a duty of proving the case beyond reasonable doubt. In this case, therefore, the prosecution has to prove to the required standard not only that Zaituni is dead, but also that she was killed by the accused persons and the killing was done with malice aforethought.

It is not disputed in this case that the death of Zaituni was not a natural one. It was a violent one. The cause of death is not disputed. It was due to a fracture of the neck jugular veins, although as aptly pointed out by the learned counsels, no single witness testified to have witnessed the incident. As such the evidence relied on by the prosecution is partly circumstantial and partly confessional. On this basis and on the totality of the evidence before me, if I reject the explanation of the 1st accused and rule out an accident, I will not hesitate to hold that Zaituni was murdered.

The vexing question now is who then killed Zaituni? The evidence on record does not give me many options. It points unerringly to only two individuals, the 1st and 2nd accused persons. As hinted above, although there is no direct evidence going to incriminate them with the alleged murder, the Republic has urged me to hold that it was the accused persons who killed Zaituni with malice aforethought. It has relied on circumstantial evidence.

Our jurisdiction is replete with authorities which dictate that conviction must only be found on circumstantial evidence, if such evidence irresistibly leads to the conclusion that it is the accused, and no one else, who committed the crime. In other words, the indictable facts must not be capable of any other interpretation than that the person in the dock is guilty of the offence charged. Mr. Chapa was very much emphatic on this area in his submission. In ***Republic v. Sadrudin Merali and Umedali Merali***, Uganda High Court of Criminal Appeal No. 220 of 1963 (unreported) Sir Udo Udoma, C. J. accurately observed as follows:

> *"... it is no derogation to say that it was so for it has been said that circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by undersigned coincidence is capable of providing a proposition with the accuracy of mathematics."*

Expressing identical sentiments over a century before in 1850, Henry D. Thoroeau, the American transcendentalist best known for his ant -materialist philosophy had this to say:

> *"Some circumstantial evidence is very strong as when you find a trout in the milk".*
> *These dicta are as true in this third millennium as they were in the second millennium and command the allegiance and respect o f us all.*

The same position was expressed in the case of ***Seif Seleman v R,*** Criminal Appeal No. 130 of 2005 CAT (unreported) that:

> *"Where evidence against an accused person is wholly circumstantial, the facts from which an inference adverse to the accused is sought to be drawn must be clearly connected with the facts from which the inference is to be inferred. In other words, inference must irresistibly lead to the guilty of an accused person."*

All the same, as aptly submitted by counsel for the defence, abroad and articulate position was given in the case of ***R. v Kerstin Cameron*** (supra). It was laid down that:

> *(a) That evidence must be incapable of more than one interpretation;*
>
> *(b) In a case where the evidence against the accused is wholly or exclusively circumstantial the facts from which an inferences of guilt or adverse to the Accused sought to be drawn must be proved beyond reason able doubt and must clearly be connected with the facts from which the inference is to be drawn or inferred: and*
>
> *(c) That evidence should be cogent and compelling as to convince a jury judge or Court that upon no rational hypothesis other than murder can the facts be accounted for.*

A scrupulous review of the prosecution's evidence especially that of PW4 and PW8 and the 1st accused's defence, both offer a story which meets the legal threshold required to founding conviction as set out in

the cited decision. PW4 was informed that the 1st accused went to the funeral with the deceased and Janeth Joseph Chungu. The three were seen by PW8 at her pombe club having drinks and left together. The 1st accused further admitted that he was left with the deceased after Janeth Joseph had run quickly in indeavour to protect her child from the rain but also left the deceased alone fearing heavy rain, stems in the way and dangerous wild animals.

The controversy begins here. The prosecution and indeed the Lady Assessors assert that it was impossible for the 1st accused to have left the deceased in the bush while it was raining heavily. Perhaps before answering that question, it is important to ask a very crucial question, whether it was possible for the 1st accused to leave his beloved mother he had to protect and run fearing rain, stems and dangerous wild animals. There are several cases where children care less for their parents but in this matter that is not the case. The 1st accused's evidence and that of PW4 demonstrate that he and the deceased loved each other. The deceased and PW4 trusted him because they brought him up properly. They were together from the funeral, drunk together and finally left together. He was not prepared to leave her go home alone that night. It is impractical, therefore, to believe his contention that he left her because of rain, stems and fear of dangerous wild

animals. Given these circumstances, I agree with Mr. Davis' contention that the 1st accused must explain what happened to the deceased. According to him failure to account for what caused her death, it must be inferred that it was him who killed the deceased by virtue of the statement made in the decision of ***Emmanuel Conrad Yosipati*** (supra). In this case the Court of Appeal of Tanzania took note of the holding in ***Mathayo Mwalimu and another v The Republic,*** Criminal Appeal No. 147 of 2008 (unreported) wherein it was held:

> *"In our considered opinion, if an accused person is alleged to have been the last person to be seen with the deceased, in the absence of a plausible explanation to explain away the circumstances leading to the death, he or she will be presumed to be the killer."*

In this case the 1st accused admitted to be the last person left with the deceased. He had therefore to offer a very strong explanation on what happened to the deceased. Since the 1st accused failed to give thorough explanation as was required of him, it behooves me, therefore, to invoke the wisdom ushered in the case of ***Emmanuel Conrad Yosipati*** (supra) to conclude that he has no acceptable explanation to impeach the truth that he has a hand in the death of the deceased.

Apart from that, after his arrest the 1st accused orally confessed to PW7 that he killed the deceased and mentioned the 2nd accused and

revealed places the latter was fond of visiting. Though time passed before arresting the 2nd accused but it was this revelation which finally enabled the investigators to arrest the 2nd accused. On his arrest, the 2nd accused made a confessional statement before PW6 and mentioned the 1st accused.

Having dealt with circumstantial evidence the next question is whether there is other evidence, together with circumstantial evidence, to lead to an inference of guilty of the accused persons. The answer to this question is in affirmative. Through PW3 (Dr. Wedson Mastara Sichalwe) and PW6, the prosecution tendered exhibit P1, being a pest mortem examination report and exhibit P2, being the 2nd accused's cautioned statement respectively. These are exhibit are the testimony relied on heavily by the prosecution. As is usually the case, on tendering exhibit P2, it was admitted after swimming through a session of trial within trial, following the defence's objection of its admissibility in evidence. While admitting the said exhibit, the Court ruled that the recording of the confessional statement conformed to the requirement of section 50 (1) (a) of the Criminal Procedure Act [Cap. 20 R.E 2019] and ruled out that it was obtained voluntarily.

Admittedly, whereas exhibit P1 provides for an expert position with respect to the deceased's cause of death, it offers nothing of probative

value to link the accused persons with death of the deceased. The same applies to PW2, PW3, PW5 and PW9 whose testimony did not have anything that puts the accused persons in a strong blemished position. PW3's testimony is to the effect that he examined the deceased's body and described the cause of the death. PW2's role was limited to advising PW1 to arrest the 1st accused and Janeth and take them to the ward office. PW5's evidence was of the weakest link in view of the fact that it only tells about conveying the 2nd accused from Igurusi to Rujewa police station on 24/3/2013. The same can also be said with respect to PW9 (Happiness Elias) whose testimony did not have anything that puts the accused persons in a strong blemished position. The latter's testimony is that she recorded the 1st accused's extrajudicial statement but never tendered it as exhibit in evidence. Generally speaking, none of the four witnesses and exhibits P1 addressed properly the question of the accused persons' culpability to the deceased's death. However, the same cannot be said of the testimony of PW1, PW4, PW6 and PW8, together with exhibit P2. In their totality, these pieces of evidence carry some significance to the matter, chiefly because they touch on the principle of a person last seen with the deceased, scene of the crime and confessions made by the accused persons.

Regarding exhibit P2 after admitting it and having at disposal the 1st accused's oral confession, the emerging issue relates to the weight to be accorded to them by this Court in proving the accused persons' guilt or otherwise.

While Mr. Chapa held the view that it was dangerous to ground conviction basing on them because they were not corroborated investing reliance on the case of ***Pascal Kitwanga*** *(supra)*, Mr. Davis is contented that the confessions carried with them elaborations of what actually transpired and are ably corroborated. In my view he is very correct.

On my part, the provisions of section 3 (1) (a), (b) and (c) of the Law of Evidence Act [Cap. 6 R.E. 2019] guide that, in criminal cases, confession to a crime may be oral, written, by conduct, and or a combination of all these or some of these. The prosecution's lone duty is to prove that there were confessions made and the same was made freely and voluntarily. In fact, I respectfully borrow the words of wisdom by Rutakangwa JA (as he then was) in ***Mohamed Haruna Mtupeni*** (supra) at page 7 that:

> *"... the very best witness in any criminal trial is an accused person who freely confesses his guilt."*

The same spirit was also expressed in the decision of ***Posolo Wilson @ Mwalyengo v R,*** CAT-Criminal Appeal No. 613 of 2015 (unreported), the CAT gave the following position:

> *"It is settled that an oral confession made by a suspect, before or in the presence of reliable witnesses, be they civilian or not, may be sufficient by itself to found conviction against the suspect [**D.P.P v Nuru Mohammed Gulamrusul** [1998] TLR 82]."*

Generally, confessional statements would only be valid as long as the suspect was a free agent when he said the words imputed on him. The case of ***Emannuel Lohay and Udagene Yalooha v R,*** Criminal Appeal No. 278 of 2010 (unreported), in my view, laid down the basic quality that a confession must have in order to constitute the basis for reliance in founding a conviction. The Court held that such a confession must be able to:

> *"... shed light on how the deceased concerned met his death, role played by each of the accused person, such details as to assume the courts concerned that **the maker of the statement must have played some culpable role in the death of the deceased**."* (Emphasis provided)

As stated earlier on, the accused persons' confessions was made in writing to PW6 and orally to PW7 respectively. In assessing the veracity of the confessions, the question to be asked is whether such confessions

were made to reliable persons? In assessing the demeanour and credibility of PW6 and PW7, I am convinced that they are reliable witnesses. They are persons of integrity and their evidence displayed a high degree of reliability. PW7 is retired police officer who testified that the 1st accused confessed to kill the deceased and mentioned the 2nd accused. PW6 is a police officer who never knew the 2nd accused prior meeting him for interrogations. He recorded diligently the story narrated by the 2nd accused and could not get it anywhere because he was not an investigator of this case or got involved in any way except in recording exhibit P2.

On whether confessions were voluntary, it is my humble finding that there is no evidence at all to prove that force or intimidations, threats or promises were applied in order to extract the said confession. PW6's and PW7's uncontroverted testimonies were that they held interviews with the accused persons and through them they confessed to murder the deceased. No meaningful cross-examination was done in respect of that contention. This shows that nothing of substance was being cross-examined, and that brings me to the array of decisions carrying with them a principle that failure to cross-examine a witness on a crucial fact constitutes an admission of that fact. The decisions include ***Posolo Wilson's*** Case (supra), ***Cyprian Athanas Kibogoyo v R*** CAT-

Criminal Appeal No. 88 of 1992, ***Nyerere Nyague v R,*** Criminal Appeal No. 67 of 2010 and ***Dr. Moses Norbert Achiula v Republic,*** CAT-Criminal Appeal No. 63 of 2012 (all unreported). In ***Nyerere Nyague*** (supra) the CAT stated in no uncertain terms that:

> *"As a matter of principle, a party who fails to cross – examine a witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the trial court to disbelieve what the witness said".*

Having failed to impeach the veracity of the statement made by PW6 and PW7, the accused persons are estopped from asking this court to disbelieve them. My firm position warrants me to conclude that in the absence of any strong challenge by defence, the confessions made by accused persons in respect of the demise of the deceased fits squarely within the description enshrined in section 3 (1) (a) of the Law of Evidence Act. I say so because the confessions reveal the culpable role played by the accused persons in the death of the deceased and the death was pre – meditated, consistent with the holding in the case of ***Emannuel Lohay and Udagene Yalooha*** (supra).

With respect to exhibit P2 after admitting it the issue that arises relates to the weight to be attached to it in proving the accused persons' guilty or otherwise. Mr. Chapa submitted that the 1st accused is linked

with the commission of the offence by exhibit P2 only. He, thus, pressed this Court not to rely on because it was not corroborated.

It is a trite law that section 27 (1) of the Law of Evidence Act, that a confession voluntarily made to a police officer, by an accused, may be proved against him. But in doing so, regard has to be on the effect that since a confessional statement is essentially an admission, the court intending to rely on it, must before it does so, satisfy itself that the accused against whom the statement sought to be proved, has admitted to ingredients of an offence to qualify to be an admission under section 3 (1) of the Evidence Act. This position was elucidated in the case of ***Juma Magori @ Patrick & 4 others v The Republic***, Criminal Appeal No. 328 of 2014 (unreported), in which the Court of Appeal discussed among other things ascertainment of confessional statements amounting to admission. The CAT was inspired by the holding of the Nigerian Supreme Court in ***Ikechukwu Okoh v The State*** (2014) LPER-22589 which borrowed leaf from the reasoning of the case of ***Republic v Sykes*** (1913) 1 Cr. App. Report 233 which handed down basic principles necessary for ascertaining weight to be accorded to the confessional statement. The relevant part of the passage in ***Ikechukwu's*** case is as follows:

*"The questions the court must be able to answer if can rely on a confessional statement to convict an accused person were set out were set out in the case of* ***Republic v Sykes*** *(1913) 1 Cr. App. Report 233 are as follows: (a) is there anything outside it to show that it is true? (b) Is it corroborated? (c) Are the factors stated in it true as can be tested? (d) Was the accused the man who had the opportunity of committing the offence? Is the confession possible (f) is it consistent with other facts which have been ascertained and proved."*

Although Mr. Chapa lamented that exhibit P2 was not corroborated and therefore this Court should not bank on it to convict the accused persons, it is in record that the accused person repudiated exhibit P2. Now, in order to rely on it, it must be adjudged voluntary when it is admitted in evidence. If it is involuntary the story ends there and cannot be admitted. But if it is voluntary and admitted but it is retracted or repudiated by the accused, the court will then as a matter of practice look for corroboration. But if corroboration cannot be found, that is, if the confession is only the evidence against the accused persons, the court may found a conviction thereon if it is fully satisfied that the confession is true. This view was adopted in the case of ***Kashindye Meli v The Republic*** [2002] TLR 374 where it was held that:

*"It is now settled law that although it is dangerous to act on repudiated or retracted confession unless such confession is corroborated,* ***the court may act upon such confession***

***if it is satisfied that the confession could not but be true."*** [Emphasis supplied]

Having this position, it is clear that this Court can convict on uncorroborated repudiated confession of the 2nd accused and his co – accused (1st accused). I am fortified by section 33 of the Evidence Act which provides that:

> *"33.-(1) When two or more persons are being tried jointly for the same offence or for different offences arising out of the same transaction, and a confession of the offence or offences charged made by one of those persons affecting himself and some other of those persons is proved, the court may take that confession into consideration against that other person.*
>
> *(2) Notwithstanding subsection (1), a conviction of an accused person shall not be based solely on a confession by a co accused."*

I subscribe to the holding in the case of ***Hassani Said Nondo*** (supra) that:

> *"... it is clear that the Court may convict on an uncorroborated retracted or repudiated confession of a maker or a co-accused as the law allows in Tanzania, if the following conditions are satisfied. First, that the court warns itself of the danger of convicting on such evidence, second, that the court is satisfied that the statement is true, free and voluntary."*

In an attempt to ascertain whether to rely on the 2nd accused's confession, there arises a need to settle a question as to whether contents of exhibit P2 are a true account of what happened with respect to the deceased's death. PW6 who recorded this confessional statement quoted the accused giving a detailed plan and execution of the murder and how it was intended that after laying hands on the deceased's medicine they would go to Chunya mines. This statement resembles in substance to the 1st accused's oral confession. This fact indicates that their narrations are nothing but a shared truth and a demonstration that they had an opportunity to commit an offence. The crucial part of exhibit P2 reads as follows:

> *"... Mnamo tarehe 16/02/2013 majira a 14:00 hours mimi na huyo **ISAYA s/o JOSEPH** tulikuwa wote kilabuni ... yeye na mimi sisi wote pamoja na kunywa pombe pia tunavuta tumbaku isiyosindikwa maarufu kwa jina gosho, pia tunavuta bangi, huyo Rafiki yangu **ISAYA s/o JOSEPH** aliwahi kunieleza ya kwamba mama yake anauza dawa za biashara za utajiri hivyo tulikwisha panga kumuua ilituweza kuchukua dawa hizo. Hiyo tarehe 16/02/2013 naye huyo mama aitwaye **ZAITUNI d/o SAMSON** alikuwa anakunywa pombe hapo kilabuni siku hiyo ndiyo tulipanga kumuua huyo mama kwani naye alikuwa hapo kilabuni muda ambao tulipanga kumuua wakati wa kurudi nyumbani, kwani aliniambia muda ukikaribia ataniambia ili niweze kutangulia kwani aliniambia hapo kilabuni wapo na dada yake ambaye hakunitajia jina, hata hivyo nilijaribu kumuuliza kama kuna*

*uwezekana tuibe hizo dawa za biashara bila kumdhulu lakini alikataa kwani aliniambia mama yake ana majini kichwani kwake tukiiba bila kumuua atajua hivyo atatudhulu, jambo ambalo nilikubaliana naye, ilipofika majira ya 20:00 hours tulianza safari lakini mimi nilienda kujificha mbele, mahali nilipojificha palikuwa karibu sana na kilabu mara nikamwona* ***ISAYA s/o JOSEPH*** *akiwa na huyo mama na mpiga ngoma aitwaye* ***MASHAKA*** *wakanipita bila kuniona. Niliwaacha waende kiasi cha dakika kumi na tano nikaanza kuwafuata taratibu ndipo huko mbele nilimkuta huyo* ***ISAYA s/o JOSEPH*** *na mama yake, ndipo huyo* ***ISAYA s/o JOSEPH*** *akampiga kibali mimi nikamkaba kwenye kolomea tukamvutia pembeni mwa barabara kimya kimya bila kupiga kelele huku pombe na povu zikiwa zinatoka mdomoni na puani. Hivyo tulimwacha hapo huyo mwenzangu* ***ISAYA s/o JOSEPH*** *tulikubaliana aende nyumbani kwa ajili ya kuchukua hizo dawa tuweze kwenda Chuya kwenye machimbo ya madini..."*

I have already indicated that the 2nd accused persons subsequently repudiated the statement. The Court was unmoved by reasons aired up, hence its decision to admit it. Exhibit P2 tells a story which is consistent with truth as told by prosecution's witnesses, especially PW3, PW4 and PW8. The statements complement, as well, with the contents of postmortem report (exhibit P1) which described the deceased's death and that what caused it is severe hemorrhage caused by the fracture of the neck jugular veins. Area identified as a target of the attack is a neck which is the same area as that the 2nd accused stated that they aimed at

when they attacked the deceased. It is fair to conclude, therefore, that exhibits P2 possesses the quality described in section 29 of the Evidence Act as amplified in ***Kashindye Meli*** (supra), and all other authorities cited above. As such, this Court is justified to rely on it, taking into consideration that it meets the threshold of weight of evidence required of it.

Glancing through the prosecution evidence testimony, exhibit P2 and 1st accused's oral confession it is quite clear that there exists some divergence and contradictions. These mainly relate to where the accused persons were to go after getting the deceased's medicine. While in exhibit P2 the 2nd accused stated that they planned to go to Chunya mines, PW7 stated that the 1st accused told him that they planned to go to Sumbawanga to start a new life. Moreover, PW9 testified that the 1st accused told her that they raped the deceased and caused her death. Another area of divergence is that while PW4 saw the deceased's damaged bracelet and her waste beads, no any other prosecution witness saw these articles. There is also a discrepancy regarding the areas where blood, scum and alcohol were oozing through. While PW4 testified that blood was oozing through mouth, nose and private parts, PW7 said blood and scum were oozing through mouth and nose.

Needless to say, these are discrepancies in the evidence. The question however, is what impact do they have on the prosecution's case?

The settled position is that discrepancies and inconsistencies in the testimony have an adverse impact if the same are fundamental. Discrepancies which are of remote effect are of no consequence and ought to be ignored. In ***Luziro s/o Sichone v. Republic***, Criminal Appeal No. 231 of 2010 (unreported), the Court of Appeal held:

> "*We shall remain alive to the fact that not every discrepancy or inconsistency in witness's evidence is fatal to the case,* ***minor discrepancies on detail or due to lapses of memory on account of passages of time should always be disregarded. It is only fundamental discrepancies going to discredit the witness which count."*** [Emphasis supplied]

In ***Mukami w/o Wankyo v Republic*** [1990] TLR, the Court of Appeal took the similar view that contradictions which do not affect the central story, are considered to be immaterial. See also: ***Bikolimana s/o Odasi @ Bimelifasi v. Republic***, Criminal No. 269 of 2012 and ***Chrizant John V. Republic***, Criminal Appeal No. 313/2015 (both unreported).

My unfleeting assessment of the discrepancies and contradictions pointed out, brings me to a conclusion that the same were in the category of normal discrepancies which would neither corrode the

accused persons voluntary confessions nor would they affect the central story given by crucial prosecution witnesses. The central story in this case is the accused persons' involvement in planning and executing the murder incident that claimed the life of the deceased. I am increasingly of the considered view that such a story has not been neutralized by the highlighted variances. Their role in the commission of the offence has been laid bare and the accused persons did not controvert any of the contents, even when they were given a chance to cross examine witnesses who tendered them.

The accused have protested their innocence and they did so by mounting a serious defence. One notable feature in their defence is that the duo was never friends, never knew each other and none of them have ever visited the other. However, DW2 testified under cross-examination that the deceased's death was not natural but she was strangled by her neck. He stated further that the 1st accused was living with the deceased and PW4 who reared and brought him up properly.

I took liberty to assess the defence of *alibi* raised by the 2nd accused but it is fair to conclude that he was attempting to exonerate himself from liability. He also tried to tilt the court's attention by claiming that he never knew the 1st accused. This is unexpected of the person

who knows that the 1st accused was raised well by the deceased and PW4 and that they had lovely life.

In general, nothing convinces me that DW2 was not a witness of truth and his demeanor cleared all doubts. He answered all questions soberly. A critical assessment of his testimony brings out one justified conclusion the accused persons knew each other prior the incident and what DW2 stated in exhibit P2 gets thrust from his sworn testimony. DW1's testimony, as already hinted earlier on, is not quite different from that of PW4 and PW8. The point of divergence is the contention that he did not touch the deceased. He simply left her in the bush after he formed an opinion that he could not stand the heavy rain. Giving this evidence a deserving assessment, the most vexing question is how on earth could he leave his beloved mother he had all the time in the threatening environment? In this I agree with Mr. Davis that his defence is a bunch of blatant lies. Giving his defence a more critical analysis, it is incomprehensible on how the deceased could run quicker than the 1st accused and got home first. It is my fortified view that the 1st accused was disguising, misleading his family and concealing some facts. The legal position, as it obtains, is to the effect that *"Lies of the accused person may corroborate the prosecution's case."* See: ***Felix Lucas***

***Kisinyila v. Republic***, CAT-Criminal Appeal No. 129 of 2009 (unreported).

Put generally, the accused's defence lacked the spine that would shake the prosecution's case or raise any reasonable doubt which would move the Court to hold that the accused's guilt has fallen short of being proved. I am inclined, in the circumstances to attach insignificant weight to the defence evidence. It is my fortified view that the prosecution presented a credible and convincing case. It has revealed that the accused persons' conduct is not consistent with innocence.

After dwelling at length on the question whether the adduced evidence has convincingly proved the case against the accused persons at the standard set out in criminal trials, the next task is to determine if actions of the accused were clothed with malice aforethought, an indispensable ingredient in a proof of murder.

In cases such as this one, in which evidence linking the accused to the killing is not direct, malice aforethought cannot be ascertained or deduced from the direct evidence, if any that has been adduced during trial. It requires some inference which requires looking at the circumstances under which the death occurred. This is in conformity with what section 200 (1) (a) and (b) of the Penal Code which provides as follows:

*"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following-*

*(a) An intention to cause the death of or to do grievous harm to any person, whether that person actually killed or not;*

*(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused."*

A revisit of the circumstances of this case leaves no flicker of doubts that death of the deceased was pre-meditated, meaning that it was desired and mathematically planned. The accused persons met, planned, agreed on the place to assault the deceased and who could go in her house to take the medicine and finally, executed the plan. This chain of events exhibits nothing but a known ill-intent that the accused persons harboured. This is where malice aforethought resides, and it can only be uncovered by giving sense to the testimony conveyed by exhibits P2 together with evidence of PW3, PW4 and PW7. The totality of these testimonies demonstrates the accused persons' pre-meditation in perpetrating the killing. 2nd accused is quoted in ***exhibit P2*** confessing as follows:

*"...Rafiki yangu **ISAYA s/o JOSEPH** aliwahi kunieleza ya kwamba mama yake anauza dawa za biashara za utajiri hivyo tulikwisha panga kumuua ilituweza kuchukua dawa*

*hizo. Hiyo tarehe 16/02/2013 naye huyo mama aitwaye* ***ZAITUNI d/o SAMSON*** *alikuwa anakunywa pombe hapo kilabuni siku hiyo ndiyo tulipanga kumuua huyo mama ... muda ambao tulipanga kumuua wakati wa kurudi nyumbani, kwani aliniambia muda ukikaribia ataniambia ili niweze kutangulia."*

The 1st accused's narration to PW7 which enabled the arrest of the 2nd accused is, in all material substance, similar to what the 2nd accused confessed with respect to arrangements that they made in the run up to the deceased's brutal demise.

What is drawn from confessional statements is the revelation of how they possessed an ill intent and how they went about to execute it. It is an admission of their active participation in terminating the deceased's life. These confessions inform what PW3 found when he examined the deceased's body, as described by exhibit P1. The confessions unveil the accused persons' grand plan to commit an offence. Even the parts of the body which were attacked were carefully identified and singled out, knowing that they would terminate the deceased's life without any undue delay.

The requirement set out in section 200 of the Penal Code has been a subject of serious discussions by this Court and the Court of Appeal of Tanzania. In arriving at a conclusion in ***Makungu Misalaba v.***

***Republic***, CAT-Criminal Appeal No. 351 of 2013 (unreported), the Court of Appeal borrowed immensely from its own wisdom in ***Enock Kipela v. Republic***, CAT-Criminal Appeal No. 150 of 1994 (unreported), wherein it was held:

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

I am settled, in my mind that the accused persons' own account of facts, points to an irresistible conclusion that malice aforethought, as an essential ingredient of murder, has been proved in a manner that sufficiently satisfies the requirements of section 200 of the Penal Code.

This conclusion draws my concurrence with all of the lady assessors who were all of the view that guilt of the accused persons was established. I am persuaded by my own conviction that the totality of the evidence adduced during this trial, leaves no shred of a reasonable doubt that it is the accused, and none else, who committed the offence

with which they are jointly and severally charged with. Consequently, I convict them of murder, contrary to section 196 of the Penal Code.

**J. M. Karayemaha**
**JUDGE**
**24/09/2021**

In view of finding guilty and eventual conviction, I hereby sentence the accused persons, namely, **Isaya Joseph @ Chungu** and James **Mwaikuka Masanja @ Rasi** to suffer death by hanging in terms of section 197 of the Penal Code.

It is so ordered.

**J. M. Karayemaha**
**JUDGE**
**24/09/2021**