

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT GEITA

ORIGINAL JURISDICTION

(MWANZA REGISTRY)

CRIMINAL SESSIONS CASE NO. 136 OF 2015

THE REPUBLIC

VERSUS

JUMA S/O GULAKA.....1st ACCUSED

JUMA S/O KASANANA.....2nd ACCUSED

BAHATI S/O JOHN @ LUTATINA.....3rd ACCUSED

JUDGMENT

16th-19th May & 15th June, 2022

ITEMBA, J.

The accused persons herein, **Juma s/o Gulaka, Juma s/o Kasanana** and **Bahati s/o John @ Lutatina** stands charged with the offence of murder, contrary to sections 196 and 197 of the Penal Code, Cap. 16 [R.E 2002] herein the Penal Code. They all pleaded not guilty to the charged offence, as a result of which the matter proceeded to a full trial.

It is worth noting that, the trial against the three accused persons Juma s/o Gulaka, Juma Kasanana and Bahati s/o John @ Lutatina was steered by an order of *trial de novo* by the Court of Appeal of Tanzania on 25th of February 2022. Previously, the same three accused persons herein



and two others who are not part of this case were charged with an offence of murder. After a full trial, the two accused persons named **Julius s/o Kataha** and **Mbaraka s/o Said** were acquitted while three accused persons herein were convicted, they appealed to the Court of Appeal and as a result, a retrial was ordered.

During trial, the Prosecution was represented by Mr. James Palangyo and Ms. Monica Matwe learned state attorneys while the 1st, 2nd and 3rd accused persons had the services of Mr. Laurent Bugoti, Erick Lutehanga and Nestory Kuyula learned advocates, respectively. After closure of both prosecution and defence cases, both parties made their final submissions. I thank the counsels for their useful submissions which have been considered in this Judgment.

It is alleged that, on the 3rd of February 2010, at Samina Forest within Geita Region, Juma s/o Gulaka, Juma Kasanana and Bahati s/o John @ Lutatina murdered one January Kasuhuke. In order to establish its case, the prosecution paraded a total of 9 witnesses and tendered 7 exhibits whereas in defence only the accused persons testified. The contents of the evidence are as hereunder.



The deceased January Kasuhuke was a milk vendor. He would ride a bicycle from his home, head to the forest, collect milk from farmers and sell it within Geita town. This was his usual routine. His brother, **Robert Kasuhuke (PW3)** and other village men like **Ramadhani Bilali (PW2)** were in the same business. Sometimes, they will be in a group of up to seven people all heading to the forest together with the deceased.

The story as to what happened begins with PW3 the deceased's brother, whose testimony was that, the 3rd of February 2010 was a typical day to the deceased. In the morning hours, he (PW3) left with the deceased from their home at Nyatotoro village heading to the forest to collect milk. On that day, PW2 had also passed at their home and joined them, each on his own bicycle they headed towards the forest. When the trio reached the cross road, they parted. PW3 went to Mwigusu forest while the deceased and PW2 went to Samina forest. Upon reaching further, PW2 parted with the deceased as he headed to collect milk at Msasa Village. Later that day PW2 went back home and found the children crying. They informed him that January Kasuhuke has been murdered and that all the adults have gone to the scene at Samina forest. He also went to the scene and found the deceased body lying down and the milk gallons were



seen nearby. The deceased's bicycle was not at the scene. PW2 assisted the police to take the deceased body to the mortuary. PW2 and PW3 had testified that on the fateful day the deceased had seven yellow gallons and he used to pack them in a wooden crate and carry them on his bicycle (**exhibit P5**). The said bicycle had some special features, it was locally made of 'pipes' or tubes, the sterling had red handlers, the seat was welded by gas and it had a carrier. Despite being locally made, the front blades also known as "mkasi" were new (readymade) and had green color. PW2 and PW3 identified the gallons, wooden crate and bicycle before the court, they stated that the bicycle was the one which belonged to the deceased only that it was painted black and its sit and carrier were missing.

The prosecution case was based on **PW6 Julius James** whom according to the prosecution, he sorted the puzzle regarding the deceased demise, as he was an eye witness. PW6 stated that he lives at the (farmers) camp in Samina forest. He worked as a grazeman for his uncle **Kabarabara Kasuhuke (PW5)** who was also the deceased brother. PW6 states that he used to sell milk to the deceased. On the fateful day he was grazing the cattle a bit far from the camp. At around 10.00 hours, he heard



someone screaming in the forest. He moved back toward the screaming voice and noticed it was the deceased, his paternal uncle who was asking for help. He saw five people with machetes attacking the deceased. He hid behind an anthill and observed the attack which took 15 to 20 minutes. PW6 identified two of the assailants including the 3rd accused. He identified these two people as he used to see them in the forest passing and sometimes at the river feeding the cows. They were wearing jackets and caps. PW6 left a heard of cows, ran to the camp and informed PW5 about the incidence and he explained that he had identified some of the assailants. Following the murder, the two raised an alarm (*mwano*) which attracted a number of people. The matter was reported to the police and **PW9 Sergeant Major Alphonse Kutaja** of Geita Police Station led investigation and went to the scene with other six police officers. He also prepared the sketch map of the scene. (**Exhibit P4**).

It was further revealed that during investigation, one **Christopher Matola**, an assistant Medical Officer at Geita District Hospital (**PW1**) performed an examination of the deceased body and the cause of death was 'excessive blood loss through multiple cut wounds'. PW1 tendered a post mortem examination report (**Exhibiti P1**) to that effect. Exhibit P1



also showed that the deceased had deep cut wounds in the left lower leg, head and neck.

PW6 identified the 3rd accused at the dock as the one he saw at the scene.

It was also the evidence by PW6 that on 30th of March 2020, while grazing at the same forest, at around 10.00 hours, he saw two people washing clothes at the pond, he identified one of them as the one who attacked the deceased. He stated that the said two people had a bicycle leaning on the tree and he noticed that it was the one belonging to the deceased. **PW5 informed the police who soon** thereafter arrested the two accused while they were still at the pond bathing. The arrest was done by **PW8 D/SSGT Elia**, PW9 and other police officers. PW6 stated further that it was the 3rd accused who had the machete while at the scene. The 1st accused also had a machete, and that the second accused is the one who picked the bicycle from the scene.

PW6 identified the 1st accused Juma Gulaka at the dock as the person he identified at the pond and stated that the other person who was at the pond, is not in the court. It was later testified by PW9 that the second



person at the pond was Reuben Simon. PW6 could also identify the bicycle and its features, the yellow gallons and the wooden crate.

The prosecution revealed that, after the arrest, Reuben Simon mentioned that at his house he had the carrier which was part of the deceased bike. Search of a carrier was done in the house of one Reuben Simon located at 14 Kambarage street. It was PW9 who conducted the search by the aid of the ten-cell leader named **Simon Kasusiya (PW4)**. PW5 was also present in the search because he knew the deceased bicycle. It was the said Reuben Simon who led the rest to his bedroom where a carrier of the deceased bicycle was found between the bed and the mattress. As the said bicycle was repainted with fresh black paint, the 1st accused led PW9 and other officers and showed them the painter who changed the bicycle color, one Paul Mobange. The said painter could identify the bicycle because it still had wet paint and had no seat.

In the cautioned statements of Juma Gulaka (**exhibit P3**) Juma Kasanana (**exhibit P2**) and Bahati John @Rutatina (**exhibit P6**), they have all confessed before PW8, PW7, PW9 respectively to have killed the deceased.



The said cautioned statements disclosed that it was one Julius Kataha who ordered the three accused persons and two others to kill the deceased because the deceased was having an affair with his wife.

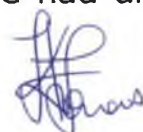
Another piece of evidence is a cautioned statement of one Reuben Simon (**exhibit P7**) which was recorded by PW9. Its contents are to the effect that he admits to have killed the deceased together with the group of four accused persons and that he has led the investigators to retrieve the carrier of the deceased's bicycle in his room. According to PW9 Reuben Simon is dead, although it was not established when.

At the close of prosecution case, the accused persons defended themselves under oath and as mentioned earlier, they did not have any witness to call. The 1st accused totally denied to have been involved in killing the deceased. He states that he just met the co-accused in remand prison and he never knew them before. He explains that on the day he was arrested he had come to Geita from his home in Katoro, to buy some cattle's medications. He then went to Q Bar and bought a soda whilst there he was arrested for murder case. He recorded his statement by telling only his personal particulars but he never admitted to have killed the deceased.

He referred to his cautioned statement that the dates have been deleted from the original 28th to 31st of March. He also stated that he was not identified properly because Julius James (PW6) did not mention him immediately after the incidence and even after his arrest there was no identification parade which was done to identify him. He challenged the dock identification by PW6, that he mistaken him.

The 2nd accused Juma Kasanana had a brief defence. He totally denied to have killed the deceased. He neither knew his co accused. He recorded his statement at the police after being beaten. He explained that he was arrested for immigration offences only to be told later that he was suspect of a murder case.

The 3rd accused person Bahati John in his defence, he stated that he is a businessman, he used to sell fish. He was arrested by two police officers including PW9. He was at his home in Mailimoja area. He was arrested because he was framed up by PW9. That it was one police officer named Duncan who told him that he has been framed. He has never been to Samina forest apart from seeing the forest whilst in the car. He also states that he had grudges with PW9 because he had an affair with one



Mariam who was the former girlfriend of PW9, and that was the source of him being framed up in a murder case.

He denied to have written any cautioned statement and that he recorded the statement after being tortured. He challenged the identification at the scene by PW6 because according to him 70 steps is a long distance for a person to be identified, especially when the incidence happened in the forest.

That being the case from both parties, the main issue is whether the prosecution has established the offence of murder against the 3 accused persons.

Before I delve into whether a case was established against the accused persons or not, I would like to point out that during trial, both parties have been occasionally referring to the evidence in Criminal Session case **no. 136/2016** either to support their case or to contradict the witnesses. I have mentioned earlier that this case was a retrial, this means, the proceedings of the former case Criminal Sessions case no. 136 of 2016 were nullified, its effect is that they do not exist. In the case of



Hakizimana Sylvester v R Criminal Appeal No. 181 of 2007 CAT

Mwanza, it was held *inter alia* that:

'Proceedings which are quashed are a nullity that is why no plea of res judicata, autrefois acquit or autrefois convict can be raised against them.'

The appellate Court also stated that the Court cannot compare the two proceedings. Therefore, it was wrong for the parties to refer to those other proceedings and such evidence or contradiction raised will not be considered herein.

Moving back to the case at hand, **Section 196 of the Penal Code** establishes the offence of murder and it states as follows:

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

Therefore, the main ingredients which needed to be proved against the accused are **causing death, with malice aforethought**, which gives us two main issues:

- i. whether the accused persons caused the death of the deceased.*

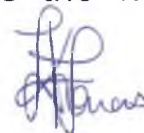


ii. If they did, whether they had malice aforethought or they intended to kill the deceased.

Based on the Post mortem report (**Exhibit P1**), as explained hereinabove, there is no dispute that the deceased death was unnatural.

As mentioned earlier, on 3rd of February 2010, PW6 who is the eye witness, was standing about 70 steps from the scene and he happened to witness the whole incidence of the accused attacking the deceased. PW6 identified the 3rd accused at the scene. In his defence the 3rd accused has raised doubts in respect of the identification stating that an identification parade was to be done to ascertain his identification. In his submission the defence counsel has explained that the witness was 70 steps from the scene which he finds it very far, that there were bushes based on the sketch map and that the witness must be in a panic state to be able to identify the assailants.

The principle of evidence of visual identification was established in the landmark case of **Waziri Amani v R** (1980) TLR 250 where the Court of Appeal had outlined factors to be considered in order to rely on visual identification evidence, which are; **one**, the time the witness had the



accused under observation; **two**; the distance at which the witness had the accused under observation; **three**, if there was any light, then the source and intensity of such light; and **four**, and whether the witness knew the accused prior to the incident. **Waziri Amani** has been referred by the appellate court from time to time including in the cases of **Raymond Francis v. Republic** [1994] TLR 100; **August Mahiyo v. Republic**, [1993] TLR 117; **Marwa Wang'iti Mwita and Another v Republic**, Criminal Appeal No, 6 of 1995 (unreported)]. **Rasul Amir Karan @ Juma & 3 others v The Republic**, Criminal Appeal No. 368 of 2017.

In respect of identification of the 3rd accused, PW6 had explained that he was hiding behind an anthill observing the accused attacking and killing the deceased an act which took about 15 to 20 minutes and the distance between himself and the scene was about 70 steps. As regards the situation at the scene, it was the defence submission that the scene had bushes and that it was not possible for PW6 to see and identify the assailants without any distractions. I have revisited the sketch map (exhibit P4) and it shows that the said distance was indeed 70 steps and in between PW6 hiding spot **(G)** and where the deceased body was lying **(A)**, there was a road to the camp marked D. There is no indication of



bushes as alleged by the defence counsel. Further, PW9 had explained in cross examination that at the scene there were trees. PW6 had stated that he heard the screaming first and checked where the voice came from, I believe, if PW6 could hear the voice and moved back towards the scene, it shows that he was not that far from the scene. PW6 was specific that at the scene it was the 3rd accused who was attacking the deceased and cutting his leg. By this description it means he had enough time and possibility of observing what was happening at the scene and who played which role. The incident took place in the morning around 10.00 hours, which means there was daylight. PW6 had stated that he was living at Samina forest as a grazeman, his daily routine involved moving around the forest feeding the cows. In the course of grazing, he had come across the 1st and 3rd accused either in the forest or at the river where he feeds the cows. PW6 had marked the 1st and 3rd accused but he never knew their names. To me, these are conditions favorable for a proper visual identification and I find no reason to doubt the identification of PW6 of the 3rd accused at the scene.

The 3rd accused has mentioned the need for identification parade and that in its absence, his identification was not proper considering that PW6



had known the 3rd accused before I find that there was no need for identification parade. The Court of Appeal has previously discussed the position where the court relies on dock identification in the absence of an identification parade. See for example **Francis Majaliwa and two others**, Criminal Appeal No. 139 of 2005 (unreported) and **Mussa Elias and two others v Republic**, Criminal Appeal No. 172 of 1993 (both unreported) and **RASUL AMIR KARAN @ JUMA. In Rasul Amir Karan** when approving **Musa Elias** the court had this to say and I quote:

'It is a well-established rule that dock identification of an accused person by a witness who is a stranger to the accused has value only where there has been an identification parade at which the witness successfully identified the accused before the witness was called to give evidence at the trial.'

It goes therefore, this parade was necessary if PW6 did not know the 3rd accused before, but he had explained that he knew him before, and he described the same to PW5.

Therefore, PW6 was not a stranger to 3rd accused. That, he frequently saw him at the forest and had marked his face.



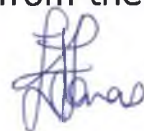
I would point out however, there is evidence from PW6 that he identified only two people at the scene; the 3rd accused and the other who was not at the dock named Baraka Said. He sometimes later states that at the scene the 1st accused had a machete and the 2nd accused left the scene with the deceased's bicycle. Based on the evidence that PW6 identified only two people at the scene and one of them is the 3rd accused, apart from the 3rd accused, his evidence against the 1st and 2nd accused persons carries no weight.

The defence counsels have submitted that the machetes which were allegedly used to kill the deceased were not brought before the court. PW9 explained that they searched the machetes but in vain. I do not think if it was necessary to bring the said machetes, having witnesses stating that he saw the machetes and the accused themselves admitting to have used two new sharpened machetes. The oral testimony was sufficient to establish that fact. Regarding PW6 leaving the cows and responding to the raised alarm, I think that was a human thing which any reasonable man would have done, giving priority to the human life as opposed to animals.



There is also a claim by the 3rd accused person that he was framed with this murder case because he had an affair with one Mariam who was PW9's girlfriend. The 3rd accused also stated that *Mama Feli* knew about the affair. Whichever, the 3rd accused did not bring either Mariam or Mama Feli to support his allegations. He explains that these ladies were bar maids hence they could not be easily traced. I think this was a serious allegation and a good defence so to speak, of which the 1st accused was supposed to try and find these witnesses. In the committal proceedings and during Plea taking and preliminary hearing the 3rd accused was given a chance to mention any witnesses whom he intends to call but he could not raise this important issue. Yet, the 3rd accused had access to legal aid. For those reasons I find the defence an afterthought and untrue.

The 3rd accused Bahati John person in his cautioned statement also had confessed to have killed the deceased. Though he retracted the statement, the said statement is so descriptive to the extent that no one else could have recorded it. Through a trial within a trial, it was clear that it was the 3rd accused who made his statement without any force or intimidation. In his own words, he explains that he is related to the second accused as he is his cousin and the 1st accused is from the same clan with



him. That, on the incidence he stayed back together with one Baraka Said at a restaurant belonging to Julius Kataha to trace the deceased and when he passed towards the forest, he called the rest of the group to inform them and he followed them. He also explained about the money which they were paid that it was Tshs. 2,500,000 in total and each had a share of Tshs. 300,000/=. I find the cautioned statement carries the confession that the 3rd accused killed the deceased and the said confession is well corroborated by the evidence of PW6.

All these pieces of evidence substantiate the strong visual identification of PW6. Every witness is entitled to credence and must be believed be unless there are good reasons not to believe him. See **Goodluck Kyando v R** [2006] TLR 363. PW6 who had testified about what he witnessed and he has no reasons to fabricate the case against the 1st accused. Hence, the evidence as described above concludes that the 3rd accused person Bahati John, was responsible in ending the life of the deceased.

In respect of the 2nd accused Juma Kasanana, there is evidence from his own cautioned statement where he confesses to have killed the



deceased. The said confession is also corroborated by the cautioned statements of the 1st and 3rd accused as they mentioned the 2nd accused to have conspired with them to kill the deceased. The second accused person has defended himself that he was arrested on 4th April, 2010 and upon arrest he was told that he was arrested based on violating immigration laws. He was tortured and asked to record a cautioned statement of which he did. He states that, the officer who recorded his statement was a tall police man who is "sukuma" by tribe and not PW9 whose tribe is actually "kurya". He also stated that he was interrogated in Kisukuma language. The 2nd accused is alleging that the case against him was a frame up. As there was no evidence of existing grudges or claims against the arresting officers there would be no reason for the 2nd accused to be framed up. I find this defence baseless.

PW9 states that the 2nd accused was arrested on 7th April 2010. Based on the contents of the cautioned statements Exhibit P3 and Exhibit P6, it appears the arrest of the 2nd accused was following him being mentioned by the 1st and 3rd accused. Basically, the evidence against the 2nd accused is his confession and the evidence from co accused. I am aware of the fact that it is unsafe for a conviction to rely on retracted



confession and that in some circumstances an accused person may be convicted based on his retracted confession statement. In the case of **Hemed Abdallah v R** [1995] TLR 172 it was held and I quote:

'Generally, it is dangerous to act upon a repudiated or retracted confession unless it is corroborated in material particular or unless the court after full consideration of the circumstances, is satisfied that the confession must be true; and that once the trial court warns itself of the danger of basing a conviction on uncorroborated retracted confession and having regard to all the circumstances of the case it is satisfied that the confession is true, it may convict on such evidence without any further ado'

[see also **Bombo Tomola v Republic** (1980) TLR 254 and **Georfev Sichizya v DPP** Criminal Appeal No.176 of 2017.]

In his cautioned statement which was admitted as exhibit P2, the second accused Juma Kasanana admits to have killed the deceased together with Juma Gulaka (the 1st accused), Bahati John and Reuben Simon. For lucidity, I will quote parts of his statement:

'nakumbuka kuwa mnamo tarehe 3/2/2010 muda wa saa nilikuwa kwenye pori la Mgusu nikiwa na kundi langu la watu wanne na mimi nikiwa wa tano na tulikua kwenye pori hilo



tukiwa na mpango wa kumuua mtu mmoja ambaye alifahamika kwa jina la January.....

na mmoja wetu aitwaye Mbaraka ndiye aliyeongea na Julius ilipofika muda was aa 1100 hrs mimi na wenzangu akina Mbaraka s/o Said, Juma s/o Guraka, Bahati s/o John na Reuben s/o Simon tulimshika marehemu January na kumkatakata mapanga hadi akafa na baada ya kufa tulimnyang'anya baiskeli yake tukaondoka nayo na tulifanya tukio hilo la mauaji baada ya kupokea Tshs. 2,000,000/= kutoka kwa Julius.....

na hela hizo alizipokea Mbaraka. Hili ni tukio langu la kwanza kumuua binadamu mwenzangu mbali na kwamba mimi ni mhalifu wa muda mrefu.'

Hereinabove, the 2nd accused states that it was one Julius Kataha who hired them to kill the deceased. That it was one Mbaraka who talked to Julius Kataha and even the money was paid through Mbaraka. He also states that they were paid a total of Tshs. two million (2,000,000/=) he also admits that he used to commit several crimes but this was his first time to kill a person.

Having warned myself and being cautious in relying on the confession statement. I have also considered the contents of the 2nd



accused cautioned statement and the similarity of his story to these of the 1st accused, the 2nd accused and Reuben Simon. Even Reuben Simon has mentioned the 2nd accused to have been involved in killing the deceased. I have found that what the 2nd accused was stating in his cautioned statement is true and this evidence is strong enough to incriminate the second accused with the offence of murder against the deceased.

As regards the first accused Juma Gulaka, the evidence against him is that he has confessed to have killed the deceased in his cautioned statement and he was found with the deceased's bicycle. As mentioned by the defence counsels in their submission, in the said cautioned statement, the dates of arrest of the 3rd accused and Reuben Simon (exhibit P7) appears to be deleted. I have gone through the said statements, 1st accused cautioned statement was recorded on 31/3/2020 from 1700 to 1740 hours, the 3rd accused statement was recorded on 31st /3/2010 from 1300 to 1420 hours and Reuben Simon's statement was recorded on 31/3/2010 from 1700 to 1834. The contradictions on the dates of arrest on the statements of Reuben Simon, I consider it minor and does not go to the root of the case because the rest of the evidence shows that the arrest at the pond was on 30th and the statements were recorded on 31st of



March 2010 and the reason for such a delay was explained by the prosecution that investigation was going on in terms of searching the rest of the accused and parts of the bicycle which was seized at the pond.

I have considered the defence raised by the 1st accused that he had come to Geita town from Katoro to buy some medication for his cows and that he was arrested at Q bar while having a soda, I decline this explanation as these are mere words to evade criminal liability and they are unsubstantiated. The 1st accused also raised an issue of identification parade. I think as it has been explained hereinabove, the evidence against the 1st accused was not based on visual identification but on being found with the deceased bicycle and his confession statement, thus there was no need for conducting an identification parade.

In his cautioned statement (exhibit P3), the 1st accused admits to have killed the deceased he also states that he used to be a cattle thief since the year 2000 together with Reuben Simon, Baraka Said, Juma Kasanana @Lugudiza (the 2nd accused) and Bahati John the (3rd accused). His words are not far from the second accused and 3rd accused in terms of the planning of the killing, that it was Julius Kataha who hired them, the



execution and the amount of money that they were promised Tshs. 2,500,000 and his share was (300,000). The 1st accused added that it was Julius Kataha who gave them two, new, sharpened machetes and that it was Baraka Said and Bahati John who had a duty to cut the deceased. Having gone through this statement, I find it to contain the truth of what happened before, during and after killing the deceased and evidence points fingers at the 1st accused.

It is also in record that the 1st accused was found with the deceased's bicycle, at the pond, shortly after the incident. That the 1st accused was with one Reuben Simon who is now the deceased. According to PW9 Reuben Simon had led them to his house where he had hidden the carrier of the said bicycle under the mattress. And, the 1st accused has led PW9 to 'Nendeni kwa Amani' street to the painter who repainted the bicycle.

The deceased was killed on 3rd of February 2010 and the bicycle was found in possession of the 1st accused on 30th of March 2010 which is within two months from the date of incidence. The prosecution in their submissions, they are relying on the *doctrine of recent possession*. In order for the doctrine of recent possession to be invoked, the prosecution must

prove that the accused person was found in possession of the property recently stolen. In the case of **Joseph Mkumbwa & Samson Mwakagenda Joseph v. R**, Criminal Appeal No. 94 of 2007; the Court stated 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 for 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, the property was recently stolen from the complainant, and lastly, that the stolen thing constitutes the subject of the charge against the accused. The fact that the accused does not claim to be the owner of the property does not relieve the prosecution of their obligation to prove the above elements...."

It has been established by the prosecution through PW2, PW3 and PW5 that the bicycle (exhibit P5) which was found with the 1st accused was the property of the deceased within two months from the incidence. Due to the nature of an item being a bicycle, I find that for a duration of two months, the bicycle was recent stolen. Four prosecutions witnesses PW2,



PW3, PW5 and PW6 stated unanimously that they used to see the deceased riding his bicycle and that PW2 a deceased's brother, was sometimes using the same bicycle. They all identified the bicycle, (exhibit P5) and explained the features of the bicycle that it had red handlers, was hand made using pipes, the blades were new (readymade) and had green color and the seat was welded by gas. During trial these features could still be seen on exhibit P5 although the same looked old and a bit rusty.

PW8 and PW9 had explained that during the arrest, the bicycle was in possession of both Reuben and the 1st accused, but it was Reuben who had the carrier at his bedroom. PW8 explained that the 1st accused attempted to escape with the said bicycle but the backup police officers arrested him. It is also in evidence that there were attempts to change the appearance of the said bicycle by repainting it in black color and by removing the carrier. These acts show the ill motive of the 3rd accused to disguise the original features of the bicycle. The evidence reveals further that it was the 1st accused who led PW8 and PW9 to the person who repainted the bicycle into black color. This evidence indicates that the 1st accused was in possession and control of the bicycle which belonged to the deceased. The 1st accused and Reuben Simon had common intention of



changing the appearance of the said bicycle because they did not want it to be linked with the deceased. Consequently, I find that the doctrine of recent possession has been properly invoked. It was held in **Rex v Bakari s/o Abdallah** [1949] 16 EACA 84 which has been referred in **Japhet Thadei Msigwa v R** Criminal Appeal no. 367 of 2008 that:

'Possession by an accused person of property proved to have been recently stolen may not support presumption of burglary or breaking and entering but of murder as well, and if all the circumstance of a case point to no other reasonable conclusion the presumption extend to any other, however, penal'

Based on this evidence I am of the strong view that Exhibit P5 is a bicycle which belonged to the deceased, it was stolen at the scene by the 1st accused and his co accused, it was found in the possession of the 1st accused. Therefore, this piece of evidence corroborates the confession statement against the 1st accused person that he was among the 5 assailants who attacked and killed the deceased at Samina forest.

I have considered Exhibit P7 which is the cautioned statement of Reuben Simon which was admitted without any objections and which also corroborates the confession of the accused person. Reuben Simon admits



the issue of him being a cattle thief together with the 1st, 2nd and 3rd accused and Baraka Said. He explained that they killed the deceased and he is the one who took the deceased's bicycle. That he removed the carrier and repainted the bicycle for Tshs 2,500/= at the corner of "Nendeni na aman'", he admits to have been arrested while bathing and he was in the possession of the deceased bicycle. And that on the following day after the arrest, he led the police to his and showed them where he has hidden the carrier in his bedroom.

Now that it has been established that it was the 1st, the 2nd and 3rd accused who killed the deceased, the second issue is whether there was *malice aforethought*. In the landmark case of **Enock Kipela v. Republic**, CAT-Criminal Appeal No. 150 of 1994, CAT (unreported). The Court held

'usually, an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various, including the following: (1) the type and size of the weapon; if any used in the attack; (2) the amount of force applied in the assault; (3) the part or parts of the body the blow were directed at or inflicted on; (4) the number of blows, although one blow may, depending upon the facts of the particular case, be

sufficient for this purpose; (5) the kind of injuries inflicted; (6) the attackers utterances, if any, made before, during or after the killing; and (7) the conduct of the attacker before and after the killing.'

In answering this issue, the evidence shows that the accused persons attacked the deceased with two, new sharpened machetes, the force applied excessively and it involved the delicate parts of the body because according to Post Mortem Examination Report, exhibit, P1, the deceased had multiple cut wounds on the left lower leg, head and neck. There was definitely more than one blow and the blows caused significant injuries. There is no evidence if the accused uttered any words before during or after the killing but their conduct after the killing was to steal the deceased's bicycle and leave the body lying lifeless in the forest. These acts without doubts shows that the accused persons had malice aforethought, that is they intended not just to injure the deceased but to kill him.

That being said, I am satisfied that the prosecution has proved its case to the required standard, that is beyond reasonable doubt, against the accused persons. I therefore, find the accused persons **Juma s/o Gulaka,**

Juma s/o Kasanana and **Bahati s/o John @ Lutatina** guilty of unlawful killing January Kasuhuke and consequently, I hereby convict them for the offence of Murder contrary to section 196 and 197 of the Penal Code Cap. 16 [R.E 2002], as charged.

Dated at **GEITA** this 15th day of June 2022.


L. J ITEMBA
JUDGE

SENTENCE

There is only one sentence for the offence of murder that is **death by hanging** and my hands are tied to the same.

Consequently, in compliance with section 197 of the Penal Code, the convicts **Juma s/o Gulaka, Juma s/o Kasanana** and **Bahati s/o John @ Lutatina** are hereby sentenced to suffer death by hanging.

It is so ordered.




L. J ITEMBA
JUDGE
15.6. 2022