

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT MOROGORO

CRIMINAL SESSIONS CASE NO. 27 OF 2020

(Original PI No. 04 of 2017, In the Resident Magistrate's Court of Morogoro, at Morogoro)

THE REPUBLIC

VERSUS

JUSTINE HAMIS JUMA @ CHAMASHINE

JUDGEMENT

Date of last order: 4th October, 2021

Date of Judgment: 10th November, 2021

CHABA, J.:

According to the information filed on 12th day of February, 2020 by the Director of Public Prosecution, **Justine Hamis Juma @ Chamashine** herein the accused person stood charged of murder contrary to section 196 of the Penal Code [Cap.16 R.E. 2019] (the Penal Code]. The particulars of the offence in a charge are to the effect that, on the 09th day of January, 2017 at Kikwaraza area, Mikumi Ward, Mikumi Division within the District of Kilosa in Morogoro Region, the accused did murder one Joseph Florence @ Msimbe (the deceased).

When the information was read over and explained to the accused person, he pleaded not guilty to the charge. The court conducted the preliminary hearing pursuant to the provision of the law under section 192 of the Criminal Procedure Act [Cap. 20 R. E. 2002] now (R. E. 2019)

(the CPA) in view to ascertaining undisputed matters. Nonetheless, the material facts were found to be disputed by the parties save for the names of the accused and the fact that he was apprehended and brought to police station in connection to instant offence. As the accused person resisted the information, the prosecution paraded fourteen (14) witnesses to prove the offence to the required standards. On the other hand, the accused person gave his evidence on oath as a single defence witness.

Determined to secure a conviction against the accused person, Ms. Flora Massawe, learned Principal State Attorney being assisted by Ms. Veronica J. Chacha, learned State Attorney appeared for the Republic, whereas the accused person enjoyed the legal services of Mr. Josberth J. Kitale, learned Advocate.

The prosecution case commenced with Meshark Charles George as prosecution witness number one (PW1). He testified that in the year 2017 while living in one suburb at Kwikaraza area in Mikumi within the District of Kilosa in Morogoro Region, together with his wife Evelyne Zacharia (PW2), they bought a motorcycle, make Boxer Bajaj with Registration No. MC 443 AFX, black in colour. According to his testimony, he bought the same on 09/04/2016 in Dar es Salaam from Ibrahim Hassan Lusewa. To prove his statement, he tendered in evidence a contract of sale of a motorcycle with Reg. No. MC 443 AFX type Boxer Bajaj, which the court admitted as Exhibit P1. He further tendered in evidence the motorcycle with Registration Card No. 6529621 bearing the names of the Ibrahim Hassan Lusewa of Dar es Salaam. The court admitted the registration card as Exhibit P2. In addition, PW1

being the lawful owner of the motorcycle he managed to establish its identity and marks which are registration number affixed to the motorcycle (Registration No. MC 443 AFX, type Boxer Bajaj and its colour (black in colour)). He afterwards, produced the motorcycle registration card in evidence and the same was marked as Exhibit P3.

PW1 averred further that he bought the motorcycle (Exhibit P3) for personal use. But later, he agreed with his wife (PW2) to change the use from personal use to commercial use. He went on to testify that his wife is the one who entered into an agreement with the deceased person to run the business, but it was unfortunate that the deceased person was attacked and killed within a week since he received the motorcycle. He added that, his wife notified him about the agreement she entered with the deceased. He insisted that since he bought the motorcycle for home use, his wife had full control and possession and all the rights to use it.

When cross examined, **PW1** testified that when the incident occurred, the process to transfer ownership of the motorcycle from Ibrahim Hassani Lusewa to the deceased's names were not yet done. He further told this court that when his wife handed over the motorcycle to Joseph Florence Msimbe (the deceased person), he was in the process to register and change use of the motorcycle (the Exhibit P3) to be used for commercial purposes, commonly known as bodaboda business.

His evidence was coupled with that of **Evelyne Zacharia Kidunda (PW2)**, his wife who testified that **Joseph Frolence Msimbe** who rode her motorcycle as bodaboda was no longer alive (a deceased person). *"Huyu alikuwa bodaboda wangu"*. She said, when her husband (PW1) bought the said motorcycle in 2016 having Reg. No. MC 443 AFX,

type Boxer Bajaj she automatically became the possessor of the property. As she was permitted by her husband to use the motorcycle (Exhibit P3) for commercial business, on 06/01/2017 she gave the deceased to run the business. They agreed that the deceased had to pay her a total of Tshs. 7,000/= per day or Tshs. 49,000/= per week. However, about five days later, on 11/01/2017 around 09:00 hours she was informed by a close friend of the deceased that Joseph Florence Msimbe was found dead at mashambani area after being attacked by the bandits who robbed his motorcycle. She also went to the Hospital at St. Kizito within Mikumi area to witness the deceased's body.

PW2 went on to tell this court that on 13/01/2017 one policeman called Joseph informed her to report at the Police Station in Mikumi. She responded and upon arrival, she was told to join the police officers and travel to region where her duty was to identify the stolen motorcycle. When they arrived in Morogoro Region they went straight to the Central Police Station. While at the police station she managed to identify the motorcycle (Exhibit P3) through its colour, (black) and its Registration No. MC 443 AFX type Boxer Bajaj. She stated further that on the material date, the motorcycle had bloodstain around the fuel tank. In cross examination, **PW1** testified that though she agreed with the deceased to run the bodaboda business, but their agreement was not reduced into writing to indicate that she handed over the motorcycle (Exhibit P3) to Joseph Florence Msimbe, the deceased.

ASP Epimarck Mwijage (**PW3**) and F. 2193 DC Joseph (**PW7**) gave evidence of material particulars. Their testimonies were to the effect that on 10/01/2017 at or about 09.00am they received a call through

mobile phone from Emanuel Sagiti Mbata herein **(PW4)** to the effect that there was one person who was found dead at mashambani/farm area. They also received similar information from Wilson Mazengo **(PW5)**. After receiving the information PW3 being the OCS, he informed PW7 and other police officers including S/SGT Hamidu, SGT Meshark and D/CPL Laurence who immediately prepared themselves and moved to the crime scene. When they reached at the crime scene, they saw drops of blood. While tracing the drops of blood, they saw the corpse of the deceased on the ground.

Upon examining the corpse of the deceased, they noticed that the deceased had cut wounds on the back of the head, at the back and on his hands. The cut wounds were caused by a sharp object. However, no one managed to identify the corpse of the deceased. The dead body was thereafter taken to St. Kizito Hospital at Mikumi for hygiene protection and identification. Many people arrived there mainly to identify the deceased. Among them were **Evelyne Zacharia Kidunda (PW2)**, and Florence Richard Msimbe (PW6), the deceased's biological father and the employee at St. Kizito Hospital. As PW6 confirmed that, his late son was a motorcycle rider commonly known as Bodaboda, such information assisted the police officers to realise that the deceased passed away upon being attacked by the bandits who later run away with the motorcycle. Therefore, PW3 asked his fellow policemen to collect the deceased's shirt for further investigation.

He thereafter opened a case file at Mikumi in respect of murder case and registered MKI/IR/20/2017 and afterward informed the Regional Crime Officer (the RCO) in Morogoro Region. Later in a day, was notified

that the motorcycle which was robbed while in possession of the deceased had been registered with Registration No. MC 443 AFX, type Boxer Bajaj. On the basis of the information received they mounted a serious investigation.

His evidence revealed that on 10/01/2017 during the night around 21:00 pm he received information from the Central Police in Morogoro Region to the effect that the accused, **Justine Hamisi Juma @ Chamashine** was apprehended by police officers who were patrolling the road along the highway of Morogoro - Iringa on 10/01/2017 at the mid night around 1:30 am while in unlawful possession of a motorcycle with Reg. No. MC 443 AFX, type Boxer Bajaj Boxer, black in colour.

Based on this information, he asked the police who was involved in investigating the matter to trace and summon the owner of the said motorcycle. In the course of investigation, PW2 who resides at Mikumi area was discovered to be the owner of the motorcycle and her husband PW1. According to PW3, PW2 did establish the identity of her motorcycle in Morogoro. He said, the investigation team was fully satisfied that the motorcycle was robbed while in the possession of the deceased. **PW7** is the one who drew the sketch map of the crime scene. He prayed to tender the exhibit and the same was admitted and **marked Exhibit PW4. When cross examined by the learned advocate**, PW3 stated among other things that, he had an opportunity to see the accused who regretted to what he did. He was looking a frail person.

The testimonies of PW4, Romanus Sagita Mbata and **PW5**, Wilson Mazengo Matonya were similar. They testified that on 10/01/2017 upon received information in respect of the incident of murder, they informed

PW3 and rushed to the crime scene at Kikwaraza mashambani/farm area nearby pastoralists area. A crowd of people assembled at the crime scene and the police officers including PW3 and PW7 were also present. They witnessed the corpse of the deceased. However, nobody was able to identify the deceased. Afterwards, the police officers took the corpse of the deceased to the Hospital at St. Kizito in Mikumi area. The deceased was identified by other motorcyclists (marehemu alitambuliwa na waendesha bodaboda) and his biological father (PW6).

The evidence of Florence Richard Msimbe (**PW6**), a biological father to the deceased person and an employee at St. Kizito Hospital as Nurse Assistant from 1991 to-date is to the effect that on 10/01/2017 while at his workplace was informed by one person to go to the mortuary. When he reached there, he met his son Joseph Florence Msimbe already dead. He wept bitterly and confirmed that his son was a motorcyclist or bodaboda rider. He said, the owners of the motorcycle are PW1 and PW2. He further testified that his son used to stay at home and he saw him for the last time on 8/1/2017.

The report on post-mortem examination which was clearly identified by Simon Venant Nkwera (PW14), the medical Doctor at St. Kizito Hospital who conducted the post-mortem examination, and which was admitted unopposed and marked as **Exhibit P7**, shows that the source of death was due to massive haemorrhage with multiple open cut wounds over the skull and limbs. The report further revealed that the deceased had cut wounds on both arms near both wrists cut off leaving loose skin only as a result of bleeding to death. The deceased also had big deep cut wound on the left side of chest and big deep cut wound on

head. **PW14** further observed that the body of the deceased was soaked with blood due to compound skull fracture.

PW8 – A police officer with force No. G. 6409 D. Josephat testified that on 09/01/2017 was assigned to drive a motor vehicle with Reg. No. PT 3391 type Land Cruiser, the property of Tanzania Police Force. On that particular day, he was in company of other police officers including DC Simba and PC Muhando. While along the main road or highway of Morogoro - Iringa, at Mzumbe Njia-panda area, they saw one person riding a motorcycle at around 1:30 am (in the mid night) on 10/01/2017. The rider was moving toward Morogoro Municipality. The motorcycle had been registered with Registration No. MC 443 AFX, type Boxer Bajaj. He gave an indication to stop using beam lights of the motor vehicle, but the rider did not stop. The Motorcycle rider's chest was naked meanwhile carrying a backpack. He suspected him to have carried bhang as he had a backpack. Since there was a roadblock ahead at the border line between the Districts of Morogoro and Mvomero at Sangasanga village, he notified **PW9 - Frank John Chimile**, a Tax Revenue Collector (Agent), Morogoro Municipality to close the gate to deny the suspect access to path through. Upon reaching to the said roadblock, the accused had no other option, and he found himself in the hands of the police officers.

They interrogated him and searched his bag where they found a machete and some clothes including a trouser type Jeans and two shirts (one red in colour and the other had black lines/stripes) which had blood stain. When he was inquired, the accused replied, he was from Mikumi area where he went to hunt an animal commonly known as dik-dik. As

they suspected him to have been in unlawful possession of property suspected to have been stolen, he filled a certificate of seizure which was signed by PW8, the suspect / the accused one Justine Hamisi Juma @ Chamashine, Frank John Chimile (PW9), G. 1231 DC Simba and another person. At around 06:30 am he brought the accused at central police and opened or filed a case against him and charged him with the offence of unlawful possession of properties suspected to have been stolen. The case file was **Registered as IR/262/10/1/2017** dated 10/01/2017.

Afterwards, he handed over all properties found while in possession of the accused to the CRO – Incharge one CPL Hagai (now Insp. Hagai). These properties are motorcycle having Reg. No. MC 443 AFX, type Boxer Bajaj, black in colour, 1 machete (panga), Two shirts, and 1 trouser - type Jeans and 1 – backpack bag. **PW8 identified** the accused person by pointing his finger against him while in the dock. He further identified the certificate of seizure through his names and force No. G. 6409 PC Josephati, the image of Tanzania Police Force Emblem, his own handwriting and his signature. The document though was objected by the defence side, but the court overruled the raised objection, admitted and marked as **Exhibit P5**. He further identified the motorcycle found in possession of the accused person through various marks as alluded to above.

PW9 - Frank John Chimile, a Tax Revenue Collector (Agent), Morogoro Municipality, in essence gave evidence of material particulars to PW8. Since he prevented the accused and denied him access to path through the roadblock upon received a call from PW8 who was patrolling

along the highway of Morogoro – Iringa Road, he managed to identify the accused, Justine Hamisi Juma @ Chamashine who was standing in the dock. He further testified that on the fateful date of 10/01/2017 the accused stayed on the said roadblock from around 1:00 am (in the mid night) up to 6:00 am in the morning. He went on to testify that he managed to identify the certificate of seizure (form) **herein Exhibit P5** through the following marks; namely, Emblem of Tanzania Police Force, the contents therein, his names and signature as well. PW9 confirmed to sign the Exhibit P5 in the capacity of an independent witness. In addition, he similarly managed to identify the stolen motorcycle herein **Exhibit P3**.

The evidence of **PW10**, a police officer with force No. E. 8949 D/CPL Kwilinus, was to the effect that, being a police officer stationed at the Central Police in Morogoro Region, apart from doing investigation on various criminal offences, he has been entrusted to hold another position as the Exhibit Keeper from 2016 to-date. He testified that on 10/01/2017 at around 7:00 am while on duty, he received some exhibits from a policeman with force No. 3127 CPL Fred which related to a criminal offence filed at the Central Police in Morogoro and registered as MORO/IR/262/2017. He mentioned the exhibits to include 1 - Motorcycle with Reg. No. MC 443 AFX, black in colour, type Boxer Bajaj. He was further handed over with 1 - machete (panga) and a backpack containing 1 - Shirt, 1 - Trouser type Jeans and a kind of shawl worn by women (mtandio). He registered all these exhibits in a book called Court Exhibits Register (Police Form No. 16) in particular entry No. 6 of 2017.

After registration, he labelled all these exhibits. As regards to the motorcycle, he labelled it around the fuel tank with white ink as MORO/IR/262/2017 followed by words ER/06/2017. He put the same marks on a backpack which contained a trouser, T-Shirt, Shirt and the machete. He thereafter stored them into the exhibits room. On the same day at around 11:00 am, he was informed by CPL Fred that the exhibits handed over to him was recently reported to have been involved in the incident of murder and the same had been reported at Mikumi police station and registered as MIK/IR/20/2017. His evidence revealed further that soon upon receiving that information, he immediately added into the Court Exhibits Register.

He went on to testify that on 14/09/2021 he brought the motorcycle before this court so that the same could be produced in court as exhibit. During his testimony, PW10 did manage to identify the motorcycle herein Exhibit P3 through the marks he put thereon as hinted above. Other marks he put on the said motorcycle is the name of CPL Seleman as he investigated this case (registered as IR/262/2017 at central police). In cross examination, **PW10** explained that the police opened two cases in respect of the exhibits found while in possession of the accused person. For the first time, he was accused of being found with properties suspected to have been stolen and later, he was informed that the seized exhibits linked the accused person with the offence of murder. He further stated that he was the last person to label the motorcycle.

The testimony of PW11, the police officer with force No. PF. 20420 CPL Hagai (now Inspector Hagai), testified and explained that in the

year 2017 was working and stationed at the Central Police in Morogoro Region. He was assigned to perform general duty and the CRO - Incharge (Charge Room Office - Incharge). He said, on 10/01/2017 at around 05:40 am (in the morning) he confirmed to receive some properties from PW8 that were seized while in possession of the suspect one Justine Hamisi Juma @ Chamashine. The accused also was brought at the Central Police and handed over to him. In general, he reiterated the story given by the PW8. Since the accused was not a stranger, he pointed his finger against him while in the dock to establish his identity. He added that, at around 7:30 am on the same day he handed over all properties found while in possession of the accused person to a policeman with force No. E. 8949 D/CPL Kwilinus (PW10), the Exhibit Keeper. On this aspect, he reiterated what PW10 explained.

PW11 continued to state that when it reached at around 11:00 am same day on 10/01/2017, he was instructed by Laurence Samson, the then OC - CID in Morogoro Region to add Ref. No. MIK/IR/20/2017 to the exhibits found while into possession of the accused because there was genuine information that the accused was connected with the offence of murdering the deceased at Mikumi area.

Following that information, he made some changes in the Detention Register. He told the court that, from that point, the suspect one Justine Hamis Juma @ Chamashine faced two offences of unlawful possession of goods suspected to have been stolen and murder case. He added that, he passes similar information to the Exhibits Keeper (PW10) who accordingly added the necessary information, including Ref. No.

MIK/IR/20/2017. Like other witnesses, PW11 did identify the motorcycle (Exhibit P3) through similar marks.

Another witness who appeared before this court as prosecution witness is **PW12, a police officer with force No. E. 6058 D/SSG Seleman** from the office of the RCO in Morogoro Region. His testimony is to the effect that on 10/01/2017 during morning hours, the Deputy RCO - SP Abrahaman Njiku assigned him to investigate a criminal offence related to the offence of unlawful possession of goods suspected to have been stolen. The police case file had Ref. No. MOR/IR/262/2017. According to him, he carefully read the file/facts of the case and further got some details from PC Josephati (PW8). He had an ample time to see the seized motorcycle, Registration No. MC 443 AFX, type Boxer Bajaj. He afterward met the accused and informed him all his rights and recorded the statement of the accused after he had given him his rights. The accused admitted having been found in possession of the said motorcycle. According to him, the accused did allege that the motorcycle (Exhibit P3) was his property and that he bought in Moshi District from one person called Simon. He however failed to prove that the same did belong him. After interrogation, the accused signed the document.

He testified further that, on 10/01/2017 before noon hours, he received an information which was to the effect that there was an incident at Mikumi which involved killing of a person. He was informed further that the motorcycle which was found while in possession of the accused, was linked with the murder case. He thus stopped to conduct investigation while awaiting for the outcome of the investigation

mounted at Mikumi police station. Later on, Zabron Msusi (PW13) asked him to join the team to investigate the incident of murder that occurred in the village called Kikwaraza within Mikumi area. During investigation, it was revealed that PW1 and PW2 who are husband and wife, were found to be the real owners of the motorcycle which was seized while in control of the accused because they produced the relevant documents including the original card. Since the investigation further revealed that the accused did admit to have committed the offence of murder together with other two bandits namely, Stephen and Mussa, he was obliged to travel to Dar es Salaam looking for these suspects at one place called Kimara stop over. But his efforts ended in vain. He further managed to identify the Exhibit P3.

The last prosecution witness, ASP Zabron Harrison Msusi (PW13) testified that after the demise of Joseph Florence Msimbe, the Deputy RCO chosen him to lead the investigation team to inquire into the matter which linked the accused, **Justine Hamis Juma @ Chamashine** with the murder case. Upon complying with the provision of the law under section 57 of the CPA, on 11/01/2017, he recorded the accused person's cautioned statement from 09:00 am up to 10:46 am after he had made a self-introduction to the accused and his rank as well, and further informed him of his rights including the rights to understand about the offence he was facing at the material time. He also informed the accused that he is not forced to say anything before him (PW13), except by his own free will, and that anything that will be stated before him could be recorded and might be used as evidence before the court. Moreover, PW13 voiced to the accused that he was at liberty to call his lawyer or advocate, his colleagues, relative or friend to witness the

recording of his cautioned statement. After he informed the accused all his rights, the accused informed him that he is ready to narrate his story or statement in absence of the aforementioned persons. Briefly, during interrogation the accused explained freely the whole plan and how they achieved their plan. He said, the mastermind was Stephen. Indeed, he confessed to have participated to murder Joseph Florence Msimbe while in company of other two criminals namely Stephen and Mussa, who are still at large.

At the end of exercise, both signed the document to certify that the contents were true and correct. However, when PW13 sought to tender the cautioned statement, it was objected by the defence side. After conducting trial within a trial, the court ruled that the accused made his statement voluntarily. The cautioned statement was eventually admitted and marked as **exhibit P6**.

Upon review of the prosecution evidence, the court found the accused had a case to answer. The court explained to the accused person all his rights as provided for under section 293 of CPA. In his defence, the accused gave evidence on affirmation and didn't call any witness.

His defence was to the effect that he was born at Igunga in Tabora Region. On 10/01/2017 at around 11:00 am he travelled from Igunga to Morogoro using a bus transport namely ALLY SAED. He arrived at Msamvu bus station in Morogoro at around 17:00 pm. He came to Morogoro looking for job of a barber. As he arrived at evening hours approaching night hours, he decided to look for a place to rest till on the following day. In the course of searching, he met with the police officers

who put him under arrest on the ground that he was looking idle and loitering in the street. The police took his bus ticket and destroyed. At around 20:00 hours (in the night), was taken to the Central Police in Morogoro Region and remanded in police custody. On 11th & 12th January, 2017 he was taken to a torture room and beaten up by the police. On 12/01/2017 at around 17:00 hours he was sent back to a torture room where he was shown a statement and forced to sign it. According to him, he refused to sign on the ground of being illiterate person. He said, the police officers are the ones who signed the document.

He further denied the allegation that he hired a motorcycle on 9/1/2017 and went to Mikumi at Kikwaraza mashambani area. Also, he denied to have killed the deceased and the allegation that he was put under arrest while at Mzumbe Njia-panda or Sangasanga area in the mid-night and signed the certificate of seizure. DW1 denied also the fact that on the fateful night he was caught while in possession of a motorcycle (Exhibit P3). He said, he didn't offer any statement to the police indicating that he confessed to have been found in unlawful possession of the motorcycle.

When cross examined by Ms. Massawe, learned Principal State Attorney, DW1 admitted his names to be correct (Justine Hamis Juma @ Chamashine). He further told the court that on 9/1/2017 he was in Igunga and on the following date on 10/1/2017 he travelled to Morogoro using a bus transport. He added that, he was invited by his close friend called Rashid. But when he arrived in Morogoro, his mobile phone went off and he therefore failed to communicate with him. Upon being asked

by the court to clarify when he was born, DW1 testified that he was born in 1999. He added that he was informed by his parents that he was born in 1999. He further testified that at the material time he had no kind of a mark or scar. In general, he totally failed to prove that he was heavily beaten by police as he alleged.

At the close of the evidence tendered by both sides, the learned Principal State Attorney made a final submission. On the other hand, the defence counsel Mr. Kitale also prayed for the right to be heard at this stage. In her final submissions, Ms. Massawe mainly analysed the evidence and argued that the prosecution side has proved their case beyond reasonable doubt. On the defence side, Mr. Kitale submitted at length stating that the prosecution side failed to prove their case because they didn't manage to establish that the accused is the one who killed the deceased.

At this juncture, I would like to appreciate both Counsels for the well-researched submissions and for the various authorities filed in support of their oral submissions. While I will not make reference to all of them, I have seriously taken them into consideration.

It is also pertinent at this juncture, to state that upon summing up the Ladies and Gentleman Assessors who assisted the court in this trial, they accordingly gave their opinions. They unanimously opined that; the prosecution side proved the charge against the accused person beyond reasonable doubts. They thus found him guilty as charged and urged this court to convict him accordingly.

I have considered the evidence from both sides, the opinion of the assessors, the charge laid against the accused person and the law applicable.

In my opinion, the following facts are not disputed; that, the deceased died after being attacked as it was evidenced by the testimony of PW14 who medically examined the corpse of the deceased and produced a report on post-mortem examination (Exhibit P7) which was supported by the sketch map of the crime scene (Exhibit P4). It is also not in dispute that the names of the accused are Justine Hamis Juma @ Chamashine and that he was arrested and brought at police station and finally arraigned before the court facing instant murder case.

In this case, as already stated earlier, the accused was charged with murder contrary to section 196 of the Penal Code [Cap.16 R.E. 2002] now [R.E. 2019]. The law provides that:

"Any person who with malice aforethought causes the death of another person by unlawful act or omission is guilty of murder".

From the above, for a conviction of the offence of murder in the case at hand and according to the provision of the law to stand, the prosecution must prove the following ingredients:

- 1. That, the accused actually caused the death of the deceased or killed him,*
- 2. If the answer to the first issue will be in affirmative, then whether the killing amounted to murder.*

In purview of the above ingredients of the offence of murder, the major issues in the instant case are:

- (a) **One**, *whether or not the accused, Justine Hamis Juma @ Chamashine actually caused the death of the deceased, and*
- (b) **Two**, *If the answer to the first issue will be affirmative, then whether the killing was amounted to murder*

At the outset, I must first underscore that, our criminal jurisprudence provides that always the burden of proving the case against the accused lies on the shoulder of the prosecution side and it never shifts. 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. See Section 3 (2) (a) of the Tanzania Evidence Act [Cap.6 R.E. 2019]. The same doctrine has been amplified in a number of cases, one of them being the case of **Hemed v. Republic** [1987] TLR 117, **Mohamed Said Matula v. R** [1995] TLR 3.

Notably, it is settled that the best evidence **is direct evidence** which comes from a person who saw or heard the accused committing an offence. However, **indirect evidence such as circumstantial evidence** or evidence of persons may be relied upon by the prosecution if it meets the criteria set by the law. It is necessary before drawing the inference of guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. See the cases of **Ilanda Kisongo v. R** (1960) EA 780 at page 782, **Magendo Paul & Another v. R** [1993] TLR 219, **Hassan Fadhili v. R.** [1994] TLR 89 and **Nathaniel Alphonse Mapunda & Another v. Republic** [2006] TLR 395. In the case of **Nathaniel**

Alphonse Mapunda (Supra), the Court of Appeal of Tanzania held inter-alia that:

"Where circumstantial evidence is relied on, the principle has always been those facts from which an inference of guilt is drawn must be proved beyond reasonable doubt".

In her final submission, Ms. Flora Massawe highlighted that it is true that there is no eyewitnesses or direct evidence, but regarding the question of circumstantial evidence, the prosecution has heavily relied on the doctrine of recent possession in a bid to secure conviction of the accused person. As far as the circumstance of this case is concerned, I agree with the learned Principal State Attorney, and I would like to start my journey from this juncture to analyze the principle of law in relation to the evidence adduced by the prosecution witnesses against the accused person.

The law on the doctrine of recent possession is settled. It is a rule of evidence. It operates on the basis that unexplained possession by an accused person of the fruits of a crime recently after it has been committed is presumptive evidence against the person in their possession not only for the charge of theft but also, for any other offence however serious. (See; **MWITA WAMBURA v. R** [1992] TLR. 118; **ALLY BAKARI v. R**; Criminal Appeal No. 47 of 1991 (unreported). It is trite law that the presumption behind that doctrine has to be applied with great circumspection. On this aspect the holding in **ALLY BAKARI AND PILI BAKARI v. R** [1992] T.L.R. 10 is instructive. In that case, the Supreme Court of our Land held inter-alia that:

*"...the presumption of guilt can only arise where **there is cogent proof that the stolen thing possessed by the accused is the one that was stolen during the commission of the offence charged, and no doubt, it is the prosecution who assumes the burden of proof...**"*[Emphasis supplied].

Moreover, in the case of **Joseph Mkubwa & Samson Mwakagenda v. R**, Criminal Appeal No. 94 of 2007 (Unreported) it was stated that for the doctrine of recent possession to be invoked, there are a number of guidelines to be considered. The Court went on to state that:

*"Where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained. For the doctrine to apply as a basis of conviction, it must be proved, **first;** that the property was found with the suspect, **second;** that the property is positively proved to be the property of the complainant, **third;** that the property was recently stolen from the complainant, and **lastly;** that the stolen thing constitutes the subject of the charge against the accused..."*

Proof that the stolen thing possessed by the accused is the one that was stolen during the commission of the offence charged can be guaranteed by evidence on a proper account of the chain of custody of the stolen thing found in possession of the accused person.

Since the issue of possession of the stolen motorcycle (Exhibit P3) was very recent, I am satisfied that this is a fit case for invoking the doctrine of recent possession to support murder. During trial, **PW8** (G. 6409 D. Josephati) and **PW9** (Frank John Chimile) who gave evidence of material particulars, they testified that the accused was arrested on 10/01/2017 around 1:30 am (in the mid night) at the roadblock just around the border line between Mzumbe Njia-panda area and Sangasanga area along the main road on the highway of Morogoro - Iringa. The two maintained that the accused was found while in unlawful possession of a stolen motorcycle together with some other items. The stolen motorcycle having registered with registration No. MC 443 AFX, type Boxer Bajaj, black in colour (**Exhibit P3**) is alleged to have been in possession of the deceased shortly before his death. Following his arrest, the certificate of seizure was then prepared to that effect and filled and afterward signed by PW8, the accused, Justine Hamis Juma @ Chamashine, Frank John Chimile (PW9), G.1231 DC Simba and another person. All the properties found while in possession of the accused including the stolen motorcycle were taken by PW8 and handed over to the CRO – Incharge one CPL Hagai (now Insp. Hagai). It was the prosecution's version that the Exhibit P3 was placed under custody of **PW10**, a police officer with force No. E. 8949 D/CPL Kwilinus, the Exhibit keepers from 2017 until when it was tendered in evidence before this court. The evidence shows that the same was clearly identified by PW8 and PW9 through various marks as alluded to above.

PW1 and PW2 who are husband and wife, asserted in their respective testimonies that, PW1 was the real owner of the recovered

motorcycle (Exhibit P3). He demonstrated that he bought the same on 09/04/2016 in Dar es Salaam from Ibrahim Hassan Lusewa. To prove his statement, he tendered in evidence a contract of sale in respect of the said motorcycle which the court admitted as **Exhibit P1**. PW1 further explicated that he was yet to transfer ownership at a point. He then tendered in evidence the Motorcycle Registration Card No. 6529621 bearing the names of the original owner one Ibrahim Hassan Lusewa of Dar es Salaam which was admitted in evidence and marked Exhibit P2. His testimony shows that, he managed to establish the identity of his motorcycle through the following marks: motorcycle Reg. No. MC 443 AFX, type Boxer Bajaj and its colour (black) and tendered the registration card in court as an exhibit P3.

Testifying in common, PW1 and PW2 stated that the stolen motorcycle was meant for personal use, but later, they agreed to change the use thereof to commercial use. Additionally, PW2 testified that, she was the one who entered into an oral agreement with the deceased person to run the bodaboda business. According to her, she agreed with the deceased person to the effect that the deceased could pay her a total of Tshs. 7000/= per day or Tsh. 49,000/= per week. However, it was unfortunate that Joseph Florence Msimbe was attacked and untimely met his death within a week since when the motorcycle was handed over to him.

It is undisputed fact that from the testimonial versions of both prosecution and defence sides that the property alleged to have been stolen and which was found while in possession and control of the deceased was deprived and incidentally, became the victim of the

perpetrated offence of murder. As the position of law stands, the doctrine of recent possession can extend to any offence incidental or connected with stealing including murder. Thus, from the circumstantial evidence advanced in court, the Exhibit P3 which is the property of PW1 and his wife, PW2 was recovered by PW8 and PW9 from another person namely Justine Hamis Juma @ Chamashine (the accused) who was not entrusted with the said property. Moreover, the said motorcycle was recovered in a distant area from where the deceased body was found at Kikwaraza mashambani area in Mikumi. Nevertheless, there is no any explanations given by the accused person to justify how he became into possession of the same.

As it was expounded in the cases of **MUSTAFA DARAJANI v. R.**, Criminal Appeal No. 242 of 2008 (unreported) and **NASSOR MOHAMED v. R.**, (1967, HCD 446), the principle of law entails that description of special marks to any property allegedly to have been stolen, should always be given first by the alleged owner before being shown and allowed to be tendered as an exhibit. In instant case it is incontestable fact that the evidence touching on who was the owner of the motorcycle (Exhibit P3), was clearly advanced by PW1 and PW2 and corroborated by the exhibits P1, P2 and P3 respectively. These two witnesses clearly explained how they managed to identify the stolen property through the respective marks.

However, in the course of trial the accused fended and claimed that he was not present when the incident took place and therefore emerged and relied on the notion of the defence of *alibi* to absolve himself from criminal liability by stating that at the time of commission of the offence

of murder, he was in Igunga District and not at the crime scene a fact which I accord no weight due to non-compliance with the provisions of the law under section 194 (4), (5) and (6) of the CPA. On this facet, the law is clear that if the accused wishes to rely on the defence of *alibi*, he must give a notice before hearing commences. If he fails, he must furnish the prosecution with the particulars of *alibi* at any time before the closure of prosecution case. If the accused still fails to meet the above requirements the court is permitted to accord no weight to such evidence.

Placing reliance on the above legal principle and upon scrutiny of the accused person's defence of *alibi*, I find that such a defence do not have legs to stand on, in view of overwhelming evidence which implicated the accused. I say so because the offence of murder was committed against the deceased and afterwards the motorcycle was stolen. According to the evidence of PW8 and PW9, the accused was put under arrest at the roadblock in the mid night at around 1.30 am while in unlawful possession of the said motorcycle (Exhibit P3). On the other side, PW1 and PW2 who were discovered to be the real owner of the Exhibit P3 succeeded to establish its identity through Exhibits P1 and P2 respectively, and their testimonies were corroborated by the testimony of PW13.

Apart from the above pieces of evidence, there is one more evidence from ASP Zabron Harrison Msusi (PW13) who interrogated the accused and then reduced his statement into writing after he had accorded him his rights before taking his statement. At the end of the day, PW13 tendered the accused person's cautioned statement as Exhibit P6. The

statement underscores that the accused confessed to have been involved in killing the deceased, Joseph Florence Msimbe while in-company of other two criminals namely Stephen who are still at large. Despite his allegation that he was heavily tortured by the police, but the truth is that when was asked by this court to clarify on the point, he admitted that at the material time had no wound or even a single mark or a scar to prove his assertion. The accused further did not produce any official document like a PF3 to substantiate his allegation.

As regards to the question of chain of custody, it is a trite principle of law that before an exhibit is tendered in court, the chain of seizure and custody must be established as it was elucidated in the case of **HEMED ATHUMAN SILAJU v. R**, Criminal Appeal No. 120 of 2006 (unreported). In instant case, there is a conspicuous proper account of the chain of custody of the stolen motorcycle found in the possession of the accused which includes documentation (paper trail) and the evidence adduced by PW8, PW9 and PW10 as well as the certificate of seizure (Exhibit 5) and the motorcycle (Exhibit P3). The certificate of seizure was positively identified by PW8 and PW9 as the same contained the contents that they filled when the accused was overpowered. Further, the two witnesses did identify the Exhibit P3 as one among the properties found while in possession of the accused at the time of arrest.

As explained by the prosecution witnesses, the accused was found red-handed with the stolen motorcycle at the aforesaid place and time which was within a short span of time (hours) from the time it was stolen at Mashambani area on 10/01/2017 at around 22:00 to 23:00

hours and the time it was recovered from the culprit. As hinted above, the stolen motorcycle was fully identified by the real owner (PW1) who produced in evidence the Registration Card and gave some details which particulars matched with the testimonies advanced by PW2, PW8, PW9 and PW10. The owner also tendered in evidence the contract of sale to prove that he bought it from the original owner. As alluded to above, the accused failed to give satisfactory explanations as to how he acquired and possessed the motorcycle as shown in his defence.

All these factors can lead to only one conclusion that the accused was involved in the commission of the offence as it was stated in the case of **MWITA WAMBURA V. REPUBLIC** (Supra). Since the accused totally failed to offer credible explanations on how he came to possess the stolen motorcycle and taking into consideration the evidence adduced by Venant Nkwera (PW14) a medical doctor who conducted the post-mortem examination and then prepared the report on post-mortem examination (Exhibit P7) of the deceased person, and the corroborating testimonies of PW1, PW2, PW8, PW9, PW10 and PW 13 respectively, I am satisfied that these witnesses are credible. The defence of *alibi* aired by the accused person, in the circumstance did not raise any reasonable doubt. Thus, for these reasons, I am of the settled view that, the prosecution side has proved their case to the standards required by the law that the accused is the one who killed the deceased. Consequently, the first issue is disposed positively.

As regards to the second issue, whether the killing amounted to murder, the crucial test is whether the accused had malice aforethought. Principally, malice aforethought is governed by section

200 of the Penal Code [Cap.16 R.E. 2019] which sets out the law as follows:

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

- (a) an intention to cause the death of or to do grievous harm to any person whether that person is actually killed or not*
- (b) ...*
- (c) ...*
- (d) ..."*

The position of the law was gorgeously summarized by the Court of Appeal in the case of **ENOCK KIPELA v. R**, Criminal Appeal No. 150 of 1994 (Mbeya Registry) (Unreported) where the Court stated in the following words:

*"... Usually an attacker will not declare his intention to cause death or grievous bodily harm, whether or not he had that intention must be ascertained from various factors; including the following (1) **the type and size of the weapon**, (2) the amount of force applied, (3) **the part or parts of the body the blow or blows were directed at or inflicted on**, (4) **the number of blows, although one blow may be sufficient for this purpose**, (5) the kind of injuries inflicted, (6) the attacker's utterances, if any, made before, during or after killing and (7) **the conduct of the attacker before and after the killing**".*
[Emphasis is added].

Guided by the above principles of the law, the evidence gleaned from the Exhibit P6 which is the accused person's cautioned statement, tells that the accused being a free agent (person) he offered his statement to PW13 and explained how he and his colleagues, Stephen and Mussa (who are still at large) made their plan to commit the offence and finally achieved their plan. According to the statement, the mastermind was Stephen. He confessed to participate murdering the deceased, Joseph Florence Msimbe while in-company of his colleagues. This piece of evidence is corroborated by the evidence of PW14, the doctor who conducted the post-mortem examination of the deceased and thereafter prepared the relevant medical report which was admitted as **Exhibit P7**. The medical report shows that the source of death was due to massive haemorrhage with multiple open cut wounds over the skull and limbs of the deceased. The report further revealed that the deceased had cut wounds on both arms near both wrists cut off leaving loose skin only as a result of excessive bleeding which occasioned the deceased's death. The deceased also had big deep cut wound on the left side of the chest and big deep cut wound on top head.

The report on post-mortem examination was corroborated by the evidence of PW8 and PW9 who testified in common that on the material night the accused was arrested while in possession of a motorcycle and his chest was uncovered meanwhile carrying a backpack. It is from the accused's conduct, PW8 and other police officers became suspicious against him to the effect that probably he carried bhang. Since there was a roadblock ahead at the border line between the Districts of Morogoro and Mvomero at Sangasanga village, he notified PW9 - Frank John Chimile who closed the gate and denied the accused access to path

through. Some properties were seized from the accused including the motorcycle which had bloodstain, machete and some clothes such as a trouser type Jeans and two shirts (one red in colour and the other had black stripes) which also had bloodstain. More so, no satisfactory explanations were given by the accused in court in respect of the items listed in the seizure certificate.

From the circumstantial viewpoint of evidence, that is a clear indication that the accused's conducts suggested his guiltiness. His cautioned statement demonstrates that he had evil mind and bad intention prior to the commission of the offence of murder. The machete and clothes which were recovered from his backpack had bloodstain and same proved that the accused before overpowered caused grievous harm to the deceased, the fact which is supported or evidenced by the medical report herein Exhibit P7. It goes without saying that the accused did use the same machete to murder the deceased. In instant case, the motorcycle and machete with blood stain being the property and an exhibit which were recovered red-handed from the accused person on the material night, clearly connects him with murdering the deceased person. All these factors taken together, it concludes and proves beyond reasonable doubt that the accused hit the deceased on a fragile part of his body and caused grievous harm with malice aforethought (with intent to kill him). Henceforth, the second question is also answered in affirmative.

Having said so, and upon considering the legal principles articulated by the Supreme Court of the Land, the surrounding circumstances of the case at hand and the opinions advanced by the three Hon. Assessors

whom all opined that the accused did involve to kill the deceased with malice aforethought, I therefore hold that the accused one **Justine Hamis Juma @ Chamashine** killed the deceased one **Joseph Florence Msimbe** with intention, and this court find the accused guilty of murder and thus convicts the accused for that offence of murder contrary to section 196 and 197 of the Penal Code [Cap.16 R.E. 2019].

It is so ordered.

DATED at MOROGORO this 10th day of November, 2021.



M. J. CHABA

JUDGE

10/11/2021

10/11/2021

Coram: Hon. M. J. Chaba, J.

For the Republic: Ms. Veronica Chacha, State Attorney.

For the Defence: Mr. Josbert J. Kitale, Advocate

Accused: Present

Assessors: 1. Ms. Vumilia Hassan Chuma.

2. Ms. Jovitha Zakayo.

3. Mr. Juma Rajabu.

L/Assistant: Mr. Makwati

CC: Ms. Victoria Sheshe

Ms. Veronica Chacha, State Attorney for the Republic:

My Lord, this case is coming for judgment. The accused person is present in person before this court and the Honourable Assessors are also present. Mr. Josberth J. Kitale, learned Advocate for the accused is also present. I am ready to receive the judgment of the court. That's all.

Mr. Josberth Kitale, Advocate for the Accused:

My Lord, we are also prepared. That's all.

Accused person:

I am ready.

COURT:

Honourable Assessors are hereby asked to take their seats ready for judgment. All three Assessors are present.

Sgd: M. J. Chaba

JUDGE

10/11/2021

COURT:

Judgment delivered under my hand and Seal of this court in open court in the presence of the accused person, his learned defence counsel Mr. Josberth J. Kitale and the learned State Attorney Ms. Veronica Chacha who appeared for the Prosecution / Republic and in the presence of Honourable Assessors and Ms. Victoria Sheshe, RMA this 10th day of November, 2021.

Sgd: M. J. Chaba

JUDGE

10/11/2021

ANTECEDENTS

Ms. Veronica Chacha, State Attorney:

My Lord, on our side we don't have any previous criminal records against the accused. However, I pray that the accused person be

sentenced in accordance with the law. As the accused caused the death of the deceased one Joseph Florence Msimbe, it is obvious that he violated the Article 14 of our Constitution of the United Republic of Tanzania. It is known that only our Almighty God has powers to shorten the life of a person and not someone else. Thus, let the accused be punished accordingly. That's all.

MITIGATION

Mr. Josberth J. Kitale, Advocate for the Accused:

My Lord, since the accused person has been found guilty of the offence of murder and convicted by the court, let him be sentenced in accordance with the law. That's all.

SENTENCE

As the accused person has been found guilty of the offence of murder and has subsequently been convicted of the same offence under the provisions of sections 197 of the Penal Code [Cap. 16 R.E. 2019] and 322 (1) of the Criminal Procedure Act [Cap.20 R.E. 2019], THIS COURT, HEREBY imposes a SENTENCE OF DEATH by hanging upon the person of Mr. Justine Hamis Juma @ Chamashine.



M. J. Chaba

JUDGE

10/11/2021

COURT:

The Right of Appeal to the Court of Appeal of Tanzania in thirty (30) days against this judgment has been appropriately explained.



Sgd: M. J. Chaba

JUDGE**10/11/2021****ORDER:**

As there is no dispute that the motorcycle herein Exhibit P3 is the property of Meshark Charles George (PW1), I order and direct that the same be handed over to him as soon as practicable.



M. J. Chaba

JUDGE**10/11/2021**