

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT KAHAMA

CRIMINAL SESSION CASE NO. 56 OF 2022

REPUBLIC

VERSUS

1. PAULO S/O PETER MALALE

2. JUMANNE S/O SAHANI

JUDGMENT

1st November and 12th December 2023

F.H. MAHIMBALI, J

The accused persons have been arraigned before this court for the offence of Murder Contrary to Section 196 of the Penal Code Cap 16 R.E 2019. It was alleged that on 31st day of August, 2021 at Nyabusalu Village Kahama District Council in Shinyanga the accused persons murdered one Malale Muswa.

The briefs facts of this case are that, on 30th August, 2021 the deceased informed his wife (PW2) that he is going to his son Paulo Peter (the 1st accused), after the said departure she could not see the deceased

anymore. The 1st accused person on the material date met with the deceased and went to a centre whereby they drank local brews together accompanied by the 2nd accused. They then returned to 1st accused's home place for dinner and sleeping. The wife of the 1st accused prepared for dinner and place where the deceased could have slept. Being tired with domestic activities the wife of the 1st accused left the place leaving the accused persons and the deceased together. In the morning an alarm was raised, when went to the scene they found the body of the deceased hanged in the bathroom. It is further alleged that PW4 when attending a call of nature heading to the bathroom, she found the deceased's body hanged with a cloth on the neck. She was shocked and ran to her neighbour whom advised her to report the incidence to the local leader.

The local leader after being informed so, he directed an alarm to be raised (mwano). People gathered and went to the scene. They also informed the police officers who came with medical doctor who examined the body and established that the deceased had died due to cerebral hypoxia (insufficient supply of oxygen to brain) following neck strangulation. Then burial ceremony was conducted.

After such sad event had taken place, one Annastazia Anthony while chopping cooking wood together with other people thereat, came one

YABU, who interrogated and informed them that the one who killed the deceased is Paulo S/O Peter Malale and Jumanne S/O Sahani the accused persons. She informed them further that on the material date, the accused persons suffocated and strangled the deceased (walimunyonga) and then tied him on his neck with a cloth and hanged him on the roof of the bathroom.

The said Annastazia Anthony, informed one Theresia Peter a daughter of the deceased the whole episode told by YABU. Theresia Peter was not tolerant with the story, she ultimately reported the matter to the local leader who later on informed the police officers and the police officers after some investigation arrested the accused persons and later mounted the charge of murder of one Malale Muswa.

To substantiate, the information against the accused, the prosecutions called nine witnesses; Dr. Masubmbuko Bundala (PW1), Kabula Kavula (PW2), Mereciana Gifan(PW3), Monica Peter (PW4), Theresia Petro (PW5), Makoye Petro (PW6), F.1689 D/SGT Stephen(PW7) Didas Ndalo (PW8) and H.8742 D/CPL Jackson, while the 1st accused person had one witness DW2 Bertha Paulo and the 2nd accused fended for himself.

Salome Mbughuni senior learned State Attorney assisted by Rachel Cosmas also learned State Attorney represented the Republic, Mr. Ishengoma Mkanjero and Mr. Rwangobe learned advocates represented the accused persons.

PW1 a medical doctor testified that on 31/8/2021, while was at Bulungwa Health center at Kahama, he received a call from police officer that he was supposed to go to one village called Nyabusalu to examine one dead body. After they had gone, they were shown a dead body hanged in the toilet. It was a body of a male African. On his neck, the said body was tied by a shirt dress and hanged to a piece of wood/stick holding the toilet roof.

In his observation at the scene, he averred since the said body had been hanged up and that there was nothing of object to aid it stand on it, it is obvious that, the body was hanged after death.

The findings of the said autopsy were that, the said deceased died due to neck strangle leading to suffocation of Oxygen into brain and neck nerves. Thus, the deceased's death was not due to cricoid cartilage but was forced so by external force.

After such observation, PW1 filled it into the order of post mortem.

The said post mortem Examination Report of the deceased Malale Muswa dated 31/8/2021 was admitted as exhibit PE1.

PW2 who is the wife of the deceased stated that in 2021 back, she was living with Malale Muswa the deceased. That on 30/8/2021, she was at home with her husband Malale Muswa who then in the morning had said fare well to her as he was going to Mr. Paulo (his son). He then took his way to Paulo. After the said departure, he could not return on that day. On the next day (i.e 31/8/2021) she was informed by Amani (her grandson that the grandfather (Malale Muswa) was hanged. PW2 then went to the scene. At the scene she saw many villagers gathered and amongst others was the chairperson. She identified the dead body of her husband hanged in the toilet. That after the said post mortem examination, they were allowed to burry.

PW3 who is the wife of the first accused testified that she was living with her husband (the 1st accused- Paulo Peter Malale). On 30/8/2021, While at home in the evening, came three persons: Malale (Paulo's father - deceased), Paulo Peter Malale and Jumanne the 2nd accused. She had cooked them dinner and they ate. After, they had finished eating PW3 prepared a room for to sleep she went to her bed and left the three there. She had also prepared the room for Mzee Malale (the deceased) because

her husband had ordered her to prepare a place for him as he would sleep there.

So, when she left for sleep, she left mzee Malale, Paulo and Jumanne being together. In the next morning of 31/8/2021, when she woke up, she saw the Mzee Malale's room still closed. She thus could not know whether he was still in his room or not. But when she got out, shortly she heard an alarm (mwano by a hoe ring), where then, she had to follow the call. At the scene, she saw Mzee Malale (her guest) hanged dead at the house of Peter's daughter (Mwana Peter). From her home to Mwana Peter's home is a close distance just crossing a road.

PW4 who is the owner of the of the home in which the toilet scene is involved, stated that on 31/8/2021 around early morning (5:00 hours to 06:00 hours), when she woke up she went to the toilet (out) for a call of nature. Surprisingly there, she saw a person hanging dead. She used torch cell to identify the said corpse hanging. By that time, she could not identify properly as who was. She ran away to report the incidence to her neighbor and where then, they went to the local leader. They, went together to the scene where the chairperson directed to call a traditional alarm (mwano). In response to the call many villagers (nzengo) gathered including Mr. Paulo Malale the son of the deceased- Malale. The local

leader called police officers who came together with medical doctor who attended the deceased body and filled up the form.

PW5 who is the daughter of the deceased asserted that on 31/8/2021 at 09:00 hours, she got a call from her husband that her father Malale Muswa is dead. She came back for funeral. There at she knew about the death of her father was due to hanging at Monica Peter's home (bathroom). A month later, that is on 1/10/2021 around morning time, had come one Anastazia Antony who went there to claim her money 20,000/=. Where she started telling PW5 about the death of her father that his death was not natural but was hanged by her brother Paulo Peter Malale. The said Anastazia had got the information from Yabu and Juma. Thereafter, she went to Mr. Makoye Peter the local leader and informed him that her father had not died a natural death as speculated but by being hanged by Paulo and his two friends. The reason of murdering is because of farm quarrel that he was being given unfertile farms by his father (Malale) and that whenever he cultivate, he yield less. The deceased was murdered at Paulo's home but the body was recovered Monica's bath room which is just a short distance – crossing a road. After being informed the local leader ordered his mgambo to arrest the said Paulo who ultimately was arrested on the same day.

PW6 – one Makoye Petro who is the local leader (PW5) asserted that on 31/8/2021, around early morning, Monica went and reported that, she saw a dead body hanging on the roof of her toilet. After that news, they went together at the home of Monica where she directed him to the toilet, He saw a human body hanging. He was shocked, he then reacted by calling mwano. The said human body was of male African. He then informed the village chairperson who then informed police who came with medical doctor. The said deceased was identified as Malale Muswa. On 1/10/2021, had come one Therezia who is the deceased's daughter and told him that she had an information that mzee Malale has been murdered by Mr. Paulo (her brother). As a local leader he instructed sungusungu leader to arrest Paulo Malale and managed to arrest him on 1/10/2021 around 16:00 hours. According to Theresia, Paulo and Yabu conspired to murder mzee Malale. Following that arrest, he had informed police who then ordered him to take the accused to police.

PW7 – D/SGT Stephen stated that on 1/10/2021 while at duty station, he got instruction from the OC-CID that he should record cautioned statement of the accused person who was in police cells by name of Paulo Peter. That was around 19:00 hours. After he had received

such instructions, he took the accused person from police cells to the investigation room and recorded the accused cautioned statement.

In totality, the accused admitted to have killed his own father in alliance with two others: Jumanne Sahani and Yabu. The cautioned statement of Mr. Paulo Peter Malale was admitted as exhibit P.2

PW8 – retired police officer, testified that on 31/8/2021 he was at police Bulungwa. That while there, he was told by his OCS Mchome that at Nyabusalu village, Namba Nane hamlet, there is a person found hanged in bathroom. He then went with the OCS together with one medical doctor to the scene of crime. At the scene, there were many people. When they asked as what happened, the owner of the premise, replied that when she went to the toilet, she found the body hanging from the roof. They also saw the dead body still hanging. The hanging body slightly touched the ground. The said body was identified to be of Malale Muswa. PW8 drew the sketch map plan of the scene of crime led by one Makoye Peter. The sketch map plan of the scene of crime as drawn by PW8 dated 31/8/2021 was admitted as exhibit P.3.

PW9 – D/CPL Jackson on the other hand, alluded that on 2/10/2021 while at Bulungwa CRO (Charge Room office) one person by the name of Anastazia came accompanied by her local leader. She said that she come

to report on the incidence that had happened on 31/8/2021 at Namba Nane Hamlet in Nyabusalu village in Ushetu District council within Kahama District. PW9 took a piece of paper and recorded her statement. The said statement of Anastazia Antony as recorded by PW9 was admitted as exhibit P4 under section 34B (1) and (2)a of the TEA after the maker of it was untraced.

When ruled that both accused persons had a case to answer to the charge, the 1st accused person on his defense, apart from making a general denial to the allegations against him, he threw blames to **Annastazia Antony** to have been the one who fabricated the case as she had a quarrel with his wife. He testified that on 30/8/2021, he was at his home Namba Nane Hamlet. He was there with Jumanne (second accused also known as Juma). On that day he had to take him to farm to cassava uprooting. It was a task that would take him for some time. So, he had to prepare some necessary goods for his living there, such as salt. As it was then evening time after the said preparations, he told him that they will go farm next day i.e 31st August, 2021. He instead that, the evening of that day, they went to pombe shop. where, they started drinking pombe. Then his father Malale Muswa (deceased) came he asked him for pombe if he had money but he replied that he had none as they had spent all the money. The deceased replied by telling him that he had

some, so he bought pombe. They continued drinking. Later on, as they were tired, he told his father that they are satisfied, they should leave. The father then joined them to his home as he also wanted to greet his grandchildren. At his home they stayed until 19:00 hours where they got dinner together. At 20:00 hours, he told him that he had to go to the center again for a wedding party and told his father if he can join. He turned down the idea, saying that he was remaining there with his grandchildren. DW1 thus went with Jumanne leaving his dad there. From the party, he came late but Jumanne was the one who returned first. When he returned with some pombe for Mzee, he was told that his father had returned home, he then gave that pombe to Mr. Jumanne (his guest).

Jumanne had slept in a thatched grass house. In the sketch map plan (P.3 exhibit the said house in which Jumanne slept is not there). He contended that the said sketch map plan didn't reflect his home stead.

On 31/8/2021 around 05.00 hours, his wife who got out had then returned inside saying that there was a mwano being called. At the scene of mwano, he was told to see what is in the toilet. He saw his father's body hanging. Also, local leaders had attended, then police had come around 11:00 hours. The body was then examined by the medical experts. He was later arrested and taken to Bulungwa police station whereby he then heard his sister informing police about killing of his father.

On 2nd October, 2021, he was taken to investigation room by police where he was then told either to agree willingly or by force. He was tortured. He then narrated the whole episode. On 4/10/2023, he was also taken to Kahama PC. He stated all the facts before Justice of Peace. Nevertheless, he denied stating anything but forced to sign. There after he was arraigned before the trial court for the accusation of murder.

DW2 – Bertha Paulo who is the elder daughter of the first accused person trying to exonerate her father from the murder claim, had a version that the story of Anastazia (her aunt) that Paulo Peter killed Mzee Malale does not click into her head as they were friends (herself and the deceased). So, she never heard the deceased being in quarrel with her dad. So, her testimony is to the effect that the two had no any known quarrel.

DW3 the second accused stated that on 30/8/2021 he was at Mr. Paulo's home. He went there for the purposes of assisting him harvesting cassava. Before he was taken there, he had to prepare some goods for his living there such as salt. So, on that day of 30/8/2021 they had remained there for some moments. That when it reached 16:00 hours, he took him to town (center) where they started drinking pombe. While there, shortly came mzee Malale. Mr. Paulo introduced to him as his father. They started drinking. After some time, they all left to Paulo's

home. While there they continued with talking. Then it was dinner time around 19:40 hours, Paulo's wife served them food.

After they had finished eating, Mr. Paulo again told them to go to center for a wedding party. He was convinced to accompany him to center. They left Mzee Malale there with Paulo's family. At the center, he directed him to remain at one point and himself was busy with his issues. After he had got tired of Pombe, he decided to go back home (to Paulo's home) and left Paulo there. On his return, he entered into the same house which he had slept the other day. After one hour sleep, came Mr. Paulo and knocked the door. He then informed him that his dad had left for his home. He could not then sleep there as he said. DW1 then went to sleep and DW3 also continued with his sleep as well.

In the next morning around 6:00 hours, Mr. Paulo informed him that his dad had not reached his home as he was found hanged into a nearby home.

The Mwano was called, at the mwano, they saw many people gathered, and they witnessed the body of Peter Malale hanging by a cloth from the toilet's roof. The local leaders then informed them that police had been informed and they were about to come to examine the body. After that, the deceased's body was taken to his home for burial arrangements.

While on the return to his village for other duties, he was arrested by Mr. Makoye (local leader) on allegation that he had killed the deceased Peter Malale at Paulo's home. He was then taken to police station where eventually charged for this case. He asserted that he is not responsible of the said murder as alleged by the prosecution.

That was all about the testimony of the case. This being a criminal case, the cardinal principle is that the prosecution owes a duty to prove the charge against the accused person beyond any reasonable doubts. It is not for the accused persons to establish their innocence. This responsibility never shifts throughout. Since the accused persons as already indicated herein above stand charged of murder, the prosecution had the duty to prove beyond reasonable doubts; **that**, death was caused to the deceased person, i.e the alleged deceased person Malale Muswa is indeed dead, **that** his death was not natural, **that**, the death was caused by unlawful act or omission, **that**, it was the accused persons who did the unlawful act or omission leading to the said death and **that**, the death was caused with malice afore thought in the meaning that the accused had intended to cause such death or grievous harm.

On the basis of the evidence on record, it is undisputed fact that Malale Muswa is indeed dead and his death was not natural. He suffocated to death due to neck strangulation leading to suffocation of oxygen into

brain and neck nerves. Thus, the deceased's death was not due to cricoid cartilage but was forced so by external force as evidenced by PW1 the doctor who examined the body and as stated in the Post Mortem Report exhibit PE.1. His evidence was corroborated by several other witnesses as summarized above who testified that they saw the deceased body hanged with shirt on the neck in the toilet of PW4.

Under the circumstances there is no doubt about the death in question. I also find out that whoever caused the said death caused the same with malice aforethought because he tied the deceased and hanged up to the roof the bathroom of the PW4. Throughout the evidence on record does not suggest the possibility of the deceased hanged himself being expert testimony as suggested by PW1.

"The death was due to neck strangulation leading to suffocation of Oxygen into brain and neck nerves. Thus, the deceased's death was not due to cricoid cartilage but was forced so by external force."

The only dispute for determination is therefore, who killed the deceased person in the manner herein above explained.

According to the prosecution it was the accused persons who brutally murdered the deceased Malale Muswa, but the accused persons

are disputing in any way being responsible for the killing of the deceased and thus had been fabricated to the case because they had no any quarrel with the deceased and loved each other.

*"the story of Anastazia that Paulo peter had killed
Mzee Malale does not click into his head as they
were so friends. She never heard them quarreling"*

The question therefore is whether we have sufficient evidence on record to prove that the accused persons are the ones who murdered the deceased. From the evidence on record, it is obvious that none of the prosecution witnesses witnessed the crime being committed. The only incriminating evidence against the accused is circumstantial evidence.

The circumstantial evidence tending to incriminate the accused is such that; i. That, the accused persons were the last persons to be with the deceased.

ii. The 1st accused person had voluntarily admitted in the cautioned statement (exhibit P2) to have killed the deceased and mentioned the 2nd accused.

For circumstantial evidence to ground a conviction against the accused, the law is settled that such circumstantial evidence must be;

- (i) That the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, and that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused, and that 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. **See Julius Justine & Others v. Republic, Criminal Appeal No. 155 of 2005, CAT, Mwanza Registry (unreported).**
- (ii) That the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt; and that before drawing the inference of guilt from circumstantial evidence, it is necessary to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. **See Simoni Msoke v. R. (supra) and John Magula Ndongo v. Republic, Criminal Appeal No. 18 of 2004 CAT, Dar es Salaam (unreported).**

- (iii) That the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person. **See Shaban Mpunzu@ Elisha Mpunzu v. Republic, Criminal Appeal No. 12 of 2002 CAT, Mwanza Registry (unreported).**
- (iv) That each link in the chain must be carefully tested and, if in the end, it does not lead to the irresistible conclusion of the accused's guilt, the whole chain must be rejected. **See Samson Daniel v. R. (supra).**
- (v) That the circumstantial evidence under consideration must be that of the surrounding circumstances which, by undesigned coincidence is capable of proving a proposition with the accuracy of mathematics. **See Julius Justine & Others v. 19 Republic, Criminal Appeal No. 155 of 2005 CAT, Mwanza Registry (unreported).**
- (vi) That 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. **See Ally Bakari v. Republic [1992] T.L.R. 10, Anetha Kapazy v.**

**Republic, Criminal Appeal No. 69 of 2012, CAT,
Mbeya Registry (unreported).**

- (vii) That the alternative possibility must not be fanciful; it must be plausible. Doubt about the guilt of an accused can count only if such doubt is reasonable. The circumstances must also be looked at, and considered, in their totality. See **Jumanne Hamis @ Upepo v. Republic, Criminal Appeal No. 329 of 2009, CAT, Tanga Registry and Sadiki Ally Mkindi v. D.P.P., Criminal Appeal No. 207 of 2009, CAT, Arusha Registry (both unreported).**

I think that some of these principles will guide me in the ensuing discussion on reliability or not of this kind of evidence.

Again, the strength or otherwise of the doctrine of the person last seen with the deceased alive depends solely on the explanation which may be given by such person to displace the presumption that he/she may be the culprit behind the death of such person. This was best expressed by the Court of Appeal in the case of **Mathayo Mwalimu and Another v. Republic, Criminal Appeal No. 147 of 2008, CAT, Dodoma Registry (unreported).** According to that case, where a

person is alleged to have been the last person to be seen with the deceased, in the absence of a plausible explanation to explain away the circumstances leading to the death, he/she will be presumed to be the killer. **See also the cases of Richard Matangule v. Republic (supra).**

I am aware that there are people who consider circumstantial evidence as weak and unreliable. In my view, that is a misconception. As was restated in the cases of **Samson Daniel v. R. (1934) 1 E.A.C.A. 154** and **R. v. Sabudin Merali and Umedali Merali, Uganda High, Criminal Appeal No. 220 of 1963 (unreported)**, the mere fact that evidence is circumstantial is far from saying that the prosecution case is weak because circumstantial evidence is sometimes the best evidence.

In the latter case of **R. v. Sabudin Merali and Umedali Merali, Sir Udo Udoma, C. J.** said that:- *"...it is no derogation to say that it was so; it has been said that circumstantial evidence is very often the best evidence. It is the evidence of surrounding circumstances which, by undesigned coincidence is capable of proving a proposition with the accuracy of mathematics.*

In the present case, the PW2, a wife of the deceased asserted that her husband left and told her that he is going to his son Paulo Peter Malale

the first accused and when departed he never returned till on the next day when she was informed that the deceased had been found hanged in the bathroom. She went and witnessed the same. PW3 a wife of the 1st accused testified that on the material date during evening time the deceased together with the accused persons had come at their home place, there at she prepared dinner food for them and place where the deceased could have slept as she was prior informed by her husband about the visit of Mr. Malale the deceased.

After she had served them with food she left and went to sleep. When she woke up in the morning the door of the room she had prepared for Mzee Malale was still closed and thus she did not know whether was inside or not.

DW1, admitted to be with Mzee Malale at the centre and then at his home place and thus they all got dinner together with the 2nd accused. But he later left the place and attended wedding party together with the 2nd accused. When he came back, he was informed that his father went to his home place. He then went to sleep; in the morning he was informed that his father is hanged at the neighbour's bathroom. He went to scene and witnessed. DW3 is in line with the testimony of the DW1.

From the extracted facts, it is therefore clear that, no doubts the accused persons were the last persons to be with the deceased. The defence by the 1st accused person that when he came back from wedding party he was informed that his father went to his home. This piece of evidence holds no water as he did not even mention as who asked such question. Similarly, such evidence is in contradictory with the testimony of DW3.

Taken as a whole, all accused persons testified that they left the place and attended wedding party and left the deceased there is also a version in the testimony of DW3 that when reached there, the DW1 told DW3 to be to one point and then he proceeded with his own issues.

"He directed me to remain at one point and himself was busy with his issues. After I had got tired of Pombe, I decided to go back home (to Paulo's home) and left Paulo there."

From the facts I disagree the defence testimony on the sense that there is no suggestion as to whether there was a real wedding party attended. In leu, it implies that the wedding story is false. Sorry to say the accused never attended wedding party.

In the case of **Mathayo Mwalimu and Another v. Republic, Criminal Appeal No. 147 of 2008, CAT, Dodoma Registry (unreported)**, it was held that the doctrine of the person last seen with the deceased alive depends solely on the explanation which may be given by such person to displace the presumption that he/she may be the culprit behind the death of such person. **See also the cases of Richard Matangule v. Republic (supra).**

Therefore, based on the guided principles, I am not refrained to declare that the accused persons were the persons last to be seen with the deceased alive. His resultant death, holds them liable unless reasonably rebutted. There is nothing of rebut.

Meanwhile exhibit P2 a cautioned statement of the 1st accused, reveals that the two accused persons murdered the deceased in joint collaboration.

Exhibit P2 was not objected by the defence and thus suggest that it was voluntarily made. The cautioned statement is in collaboration with the statement made by Annastazia Antony, (exhibit 4) which was also admitted without any objection.

I understand that, the relevant law regarding admission of accused's confession under this head is this: **First**, a confession or statement will

be presumed to have been voluntarily made until objection to it is made by the defence on the ground, either that it was not voluntarily made or not made at all. **See Selemani Hassani v R Criminal Appeal No. 364 of 2008** (unreported). **Secondly**, if an accused 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. **See Shihenze Seni and Another v r (1992) tlr. 330, Juma Kaulule v R Criminal Appeal No. 281 of 2006** (unreported). **Thirdly**, in the absence of any objection to the admission of the statement when the prosecution sought to have it admitted, the trial court cannot hold a trial within trial or inquiry suo motu, to test its voluntariness. **Stephen Jason and Another v R Criminal Appeal No. 79 of 1999** (unreported) **Fourthly**, if objection is made at the right time, the trial court must stop everything and proceed to conduct a trial within trial or an inquiry, into the voluntariness or otherwise of the alleged confession before the confession is admitted in evidence (**Twaha Ally and 5 others v R Criminal Appeal No. 78 of 2004**) (unreported). **Fifthly**, even if a confession is found to be voluntary and admitted, the trial court is still saddled with the duty of evaluating the weight to be attached to such evidence given the circumstances of each case (**See Tuwamoi v Uganda (1967) E.A 91, Stephen Jason & others v R** (supra). And

lastly, everything being equal the best evidence in a criminal trial is a voluntary confession from the accused himself. **See Paulo Maduka and 4 others v R Criminal Appeal No. 110 of 2007 (unreported).**

What constitutes malice aforethought or intention to kill is well defined by laws, literature and decided cases (see section 200 of the Penal Code and the case of **Enock Kipela vs The Republic** (Criminal Appeal 150 of 1994) [1999] TZCA 7 (10 June 1999)).

According to the Black's Law Dictionary, malice aforethought is defined as:

"A pre-determination to commit an act without legal justification or excuse.... An intent, at the time of killing, wilfully to take the life of human being, or an intent wilfully to act in callous and wanton disregard of the consequences to human life: but "malice aforethought" does not necessarily imply any ill will, spite or hatred towards the individual killed" (see Criminal Law in Tanzania, A Case Digest, by Dr Fauz Twaib and Daudi Kinywafu at page 335).

Now, as ascribed from the facts and evidence of this case that the 1st accused person voluntarily confessed to have murdered the deceased

in his cautioned statement and since it was not objected, then it is worthy to conclude that the accused persons are incriminated with the murder of one Malale Muswa (deceased). In the light of the herein above analysis, observations and findings, I find that the accuseds' defence has not casted any reasonable doubts to shake the prosecution's case. In the case of **Goodluck Kyando Vs. Republic**, [2006] T.L.R 363, puts it clear that it is trite law that every witness is entitled to credence and must be believed and his testimony is accepted unless there are good and cogent reasons not believing a witness. See also **Mathias Bundala Vs. Rep, Criminal Appeal No. 62 of 2004**, Court of Appeal at Mwanza and section 146(2) of Tanzania Evidence Act, Cap 6.

I reject the accused's defence and find that the prosecution case has been sufficiently proved beyond any reasonable doubt against the accused persons **Paulo Peter Malale and Jumanne Sahani**. I am persuaded on the totality of the prosecution evidence adduced during the trial via PW2, PW3, PW7 and exhibits PE1 & PE2 which in fact is corroborated by the evidence of PW5 and exhibit PE4 has left no doubt but a real and justified impression that that the accused persons had planned and participated to the commission of the offence of murder against the deceased **Malale Muswa**. Where hearsay evidence is acted

upon and leads to a discovery of truth, it is reliable and actionable when that discovery is truthful.

I accordingly convict them for the offence of murder contrary to section 196 and 197 of the Penal Code, Cap.16 R.E 2022.



F. H. Mahimbali

Judge

Considering the punishment for murder is only one known as per law, the accused persons are hereby sentenced to suffer death by hanging pursuant to section 197 of the Penal Code, Cap 16 R.E 2022 as read together with section 322 (1) & (2) of the CPA, Cap 20 R.E 2022.



F. H. Mahimbali

Judge

Right of Appeal fully explained to any aggrieved party under section 323 of the CPA, Cap 20 R.E 2019.

DATED at KAHAMA this 12th day of December, 2023.



F.H. Mahimbali
Judge

Judgment delivered today the 12th day of December, 2023 in the presence of Insp Felix Mbise holding brief of Mr. Jairo for Republic, Mr. Makanjero Ishengoma learned advocate for the defense and Ms Beatrice, RMA, present in Chamber Court.



F.H. MAHIMBALI
JUDGE