

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL SESSIONS CASES NO. 23 OF 2016

REPUBLIC

VERSUS

- 1. JULIUS S/O KATISHA NGOLE**
- 2. PHILIPO S/O WANGA**
- 3. NASIBU S/O MVANGO SIMBAYANJE**
- 4. YOHANA S/O HERMAN MWARIEGO**
- 5. LUCAS S/O GOODWELL MUMILA**
- 6. HAROUN S/O YENDA**
- 7. ERGENESS S/O ADAM MBOGO**
- 8. WILSON S/O NAIROBI @ MZUMBWE**
- 9. RASHID S/O JAPHET BWIDIKO**

JUDGEMENT.

12 & 13/10/2021.

Utamwa, J.

In this case, there are nine accused persons, namely JULIUS S/O KATISHA NGOLE, PHILIPO S/O WANGA, NASIBU S/O MVANGO SIMBAYANJE, YOHANA S/O HERMAN MWARIEGO, LUCAS S/O GOODWELL MUMILA, HAROUN S/O YENDA, ERGENESS S/O ADAM MBOGO, WILSON S/O NAIROBI @ MZUMBWE and RASHID S/O JAPHET BWIDIKO

(henceforth the first, second, third, fourth, fifth, sixth, seventh, eighth and ninth accused respectively). They were jointly charged with one count of murder contrary to section 196 and 197 of the Penal Code Cap. 16 R. E. 2002 (currently RE. 2019), hereinafter called the Penal Code in short. The particulars of the offence according to the charge sheet alleged that, on the 6th day of November, 2013, at Mshewe village within the District and Region of Mbeya, the nine accused persons murdered one Hanahela s/o Mwakabana (henceforth the deceased or Hanahela in short). When the charge was read over and explained to the accused persons, they all pleaded not guilty.

It must however, be noted at this juncture that, this court (before Hon. Chocha, J as he then was) conducted a preliminary hearing as per the provisions of section 192 of the Criminal Procedure Act, Cap. 20 R. E. 2002, now R. E. 2019 (the CPA). Nevertheless, no any material fact was found to be undisputed by the parties, save for the respective names of the accused persons. The prosecution then paraded a total of 11 witnesses to support the charge. In fact, the proceedings show that, 12 prosecution witnesses testified. Nevertheless, one witness (D/Cpl. Hamis) initially testified as PW.6, but later he testified as PW.10 for adducing additional evidence. Indeed, though the prosecution brought him as another witness to form a total of 12 witnesses, the fact remains that, he was only recalled to adduce additional evidence, hence the view that, only 11 witnesses testified on behalf of the prosecution case. On the other side, all the nine accused persons gave their respective defences on oath and invited two other

witnesses to form a total of 11 defence witnesses as it will be shown below.

In this case, the Republic was represented by Mr. Baraka Mgaya and Ms. Sarah Anesius, learned State Attorneys. The record however, indicates that, at a time, Ms. Zena James, also learned State Attorney, had participated in prosecuting the case. On the other side, the nine accused persons were advocated for by Mr. Daniel Muya and Ms. Beatrice Mwahande, learned advocates.

The prosecution case, was essentially as follows: according to the testimony of the Prosecution Witness No. 1 (PW.1), one **Edward Mwaikasu**, on the material date (the 6th November, 2013) at 8.00 am, he attended the burial ceremony of his cousin, one Juma Hanahela who had died before. The ceremony was at Mshewe village though he (PW.1) lives in Nzovwe area (of Mbeya City). While he was attending a meeting of relatives in a room at the ceremony, the first accused, who was chairman of the hamlet, approached them and asked for the deceased (PW.1's uncle and father of the late Juma Hanahela) to go and approve the completion of the grave where Juma could be buried. He (PW.1) who chaired the meeting permitted the deceased to go to the grave with the first accused. Later on, the deceased went back to the meeting and informed its members that, the situation was not calm at the grave. That was because, people there were uttering some unusual words. The words were that, the grave could not be dug in his (deceased) presence. The first accused returned again and requested to go with the deceased, he (PW.1) again, permitted him, but this time he followed them behind.

When the PW.1 arrived at the grave, he found the deceased digging it. He requested people, mostly youths around there to give him chance to say something about the deceased (Hanahela) and resolve the problem (if any). Nevertheless, one of those persons, the third accused, raised an iron tool for digging earth (*sululu* in Kiswahili) and threatened to cut him (PW.1) with it. PW.1 run to first accused who was about two meters from the grave. He asked him if that was the procedure for the burial process. The first accused asked him (PW.1) to leave the process to proceed (*we acha tu* in Kiswahili). He then saw people throwing soil into the grave by using spades and hoes while the Hanahela was still into it. At that time, the first accused was only standing near PW.1. As the chairman, the first accused did not stop those persons from throwing the soil into the grave. He (PW.1) then went aside for about 10 meters for calling the police from Mbeya by a phone and for reporting the matter. He then went back to the grave where he found the Hanahela had been completely buried alive. The culprits then advised the first accused to call policemen by phone and tell them that people were attacking a person so that he (first accused) could not be tasked for anything.

The PW. 1 went on telling the court that, upon the youths burying the deceased alive, they started digging another grave for Juma Hanahela about a meter from where they had buried Hanahela. They were many at the grave. They were saying that, Hanahela should go with his stupidity (*aende na ujinga wake* in Kiswahili). Policemen arrived at the cemetery soon after Hanahela had been buried alive, and people went on burring the body of Juma. One of the police officers asked people to unearth the grave

in which Hanahela had been buried, but they all remained quiet. He (PW.1) was by then standing near that police officer. Then a policeman arrested a young man, people wanted to assist the arrested man. Another policeman shot a bullet/bomb on air. Then some persons who had buried Hanahela alive were arrested, but some run away. Seven persons were arrested at the grave including Tunosye (son of Hanahela) himself. Policemen said, Tunosye had to go with them for making a statement. At the time of the arrest, the first accused was not at the cemetery. He (PW.1) however, had informed the police through a phone to arrest any person who would call them by phone since he knew that the first accused would make a phone to the police. For the above situation, he (PW.1) believed that the first accused was among the persons who had planned to bury the deceased Hanahela alive.

It was a further testimony by the PW.1 that, the said Tunosye, son of Hanahela was not at the grave when his father was being buried alive. He only went there when the body of his brother Juma was being buried. The said Tunosye could not obstruct the sadistic burial of his father (Hanahela) because, he was in the house of Juma which was about 50 meters from the grave. He (PW.1) had also warned Tunosye not to go to the grave at the material time because, the youths there had threatened to hurt him (PW.1).

PW.1 also said, he saw the persons who had been arrested at the graveyard in the police motor vehicle. He did so when he went to plead with the police so that they could release Tunosye since he was son of the deceased, Hanahela. Such persons were the same who had buried

Hanahela alive. He did not know them before, but he saw their faces at the time they buried Hanahela alive and when they were in the police motor vehicle. When policemen left, he remained at Juma's place.

On the 6th of November, 2013 PW.1 made a statement at police station, according to his evidence. On 9th of November, 2013 he was summoned to the police station to identify the culprits. The identification parade was conducted at the Mbeya central police station. The members of the parade were put in four lines in the following pattern: the first line had 4 persons, the second had 3, the third had 4 and the last had 2 persons only. The lines were arranged in such a way that, after the first line, each of the other lines was behind another. There was thus, a total of 10 persons in the parade. He however, identified only 7 culprits from them. The persons he identified were the first, second, third, fourth, fifth, sixth and seventh accused person whom he identified in court.

When cross-examined, PW.1 said, the deceased was his own uncle. He did not grow in Mshewe village where the event occurred. There were many persons around the grave, they were about a hundred. He knew the first accused for the first time on the fateful date when he was introduced to him by the deceased (Hanahela) and Tunosye as the chairman of the village. When he (PW.1) went to the grave, he stood near the first accused at about 2 metres from the grave in which the deceased was being buried alive. He was also there when the youths completely covered the grave with soil while the deceased was in it. It was soon before that time when the deceased had been asked by the youths to go into the grave and dig it. The pretended that it was difficult to do so. Though, he (PW.1) could not

know the exact number of persons who were digging the grave, they were about 8. In fact, few persons were digging the grave while many others were around there. The first accused also saw when the deceased was being instructed to get into the grave and dig it. The third accused was the one who threatened to hurt him (PW.1) by the iron tool.

In his further cross-examination, PW.1 said, other persons around could not obstruct the culprits from burying the deceased alive since they had a common intention, and he (PW.1) could not thus, do so alone. He could not also inform other mourners of the brutal burial of the deceased since he was not a leader there. He identified the culprits at the identification parade as follows: in the first line he identified 2, in the second line 3, in third line 1 and in the fourth line 1.

It was further testified by PW.1 during his cross-examination that, he observed the body that was exhumed from the grave following the order by policemen, it was of the deceased, Hanahela. He does not know who mentioned the culprits to the policemen so that they could be arrested at the graveyard. It is also true that, policemen arrested people randomly (*bila uhakika* in Kiswahili).

During his re-examination, the PW.1 said, he did not know which techniques were used by policemen to know the culprits and to arrest them at the cemetery on the material date.

When examined by assessors, PW.1 said, he identified a total of 8 persons at the grave as culprits, but only 7 were in court and he does not

know why the other was not there. At the grave, he went near the first accused after the threat to hurt him had been made.

Upon examination by the court, PW.1 said, the first accused could not have the courage to obstruct the culprits from burying the deceased alive following the threat that had been directed to him (PW.1). The pattern of members of the identification parade was that, the first line had 4, the second 2, the third 4 and the fourth had 1. This arrangement, he said, was different from the one he had explained before, i.e 4, 3, 4 and 2 members in the first, second, third and fourth lines respectively. He also said, he could not remember from which line he identified which accused, except for the first and third accused whom he identified in the first line. This was because, he still had many thoughts for the event and long-time had lapsed between the date of the event and that of his testimony (on 28th August, 2019). The parade had thus, 11 members, but he identified only the 1st – 7th accused. He did not remember if he saw the 8th and 9th accused persons. He did not also hear who among the culprits had instructed the deceased (Hanahela) to get into the grave. The body of the deceased was exhumed in his absence as he left the village on the said 6th November, 2013. He did not also remember who among the accused persons was arrested first and was assisted by others before the police shot a bullet/bomb on air. This due to the hectic situation at the graveyard (*palikuwa na mkanganyiko* in Kiswahili). He did not know any reason as to why the said Hanahela was buried alive.

The prosecution case was also based on the evidence of **PW.2, Tunosye Hanahela Mwakabana** (son of the deceased) who testified as

follows: He previously lived at Mshewe village where he was born, however, he currently lives in Mbalizi area (of Mbeya City) since 2013. He attended the burial proceedings of his brother Juma, at Mshewe village on the material date. Juma had died on the 5th of November, 2013, i. e. a day before the fateful date. A meeting of relatives was conducted at the house of Juma. The PW.1 (Edward) and the deceased (Hanahela) also attended the meeting. While the meeting was going on, the first accused (as the hamlet chairman) interfered and informed the Hanahela that, he was needed at the cemetery. The deceased went there, but he returned back to the meeting. He (deceased) informed the meeting that, the situation at the cemetery was not good (*hali kule siyo nzuri* in Kiswahili). He said, people who were digging the grave for Juma had forced him to get into it and go on digging it. The first accused went again to the meeting and informed the Hanahela that he was needed at the cemetery. Then PW.1 who was chairing the meeting permitted the Hanahela to go to the graveyard with the first accused. He (PW.2) remained in the house.

It was further the testimony by PW.2 that, soon after the deceased had gone to the cemetery, he heard noises. Some people were crying while others were applauding (*wengine walikuwa wanalia na wengine wanashangilia* in Kiswahili). He then got out so as to go to the grave. He so dust at the grave. PW.1 asked him (PW.2) to go back in the house since people had buried the deceased alive. He (PW.2) obeyed the advice given by PW.1 and went back in the house. When the noises had settled, PW. 2 went to the grave. PW.1 informed him (PW.2) that, the persons who were digging the grave for Juma are the ones who had buried the deceased

alive in the other grave. He saw persons who were near the grave for the deceased and were then, digging another grave for Juma. When policemen went to the house of Juma, he went with them to the graveyard and showed to them the grave in which the deceased had been buried alive. He also informed a police officer that, it was the first accused who had asked the deceased to go to the grave. He (PW.2) further informed the police that, the persons who were digging the other grave for Juma were the same persons who had buried the deceased alive.

The PW. 2 also testified that, after the burial of Juma, he heard a bomb-like sound. Then policemen started arresting persons whom he (PW.2) had shown as the ones who had buried the deceased alive. A total of 6 of them were arrested at the cemetery and taken to a police motor vehicle. However, he (PW.2) did not know such persons. He knew them after the event. Before that, he knew them by faces and not by names. He further said, he could remember them in court since he was with them in the police motor vehicle and at the police station. The first accused however, was known to him and identified him in court. He also identified the second to third accused in the dock.

The PW.2 added in his evidence that, on the material date, the police took him (PW.1) with them to Mbeya central police station so that he could make a statement. On the way, the police motor vehicle passed through the Mbalizi police station and collected the first accused who had been arrested before and kept there. He gave his statement at the Mbeya central police station and he was released.

It was also the testimony of PW.2 that, on the 7th November, 2013, policemen went again to the cemetery, exhumed the body of the deceased (Hanahela) in his (PW. 2) presence. A doctor then examined the body and permitted the relatives to formerly bury the body.

In his cross-examination, PW.2 gave the following evidence: that, he did not know if the practice of calling a father of a deceased to check a grave of his dead son was usual at that area. He did not also see when the deceased was being buried alive. It was PW.1 who informed him of that event. He did not thus, see persons who buried him alive. He only saw dust at the grave when he went there. Edward knows better on persons who buried the deceased alive. The mourners who were applauding were those near the grave of the deceased, and those who were crying were around the house of Juma. He did not know why people around the place could not obstruct the culprits from burying the deceased alive.

In his further cross-examination, the PW.2 said, he could not say who dug the grave for Juma due to the big number of people around there. Though he had previously said that he saw the persons who dug Juma's grave, he is not a liar by changing the statement to the effect that he did not see such persons. After the bomb sound at the graveyard, people dispersed as the police were arresting others.

In his re-examination, the PW.2 said, it was Edward who showed him the persons who had buried the deceased alive while they were digging the second grave, i.e. for Juma.

In examination by assessors, PW.2 said, he was the one who pointed out the persons who were digging the grave for Juma as the ones who had also buried the deceased alive. However, that information to the policemen was based on the information that he had received from PW.1 (Edward).

The PW.3, one **ACP. Mutatiro Nyamhanga Kitinkwi** also testified on behalf of the Republic. He gave the following evidence: that, on the material date he was a police officer (ASP) and head of the investigation department in Mbeya District (the OC-CID). Upon being informed of the event of a person being buried alive, he went to the scene of crime, i.e at the cemetery in Mshewe village. He went there by a police motor vehicle. He was accompanied by six policemen who were in civil attire. They were Cpl. Leonard, D/C Simon, D/C Aman, D/C Alan and PC Shani. Though there were many people there, he met PW.2 (Tunosye) who was son of the deceased (Hanahela). PW.2 informed him that, the deceased had been buried alive upon the first accused calling him to the grave.

It was also the evidence of PW. 3 that, PW.2 (Tunosye) showed him a group of young persons as the persons who had buried the deceased alive. At that time, the group was digging another grave for one Juma who had died naturally, a day before the event. Such youths were applauding on another grave said to be the one in which the Hanahela had been buried alive. They were making jokes saying that, policemen who had arrived there should be given boiled corns (*Makande in kiswahili*) which they were also eating. He called for additional policemen from the Regional Police Commander (RPC) in view of effecting a successful arrest since there were many people there. He then instructed his officers to concentrate on

the boys who were digging the grave for Juma. He also asked them to mix themselves with other mourners. He further prepared one police officer to explode a bomb so that people could disperse to make the arrest easier. He then made the agreed sign of scratching his head and the bomb was exploded. Mourners dispatched and six culprits were arrested at the cemetery. D/C Simon arrested 2 suspects, D/C Ahmed also arrested 2 and another officer arrested 2. The suspects were taken to the police motor vehicle.

The PW. 3 further testified that, on their way to the cemetery, the additional police officers he had asked for, arrested other six persons who were running away from the cemetery. PW.2 also informed him (PW.3) that, he suspected the first accused as among the culprits since he had asked the deceased to go to the grave where he was latter buried alive. The first accused did not also take any step to obstruct the youths from committing the offence. He (PW.3) then instructed police officers at Mbalizi Police Station to retain the first accused who had gone there to report the event. This was for purpose of joining him with the other arrested suspects. The arrested suspects including the first accused, were taken to Mbeya central police station. The PW.2 (Tunosye) was also taken there for making his statement. The next day, he sent his assistant to exhume the body of the deceased Hanahela in a company of the doctor who was assigned to examine the body.

In his evidence, the PW.3 also said, though he remembered the first accused in court, he did not remember the other six accused persons who had been arrested at the cemetery. The other six suspects who were

arrested by the additional policemen were released because, they were arrested only when they were running away from the cemetery. An identification parade was then conducted at police station. It was supervised by a police officer called Mpeleka.

When cross-examined, the PW.3 said, another person whom he could not mention, told him a story that was 100% like the one PW.2 (Tunosye) had told him (PW. 3). He (PW.3) also believed the story by PW.2 (Tunosye) as the person who saw the event. His belief was enhanced by the conduct of the youths who were joking at the cemetery saying that policemen should be given boiled corns. The other policemen were not with him when PW.2 (Tunosye) was showing to him the group of boys who were digging the grave for Juma and who had buried the deceased alive. The PW.2 showed him (PW.3) about 30 youths who had committed the offence. The PW.2 also told him (PW.3) that, he did not go to the grave since he had been warned that he would be hurt there. He (PW.3) did not remember the boy who made a joke that policemen should be given boiled corns, but he was among those who were standing near the two graves.

When re-examined, the PW.3 said, he could not remember the boy who had made the joke to policemen because, six years had lapsed from the date of the event to the date of his testimony. Moreover, people change and they also change their attire. The said number of 30 boys he saw digging the grave for Juma was due to his mere estimation. These persons were not moving to other mourners and the mourners were not moving to the culprits' group at the time when they were digging the grave for Juma. The culprits were also not moving to the other mourners.

The evidence of PW. 3 upon being examined by assessors was that, only 6 accused persons were arrested at the cemetery. Others two were arrested later by investigators while the first accused was arrested at Mbalizi police station. He (PW.3) remembered only the first accused among all the accused persons. At the grave, not all the estimated 30 youths were holding grave-digging tools. The PW. 2 (Tinosye) had also told him (PW.3) that, he had seen the culprits burying the deceased alive.

Another prosecution witness was **Dr. Yunus Ramadhan Mbaga** (a Medical Officer) who testified as PW.4. He told the court that, on the 7th November, 2013, PW. 3 (ASP Mutatiro) asked him to examine a dead body at Mshewe Village. He went there accompanied by one Insp. Nasoro. At the scene, they exhumed the body in the assistance of other persons. The body was found standing vertically in the grave. It was identified to him as being of one Hanahela Mwakabana aged 80 years. He then examined the body internally and externally and made his post-mortem report dated the same 7th November, 2013 (exhibit P. 1). His report showed that, the cause of death was suffocation due to being buried in the deep grave.

One No. F. 23, Detective Corporal **(D/C) Simon**, a police officer in the investigation department, testified as PW. 5 as follows: that he was among the police officers who accompanied PW.3 (ASP. Mutatiro) to the cemetery at Mshewe village following information that a person was being buried alive. Other officers included D/CPI. Hamis, D/C Allan and D/C Amani. All were not in police uniform. At the cemetery they saw many people and a fresh grave. Some people were digging another grave near it. They were uttering hopeless words saying that, some people should eat

boiled corns (*wale kande hao*, in kishwahili). The PW.3 then informed them (other policemen) that a son of the deceased who had been buried alive had shown people who had committed the offence. They were the ones who were digging the other grave and those who were on the fresh grave. The PW.3 asked the other officers to mark the suspects and each officer had to arrest at least two of them upon him making the agreed sign of touching his head.

The PW.5 further testified that, when PW.3 made the agreed sign, one of the officers shot a bomb to scare the crowd. He (PW.5) then arrested the two suspects he had marked. D/C Amani and D/C Allan also arrested two each. Additional police officers who came to assist in the exercise of arresting the culprits also arrested six suspects. All the 12 suspects were thus, put into the police motor vehicle and taken to Mbeya central police station. The first accused who had been retained at Mbarali police station was also joined with the other arrested suspects.

It was also the evidence by PW.5 that, the two suspects he arrested at the cemetery introduced themselves as Yohana Kilimani and Kenedy Simon. However, in court, he said, he could identified Yohana (fourth accused) only and not the other one (Kenedy). He also said, in court that, he remembered the first accused (who had been taken from Mbalizi police station) the second, third, fifth, sixth and the seventh. This was because, he travelled with them in the motor vehicle for long time from Mshewe village to the Mbeya central police station.

Upon being cross-examine, the PW.5 said, it took about an hour and a half or two between the time when the first group of police officers arrived at the cemetery to the time when they started arresting the culprits. He arrested the two suspects following the briefing from PW.3. The burial area was open to the extent that, one could see another person even at a distance of 100 meters. The youths dug the grave for Juma in turns. The six suspects who were arrested by the additional policemen were arrested without being pointed by any other person. He (PW.5) carried a gun and other policemen also had guns when they went to the cemetery. PW.5 also said, he did not know where the second person he had arrested at the cemetery was.

When he was examined by assessors, PW.5 replied that, the suspects could not run away upon burying the deceased alive. This was because, they did not know that there were policemen there. He did not also see in court the suspects who had been arrested by the additional policemen.

In the examination by the court, the PW.5 said, he did not hear the conversation between PW.2 (Tunosye) and PW.3 when the former was showing the culprits to the latter. He (PW.5) thus, acted upon directions of the PW.3 himself in arresting the two suspects.

One No. F. 4204, **D/Cpl. Hamisi** testified as PW.6. His evidence was that, he works, in the investigation department at Mbeya central police station. On the material date he was among the police officers who accompanied PW.3 to Mshewe village following the information relate on burying the deceased alive. He mentioned other officers who were also

mentioned by the PW.5. In fact, his evidence was similar to that of PW.5. He only added that, the persons who were on the fresh grave were jumping on it. PW.3 instructed him (PW.6) to remain in the motor vehicle for guarding the weapons which were in it. The PW.3 also instructed PC. Shabani to explode a bomb on air when additional policemen arrived. He (PW.6) thus, remained with PC. Shaban at the motor vehicle.

It was also the story of the PW.6 in court that, when PW.3 touched his head after the burial of Juma, PC. Shaban exploded the bomb on air. The other police officer thus, arrested two suspects each. The additional force also arrived. At the end of the day, 12 suspects were arrested. The first accused was collected at Mbalizi police station where he had been retained. The arrested persons were taken to Mbeya central police station. PW.6 also identified in court the accused No. 2-7 as being among those who were arrested at the cemetery. He further said, the officers then collected the tools (exhibit P.2 collectively) which were used for digging the graves at the cemetery. They included two hoes, two spades and an iron tool (*sululu* in kiswahili).

It was further the evidence by PW.6 that, he was assigned to investigate the case in cooperation with another police officer. On the 7th November, he accompanied the PW. 4, Dr. Yunus to the cemetery to examine the dead body of Hanahela and he did so successfully upon exhuming it from the grave. He also made the sketch map (exhibit P. 3). He then took PW.1 (Edward) to the police station for identification parade. It was conducted by one Insp. Mpeleka who later gave him (PW.6) four records of the parade showing that 7 suspects had been identified

therefrom by PW.1. He (PW.6) then received different statements of the suspects recorded by various police officers. Two other more suspects were arrested on the 28th January, 2014. These two suspects were the eighth and ninth accused persons whom he identified in court. He (PW.6) then recorded their statements. On the 7th February, 2014 he took the two suspects to the justice of peace for recording their extrajudicial statements and they did so successfully.

When D/Cpl. Hamis, was recalled (and testified as PW.10) as hinted previously, he said that, on the 9th November, 2013, as a police officer, he also wrote a statement of two witnesses who had participated in the identification parade at issue. He remembered the witnesses by their respective first names as Simbaya and Mbanganile. Simbaya told him (D/Cpl. Hamis) that, in the parade he had attended, one suspect called Lucas Godwine was identified by a witness. As to Mbanganile, he told him that, a suspect called Haroun Yende was identified in the parade he attended. Both witnesses signed their respective statements to show that they were correctly recorded. He (D/Cpl. Hamis) also put his certificates at the bottom of each statement. He tendered the two statements in evidence under section 34B of Evidence Act as follows: that of Mbanganile as exhibit P. 11 and that of Simbaya as exhibit P. 12.

The evidence by D/Cpl. Hamis on cross-examination was that, though he saw PW.1 (Edward) and another relative of the deceased talking to PW.3 (ASP. Mutatiro), he did not hear their conversations. It took about an hour and a half in waiting for orders from the PW.3 for effecting the arrest.

The arrested suspects are the ones he saw jumping and applauding themselves on the fresh grave.

In his re-examination, D/Cpl. Hamisi said, the sketch map he made showed actual distances from one point to another, but his evidence was based on mere opinion or estimations regarding such distances. The court should thus, rely upon the sketch map.

In the course of his examination by assessors, D/Cpl. Hamis said, no accused person in court was arrested by the additional police officers. The ones who were arrested by them were released at the police stations after they had been sorted out. When he was examined by the court, he said, he could not remember which accused among those in court was arrested by which police officer among those who effected the arrest.

On his part, one **ASP. Peter Mpeleka**, as PW.7 testified that, on the 9th November, 2013 he was an Inspector of police in Mbeya. On the 9th November, 2013, the PW.3 assigned him (PW.7) to conduct the Identification parade regarding 12 suspects of murder. They had to be identified by one witness called Edward (PW.1). The investigator of the case had to arrange the parade and his (PW.7) duty was only to supervise it. One D/C. Leonard was assigned to call the identifying witness. The parade was conducted in six phases according to the requirement of the Police General Orders (the PGO). This followed the fact that, the suspects were 12. Each phase had 11 members, which said number included the two suspects. Those two suspects were put in different positions in the parade and the witness touched the identified suspects. The 11 members

of the parade were facing a building and stood in only one line in the open space at the compound of the Office Commanding of the District (OCD). The other 9 members of the parade in each phase were taken from the police lockup according to the OC-CID. The said 11 members of the parade in each phase were of different height, some were tall and others short. They were also of different skin complexions including brown, black and white (*weupe, weusi na maji ya kunde* in Kiswahili).

It was also the evidence by PW.7 that, the identifying witness was kept in the office of the OC-CID (ASP. Mutatiro) to wait for identifying the suspects. The office of the OC-CID is also in the compound of the OCD'S office. He did not know however, what the witness was doing in that office. He did not also know if ASP Mutatiro was in his office. The parade was conducted at a distance of about 50 meters from the office of the OC-CID.

The results of the parade, according to the PW.7 were as follows: in the first three phases, both suspects were identified, but in the fourth phase only one suspect was identified. No suspect was identified in the fifth and sixth phases. A total of 7 suspects were thus, identified in the parade and they confirmed that fact in their respective identification registers.

PW.7 further testified that, when the seven suspects had been identified, the necessary Identification parade registers were felt accordingly. The registers (i. e. exhibits P. 4, 5, 6 and 7) showed the position of each identified suspect in the parade and each of them had to show that he had been identified. He (PW.7) also had to verify that fact.

The registers were handled over to the OC-CID. The exhibits 4-7 related to the following suspects respectively: exhibit P. 4 (for Yohana and Ergenes), Exhibit P. 5 (for Julius and Lucas), exhibit P. 6 (for Nasibu and Philip) and exhibit P. 7 (for Haroun). PW.7 also said, he could remember the faces of the accused persons, but not their names.

In his cross-examination, the PW.7 testified that, according to paragraphs 1-6 of the PGO No. 232, where two suspects are to be identified, there must be 10-12 members of the parade, the suspects inclusive. The exhibit P. 4 for example, showed that, it had 10 members including the suspects Yohana and Ergenes. This was the case for all other registers related to the rest of the suspects. That means that, the non-suspect members in those phases of the parade were only 8 in each parade. When he went to supervise the parade, he found the members already prepared by the investigator of the case. He did not know what was the identifying witness doing at the office of the OC-CID (PW.1).

He further said, he informed each of the suspects of his rights in the parade. Such rights included the following: that, the identifying witness will go through the parade in front and behind them and touch the identified suspect. He also informed them that, an identified suspect had to confirm in the register that he had been identified.

In conducting the parade, D/C Leonard and D/C Alan had roles to play in accordance to the PGO. The former had the role of bringing the identifying witness to the parade and the later had to return him. He did not produce in court the identification registers for the other two phases

because, in such phases no suspect was identified. In fact, the eighth and ninth accused persons were not identified in the parade.

When examined by the court, the PW.7 testified that, in his examination in chief he said that each phase of the parade had 11 members including two suspects, but in cross-examination he said, each had 10 members, the two suspects inclusive. However, the discrepancy was due to the lapse of long time from the time he had supervised the parade to the time of his testimony (2nd September, 2020). However, the truth is that, each phase of the parade had 10 members including the two suspects. The court may take this later version of the evidence as true. However, in each phase of the parade there were new members. The difference of the appearance of the members of the parade did not simplify the identification to the identifying witness. He did not ask if there was a possibility of having other members of the parade who had similar appearance with the suspects. In each of the phases of the parade, the members were arranged and he would only go to supervise it. He also asked if any suspect had a question to ask, but none of them asked a question. He also informed the suspects of their right to choose the position in the parade and put on the attire they preferred. He did not mention these rights when being cross-examined because, he forgot to do so.

The prosecution further invited one No. E. 577, D/Sgnt **Exaud Mndeme** as PW.8. He gave the following evidence: as a police officer, he was assigned by the OC-CID, PW.3 (ASP. Mutatiro) to record the statement of one **Ezekia s/o Kibona**, as a witness who had attended the

identification parade at issue. That was on the 9th November, 2013. The said Ezekia told him (PW.8) that, he was in police lock up for other criminal suspicions. He was asked to attend the parade with other persons. In the parade, the members were put in a single line and a witness was called to identify the suspects of an offence. A suspect called Philip Mwanga who was standing on his (Ezekia) right side, was identified by the witness. The PW.8 thus, gave the statement to Ezekia who read and signed it by a pen to show that it was genuinely recorded. He tendered the statement in evidence under section 34B of the Evidence Act, Cap. 16 R. E 2019 (henceforth the Evidence Act) as exhibit P. 8.

In his cross examination, the PW.8 said, Ezekia told him that, in the parade he attended, other four suspects were identified, but he (PW.8) did not ask him the names of such other suspects since he was not standing near them.

When examined by the court, PW.8 said, Ezekia told him that, the parade he attended had 10 members and a total of 4 suspects were identified in that parade, but he did not mention the names of other the three suspects.

In his turn, one No. E. 6796 D/Cpl. **Vincent Godfrey Henjewe**, gave the following evidence as PW.9: that, as a police officer at Mbeya central police station, on 9th November, 2013, he was assigned by PW.3 to record statements of two witnesses namely Antony Kombwe and Bahati Julius. The two told him (PW.9) that, they were in the police lockup for other criminal suspicions. They were involved in the identification parade

under consideration. Antony stood as the last person from the right side. They also said, the identifying witness touched one Nasibu Saidi who was slim, brownish and tall. Antony said, Nasibu was standing on his left side in the parade. On his part, Bahati said, the said Nasibu was put on his right side.

It was also the evidence of PW.9 that, Antony and Bahati signed their respective statements to show that they were correctly recorded. He (PW.9) also put his certificate to that effect in both statements. He then tendered the two statements in evidence under section 34B of Evidence Act as follows: that of Bahati as exhibit P. 9 and that of Antony as exhibit P. 10.

Another witness was one **No. G. 1007, D/Cpl. Alan Kivamba** who testified as PW.11. He told the court that, as a police officer, on the 9th November, 2013 he recorded a statement of a witness, one Timoth Helman who had participated in the identification parade under discussion. The said Timoth told him (PW.11) that, in the parade, a suspect called Haroun Yenda, who was standing on his (Timoth) right side, was identified by the identifying witness. Timoth read and signed his statement to confirm that it was correctly recorded. He (PW.11) also certified the statement at the bottom. PW.11 thus, tendered the statement in evidence under section 34B of the Evidence Act as exhibit P.13.

The last prosecution witness was No. F. 7892, **D/Cpl. Werema**. He testified as PW. 12, that, on 9th November, 2013, he recorded the statement of a suspect one Frank Sanga who was in police cells. Frank told

him (PW.12) that, he had participated in the identification parade at issue. In the parade, a person called Yohana Helman was identified by an identifying witness. The PW.12 then tendered the statement in evidence under section 34B of the Evidence Act as exhibit P.14.

Upon the closure of the prosecution case, the court found all the nine accused persons with a case to answer. Upon being informed of their statutory rights under section 293(1)-(3) of the CPA, they all chose to make their respective defences on oath. The first and fourth accused persons (DW.1 and DW.4 respectively) also opted to call one witnesses each. Their respective defences were as follows:

The firsts accused, **Julius Katisha Ngole**, as Defence Witness No. 1 (DW.1), testified in his examination in chief that, on the material date, he was chairman of Mshevage hamlet. In the morning of that date he attended the burial of one Juma Hanahela to supervise the burial proceedings as the chairman. This was because, the late Juma lived in his hamlet. He found relatives of Juma including his (Juma) father, the deceased (Hanahela Mwakabana) and other persons. One Fenad Mwankwasya advised him (first accused) to ask the deceased (Hanahela) to go and show the place where the grave for Juma would be dug. The deceased showed the place for the purposes. Some youths went on digging the grave while other persons, including DW.1 himself went to Juma's house which was near the cemetery. The youths were about 18 in number. At around 11.25 am, the youths informed him (first accused) that, the grave was complete.

It was also the evidence by the first accused that, he later heard the youths making noises from the grave. They were chasing someone saying he was a witch like the deceased (Hanahela). When he went to the cemetery to see what was the matter, the youths asked him (first accused) to take away Edward (PW.1) who was there, because he was a witch like the deceased (Hanahela). They pushed him (PW.1) to him (first accused). They then beat both Edward and the first accused. They both run away. He (first accused) then heard people saying, the youths were burying Hanahela alive. He went back to the grave where there was dust. The youths started beating him again. They were many and he could not identify any of them. There was also dust which impaired vision. He (first accused) then went to Mbalizi Police station to report the matter so that the deceased could be rescued from being buried alive. He recorded his statement there through a woman police. However, he was put in the police cells following the directives of the Officer Commanding of the Station (the OCS). He was later taken to Mbeya central police station where he recorded another statement.

The first accused further testified in his defence that, on the third day after his arrest, he was subjected to an identification parade that involved a total of 11 persons. The said Edward (PW.1) went to the parade in the company of a police officer and pointed every member of the parade. He also touched him (first accused) on his head from behind. The other 10 members of the parade were of different appearance, some were huge and some thin. His clothes were date at the parade as he had been in the

funeral activities before the arrest. He thus, prayed for the court to acquit him.

When he was cross-examined, the first accused said that, he used a motor cycle when he went to report the matter to Mbalizi police station. He was with the deceased (Hanahela) when he showed the place for digging Juma's grave. He saw the PW.1 at 11. 30 am at the burial place when he went to inform the deceased that, the grave for Juma was complete. The youths who dug Juma's grave were from his hamlet and other 7 hamlets of the area. His hamlet is in Mshewe village which covers the 8 hamlets. He did not also ask for the reasons of burying the deceased (Hanahela) alive. This was because as he was, previously beaten.

In his re-examination, the first accused said that, he could not report the matter to police Mbalizi by phone because, his phone had an exhausted battery (not charged). He did not also have the phone numbers for the police station.

When he was examined by an assessor, the first accused said, he had no any protection for security in performing his duties.

On his part, the second accused **Philip s/o Wanga**, who testified as DW.2, told the court that, on the material date, at 8.00 am he went to his farm at Igugu village. He returned at 11.00 am and went to drink alcohol in a pombe shop at Mshewe village. He was thus, arrested at the pombe shop on the material date and taken to a police motor vehicle. He was later taken to Mbeya central police station. He was put in a queue for

identification, but he was not identified. He did not participate in burying the deceased alive. He thus, urged this court to acquit him.

Upon being cross-examine, the second accused said, he did not attend to burial of Juma Hanahela because, he did not know about his death. He did not also inform the court before that he would rely upon on the defence of alibi.

The defence by the third accused **Nasibu Mvango Simbayanje** (DW.3) was that, on the material date, as a conductor of passengers' vehicles, he travelled from Mbalizi to Chunya with a motor vehicle of Land-cruiser make. The vehicle stopped at Mshewe village and he went to buy sigarate from a shop. He heard a bursting sound like a bomb explosion while he was still in the shop. When he got out of the shop, he was arrested by policemen. There was a fracas at the place and people were raining randomly. He was put in a police motor vehicle in which there were other persons. They were taken to Mbeya central police station. At the police station, someone asked him for money so that he could assist him in the case. He did not accept the offer as he was innocent. He did not also participate in the murder of the deceased and he did not know him. He thus, prayed for this court to let him free.

Upon being cross-examined, the third accused testified that, the driver of the motor vehicle he travelled with was one Michael and it was his first time to travel with him. He did not remember if any of the other accused persons were in the police motor vehicle he was put in. He was involved in an identification parade at police station. He did not also inform

the court earlier that he would rely upon the defence that he was not at the scene of crime. He did not also know where the bomb sound came from. After his arrest, he did not know where did the drive of the motor vehicle he was travelling with went. He did not further know the person who had asked for money from him at police station. In the identification parade, PW.1 identified him though he did not know him before.

In his defence, the fourth accused, **Yohana Herman Mwariego**, who testified as DW.4, told the court that, on the material date, he was in Ifwekenya village in Chunya with his junior brother, one Boniface Herman Mwariego, a commercial motor cyclist (Bodaboda). He went there to visit his parents in law. They left the village at 2.00 pm on a motor cycle rode by Boniface. When they arrived at Mshewe village, while on their way to home, they met two policemen near a primary school. The policemen arrested them and took the motor cycle, its ignition keys and helmet. They put them into a police motor vehicle and they were taken to Mbeya Central police station. At the police station, he was put in a queue for purpose of identifying suspects who had buried a person alive. PW.1 (Edward) was brought to identify some suspects. He pointed a finger at him (fourth accused) from a distance and thereafter he touched his shoulder from behind. He thus, prayed for the court to let him free as he knows nothing about the case and he does not even live at Mshewe village where the event occurred.

The fourth accused's evidence in cross-examination was that, he did not attend the burial of Juma Hanahela and he did not know him. He did not also inform the court earlier that he would rely on the defence that he

was not at the scene of crime on the material date. He did not also know PW.1 (Edward) before the event.

In examination by assessors, the fourth accused said, he was arrested at 4.00 pm. His brother Boniface was later released for the reasons he (fourth accused) did not know.

Lucas Goodwell Mumila, the fifth accused person testified as DW.5. He told the court that, he lived in Ituha-Mbeya District. On the material date he went to Mwanjelwa, in Mbeya City and Uyole. He received a call from one Amazon Chaka inviting him to go to Chunya for a football league as he is a footballer. He then decided to travel on a hired motor cycle to Chunya (Mbuyuni area). On his way, they reached at Mshewe village. There was a hectic situation in the road as people were running randomly. The motor cyclist stopped. However, policemen arrested both of them and put them into a police motor vehicle. They were taken to Mbeya central police station. He was not involved in burying the deceased alive. He thus, urged the court to let him free.

During his cross-examination, the fifth accused said, he and his advocate did not inform the court earlier that he would depend on the defence that he was not at the scene of crime. He did not admit during the preliminary hearing that he lives in Mshewe village. The motor cyclist who rode him was not in court.

In the examination by an assessor, the fifth accused said, he did not know the deceased Hanahela Mwakabana as he did not live in the deceased's village.

The sixth accused, **Haroun Yenda** (DW.6) told the court in his defence that, he lived in Mkwajuni area of Mkwajuni District within Songwe region. On the material date he travelled from Mkwajuni to Iwala village of Mbeya District for a family meeting. He left Iwala at 2.00 pm for his home. He used a motor cycle for hire. On the way, they were arrested by policemen at a place he did not know. They were put into a police motor vehicle and taken to Mbeya central police station via Mbalizi police station from where the first accused was collected. After 4 days of staying at the police station, he was subjected to the identification parade. The identifying witness was in company of a police officer. The officer pointed a finger to the members of the parade from a distance. When they went near the parade the witness pointed at him (sixth accused), but he did not know that witness before. He thus, prayed for this court to let him free because he knew nothing on this case and he did not know the deceased.

In his cross-examination, the sixth accused said, he did not remember the village in which he was arrested. In that village, the situation was calm at the time he was arrested. He did not also remember how many persons were in the police motor vehicle he was put in. He was thus, not at the scene where the deceased was buried alive. However, he, and his advocate did not inform the court earlier that he would depend on the defence that he was not at the scene of crime at the material time. He did not also remember if any of the co-accused was in the police motor vehicle he was put in.

In his defence, the seventh accused, **Ergeness s/o Adam Mbogo** testified as DW.7. He told the court that, he lived in Mpakani hamlet within

the Mshewe village. In the morning of the material date, he went to his farm located in Mpakani hamlet. He worked in the farm up to 2. 30 pm and went to the market place, at Mshewe village to buy some provisions. While at the market he was arrested by policemen and put into their motor vehicle where there were other persons. They were taken to Mbeya central police station via Mbalizi Police station. He did not know about the burial of Juma. While at Mbeya police station they were arranged in a queue and PW.1 (Edward) went to the queue to identify suspects. He was in a company of a policeman who pointed to the queue at a distance. The PW.1 then came near and touched him (seventh accused) and other persons. He did not kill the deceased, he thus urged this court to let him free.

In the cross-examination, the seventh accused said, he, and his advocate did not tell the court before, that he would rely upon the defence that he was not at the scene of crime at the material date. He saw the PW.1 standing with the PW.3 at the market place where he was arrested.

In his turn, the eighth accused, **Wilson Nairobi Mzombwe** who testified as DW.8 told the court that, he lived in Mshewe village, at Ijombe hamlet. While sleeping at his home in the midnight of 8th January, 2014, policemen kicked his door open, beat and arrested him. They put him in their motor vehicle and took him to Mbeya central police station. He was later joined into this case after a month and 3 days. He was not aware of the deaths of both Juma and the deceased (Hanahela). He thus, pressed the court to acquit him.

When he was cross-examined, the eighth accused said, at all the material period from the fateful date to the date of his arrest he was in his hamlet. He heard about the death of the deceased when the charge was read to the accused persons in court.

The defence by the ninth accused, **Rashid Japhet Bwidiko** (DW.9) was that: he lived in Shitete village of Mbye rural District. On 28th February, 2014 when he was travelling to Chunya by a bicycle, he met policemen at Mbalizi area and they arrested him. They put him into their motor vehicle and took him to Mbeya police station. He was then taken to court. However he did not know both Juma Hanahela and Hanahela Mwakabana. He did not know anything about this case, he thus, prayed to this court to acquit him.

During the cross-examination, the ninth accused said, He did not know the village called Mshewe. Policemen who arrested him did not testify in court.

DW.10, **Laweli Mwastalula Mwankwasya** in fact, supported the story of the first accused. He testified that, he lives at Mshewe since he was born. He knows the first accused (Julius Katisha Ngole), the late Juma Hanahela and the deceased (Hanahela Mwakabana). The first accused was chairman of Mshewaje hamlet for long time. He also knew the seventh accused (Ergeness). In the morning of the fateful day, at 8.00 am he went to the funeral of Juma at Mshewe village. The said Juma had died a day before. At the burial place he found the deceased (Hanahela, who was also father of the late Juma) and his other relatives. He (DW.10) and other

people suggested that, they should start digging the grave for Juma. They sent the first accused to ask Hanahela (the deceased) to show people the place for digging the grave of his son (Juma). The first accused did so and Hanahela showed them the place. They started digging the tomb for Juma.

When people had started digging the grave for Juma, a group of youths arrived and took over the task. Other people, including him (DW.10), went back to the house of Juma for waiting. When the grave was complete the youths informed the first accused of that fact. The first accused went to report the completion of the grave to the said Hanahela who was in a family meeting. Thereafter Hanahela and his relatives, including Edward (PW.1), went to inspect the grave. He (DW.10) was at the house of Juma, but he heard the youths making noises and uttering insults saying "you are witch," "*kuma mayo*" (a Swahili insult mentioning private parts of one's mother). He (DW.10) did not however, know immediately to whom the insults were directed. At that time the first accused was not at the grave, he was talking to ladies who were preparing food at a different place in Juma's compound. He (first accused) then went to the grave to see what the matter was. Soon thereafter, he saw the first accused and Edward coming back to the house while dusted. The first accused informed the DW.10 and others that, the youths had beaten him and Edward. A son of Hanahela, one Tinosye (PW.2) informed the people that, his father, Hanahela had been buried alive. He (DW.10) and other people could not go to the grave at that time since the youths were violent and were through stones to them.

It was also the evidence of DW.10 that, upon being informed of the event of burying the deceased alive, he (DW.10) and other elders decided to report the matter to police. They advised the first accused to do so. He (first accused) went to report the matter to police, but he did not go back to the village again. When police went to the cemetery, the fracas had settled, and he (DW.10) did not see the youths who were digging the grave for Juma. When he (DW.10) went to the grave upon the arrival of policemen, he saw a crowd of youths that made it difficult to identify a person. He also participated in the burial of Juma in another grave. The policemen then shot a bullet on air, and people, including DW.10 himself dispersed.

When he was cross-examine, he said, he could not know what was going between the first accused and the group of youths since he was at Juma's house which was about 100 meters from the grave. He heard Tunosye saying that, his father had been buried alive. But, he did not know exactly at which time Juma was buried.

In re-examination, the DW.10 said, the event occurred at about 11.30 am, but the burial of Juma was at about 15.30 pm.

When he was examined by the court, DW.10 said, he did not see the youths burying Hanahela alive. He did not also know how the first accused got dusted.

The last defence witness was **Boniface Herman Mwariego** who testified as DW.11. He actually, supported the story of the fourth accused, his brother. He testified that, on the material date he travelled with him by

a motorcycle from Chunya to Mbeya. He was riding the motor cycle and his brother was a passenger. When they arrived at Mshewe village, they were arrested by policemen. They were put into the police motor vehicle in which there were other persons. His (DW.11) motorcycle was taken by a policeman. They were then taken to Mbeya central police station via Mbalizi police station from where one of the first accused was collected. He (DW.11) was later released from the police custody and given his motorcycle.

In his cross-examination, DW.11 said, he had forgotten the complete registration numbers of his motorcycle as he had sold it. He (DW.11) and the fourth accused left Chunya for home at 2. 00 pm on the material date.

Upon the closure of the defence case, both sides made their respective final written submissions. The submissions on behalf of the Republic were signed by one State Attorney who did not wish to disclose his name. On the other hand, the written submissions for all the accused persons were signed jointly by both defence counsel. Representatives of both sides also addressed the court on the summary of their respective written submissions. I will consider the submissions in the due course of deciding this case.

It must be noted at this juncture that, in this case, the witnesses were mentioning two dead persons, i. e. Hanahela Mwakabana and Juma Hanahela (father and son respectively). It is however, shown in evidence that, the former died on the material date while the later had died a day

before. The former died violently while the later suffered natural death. The case at hand however, is related to the former only and not the later.

It is also worth noting at this stage that, though during the preliminary hearing mentioned above no undisputed material facts for this case were identified, the evidence has shown that, both sides of the case do not dispute the following material facts: that, the deceased (Hanahela) died of suffocation due to being buried alive in a deep grave as testified by Dr. Yunus (PW.4) and as shown in the post-mortem report (exhibit P.1). The first accused was the chairman of Mshevaje hamlet within the village of Mshewe where the event occurred. He also present at the scene of crime, i.e at the burial of Juma Hanahela on the material date and time. Furthermore, it is not disputed that, upon being arrested, all the accused persons were put in Mbeya central police station where the 1st -7th were subjected to an identification parade. It was further agreed, according to the final submissions by both sides of the case that, there was no sufficient evidence against the 8th and 9th accused persons.

A summing up of the case having been made to the three assessors who assisted the court in the trial as required by the law, they were unanimously of the view that, the evidence adduced by the prosecution against all the 9 accused persons was insufficient. They thus, opined that, they are all not guilty of the offence they were charged with and should be acquitted.

Having considered the evidence, the submissions by the parties, the opinion by the assessors and the law, I will now proceed to decide the

case. In my settled opinion, for a conviction of the offence of murder under section 196 of the Penal Code to stand, the prosecution has to prove the following ingredients:

- a. That, the accused actually caused the death of the deceased or killed him,
- b. That, he killed the deceased with malice aforethought, or
- c. That, the killing was performed in committing an unlawful act or omission.

I will therefore, test the ingredients of the offence in the case at hand starting with the one listed as the first herein above. In case need will arise I will also test the rest. Otherwise, I will make necessary orders according to the law.

Regarding the first ingredients of the offence, the major issue for determination is, as rightly contended by the learned defence counsel, whether or not all the 9 accused persons, or any of them caused the death of the deceased (Hanahela Mwakabana). This issue is irrespective of the consensus by the parties in their final submissions mentioned above that, there is no sufficient evidence against the eighth and ninth accused persons. This is because, the law requires courts to decide cases according to the law and not according to the agreements by the parties. The court may thus, either agree with them or decide otherwise on giving reasons.

Indeed, it is a general principle of our criminal law in cases like the one under consideration that, the prosecution bears the burden of proving the case against the accused. The standard of proof is beyond reasonable

doubts. The accused bears no duty to prove his innocence. His duty is only to raise reasonable doubts in the mind of the court.

In the case at hand, it was the prosecution case that, all the 9 accused persons killed the deceased by burying him alive in the grave that had been intended for Juma Hanahela who had suffered a natural death. The accused persons disputed this fact. In discussing the major issue posed above (regarding the first ingredient of the offence), I will divide the 9 accused persons into three categories depending on the nature of the evidence against them. The first category is constituted by the first accused alone. The second category is made of the second, third, fourth, fifth, sixth and seventh accused persons (henceforth the six accuseds). The third group, is formed by the eighth and ninth accused.

I will firstly discuss the third category of accuseds, then the second and lastly the first category of the first accused alone. This plan is for purposes of convenience.

Concerning the third category (of the eighth and ninth accuseds), the available prosecution evidence shows that, they were not arrested at the scene of crime (i.e. at the cemetery). They were also neither involved nor identified in the identification parade. It is also not explained as to how they were arrested. In their respective defences, the twin accused persons testified that, they were not arrested on the material date. They were only arrested at different places unrelated to the scene of crime. Moreover, none of the prosecution witnesses gave evidence implicating them. I therefore, approve the consensus of both sides of the case in their final

written submissions that, there was no sufficient evidence against these two accused persons.

Regarding the second group formed by the six accuseds, and according to the evidence and final submissions by both sides, I am of the view that, the following two sub-issues must firstly be resolved before considering the major issue in relation to them:

- i. Whether the circumstances of the case at hand attract an issue of identification of the six accuseds.
- ii. In case the answer to the first sub-issue is in the affirmative, then whether all the six accuseds or any of them was properly identified.

Regarding the first sub-issue, the learned State Attorney for the Republic submitted that, since the incident took place at daytime and the 2nd -7th accuseds were arrested under hot pursuit right at the scene of crime, there is no issue of their mistaken identification. He supported his contention by citing the decision of the Court of Appeal of Tanzania (the CAT) in the case of **Joseph Munene and Ally Hassan v. Republic, Criminal Appeal No. 109 of 2002, CAT at Arusha** (unreported).

On their part, the learned defence advocates argued in their submissions that, several conditions at the scene of crime were not favourable for an accurate identification of the perpetrators of the crime at issue.

In my view, the circumstances of the case attract an affirmative answer to the first sub-issue posed above for the following reasons: in the first place, it is trite law that, the evidence of visual identification of an accused person is the weakest and most unreliable, no court should therefore, act on such evidence unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely water tight: see the decision of the CAT in the landmark case of **Waziri Amani v. R [1980] TLR 250**. The same court held in the case of **Saidi Chally Scania v. Republic, Criminal Appeal No. 69 of 2005, CAT at Mwanza** (unreported, at page 7 of the typed version) and I quote verbatim the relevant paragraph for a readymade reference:

"We think that where a witness is testifying about identifying another person in **unfavourable circumstances**, like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all the aids to unmistakable identification like proximity to the person being identified, the source of light and its intensity, the length of time the person being identified was within view and also whether the person is familiar or a stranger." (Bold emphasis is provided).

In my further view, therefore, darkness is not the only factor causing "possibilities of mistaken identity" envisaged in the **Waziri Amani case** (supra) and "unfavourable circumstances for identifying another person" envisioned in the **Saidi Chally case** (supra) as the learned State Attorney wanted to propose in his written submissions. These two precedents therefore, discussed on darkness only as one of the factors which may cause the conditions mentioned above. There are, in my view, various other factors which may cause the above mentioned conditions even at broad daylight. Such factors include darkness (itself), fog, smoke, dust,

crowded or congested scenes, hidden faces, swift movements, long distance between the identifying witness and the culprit, bushes etc, as long as such factors are capable of causing impeding human ocular assessment (eye sight or vision).

Some of such other factors (apart from darkness), which may cause the above mentioned condition of "possibilities of mistaken identity" or "unfavourable circumstances for identifying another person" have been tested by courts of this land. In the case of **Saidi Hatibu v. Republic [1984] TLR 280** for example, this court (Samatta, J, as he then was), held that, it was unsafe for the trial magistrate to have accepted the identification evidence because, the distance between the identifying witness and the appellant was quite long and the appellant was in a bush. Moreover, in the case of **Justin Nyari and another v. Republic, Criminal Appeal No. 37 of 2006, High Court of Tanzania (HCT), at Arusha** (unreported) this court (Othman, J. as he then was), held *inter alia*, that, the fact that a person was in a stationary car and the culprit was in a car moving at a speed of 40-45 kilometers per hour, and the fact that the observation by the identifying witness was fleeting, and the fact that a car was parked between the identifying witness and the culprit, could not ensure a proper identification of the culprit though the alleged identification was at daylight.

There are other various instances demonstrating the view just underlined above. In the case of **Capt. Manuzu Ambrose Lamu and another v. Republic, Criminal Appeal No. 145 of 1991, CAT at Mwanza** (unreported, at page 10 of the typed version), it was also

observed by the CAT that, a witness could not identify the appellant at a distance of 40 paces away though it was daylight (at 8.30 am). Moreover, in the case of **Ayubu s/o Zahoro v. Republic, Criminal Appeal No. 177 of 2004, CAT at Mwanza** (unreported, at page 5 of the typed version) it was observed that, in the attack by a group of violent boys who were throwing stones at the identifying witnesses (though at daylight, i.e. at 4. 00 pm), positive evidence of identification of the attackers was necessary to avoid convicting an innocent person.

In the case at hand, the evidence undisputedly shows that, there was a crowd at the cemetery. There was also dust around the grave at issue when the deceased was being buried alive. Moreover, there is evidence that, at the time the deceased was being buried alive, there was a fracas around the grave since the alleged culprits were making noises, uttering insults and throwing stones. In fact, one of them threatened to cut the PW.1 by an iron tool (*sululu*) before he run away to where the first accused was standing. Moreover, it is shown in the evidence that, the group of persons who were digging the grave of Juma, were same who had perpetrated the event some times before. However, there was no evidence overruling the fact that no any other mourner could have joined the group or that, no any member of that group could have got out of the group and join the other mourners or even go away. There was no evidence showing that someone was putting a surveillance at them at all the material time. PW.3 tried to show in his evidence that, there was no such movements. Nonetheless, he cannot be reliable for this particular piece of evidence. This is because, he came late when the deceased had already been buried alive. He did not

witness the atmosphere before. In my view, therefore, such atmosphere fit squirrely to the factors that may cause “possibilities of mistaken identity” or “unfavourable circumstances for identifying another person” envisaged in the **Waziri Amani Case** (supra) and the **Saidi Chally case** (supra).

Actually, this court is entitled to presume, under section 122 of the evidence Act that, the circumstances which prevailed at the material time around the grave at issue, caused the above mentioned difficult conditions for identifying a person. The court is entitled to presume so under section 122 of the Evidence Act. These provisions provide that, a court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

In my further opinion therefore, the above highlighted principles on visual identification articulated in the land mark **Waziri Amani Case** (supra) and many others including the **Saidi Chally case** (supra), apply not only in relation to darkness as a factor causing such difficult conditions for identifying another person. The principle can apply in relation to any other factor that lead to the same result (of difficult conditions for identifying a person).

Owing to the above reasons, I find that, the circumstances in the **Joseph Munene case** (supra) relied upon by the learned State Attorney in his contentions, were not similar to the case under consideration. In the first place, in that case, the suspect who was arrested was not arrested at

the since of crime as the learned Sate Attorney wanted to envisage. The suspect and his colleagues robbed the complainant while armed. He was continuously chased until when he was arrested somewhere else (in a *masai-boma*). There was neither crowd nor dust at that scene of crime like in the case at hand. Moreover, there was neither crowd nor dust at the place the suspect was arrested. Besides, in the case at hand the accused persons are not alleged to have run away from the scene of crime. They are alleged to have been there at all the material time. The issue here is whether they could be identified following the circumstances at the scene of crime at the material time mentioned above.

Again, in the case at hand the arrest was effected after some time had lapsed from when the deceased had been buried alive. This is because, the arrest was performed by police officers after the burial of Juma when the deceased had already been killed. PW.6 said that, it took about an hour and a half from when the police officers arrived at the cemetery to the time when the arrest commenced. At all that material time police officers were waiting for the orders from PW.3. Evidence also shows that, police officers arrived at the scene when the deceased had already been buried. At that time, the grave for Juma was still being excavated. This evidence shows therefore, that, the time from when the deceased was buried alive to when the arrest was effected was longer than an hour and a half estimated by the witness mentioned above. It was therefore, not possible to presume that the same culprits were being traced at all the material time from the time of the event. It is more so considering the observation I made above that, the possibility for the group of the alleged

culprits to mix up with other mourners and for the other mourners to mix with culprits was not ruled out.

Due to the reasons shown above and the dissimilarities between the circumstances in the case at hand and those in the **Joseph Munene case** (supra), I distinguish that case.

Moreover, the holding of the identification parade at the police station presupposed that, there were some difficulties in identifying the culprits at the scene. They thus, wanted to confirm such identification.

Owing to the reasons shown above, I agree with the two learned counsel for the accused persons that, there was unfavourable conditions for proper identity. I thus, answer the first sub-issue posed above affirmatively that, the circumstances of the case at hand attract an issue of identification of regarding the six accuseds. This answer calls for the examination of the second sub-issue.

The task of this court under the second sub-issue is to inquire if all the six accuseds (under the second group) or any of them was properly identified. The prosecution side did not offer much submissions regarding this sub-issue since it believed that, the issue of identification of the accused persons does not arise. I have however, determined that issue herein above. The defence advocates submitted regarding this issue that, the six accuseds were not properly identified. They contended that, there was no evidence showing the duration of the event and there was dust which impaired vision to PW.1 who said he saw the event. They further argued that, the fact that PW.2 (Tunosye) was arrested and taken to

Mbeya police station with other accused persons, and the fact that he was later released, is a sign that there was no proper identification.

The two defence counsel also attacked the propriety of the identification parade. They argued that, it offended the PGO in the following manner: some arresting officers like DC. Allan and DC. Leonard took a role in the parade though they were also involved in arresting the accused persons at the scene of crime. Moreover, there is no evidence that the six accuseds were informed of their right to make any objection prior to the identification in the parade. There were also discrepancies of age among the persons involved in the parade and some accused persons. They gave examples of the second accused, Philipo Wanga (65 years) who was paraded with one Ezekia (25 years) according to the exhibit p. 8. Again the fourth accused person, Yohana Herman (43 years) was paraded with one Bahati Julius (31 years) according to the exhibit p. 9. Furthermore, exhibit p. 14 showed that, the third accused, Nasibu Mvango Simbayanje (41 years) was paraded with one Frank Songa (26 years).

The two defence counsel further argued that, the law guides that, the requirements set under the PGO for conducting a parade must be fully observed. They cited the case of **Republic v. XC-7537 PC. Venance Mbuta, Criminal Sessions Case No. 87 of [1998] TLR. 2002** to support their contention.

Indeed, I agree with the two learned counsel for the accused persons that, the reasons they have shown above, demonstrate serious weaknesses

in the evidence of identification of the six accused persons under this category.

In fact, PW.3 tried to show that, the PW.2 (Tunosye) had accompanied the police only for making a statement. He tried to show that he was not arrested like the six accuseds. However, this story, in my view, lacks strength. It cannot be understood as to why PW.2 had to be forcibly taken to the police station like that. He could have gone there for making the statement even the next day. The PW.1 also said, he made the statement at police station, but he was not taken forcibly from the scene of crime at the material date the way the PW.2 was taken. Besides, there is evidence from PW.1 that, he even pleaded for the police officer not to take the PW.2, but they were adamant. The prosecution did not also offer any explanation as to why it was so urgent for the PW.2 to be treated that way for the statement. It is thus, surprising that he (PW.2) could be so tried though he was son of the deceased. It is more so considering the fact that, his father had just been murdered brutally only some hours previously. The PW.2 was thus, expected to be in sorrow at that time of the material date when the death of his father was still fresh.

It is thus, believable, as the learned two defence advocates argued, that, PW.2 was also arrested together with the six accused persons, but he was later released. This act shows an uncertainty in the arrest, hence unreliability of the identity of the actual culprits at the scene of crime as rightly argued by the two defence counsel in their submissions.

In fact, apart from the weaknesses of the evidence of visual identification pointed out by the defence advocates, there many other signposts of that weak identification for the six accuseds in the second category. PW1, for example, testified that he did not hear or see the person who instructed the deceased to get into the grave though he was at the grave. He did not also remember which was the accused or suspect who had been arrested first and who was about to be rescued by others before the police intervened. Again, when PW. 2 was cross-examined, he said, he could not say who dug the grave for Juma due to the big number of people around there. Furthermore, PW.3 said that, Tunosye (PW.2) had showed him (PW.3) about 30 youths who had committed the offence and who were then digging the grave for Juma. However, PW.1 (Edward), in his cross-examination said that, though, he could not know the exact number of persons who were digging the grave, they were about 8. In my view, though these mentioned numbers of such culprits were based on estimations only, there is indeed, a big difference between 30 and 8. The great dissimilarity creates doubts if the two witness could actually properly observe the actual culprits in this case.

Again, PW.3 said that, in court he could remember only the first accused and not the other six accused persons who were allegedly arrested at the scene of crime. Furthermore, PW.5 said, he did not see in court one of the suspects (Kenedy) he had arrested at the scene. No explanation was given by the prosecution as to why the said Kenedy was not joined in this case. The presumption here, is therefore that, the said Kenedy was wrongly or mistakenly arrested following a mistaken identify.

Moreover, the arrest of the six accused persons under this second category leaves a lot to be desired. The evidence shows that, they were all arrested by the respective police officers following the instructions in the briefing made to them by their senior officer (the PW.3). However, the evidence further shows that, the instructions by the PW.3 were based on the information given to him by PW.2 (Tunosye). The said Tunosye (PW.2) nevertheless, was not at the scene of crime (at the grave) when the deceased was being buried alive. His (PW.2) knowledge of the culprits depended on the information given to him by PW.1 (Edward) who said he saw the event at a close distance. The evidence also shows that, PW.3 (Tunosye) pointed the culprits to PW.3 when they were digging the second grave for Juma after a lapse of more than an hour (as observed above) from when the deceased had been buried alive in the nearest grave. He (PW.2) did so because, PW.1 (Edward) had informed him that those who were digging the grave for Juma were the same persons who had buried the deceased alive.

As I observed before, the possibility for the mourners to join the group of persons who were digging the grave for Juma or the vice versa was not overruled. It is more so since evidence shows undisputedly that PW.1 (Edward) who claimed to have seen the culprits burying the deceased alive was strange in Mshewe village and he did not know such persons before. It is the law that, it is more difficult to identify a strange face than to recognise a familiar face under unfavourable circumstances. It follows thus, that, the six accused persons were arrested on a third information the source of which was also unreliable. This scenario also

points out that, there was a limited identification of the six accused person in the case under consideration.

There is yet another surprising scenario in the case at hand. Though PW.1 claimed in court that he had identified the accused persons, there was no any evidence showing what he had informed the police about involvement of the these six accuseds to the event at issue. He said in his evidence that, he made a statement at Mbeya central police station on the same material date. However, no such statement was tendered in evidence and there was no explanation given by the prosecution for the omission. This omission was fatal to the evidence of visual identification adduced by PW.1. The law guides that, since such statement is admissible in evidence under section 166 of Evidence Act, failure by the prosecution to produce (in court) the statement of the identifying witness made at police station creates doubts on the identification of the culprit: see the case of **Mohamed s/o Issa v. R. (1968) HCD. n. 262.**

Section 166 of the Evidence Act just mentioned above provides thus, and I quote it for the sake of a quick reference:

"In order to corroborate the testimony of a witness, any former statement, written or oral, made by that witness relating to the same fact made either at or about the same time when the fact took place or before any authority legally competent to investigate the fact, may be proved."

The logic behind section 166 of the Evidence Act and the principle underlined in the **Mohamed Issa case** (supra) is not far to fetch. The statement envisaged under this principle gives the court an opportunity to determine whether what the identifying witness testifies in court is similar

to what he stated in police in view of testing his consistence regarding the evidence on visual identification. Actually, consistence of a witness's statement is one of the important factors for testing his credibility.

Regarding the procedure for identification parades supervised by police officers, it is common ground that, our law makes clear rules regarding them. I will give an overview on the parades here. These parades are essentially investigative in nature, they work together with the evidence on visual identification. The evidence on such parades is, thus, not substantive evidence. Its purpose is to corroborate the dock identification (in court) of an accused by a witness in terms of section 166 of the Evidence Act: see the decision of the CAT in the cases of **Moses Charles Deo v. Republic [1987] TLR 134** and **Benson Kibaso Nyankonda @ Olembe Patroba Apio v. Republic [1998] TLR 40**. The evidence on identification parade proceedings is therefore, aimed at supporting the evidence on visual identification by a witness at the scene of crime; see **Deogratiuous Godwin v. Republic, Criminal Appeal No. 107 of 2005, CAT at Arusha (unreported)**. Such evidence (on identification parade) thus, becomes helpless where the identifying witness in the parade and at the scene does not testify in court: see the **Benson Kibaso case** (supra).

Laws which govern the parades in this country include the following: the Evidence Act (section 166 etc.), the CPA (section 60), the Police Force and Auxiliary Services Act, Cap. 322 R.E. 2002 and the PGO (No. 232) made under Cap. 322. This PGO was made in 1961, but revised in 2006. Case Law also makes a substantial guidance related to the rules on the

parades. The famous case on this subject is **Rex v. Mwango S/O Manaa, (1936) 3 E.A.C.A 29** which has been followed in various decisions of the courts of this land.

The most important aspect to note in conducting the parades is that, there must be fairness to both the suspect and the identifying witness in conducting a parade: see paragraph 1 of the PGO. The rules of the game, according to the generality of the law cited above include the following (to mention a few): the suspect must be informed of the right to choose the position in the parade, the arresting officers and those who participated in the investigation of the case should not participate in the parade and members of the parade should be of similar age, height, general appearance and class of life and their clothing should be in a general way similar, but they should not however, look uniform even as to their hair styles; see also the case of **Tongeni Naata v. Republic [1991] TLR 54** (by the CAT). Other rules are that, members to be identified should not be known to the identifying witness and if the suspect desires the attendance of a solicitor or friend, arrangements must be made for him to attend the parade, as an observer, if he wishes to do so. Again, the identifying witness must make prior description of the suspect before he performs the identification in the parade.

Moreover, in an identification parade, there should be eight or more persons (in it) for one suspect: ten or more for two suspects. If there are more than two suspects, more than one parade will normally be held with different personnel being used to form each parade. It is also a requirement that, the officer conducting the parade will explain the

purpose of the parade to the suspect so as to know if he has any objection to any person participating in the parade. Any objection raised by the suspect will be noted in the identification parade register and immediate steps taken to replace those persons to whom the suspect objects. Furthermore, the officer conducting the parade will explain the purpose of the parade to the identifying witness in the hearing of those on the parade and invite him or her to point out by touching, any person he identifies.

In the case at hand nonetheless, most of the rules mentioned above were not complied with; there was for example, no prosecution evidence showing that the accused persons were informed of their right to choose the position in the parade. The arresting officers had some roles in the parade at issue as complained of by the defence advocates above. PW.7 (ASP. Mpeleka) who supervised the parade for example, testified that, DC. Leonard and DC. Alan were assigned the task of escorting PW.1 (the identifying witness) to and from the office of the OC-CID for each phase of the parade. There was also no similarity of the members of the parade as rightly observed by the defence counsel. PW. 7 also testified that, some members of the parade were tall while others were short, some were fat while others were slim and they were of different skin complexions.

Again, the first accused was already known to the PW.1 before the parade as he (PW.1) said in evidence that, he had been introduced to him at the burial place before the event had occurred. The first accused was thus, unnecessarily involved in the identification parade. It was observed in the case of **Hamisi Ally and 3 others v. Republic, Criminal Appeal No. 596 2015, CAT at Dodoma** (unreported) that, the test in an

identification parade is to enable a witness to identify a person or persons whom she or he had not known or seen before the incident. It followed thus, that, involving the first accused in the identification parade rendered it useless as far as he was concerned.

Moreover, there is no evidence that PW.1 made description of any accused before he identified them from the parade. This omission was against the guidance in the case of **Juma Omary Juma and another v. Republic, Criminal Appeal No. 214 of 2015, CAT at Dar es Salaam** (unreported). There was also no evidence that PW.7 (the officer who conducted the parade) had explained the purpose of the parade to the accused persons (before the parade was conducted) to know if they had any objection to any person participating in it. There is also want of evidence that he (PW.7) explained the purpose of the parade to the identifying witness (PW.1) in the hearing of the accused persons.

It was also surprising in the case at hand that, though it was PW.2 (Tunosye) who had pointed out the accused persons to the PW.3 (ASP. Mutatiro) as the culprits, which said act led to their arrest, he was not called to identify them in the identification parade at issue. Inviting him (PW.2) to the parade to identify the accused persons would have confirmed his story that they were actually, the very persons he had pointed to at the scene of crime so that they could be arrested. No explanation was offered by the prosecution for the omission. This situation creates doubts that, he (PW.2) could not have identified them in the parade since he had not seen them at the scene of crime burying the deceased alive.

The evidence also points out that, instead of PW.2 (Tunosye) the prosecution opted to invite PW.1 (Edward) to perform the task of identifying the suspects from the parade. However, since PW.1 had not pointed out the accused persons to the PW.3 before their arrest, and since the statement he made to the police station was not tendered in evidence for the court to see what he had stated at police station, and since no explanation was offered by the prosecution for the omission, and since there was no scintilla of evidence showing that the PW.1 had made description of any accused before he identified them in the parade as hinted above, then his alleged identification of all the accuseds in the parade was a nullity in law. It is our law that, an identification parade conducted without any prior description of the suspect by the identifying witness is useless; see the **Juma Omary case** (supra) and the case of **Hamisi Ally case** (supra).

Owing to the above reasons, the rest of the prosecution evidence in support of the parade cannot be a good gear to rescue the essence of the parade in the present case. There was therefore, no fairness on the part of the accused persons in the entire conduct of the parade. Our law guides that, in criminal cases, the right to fair trial should be observed from the stage of investigating the case to the finalization of an appeal (if any): see the case of **Mikidadi Rashidi Adam v. Zawadi Mohamed, Criminal Appeal No. 211 of 2015, CAT, at Mtwara** (unreported). This is the indeed, the very spirit of fairness underscored under paragraph 1 of the PGO mentioned above.

It must also be born in mind at this juncture that, the evidence against these six accused persons (in the second group) was wholly based on visual identification according to the circumstances shown above. There was not any other independent piece of evidence implicating them.

All the weaknesses in the pieces of evidence mentioned above in my view, point out that, the circumstances at the scene of crime at the material time were unfavourable for visual identification. I consequently answer the second sub-issue negatively that, all the six accuseds under the second group were not properly identified.

I will now revert to the first category of the accused persons, which is related to the first accused alone (in relation to the major issue). According to the evidence and the submissions by the learned State Attorney for the Republic, the first accuse was implicated in the case at hand for his conduct. This was also the evidence by PW. 1 and PW.2 who showed in evidence that, they suspected the first accused for his conduct. In fact, I agree with the submissions by the learned State Attorney that, the law provides that, in opportune circumstances, the conduct of an accused person soon before, during or after committing an offence may form evidence implicating him. This legal guidance is in fact, based on circumstantial evidence. It is not thus, necessary that in every instance such conduct of an accused persons may implicate him. This is because, the law commands that, for circumstantial evidence to found a conviction, it must provide the evidence in which the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt; see the case of **Hassani**

Fadhili v. Republic 1994 TLR 89 (by the CAT) following **Simon s/o Musoke v R [1958] EA 715**.

In the case under consideration, the conduct imputed to the first accused according to the evidence, relates to his following acts: he was the one who went twice to the family meeting and asked for the deceased Hanahela to go to the grave for approving it. Again, he was only standing quite near the grave at the time when the culprits were burying the deceased alive and he did not obstruct them from doing so as a leader. When PW.1 asked him about the sadistic event, he (first accused) told him to leave the situation as it was. He was also the first person to report the matter to Mbalizi police station, though he delayed to do so by going there physically instead of calling the police by his phone.

Due to the above listed acts of the first accused, the learned State Attorney presses this court to find him guilty under the doctrine of common intention provided under section 23 of the penal code. He contended that, the first accused cannot avoid that involvement since he did not disassociate himself from the actual culprits before the event. That would have been the way for him to avoid the consequences of section 23 of the Penal Code, he argued. He cited the case of **Mhina s/o Mndolwa v. Republic, Criminal Appeal No. 40 of 2007, CAT** (unreported) to cement his contention. The two learned counsel for the accused persons did not argue much on this line since they relied much on their contention that there was no proper identification for all the 9 accused persons.

In my view, the circumstances of the case do not favour the arguments advanced by the prosecution. This is due to the following reasons: it is clear from the evidence of PW.1 that, the culprits at the grave were violent and they even tried to cut him (PW.1) by an iron tool (*sululu*). There is also evidence that, the culprits were uttering insults and were throwing stones. Again, the entire public which was around there could not also obstruct the group of culprits from burying the deceased alive. In his evidence, the PW.1 (Edward) tried to show that the entire public of the mourners were in support of the brutal event that is why they did not interfere. However, that statement was countered by PW. 2 (Tunosye) who showed in his evidence that, when he got out of the house upon hearing the noises from the grave, he saw some mourners crying while others were applauding. Such cries cannot also be interpreted as a sign of supporting the brutal killing of the deceased as PW.1 wanted to suggest. Now, how could one expect the first accused to dire interfere the culprits amid such anger and violence they were causing? In my view, if at all first accused conducted himself in the manner explained above, he might have acted so in fear for his security as he himself said in his defence (when he was examined by an assessor). This court finds this explanation by the first accused reasonable. The court is entitled to presume so under section 122 of the Evidence Act discussed earlier.

Moreover, it was not disputed that the first accused was a local leader at the area. It was thus, not surprising to see him active in supervising such matters like burials. Indeed, PW.1 and PW.2 themselves recognised the role played by the first accused. This is because, PW.1

permitted the deceased to go with the first accused to the grave twice in the presence of PW.2 who did not object the permission. That was the case even after the deceased had informed them that in the grave there were some unusual words being uttered. If these two witnesses could not sense any danger coming, how could they blame the first accused for not seeing it and classify him as one of the culprits?

Furthermore, I do not see anything wrong for the first accused, as a leader, to report the matter to the police. That was his role as a local leader and any other good citizen could do so. Besides, reporting crimes to police or other authorities is an obligation of every citizen of this country; see section 7 of the CPA. In his submissions, the learned State Attorney wanted to implicate the first accused by showing that, he did not go to the police for reporting the event until he was advised by other people as testified by DW.1. Nevertheless, that fact alone does not implicate him owing to the hectic situation that had been caused by the unusual event. Such unfamiliar tragedy could preoccupy the mind of any reasonable person. Again, the blameworthiness that the first accused could have called the police by phone instead of delaying by using a motor cycle is not forceful. The accused gave a reasonable explanation that, his phone had an exhausted battery and he did not have the phone numbers for the police.

Under the circumstances demonstrated above, I distinguish the **Mhina Mndolwa case** (supra) from the case at hand. I consequently disagree with the prosecution that, the first accused can be netted under the doctrine of common intention.


I have also considered the above respective defences of all the accused persons. I am of the view that, since the prosecution evidence did not implicate them as demonstrated above, the evidence by the first accuse as discussed earlier created doubts in the mind of the court. As to the evidence of other accused persons (the 2nd – 9th), I understand that, they gave the defences of alibi. I actually, agree with the learned State Attorney that the defence did not follow the proper procedure under section 194 of the CPA since they did not give prior notice of the defence to the court and the prosecution side. The learned State Attorney also argued that, the accused persons, except the fourth, did not call other persons to support their respective defences of *alibi* as required by the law and as underlined in the case of **Chrisant John v. Republic, Criminal Appeal No. 213 of 2015, CAT** (unreported). However, for the weaknesses of the prosecution case pointed out above, the court cannot find the accused persons guilty for their weak defences only. I therefore, distinguish the **Chrisant John case** (supra) from the case under consideration.

Owing to the above reasons which show insufficiency of the prosecution evidence, I answer the major issue regarding the first ingredient of the offence of murder mentioned above negatively that, all the 9 accused persons did not cause the death of the deceased (Hanahela Mwakabana).

Now, having answered the major issue negatively, I have to, as I hereby do, find that the first ingredient of murder has not been established. The law requires that, all the ingredients of the offence of

murder I listed previously to be established cumulatively and not alternatively. It follows thus, that, since the first ingredient is not established, there is no need to test the rest of the ingredients. I will not thus, test them since doing so will amount to performing a superfluous or academic exercise which is not the core objective of the education process.

I consequently agree with the unanimous opinion of the three assessors that, all the 9 accused persons are not guilty as charged. I accordingly acquit them. It is so ordered.


JHK. UTAMWA
JUDGE
13/10/2021.

Date: 13/10/2021

Coram: JHK. Utamwa, Judge.

For the Republic: Ms. Sarah Anesius, State Attorney.

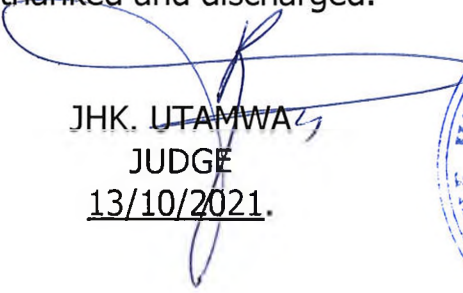
For the Accused Persons: Mr. Daniel Muya, advocate

Accused persons: All nine present.

Assessors: All 3 present:

B/C: Mr. E. Kibona, RMA.

Court: Judgment delivered in the presence of Ms. Sarah Ansius, learned State Attorney for the Republic, all the 9 accused persons, Mr. Daniel Muya, learned defence counsel and the 3 assessors, in court, this 13th October, 2021. Assessors thanked and discharged.


JHK. UTAMWA
JUDGE
13/10/2021.

