THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT NJOMBE

CRIMINAL SESSION CASE NO. 09 OF 2019

REPUBLIC

VS.

1. **ELIAS S/O SHIDA @ JACKSON S/O MWENDA @ WHITE**
2. **ORESTUS S/O MBAWALA@ BONGE**
3. **HUSSEIN S/O KHAMIS @ ZONGA**

JUDGMENT

22nd June & 05th July, 2022.

UTAMWA, J.

The accused persons in this case are ELIAS S/O SHIDA @ JACKSON S/O MWENDA @ WHITE, ORESTUS S/O MBAWALA @ BONGE and HUSSEIN S/O KHAMIS @ ZONGA hereinafter referred to as the first, second and third accused respectively. They stand jointly charged with the offence of murder contrary to section 196 and 197 of the Penal Code, Cap. 16, R.E 2019. It was alleged in the particulars of the offence (vide the substituted charge sheet dated 20th June, 2022 and filed in court on the following date) that, all the accused persons on the 7th day of June, 2016,

at Mashujaa Street of Makambako within the District and Region of Njombe, did murder one JAMES S/O KAENGESA, henceforth the deceased. When the charge sheet (the charge) was read and explained to the accused persons, they all pleaded not guilty.

During the preliminary hearing conducted under section 192 of the Criminal Procedure Act, Cap. 20 R. E. 2002 (Now R. E. 2019), henceforth the CPA, no material facts were agreed by the parties save for the personal particulars of all the accused persons. It was also undisputed that, the accused persons were suspected of the murder at issue and arrested at various places.

The prosecution paraded a total of 6 witnesses and 12 exhibits to support the charge. The accused persons gave their respective sworn and affirmed defences without calling any other defence witness.

In this case, the Republic was represented by Messrs. Matiku Nyangelo and Andrew Mandwa, learned State Attorneys. On the other hand, Messrs. Musa Mhagama, Bryton Kaguo and Octavian Mbungani, learned advocates, represented the first, second and third accused respectively.

The trial regarding this case, proceeded without the aid of assessors vide the provisions of section 265(1) of the CPA as repealed and replaced vide section 30 of the Written Laws (Miscellaneous Amendments) Act, No. 1 of 2022. The new provisions of the Act no longer makes it compulsory for a trial of this nature to be conducted with aid of assessors. The provisions guide thus, and I quote them verbatim for a readymade reference:

> "The High Court, where it considers necessary for the interest of justice, sit with not less than two assessors provided that in deciding the matter, the judge shall not be bound by the opinions of the assessors."

During the trial, Dr. Editruda Benedict Sanga, an Assistant Medical Officer at Makambako Town Council Hospital (MTCH) gave evidence as the first prosecution witness (PW.1). She testified that, on 11th June, 2016 at 10:00 am while at her work place, police officers including one Isaya Sudi, the Officer Commanding of Criminal Investigation Department of the District, (the OC- CID) and two relatives of the deceased visited her. They requested her to examine the body of the deceased which was in the MTCH mortuary. She saw the body which had blood stains in the ears and had a wound on the chin. She examined it and made a post-mortem report (the PMR) which was admitted in court as exhibit P.1. She concluded in the PMR that the deceased had died due to lack of oxygen, i.e *Asyphyxia* due to strangulation. She then handled the PMR to the police officer.

Mrs. Enerika Nyenzi, who testified as PW.2 was the deceased's wife. Her testimony was basically that, she got married to the deceased in 2010. On 24th April, 2016 they (the deceased and PW.2) bought a motorcycle from a shop of one Mr. Asheri Lutengano Mgobasa in Makambako area at Tanzanian shillings (Tshs.) 1,950,000/=. They were issued with the motorcycle registration card, a receipt and a sale agreement. She tendered the copies of the documents in evidence and they were admitted as exhibit P.2, P.3 and P.4 respectively. The deceased used the motorcycle for commercial purposes since he used to carrying passengers on hire (commonly known in Kiswahili as the *bodaboda* business).

It was also the evidence by PW.2 that, on 7th June, 2016, at 8:00 pm the deceased left home for his usual business of *bodaboda*. He did not come back home and her (PW.2) efforts to find him proved failure as the deceased's mobile phone was not reachable. Upon inquiring from his friends, they informed her that, he did not get to work on that material night. On 8th June, 2016 she reported the missing of the deceased at Makambako Police Station. On 10th June, 2016 she was informed that his body had been found near Deo Sanga School. On 11th June, 2016 she was taken to the mortuary at Makambako Hospital where she identified the deceased body. On 14th June, 2016 she went to the police station where she identified the found motorcycle as the one which had been used by the deceased. The motorcycle was of STAR make with the registration numbers MC. 278 BCX (exhibit P.6). She also identified it in court by its colours, make and registration numbers.

In cross-examination, the PW.2 said that, she does not know who killed the deceased. When examined by the court she said that, the registration card of the motorcycle still shows the name of Asheri Lutengano Mgobasa (the vendor) as the owner thereof. The name of the owner had not been changed in the registration card since her husband died only one month and 14 days after buying the motorcycle.

According to PW.3, Mr. Domisio Njogolo, the chairman of Kivavi Street in Makambako area (wherer the deceased resided before his death), he was informed of the disappearance of the deceased on 8th June, 2016. On 10th June, 2016 he was among the search party which found the

deceased's body in a farm near the Deo Sanga School. The matter was then reported to the police who came and took the body. On 21st June, 2016 while at his office he received police officers who introduced him to two men who were in a police motor vehicle. He was also informed that, the two men were the suspects of the murder of the deceased and they wanted to show them (Police officers) the scene of the crime and the place where the dead body was left. The PW.3 and another person one Josephat Kipega were involved by the police officers in that investigative process as independent witnesses.

PW.3 further testified that, the first person to show the scene of crime was the second accused (Orestus Mbawala). He narrated to the police officers and PW.3 on their (Orestus and others) whole evil plan and its execution. He (second accused) told them that, he (Orestus) and his other two colleagues had arranged to get a new motorcycle by robbing (*kupora* in Kiswahili). They thus, prepared a manila rope tied in some sticks for robbing. They then sent one of them to hire a good motorcycle at Makambako Township and lead it to the agreed place. Their colleague did so and they used the rope to strangle the motorcyclist at the scene of crime. They then abandoned the dead body in a maize farm near the road. Thereafter, they left for Mbeya on the same motorcycle. The first accused person (Elias) then also showed the team the science of crime and the place where the body had been abandoned. He also repeated the story as narrated by the second accused.

On his part, SP. Yesaya Edward Sudi (PW. 4) told the court that, on 10th June, 2016 at around 7:00 am he was informed of a dead person in a farm near Deo Sanga Secondary School. He went to the scene of crime accompanied with other police officers. They found the dead body which was identified by some people to be of James Kaengesa who had been missing since 7th June, 2016. The deceased body was then taken to the mortuary at Makambako hospital. On 13th June, 2016 he was informed by a phone-call that, murderers of the deceased had been arrested and put at Rujewa Police Station, in Mbarali District of Mbeya Region.

It was a further testimony by PW. 4 that, he went to Rujewa Police Station to follow up the matter in a company of other police officers. He then realized that, the first accused, Elias Shida Mkuwa whom he knew before as Jackson Mwenda, had been arrested with some properties. They included the motorcycle with registration numbers MC. 278 BCX make Star (Exhibit P.6), a hand phone make Nokia (exhibit P.7) and a small black bag (Exhibit P.11). The bag contained a voter's identity card in the name of Hussein Hamis Zonga (Exhibit P. 8).

PW. 4 further testified that, when he interrogated the first accused, he admitted that, the above listed properties belonged to him. He then interrogated the suspect in relation to the murder of the deceased. The first accused also informed him (PW.4) that, on 7th June, 2016 in cooperation with his friends (Orestus Mbawala @ Bonge and Hussein Hamis Zonga) they killed the deceased. He also informed him that his other two friends ran away from the place where he (first accused) was arrested.

The PW.4 then prepared a certificate of seizure (Exhibit P.5) of the properties found in possession of the first accused and returned to Makambako with the first accused.

On 20th June, 2016, PW.4 was informed that two other accused persons had been arrested in Njombe in relation to the murder of the deceased. On 21st June, 2016 the second and third accused persons were brought to Makambako Police Station. He then interrogated the accused persons in relation to the murder of the deceased. They all confessed to have participated in the killing. On the same day, the first and second accused persons led PW.4 and other persons to the scene of crime and to the place where they had abandoned the deceased's body upon killing him. The chairman of the street (PW.3) also witnessed the two accused persons showing two places. They then made a sketch map of the scene of the crime.

On cross-examination, PW.4 explained that, the certificate of seizure was felt on 13th June, 2016 when the accused was still in Rujewa Police Station. The accused persons were not arrested on the same day. The first accused was arrested on 13th June, 2016, the second and third accused persons were arrested on 20th June, 2016. He also explained that, he did not take the third accused person to show the scene of crime because, according to the accused persons' explanation, the third accused did not know where the scene of crime was and the place where the body was abandoned.

According to PW.5 (No. D. 1818 S/Sgt. Daniel Mndeme), a vehicle inspection officer at Makambako Police Station, on 14th June, 2016 at 08:00 he was assigned by PW.4 to inspect a motorcycle with registration No. MC. 278 BCX. The same was at Makambako Police Station. He was assigned to verify the legality of its registration. Upon his examination, he filled a Vehicle Inspection Report (VIR) in which he showed that, the motorcycle had been legally registered in the name of one Ashery Lutengano Mgobasa.

Sgt. Ally Mohammed, a police officer at Rujewa police station testified as PW.6. His evidence was essentially that, on 8th June, 2016 at 2:00 pm he was conducting a night patrol with his colleague police officers through the Mbeya- Iringa highway. They found 3 persons sitting on a motorcycle along the road. When they came closer to the 3 persons, two of them run away, but they arrested one. The arrested person had a black bag on his back. Upon inspecting the bag, they found in it various items such as an Iron bar (Exhibit P.10), a knife, a spanner, a hand phone (Nokia- Exhibit P.7), four hand phone chips and a red shirt. Upon interrogating the arrestee, he introduced himself as Jackson Mwenda. He said, he was on his way from a farm in Mahongole area to Mbeya. The motorcycle was of STAR make with registration numbers of MC. 278 BCX. The suspect was then taken to Rujewa Police Station. He was then taken to the Mbarali District Court where he was charged with the offence of attempted robbery.

It was a further testimony by PW.6 that, in Rujewa Police Station they made a Prisoner's Property Report (PPR) which was admitted as exhibit P.9. According to PW.6, a PPR is a document into which properties belonging to suspects put in police custody are listed. The PPR in relation to this case (exhibit P.9) was thus, made because, police officers at Rujewa police station assumed that, the properties found with the first accused were his personal properties. PW.6 and testified that, the PPR showed that, the accused was arrested with the following personal properties: a bag (Exhibit P.11), a shirt, a black hand phone (Nokia), an Identity Card of Hussein Zonga, a motorcycle with registration numbers MC. 278 BCX, a manila rope tied on small sticks (P. 12).

Upon the closure of the prosecution's case, this court found all the accused persons with a case to answer, hence their sworn and affirmed defences as show bellow.

The defence case started with the first accused as the first defence witness (DW.1). In his sworn defence he essentially testified that, his names are Elias Shida Mkuwa also known as Jackson Mwenda and White. He lived in Matalawe area of Njombe District before his arrest. On 8th June, 2016 he went to Igawa area (in Mbarali District) to meet his lover. He was at Igawa from 7th June, 2016 at 5:00 pm to 2:00 pm on 8th June, 2016. He then hired a motorcycle to take him to Madabaga village. On the motorcycle there was another passenger and the cyclist. There were thus, three persons in the motorcycle including the first accused himself. When they arrived at Machimbo area, the motorcyclist stopped the motorcycle

and the two other men sat for eating food which they had carried in a bag. Police officers appeared in a motor vehicle and the other two persons run away. He was thus, arrested and taken to Rujewa police station with all the properties found there including the motorcycle. He however, did not admit that the properties belonged to him. He was then taken to court for attempted robbery.

On 14th June, 2016 according to the first accused, he was removed from remand prison in Mbarali and taken to Makambako police station. From 14th June, 2016 to 21st June, 2016 he was thus, in the lockup of Makambako Police Station. In the evening of 21st June, 2016 he was taken out of the lockup, put into a police motor vehicle and taken to a place where he did not know. He was introduced to the chairman of Kivavi (PW.3). He met the third accused person while in the District court during committal proceedings for this case.

The second accused person (DW.2) gave his sworn evidence as follows: that he lives in Songea, but he has been in Njombe since 2015 for a business of selling various shop commodities such as rice, oil etc. On 20th June, 2016 while in Njombe, at Ramadhani area, he was arrested by police officers from Songea. They alleged that, he had committed an economic sabotage offence. He was then taken to Njombe Police Station. On 21st June, 2016 he was taken in a motor vehicle by Yesaya Sudi (PW.4) and taken to Makambako Police Station. While in Makambako, he was taken into a police motor vehicle where he was asked to lie on his stomach. Another person whom he did not know before, was also brought into the

vehicle. The motor vehicle moved to a place he did not know. They (second accused and that other person) were introduced to the chairman of the place (PW.3). He thus, prayed for the court to acquit him since he did not participate in the killing.

In his defence, the third accused (DW.3) testified that, he is a businessman who resides in Dar es Salaam. He was arrested in Njombe at Milango minne. He came to Njombe on 26th June, 2016 to buy potatoes for his chips (fried potatoes) business. On 27th June, 2016 he was arrested. He denied to have participated in any murder because, on the material day he was in Dar es Salaam. He also denied to be the owner of the voter's card (Exhibit P.8) found in the black bag in passion of the first accused.

Upon the closure of the trial, both sides of the case opted to make final written submissions. However, only the prosecution and the counsel for the third accused person duly filed their submissions in court.

The final submissions by the prosecution were signed by Mr. Matiku Nyangero, learned State Attorney. He contended that, the issue for determination is whether the accused persons are liable for the murder of the deceased. The learned State Attorney argued that, there was no direct evidence to connect the accused persons with the charged offence. In a charge of murder it is upon the prosecution to prove the link between the death of the deceased and the accused as held in the case of **Mohamed Said Matula v. Republic (1996) TLR**. This stance of law, he contended, is based on the doctrine of presumption of innocence of an accused person which is enshrined under article 13(6)(b) of the Constitution of the United

Republic of Tanzania, 1977. He cemented this position of the law by citing the precedents of **Nyeura Patrict v. Republic, Criminal Appeal No. 73 of 2013** (unreported) and **John Makolobola v. Republic [2002] TLR 296.**

The learned State Attorney also submitted that, the only evidence available against the accused persons is oral confessions of the accused persons and circumstantial evidence. It is also not disputed that, the deceased died unnatural death as per the evidence of PW.1, PW.2, PW.3 and PW.4. This fact is also backed up by the PMR (exhibit P.1) which shows that, the cause of the deceased's death was *Asyphxia* due to Strangulation. He added, it is settled law that, oral confession made by a suspect before or in the presence of reliable witnesses, whether civilian or not, may be sufficient by itself to ground a conviction against an accused. To cement this position, he cited the cases of **Posolo Wilson @ Mwalyengo v. Republic, Criminal Appeal No. 613 of 2015** (unreported) and **John Peter Shayo and two others v. Republic [1998] TLR 198.** In the above cases, according to the learned State Attorney, there are two principles to note. These are: how reliable are the witnesses to whom the oral confession was made and that, oral confession must be received with great caution. He also cited a litany of decisions supporting the legal stance just highlighted above. The decisions included **The Director of Public Prosecutions v. Nuru Mohamed Gueamrasul [1998] TLR 82, Mohamed Manguku v. Republic, Criminal Appeal No. 194 of 2004** (unreported) and **Tumaini Daudi Ikera v. Republic, Criminal Appeal No. 158 of 2009** (unreported).

The learned State Attorney further contended that, a trial court must also determine whether the oral confession was voluntary or not. He defined an involuntary confession basing on section 27 (3) the Evidence Act, Cap. 6 R.E 2019 (The Evidence Act) which guides that, a confession is involuntary if it was induced by any threat, promise or other prejudice held out by the police officer to whom it was made or by any member of the Police Force or by any other person in authority.

In the case at hand, argued the learned State Attorney, the accused persons confessed before the chairman of Kivavi area and the investigator (PW.3 and PW. 4) that, they had killed the deceased. The question is therefore whether the accused persons were free agents when giving their respective confessions. The learned State Attorney submitted that, it was PW.4's evidence that after apprehending the first accused, they interviewed him in connection with the death of the deceased and he admitted to have killed the deceased. The first and second accused persons also confessed to PW.3 orally when they went to show the scene of crime. They also narrated the whole killing mission from its planning to its execution. There was no way PW.3 could obtain all this relevant information which connects the accused persons with the murder without obtaining it from the accused persons themselves.

It was also the submissions by the learned State Attorney that, the defence side did not cross-examine or raise any doubt as to the accused persons' confessions. The testimony by PW.3 was thus, water tight and

reliable, hence capable of grounding a conviction against all the accused persons.

The learned State Attorney added that, the PW. 4 narrated in detail on how he was familiar with the first and second accused persons and on how all the three accused persons confesses to have killed the deceased. Nonetheless, he was not cross-examined on this aspect. In law, he contended, failure to cross-examine a witness on a vital matter amounts to an acceptance of such fact. He cemented the contention by citing the cases of **Damian Ruhele v Republic, Criminal Appeal No. 501 of 2007** (unreported) and **Nyerere Nyague v. Republic, Criminal Appeal No. 67 of 2010** (unreported). He thus, urged this court to rely upon the confessions made by the accused's before PW.3 and PW.4 as being reliable and credible witnesses.

Furthermore, the learned State Attorney argued that, another evidence against the accused persons was circumstantial and based on the doctrine of recent possession. The doctrine of recent possession instructs that, if a person is found in possession of stolen property and fails to give reasonable explanation he is presumed to be the thief or a guilty receiver. He supported the legal stance by citing the cases of **Juma Marwa v. Republic, Criminal Appeal No. 71 of 2001** (unreported) and **Mkubwa Mwakagenda v. Republic, Criminal Appeal No. 94 of 2007** (unreported), **Republic v. Loughlin, 35 Criminal Appeal, R. 69** (by the Lord Chief Justice of England) and **Manazo Mandundu and Another v Republic (1990) TLR 92.**

As to circumstantial evidence, the learned State Attorney charged that, the law guides thus; in a case depending conclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. He cited the following precedents to support the legal position: **Simon Musoke v. Republic (1958) EA 718, Teper v. Republic (2) 1952 A.C 480, Hassani Fadhili v. Republic (1994) TLR 89, Ally Bakari and Pili Bakari v. Republic (1992) TLR 10 and Rex v. Bakari Abdulla (1949) 16 EACA 84.**

The learned State Attorney further made reference to the book of Sarkar on Evidence, 15th Edition 2003, Volume 1 at Page 63 which emphasized that, in cases which rely on circumstantial evidence, the evidence must satisfy the following 3 tests: **i)** the circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established, **ii)** such circumstances should be of a definite tendency unerringly pointing towards the guilty of the accused, and **iii)** if such circumstances are taken cumulatively, they 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.

In the present case, the learned State Attorney contended that, the first accused was found in possession of the motorcycle, other breaking tools and the third accused's voter's registration card. This was in the same night the deceased went missing. This account strongly connects the

accused persons with the murder under discussion. The third accused person thus, cannot escape liability since his voter's registration card was found in possession of the first accused. The accused persons were thus, found in possession of the motor cycle within a few hours after the missing of the deceased and they failed to offer any reasonable explanation.

In the prosecution case, the learned State Attorney further argued, there was no any contradiction (among its witnesses) which goes to the root of the matter. If there is any contradiction, it must be considered as a minor one which does not go to the root of the matter. This is because, in law, not every discrepancy in the prosecution case will cause the prosecution case to flop. He cited the case of **Said Ally Ismail v. Republic, Criminal Appeal No. 249 of 2008** (unreported) to cement the point.

Finally, the learned State Attorney urged this court to convict the all the accused persons as charged, based on the oral confession and circumstantial evidence which was based on the doctrine of recent possession.

On the other hand, the learned counsel for the third accused argued in his final submissions as follows: that, no any prosecution witness testified that he saw the third accused committing the murder at issue. The only witness who tried to implicate him was PW.4 who, among other things, told the court that all the accused persons admitted before him that they had committed the murder at issue. However, his evidence has not been corroborated. If the accused had confessed, then there ought to be a

recorded cautioned statement to that effect. In the absence of the recorded confessional statement, the PW.4 evidence cannot be believed.

The learned defence counsel further submitted that, the PW. 4 did not tell this court as to why the admission or confession from the first accused person was not recorded though the same was a very important piece of prosecution evidence. The third accused was also not mentioned when the other accused persons went to the scene of crime. The only thing that tried to implicate the third accused is the voter's card which was found in the bag at the place where the first accused was arrested. In his defence, the third accused denied everything about the card and said that, the names appearing in the said card are not his. He also said that, his home place is Kalakala and not Kilakala as shown in the said card. Furthermore, he contended that, no witness was called to testify on the connection between the third accused person and the voter's card. In his view, there was a need to have a witness from the Electoral Commission to confirm the connectivity of the card and the third accused. This is because, there are finger prints and other identity factors that can identify persons in the Commission's records.

It was also the contention by the learned defence counsel that, the duty of this court is to form an opinion depending on the testimony adduced by witnesses and not form its own opinion. There is no evidence that linked the third accused to the murder at issue. Though there is no number of witness needed to prove a case, courts should take precautions

when relying on evidence of a single witness as it was in the case at hand in relation to the third accused.

I have considered the evidence from the prosecution and the defence side as well as the respective final written submissions narrated above. I am settled in mind that, the following facts are not in dispute: that, the deceased actually died and he suffered an unnatural death. His body was found abandoned in a farm near Deo Sanga Secondary School in Makambako Township and was medically examined by PW.1 (Dr. Editruda). The cause of his death was lack of oxygen (*asyphyxia*) due to strangulation. It is further not disputed that, the first accused person was arrested in connection of the motorcycle said to have been used by the deceased soon before his death.

In my view, the major issue is therefore, *whether all the three accused persons or any of them, is guilty of the murder of the deceased James s/o Kaengesa*. My further view, is that, for the prosecution to prove the offence of murder under section 196 of the Penal Code, the following ingredients must be established cumulatively and beyond reasonable doubts:

i. That, the deceased named in the charge actually died.

ii. That, it was the accused person who actually caused the death of the deceased (or killed him/her).

iii. That, the killing of the deceased was with malice aforethought.

iv. That, the killing was by committing an unlawful act or omission.

It is also trite law that, the prosecution bears the burden of proving the case against the accused as rightly contended by the learned State Attorney in his final submissions. The standard of proof is beyond reasonable doubts unless the law provides otherwise (which is not the case in the offence under consideration); see, Section 3 (2) (a) of the Evidence Act and the case of **Hemed v. Republic [1987] TLR 117**. The law further guides that, the accused bears no duty to prove his innocence. His duty is only to raise reasonable doubts in the mind of the court. This principle of law is based on the constitutional doctrine of the presumption of innocence hinted earlier by the learned State Attorney. It is also a legal principle that, any reasonable doubts left by the prosecution evidence should be resolved in favour of the accused person.

In deciding the case at hand therefore, I will test if the prosecution case has proved all the ingredients of murder listed above. I will test one ingredient after another.

On the first ingredient, the sub-issue is *whether it has been proved beyond reasonable doubts that the deceased (James s/o Kaengesa) actually died*. As hinted earlier, this fact is not disputed. It has also been cemented by the evidence of PW.1 who examined his body. PW.2 also testified that the deceased died and his body was found later after he became missing. The PMR (exhibit P.1) also testifies clearly that the deceased died for lack of oxygen due to strangulation. I therefore, answer the above posed sub-issue affirmatively that, it has been proved beyond

reasonable doubts that the deceased (James s/o Kaengesa) actually died. The first ingredient has thus, been established.

Regarding the second ingredient of murder, the sub-issue is *whether or not all the accused persons or any of them, caused the death of the deceased (or killed him).* It should be noted as rightly contended by the learned State Attorney, that, in the case at hand no witness gave direct evidence that he/she saw or heard the three accused persons killing the deceased. The prosecution case was thus, mainly based on circumstantial evidence. The law on circumstantial evidence guides that, for a conviction to stand, circumstantial evidence must be water tight leaving no other interpretation apart from the guilty of the accused as correctly put by the learned State Attorney in his submissions. In fact, this kind of evidence is based on section 122 of the Evidence Act as observed by the Court of Appeal of Tanzania (the CAT) in the case of **Julius Justine and 4 others v. Republic, Criminal Appeal No. 155 of 2005** (unreported). These provisions guide that, the court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. The spirit embodied under these provisions was also underscored by the CAT in the case of **Issaya Renatus v. Republic, Criminal Appeal No. 542 of 2015** (unreported).

The CAT in the **Julius Justine case** (supra) further underlined that, the doctrine of recent possession must be applied with care because, it is rebuttable and does not displace the constitutional principle of presumption

of innocence which is in fovour of an accused person. In making this precaution, the CAT took inspiration from the case of **George Edward Komowski v. R (1948) TLR 322.**

Indeed, circumstantial evidence is among the best evidence if taken with all the precautions. No wonder the CAT observed in the **Julius Justine case** (supra at page 23) thus, and I quote it for a swift reference:

> ".....it has been said that circumstantial evidence is very often the best evidence. It is the evidence of surrounding circumstances which, by undersigned coincidence is capable of proving a proposition with the accuracy of mathematics".

My task at this juncture is therefore, to test if the prosecution's circumstantial evidence was tight enough to prove the sub-issue posed above beyond reasonable doubts against each accused person. I will perform this task in respect of each accused person starting with the first accused.

As to the first accused, the prosecution intended to link him with the murder basing on the doctrine of recent possession since he was found with the motorcycle used by the deceased at the material time. The doctrine of recent possession was correctly restated by the learned State Attorney in his submissions as narrated previously. It was also underlined by the CAT in the **Julius Justine case** (supra). Furthermore, in the case of **Joseph Mkumbwa and Samson Mwakagenda v. Republic, Criminal Appeal No. 94 of 2007** (unreported), the CAT held, and I quote it for a readymade reference:

> "Where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence

> connected with the person or place wherefrom the property was obtained. For the doctrine to apply as a basis of conviction it must be proved, first, that the property was found with the suspect; second, that the property is positively proved to be the property of the complainant; third, that the property was recently stolen from the complainant; and lastly, that the stolen thing constitutes the subject of the charge against the accused.... The fact that the accused does not claim to be the owner of the property does not relieve the prosecution to prove the above elements."

In my view therefore, the doctrine of recent possession can smoothly apply in murder cases, if the prosecution proves that the property at issue really belonged to the deceased or was in his/her possession at the time of his death. A proper identification of the property at issue is thus, of utmost importance.

In the case at hand, PW.2 gave a description of the motorcycle that had been used by the deceased in carrying out his *bodaboda* business. She did so before the police and in court. She described it by its registration No. MC. 278 BCX, its chassis numbers and engine numbers. This piece of evidence was corroborated by the evidence of PW. 4, PW.5 and PW. 6 who are the police officers involved in the case as shown above. The identity was also cemented by the documents produced by PW.2 (the copies of registration card, receipt and sale agreement).

Furthermore, according to the evidence of PW.6, the first accused was arrested in possession of the motorcycle since he was found on it with two other persons who run away upon seeing police officers approaching them. He was also found with the black bag (exhibit P.11) that contained some breaking tools together with a rope tied on twigs, henceforth the rope (exhibit P.12) said to have been used to strangle the deceased. That

was only in the same night when the deceased left home and was not seen alive again. These pieces of evidence are supported by PW.3 and PW.4 who testified that, the first and second accused informed them that, they in fact killed the deceased and thereafter they (the 3 accused persons) all travelled to Mbeya on the same motorcycle. The two accused persons also showed to the PW.3 and PW.4 the scene of crime and the place where the body of the deceased was abandoned.

In his defence, the first accused did not dispute on the identity of the motorcycle. He did not also dispute that he was arrested at the place where the motorcycle was found. Furthermore, he did not dispute the time when he was arrested. His contention is that, he was only a passenger on the motorcycle that belonged to the two other persons who run away. He also contended that he was arrested when he was standing near the motorcycle waiting for the two other men to get their meal so that they could continue with their journey.

Indeed, the first accused also admitted before the PW.4 that he had been found with the motor cycle and he participated in killing the deceased. This admission was also heard by PW.3. Furthermore, the place shown by the first accused as the point where the dead body of the deceased was abandoned, was the same place where the body had actually been previously found by the search party which included the PW.3 himself. The admission he (first accused) made before the PW.3 and PW.4 was good evidence as rightly argued by the learned State Attorney. It

is more so since neither torture, nor inducement nor promise was alleged to have been made to the first accused before he admitted.

In my view, there is no reason why the court should not believe the evidence by PW.3, PW.4 and PW.6 against the first accused. The first accused did not also suggest any reason for that course. Besides, the PW.3 and PW.6 did not know him before the event. They were involved in the matter at hand only in their respective routine duties. The law guides that, every witness is entitled to credence in his/her testimony and must be believed unless there are cogent grounds for not believing him or her; see the CAT decision in **Goodluck Kyando v. Republic, Criminal Appeal No. 118 of 2003, CAT at Mbeya** (unreported).

It is also my settled view that, the first accused defence (narrated above) did not amount to any reasonable explanation to exonerate himself from the illicit possession of the motorcycle. This is because, it could not be expected for him to opt for travelling in a motorcycle at that night with two persons he did not know before. He did not also tell the court if his night traveling had any urgency so as to justify the risk he took. Again, even his defence that on the material time he was at Igawa area is an afterthought that cannot constitute any reasonable explanation. In law, his defence amounted to the special defence of *alibi* which implies that, the accused was not at the scene of crime at the material time of committing the offence at issue.

The law requires an accused who intends to raise the defence of *alibi* (like the one offered by the first accused in the case at hand), to give

notice to the court and the prosecution before the hearing of the case commences. However, if he/she fails to do so, he/she is bound to furnish the prosecution with the particulars of the *alibi* at any time before the case for the prosecution is closed; see sections 194 (4) and (5) of the CPA. Obviously, the first accused in the case at hand did not comply with these provisions of the law. I therefore, reject the accused's defence of *alibi*. Besides, his defence is not strong enough to raise reasonable doubts amid the strong prosecution evidence discussed above.

Due to the above reasons, I find that, the doctrine of recent possession smoothly applies against the first accused person. The evidence of his possession of the motorcycle soon after the killing of the deceased was also supported by other evidence of his own admission before the PW.3 and PW.4 as shown above. I thus, find that, the accused was involved in the killing of the deceased.

Concerning the second accused, there is the evidence of PW.3 and PW. 4 that he admitted before them that he killed the deceased in corporation with other persons. He also showed to them the scene of crime and the place where they (second accused and others) abandoned the deceased body upon killing him. The place happened to be the same point on which PW.3 and other members of the search party had found the dead body. Again, according to PW.3 and 4, the second accused explained the details of their plan to get a good motorcycle by robbing and how they executed the plan as narrated above. He also told them that, they strangled the deceased to death by the rope (Exhibit P. 12). This rope was

also found in the bag (exhibit P.11) which was found in possession of the first accused together with the motorcycle according to the evidence of PW.6. The evidence also tallies with the evidence by PW.1 who testified that, the deceased died of lack of oxygen due to strangulation.

As found earlier, such admission is a good evidence against the second accused as correctly contended by the learned State Attorney. It is more so since neither torture, nor threat nor promise was allegedly made to the second accused before he admitted. Furthermore, as I also found before, there is no reason for not believing the PW.3 and PW.4 and the accused did not suggest one. They are thus, entitled to credence under the authority of the **Goodluck Kyando case** (supra).

His defence, that he was arrested for economic sabotage offences, but later he was joined to this case unreasonably cannot thus, shake the above tight prosecution evidence.

Having observed as above, I make a finding that, the second accused was also involved in the killing of the deceased.

As to the third accused person, I am of the view that, he cannot also escape liability. The PW.4 testified that, he interrogated all the accused persons and they admitted to have killed the deceased. Furthermore, his own voter's identity card (exhibit P.8) was found in the bag which was found with the first accused. That was the very bag from which the rope used to strangle the deceased (according to the admission by the first and second accused persons to the PW.3 and PW.4) was found. The bag was found with the first accused person who was also in possession of the

motorcycle of the deceased. All these pieces of evidence points to the third accused as the culprit.

His defence that he was arrested in Njombe for nothing does not shake the tight prosecution case narrated above. Again, his defence amounted to an *alibi* since he said, on the material date he was in Dar es Salaam. However, such defence is rejected because, he did not give any notice for the defence as required by section n 194 (4) and (5) of the CPA discussed earlier. It is thus, an afterthought which cannot support him. Furthermore, in his defence, he did not give any reasonable explanation as to why his voter's card was in the bag held by the first accused who was found with the motorcycle with two other persons who run away.

Again, in his defence, the third accused denied that the voter's card did not belong to him and the photograph in it was not his. Nonetheless, the photograph conspicuously shows his own face by naked eyes. The court observed that fact in court, noted it in the proceedings and declared to the parties that it had done so. His denial that the photograph did not belong to him was thus, a pure lie. In fact, under the circumstances of the case, it was expected that, the third accused could give reasonable explanation on how and why his voter's card was in possession of the first accused. But, he did not do so apart from offering open lies by denying even his own face on the photograph. Such kind of open lies offered by an accused person in a criminal charge were held to be inconsistent with the accused's innocence; see the **Julius Justine case** (supra, at page 26).

Furthermore, thought the voter's card showed that the owner was Hussein s/o Hamisi Zonga, the third accused said, the middle name was not his. This is because, his middle name is spelt as "Hamisi" and not as "Khamisi" as shown in the card. He also contended that, his home place in Dar es Salaam is "Kalakala" and not "Kilakala" as shown in the voter's card. Nonetheless, such discrepancies are minor in my view. This is because, the photograph clearly showed that it was of the third accused. His first and third names are not disputed. The mere discrepancies of the single character in his middle name and his place of aboard suggests only the existence of typographical errors. The discrepancies do not thus, affect the substantial fact that, the voter's card belonged to himself.

Owing to the above reasons, I am of the view that, the third accused was also involved in the killing at issue.

Having observed as above, I find that, the prosecution evidence sufficiently points that, the three accused persons, jointly killed the deceased. I further find that, the two persons who run away from the place where the first accused and the motorcycle were found, were none other than the second and third accused though the first accused opted to conceal them. Their respective defences narrated and considered herein above did not thus, raise any reasonable doubt in the mind of this court. If anything, they have only left remote and fanciful possibilities which do not in law, exonerate an accused from a criminal liability as per the decision by the CAT in the case of **Abdallah Seif v. Republic, Criminal Appeal No. 122 of 2020, CAT at Dar es Salaam** (unreported). In underlining this

legal stance, the CAT followed the case of **Chadrankant Joshubhai Patel v. Republic, Criminal Appeal No. 13 of 1998** (unreported) which also took inspiration from the English case of **Miller v. Minister of Pension [1974] 2 All ER 372.**

Having discussed as above, I answer the sub-issue under the second ingredient of murder affirmatively that, all the accused persons caused the death of the deceased (or killed him). The second ingredient of murder has thus, been proved beyond reasonable doubts.

I now test the third ingredient of murder. The sub-issue here is *whether the killing of the deceased was with malice aforethought.* According the evidence of PW.3 and PW.4, the first and second accused admitted before them that they had killed the decease with a third person. I have already found above that, the said third person was the third accused. They all wanted to accomplish their motive of robbing a good motorcycle. One of them thus, hired the deceased motorcycle, took him to the planned area and they strangled him to death by the rope. They then took his motorcycle and heeded to Mbeya. This shows that, they had malice aforethought against the deceased as defined under section 200(a) or (c) of the Penal Code. These provisions guide thus, and I quote them for ease of reference:

> "Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-
>
> > (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
> >
> > (b)...(Not applicable).

(c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;"

I accordingly answer the issue under the third ingredient of murder affirmatively that, the killing of the deceased was with malice aforethought. The third ingredient was thus, established beyond reasonable doubts.

The fourth and last ingredient calls for a sub-issue of *whether the killing was by committing an unlawful act*. The law prohibits one person from assaulting another as provided in the Penal Code from section 240 to 243. The accused persons' act of killing the deceased was intended to facilitate their mission of robbing the motorcycle from the deceased. This was due to the evidence of PW.3 and PW.4 who testified on the admission made to them by the first and second accused. PW. 1 also opined in the PMR that the deceased died due to lack of oxygen due to strangulation and that he had marks on his neck and a wound under the chin. Such robbery of the motorcycle by strangling the deceased also amounted to armed robbery, which is an offence under section 287 of the Penal Code. The sub-issue under this heading is thus, affirmatively answered that the killing of the deceased was by committing an unlawful act. The fourth ingredient has thus, also been established beyond reasonable doubts.

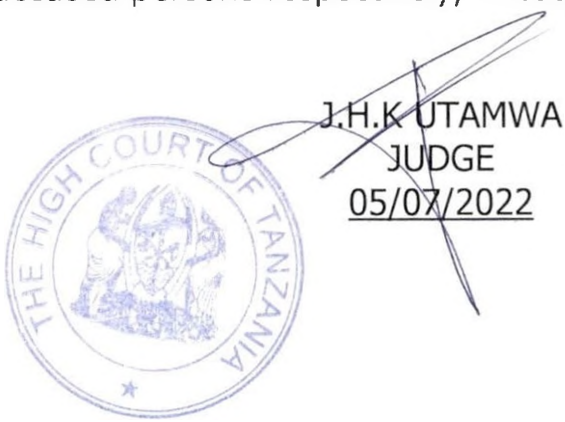
Due to the findings I have made above, I find that, the prosecution has proved all the ingredients of the offence of murder against all the 3 accused persons. I accordingly answer the major issue posed earlier positively that, all the three accused persons are guilty of the murder of the deceased James s/o Kaengesa. I consequently, convict all the three accused persons, ELIAS S/O SHIDA @ JACKSON S/O MWENDA @ WHITE,

ORESTUS S/O MBAWALA @ BONGE, HUSSEIN S/O KHAMIS @ ZONGA of murder of JAMES KAHENGESA as charge under section 196 and 197 of the Penal Code. It is so ordered.

JHK. UTAMWA
JUDGE
05/07/2022.

Date: 05/07/2022.
Coram: JHK. UTAMWA, J.
For Republic: Mr. Matiku Nyangero, State Attorney.
Accused persons: all 3 present.
For First Accused: Mr. Mussa Muhagama, advocate.
For Second Accused: Mr. Bryton Kaguo, advocate.
For Third Accused: Mr. Octavian Mbungani, advocate.
B/C: Gloria

Court: Judgement delivered in the presence of Mr. Matiku Nyangero, State Attorney for Republic, the 3 accused persons, Mr. Mussa Muhagama, Mr. Bryton Kaguo and Mr. Octavian Mbungani, advocates for the first, second and third accused persons respectively, in court, this 5th July, 2022.



J.H.K UTAMWA
JUDGE
05/07/2022