

IN THE HIGH COURT OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI
ORIGINAL JURISDICTION
CRIMINAL SESSION CASE NO. 44 OF 2019
REPUBLIC
VERSUS

- 1. ERICK WILSON TEETE**
- 2. FADHILI MOHAMED @ MUSHI**
- 3. JOHN JAMES DANIEL**
- 4. NASSORO ALFAN NASORO**
- 5. PASCHAL JOSEPH MUSHI**
- 6. IBRAHIM ATHUMAN MKINDI @IBRA**
- 7. ROBER JOHN MASSAWE @ KIPARA**
- 8. JUMA HAMIS RAMADHANI**

JUDGMENT

7th & 14th December, 2022

A.P.KILIMI, J.:

In this case, eight accused persons, namely Erick Wilson Teete, Fadhili Mohamed @ Mushi, John James Daniel, Nassoro Alfani Nasoro, Paschal Joseph Mushi, Ibrahim Athuman Mkindi @Ibra, Robert John Massawe @

Kipara and Juma Hamis Ramadhani are charged before this court of two counts, both counts are in respect to the offence of murder under section 196 of the Penal Code [Cap 16 RE 2019]. It was alleged by the prosecution that on 3rd July, 2016 at Shanty Town area within Moshi District in Kilimanjaro Region, both accused did Murder one Dominick Boniface Cheddy. Also on the same date, they did murder another person named Omary s/o Mohamed Idd Amini. When the information of these two counts of murder was read over and properly explained to the accused persons, they pleaded not guilty.

A brief summary of the facts, reveals that on the 3rd day of July, 2016 the two deceased persons were on duty as watchmen at Asante Tours Office, during night hours the accused invaded the said office and robbed therein, It was during the commission of robbery whereby the accused person took a decision of killing the deceased after one of the accused realized that the watchmen identified him while he was committing robbery, after fearing that the deceased persons would reveal his identity of him, so they decided to kill the deceased persons.

The deceased bodies were found in the morning at about 07:00 hours and the matter were reported at the police station. The Police arrived at the scene of the crime whereby the sketch map was drawn and the bodies of the deceased were taken to KCMC. The autopsy revealed the cause of death to be blunt force trauma to their head.

In the course of Investigation second accused person namely Fadhili s/o Mohamed Mushi was arrested and during interrogation he confessed killing the deceased persons and also implicated other accused persons. This led other accused persons to be arrested on other dates. All the accused persons confessed to having taken part in he said robbery which led to the killing of the deceased person. Also, their interview was recorded via video, this was done in respect to 1st, 2nd, 3rd and 7th accused persons.

When the facts were read during the preliminary hearing, matters which were agreed upon are; one, their names of the accused persons save for the 6th and 7th accused who rejected @ names and two, that the accused were arrested and now stand charged with this offence of murder.

To establish the charge against the accused, the Republic paraded thirteen witnesses and tendered fifteen exhibits. The witnesses were; Inspector Pessa (PW1), Inspector Leons Lehani Mwamunyi (PW2), G2362 DC Kabelwa (PW3), Dr. Patrick Amsi (PW4), E3234 D/Ssgt James (PW5), Rogath Minja (PW6), F1157 D/Ssgt Hashim (PW7), Elias Haway (PW8), Assistant Inspector Uswege Msangarafu (PW9), Tom Paulo Swai (PW10), E9572 Sgt Charles, Gilbard Gilian Shangali (PW12) and E9456 Ssgt Zephrine (PW13)

The Exhibits tendered were; caution statement of John James Daniel (Exh. P1), Report on Postmortem examination of Omari Mohamed Idd Amini (Exh. PE2), Report on Postmortem examination of Dominic Boniface Cheddy (Exh. PE3), Certificate from Forensic Bureau (PE4), Two CD (Exh. PE5), Handing over certificate from PW6 (Exh. PE6), caution statement of Nassoro Alfani Nassoro (Exh. PE7), caution statement of Ibrahim Athmani Mkindi (Exh. P8), caution statement of Erick Willison Teete (Exh. PE9), caution statement of Robert John Massawe (Exh. PE10), caution statement of Paschal Joseph Mushi (Exh. PE11), caution statement of Juma Hamisi Ramadhani (Exh. PE12), sketch map of the crime scene (Exh. PE 13), caution

statement of Fadhili Mohamed Mushi (Exh. PE 14) and handing over certificate from PW13 (Exh. PE 15).

At the hearing of this case, the Republic at first was represented by Mr. Kassim Nassir and Sabitina Mcharo State Attorney and later Mr Kainunura Senior State Attorney and Malima Maabuba State Attorney, while the accused persons enjoyed the legal services of the following learned advocates; Mr Elisante Kimaro for first accused, Mr Leonard Mashabara for second accused, Mr Emmanuel Antony and Ms Magdalena Kaaya for third accused, Mr Pius Ndanu for fourth accused, Mr. Modestus Njau for sixth accused, Mr. Yusufu Mwangazambili for seventh accused and Mr Philip Njau for eighth accused person.

In respect to the bench, I was accompanied with the aid of lady and Gentleman Assessors namely; Mama Swaumu Kyara and Abdalah Mtwenge. My legal assistant was Ms Kakolaki.

In brief, the prosecution evidence in this case based on the following facts; a per testimony of OC CID one **Elias Haway** (PW8) said, on 3/7/2016 he got information that there is incident of killing happened at Asante Tours in Moshi Urban, at Shanty town area. He went to the scene with other police

officers, there he saw two watchmen killed, one being outside on the corridor and other was inside. He then ordered investigations to start immediately. Later on, 28/8/2016, he got information from Arusha that, there are accused persons engaged in that incident of killing at Asante Tours, He appointed a team of police officers to go to Arusha for making follow up and arrest, in that operation, that team managed to arrest some of the accused persons and brought at Moshi Central Police Station.

PW8 further said, after being arrived, he interrogated them, on earlier interview they confessed to commit the said killing, after being seen that they confess, he then decided to interrogate them again by recording video. this was done in respect to Robert Massawe @Kipara (seventh accused person) and Erick Wilson Teete (first accused). PW8 also said in that interview both confessed that they participated on that killing of the two watchmen and mentioned the others. Robert Masawe mentioned Erick Wilson Tetee, Nassor @war bus, Juma Hamisi and Ibra. While Erick Wilson Tetee mentioned Massawe @Kipara, Nassoro, Big and Ibra. Then PW8 handled them to investigators to continue with other process.

In cross examination, PW8, stated that, when attended the scene of crime early morning, outside the said house there was a safe money custody broken, also the owner of Asante Tours gave them statement of the incident and told them the money was stolen. After the incident he ordered the murder file be opened. In respect to accused arrested at Arusha he got information on 28/8/2016, it is about 07:00 hours, accused person were free at the areas called Njiro Arusha, after that he instructed immediately a team which rushed at Arusha, and returned in Moshi at about 11:00 to 12:00 hours. In respect to interrogation through video he said, is the one who initiated it and he did it under section 59 of the Criminal Procedure Act CPA Cap.20.

On his part, **Best Eliasafi Pesa** (PW1), stated that on 28/8/2016 being on duty as a police Inspector, he was instructed by OC CID, SP Elias Awayi (PW8). To prepare police officers who will go at Arusha to take four suspects, he secured three officers and rushed with them at Arusha using 45 minutes. After arriving Arusha Central Police, they waited for five minutes, a police motor vehicle of Arusha, arrived with four (4) suspects. PW1 further said, he was handed over the suspects. He mentioned their names to be

Erick (Manyele), Fadhili Mohamed, Robert@ Kipara and John Big. He then led the troop with accused persons back to Moshi and handed over them to OC CID (PW8).

In cross examination PW1 stated that, the suspects were handed over to him normally. There was no any documentation. At police Arusha, they did not tell him the time the suspects were under restraint, He was told they are suspects in the murder of Asante Tours officers in Moshi. When he was instructed to go to Arusha, he did not know whether they have already been arrested.

Along with the version of PW1 above, Insp. **Leons Lehani Mwamunyi** (PW2), told this court that on 28/8/2016 being on duty at RCO's office Kilimanjaro, He received information from an informer that a suspect of murder at Asante Tours officer has been seen at Uru area. Arusha, he mobilized a team of police officers, D/Sgt Wilson, DC Derick, DC Goodluck, DC Felician and led them fast at Arusha, upon reaching Arusha, they knew the home of the suspect through an informer. When they were heading, they were told the name of the suspect. That was Paschal Joseph Mushi. PW2 further said, they found him in his home and managed to apprehend him despite of his attempt to run, by then it was 12 noon.

Later he received other information in respect of the person known as Ibrahim Athuman Mkindi @ Ibra, that is at Kalimani area at Bodaboda station, the team went to the area and around 15:30 hours they identified him and arrested him. They went with him for the purpose of search, they find him with nothing and at about hours 17:00 they handed over him at CRO for other procedure.

PW2 added that, on 9/9/2016 being in office at around 1:00 hours, he received another information from the informer concerning another suspect who was said to have participated in the murder at Asante Tours. He was told that his name is Juma Hamis Ramadhani. This time, he led another squad of police officers namely; S/Sgt Makinda, D/Sgt Wilson, D/CPL Fatuma, DC Lameck D/C Erick, Victor and DC Goodluck. They arrived at the resident of Juma Hamisi Ramadhani at around 4:30 am. He was present, they managed to arrest and searched his home and obtained Bangi cannabis sativa (Bangi). The accused took them to look for other suspect unsuccessful, they returned him at the Moshi Police central.

In cross examination PW2 said that, he knows report book. It is used to keep record of all information's reported at the Police station. He did not know Paschal Joseph Mushi before, the process of arresting the suspects

was done and recorded. The informer gave intelligence information relating to the involvement of the suspects. A report of the event was brought at police central by a representative of the company of Asante Tour, Culprits entered the premises by cutting a fence. Before killing them, deceased were tied with ropes. Apart from killing the suspects stole money.

Another was **G. 2362 DC Kabelwa** (PW3), testified that on 28/8/2016 being on duty at around 13:00, OC-CID Moshi District SP Haway Elias handed to him one John James Daniel (third accused). PW3 further testified on how he interrogated him and later recorded his statement in which the accused stated how he participated and mentioned the other accused persons who were together. He further tendered that caution statement which was admitted as exhibit P1.

In cross examination, PW 3 said, the suspect mentioned Erick and another person called Kipara. He added that most criminals use @ names to hide their true identities. The names used which were mentioned are among the suspect. In his statement the accused said they used a club to kill. He also said laptop and a camera are with Erick and money stolen were distributed to the suspects.

PW3 again turned to this court as a recalled witness, he told this court he also did interrogate Nassoro Alphan Nassoro, the fourth accused person, he explained how he took his caution statement, the same was tendered and admitted as PE7. He further added that, the accused person confessed to participate on killing of Asante Tours and mentioned all accused persons participated on that incident.

Another witness, **Patrick Amsi** (PW4), a Medical doctor told this court he did examine the dead body which was identified to him as Omari Mahamed Idd Amin, he reveled a deceased body had wounds on the Head, on right eye, the body was discharging blood from nose, also it had wound on head fore left, after that he examine inside the head by dissecting, in order to reach Head borne. He identified that Head Borne was broken, also He saw blood drained in brain, then he concluded that the death of deceased was caused by those injury on head, and in his professional it is called Blunt force trauma to the head, he then wrote Postmortem Report which was admitted as exhibit PE2.

PW 4 further did another postmortem of the other dead body, which was identified to him to be of Dominick Boniface Chedi, He look outside the

body, the deceased were having wound at right ear, also he was discharging blood from that ear right, also he was having a big wound on front head (*Kichogo*) also he got break of lower jaw by a cut from left and right across. Then he concluded to hold that death was caused by Blunt force trauma on the head, He tendered a postmortem report which was admitted in this court as exhibit PE3.

Another witness, **E 3234 D/S/SGT James** (PW5) told this court being a Police Officer, working at Forensic Bureau at Picture/Photo Department. On 17/12/2018 received a letter from OC CID Moshi District, it was annexed with 2 CD, it wanted to inquire forensically on its authenticity. After forensic investigation, He identify that those video inside is pure with authenticity and not man made, He also discovered that both CD have the same video clip. He then prepared certificate to prove what he did approve and sent it back with the said certificate to OC-CID Moshi, he tendered the said certificate which was not objected and admitted as exhibit PE4. PW 5 further tendered the two CD he inquired, which was admitted and marked exhibit PE5.

In cross examination, PW5 said, He did not inspect the quality, he admits there were sounds of other commotions, like movement of cars, and

other noises. Jump cut (*mkatiko*) can happen if the device length end, He has to change, the issue of jump cut (*mkatiko*) is unavoidable.

It was then, **Rogath Constantini Minja** (PW6), on 28/8/2016 being a police officer at Forensic Bureau Department at Kilimanjaro RCO office, he was instructed by Haway who was OC-CID to record his interrogation with two accused persons, He did that duty using camera SONY PD 175. After that another interrogator entered the room prepared, who was Afande Hashimu (PW7), who interrogated two accused persons and both were video recorded. He then transformed that image into re-writable CD. Later on 17/12/2018 he sent the DVD to Photographic forensic at Police Headquarter Dar es salaam by handing over to S/Sgt Zephrine using handing over certificate, he tendered the said Handing over Certificate which was admitted as exhibit PE6.

In cross examination, PW6 said, He did not set time or date of recording. He certified in his explanation that is one who recorded the said video, Pictures depend on the largeness of the room, in order to capture sound, he has to be nearby. DVD which is re-writable means you can't add or reduced its content.

However, PW6 was recalled for further cross- examination, he said it was a video of what accused persons knows about the offence they were alleged with, that interrogation recorded was not caution statement. In re-examination, he said, he did not give them copy, because it was not the requirement of the law, jump cut (*mkatiko*) was caused by error by DVD and Tape.

Next was a police officer, **F.1157 D/SSGT Hashim** (PW7) stated that, on 28/8/2016, being in RCO office Moshi on duty, he got instruction to conduct interrogations of two accused persons, those interrogation was recorded via video by a police officer from forensic department. He started with the accused person known as Fadhili Mohamed Mushi who confessed to participate on that killing of Asante Tours 3/7/2016 Saturday night. He also mentioned the other culprits who were together on that killing, he mentioned them by name Ibrahim or Ibra shoeshine, Kenge, Mussa Kaujenge, Paschal and other called Juma, Erick Samwel, John James@ Big and Nassoro @WarBus.

PW7 further added that, he continued with second accused person, who was called John James Daniel @JohnBig, who also confess to participate

on the said killing by using motorcycle as a rider (*bodaboda*), he was riding accused from one area to another area.

Assistant Inspector of Police **Uswewe Msangarafu** (PW9), testified how on 29/8/2016 he recorded the statement of Ibrahim Athuman Mkindi @ Ibrahim Shoe shine, on the said interrogation, the accused told him, how he participated and did the said incident of killing, also he told his chance in participation and how he gained advantage in that offence. The said caution statement was admitted as exhibit PE 8.

Furthermore, **Tom Paulo Swai** (PW10), stated he was employed at Asante tours as a store keeper from 2014 to 2020, he knew Juma Hamis Ramadhan (eighth accused), because they worked together, he recalled that he worked as a porter, cooker and also bicycle repair, he also said he left the said job on 2015. In cross examination PW10 said that on the fateful day he was the first to reach the job at Asante Tours Office, it was at 06:30 hours, He saw watchmen deceased bodies, having blood, He called Cuthbert Swai the owner, who called Police Officer, those watchmen used to guard at night.

Another prosecution evidence was is **E8572 Sgt Charles** (PW11), who said on 28/8/2016 he took the caution statement of Erick Willison Teete (first accused) and that of Robert John Masawe (seventh accused), he also said each confessed before him to participate on the said killing and mentioned the others. Again on 29/8/2016 he did interrogate the fifth accused, one Paschal Joseph Mushi and Later on 9/9/2016 he was given another task of taking the caution statement of Juma Hamisi Ramadhani (eighth accused). These caution statements after trial within a trial was admitted as exhibits except the caution statement of the fifth accused person which was admitted without objection.

In cross examinations PW11 said, He was not an arresting officer, those four accused people talked the truth, what connected them with the offence charged is their statement they stated to him. He also said, it is true that at Asante Tours office, there were House Breaking.

On his part, **Gilbard Gilian Shangali**, (PW12) stated is the Manager of Asante Tours, on 3/7/2016 at 07:00 hour, being at Machame, He received a call from co-worker called Fredrick Shoo, who told him to rush to office,

he told him there is a big problem, He rushed at office and found many people and Police officers, then he was told that the office is broken and two watchmen killed, being accompanied by police officers, they entered at waiting room, one watchman was seen dead, was called Omary, after that they entered inside, in a corridor he saw another watchman dead on the corridor, he was called Dominic, after that they entered into his office, they find things dispersed and the cabinet being wrecked, file were opened, in that cabinet, inside there was money safe custody of the company, he saw being removed, also checks books were not there, in that safe custody, passports of guests were removed and dumped on the ground, then after two days, they knew that Tshs 15,000,000/= and USD 13,000/= which were kept in Accountant office was stolen in that incident, then the incident continued to be investigated by Police. He knows the eighth accused person because he used to be an employee at Asante Tours Office.

In cross examination PW12 said that, as procedure when guests go to mountain, valuable things remain in office, such as money, passports, when incidents happen, He was having about 10 guests, the said stolen money belong to tourists, one of guest did not get his passport.

The last prosecution witness, **E9456 Ssgt Zephrine** (PW13), he was the investigator of this case, on the fateful day morning he went to the scene of crime with other police officer led by OC-OCD Moshi (PW8). They did inspect the scene of crime and found two men killed who were watchmen at Asante Tours Office, Next day on 4/7/2016, he went again and then drew the sketch map. He did that job with the aid of the manager of that office (PW12), He tendered the said sketch map which was admitted and marked PE13. PW13 added that on 28/8/2016 he was tasked to record the caution statement of the second accused person one Fadhil Mohamed Mushi, he told this court on how he did in that task. Another task he did, is to prepared a handing over certificate, after he took the said CDs from Forensic Headquarters, he was the one who took them from Dar es salaam, therefore the certificate prepared was signed by him and Sgt Rogath (PW6), the same was admitted in this court as PE15.

In cross examination PW13 said at the scene, they found many people, the house was broken and things stolen, He did not take finger prints because people were already distorting the evidence to be taken by finger prints. The Detention Register was destroyed as per PGO. Other suspects mentioned like Kenge and Mussa Kaujenge never been arrested. The second

accused said they were seven, he mentioned, Ibra shoe shine, Erick, Clemence Ngonyani, Kenge, Mussa Kaujenge, Robert Massawe @ Kipara and John Big.

That marked the end of the prosecution case, consequently this court found the case to answer have been established against all accused persons, then were called upon to defend themselves after given their fundamental right in terms of the provisions of section 293(2) of the Criminal Procedure Act, Cap.20 R.E 2022.

In his defence, first accused **Erick Wilson Teete** (DW1), **denied** to commit the two counts charged. He testified that on 25/8/2016 at 21:30 hours being at Ilboru, he caught in flagmento delicto one Police Officer called Hamisi with his fiancé called Happy, there at the fighting started among them, Hamisi managed to escape. Later at about 23:00 hrs, the door was knocked, 5 police officers, entered the house and arrested him, then he was sent to Police Central Arusha. He said Hamisi continue to threatened him for the act he did due to his fiancé and promise him for vengeance. on 26/8/2016 at 16:00 hours, he was transferred to Moshi, after arriving at Central Police Moshi, he was charged with the offence of Murder.

DW1 further denied totally to write a caution statement, he said he was forced to confess after torture of severe beatings and electric shocks, he showed old scars in his body. In respect to the video recorded he also said before he entered recording room, police officers beaten him and ask him to say what they want, during interrogation they ordered recording to stop until he talks what they want. Also, they ordered him, to speak names which he don't know, like, warbus, Ibra. DW1 also added that on 28/9/2016 in subordinate court ordered police to send him to Hospital but they refused, he also requested for detention Register to prove the offence he was charged with, it never delivered to him.

Responding to questions on cross examination by the prosecuting Senior State Attorney, he said his fiancé live with many neighbors, he did not inform anybody but changed that he informed co-tenant.

In regard to the second accused, **Fadhili s/o Mohamed @ Mushi**, (DW2) stated that, on 26/8/2016 he was arrested by police officer at Arusha selling five pairs of shoes which they suspected him that he has stolen somewhere, he was then remanded in Arusha Central Police, next day at

about 17:00 police officer closed his eyes with a piece of black cloth and moved him with the police motor vehicle. When the said cloth in his eyes was removed, He realize is at Moshi central police, thereat he was tortured for two days but he refused to agree, on 28/8/2016 at 16:00 hours, he was again taken to the torturing area known as Mbao, torture continued one police officer called Zephrine forced him to sign otherwise he should be killed then he signed. In respect to video recording, police officers beaten him and ask him to say what they want. He added he was forced under the gun point which was not seen in the video and sometimes the video stopped to coach him what to say. He further said on February, 2022 he requested for Detention Register which was not brought which could have shown the date of Arrest.

Responding for question of clarification by gentleman court assessor, DW1 said, the Register they prayed, they did sign together in one letter, it shows the date they were arrested.

Next is the third accused person, one **John James Daniel** (DW3), he defended that, on 2/9/2016 on the way from Arusha to Moshi, he was arrested by police officer, when he was searched, he was found with one roll

of Bangi, he was taken to Moshi police central. In the evening he was taken to a place he called Mbao, there he was tortured for 30 minutes and later he was given a paper to read which it has the incident of killing at asante tours and stealing a Bureau de change, he refused. Later next day he was taken again at the same place, preparation for torture started and after being told he will pass the same torture inflicted last day, he agreed and signed. Also, in respect to interrogation by video he also reiterated what DW1 and DW2 have said, but for him he added that during the said video recording the gun was corked and he was so scared and agreed on what he was forced to say.

In regard to fourth accused, **Nassor Alphan Nassor** (DW4), stated that, on 6/9/2016, he went to Moshi Central Police, to claim for his clothes which was taken by Cpl Charles, he did not give it to him instead he was arrested, in respect to caution statement taken, he said he was tortured at the place known Mbao FC, for him it was on 7/9/2016 where the torture started and in second time was on 9/9/2016 on the same place where he was forced to sign.

Next accused person was, **Paschal Joseph Mushi** (DW5), testified that, he was arrested on 22/8/2016 night hours having in possession of stolen properties and taken to Majengo Police station, after two days he was

taken to Moshi central Police. He further said on 28/8/2016 he was taken to torture room where he was tortured and returned to lock up, the following day he was taken in the same room, then upon being scared to be tortured again, he did sign the document given to him without knowing what is inside.

In regard to sixth accused one **Ibrahim Athuman Mkindi** (DW6) defended by saying that he was arrested by police officers on 28/8/2016, at Kaloleni, Moshi town. Next day on 29/8/2016, he was sent to torturing room known as Mbao FC, and forced to sign a paper which he did not know what was written on it. He further explained the bad relation with Isack Chaula a police officer whom he owes money after contract of payment his money breached.

Then it was the seventh accused one **Robert John Massawe** (DW7) who said that on 24/8/2016 at 20:00 hours, he was arrested by 8 police officers having canibias sativa (*Bangi*) in his bag, after arrest they sent him to kwanguneme Police Post Arusha, at about 21:00 he was transferred to Arusha Central Police. On 26/8/2016 at 18:00 hours, he was transported to Moshi by Police officers whom he mentioned to be Afande Pessa, Haway and Derick. Upon arrival at Moshi at about 21:30, he was then taken to Mbao FC

which is the old Regional Building, thereat he was tortured by electric shock and told he has to confess the killing happened at Asante Tours, the following day on 27/8/2016, he was returned to Mbao FC, where the same torture started plus beatings, is when he accepted to sign, he prayed to read what is in those papers they refused. DW7 further said on 3/9/2016, he was taken into a room for recording video, he was told to agree the killing of Asante tours by OC CID Haway, DW7 added because inside that room there was a police officer possessing gun, he agreed to participate on the said killings.

Responding cross examination by Senior State Attorney, DW7 said, no any evidence that he was tortured, no grudges or conflict with any police officer, his signature and thumbprint belong to him. In that video, it shows himself and Haway, nobody was seen having a gun.

The last accused is **Juma Hamisi Ramadhani** (DW8), he told this court that on 4/9/2016, he was arrested during midnight in his home by police officer with one roll of (Bangji) Canivas sativa. Those police officers were led by Inspector Leonce, from that date of arrested he was tortured until 9/9/2016 when he decided to sign papers written words unknown to him, he decided to do so because he was taken to TPC police station, where

he stayed for four days without given food. Further DW8 said upon arrest he was charged by the said offence of possession of Bangi and acquitted in Criminal Case number 616 of 2016 at the District Court. That is why he wrote a letter requesting for Detention Register at Moshi Central Police in order to show which offence was arrested for.

PW8 procured a witness one Mayasa **Issa** (DW9), she testified that on 4/9/2016 at about 0100 hrs. being at her home in Njoro Moshi, she heard a gate knocking, when he opened, she saw two police officer and her grandchild, one police officer introduced to her that is Inspector Leonce, they told her that, the child was taken with his father Juma Hamisi Ramadhani, who is remanded at police station, they also told her that he was arrested with roles of canibias sativa (*Bangi*).

That was the end of the defence case, next both sides were interested and obvious did final closing submissions. In their submissions they extensively furnished the details affecting evidence adduced by both sides. However, I will not reproduce these submissions in this judgment, but I will entirely consider them when the need arises in this judgment as per issues which will be raised by this court. Generally, according to these submissions,

it is undisputed that the defense side submitted that the prosecution has failed to prove this case beyond reasonable doubts, while prosecution contended that the evidence tendered absolutely proved the offence charged against the accused persons.

Next after final submission, it follows summing notice to lady and gentleman assessors in order to receive their opinions. The first assessor's Mr. Abdalah Mtwenge opinions were that, all accused persons were not taken to justice of peace, if at all could have done so, prosecution evidence could have been not shaken, the reasons he advanced is that Police officers were the one who arrested and investigated, therefore the confessions to justice of peace could have removed this doubt, he also opine that the Detention Register was very important to be brought in order to show when and which offence accused persons were arrested for. Next, he says according to doctor who did postmortem, deceased were killed by beating of heavy thing on their head, nothing were brought such as hummer or safe. Mr. Abdalah Mtwenge further said in respect to four accused persons recorded by video, they are guilty for the offence charged but he advised next time this kind of interrogation be done in the presence of their advocates, also he said on that

video which was played he saw jump cut (*mkatiko*), therefore he can't know what were cut off thus brings doubt. Lastly, he said the remaining accused fourth, fifth, sixth and eighth accused in his opinion are not guilty because they had grudges with police officers, also he added the accused mentioned Mussa Kaujenge and Kenge who are never arrested, he opines to be the main killer.

The second assessor, Swaumu Kyara opined that, she concedes with his fellow assessor, that first, second, third and sevenths accused persons were seen on the video recorded, they were free agent and no one rejected the said video, therefore she opines that they are guilty. I respect to fourth, fifth, sixth and eighth accused persons were not recorded by video, and therefore she left for the court to decide on them.

Being mindful of these assessors' opinions, I now proceed to examine the evidence on record and determine as follows; In this case all accused persons are charged of two counts, both for the offence created under section 196 of the penal Code Cap 16. which provides as follows;

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

It is a trite law that in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution. (See **Jonas Nkize v. Republic** [1992] TLR 213, **Furaha Michael v. Republic**, Criminal Appeal No. 326 of 2010 (Unreported), however, the onus never shifts away from the prosecution and no duty is cast on the accused person to establish his or her innocence. (See **Said Hemed versus Republic** [1986] TLR117

In principle, the offence of murder to be proved as per principle enunciated above, fundamental elements must be established and proved; these are as follows; first and more most, death of the deceased, secondly; that the death was unnatural, thirdly; that death was caused by unlawful act or omission of the accused and fourthly; that the killing was actuated by malice afore thought. However, it should be noted that where the charge/information involves more than one accused the court must see whether there was common intention. (See the case of **Republic v. Filbert s/o Arobogast and another** Criminal Sessions Case No. 71 of 2016 (Bukoba Registry) unreported.

According to the circumstances of this case, I am conveniently to be directed by the following issues;

1. Whether the death of the two watchmen was unnatural?
2. Whether the death was caused by unlawful act or omission of the accused persons?
3. Whether there was common intention among the accused persons to execute an unlawful purpose?
4. Whether the killing was actuated by malice aforethought?

It is not disputed that the two deceased are dead, and their death was brutal and unnatural as per the post-mortem report exhibit PE2 and PE3. It is equally not disputed that on 3rd July, 2016 the dead body of Omari Mahamed Idd Amin and Dominick Boniface Cheddy were found at the scene of the crime at Asante Tours office in the morning. PW4 Patrick Amsi, a Medical doctor did examine the two dead body, and found their death was due to injuries on their head and then he concluded to hold that death was caused by Blunt force trauma on the head.

Essentially, there was no dispute on that facts of this professionalism of PW4 and also exhibits PE2 and PE2, In view thereof, I am persuaded to

hold that prosecution has proved beyond reasonable doubt that the two deceased died unnatural death. Thus, the first issue is proved in affirmative.

The second issue for determination is whether all eight accused persons, unlawfully caused the death of the said deceased persons. On this issue, according to the evidence tendered and the final submission by the prosecution, it apparently the prosecution is relying on two types of evidence, **one**, the evidence of caution statements of each accused persons, **two**, the evidence of recorded video of interrogations of the four accused persons.

I am in agreement with the defense closing submissions that, no a single witness was procured in this court to testify as an eye witness to the said killings of Asante Tours. I therefore concede with the defense final submission that the evidence in this case is entirely circumstantial in respect of an offence which was committed at night. I am mindful it is a trite law for such evidence to be authentic, it must meet the conditions that were adopted by the Court of Appeal in **Criminal Appeal No 247 Of 2008; Ndalahwa Shilanda nd Buswelu Busaru Vs Republic** (unreported) where it was

held that for circumstantial evidence to ground a valid conviction, the following three 3 conditions must be met;

*(i) the circumstances from which an inference of guilt is sought to be drawn, **must be cogently and firmly established.***

*(ii) those circumstances should be of a **definite tendency unerringly pointing towards the guilty of the accused;** and*

*(iii) the circumstances taken cumulatively, should form a chain so, **complete that there is no escape from conclusion that within all human possibility the crime was committed by the accused and no one else.**"*

[Emphasis provided].

(Also see Sarkar on Evidence, 15th Ed. Vol. 1, p. 63; **Andrea v Republic**, Criminal Appeal No. 231 of 2005 (unreported) also see **Simon Musoke v Republic** [1958] EA 715 **RV Kipkuring arap Koske** [1949] EACA135; **Abdul Muganyizi VR** [1980]TLR 263; **Protas John Kitogo & Another VR** [1992] TLR 51 and **Hamidu Mussa Themetheo &. Another VR** [1993] TLR 125).

From the said established authorities, it is common ground that for circumstantial evidence to found a conviction, it must be such that it irresistibly points to the guilt of the accused.

According to the evidence, the prosecution managed to tender caution statements of all eight accused person charged in this case, however, despite both were admitted as exhibits by this court both of the said caution statements were retracted by accused persons. Both rulings in respect to trial within a trial, the court reserved the issues of time compliance of recording statements as per law and certification of the said statements by the accused persons.

This was also reflected in the final submission, when Mr Emmanuel Antony who represented all defence counsel when, argued that, those statement were not taken according to section 57 of CPA Cap. 20, he further added that, in this case all statements tendered no anyone of the accused person signed certificate. He cited the case of **Ibrahim Issa and 2 others v. R** Criminal Appeal No. 159 of 2006 CAT at Tabora.

While the Mr. Kainunura Senior State Attorney submitted that the prosecution witnesses at the trial explained that they gave all their rights to accused, he further said others are procedural irregularities which does not affect the content of the said caution statements and even if it seems that was not read to accused, it is not fatal to jeopardies the right of the accused

persons. He urged this court to consider the case of Chacha **Jeremiah Mrimi and three others v Republic** Criminal Appeal No. 551 of 215 CAT at Mwanza; **Mohamed Hamis Sakis v. Republic** Appeal No. 97 of 2008, CAT Mbeya and Nyerere **Nyague v. Republic** Appeal Case No 67 of 2010 at page 9 till 12, then he insisted, those shortcomings does not affect the content on the said caution statement.

In considering the above, according to the evidence of PW1 who led the troop of four police officer, on 28/8/2016 moved fast to Arusha after he got directives from OC CID (PW8) that there are information four accused participated in the killing have been arrested, so they moved to Arusha, upon reach the Police Central Arusha they were told by Police In charge CRO to wait the accused have been arrested, and they are on the way to be brought at Arusha police station, then police Arusha came with them and handled to Police Kilimanjaro and the journey back to Moshi started.

In my view of the circumstances of investigation of this case, and the arrest of the accused persons has a lot to be predicted, the nature of the incident caused, the time to find the accused persons and collection of intelligence information, which resulted to the arrest of eight accused, who

were scattered within the area of two regions Arusha and Kilimanjaro. Some were arrested in Arusha and some in Kilimanjaro and on different dates, taking the nature of the offence committed and the circumstances of the investigations, and the place they were arrested and then transported to another region as stated, I am of the opinion this is to be taken to be exceptional circumstances. Nonetheless having considered that the said statements contain information relevant to the fact in issue, any omission to the procedure of time of recording and certification to the said statements in my view does not affect the weight and value on them. (See **Yusuph Masalu @ Jiduvi and 3 Others v. Republic Criminal** Appeal No.163 of 2017 and **Chacha Jeremiah Murimi and 3 Others v. R.** (supra) and **Nyerere Nyague v. Republic.** (Supra)

Moreover, the defence during trial, raised discrepancies which were pointed out by the defence counsels especially in respect of the statements of prosecution witnesses (PW1, PW7 and PW8), I am mindful, it is a trite law in evaluating discrepancies, contradictions and omissions, it is undesirable for court to pick out sentences and consider them in isolation from the rest of the statements, the court has to decide whether the discrepancies and contradictions are only minor and whether they go to the

root of the matter (See **Dickson Elia Nsamba Shapwata and Another v. Republic**, Criminal Appeal No. 28 of 2009 CAT **Said Ally v. The Republic**, Criminal Appeal No. 249 of 2008, **Ally Kinanda and Others v. The Republic**, Criminal Appeal No. 206 of 2007; **Samson Matiga v. The Republic**, Criminal Appeal No. 205 of 2007; **Omari Kasenga v. The Republic**, Criminal Appeal No. 84 of 2011 (all unreported)]).

Having examined the evidence on record in lieu of the principle above, I find them to be minor contradictions and discrepancies in the evidence of the above witnesses, I am settled that the same are normal and not so material to dismantle the prosecution case.

In their defense, all accused persons continued to insist that the said caution statements were obtained involuntary. However, there is also no dispute their statements implicated each other, and other not arrested accused persons that they were together on the said killing, it is therefore my view, these are confessions of co-accused persons which also retracted as stated above. It is a trite law that a retracted confession cannot corroborate another retracted confession (see **John Cherehani and Another v. The Republic** Criminal Appeal No. 189 of 1989 (unreported))

and **Mkubwa Said v. Smz** [1992] TLR 365. Even if the same would not have been retracted, being confessions of co-accused persons, those confessions themselves needed corroboration for them to have authenticity to corroborate any other evidence, because the law is that, the evidence that needs corroboration cannot corroborate another evidence (see **Jimmy Runangaza v. Republic Criminal Appeal No 159b of 2017 CAT** (Unreported)).

In prosecution final submission Mr. Kainunura Senior State Attorney contended that, there is another evidence of confession recorded by video concerning Accused No. 1, 2, 3 and 7, the said video in a CD was admitted by this court as PE5, he further said, in that video the mentioned accused persons confessed to commit the offence charged and mentioned the other who were together on the commission. Mr Kainunura Senior State Attorney submitted further that, that video not to be taken as a caution statements, but be taken as a supplement or evidence to corroborate to their caution statements, he further submitted that, this is due to the fact that, by then there was not law requiring to do so. He also added that, PW8 and PW7 said those were preliminary interview taken as supplement to caution statement. He further submitted that, the video did considered

section 18(1) and (2) of the **Electronic Transaction Act** of 2015. Where PW6 Sgt Rogath, showed how he recorded and kept and later transformed to DVD, which was rewritable. Also, PW5 SSgt James proves to the court that the pictures were valid without being edited, so the video was concluded showing the truth.

Now according to the above prosecution submissions, and according to the principle of according weight on retracted confession and confession of co-accused enunciated herein above. It therefore, in my considered opinion prosecution has created two status group of accused persons. The first group of accused persons are those not recorded their interrogation via video and the second is a group of accused persons recorded their interrogations through video.

For purpose of convenient, I will start with the first group, these includes Nassoro Alphan Nassoro (fourth accused), Paschal Joseph Mushi (fifth accused), Ibrahim Athman Mkindi (sixth accused) and Juma Hamisi Ramadhani (eighth accused). These are in a group which not recorded

interrogations by video. Thus, it means they are remained merely with normal caution statements taken by police officers as evidenced above.

It is a trite law, in order to convict an accused person based on his confession, that confession must meet two tests and pass both of them. **First** it must have been obtained voluntarily and **secondly** it must be of sufficient weight or value and not retracted at the trial. If it is retracted during the trial for whatever reason, such confession requires corroboration, unless the Court is satisfied that the confession could contain nothing else but the truth as per the case of **Kashindye Meli V. Republic** [2002] TLR 374.

This observation was proceeded from defunct East Africa Court of Appeal, when discussed the value and weight to be attached to retracted confessions, in the case of **Tuwamoi v. Uganda (1967)** EA 84. One of the major propositions in this case was that a court can convict the maker of an uncorroborated retracted confession, if it warns itself of the danger of acting upon such an uncorroborated retracted confession, and is fully satisfied that the retracted confession cannot but be true.

I have considered the circumstances of this case and the said caution statements of the above four mentioned accused, I am not satisfied and it is my considered opinion that the caution statement of this group of four accused persons needs to be corroborated by another piece of independent evidence. Now the question follows which I have asked myself is there any tangible evidence to corroborate their statements.

According to the prosecution evidence, the only evidence implicating this group of accused persons are their caution statements, now as per principle stated above, it is my considered opinion this court cannot base a conviction on their statements because, **first**, section 33(2) of the **Tanzania Evidence Act (Cap 6 RE 2022)** forbids conviction based solely on a confession of a co-accused or confessions of co-accused persons, **secondly** the caution statements were all retracted and no corroboration efforts were made.

Furthermore, there is no independent evidence nor any *viva voce* oral evidence tendered to incriminate them. As already observed above that a confession of a co-accused persons cannot ground a valid conviction of a co

accused (see **Thadei Mlomo and Others v. Republic [1995] TLR 187**).

In the circumstances, I am of settled opinion, this Court is unable to find this group of accused persons guilty for the offence of murder as charged.

Next group, is the second group which includes, Erick Wilson Teete (first accused), Fadhili Mohamed Mushi (second accused), John James Daniel (third accused) and Robert John Masawe (seventh accused). As said above this is the group where they were video recorded. In that video each stated in respect to his participation of the offence charged but in their defence all accused person retracted the said interrogations to be forced one.

In their final submission, the defence argued that, the evidence of video was taken without any authorization of law to record video, although prosecution says that it is by virtue of section 59 of CPA Cap 20 R.E. 2022, further they submitted that, the said provision deals with investigation, and is for photos and not moving pictures. They also submitted that, even if it could have been legally, the accused persons were not given a copy and lastly, they submitted that, is how it was tendered for admission, the one who tendered the said CD, did not say the CD be played full time. However,

the prosecution in their submission also was of the same view that by then there was no law required to do so.

In my view, I don't concede with both contentions. For the purpose of this argument, let me reproduce the said provision on the respective matter;

*'59-(1) Any police officer in charge of a police station or any police officer investigating an offence may take or cause to be taken measurements, prints of the hand, fingers, feet or toes of, **or recordings of the voice** or, photographs of, or samples of the handwriting of any person who is charged with an offence, whether such person is in lawful custody of the police or otherwise where such measurements, prints, **recordings**, photographs or samples, as the case may be, are reasonably believed to be necessary for the identification of the person with respect to, or **for affording evidence as to the commission of an offence for which he is in custody or charged.**'*

(Emphasize supplied)

There is no dispute that the offence alleged was committed in the year 2016, the said provision was provided in our criminal procedure Act, I concede with

the defense submission that the law did not provides for moving pictures, but the evidence itself tendered as PE5 comprises the recording of voice of the accused person which to my opinion is more important in this case than mere pictures without voice, the law above allows recording of voice which in fact it is available on that exhibit when is played. In my interpretation of the above provision, the said provision was not offended when the CD tendered comprised recorded voice of the accused persons plus their images in form of video, nonetheless, I think the intention of legislature was met which is done for purpose of affording evidence as to the commission of an offence for which is charged. In view of the above, it is my opinion no law was infringed on such recording and it is my settled mind is acceptable and proper.

Moreover, according to the cross examination on part of the defence, when exhibit PE5 which is CD was used in proving the case, it seems they took squarely those interrogation recorded as caution statement. In his final submission Mr. Kainunura Senior State Attorney submitted that, the video is not to be taken as a caution statement, be taken as a supplement or corroborate the caution statement. Also as said PW8 and PW7 informed

those were preliminary interview taken as supplement to caution statement. In my view, taking the provision I have interpreted herein above, I am in agreement with the learned Senior State Attorney viewpoint. Therefore, no requirement of giving a copy to accused person was necessary.

The next point to be considered in this evidence of CD (PE5) is its weight in proving the offence charged. As rule admissibility is one thing and according weight another thing. There is no dispute that this is electronic evidence, and by then, when it was recorded, we had a law which is The Electronic Transaction Act of 2015, the section 18 of the said law did provide some requisites in admission of the electronic evidence, I reproduce the important part in this regard as hereunder;

'18.-(1) In any legal proceedings, nothing in the rules of evidence shall apply so as to deny the admissibility of data message on ground that it is a data message.

(2) In determining admissibility and evidential weight of a data message, the following shall be considered-

(a) the reliability of the manner in which the data message was generated, stored or communicated;

- (b) the reliability of the manner in which the integrity of the data message was maintained;*
- (c) the manner in which its originator was identified; and*
- (d) any other factor that may be relevant in assessing the weight of evidence.*

(3) The authenticity of an electronic records system in which an electronic record is recorded or stored shall, in the absence of evidence to the contrary, be presumed where-

- (a) there is evidence that supports a finding that at **all material times the computer system or other similar device was operating properly** or, if it was not, the fact of its not operating properly did not affect the integrity of an electronic record and there are no **other reasonable grounds on which to doubt the authenticity of the electronic records system;***

(Emphasize supplied)

According to the prosecution, PW6. Rogath Constantini Minja, on 28/8/2016 being a police officer at Forensic Bureau Department at Kilimanjaro RCO office, he recorded the said video using camera SONY PD 175, then he used firewire cable to insert the data from the camera to

computer using a program called Pinacle 15, he said the computer was perfect, then he used NERO program to burn a re-writable DVD, being a custodian he handled the said CDs to S/Sgt Zephrene who went with it for approval of its authenticity at Photographic forensic Bureau at Police Headquarter Dar es salaam, he tendered the said handing over certificate which was admitted as exhibit PE6. At Forensic Bureau Department Headquarter, PW5. E 3234 D/S/SGT James did forensic investigation, he identifies that those video inside is pure with authenticity and not man made, he also discovered that both CD have the same video clip. He tendered the said certificate which was not objected and admitted as exhibit PE4. Again, he handled over to S/Sgt Zephrene who later handled over to D/Sgt Rogath while DC Msangarufu witnessed, the handing over was admitted certificate as PE15.

According to the above prosecution evidence, I am settled and satisfied that the reliability of the manner in which the data message was generated, stored or communicated, the reliability of the manner in which the integrity of the data message was maintained and the manner in which its originator was identified was in accordance with the law.

Another point, which need to be highlighted at this juncture is the video itself and how it was tendered and played, the said video comprises sound and moving pictures, and the said CD was tendered by PW5. E 3234 D/S/SGT James who proved its authentic from Police Headquarter. He was the material witness to tender it since he made forensic research to know its authenticity. Therefore, he possessed the knowledge to explained to this court. The said video was played after being admitted as exhibit PE5, Furthermore, it was played again when Rogath Minja (PW6) was recalled for purpose of cross examination, it was played again by Elias Haway (PW8) and also played F1157 D/Ssgt Hashimu (PW7) when testified on how they did interrogation with the accused persons, so it was played more than once. In my view nowhere the right of the accused persons was jeopardized.

Nonetheless, I am mindful this witness being an expert is not a witness of fact, his evidence is really of an advisory character. It is from those advisory and images as in this case, the court may form its own judgment by its own observation. (See the case of **Hilda Abel v.R** (1993) TLR 243, **Zefelinus Lumb @ Philimon v. R**, Criminal Appeal No. 243 of 2013 CAT and **Director of Public Prosecutions v. Shida Manyama@ Selemani Mabuba**, Criminal Appeal No. 285 of 2012 (unreported))

However, when said video was playing in this court, the defense counsels noted some disruptions/ commotions, which in fact, I also noted them in the proceeding, I think I have a duty to address them. Example when PW6 was cross examined on 30/11/2022. Mr Elisante Kimaro prayed the said DVD be played at the time of 1:10:30 this means played at point of one hour, ten minutes and thirty second, Mr Elisante contended that, at that time the recording was having jump cut (*mkatiko*), same also was at 41:10 , in all incidents PW6 maintained that was an error between DVD and Tape. Also in cross examination made to PW8 Elias Haway by Mr Emmanuel defence counsel, at some point of time which this court recorded time length of play, it was seen and heard sound of radio call, shaking of accused in interrogation, a door opening and closed, accused looking back.

Another incidents while the said PE5 was playing is external voices, this court recorded that some point of time we heard external sound like sound of motor vehicle and motorcycle, people talking out of office and once at one point a sound of gun carking which was at 1:19:17. In responding these allegations PW8 who was OC CID and one of the interrogators recorded of the said video, said the same was recorded in his office which is near the road where movements continued, also there other offices near his

office therefore office duty were continuing. For purpose of clarity, I am persuaded to quote the words said by PW8 in court;

***Xxd by Ms. Magdalena Kaaya advocate for
third accused person***

"..... The room was calm, the police station is situated near the road, people were entering and when they saw me doing interrogation they turn back, it is true that the room was small and the camera focused on me and accused person....."

I have think of these disruptions/ commotions, the fact I have also an ample opportunity to observe these external influences and I recorded them in the proceeding, it is my settled opinion, those were not anomalies which distorted the content recorded, but according to the circumstances shown above of recording the said video, I am persuaded to consider them in assessing the weight of exhibit PE5, it is my finding that, this video evidence also is evidence which need to be corroborated. My reason of doing so is not to give credence to PE5, but to confirm or support the said evidence which

is sufficient, satisfactory and credible. (See section 18 (2) (d) of The Electronic Transaction Act Cap.442 R.E.2022 and the case of **Azizi Abdallah v. Republic**, [1991] TLR 71 which cited with approval the case of **DPP v. Hester**, (1973) AC 290).

I am mindful, that is a matter of practice, and a conviction would not necessarily be illegal or be quashed if it stands on uncorroborated evidence. But even if it is a matter of practice, the trial court would be required to warn itself (**See Ndalahwa Shilanga & Another v. Republic**, Criminal Appeal No. 247 of 2008 (unreported). Again, having considered the circumstances of the video record as elaborated hereinabove, I am not convinced to warn myself and hold that the said recorded statements environments is virtuously precisely. It is still my opinion they need to be corroborated.

Having observed as above, now the next point to be considered is there any other evidence to corroborate this evidence of PE5. It is undisputed fact that the one initiated this recording is OC CID Moshi by then one Elias Haway (PE8), he did his part by interrogating two accused persons, who are Robert John Masawe@ Kipara (seventh accused) and Erick Wilson Teete (first accused person). Before he decided them to be recorded, he had an earlier interview with them and they confessed to commit the offence

charged, this can be evidenced in proceeding and for purpose of this I quote him how he said during trial;

In examination in chief by Mr. Kainunura SSA;

*"I also interrogated them, on earlier interview they were confessing, I then took two accused persons to be interrogated by using video. I took Robert John Massawe @Kipara and Erick Wilson Tetee, **after being seen that they confessed**, I report the matter to RCO so that he can give me a video Recorder, he gave me Detective Sgt Rogath."*

In cross examination by Mr. Leonard Mashabara advocate;

*"I started to interrogated them earlier without recording video, then next I recorded video after knowing their **ideas on the commission of the said offence.**"*

In cross examination by Ms Magdalena Kaaya advocate;

*"When they arrived, I did interrogate them, **they narrated the story and confessed**, that is why I convened a special interrogation with video recorder personally"*

(Emphasize supplied)

I, being on bench as presiding officer in this case, I had an ample time to hear and recorded the evidence of this PW8, I did assess his demeanor and credibility. I am satisfied that PW8 said nothing but only true that the said two accused said so before they were recorded, nonetheless, I see no any material contradiction in his evidence to affect his credibility.

Be as it may, the next point to be discussed having observed above, is whether the above words uttered amount to oral confession. I am mindful in regard to the admissibility of oral confession, it is settled law that, oral confession made by a suspect before or in the presence of a reliable witnesses, be civilian nor not, may be sufficient by itself to found conviction against the suspects [See **Posolo Wilson @ Mwalyengo v. Republic**, Criminal Appeal No.613 of 2015 (unreported)].

The test for admissibility of oral confession which was generated in **Posolo Wilson @ Mwalyengo** (supra) is on reliability of witnesses to whom the said oral confession was made by the suspect. It also the view in the case of **John Peter Shayo and Two Others v. Republic** (1998) TLR

198, where the court held that as a general rule, oral confessions of guilty are admissible though they are to be received with great caution. Taking the principle in **Posolo Wilson @ Mwalyengo** (supra) and that in **John Peter Shayo and Two Others vs. R** (supra), there are two requisites to take into account in admissibility of evidence on oral confessions. One is how reliable are the witnesses to whom the oral confessions was made and two, oral confession must be received with great caution. (See, **Peters V. Sunday Post** (1958) E. A. 424 and **Shaban Daudi v. Republic**, Criminal Appeal No. 28 of 2001, CAT (unreported)).

Furthermore, in the very recent case of **Vasco Lwenje Maneno Chiluba V. Director of Public Prosecutions** Criminal Appeal No. 220 of 2020 (CAT) at Mbeya. (Tanzlii.com), the apex court of this land cited with approval the case of **Ndalahwa Shillanga & Another v. Republic**, Criminal Appeal No. 247 of 2008 (unreported) which referred in **Ntobangi Kelya & Another v. Republic**, Criminal Appeal No. 256 of 2017 (also unreported), wherein the Court sounded a caution against reliance on confessions made in the presence of Sungusungu militia in the following words:

*"Equally, the appellant is alleged to have made such confession in the presence of a group of village vigilantes (Sungusungu). In **Regina and Another v. Republic**; Criminal Appeal No. 10 of 1998 (unreported), it was held that although in law Sungusungu were not policemen, in real life, they had more coercive power than ordinary citizens and therefore feared. What emerges from the foregoing is that a confession made before Policemen who are taken wield coercive powers is not ordinarily voluntary unless there is evidence proving the contrary. Neither PW2 nor PW7 led evidence suggesting that before making such confession, the first appellant was warned on the effect of such confession against him".*

In my view to the words of these two accused persons, stated before OC CID (PW8) cannot be squarely to be oral evidence as per principles established in above cases, because first, the words they uttered to him as quoted above was a general acceptance, PW8 did not explain how they did the act of causing the death of the two watchmen, if at all they confessed, this cause me to believe that there was no confession to the ingredients of murder. Second PW8 being a police officer, is the person with coercive

power, no evidence adduced that his power was not used to make them to be free agents on what they said before him. It therefore my considered opinion this utterance did not met the requirement of law to be termed as oral confession.

In respect to the remaining two accused persons whom were video recorded, who are second and third accused, the evidence on record does not show that they did oral confession before being recorded. PW7 who presided over the said recording said nothing.

It therefore my view, after taking regard the circumstances of this case and analysis made above. The remaining evidence is their caution statements which are retracted and video evidence which need corroboration. However, in both evidence they implicated each other as co accused persons.

Principles regarding evidence of a co accused is prescribed under section 33(1) and (2) of the Evidence Act, Cap.6 R.E 2022 as hereunder:

"S. 33(1) When two or more persons are being tried jointly for the same offence or for different offences arising out of the same transaction and a confession of the offence or offences charged made by one of

those persons affecting himself and some other of those persons is proved, the court may take that confession into consideration against that other person.

*(2) Notwithstanding subsection (1), a conviction of an accused person **shall not be based solely on a confession by a co-accused.***

(Emphasis mine)

Therefore, basing on the above law, it is not proper for the court of law to convict the accused solely on the confession of co accused. This was also observed in the case of Bushiri **Amir v. Republic** (1992) TLR 65 when the court stated that:

"(iii) Evidence of a co accused is on the same footing as that of an accomplice, that is, it is admissible but must be treated with caution and as a matter of prudence, would require corroboration.

(iv) It would be unsafe to found a conviction of the Appellant on the uncorroborated evidence of the co accused."

Moreover, as said above, both evidences remained need to be corroborated, therefore they can't corroborate each other. I wish to fortify my view by principle of law stated above, that no conviction can be sustained without corroboration if it is based on evidence that requires corroboration. Furthermore, it is a settle law that the evidence which itself requires corroboration cannot be used to corroborate another evidence. (See **Ally Msutu v. Republic** [1980] TLR 1 and **Swelu Maramoja v. Republic**, Criminal Appeal No. 43 of 1991 (unreported)).

In the circumstances above, since the remained evidence of video cannot corroborate the retracted caution statements of these four accused persons, I hold the prosecution has not proved that this another group of four accused persons namely Erick Wilson Teete, Fadhili s/o Mohamed Mushi, John s/o James Daniel and Robert John Masawe participated with others perpetrators in causing the death of the two deceased by unlawful acts. Therefore, the issue raised is not answered in affirmative.

Having hold as above in respect to this issue, this presuppose the next two issues of common intention among the accused persons to execute the

unlawful purpose and whether they had malice aforethought to be nugatory, I consequently continue to make conclusion of the finding as follows;

In the case at hand, it is undisputed that the two deceased died by unnatural death. The major issue which this court directed to be answered was whether the brutal death of the deceased was caused by the accused persons, according to the finding and the reasons stated above this question had been answered in the negative, as I have said earlier that, the evidence adduced by prosecution was not enough to prove beyond reasonable doubt, that all accused persons caused the death of the two deceased.

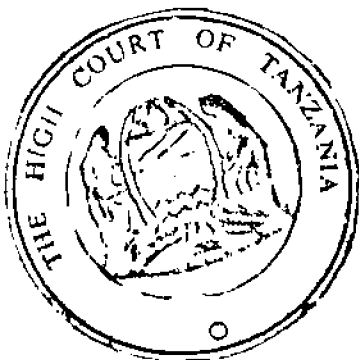
In this matter as stated earlier, the standard of proof required in criminal cases is proof beyond reasonable, this is provided under Section 110 and 112 read together with section 3(2) (a) of the Evidence Act [Cap 6 R.E.2022]. see also the case of **Maliki George Ngendakumana v. The Republic**, Criminal Appeal No. 353 of 2014 (CAT) Bukoba (unreported) and **Magendo Paul and another v. Republic** [1993] T.L.R 219.

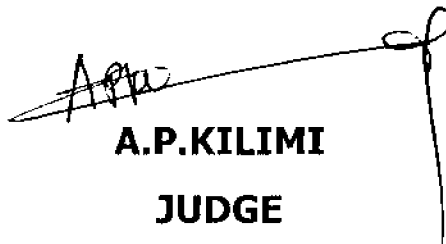
That said, I agree with the lady and gentleman assessors in respect to fourth, fifth, sixth and eighth accused persons that are not guilty with the

offence charged and I differ with them in their opinion of guilty in respect to first, second, third and seventh accused for the reasons I given above.

Subsequently, I therefore find all eight accused persons, namely; Erick Wilson Teete, Fadhili @Mohamed Mushi, John @James Daniel, Nassoro Alphan Nassoro, Paschal Joseph Mushi, Ibrahim Athman Mkindi, Robert s/o John Massawe and Juma Hamisi Ramadhani not guilty for both two counts charged of the offence of murder contrary to section 196 of the Penal Code Cap. 16 R.E. 2022 and consequently I proceed to acquit them all for these counts charged forthwith. I thus order their release from custody, unless they have another lawful cause held them therein. It is so ordered.

DATED at MOSHI this 14th day of December, 2022.




A.P.KILIMI
JUDGE
14/12/2022

Court: Judgment delivered in chambers in the presence Sabina Mcharo Learned State Attorney for the Republic and learned Advocates Elisante

Kimaro, Emmanuel Antony, Modestus Njau, Urlick Shayo, Philip Njau for defence and all accused present. Right of Appeal dully explained to them.

Sgd; A.P.KILIMI

JUDGE

14/12/2022