

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA**

SITTING AT BARIADI

CRIMINAL SESSION NO 75 OF 2016

REPUBLIC

VERSUS

YIKA JASAMILA @SUNGWA.....1ST ACCUSED

MAJESHI NSULUJA@JIJI.....2ND ACCUSED

MABULA BODO@KIDAHADI.....3RD ACCUSED

JUDGMENT

11th & 18th March 2022

MKWIZU, J.:

At Gasuma village, Mwaubingi Ward within Bariadi District in Simiyu Region there lived Mongu Lugata (the deceased) a person with albinism. On 11/5/2015 while at football pitch watching football game, 1st accused Yika Jasamila also a resident of the same village, in consideration of 100,000 by the 2nd accused person, 3rd accused person and other persons who are not in court was requested to facilitate the handing to them the deceased alive. 1st accused accepted the deal and did as agree. On the same night, 1st accused went to Nkamba Saguda, a neighbour and deceased's close friend. There, 1st accused met the deceased having dinner with her friend. 1st accused seduced the deceased and left with her and handled her to the 2nd, 3rd accused and other people. The 2nd and 3rd accused person and their

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PW1 is Mili Kasili, a Ward executive officer for Mwaubingi Ward centered at Gasuma within Bariadi in Simiyu Region by then. He knew Mongu Lugata as a person with albinism and a resident of Gasuma village where she lived with her daughter, of approximately 5 years old. He also identified accused person in court one by one stating that they are all resident of Gasuma. He was informed of the incident by Mangalu (his subordinate) on 12/5/2014 on his way from Dutwa to Bariadi. He rushed to the scene where he found police and the doctor conducting postmortem examination on the deceased body which according to this witness was lying just 5 paces from her house with her left leg and two fingers on her left arm amputated.

After the postmortem examination, the deceased house was searched, and cap and a torch were retrieved. The cap was identified to belong to Sitta Nhandi who was not at the gathering at the scene but was arrested on that days' night.

On 21/5/2014, PW1 was again informed by an informer that Yika Jasamila was seen with the deceased person on the night of the incident at around 20:00 and that Nkamba's bus fare to the police for interrogation was being sponsored by Yika Jasamila. He arrested Yika Jasamila on 21/5/2014 at around 19:00 hours, at Mwaubingi village in a pombe club and informed the police of Yika's arrest. Police responded to his call and arrived at his office at 23:00 hours. On their interview with Yika Jasamila, he admitted to have assisted in taking the deceased from her friend Nkamba Saguda to Sitta Nhandi who, according to the prosecution evidence, died in prison before the beginning of the trial, Majeshi Nsuluja (2nd accused person) and Mabula Bodo (3rd accused person) and that he was paid 100,000/= for that

assignment. This witness told the court that Yika told them that he gave 30,000/= out of the 100,000/= to his wife. Yika's house was searched on the same night, but nothing was recovered in connection to the murder incident except for his wife's concession to have received 30,000/= from her husband and that he had remained with 2000/= only. PW1 said at around 00.00 Police left with the 2000/= and Yika Jasamila.

PW2, ASSEY JOHN, is a medical doctor by profession and **Resident of Meatu District**. He on 12/5/2014 morning at Somanda Hospital was contacted by the police for a postmortem examination of the deceased body at Gasuma village. He, together with the police visited the scene where they found a deceased body lying outside the house covered with clothes. He was informed that deceased is called Mongu Lugata. He uncovered the body and found that it was of an adult woman with albinism. Left leg was amputated from the knee point. Two fingers on her left hand (third and fourth finger) were also missing. The amputated area had clots of blood and the joint of the knee (patella) was left on the ground with other pieces of meat. He also tendered the Postmortem Examination Report (**Exhibit P2.**) describing the cause of death as severe hemorrhage.

PW3 is an ASSISTANT INSPECTOR MASALU, a Police Officer Crime Investigation Department at Busega District. He informed the court that he was in 2014 working at Bariadi Police Station. On 22/5/2014 morning, he was instructed by ASP Mbise to interrogate Yika Jsamila. He took the 1st accused, who according to him was healthy from the police lockup to the investigation room where they remained only two of them. He (PW3) introduced to the accused person and informed him of his accusations and

informed the accused of his rights including that whatever statement he makes freely will be recorded and may be used in evidence against him, his right to call relative, a friend, advocate to present when making a statement. PW3 said accused agreed to give his statement in the absence of any person and signed to signify understanding of his right. PW3 also signed. He began recording the accused's statement from 7:45 am in which the apart from confessing to have killed the deceased in a company of Mabula Bodo, Sitta Nhandi and Majeshi Nsuluja, accused informed him that he was brought at the police station at 5:00 hours

PW3 said, in his confession, accused said he was requested by Mabula Modo to convince Mongu Lugata (deceased) and take her to Mabula Bodo, Sitta Nhandi and Majeshi Nsuluja at a consideration of 100,000/= the assignment which he did. At the end, PW3 read the statement to the accused person and they both signed after accused had agreed that it was correct. 1st accused cautioned statement was admitted in court as **Exhibit P3**

INSPECTOR GAUDENT testified as PW4 in this case. He said he had on 6/6/2014 planned to arrest suspects of murder named Mabula Bodo, Daudi Yalema and Maguta Shagi at their hiding places at Ikungulyandili, Mwadobana, Dutwa village, Kahama and tabora – Singe. He arranged Coplo Machiya D/C Baraka, D/C Paulo and WP Noelia to go to Ikungulyandili, Mwadobana, Dutwa to Ikungulyabashashi. And that he led the team to Ikungulyandili Village where they managed to arrest Majeshi Nsuluja at 00.00hrs and they there after informed Majeshi Nsuluja that he is accused of killing Mongu Lugata.

From Ikungulyandili Village, PW4 said they headed to Mwadobana village, Dutwa and Ikungulyabashashi village looking Dandia Yalema and other accused persons unsuccessfully. They then went back to Bariadi Police Station where they arrived at 6:00 hours and took the accused to the police lockup for other investigation steps. He said, Majeshi Nsuluja was fine, had no health problem and went ahead to identify Majeshi Nsuluja in court.

During cross examination Pw4 informed the court that Majeshi Nsuluja was arrested on 7/6/2014 at 00:00 hours at Ikungulyandili village. And that he had nothing in connection with the offence. He stated further that they went with Majeshi Nsuluja to Mwadobana and Ikungulyabashashi village looking for other suspects before going back to Bariadi police station.

PW5 is D5355 DETECTIVE SUGENT JAMES also a police officer Bariadi District. He on 12/5/2014, 7:30 am while at Bariadi police station informed of the murder incident at Gasuma village by ASP Mbise. He together with D/C Noelia, Coplo Dominick, D/C Tiba, Afande Gaudent and Doctor Assey visited the scene. They found the deceased body outside the house. The deceased's left leg was amputated at a knee point and two fingers of the left hand were also amputated plus thumb nail removed. The amputated body parties were not at the scene.

At the deceased house they found one cap – black in color and a torch. That villagers at the gathering (mwano) identified the cap to belongs to Sita Nhandi. Both the cap and the torch were collected for further investigation. The sketch map of the scene was drawn, deceased body examined. And the body was released for burial arrangements.

On 13/5/2014, stated PW5, they managed to arrest Nkamba Saguda, deceased's close friend and Sitta Nhandi. Nkamba Saguda mentioned Yika Jasamila as the one who left with the deceased from her house on the night of 12/5/2014. Sitta Nhandi confessed to have committed the offence with Majeshi Nsuluja, Mabula Bodo and Yika Jasamila. He said Nkamba Saguda was discharged for insufficient evidence connecting her with the murder of Mongu Lugata. Sitta Nhandi was charged but died before trial.

PW5 narrated further that on 21/5/2014 at 20:00 hours he learnt of the arrest of Yika Jasamila at Mwaubingi- Gasuma Village. They went to Gasuma and re arrested Yika Jasamila at around 00.00 hrs. Yika Jasamila confessed to have assisted in taking the deceased to his colleague, Mabula Bodo, Sitta Nhandi and Majeshi Nsuluja at a consideration of 100,000/=. PW5 said, they then searched 1st accused house at around 00:30 hours in the presence of his wife and WEO. They went back to Bariadi police station where they arrived at 5:00 hours and took the 1st accused to the police lockup.

On 7/6/2014 at 7:00 am he was assigned a task of recording Majeshi Nsuluja's cautioned statement. He took him from the police locup to the interrogation room where they stayed only two of them. He said, Majeshi Nsuluja was normal, and physically fit. He introduced to the accused and informed him that he is accused of murder of Mongu Lugata. He also informed the Majeshi Nsuluja of his basic rights including the rights to call a relative, a friend or lawyer when his statement is recorded and that his statement may be used in evidence against him. Majeshi Nsuluja, stated PW5, volunteered to give his statement in the absence of any person. And they both signed.

PW5 said he started recording the cautioned statement at 8:00 hours of 7/6/2014 where Majeshi Nsuluja confessed to have murdered Mongu Lugata naming his associates as Sitta Nhandi, Yika Jasamila and Mabula Bodo. He at the end gave the accused the statement to read and accepted the contents as a true version of his statement and they all signed in each page. Second accused's cautioned statement was admitted as **Exhibit P4** after a trial within a trial.

PW6, E 2878 D/CPL DOMINICK is also a Police Officer Criminal Investigation Department – Busega District but who worked with the Bariadi Police Criminal Investigation Department in 2014. He is also among the team of the police officers who visited the scene of crime on 12/5/2014 at Gasuma village. His evidence therefore on what transpired at the scene is similar to that of PW3, PW4 and PW5. He at the scene drew a sketch map plan of the scene (**Exhibit P1.**)

He also participated in the arrest of the 3rd accused Mabula Bodo. One of his assignments on 10/6/2014 was to arrest one of the suspect of murder incident in question at GB lodge - Bariadi and that they arrested Mabula Bodo at 11:15 hours where they found him seated outside the said lodge. They took the accused to the Bariadi police lockup.

At around 13:00 hours, PW6 said, he was assigned to record Mabula Bodo's cautioned statement. He took the accused from the locup to the investigation room where they remained two of them. PW6 and the accused person. He said accused was healthy. He introduced himself to the accused and accused introduced to him as Mabula Bodo @ Kidahadi, Sukuma by tribe,

52 years, peasant of Gasuma village. PW6 went ahead to informing the accused that he is accused of murder contrary to section 196 of the Penal Code, that he may wish to call his relative, friend or lawyer to be present while making his statement but accused said he would give his statement alone. And he signed after he had understood his rights. He signed by his hand followed by PW6 signature.

According to PW6, the statement was recorded from 13:20 hrs to 16.05hrs where accused confessed to have committed the offence in a company of Sitta Nhandi, Yika Jasamila and Majeshi Nsuluja. He said, accused disclosed to him that he gave Yika Jasamila 100,000/= as payment for bringing the deceased to them. At the killing Accused held the deceased with Majeshi Nsuluja while Sitta Nhandi was cutting the deceased. Again, the 3rd accused statement was admitted in evidence as **Exhibit P5 after a trial within a trial**

PW7, LIBERATA MUHAGAMA is a Primary Court Magistrate and a Justice of the Peace. Her main duty was to records 1st and 2nd accused's extra judicial statement. Her testimony was that on 22/5/2014 and 7/6/2014 while at Somanda Primary court Yika Jasamila and Majeshi Nsuluja were brought to her by Afande Dominick and Afande Hassan respectively for recording their extra judicial statement. She directed the police to shift to the District Court building where she would record the statements for the building at Somanda Primary court was not conducive for those activities. At the District Court, stated PW7, she ordered police to uncuff the accused persons and leave the office. The accused persons were normal and physically fit. She enquired on their voluntariness, and both accused were

ready and free to make their statement. She warned them that if they make a statement, the same may be used as evidence in a court of law against them. She asked the accused persons if they were subjected to any torture, beatings, coercion and forced to make the statement, but all said they were not. He inspected them and found them okay and that they confirmed to her that they are making their statement out of their own free will. She read the answers to them and signed after they found the answers recorded correct. PW7 said, both Yika Jasamila and Majeshi Nsuluja confessed to have killed a person called Mongu Lugata a woman with albinism. After the recording, she read the statement to the accused persons and they both signed the statement. The statements were admitted as **Exhibit P6 and P7 respectively.**

PW8: KEZIA JERALD MANYAMA, a retired Primary Court magistrate and a justice of peace who in 2014 worked at Somanda Primary Court. Her participation in this case is that she recorded Mabula Bodo's extra judicial statement on 11/6/. Recounting on how she recorded the statement PW8 said, accused was brought to her by a police officer with police force No D 8346 Coplo Machiya at 10.15hrs. She directed them to shift to the District Court building where she would do the recording due to insecure nature of the Somanda P/C building. At Bariadi District Court, PW8 ordered the police to leave, and she remained with the accused. She introduced herself to the accused as a justice of and asked if he really wishes to make the statement out of his free will. She said, accused was normal. She signed signifying understanding of the rights before the recording of the confession. After that, PW8 said she recorded the accused confession where he admitted

having killed a woman with an albinism. She lastly read the statement to the accused and they both signed. The 3rd accused extra judicial statement was admitted as **Exhibit P8**.

On cross examination, PW8 stated that the recording of exhibit P8 was guided by the Chief Justices Directives and that she could do the recording anywhere within the territorial jurisdiction. She added the statements on page 5 lines seven and eight from bottom were recorded before she closed the statement and that the reason for such an addition was that she recorded irrelevant information which triggered the re-writing of the statement in a fresh paper and read it to the accused person and handed to the police both statements, that is the correct copy and the wrong one. But insisted that the original copy is the correct copy. PW8 also said the use of the District Court magistrate stamp was necessitated by the facts that she used the offices as a justice of peace.

During reexamination, PW8 said, she added the statement on the accused statement after she was so reminded by the accused person. And that there is no bar for a justice of peace to add a statement if so, required by the accused provided it is read to him and the statement is signed by the accused.

PW9 ASSISTANT INSPECTOR NOELIA, also is a police officer at Bariadi Investigation department. Her evidence is more less similar to that of Pw3, PW4, Pw5 and PW6 with an additional information on how she dealt with Nkamb Saguda, deceased's friend. On this PW9 said, she interrogated Nkamba Saguda as one of the suspects. Nkamba Saguda informed her that she was with the deceased on the market (mnadani) during the day just

before the incident. After market activities they headed to her house, and later at 22.00hrs Yika Jasamila followed the deceased at Nkamba's house, seduced her and together went to sleep at the deceased's house. PW9's went further explaining that Nkamba Saguda was initially joined as an accused but was released later for insufficiency of evidence. Her statement as a witness was recorded by WP Joyce and that she was personally involved in tracing Nkamba saguda for service of the summonses to appear as a witness before the court but they failed to trace her.

Defence case had four witnesses, DW1 is YIKA JASAMILA, his evidence is a denial of the commission of the offence. He on 12/5/2014 at 8:00hrs heard an alarm. He attended the alarm (Mwano) where he found Mongu Lugata killed with her left leg and two fingers were amputated. He also participated on the burial activities. According to DW1, Kudawa Yalema was arrested first at the 'Mwano'.

Speaking of his own arrest, DW1 said, he was arrested by the police on 20/5/2014 at the pombe shop, taken to WEO offices at Gasuma followed by a Police search at his house. He was conveyed to the Police station Bariadi where he stayed to 1:00hrs before he was shifted to the investigation room, informed of the murder accusations. Police told him that Nkamba Saguda had informed them that he left with the deceased on the material night and was required to tell if he knows Mabula Bodo and Majeshi Nsuluja. DW1 said he told the police that he knew the named persons. He was then tortured and forced to confesses the commission of the offence. He on that ground confessed.

Second accused, MAJESHI NSULUJA, testified as DW2. His evidence was short but focused. He on 10th May 2014 went to Ikungulyandili to attend her mother-in-law who was sick. He took his mother-in-law to Mkula Hospital where he stayed from 10/15/2014 to 12/5/2014. They were after some investigation referred to Bugando Hospital. On 13th May 2014 his mother-in-law was diagnosed with cervical cancer and on 14th May 2014 on the way back home, the mother-in-law, one Tabu Thomas passed away at Nyakabindi village.

He was arrested on 6th June 2014 at Bariadi police station where he went to bail out his brother, Mangu Nsuluja. He was, according to DW2, subjected to torture, forced to confess that he killed Mongu Lugata and signed a statement without knowing what it was all about. He denied having been taken before a justice of peace and that he saw Liberata Mhagama, PW7 for the first time here in court.

DW3 ALEX NDALIJA, was in 2014 residing in Ikunguliandili, Mwadobana Ward within Bariadi District and DW2's father-in-law. His evidence was in support of DW2's defence of alibi to the effect that DW2 was at Mkula hospital and later to Bugando hospital to 14/5/2014. When probed on where the documents relating to the deceased (**Tabu Thomas**), medicines, and travel tickets, he said all were buried with the deceased under Sukuma customs, and he was not aware if he could secure one from the two hospitals.

MABULA BODO (DW4) also denied the charges, He said he heard the alarm (mwano) and attended the gathering as usual at Mzee Lugata's homestead. He came to be arrested later either 9 or 10th June 2014 at Bariadi. At Bariadi

Police, stated DW4, he was tortured and forced to sign a paper without it read on him. He also denied having known PW8.

After the closure of the defence case, parties' counsels were ordered, and they duly filed their written closing submissions. The State Attorney's contention was that prosecution case has been proved beyond reasonable doubts while the defence are of the different view. They all urged the court to find that prosecution has failed to prove the case beyond reasonable doubt. The details of their final submissions will be considered in this judgement while analyzing the evidence presented by the parties.

After the summing up of the case to the three assessors who assisted the court in the trial as required by the law, one of them was of the view that, the evidence adduced by the prosecution against all the three accused persons was insufficient. He thus, opined that, accused persons are not guilty of the offence and should be acquitted. The rest two assessors were of a different opinion that prosecution managed to prove the case against all the accused persons beyond reasonable doubt. They advised the court to find them guilty.

I have acutely evaluated the evidence, the submissions by the parties, and the law, for a conviction of the offence of murder under section 196 of the Penal Code to stand, the prosecution must prove the following ingredients:

- i. whether Mongu Lugata is dead*
- ii. whether the death was with malice aforethought*
- ii. whether three accused persons in court are responsible.*

Death of Mongu Lugata is not at issue in this case. Parties had agreed on this issue during the preliminary hearing where one of the agreed facts is

the death of Mungu Lugata. PW2, the doctor described the cause of death in the Postmortem examination Report (exhibit P1) as "***severe hemorrhage as a result of amputation of the left leg at the knee joint and the chopping of the third and fourth fingers of the left Hand***". This evidence was supported by PW1, PW3, PW4, PW6 and two defence witnesses, DW1 and DW4 who visited the scene after the alarm, all agree that Mongu Lugata is dead and that her death was due to amputation of her left leg, two fingers and thumb nail.

Plainly, the above evidence describes the perpetrators' motive. The chopping of the deceased's leg and fingers and leaving her unattended outside her house at the night of 12/5/2014 echo's nothing than one's intention to cause death. I am on this guided by section 200 of the Penal code (Cap 16 RE 2019) which designates malice aforethought as *inter alia* an intention to cause the death of or to do grievous harm to any person or knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person. By this definition therefore, it is certainly that the deceased's death resulted from amputation of her leg and fingers was calculated. That marks the end of the 1st and second issues in affirmative.

The last and crucial issue is whether all the accused persons before the court or any of them caused the death of the deceased Mongu Lugata. As rightly submitted by the counsels for the 2nd and 3rd accused persons, the general principle of our criminal law in cases like the one under consideration is that the prosecution bears the burden of proof, and the standard of proof is beyond reasonable doubts. The accused bears no duty to prove his innocence. His duty is only to raise reasonable doubts.

It is common ground that the case against the appellant is based entirely on circumstantial evidence. There is no direct evidence to show who amputated the deceased's body parts which eventually led to the complained death. To ground conviction on such evidence, the legal principle articulates, the evidence must irresistibly point to the guilt of the accused, the accused persons in this case to the exclusion of any other person. This principle was pronounced in the case of **Kipkering Arap Koskei & Another –Vs- Republic** [1949] 16 EACA 135.

The prosecution's circumstantial evidence against the accused persons in this case is premised on mainly three aspects. **One**, that accused persons were the last persons to be with the deceased alive. **Two**, the accused's respective confessional statements. **Three**, that they had a common intention. It should be stated here that all accused persons denied killing the deceased. They all retracted their cautioned confessions though on different styles and stages and repudiated their extra judicial statements.

The law is clear that if an accused person is alleged to have been the last person to be seen with the deceased, in the absence of any plausible explanation to explain away the circumstances leading to the death, he or she will be presumed to be the killer. PW1, PW3, PW5, PW7 and PW9 are key witnesses on this point. 1st accused is said to have orally confessed before PW1 and PW5 to have taken the deceased to his fellow accused persons. He repeated his confession before the police (PW3) through a cautioned statement (exhibit P3) and before the justice of the peace in his extra judicial statement (exhibit P6).

According to PW1, he on 21/5/2016 after the alleged murder received an information that Yika Jasamila was seen with the deceased alive on the evening before death. He arrested the 1st accused who on an interrogation admitted having convinced and handed the deceased to other accused persons on that material night. And that he was paid 100,000 for that assignment. PW1's respective evidence goes as follows:

"I made follow ups of the matter to know responsible persons. On 21/5/2014 I got information from the informer that Yika Jasamila was seen with the deceased on 12/5/2014 at around 20:00 hours... I arrested Yika Jasamila on 21/5/2014 at around 19:00 hours, ... at Mwaubingi village. ...

After that arrest, police were informed. On what transpired on the interview with the police at PW1's office, PW1 said;

Police came at around 23:00 hours. Police interviewed Yika Jasamila. Yika Jasamila said his duty was to take the deceased to the people who had requested for the deceased. ...he took the deceased from her friend Nkamba Saguda where she was having dinner and handed the deceased to Sitta Nhandi, Majeshi Nsuluja (2nd accused person) and Mabula Bodo (3^d accused person)."

The law in our jurisdiction is clear that an oral confession made before a reliable witness can base a conviction provided it is freely and voluntarily obtained. In **Mohamed Manguku Vs. Republic**, Criminal Appeal No 194 of 2004 (CAT-unreported) the Court stated that;

"Oral confession would be valid as long as the suspect was a free agent when the words imputed to him were said."

The prosecution evidence is clear that 1st accused had orally confessed before PW1 and PW5. First accused's defence in a way supports this evidence. He admitted having been arrested taken to the PW1's office and later police searched his house before he was taken to the police station. Nothing in his defence alleges torture or any inducement at the PW1's office prompted to his oral confession. The oral confession before Pw1 and Pw5 was for that reason freely and voluntarily made. This evidence is consistent with the rest of the prosecution evidence including that of PW3, PW5 and PW9.

PW5 is among the police officers who went for Yika Jasamila after his arrest. He confirmed to have interrogated 1st accused. According to PW5, 1st accused had told them that he was asked by his fellow Mabula Boddo, Sitta Nhandi and Majeshi Nsuluja to convince and take the deceased to them for the consideration of 100,000. Confirming the above information, PW9 said, on her interrogation with Nkamba Saguda, deceased's best friend, she was informed that Yika Jasamila and deceased left Nkamba Saguda's home between 22.00 to 23.000hrs of the material night in view of going to sleep at the deceased house.

PW3 who recorded the 1st accused's cautioned statement also had a similar story from the 1st accused. He said, in his statement, 1st accused said his duty was to take the deceased-Mongu Lugata to Mabula Bodo, Majeshi Nsuluja and Sitta Nhandi the assignment which he discharged at a consideration of 100,000. He explained further that, 1st accused took the deceased from Nkamba Saguda's home at the material night after he had

seduced him and that they both agreed that they would sleep at the deceased house.

The coherence of the prosecution's evidence on this point demonstrates their credibility. Apart from being a local leader of Gasuma, for instance, PW1 knows the deceased and all the accused persons. He was at the scene where 1st accused was not among the mentioned suspects and that he only arrested the 1st accused person after he had learnt of his closeness with the deceased on the material date. There is nothing brought into evidence pointing to why should PW1 incriminate his own people including the 1st accused. PW5 also though a police officer had nothing to do with the 1st accused except for the re arresting of the accused after he was informed of his arrest by PW1. Their evidence gains a strong support from PW3 and PW9.

Added to the above is the 1st accused's own confession (cautioned statement -exhibit P3 and extra judicial statement exhibit P6). I have consciously evaluated the said statements. Exhibit P3 was tendered by PW3 and that before its admission, the 1st accused, and his advocate were invited by the court to say if they have anything impeding the sought admission. The 1st accused's counsel did not raise any objection. Responding to its admission. Daud Masunga counsel for the 1st accused said:

"I do not have any objection to the tendering of the cautioned statement as exhibit."

Again, the 1st accused counsel did not query the details of the said statement when its contents were read out in court to the effect that, Yika Jasamila confessed to have taken the deceased to his fellow accused persons, save for allegations of torture in obtaining the 1st accused's signature brought

during defence stage which I firmly doubt. If it were true that the 1st accused cautioned statement was obtained by torture as he wanted the court to believe during the defence, he would have so disclosed after he was invited to say a word before its admission. It is inconceivable that 1st accused, who was represented by a counsel, could have forgotten the issue of torture at that opportune stage of the trial before the admission of exhibit P3, an incriminating statement into the courts records, just to remember and give its detailed account at the defence stage. I am therefore convinced that his retraction during the defence is nothing but an afterthought. My reasoning finds support from the Court of Appeal decision in **Twaha Ali And 5 Others V R**, Criminal Appeal No. 78 of 2004 CAT (unreported) where the Court said that a confession or statement will be presumed to have been voluntarily made until objection to it is made by the defence on the ground that it was not so, or it was not made at all. And speaking on when the said objection should be raised, the Court of Appeal in **Emmanuel Lohay and Another v. The Republic**, Criminal Case No. 278 of 2018 (unreported) observed as follows:

*"It is trite Law that if an accused person intends to object to the admissibility of a statement/confession he must do so before it is admitted and not during cross-examination or during defence - **Shihoze Semi and Another v. Republic** (1992) TLR 330. In this case the appellants 'missed the boat' by trying to disown the statements at the defence stage. That was already too late. Objections, if any, ought to have been taken before they were admitted in evidence."*

The issue of time limitation raised by the counsel for the 2nd and 3rd accused person in respect of the above exhibit was resolved in the prosecutions favour that the statement (exhibit P3) was recorded within time after exclusion of the time 1st accused was involved on the investigation processes connected to the offence followed by his transmission from Gasuma to the police station under section 50 (2) (a) of the CPA, Cap 20 RE 2019.

Prosecution also relied on the 1st accused's extra judicial statement tendered in court by PW7, exhibit P6. This document's admissibility was unsuccessfully opposed by the defence counsel. And the 1st accused's defence had nothing in relation to exhibit P6 and PW7's evidence. In short, the evidence by PW7 remained uncontroverted during cross examination and at the defence stage. It is certainly therefore from the above analysis that both oral and written confessions by the 1st accused person were given by the 1st accused and was voluntarily made.

I am aware that admission of a confession alone is not enough, especially when retracted or repudiated. The court is, by law required to evaluate the weight to be attached to it. In **Nyerere Nyague V R** , Criminal Appeal No 67 of 2010(Unreported) citing with approval **Tuwamoi V Uganda** (1967) EA 91 Court of Appeal emphasized that;

"Even if a confession is found to be voluntary and admitted, the trial court is still saddled with the duty of evaluating the weight to be attached to such evidence given the circumstances of each case"

I have taken that root. A close and objective evaluation of the 1st accused's statements (Exhibits P3 and P6) in relation to the prosecution evidence

reveals that the statements contain nothing but truth. Both Exhibit P3 and P6, as hinted above, explain the 1st accused's role. He specifically admitted having handed the deceased to the rest of the accused persons the fact, which is corroborated by PW1, PW3, PW5 and PW9's evidence. 1st accused's defence has nothing valuable to dismantle the strong prosecution evidence against him.

In their final submissions, the defence counsels complained of failure by the prosecution to call Nkamba Saguda as a witness in court. I admit that Nkamba Saguda was, in this case a very material witness for the prosecution particularly on how the deceased lived her last day on earth to when as alleged lured by the 1st accused. Her presence in court as a witness could not be procured and the reason given was that she was no where to be found. PW9 explained how she personally traced the said woman for service of the court's summons to no avail. I think, prosecutions cannot be blamed for that as Nkamba Saguda's non-appearance as a witness was clarified in court.

The prosecution evidence above shows that 1st accused has in a way explained how he parted with the deceased. That he handed her to his fellow including 2nd and 3rd accused person at the night of incident just before her brutal death resulted from amputation of the deceased's body parties. Is his explanation plausible to exonerate him from the liability? I will come back to this later after discussion of some few pertinent issues.

The next question is, who did the amputation of the deceased's leg and fingers? The only available evidence on this point is the accused's confessions made before the police and the justices of the peace. As

explained herein above, 1st accused's confessions (Exhibit P3 and P6), named Sitta Nhandi, Mabula Bodo and Majeshi Nsuluja as the persons 1st accused left the deceased with on the material night.

It was contended by the 2nd and 3rd accused's counsel in their final submissions that 1st accused's confessions are confessions of a co -accused as against the rest two accused persons which requires corroboration. I hold a different view. It is true that, though under section 33 (1) and (2) of the evidence Act Cap 6 R E 2019 the court may take a co accused's confession into consideration against another person charged together but no conviction of an accused person shall base solely on a confession by a co -accused. This position was expounded in the case of **Seleman Rashid and others vs R** (1981) TRL 252, that:

*"The court of Appeal has on numerous occasions held that a confession by an accused person can only be used as lending assurance to other evidence against the co-accused and that it cannot be used as the basis for the prosecution case. See **Gopa V.R** (1993) 20 EACA 318 and **Ezera V.R.** (1962) EA 309. **Thus as a matter of practice, a conviction should not be based solely on the co-accused...**" (emphasis added)*

In this trial, confession of a co accused is not the only evidence. While I am confident that 1st accused's confession was corroborated by PW1, PW5 and PW9, there is in addition, the 2nd and 3rd accused's own confessions which can stand on their own to ground conviction if corroborated or found to be true. Thus, as guided by the above cited decision of the court, the 1st

accused's confessions in this case, is only used to lending an assurance to the 2nd and 3rd accused's confession.

It should be noted here that, it is the 1st accused's oral confession before PW1 and PW5 which led to the arrest of the 2nd and third accused persons. After their arrest, second and third accused persons admitted the commission of the offence and narrated how the 1st accused was involved in the game, their confessions that tallied that of the 1st accused's statements.

In their confessions, both before the police and the justice of the peace, (exhibits P4, P5, P7 and P8) 2nd and 3rd accused person, (Majeshi Nsuluja and Mabula Bodo) confessed to have killed the deceased Mongu Lugata by chopping of her left leg and two fingers in cooperation with Sitta Nhandi, Budadi and Dandi Yalema. They also named Yika Jasamila (1st Accused) as the person they paid 100,000/= to bring to them the deceased on the material night. I am conscious of the fact that, all exhibits above (P4, P5, P7 and P8) were repudiated and retracted and the rule that, a conviction cannot rest solely upon an uncorroborated confession, especially when retracted or repudiated. Courts will ordinarily act on such confessions if corroborated by independent evidence unless the court is fully satisfied, after considering all the material points and surrounding circumstances, that a confession cannot but be true. See the decision in **Hatibu Gandhi and Others Versus Republic** [1996] TLR 12 and **Nyerere Nyague** (supra).

I will begin with exhibit P8. In this exhibit the 3rd accused is alleged to have admitted having killed the deceased with his fellow 1st accused, 2nd accused and others not in court. This statement (exhibit P8) was however seriously

attacked during trial. Though admitted in evidence, its authenticity was challenged during cross examination. PW8 admitted during cross examination to have recorded two extra judicial statements from the 3rd accused on the reason that she initially recorded irrelevant facts leading to her opting to re write the statement which was signed by the accused person. PW8's evidence on this issue goes thus:

"I recorded two extra judicial statement from Mabula Bodo. They are two. The original copy is the correct one. I don't know which one among the two was served on the accused, Mabula Bodo. "

I have tried to see the validity of the defence contention that the statement tendered was not served upon the 3rd accused at the committal proceedings as their questions during cross examination suggested. Unfortunately, however, the document served on the 3rd accused was not made part of evidence in court and therefore, I was left with nothing to compare with exhibit P8. In her final submissions, the learned State Attorney invited the court to disregard the previous statement which is inconsistent with the evidence given in court for not constituting evidence upon which they can be acted upon. She on this relied on the decision of **Ngeti s/o Mwaghina V Republic** (1961)5 EALR. I would have accepted the suggestion above and proceed to act accordingly if not for the glaring contradictions on the PW8's evidence on this point. While telling the court that the re- rewriting of the 3rd accused's statement was due to recording of irrelevant information as reproduced hereunder that.

"I had written the first statement and found that I had written irrelevant statement that they passed somewhere and ate ugali.

Then I decided to re write the statement in a fresh paper and read it to the accused person."

PW8 failed to show the court the pointed irrelevant information on the discarded statement when so required by the defence counsel. She said.

"Yes, it is true that the statement that they passed to a place and ate ugali is not recorded in the incorrect statement which was served on the accused person."

Generally, PW8s evidence is vague on what made her record and retain both (correct and incorrect) extra judicial statement by the 3rd accused person. The contradiction above raises doubt to the genuineness of exhibit P8 which I rule in the accused's favour. Exhibit P8 is therefore found insignificant and disregarded.

Exhibits P4 and P5 are the 2nd and 3rd accused's cautioned statements. The ruling on trial within trial sorted out the issue of voluntariness. It was found that the statements (exhibit P4 and P5) were voluntarily made and that it was made within time prescribed by the law. The crucial issue is therefore the truthfulness of the alleged confession.

The court have warned itself of the danger to act on uncorroborated retracted or repudiated confession as emphasized in **Hemed Abdallah v. Republic** [1995] TLR 172 that:

"Generally, 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 is satisfied that the confession must be true."

And have sensibly examined the 2nd and 3rd accused's cautioned statements. The said statements are detailed such that apart from giving the accused's person particulars and family details, 2nd and 3rd accused confessed to have asked 1st accused to bring to them the deceased at the agreed cost of 100,000/=. They also confessed to have killed the deceased in collaboration with Sitta Nhandi, and other two persons. In exhibit P7, 2nd accused, admitted having committed the offence with his colleague 1st accused person, third accused and Sitta Nhandi.

Accused persons were arrested on diverse dates and separately interrogated. First accused's statements (Exhibit P3 and P6) laid a foundation on how the deceased landed into the 2nd and 3rd accused's hands. The 2nd and 3rd accused's confessions contains elaboration of what transpired with the 1st accused person before the deceased's death to the amputation of the deceased's body parties, which according to the Doctor, (PW2) resulted into the death of the deceased. And PW1 and PW5 and Pw9 whom I found trustworthy provide collaborative evidence especially on how the deceased was trapped to the death ground.

I have as well evaluated the accused's defence. DW1 Yika Jasamila and Dw4, Mabula Bodo denied the accusations. They alleged to have no knowledge of whatever transpired before and during the incident. They attended the Mwano. DW1 participated in all the burial activities while DW4 said he left the 'Mwano' after he had handed the deceased body to the respective authority. I have failed to find anything in their defence raising doubt to the above prosecution evidence. The fact that 1st accused was at the scene of crime after the incident is part of the prosecution case and his own

confession (Exhibit P3) is elaborative on that point. As decided above, his torture allegations are an afterthought worth ignoring.

DW4's defence could not challenge the prosecutions strong evidence that he, together with his fellow accused was at the scene on the material night. In fact, his own confession places him at the scene of the crime at the material night. His allegation of torture was not established and therefore had no effect to the prosecution evidence.

DW2 relied on a defence of alibi that he was attending his sick mother in-law Tabu Thomas from 10/5/2015 at Mkula Hospital and Bugando to 14/5/2014 when she passed away. His defence was supported by his father-in-law DW3. I have considered this defence as well. Unfortunately, 2nd accused's defence could not contradict prosecution's evidence including his own detailed confessions which places him at the scene on the material date and time of incident. I should point here that, his allegation of torture and fear of death that led him sign the cautioned statement were not justified.

I also find strength on the Accused's plea of guilty at the preliminary hearing. When called before this court for plea taking and preliminary hearing on 3/3/2017, almost three years and nine months after their arrest, all accused person accepted the information of murder read to them with the particulars that **"on 12th day of May, 2014 at Gasuma Village within Bariadi District in Simiyu Region they murdered MONGU D/O LUGATA."** I understand that the admission of the above information of murder is not sufficient evidence of the offence against the accused, more so because the standard of proof in a murder case is beyond reasonable doubt, but my view is, at this stage, accused were a little bit settled after all the arrest

commotions and tensions. Almost four years period in prison was enough for them to understand the accusations they are facing and digest on what exactly they were up to. And if at all their confessions were induced, they would have not come up with a plea of guilty at that stage of the proceedings. Their admission of the offence of murder at that stage, when they were not only free from the police, but before a court of law with an assistance of the learned counsels signifies that their earlier confessions were nothing but true expression of an accurate facts of the incident at issue. Having considered the above, I am of the strong view that accused's confessions above are not only willingly made but contain nothing but an absolute truth of what transpired on the material date. The offence of murder has been positively proved against the 2nd and 3rd accused persons.

I will now turn to the question whether the explanation given by Yika Jasamila, (1st accused), exonerate him from the murder accusations. As hinted above, 1st accused alleged to have left the deceased on the 2nd, 3rd accused and Sitta Nhandi. On how he executed his part of the mission 1st accused's cautioned statement (exhibit P3) reads:

"Nakumbuka ilikuwa tarehe 11/5/2014 muda wasaa 18:00hrs nilikuwa nikiangalia mpira kati ya Gasuma na Mwadobana, wakati nikiendelea kuangalia mpira huo mara nilifuatwa na MABULA s/o BODO, SITTA s/o Nhandi na MAJESHI s/o NSULUJA ambao kabla ya hapo wote ninawafahamu kwani wote wamezaliwa kijiji cha Gasuma. Na katika maongezi yao MABULA s/o BODO baada ya kusalimiana aliniomba tukutane pembeni tuongee ambapo alinielekeza twende kwenye klabu cha pombe za kienyeji cha MWANAJOSE, ambapo waliniagizia pombe aina ya mabombonya, na wao waliagiza pombe hiyo hiyo tukawa tunakunywa pamoja. Baadae walianzisha maongezi ambapo MABULA s/o BODO ndiye aliyeanzisha maongezi kwa kuniambia

kuwa "wewe unaye karibu sana na Yule MUNGU d/o LUGATA (Albino) tunashida nae tunaomba ututolee kutoka nyumbani". Niliwauliza mnamtaka wa nini? wao wakasema kazi yangu ni kuwatolea tu, niwauliza kama ndivyo mtanilipa sh. Ngapi? Wakasema shilingi elfu kumi nikakataa, waliendelea kupandisha bei hadi elfu hamsini nikaendelea kukataa ndipo wakatoka nje kujadili ambapo waliporudi walisema watanipa shilingi laki moja tu na nilikubali na kwa vile kumbe walikuwa nayo pale MABULA s/o BODO alinipa hiyo hela na wakati huo tulikuwa watu wanne yaani wao watatu na mimi. Na baada ya kukubaliana tuliondoka wote pamoja na ilikuwa muda wa saa 19:30hrs usiku ambapo hatukumkuta nyumbani kwake, hivyo niliwaacha wamesismama barabarani na kwa vile nina uzoefu nae nilijua kuwa atakuwa nyumbani kwa NKAMBA d/o SAGUDA kwa vile ni rafiki yake. Nilipofika kwa NKAMBA d/o SAGUDA nilimkuta yuko pale na walikuwa wanakula nilianza kumshawishi kwa kumtongoza ambapo yeye, marehemu aliniambia kuwa hawezi kututongoza wote mimi na dada yangu niliendelea kumbembeleza kuwa nina shida na wewe nyumbani kwako aliniuliza shida gani? Nilimwambia twende nyumbani kwako na wakati tunaongea hayo yote KAMBA d/o SAGUDA alikuwepo na alikuwa anatusikia maongezi yetu, ndipo nilipofanikiwa kutoka nae kama tunaelekea nyumbani kwake na tulipofika barabarani karibu na nyumbani kwake niliwakuta pale akina MABULA s/o BODO, MAJESHI s/o SULUJA na SITTA s/o NHANDI ambapo nilimunong'oneza MABULA s/o BODO kuwa mtu wenu huyo nimeshamleta, nae akaniambia kuwa umemaliza kazi yako, na wakati huo niliweza kuwaona watu watatu wanaume ambao nilipowaangalia sikuweza hata kuwatambua sura zao machoni kwangu walikuwa wageni kabisa ambao mmoja wao alikuwa amevaa koti refu hadi miguuni, mwingine alivaa jacketi nyeusi, mwingine alivaa shati lenye madoa madoa meupe na meusi na niliamua kuondoka bila hata kuuliza kuwa hao ni akina nani? Na kwa upande wa kina MABULA s/o BODO alikuwa amevaa jacketi jeusi, alivaa kofia ya kibaragashia, SITTA s/o NHANDI alivaa jacketi rangi ya kaki na kofia maarufu kapero au cap rangi nyeusi na MAJESHI s/o NSULUJA alikuwa amevaa jacketi nae jeusi na nguo hizi ndizo walizokuwa nazo hata kipindi wananifuata mpirani. Na baada ya

kuachana nao nilirudi nyumbani kwangu ambapo nilimpa mke wangu mdogo kiasi cha Tshs. 30,000/= azitunze na mimi nilibakiwa na Tshs. 70,000/= ambayo nimeimalizia kwenye pombe. Na baada ya tarehe 12/5/2014 muda wa saa 08:00hrs nikiwa nyumbani kwangu nilisikia yowe wakilelekeza watu waende nyumbani kwa LUPATA kwani mama wa pale ameuwawa. Na baada ya kufika eneo tulikuta mwili wa marehemu nje akiwa amekatwa mguu upande wa kushoto amenyofolewa vidole viwili vya mkono wa kushoto ndipo watu walipoanza kutoa taarifa kwenye vyombo husika, akilini mwangu baada ya kuona hali hiyo na kwa vile marehemu nilimwacha mikononi mwa MABULA s/o BODO, SITTA s/o NHANDI, na MAJESHI NSULUJA pamoja na wageni wao watatu, hivyo niliamini kabisa wao ndio waliohusika na mauaji hayo, na ndiyo maana walinipa fedha nyingi. Na sikuweza kutoa taarifa kwa polisi au viongozi wa Serikali ya kijiji kwa vile niliogopa kusema kuofia usalama wangu hadi hapo nilipokamatwa na polisi ndipo kueleza ukweli."

Five issues are noticeable from the above statement. **One**, that accused was approached by his fellow well known to him, 2nd and 3rd accused inclusive indicating to him their interest with the deceased Mongu Lugata. **Two**, that he was tasked to convince and take the deceased to them, **three**, the assignment was negotiated from 10,000/= to 100,000/= which was paid after the completion of the task. **Four**, 1st accused did as assigned and left the deceased with Mabula Bodo, Majeshi Nsuluja and their fellow on the night of 11/5/2014, And **five**, that 1st accused remained silence until when he was arrested on 21/5/2014.

Section 23 of the Penal Code Cap 16 R E 2016 is of assistance here. It provides;

"23. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another,

and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

In **Godfrey James Ihuya V R** (1980) TLR 197 Court of Appeal had this to say on how a common intention can be inferred:


"To constitute a common intention to prosecute an unlawful purpose ... it is not necessary that there should have been any concerted agreement between the accused persons prior to the attack of the so-called thief. Their common intention may be inferred from their presence, their actions, and the omission of any of them to dissociate himself from the assault."

I agree with the learned state attorney's final submissions that there was a common intention amongst the accused persons. Yika Jasamila, Mabula Bodo, Majeshi Nsuluja and Sitta Nhandi had a pre – arranged agreement on how to get the deceased. Yika was paid to persuade and make the deceased available to the killers. The negotiations from 10,000/= to 100,000/= paid for that purpose only, reflects one's knowledge of the mission ahead . His efforts to persuade the deceased at Nkamba Saguda's house and his conduct on the incident date after the mwano and his non-disclosure of the killers to the village authority and /or the police after the murder incident are inconsistent with his innocence. The murder of Mongu Lugata in this case, is certainly a probable consequence of 1st accused execution of the agreement with the rest of the accused persons and therefore he is under

section 23 of the Penal Code deemed to have committed the offence of murder.

I for the above reasons find the prosecution case with sufficient evidence to support the offence against the three accused persons. My findings are in accord of the two assessors who opined that prosecution has managed to prove the offence. Consequently, all accused persons are found guilty as charged. Accused's **YIKA JASAMILA, MAJESHI NSULUJA AND MABULA BODO** are hereby convicted of the offence of murder contrary to section 196 of the Penal code (Cap 16 RE 2002 now 2019).

Dated at Bariadi, this 18th March 2022


E.Y. MKWIZU
JUDGE
18/3/2022

Court: This judgement is delivered in an open Court this 18th day of March 2022 in the presence of the accused person, Ms. Rehema sakafu learned state attorney for the Republic, Mr. Daudi Masunga for the 1st accused and Mr. Samwel Lugundiga and Mr. Masudi Kitanda Mbogo also learned advocates for the 2nd and third accused persons and lady and gentlemen assessors


E.Y. MKWIZU
JUDGE
18/3/2022

SENTENCE

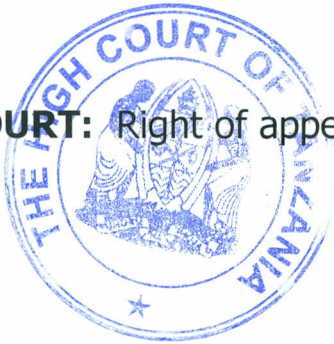
The accused persons **YIKA JASAMILA, MAJESHI NSULUJA AND MABULA BODO** are hereby sentenced to suffer DEATH PENALTY by

hanging under section 197 of the penal Code (Cap 16 R: E 2019) following their conviction under section 196 of the Penal Code, (Cap 16 R:E 2002- now 2019)



E.Y. MKWIZU
JUDGE
18/3/2022

COURT: Right of appeal to the court of appeal explained.



E.Y. MKWIZU
JUDGE
18/3/2022