

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(IN THE DISTRICT REGISTRY OF BUKOBA)  
AT BUKOBA**

**CRIMINAL SESSIONS CASE NO. 97 OF 2018**

**REPUBLIC  
Versus  
FERNANDES FRANCIS**

**JUDGMENT**

*17<sup>th</sup> November & 16<sup>th</sup> December 2022*

**OTARU, J.:**

**FERNANDES FRANCIS** stands charged with the offence of **murder** contrary to Section 196 of the **Penal Code** (Cap. 16 R.E. 2002). It is alleged by the prosecution that in the evening of 5<sup>th</sup> December, 2017 at Ngando village in Nsunga ward within Missenyi District in Kagera Region, the accused herein did murder **JOSWAMU JOSIAH** (the deceased).

The accused pleaded not guilty to the information of murder thus the prosecution called six (6) witnesses to prove their case and tendered six (6) exhibits which are a post mortem examination report (exhibit P1), sketch plan (exhibit P2), cautioned statement of the accused (exhibit P3), copies of Happy Hour Guesthouse relevant guest registry pages (exhibit P4), a motorcycle (exhibit P5) and accused's extra judicial statement (exhibit P6). The accused testified under oath. He chose not calling any witnesses nor tendering any exhibits

At the trial, the prosecuting Republic was represented by Ms. Judith Mwakyusa and Amani Kyando, learned Senior State Attorney and State Attorney, respectively, while the accused was represented by Mr. Joseph Bitakwate, learned advocate. The case was heard without the presence of assessors.

In the morning of 05<sup>th</sup> December 2017, **Imman Josiah** (PW4), the deceased's brother, lent to the deceased a motorcycle he was using as '*bodaboda*' (for commercial purposes). The motorcycle was Registered as No. MC332 BHX, SunLag, red in colour, it had a red cover on top and a phrase '*msione nanyamaza mkadhani siwaoni*' on the back mud guard. They had an agreement that the deceased would return it by afternoon as he needed to use it between 14.00hrs and 15.00hrs. When the motorcycle was not returned by 17.00hrs, PW4 decided to trace his brother to the place where he would have parked. The *bodaboda* was not there. Neither was his brother. He did not succeed finding the deceased on that day. By 20.00hrs, PW4 was informed by one Antidius and some other people that his brother was seen hired by the accused at about 10.00hrs and 14.00hrs. The accused had been known to them from before the incident by the alias of Katebaka. When the deceased had not come back by the following morning, PW4, their father **Josiah Ndyamkama Kalugendo** (PW5) and the whole family became alarmed. They begun seriously searching for the deceased. They were directed where the accused lived but he was not there. They went to his

aunt's house in the same neighborhood. The aunt told them that the last day she saw the accused was 5<sup>th</sup> December 2017 when he borrowed a knife from her. She also advised them to look for him at Mutukula as it was the place he liked frequenting. PW4 and PW5 took the advise and went to Mutukula. They arrived there in the afternoon. They checked at the police, just in case they might have been detained for some reason. But they weren't there. So they reported the duo as missing together with the motorcycle.

By chance they saw the accused walking towards them. PW4 stopped him and asked about the whereabouts of his brother (the deceased). The accused informed them that they parted ways at 20.00hrs the previous night. PW4 and PW5 weren't satisfied with the response and detained the accused. They took the accused first to Bunanzi *bodaboda* parking area then to Kyaka Police Station. They arrived at Kyaka Police Station at night. While at the station, the accused was searched by **G 4692 D/C Khalifa** (PW2). He was found to be in possession of a set of motorcycle keys which PW4 immediately recognized as his. At this stage the accused was charged with motorcycle theft.

On the following morning, PW4 went back to Mutukula with a couple of friends. They started searching everywhere until they saw the motorcycle at the corridor of a Happy Hour Guesthouse. The personalized phrase '*msione nanyamaza mkadhani siwaoni*' at the back mud guard startled him. He

immediately identified his *bodaboda* by confirming the registration and other marks (exhibit P5). He called Kyaka Police Station but they advised them to report at Mutukula Police as they were within their Jurisdiction. The Police communicated amongst themselves. The Police from Kyaka arrived with the accused. Together with Mutukula Police they went to the Happy Guesthouse, among them was **E. 7984 D/Sgt. Brighton** (PW3) from Kyaka Police station. All this happened at daytime. In the evening, PW4, PW5 and their friends met again at Kyaka Police station. They had driven behind the Police Defender which diverted into the sugarcane plantation towards Old Kagera Sugar place. They followed the Defender to the pivot station where they were told was the place the accused had directed them to look for the deceased. PW3 confirmed this occurrence and tendered the sketch plan (exhibit P2), cautioned statement (exhibit P3), copies of pages from Happy Guesthouse guest registry (exhibit P4) as well as the motorcycle (exhibit P5). They searched within the sugarcane plantation but the search had to be halted due to darkness. The next morning of 08<sup>th</sup> December 2017, PW4 and friends organized an early search while coordinating with the Police. The body of the deceased was found. It had cut wounds. It was confirmed by **Sweetbert Sylveri Donat** (PW1), the medical doctor that the cause of death was direct injury to the heart which resulted into bleeding and immediate stoppage of the heart. The postmortem examination report (exhibit P1) is to that effect. The accused recorded the cautioned statement before PW3 (exhibit P3) and

extra judicial statement (exhibit P6) before justice of piece **Erick Justin Ikera** (PW6).

The accused defended himself under oath. He neither called any witnesses nor tendered any documents. The basis of his defense was *alibi*. He denied all allegations against him and stated that on the material day he was at his home and was arrested at his home as well.

Learned counsel for both sides submitted their final submissions. The defense contended that the prosecution failed to discharge the duty of proving the offence of murder against the accused person. Relying on the case of **Nataniel Alphonse Mapunda & Benjamin Alphonse Mapunda v. Republic**, (2006) TLR 395 that the defense has no duty of proving that the accused committed the offence but only to raise doubts, the defense prayed that such doubts should be decided in favor of the accused. They prayed that the court finds the accused not guilty of the offence charged and set him free. The prosecution on the other side argued that they had proved the case beyond reasonable doubt as required by law.

The learned counsel for the defence raised the following doubts;-

1. That PW4 mentioned one Antidius and others as people who saw the accused hiring the deceased. The defence wondered why these people were not called to testify and no reasons were given for such failure.

2. Why weren't motorcycle ignition keys brought in court. They doubted if at all there's such keys and if they were really found with the accused.
3. That there's no connection between the motorcycle and the accused as at the time the alleged motorcycle was seized, the accused was not in Uganda (at the place where it was seized) and that there is no exhibit that was submitted by the prosecution to show that the same was brought from Uganda to Tanzania as alleged.
4. They doubted the evidence of PW5 who stated that the accused lead the police to the place where the body was found, as the accused was alleged to be seated at the back of the defender thus he was not able to direct the driver to that place as the body was found in the absence of the accused.
5. That although the prosecution submitted exhibit P4 with intention of joining the accused to the motorcycle allegedly causing the death of the deceased, the information inside the exhibit seems to have been created for a specific purpose as the Registration contains the same handwriting from the beginning to the end. The information concerning the accused also contains details of a motorcycle which shows that it was specifically manufactured for this accused. sclaimed that exhibit P4 is not a trust worthy exhibit and prayed for the court to ignore it.

6. That the cautioned statement (exhibit P3) was not made by the accused and it was taken outside the prescribed time with no permission to do so. The statement lacks basis of being called a cautioned statement thus should be ignored by the court.
7. Doubted the confession of the accused before the justice of peace (exhibit P6) and prayed that it be given no weight because PW6 who produced the exhibit as he said himself did not know if the accused was taken before him at a free will or otherwise. Also PW3 testified that he ordered the accused to be taken before the justice of peace. Above all the accused himself testified that he did not write any statement. He was merely forced to sign. Thus they prayed that exhibit P6 should be ignored.
8. That the evidence adduced in court is circumstantial, circumstances which do not joint the accused with the offence. That circumstantial evidence can only lead to conviction where there's enough evidence to join the accused person with the offence. In the case of **Jimmy Ruhangaza v. Republic**, Criminal Appeal No. 159B of 2017 (CAT Bukoba) (unreported) stated that evidence that requires corroboration cannot be used to corroborate other evidence. Since all evidence herein is circumstantial and there are a lot of holes in each individual item thus none can be used to corroborate any fact to connect the accused to the crime.

On the part of the prosecution, they responded as follows:-

1. On the question why Antidius and other people who claimed to have seen the accused hiring the deceased were not called as witnesses in court, the prosecution responded that the witnesses called have managed to show that the accused committed the crime charged and there is no breakage of the chain, as such they did not think it necessary to call Antidius or any other witness on the question, in court. They also prayed to the court not to draw adverse inference as everything went according to how it should be. The court had an opportunity to see the demeanor of all witnesses before it thus they prayed to the court to consider their testimonies as they are credible witnesses as per the decision of **Goodluck Kyando v. Republic** [2006] TLR 363.
2. Even though Exhibit P5 was found in Uganda side of the border, it was within the area which is accessible without any documentations and that they had not crossed the part that required authorizations. That PW3, PW4 and PW5 who had an opportunity to be at the place where the motorcycle was found also explained this to the court.
3. About showing where the body was to the police PW4 explained that in the Defender the accused sat behind facing behind also, the accused was not communicating with the driver but the policeman seated beside the accused at the back (PW 3). And it is the police who called him informing him that the accused has told them where he left the deceased.



4. On the register (exhibit P4), PW3 explained now he got it, how he took a copy and certified the same. The witness clearly explained that he did not know the accused before that day and that there were no grudges or any reason of him testifying untruthfully.
5. On the issue of confession, on 7/12/2017 the accused made an oral confession about the whereabouts of the deceased, his confession has resulted in the discovery of the body in the sugarcane plantation at Kagera A. The oral confession is backed up by Section 31 of the **Evidence Act**, (Cap. 6 of the laws). There's also a confession of the accused before justice of peace (exhibit P6) and the cautioned statement (exhibit P3) where by the accused admitted to have committed the crime leading to discovery of the body.
6. On admissibility of the cautioned statement, the claim that the accused did not make it is an afterthought. This has not been raised earlier as required, but during his defense. Although the prosecution is duty bound to prove the case, the accused has a duty to prove his allegations as this one. In **Samwel Mkika v. Republic**; Criminal Appeal No. 47 of 2001 (CAT) Mwanza (unreported) page 16 they prayed the court to consider it as an aforethought.

7. Concluded that the whole chain of events on the issue that the accused is the one that caused the death has also been proved beyond any reasonable doubt.

I have considered both party's final submissions, analyzed the doubts raised by the defense side, the responses by the prosecution as well as the applicable law and wish to respond as follows;-

On the question of Antidius and other witnesses not being called to testify about the aspect of seeing the accused hiring the deceased; in terms of Section 143 of the **Evidence Act**, (Cap.6 R.E. 2022) no specific number of witnesses is required to prove any fact. The position of the law being clear about the number of witnesses, what is important is the quality of the evidence and it's credibility. As submitted by the prosecution, they called the witnesses they considered substantial and credible in proving their case. It is their choice. The court is to give its decision basing on what has been brought before it. I have therefore considered the evidence before me basing on the decision of **Goodluck Kyando v. Republic**, (2002) TLR 363 that *every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing the witness*. I have considered the testimonies of the prosecution witnesses in depth. I do not see any reason for disbelieving them.

About the motorcycle ignition keys not being brought in court thereby doubting their presence; it must be noted that the prosecution is not compelled to tender anything in evidence. If they fail to tender material evidence in their possession, it is so done at their own detriment and an advantage to the defense. In giving the decision, I considered the evidence that was brought in court.

On the doubt about the seizure of exhibit P5 in Uganda, I took judicial notice on the procedure as adduced by PW3, the police officer whose duty is dealing with such matters on daily basis. He stated that they had communicated with the border police when seizing it. I have no reason to disbelieve PW3. The accused is connected to exhibit P5 through oral testimonies of PW3, PW4 and PW5. He is also connected through exhibits P3 and P6, credibility of which shall be dealt with in due course.

On the ability of the accused to direct the driver to the place where the body was found; PW3 explained how this was done. He was seated with the accused at the rear and he communicated to the driver what the accused was informing him. The result of the accused's statement led to the discovery of the body. Again, I have no reason in disbelieving PW3. Nevertheless, I agree with the prosecution that the accused's action having led to the discovery of the body, falls under Section 31 of the **Evidence Act**, (Cap. 6 of the laws) which provides that;-

*'When any fact is deposed towards discovery in consequence of information received from a person accused of any offence in the custody of any Police Officer, so much of such information whether it amounts to a confession or not, as relates distinctly to the fact that hereby discovered is relevant'.*

The oral statement and action by the accused while in the custody of PW3 is given evidential weight, which under the circumstances, amounted to a confession.

On the copy of the guest house registry (exhibit P4); I have observed PW3 testifying in court and particularly when tendering exhibit P4 and I have not observed anything that would make me doubt the credibility of PW3. The claim of the motorcycle in question being found in the Happy Hour Guesthouse is not based on exhibit P4 alone but also on the testimonies of PW3, PW4 and PW5. All these together place the motorcycle in question in the possession of the accused.

On the claim of the cautioned statement (exhibit P3) not being made by the accused and outside the prescribed time; as stated by the prosecution, this was raised by the accused at his defense, as an afterthought. When PW3, who recorded the cautioned statement was testifying, the accused prayed that the court ignores the cautioned statement because it was taken contrary to Section 50(1)(a) of the **Criminal Procedure Act** (CPA), (Cap 20 of the

Laws) (outside the legally prescribed time of 4 hours) as the accused was arrested on 06<sup>th</sup> December 2017 while his statement was recorded on 08<sup>th</sup> December 2017. This is different from what was raised at the trial. At the trial, the accused claimed that the confession was taken outside the prescribed time and the time the recording was finished was not indicated. At no point did the accused state that he did not make the statement. From the testimonies, the accused was apprehended and charged with motorcycle theft on 06<sup>th</sup> December 2017. The charge of murder was preferred against the accused on 08<sup>th</sup> December 2017, after the body was found. The statement was recorded in the evening of the same day. As the court was invited to deal with procedure under Sections 50(1)(a) and 57(2) of the **CPA**, the learned counsel made submissions on the same. Basing on the principles in the cases of **Chacha Murimi v. Republic**, Criminal Appeal No. 551 of 2015 (CAT Mwanza) and **Yustas Katoma v. Republic**, Criminal Appeal No. 242 of 2006 (CAT Mbeya), (both cases unreported), the Court took into account the complications in investigation and having looked at the cautioned statements in issue, which contained information relevant to the fact in issue, was of the considered view that there was no possibility that the omission to comply with provisions of Section 50 of the **CPA** amounted to an irregularity affecting the root of the matter so as to invalidate the cautioned statements in question. As in the cited cases, this court too ruled that what was contravened was

procedural matter which did not affect the weight attached to the substance in the cautioned statement.

On whether the failure to record the cautioned statement within a period of four hours prejudiced the accused; in **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 (CAT) (unreported), the Court was faced with similar predicament but after being satisfied that the trial court in admitting the cautioned statement of the accused took into consideration the complication in investigations, the benefit of public interest and that the rights and freedoms of the accused were not unduly prejudiced, the Court held that; *'it is not correct to take that every apparent contravention of the provisions of the CPA automatically leads to the exclusion of the evidence in question'*. As in the above cases, this court too ruled that although the two provisions were important, but noncompliance of the same was not fatal because none of the rights and freedoms of the accused were prejudiced. The cautioned statement was admitted as evidence in court. As stated earlier, the claim that the accused did not record the cautioned statement is a mere afterthought.

On the prayer by the accused that the extra judicial statement (exhibit P6) be given no weight; the same was raised and resolved this at the trial. Trial within a trial was conducted to determine admissibility of the statement. At the end of which, this court ruled that the extra judicial statement was admissible as evidence after finding that there were no threats to the

accused. The accused did not indicate of existence of any threats to his life neither to PW6 while recording the statement nor at the trial during cross examination. Evidently, the accused recorded the statement before the justice of peace and he did so voluntarily. The same was therefore admitted as evidence in court.

Having cleared the doubts raised by the accused, I went on to consider the availed evidence in relation to the offence the accused is facing. This being a criminal case and particularly a murder one, the prosecution has a duty to prove three main ingredients; that there is an unnatural death; that the said death was a result of unlawful act or omission by the accused and that *malice aforethought* was involved. Each of these ingredients has to be proved beyond reasonable doubt by the prosecution.

At the outset, it is noted that the case is based on circumstantial evidence as well as the accused's confessions. I am in agreement with the defense that evidence that requires corroboration cannot be used to corroborate other evidence. I am also in agreement with the prosecution on the trite law that circumstantial evidence can lead to conviction if there is inference that it is the accused and no other person who has committed the crime. Such evidence should be truthful with a complete chain leading the accused to the crime (refer to the case of **Mashaka Juma @Mtalula v.**

**Republic;** Criminal Appeal No. 140 of 2020 (CAT) (unreported)). I have thus considered the availed evidence as shown below.

On the first ingredient, the cause of death has been proved by exhibit P1 and PW1, the doctor who examined the deceased's body. PW1 testified that the deceased met his death due to a cut to the heart that resulted into bleeding and immediate stoppage of the heart. PW3, PW5 being independent witnesses, exhibit P1- the post mortem report, exhibits P3 together with P6 (the accused's narration of the way he inflicted the injuries are relevant) have corroborated the testimony of PW1. PW3 and PW5 saw the wounds. There is thus sufficient evidence proving to the required standard that the deceased died from unnatural cause.

As to evidence concerning the second ingredient; the accused's involvement in the commission of the crime is again based on three principles. The first principle being the accused being the last person to be seen with the deceased; the second, that the accused was found in possession of the motorcycle driven by the deceased (the doctrine of recent possession); and third, the accused's own confessions.

According to PW4, the accused had been the last person to be seen with the deceased (on the 5<sup>th</sup> December 2017). As stated earlier, this is the only witness testifying to that effect. He testified that while searching for his brother on the same day he disappeared, he was told that he was seen with



the accused. PW4 and PW5 testified that from that day the deceased was never seen again until he was found dead in the sugarcane plantation on 08<sup>th</sup> December 2017. PW3 corroborates what is stated by PW4 and PW5.

The accused and PW4 are people who knew each other even before the incident (both, the accused and PW4 testified to that effect). The accused was also well known in the area. He was seen several times with the deceased during the day, such that there is no possibility of mistaken identity. PW4 was well composed when testifying. I considered the credibility of this witness and have seen no reason of discrediting him. He seemed like a genuine and truthful witness to me.

On the principle of *the last person to be seen with the deceased*, the Court in the case of **Mathayo Mwalimu & Masai Rengwa vs. Republic** [2009] TLR 271, held that;-

*'the accused person is alleged to have been the last person to be seen with the deceased in the absence of a plausible explanation to explain away the circumstances leading to death, he or she will be presumed to be the killer'.*

I am well aware that the last seen principle must be applied with caution, (see **Japhet Kalanga vs. the Republic**, Criminal Appeal No. 332 of 2016, CAT at Mbeya (unreported)) as the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person (also see

**Shabani Mpunzu @Elisha Mpunzu v. Republic**, Criminal Appeal No. 12 of 2002 (unreported)). In the case at hand, in the absence of other evidence, there is no plausible explanation to explain away the circumstances leading to the accused's death. But as said earlier, this is not the only principle against the accused. The accused was also found to be in possession of the motorcycle's ignition keys and later the motorcycle (exhibit P5).

The doctrine of recent possession is expounded in the case of **Joseph Mkumbwa & Samson Mwakagenda Joseph v. Republic**, Criminal Appeal No. 94 of 2007, the Court stated thus:-

*'Where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained.'*

The testimonies of PW3, PW4 and PW5 are to the effect that the accused was in possession of the ignition keys to exhibit P5. What followed therefrom was finding exhibit P5 which the accused kept at the Happy Hour Guesthouse in Mutukula area. The prosecution reported that the receptionist who identified the accused and recorded the motorcycle (exhibit P5) in exhibit P4, was not found as she was no longer working there. I have considered the testimonies of availed witnesses in relation to the chain of events and found their testimonies to be consistent with the rest of the evidence. PW3 was led

to exhibit P5 by the accused himself when interrogated at the police station; while PW4 and PW5 found the same independently. Again, I had no reason in doubting their testimonies, which I found to be believable. In combination with the above, I also considered the accused's confessions.

The relevant parts of Section 3 of the **Evidence Act** (supra) define confession as;-

- a) *Words or conduct, or a combination of both from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person who said the words or did the act or acts constituting the conduct has committed an offence; or*
- b) ..
- c) *A statement containing an admission of all the ingredients of the offence with which its maker is charged; or ....*

Section 3(a) of the **Evidence Act** (supra) squarely covers the statement and actions of the accused to PW3 which eventually led to discovery of exhibit P5 as well as the body in the sugarcane plantation. Exhibits P3 and P6 fall under Section 3(c) of the Act. As per the case of **Michael John @Mtei v. R**, Criminal Appeal No.202 of 2012, CAT (unreported);-

*'for a statement to qualify for a confession it must contain the admission of all the ingredients of the*

*offence charged as provided for under section 3(c) of the **Evidence Act**, 1967.'*

Further, in a confession the prosecution has to prove that the accused by his conduct or words made a statement and the statement or conduct amounting to a confession was freely and voluntarily made (see **Diamon s/o Malakela @Maunganya v. Republic**, Criminal Appeal No.205 of 2005, CAT (unreported)).

There is a statement by the accused before PW3 that led to discoveries of exhibit P5 as well as the body of the deceased in the middle of the sugar cane plantation. That statement, as correctly submitted by the prosecution, falls under Section 31 of the **Evidence Act** (supra); there is also exhibit P3 and exhibit P6. Exhibit P6 being a retracted confession, the Court of Appeal in the case of **Rashid Ally Mtiliga and Two Others v. Republic**, Criminal Appeal No. 240 of 2004, CAT (unreported) had this to say:-

*'In ideal cases, retracted confessions need corroboration as a matter of practice. Of course, in saying so we are aware that it is possible for a court to convict on a retracted confession even without corroboration but such a confession must be received and treated with great care, caution and reserve.'*

As stated earlier, trial within trial was conducted in respect of exhibit P6 and it was found to have been made by the accused voluntarily. The voluntariness of exhibit P3, on the other hand, remained unchallenged. I have made comparison between exhibit P3 and P6 and observed that the type of weapon used is different. In exhibit P3 it is said to be a knife while in exhibit P6 it is a nail '*msumari*'. There is an interval of about ten (10) days between recording of exhibits P3 and P6, thus it is quite possible that the accused, upon reflection decided to change his story so as to distort the evidence. I do not think that this can in any way distort the evidence as a whole against the accused. Even if exhibit P6 is ignored, as prayed by the defense, exhibit P3 is consistent with the injuries as testified by PW1 and exhibit P1. Exhibit P3 therefore, can safely be relied on to prove the case against the accused, following the trend established in the case of **Mukami Wankyo v. Republic** [1990] TLR 46, where the court stated that '*any confession containing nothing but the truth of what transpired can safely be relied by the court to determine its admissibility and conviction*'. Having considered the same, it is my considered view that exhibit P3 contains nothing but the truth and the evidence as a whole points at the accused and the accused alone as the person who killed the deceased.

At this juncture, I wish to consider the defense of *alibi* raised by the accused. He stated that on the day in question he was at his home and that

he did not go to the places in question. First and foremost, the law is settled under section 194(4) of the **Criminal Procedure Act**, [Cap 20 R.E. 2019] on the requirement to give notice when relying on the defence of *alibi*. The provision reads;-

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

*(5) Where an accused person does not give notice of his intention to rely on the defence of *alibi* before the hearing of the case, he shall **furnish case before the prosecution is closed.***

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

In the decision of **Marwa Wangiti Mwita & Others v. Republic**, [2002] TLR 39, it was emphasized that for one to rely on the defense of *alibi*, first he has to give notice and second give evidence on the fact of the said *alibi*. In this case, there is neither notice nor evidence to that effect, as such, by virtue of Section 194(6) of the **Criminal Procedure Act** (supra), the court has discretion to accord it weight or otherwise. I have decided to consider the defense even without the prior notice. The accused did not call any witness nor produce any other type of evidence to substantiate his *alibi*. It is unfortunate because the evidence adduced by the prosecution is watertight

against him. His *alibi* stands no chance in shaking the prosecution evidence in any way.

I shall now move to the third element of *malice aforethought*. *Malice aforethought* is provided for under Section 200 of the **Penal Code** and the leading case in this area is **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994, (CAT Mbeya) (unreported) which explains the indicators of *malice aforethought* as follows:-

*'Usually an attacker will not declare his intention 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 blow was directed at or inflicted on, (4) the number of blows, although one blow may, depending upon the facts of the particular case, (5) the kind of injuries inflicted, (6) the attacker's utterances, if any, made before, during or after the killing; and (7) the conduct of the attacker before and after the killing.*

Exhibit P1 indicates that death was a result of direct stabbing into the heart using a sharp object. Exhibits P3 and P6 contain confessions of stabbing the deceased directly on the heart. The weapon used by the accused being a sharp object which was used to inflict a fatal blow directly into the deceased's

heart, indicates without any doubt that the accused acted with *malice aforethought*.

Consequently, there is enough evidence to join the accused person with the offence as charged. It is thus my finding and decision that the prosecution has proved the case of murder against the accused **FERNANDES FRANCIS**, beyond reasonable doubt. I therefore find the accused, **FERNANDES FRANCIS** guilty of the offence of murder contrary to Section 196 of the **Penal Code** (Cap 16 R.E. 2002) as charged, and convict him accordingly.

It is so ordered.

**Dated at BUKOBA** this 16<sup>th</sup> day of December 2022.

*M. P. Otaru*

M.P. Otaru  
**Judge**

### **SENTENCE**

There is only one sentence for murder provided by the law. That sentence is death by hanging. I therefore and hereby sentence **FERNANDES FRANCIS** to suffer death by hanging.

The right of appeal to the Court of Appeal is explained.



*M. P. Otaru*

M.P. Otaru  
**Judge**  
16/12/2022