

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**  
**(ORIGINAL JURISDICTION)**  
**CRIMINAL SESSION CASE NO. 96 OF 2018**  
**THE REPUBLIC**

**VERSUS**

**HAMIDU SAID NASSORO @ KINDAMBA @ KINDIMBA ..... 1<sup>ST</sup> ACCUSED**

**GEOFFREY GILBERT DOTTO @ JOFU..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

*21<sup>st</sup> March, 2022 & 08<sup>th</sup> April, 2022.*

**E.E. KAKOLAKI, J.**

The accused persons in this matter Hamidu Said Nassoro @ Kindamba @ Kindimba and Geoffrey Gilbert Dotto @ Jofu are jointly and together charged with the offence Murder; Contrary to Section 196 of the Penal Code, [Cap. 16 R.E 2002]. It is the prosecution case against them that on the night of 06<sup>th</sup> December, 2015 at Machinjioni Pangani area within Kibaha District in Coast Region while armed with a gun together with two other persons not charged, invaded one **Michael Kinyenje Mpembee @ Marko Kinyenje**

**Mpembee** at his home and shot him with bullet on his stomach (abdomen). The later was taken to Tumbi Hospital on the same night by his brother (PW4) for medical attention after being informed by PW3 (the deceased's neighbour) before he was referred to Muhimbili National Hospital (MNH) on the 10/12/2015 where he died on the next day of 11/12/2015 while undergoing treatments. The incident was reported at Tumbi Police Station and investigation mounted that led into arrest of the 1<sup>st</sup> accused on the same day, who allegedly when interviewed orally by PW6 (A/Insp. Kilian) confessed to have been involved in the said invasion and mentioned the 2<sup>nd</sup> accused and others not charged as his co-perpetrators of the crime hence arrest of 2<sup>nd</sup> accused on the 31/08/2017 before he was joined as co-accused in this case. The deceased body was examined by Dr. Hubert Nguvumali (PW2) while witnessed by PW1 (D/S/Sgt Ally), and the autopsy report issued remaking that, his death was due to Hemorrhagic shock following gunshot wounds he had sustained that penetrated his abdomen from right to left side and ruptured his colon (Exh. PE I). When the charge was read over to the accused during preliminary hearing, both accused persons denied all material facts as they accepted only their personal particulars, hence a need for the prosecution to prove their guilty. In discharging its noble duty the

prosecution called in court eight (8) witnesses and tendered four (4) exhibits. The exhibits are the Postmortem Examination Report (Exh. PE I) duly tendered by Dr. Hubert Nguvumali PW2, crime scene sketch map (Exh. PE II) and deceased's dying declaration (exh. PEIII) tendered by PW7 and witness statement of one Stephano Patrick @ Mchiwa (Exh. PE IV) tendered by PW8.

On the defence side both accused defended themselves on oath and without tendering any exhibit. It is only the 2<sup>nd</sup> accused who called his wife one Hidaya Ramadhani Nyoni (DW3). During the trial the prosecution was represented by Ms. Aurelia Makundi learned Senior State Attorney and Ms. Elizabeth Olomi, learned State Attorney while the 1<sup>st</sup> and 2<sup>nd</sup> accused persons enjoyed legal representation of Mr. Octavian Mshukuma and Godfrey Kizito both learned advocates. Hearing of the case proceeded with aid of assessors who finally delivered their opinions after being taken through to the summary of evidence of both sides as adduced in court.

During the trial through the evidence of PW1 (Police officer who witnessed the autopsy), PW2 (the doctor who conducted the autopsy), PW3 the (deceased neighbour) and PW4 (deceased brother one Husila) and autopsy report exhibit PE1, the prosecution managed to prove to the court beyond

reasonable doubt that, the deceased was died of unnatural death. It was established his death resulted from Hemorrhagic shock following gunshot wounds he had sustained that penetrated his abdomen from the right side to the left side which ruptured the colon. It was also proved through evidence of PW3 and PW4 that the deceased sustained those wounds after being invaded by thugs and shot with gun on his stomach. The only remained disputed fact in which this court framed an issue to answer it is whether it is the accused persons who killed the deceased.

In answering this issue I wish to state from the outset that throughout the trial no eye witness testified in court to have witnessed the accused persons committing the offence. The prosecution case on this issue therefore hinges on 1<sup>st</sup> accused oral confession before PW6, deceased oral dying declaration through PW3 and PW4 and in writing through exhibit PEIII as recorded by PW7, and witness statement of one Stephano Patrick @ Mchiwa (exhibit PEIV) which evidence I am intending to discuss and analyze in this judgment.

To start with is the 1<sup>st</sup> accused oral confession before PW6 who informed the court that on the 07/12/2015 was assigned by the OC-CID for Kibaha Police Station to investigate the armed robbery incident that was reported, as at that time there were two suspects arrested already one of which was the 1<sup>st</sup>

accused since the other one was later on converted into prosecution witness. He said, in that course of investigation he happened to orally interview the 1<sup>st</sup> accused who confessed to have participated in the commission of an offence though not directly as the main perpetrator was one **Jofu**. That, the 1<sup>st</sup> accused told him that, a day before the invasion incidence together with Costa, Kiduku and Jofu convened at Imani butcher to plan to invade and steal money from the deceased new house, on suspicion that he had a good reserve of money following his purchase of cattle worth eighteen (18) million. The witness went on testifying on 6<sup>th</sup> day of the month he had forgotten the 1<sup>st</sup> accused together with his colleague went up to the deceased new house he used to sleep in occasionally located at Pangani area where they shot him with bullet on the stomach. He said as per the 1<sup>st</sup> accused it is Jofu who shot the deceased with a gun he had in his possession. And further that, after that shooting and upon noting that the deceased had identified him he rushed to Tumbi Police Station for reporting the incident but was held up following dissatisfactory information he rendered to the CRO – incharge hence possible interview with him. When cross examined by Mr. Mshukuma counsel for the 1<sup>st</sup> accused person as to why he did not put in writing accused confession if at all he confessed to him, PW6 said he was

the investigator of the case so he requested someone else to record it. On his side the 1<sup>st</sup> accused during his defence as DW1 strongly denied to have participated in the offence he was being accused of. It was his story that, the deceased was his friend and on the 06/12/2015 night time was at his new residence at Pangani area. While outside together with one Hamis and the deceased inside the house, he saw a motorcycle coming to their direction only to note that it was the police officer one Francis who had carried one John Mbuya. He said, the two asked for the deceased on pretence that were looking for shelter on that very night. That, on hearing their voice the deceased who was inside called one John Mbuya who went closer to the grill window together with Francis before he was put under arrest by said Francis and taken to the rear of the house on assertion of engaging in a discussion he was not concerned with. DW1 stated further that, he managed to escape from hands of Francis and run away before he heard a blasting sound a moment later something which scared him not to go back to the scene and decided to go straight to the police station at Tumbi for the purposes of reporting the incident. It was his further defence that, while there and after reporting the said invasion incident mentioning involvement of Francis and John Mbuya (police officers), it is Afande Costa only who interviewed him on

07/12/2015 at about 05.00 am. DW1 informed the court on how he met the RCO and RPC for Coast Region at Tumbi Police Station after being take under arrest, before he was taken to Kwala area on the 09/12/2015 and tortured while forced to denounce his earlier made statement that, Francis and John Mbuya were involved in the said armed robbery or deceased invasion. He averred, following that torture he was issued with PF3 but one afande Jonathan who used to escort him to hospital told him will never get it back. Despite all that tormented moments he said, did not record any statement at police before he was taken to court. He prayed the court to find him not guilty as he did not kill his friend.

As for the 2<sup>nd</sup> accused person in his defence testimony as DW2 flatly denied any involvement in the commission of an offence relying on defence of alibi that on the 06/12/2015 night time was at his home with his wife (DW3) and that, he was never known by the nick name of **Jofu** before. He denied also to have known to the 1<sup>st</sup> accused before until when he was arrested in connection of this offence on 31/08/2017 at Ukonga Mazizini slaughter house and joined with him. He prayed the court to find him not guilty. To corroborate his defence of alibi his wife Hidayah Ramadhan Nyoni (DW2) informed the court that on the fateful day at night was with her husband at

home till next day. When cross examined as to whether the 2<sup>nd</sup> accused was nicknamed Jofu she confirmed that it is true he was using that nick name.

Both accused persons are facing a charge of murder in this case. Murder is simply defined as causing death of human being through unlawful act or omission which is actuated with malice aforethought. The provisions of section 196 of the Penal Code reads:

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

And malice aforethought is defined by the **Blacks Law Dictionary**, 8<sup>th</sup> Edition (2004) page 3038 to mean (1) *the intent to kill*, (2) *the intent to inflict grievous bodily harm*, (3) *extremely reckless indifference to the value of human life (the so-called abandoned and malignant heart)*, or (4) *the intent to commit a dangerous felony (offence)*. This definition is also reflected in our law under section 200 (a) – (d) of the Penal Code under different circumstances but for the purposes of this matter it is instructive to quote the one under subsection (a) which reads:

*200. Malice aforethought shall be deemed to be established by evidence proving any one nor 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;*

The accusations against both accused persons in this case is that, with malice aforethought they invaded the deceased's home and caused him grievous harm by gunshot on the stomach thereby causing his colon to rupture, the act which resulted into severe bleeding hence his ultimate death. And that, through oral confession of the 1<sup>st</sup> accused before PW6 which also incriminated the 2<sup>nd</sup> accused, the two accused persons together with other fellows in their company, had a motive of robbing the deceased of his money which they believed he reserved after he had purchased cattle worth eighteen million shillings.

The law recognizes oral confession as evidence which in itself can base conviction of the accused person. This position of the law was stated by the Court of Appeal in the case of **Osolo Wilson @ Mwalyego Vs. R**, Criminal Appeal No. 613 of 2015 (CAT-unreported), where it observed thus: -

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

The term confession is defined by the law under section 3(1)(a),(b),(c) and (d) of the Evidence Act, [Cap. 06 R.E 2019] to mean words or conducts or combination of both or a statement containing an admission or affirmative declaration of all or substantial ingredients of the offence with which its maker is charged with and/or from which an inference may reasonably be drawn that its maker has committed an offence. Confession can be in written form before the police officer or justice of peace or orally made before any reliable witness.

Having examined the position of the law on confession extracted from the accused person, the emerging question before the court for determination in response to the main issue is whether the repudiated extracted oral confession of 1<sup>st</sup> accused before PW6 is worth of consideration by this court to prove guilty of both accused persons to the hilt on the charge of Murder. For the confession to be reliable the same must have been obtained voluntarily and in compliance of the law. And further, for the same to be believed must be detailed and elaborate to the extent of establishing all ingredients of the offence. In this case, I find the alleged confession did not meet all these qualifications for three reasons. **One**, when testifying in court PW6 did not inform the court as to whether during interview with the 1<sup>st</sup>

accused, he informed him of the offence he was facing before extracting the alleged confession from him. It was so important for the accused to know the offence he was confessing to have committed before the alleged confession is made. **Secondly**, PW6 when giving his testimony was not sure of the month and year in which the alleged offence was actually committed by the 1<sup>st</sup> accused as he said, it was on 06<sup>th</sup> day of the month he had forgotten. In absence of clear evidence on date in which the alleged offence was committed by the 1<sup>st</sup> accused, it cannot be concluded that, he confessed to the commission of an offence he is being charged with. **Thirdly**, the witness PW6 failed to identify in court the person whom the alleged confession was procured from. It is a cardinal principle in Criminal justice that all doubts are resolved at the appellant's favour (see. **Aloyce Mgovano Vs. The Republic**, Criminal Appeal No. 182 of 2011 (CAT-unreported)). From the above raised grounds this court entertains doubt on the reliability of the alleged oral confession hence refrain from taking it into consideration.

I now move to the next set of evidence by the prosecution which is the deceased's dying declaration as per the evidence of PW3 and PW4 as well as exhibit PE III. To start with is the evidence of PW3, the deceased neighbour who heard the deceased raising alarm and responded to

immediately. It was his testimony that on the fateful day of 06/12/2015 at about 10.00 Pm while preparing to go to bed he heard an alarm coming from the deceased house calling for help saying "jirani nisaide kindamba unaniulia nini". That on responding to the scene of crime he found the thugs already gone and the deceased who had laid down on the mattress informed him that, was shot by gun on his abdomen and asked him to help calling his brother PW4 in which he did. He said, he observed the deceased abdomen wound by aid of solar lamp which was on at that time. When cross examined whether Kindamba who was mentioned by the deceased was around in the premises on that day, PW3 said does not remember to have seen him on that day and prior to the commission of an offence. This witness did not tell the court as to whether the deceased mentioned to him his assailants, Kindamba inclusive and how did he identify them so as to confirm of what he heard before responding to the crime scene that, the person mentioned by the deceased was in fact Kindamba (1<sup>st</sup> accused person). On the other hand PW4, the deceased brother informed the court that, when called by PW3 and informed of the injury suffered by his brother (deceased), he called at the scene of crime with a motor vehicle ready to take him to the hospital. He said, on the way to hospital he heard the deceased complaining that

Kindamba had hired robbers to rob and kill him. Like PW3 did not inquire further to get more particulars of which Kindamba was being referred to by the deceased and how did the deceased manage to identify him while it was dark and how he had planned to hire the said robbers.

Dying declaration is a statement written or verbal of relevant facts made by a person explaining the circumstances of his death. The Court of Appeal of Tanzania in the case of **Onael Dauson Macha Vs. Republic**, Criminal Appeal No. 214/2007 (HC-unreported), on what amounts to dying declaration and its relevance in criminal matter had this to say:-

***"dying declaration is the statement made by the deceased person as to the cause of his death. It is relevant in criminal proceeding and admissible in evidence in case in which the cause of the death of that person comes into question". (Emphasis supplied)***

Applying the above definition of the term dying declaration to the facts of this case where PW3 and PW4 do not state to have extracted more information from the deceased on who exactly caused his death and how was it perpetrated, I find it difficult to believe that, the mere mentioning of the 1<sup>st</sup> accused believing that he is the one who had hired robbers to rob and kill him (decease) is an assurance and a proof that he is the perpetrator

of the said murder for want of further and better particulars on how was the offence perpetrated. I so conclude as in the circumstances of this case a mere mentioning of 1<sup>st</sup> accused might have resulted from deceased's honest mistake of identity for want of light, wrong beliefs that he might have caused his death for being his enemy or resulted from hallucinations.

As regard to exhibit PEIII (dying declaration), the deceased narrates in details his personal and family particulars while mentioning one Jofu, Ayubu and Kindamba to be amongst the people he identified when invaded at home of the night of 06/12/2015. He states that, on the fateful day Jofu, Ayubu and two others whom he could not identify arrived at his home and asked Kindamba to allow them meet him as he was inside the house. That, as Kindamba was escorting them to the house's door he refused to open for them and that is when **Jofu** shot him with gun on the stomach through the grill window without tops. He also mentions Kindamba as the person who caused him all that trouble for being known to the invaders before. Like the deceased dying declaration allegedly made before PW3 and PW4, I also entertain doubt on his declaration in exhibit PEIII too. The reason I am so doing is that, as per both PW3 and PW4 evidence the only source of light at the scene of crime was the solar lamp which was on in the room where the

deceased was found shot by gun on the abdomen. The author of exhibit PEIII does not disclose as to what source of light aided him to identify his assailants who were outside while it was dark. It is the law in a criminal charge whose evidence depends much on identification of the accused person the circumstances favourable for proper identification of the party must be obtained. The Court of Appeal in the case of **Raymond Francis v. R** [1994] TLR 100, citing the case of **Mohamed Alhui v. Rex (1942) 9 EACA 72**, and speaking through Lubuva, J.A., stated thus:

*"....it is elementary that in a criminal case whose determination depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance."*

Applying the above cited principle of the law to the facts of this case and in particular the deceased's dying declaration in exhibit PEIII as well as the one through PW3 and PW4, where the source of light that enabled him to identify his assailants is not disclosed, I am convinced and therefore forced to arrive to a finding that, the conditions for proper identification of both accused persons were not favourable. Thus the alleged dying declaration is not reliable at all in the eyes of law.

Lastly in prosecution evidence is the witness statement of Stephano Partick @ Mchiwa (exhibit PEIV) duly tendered by PW8. It is in this statement where its author who also participated in the commission of an offence before he was converted into witness, gave a detailed account on how the invasion was executed by the 2<sup>nd</sup> accused, himself and Poi and Hamis (not charged) under assistance of the 1<sup>st</sup> accused. And that it is one Jofu who shot the deceased on the stomach using his gun. Admittedly exhibit PEIV is the statement of a witness who cannot be found or called to testify in court duly recorded under section 34B(2)(c) of the Evidence Act. When tendered in court was not objected by the defence side as the prosecution had served the defence with a prior notice in accordance with the law. It is however the law that, section 34B(2) carries six (6) conditions to be met before the statement is admitted in court from subsection 2(a) to (f). The Court of Appeal in the case of **Shilinde Bulaya Vs. R**, Criminal Appeal No. 185 of 2013, **Fadhili Heri @ Selemani Vs. R**, Criminal Appeal No. 283 of 2011 and **Twaha Ali and 5 Others Vs. R**, Criminal Appeal No. 78 of 2004 (all CAT-unreported) insisted that all the above conditions as laid down in paragraphs (a) to (f) of sub-section (2) of section 34B of the Evidence Act are cumulative and therefore must all be met for a witness statement to be



admissible under section 34B (1) and (2) of the Evidence Act. See also the case of **Joseph Shabani Mohamed Bay Vs. R**, Criminal Appeal No. 399 of 2015 (CAT-unreported). My perusal of exhibit PEVI has unveiled the fact that, the same was not read to its author by the recorder (PW8) before the author could append his signature contrary to the provision of section 34B(2) (f) of the Evidence Act which provides that:

*2) A written or electronic statement may only be admissible under this section-*

*(f) if, where the statement is made by a person who cannot read it, it is read to him before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read.*

As it is already established that the statement was not read to its author before his signature, then contents therein are questionable hence cannot be relied upon by this court despite the fact that it was admitted in court without objection. In light of the above analysis of evidence I am satisfied that, the prosecution evidence have failed to prove its case against both accused persons beyond reasonable doubt. In turn thereof I am made to believe the defence case in respect of the 1<sup>st</sup> accused person that, he did not kill his friend and the 2<sup>nd</sup> accused that, he was not present at the scene of crime on the night of 06/12/2015.

Having so found, I wish also to consider assessors opinions in respect of both accused persons. As to the 1<sup>st</sup> accused person, it is only the 2<sup>nd</sup> assessor who found him guilty of the offence of Murder relying on the evidence of deceased dying declaration through PW3, PW4 and his accused oral confession before PW6. With due respect I defer with him for the reasons stated when considering the said evidence above and found that both evidence is doubtful. I share the opinion of both 1<sup>st</sup> and 3<sup>rd</sup> assessors concerning the guilty of the 1<sup>st</sup> accused that his case was not proved beyond reasonable doubt. As to the 2<sup>nd</sup> accused I am also at one with all assessors who found him not guilty on the reason that the evidence against him is insufficient to prove such serious offence.

In the upshot I am satisfied that, in this case the prosecution has failed to prove its case beyond reasonable doubt against both accused persons. I therefore find them not guilty of the offence of Murder; Contrary to section 196 of the Penal Code as charged and hereby proceed to acquit them. They are to be released forthwith unless otherwise lawfully held.

It is so ordered.

DATED at Dar es salaam this 08<sup>th</sup> day of April, 2022.



E. E. KAKOLAKI  
**JUDGE**  
08/04/2022.