

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

**AT KASULU**

**CRIMINAL SESSION CASE NO. 18 OF 2021**

**REPUBLIC**

**VERSUS**

**1. TABIBU NYUNDO**

**2. THOBIAS NTAKIYICHA**

**JUDGEMENT**

6/9/2021 & 21/9/2021

**L.M. MLACHA, J.**

The accused, Tabibu Nyundo and Thobias Ntakiyicha are charged of Murder contrary to section 196 and 197 of the Penal Code, Cap 16 R.E. 2019. It was alleged that they murdered Jimson Buchumi on 27/1/2019 at Gwanumpu Village, Kakonko District, Kigoma Region. They denied the charges. The prosecution led by Ms. Antia Julius and Mrs. Happiness Mayunga, State Attorneys, brought nine witnesses and tendered five exhibits to discharge their burden of proof. The accused were the only defence witnesses. They had no exhibits to tender.

The evidence from the prosecution can be presented as follows.  
PW1 Shukuru January, a resident of Gwanumpu Village has a business of

M-pesa, sending and receiving money through the network. He woke up in the morning of 28/1/2019 and found three messages in his phone. They came from No. 0745301385. They read as under; "Tumemkamata mtoto wa Buchumi tunahitaji pesa Tshs. 5,000,000/=", "Mwambie Baba yake atume pesa hizo ili tumuachie" and "Mtoto huyo anaitwa Jimson Buchumi". Buchumi is his neighbour and he knew the boy. He saw the matter as being serious. He rushed to see PW2 Buchumi Katifiye. He met him. He read the messages. The two decided to go and see village leaders. They moved to the village office where they met PW6 Festo Sulila, the village Chairman and PW7 Robert John Gendaruheze, the Village Executive Officer (VEO). They had a short discussion. They decided to go and report at Gwanumpu Police Post.

PW1, PW2, PW6 and PW7 moved to Gwanumpu Police Post where they met PW8 H 3907 D/SGT FREDY. He too read the messages which came from No. 0745301385 registered in the name of Elizabeth Toi. PW8 contacted his boss, the OC-CID of Kakonko who directed them to make a follow up in the nearby bush. PW9 E 9284 D/SSGT Stanley was directed by the OC – CID to send a first warning message to the Regional Crimes Officer (RCO) because the crime appeared to be serious. It was done.

PW6 organized villagers to move around in the bush but they could not get the boy. Meanwhile, several other messages were sent to demand

the money through the number. The kidnappers went down up to Tshs. 1,500,000/=. PW6 and PW7 saw that it was wise to raise the funds to rescue the life of the boy. They decided to call an emergency meeting of the village on 30/1/2021 to ask people to make contributions. PW1, PW2, PW6 and PW7 said that villagers were asked to contribute Tshs. 2,000/= and above. They managed to get Tshs. 700,000/=. PW2 added Tshs. 800,000/= as a parent to get Tshs. 1,500,000/=. The money was handled to PW6, the village Chairman. He deposited the money in his phone with line number 0752332835. He then sought advice from the police on what he should do. The police advised him to send the money to number 0745301385 in three installments. That, it could bring a good reflection at the time of removing the money. He did so. PW4 Deus Salile Tingarugwa was assigned to cross check at the Voda Desk to see what could happen. He and PW1 had gone earlier to the Voda Desk to register the complain so he was familiar with them. He had a police letter to introduce him to them.

Now, on 2/2/2019 PW4 passed at Kakonko Voda Desk and was told that the money had been transferred to number 0745139289 registered in the name of Thobias Lazaro Ntakiyicha. He communicated the report to PW6, the village Chairman. PW6 who was in church, left his Bible behind and returned to the village office. He knew Thobias for a long time.

He lived nearby in the hamlet which he led.

It was the evidence of PW6 that they picked motorcycles (Bodaboda) and moved to the place where he lived. He was in the company of PW7. They could not get him at home but his young brother, January Lazaro Ntakiyicha, told them that Thobias and his friend Tabibu Nyundo had gone to the farms to harvest beans. They arrested January and sent him to the Police Post.

PW6, PW2 and some villagers proceeded to the farms while leaving PW7 behind. They arrived at the farms where they met Tabibu Nyundo eating food (ugali). He had a machete aside. He appeared to be shocked. They questioned him to know if he had a line with number 0745139289. He said No. They asked him the whereabouts of Thobias. He said that Thobias had returned to the village. A message was sent to PW7 who arranged people to arrest him. Meanwhile Tabibu was put under arrest and sent to the Police Post.

PW7 moved with some peoples Militia (Mgambo) to arrest Thobias. They went to his home and arrested him as he was coming home. They sent him to Gwanumpu Police Post. They questioned him about line number 0745139289. He said that it was at home. He directed his wife to bring his jacket (koti). He pointed at the place where he had put. They could get the line hidden in one of its ends (kwenye pindo). It was fixed

to a phone. Thobias was asked to reveal the secret code. He released it. On being tested, it was discovered that it had a balance of Tshs. 1,480,000/=. Tshs. 20,000/= was missing. They then noted that it was the line they were looking for.

It was the evidence of PW6 that Tabibu had a phone, Tecno button which used two lines. It was later known to have IMEI No. 354339095060160 and IMEI No. 3543339095060178. It had no line. He told them that, the line which had been demanding money was burnt by Thobias. PW6 went on to say that on the advice of the Police, observing that it was risk to leave the money in the line whose secret code was already known, he approached an M-pesa agent and took out the money. He took out Tshs. 100,000/= which was used to pay the bodaboda leaving a balance Tshs. 1,376,000/=. The money (Exhibit P2), the phone Techno button (Exhibit P3) and two lines (that of the Chairman and that of Thobias) (Exhibit P4) were handled to PW8 at the Police Post.

It was the evidence of PW8 that he received a call on 5/2/2019 to send the exhibits to Kakonko Police Station. He was alone at the Police Post making it difficult to move. He was advised to handle them to PW6 who sent them to PW9. The later received them and handled them to the exhibit keeper (PW5). PW5 is the one who tendered exhibits P2, P3 and P4 (the 2 lines) to court. PW6 handled them to PW9 through a handling

over note (exhibit P5). The Postmortem Examination Report (Exhibit P1) was tender by PW3 Dr. Samson Benjamini.

It was the evidence of PW9 that while at Kakonko Police Station on 6/2/2019, as he was at the CRO office which is near the lock up, he heard Thobias Ntakiyicha saying "Afande Stanley tunashida na wewe". He came close to the lock up. They said that they needed to tell him something. He looks them to the CID office. They said that they had killed the boy. He demanded to know where they could get the body. They told him that it was in the bush between Gwanumpu and Bukililo villages. He returned them to the lock up and reported the matter to the OC-CID who directed him to prepare a car and some policemen to go and visit the place. It was far away, about 48KM. They arranged to meet the police officers of Gwanumpu somewhere in between. They moved to the place being led by the accused. They met the other policemen and moved inside the bush. They reached an area where there were holes (mashimo) caused by brick makers. He was in the company of PW8 and other Policemen. They saw the grave which was under a big tree. They removed the soil which was still fresh. They saw the head and believed the story. The OC-CID ordered them to call villagers to witness and remove the body. Meanwhile the accused were removed for security reasons. PW8 called the villagers. Those who came included PW2, the father of the boy and PW6, the village

Chairman. PW3 and PW7 were also present. The body of the deceased was removed from the grave where it had been buried. Its hands and legs were tied with ropes. It was buried while seated. His mouth was covered with cloth which moved his neck. The head was covered with a net.

PW3 examined the body to establish the course of death. The body of the deceased was identified to him by PW2 and PW6. He was told that it was the body of a boy called Jimson Bichumi. PW3 said that it had started to decompose but one could identify it. On being examined, it was established that he died due to lack of air (oxygen). PW3 said that he lost air in the ground where he had been buried or else it was due to the cloth which was put on the mouth.

It was the evidence of PW9 that he returned to the Police Station after they had seen the grave. He changed the charges from kidnapping to murder. He then started to record the cautioned statements (exhibits P6 and P7) on the confessions already made. PW9 explained the way he prepared the room and recorded the statements, one after the other. That he informed the accused that they were faced with murder and were free to make the statement or not. They could also call a relative or advocate to be present. They said that they were ready to make the statements. They could speak alone. They were physically fit. He started with Thobias. His statement was recorded from 4:00 PM to 5:10 PM. He then broke for

an emergency but returned later. He started the interview of Tabibu from 6:00 PM upto 7:00 PM. PW9 said that the confessions were made voluntarily. No force was applied. They were freely made. PW1, PW2, PW6, PW7, PW8 and PW9 could identify the accused at the dock.

The accused were the only defence witnesses. They had no witness to call. They had no exhibit to tender.

DW1 Tabibu Nyundo was led by Silvester Damas Sogomba to give the following defence. He denied the charges. He said that he was at home on 28/1/2019 when he got reports that the child had been kidnapped. He went to the village center where he bought tomato, small fish (dagaa) and cooking oil. He cooked food and ate. He got back to the village center. He denied to have any relationship with Thobias Lazaro. He never knew January. He admitted that the phone was picked from him but argued that there was any seizure certificate. He said that he is not aware of the person who sent the messages to Shukuru January (PW1). He went on to say that the prosecution was supposed to bring evidence from the vodashop to connect him to the money and the crime.

DW1 went on to say that the lines could not show the names of Elizabeth Toi and Thobias when tested. Further, villagers said that it was used by January Ntakiyicha but he was not brought as a witness. He proceeded to say that the police were supposed to bring the sketch map



but could not do so. He added that he had grudges with Festo Salila and Deus Salila. A daughter of Festo called Leticia became pregnant and he was the suspect. His wife was selling medicines at the Medical store of Deus. Tshs. 450,000/= got lost from the shop and he was the suspect. Deus argued him to bring the money or get problems. He associated the charges to these grudges. He proceeded to tell the court that villagers were supposed to be present at the time when they took the Police to the grave. Further, it was important to bring the jacket. He said that the statement should not have been received because he could not see his signature.

DW2 Thobias Lazaro Ntakiyicha was led by Elizabeth Twakazi to tell the court that he is a resident of Gwanumpu village. He said that he was arrested by PW2 and PW7 who sent him to Gwanumpu Police Post and later to Kakonko Police Station. He proceeded to tell the court that he was in the village and took part in looking for the boy. He also contributed Tshs. 2,000/=. He denied to own the line which received the money. He said that he never made the statement. He was forced to sign on the statement. They stabbed him with knives. He was tortured. He was stabbed on the hands, right shoulder and leg. He signed using his thumb for fear of his life, he said. He met Tabibu in court for the first time. He requested the court to set him free.

That marks the summary of the evidence received in court.

I sat with two assessors; Batholomeo Josephat Furugutu and Consolata Raphael Shinga. They were reminded of the evidence adduced in court as shown above. They were told that evidence may be direct or circumstantial. Direct evidence is the evidence of a witness who says that he saw the accused committing the offence. There is no direct evidence in this case. The case is based on circumstantial evidence and confessions of the accused leading to recovery of the body of the deceased. They were informed that circumstantial evidence is evidence picked from the circumstances of the case. It can be the basis of a conviction but the court must, before deciding to use it as a base for a conviction, be satisfied that the facts are incompatible with the innocence of the accused, and capable of having no other explanation other than that of the guilt of the accused. (See **Simon Musoke v. Republic** [1958]1 EA 715 quoted in **Hilda Innocent v. Republic**, Criminal Appeal No.288 of 2019). See also **R.V. Kerstin Cameron [2003]** TLR 84 where the principles of basing a conviction on circumstantial evidence were set. One the principles is that, in murder cases, evidence should be cogent and compelling to convince the court that they lead to no other rational hypothesis other than the fact that the accused murdered the deceased.

They were told that murder is killing with malice aforethought, killing with intension as opposed accidental killings. And that, malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: (i) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not, (ii) 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, (iii) an intent to commit an offence punishable with a penalty which is greater than imprisonment for three years and (iv) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence. Malice may also be inferred from the nature of the weapon used and the part or parts of the body where the harm is inflicted. (See **Elias Paul v. R**, CAT Criminal Appeal No. 07 OF 2004).

They were given the meaning of a confession, a statement of the accused made to the police or justice of peace showing that he committed the offence. That, the confession of the accused made to the police and or justice of peace can be used as a base for a conviction save that it must

have been given with free will. (See **Habiyalimana Augustino and another v. The Republic**, Criminal Appeal No.179 of 2007). They were invited to examine the evidence given in court and say whether in their opinion, the confessions were made freely so as to be good evidence to base a conviction or not.

They were informed of the duty of the prosecution to establish the chain of custody of the exhibits from the time when they were picked from the suspects to the time when they were finally tendered in court. In our case we have exhibits P1, P2, P3, P4 and P5. These exhibits are meant to connect the accused to the commission of the crime. The assessors were told that, the chain of custody must not be broken and where it is broken, the circumstance must show that, the exhibits were not interfered or tempered with in between. (See **Chacha Jeremiah Murimi and 3 others v. The Republic**, CAT Criminal Appeal No.551 of 2015).

They were asked to examine the credibility of witnesses. And that generally all witnesses are credible unless the contrary is proved. (See **Goodluck Kyando v. Republic**, [2006] T.L.R 363). They were invited to see if any witnesses showed a picture that he was speaking lies or was not credible.

They were informed that in a criminal trial, the burden of proof lies to the prosecution from the beginning to the end. The prosecution has to

prove the case beyond reasonable doubts. The accused have no duty to prove their innocence. Their duty is to point out areas of doubts in the prosecution case. (See **Woodmington v DPP** (1935) AC 462, **Awadhi Abdarahamani Waziri v Republic**, Criminal Appeal No. 303 of 2014, CAT, at Arusha (unreported), **Marando Suleiman Marando v Serikali Yamapinduzi Zanzibar ("Smz")** [1998] T. L. R. (HC) 375, **Seifu Mohamed El-Abadan v. The Republic**, Criminal Application No. 8/12 of 2020 and **Salum Seifu Mkandambuli v. The Republic**, Criminal Appeal No.128 of 2019).

Having so well informed, the assessors had this to say: Mr. Batholomeo found PW1, PW2, PW4, PW6, PW7, PW8 and PW9 as witnesses of truth. He found them to be corroborative and reliable. They have proved that the deceased was murdered by the accused. He had the view that the killing was intentional because the deceased was buried on the ground. He found that the prosecution has proved its case beyond reasonable doubt. He found the accused guilty of murder.

The other assessor (Consolata) said that there was no proof beyond reasonable doubts. She had the view that it was important to bring evidence from the systems of Vodacom to link the accused with the crime committed because the lines were found to be used by many people. She had the view that the Postmortem Examination Report (exhibit P1) is

useless because it did not show who committed the crime. She was convinced by the defence evidence that it was important to be with village leaders in the first visit to the grave. She said that, so long as there was nobody who saw the accused committing the crime, leaving the case with circumstantial evidence, which in her opinion was not enough, the accused must be found not guilty. She found them not guilty of murder.

I have tried to consider the opinion of assessors in the light of the evidence on record and the applicable law carefully. As hinted above, there is no one who saw the accused, by his eyes, killing the deceased. The prosecution case is based on circumstantial evidence and confessions leading to recovery of the body of the deceased. I will make a discussion on those areas fully, but I think for obvious reasons, I should start with credibility of witnesses.

In **Goodluck Kyando v Republic** (supra), the Court of Appeal laid down the principle that;

*"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing a witness"*

The court expounded the principle in **Athumani Rashidi v The Republic**, CAT Criminal Appeal 264 of 2016, page 12 where it was held

thus:

*"Good reasons for not believing a witness include the fact that the witness has given improbable or implausible evidence, or the evidence has been materially contradicted by another witness or witnesses. (See **Mathias Bundala v Republic**, Criminal Appeal No. 62 of 2004)"*

In **Shabani Daud v. Republic**, CAT Criminal Appeal No 28 of 2001 and **Abdalah Musa Mollel Banjor v. Republic**, CAT Criminal Appeal No. 31 of 2008- both unreported, the court had a chance to discuss credibility of witnesses. It was held that, credibility of witnesses can be determined in two ways, among others; **one**, by assessing the coherence of the testimony of that witness and **two**, by considering his evidence in relation to the evidence of other witnesses.

So, the evidence of every witness is presumed to be correct save where it is improbable or implausible (not seeming reasonable, failing to convince) or where it has been materially contradicted by another evidence. The law also talks of coherence of evidence (systematic or logical connection of evidence) and the measure of the evidence of the witness in relation to other witnesses. In other words, how does the evidence look like. Is it reasonable, convincing and logical? Does it bring

sense? What can we speak of it when it is compared with the evidence of other witnesses (including those of the other side)?

Further to that, in my view, we must add one more consideration; the appearance of the witness at the witness box. How does he look like? How is he speaking? Is there any shaking and or stammering? Is there any late response to simple and straight forward questions? Is there any holding of the head before response to simple but key questions? Is there a direct or technical refusal to answer key questions?

The appearance of a witness speaks a lot. Much as it is true that most people are afraid of court proceedings, but it is not expected that a witness should be shaking (or sweating) and or stammering when asked a key question. He is not expected to delay or fail to answer simple questions like, the colour of the shirt of the accused, the type of light or the names of people who were arounds. He is not expected to hold his head or mouth to look for answers to straight toward questions. He is not expected to refuse to answer any question or to deny obvious things. If any of those things happens, the court must think of giving a negative credit to the witness and the evidence given.

If what he says is improbable or implausible, it is likely that he is speaking a lie. Equally, if his evidence has been contradicted materially by another evidence which appears to be more convincing, it is likely that the



witness is not speaking the truth. In the like manner, if the evidence lack coherence, it is likely that he is cheating or speaking a lie. Refusal to answer a material question discredit a witness, render him not reliable.

I had time to examine all the witnesses closely. I could not doubt the credibility of prosecution witnesses. They all appeared cool and composed. Their evidence had a logical flow and was worth of belief. I doubted the credibility of the accused. They appeared worried and shaking, particularly the first accused. They appeared as people a with guilty conscious. Their evidence on key areas, lacked consistence and logic. It was very weak. For instance, the accused deny their confessions but the circumstance show that there was no way the police could go to the grave unless taken by the accused. The denial was weak. It was also materially contradicted by the evidence of people who went to the grave and who saw the body of the deceased being pulled out. Their denial was thus a lie. They also alleged torture but their evidence lacked supporting medical chits suggesting that they were speaking a lie. The first accused spoke of some grudges with some prosecution witnesses on issues which involved his wife. In a usual flow of things, much as he is not expected to prove his innocence, but one would expect his wife to come as a witness to support him. He could not bring her suggesting that the grudges were a mere defence, a lie. Whereas they agreed to know village leaders (who

also knew them) they denied to know each other. That was a lie given the strength of the evidence PW2, PW6 and PW7 and circumstances of village life.

Next for consideration is whether there was evidence to prove the case. Much as the accused have been found to have spoken a lot of lies in their defence, but yet, the prosecution has a duty to show that they committed the crime and have to do so beyond the shadows of doubt. We have two sets of evidence which complement each other; circumstantial evidence and evidence based on confessions.

I will start with circumstantial evidence. We have the evidence of PW1, PW2, PW6, PW7, and PW8 which show that the boy was found missing on 27/1/2021 and found in the grave, dead, on 6/2/2021. In between there were several efforts done to recover him believing that he had been kidnapped and was alive. They had messages from number 0745301385 registered in the name of Elizabeth Toi, a woman not known in the village. The Police advised them to trace him around the bush. Villagers traced the boy in the nearby bushes but could not be successful. Meanwhile PW2 and PW6 proceeded to communicate with the kidnappers seeking some relief. On 30/1/2021 they managed to negotiate the amount from Tshs. 5,000,000/= to Tshs. 1,500,000/=. They found this figure manageable. They called an emergency meeting of villagers whom they

asked to contribute some money to get the boy back. They agreed and could raise the amount in two days.

The money was given to PW6 who sent the amount to the kidnappers through number 0745301385. He used his phone which had number 0752332835. The money was later transferred to number 0745139289 registered in the name of Thobias Lazaro Ntakiyicha, the second accused. They all knew him. They then started to search for Thobias Lazaro Ntakiyicha. They moved to his home and were told that he was in the farms with his friend Tabibu. They moved to the farms where they got Tabibu. He was suspicious! He had a phone without a line. He told them that Thobias had gone back to the village. He was arrested and taken to the police post. Thobias was arrested later by PW7 in the company of other villagers. Tabibu told PW6 and the Police that Thobias had burnt line with number 0745301385. This is the line which was sending messages. It is also the line which received the money and transferred it to 0745139289.

Line number 0745139289 was picked from the coat/jacket of Thobias. It was brought at the police station by his wife. He located the place where it could be found, at the rear end (kwenye pindo) and it was found in the place. He also gave its secret code when asked to do so. This is as per PW2, PW6, PW7 and PW8. PW6 used the secret code to remove

the money which was later tendered in court.

The evidence shows that the money Tshs. 1,276,000= (exhibit P2), the phone, Techno button picked from the first accused (exhibits P3) and the two lines, line number 0745139289 which was picked from the second accused and the line of the Chairman, line number 0752332835 (exhibits P4 collectively), were handled to the police post at Gwanumpu and received by PW8 who entered a record to that effect in O.B. Book. The court was told that a police post does not have an exhibit register. Everything is recorded in the O.B. book. The exhibits were picked by PW6 who sent them to PW9. It was said that PW9 allowed PW6 to bring them as PW8 was alone at the police post. He could not leave the station without police. PW6 handled them to PW9 through a handwritten note, exhibit P5. The later handled them to PW5, the exhibit keeper who marked and registered them in the exhibit register. She retained them at the exhibit room until the day when they were finally received in court as exhibit. The O.B. book of Gwanumpu Police Post and the exhibit register of Kakonko Police station could not be brought as exhibit. The explanation we got is that they are still in use.

So, apart from the oral evidence of PW5, PW6, PW8 and PW9 and exhibit P5, there is no other evidence showing the chain of custody. Under the old position of the law, long before the coming of **Chacha Jeremiah**

**Mrimi v. Republic** (supra), one could say that the lack of the O.B. and the exhibit register, which were vital documents in the transactions created a gap which, affected the chain custody, making the exhibits illegally before the court. But I think, this is no longer the position. The court reviewed its decision in **Joseph Leonard Manyota v. Republic**, CAT Criminal Appeal No. 485 of 2015 where it was said thus;

*"...it is not every time when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the case say, where the potential evidence is **not in a danger of being destroyed, or polluted, and or in anyway tempered** with. Where the circumstances may reasonably show the absence of such dangers, **the court can safely receive such evidence despite the fact that the chain of custody may have been broken.** Of course, this will depend on the prevailing circumstances in every particular case."*  
(Emphasis added)

Applying the above principle, the Court of Appeal had this to say in **Chacha Jeremiah Mrimi** (supra), at page 25;

*"...the trial judge in our view subjected the evidence of PW6, PW9, PW4 and PW15 to*

***acritical evaluation** and came to the conclusion that there was a **careful handling of the exhibits** from the time the exhibits were seized to the time when taken to the Chief Government chemist for analysis and subsequently tendered in court. **There is nothing to suggest that in between they were intercepted and tempered with.** In that basis, the exhibits tendered were therefore appositely received in evidence."*

So, in my view, the test is no longer the chronological of documentation of events but a critical evaluation of the evidence on the part of the trial judge or magistrate. He has to examine the evidence critically and say if there was a careful handling of exhibits from the moment of seizure to the time when they were tendered in court as evidence. If he is satisfied that there was no possibility of being intercepted or tempered with, he can safely receive them despite of there being a broken chain or lack of documentation.

I had time to give a critical evaluation of the evidence of PW6, PW8, PW9 and PW5. I have also considered the circumstance of the case as whole. Having so done, I could not see the possibility of tempering with exhibits P2, P3 and P4. The exhibits in my view, were safely received, stored and tendered in court. They are thus good evidence despite the

fact that the O.B. book and the exhibit register could not be tendered in court as evidence. Further, the explanation given for failure to bring them is justified.

On my reflection of the evidence, I have the view that, the fact that the second accused was found with the line which had received the money from the line which had been sending messages, the fact that he gave the secret code which allowed the money to be released, the messages and continual demand of the money brings a strong circumstantial evidence showing that he must be the one or one of those who killed the child who was found later in the grave. This evidence is strong and can lead to a conviction for murder. But the evidence is not enough, if left alone, to the first accused to the offence. If anything, it connects him remotely. I am saying remotely because of lack of electronic evidence from Vodacom or the cybercrime unit of the Police force to link the phone which was found with him to other phones and lines of other people who were active in the transaction. If we had the evidence, which I find as a weakness of the investigator and the prosecution, we could see the connections clearly including the location and time of each transaction. There is no such a link.

But, despite the lack of electronic evidence, there were some other independent pieces of evidence which connect the first accused to the

second accused and the crime. (i) the confessions, (ii) the evidence that they took the police to the place where they had buried the child.

I will now move to examine the confessions. PW9 is the star witness in this area. PW9 said that both of them called him saying that they needed to say the truth. They then took the police to the grave. PW8 and PW9 were among them. The grave was opened and the boy was found dead. Those who witnessed the body of the boy being removed from the grave included PW2, PW3, PW6, PW7, PW8 and PW9. The accused made the confessions statements. The confessions led to the recovery of the body of the deceased.

The accused denied the confessions, exhibits P6 and P7. I had a chance to examine the circumstances under which the statements were recorded and the demeanour of the witnesses of both sides on that aspect. Having done so, I am convinced that the accused were treated accordingly to the law during the recording of the statements. I have the view that they gave the confessions freely. The defence of torture given by the accused lacked proof for they had no PF3 or any report from prison showing that they entered the prisons with blood wounds as alleged. The record of the lower court was also silent. They failed to inject doubts to the prosecution evidence. To prove that they were not forced, they took the police to the place where they had buried the boy. The police could



not have managed to go there without being led by the accused. Further, the police could not have been sent to the place by some other guy and allege that it was the accused who took them to the grave. PW8 and PW9 did not appear to have any malice. PW9 who was the investigator appeared to be an experienced policeman who knew his job. The fact that the accused lead the police to the place where they had buried the deceased firmly ground a conviction against them on the offence of murder. (See **Tumaini Daudi Ikeru v. The Republic**, CAT Criminal Appeal No. 158 of 2009, page 10 and **Mathias Bundala v. The Republic**, CAT Criminal Appeal No. 62 of 2004).

It follows that the confessions were voluntarily made and can be used as a base for conviction.

Finally, I will move to discuss the defence of the accused. It was discussed at the moment of my discussion on the credibility of witnesses but it will also be discussed here because they spent some time attacking the prosecution case trying to show that there was no proof beyond reasonable doubts. They attacked the prosecution case on several fronts.

One, the accused deny to know each other. Two, the first accused agree that the phone Techno button, belongs to him but deny its involvement in the transactions. Three, the first accused does not see the validity of the transactions in the absence of a witness or evidence from

Vodacom. He argued that when the numbers were tested, they read different names other than Elizabeth Toi and Thobias Ntakiyicha. He argues that they are not reliable. Four, the first accused questioned the reason as to why January Lazaro Ntakiyicha could not be charged while there was evidence that he happened to use the line. Five, first accused spoke of grudges to PW4 saying he was merely fixed due to the grudges. Six, the first accused said that if he took the police to the grave, villagers could be called while he was there. Eight, he denied his statement saying that it does not carry his signature. The second accused denied to be involved in the commission of the crime. He said that he was forced to sign his statement. He said that there was no evidence showing that he was involved in the commission of the crime.

I had time to reflect on the defence of the accused. As hinted above the credibility of the accused at the witness box was shaky. I could not believe them at all. That alone could lead me to dismiss their defence but let me discuss to see if what they said managed to inject doubt to the prosecution case. I start with the story that they don't know each other. Like one of the assessors, I had no doubt to PW1, PW2, PW6 and PW7 who were clear that the accused lived in the village. The accused accepted this fact but deny to know each other. I think that was a mere defence, a cooked story. It is the first accused who said that the second accused had

gone to the village. He was arrested shortly based on this information. It is he who said that the second accused had the line. Using this information, the line was found in the coat of the second accused. If they were not known to each other as alleged, Thobias could not be arrested in the manner he was arrested. And the line could not have been found with Thobias. Further, on the reliable evidence of PW9, the court was informed that the two accused called PW9 to speak the truth. They then (jointly) lead the Police to the grave. The fact that they called him and moved together to the grave, shows clearly that they know each other.

I agree with the first accused that there was need to bring evidence from Vodacom and computer prints to show the transactions of the four lines (the line of PW1, the line of Elizabeth Toi, the line of Thobias and the line of PW6). It was important to bring this evidence, as said above, to establish the transaction clearly. But, the lack of the evidence from Vodacom cannot make any of the accused innocent because of the existence of other pieces of evidence as shown above. Further, if the line of Thobias was used by other people including January Lazaro Ntakiyicha, he could not have known its secret code. The fact that it was found with him and he knew its secret code, which was used to access the money, prove that it was his line.

There is also the defence that the confessions were not voluntary. The accused were tortured and forced to sign. I had time to examine this matter during the trial. The prosecution led good evidence showing that the statements were made voluntarily. They showed how PW9 recorded the statements, the place and the time. The accused were given all their rights. The accused showed old scars without any PF3 and report from the prison superintendent. The scars in the body of the accused were thus a result of something else not connected to events of 6/2/2019.

Further, the confessions of the accused are held to be voluntary because they lead to the recovery of the body of the deceased. The accused should not deny this fact for the police could not have known the place where the body of the deceased was buried unless taken by the accused. Or else, it is not possible that they were taken to the grave by some other people and say that it was the accused who took them to the place. There is also a defence that there was need to bring village leaders to the grave on the first trip. I think that was not practicable given the tension at the village. Allowing the people to meet the accused was risk and could lead to their death. Again, the police had no reason to call people at that stage for they were still in the investigation process which had nothing to do with villagers.

All things measured and weighed carefully, I have the view that the accused are the ones who kidnapped the boy whom they decided to kill thereafter. The evidence from the grave shows that they killed him in a very barbaric way. They had with malice aforethought. That said, I find the accused guilty of murder contrary to section 196 and 197 of the Penal Code, cap 16 R.E. 2019, as charged and convict them accordingly.



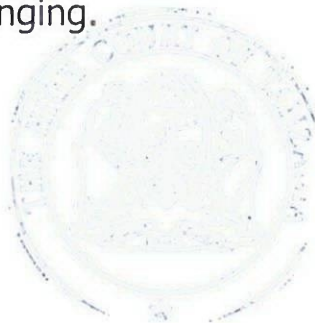
L.M. Mlacha

**JUDGE**

**21/9/2021**

**SENTENCE**

There is only one sentence for murder which is death by hanging. I would prefer for another sentence but my hands are tied. I sentence you the said TABIBU NYUNDO AND THCBIAS NTAKIYICHA to suffer death by hanging.



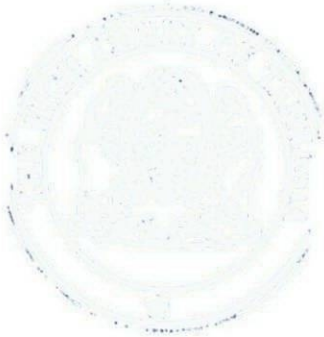
L.M. Mlacha

**JUDGE**

**21/9/2021**

**Court:** Judgment read in open court in the presence of the accused, Mrs. Happiness Mayunga and Miss Antia Julius State Attorneys for the Republic and Mr. Silvester Damas Sogomba and Miss Elizabeth Twakazi, Advocates for the first and second accused respectively.

Right of appeal Explained.



L.M. Mlacha

**JUDGE**

**21/9/2021**

