

**IN THE UNITED OF THE HIGH COURT OF TANZANIA
(IN THE SUB REGISTRY OF MWANZA)
AT GEITA.**

CRIMINAL SESSIONS CASE NO. 77 OF 2020

REPUBLIC

- 1. JUMA S/O LUKANDA**
- 2. KULWA S/O LUKANDA @ MALIMI**
- 3. PETER S/O MAGOLA @ MASUMBUKO**

JUDGMENT

*Date of Last Order: 15th November, 2022
Date of Judgment: 15th December, 2022*

KAMANA, J:

Juma Lukanda, Kulwa Lukanda @Malimi and Peter Magola @Masumbuko hereinafter to be referred to as the 1st, 2nd and 3rd accused were arraigned before this Court charged with an offence of murdering one Suzana Lukanda contrary to sections 196 and 197 of the Penal Code, Cap. 16 [RE.2019]. It was alleged by the Prosecution that on 29th September, 2019 around 2000hrs at Shabaka Village, Nyangh'wale District within Geita Region, the trio, with malice aforethought, killed Suzana Lukanda. The accused pleaded not guilty to the information levelled against them and hence the full trial was held.



During the trial, the Republic was represented by Ms. Gisela Alex and Mr. Erasto Anosisye, both learned Senior State Attorneys. On the other hand, the 1st, 2nd and 3rd accused were advocated by Messrs. Gaston Thomas, Erick Lutehanga and Forget Mongi respectively.

In a bid to prove its case against the accused persons, the Prosecution called six witnesses. These witnesses were H. 5570 Det. Cpl. Nicholaus (PW1), G. 8086 Cpl. Joseph Jikolo (PW2), H.16 Det. Cpl. Yusuph Selemani (PW3), G.1307 Det. Cpl. Felician Andrew (PW4), Sylvester Iddi (PW5) and H. 461 Det. Cpl. Denis Joseph Subiri (PW6). Further, the Prosecution tendered five Exhibits which were cautioned statements of both accused, sketchy map of the scene of crime and the Post Mortem Report. The accused persons had neither witness, save for themselves, nor exhibits.

It was the testification of H. 5570 Det. Cpl. Nicholaus (PW1) that on 21st October, 2019 he was at Shabaka Village for the purpose of arresting Peter Magola (the 3rd accused) who was accused of killing Suzana Lukanda. After arresting the accused, he and his colleague one Paschal took the accused to Kharumwa Police Station. Thereat, he recorded the cautioned statement of the 3rd accused. PW1 averred that during the interrogation, the 3rd accused confessed to have a hand in



murdering Suzana Lukanda by helping the 1st and 2nd accused persons. The Witness prayed this Court to admit as an exhibit the cautioned statement of the 3rd accused. The cautioned statement was admitted as Exhibit P1 after the same being not objected.

For the purpose of coherence, I think it is necessary to have a look at Exh.P1 (cautioned statement of the 3rd accused). Materially, in the cautioned statement, the 3rd accused is recorded to state that he was approached by the 1st accused and one Paulo Lukanda who are brothers for the purpose of learning from him methods of killing by machetes and evading accusations and arrest. According to the cautioned statement, the 1st accused and Paulo Lukanda wanted to eliminate their sister Suzana Lukanda on the account that she was bewitching them to the extent of ending the lives of their closest relatives including their father, brothers and children.

It is stated in Exh. P1 that the 3rd accused advised the 1st accused and Paulo Lukanda to consult a witchdoctor with a view to ascertaining the truthfulness as to who bewitches their family before murdering their sister Suzana Lukanda. It is further averred in Exh.P1 that after some days, the 1st accused and Paulo Lukanda returned to the 3rd accused with the news that they have consulted the witchdoctor who confirmed that Suzana Lukanda is a witch and is responsible for bewitching their



family including causing deaths of their dear ones. Having heard that, the 3rd accused prescribed them a medicine that will fool people to the extent of not accusing the duo with regard to the killing of their sister. It was recorded in the cautioned statement that the 3rd accused assigned the duo with duties during the killing of Suzana Lukanda whereby Paulo Lukanda was to kill Suzana Lukanda and Juma Lukanda (the 1st accused) was to protect Paulo Lukanda against any interference during their operation. Few days later, the 3rd accused, according to Exh.P1, heard a yell commonly known as *mwano* from Suzana Lukanda's house and formed an opinion that the duo has killed their sister Suzana Lukanda.

During cross examination, PW1 testified that Peter Magola, the 3rd accused was recorded in his cautioned statement to state that he learnt to kill people with machetes from one Japhet Kaluhiyage. PW1 stated that the 3rd accused narrated to have killed many people in the company of one Wilson and Salu Chiluluka though he did not state to have been cooperating with Salu Chiluluka in killing Suzana Lukanda. PW1 testified that the 3rd accused was of the belief that Juma Lukanda (1st accused) and Paulo Lukanda were responsible for the death of Suzana Lukanda since the duo went to him to seek advice on how to kill Suzana Lukanda. The Witness stated that the 3rd accused had such belief due to the fact



that he was not present at the commission of the alleged murder of Suzana Lukanda.

G. 8086 Cpl. Joseph Jikolo (PW2) testified that on 30th September, 2019 he was at Kharumwa Police Station where he interrogated a person known as Juma Lukanda (the 1st accused) who was in a police cell. In that cautioned statement, the accused Juma Lukanda confessed to participate in killing Suzana Lukanda. He prayed this Court to admit the cautioned statement which was admitted after not being objected and marked as Exhibit P2.

Substantially, in Exh.P2, the 1st accused stated that after a series of deaths and diseases within their family, he and other family members, notably Sikitu Mayala and Suzana Lukanda (deceased) decided in two times to consult a witchdoctor called Kalwinzi. In the course of those consultations, the witchdoctor revealed, in the absence of Suzana Lukanda, that it is Suzana Lukanda who is a cause of all misfortunes in their family as she was a witch.

Pursuant to that revelation, it is stated in Exh.P2, the 1st accused and other family members who were named as Kweji Mussa and Sikitu Mayala had a meeting in the 1st accused's house where they planned to kill Suzana Lukanda. It was their belief that Suzana Lukanda should be neutralized by being killed before she kills them. In that meeting,



according to Exh.P2, it was agreed that Salu Chilulula should be hired to kill Suzana Lukanda by using machetes. The 1st accused is recorded to state that Kweji Mussa went to a place known as Kamena where she concluded a deal with Salu Chilulula whereby the latter agreed to kill Suzana Lukanda in consideration of Tshs.200,000/-. He is further recorded to aver that the said amount was paid to Salu Chiluluka by Sikitu Mayala who sold a cow and that he (the 1st accused) did not contribute a cent as he is a necessitous person. It was his statement that Salu Chiluluka resided in the house of Kweji Mussa before killing Suzana Lukanda and disappeared thereafter.

When cross examined, PW2 testified that the 1st accused did not tell him that he participated in a meeting that involved Kweji Mussa and Salu Chiluluka. He stressed that Juma Lukanda got the information with regard to what transpired between Kweji Mussa and Salu Chiluluka by being told. It was his evidence that Juma Lukanda did not mention the 2nd and 3rd accused as attendees of the meeting that planned to kill Suzana Lukanda. PW2 further stated that there was no meeting other than the one attended by 1st accused, Kweji Mussa and Sikitu Mayala.

H.16 Det. Cpl. Yusuph Selemani (PW3) told this Court that on 30th September, 2019 he was at Kharumwa Police Station when he interrogated Kulwa Lukanda (the 2nd accused) who was in a police cell



accused of killing Suzana Lukanda. It was his evidence that the 2nd accused person confessed to have participated in the plan that led to the demise of Suzana Lukanda. The witness prayed this Court to admit the cautioned statement as Exhibit and the same was not objected under section 27 of the Tanzania Evidence Act, Cap.6 and hence admitted and marked Exhibit P3. It is worthy to note that the cautioned statement was objected as infringing the provisions of section 50 of the Criminal Procedure Act, Cap. 20 for being recorded out of time but the objection was overruled in terms of section 169 of the same Act.

According to Exh.P3, Kulwa Lukanda (the 2nd accused) stated that in July, 2019 he and other family members had a meeting in which they discussed the witchcraft of their sister Suzana Lukanda. In the said meeting which was held at the 1st accused's place, as depicted in Exh.P3, it was decided that Salu Chiluluka should be hired to kill Suzana Lukanda. The 2nd accused was recorded to state that on 29th September, 2019 around 2000hrs Suzana Lukanda was killed by being cut by machete by Salu Chiluluka whom they paid Tshs. 200,000/-. The reason that led to the killing in question, according to Exh.P3, is the fact that after a series of misfortunes in their family, they went to consult the



witchdoctor Kalwinzi who told them that their sister was the one who caused such misfortunes as she was a witch.

During cross examination, PW3 told this Court that the 2nd accused did not mention the persons who participated in the meeting that planned the killings of Suzana Lukanda. The witness further stated that in the cautioned statement, the 2nd accused did not mention persons who hired Salu Chiluluka to kill Suzana Lukanda. PW3 testified that the 2nd accused did not mention Peter Magola (3rd accused) as a person who took him to the witchdoctor.

Another witness was G.1307 Det. Cpl. Felician Andrew (PW4). This witness testified that on 30th September, 2019 he and his colleagues were instructed to go to Shabaka Village where there was the murder incident. Thereat, he found a dead body with wounds and blood. He was instructed to draw a sketchy map of the scene of crime. Thereafter, some persons were arrested and taken to Kharumwa Police Station. He tendered the sketch map which was not objected and the same was admitted and marked as Exhibit P4.

Sylvester Iddi, the deceased's son, testified as PW5. It was his evidence that there was a misunderstanding between his mother Suzana Lukanda and his uncle Juma Lukanda (the 1st accused). The



misunderstanding ensued on 15th June, 2014 when his grandfather passed away. Following that death, the 1st accused started to accuse his sister Suzana Lukanda to be a witch who caused the death of their father. PW5 testified that after the death of his grandfather, his grandmother proposed that the farm left by their deceased grandfather be divided amongst his children. The witness testified that the said proposal was rejected by them (he did not particularize) and they continued to call his mother a witch.

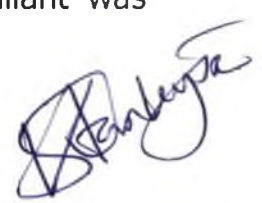
With regard to the fateful day, PW5 testified that around 2000hrs he was at his mother's place with Kulwa Iddi, Dotto Iddi, Suzana Sylvester (his daughter), his grandmother Kabula Mayala and his mother Suzana Lukanda (the deceased). PW5 told the Court that while having their supper outside their house, he saw a torchlight directed to them. He asked the person who held the torch why he beamed his torch on them. The holder of the said torch approached them and started to inflict blows of machetes on his mother Suzana Lukanda. The witness testified that he managed to identify that person as his uncle Juma Lukanda and that person wore a cap with a red scarf on top of it and a black jacket. It was his testification that he asked the assailant the reason behind cutting his mother with a machete but the latter directed



his torchlight to him and he decided to flee from that place. It is his evidence that the assailant spent five minutes to attack his mother who succumbed to death.

PW5 further stated that he went straight to his brother's house named Meli Pambe who was not at his home. From there, he went to the Village Chairman's house to report the incident. The witness testified that he could not find the Chairman at his home. After the Chairman being phoned, he came to his home and took PW5 to their place. Thereat, he found his mother had already joined her ancestors. According to him, the deceased body had wounds caused by being cut with a machete. He stated to have mentioned to *Wananzengo* that Juma Lukanda was the one who killed his mother. The Witness further testified that he informed the police when they came at the scene of crime that Juma Lukanda was responsible for his mother's death. He told the Court that opinion poll with regard to finding who was responsible for the murderous act was conducted.

During cross examination, Sylvester Iddi testified that the torch light was directed to him and in view of that he could not be able to see the assailant as he leaned down. The witness stated that he could not recognize the assailant as he hid his face with a cap and a red scarf. He further testified that the light was so dim so that the assailant was



forced to use a torchlight to identify his target. The deceased's son told this Court that he related his suspicions with regard to Juma Lukanda for the first time to the Police. It was the testimony of PW5 that the villagers conducted opinion poll as the assailant was not recognized in the scene of crime. He testified that the 1st and 2nd accused were taken to be killers of his mother out of suspicions.

In re-examination, PW5 testified to have identified the assailant as his uncle Juma Lukanda as there was solar light which was bright. He stated that the assailant did not use torchlight but the light from a cell phone. He testified that he informed Police that Juma Lukanda is the one who killed his mother out of reality and not suspicions.

The last in the list of witnesses fielded by the Prosecution was H.461 Det. Cpl. Denis Joseph Subiri (PW6). The witness testified that he went to the scene of crime as an investigator. Thereat, he found the deceased's body lying down with wounds caused by being cut. It was his testimony that while his colleagues were busy interrogating the deceased's family members, he was with the Doctor who was examining the deceased's body. He averred that the deceased's body was examined by the Doctor at the scene of crime and the Post Mortem Report was filled and handed over to him by the said Doctor. It was his evidence that the said Report was kept in the file with other exhibits



before the same being forwarded to the Prosecution. The witness tendered the said Post Mortem Report which was not objected and admitted as Exhibit P5.

PW6 continued to testify that he discovered that the deceased's children and other people mentioned Juma Lukanda, Paulo Lukanda, Kulwa Lukanda and Peter Magola as persons responsible for the death of Suzana Lukanda. The witness stated that the opinion poll was conducted at the request of persons who were there on the account that due to the customs of that area, the deceased's children could not mention the culprits. PW6 told this Court that the results of the poll showed that Juma Lukanda, Paulo Lukanda, Kulwa Lukanda and Peter Magola were perpetrators of the heinous act.

When cross examined, the witness stressed that the opinion poll was conducted out of customs though he admitted that before the poll the culprits were unknown.

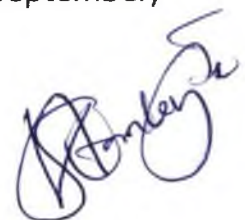
The prosecution case was marked closed after the testimonies of the six prosecution witnesses and admission of five exhibits. The court was satisfied that a prima facie case against the accused has been established and therefore, the accused persons were required to defend their case.



Juma Lukanda (DW1) testified that he was in good relationship with his sister Suzana Lukanda. He denied neither to accuse his sister Suzana Lukanda of sorcery nor to participate in any meeting for the purpose of killing Suzana Lukanda. The witness averred that he had never met Peter Lugola for the purpose of plotting his sister's death. Further, DW1 denied to have known Kweji Mussa and Salu Chiluluka.

It was the testimony of Juma Lukanda that on the fateful night he was at his home when he heard *mwano* which stated that something awful had happened at his sister's place. As a brother, he went to Suzana Lukanda's place where he found her sister already dead. Thereat, he inquired what happened and was told that a man with black jacket, cap and red scarf attacked her sister. He continued to stay at that place until when the police came and ordered that opinion poll be conducted to establish who was responsible for murdering Suzana Lukanda. It was his testimony that he does not know why the voters picked him as a person who killed Suzana Lukanda. DW1 told this Court that after the poll, he was taken to Police Station where he was subjected to torture before signing the papers he did not know as he is unschooled.

Kulwa Lukanda (DW2) testified that he and his sister Suzana Lukanda had cordial relationship. He testified that on 29th September,



officers examined the deceased's body and others interrogated deceased's children. After such interrogation, police ordered the conduct of opinion poll with a view to identifying who was responsible for Suzana Lukanda's death.

Peter Magola continued to testify that after the poll, police apprehended Juma Lukanda, Kulwa Lukanda, Paulo Lukanda and Tabu Lukanda and took them to the police station for further investigation. He remained at the deceased's place where he participated in her burial.

DW3 told this Court that on 21st October, 2019 he was called by the Ward Executive Office who wanted him to go to his office where there were his guests. He went there and found the Ward Executive Officer with two men with plain clothes who introduced themselves as police officers. The officers took him to the police station after telling him that he is required to adduce evidence. At the police station, he was locked up. The next day, he was taken to the investigation room where he was asked his name and returned to the cell. It was DW3's evidence that after six days around 2200hrs he was taken from the cell to the investigation room where he was told that he had persuaded Juma Lukanda, Kulwa Lukanda and Paulo Lukanda to consult a witch doctor on the allegations that their sister is bewitching them. According to the witness, he denied those accusations.



On cross examination, Peter Magola testified to have been tortured by police while in their custody. He told this Court that he was handcuffed on hands and legs and hanged between two objects.

Having heard the evidence of both Prosecution and Defence, this Court is invited to determine whether the Prosecution has proved its case against the accused persons beyond reasonable doubt. I take this course as it is a principle of criminal law for the accused person to be convicted of a criminal offence, Prosecution must prove all ingredients of the offence in question beyond reasonable doubt. Section 3(2)(a) of the Tanzania Evidence Act, Cap. 6 provides:

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

In this regard, I am fortified with the decision of the Court of Appeal in the case of **Pascal Yoya @ Maganga v. Republic**, Criminal Appeal No. 248 of 2017 where it was stated:

'It is a cardinal principle of criminal law in our jurisdiction that, in cases such as the one at hand, it is the prosecution that has a burden of proving its case beyond reasonable doubt. The burden never shifts to the accused. An accused only needs to raise



*some reasonable doubt on the prosecution case and he need not prove his innocence. See the cases of **Woolmington v. Director of Public Prosecutions** [1935] AC 462; **Abdi Ally** (supra) and **Mohamed Haruna @ Mtupeni & Another v. Republic**, Criminal Appeal No. 25 of 2007 (unreported).'*

Since the accused persons are charged with an offence of murder, the Prosecution is placed under the duty to prove that there is a person who has died and the cause of death is unlawful. Further, the Prosecution is bound to prove that the accused person before me did murder the said person and the killing was premeditated. This also is not a new phenomenon as the Courts have taken this position in determining whether the offence of murder has been proved beyond reasonable doubt. In the case of **Anthony Kinanila and Another v. Republic**, Criminal Appeal No. 83 of 2021, the Court of Appeal observed that:

In a charge of murder like the one in the instant case, it is trite that the prosecution required to prove all the ingredients of murder in order to win a conviction thereof. The said ingredients which the prosecution must prove beyond reasonable doubt are; i) That the deceased is really dead. ii) That the death was caused by someone unlawfully iii) That



there was malice aforethought and iv) That the accused person directly or indirectly took part in the commission of the murder.

When the offence of murder is committed by more than one person, it is important that the proof of existence of common intention amongst the perpetrators of the crime be established.

In view of the above position, this Court is now invited to cumulatively determine the following issues:

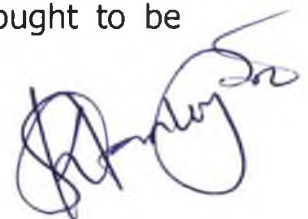
1. Whether Suzana Lukanda really died.
2. Whether her cause of death is unnatural.
3. Whether the death was caused by unlawful act or omission of the accused persons.
4. Whether there was a common intention amongst the accused person to murder Suzana Lukanda.
5. Whether the killing was elicited with malice aforethought.

Starting with the first issue on whether Suzana Lukanda really died, it is undisputable that she died. Both Prosecution and Defence are in agreement that Suzana Lukanda is no more. This position is solidified with an autopsy Report which was admitted as Exh. P5. This issue is answered in affirmative.



The next question for my determination is whether the cause of death of Suzana Lukanda is unnatural or otherwise. Again, the Prosecution and Defence are in agreement that Suzana Lukanda died unnaturally by being cut with machetes. This position is cemented by PW5 Sylvester Iddi who testified to witness the assailant attacking his mother with a machete. Further, PW5 Det. Cpl. Felician Andrew and PW6 Det. Cpl. Denis Joseph Subiri testified to have seen the deceased's body with wounds caused by being inflicted with machete. Their evidence with regard to that matter went unchallenged by the testimonies of DW1 Juma Lukanda, DW2 Kulwa Lukanda and DW3 Peter Magola. The Post Mortem Report (Exh.P5) conclusively established that cause of death of Suzana Lukanda was excessive bleeding/haemorrhage secondary to multiple cut wounds on the arm, neck and head. Again, this issue is answered in affirmative.

On the third issue on whether the accused persons had a hand in causing the unnatural death of Suzana Lukanda, I think it is imperative to firstly consider the evidence adduced by PW5 Sylvester Iddi, the deceased's son, since he was the one present during the commission of the unpleasant act which led to the death of his mother. In considering his evidence, I will be guided by the principle that every witness is a competent witness deserving credence and his evidence ought to be



believed unless there are tangible reasons for the witness to be doubted. This position was taken by the Court of Appeal in the case of **Goodluck Kyando v. Republic**, [2006] TLR 365 where it was observed:

'It is trite law 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 a witness.'

Further, I am mindful of the fact that this Court as trial Court is placed with the duty of weighing the credibility of the witness so far as his demeanor is concerned. Besides, this Court is bound to test the credibility of the witness in terms of his coherence and his testimony in relation to other testimonies of witnesses including the accused persons. In this regard, I am inspired by the observation of the Court of Appeal in the case of **Shabani Daudi v. Republic**, Criminal Appeal No. 28 of 2000 (unreported) where the Court pronounced the following:

'The credibility of witness is the monopoly of the trial court but only in so far as the demeanour is concerned. The credibility of a witness can also be determined in two other ways; one, when assessing the coherence of the testimony of the witness. Two, when the testimony of that witness is considered in



relation with the evidence of other witness including the accused person.'

In examination in chief, the only eye witness testified to have seen his uncle Juma Lukanda attacking his late mother with a machete. He stated to have mentioned to *Wananzengo* that Juma Lukanda was the one who killed his mother. The Witness further testified that he informed the police when they came at the scene of crime that Juma Lukanda was responsible.

During cross examination, PW5 testified that the torch light was directed to him and in view of that he could not be able to see the assailant as he leaned down. The witness stated that he could not recognize the assailant as he hid his face with a cap and a red scarf. He further testified that the light was so dim so that the assailant was forced to use a torchlight to identify his target. The deceased's son told this Court that he related his suspicions with regard to Juma Lukanda for the first time to the Police. It was the testimony of PW5 that the villagers conducted opinion poll as the assailant was not recognized in the scene of crime. He testified that the 1st and 2nd accused were taken to be killers of his mother out of suspicions.

In re-examination, PW5 testified to have identified the assailant as his uncle Juma Lukanda as there was solar light which was bright. He



stated that the assailant did not use torchlight but the light from a cell phone. He testified that he informed police officers that Juma Lukanda is the one who killed his mother out of reality and not suspicions.

It is my considered opinion that the evidence adduced by PW5 was full of contradictions so far as material facts are concerned. Firstly, the witness in his evidence gave two accounts of who the assailant was. In the examination in chief, PW5 told this Court that the assailant was his uncle Juma Lukanda. When cross examined, he changed his story to the extent that he could not be able to recognize the assailant as the latter directed his torchlight to him which led him to lean down. In re-examination, as an afterthought, he stated that there was a bright solar light that enabled him to recognize Juma Lukanda as an assailant and that Juma Lukanda was using a light from his cellphone. Secondly, in examination in chief, the witness testified to have informed *wananzengo* who responded to *mwano* that the assailant was his uncle Juma Lukanda. When cross examined, the witness testified to have firstly mention the name of Juma Lukanda as an assailant to the Police officers. With this kind of evidence, I do not hesitate to conclude that PW5 is a witness worthy no credence as his evidence is substantially tainted with incoherence and contradictions.



Assuming that what PW5 testified is true, it is untenable in my mind for an assailant to use a light whether from his torch or cellphone when there is a bright solar light as alleged by PW5 in re-examination. Further, under normal circumstances, if he really mentioned Juma Lukanda as an assailant to *wananzengo*, definitely police officers would find him under arrest and the opinion poll would not have been conducted.

This Court asked itself the reason for conducting opinion poll whilst the culprit was already known as PW5 wanted this Court to believe. It finds none and the allegations of PW6 that customarily it was impossible to name the culprit without opinion poll are baseless as the same witness admitted during cross examination that up to their arrival at the scene of crime no person was mentioned to have participated in killing Suzana Lukanda. Further, PW5, the eye witness, told this Court, during cross examination, that the arrest of the 1st and 2nd accused based on suspicions. In view of this, PW5's evidence will be given no weight in determining the issue as to who was responsible for killing Suzana Lukanda.

After discarding the evidence of PW5, the only evidence which the Court remains with are cautioned statements of the accused persons. In considering those cautioned statements, the Court considered the



evidence adduced by PW1, PW2 and PW3 who recorded the statements. As it was stated hereinabove, those statements were admitted without being retracted or repudiated in accordance with section 27 of the Tanzania Evidence Act. That being the position, in considering the statements, I am guided by the provisions of section 27(1) of the Tanzania Evidence Act which stipulate that the confession of the accused voluntarily made may be proved against him. The subsection reads:

(1)A confession voluntarily made to a police officer by a person accused of an offence may be proved as against that person.'

I am further guided by the principle that the best evidence is that one of the accused voluntarily given and which incriminates him. This position was lucidly elucidated in the celebrated case of **Ally Mohamed Mkupa v. Republic**, Criminal Appeal No. 2 of 2018 where it was stated:

'Now, it cannot be gainsaid that, in any criminal trial, the very best of witnesses is an accused person who confesses freely and voluntarily to have committed the offence.'



See **Paulo Maduka and 4 Others v. Republic**, Criminal Appeal No. 110 of 2007 (unreported) **Selemani Hassan v. Republic**, Criminal Appeal No. 364 of 2004 (unreported).

I am alive with the observation of the Court of Appeal in the case of **Mathei Fidoline Haule v. Republic** [1992] TLR 148 in which the Court stressed that for a confession to be considered the same must admits all ingredients of the offence. The Court of Appeal observed:

'A confession within the context of criminal law is one which admits in terms the offence charged. It is one which admits all the ingredients of the offence. An admission of one or only some of the ingredients of the offence is not sufficient.'

In considering the cautioned statements of the accused persons, I must state at this point that I will accord no weight to the same for the following reasons.

Firstly, PW1, PW2 and PW3 who recorded the cautioned statements of both accused told this Court during their cross examinations that after recording the cautioned statements they took the accused to the justice of the peace for the purpose of recording their extra judicial statement. Until it closes its case, Prosecution did not tender the extra judicial statements before this Court. In this regard, it is



clear in my mind that either of the two happened. **One**, the accused persons were not brought before the justice of the peace and that means the witnesses (PW1, PW2 and PW3) were economical with the truths. **Two**, upon brought before the justice of the peace, the accused did not confess to have a hand in killing Suzana Lukanda.

I take that path on the account that it is a rule of practice that when an accused confessed to have committed an offence, it is prudent for him to be brought before the justice of the peace to record his extra judicial statement. This is due to the fact that it is expected that an accused before the justice of the peace is freer than when he is before the police officer. In that case, investigators of this case were supposed to ensure that the extra judicial statements of the accused persons are tendered to support the cautioned statements. In this regard, may I refer the case of **Ndorosi Kudekei v. Republic**, Criminal Appeal No. 318 of 2016 where the Court of Appeal stated:

*'..... what was placed before the court in evidence, was the cautioned statement only (exhibit P1), whereas the whereabouts of the extra judicial statement which was made to the justice of peace was nowhere to be seen. **With the absence of the extra judicial statement, the trial judge was not placed in a better position of assessing as***



to whether the appellant really confessed to have killed the deceased or not. (Emphasis added). See: **Samson Kadeya Kazeze v. Republic**, Criminal Appeal No. 137 of 1993.

Secondly, the cautioned statements of the accused persons differ materially in various aspects which creates doubts as to their authenticity. **One**, in Exh. P2, the 1st accused is recorded to state that there was a meeting that involved him, Kweji Mussa and Sikitu Mayala. In that cautioned statement, the 2nd accused is not mentioned as one of the participants though in his cautioned statement which is Exh.P3 he is recorded to state that he participated in the said meeting that was held in the 1st accused's place. Further, in Exh. P3, it was not stated who participated in the meeting and that fact was evidenced by PW3. In my opinion, this was the significant issue which was supposed to be cleared by the Prosecution is establishing guiltiness of the accused.

Two, cautioned statement of the 1st accused and 2nd accused have nothing to do with the 3rd accused. Neither of the two cautioned statements mentioned the name of Peter Magola (the 3rd accused). That being the case, I do not see how the said statements of the 1st and 2nd accused can be used to connect the 3rd accused.

Three, the cautioned statement (Exh.P1) of the 3rd accused did mention the 1st accused and Paulo Lukanda as the persons who went to



him to find ways of killing Suzana Lukanda and in view of that he directed them to consult a witchdoctor to prove if Suzana Lukanda was the one bewitching them. Further, it was recorded in Exh.P1 that the 3rd accused gave the 1st Accused and Paulo Lukanda medicines for protecting them from accusations after they killed their sister. Apart from that, it was recorded that the 3rd Accused instructed Paulo Lukanda to effect the killing and the 1st accused to protect Paulo Lukanda from any interference while executing the killing. Admittedly, I have failed to take this statement as true account of the 3rd accused. If he was really consulted by the 1st accused, why he was not mentioned by the 1st accused in his confessional statement (Exh.P2)? In my view, there is a very serious disconnection between the 3rd accused and the rest of the accused.

In his defence, the 1st accused categorically denied to have known Kweji Mussa. Prosecution did cross examine him of such denial. This means that Prosecution admitted that the 1st accused and Kweji Mussa were unknown to each other. This is in line with the principle that failure to cross examine on crucial matter amounts to an agreement that such matter is true. See: **Nyerere Nyague v R**, Criminal Appeal No. 67/2010 (Arusha, May 2012) and **Cyprian A. Kibogoyo v.R.** (CAT) DSM Cr. Appeal No. 88 of 1992.



That being the case, the alleged meeting between the 1st accused, Kweji Mussa and Sikitu Mayala is doubtful as to its taking place since 1st accused and Kweji Mussa are unknown to each other, the fact which was not disputed by Prosecution.

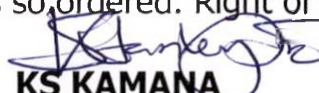
In concluding, it is my considered view that the Prosecution's case was weak in the sense that it sought conviction of the accused persons on a poorly investigated case. In tendering Exh. P1, the Prosecution wanted this Court to believe that the 1st accused and Paulo Lukanda were the one responsible for murdering Suzana Lukanda though Paulo Lukanda was discharged before the trial. Further, in tendering Exh.P3, the Prosecution wanted this Court to convict Kulwa Lukanda for participating in a meeting that plotted the murder of Suzana Lukanda which was alleged to have been effected by Salu Chiluluka though the said Exhibit did not state who were other plotters. In tendering Exh. P2, the Prosecution sought conviction against the 1st accused for holding a meeting with Kweji Mussa and Sikitu Mayala which in effect led to hiring of Salu Chiluluka who killed Suzana Lukanda. In fielding Sylvester Iddi (PW5), the same Prosecution wanted this Court to believe that Juma Lukanda, the 1st accused was the one who killed Suzana Lukanda with a machete. Equally, this amounted to riding more than one horse at the same time.



In view of the foregoing reasons, Prosecution has failed to prove its case beyond reasonable doubt. Being mindful of the fact that the conviction of accused, however poor their defence is, cannot be arrived at when the Prosecution fails to prove its case beyond reasonable doubt, I do not see it safe to convict the accused on the basis of the available evidence.

Juma Lukanda, Kulwa Lukanda @Malimi and Peter Magola @Masumbuko, the 1st, 2nd and 3rd accused are hereby acquitted. I order immediate release of the accused from prison unless otherwise lawfully held for another reason. It is so ordered. Right of appeal explained.




KS KAMANA
JUDGE
15/12/2022