IN THE HIGH COURT OF THE UNITED REPUBLC OF TANZANIA

BUKOBA DISTRICT REGISTRY

SITTING AT BIHARAMULO

ORIGINAL JURISDICTION

CRIMINAL SESSION CASE NO. 67 OF 2021

THE REPUBLIC

VERSUS

EMMANUEL S/O BARAKANFITIYE@ RAIS ..... 1ST ACCUSED

JACKSON S/O EMMANUEL.....2ND ACCUSED

JUDGMENT

03/06/2022 & 07/06/2022

E. L. NGIGWANA, J.

On the night of 13th day of May 2020, the deceased's life (Mariana d/o Matabaro), a woman aged 75 years old, was abruptly shattered in callous, brutal and shocking manner. The accused persons namely; Emmanuel s/o Barakanfitiye @ Rais and Jackson s/o Emmanuel (A father and son) respectively were arrested in connection of the incident and were jointly and together charged for Murder contrary to sections 196 and 197 of the Penal Code Cap 16 R: E 2019).

It was alleged by the prosecution that the duo, on the fateful night, at Karundi "A" Hamlet in Mwanga Village within Biharamulo District in Kagera Region, did murder one Mariana d/o Matabaro.

When the information of murder was read over and properly explained to the accused persons in Kiswahili language, they pleaded not guilty.

To establish and prove criminality against the accused persons, prosecution featured six (6) witnesses and tendered three (3) exhibits. The witnesses were; Daudi s/o Pili **(PW1),** Mambo s/o Barakanfitiye **(PW2),** George s/o Barakanfitiye (**PW3),** Petro s/o Bukuru **(PW4),** G.8635 D/C Dhiki **(PW5),** and F.5433 D/C Pastory **(PW6.** The Exhibits tendered were; Report on Postmortem examination (**Exh. P1**), sketch map of the crime scene (**Exh. P2**) and cautioned statement of the 1st accused person (**Exh. P3).**

On their part, the accused persons defended themselves under oath; the 1st accused called no witnesses and also tendered no exhibits. The 2nd accused featured one witness and tendered no exhibits. The 1st and 2nd accused persons testified as **DW1** and **DW2** respectively while Revocatus s/o John @ Anaclet testified as **DW3.**

At the hearing of this case, the Republic was represented by Ms. Veronica Moshi, learned State Attorney while the accused persons enjoyed the legal services of Ms. Esther Sentozi, learned advocate. My Legal Assistant was Hon. E. M. Kamaleki.

It should be very clear at this juncture that section 265 of the Criminal Procedure Act, Cap 20 R: E 2019 was amended through section 30 of the Written Laws (Miscellaneous Amendments) Act No. 1 of 2022.Prio to the amendment, all criminal trials before the High Court were conducted with the aid of not less than two assessors, and under section 298 (1) of the CPA, the trial Judge was mandatorily required at the conclusion of the hearing of

the evidence of both sides to sum-up the case adequately to the assessors on the facts in relation to law before the assessors are called to give their opinion. Following the said amendment, the said mandatory requirement is no longer there.

However, the court will still sit with assessors when it appears necessary for the interest of justice, but as of now, the rules in relation to their appointment and qualifications, summing and opinion are not yet in place. The making of the said rules is within the mandate of the Chief Justice. Therefore, in the instant case, I sat without the aid of assessors, and for that reason, names of assessors, summing-up to assessors as well as their opinion will not feature in this judgment.

The evidence adduced by the prosecution can be summarized as follows. PW1 is a Clinical Officer stationed at Nyabusozi Health Centre within Biharamulo District. He testified that on 14/05/2020, he was summoned and accompanied the police officers to the scene of crime to wit; Kurundi "A" to examine the deceased's body. He further testified that he conducted examination of the deceased's body in the presence of the deceased's son (PW2), the Hamlet leader (PW4) and in the presence of the police Officers namely; Sgt. Mangoma and D/C Dhiki (PW5). He added that the body had multiple cut wounds on the head and on the thumb of the right arm. In that regard, PW1 testified that he formed opinion that the cause of death was severe bleeding due to multiple cut wounds on the head. He added that, having completed the examination, he prepared the report on postmortem examination (Exh. P1).

The evidence of PW2 was that on 13/05/2020 PW3 joined his family to discuss the issue of clay bricks making, and at 20:30 hours while seated outside enjoying a strong light and warm made of firewood, waiting for dinner, he heard his mother (deceased) crying for help, and suddenly, he saw the deceased running towards the place where they were seated.

PW2 added that he took and switched on his torch and directed its light towards the deceased, and that he saw her being chased by three persons. He further testified that, at a distance of about four feet, the said three persons caught the deceased and started assaulting her using a bush knife. He added that by the help of strong torch light and the strong light made of firewood, he correctly identified two culprits to be Emmanuel s/o Barakanfitiye (1st accused) who is his elder brother, and Jackson s/o Emmanuel (2nd accused) who is the son of the 1st accused and the deceased's grandson.

He added that he, together with his brother (PW3) while moving to rescue the deceased, the 2nd accused threw and big stone and hit him on the chest and a result, he fell down, and having seen that he had also been attacked, PW3 did run away from the scene while crying for help. PW2 added that, after the incident, the accused persons disappeared for few minutes, then, they came back to confirm whether they succeeded in their mission, whereas the 1st accused shouted **"Tayari kazi tumemaliza",** and from there they disappeared to unknown places until when they were arrested.

He added that, following the alarm which was raised by PW3, villagers gathered at the scene of crime including the Hamlet leader (PW4). He added that, on the fateful night, he told PW4 and the Villagers that his mother was murdered by three persons and he mentioned the 1st and 2nd accused

persons and from there, he joined the villagers to the home of the 1st accused on the same night, but neither the 1st accused nor the 2nd accused was at home. He added that, on 14/05/2020, the police came with the Clinical officer who conducted postmortem examination in his presence and finally, they were permitted to bury the deceased's body and they did so.

When cross examined by the defense counsel and the accused person as to whether he identified the accused persons on the fateful night, PW2 testified that the identification was possible because, the 1st and 2nd accused persons were not strangers to him, he saw and identified them at a distance of about 4 feet by the help of torch light and strong firelight made of fire wood. He added that, having murdered the deceased, the accused persons disappeared, and few minutes, they came back and saw them for the 2nd time and heard his brother (1st accused) uttering these words; **"Tayari kazi tumemaliza".** He added that the 1st accused did wear a black trouser and white shirt while the 2nd accused did wear a black trouser and white –red shirt. He also said, the scene of crime was an open area with no trees or shrubs.

PW3 testified that on 13/5/2020 at 20:30 while seated outside at the home of PW2 discussing the issue of clay brick making while enjoying a strong light and warm made of firewood, waiting for dinner, all over the sudden, he heard his mother (deceased) crying for help, and suddenly, he saw the deceased running towards the place where they were seated at the home of PW2.

He added that he saw his young brother (PW3) taking and switching on his torch and directed its light towards the deceased, and by the help of the said torch light and firelight made of dry firewood, he saw and identified the

accused persons only at a distance of about four feet assaulting the deceased using a bush knife. He added that the one who had a bush knife was the 1st accused who is his elder brother, but he did not identify the third person who was with the accused persons.

He added that his young brother (PW3) while moving to rescue the deceased, the 2nd accused threw a big stone and hit him on the chest. He further testified that having seen that PW2 was attacked and that the 1st accused had a bush knife, he did run away from the scene while crying for help, and then informed the Hamlet leader (PW4) via telephone about the incident, and the fact that he saw and identified the 1st and 2nd accused persons murdering the deceased, but he did not identify the third person. He said he saw in his own eyes the 1st accused inflicting serious cut wounds on the deceased's head.

PW3 added that the Hamlet leader (PW4) and other Villagers came and all headed to the home of the 1st accused, but was not found at home. He added that, on 14/05/2020, the police came with the Clinical officer who conducted postmortem examination and finally, they were permitted to bury the deceased's body and they did so.

PW3 added that, in 2018, the deceased was assaulted by her grandson (2nd accused), and repeated the act in 2020, whereas matter was settled amicably by the Hamlet leader (PW4) and the 2nd accused was ordered to compensate the deceased at the tune of Tshs. 40,000/= but before her death she was just paid Tshs,20,000/= on the promise that the remaining balance would have been paid on 14/05/2020, but a day before the agreed date, the deceased was brutally killed.

When cross examined by the defense counsel as to whether he identified the accused persons on the fateful night, PW3 testified that the identification was possible because, the 1st and 2nd accused persons were not strangers to him, he saw and identified them at distance of about 4 feet by the help of torch light and strong firelight made of fire wood.

PW4 who is the Hamlet leader of Karundi "A" testified that on 13/05/2020, he received a telephone call from one PW3 informing him that his mother has been invaded and attacked to death by the three persons but he identified two culprits; Emmanuel Barakanfitiye (1st accused) and his son Jackson (2nd accused). He added that, following that information, he went to the scene of crime and found PW2 and PW3 but also witnessed the deceased's body lying on the ground where he saw big cut wounds on the head and the blood on the ground.

He added that, at the scene of crime PW2 told him that the deceased was murdered by the accused persons as he identified them at the scene of crime. PW4 added, from there, he led PW2, PW3 and other villagers to the home of the 1st accused, but they did not find him. PW4 further said, through telephone, he informed the police about the incident, and on 14/05/2020 the police arrived while accompanied by a medical practitioner who examined the dead body in his presence, and finally, they were allowed to bury the body. He also said the sketch map of the scene of crime was drawn by the police under his help.

PW4 also testified confirming that on 11/05/2020, he convened a meeting to settle the dispute between the deceased and her grandson (2nd accused) whereas the 2nd accused was ordered to compensate the deceased at a tune

of 40,000/= for assaulting his grandmother, but the deceased was paid Tsh20,000/= as she was killed before receiving the balance of Tshs.20,000/=.He added that, the deceased, PW2, PW3 and the accused all were residing at Karundi "A" and has been a leader of the said Hamlet since 2015 to date therefore, were not strangers to him.

The evidence of PW5 is to the effect that on 14/05/2020 he joined the medical doctor to Karundi "A" Hamlet where he witnessed the dead body of the woman lying on the ground, and he drew the sketch map of the scene of crime (Exh.P2) under the help of the Hamlet leader (PW4).

PW6 testified that on 14/05/2020, he visited the scene of crime at Kirundi "A" following the report that there was a woman murdered there. He added that, upon his arrival at the scene of crime, he witnessed a dead body lying on the ground. He added that, the body had big cut wounds on the head and on the thumb of the right arm, and he was informed by the deceased's sons namely; Mambo Barakanfitiye (PW2) and Geroge Barakanfitiye (PW3) that they identified the accused persons on the fateful night as persons who murdered the deceased. He added that the investigation went on and on 01/06/2020 the 2nd accused Jackson s/o Emmanuel was arrested at Midawe and on 01/07/2020; the 1st accused Emmanuel Barakanfitiye was arrested at the place known as Rwamgasa Mlima No. 9 Katoro in Geita Region, and matched to Rwamgasa police station. He added that he was among the arresting officers; therefore, he recorded the 1st accused's cautioned statement according to law and according to PW6, he confessed to have committed the offence. He prayed to tender the same as exhibit but it was objected by the defense counsel on the ground the 1st accused had never made any

statement to the police but was just called and forced to sign an already prepared document. After a trial within a trial, the objection was overruled therefore; the 1st accused's cautioned statement was admitted as **exhibit P3.**

When cross examined by the defence counsel, he testified that it took him two to travel days from Rwamgasa police station to Biharamulo due transport problems and that later on, the accused persons were taken to the justice of peace for extra-judicial statements, but they denied the allegations. He further said during the interrogation, the 2nd accused denied the allegations. This marked the end of the summary of the prosecution evidence.

DW1 his defense testified that on 13/05/2020 he was at Rwamgasa Katoro Geita Region at his second home where his second wife lives. He added that, he was arrested on 01/07/2020 at Rwamgasa allegedly murdering his biological mother, and therefore was matched up to Rwamgasa police station, then, he was transported by PW6 from Rwamgasa to Biharamulo District. He added that, he was summoned by PW6 into his office at Biharamulo, and upon his arrival, he was forced by PW6 to sign the statement which was not read to him. He added that, he was taken to the justice of piece for extra-judicial statement and he denied the allegations before the justice of peace.DW1 added that, since on the fateful night of 13/05/2020, he was at Geita, he would not have committed the offence.

When cross-examined by the learned State Attorney, DWI admitted that PW2, PW3 and the deceased were all living at Karundi "A" Mwanga Village within Biharamulo District. He also admitted that the deceased was his biological mother and that he did not attend her burial ceremony. He also admitted that he has a home at Karundi "A" at a distance of almost 50metres from the

deceased's house. He also admitted to have clearly heard the evidence of PW2 and PW3 here in court when testified how they identified him on the fateful night.

When cross-examined as to whether he had ever notified the court that he would rely on the defence of alibi, he said he had neither raised such defence before the commencement the prosecution case nor before the closure of the prosecution case, but he did so at the defence stage. He also admitted that he travelled from Kurudi "A" Geita using a bus, and admitted to have not tendered the bus ticket, or called any of the passengers whom he travelled with or the agent who issued the bus ticket to him, or called his 2nd wife namely Hawa John who is residing at Geita as a witness. He admitted that there was no conflict between him, PW2 and PW3, but the conflict was between the deceased and her grandsons who are his sons. He further said, though there was no conflict, he built a house of 8 iron sheets for his mother, but PW2 and PW3 were not happy therefore, there was a conflict. He also admitted that he neither cross-examined PW2 nor PW3 in that area nor reported a dispute to any authority.

DWI also admitted that he tendered no PF3 to show that he was assaulted by PW6 and that was attended at any hospital. He also admitted that when he was taken to court of 8/7/2020 he was of good health.

DW2 (18yrs old) testified that on 11/05/2020 he, together with other young men namely; Revocatus Anaclet, Martin and Deous went to Kamlanda area to fish in Mtundu River. He added that, they stayed there from 11/05/2020 and came back to their home on 14/05/2020 where they arrived at Mwanga Village Center around 9:00hours. He added that, at Mwanga Village center,

they met a group of people who informed him that his grandmother was murdered in the night of 13th day of May 2020, and that he was one of the suspects. He added that he went at home and met his sister who advised him go his uncle who resides at Midawe area, and he did go. He added that, on 01/06/2020 he was arrested at Midawe, and after interrogation, he was released on bail but he was re -arrested following the arrest of his father (DW1) and finally brought to court.

When cross-examined by the State Attorney as to why he told the court that he is 18 years old, DW2 testified at the time of his arrest he was 16 years old. When further cross examined, he said there is nowhere he admitted that at the time of arrest he was 20years old. He also admitted to have heard the evidence of PW2 and PW3 testifying how they identified him on the fateful night. In further cross-examination, he said, they got very few fishes, and they placed and carried them in single bag. He added that, at the river there were so many other persons who were fishing but were strangers to him. He also admitted to have assaulted her grandmother (deceased) in 2018 and in 2020 where in May 2020, the dispute was settled and he was ordered to compensate her at a tune of 40,000/= but he paid Tshs. 20,000/= before her death.

DW3 testified that on 11/05/2020, he joined his friend Jackson Emanuel (DW2), and other two young men; Deous and Martin and all went to fish in Mtundu River, and managed to come back on 14/05/2020, whereas at Mwanga center, they met a group of people who informed them that the grandmother of the DW2 was murdered on 13/05/2020. He added that, from there, they departed to their homes.

When cross –examined by the learned State Attorney, DW3 said they arrived at Mwanga Village center on 14/05/2020 at 14:00hours. He also said at Mtundu River, they found no other persons fishing and no one joined them during their stay in that place. He added that each person carried a small bag which had about 8 to 10 fishes. This marked the end the summary of defence evidence. Both the prosecution and the defence side opted neither to make final oral submissions nor written submissions.

Now, it is pertinent at this stage to determine whether or not the offence of murder has been proved as against the accused persons beyond reasonable doubt because the standard of proof in criminal cases is that of beyond reasonable doubt. Section 3 (2) (a) of the Evidence Act Cap 6 R.E 2019 provides that;

"A fact is said to have been proved in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists".

This standard was insisted in the case of **JONAS NKIZE V.R [1992] TLR 213** where this court through Katiti, J. (as he then was) stated that;

"*The general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our law, and forgetting or Ignoring it is unforgivable, and is a peril not worth taking".*

Emphasizing the same standard, the court of Appeal of Tanzania **in Furaha Michael versus The Republic, Criminal Appeal No. 326 of 2010** (Unreported) had this to say;

"The cardinal principle in criminal cases places on the shoulders of the prosecution the burden of proving the guilt of the accused beyond all reasonable doubt".

In another case, **George Mwanyingili versus Republic, Criminal Appeal No.335 of 2016 CAT (Unreported) the Court of Appeal** had this to say;

"We wish to re-instate the obvious that the burden of proof in criminal cases always lies squarely on the shoulders of the prosecution, unless any particular statute directs otherwise. Even then however, that burden is on the balance of probability and shifts back to the prosecution"

The onus never shifts away from the prosecution and no duty is cast on the accused person to establish his or her innocence. See **Said Hemed versus Republic [1986] TLR** 117.

In order to sustain conviction in homicide cases like this one, the prosecution must prove beyond reasonable doubt all these fundamental ingredients that; first and more most, **death of the deceased,** secondly, that **the death was unnatural,** thirdly, that **death was caused by unlawful act or omission of the accused,** and fourthly, that **the killing was actuated by malice afore thought**. However, it should be noted that **where the charge/information involves more than one accused the court must see whether there was common intention**. In this respect, the major issues in the instant case are therefore, five as follows;

1. Whether deceased namely; Mariana d/o Mataboro really died.

2. Whether his death was not natural.

3. *Whether the death was caused by unlawful act or omission of the accused persons.*

4. *Whether there was common intention among the accused persons to execute an unlawful purpose.*

5. *Whether the killing was actuated by malice aforethought.*

1ST ISSUE.

The postmortem report on examination of the body of the deceased was duly produced and since it was not objected by the defence side, it was admitted as **Exh. P1**. PW1 who conducted an autopsy confirmed that the deceased suffered cut wounds on the head and in the thumb of the right arm which made her to over bleed, and he formed opinion that the cause of death was hemorrhage due to the said multiple cut wounds.

PW2, PW3 and PW4 confirmed in their evidence that their mother was attacked to death and the postmortem examination was conducted by PW1 in their presence and finally they were allowed to bury the body. The police officers PW5 and PW6 confirmed to have arrived at the scene of crime and witnessed the dead body with cut wounds lying on the ground whereas PW5 drew the sketch map of the scene of crime. To the extent, the first ingredient of the offence has been proved. In other words, the first issue has been answered in the affirmative.

2ND ISSUE.

As to the unlawful nature of the death, it is trite that the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is

authorized by the law. **In the case of Guzambizi Wesonga versus Republic (1948) 15 EACA, it was held that;**

"Every homicide is presumed to be unlawful except where the circumstances make it excusable or where it has been authorized by the law. For homicide to be excusable, it must have been caused under justifiable circumstances, for example in self defence or in defence of property".

In the instant case the deceased died from head cut wounds inflicted by a sharp object. Given to the nature of the injuries suffered by the deceased that resulted in her death as indicated in the postmortem examination report (Exh.p1) and as per the evidence of PW2 and PW3 who witnessed the deceased being attacked by the assailant and the evidence of PW4, PW5 and PW6 who witnessed the dead body with cut wounds lying on the ground, it can safely be concluded that the death of the deceased was the desired outcome of whoever the assailant was, hence it was unlawful. To that extent, the 2nd ingredient has been proved. Meaning therefore, the second issue has been answered in affirmative.

3RD ISSUE.

It is trite law that in order to sustain conviction in a murder case, the prosecution evidence must be cogent enough leaving no doubt to the criminal liability of the accused person linking him/her with the offence. The prosecution therefore, must produce credible and reliable witnesses whose evidences irresistibly point to none save only to the accused person. **In the case of Mohamed Matula v.Republic [1995] TLR 3 it was held that;**

"Upon the charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said

death and the accused, the onus never shift away from the prosecution and no duty is cast on the appellant to establish his innocence"

The guilty of the accused can be proved either by direct evidence, circumstantial or through confessional statements of the accused. Direct evidence is what a witness says he/she saw or heard or did while circumstantial evidence is the evidence of surrounding circumstances which by un-designed coincidence is capable of proving a proposition with accuracy. The absence of direct evidence is indeed the very essence of resort to circumstantial evidence. In the instant case, the prosecution depends entirely on direct evidence and confessional statement of the 1st accused person.

PW2 and PW3 were the eye witnesses of the crime. Their evidence is to the effect that on the fateful night, they saw in their own eyes three assailants killing the deceased using a bush knife. It is further their evidence that, despite that it was night time; they managed to identify two culprits, that is to say the 1st and 2nd accused persons.

Now the question to be resolved here is whether the accused persons were correctly identified on the fateful night?

It is undisputed that the incident in the instant case occurred at night hours thus, the evidence on how the accused persons were seen and identified is so crucial because in order to convict the accused person on the evidence of visual identification, the court must be satisfied that the evidence is watertight. In the case of **Waziri Amani v. Republic** [1980] TLR 250, it was held that;

"Evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight".

The Court further stated that;

"*Although no hard and fast rules can be laid down as to the manner a trial Judge should determine questions of disputed identity, it seems dear to that he could not be said to have property resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would, for example, expect to find on record questions as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not".*

In **Raymond Francis v. Republic** [1994] TLR 100, the Court of Appeal had this to say;

"It is elementary that a criminal case whose determination depends essentially on identification evidence on conditions favoring a correct identification is of utmost importance."

In the case of **VITALIS BERNARD KITALE VERSUS REPUBLIC,** Criminal Appeal No. 263 of 2007, (CAT) Arusha, (unreported) the Court of Appeal held that;

"We do not think that knowing the appellant alone is sufficient. There should be more concrete detailed description of the appellant. The witness should have given a description of the appellant as he saw him at the time of the incident".

In the instant case, the evidence of the two identifying witnesses (PW2 and PW3) both sons of the deceased, is that they correctly identified the accused persons by the help strong torch light directed by PW2 towards them, and the help of the strong firelight made of dry fire wood, and that, accused persons were not strangers to them, the 1st accused being their elder brother and the 2nd accused being the son of the 1st accused, hence the deceased's grandson, and were all living at Karundi "A" Hamlet.

In the case of **Nuba and Another versus Republic**, Criminal Appeal No.425 of 2013 CAT (Unreported) the Court of Appeal held that
"Identification through the aid of torch which is held and wielded by the alleged culprits is most unreliable"

With no doubt, the opposite is also true, meaning identification through the aid of torch which is held and wielded by the identifying witness is reliable, because under normal circumstances, it is easy for a person flashing the torch towards the assailants/ culprits to identify them especially where the torch light is bright enough to allow correct identification.

It should be noted the evidence on record in the instant case is that PW2 flashed the torch light towards the accused persons in an open area, and the light was bright because the batteries were new, as were bought a day before the commission of the offence. Also there was strong firelight made of

dry fire wood. Under the circumstances the light was sufficient and it allowed correct identification of the accused persons.

It is also their evidence that the distance between them and the accused persons was four (4) feet, and that the scene of crime was an open area with neither trees nor shrubs. It is also their evidence that the one who had a bush knife was the 1st accused and they witnessed him on their own eyes cutting the deceased on the head until she fell down. It is their evidence that, the incident took duration of about five minutes. PW2 added that the 1st accused did wear a black trouser and white shirt while the 2nd accused did wear black trouser and a white-red shirt.

PW2 also said, after being attacked and fell down, the accused persons left for a while leaving the deceased lying on the ground, but few minutes later, they came back where the 1st accused touched the deceased's body and uttered the words " **Kazi yetu tumemaliza"** and from there, they escaped completely. He added that he was very familiar with the voice of his brother (DW1).

Even if that is enough, the identifiers were two; there was probability of one identifier who did not hold the torch to have properly identified the culprits with the aid of the one a torch as they were adjacent.

In their defence, each accused person raised the defense of alibi. The 1st accused person said on 13/05/2020 he was in Geita Region in place known as Rwamgasa-Katoro while the 2nd accused said he was at Kamlanda Hamlet.

According to Oxford Dictionary of Law, 6th Edition, Oxford University Press, Alibi is:

"A defence to a criminal charge alleging that the accused was not at the place which the offence was committed at the time of its alleged commission and so could not have been responsible for it"

It is common knowledge that on the issue of **alibi,** the law requires an accused to give notice if he wishes to rely on this defence so that the court may attach the deserved weight to such defence.

Section 194(4) of the Criminal Procedure Act [Cap.20 R.E.2019] provides that;

"Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case."

In case an accused person does not give notice, the court has discretion whether to attach weight or not to such a defence.

Section 194(6) of the Criminal Procedure Act [Cap.20 R.E.2019] provides that;

"If the accused raises a defence of alibi without having first furnished the prosecution pursuant to this section, the court may in its discretion, accord no weight of any kind to the defence."

Marwa Wangiti Mwita and another V. R [2002] TLR 39, it was held that;

"The absence of notice required by section 194 of the CPA, 1985, does not mandate or authorize the outright rejection of an alibi, though. It may affect the weight to be place on it".

It should be noted that where an accused raises the defense of alibi, **he has no duty to prove it. The duty lies on the prosecution to disprove a defense of alibi and place the accused at the scene of crime as the perpetrator of the offence**. In **Sija Juma Kocho versus Republic [1994] TLR 206 it was held that;**

"It is not the burden of the accused to prove alibi though it would be reasonable if any witness would be called by the accused to confirm it".

However, in the case of **Makala Kiula Versus Republic** Criminal Appeal No. 2 of 1983 (unreported), the Court of Appeal of Tanzania had this to say in respect the defence of alibi.

"If a person charged with a serious offence alleges that at the time when it was committed, he was in some other place where he is well known and yet he makes no effort to prove that fact, which if true, could easily be proved, the court must necessarily attach little weight to his allegations".

In the case of **Kubezya John versus Republic, Criminal Appeal No.488 of 2015 CAT (Unreported)**, the Court of appeal went a step further and held that;

"We wish to interject here that we are alive that the accused person is under no legal duty to prove his innocence. But in situations where, like here, the accused person is depending on the defense of ALIBI, it is his duty to demonstrate his alibi albeit on balance of probabilities...."

In the instant case, there was late disclosure of an **alibi** by the accused persons because they did not comply with section 194 (4) of the Act (supra).

They did not even raise the defence of alibi before the closure of the prosecution case. They did so at the defence stage. However, where there is such no compliance, the trial court still has the discretion to consider the same as I hereby do.

Since the accused persons are depending on the defense of **ALIBI,** it is their duty to demonstrate their alibi albeit on balance of probabilities. On his side the 1st accused told this court that he travelled from Karundi "A" to Geita and lived at Rwamgasa with his 2nd wife namely; Hawa John, leaving the first wife at Kurundi "A" but he neither called his first wife who is at Kurundi "A" nor his 2nd wife or any other person from Karundi "A" or Rwamgasa Geita to demonstrate his alibi that on 13/05/2020 he was not at Karundi "A" but at Rwamgasa. On cross-examination, the 1st accused person who said he left his 1st wife at Kurundi "A" and were in good terms, he said he did not attend the burial ceremony of his mother (deceased) or go back to Karundi "A" to date.

On his side, the 2nd accused told the court that on the on 11/05/2020 from noon hours, up to 14/05/2020 morning, he, together with DW3 and other two young men were at Kamalanda Hamlet fishing at Mtundu River. He added that, they came back to the village on 14/05/2020 and arrived at the Mwanga Village center at 10:00hours and they placed and carried few fishes in single bag. He also said at Mtundu River, they met so many other people fishing. His witness gave similar evidence that from 11/05/2020, they were at Kamlanda fishing and that they came back on 14/05/2020. He also admitted to have assaulted the deceased in 2018 and 2020, where he was ordered to compensate her at the tune of Tshs. 40,000/=.

However, DW3 contradicted his evidence by saying, from the time of their arrival to the time of their departure, they saw no any other person fishing in Mtundu River.DW3 also said on 14/05/2020, they arrived at the village center at 14:00hours, and that each person carried about 8-10 fishes in his bag. DW1 also admitted that, he did not attend the burial ceremony of his grandmother but he departed to his uncle who resides at Midawe after being advised to do so.

Reading the evidence of the accused persons as it appears herein above; it goes without saying that the accused persons have not demonstrated their alibi to the balance of probabilities. Indeed that was no more but an attempt to mislead a court through a false alibi. The evidence of PW2 and PW3 who were the eye witnesses of the crime, and who saw and correctly identified the accused persons as person who murdered the deceased, clearly displaces and demolishes the evidence of the accused persons that they were absent and therefore they did not commit the offence of murder on the fateful night of 13th day of May 2020. The defence of alibi raised collapses in the circumstances as it does not shake the prosecution evidence.

It should be noted that the ability of a witness to name a suspect at the earliest opportunity time is an all- important assurance of his credibility.
In the case **of Marwa Wangiti Mwita and Another v.Republic [2002] TLR 39**, it was held that;
"The ability of a witness to name a suspect at the earliest opportunity is an all- important assurance of his credibility, *in the same way; unexplained delay or complete failure to do so should put a prudent court to inquiry"* ***(Emphasis added).***

In the instant case, PW3 on the fateful night informed PW4 about the incident mentioning to him the accused persons, upon such information, PW4 arrived at the scene of crime where he saw the body where PW2 mentioned the accused persons to him too, as a result, PW4 led PW2, PW3 and other villagers on the same night to the home of the 1st accused but they did not find them because they escaped after the commission of the offence. In that respect, PW2 and PW3 mentioned the accused persons at the earliest possible time, hence they are credible identifying witnesses. Generally, in the matter at hand, the possibility of confusion as to the accused persons' identity was therefore non-existent.

The cautioned statement of DW1 is also another piece of evidence in this case. It is trite that a confession is a criminal suspect's acknowledgment of guilty; it is usually in writing and often including the details of the offense. A free and voluntary confession deserves a highest credit, because it is presumed to flow from the strongest sense of guilt and therefore, it is admitted as proof of the crime to which it refers. Thus, in law, the evidence of an accused person who confess is the best evidence if it is made voluntarily and a conviction can be based on it.

DW1 retracted and/or repudiated his cautioned statement that he never made the same .He alleged that was just forced to sign it. The court conducted a trial within a trial and overruled the objection, and the statement was admitted as Exh.P3. Part of the same reads;

"*Nakumbuka tarehe 01/07/2020 majira ya saa 17:20 hrs huko Rwamgasa Kataro Geita nikiwa ndani ya hifadhi ya pori hilo Mlima wa tisa(9) nilikamatwa*

na askari polisi pamoja na askari mgambo kwa kushirikiana na shemeji yangu aitwaye Yohana s/o John na baada ya kunikamata askari hao waliotoka Biharamulo walinihoji kuhusiana na tuhuma za mauaji ya mama yangu Mariana Matabaro na mimi ninakiri kuhusika na mauaji hayo ya kuua mama yangu kwa kumkatakata mapanga sehemeu ya kichwani, upande wa sikio la kulia na kidole gumba cha mkono wa kulia na panga hilo nililitupa maporini nami nilishirikiana na Jackson Emmanuel ambaye yeye alienda kumgongea.Mambo Barakanfitiye ndiye alitaka kuwa na juhudi za kumuokoa mama lakini alipigwa jiwe kifuani..... tuliondoka na baadaye tulirudi ili kuhakikisha kama amekufa kweli na wakati huo Mambo Barakanfitiye alikuwa pembeni, hakuweza kufanya chochote kwa kuwa tayari alikuwa tayari ameshapigwa jiwe la kifuani akaogopa kutusogelea. Mimi nimeamua kumuua mama yangu Mariana Matabaro kwa sababu ya ardhi na pia ugomvi wa mara kwa mara na watoto wangu ambao ni Deous Emmanuel na Jackson Emmanuel....."

The land mark case of **Tuwamoi v. Uganda [1967] E.A 84** provided the warning and how the court may invoke the accused person's confession for conviction. The court stated that:

"A trial court should accept with caution a confession which has been retracted or repudiated or both retracted and repudiated and ***must be fully satisfied that in all the circumstances of the case that the confession is true.*** *The same standard of proof is required in all cases and usually,* ***a court will act on the confession if corroborated in some material particular by independent evidence accepted by the court.*** *But corroboration is not necessary for law and the court may act on a confession alone* ***if it is fully satisfied after considering all the material points***

and surrounding circumstances that the confession cannot but be true". (Emphasis added)

In the case of **Hemed Abdallah versus Republic [1995]** TLR 172 the Court of Appeal held that:

"It is dangerous to act upon a repudiated or retracted confession unless it is corroborated in material particulars or unless the court, after full consideration of the circumstances of the case is satisfied that the confession must be true".

In another case, **Steven s/o Jason and 2 Others Versus Republic, Criminal Appeal No. 79 of 1999 CAT (unreported), it was held that;**

"Admission of an exhibit such the cautioned statement in question is one thing and the weight to be given to the evidence contained therein is another thing. This depends on the totality evaluation of the evidence at issue and other pieces of evidence available on record".

In the instant case, in my opinion, despite the cautioned statement being retracted and/or repudiated, the confession as reproduced herein above is so elaborative on the weapon used, the role played by each accused in the execution of the killing, and the motive behind the killing, the facts which could not have been given by any person except the one who had knowledge of it. The statement is consistent with other facts which have already been ascertained. It contains necessary facts to show that the same is true therefore; I accord evidential weight on it. The cautioned statement of DW1 indeed, corroborated the evidence of PW1, PW2 and PW3.

According to Black's Law Dictionary, *2nd Edition, 1995; to corroborate means to strengthen, to make a statement or testimony more credible by confirming facts or evidence. Corroborative evidence in a way is a supplementary*

testimony to the already given evidence and tending to strengthen or confirm it.

It was held in the case of **Ezera Kyabanamizi versus R, [1962] E.A 309** that a statement made by a co-accused person, whether orally or written, implicating his/her co-accused, can only be used to supplement substantial evidence already in place where in **Gopa Gidamebanya and others versus R. [1953] 20 EACA 318** it was held that;

"The confession of co-accused is intended to be used to corroborate and even to supplement the evidence in those exceptional cases in which, without its aid, the other evidence falls short by a very narrow margin of that standard which is requisite for a conviction. There must be a basis of substantial evidence to which a confession or statement may be added. If there is substantial evidence against the accused and there remains some lingering doubt the confession may be taken into account to set that little doubt at rest".

Furthermore, the first accused person in his defence testified that there was a conflict between him and his young brothers (PW2 and PW3) actuated by jealousy after he had built a small house of eight (8) iron sheets for his mother (the deceased) which made him to be more loved than his brothers.

However, when cross –examined by the learned State Attorney as to whether he cross-examined PW2 and PW3 on that conflict, he admitted that he neither personally nor through his advocate cross-examined them. According to PW2 and PW3, there was no conflict between them and the first accused.

In the case of **Damin Rubehe versus Republic,** Criminal Appeal No.501 of 2007, the Court of Appeal had this to say;

"It is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence"

In the same parity of reasoning the Court of Appeal in the case of **Nyerere Nyague** (Supra) held that;

"As a matter of principle, a party who fails to cross-examine a witness on a certain matter is deemed to have accepted the matter and will be estopped from asking the trial court to disbelieve what the witness said"

Adverting to the case at hand, DW1 did not cross-examine PW2 and PW3 when adduced their evidence that there was no conflict between them and DW1. In that respect, I find that the allegation rose by DW1 that there was such a conflict is no more but an afterthought, hence has no leg to stand.

Even if it is assumed, just for the sake of argument that there was such a conflict, still it would not have affected the prosecution case because in a common knowledge that where the evidence led in a case is reliable and true in fact, the fact that the witness had grouse against the accused person would not weaken the validity or credibility of his evidence so long as the trial court finds it to be direct, unassailable and true.

Basing on the evaluation and analysis of the evidence done in relation to the 3rd issue, I am satisfied that the prosecution has managed to prove beyond reasonable doubt that the death of Mariana d/o Matabaro was caused by unlawful acts of the accused persons.

4TH ISSUE.

In the instant case, there is more than one accused person therefore, it is mandatory to determine whether the accused persons had common intention. Common intention is the meeting of the mind of the accused persons which is necessary to be present in joint charges. However, common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to disassociate himself from the assault/act.

However, it should be noted that the mere presence of the accused person in the scene of crime is not final and conclusive prove of common intention.

Section 23 of the Penal Code Cap 16 R:E 2019 provides that;

"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"

It should be noted that in order to make the doctrine of common intention applicable, it must be shown that the accused persons shared with another a common intention to pursue a specific unlawful purpose, and in the prosecution of that unlawful purpose, an offence was committed and that the doctrine of common intention would apply irrespective of whether the offence was murder or manslaughter, and it is not necessary to make a finding as to who actually caused the death. **See Ismail Kisegerwa and Another versus Uganda, CA, Criminal Appeal No.6 of 1978.**

In **BomboTomola versus Republic [1980] TLR 254** the Court while addressing the issue of common intention had this to say;

"*The question which arises is who was the author of the fatal blow or blows which broke the spinal cord? Obviously, if the appellant was the author of the fatal blow or blows, she could be found to have caused the death of the deceased, but if, on the other hand, the fatal blow or blow were administered by the second accused, the appellant would not be found legally responsible for the death of the deceased unless the situation falls either under the provisions of section 22 or section 23 of the Penal Code, which deal with parties to a criminal offence and offence committed by joint offenders in the prosecution of a common purpose*"

In Abdi Alli versus R. [1956] E.A.C.A, 573 the Court of Appeal held that:

"*The existence of common intention being the sole test of joint responsibility, it must be proved what the common intention was and that the common act for which the accused were to be made responsible was acted upon in furtherance of that common intention. The presumption of common intention must not be too readily applied or pushed too far*".

The prosecution through PW2 and PW3 has proved that the accused persons were both at the scene of crime and that the 1st accused played the role of killing the deceased and he did so in the presence of the 2nd accused, and that, PW2 attempted to rescue the deceased but the 2nd accused stopped him by attacking him on the chest using a big stone. The evidence of PW2 is very strong to the effect that the accused persons, few minutes after the incident, they came back and after confirming that the deceased really dead, they disappeared to unknown places until when they were traced and finally

arrested. The 1st accused in his cautioned statement also narrated that they had common intention. To that extent, the issue of common intention has been proved beyond reasonable doubt.

5TH ISSUE.

Undoubtedly, murder is said to be committed when an accused person kills another with malice aforethought. Section 200 (1) of the Penal Code Cap 16 R: E 2019 Provides that;

" *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;

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

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

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence.

It should be noted that **malice afore thought** can be inferred from the nature of the weapon if used or/and the geographical location of the body on which the attack was made, and the conduct of the accused.

In the case of **Enock Kipela versus Republic, Criminal Appeal No. 150 of 1994 CAT** (Unreported) at page 6 the Court observed that;

"Usually, an attacker will not declare to cause death or grievous bodily harm, whether or not he had that intention must be ascertained from various factors, including the following: the type and size of the weapon, if any, used in the attack, the amount of force applied in the assault, the part or parts of the body the blows were directed at or inflicted on, the number of blows, although one blow may, depending upon the facts of the particular case, be sufficient for this purpose, the kind of injuries inflicted, the attacker's utterances, if any, made before, during or after the killing, and the conduct of the attacker before and after the killing".

In the instant case, the postmortem report showed that cut wounds were inflicted in the decease's head using a sharp object. It is the evidence of PW2 and PW3 that they saw the 1st accused attacking the deceased on her head using a bush knife .PW4, PW5 and PW6 confirmed that the deceased sustained serious cut wounds on her head and on the thumb of the right arm. The offence was committed during night hours. The type of weapon used to wit; a bush knife, the part of the body attacked to wit; head, multiple cut wounds suffered by the deceased, the time of the commission of the offence, the utterance of the DW1 after the commission of the offence" ***TAYARI KAZI TUMEMALIZA***" all indicated that the killing Mariana d/o Matabaro by the accused persons was actuated by malice aforethought. The 1st accused person in his cautioned statement disclosed the reason or motive behind for killing his mother, thus it was a planned act executed with malice aforethought.

I am alive that motive is not an ingredient of the offence of murder but it tends to strengthen the prosecution case, just as its absence tends to weaken it. In other words, lack of motive negates malice. See **R v. Stephano Alois** [1972] HDC No.199 and **Republic versus Asumin d/o Bakari,** Criminal sessions case No.9 of 2016.

In the upshot, it is apparent that all ingredients of murder have been proved beyond reasonable doubt and having considered the totality of the evidence placed before me, I find the accused persons guilty of the offence of murder Consequently, I hereby convict the accused persons of the offence of Murder under section 196 of the Penal Code Cap 16 R: E 2019.

It is so ordered.

E.L.NGIGWANA

JUDGE

07/06/2022

SENTENCE.

In our jurisdiction, the offence of murder under section 196 of the Penal Code Cap 16 R: E 2019, upon conviction attracts only one sentence which is death by hanging.

By virtue of section 197 of the Penal Code, I hereby sentence the 1st accused person Emmanuel s/o Barakanfitiye @ Rais to death; and in terms of section 26(1) of the Penal Code and section 322 (2) of the Criminal Procedure Act, Cap 20 R: E 2019, I hereby direct that the accused shall suffer death by hanging. It is so ordered.

As regards the 2nd convict, I have considered the fact that at the time of the commission of the offence, he was 16 years old therefore, Section 26 (2) of the Penal Code Cap 16 R: E 2019 must come into play. The same provides that;

"The sentence, of death shall not be pronounced on or recorded against any person who at the time of the commission of the offence was under eighteen years of age, but in, lieu of the sentence of death, the court shall sentence that person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the Minister for the time being responsible for legal affair may direct, and whilst so detained shall be deemed to be in legal custody"

In that premise, I hereby sentence the 2nd accused to be detained in prison during the President's pleasure under section 197 read together with section 26 of the Penal Code Cap 16 R: E 2019.

E. L. NGIGWANA

JUDGE

07/06/2022

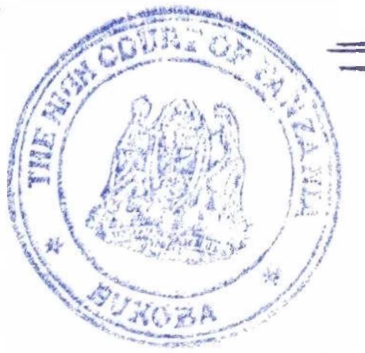
Right to appeal by lodging a notice of appeal within 30 days from today fully explained.

E. L. NGIGWANA

JUDGE

07/06/2022

Judgment delivered this 7th day June 2022 in the presence of Ms. Veronica Moshi, learned State Attorney for the Respondent Republic, both accused persons, Ms. Esther Sentozi, defence counsel for the accused persons, Hon. E. M. Kamaleki, Judges' Law Assistant and Tumain Hamidu - B/C



E. L. NGIGWANA

JUDGE

07/06/2022.