

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIBONDO

CRIMINAL SESSION CASE NO. 03 OF 2022

REPUBLIC

VERSUS

1. CHIPUKIZI S/O CHONDI

2. NYAMSASE D/O MASESA

JUDGMENT

6/7/2022 & 8/7/2022

L.M. Mlacha, J

Chipukizi Chondi and Nyamsase Masesa are charged of murder c/s 196 and 197 of the Penal Code, Cap 16 R.E 2019. It is alleged that they killed Magezi Kagweshihire on 22/6/2021 at Kanyonza village within Kakonko district, Kigoma region. They denied the charge.

The prosecution led by Agnes Hyera, Principal State Attorney and Clement Masua state attorney called 10 witnesses who tendered 10 exhibits to discharge their burden of proof. Among the exhibits which were tendered was a mattress alleged to contain the blood of the deceased and a machete @ panga which is alleged to have been used in cutting the throat

of the deceased. The deceased is alleged to have been slaughtered in his matrimonial bed on the night of 22/6/2021. The accused denied to commit the murder, each in his/her own way. This judgment is set to establish the reality. I will try to show what happened and the part played by each of them, if any.

The star prosecution witness was PW3, Yamungu Magezi, a child aged 10 years. He is son of the deceased. The second accused is his biological mother. After being tested in terms of section 127 of the Evidence Act, Cap 6 R.E 2019, a finding was made that he had sufficient knowledge but did not know the meaning of an oath. He gave evidence without oath. He promised to speak the truth. When he was given a chance to speak, he told the court that on 22/6/2021 at around 9:00 PM he and his brother Yusufu were at home seated at the kitchen. His mother, the second accused came and asked for the keys to the main house. He gave her the keys. She opened the door. While there, he saw Chipu (the first accused) and her mother entering the house. His mother was holding a torch which helped him to see them. Chipu was known to him. He used to see him at his shop at the village. The kitchen was also near. His mother cooked food and they ate. They moved to sleep in their room. While in their room, he

heard his father saying "Chipu unaniua". He thereafter heard the voice of something roaring. He asked his mother of what was happening. She told him that it was a dog. She saw her mother getting out regularly. When he said on what was happening, she said that her stomach had pains. PW3 could identify Chipu (1st accused) at the dock. He could also identify his mother/second accused. During cross examination he stressed that he used to see the first accused regularly at his shop (Kibandani). He went on to say that he heard his father entering the house. He added that they were on the bed but awake.

It was the evidence of PW2 Jesca Pebuye (47) that the deceased was her husband. She was the first wife. The second accused was the second wife. She lived with the deceased for 20 years and had six (6) children. He went on to say that her husband left home on 21/6/2021 and went to attend a burial ceremony at Runzewe. He returned on 22/6/2021 at 6:00 PM. He greeted them and moved to Samasama to watch football. He returned at 9:00 PM and passed at the house of the second accused to get food. He returned and asked for food saying the junior wife had no food. She gave him food. He ate and left to the junior wife to spend the night. She woke up in the morning and proceeded to the garden. She returned later in the

day but could not see her husband. She thought he was on the other side because that was not her shift. She could not see him anymore.

On 24/6/2021, Thursday, PW2 thought it wise to visit the junior wife to ask for the whereabouts of his husband. The junior wife said that she could not see him since Monday. She told her that he had come to her on Tuesday. The junior wife replied that she did not know his whereabouts. She advised that they should tell their father in law. They did so. Their father in law advised them to see their brother in law. They did so. People gathered and made calls to his friends without success. While there at around 2:00 PM, the second accused advised people to look for him in the bushes. His two sisters in law and his child rose up and went into the bush/farms. They soon saw him under a banana tree dead. They rose an alarm and people came. He had wounds. She went on to say that the relation between the junior wife and the deceased was bad because he suspected her to have a love affair with the first accused. She went on to say that she knew the first accused very well. He used to see him regularly at Kayonza. She could identify the two accused at the dock.

PW4 Obeid Kagwesihiile is a brother of the deceased. He received a call from PW2 who said that his brother had disappeared. They traced him

without success. They soon heard an alarm. On moving close they found him under a banana tree dead. They informed the village chairman and the police.

PW4 went on to say that the deceased was laid under the banana tree naked. His clothes and the phone were aside. He had a cut wound on one side of the face and the other on the neck. His neck was cut. When they looked around, they found marks which led to the house of the junior wife, the second accused. They suspected her to be involved. They followed the marks and entered inside the house. They moved to the matrimonial bedroom where they saw blood on a bag of maize and the wall. They turned the other side of the mattress and saw a lot of blood. They moved to the kitchen and found the panga. He identified the accused at the dock. He said that the second accused lived with his brother for 10 years. He knows her very well. He also knows the first accused, a person whom they grew together at the village.

It was the evidence of PW8 Inspector Andrew Danford Nyirenda, PW9 F 1618 D/SGT Maira and PW10 H 168 D/CPL Ramadhani that the the second accused was brought by the chairman of Kumuyando B hamlet Mr. Juma Kafuku at the police station on 24/6/2021. Juma said that he had brought

her on security reasons. When she was questioned she confessed to be involved in killing the deceased. They moved together to the scene of crime. They found the deceased laid on the ground. He was necked with two wounds. One of the wounds was on the right side of his face. The second was on the neck. Like other witnesses, they said that there were marks on the ground showing that the deceased was killed somewhere and dragged to the area. He was dumped under the banana tree. The marks led to the house of the second accused who had earlier confessed to commit the crime. They moved to the house which according to the sketch map drawn by PW10 is in a distance of 106 meters. They all said that when they entered inside the house they saw blood on a bag of maize and the wall. The mattress did not show any signs but when they turned it to the other side they found a lot of blood. The second accused took them to the kitchen where they got the panga. They seized the mattress and the panga which were later received as exhibits P3 and P4 respectively. The search order and the sketch maps were received as exhibits PW8 and P10 respectively.

It was the evidence of PW8 Inspector Nyirenda that he took the mattress and the panga to the police station and gave them to PW10 DC Ramadhani

(now CPL Ramadhani) through the station diary of police Kakonko. DC Ramadhani gave them to PW6 CPL Justine who was the exhibit keeper. PW6 is the one who tendered them in court. He also tendered the clothes (a khaki trouser, a T-shirt, underpants (bukta), and sweater) which were tendered as exhibit P5 collectively and the slippers (Exhibit P6).

The body of the deceased was picked by the police and sent to Mganza Health Center. PW1 Dr. Bigilimana Francis Mapigano (48) was given instructions by the police to examine the body to establish the cause of death. He said that the deceased had two cut wounds. One was on the lower jaw. It was deep up to the bone. The bone was visible by eyes, he said. The second was on the front area of the neck. The air and food passages were cut completely. The wounds had maggots (funza). He filled a postmortem examination report and gave it to the police. It was received marked exhibit P1. He had the opinion that death was caused by excessive bleeding from the cut wounds. He added that the wounds were caused by a sharp instrument.

It was the evidence PW5 WP Amina that she questioned the second accused friendly on 28/6/2021 at 12:00 noon and found that she was confessing. She told the OC-CID of this fact who directed she should be

sent to a justice of peace. She sent her to PW7 Sophia Ernest Ritenge of Kibondo Primary Court. PW7 recorded her extra judicial statement which was received as exhibit P7. She also confessed to PW9 D/SGT Maira who recorded her cautioned statement, Exhibit P9.

Both the extra judicial and the cautioned statements were received without objection. Reading through, I have noted that they give details of what happened on the night of the 22/6/2021 and thereafter. They have a confession of the second accused which also implicates the first accused.

The second accused gave evidence as DW1. She repeated what she had said in the confessions except on the element of giving the panga. Her evidence can be presented as follows. That she was married in October 2007. She was beaten twice in between on minor mistakes. They have 5 children – Yamungu Magezi (5), Edirisa and Yusufu (twines aged (7 years), Tunza Magezi (3 ½ years) and Daniel Magezi (7 months). On 22/6/2021 she met the first accused on the way as she was going to the farm. The first accused was her boyfriend. He asked if they could meet that day. She told him that they could meet because her husband was away. He had gone to a place called Msalabani to attend a burial ceremony. They agreed that he could come at home at around 9:00 PM. They parted. When she

came home in the evening she was told by the children that her husband had come home in the company of two others on a motorcycle. She could not inform the first accused of the changes because she had no phone. She planned to tell him that there was no food so that he could move to sleep with the elder wife (PW2). She prepared food and gave the children. When her husband came she told her that there was no food. He moved to the first wife. Soon later, Chipukizi the first accused came. They moved to the room to sleep. It took some time. Her husband returned. The first accused picked his clothes and went to the Children room. She opened the door for her husband who moved straight to the bedroom to sleep. She put a stone on the door so that the first accused could get a route to escape.

Dw1 went on to say that while on the bed asleep with her husband, the first accused came and held him on the neck. They started to quarrel. She picked her child and run to the sitting room. She soon got stomach problems leading to diarrhoea. She moved outside to attend the call. When she came inside she met the first accused cutting her husband. He told her that if she could raise an alarm he could finish her as well. She remained silent. Her stomach problems proceeded. She had to go out again for a stomach run out. She then saw the first accused pulling him out promising

to kill her as well. She closed the door and remained inside. He left. He could not return. She ended saying that the deceased was killed by the first accused, not her.

During cross examination, the second accused told the court that her relation with the first accused started in 2008 but she was warned by her husband. It ended. She said that her husband had no quarrels with people but the first accused was troublesome in the village. He used to beat his wives. She went on to say that she washed the panga with water to remove blood. She could not wash the mattress. He agreed that she made her confession to the police without torture. She also confessed before the justice of peace. She went on to say that Yamungu (PW3) spoke the truth but the story of the key was a lie. She agreed that she told Yamungu that it was the roaring of a dog. She also agreed that her husband said that "Chipu unaniua". She denied giving the panga to him saying that "he took the panga himself" adding that it was inside the house. She went on to say that she remained silent because she had committed a big mistake. She agreed that she dug to remove blood stains from the door. She also rubbed the wall slightly. During re-examination, she told the court that she

could not report because she was afraid for she had been the cause of the death.

The first accused appeared as DW2. He told the court that he has a business of selling beer at the village. While at home on 22/6/2021 he received his sister in law, DW4 Amina Paulo. He remained at home with his wife, DW3 Silvia Paulo and the visitor up to 4:00 PM when he went to open his business. He attended his business up to 8:00 PM and came back home. He met the family watching Television news. He ate food and watched the TV. There was no issue up to 24/6/2021 when he heard news that the deceased had disappeared. He joined people to trace him but could not succeed. At 6:00 PM he heard an alarm. People said that he had been found dead at the farm of Silvester. The village chairman and the police came. They moved to the scene of crime. He was later suspected of killing him. He denied to commit crime. He denied to have any relation with the second accused. He said that the woman might have been influenced by Juma Kifuku to mention him on some grudges between him and Juma Kifuku. He said that he had no grudges with the deceased who was his uncle. He also said that he had no grudges with Yamungu (PW3). He brought DW3 and DW4 to corroborate the evidence that he never went out

on the night of 22/6/2021. He was at home with his wife Silvia Paulo and the visitor.

That marks the end of the evidence before the court. Counsel had a chance to make final submissions. Each made a submission to support his or her case. I will refer to their submissions in the course of discussing the evidence and the relevant legal principles.

My examination of the evidence on record and the submission has shown me that it is not disputed that the deceased disappeared on 24/6/2021 and found dead under a banana tree on 24/6/2021. It is also not disputed that the deceased had two deep cut wounds caused by a sharp instrument which are the cause of death. Death and the cause of death are not disputed. The issue is who killed the deceased and whether those who killed him had malice aforethought. Based on the evidence above, the principle state attorney has the view that the accused are the ones who killed the deceased and that they did so with malice aforethought. The defence counsels are divided. Ms. Nyambura Nashon has the view that her client is innocent. She has shifted the case to the first accused. Based on the defence of the first accused that he did not get out that night, Mr.

Godrian Tilya has the view that the prosecution has failed to prove the case against the first accused. I have considered their submissions carefully.

My look at the prosecution case has shown me that it is based on circumstantial evidence, confessions and evidence of a Co-accused. I will try to explore the law and principles involved fully. I will also examine the element of malice for each accused in line with the doctrine of common intension. I will relate them with the evidence on record.

I will start with circumstantial evidence. This is evidence picked from the circumstance of the commission of the crime which shows the way the crime was committed. The court will look at the words spoken, deeds done or omitted to be done, physical features of the scene of crime and objects found at the scene of crime or some other place connected to the scene of crime and the conduct of the person suspected to commit the crime. It will look at the whole scenario and try to interpret what might have happened and who might be involved.

Sarkar on Evidence, 15th Ed. 2003 Report Vol. 1 page 63 say that circumstantial evidence must satisfy three tests:

*1) the circumstances from which an inference of guilty is sought to be drawn, **must be cogently and firmly established;***

2) *those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;* and
3) *the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.*" (Emphasis added)

The erstwhile East African Court of Appeal said the following in **Simon Musoke v. R.** (1958) EA. 715 at page 718 where it was said thus:

*"... in a case depending exclusively upon circumstantial evidence the court must before deciding upon a conviction find that **the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilty**".* (Emphasis added)

In **Jimmy Runangaza v. Republic**, Criminal Appeal No. 159B of 2017 the Court of Appeal had this to say:

*"... In order for the circumstantial evidence to sustain a conviction, **it must point irresistibly to the accused's guilt.**"*(Emphasis added)

See also **Simon Musoke v. Republic**, [1958] EA 715.

I will start by an examination of the evidence. PW3 Yamungu Magezi saw the two accused persons entering inside the house that night. The accused

were known to him very well. The first accused has a shop at the village where he used to see him. The second accused was his biological mother. He saw them using the light of a torch from the second accused. PW3 said that subsequent in the night while in their room on bed but not asleep, he heard his father knocking the door who entered. He knew his voice very well as his parent. He could therefore identify him by voice without doubt. While still awake, he heard his father saying "Chipu unaniua" literally meaning Chipu you are killing me. He then heard a roaring voice. He asked with his mother who was at the sitting room by then, moving in and out of the house on what that voice could be. His mother told him that it was the voice of dogs. Believing that to be correct, he slept.

We have the evidence of PW2 who told the court that her husband went missing. She could not see her from 22/6/2021 when he move to the second accused to 24/6/2021 when he was found dead. She moved and asked the second accused on the whereabouts of their husband. The second accused said that she was not aware. They moved to tell their father in law who advised them to go and ask his brother (PW4). They went to see him and some relatives who made calls to his friends without success. But while seated at home in the evening contemplating on what

had happened, the second accused advised them to move around the bush to see if he could be there. That advice was followed and led to the recovery of the body of the deceased in the farm under a banana tree.

We have the evidence PW8 Inspector Nyirenda, PW9 D/SGT Maira and PW10 D/CPL Ramadhani who told the court that the second accused was brought at the police station on 24/6/2021 at 6:00 PM by Juma Kifuku, the chairman of Kumyando B hamlet on safety reasons, to avoid angry villagers who accused her of killing her husband. On being questioned, she agreed to take part in killing her husband and took them to the scene of crime. They saw the body of the deceased under a banana tree naked. His clothes and phone were aside. On inquiry, they saw marks on the ground of something which had been drug. The marks led them to the house of the second accused. The sketch map (Exhibit P10) shows the marks and the distance (106 meters). They all said that they followed the marks and entered the bed room of the deceased. They saw blood on a maize bag, on the walls and the mattress inside the bedroom. They added that the second accused took them to the kitchen where they saw the panga. They seized the mattress and panga as exhibit after filling the search order.

We have the evidence of PW8, PW10 and PW6 and exhibit P2 which show the chain of custody of exhibits P3 and P4. PW8 seized them at the scene of crime after the seizure note. He sent them to the police station. He gave them to PW10. The latter gave them to PW6, the exhibit keeper who entered them in the exhibit register, PF16. They were given serial Number 38. PW10 is the one who tendered them in court. The evidence shows a good chain of custody.

Looking at the evidence of PW1, PW2, PW3, PW4, PW8, PW9 and PW10 and exhibits P1, P2, P3, P4, and P10 one can see a complete chain of events leading to the conclusion that, within all human probability, the deceased was killed by the accused and no one else. The evidence is incompatible with the innocence of the accused and incapable of any other explanation than the fact that the accused are the one who killed the deceased. The evidence presents a strong circumstantial evidence showing that the accused are the ones who killed the deceased and no one else. The evidence does not lead to someone else other than the accused persons. It is tight and clear.

The defence of the first accused and his witnesses that he did not go out that night appear to be a cooked story. Even his face and that of his

witness did not show that they were speaking the truth. Their demeanour was very shaking. That also applies to the defence that he had drudges with Juma Kafuku. It is an afterthought and baseless. It is dismissed.

Apart from the circumstantial evidence, we have the cautioned statement, exhibit P9 and the extra judicial statement exhibit P7. As indicated above, they were all admitted without objection. They also form the basis of the defence of the second accused. Exhibit 9 reads in part as under:

"MAELEZO KAMILI: Mnamo tarehe 21.06.2021 majira ya saa 02:00 hrs Mume wangu MAGEZI KAGWESIHIILE aliniaga kuwa anaondoka kwenda Msibani huko MSALABANI LUNZEWE Wilayani Biharamlo Mkoani KAGERA ... mnamo tarehe 22.06.2021 majira ya 16.00hrs nikiwa ninaenda Bustanini – MUYOVOZI nilikutana na mpenzi wangu aitwaye CHIPUKIZI S/O? ambaye aliniuliza vipi mipango ikoje nilimwambia kuwa haina shida yoyote aje nyumbani tu kwani mume wangu hayupo amesafiri ameenda msibani huko Msalabani. CHIPUKIZI s.o ? alisema atakuja nyumbani kwangu kati ya majira ya saa 21:00-22:00hrs kwani alijua hayupo mume wangu na tuliachana nikaenda Bustanini – MOYOVOZI. Nilirudi majira ya 19:00hrs na kuwakuta watoto wangu ambao waliniambia kuwa mume wangu amerudi toka msibani na amechukua muhogo na kuondoka akiwa anatafuna akiwa na watu wawili ambao hawawajui majina

na wameondoka na pikipiki na kwenda sokoni. Nilipika chakula ugalli na Maharagwe na tulikula chakula chote kikaisha na kabla sijalala watoto wakiwa wamelala majira ya 21:00hrs mume wangu MAGEZI s/o KAGWESI HILE alifika nyumbani na kuomba chakula lakini nilimwambia kuwa chakula kimeisha na aliondoka kwenda kwa mke mkubwa. Na sikuweza kumpata CHIPUKIZI s/o ili kumzuia asiweze kuja kwani mme wangu amerudi kwani mimi nilikuwa sina simu. Na ilipofika majira ya 21:30hrs alikuja CHIPUKIZI s/o? na kuingia ndani na kulala kitandani na kuvua nguo zake zote na alikuwa ameshafanya tendo la ndoa [kunitomba] mara moja. Baada ya kumaliza kunitomba ndipo mume wangu alipokuja na kubisha hodi **ndipo CHIPUKIZI s/o? alichukua nguo zake na kwenda kujificha chumba cha Watoto** ndipo nami nilipoamka na kwenda kumfungulia mume wangu ambaye aliingia ndani na kupitiliza kulala kitandani **nami niliamua kuacha mlango wazi kwani mlango wa kutoka nje niliegesha tu bila kufunga na kemeo** Baada ya hapo nilirudi kulala kitandani na mume wangu na ilikuwa yapata kama majira ya saa 23:00hrs. na kwa wakati huo mume wangu alikuwa ameshaanza kusinzia kwani alikuwa ameanza kukoroma ndipo alipokuja **CHIPUKIZI s/o? chumbani na kumkaba mume wangu kwenye koromeo** ndipo nilipoamka na kujifunga nguo na kumchukua mtoto wangu aitwaye TUNZA d/o MAGEZI na kusimama pembeni ndipo nilipochukua tochi na kuiwasha na

kumwona aliyekuwa amemkaba ni CHIPUKIZI s/o? ambaye aliniambia kuwa **niletee panga nami nilienda chukua panga lililokuwa sebuleni kwetu ambalo ni letu la kukatia kuni na kumletea CHIPUKIZI s/o?** ambaye alianza kumkata na panga sehemu za kwenye mshavu na kichwani huku mume wangu alianza kupiga kelele nami kwa hofu nilitoka na kwenda sebuleni. Mtoto wangu aitwaye YAMUNGU s/o MAGEZI aliniuliza mama ni nini hicho nami nilimjibu kuwa **labda ni mbwa ndiyo wanaopiga kelele huko nje** ambao wamemaliza kama siku mbili. Mtoto aliniuliza kwanini niko sebuleni nilimwambia kuwa **tumbo linaniuma na nilitoka nje na kwenda kujisaidia kwani nilikuwa nimeshaanza kuharisha kutokana na uoga.** CHIPUKIZI s/o? aliniuliza kuwa nitakusaidiaje sasa katika hili. Basi aliniambia kuwa **anamchukua na kwenda kumtupa nje akiwa na nguo za marehemu na alimtoa akiwa anamvuta akiwa amemshika mkono pamoja na nguo zake na alipitilizia huko na kuondoka.** Na kwa ujumla mume aliuawa na CHIPUKIZI s/o? mle chumbani kwetu kitandani kwani chumba kilikuwa kimejaa damu. Godoro pia huku pembeni kukiwa na lile panga likiwa na Damu. Nilichukua uamuzi sasa na kulisafisha panga kwa maji ili kuondoa damu na kutoa shuka ambalo lilikuwa limejaa damu lililokuwa kitandani. Nilitoka nje na kwenda kuchukua udongo na kuweka chini ambapo damu zilikuwa zimetapakaa na nilichukua kitambaa na

maji na kuanza kufuta damu zilizokuwa zimejaa kwenye magunia na ukutani. Mnamo tarehe 23/06/2021 asubuhi niliamka na kufuata ule mburuzo ambapo napo ile miburuzo nayo niliifuta na nje ya nyumba nilifagia ili kufuta matone ya damu na mburuzo. Maiti ya mume wangu CHIPUKIZI s/o? alimpeleka katika shamba la SILVESTER s/o BANGUKA ila shamba likiwa limepakana na shamba letu. Na asubuhi hiyo niliamua kwenda kuchimba mashimo matano kwa ajili ya kupanda migomba na hii lengo langu ni katika kuondoa ile miburuzo katika shamba letu. Nilienda kufua shuka na cover la godoro lililokuwa limejaa damu sana na baada ya kukauka nilienda kulificha cover la Godoro jikoni kwenye na shuka nililiweka kwenye bag la nguo zangu lengo ni kwamba watu wasije kusikia harufu la damu na panga nilienda kulificha jikoni. Baada ya hapo niliendelea na shughuli zangu kama kawaida huku nikiwa na wasiwasi sana....CHIPUKIZI s/o? ni mpenzi wangu wa muda mrefu tangu mwaka 2008 nikiwa nina mtoto mmoja ambapo mme wangu alitufumania nje ya nyumba yangu ... Mwezi Novemba 2020 tulianza tena mahusiano ya kimapenzi na CHIPUKIZI s/o? ... **Na sikuweza kujua kwanini nilichukua jukumu la kutoa panga ila zaidi nilijua kuwa anamtishia tu mume wangu hatamuua ..."** (Emphasis added)

Exhibit P7 reads in part as under:

"MAELEZO YA MTUHUMIWA

Mimi ndiye niliyesababisha kifo cha marehemu mme wangu aitwaye Magezi Kagwesile. Mme wangu aliniaga siku ya jumapili, akasema anataka aende msibani huko Msalabani. Siku hiyo alilala kwa bi-Mkubwa. Jumatatu asubuhi aliamka saa moja asubuhi, tukasalimiana kisha akaenda kwa baba yeke kumsalimia.

*Mimi nilichukua baiskeli, nikaenda shambani kupalilia mihogo isiungue na moto. Nilirudi saa nane mchana mme wangu hakurudi siku hiyo kutoka Msalabani, alirudi kesho yake. Huyu mwanaume wa pembeni anayeitwa Chipukizi tuliwasiliana, tukapanga na masaa ya yeye kuja nyumbani. Nilimwambia aje hakuna shida, mme wangu yuko msalabani. Alisema atakuja saa tatu usiku. Mme wangu alirudi saa 12 za jioni, akasalimia watoto mimi nilikuwa nimetoka. Alichukua mhogo wa kutafuna, akaondoka akaenda kuangalia mpira. Alirudi saa tatu usiku, akapiga hodi, nikafungua. Aliuliza chakula, nikasema chakula tumemaliza. Alienda kwa bi mkubwa akala. Baada ya kula alirudi kwangu kulala. Aliporudi mme wangu alikuta Chipukizi ameshakuja kwangu kulala yumo ndani. **Alipopiga hodi nikamfungulia. Yule Chipukizi alichukua nguo zake akaenda kujificha chumba cha Watoto. Alipokuwa amejificha niliacha milango wazi, Yule Chipukizi alitoka kule alipokuwa amejificha akaja chumbani kwangu, akafika anamkaba mme wangu shingoni, wakaanza***

kugombana. Chipukizi akaniambia nimpelekee upanga, nikampelekea. Hapohapo akaanza kumkatakata na upanga, mme wangu akaanza kukoroma, Watoto wakaamka. Wakauliza hicho kinachokoroma ni nini?. Nikawaambia ni mbwa wanagombana nje....Alimbeba akasema nisiseme ni yeye, niseme ni mrundi aliyemuua. Nilikubali, akaenda kumficha kwenye shamba la pamba, mgombani. Niliamka asubuhi mapema nikachimba chimba nje kuondoa mikwaruzo alipompitisha kisha nilifanya usafi ndani ya nyumba. Mashuka nilienda kuyafua, kava nikalificha jikoni na shuka nikaliweka kwenye begi. Baada ya hapo nilijinyamanzia kimya, zikapita siku mbili bila kusema.

Siku ya pili mke mwenzangu alikuja kuniuza mme wetu alipo, nikasema sijui alipo, tangu aende msalabani sijamuona.

... walipoenda shambani walimkuta amefariki. Walikuja ndani kwangu kukagua wakakuta damu kwenye godoro. Walianza kunipiga, wengine wakanikimbiza kituo cha polisi Kakonko”(Emphasis added)

In brief the confessions have the following. That the second accused had a relation with the first accused. On 22/6/2021 he met her as she was going to the farm. He asked whether they could be together that day. She said yes as her husband was away. Her husband had gone to attend a burial ceremony at an area called Msalabani. They agreed that he should come at

9:00 PM. The first accused came at 9:00 PM as agreed and they had sex once. As they were still on the bed, the deceased knocked. She advised him to move to the room of the kids which he complied. He then went to open the door for her husband who entered inside the bed room to sleep leaving the door open. She also slept hoping that the first accused could use the chance to escape. He did not use the chance but instead stormed into the room and held her husband by the neck. He asked her to bring the panga which he used to cut and slaughter him. He then pulled and took him to the place where he was seen. She removed the mattress cover and washed it. She also washed the panga to try to hide what had happened. She felt stomach upset and diarrhoea that night and had several run outs due to stress on what had happened. She kept silent up to 24/6/2021 when the search started. She advised them to move around the bush. They managed to get him.

Speaking of confessions, the court of Appeal had this to say in **Paulo Maduka & 4 Others v. Republic**, (CAT), Criminal Appeal No. 110 of 2007 page 10.

*"... The very best of witnesses in any criminal trial is an accused person who confesses his guilt. However, **such claims of***

accused persons having made confessions should not be treated casually by courts of justice. The prosecution should always prove that there was a confession made and the same was made freely and voluntarily". (Emphasis added)

The court had this to say in **Jacob Asegelile Kakune v. DPP** Criminal Appeal No. 178 of 2017 at Page 14.

"... an accused person who confesses to a crime is the best witness".

See also **Ibrahimu Ibrahimu Dawa v. Republic**, Criminal Appeal No. 260 of 2016 (unreported) and **Mohamed Haruna Mtupeni and Another v. Republic**, Criminal Appeal No. 259 of 2007 to see the same principle.

The confession is clear. It was made voluntarily. But, as was vivid from above, the confession of the second accused did not end on her. It extended to incriminate the first accused. This in law is called evidence of an accomplice. I will thus try to explore the principles involved before going to establish the liability of the accused.

Speaking of accomplice evidence, the Court of Appeal had this to say in **Miraji Iddi Waziri @ Simwana & Another vs Republic** Criminal Appeal No. 14 of 2018 at page13:

*"... we agree in principle that evidence of an accomplice needs **corroboration** for it to be acted upon against an accused. However, **a conviction is not necessarily illegal for being based on uncorroborated evidence of an accomplice**".*
(Emphasis added)

In **Godfrey James Ihuya and Another v. Republic**, [1980] T.L.R.197 it was said thus:

*"... we agree in principle that the evidence of an accomplice needs corroboration for it to be acted upon against an accused. However, **a conviction is not necessarily illegal for being based on uncorroborated evidence of an accomplice**. We have said so in many occasions but one case shall surface to illustrate."*(Emphasis added)

In **Michael Mathias v. Republic**, Criminal Appeal No. 9 of 2007 where it was said as follows at page 8:

*"... in appropriate cases, **a conviction can be founded on uncorroborated evidence** of an accomplice where the court finds it to be true and **warns itself of the danger** of convicting on uncorroborated evidence of an accomplice"*(Emphasis added)

See also **Fanuel Joseph Mbendule v. R** (1989) TLR 221; and **Pascal Kitigwa v R** (1994) TLR 65.

The confessions made by the second accused to the police and the justice of peace were made voluntarily. They were also admitted without objection. They are good evidence against the second accused but can also be used as a basis for convicting the first accused. They can be the basis of the conviction of the first accused alone without corroboration, if the court will be satisfied of the truth in them and warn itself of the dangers of acting on uncorroborated evidence of an accomplice. But having looked at the evidence on record, I can hasten to say that there was a good corroboration from PW2, PW3, PW4, PW8, PW9 and PW10. That is to say, there was another independent evidence to support the confessions.

PW3 Yamungu Magezi who appeared to be very reliable saw the first accused entering inside the house that night at around 9:00 PM. He heard his father entering the house. He heard him saying that "Chipu unaniua" laterally meaning that Chipu you are killing me. Chipu is the first accused. He also heard the roaring voice, the voice of the deceased as he was fighting for his life after being slaughtered. He was told that it was the voice of dogs and slept.

The evidence of PW3 is evidence of a child of tender age. His evidence was received after compliance with section 127 (4) of the Evidence Act as

shown above. He gave unsworn evidence. He promised to speak the truth. The position of the law is that the evidence of a child of tender age may be used to support a conviction provided that there is full compliance to section 127 (2) of the Evidence Act. See **Hassan Kamunyu v. The Republic**, Criminal Appeal No. 277 of 2016 (CAT) page 12 and **Athumani James vs The Republic** Criminal Appeal No. 69 of 2017 (CAT) pages 10 to 11.

In Athumani James the court reiterated its earlier position set in **Nguza Vikings @ Babu Seya & 4 Others v. Republic**, Criminal Appeal No. 56 of 2005, **Kimbuta Otiniel v. Republic**, Criminal Appeal No. 300 of 2011, **Mtendawema Said v. Republic**, Criminal Appeal No. 199 of 2011 and **Rajabu Ponda v. Republic**, Criminal Appeal No. 342 of 2017 (all unreported) and said the following:

*"In all the above cases, we held that **an unsworn testimony of a child of tender age may be used to found a conviction without corroboration** provided that the court is satisfied that the witness spoke but the truth".(Emphasis added)*

PW3 appeared reliable and credible and his evidence could stand alone to sustain a conviction without corroboration. But we have the evidence of

PW2, PW4, PW8, PW9 and PW10 who saw the marks leading to the house and who found blood in the bag of maize, walls and the mattress. They also saw the panga. They appeared credible and reliable as well.

All these pieces of evidence corroborate the confession of the second accused as against the first accused. They also defeat the defence of the first accused and his witnesses. The first accused and his witnesses could not impress me at all. The first accused appeared to speak open lies. They had nothing but to corroborate the prosecution case for as it was said in **Felix Lucas Kisinyila vs Republic. (CAT)** Criminal Appeal No. 129 of 2002, lies of the accused corroborate the prosecution case. His witnesses were equally liars. They appeared as having an obvious interest to serve. I could not believe them. Their evidence did not manage to shake the strong evidence from the prosecution which is based on the confessions of the second accused and other piece of evidence as shown above. It is baseless and dismissed.

All things considered, it is my finding that the accused acted in a joint enterprise to kill the deceased. The next stage is to examine malice aforethought for each accused in the circumstance of this case. It is also

important to examine common intention. I will discuss these elements together.

The leading case in malice is the case of **Enock Kipela vs The Republic** Criminal Appeal No. 150 of 1994. In this case the Court of Appeal had this to say at page 7:

"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, 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 or blows 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 attacker's utterances, if any, made before, during or after the killing; and (7) the conduct of the attacker before and after the killing."

See also, **Mark Kasimiri vs R.** criminal appeal no. 39 of 2017 and **Saimon %Justine, Mbonea Mbwambo & another vs Republic.**

(CAT), Criminal Appeal No. 53 of 2006

In common intention, I am aware of the position held by the defunct East African Court of Appeal in **R. V. Tabulanyeka S/o Kirya and Others**

[1942] 10 EACA51 and the developments which followed thereafter. In

Tabulanyeka the court had this to say at page 52:

*"To constitute such common intention, it is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. **Their common intention may be inferred from their presence, their actions and the omission of any of them to dissociate himself from the attack...**" (Emphasis added)*

But in **Jackson Mwakatoka V. R** [1990] TLR 17 the Court of Appeal had this to say:

"Mere presence of the first appellant at the scene of the crime was not sufficient to invoke the doctrine of common intention and implicate him to murder."

In **Elizabeth Elias @ Bella Vs R**. Criminal Appeal No. 293 of 2015 the Court of Appeal quoted with approval the following passage from the decision made by the Court of Appeal of Kenya made in **Awino Samwel Otieno v. Republic**, Criminal Appeal No. 124 of 2012 [2014] & eKLR at page 12:

*"Common intention under section 21 connotes a situation where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object by unlawful means and so act or express themselves as to reveal such intention. **It***

***implies a pre-arranged plan.** Although common intention can develop in the course of commission of the offence, it normally precedes the commission of the crime showing **a pre-meditated plan to act in concert.** It comes into being in point of time prior to the commencement of the act" (Emphasis added)*

"Under section 23 of the Penal Code where there is common intention each of the person who formed such intention in effecting an unlawful purpose is deemed to have committed that offence."

I will now move to examine the evidence to see if the accused had malice and common intention to commit the crime of murder.

I had time to examine the evidence closely. The evidence show that the second accused opened the door for his husband who entered the bedroom and slept. Earlier, the second accused had arranged for the first accused to shift to the children's room to avoid a possible physical confrontation. She left the door open for him to escape. The couple slept. While there, the first accused stormed into the room and held the deceased by the neck. The evidence does not show that the two had a prior arrangement on this. He just came himself. It was an idea developed

in his mind while in the children's room. He then cut the deceased and proceeded to slaughter him. He then drugged and moved to throw him in the farm 106 meters from the house. He disappeared. The evidence does not show that the second accused had a prior arrangement with the first accused to kill her husband. The arrangement was for doing sex which they did once. She then arranged for her to the children's room. The evidence does not show the existence of a room to discuss to commit the crime. Time was too short to make to make the discussion and consensus. What is obvious is that the first accused developed the idea himself while at the children's room.

What about the act of bringing the panga and what followed thereafter? The second accused confessed to the police and the justice of peace that she gave him the panga. She denied this fact when she appeared before me. I had a close look at the statements. I could also look at her. I accept all other facts in the statements but I entertain doubts if she gave the panga to the first accused. The totality of evidence does not match with this statement. I think here is where the statement made by the Court of Appeal in **Paulo Maduka** (supra) becomes relevant. The court said that *'such claims of accused persons having made confessions should not be*

treated casually by courts of justice'. This means that, the court still have to examine the confessions critically to see if they reflect the truth and reality on the ground. Cautioned statement and extra judicial statements are written by human beings not Angels. They should not be taken like Koranic or Biblical Verses. For some reasons people who record the statements may insert words which were not said by the accused or said by the accused with a different meaning but recorded differently. I doubt if the second accused who had arranged for the first accused to escape shortly and who was shaking in the sitting room with her child could have the courage of bringing the machete for her husband to be slaughtered. I doubt that part of the statement, and if she did so, she must have done so under a state of terror and confusions. I believed her words in court. She appeared very credible. I will hold her accountable for inviting the first accused in the matrimonial home. I will hold her responsible for being the source of what happened. I will also hold her accountable for what she did subsequent to the killing. All factors measured carefully, I have the view that all what was done to the second accused take her to the lesser offence of manslaughter and not murder. I have failed to see the malice and common intention for murder on her side.

What about the first accused? The evidence is clear that the first accused developed the malice alone while in the children's room and moved to execute his plans. He cut the deceased's face and throat. He killed him. He then dragged him for 106 meters. He threw him in the farm and moved away. Looking at the type of weapon used (machete), the place where it was applied (a deep cut on the face and throat) and the conduct of the first accused thereafter, one can see nothing less of a clear indication of malice for murder. He had malice and executed his plan like a wild animal.

All things weighed carefully, I find you the said Chipukizi Chondi guilty of Murder c/s 196 and 197 of the Penal Code, Cap 16 R.E. 2019 as charged and convict you accordingly. The second accused, Nyamsase Masesa is found guilty of the lesser offence of Manslaughter c/s 195 and 198 of the Penal Code, Cap 16 R.E. 2019 and convicted accordingly.

L.M. Mlacha

Judge

8/7/2022

SENTENCE FOR THE FIRST ACCUSED CHIPUKIZI CHONDI

There is only one sentence for murder which is death by hanging. I personally do not want the sentence but my hands are tied. I sentence you the said CHIPUKIZI CHONDI to suffer death by Hanging.



L.M. Mlacha

Judge

8/7/2022

SENTENCE FOR THE SECOND ACCUSED NYAMSASE MASESA

Having considered the submission of counsel and the gravity of the crime, I sentence you the said Nyamsase Masesa to serve ten (10) years in jail.



L.M. Mlacha

Judge

8/7/2022

Court: Judgment delivered open court in the presence of the accused and their counsel Mr. Godrian Tilya and Ms. Nyambura Nashon and Ms. Agnes Hyera Principal state attorney and Mr. Clement Masua state attorney for the Republic.

The Right of Appeal Explained.




L.M. Mlacha

Judge

8/7/2022