

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA DISTRICT REGISTRY

AT NJOMBE

CRIMINAL SESSION CASE NO. 22 OF 2020

THE REPUBLIC

VERSUS

1. PHILIPO KIWALE @ ANDREA

2. AMOS BONIFASI MHEMA

JUDGEMENT

Date of last order: 06.12.2022

Date of Judgment: 15.12.2022

A.E. Mwipopo, J.

The accused persons namely Philipo Kiwale @ Andrea and Amos Bonifasi Mhema are jointly and together charged for murder offence contrary to section 196 and 197 of The Penal Code, Cap. 16, R.E 2019. It was alleged in the particulars of the offence that on 17th of May 2019 at Kihanga Village within the District and Region of Njombe they did murder one Stulda D/O Kinyunyu. Both accused persons pleaded not guilty to the offence and the

prosecution called 6 witnesses and tendered 16 exhibits to prove the case. The accused defended themselves on oath and they neither called any other witness nor they tendered any exhibit in their defense.

The first prosecution witness is Dr. Charles Hilali Mbota – PW1 who testified that he is working at Makambako Township Hospital. That on 20.05.2019 while at Makambako Hospital a police officer came and requested him to examine the cause of death of the deceased who was in mortuary. PW1 went to hospital mortuary where he found two police officers and deceased relatives. Deceased relatives identified the deceased body. PW1 examined the cause of death of the deceased and filled the report. He said that the cause of deceased death is severe brain injury which was caused by heavy blunt object. The injury probably caused internal hemorrhage. He handled the report to the police officer. The said Post Mortem report was admitted as Exhibit P1 for the prosecution.

When he was cross examined by the counsel for the 1st accused and 2nd accused, PW1 said that he knew that the deceased name is Stulda Kinyunyu from the deceased relatives. The names of deceased relatives who identified the deceased are in exhibit P1. In the report of post mortem

examination – exhibit P1 he was of the opinion that death occurred approximately a day before post mortem examination which means the death probably occurred on 19.05.2019. In the report he stated that the deceased body was wet and was covered with mud. Probably the deceased body was inside water. Under normal circumstances it is possible for the deceased body soaked or immersed in water to be covered with mud. It was not possible for the fertilizer bag to retain water for long time. The deceased body and clothes were wet. PW1 said his name is not in the Exhibit P1, but exhibit P1 contained his signature, his handwriting, hospital stamp and the name of the deceased.

Obed Abraham Mnyavilwa – PW2 was the second prosecution witness. He testified that he is residing at Kihanga Street in Mlowa Ward. He is Executive Officer of the street of Kihanga for 8 years. On 18.05.2019 he was in the farm within Kihanga. Around 09:00 hours he received a call from chairman of the street namely Victory Bernard Mfuse informing him that Stulda Kinyunyu did not return to her house on the previous night and the information came from children of Stulda Kinyunyu. PW2 went to the house of Stulda Kinyunyu and he found children of Stulda Kinyunyu namely Leonia Charles Mangililwe and Clinton Chungu. He asked what happened and they

answered that their mother did not come back home on the previous day. Further Leonia Mangililwe told PW2 that around 03:00 hours 1st accused entered inside Stulda Kinyunyu's house she was living with her children, switched off the light and he took Solar battery sundar make, a card of clinic of Leonia Mangililwe and Tshs. 8,500/=.

After receiving that information, PW2 asked three local militia to find 1st accused. The local Militia arrested 1st accused and they brought him in the street office. PW2 told 1st accused that he is suspect in the disappearance of Stulda Kinyunyu and 1st accused answered that he was not responsible. PW2 phoned Ward Executive Officer and police informing them about the incident and that he has apprehended the suspect. Police came to the street office and they interrogated the suspect. The police decided to conduct search at 1st accused's house. They went to the house of 1st accused to conduct search and they found the Solar battery, clinic card and money. The police decided to go with 1st accused and exhibits to the police station as many people were gathering in the area.

On 19.05.2019 around 08:20 hours PW2 received a phone call from police informing him to stop searching for Stulda Kinyunyu and to return to

the street office. He went to the office waiting for the police. Police arrived at the office with 1st accused. 1st accused confessed to PW2 that he has killed Stulda Kinyunyu by using axe and he was with 2nd accused. He said 2nd accused was holding deceased leg when he hit the deceased with axe. After killing the deceased, they put her body in fertilizers bag (loba) which was big enough to take 12 tins of maize, carried the deceased body by using bicycle and dumped the body in the well owned by Daud Makalanga. PW2 said 1st accused told him that they did break two padlock used to lock the door of the well before dumping the deceased body inside the well. He asked 1st accused if he is willing to show them the deceased body and 1st accused said that he was ready.

1st accused led them to the well in the farm of Daud Makalanga. He told them that the well has a door which was closed with two padlocks. That they did break two padlocks and they threw those padlocks on ground. 1st accused show them where they threw those padlocks and they found two padlocks a big one and small one. One padlock was silver in colour and the other was of gold in colour on its sides. PW2 called the owner of the well and asked him to come to his well with generator to help them take out the water from the well.

Daud Makalanga came with the generator and they took water out of the well. One person entered inside the well and retrieved the deceased body from the well. Deceased body was inside plastic fertilizer bag (loba). They found the deceased body had a wound in the head and was swollen. 1st accused told them the body is of Stulda whom they killed. After the fertilizer bag (loba) was opened, deceased relative identified the body to be that of Stulda Kinyunyu. Then the deceased body was taken to hospital by police.

On 20.05.2019, 1st accused led the police to where he hid the deceased phone which he took after the incident. 1st accused led the police and villagers to his father's farm. The phone was hidden inside bamboo trees bushes (vitindi). The phone was Itel of blue colour. The police took the phone as exhibit. PW2 said he knew 1st accused as a resident of Kihanga Street and his ten cell leader is Majaliwa Israel Kidadula. PW2 said while the search for deceased was going on, 2nd accused disappeared from the street. 2nd accused was arrested on 19.05.2019 around 16:00 hours by people. They informed the police who came to take 2nd accused to Police station.

When PW2 was cross examined by defense counsels he said that he was informed by Leonia Mangililwe that there was an incident of stealing of

a Solar battery. The deceased body was found inside the fertilizer bag/plastic bag (loba) and the bag was taken by the police as exhibit. The phone which was stolen by the 1st accused belongs to the deceased because deceased children identified it and the line which deceased was using was found inside the phone. There was no TCRA report which was shown or brought to him. The children of the deceased did not bring any receipt to prove that the phone belongs to the deceased. The 1st accused had no injuries when he was brought to street offices. If 1st accused got injuries, he probably sustained those injuries while in the hands of police.

PW2 admitted that he was not present when the 1st accused was arrested by local militias, but the 1st accused was handled to the street chairman with no injuries. He handled the 1st accused to the police with no injuries. If 1st accused got some injuries, he don't know when the 1st accused he sustained those injuries. PW2 said after 1st accused was arrested, he denied to kill the deceased. 1st accused admitted to kill the deceased later on, when he was brought back to the street office from police station. 1st accused confessed to PW2 that he killed the deceased. When 1st accused was confessing at street office there were two police officers holding guns. Also, 1st accused hands were in handcuffs and almost 1000 people were

around the office when he was confessed to PW2. The 1st accused appeared to be normal. PW2 did not ask the 1st accused if he was beaten or tortured by the police. 2nd accused run away later on as he was present during the search for deceased. After there was rumors that 1st accused is responsible, 2nd accused disappeared. 2nd accused was arrested in the forest where he went to hide. He was informed by people who arrested 2nd accused that 2nd accused was hiding in the forest. PW2 ordered the 1st accused to be arrested on suspicious that he was responsible for disappearance of the deceased.

Leonia Mangililwe – PW3 was the 3rd prosecution witness. PW3 testified that she is resides at Kihanga Village with her grandmother. She said that, her mother was called Stulda Kinyunyu. PW3 said on 17.05.2019 her mother left home and went to Kijiweni to buy soap, but she did not return. At that time PW3 was living with the deceased. She said around 03:00 hours in the midnight a male person entered inside the deceased house, switched off the lights, and she heard that person throwing the clothes and mattress in her mother's room. She said she managed to identify the person when he was going out of the house by moonlight. She said that the person entered the house was wearing a torch on his forehead. She said the person was Philipo kiwale (first accused). PW3 said she was in her last month of pregnancy as

result she could not do anything to stop the 1st accused from taking solar battery and pouch.

In the morning, PW3 and her brother went to report to their grandmother on disappearance of their mother. While on their way back home, they saw her mothers' slippers and there was sign of people fighting in the area. PW3 picked those slippers. She also found a soap bar on the way and she picked it. Later on the alarm was raised by village leaders and search of the accused commenced.

After sometime passed without finding her mother, PW3 phoned the street chairman and told him that the 1st accused did break her mother's house and stole a solar battery sundar make, Money Tshs.8500/=, pouch and clinic card in the night. She said the pouch, money and clinic card belongs to her and solar battery belongs to her mother. The solar battery has a negative and positive marks on its top written by a marker pen. Following the information, the 1st accused was arrested and when he was asked by village leadership about the disappearance of Stulda Kinyunyu, the 1st accused denied to know anything. Police were informed and they came to the village office in the evening. The 1st accused was handled to the police.

Police went to search 1st accused house and she accompanied them. PW3 said that she was able to identify her mother's solar battery and her clinic card which were found at the 1st accused house during search. The police then left with 1st accused and exhibits seized.

PW3 said the search of her mother continued on 19.05.2019, but later on the village chairman told them to meet at the street office. She went to street office and she found the 1st accused was already at the office. A lot of people were at the street office. PW3 heard that 1st accused has admitted to kill the deceased and he is ready to show where they hide the deceased body at the well owned by Makalanga. The 1st accused led them to the area owned by Makalanga and he show them two 2 padlocks on the ground, one big and one small. 1st accused said the padlocks were used to close the door/cover of the well. He then show the well and said that deceased body was inside the well. One Vony Omange entered inside the well and said there is body of person inside the well, but there was water inside the well. They pulled water out of the well by using a generator. While PW3 was interviewed by police, the deceased body was retrieved from the well. PW3 was called to identify the body. PW3 said she was able to identify the body as that of

her mother. She was able to identify the body by her face and clothes. The police took the deceased body to mortuary.

PW3 said that 1st accused also led police to where he hide the deceased phone which he took after killing her. The phone was hidden in the farm of the 1st accused father in bamboo trees bush (kitindi). PW3 identified the phone to be the property of her mother by its appearance. She said it is ITEL make of blue colour. In the following morning, they went to take the deceased body and they buried her.

When she was cross examined by the defence counsels, PW3 said that she identified the 1st accused by using moonlight when he was going out of the deceased house. 1st accused was wearing red cap, chocolate jacket and blue trouser (jeans). PW3 said she put the mark in battery. There was no reason for marking the battery. PW3 said she saw 1st and 2nd accused buying beer to the deceased at the local pombe club on 17.05.2019 at evening hours, but she did not tell the police or the village leaders. The deceased body was found inside big fertilizer bag used to store maize (loba), but when she saw the body the face was not covered by the said loba.

The fourth prosecution witness is police officer with No. G. 201 D/Cpl James – PW4. He said that on 19.05.2019 while at Makambako Police Station he was ordered by OC CID namely Yesaya Sudi to record cautioned statement of Amos Mhema (2nd accused). He was informed that the 2nd accused was arrested on 19.05.2019. He prepared the investigation office for interview and went to take the 2nd accused from the lock up. The investigation room had chairs, table and files.

PW4 said he identified himself to the 2nd accused. He then informed him that he is accused of killing one Stulda Kinyunyu and he want to record his cautioned statement if he is willing. That he is not forced to say anything except with his consent and that whatever he says will be recorded and may be used as evidence against him in court. PW4 said he informed him that he has right to call a relative, friend, any person or his advocate during interview and the 2nd accused said that he want to record his statement in the presence of his relative Essau Mhema who was in police station. Essau Mhema was called to the investigation room and was informed that 2nd accused wants him to witness the recording of his statement. Essau Mhema agreed to witness the interview. The 2nd accused signed the paper by putting a thumb print, then Essau Mhema and PW4 also signed the paper. PW4 started to

record the 2nd accused statement at 19:00 Hours. After finishing to record the statement, PW4 said that he read it to the 2nd accused who said that the statement is correct. Then, all signed the statement. PW4 tendered cautioned statement of the 2nd accused and it was admitted as exhibit P2 for the prosecution without objection from defense side.

During cross examination by defense counsels, PW4 said that he started recording the statement at 19:00 Hours. Essau Mhema came to the Police Station to inquiry about the arrest of the 2nd accused. When he was recording the statement of the 2nd accused, the 1st accused was in the police lock up at Makambako.

Jackson Thomas Banobi – PW5 testified that he is a Judge Legal Assistant. He said that in 2019 he was Resident Magistrate Incharge of Makambako Primary Court and justice of peace. On 21.05.2019 around noon hours while in Makambako Primary Court, a police officer namely D/CPL Masudi came with a suspect. D/Cpl Masudi told PW5 that he has a suspect namely Philipo Kiwale (1st accused) who want to record a confession. That the 1st accused is accused of killing one Stulda Kinyunyu. PW5 said he asked the the police officer to leave the suspect under custody Court clerk namely

Stefano. D/Cpl Masudi left the area. PW5 asked the 1st accused if he is fluent in Swahili language and the 1st accused admitted that he is fluent in Swahili. PW5 informed the 1st accused that he is Justice of Peace and that whatever he says concerning the death of Stulda Kinyunyu will be recorded and may be used as evidence against him in court.

PW5 examined the 1st accused and observed that the 1st accused had a wound in his left leg. 1st accused said that he sustained the injuries when he was arrested by people at Kihanga. PW5 was satisfied that the 1st accused was fine despite the wound. He asked the 1st accused if he is willing to give his statement and 1st accused answered that he is ready to give statement willingly and that he was not threatened or promised anything by anyone. The 1st accused informed PW5 that he was arrested at Kihanga Street on 18.05.2019 in the night hours. Thereafter, PW5 commenced to record 1st accused statement. After PW5 completed to record the 1st accused statement, he read it to the 1st accused who said the statement is correct. Both, the 1st accused and PW5 signed the extra judicial statement. Then, PW5 took the recorded extra judicial statement and the 1st accused and handed them to the police officer. PW5 tendered the extra judicial statement of the 1st accused person which was admitted as exhibit P3 for the

prosecution as there was no objection from defense side. In the said extra judicial statement the 1st accused was confessing to kill the deceased.

When cross examined by defense counsels, PW5 said that the 1st accused did not say who arrested him. The wound in the 1st accused leg was of two to three days. The wound was in the process of healing. 1st accused told PW5 that he was arrested 3 days back. PW5 said he don't know who did beat the 1st accused during arrest. It might be people or police. PW5 said he did not ask the 1st accused in the extra judicial statement as to where he sleep before he was brought to record his extra judicial statement. The 1st accused was willing to record his statement without being threatened or promised anything by anyone. PW5 did not record the extra judicial statement of 2nd accused.

The last prosecution witness is police officer with No. F. 2579 D/Sgt Masudi – PW6. PW6 said he is a police officer working at investigation department at Makambako police station. He said that he is the investigator of the case. He was assigned to investigate this case by OC-CID Makambako namely Yessaya Sudi. He said on 18.05.2019 in the evening hours he received information from leaders of Kihanga village that there is incident of

a person by the name of Stulda Kinyunyu to disappear. The information shows that one suspect was arrested for stealing solar battery and pouch in the house of Stulda Kinyunyu. PW6 accompanied OC-CID, D/CPL Hamis, D/CPL James and other police officers went to Kihanga village. After that arrive at Kihanga village, they found people have gathered and the 1st accused has already been arrested by the people. The 1st accused was handled to the police and the police went to the house of 1st accused to conduct search of goods stolen from Stulda Kinyunyu's house.

During search, the police were able to seize two batteries of sundar make of white colour. The children of Stulda Kinyunyu identified one battery as the property of their mother which was stolen a day before. The certificate of seizure was filled and it was signed by village leaders and 1st accused. The police took Philipo Kiwale and the exhibits seized to Makambako police station where investigation file was opened for the disappearance of Stulda Kinyunyu. The exhibits and certificate of seizure was handled to him as an investigator of the case and he handled the same to WP No.9947 PC Dorothy who is exhibit keeper.

On 19.05.2019 around morning hours PW6 took 1st accused for interview in his office. He said that 1st accused admitted to kill Stulda Kinyunyu by using an axe and he said he was assisted by the 2nd accused. 1st accused told him that they dumped the deceased body in the well and he was willing to show them. PW6 informed OC-CID of what 1st accused told him. OC-CID asked PW6 to prepare other police officers to go to Kihanga village so that accused person could show them where the deceased body was dumped.

They went to Kihanga village together with OC-CID Makambako and another police officer. They carried gloves and stretches. They arrived at village office and they found a lot of people have gathered. The village executive officer also got chance to speak to 1st accused who confessed to village executive officer that he killed Stulda Kinyuyu and dumped her body in the well. The 1st accused led them to the farm of Daud Makalanga where there was a water well. He told police that the deceased body was dumped inside the water well. The door of the well was not locked and 1st accused told them that they did break padlocks of the well before dumping the deceased body. 1st accused did show the police where they threw those padlocks and the police were able to seize two broken padlocks. One padlock

was big and other one small. Both padlocks were of silver colour. Those padlocks one was written Fantom and another one Wohu. He prepared a certificate of seizure which was signed by village leaders. The deceased body was retrieved from the water well and the body was inside fertilizer/plastic bag. The bag was opened and deceased relatives and 1st accused admitted that the body is that of Stulda Kinyunyu.

PW6 said that 1st accused led the police to the house of 2nd accused to conduct search where one axe which was used to kill the deceased was seized. PW6 filled certificate of seizure. Then, the 1st accused led the police to his house and they searched the house where they found a black pouch with white patches. Inside the pouch there was clinic card and money which were identified by the child of the deceased namely Leonia Mangililwe. The money was Tshs. 8,450/= . The money was one 5,000/= note, 3 notes of 1000, two 200 coins and one 50 shillings coin. PW6 filled another certificate of seizure which was signed by village leadership and accused person.

Further, PW6 said that the 1st accused told them that he took deceased phone and went to hide it after killing her. 1st accused led the Police to where he hide the phone in his father's farm inside bamboo trees bush. The phone

was of Itel make, dark blue in colour with light blue stripes on the sides of the phone. Police seized the phone and filled certificate of seizure which was handled to PW6. The Imei number of the phone and phone number were recorded in the certificate of seizure. On 20.05.2019 the post mortem examination of the deceased body was conducted by Dr. Charles Mbota at the mortuary of Makambako Hospital. After examination was completed the deceased body was handled to relatives for burial and report on post mortem examination was handled to PW6. Around 15:00 hours on the same date D/Cpl Hamis went to Kihanga village to draw sketch map and he handled it to PW6. On 21/05/2019 Philipo Kiwale was sent to the Justice of Peace where he recorded his extra judicial statement.

PW6 tendered certificate of seizure for the Solar battery and pouch as exhibit P4, certificate of seizure of mobile phone Itel was admitted as exhibit P6, certificate of seizure of two padlocks was admitted as Exhibit P7, certificate of seizure of two Solar batteries sundar make was admitted as exhibit P8 and the sketch map of the scene of crime is admitted as exhibit P9 for the prosecution. He also tendered two Solar batteries seized at 1st accused house and one battery had -+marks written by marker pen which were collectively admitted as exhibit P10, axe was admitted as exhibit P11,

Pouch was admitted as exhibit P12, Clinic card was admitted as exhibit P13, two padlocks were admitted collectively as exhibit P14, mobile phone Itel was admitted as P15, money were admitted collectively as P16.

Upon cross examination, PW6 said that the information received from leaders of Kihanga was about the theft of property of the deceased and the 1st accused was arrested for stealing deceased property. They opened the inquiry file as there was suspicion that the 1st accused killed the deceased. All physical exhibits were labelled as exhibit No. 12 and exhibits were tendered without the label. That the court has to believe that the exhibits are the one seized during investigation even though the label was not tendered. The money which was tendered here in court are the same money found inside the pouch of PW3.

Further, PW6 said the phone Imei number 354546107574547/54 and phone number 0742536591 were recorded in the seizure certificate. The phone number belongs to the deceased because it was registered in her name. He knew that the number was registered in the name of the deceased after he sent money to the number through M-Pesa and they found the number was registered as Stulda Kinyunyu. PW6 said he thought the 1st

accused sustained the injury stated in extra judicial statement during his arrest since people assaulted him when he was arrested.

In their defense, both accused testified on oath. The first accused namely Philipo Kiwale - DW1 testified that he was arrested by local militia on 17.08.2019 around 18:00 hours when he was returning to his house from the farm. The local militia took him to the village office. The village executive officer (PW2) asked him where he was. He answered that he was in the farm. PW2 told him to wait for the police to come. The police came and they asked him as to why he did not go to attend the alarm raised for the search of disappeared person. At that moment they did not tell him who disappeared. He told the police that he had no information.

DW1 said he knows that he was charged before this court for the death of Stulda Kinyunyu. He knows the deceased as she was residing at Kihanga village. DW1 denied to kill the deceased. He said that the extra judicial statement was not correct as he did not confess. He was asked to sign a statement which he don't know it's content. The statement which he signed was not the one which was tendered in court. He doesn't know how to read and write as he did not go to school. He knew that the statement tendered

was not the one he recorded as its contents was different from what he said to the justice of peace. He did not meet with the 2nd accused or the deceased on 17.05.2019. He also denied to lead police officers to the place where the deceased body was dumped. He said that it is true that police searched his house on 17.05.2019. He didn't know what was seized during search as it was dark, but in the police station he was shown Solar battery alleged to be seized at his house. He said he has never owned a Solar batter.

DW1 added that the axe which was tendered in court does not belong to him and he don't know the owner of the axe. The pouch alleged to be found in his house he doesn't know it. He said that he have a wife, but she does not own a pouch of that colour. He was interviewed at police station, but the same was not recorded. After he was arrested by the police, they took him to the justice of the peace at Makambako Primary Court. Justice of peace was the one who testified here in court. He did not confess before Village Executive Officer – PW2 about killing the deceased. When he was asked about the disappearance of the deceased by PW2 at village office he denied to be responsible. He added that he signed the search and seizure certificates at police station. He did not sign the seizure certificate at his

house. His tencell leader namely Semfuse signed the seizure certificate at police.

DW1 said that the evidence adduced by prosecution witnesses shows that when the deceased body was taken out of water well it was inside fertilizer bag (loba). But the said bag was not tendered in court as exhibit. The bicycle which was said to be used to take the deceased body to the well was not tendered as exhibit. Because of those omissions, DW1 prayed for the court to find that he is not guilty of the offence and to discharge him.

When he was crossed examined by the prosecution, DW1 said that he believes that the reason he was arrested was his absence during search for the deceased. He said that after the deceased body was found by the police, they went back to the police station. DW1 also admitted that he was taken to Justice of Peace, but he was forced to sign the statement recorded by Justice of Peace. The justice of peace did not ask him as to when he was arrested. He said he told his advocate that he was forced to sign the extra judicial statement. The search in his house was conducted on 17.05.2019 around 20:00 hours and during search his wife was present.

The 2nd accused namely Amos Mhema - DW2 was the last defense witness. He testified that he resides at Kihanga village and he works as peasant and masonry. DW2 said he know the 1st accused and the deceased as they were residing in the same village. On the 17.05.2019 he went to work in his farm and he returned to his home around 19:00 hours. He did not meet with deceased or 1st accused on 17.05.2019. He has a wife whom he is living with. The name of his wife is Neema Chungu. He said he has information that his wife has left his house after he was arrested. Thus, he could not bring her as witness.

DW2 said he did not participate in the incident of killing the deceased. On 18.05.2019 he participated in the search for deceased namely Stulda Kinyunyu. He was arrested by local militia at his farm on 18.05.2019 around 16:00 hours. They took him to the village office. He asked the PW2 why he was arrested and PW2 answered that he will know after the police came. The police came around 19:00 hours and took him to Makambako police station. He denied to have confessed in his cautioned statement recorded by the police officer namely James, but he was forced to sign it. The statement was not read to him after being recorded.

With regard to the axe tendered by prosecution, DW2 said it does not belong to him and he don't know when and how the police found it. He don't know the owner of the axe. He was not present when other exhibit were seized by the police. He put his thumbprint in some of the document at Makambako police station.

When he was cross examined, DW2 said that prosecution evidence shows that he recorded his statement at the police and he was confessing. He denied to confess. Before the incident he did not know the police officer who said he recorded his statement and he has no problem with him. He doesn't know why James testified that way before this court. This was the end of defense case. Counsels for both sides did not wish to make final submissions after closing of their cases.

There is no dispute that the deceased person namely Stulda Kinyunyu is dead. The evidence from PW2, PW3 and PW6 proved that they witnessed the deceased body being retrieved from the water well owned by Daudi Makaranga already dead. The deceased body was inside fertilizer bag (loba). This proves that the body was dumped to the water well by somebody. The deceased could not put himself in the plastic fertilizer bag and drown herself

in the well. The evidence of PW2, PW3 and PW6 is supported by testimony of Dr. Mbota – PW1 who examined deceased body. PW1 said that the cause of deceased death is severe brain injury which was caused by heavy blunt object. That injury probably caused internal haemorrhage. The report on post mortem examination of the deceased body – exhibit P1 shows in its summary that the deceased has fractured skull bone with laceration wound 7 cm, bloody clots, nasal and mouth discharge and tongue was not bluish. The evidence shows that deceased was killed somewhere else by somebody who used heavy blunt object which caused the fracture in deceased skull bone and the body was dumped inside water well. Thus, the evidence proved without doubt that deceased death was not natural.

This being a murder case, the remaining issues for determination are whether accused persons are responsible for the deceased death, and if the answer is positive, whether they killed the deceased with malice aforethought and with common intention.

Burden of proof in criminal cases is always on the prosecution. The exception is only where the law provides otherwise. The standard of proof required in criminal case is beyond reasonable doubt. This is provided by

section 3 (2) (a) of the Evidence Act, Cap. 6 RE 2002. The requirement of proving a criminal case beyond reasonable doubt has been emphasized by Court in several of its decisions. In the case of **Hemed vs. Republic [1987] TLR 117**, it was stated that:-

"...in criminal cases the standard of proof is beyond reasonable doubt. Where the onus shifts to the accused it is on a balance or probabilities."

In the case of **Mohamed Matula vs. Republic [1995] TLR 3**, it was held that:

"Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused; the onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence."

No duty is cast on the accused person to establish his or her innocence as it was held in the case of **Said Hemed vs. Republic [1986] TLR 117**

The prosecution alleges that it is the accused persons who killed the deceased. As accused persons were charged for murder offence contrary to section 196 and 197 of the Penal Code, Cap. 16 R.E. 2019, the prosecutions are duty bound to prove the case beyond reasonable doubts. There are two

elements which must be proved against the accused persons, the act of unlawful killing and malice aforethought.

In the present case, the prosecution case against the accused persons depends wholly on circumstantial evidence. There is no eyewitness to the deceased's murder. None among prosecution witnesses testified to see the person who killed the deceased. But having no witness who saw accused persons killing the deceased does not mean that it can exonerate them from the offence they stand charged if there is sufficient evidence implicating them with the offence. Not every killing can be witnessed by an eye witness. The Court may convict the accused person on circumstantial evidence if facts leads to no other conclusion than that of the guilt of the accused person. In **Hamida Mussa vs. Republic [1993] T.L.R. 123**, the Court held that, I quote:

"Circumstantial evidence justifies conviction where inculpatory fact or facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt"

Similar position was stated by Court of Appeal in the case of **Samwel Marwa @ Ogonga vs. Republic**, Criminal Appeal No. 74 of 2013, Court of Appeal of Tanzania at Mwanza, (Unreported), where it was held that:-

"To pin liability on the basis of circumstantial evidence, the evidence must lead to no other conclusion except that the accused is the person who committed the offence he is charged with. If the evidence is capable of more than one explanation it does not meet the standard of proof set in this principle."

The facts which lead to conclusion that the accused person is guilty must be proved beyond reasonable doubts. In the case of **Ally Bakari vs. Republic [1992] TLR 10** the Court of Appeal held that: –

"Where the evidence against the accused is wholly circumstantial the facts from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be connected with the facts which the inference is to be inferred."

In the case of **Gabriel Simon Mnyele vs. Republic**, Criminal Appeal No. 437 of 2007, Court of Appeal Of Tanzania at Dar Es Salaam, (Unreported), the Court of Appeal provided a test when a case rest on circumstantial evidence. The Court held that:-

"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. From the authorities we are settled in our minds that when a case rests on circumstantial evidence such evidence must satisfy three tests:- (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 guilt of the accused: (iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

The prosecution evidence in this case is reliant on confessions of accused persons and doctrine of recent possession. It is a trite law that a confession voluntarily made to a police officer by a person accused of an offence may be proved as against that person. This is provided by section 27(1) of the Evidence Act, Cap. 6 R.E. 2019. 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. See **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."

The evidence available reveal that the 1st accused was apprehended by village authority on 18.05.2019 following disappearance of the deceased on 17.05.2019. The evidence from PW2 & PW3 reveal that PW3 saw the 1st accused breaking into deceased house and he steal solar battery and a pouch containing PW3's clinic card and money on the date the deceased failed to return home. This raised suspicion that the 1st accused knew where is the deceased as on the date of her disappearance he went to break into deceased house and did steal some properties. The village leaders arrested

the 1st accused person as the suspect for the disappearance of the deceased. Police were informed. Upon searching the 1st accused house, police found solar battery which was identified by PW3 to be the property of the deceased which was stolen during burglary.

It was upon interview done by PW6 at Makambako Police Station where the 1st accused admitted to kill the deceased. He said it was him and 2nd accused who killed the deceased. The 1st accused confessed to PW2 at Kihanga Village Office on 19.05.2019 that he killed the deceased and he said he was ready to show them the deceased body. The testimony of PW6 and PW2 is that the 1st accused confessed orally to them. The said 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 confession of 1st accused person before PW2 and PW6 shows that the 1st accused said he was ready to show where the deceased body was dumped. The 1st accused led police officers and villagers to the water well owned by Daudi Makalanga where he told them that they dumped the deceased body after breaking padlocks which locked the well door/cover. The broken padlocks were found at the area and deceased body was retrieved from the well. The evidence is found in the testimony of PW2, PW3 and PW6. This evidence prove that the deceased body was discovered after the 1st accused person led them to where it was dumped. Thus, it is the oral confession of the 1st accused which led to discovery of the deceased body. The oral confession was corroborated by the discovery of the deceased body and such confession is relevant.

Section 31 of the Evidence Act, Cap 6 R.E. 2019 provides that a confession leading to discovery is reliable. In **John Peter Shayo and 2 others vs Republic (1998) TLR 198** it was held that:

" (i) Confessions that are otherwise inadmissible are allowed to be given in evidence under section 31 of the Evidence Act 1967 if, and only if, they lead to the discovery of material objects connected with the crime, the rationale being that such discovery supplies a guarantee of the truth of that portion on the confession which led to it."

The Court of Appeal was of the same position in the case of **Mboje Mawe and 3 Others vs. Republic**, Criminal Appeal No. 161 of 2010 (unreported). In the present case, the oral confession of the 1st accused leading to discovery of the deceased body guarantee the truth of the said oral confession as it was not possible without being led by the 1st accused for the deceased body to be discovered.

Further corroboration is found in the testimony of PW2, PW3 and PW6 who testified that the 1st accused did lead them to where he hides the deceased phone which he did steal after the incident. The said mobile phone ITEL make of blue colour was found in the farm owned by 1st accused father inside the bush of bamboo trees. PW3 identified the phone to belong to the deceased and she said that the phone was in deceased possession when she left home before her disappearance. PW6 testified that the line which was found inside the seized phone was registered in the name of the deceased. This means that the 1st accused constructively was found in the possession

of deceased phone which was in the deceased possession before she disappeared.

The Court may convict relying in the recent possession of the stolen property which is connected with the crime. In the case of **Nelson George and 4 Others vs. Republic**, Consolidated Criminal Appeal No. 31, 93 and 94 of 2010, Court of Appeal of Tanzania at Mwanza, (unreported), it was held that:-

"In law, recent possession of property recently stolen or unlawfully obtained can be the basis of a conviction for any crime connected with the asportation of that property."

In the present case the prosecution evidence have proved that by the act of 1st accused to lead police and villagers to retrieve deceased phone in bamboo trees bush found in his 1st accused father's farm it means the phone was in his possession. The testimony of PW3 show that the phone was in the possession of the deceased before she disappeared and PW3 even talked to the deceased on 17.05.2019. The said phone was identified by PW3 to belong to the deceased by its make (itel) and colour (blue colour). PW6 identified it by the number of the line found in the phone which was registered in the deceased name which shows that it belongs to the

deceased. Identification of a stolen property by special mark is sufficient proof of ownership as it was held in **Ramadhani Hamisi and Another vs. Republic**, Criminal Appeal No. 513 of 2016 (unreported).

There is extra judicial statement of the 1st accused which corroborate the oral confession made before PW2 and PW6. The said extra judicial statement was recorded by PW5 who is a justice of peace. The said extra judicial statement was admitted without objection from the defense side and in the said statement the 1st accused was confessing to kill the deceased. In the extra judicial statement the 1st accused said they planned to kill the deceased with the 2nd accused because of their misunderstanding and before they killed her they made her drunk by buying her alcohol. He said that after the deceased fell on ground on her way home, he attacked her by using axe and the 2nd accused was holding deceased legs. That they put the deceased body in fertilizer plastic bag and carried it to the water well owned by Daudi Makalanga where they dumped the body. The said story gives details of how the killing was done. In the said confession the 1st accused implicated the 2nd accused that they planned to kill the deceased, they got her drunk, killed her and dumped deceased body in the water well.

The 2nd accused confessed to kill the deceased in his confession recorded at Makambako Police Station by PW4. 2nd accused statement was admitted as prosecution without any objection. Regarding evidence implicating the 2nd accused is the seizure of seizure of the axe alleged to be used during the incident at his home. However, the seizure certificate of the axe shows that the search was conducted in the house of the 1st accused and not in the house of the 2nd accused.

As I stated earlier herein, both accused denied to kill the deceased in their testimony. The 1st accused said he was arrested because he did not participate in the search for the deceased which he did not get information about her disappearance. 1st accused denied to lead the police to the discovery of the deceased body or to where he hide the deceased phone. He denied to record confession before the justice of peace and said the justice of peace was given money by the police to record what was in the statement from the police. He said he was under threat of torture at the time he was taken to justice of peace. He did not know what was written in the paper he signed. He prayed to be since the bicycle which the prosecution evidence shows it carried the deceased body and fertilizer bag which the deceased body was found in when it was retrieved from the well was not tendered.

On his side, the 2nd accused denied kill the deceased. He said on 17.05.2019 he did not meet with the 1st accused or the deceased. He denied to own the axe which was alleged to be used to kill the deceased and he said he was not present when it was seized. He said he was forced to sign a statement at police, but the confession tendered in Court alleged to be his cautioned statement does not belong to him.

It is my considered opinion that, act of both accused persons to deny to make their confessions is an afterthought. They had chance to object the tendering of their confessions at admission stage. The defense side did not raise any objection on the voluntariness when the confessions were tendered. Complaining at the defense stage that they were forced to sign is an afterthought. Their failure to object the confessional statements when they were sought to be tendered implies that they admitted/accepted the content of those statements.

In the case of **Tabu Sita vs. Republic**, Criminal Appeal No. 297 of 2019 Court of Appeal of Tanzania at Shinyanga (Unreported) at page 15 when referring the case of **Emmanuel Lohay and Another vs. Republic**,

Criminal Appeal No. 278 of 2010, (unreported) the Court of Appeal held that:-

*"It is trite law that if an accused person intends to object to the admissibility of a statement/confession, he must do so before it is admitted and not during cross-examination or during defence-**Shihoze Semi and Another v. Republic** (1992) TLR 330. In the case, the appellants missed the boat by trying to disown the statements at the defence stage. That was already too late. Objections, if any, ought to have been taken before they were admitted in evidence"*

Even after the contents of the said confessions were read over before the court, accused persons did not cross examine witnesses on that aspect. The counsel for the 1st accused asked PW5 in cross examination about the wound 1st accused had in his leg and PW5 answered that the 1st accused told him that he sustained the injury when he was arrested. This means that the injury observed by PW5 was not sustained by torture during recording of the confession as it was alleged by the 1st accused.

It is trite law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted and will be estopped from asking the court to disbelieve what the witness said, as the silence is

tantamount to accepting its truth. This was held in the case of **Hassan Mohamed Nagoya vs. Republic**, Criminal Appeal No. 134 of 2012, Court of Appeal of Tanzania (unreported).

It was held in the case of **Ismail Selemani Nole vs. Republic**, Criminal Appeal No. 117 of 2013, Court of Appeal of Tanzania at Mtwara, (unreported), that:-

"It is now settled that a decision not to cross-examine a witness at all or on a particular point is tantamount to an acceptance of the unchallenged evidence as accurate, unless the testimony of the witness is incredible or there has been a clear notice of the intention to impeach the relevant testimony..."

In the instant case, I find no reason to doubt the testimonies of PW2, PW3, PW4, PW5 and PW6 whom their evidence proved that it was the 1st and 2nd accused person who killed the deceased. These witnesses are credible as they were both coherent and cogent. I'm aware that there are some contradictions in the testimony of these witnesses such as PW2 testified that Kihanga is the street but other witnesses refer to Kihanga as Village. PW6 said on 18.05. 2019 they found and seized only solar battery at 1st accused house, but PW3 said on that day battery and her clinic card were

seized. Also the testimony of PW2 differs to that of PW3 and PW6 on the date the 1st accused led the police to retrieve the deceased phone. Contradictions by any particular witness or among witnesses cannot be avoided in the case as it was held in the case of **Dickson Elia Nsamba Shapwata vs. Republic**, Criminal Appeal No. 92 of 2007 (unreported). This might happen due to number of factors including observation error, memory loss, shock and other factors. This Court in the case of **Evarist Kachembeho and Others vs. Republic [1978] LRT no. 70** held that:

"Human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story."

In **John Gilikola vs. Republic**, Criminal Appeal No. 31 of 1999, (unreported), it was held that due to the frailty of human memory and if the contradictions or discrepancies in issue are on details, the Court may overlook such contradictions or discrepancies.

In the present case, the contradictions pointed out were minor and does not go to the gist of their testimony that the 1st accused confessed to kill the deceased which led to discovery of deceased body and phone. Thus, I'm satisfied that the confessions of accused persons was nothing but the

truth and the prosecution proved beyond any doubt that it was both accused persons who jointly killed the deceased.

The 1st accused implicated himself in his confession and also implicated the 2nd accused persons. The same to the 2nd accused confession, it implicated the 2nd accused and the 1st accused. The confessions provide the circumstances and the manner in which the deceased met his death. The confessions are detailed that the events described therein could have only been given by people who had knowledge of how the deceased met his death. The confessions reveal how accused persons planned and participate in the killing the deceased. This signifies that the accused persons had intention to kill the deceased and had common intention of killing the deceased.

Failure to tender fertilizer bag (loba) or bicycle used to commit the offence does not affect the prosecution case in anyway. The evidence is silent if the bicycle allegedly was used to commit the offence was seized hence it was not possible to tender it as exhibit. Regarding the fertilizer bag [loba], the evidence of PW2 shows that police took the bag. No reason was provided by prosecution for failure to tender the fertilizer bag (loba) which

the deceased body was found when the body was retrieved from the water well. However, even without tendering it, still the prosecution case is very strong. It was not shaken at all and there is no doubt whatsoever raised in prosecution case.

Therefore, I find that prosecution proved beyond doubt the offence of murder against both accused persons. Consequently, I convict accused persons namely Philipo Kiwale @ Andrea and Amos Bonifasi Mhema for the offence of murder contrary to section 196 and 197 of the Penal Code, Cap. 16 R.E 2019.

SENTENCE

The conviction for the offence of murder under section 196 of the penal Code, Cap 16 R. E. 2019, attracts only one sentence which is death by hanging in our jurisdiction. That means the court has no other option or discretion to impose a different sentence. For that reason and by virtue of section 26(1) and section 197 of the Penal Code, Cap. 16 R.E. 2022 and section 322 (2) of the Criminal Procedure Act, 20 Cap 20 R.E. 2022, I hereby sentence Philipo Kiwale @ Andrea and Amos Bonifasi Mhema to suffer death by hanging. It is so ordered. Right of appeal fully explained.

ORDERS

1. The solar battery, pouch, clinic card, mobile phone itel make and shillings 8,450/= which were tendered as exhibit in this case to be handled to police who shall handle the exhibit to children of the deceased namely Leonia Mangililwe and Clinton Chungu.
2. The axe which was tendered as exhibit and was not claimed by anybody to be handled to the police.



A handwritten signature in blue ink, appearing to be "A.E. Mwipopo", written over a horizontal line.

A.E. Mwipopo

Judge

15/12/2022

The judgment was delivered in open Court this 15th December, 2022, in the presence of State Attorneys for republic, all accused persons, the defense counsels for each of accused person.



A handwritten signature in blue ink, appearing to be "A.E. Mwipopo", written over a horizontal line.

A.E. Mwipopo

Judge

15/12/2022