

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TABORA REGISTRY)

SITTING AT NZEGA

CRIMINAL SESSION CASE NO. 16 OF 2021

REPUBLIC

VERSUS

- 1. DOTTO GIBE**
- 2. SAIDA D/O MAIGE**
- 3. ELIZABETH D/O PAUL**

JUDGMENT

Date: 01.12.2022 & 16.12.2022

BAHATI SALEMA, J.:

The accused persons namely **Dotto Gibe, Saida d/o Maige** and **Elizabeth d/o Paul** (hereinafter referred to as the first, second and third accused persons respectively) stand charged in this court with the offence of murder contrary to sections 196 and 197 of the Penal Code, Cap. 16 [R.E 2022]. It was alleged in the particulars of the offence that on 23rd October 2021 at Mwamapuli village within Igunga District

Tabora Region accused jointly and together murdered one Juma Mdundu. The accused persons pleaded not guilty to the charge.

During the trial, the Republic was represented by Ms. Jane Mandago and Mr. Merito Ukongoji, State Attorneys whereas Mr. Fadhili Kingu appeared for the 1st accused, Mr. Ibrahim Kimwaga for the second and Mr. Saleh Makunga for the third accused. In proving the charge the Republic brought 10 witnesses to the court and tendered 7 exhibits. The accused persons gave evidence on their behalf and they did not call any witnesses.

Starting with the evidence of **PW1, Dr. Scolastica Andrew Ikangilo**, a medical doctor with 21 years' experience testified that on 24/10/2021 at 11 hrs, she went to Mwamapuli village accompanied by police officers to conduct the post-mortem examination of one Juma Mdundu. Upon examination, she filled out a postmortem report where the body had wounds on the neck, head and hand. She filled out the postmortem report which was admitted as exhibit "P1".

PW2 Kalwinzi Kashinje, a chairman of Mwamapuli village (Magharibi), testified to the court that on 23/10/2021 at 19 hrs while at home he heard an alarm raised from the village and went to the house of Juma Mdundu where he found him laying outside on the ground in a pool of blood. He met a crowd of people gathered and the family of the

deceased his son and wife. While interviewing her wife, she stated that the assailant arrived at 19 hrs. The deceased invited them while there were about to eat they attacked him. The assailants were two but she could not recognize them. She ran to the neighborhood asking for help. Her neighbors came and found the deceased already dead. They started asking the wife of the deceased. When his son Kamuga came, he told them that his mother, Eliza Paulo and Saida Maige were the ones who killed his father. He told them that one day Eliza, his mother, called him while he was at Machimboni –Imalilo and he met Saida Maige and Eliza sitting together and the other one he could not recognize his name. PW2 further testified that his mother (Eliza) told him that he wanted to kill his father since "*maeneo yetu tunanyanyaswa na huyu baba yako*" but his son refused to partake in the killing of his father and he left. Kamuga was living at his grandfather's place but in the same village.

PW2 stated that after he mentioned the names of the accused the village vigilante (*sungusungu*) arrested them and after being interrogated Eliza confessed to having killed Juma Mdundu while being assisted by Saida Maige. He further testified that Elizabeth Paul was arrested at Matinje –Igunga at 22hrs while Saida Maige at Mwamashiku at 24hrs – Igunga. He also testified to having found two assailants who participated in the commission of the offence. They paid them TZS

300,000/= for the first installment and the remaining balance TZS 400,000/= was to be delivered by Saida Maige.

Thereafter PW2, informed the police from Igunga through the Village Executive Officer, Emma Nyapi accompanied by a doctor who arrived on 24/10/2021 at 11 hrs. He also assisted the police in drawing a sketch map. Then, they allowed them to bury the body. After that, the police left with Saida Maige and Eliza Paulo. The chairman further testified that the conflict was on the land. Saida Maige was allegedly the buyer of the said land. He told this court that, as a chairman, he had never heard of any dispute. During cross-examination, he stated that he was told by Kamuga.

PW3, Lightness Solomon Kahuta, a magistrate at Makomero and Igunga Mjini Primary Court testified to the court that on 27/10/2021 at 11 hrs while at Igunga Mjini received Dotto Gibe, the 1st accused who was under the supervision of Corporal Marco. She was requested to interview the accused person on the allegation of murder. She then inspected the accused and noted on his left leg had wounds and his two legs had swollen. Upon interviewing him, on his wounds, he said that he got those wounds while he was fleeing from the police at Choma that is when he was beaten and injured. She asked him if he was ready to give his statement voluntarily and she started recording him. He briefly, stated that he was among the killers of Juma Mdundu.

PW4, Jackeline Joseph Kessy, also a Magistrate at Igunga Mjini testified to the court while in her office PW. Swaumu went with the accused Elizabeth Paulo who was alleged of murder and wanted to confess. She further stated that before interviewing she inspected her body and found her with wounds on her legs and one long-time scar. Briefly, she said that she was arrested and beaten by *Sungusungu* at Mwamapuli. She explained having conspired to kill her husband.

Next was **PW5, WP 6795 Corporal Swaumu**, who testified that on 28/10/2021 she was directed by her supervisor from the investigation department to take Elizabeth to the justice of the peace. She stated that took her to the justice of the peace and handed her to the justice of the peace and later on, she went to pick her up.

PW6, G. 3659 Cpl. Marco testified that he worked at Igunga District. On 25/10/2021 he received instructions from ASP. Kimweri to take Dotto Gibe to the justice of the peace at Igunga Mjini Primary Court. He stated that he took him before the justice of the peace. During cross-examination, he said that it was his first time seeing him.

PW7, G. 3889 Detective Cpl. Clarence the investigator at Igunga – Tabora for 13 years testified that on 24/10/2021 he was informed of the incident that occurred at Mwamapuli village. They went to the place of crime accompanied by a doctor (PW1). After arrival, they found Juma Mdundu was killed. He further testified that there were two

people namely Saida Maige and Elizabeth Paulo arrested by village vigilantes. He interviewed the wife of the deceased Ester John, Kamuga and the village chairman and noted that the culprits were two and stole the deceased phone and TZS. 60,000/= and later disappeared.

He further interviewed Elizabeth Paulo who explained the whole story that she was the ex-wife of the deceased who conspired with Saida Maige to kill Juma Mdundu with intention of inheriting the "*mashamba*" and that her children were despised in that house. He further testified that Elizabeth and Saida found the killers and they agreed to pay them TZS.750,000/= which was given in two installments: the 1st installment TZS 300,000/= upfront and after the incident TZS 400,000/=. On another day, when they met they were Elizabeth, Dotto Gibe, Saida Maige, Hamisi and Kamuga Juma. Kamuga refused to participate in the killing. Saida Maige provided TZS 300,000/= before and promised to pay after the incident TZS 400,000/=. He further stated that Dotto Gibe and Hamisi went to kill and stole the phone Itel black in color. They then went to Elizabeth's place to wash their panga. He testified that it was the village vigilante (*sungusungu*) who arrested Elizabeth and then Saida Maige in the next village.

He further testified that they started to make follow-ups near Choma village with Elizabeth and Saida. It was during the night when they went to Choma to find Dotto and Hamisi who were

communicating with Elizabeth via mobile phone. However, they failed to arrest Hamis and went back to Igunga police station and arrived at 8 hrs. It was already on 25/10/2022. Thereafter, he was directed by his supervisor to record Saida and WP. Jackeline to Elizabeth Paulo. He told the court that Saida had a wound on his leg caused by *Sungusungu* who arrested him while Elizabeth was fine.

After he completed interviewing him, he was then informed that Dotto called Elizabeth Paulo to pay TZS. 400,000/= which remained after the killing. Dotto was demanding his money and they made a trap to arrest him. Dotto told Elizabeth to meet at Choma village a famous place. He testified further that they went using different transport to Choma. They went also with Elizabeth Paulo, the accused since she was communicating with Dotto. They arrived Choma at 14.30hrs and phoned Dotto who instructed Elizabeth to go to the bar while they were coming on the motorcycle. They waited until 18hrs and Dotto located another place then they put up a trap to catch him. Upon seeing them Dotto started running and they chased him with the assistance of people about half a kilometer. He was arrested by the people who assaulted him until they shot fire and thereafter took the accused to the police station and arrived at 20 hrs.

After inspecting him, he found a small black phone, which Elizabeth recognized to be the possession of the deceased. Thereafter

they called the deceased wife who identified the phone as J. & M after opening the phone. They filed a certificate of seizure and it was kept at the exhibit place. The mobile phone is admitted and marked as "P3".

PW8, Ester John, the wife of the deceased testified that she was a resident of Mwamapuli. She was living with her husband Juma Mdundu who was killed on 23/10/2021. She testified that it was around 18 hrs in the evening when two men passed by their house and came back later at 19hrs. They found them outside preparing to eat. Her husband invited them but they declined and started to cut him using a machete on his back, neck, and chest. They were with her husband, in-law and 5 grandchildren. They were not very far from the deceased. She managed to recognize them through their clothes. One had black trousers and a black shirt and the second had white trousers and a shirt with dots and a cap. She testified to the court that they were short in height. She ran to the neighborhood for assistance. Her neighbor Mwamayala raised an alarm. People went to the place only to find him already dead. The culprit took the money and the black phone.

They informed son Kamuga who was living with his grandfather, Ngolelwa. Upon his arrival, Kamuga who is the son of Elizabeth Paul said that the killer was his mother Elizabeth Paulo. He narrated that he was called by his mother, Elizabeth Paulo while at Imalilo- Machimbo to go to her mother's place at Matinde. After arrived he found two people

namely Maige, Saida and another person he could not recognize, he was covered. He said that her mother told him that she wanted to kill his father, so Kamuga could assist but he refused. The team told him that since he had refused and had known the secret they will kill him. She further testified that it was on Friday 22/10/2021 and the deceased was butchered on Saturday 23/10/2021.

After the incident, she went inside and she did not know what happened thereafter. Upon hearing the incident, the village vigilante went to find Elizabeth Paul who was at her home Matinje while Saida Maige was arrested at the wedding and following the assault by the villagers, they, later on, confessed to having participated in the killings.

She then testified that on the following day, police from Igunga arrived at 13hrs. The doctor also examined the body of Juma Mdundu who was buried on 24/10/2021.

During cross-examination, she stated that the incident occurred at 19hrs and the assailants used a torch. Saida Maige was not among them. She also stated that Eliza and Saida did not state firstly but after being tortured they confessed.

PW9, WP. 8271 Detective Corp. Jackeline, testified that on 24/10/2021 two suspects were arrested by villagers at Mwamapuli. On 25/10/2021 she went to Mwamapuli and came with two suspects to Igunga police Station. While on their way Eliza told them the other

killers were at Choma. So they went to Choma and set trap for arrest. They stayed for a long time since the number she used to communicate with was unreachable, thereafter they decided to go back to the station. It was 5hrs in the morning and arrived at 8 hrs the police station and interviewed Eliza while PC. Clarence interviewed Saida.

While they were taking them from Mwamapuli Eliza was fine while Saida had some injuries which were inflicted by the villagers.

While interviewing, Eliza pone called and she received a call from Dotto who wanted to meet Eliza and pay them the remained balance. He told her to meet at Choma. Since he completed interviewing her he went to his supervisor who directed them to make a follow-up at Choma. Her phone rang again, thereafter at 14 hrs they went to Choma for another investigation. They then made a trap while she remained with Eliza. She saw two people Hamis and Dotto unfortunately they managed to arrest Dotto with the aid of other people and went back to the police station where Corp. Wenceslaus started to inspect him. Dotto had wounds from the angry citizen.

He was found with a small black phone. Eliza told him that the phone did not belong to him. The phone was admitted as exhibit " P6".

PW10, F. 5505 Detective Corp. Wenceslaus, an investigator testified that on 25/10/2021 at 20 hrs – 21 hrs. he was at Igunga police where they were coming from arresting Dotto Gibe. He was directed to

interview Dotto Gibe. He started to interview after searching and he was found with Itel, black which he said belonged to the deceased Mdundu. He recorded the accused and he certified. He briefly stated that he confessed to having participated after being requested by Elizabeth.

During cross-examination, he stated that the certificate of seizure was filled by Corp. Clarence. He had small wounds. He did not say if he was given 300,000/= by Saida Maige. That marked the end of a prosecution.

Having heard the evidence adduced by the prosecution side the court ruled out that, the evidence is sufficient to require the accused person to give his defence which means the prosecution has established a *prima facie* case against the accused person and he was given his rights and was invited to make his defence.

On the other hand, defence witnesses all led by Mr. Fadhili Kingu, Mr. Ibrahim Kimwaga and Mr. Saleh Makunga learned counsels testified as follows: -

DW1, Dotto Gibe, testified that he was living at Mwamagula, Nzega – Tabora and was arrested by DC. Wenceslaus on 25/10/2021 at Choma while undertaking maize business and was sent to Choma Police station. He was later sent to Igunga police Station and upon arrival, he

was undressed and remained naked and police Wenceslaus started to assault him to admit to the killing of Mdundu. He testified that he confessed after being assaulted and got the wounds at the police station where he stayed for 2 weeks before he was arraigned in Court. He prayed this court to set him free.

DW2, Saida Maige Kija testified to the court that on 23/10/2021 at 23.30 hrs he was arrested by sungusungu vigilante while attending the wedding ceremony at Ng'washiki-Makonya hamlet. He was taken to Mwamapuli – Kitongoji cha Magharibi.

Upon arrival, he was told that he had aligned with Elizabeth Paulo to kill Juma Mdundu. He also found Elizabeth at the scene of a crime. They stayed until 24/10/2021 around 13 hrs when police came. They were taken to the police station starting at Igunga district with Eliza Paul. It was on 24/10/2021 at 16 hrs when they were taken to the police. They arrived at 18 hrs. Upon arrival they were locked up and on 25/10/2021 at 8.30 in the morning she was interviewed. He testified that he did not communicate with Eliza to plan the killing and had no dispute with Juma Mdundu.

He testified further that he knew Eliza through his late husband Mdundu before they separated. He prayed to this court to set him free. During cross-examination, he stated that he and the late Mdundu bought land in the same area at Mwamapuli. Eliza was still her husband

and she knew his land was beside Juma Mdundu. He did not ask why Eliza mentioned him since they were crowded by Sungusungu.

The last **DW3, Elizabeth Paulo Shigella**, testified that she was arrested on 23/10/2021 at 21 hrs at Matinje by Sungusungu and was taken to the place of incidence at Mwamapuli. She was under arrest of Sungusungu until 24/10/2021 when police arrived at 13 hrs. They were taken to the police station.

She further testified that the deceased used to be his husband whom she married in 1996 and lasted in 2005 when she married another woman. After she divorced they divided the properties, so she did not quarrel with him. She testified that after being arrested she went to Igunga police station and arrived at 18 hrs.

On the following day at 9hrs WP Jackeline sent her to the investigation room where he met 2 policemen, Wence and Barto who told her to undress, he also found Saida Maige naked. Barto started assaulting her until she undressed. She testified that she was forced to sign using a thumbprint.

During cross-examination, she stated that she divorced her husband. She stated that Kamuga was living at his father's place he never came to visit me at her place nor the other children.

In general, the accused persons dissociated themselves from the offence leveled against them. They prayed for their acquittal. That marked the end of both the prosecution and defence case.

Both counsels did not wish to make their final submissions after closing the case and prayed the court proceed with the matter.

From the evidence on record, there is no dispute that **Juma Mdundu** is dead and he died a violent death, this court has found the issue for determination in this court is whether the evidence adduced by the prosecution side has managed to establish their case to the required standards. If the answer will be in the affirmative the next issue is whether they caused the death with malice aforethought.

That being the evidence received by the court, this being a criminal case the court has found it proper to state at this juncture that, in deciding this case the court is required to be guided by the principle of law provided under section 3(2) (a) of the Evidence Act, Cap. 6 [R.E 2022] which states that;

" In order to say a fact has been proved in criminal matters except where any statute or other law provides otherwise, the court is required to be satisfied by the prosecution beyond reasonable doubt that the fact exists."

This principle of law has been strictly observed by our courts in criminal matters in the case of **Said Ally V R**, Criminal Appeal No 55 of 2012 CAT Dodoma (unreported) where the court of appeal stated that; *it is a general principle of law and practice that it is the prosecution's burden to prove its case beyond reasonable doubt.* The court of appeal quoted in the above-cited case the meaning of the stated principle as laid in the case of **Samson Matiga V R**, Criminal Appeal No 205 of 2007 where the court stated;

"What this means, to put it simply, is that the prosecution evidence must be so strong as to leave no doubt to the criminal liability of an accused person. Such evidence must irresistibly point to the accused person, and not any other, as the one who committed the offence."

With the above principle of law in mind, I am correct to state that the accused persons are charged with the murder of **Juma Mdundu** contrary to sections 196 and 197 of the Penal Code, Cap. 16 [R.E 2022]. In the case of murder, these provisions must be read together with section 200 of the same law. While section 196 provides that a person commits an offence of murder if, with malice aforethought, he causes the death of another person by unlawful act or omission, section 197 provides for the punishment for the offence of murder.

The detailed definition of *mens rea* is covered in Section 200 of the Penal Code, Cap 16, R.E 2019. In **Republic V Masunga Nzengo, High Court** of Tanzania at Tabora, Criminal Session Case No. 46 of 39 2019 (unreported), this Court has reviewed several decided cases on malice aforethought, concluded that:

"These cases propound the underlying principles that if evidence shows the nature of wounds, the weapon used to inflict the wounds, the conduct of the accused before and after the incident and the mode of resentment adopted by the accused in reaction to the deceased's action in the particular circumstances, then malice aforethought could well be manifested as per Section 200 of the Penal Code."

Gathering from the summary of the proceedings, in the case of **Bomboo Amma and Petro Juma @Lanta vs the Republic**, Criminal Appeal No. 320 of 2016 CAT Arusha (Unreported), the Republic has to prove the following ingredients of the offences in this case that;

- a) *The deceased Juma Mdundu died and;*
- b) *That his death was unnatural ;*
- c) *The death was caused by the accused person in this case*
- d) *The accused intended to cause such death or had knowledge that the act or omission causing death will probably cause the death.*

Having considered the evidence adduced to the court by both sides, on the **first ingredient** the court has noted that, there is no dispute that Juma Mdundu is dead. *The second ingredient* was that death was unnatural. Juma Mdundu died as a result of the injury which caused severe bleeding. That was proved by the prosecution witnesses who testified before the court as PW1, Scolastica Ikangilo, PW2 Kalwinzi Kashinje, PW7 G 3189 Detective Corporal Clarence, PW8 Esther John PW9 WP 8271 Detective Corporal Jackeline. From the evidence on record, Mdundu is dead of unnatural death. The post-mortem examination report which was admitted as exhibit "PI" demonstrates that the deceased sustained multiple cut wounds on the skull and both shoulders which caused severe bleeding resulting in her death. The report reveals further that the cause of death was severe bleeding. This shows therefore that whoever did that act had *malice aforethought*.

On the **third ingredient** of who killed the deceased, or whether it was the accused persons who killed the deceased. On this issue, the prosecution relied on three types of evidence the circumstances surrounding the commission, the credibility of witnesses as well as repudiation of the caution statement

I will start with *credibility*. It is clear on the record that there is no direct evidence of a witness who identified the actual person who cut the deceased with the panga. In her evidence, the wife of the deceased

PW8, Esther John was candid that she did not identify the attackers save that she merely saw a person who had a torch start to cut the deceased and she ran away asking for help.

Much as she later heard her son Kamuga Mdundu mentioning Elizabeth Paul and Saida Maige the accused persons at the scene of a crime when they were gathered. With that information, it led to the arrest of the accused persons who after being arrested confessed to having been involved in the killing of the deceased Juma Mdundu.

As to the second issue on *repudiated cautioned statements*. Generally, the reliability or otherwise of a statement regarded as a confession is based on the assumption that it was made and, further that it was voluntarily made. In the case at hand, the caution statements of Dotto Gibe, Saida s/o Maige, and Elizabeth d/o Paul have been repudiated on tendering. However, after a trial within a trial, they were all admitted.

As a matter of law concerning retracted confessions, I am aware that the rationale is that, depending on the circumstances of the case, a conviction can be founded on such a statement after the court has properly directed itself on the evidence and is satisfied with its truthfulness. The case of **Hatibu Gandhi and others versus the Republic [1996] TLR 12**. Also, in another case of **Tuwamoi Versus Uganda (1967), EA 84** at page 91 quoted with approval by the Court of Appeal

of Tanzania in the case of **Umalo Mussa versus Republic, Criminal Appeal No. of 2005 (Unreported)**, 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."

It is however dangerous to act on uncorroborated retracted or repudiated confession. In the case of **Hemed Abdallah versus Republic [1995] TLR 172** the Court stated 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.'

Under the principle of law stated in the above case, where the confession has been retracted or repudiated, to base a conviction on such a confession must pass three important tests, **first**, the confession must be *corroborated by other independent witnesses*; **second**, the confession must be established that the *maker made it of his free will*; and **thirdly**, its central theme is believed to be nothing but the truth. It

is therefore pertinent at this stage to examine the truth or otherwise of the caution statement of the accused persons.

In assessing a confession, the main consideration at this stage will be, is it true? And whether the accused persons have correctly related what happened and whether the statements established their guilt with the degree of certainty required in a criminal case. This applies to all confessions, whether they have been retracted, repudiated, or admitted, but when an accused person denies or retracts his statements at the trial then this is a part of the circumstances of the case which the court must consider in deciding whether the confession is true. In **Ndorosi Kudekei vs The Republic, Criminal Appeal No.318 of 2016- CAT Arusha, (unreported)**, the Court held:

"The trial court should accept any confession which has been retracted or repudiated or both the retracted and repudiated with caution and must before founding a conviction on such a confession be fully satisfied in all circumstances of the case; the confession is true.

Under the principle elaborated in the cited cases above, to conclude whether the accused persons are responsible or not, it is important to examine the accused's cautioned statements along with the remaining evidence available. It is in the cautioned statements of the three

accused persons that they are said to have admitted their involvement in the commission of the offence. I have found that these cautioned statements have probative value. They are undeniable. My reasons for holding so are that the statements are well-detailed and were made by a person who had direct knowledge of what happened. The statements show how the accused persons planned to kill the deceased and the motive behind such a plan. The statement explains in detail how the plan was carried out as follows:

I wish to highlight some key statements in the caution statement of the accused persons. The first accused **Saida s/o Maige Kija** in his caution statement as P4 stated;

"Nakumbuka mnamo tarehe sikumbuki mwezi wa kumi mwaka 2021 alikuja Elizabeth Paul akaniambia nimpe hela laki tatu kuwa ninataka kufanya mpango wa kumuua mume wake anaitwa Juma Mdundu waliyeachana muda mrefu. Nilimuuliza sababu akajibu ananyanyasa watoto aliozaa nae na yeye pia. Nikamjibu kama mtoto wake ameridhia basi nitakuja nyumbani .Nilienda nyumbani siku ya Jumatano tarehe 20/10/2021 nikawa nimemkuta Elizabeth Paul na mwanae anaitwa Kamuga Juma na kukaa nao kikao cha kuwapa fedha ili wamuue baba yao. Baadae wanilipe hela yangu ambayo ni laki 300,000/= natanguliza na

baada ya kuuu nitawapa laki nne.Wakichukua mashamba watanipa shamba lakini mimi niliwakatalia na kuwaambia kuwa mimi nina mashamba mengi. Wanipe fedha ambayo hatukuelewana bado...

Niliwakabidhi fedha hiyo, siku ya jumamosi tarehe 23/10/2021 asubuhi niliitwa na Elizabeth Paulo akiwa na mtoto wake pamoja na vijana wawili ambao nilikuwa siwafahamu akaniambia kuwa kazi leo inafanyika unaowaona ndio wanaofanya kazi. Nikawambia kama wanafanya kazi mimi naondoka kwenda kweye harusi.Tukaachana nao.....,

The statement of the second accused **Elizabeth Paul Shigela** admitted as "P6" stated that;

"Nakumbuka ilikuwa mwezi wa 10/2021 alikuja mzee Saida Maige na mara baada ya salaam aliniambia kuwa mimi nina wazo nataka mimi na wewe tumuue mzee Juma Mdundu.Nilimuuliza kwa nini? Alisema kuwa mimi na Juma Mdundu tunagombania mashamba, mimi yale maeneo nataka yawe yangu hivyo imepelekea hadi sasa hatusalimiani. Siku hiyo nilimkatalia nilipomkatalia Saida alifoka sana na kuniambia kuwa kwa kuwa siri umeijua basi jua wewe utaanza kuuawa.

Baada ya siku mbili,siku ya tatu akaja pale tena nyumbani kwangu pindi anafika alikuta wageni wangu ambaye ni Doi? ambaye ni rafiki yake na

kaka yangu aitwaye Hamisi Lufunga , huyu ni binamu yangu , siku hiyo ndipo tulikaa kikao mimi, Saida Maige na Doi na kujadili kuhusu suala la kummuua Juma Mdundu. Tukiwa katika mazungumzo Saida Maige alinitaka nimpigie kijana wangu Kamuga Mdundu aje hapo nyumbani kwa haraka, Kamuga Mdundu alipanda pikipiki baada ya muda amefika aliingia moja kwa moja ndani na kutukuta wote watatu na yeye wanne Saida akamwambia mimi ndiye nina shida na wewe hebu tutoke nje basi tukawa tumetoka nje na kuanza kumweleza kuwa shida yangu niliyokuitia mimi nataka tumuue baba yako kijana aliuliza je amekukosea nini. Ni kwa ajili ya maeneo tu, kijana alikataa hapohapo Saida alitoa onyo kali na kijana aliondoka.Sisi pale tulikaa na kujadili ni nani atakayeenda kuua na tulikubaliana Doi S/O? na rafiki yake Hamisi Lufunga na tulikubaliana tuwalipe laki saba lakini zilitangulia laki tatu na aliyetoa hizo hela ni Mzee Saida. Maige hata mie nilihakiki na aliwaambia kuwa mkimaliza huko hela iliyobaki nitawapatia siku ya tarehe 25/10/2021.”

The caution statement of **Dotto s/o Gibe** which was admitted as exhibit P7 stated that ;

“Sikumbuki ni tarehe za mwanzoni mwa mwezi wa 10/2021 rafiki yangu Hamis Lufunga ambaye pia ni kaka wa ukoo alinipigia simu na kunieleza kuwa amepata dili kwa dada mmoja aitwaye Elizabeth Paul mkazi wa kijiji cha Matinje wilaya ya Igunga

ambapo alidai kuwa dili hilo ni la kwenda kuua mtu na kwamba anataka amuue mume wake ili arithi mali kwani walishatengana tangu miaka mingi lakini yeye na watoto wake hawakupata kitu chochote hivyo yeye kaka yangu Hamis Lufunga amekubali ndiyo maana ameamua kuniambia mimi ili tushirikiane. ...Baada ya kufika huko na kuona kuwa mipango imekaa vizuri na kweli siku hiyo hiyo baada ya kutangulia mchana akanipigia simu nami nikaanza safari kwa usafiri wa pikipiki hadi majira ya jioni akanipokea katika kijiji cha Matinje na kunipeleka nyumbani kwa Elizabeth na kumkuta yeye Elizabeth na mtu mwingine ambaye nilitambulishwa kuwa anaitwa Saida Maige mkazi wa kijiji cha Mwamapuli ambaye ni jirani na mume wake na marehemu tunayeenda kumuua ... tulifika eneo la tukio majira ya 19hrs na kuwakuta wakijiandaa kula chakula cha usiku na wamekaa nje ambapo Hamis Lufunga alinionyesha ishara ya kwamba ndiye yeye na kumkata mapanga kichwani, mgongoni na shingoni hadi akafariki dunia. Baada ya hapo nilichukua simu na Hamis elfu 60 na kurudi Matinje. ”

Ndipo tarehe 25 /10/2021 majira ya saa 18hrs nikiwa kijiji cha Choma nafuatilia pesa iliyobaki laki nne nilikamatwa na askari polisi.”

In this case, I am aware that, although there is no rule of law or practice making corroboration of a retracted confession essential; in this case at hand, corroboration of a retracted confession is desirable by independent evidence as no other evidence points to the accused as having been identified as people who committed the crime herein. Apart from the Prosecution witnesses, this was also corroborated by the *Extra-judicial statement* of **Elizabeth Paul** as P4 who stated that;

"...Alikuwa Mzee Saida akanikuta kwenye kibanda changu tukasalimiana akaniambia nina shida na wewe, nikamuuliza shida gani akasema ninataka nimuue mume wako kwa kuwa hatuongeti nina kesi naye za shamba. ... Baada nikafuatwa na pikipiki niende eneo la tukio, nilipofika nikawekwa chini ya ulinzi nikaanza kupigwa na kuhojiwa nikawaambia nilikubali baada ya kutishiwa panga. Kesho yake tukapelekwa kituo cha polisi Igunga maaskari wakachukua simu zetu. Kumbe Mzee Saida alilipa laki tatu kwa muuaji ikabaki laki nne ndipo Doi akanipigia akiniulizia Mzee Saida amlipe hela yake .Nikamwambia asubiri nimtafute mzee Saida. .Nikafanya ujanja nikamuambia hela yake ninayo

aifuata akawaona maaskari akakimbia lakini badae akakamatwa.”

Likewise, the extra-judicial statement of the **Dotto Gibe** which was admitted as exhibit P2 revealed that;

“ Hamis akanifuata kwangu na kuniambia hivyo na kuniomba nimsindikize kwa dada yake tukachukue hela kwa kuwa kuna kumuua mume wake aliyeachana naye. Nilimuuliza mmekubaliana sh ngapi akanijibu 750,000/= . Nikamwambia mimi siwezi na baada ya hapo akanilazimisha kwenda ila nishike tochi. Basi tukaenda mpaka kwa Eliza. Eliza alikuwa akishirikiana na Bwana mmoja anaitwa Saida na huyo Saida akaomba kama akishirikiana kumuua mume wake ampe mashamba. Makubaliano hayo yalifanywa na Eliza, Saida na watoto watatu wa Saida”

Sasa hiyo siku tulienda kwa huyo mzee, mume wake na Eliza wakati wa usiku saa moja na tukamkuta ametengewa chakula hapo nje . Baada ya sie kunawa mikono tukataka kula, Hamis alikuwa ameshika panga ndipo akampiga panga kwenye shingo, koromeo na kumkagua na kuchuku TZS 60,000 na simu ndogo tukaondoka...”

Both caution statements and extra-judicial statements mentioned the accused persons collaborated in killing Juma Mdundu. As stated earlier, there are statements by both accused persons on record detailing their involvement in the murder. Thus, as far as the prosecution evidence is concerned, the cautioned statements have implicated the accused persons and is not extraneous facts. Besides, their testimonies corroborated each other. In the case of **Aziz Abdallah Versus R [1991], TLR. 71** the court observed that;

"The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect of or incredible but only to confirm or support that which is sufficient and satisfactory and credible."

In this regard, therefore, I am of the considered view that the prosecution witnesses corroborated each other. In this sense, I am inspired by the remark made by this Court in **Steven Jason and two others v Republic**, Criminal Appeal No. 79 of 1999 (unreported) that:

"The detailed account of the initial stages of the plan to kill the deceased, the role played by each of the appellants in the plan and the sequence of events leading to the death of the deceased, could not in our view, be given by a person who was not either a party to the plan or had knowledge of

it. Otherwise, it is inconceivable that all this information was thrust upon the first appellant by the Justice of Peace or someone else he claims.

Therefore, the **third ingredient** is answered in the affirmative that the death was caused by the accused persons.

As to the **fourth ingredient** of whether *the accused intended to cause such death, or had knowledge that the act or omission causing death will probably cause the death.* Although it may not be easy to establish malice aforethought because it involved the accused's mental intent. However, **section 200 of the Penal Code, Cap. 16[R.E 2022]** provides some indicators of malice aforethought.

To bolster this ground, the Court of Appeal in the case of **Enock Kipela V Republic**, Criminal Appeal No.150 of 1994 CAT (Unreported) on page 6 held 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:

- 1. the type and size of the weapon if any used in the attack*

2. *the amount of force applied in the assault*
3. *the part or parts of the body the blows were directed at or inflicted on*
4. *the number of blows, although one may, depend upon the facts of the particular case be sufficient for this purpose,*
5. *the kind of injuries inflicted*
6. *the attacker's utterances, if any, made before, during or after the killing, and the conduct of the attacker before and after the killing*
7. *the conduct of the attacker before and after the killing”.*

In the instant case, the accused used a machete in killing the deceased and it can fairly be established that the accused used a huge amount of force to kill the deceased suggesting that the accused intended to terminate the deceased's life and thereafter run away. The intention to kill was well established. In my view, the instant case may directly fit squarely into the provisions of section 200 of the Penal Code, Cap.16.

Applying the guiding factors in the case of **Enock Kipela** (supra) to the evidence above the accused persons, the court is convinced that the accused had *malice aforethought*.

The court also considered the evidence of the defence of Dotto Gibbe, Saida Maige and Elizabeth Paulo and found it to have no weight.

Having considered this evidence in the light of the whole evidence in the case and circumstances of this case, it casts no doubt on the prosecution evidence which I consider to be watertight. I accordingly find the accused persons guilty as charged with murder contrary to section 196 of the Penal Code, Cap.16 [R.E 2022]. I convict them as charged.

Order accordingly.

SENTENCE

In murder cases, once an accused person has been found guilty, the only sentence prescribed is death by hanging. The law requires that an accused person who is found guilty of murder must be sentenced to *death by hanging*. I thus have no option but to impose the sentence as provided by law. From the premises of the conviction entered, I sentence the accused persons **Dotto Gibbe, Saida Maige and Elizabeth Paulo** to death which shall be suffered by hanging as provided by section 197 of the Penal Code, Cap. 16 [R.E 2022].

Order accordingly.

Bahati

A. BAHATI SALEMA

JUDGE

Right of appeal fully explained.



Bahati

A. BAHATI SALEMA

JUDGE

14/12/2022

