

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA DISTRICT REGISTRY

AT NJOMBE

CRIMINAL SESSION CASE NO. 26 OF 2020

THE REPUBLIC

VERSUS

- 1. GOD SALEHE @ SHAIBU SALEHE**
- 2. MAJALIWA MBILINYI @ JEREMIA**

RULING

(IN TERMS OF SECTION 293 OF THE CRIMINAL PROCEDURE ACT, CAP. 20, R.E. 2022)

Date of Last Order: 12.12.2022

Date of Ruling: 13.12.2022

A.E. Mwipopo, J.

Accused persons namely God Salehe @ Shaibu Salehe and Majaliwa Mbilinyi @ Jeremia Stefano were arraigned in this Court for the murder offence contrary to section 196 and 197 of the Penal Code, Cap. 16, R.E. 2002. It was alleged that on the 30th day of April, 2016 at Wende Secondary School within the District and Region of Njombe jointly and together they murdered one Uhaula Kayanda. Both accused pleaded not guilty to the

offence and the Republic summoned 7 witnesses and produced 9 exhibits to prove the case. The prosecution's evidence in brief was as follows:-

SP Yessaya Sudi – PW1 testified that he is a police officer working in Mwanza Region. In 2016 he was OC-CID Makambako Police District within Njombe Region. On 20.08.2016 PW1 received an information that the suspect of robbery and rape offences committed at Makambako was at Mufindi District in Iringa Region. PW1 accompanied with other police officers went to Mafinga on the 30.08.2016 for the purpose of inquiring about the information and to arrest the suspect. They arrived at Mafinga around 00:00 hours on 31.08.2016 and they went to the house of God Salehe (1st accused) who was the suspect. They arrested the 1st accused and searched his house. Police were able to find several items which were used to commit the offences of robbery and rape. After the search was completed, police took the suspect and seized properties to Makambako Police Station.

At Makambako police station, police interviewed the 1st accused about the rape and robbery incidents committed in Makambako area. The suspect confessed to commit those offences and he added that he also committed the murder of security guard of Wende Secondary School in Njombe District.

The 1st accused said he committed the murder offence together with Majaliwa Mbilinyi. 1st accused said his gang was using two rifle guns in committing those offences. He told PW1 that one of the gun was at Idofi Street in Makambako at the House of Benedicto Funzila. 1st accused led PW1 and other police officers to the house of Benedicto Funzila where the rifle gun and its bullets were seized. Certificate of seizure was filled. Police took the gun, bullets, 1st accused and Benedicto Funzila back to Makambako Police Station.

1st accused told the police that the gun used in the murder incident at Wende Secondary School was seized by the police during armed robbery incident at Kibiki's Petro Station. PW1 was aware of the armed robbery incident at Kibiki's Petro Station which occurred few days back where one riffle gun with No. A.194300 was seized during gunfire exchange between robbers and the police. PW1 communicated with OC-CID Njombe about the information of murder incident at Wende Secondary School he received from the 1st accused. After completing his investigation, PW1 arrested several other suspects and on 14.09.2016 he did take all suspects to face their charges in Court.

PW1 said D/Cpl Salehe and D/C Nelius from the office of OC CID Njombe visited his office on 12.09.2016. They requested for the riffle gun make with No. A.194300 which the 1st accused said it was seized by the police at robbery incident in Kibiki's petrol station. The gun which was at Makambako Police Station Amoury was handled to them. On 04.08.2018 D/Cpl Salehe brought the gun with No. A.194300 and three spent cartridge to PW1 so he could take the gun and other guns seized during investigation to the ballistic Unit for ballistic examination. PW1 travelled to Dar Es Salaam on 05.08.2018 with the riffle gun with No. A. 194300, other guns and 3 spent cartridge. On the 06.08.2018, PW1 handled all the guns including the Riffle with No. A. 194300 and 3 spent cartridges from Njombe District Police to ASP Mayunga of Ballistic Unit. PW1 went back to Ballistic Unit to take the report and the exhibits on 15.08.2018. He met with ASP Mayunga who handled back to him the gun with No. A. 194300, spent cartridge and the ballistic Expert Report. PW1 travelled back to Makambako on 16.08.2018 and he handled the gun and ballistic examination report to Amoury keeper of Makambako Police Station namely Sgt. Linus on the same date.

It was on 10.10.2018 when PW1 took the gun with No. A. 194300, five spent cartridge and the ballistic report to police Njombe District and he

handled the rifle gun with No. A. 194300, spent cartridges and ballistic report to WP Mariam and Sgt. Sanke. It was the OC-CID Njombe who ordered PW1 to handle those exhibits to them. After handling the exhibits PW1 went back to Makambako.

Upon cross examination, PW1 said that Police seized mobile phones, vitenge and other clothes which were not related to this case when they searched the house of 1st accused at Mafinga. He did not record the interview with 1st accused. In the interview, 1st accused said that there was a gun seized at Kibiki's Petrol Station during robbery incident. 1st accused said that he did not participate in the robbery incident at Kibiki's Petrol Station. 1st accused was not found in the possession of the rifle gun with No. A. 194300. PW1 is aware that the gun with No. A 194300 was seized by Inspector Kelvin and other police officers during gunfire shootout during armed robbery incident at Kibiki's petrol station. It was on 25.07.2016 when PW1 was informed about the seized gun. From 30.08.2016 up to 14.09.2016 the 1st accused person was in the police custody. On 14.09.2016 1st accused was sent to the court. Police stayed with the 1st accused for a long time as he had several cases of armed robbery and rape.

Further, PW1 said that he was ordered to take the guns to the ballistic unit. PW1 took gun and 3 spent cartridge to the Ballistic Unit, but when he handled the gun and 5 spent cartridge to Njombe police station. Two more spent cartridges were handled to PW1 from Ballistic Unit at Dar Es Salaam. Njombe District Police requested for ballistic examination to satisfy themselves if the gun used in the murder incident at Wende Secondary School was the one seized at robbery incident at Kibiki Petrol Station as 1st accused said during interview. PW1 said he don't know as to when the 1st accused was brought to Njombe to face his murder case. When the 1st accused was arrested he was not given bail as his offences were not bailable.

Isaack Lulindi – PW2 was the 2nd prosecution witness. He testified that he is a medical doctor working at Kibena District Hospital. On 30.04.2016 while at Kibena Hospital, he was informed by hospital matron to conduct a post mortem examination the deceased at mortuary. He went to the mortuary where he found deceased relatives, police and mortuary keeper. Deceased relatives identified the deceased body. PW2 examined the deceased body which was in the sink. The body was covered with blood and it had some injuries. After he completed the examination, PW2 prepared a report. The report on post mortem examination of the deceased body was

tendered as exhibit P1. He said that the report shows that the cause of death is traumatic brain injuries caused by gunshot. He handled the report to the police officer.

PW2 said when he was cross examined that the injuries in the deceased body was caused by penetrating wound and the history shows that the deceased was shot by bullet. The history was provided by deceased relatives. The cause of injury was gun shooting because of the nature of the injury. There was no bullet in the body. The deceased body had penetrating wound in the head caused by gun shooting. Gun wounds had small wound on entrance point and large wound on exit point.

Inspector Magreth Frolence Mbawa – PW3, who is the 3rd prosecution witness, testified that she is a police officer station at Njombe. On 14.09.2016 she was assigned by ASP Mnuo a task of conducting identification parade. The said identification parade was conducted at Njombe police station. Cpl Bedon prepared the parade which contained 9 people of similar in height, body appearance and clothing. The suspect namely God Salehe (1st accused) was brought by D/C Ambrose and PW3 informed 1st accused that the identification parade is conducted to see if the

witness will identify him. She informed the 1st accused of his right to stand at any place in the parade line and he has right to call for the presence of relatives or friends to witness the parade. PW3 said she asked 1st accused if he has any objection to the parade and he answered he has no objection. The 1st accused chose to stand in the 5th place at the line from the right side. The parade was conducted around 16:30 hours hence there was sufficient light.

The identifying witness was brought to the parade from the office by D/C Ambrose. PW3 informed the witness that the people in line at identification parade are suspect of the murder incident which she saw. That the witness shall pass in front and behind the suspecting standing in line and if she is able to identify any of the person in the line she has to point the person by touching. The witness said she is ready to identify the person she saw on the murder incident. The witness identified the 1st accused who was standing in the 5th place at the parade by touching him. The witness passed in front and behind the line. The witness was taken away from the parade. PW3 asked the 1st accused if he has any objection to the parade and he answered he has no objection. She filed the identification register form with names of participants, the accused persons and the report of the parade.

The accused person and PW3 signed the identification register form. She tendered the identification register form as exhibit P2.

Upon cross examination, PW3 said the 1st accused was wearing a T-shirt at the parade. She was informed by ASP Mnuo that the suspect whom she has to conduct the parade was coming from prison. PW3 said she did not ask the identifying witness the description of the suspect. She did not tell the 1st accused to change his clothes if he wishes. The 1st accused was standing at the same position when the witness passed in front and behind the parade line. PW3 did not afford the 1st accused right to change position. She don't know where other people in the parade came from. She listed two people on right side and left side of the suspect as witnesses. He did not give the 1st accused person right to call for the presence of any person of his choice to witness the parade or to change the place of his choice in the parade after PW3 walked in front of the line.

The fourth prosecution witness namely Subira Imani Mwaiselo – PW4 testified that in 2016 she was form three student at Wende Secondary School located in Njombe Region. On 30.04.2016 around mid-night hours she was inside the dormitory. While preparing to go to bed after studying, she saw

three people standing besides her bed. At first she thought they are teachers, but one pointed a gun to her and said that she is under arrest. That they have already killed the watchman. Seeing that, PW4 screamed loudly for help while running outside the dormitory for help. Other students who were inside the dormitory also did run away. Those people she saw inside the dormitory with a gun also run away direction of the road. PW4 informed the matron namely Grace of what happened and matron called police. Police arrived later on and they asked PW4 what happened. PW4 told them the whole incident.

PW4 said she identified those people who entered inside their dormitory. She said two of them were a little bit taller and one was short and light skinned. She said one was wearing white shirt and black trouser. When she saw these people it was approximately two meters between them. She added that the light from electric bulb enabled her to identify the bandits. On 14.09.2016 she was called at Njombe police station to identify those people whom she saw inside the dormitory with a gun. Before she went to where the parade was conducted, she was in the investigation office at Njombe police station. One police led PW4 from investigation office to the place where the identification parade was conducted. At the parade, she was

asked to show the person who did the incident at the dormitory. PW4 was able to identify the person whom she saw in the dormitory by touching his shoulder. She said there were 10 people in the parade line. She identified the person since he did not cover his face during the incident. Other outlaws were wearing a hat (mizula) during the incident. In the parade, the suspect she identified was wearing a baraghashia cap. PW4 said the person whom she identified is the person the 1st accused. In the parade, the 1st accused was the 5th person from the right. After she have identified the 1st accused in the parade, she went back to the investigation office.

During cross examination, PW4 said that she gave her statement to the police two times on 30.04.2016 and on 14.09.2016. PW4 said she provided description of the suspect whom she could identify to the police as a little bit short and light skinned. Her statement was recorded on 14.09.2016 after identification parade was conducted. The only thing showing that she participated in the identification parade is her testimony. During identification parade, the 1st accused was wearing a red T-shirt and white hat (baraghashia). The electric bulb which was giving light inside the dormitory was not very big. There was no murder which occurred inside the dormitory, but she heard one of the student was injured by gunshot. During

the incident the watchmen died. She did not see who killed the watchman.

A/Inspector Nelius Nestory Gabriel – PW5 testified that he is a police officer at Njombe Police District. That on 14.09.2016 while at Njombe police station he was assigned to record statement of the 1st accused. The 1st accused was in the police station reception (C.R.O) as he was brought from prison. He took the 1st accused to investigation office. After introduction, PW5 informed the 1st accused that he want to record his statement concerning the killing of the watchmen at Wende Secondary School. The 1st accused admitted during interview that he participated in the murder incident at Wende Secondary School and he was with 2nd accused and Kizito. PW5 tried to tender the cautioned statement of the 1st accused he recorded during interview, but the same was rejected at a trial within a trial as the Court found that it was not voluntarily made. There was a proof the 1st accused was tortured and was denied some of his rights during interview.

SP John Mayunga Sangija – PW6 was the sixth prosecution witness. He testified that he is employee of the Police Force at Ballistic laboratory. He said he is the head of Ballistic Laboratory. On 06.08.2018 PW6 received a letter accompanied with exhibits for ballistic examination at Ballistic

Laboratory from ASP Yessaya Sudi who was OC-CID Makambako. The exhibits were one rifle gun with caliber .22 with serial No. A 194300, 2 bullets with caliber .22 and 3 spent cartridge with caliber .22. The covering letter was requesting for examination for the relationship between the gun and 3 spent cartridge, examination of the type of gun and if the gun works properly, the type of the bullets and the effects of the gun and the bullets. PW6 registered the gun and marked it as K-1, the two bullets were marked as K-2 and K-3, and the three spent cartridge was marked as Q-1, Q-2 and Q-3.

PW6 said he examined the gun by taking two bullets marked K-2 and K-3, put them in the gun (K-1) and shoot. The gun (K-1) was able to fire both bullets [K-2 AND k-3]. The cover of K-2 and K-3 were marked as T-1 and T-2. PW6 regarded T-1 and T-2 as standard. He took T-1 and T-2 and compared it with Q-1, Q-2 and Q-3 by using a microscope. After examination, he prepared the report of the ballistic examination report on 15.08.2018. On the same date he handled the ballistic report and exhibits to ASP Yessaya Sudi – PW1. The said ballistic report is accompanied with a book of photograph. The witness tendered the ballistic expert report as exhibit P3. He was of the opinion that exhibit Q1, Q2 and Q3 were shot by the gun K-

1. PW6 handled the gun and 5 spent cartridge to PW1. Three of spent cartridge were found in the scene of crime and two which were fired at the ballistic laboratory during ballistic examination. PW6 tendered the rifle gun with No. A 194300 and it was admitted as exhibit P4, three spent cartridge found at the scene of crime were admitted collectively as exhibit P5, and 2 spent cartridge allegedly were fired at the ballistic laboratory by Exhibit P4 were admitted as exhibit P6.

In cross examination, PW6 said court has to believe that he received 2 bullets and 3 spent cartridge from PW1. The bullet caliber is the same as in its spent cartridge. The caliber of gun resembles in classical characteristic of gun of its kind. But, each gun has individual characteristics in the pin impression. He used 7 days to examine the gun.

The last prosecution witness is police officer with No. E. 4186 D/Sgt Salehe – PW7. He said he is police officer at Njombe police station and that on 30.04.2016 he was assigned to investigate the murder incident which occurred at Wende Secondary School. On the same date he received some of the exhibits which includes a sketch map of the scene of crime which was drawn by Police Officer with No. G.5095 D/C Boniface and the report on post

mortem examination of the deceased body from OC-CID Njombe. He put both exhibits in the investigation file.

PW7 said he arrested the 1st and 2nd accused person on 14.09.2016 at District Court following his request for their removal order on 12.09.2016. He took both accused persons from the District Court to the office of OCS Njombe police station. There was identification parade to be conducted. After identification parade was conducted, PW7 interviewed the 2nd accused namely Majaliwa Mbilinyi. The 2nd accused admitted during interview to participate in the incident at Wende Secondary School where the watchman was murdered. He said they were together with the 1st accused and Kizito. They used a gun which its buttstock was cut. It was Kizito who shot the deceased. They took money in the office and they divided the money. 1st accused told him that the gun was seized by police at armed robbery incident at Kibiki's petrol station located at Makambako.

After interviewing the 2nd accused, PW7 made effort to find the gun which shot the spent cartridge found at the scene of crime. He got information that on 25.05.2016 there was armed robbery incident at Kibiki Petrol Station located at Makambako where the gun was seized. PW7

commander did write a letter to Makambako Police Station requesting for the gun. He went to take the rifle gun with No. A 194300. He was able to identify the gun at Makambako police station as its buttstock was cut off. On 10.02.2020, PW7 prepared a chain of custody form showing how the gun was handled from the time it was seized until it was received at Njombe police station Amoury. He also prepared the chain of custody form from the 3 spent cartridge. The sketch map of the scene of crime was admitted as exhibit P7, the chain of custody form for the 3 spent cartridge was admitted as exhibit P8, and chain of custody form for the gun was admitted as exhibit P9.

Upon cross examination, PW7 said that it was OC-CID namely Hassan Okele, D/C Boniface and D/C Peter who found the spent cartridge at the scene of crime. The sketch map – Exhibit P7 does not show the place where the spent cartridge were found. He did not tender certificate of seizure of the spent cartridges alleged to be found at the scene of crime as he was not the one who found them. The chain of custody form of the 3 spent bullet show that it was handled to PW7 on 04.08.2018 for the purpose of sending it to ballistic expert for examination. The said spent cartridge was found at the scene of crime on 30.04.2016. It was on 09.09.2016 when he got

information that the gun which was used in murder incident at Wende Secondary School was seized by Mkambako Police Station at incident which occurred at Kibiki's Petrol Station. The gun and spent cartridge were sent to ballistic expert in 2018 since they did not know it's were about. He was no aware if PW1 testified that immediately after interviewing the 1st accused person he informed OC CID Njombe. This was the end of prosecution case.

The evidence available in record shows that the deceased namely Uhaula Kayanda is dead. The testimony of the doctor who examined the deceased body - PW2 shows that the deceased had a penetrating wound in the head. He said the injury was caused by gun shooting due to the nature of the injury. He said the deceased had penetrating injury which its entry point was smaller and the exit point was big. The testimony by PW2 is supported by the report on post mortem examination of the deceased body – exhibit P1 which shows that the cause of death is traumatic brain injuries due to severe head injury caused by gun shooting. The report reveals that the deceased has multiple injuries of skull bones on frontal and backward of head (penetrating wound to the skull). There was rapture of deceased great vessels supplying blood to brain with injuries of brain tissues leading to severe bleeding. This proves without doubt that the deceased is dead and

his death was not natural. The deceased sustain brain injuries instigated by gunshot which caused severe bleeding. This means that somebody did shoot the deceased and caused his death.

The remaining issue for determination is whether the accused persons were responsible for deceased death. The prosecution evidence is relying on the identification of the 1st accused by PW4, identification parade, oral confessions of accused persons, ballistic expert report to prove that it was the accused persons who killed the deceased.

Regarding identification of the 1st accused by PW4, the question is whether the 1st accused was properly identified. The Law is settled that the evidence of visual identification is the weakest kind, thus before it is taken as a basis of conviction it must be watertight. In the famous case of **Waziri Amani vs. Republic [1980] TLR 250**, Court of Appeal held that:-

"The evidence of visual identification is of the weakest kind and most unreliable. As such, courts must not act on visual identification unless and until all possibilities of mistaken identity are eliminated and the court is satisfied that such evidence is watertight."

In the case of **Raymond Francis vs. Republic [1994] T.L.R. 100**, the Court of Appeal held that:-

"It is elementary that a criminal case whose determination depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance."

From the decisions cited above, it is very important to consider conditions for identification of the suspect was favouring the correct identification where the criminal case depends principally on identification of the accused person. The conditions favouring a correct or watertight identification includes the time the witness put the suspect under observation, distance between them, the intensity of light, presence of anything which obstructed the witness from observing the suspect such as threat. These factors were stated by the Court of Appeal in the case of **Sostenes Myazagiro @ Nyarushasi vs. Republic**, Criminal Appeal No. 276 of 2014, Court of Appeal of Tanzania, at Tabora, (Unreported). Similar position was stated by the Court of Appeal in the case of **Chacha Jeremiah Murimi and 3 Others vs. Republic**, Criminal Appeal No. 551 of 2015, Court of Appeal of Tanzania, at Mwanza, (Unreported), where it held that:-

"Admittedly, evidence of visual identification is of the weakest kind, and no court should buttstock a conviction on such evidence unless it is absolutely watertight; and that every possibility of a mistaken identity has been eliminated. To guard against that possibility the Court

has prescribed several factors to be considered in deciding whether a witness has identified the suspect in question. The most commonly fronted are: How long did the witness have the accused under observation? At what distance? What was the source and intensity of the light if it was at night? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he have any special reason for remembering the accused? What interval has lapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses, when first seen by them and his actual appearance? Did the witness name or describe the accused to the next person he saw? Did that/those other person/s give evidence to confirm it."

In the above cited case, the Court added other factors to be considered to eliminate possible mistaken identification to include the interval lapsed between the original observation and the subsequent identification to the police, presence of any material discrepancy between the description of the accused given to the police by the witnesses when first seen the suspect and his actual appearance, if the witness named or described the accused to the next person he saw, and if the other person give evidence to confirm it.

In the case at hand, PW4 said she was able to identify one of the criminal when they invaded their dormitory. She said there was electric light

from the bulb and the offenders were just 2 meters from where she was, the incident took long time approximately it took 30 minutes and she was able to observe the criminals, and she provided description of one criminal whom she was able to identify to the matron and police. PW4 said she identified the criminal as 1st accused during identification parade which was conducted on 14.09.2016 at Njombe Police Station.

Unfortunately, PW4 did not state the intensity of light in the dormitory which enabled her to identify the 1st accused. After finding that those criminals have a gun and they told her to keep quiet as the watchman is dead, PW4 said she screamed and run out of the dormitory. This shows that she was shocked and things happened fast. The time she said she was observing the criminals seems to be too long, 30 minutes of observing the offenders after they have pointed a gun at her and made the threat is doubtful. Moreover, the police officer or the matron whom PW4 said she told them that she can identify the criminals did not come to confirm the story. During cross examination, PW4 admitted that she recorded her statement at the police on 14.09.2016 after identification parade was conducted which means that there is nothing to prove that she provided description of the suspect before the identification parade was conducted. PW4 said in her

testimony that 1st accused was wearing a baraghashia hat during identification parade, the fact which was not disclosed by PW3. This raises doubt if the clothes and appearance of 1st accused was similar to other people in the identification parade.

Further, the identification register – exhibit P2 tendered by PW3 was not signed by PW4 to show that she identified the 1st accused during the parade. The witnesses of the parade namely Loft Lalika and Albert Nzakalila who were in identification parade line next to the 1st accused on his right and left side were not brought to testify. These are witnesses who were supposed to confirm that the accused person was identified by PW4. From PW3 answers during cross examination, it is clear that she did not give the 1st accused right to call for the attendance of a solicitor or friend in the parade if the 1st accused wishes to do so. All of these were contrary to procedures for conducting identification provided by the Police General Order (P.G.O.) No. 232 (d) and (s). The said omission in conducting the parade has prejudiced 1st accused rights in the said identification parade. Thus, the identification of the 1st accused by PW4 is not watertight and is full of doubt.

Another prosecution evidence connecting both accused persons to the deceased death is oral confessions of accused persons. This is found in the testimony of PW1, PW5 AND PW7.

It is a trite law under section 27(1) of the Evidence Act, Cap. 6 R.E. 2019 that a confession voluntarily made to a police officer by a person accused of an offence may be proved as against that person. The court may convict the accused person relying on confession where it is satisfied that the confession is nothing but the truth even when he denies to make the confession or he made it involuntary as it was held in **Tuwamoi vs. Uganda (1967) EA 84** and **Hamis Athuman and Two Others vs. Republic [1993] TLR 110**. In the case of **Hemed Abdallah vs. Republic [1994] TLR 72**, the court held that:-

"Once the trial court warns itself on the dangers of basing a conviction on uncorroborated retracted confession and having regard to all the circumstances of the case, it is satisfied that the confession is true it may, convict on such evidence without any further ado."

However, it is settled as a matter of prudence that a retracted or repudiated confession requires corroboration. In **Ali Salehe Msutu vs. Republic [1980] TLR 1** it was held at page 4 that:-

"It has long been an established rule of practice in East Africa, including this country, that a repudiated confession, though as a matter of law may support a conviction, generally requires as a matter of prudence corroboration as is normally the case where a confession is retracted."

PW1 testified that on 31.08.2016 he arrested the 1st accused at Mafinga on robbery and rape accusations. He took the 1st accused to Makambako Police Station. Police interrogated the 1st accused at police station and the 1st accused admitted to participate in the killings at Wende Secondary School. 1st accused said he was with 2nd accused and Kizito in the incident. He also told PW1 that the gun which was used in that incident was seized by police at armed robbery incident at Kibiki's petrol Station located in Makambako. PW1 said he know the robbery incident at Kibiki's Petrol Station where one gun was seized. He informed OC CID Njombe about 1st accused confession.

On his side, PW5 testified that he interviewed the 1st accused on 14.09.2019 at Njombe Police Station. That the 1st accused confessed to participate in the armed robbery at Wende Secondary School where one watchman was killed by gunshot. 1st accused was with the 2nd accused and Kizito. PW5 attempted to tender cautioned statement of the 1st accused, but

the prayer to tender the 1st accused caution statement was rejected by this Court during trial within a trial following objection raised by defense counsel for the 1st accused on ground that it was obtained through torture and it was obvious that rights of 1st accused during interview were prejudiced.

Another oral confession available is that of PW7 who said he interviewed 2nd accused on 14.09.2016. He said he became aware that the 1st and 2nd accused are responsible for the murder incident at Wende Secondary School on 12.09.2016 and on 14.09.2016 he interviewed the 2nd accused at Njombe Police Station. He said the 2nd accused confessed to participate in the killing of the deceased at Wende Secondary School and they used a gun which its buttstock was cut.

It is settled that oral confession if provided by reliable witnesses is sufficient to prove the case. In the case of **Chamuriho Kirenge @ Chamuriho Julias vs. Republic**, Criminal Appeal No. 597 of 2017, Court of Appeal of Tanzania at Mwanza, (unreported), it was held at page 21 of the judgment that:-

"It is settled that an oral confession of guilt made by a suspect before or in the presence of reliable witnesses, be they civilian or not, maybe sufficient by itself to ground conviction against the suspect."

The same position was stated in the case of in **John Peter Shayo and Two Others vs. Republic [1998] TLR 198** where it was held that:-

"As a general rule, oral confessions of guilty are admissible though they are to be received with great caution, and s. 27(1) and 31 of the Evidence Act, 1967 contemplates such confessions."

The oral confessions of accused persons to PW1, PW5 and PW7 has a lot in question. PW1 testified that immediately after the 1st accused confessed to participate in the murder incident at Wende Secondary School and informed him that the gun used in the incident was seized during armed robbery incident at Kibiki Petrol Station he informed OC CID Njombe. However, PW7 said in his testimony that he knew that 1st and 2nd accused were responsible for the death of the deceased on 12.09.2016. This raises a lot of doubt if PW1 informed the OC CID Njombe that 1st accused is responsible for the death of the deceased immediately after interviewing him, how come PW7 who is the investigator of the case did not receive such information. PW1 did not say if the 1st accused provided his confession voluntarily during the interview. The testimony of PW1 shows that the 1st accused was taken to Court after 14 days. PW1 said the reason of delay to take 1st accused to Court was they were arresting other suspect and

conducting investigation, this raises doubt if the 1st accused provided his oral confession voluntarily. The reason for staying with the 1st accused under custody for 14 days was not sufficient.

There is no evidence available in record at all to show as to when the 2nd accused was arrested. PW7 did not say in his testimony if the 2nd accused gave his confession voluntarily since the law is clear that the said confession to police officer must be given without threat, promise or other prejudice. As there is doubt in the voluntariness of oral confessions of accused persons, the said confessions requires corroboration from other independent evidence to prove the case. There is no such evidence available in the record.

The testimony of PW6 is that the gun alleged to be found with accused person was the one that fired the 3 spent cartridge found in the scene of crime. Very unfortunately, there is no evidence which proves that the said 3 spent cartridges were found at the scene of crime. When PW7 was asked during cross examination about the certificate of seizure of 3 spent cartridge or any proof to show that the spent cartridge were found at the scene of crime his answer was that there in none as it was ASP Okelo, D/C Boniface and D/C peter who found those spent cartridges. These witnesses did not

come to testify in Court. This means that there is no evidence at all to prove that the 3 spent cartridges which were sent to ballistic expert were found at the scene of crime. In addition, the evidence available show that the gun which was allegedly used to kill the deceased was handed to PW7 on 12.09.2016 and the 3 spent cartridges were found on 30.04.2016 which is the date of incident. It took the police almost two years to send the spent cartridge and gun to ballistic expert for examination. The gun and spent cartridge were sent to ballistic laboratory by PW1 on 06.08.2018. This raises a lot of question on the reason of such a long delay to examine the gun if it fired the spent cartridge.

Moreover, there is no evidence at all to prove that the said rifle gun which was sent to ballistic laboratory for examination was in possession of accused persons. PW1 testified that the gun was seized during robbery incident at Kibiki's Petrol Station. There is no seizure certificate or witness who testified to seize the said gun. The only connection between the gun and accused persons was testimony of PW1 and PW7 that accused persons said in their oral confessions that the gun used in the Wende Secondary School murder was rifle which its buttstock was cut and it was seized by police in the armed robbery gunfire exchange at Kibiki's Petrol Station. As

the oral confession has doubts, there is nothing connecting all accused persons with the respective gun.

Therefore, with such a kind of evidence in record, I find that there is no sufficient evidence to require accused persons to defend themselves. The evidence available is full of doubt, leaves a lot of gaps in the chain and as whole is not sufficient to prove that it was accused persons who committed the offence of murder or any other offence of which, under the provisions of sections 300 to 309 of the Criminal Procedure Act, Cap. 20, R.E. 2022, they are liable to be convicted. Thus, I record a finding of not guilty against accused namely God Salehe @ Shaibu Salehe and Majaliwa Mbilinyi@Jeremia and they are acquitted from this case. It is so ordered accordingly.



A handwritten signature in blue ink, consisting of stylized, overlapping loops and a long horizontal stroke extending to the right.

A.E. MWIPOPO
JUDGE
13.12.2022

ORDERS

Rifle gun with No. A. 194300 and 5 spent cartridge which were tendered in this case as exhibit to be handled to the Police who are required to destroy it.



A.E. MWIPOPO

JUDGE

13.12.2022