

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

AT SINGIDA

CRIMINAL SESSIONS CASE NO. 42 OF 2018

THE REPUBLIC

VERSUS

- 1. DANIEL S/O THOMAS @YUSUPH @NGENI.....1st ACCUSED**
- 2. EMMANUEL S/O THOMAS2nd ACCUSED**

JUDGEMENT

04th & 14th March, 2022

KAGOMBA, J

The accused persons DANIEL S/O THOMAS @ YUSUPH @NGENI and his brother EMMANUEL S/O THOMAS are facing an information of murder instituted under Sections 196 and 197 of the Penal Code, [Cap 16 Vol. 1, R. E 2002] (hereinafter "**the Penal Code**"). The particulars of the offence show that the accused persons on 13th day of October, 2013 at about 06:30hrs at Igwamadete village, Iseke Ward, Nkonko Division within Manyoni District in Singida Region murdered one ALORD S/O JOSHUA. The facts of the case show that on the material day the deceased together with his friend one DAUDI S/O AZARIA were on their way to Mpapa village. Along the way they were attacked by two robbers who were armed with muzzle gun "*gobore*". The two robbers demanded money from the deceased who gave them Eight Thousand shillings (Tsh. 8,000/=). The robbers were not satisfied with the

said amount of money, hence the one who carried "*gobore*" shot the deceased who died on the spot. DAUDI S/O AZARIA who was with deceased managed to identify the first accused person DANIEL S/O THOMAS @YUSUPH @NGENI.

An autopsy on the deceased's body was conducted and the report indicated that the deceased's death was due to "SEVERE HAEMORRHAGE DUE TO GUNSHOT ON THE CHEST (L) SIDE".

The facts of the case further show that the incident pertaining to the death was reported to police, thereafter the accused person DANIEL S/O THOMAS was traced and later arrested in Morogoro. Upon interrogation, the accused DANIEL S/O THOAMS confessed to have murdered the deceased in conjunction with his brother one EMMANUEL S/O THOMAS. He also informed one SULE D/O MATIANA that they murdered the deceased.

The second accused person EMMANUEL S/O THOMAS was arrested on 21st day of May, 2015 almost two years after the commission of the crime as he absconded after committing the offence. The two accused persons were charged for contravening Section 196 and 197 of the Penal Code, as foresaid. Whenever the twosome was called to take a plea, they have consistently pleaded not guilty. As such, the onus to prove them guilty as charged is on the prosecution side.

During trial, the prosecution lined up a total of eight prosecution witnesses and tendered four exhibits. All the prosecution witnesses were from the list of fifteen witnesses whom the prosecution intimated during

preliminary hearing that it would call to prove the case. The four exhibits were also not a surprise to the Court nor to the accused persons. They were already listed during preliminary hearing.

The defence called the two accused persons to defend themselves under oath. The prosecution was led by Mr. Almachius Bagenda, learned State Attorney, while Mr. Peter Ndimbo and Ms. Zahara Chima, the learned Advocates represented the first and second accused person respectively. I feel obliged to commend all the counsels for their great industry in research and professional conduct as officers of the Court. They displayed shining skills throughout the trial.

At the commencement of trial, there was no any issue that was agreed between the parties save for the names of the accused persons, the dates on which the accused persons were arrested and the fact that the accused persons are jointly charged with murder contrary to section 196 and 197 of **the Penal Code**. This short convergence, is as per Memorandum of Matters Agreed signed during preliminary hearing. As such, there is no common ground that ALORD S/O JOSHUA is dead, his death was not natural and that it's the accused persons who killed him with malice aforethought. All these issues shall have to be proved by the prosecution, beyond reasonable doubt.

PW1 DAUDI AZARIA, told the Court that in the morning of the fateful day the 13th of day of October, 2013, he was with the deceased. Each was riding a bicycle towards Mpapa village. Along the way, at Igwamadete hill, they were attacked by the two accused persons. Each of the accused persons was holding a "gobore". The robbers shouted "toa hela!" as they demanded

money from PW1 and the deceased. The deceased was in front while PW1 DAUDI AZARIA was riding behind him. The robber who ambushed the deceased was thin and tall, dressed in a red jacket with his face covered by some nylon material. Having seen that, PW1 got a quick idea to run away. So, he made a U-turn, but alas, he came face to face with another robber holding a *gobore*. He was told to surrender and was led to where his colleague was stopped by the first robber.

PW1 further told the Court that the second robber who confronted him also wore a coat or jacket and his face was covered with a nylon material, which was torn. The first robber was standing with his gun in front of the deceased and PW1, and the second robber was behind PW1. To save his soul PW1 gave out Tsh. 350,000/= while the deceased gave them Tsh. 8,000/=. The deceased's other money was in his jacket which was tied to a container (a "*tenga*") that was carried on his bicycle. The attackers told the deceased to untie the jacket but, alas, while putting the jacket down he was shot on the left side of his chest, by the robber who was in front of them, and died instantly.

PW1 continued to tell the Court that the deceased was shot because he delayed to give them money and he was resisting. Afterwards, PW1 was beaten by the killer using the base of the *gobore* he was holding. In the process, the *gobore* fell off the hands of the killer and PW1 managed to escape the ordeal. He went to Sanza Police Station to report the incident.

It was PW1's further testimony that he was able to identify the attacker who confronted him when he was trying to U-turn to escape. He told the

Court that the incident happened at 07:00hrs, and lasted for about one hour. He said that the attacker who came from behind was DANIEL S/O THOMAS @YUSUPH @ NGENI, the first accused person. He was able to identify him because he has known him for long time as the accused person used to stay at the house of PW1's friend called Mtote in Sanza village; his face mask was torn, his morphology was very familiar to PW1 and the distance between them at the scene of crime was about five (5) meters in estimation.

PW1 confidently insisted that NGENI was one of the two robbers. PW1 heard both robbers shouting "*toa hela!*". He repeated that he did not recognize the first accused person but he recognized NGENI.

PW2 SULE MTIANA told the Court that in the morning of the fateful day, EMMANUEL, the second accused person, went home to greet her. EMMANUEL looked abnormally cool and was murmuring to himself. Upon being asked by PW2 if there was anything wrong, he replied in the negative. He would walk some few steps and return to where PW2 was standing while still murmuring.

PW2 later went to attend funeral of a woman who had died in the village. At the funeral, one Malanga announced that there was a person who was shot dead at Igwamadete hill. After the funeral, PW2 went to collect firewood at a nearby bush. While collecting firewood, NGENI, the first accused person came nearby and asked her if she had heard about the incident that had occurred at the hill. PW2 pretended as if she had heard nothing. NGENI started to tell her that they (NGENI himself, one MOSI

MANAIJA and EMMANUEL, the second accused person) had killed a person at Igwamadete hill.

PW2 SULE MTIANA continued to tell the Court that NGENI's eyes were reddish and his shirt had some blood stains. It was PW2's further testimony that she was a mistress of the second accused person, who is NGENI's brother. EMMANUEL disappeared after that incident but came back to PW2's house one day deep in the night at 01:00 hrs and asked PW2 to travel away with him. He somehow intimidated PW2 who succumbed to the proposal, thus both EMMANUEL and PW2 travelled to Mbeya region. While in Mbeya, PW2 was left behind by EMMANUEL in a Guest House without knowing where EMMANUEL had headed to. She confidently told the Court that both EMMANUEL and NGENI confessed to her that they killed the deceased. She reported the matter to Kitogoji Officer called Nasra.

PW3 YUDITH D/O DAVID, upon oath gave her testimony in Court. Admittedly, the Court inadvertently skipped the requirement of the law under section 130(3) of **the Evidence Act [Cap 6 R.E 2019]** (Hereinafter "**the Evidence Act**"). PW3 is the wife of the second accused person and readily gave her testimony in Court, without however being informed that she was not a compellable witness as spelt under section 130(1) of **the Evidence Act**. For this reason, her testimony is not admitted against her husband. For this reason, the Court has extracted from PW3's testimony only some parts that relate to the conduct of the first accused person in this case. As such, the limit of application of the PW3's testimony shall be strictly observed, henceforth.

In relation to the first accused person, it is PW3's testimony that on the night preceding the fateful date, one Saturday, the first accused person came to PW3's home in the night. As he knocked the door, he was heard by PW3 saying "the moon has already set". The first accused person was seen leaving PW3's home while dressed in abnormal dresses. In PW3's own words, the first accused person was dressed in "*nguo za ajabu ajabu*". PW3 also told the Court that in the evening preceding the incident MOSI MNAIJA also visited her home. These are the bits and pieces of PW3's testimony that will be evaluated in due course.

PW4 HASSAN ABDALLAH, told the Court that he was a business colleague of the deceased. On the fateful date he passed at the scene of crime and saw the deceased's body lying down near two bicycles which he recognized as those owned by his friends the deceased and PW1. The deceased was dressed in trouser and jacket. PW4 went to report the incident at Sanza Police Station where he found PW1 DAUDI AZARIA reporting the same to police. PW4 also told the Court that there were rumors in the village that NGENI was once involved in a house breaking incident at Rosi area.

PW5 – E 9204 D/CPL WILSON, told the Court that he visited the scene of crime at Igwamadete hill and the residence of the deceased at Sanza village in the morning of the fateful day. At Sanza, he witnessed the medical examination on the body of the deceased and testified that the deceased had a wound on the left side his chest. He also recorded the statements of some of the witnesses. PW5 further told the Court that upon information that the first accused person was arrested in Morogoro, he went to bring him back to Manyoni. The first accused person, DANIEL S/O THOMAS, confessed

to PW5 that him and his brother EMMANUEL S/O THOMAS were responsible for the murder of ALORD JOSHUA.

According to PW5, upon interrogation, the first accused person told him that on that fateful day, the first accused person and his brother had left for a hunting expedition at night in the bush with a "gobore". He said until 06:00hrs they were unsuccessful to get animals. While in the bush, they saw two people passing. They suspected that those people had money and so they decided to ambush them. As they were ordering the two people to give out money, his brother EMMANUEL S/O THOMAS shot ALORD JOSHUA with his gun and he died. After seeing that they have killed, they run away for hiding.

PW5 further told the Court that after recording the Cautioned Statement of the first accused person, he prepared a charge sheet and took him to Court. He couldn't file the said Cautioned Statement because he recorded it beyond the legally allowable time, as they delayed on the road from Morogoro to Manyoni. He further told the Court that police did not get any exhibit at the scene of the crime.

PW6 PETER NYUNGU, told the Court that at 12:30hrs on 13th day of October, 2013 he carried out post mortem examination of the deceased's body at Sanza village. The body had wounds on the left side of the chest. There were about three holes within the wound which looked like they were caused by bullets. He said the death of the deceased was caused by excessive bleeding – hemorrhage.

PW6 further told the Court that after examination of the body, he gave a "note" to the police showing his findings regarding the wound but not a full report. He explained that when he was called to go for examination of the deceased's body, he did not have the post mortem report form with him. So, he had to go back to Manyoni District Hospital, where he was working, to get the form, fill it and get it typed. For this reason, he did not hand over the autopsy report to police on the same day. PW6 tendered the Post mortem Examination Report on the death of ALORD S/O JOSHUA and the same was admitted as **Exhibit P1**, and was read in Court accordingly.

PW7 E 2826 SGT KAMALA, told the Court that on the fateful date at 0830hrs, PW1 DAUDI AZARIA reported to him the murder incident. He said, according to PW1, the incident occurred on the same day at 06:00hrs, at Igwamadete hill.

PW7 further told the Court that after receiving the report, he went to the scene of crime in the company of his In-charge. He found the deceased's body lying beside the road with a wound on the left side of the chest caused by bullet from *gobore*. They did not find any bullets because locally made bullets for *gobore* normally get destroyed during the gun blast. He drew the Sketch map of the scene of crime which he tendered in Court. The same was admitted as **Exhibit P2** and was read in Court accordingly.

PW7 carried investigation at a house he considered to belong to the second accused person, EMMANUEL S/O THOAMS. He found only PW2, as EMMANUEL had already fled the area for hiding. He further told the Court that police got a tip that MOSI JEREMIA @ MNAIJA and MAWAZO LUCAS

KOMBA were involved in the crime. However, the two were later released after consultation with State Attorney.

It was PW7's further testimony that they arrested EMMANUEL S/O THOMAS on 20th day of May, 2015 at Chikola village in Dodoma. In the process, EMMANUEL S/O THOMAS confessed to PW7 that he participated in the murder and mentioned his young brother DANIEL S/O THOMAS, as his accomplice. PW7 recorded the Cautioned Statement of EMMANUEL S/O THOMAS. He tendered the same as an exhibit but its admission was objected. After a trial within trial to determine its voluntariness, the Cautioned Statement was eventually admitted as **Exhibit P3** and was read in Court accordingly.

According to **Exhibit P3**, the second accused person EMMANUEL S/O THOMAS told PW7 that on 12th day of October, 2013 his young brother DANIEL S/O THOMAS @YUSUPH @ NGENI went to his residence. NGENI told him that there was a "mission" which they should execute by using EMMANUEL's *gobore*. In execution of that mission EMMANUEL S/O THOMAS confessed before PW7 that he killed ALORD S/O JOSHUA and he was the first accused person as his accomplice.

PW8 ATHUMAN SINGANA, told the Court that he was a Magistrate at Manyoni Primary Court from 2014 to 2015, and also worked as a Justice of the Peace. On 22nd day of May, 2015 he recorded the Extra judicial Statement of the second accused person, EMMANUEL S/O THOMAS who confessed to him that he murdered the deceased and he was with his young brother, DANIEL S/O THOMAS, the first accused person as his accomplice.

PW8 clearly elaborated, step by step, how the second accused person was brought to him by G.1793 D/CPL JUMA, and how he recorded the Extra judicial Statement by observing all required procedures set by law. He tendered in Court the said Extra judicial Statement of the second accused person. The same was admitted as **Exhibit P4**, after overruling the defence objection through a mini trial, who sought to impress the Court that the accused person was not a free agent when making the statement in question. The Exhibit was duly read in Court after its admission.

The said PW8 was the last of the prosecution witnesses to be paraded. Hence the prosecution case was accordingly closed. Following the ruling of this Court that the prosecution had established a *prima facie* case against both the accused persons, the defence case opened after the accused persons were informed of their rights under section 293(3) of **the Criminal Procedure Act**, [Cap 20 R. E 2019]. They chose to defend themselves under oath.

DW1 DANIEL S/O THOMAS @ YUSUPH @ NGENI, told the Court that on the 13th day of October, 2013, he was at home in Igwamadete village. He was informed of the murder incident at the hill. He was also informed about a funeral at Mr. Stanley's residence. He attended the funeral where he was one of the youths who were selected to dig the grave. He fully participated in that funeral and returned home to eat and later went to watch a football match in the evening.

DW1 further told the Court that on the night of 14th day of October, 2013 he travelled to Morogoro where he had previously taken his pregnant

wife for safe delivery. He had to rush to Morogoro without notifying other relatives and neighbours because of the urgent nature of his journey. He was to take money quickly to his wife for hospital bills and her upkeep.

DW1 further testified that he was arrested in Morogoro on 17th day of October, 2013 and on 19th day of October 2013, he was transferred to Manyoni Police Station where he arrived at 17:00hrs. During interrogation regarding the murder of the deceased, DW1 denied the allegation, whereupon, he was told by police that his colleague had already revealed all the information. On 21st day of October 2013, he appeared in Manyoni District Court for murder charge.

DW1 denied to have taken part in the alleged murder. He denied to have carried out any hunting expedition. He said that the second accused person, EMMANUEL S/O THOAMS, is his brother but he never met with him on the 13th day October 2013. He assured the Court that there are no quarrels whatsoever between him and his brother EMMANUEL; That PW3 YUDITH D/O DAVID is his brother's wife but PW2 SULE D/O MTIANA is a person he had just been seeing in the village. He said he did not know if SULE D/O MTIANA was his brother's mistress. That was his defence.

DW2 EMMANUEL S/O THOMAS, testified that on the 13th day of October, 2013 he was at home in Igwamadete village. There was a funeral at Mr. Stanley's residence where he participated fully. He went to dig the grave with others. While at the graveyard he got information from one Malanga Mnyagulu that there was a person who was killed at Igwamadete hill.

DW2 went on defending himself that after the burial he went back to Mr. Stanley's place and later headed back home at around 11:00hrs. While at home, one Ntanda visited him and proposed that they should go to work. On the next day, that is 14th day of October, 2013, him and his work colleague Mr. Ntanda went to work in the bush. They were felling logs for making timbers. Afterwards, they returned home at Igwamadete. After one week they left to Simbanguru where they were called by their client called Nzwiri. DW2 later went to Chikola village where he stayed for one and half years before he was arrested on 17th day of May 2015. He later appeared in Singida District Court to face murder charge.

DW2 assured the Court that DANIEL S/O THOMAS @ YUSUPH @ NGENI is his young brother but he did not see him at the funeral on the 13th day of October, 2013. He also assured the Court that he has no any quarrels whatsoever with his young brother, DANIEL. He said that YUDITH D/O DAVID is his wife and SULE D/O MTINA is his mistress. He denied to have done hunting activities. He also denied any knowledge of the place where the deceased was killed. He said he does not have quarrels whatsoever with SULE D/O MTIANA. He wound up his defense by leaving it to the Court to decide if he is guilty.

Having heard both the prosecution and defence cases, the Court invited the counsels for prosecution and defence to make their final submissions. The prosecution's view is that both accused persons are connected to the death of the deceased and that the case has been proved beyond all reasonable doubts. In their submission, the prosecution relied on the following aspects of evidence and the law:

One, DW2 EMMANUEL S/O THOMAS, confessed before PW7 E 2826 SGT KAMALA and PW8 ATHUMANI SINGANA. In this aspect, the prosecution referred to the case of **Jumanne Ahmed Chivinja & Another V. Republic**, Criminal Appeal No. 371 of 2019, CAT, DSM, where the Court of Appeal stated, at page 10 of the typed Judgment of the Court that:

*"It has long been settled that a person who confess to a crime is the best witness, a position taken by the Court in many of its decisions such as **DPP vs. Nuru Gulamrasul** [1988] TLR 82 cited in **Diamon Malekela @ Maungaya vs. Republic...**"*

It was therefore Mr. Bagenda's submission that since there was confession by the second accused person, other prosecution witnesses were corroborating the best evidence given by DW2 himself on his guilty.

Two; the first accused person was involved in the commission of the offence by being mentioned in the Cautioned Statement (**Exhibit P3**) and the Extra judicial Statement (**Exhibit P4**). In this regard, the learned State Attorney referred to section 33 of **the Evidence Act**. He submitted that, while subsection (2) of the said section reminds the Court not to anchor conviction solely on the evidence of a co-accused, subsection (1) thereof allows the Court to consider the merits of such evidence in its decision against that other person.

Mr. Bagenda further submitted that the evidence has proved that the first and second accused persons had a common intention which suits the

invocation of the provision of section 23 of **the Penal Code**. On the issue of common intention, the learned State Attorney recalled the case of **Jumane Ahmed Chivinja & Another V. Republic (Supra)**, and the case of **Shija Luyeko V. Republic [2004] TLR 254**. On page 10 of the typed Judgement of **Kivinja's case**, the Court of Appeal states:

".....although he did not actively execute the theft, he and the actual perpetrators had a common intention, he was there watching as the others committed the offence, and received a reward for it"

And in the case of **Shija Luyeko vs. Republic (Supra)**, the Court of Appeal states.

"For a common intention to be established two or more persons must form a common intention to commit unlawful act together"

In the above connection, Mr. Bagenda submitted that the two accused persons had a common intention.

He further submitted that the first accused person was also involved in the crime on account of his own oral confessions to PW2 SULE D/O MTIANA and PW5 D/CPL WILSON, before whom he categorically confessed that he participated in the crime.

Mr. Bagenda further argued that the oral confession of the first accused person proved existence of a common intention between him and

his brother. To this end, he cited the case of **Ngasa Sita @ Mabundu v. Republic**, Criminal Appeal No. 254 of 2017, CAT at Shinyanga, where on page 25 of the typed judgment of the Court of Appeal, it is stated:

"It is settled law that, an oral confession made by a suspect, before or in the presence of reliable witness, be they civilian or not, may be sufficient by itself to found conviction against the suspect".

He went further to refer to the same case of **Ngasa Sita**, where the Court of Appeal further states:

"It is equally important to ensure such oral confession would be valid as long as the suspect was free agent when he said the words imputed to him".

The learned State Attorney elaborated that, PW2 SULE D/O MTIANA is a normal civilian who could not coerce the first accused person to confess to her. As such, he said, the first accused person confessed before PW2 as a free agent, as he was before PW5 E2904 D/CPL WILSON. He added that PW2 and PW5 have proved to be credible witnesses and that the first accused person had assured the Court that there existed no quarrels whatsoever between him and PW2 SULE D/O MTIANA.

Three; existence of malice aforethought has been proved as per section 200 of **the Penal Code**, particularly paragraph (c). In this connection, Mr. Bagenda cited the case of **Rutu Qamara @ Qares V.**

Republic, Criminal Appeal No. 110 of 2018, CAT, Arusha, where on page 12 to 13 of the typed Judgment, the Court of Appeal has itemized factors that can constitute malice aforethought.

Four; the discrepancies in the testimonies of the prosecution witnesses be excused as they were due to long passage of time lapse in human memory. To this end, he referred to the decision of the Court of Appeal in **John Gilikoa v. Republic**, Criminal Appeal No. 31 of 1999, CAT, Mwanza, on how to address such shortfalls, where on the eighth page (unnumbered) of the typed judgment of the Court, it is stated:

"The discrepancies were on details and they have been occasioned by the relatively long passage of time between those two statements and the giving evidence in Court and also by frailty of human memory".

Mr. Bagenda submitted that in addition to the reasons for discrepancies mentioned by the Court of Appeal, in the case at hand, some of the prosecution witnesses were illiterate.

Five; the exhibits tendered in Court have proved several evidential matters they were meant to prove. Mr. Bagenda prayed the Court to consider the Postmortem Examination Report (**Exhibit P1**) as the evidence of the cause of death of ALORD S/O JOSHUA; the Sketch map of the Scene of Crime (**Exhibit P2**) be considered to show the environment and distances of various items at the scene of crime and the Cautioned Statement of the

second accused person (**Exhibit P3**) be considered in the light of the decision of Court of Appeal in the famous case of **Rhino Migere v. Republic**, Criminal Appeal No 122 of 2002 (unreported), which the Court of Appeal referred to in the cited case of **Jumane Ahmad Chivinja & Another v. Republic (Supra)** on page 9 of the typed Judgment of the Court of Appeal. In the cited case of **Rhino Migere** it was stated:

"...for a statement to qualify for a confession it must contain the admission of all the ingredients of the offence charged as provided for under section 3 (c) of the Evidence Act, 1967..."

The learned State Attorney submitted further that the Extra judicial Statement of the second accused person (**Exhibit P4**) be given due weight in light of the decision in the case of **Peter Charles Makupila @ Askofu V. Republic**, Criminal appeal No. 21 of 2019, CAT, DSM, on pages 14, 21, 22 and 23 of the typed Judgment where guidance to Justices of the Peace on how confessions are to be duly recorded is given.

Having submitted along those six aspects, Mr. Bagenda enjoined the Court to find the case proved beyond reasonable doubts. He also referred the Court to Article 107A (2) (a) of the **Constitution of the United Republic of Tanzania, 1977 (As revised)**, to the effect that technicalities should not be allowed to impede substantive justice.

Mr. Peter Ndimbo, learned Advocate representing the first accused person, first underscored the fact that it was the duty of prosecution to prove the case beyond reasonable doubts. He also underscored the legal position

that conviction, if any, should be based on the strength of the prosecution case, not otherwise. He cited to this end the case of **Christina Kaale & Another v. Republic [1992] TLR 302.**

Mr. Ndimbo submitted that of all the eight (8) prosecution witnesses, none had proved the case against the first accused person. He gave the following reasons:

One; identification of the accused persons was doubtful. PW1 DAUDI AZARIA told the Court that the accused persons had covered their faces with masks and that the first accused person was behind PW1 at the scene of crime, making their identification difficult. He cited the case of **Aburham Daniel v. Republic**, Criminal Appeal No. 6 of 2007, CAT, Arusha, where on page 5 of the typed judgment, the Court of Appeal mentioned factors to be considered in identification of accused person at crime scene. They include the time the witness had the accused under observation, the distance at which the witness had the accused under observation, the intensity of the light and whether the witness knew the accused before. Mr. Ndimbo doubted if PW1 in a state of panic in the ambush and the fact that him and the first accused person hail from different villages, was able to properly identify the first accused person.

Capitalizing on identification doubts, Mr. Ndimbo submitted that the testimony of PW1 is also made doubtful by the fact that there were other accused persons mentioned in the testimonies who were present. He referred to the testimony of PW7 E 2826 SGT KAMALA who told the Court that MOSI JEREMIA @ MNAIJA, ELAIS HENRY and MAWAZO LUCAS KOMBA

were the other suspects, hence the doubt if it's only the accused persons who were at the scene.

Two; there are discrepancies in the prosecution evidence. In this aspect Mr. Ndimbo submitted that while PW1 DAUDI AZARIA said that the deceased was undressed and remained only with shorts, PW4 HASSAN ABDALLAH told the Court that upon arrival at the crime scene, he found the deceased's body clothed with trousers and a jacket. Mr. Ndimbo argued that such contradictions cast doubt on prosecution witnesses.

Three; there is lack of proof of participation of the first accused person in committing murder. The learned advocate submitted that of all the prosecution witnesses, no one had mentioned the first accused person that he committed the murder. He said, PW1 told the Court that the person who shot the deceased was the one who was in front and he could not identify him there. PW7 told the Court that PW1 told him during recording of his Cautioned Statement that he could not identify the person who killed the deceased. Also, PW7 told the Court that he does not know DANIEL S/O THOMAS. Mr. Ndimbo submitted therefore that the prosecution did not prove involvement of the first accused person in the offence.

Four; there is no confirmation of the weapon used in the murder. Mr. Ndimbo submitted that the prosecution has left holes in its evidence as to which weapon was actually used in the murder. There has been no expert evidence to confirm that it was a "*gobore*" that was used.

Five; There are doubts in the evidence of PW 6 PETER NYUNGU, as an expert. Mr. Ndimbo submitted that there is doubt regarding the time Dr. Peter Nyungu started his examination of the body of the deceased. The doctor has stated two different times in his testimony, one being 06:00hrs, but also said in his report that he examined the body at 12:00hrs. He also doubted if by PW6's testimony, the body was examined before 24hours and questioned his competence as a doctor.

Ms. Zahara Chima, learned Advocate for the second accused person, EMMANUEL S/O THOMAS, started her submission by **firstly** praying that the testimony of PW3 YUDITH DAVID be expunged from records for being recorded in contravention of section 130(3) of **the Evidence Act**, as we explained earlier in this Judgment. To this end she cited the case of **Zamir Rahim V. Republic**, Criminal Appeal No. 418 of 2018, CAT at DSM.

Secondly; she submitted that since the Cautioned Statement **Exhibit P3** tendered by PW7 E 2826 SGT KAMALA was retracted, corroboration is required. To support her submission Ms. Chima cited the case of **Janta Joseph Komba & 3 Others v. Republic**, Criminal Appeal No. 95 of 2006, CAT at DSM, where on page 10 of the typed judgment of the Court of Appeal it was held that such a retracted confession cannot form a basis for conviction without corroboration.

Thirdly; Ms. Chima called for the same fate applicable to Exhibit P3, to befall the Extra judicial Statement (Exhibit P4) tendered in Court by PW 8 ATHUMANI SINGANA. She submitted further that since, in principal, the Extra judicial Statement was corroborating the Cautioned Statement, and

both were retracted, the Extra judicial Statement cannot corroborate the Cautioned Statement. To this end she referred to the case of **Ndalahwa Shilanga & Another V. Republic**, Criminal Appeal No. 247 of 2008, CAT at Mwanza, where on page 19 of the typed judgment of the Court of Appeal the court said; "So a retracted confession cannot corroborate another retracted corroboration".

Fourthly, she pointed at shortfalls in the testimonies of PW1 DAUDI AZARIA, PW2 SULE MTIANA, PW4 HASSAN ABDALLAH, PW6 PETER NYUNGU and PW5 E 9204 D/CPL WILSON. In this aspect Ms. Chima made the following comments:

One; PW1 who was the only eye witness told the Court that he did not recognize the person who shot the deceased. He only described the killer as "thin and tall", leaving behind a question as to whether the described person is the second accused person, and the Court had not been told if there was an identification parade.

Two; Since it was PW1's testimony that the robbers had covered their faces, the criteria for visual identification have to be proved in line with the decision in the case of **Waziri Amani V. Republic [1990] TLR 250**. The cited case is referred with affirmation in the Case of **Aburaham Daniel (Supra)**. Hence, she said, the evidence of PW1 is rendered weak and it cannot corroborate other evidences.

Three; the evidence of PW2 SULE D/O MTIANA, that DANIEL S/O THOMAS confessed to her that him, EMMANUEL THOMAS and MOSI

JEREMIAH had committed the murder at the hill, is weak and her assertion that she fled with the second accused person to Mbeya was not corroborated by any other testimony.

Four; in the Cautioned Statement of PW3 stated that she was told by the first accused person that it was the first accused person who killed the deceased by using a gun owned by his brother. Ms. Chima submitted that such a statement contradicts the testimony of PW1 DAUDI AZARIA who told the Court that the first accused person is not the one who killed the deceased.

Five; the first accused person is a co-accused to the second accused. As such what was stated by PW2 from PW1 as a source shall require corroboration in line with the decision of the Court of Appeal in **Ndalahwa Shilanga & Another v. Republic (supra)** on page 18 of the typed Judgment, where it was held that corroboration of a confession from a co-accused is required as a matter of law.

Six; the testimony of PW4 HASSAN ABDALLAH has not connected the second accused person with the murder at all.

Seven; the testimony of PW5 E 9204 D/CPL WILSON, does not directly point to the second accused person, it is not direct evidence and has not been corroborated, and

Eight; PW6 PETER NYUNGU, a medical doctor who examined the body of the deceased, does not know who committed the murder.

In concluding her final submission, Ms. Chima said it was her views that the prosecution has not been able to prove the case against her client, the second accused person, without reasonable doubts. She prayed the Court to benefit her client with the weaknesses in the prosecution case.

Having heard the entire case, a summing up to the honourable assessors was done by providing explanation on all vital points of law including the nature and ingredients of murder offence, duty to prove the case and standard of proof required, summary of prosecution and defence evidences, irregularity in the recording of the testimony of PW3 and how the testimony of PW3 should be used, criteria for proper identification of the accused persons, credibility of witnesses, corroboration of evidence, voluntariness of the confessional statements, and the main issues for which their opinion was required by the Court. The three assessors in their unison returned the verdict of guilty for both accused persons.

From that background, it is the duty of the Court to consider the evidence adduced, the submissions made by the parties and the opinion of the honourable assessors, guided by what the Court considers to be the main issues for determination, which are:

- (1) Whether ALORD S/O JOSHUA, the deceased, was killed by the accused persons?
- (2) Whether the accused persons killed the deceased with malice aforethought and thus guilty of murder as charged.

It is common knowledge that the duty to prove the above stated issues lies on the prosecution and they have to prove the case beyond reasonable doubts. The Court, therefore, shall determine each issue basing on the evidence adduced and duly recorded in Court proceedings guided by the law.

To determine the first issue, there are two approaches which the Court has considered. The first approach is to start from the question whether the first accused person was properly identified by PW1 and to find out whether the second accused person was his accomplice. The second approach is to analyze the confessional statements of the second accused person to decide whether the same can be used, with or without corroboration, to convict the accused persons, once malice aforethought is also proved. The Court shall test both approaches but shall make its judgment on either approach or both, accordingly. The Court starts with the first approach, on identification of the accused persons.

From the evidence adduced in Court and parties' submissions, there has been no controversy on whether ALORD S/O JOSHUA is dead. The testimonies of PW1 DAUDI AZARIA, the only eye witness in this case; PW6 PETER NYUNGU, the medical doctor who examined the body of the deceased and PW7 E 2826 SGT KAMALA who drew and tendered the Sketch map of the Scene of Crime (**Exhibit P2**) are enough to prove the death of the deceased. The three testimonies further prove that the death occurred on 13th day of October, 2013 and was unnatural.

What is at the centre of this case, is whether it's the accused persons who killed the deceased. In determining this issue, it shall be enough to hold

both the accused persons responsible for killing the deceased if, in terms of section 23 of **the Penal Code**, both accused persons had formed a common intention to carry out an unlawful purpose, and in so doing the murder ensued as a probable consequence of the execution of that common purpose. The above cited provision of **the Penal Code** states:

"23. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence".

As to whether it is the accused persons who killed the deceased, the only direct evidence available is that of PW1 DAUDI AZARIA who testified in Court that he did not recognize the attacker who shot the deceased but he recognized his accomplice. He mentioned the accomplice as NGENI, the first accused person. Despite the fact that both attackers had put on nylon masks on their faces, PW1 says he identified DANIEL S/O THOMAS @YUSUPH@ NGENI because his face mask was torn, the distance between him and both attackers was only about 5 meters, it was 07:00hrs in the early morning and above all he has known NGENI for a long time as NGENI was living in a house of PW1's friends called Mtote in Sanza village. Apparently, PW1 even heard the voice of the attackers when each shouted "*toa hela!*". NGENI also told PW1 to surrender when PW1 was attempting to U-turn for purpose of escaping, only to come face to face with NGENI who was coming from behind.

The above testimony of PW1 is given credence by the Court, and his identification of the first accused person is found to be trustable for the following main reasons:

One; it is trite law that every witness deserves credence, unless proved otherwise. This principal was well stated in the case of **Goodluck Kyando V. Republic [2006] T.L.R 363**, and the Court is thus guided accordingly.

Two; save for the face mask, the testimony of PW1 adequately meets all the important criteria for positive visual identification stated by the Court of Appeal in **Aburaham Daniel v. Republic (supra)** and **Waziri Amani v. Republic (1980) T.L.R 250** with regard to light intensity, time duration of the observation, previous knowledge of the attacker and the distance between PW1 and the accused person, as explained below.

It is apparent that PW1 could not reasonably look at his watch to note the time of the incident. Whatever time stated in the testimonies is a guess work based on other relative factors, such as the time the victims started their journey and the time PW1 reported the incident to Police. From the evidence adduced in Court, the murder incident occurred between 06:00hrs and 07:00hrs in the morning where intensity of light is fairly good. The distance between PW1 and where the first accused person was standing is approximated to be only five (5) meters. The incident lasted for some time. PW1 said it lasted for about an hour. The Court holds a different view. The incident, which initially was armed robbery, may not have taken that long especially where the victims were not equally armed. However, guided by the evidence adduced by PW1 that there were some arguments between the

attackers and the deceased, and the fact that the second attacker who was coming from behind re-directed PW1, when he was trying to escape, to where the other pair was standing, such activities could reasonably take about 15 to 20 minutes. The Court is of the view that such a duration of observation is long enough for PW1 to identify the second accused person, especially if he was known to him before. In this case PW1 had known NGENI for long time as he has well explained in his testimony.

Three; visual identification was not the only too that was availed to PW1. Evidence adduced by PW1 reveals that there was **voice** too as well. It is clear from PW1's testimony that the first accused person told him to surrender. Later, both attackers demanded money by shouting "**toa hela!**" Hearing a voice of a person well known to him, in addition to knowing his morphology as PW1 clearly stated, makes it highly likely that PW1 identified the second accused person despite covering his face with a nylon mask.

Four; the nylon facial mask of NGENI was said to be torn, making it possible for PW1 to cement his cognitive instincts, supported by the emerging morning sunlight, the accused person's morphology and voice too as aforesaid.

Five; PW1, by his demeanour on record, looked credible witness in the eyes of the Court. He was straight and unshaken. The fact that PW1 knows he is the only eye witness, he could have kept quiet on the fact that the attackers had facial masks. Being that faithful to his oath, PW1 stated repeatedly that he did not recognize the killer. But asserted confidently that he identified the first accused person who is not the actual killer.

The testimony of PW1 was not without discrepancies. However, discrepancies were observed in few forgivable facts, which were mentioned by Mr. Ndimbo, the learned advocate in his final submission. The Court holds that such discrepancies were caused by relatively long passage of time and certainly by frailty of human memory, the incident having occurred nine years down the lane. Besides, the discrepancy as to whether the deceased was in shorts or trousers is not material when the rest of the testimony as to who killed the deceased was firmly impeccable.

When the honourable assessors were asked to opine on the possibility of visual identification at that time of the day, i.e between 06:00hrs to 07:00hrs, they intimated that at that time there is usually enough light for proper identification in the environment of Singida Region, where the incident occurred. For the above stated reasons, the Court is of the view that identification of NGENI, the first accused person was properly done.

Mr. Ndimbo, had submitted that none of the prosecution witnesses did mention his client, as a participant in the commission of the crime. The Court finds otherwise, unless the learned advocate intended to submit that his client, the first accused person has not been mentioned as the actual killer of the deceased. The testimony of PW1 that NGENI was one of the two attackers who killed the deceased is on record and is supported by the testimony of PW2 SULE D/O MTIANA who testified that NGENI made an oral confession to that effect when the two met in the bush. It's PW2's testimony that while she was collecting firewood, NGENI told her of his participation in the incident alongside his brother and one MOSI MNAIJA. By this oral confession, the testimony of PW1 DAUDI AZARIA that he was able to identify

NGENI at the crime scene becomes irresistibly correct, despite MOSI MNAIJA being mentioned. In due course, the Court shall address the question whether MOSI JEREMIA @ MNAIJA was one of the attackers at the scene of crime and its implication on testimony of PW1 that he identified the first accused person as the Court has held.

The credence of PW1's identification of NGENI is rendered further trustable by the additional oral confession of EMMANUEL S/O THOMAS, the second accused person to PW2. It is on record that PW2 testified in Court that even EMMANUEL S/O THOMAS, her boyfriend, confessed to her that he was involved in the killing of the deceased. The same testimony is contained in both confessional statements of EMMANUEL which, though retracted, speaks the same thing regarding the fact that it was him who killed the deceased and his young brother, DANIEL S/O THOMAS @ YUSUPH @ NGENI was his accomplice.

As if it were an icing on the cake, the Court allowed the accused persons to cross examine PW2, and all other prosecution witnesses. This was done after the cross-examination done by defence counsels. The accused persons took this opportunity to ask prosecution witnesses questions, as they pleased, but none of them seized the opportunity to contradict the facts stated by PW2 in her testimony. The gesture of allowing the accused persons, who were represented, to cross-examine prosecution witnesses, may not be usual in Court practice in our jurisdiction. However, it was deliberately done to find more facts given the relatively long passage of time of about nine (9) years since the murder incident occurred. It was a considered view of the Court that with such an allowance the truth would

further sprawl, without miscarriage of justice. By the accused persons choosing not to ask PW2 any question, the Court drew an inference that what she stated in her testimony was true, to the extent that it was not contradicted by defence counsels who cross examined her.

There is a pending issue as to whether MOSI JEREMIA@MNAIJA was also an accomplice at the scene of crime and the implication of his presence to the identification of the first accused person by PW1. It's the Court's finding that the evidence does point, by and large, to the two accused persons and their two victims as the only four people who were at the scene of crime when the deceased was shot. There was PW1 himself and the deceased on one hand and the two attackers on the other hand. The only attacker who was identified at the scene of crime is the first accused person, the second accused person has been mentioned by PW2 through his, and his young brother's oral confessions. The second accused person has also been mentioned through his written confessions and his oral confession to PW7. However, taking the confessional statements duly admitted in Court as Exhibits **P3 and P4**, in light of the corroborative testimony of PW2, the Court has no doubt that the second attacker is EMMANUEL S/O THOMAS.

From the above, it is the two accused persons who were involved in the murder of the deceased, and it is the second accused person who shot the deceased dead. The Court maintains these findings even in the scenario revealed in the Extra judicial Statement (**Exhibit P4**) that MOSI JEREMIA@MNAIJA was another accomplice present at the crime scene. The reasons for the above findings are discussed below.

In the Extrajudicial Statement (**Exhibit P4**), the second accused person has mentioned MOSI JEREMIA @MNAIJA as another person who was involved in perpetration of the murder. MNAIJA's role in the incident was to give his cohort a tip that his neighbour, who was one of the victims, had money and would pass by the hill. His second role was to trace the victims along the road towards the hill. But he is also said to be the person who gave the second accused person a sign to shoot the deceased and he shot. The particular excerpt from **Exhibit P4** states:

*"MOSI JEREMIA ALITUACHA MLIMA MDOGO. BAADAE ALIRUDI **AKATUAMBIA KUNA JIRANI YAKE ANAKUJA TUCHUKUE FEDHA TUMUUE NA MOSI JEREMIA AKAONDOKA.***

*SAA12.30 ALIPOWAONA WATU WANAKUJA, ALIRUDI NA KUTUAMBIA ANAKUJA TUJIANDAE. NA WALIPOFIKA TULIWASIMAMISHA TUKIWA WATATU. 1.MOSI JEREMIA. 2. NGENI THOMAS NA MIMI 3. EMMANUEL THOMAS. NGENI THOMAS ALIWAOMBA WATOE FEDHA NA WAKAZITUPA CHINI NA TUKAANZA KUOKOTA. **MOSI JEREMIA AKANIPA ISHARA YA KUFYATUA RISASI NA KUMPIGA MAREHEMU NA TUKAKIMBIA WOTE PORINI.**"*

[**Emphasis added by the Court**].

What the Court reads from the above excerpt is that, MOSI JEREMIA @ MNAIJA could have also been in the vicinity of the scene of crime. Since his neighbour was targeted, he did not want to be seen anyhow. For this

reason, he had to hide himself at a place where only his accomplices could see him but not the victims. This inference is based on the words used by the second accused person that MOSI JERMIA gave him *a signal* to shoot. If MOSI JERMIA@MNAIJA was conspicuously involved in the ambush like the accused persons, he could have *told* the second accused to shoot instead of giving *a signal*. Since the second accused person was able to see the *signal* made by MOSI JERMIA@MNAIJA, wherever he was hiding, it adds weight to the fact that the intensity of light at the crime scene was sufficient to identify a person.

Even if the Court accepts that MOSI JERMIA@MNAIJA was another accomplice, the status of evidence does not change with regard to responsibility of the accused persons in the murder. It remains that MOSI JERMIA@MNAIJA was not seen by PW1 for the stated reasons, and he is not included in the Information of murder before the Court. Whatever his role was can, and I think it should, be further investigated for necessary legal action.

Having deliberated on the first approach which was premised on identification of the accused persons at the scene of crime, the Court turns its attention to the **second approach** which is premised on confessional statements and whether the Court can anchor conviction on such evidence. Mr. Bagenda, the learned State Attorney, had put it to the Court that the best evidence in this case is that of confession of the second accused person, who confessed to PW7 E2826 SGT KAMALA and PW8 ATHUMANI SINGANA. He cited the case of **Jumanne Ahmed Chivinja & Another v. Republic (supra)** to the effect that a person who confesses to a crime is the best

witness. The Court of Appeal in this cited case referred with approval to the same position held in **DPP V. Nuru Gulamrasul [1988] T.L.R. 82** and in **Diamon Malekela @ Maungaya v. Republic**. Mr. Bagenda submitted that with the above settled position of the law, all other witnesses were corroborating what the second accused person stated in his Cautioned Statement and in his Extrajudicial Statement, admitted as **Exhibits P3** and **P4** respectively.

The Court concurs with Mr. Bagenda's submission that the best evidence is the confession of the accused person himself. There is a load of authorities to that effect, some of which have been cited in this case. The Court also concurs with the submission of Ms. Chima that both confessional statements of the second accused person were retracted, and therefore require corroboration. In this situation, the Court has to determine whether it can base conviction of the accused persons on what was confessed by the second accused person, therein. The Court finds a clear and binding legal guidance on this subject from the decision of Court of Appeal in **Ndalahwa Shilanga & Another V. Republic (Supra)**, where on page 13 of the typed Judgment, it is stated as follows:

*"In HATIBU TENGU V R Criminal Appeal No. 62 of 1995 (unreported) this Court extracted two tests from TUWAMOI's case, which any confession must pass if it is to be acted upon by a court. The first test is whether the confession was made voluntarily and properly, that is legally by, (if necessary) by the process of a trial within trial or inquiry (in trials with without assessors). This determines the **admissibility** of the confession.*

*The second stage is the evaluation of the confession, to determine, whether it is true, including the need of and whether or not there is corroboration. This stage determines the **weight/value** of the confession. **If the court finds that there is corroboration it can convict. If the court finds no corroboration, it can still convict if the court finds that the confession contains nothing but the truth, and after warning itself of the danger of convicting without corroboration.** But in determining whether or not the confession contains the truth, all the circumstances of the particular case, must be taken into account, including whether the confession is retracted or repudiated by an accused person”*

[**Emphasis added** from the word “If” to the word “corroboration”].

Guided by the above excerpt, and in view of all the circumstances peculiar to this case as narrated in the testimonies adduced in Court, determination of the issues posed in this case is as follows:

First; both confessional statements of the second accused person, EMMANUEL S/O THOMAS, were admitted after the Court had satisfied itself that the accused was a free agent. There was no torture or inducement before or during the recording of the statements. PW7 and PW8 gave credible accounts of all the steps each had taken before, during and after recording of the statements, as required by law. The Case of **Peter Charles Makupila @ Askofu v. Republic, (supra)** which was cited by Mr. Bagenda, has been referred to cross check if **Exhibit P4** was recorded by observing such guidelines. The Court has found no substantive divergence.

Likewise, **Exhibit P3** was recorded by PW7 by observing the law at all stages. The Court is therefore of settled mind that the admission of both exhibits was lawful. This takes care of the **admissibility** test.

Secondly; regarding evaluation of the confessions to determine their respective weights or value as pieces of evidence, it is the view of this Court that both confessions contained nothing but the truth in material particulars. This view is founded on several reasons, as follows:

One, the material particulars as to who killed the deceased, participation of the first accused person in the ambush and what happened thereafter, including the escape of the second accused to Mbeya region, are coherently stated. This is despite of some discrepancies observed in the contents of the Exhibits with regards to time of the incident, whether it was 06:00hrs as in **Exhibit P3** or 05:30hrs in **Exhibit P4** or even 07:00hrs as per PW1. Or, whether MOSI JEREMIA @MNAIJA was around or not. The Court agrees that such discrepancies were marking down the weight of the testimony. However, the Court has found that MOSI JEREMIA @ MNAIJA could have been around in the vicinity of the crime scene but was not seen by PW1 for reasons already stated. As such there isn't any material controversy tainting the sanctity of the testimonies contained in the said Exhibits.

Two; the confessional statements present an account of the murder incident with details which could not be made except by a person with proven knowledge on the same. For example, while PW2 SULE D/O MTIANA states in her testimony that she was left at a Guest House in Mbeya without

knowing where EMMANUEL had headed to, EMMANUEL S/O THOMAS himself states in **Exhibit P4** that he went to Mafinga in Iringa in March 2014 and later in May 2014 he returned to Igwamadete to pick the family and headed to Chikola where he was eventually arrested. Such details could not come out of imagination of PW8 ATHUMANI SINGANA, the Justice of the Peace. Likewise, the contents of **Exhibit P3** recorded by PW7 E 2826 SGT KAMALA, which covered the family history of the accused, pre-ambush consultations at the accused's residence, the role of the second accused person at the scene of crime, the oral confession to PW2, the escape to Mbeya, Mafinga to Chikola up to the date of arrest are so detailed and coherently stated that, in the eyes of the Court, the same cannot be anything but the truth.

Three, the details contained in the confessional statements were relayed to the Court in the testimonies of PW1, PW2 and PW5 in a manner that makes one true and complete picture of what happened in the murder incident. We thus find that the **Exhibits P3** and **P4** are sufficiently corroborated by the said testimonies put together. What adds more weight to these testimonies is the fact that during trial the accused persons cross-examined the witnesses but did not shake any of them in respect of the material particulars of the case.

Suffice to conclude that the confessional statements of the second accused person EMMANUEL S/O THOMAS contain sufficient details, which prove without any reasonable doubts, that it is the second accused person who shot dead the deceased, and in so doing he was prosecuting a common purpose with the first accused DANIEL S/O THOMAS @YUSUPH @ NGENI.

Their common purpose was to rob money from the deceased and his business colleague, PW1, which they did and benefitted from the same.

The material facts on the participation of both accused person in the incident of murder are explained in the testimony of PW2 SULE D/O MTIANA, a mistress of the second accused person. Both the accused persons testified in Court that they had no quarrels whatsoever with PW2. As such the Court cannot hold that the testimony of PW2 against his boyfriend was instigated by malice, ill-will or inducement of any kind. The fluency of her testimony and her credibility were noted by the Court during trial, and so was the credence of PW1 and PW5. For all these reasons, and despite the repudiation of the confessions, the Court has no doubt about its above findings.

The Court is alive to the position of the law in **the Evidence Act**, regarding confession of a co-accused. While section 33(1) allows the Court to consider such confession in convicting a co-accused, section 33(2) of the Act prohibits conviction to be solely based on such a confession. In this case, however, the testimonies of PW1 who adequately identified the first accused person at the crime scene and the first accused's own oral confession to PW2, have been considered too. Credibility of the said witnesses need not be repeated.

Besides the above testimonies linking the first accused person with the commission of the offence, he was mentioned in the selected parts of the testimony of PW3 that he went to knock the door at PW3's residence, deep in the night, and was heard by PW3 saying the moon had already set. His dressing was described by PW3 as abnormal. Such pieces of testimony,

which went uncontroverted by the first accused person, do tally with what PW1 testified regarding the appearance of the first accused person at the crime scene. Covering one's head with torn nylon material is indeed abnormal. Hence, by applying the *res gestae* rule under section 8 of **the Evidence Act**, to the said testimony, the Court irresistibly holds that the participation of the first accused person in the murder is undoubtedly proved. To this extent the testimonies of PW1 DAVID AZARIA and PW3 YUDITH D/O DAVID have, in our view, corroborated the confessional statements of the second accused person (**Exhibit P3** and **P4**) on one hand, and the oral confession of the first accused person to PW2 SULE D/O MTIANA with regards to participation of the second accused person in the crime, on the other hand.

While using the testimony of PW3 YUDITH D/O DAVID, the Court has cautioned itself on its legality. Ms. Chima, the learned advocate for the second accused person has asserted in her final submission that the testimony should be expunged from the proceedings. For this reason, the Court has restrained itself from using the entire evidence of PW3 against her husband, EMMANUEL S/O THOMAS, who is the second accused person. Doing that would surely be unlawful.

The above scenario being cared for, the question arises as to whether the entire evidence of PW3 should be expunged from records as suggested by the learned advocate? The Court holds that where there are more than one accused persons in a case, as it is in this case, a testimony recorded in contravention of the provision of section 130(3) of **the Evidence Act**, shall not be used, in entirety, against that particular spouse to the witness but

may be used by a court against any of the remaining accused persons. Clearly, section 130(3) of the Act gives that privilege only to spouses and no others. It is for this reason, the Court during summing up to assessors, guided them to abstain from using PW3's testimony, and has proceeded to use it against the first accused person only.

In concluding the above deliberation, it's the Court's finding that the first issue on whether the deceased ALORD S/O JEREMIA was killed and the killers are the accused persons is answered in the affirmative. The same has been proved to the required standard to be true.

As to whether the accused persons killed the deceased with malice aforethought, we are guided by the decision of the Court of Appeal in the case of **Rutu Qamara @ Qares v. Republic (supra)**, which was cited to the Court by the learned State Attorney, Mr. Bagenda. On page 12 of the typed Judgment of the Court of Appeal, the following factors were listed to establish intention to kill:

- (i) The type of weapon used in the attack leading to the death of the deceased.*
- (ii) The amount of force which was used by the attacker in assaulting the deceased.*
- (iii) The part of the body of the deceased where the blows of the attacker were directed at or inflicted.*
- (iv) The number of blows which were made by the attacker, although one blow may be enough depending on the nature and circumstances of each particular case.*
- (v) The kind of injuries inflicted on the deceased's body;*

- (vi) *The utterances made by the attacker if nay(sic), during, before and after the attack; or*
- (vii) *The conduct of the attacker before or after the incident of attack”.*

It is the view of the Court that the above factors have been substantially established in this case through evidence adduced in Court. The weapon used by the attackers in this case is a *gobore*, the gun shot was aimed at the left part of the deceased's chest where the heart is known to be located underneath, the attackers shouted "*toa hela!*" which means they were forcefully demanding money from their victims, they took money and after the murder each of the attackers somehow got a reason to travel away from the village.

Judging this case in light of the law and principles stated in the cases of **Enock Kipera V. Republic**, Criminal Appeal No. 150 of 1994 (unreported) and in **Charles Bode v. Republic**, Criminal Appeal No. 46 of 2016 which were referred to, and augmented in the cited case of **Rutu Qamara (Supra)**, the Court holds that the two accused persons did kill the deceased with malice aforethought. The existence of malice aforethought in the minds of the accused persons has been duly proved, without any reasonable doubt.

In this case it has been proved that it is the second accused person who shot the deceased dead. It has also been proved that both the accused persons had a common intention of robbing the money from the deceased and his colleague PW1 DAUDI AZARJA. In this scenario, although the second

accused person did not shoot the deceased, he and the actual killer had a common intention. He was there not only watching his brother using the gun to demand money from the deceased, but he actively participated in demanding money from PW1 and eventually, both accused persons received rewards for their joint mission. Relying on the decision of the Court of Appeal in **Jumane Ahmad Chivinja & Another v. Republic (supra)**, the above described roles of the accused persons prove existence of common intention, which under the provision of section 23 of **the Penal Code**, makes the first accused person criminally liable as a joint perpetrator of the murder offence in question.

At this juncture, I should consider what obtains in the defence of the first and second accused persons who defended themselves as DW1 and DW2 respectively. Both do agree that they were in their respective homes at Igwamadete village on that fateful date. Each told the Court that he heard the news of the killing of a person that occurred at Igwamadete hill. Each testified that he participated fully in the burial of the woman who died at Mr. Stanley's house and each was selected to dig the grave but surprisingly DW2 told the Court that he did not see DW1 at the funeral. How could murder suspects on the run, as they were, be seen fully participating in a funeral? How could either of the accused person see other one there? The testimonies of DW1 and DW2 are, to say the least, cooked stories. To make a cooked story more unpalatable, each of them somehow got a reason to travel away from the village on the following day, ie on 14th day of October, 2013 until when each of them was arrested on different dates. While mentioning this "coincidence", be it said that there exists circumstantial evidence too, that links the accused persons with the commission of the offence.

The said testimonies of the DW1 and DW2 when examined in the light of the evidence adduced by PW2 who saw them in the bush and later travelled with the second accused person to Mbeya; PW7 who went to search the house of second accused but did not find him there and the confessional statements of the second accused person that they decided to run away for hiding after the incident, prove that DW1 and DW2 had no credible defence but lies. When a question was put to DW2 on cross-examination by Mr. Bagenda, the learned State Attorney, as to whom between them was telling lies about being present at the funeral, DW2 replied that he did not understand the question. This was after the learned State Attorney had repeated the question more than two times in different simple styles.

While appreciating the position of the law that the conviction of the accused persons has to be founded on the strength of the prosecution case and not the weakness of the defence case, this Court concludes with settled mind that the prosecution has indeed proved the information of murder against both the first and second accused persons beyond all reasonable doubts. It is the Court's finding that the deceased ALORD S/O JOSHUA died on the 13th day of October, 2013 at Igwamadete hill within Manyoni District in Singida Region. His death was not natural but he was killed by using a gun.

It's a further finding of the Court that the killer was the second accused person, EMMANUEL S/O THOMAS, who perpetrated the killing jointly with his young brother, the first accused person DANIEL S/O THOMAS @YUSUPH @ NGENI, in pursuit of their common purpose, which was to rob money from the deceased and his colleague PW1 DAUDI AZARIA. It is also established

that the accused persons perpetrated the killing of ALORD S/O JOSHUA with malice aforethought.

For the above stated reasons, the Court finds both the first accused person DANIEL S/O THOMAS @YUSUPH @ NGENI and the second accused person EMMANUEL S/O THOMAS guilty of murder of ALORD S/O JOSHUA under section 196 and 197 of the Penal Code, and hereby convict both the accused persons for murder, accordingly.

As there is only one punishment for offenders convicted of murder under section 197 of the **Penal Code**, the convicts are sentenced to death. Each of the convict shall surfer death by hanging.

It is ordered accordingly.

Court:

Right of appeal to the Court of Appeal duly explained.




ABDI. S. KAGOMBA
JUDGE
14/03/2022