

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL SESSSION CASE NO. 30 OF 2018
REPUBLIC
VERSUS

- 1. ALEX S/O ROBERT MWAKIMBWALA**
- 2. ELIAS S/O NICO MUSHI @ MANGI**
- 3. GIDION S/O NTULO @ MWAMKINGA**
- 4. SHAIBU S/O MWINUKA @ MWAMKING**
- 5. LUSEKELO S/O ATUPELE**

JUDGMENT

Last order & Judgment 04/04/2022

NGUNYALE, J.

The facts giving rise to this case may simply be narrated that on 30th day of June 2017 the police received information from *wananchi* that there was a body of a woman found lying beside the path near to Isyesye burial place. The police went there and collected the deceased body and took it to mortuary at Mbeya Zonal Referral Hospital. The staff members BRAC institution where the deceased during her life time was working identified the deceased body as the body of Victoria Manase. They were looking for her from 13:00 hours on the very date. On the fateful date the deceased as a loan officer of BRAC an institution which disburses loans to small scall entrepreneurs left the office at 09:00 hours going to Isanga to meet small

scale entrepreneurs who had taken loans from BRAC. She met the group members at Isanga where she gave them normal business education on how to run business using loans and she collected repayment of their respective loans a total of 1,970,000/=. The said amount of money she did put in her hand beg.

She left Isanga at around 11:00 hours heading to Mwanjelwa to their office. From the time she left Isanga she was not seen or reached by phone till her body was found at Isesye. The Police Force immediately set on motion investigation. Investigation through cellular phone of the deceased linked the first accused with the event. It was alleged that on 3rd day of August 2017 the investigation team found the phone with PW6 STANLEY STANSLAUS HASSAN who bought it from PW14 Hured Salum. The said Hured Salum had bought the same from the first accused ALEX s/o ROBERT MWAKIMBWALA through Bariki Sanga. It is further alleged that the interrogation of those people who exchanged the phone ended with an explosive discovery that the first accused Alex Robert Mwakimbwala and his fellows were the suspects. The first accused is alleged to have admitted to participate in murdering the deceased Victoria Manase on 30th day of June 2017 in cooperation with other accused persons.

The police managed to arrest all the suspects in connection with the tragedy of murdering Victoria Manase. The wheels of justice arrested Alex s/o Robert @ Mwakimbwala, Elias s/o Nico Mushi @ Mangi, Gidion s/o Ntulo @ Mwamkinga, Shaibu s/o Mwinuka @ Mwamkinga and Lusekelo s/o Atupele Mwampandana hereinafter to be referred to as the first, second, third, fourth and fifth accused persons respectively. They are before the Court arraigned with the information of murder contrary to section 196 and 197 of the Penal Code Cap 16 R. E 2019. The prosecution

alleged that Alex s/o Robert Mwakimbwala, Elias s/o Niko Mushi @ Mangi, Gidion s/o Ntulo @ Mwamkinga, Shaibu s/o Mwinuka @ Mwamkinga and Lusekelo s/o Atupele Mwampandana are charged that on the 30th day of June, 2017 at Isanga area within the city and region of Mbeya jointly and together murdered one Victoria d/o Manase.

According to the facts it was further alleged that after the deceased had left the group members, she went to the main road to board transport to Mwanjelwa. She did board a Bajaj of which the first, second and third accused persons purported to be passengers. The deceased was seated at the middle between the first and the second accused, the fifth accused was driving the said Bajaj. The third accused did board to the left of the driver. The fourth accused remained to the scene of crime, it is alleged that he was near to the place where the deceased was attending the small-scale entrepreneur, his role was to give sign to his fellows when the deceased will be leaving the scene going to find transport. He was to give them sign in order to make them move forward the Bajaj ready to take passengers to attract the deceased to board. When the deceased was already in, they left Isanga min market, shortly, the second accused started to strangle the deceased assisted by the first accused and the third accused person. They strangled her till death while the Bajaj was moving, at last they threw her body at Isyesye area after they robbed her handbag and cellular phone.

The prosecution did parade a total of 14 prosecution witnesses namely PW1 Leonald Maguna(54), PW2 Furahat Kalongole (40), PW3 Esta Jonas Mwambebe (43), PW4 Dr. William John Mulla (48), PW5 D 5517 Dt Stn Sgt Daniel (54), PW6 Stanley Stanslaus Hassan (28). Others prosecution witnesses are PW7 Isayi Mtunguja (37), PW8 Fadhili Luinga (36), PW9 ZAINAB KESI (54), PW10 F 23 Dt Sgt Saimon (44), PW11 E 577 Dt Sgt

Exaud (54), PW12 E382 Dt Sgt Simon (54), PW113 E1864 DT Sgt JAIL (53), PW14 Hured Salum (46), PW15 E6796 Dt Sgt Vincent (53)

The prosecution tendered exhibits as follows; Report on Post Mortem Examination Exhibit PE1 as tendered by PW4, Techno Cellular Phone exhibit No. PE2 as tendered by PW5, Certificate of Seizure exhibit PE 3 as tendered by PW5, Bajaj green in colour with registration No. MC 238 AYR exhibit No. PE4 as tendered by PW5, Seizure Note in respect of Bajaj exhibit No. PE5 as tendered by PW5, extra judicial statement of the 5th accused exhibit No. PE6 as tendered by PW7, extra judicial statement of 1st accused and 3rd accused admitted as exhibits No. PE7 and PE 8 respectively as tendered by PW8. Caution Statement of Elias Niko @ Mangi exhibit No. PE9 as tendered by PW10, Caution Statement of 5th accused exhibit No. PE10 as tendered by PW11.

Other exhibits include caution statement of 3rd accused exhibit No. PE11 as tendered by PW11,

During trial the republic was ably represented by Mr. Castus Ndamugoba learned Senior State Attorney and occasionally assisted by Mr. A. Bagenda State Attorney. The defence team was formed by learned advocates namely Felix Kapinga for the first accused, Boniface Mondu and Siamin Ngwembe for the second accused, Ms. Febi Cheyo and S. Ngwale for the third accused, Alfredy Chapa and Samson Sui for the fourth accused and Mr. Mushokorwa and Ms. Nyasige Kajanja for the fifth accused person.

The trial was conducted with the aid of three assessors namely Amina Angetile Kibumba, Hidaya Musa and Ndibuma Makola. Ndibuma Makola could not attend the trial till completion. I am grateful to the State Attorneys and defence Counsels for their kind support, I also extend my

thanks to the Lady Assessors who sat with me and stated their opinion basing on the facts of the case.

The Court made a summing up to the lady assessors, all of them in their opinion returned a verdict that the first, second and third accused persons are guilty of the offence charged. They are guilty because they jointly killed the deceased while in the Bajaj. The fourth and fifth are not guilty because the fourth accused was not at the scene of crime and the fifth accused was a mere Bajaj driver.

At the time of hearing, it was not in dispute that Victoria Manase died as proved by PW4 Dr. William Muller and the cause of death per Report on Post Mortem Examination exhibit PE4 tendered was asphyxia due to strangulation. Death was also proved by oral evidence. It is elementary that death and its cause may be proved by evidence other than medical, see **Aliyudi Dauda Hassan & 2 Others vs. R**, Criminal Appeal No. 282 of 2019.

The first prosecution witness Leonald Magoma (54) testified that he is a WEO of Isyesye Ward since 2015, on 30th day of June 2017 he was at field work around Isyesye, at around 12:00 hours he received a call from one Civilian Ezekiel Mwazonje telling him that there is a body of the woman near the road to Isyesye. He found one member of the street government PW9 and they went to the scene of event. At the scene, they witnessed the body of a woman aged between 25 and 30 years old. The body was on the ground with injuries to the leg, hands and neck. He called the police who came to pick the body for safety and other inquiries.

The witness went on testifying that on 9th August 2017 at around 11:00 hours he was called by *afande* Vincent from Mbeya central police. He asked him to go to central police because the suspects of the previous

murder case had been arrested. The witness went there. They were told that the suspects intend to show where they found the deceased and the whole route till they tossed the deceased body at Isyesye. They left there with the police, street chairman, WEO of the area and the accused persons. At Isanga the fifth accused told them that he was the driver of the Bajaj, he parked it along the road, he was hired by the fourth accused. The accused told them that the deceased went there as a passenger and did board the Bajaj. They did show them the area where they started to strangle the deceased while the Bajaj was moving. They took them to the place where they threw the deceased body. The second accused is the one who told them that he strangled the deceased to death while the first accused was holding legs of the deceased. After showing them the place where they abandoned the deceased body, they took them to the place where they shared money seized from the deceased. At last, they took them to a place where they threw the documents of the deceased.

The second witness was FURAHAT KALONGOLE who testified that she is the Manager of BRAC Mwanjelwa Mbeya and the deceased was one of the employees of BRAC. The deceased was a credit officer passing around educating clients about how to deal with business using loan and how to attend loss. On 30th day of June 2017 the deceased was at work as usual. She was assigned to visit the clients at Pomboho near to old airport and Isanga. After attending clients and collected payments she was to return to office at noon. On the very day at noon, she had yet returned back, they started to make follow up of her by phone. Her phone was not reachable. The witness asked members of Isanga about the whereabouts of the deceased they told her that she had left since 11:00 hours. Till 13:00 hours she was not found. When they were moving looking for her, they received a call from one of their customers who told them that they

saw the body of their employee at Isyesye burial yard. The informer did not know the name of the deceased. They reported to central police. The police told them that the deceased body is already at mortuary they should go there for identification. The witness identified the deceased body as of Victoria Manase. The body had bruises to the neck and legs

The third witness was Esta Jonas Mwambebe, she testified that she is a business woman based at Isanga and she is one of the members who take loans from BRAC. On 30th day of June 2017 morning hours she was at her home with 25 members who are also beneficiaries of loans from BRAC. The deceased visited them there as usual for a session of education about use of loans in business. She completed her session and she collected loan repayment of that day 568,100/= and kept in her bag. She left at around 11:25 hours. Later at around 14: 00 hours she was called by BRAC manager asking for the deceased. She told her that the deceased left since 11:25. She was called again by the manager to go to assist finding the deceased. While with the manager they heard about the body of a woman found at Isyesye. They went to central police where they were advised to go to mortuary to identify the deceased. The witness saw the body and she identified to be the body of Victoria Manase. The body had bruises to her neck.

PW4 DR. Willium John Muller informed the Court that he examined the body of the deceased on 4th July 2017 and he prepared Report on Post Mortem Examination Exhibit PE1 which established that cause of death was lack of oxygen to the body due to strangulation. When he was cross examined, he said that strangulation might have been executed by hands.

PW5 Dt Stn Sgt Daniel (54) testified that on 3rd day of August 2017 he remembers he was assigned by Dt Cpl Vincent who was investigating murder case to make follow up of the phone number which was of the

late Victoria Manase. He told him that the phone number 0765985497 was being used by somebody in the phone of the deceased. The said number was being using in a smart phone Techno which was suspected to be owned by Victoria Manase the deceased. He started making follow up on line, he detected that there is a person using the said phone using sim card registered by the name of STANLEY STANSLAUS. He made communication till he met the user, Stanley Stanslaus. The user Stanley Stanslaus took them to a place he had kept the phone. The phone was admitted as exhibit No. PE2. The phone/handset had IME number 357274074435025 and IME number 357274074435033. Those are the numbers which distinguish the very phone with all other cellular phones. The witness seized the said phone through seizure note exhibit No. PE3.

The witness went on informing the Court that he interrogated Stanley Stanslaus about where he got the phone. He told him that he bought from Hured Salum (PW14). They found the said Hured Salum who told them that he bought the phone from the first accused person. Hured Salum was linked to the first accused person by Bariki Sanga. The witness managed to arrest the first accused. After arrest, the said Alex Robert the first accused admitted to have sold the phone. He took the first accused to the investigator of the case at central police. The first accused was interrogated and he mentioned his fellow Elias Niko Mushi the second accused person. He was arrested immediately. Alex Robert said that he got the phone from the deceased Victoria Manase. They murdered her and left away with her phone and cash money. The second accused was interrogated and he mentioned the third accused as the accomplice. Directed by the first accused they managed to arrest the third accused person.

The third accused said that they used Bajaj in commission of an offence. The Bajaj was being driven by the fifth accused person. They arrested the fifth accused person who had Bajaj with registration No. MC238 AYR green in colour exhibit No. PE4 in Court. On the date of event, it was driven by the fifth accused person. The witness testified further that after arresting the fifth accused with a Bajaj he prepared seizure note. The seizure note was admitted as PE5. The fifth accused person was interrogated and he said that he was hired by Shaibu Mwinuka on the date of event. The fifth accused assisted the police to arrest the 4th accused in the morning of 6th August 2017. During cross examination the witness said that the first accused is the one who said that the phone he took from the woman. The first accused started to mention the second accused and the third accused.

The sixth prosecution witness was STANLEY STANSLAUS HASSAN (28) who testified that early July 2017 while at Kabwe he was called by a person he did not know. The said person told him that he is in need to meet him. He realized that the person who was calling him was a police officer who was inquiring about a phone. That said person happened to be used to the relative of the witness one Victor Stanslaus. The witness told the police officer that the phone is his, he bought from Huledi. Huledi was also called and he joined them there. Huledi said that the phone was his he bought from Bariki. Bariki was also arrested and joined them at the place where inquiry about the phone took place. Bariki said that the phone he was given by the first accused to sale. The witness identified the phone exhibit No. P2 with its IME numbers. Sim one IME No. 35727407435025 and sim two IME No. 357274074435033. Handset is coloured silver Made Techno. The witness testified further that his

statement was recorded and he signed. He identified exhibit PE3 seizure note which he also signed.

The prosecution case was also formed by PW7 ISAYI MTUNGUJA (38) who informed the Court that he recorded extra judicial statement of the fifth accused on 7th day of August 2017 at around 11:00 hours. The Extra Judicial Statement of the fifth accused person was admitted as exhibit No. PE6. During cross examination the witness said that the fifth accused told him that the first accused assisted the second accused to strangle the deceased.

The prosecution case went further through the testimony of PW8 Fadhili Luvinga (36) Justice of Peace who testified that he recorded Extra Judicial Statement of the first accused on 4th day of August 2017 at around 17:00 hours and statement of the third accused on 7th August 2017. In their respective statement both accused persons in their statement they said that they participated in the event of murdering the deceased Victoria Manase. The Extra Judicial Statement of Alex Robert dated 4th August 2017 was admitted as exhibit No. PE7 and the one of Gidion Ntulo dated 7th August 2017 admitted as PE8.

The other prosecution witness was PW9 ZAINAB KESI (54) informed the Court on oath that on 30th day of June 2017 she was with other street government leader who went to witness the deceased body. She saw the body lying near the road. She did not know the name of the deceased. She informed the Court that by then she was a member of the street government of Isyesye. She went on testifying that on 9th August 2017 at around 12:00 hours she was called by VEO, she was informed that they are supposed to go to central police. She went to central police where she found the VEO was already there. At police they were told that the suspects in respect of the body they witness have been arrested, on that

day those suspects were ready to show route and place where they murdered the deceased.

The witness testified that the accused were brought, they were five accused persons. The accused told them that the offence was committed at Isanga. They took them to Isanga where the event started. The witness said that they left in their private vehicle and the police vehicle carried the suspects and the police officers. The VEO and street chairman of Isanga was involved in the event. The whole team dropped at Isanga min market. The team included the five accused persons. One accused person introduced himself by the name of Lusekelo, he told them that on the fateful date he was riding the Bajaj. The deceased did board the Bajaj he was driving. Before the deceased had boarded the same the first accused received a call and told him to move forward the Bajaj. The first accused by then was within the Bajaj. The fifth accused told them that the fourth accused was near to the place where the deceased was attending clients. He is the one who gave sign to the first accused that the woman is heading to the bus stop. PW9 said that Shaibu Mwinuka admitted that he called second accused. The 3rd accused was behind the woman also running to board the Bajaj. When the deceased entered to the Bajaj. After the deceased and the second accused had boarded the Bajaj, it started to move. The fifth accused told them that after driving short distance one passenger stopped it. The one who stopped it was the third accused. The fifth accused stopped and the Said Gidion did board. According to the fifth accused person, the Bajaj carried Alex, the deceased, Mangi and later Gidion Mwamkinga.

It was the testimony of PW9 that the fifth accused told them that the first accused is the one who did strangle the deceased to death while the Bajaj was moving. The other accused were being asked as to whether what is

said by Lusekelo is true each agreed that it was true. When they reached Isyesye Mangi told them to stop so that they can throw the body. He stopped the Bajaj and the body was thrown by Mangi. They seized from the deceased a hand bag which had money and a phone. The second accused gave the first accused a phone of the deceased to look for a customer. The witness said that he saw the accused persons only once on the day of moving with them to see the route of commission of the offence, she managed to identify four accused persons at the doc by names except the fourth accused.

The tenth prosecution witness PW10 E23 Dt Sgt Simon (44) testified that on 5th day of August 2017 at Mbeya central police he recorded caution statement of the second accused person called Elias Nico Mushi @ Mangi. The caution statement was admitted as exhibit No. PE 9. The witness testified that in the caution statement the accused admitted to have participated in murdering the deceased Victoria Manase and he is the one who strangled the deceased to death. The statement was recorded from 05:50 to 07:10 hours.

In the other development the prosecution case was formed by PW11 E 577 Dt Sgt Exaud (54) a police officer responsible with criminal investigation. On 5th August 2017 he recorded caution statement of the 5th accused Atupele Lusekelo Mampandana which was admitted as exhibit No. PE 10. He recorded the statement from 21:18 – 22:14 hours. In the statement he narrated how the deceased was murdered by being strangled by the second accused person while Bajaj was moving. The fifth accused was driving the said Bajaj.

PW12 E 382 Dt Sgt Simon testified that on 5th day of August 2017 at around 22:00 hours till 23:45 hours he recorded caution statement of the accused Gidion Ntulo the third accused person. He tendered caution

statement exhibit PE11. In the caution statement he told him that he participated in the robbery and murder of the deceased. The other prosecution witness was PW13 E 1864 Dt Sgt Jail (53) a police officer responsible with investigation. He informed the Court on oath that on 6th day of August 2017 he did interview the fourth accused persons named Shaibu Mwinuka. The alleged caution statement was not admitted in Court.

The prosecution case continued with the testimony of PW14 Hured Salumu (46) he testified that around July 2017 while at his working place one Bariki Sanga went there selling a phone. He told him that he was selling at a price of 70,000/=. The phone was made Techno silver in colour. The witness told him that he has only 40,000/= Tshs. The Said Bariki Sanga told him that he was to communicate with the owner for negotiations. He left and after five minutes he came back with Alex Robert. The Said Alex Robert accepted 40,000/=. The witness paid cash 40,000/= to Bariki Sanga who handled the money to Alex Robert. After he paid in his presence the money was handled to Alex Robert. The witness charged the phone and started to use it. In using the same one Stanislaus Stanley told him he loves the phone he was ready to buy it. The witness sold it to Stanley at a price of 58,000/=. The witness said that Bariki Sanga and Alex Robert are very familiar to him because they are working around the same premises where they meet now and then.

The witness went on testifying that on 3rd day of August 2017 at around 15: 00 hours while at his working place he was arrested by a police officer. He handled the office and left with the police to the motor vehicle. To the vehicle he found Stanley Stanslaus. He told the police that he had a phone made Techno which he sold to Stanley Stanslaus. He also told him that the said phone he bought from Alex Robert who was with Bariki. The

procedure to arrest Alex Robert started. He was called by phone and he joined there. The witness identified the first accused at the dock as Alex Robert. The witness identified the phone exhibit P1 as the one he bought and sold.

On 30th March 2017 the Court received the testimony of the prosecution witness PW15 E 6796 Dt Sgt Vincent (53), he informed the Court that on 3rd day of August 2017 between 19:00 hours to 20:30 hours he recorded caution statement of the first accused person one Alex Robert Mwakingwala. This accused is the one who made clear the trend of commission of the offence and enabled the police to get other accused persons. In his caution statement, the accused said that he participated in the event where on 30th June 2017 they carried the deceased in the Bajaj, he was with other accused persons. In the Bajaj the second accused did strangle the deceased to death. The first accused said that he assisted the first accused by holding tightly the legs of the deceased for her not to rescue herself and the 3rd accused was holding her hands. The witness said that the accused was in good health before and after he recorded his caution statement. The recorded caution statement was tendered by PW15 and admitted in Court as exhibit No. PE13.

At the close of evidence in support of the charge, the first, second, third, fourth and fifth accused persons were found having a case to answer. The defence case was formed as hereinunder: -

The first defence witness was Alex Robert Mwakimbwala who testified that he is a business man selling grilled maize along the road to Old Airport Mbeya city. He was arrested by police officers on 4th day of August 2017 at Mapelele area within Mbeya City. After arrest he was taken to central police, they reached central police at around 20:00 hours. Among the police officers who arrested him he remembered afande Daniel and Alam.

At police they did show him a cellular phone which was silver in colour and he was asked if he know the very phone. He said no. There after he was beaten while forced to admit what they were asking him about the phone. He said that he denied. The beatings and torture continued next day on 5th day of August 2017. The torture was too hard and his condition was worse thus on 5th day of August 2017 he was given by *Afande* Vincent the papers to sign. Fearing further beatings, he decided to sign all the papers which were in possession of *afande* Vincent. Thereafter he remained in lockup facing serious pain resulted from torture.

In his further testimony he informed the Court that on 9th day of August 2017 he was taken out of the police lock up by a policeman called Vincent and outside he found other police officers. He was taken in the police motor vehicle. They went to the area called Isanga. They were with other accused persons. They dropped at Isanga at the road side where they remained for few minutes and then, they continued with the journey. They stopped to another area where he described as '*kwenye majani mengi*' they stopped for a while then they left through Nanenane. To that area he remained mute. Later, on 22nd August 2017 he was taken to Field Force Dispensary for treatment of his leg and hand. On 11th September 2017 he was arraigned before Mbeya District Court. He tendered treatment documents which were admitted as exhibit No. DE1.

The defence case was formed by the second witness DW2 Elias Niko Mushi (56). He testified that he resides at Kimara Dar Es Salaam since 1989. On 3rd day of August 2017, he travelled from Dar es Salaam to Mbeya for his business. He had carried shoes and cosmetics for sale. He reached Mbeya in the evening of 3rd August 2017 at around 20:00 hours. He dropped his luggage's there. He travelled using New Force Bus Service. When he was looking for transport to move to Nzovye area he was arrested by police

officers. They checked his box and found the cosmetics. They told him that he was dealing with illegal business. He was taken to central police and kept in lock up. He stayed at lock up for few minutes and then *afande* Vincent, Exaud and Daniel took him out of lock up. He was taken to a place where they started to ask him why he was dealing with illegal business. He told them that his business is legal. They started to beat him severe, the exercised existed for about 20 minutes. He was returned to lock up of central police and later at mid night he was transferred to Inyala lock up a place along the road to Dar es salaam. While at Inyala next day they continue to beat him and at the end he was asked to sign documents as brought by *afande* Vincent. He asked for time to read them before signing but they refused. He decided to sign the same on 6th August 2017 to avoid further torture. He did not know who prepared the documents. On 9th day of August 2017, he was taken out of the lock up by *afande* Vincent. He met with other accused persons in this case. They moved a long route where they were dropping to take pictures in about three stations.

The witness went on informing the Court that he was returned to central police where *afande* Vincent went to him with a batch of papers. He managed to read the heading '*maelezo ya nyongeza*'. He was directed to write certification to accept the content. He was arraigned before the District Court of Mbeya on 11th September 2017 for the offence of murder. They alleged that he murdered Victoria Manase. He tendered treatment documents which were admitted as exhibit No. DE2. He alleged sickness was caused by torture.

The third defence witness was Gidion s/o NTULO (47) who in his testimony disassociated himself with commission of the offence charged. He testified that he was arrested on 5th day of August 2017. At the night

of the date of arrest while at central police he was taken to investigation room by police officers namely Daniel, Vincent, Simon and Alex. While he was at the said investigation room, he heard the policemen saying that he is the one responsible with murder of the deceased body recovered at Isyesye. They told him that he is responsible with murder. He denied the accusations. His denial made the police to beat him severe on the night of 5th August 2017 while naked. He lamented that they did hang him on the roof of the very room. He was forced to agree that he murdered. He was then asked to sign papers which were in the hands of *afande* Simon. Simon by then was writing. He moved where Simon was writing in order to sign. His hands were shaking he could not sign.

He went on testifying that after he failed to sign, he was returned to lock up. Next day morning on 6th August 2017 the previous police officers took him again to the investigation room where he signed all the papers he was given. They were many papers and he signed all of them. He complained to OCS that he was sick but they never took him to hospital. He was also promised to be taken to their boss. The other day on 7th day of August 2017 in the evening he was taken to the said boss where he also signed several papers after being beaten. It was at 17:00 hours when he signed those papers on 6th August 2017. The said boss is the one who told him to sign those papers. Before signing, the said boss checked him his legs and he continued writing. He signed many papers by normal signature and thumb print. The said, boss he came to realize that he was the justice of peace.

In his further testimony he testified that on 9th day of August 2017 at noon he was taken to a place where he realized to be Isanga along main road to Chunya. He dropped down and pictures were taken. He was dropped to another area near the tombs. There also pictures were taken.

He was sick all the time, on 10th August 2017 he told OCS that he was sick. *Afande* Vincent was told to take him to hospital. He was taken to Field Force Unit hospital for treatment. At the end he prayed the Court to set him free because he did not commit the alleged offence of murder.

DW4 SHAIBU MWINUKA (44) testified to the effect that, he was arrested on 5th day of August 2017 by a police officer called Vincent. He was detained at central police at around 20:00 hours on the same date of arrest. On 11th day of September 2017, he was charged with the offence of murder. Before being charge on 11th day of September 2017 he was told nothing about the offence of murder and his statement was never recorded about murder case. No investigation was made about his phone communication and the phone is still in custody of the police force. The allegations of murder are false. There is no any exhibit that he committed the offence of murder. The evidence that he hired Bajaj is false, no phone communication evidence has been tendered po prove that he hired a Bajaj. It is not true that he assisted other accused to know that the woman was ready going to board the Bajaj. The statements of other accused mentioning him are false. He insisted that he never communicated with either of the accused persons and he did not know them before this case. The witness Zainab Kesi could not identify him in Court.

The defence case was made by the last witness DW5 LUSEKELO ATUPELE MWAPANDANA (25), he testified to the effect that he is a driver of Bajaj based within the city of Mbeya between Kabwe and Mwambene. He is charged with the offence of murder with Alex Robert, Elias Nico Mushi, Gidion Ntulo and Shaibu Mwinuka. He knows Shaibu Mwinuka the fourth accused even before this case. He used to hire his Bajaj several times. On 30th day of June 2017 the fourth accused person called him at around 09:00 that they meet at Mkapa area. He went there and he found him

with other two people including the third accused person. The fourth accused told him that they go to Isanga to pick his wife. When they reached Magege area the third accused dropped. They moved further and when they reached KKKT church at Isanga the fourth accused told him to stop for a person to board. The second accused did board. Thereafter in the Bajaj they became three people, that is to say the witness DW5, the second accused and the fourth accused.

He went on testifying that they went to Isanga Soko Dogo at Omega bar. The fifth accused told him to park aside the Bajaj. Shaibu Mwinuka introduced DW5 to the second accused as his fellow he should keep listening and receiving instructions from him and he left. After thirty minutes Elias Mushi received a call, when he was done with the call he told the witness DW5 to move the Bajaj to the area where other Bajaj are parking. He saw two people stopping the Bajaj a woman and a man. The man he came to realize that he is the first accused and the woman is the deceased. The first accused he came to prove him at the time of arrest. The woman did board the back seat at the middle between the first and the second accused. They started the journey and after driving few paces he saw the third accused and immediately the second accused told him to stop. The third accused did board sitting to the left of the DW5 of the driver. They continued with a journey. The witness DW5 heard the woman crying behind. He checked at the back and parked aside the Bajaj. He saw the second accused snatching the handbag of the woman and the first accused was closing the *turubai* of the Bajaj.

The witness could not end there, he went on testifying that the second accused ordered him to drive the Bajaj otherwise he will be killed. At that time the second accused had strangled the woman to her neck, the first accused was holding her legs tightly. DW5 drove the Bajaj till they reached

Isyesye makaburini where he was ordered by the second accused to stop the Bajaj. He stopped and the first and second accused threw the deceased out of the Bajaj. According to the witness DW5 the woman was already dead. After they left the deceased, they moved away. While moving the second accused told DW5 that 'you have seen what happened we warn you not to tell anybody otherwise we will kill you. If you will report to police we will know we have a big network.' Later, he came to know that the woman died.

It was further testimony of DW5 to the effect that on 5th day of August 2017 at around 20:00 hours he was arrested by police at Mwanjelwa. They were four police officers but he identified one of them as *afande* Daniel. Next day at police station he saw Alex Robert, Elias Niko Mushi, Gidion Ntulo and Shaibu Mwinuka. When he saw those people, he got a picture that his arrest was probable of the event of 30th June 2017. That picture made him to inform the police whole scenario of 30th June 2017. He said that the threat made him not to report anywhere. He denied to have committed the offence of murder instead the event occurred out of his control *'sikuwa na uwezo wowote wa kumwokoia marehemu... siku hiyo nilikuwa mnyonge tu.'* He prayed the Court to acquit him.

Having heard evidence from both sides now it is high time to consider evidence on record and relevant exhibits as tendered. I think, being guided by law and Court practice I am in a position to determine the case without fear or favour. The main issues for determination are; whether the accused persons namely ALEX S/O ROBERT MWAKIMBWALA, ELIAS S/O NICO MUSHI @ MANGI, GIDION S/O NTULO @ MWAMKINGA, SHAIBU S/O MWINUKA @ MWAMKING and LUSEKELO S/O ATUPELE MWAMPANDANA murdered the deceased person VICTORIA MANASE. Other emerging issue I will determined as I go along.

The universal standard in criminal justice the offence ought to be proved beyond all reasonable doubt. In the case at hand the prosecution duty is not only to prove that death occurred but also the link between the said death and the accused persons. It should be proved beyond all reasonable doubt that nobody else but he accused person committed the offence charged. In case of any doubt the benefit goes to the accused persons through acquittal. Frankly speaking, the acquittal does not always mean that the accused persons is innocent, it simply means that a case against him was not proved to the cardinal principal i. e beyond all reasonable doubt.

The accused persons have been charged with the offence of murder contrary to section 196 of the Penal Code Cap 16 R. E 2019 which provides; -

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

Guided by the above provision the prosecution is obliged to prove that it is the accused persons who murdered the deceased Victoria Manase and that they did that with **malice aforethought**. Malice aforethought is defined under section 200 of the Penal Code Cap 16 R. E 2019.

At present it is not in dispute that Victoria Manase is dead and she faced unnatural death as proved through evidence. PW1 and PW9 witnessed the deceased body at Isyesye. The body had injuries to the leg, hands and neck. PW2 and PW3 on 30th June 2017 identified the deceased body at Mbeya Zonal Referral Hospital. The body had bruises to its neck. The evidence of all four witnesses above suggested that the said Victoria Manase faced unnatural death. PW4 the Medical Doctor examined the body of the deceased one Victoria Manase and he prepared a Report on Post-Mortem Examination. The report which was admitted in Court as

exhibit No. PE1 established that cause of death was Asphyxia due to strangulation.

Strangulation suggests malice aforethought, the person who inflicted strangulation contemplated and intended to kill.

The most contentious issue before the court is whether the accused persons are the one who killed the deceased. The issue will be answered through considering holistic the evidence on record.

The accused persons disassociated with causing murder to Victoria Manase and there is no witness who testified direct evidence that he witnessed the accused persons murdering the deceased other than the evidence of the co accused DW5 which by itself cannot ground conviction even if it is proved to be true. In the case of **Mathias Bundal vs. The Republic**, Criminal Appeal No. 62 of 2004 (unreported) it was observed that it is not the requirement of the law that every killing has to be eye witness. Had it been the requirement then many homicides would remain unsolved.

Prosecution case is based on Extra Judicial Statement of the 5th accused person exhibit No. PE6 as tendered by PW7, Extra Judicial Statements of the 1st and 3rd accused persons as tendered by PW8 as exhibits No. PE7 & PE8 respectively. Others are Caution Statements of the 1st, 2nd, 3rd, and 5th accused persons admitted as exhibits No. PE9, PE13, PE11 and PE10 respectively. The purported caution statement of the 4th accused person was rejected.

The Extra Judicial Statements were of the three accused persons namely Alex Robert Mwakimbwala the first accused, the other was of Gidion s/o Ntulo @ Mwamkinga the third accused and of Lusekelo s/o Atupele Mwampandana the fifth accused persons.

The prosecution evidence pointed a finger to those three accused persons alleging that the first, third and fifth accused alleging that they confessed to have participated in the event and they murdered the deceased. The Extra Judicial Statements Exhibit PE6, PE7 and PE8 were admitted in Court besides being objected for the allegations that they were obtained involuntarily. Trial within a trial was held for each Extra judicial Statement and it was established that the same were freely and voluntarily obtained. The recording of Caution Statements is guided by the law of evidence and Chief Justice Guidelines. At this point I wish to subject the caution statement to the test of Chief Justice Guidelines to ascertain their competence.

The case of **Japhet Thadei Msigwa vs. Republic**, Criminal Appeal No. 367 of 2008 (unreported) the Court insisted that the Justices of Peace are required to comply to Chief Justice Guidelines in recording Caution Statements. In the very case it was observed: -

"We think the need to observe the Chief Justice's Instructions [is] twofold. One, if the suspect decided to give such statement he should be aware of the implications involved. Two, it will enable the trial court to know the surrounding circumstances under which the statement was taken and decide whether or not it was given voluntarily. Non-compliance will normally render the statement not to have been taken voluntarily."

In Japhet Thadei Msigwa (supra) the Court revisited the CJ's Guide, now published in A Handbook for Magistrates in the Primary Courts - Revised and Updated Version, January 2019. It summarized the steps a Justice of the Peace must take before recording an extra-judicial statement thus:

"Before the Justice of the Peace records the confession of such person, he must make sure that all eight steps enumerated therein are observed. The Justice of the Peace ought to observe, inter alia, the following

(i) The time and date of his arrest;

(ii) The place he was arrested;

(iii) The place he slept before the date he was brought to him;

(iv) Whether any person by threat or promise or violence has persuaded him to give the statement;

(v) Whether he really wishes to make the statement on his own free will;

(vi) That if he make a statement, the same may be used as evidence against him."

[Emphasis added]

Guided by the above guide I am going to resolve issues about the Extra Judicial Statements. In his testimony PW7 tendered Extra Judicial Statement of the fifth accused exhibit PE6. He was subjected to cross examination, when he was cross examined, he said that he did not ask the accused from which remand he came from. He said that he is un aware of the Chief Justice Guidelines on recording Extra Judicial Statement. He did not read the statement to the fifth accused person after he completed recording the same. Guided by the above authorities it is clear that the Justice of Peace could not inquire as to where the accused came from and the statement was not read and confirmed by the fifth accused person to be correct. The other anomaly as noted the Justice of Peace (PW7) who recorded the statement appears to be completely unaware of the CJ's Guide. Thus, he could not comply to sensitive parts of it. I am settled in my mind that there are omissions. But the omission not to read the statement to the fifth accused persons after completing recording and being un aware of CJ's guidelines was so grave to the extent that they reduce its evidential value. It cannot stand alone without corroboration to ground conviction.

The Extra Judicial Statement recorded and tendered by PW8 exhibits PE7 and PE8 are worth of grounding conviction because one, the justice of peace was aware of CJ's guidelines two, the anomaly of not signing after verification at the end is not fatal to attract technicalities of disregarding it because he read the same to the accused persons and he was satisfied about voluntariness of the third and first accused persons to give statement out of any form of promise. He reminded them that they might be used as evidence in Court. The Extra Judicial Statements PE7 for the first accused person and PE8 for the third accused person are sound and were voluntarily made as ruled after holding trial within a trial.

It is my sincere view that the procedure in recording the Extra Judicial Statement of the first and third accused persons was proper. The two accused persons confessed to have committed the offence charged. The content of the Extra Judicial Statement of the first and third accused person are clear that the accused persons assisted to cause death to the deceased. They intended to robe her in the course of facilitating robbery they strangled her to death.

The first and third accused persons were interviewed and their caution statements were recoded before the police officer for each. PW15 E6796 Dt Sgt Vincent (53) recorded caution statement of the first accused person Exhibit No. PE13. In the caution statement he confessed to have participated in the event of murdering Victoria d/o Manase. In the caution statement the first accused said that the second accused strangled the decease neck and he assisted by holding the deceased legs for her not to rescue herself. During trial within a trial the Court was satisfied that the statement was freely and voluntarily made before the police officer on 3rd day of August 2017.

Likewise, the third accused persons his caution statement Exhibit No. PE 11 was recorded by PW12 E382 Dt Sgt Simon (54) on 5th August 2017. He admitted to have participated in commission of the offence of murder by killing Victoria Manase in an intention to robe from her. He supported the acts of the second accused and the first accused persons who strangled the deceased to death.

Therefore, the first and third accused persons freely confessed before a Police Officer and subsequently they repeated their confession to the Justice of Peace as noted above. Presence of Extra Judicial Statement acts as an assurance of truth in the caution statement. I have no doubt that the first and third accused persons confessed before the police officer and subsequently to the Justice of Peace.

In further development of the prosecution case, it was the testimony of PW10 F 23 Dt Sgt Saimon (44) that he recorded caution statement of the second accused person. The caution statement of the second accused person ELIAS NIKO MUSHI @ MANGI was admitted as tendered by PW10 as exhibit No. PE 10. It was the testimony of PW10 that the second accused persons confessed before him that they strangled to death the deceased Victoria Manase on 30th June 2017. The act of strangulation was done by him the second accused, first accused and third accused. The fifth accused had a single duty to drive the Bajaj. Therefore, the second accused confessed to have committed the offence of murder before a police office.

According to the evidence on record the Court has warned it self and ended to be satisfied that the confession of the first, second and third accused persons is nothing but the truth, see the case of **Bombo Tomola v. Republic** [1980] TLR 254. The Court having conducted a trial within a trial to ascertain the voluntariness of the caution statement of the first

accused exhibit No. PE13, of the second accused exhibit No. 10 and of the third accused PE11 it was satisfied that each of the caution statement was voluntarily and freely made by each of the accused person before a respective police officer. The admission of the best evidence in the prosecution case as it was stated in the case of **Paul Maduka and 4 Others vs. The Republic**, Criminal Appeal No. 110 of 2007 (unreported) it was observed that;

"There is no doubt that a confession to an offence made to a police officer, is admissible in evidence. The very best of witnesses in any criminal trial is an accused person who confesses his guilt. However, such claims of accused persons having made confessions should always not be treated casually by courts of justice. The prosecution should always prove that there was a confession made and the same was made freely and voluntarily. The confession should have been free from the blemishes of compulsion, inducements, promises or even self-hallucinations."

The Court has been satisfied that the confession was true because the content of all the caution statements corroborates the content of post mortem report and eye witnesses who witnessed the body of the deceased. The witnesses who witnessed the body of the deceased at Isyesye and mortuary the status of the neck of the deceased being found with bruises suggested strangulation. All those contents correlate the caution statements. Generally, the Court has examined the caution statements and found that the accused gave a detailed account on how the deceased met her death. The statement describes the plan how the deceased did board the Bajaj and how the three accused persons cooperated each other to strangle her to death. The way they robbed her money and phone. Those details could not be gathered elsewhere other than from the accused persons. On 9th day of August 2017 as testified by PW1 and PW9 the accused persons did show the route which the offence

was committed, in their defence all three accused persons DW1, DW2 and DW3 admitted to have a journey with the police on the very date in three stations from Isanga but denying the evidence of PW1 and PW9 that they did show the whole scenario of commission of the offence. It is a principle of law that lies of the accused person may corroborated the prosecution case which is already solidly made.

I recall the law and practice that before relying on retracted or repudiated confession the Court has to warn itself of the danger of convicting on such confession **Hamis Meure Gandthi and Others vs. R** (1966) TLL 12. After warning myself of such danger, I find that the confessions were nothing but truthful to be acted upon because of the correlation stated above.

During defence hearing DW1, DW2 and DW3 raised complaint of torture but trial within a trial established that the same were mere afterthoughts. DW1 denied to have been arrested on 3rd day of August 2017 but there was direct evidence from PW6, PW5 and PW14 that he was arrested on 3rd day of August 2017. That being the case I think in this case lies of the accused persons corroborated the prosecution evidence, see **Aliyudi Dauda supra and Felix Lucas Kisinyila vs Republic**, Criminal Appeal No. 129 of 2002 (unreported).

The second accused persons in his defence raised a defence of alibi that on the date of offence he was travelling from Dar es Salaam to Moshi for a funeral of his relative. Unfortunately, he did not raise notice as required. His defence cannot hold water in the circumstance where his caution statement exhibit No. PE10 is straight forward that he committed the alleged offence of murder. In the same trend DW3 distanced himself from commission of the alleged offence but his defence has raised no doubt to the prosecution case because he willingly confessed before the police

officer and the Justice of Peace that he committed the offence charged. Trend of the defence witnesses carried lies which strengthen the prosecution case. For example, DW3 Gidion Ntulo testified that on the date alleged he committed the offence he was not present, he travelled to Mafinga. His evidence is outweighed by the prosecution evidence in PE11 that he confessed before the police officer that he committed the offence charged.

As a whole then the series of evidence proves that the accused persons are the persons who murdered Victoria Manase and nobody else. The witnesses who witnessed the deceased body noted bruised to her neck legs and hands, the doctor who examined the deceased body found that caused of death was strangulation and the accused persons confessed to have strangled the deceased to death. The series of events correlate that it is the accused persons who strangled the deceased to death.

I am settled that nobody else murdered Victoria Manase but the accused person. Does the accused persons murdered with malice aforethought? Certainly, yes by considering part of the body they concentrated. The neck is very vulnerably. It was attacked. It is not in the ordinary cause of things and human behaviour for a man who attacks another to declare that his intention was to kill even if such was his intention. The act of the accused person was by any means and by either means to rob. The offence of robbery is punishable by sentence of more than three years under the Penal Code. Therefore, malice aforethought is established under section 200 (c) of the Penal Code Cap 16 R. E 2019.

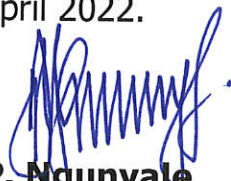
In the end result the court has been satisfied that the prosecution has proved its case beyond all reasonable doubt the standard required in criminal cases against the first, second and third accused persons as opined by the assessors. In the other verdict there is weak evidence to

ground conviction against the fourth and fifth accused persons, their involvement is too remote to convict them is this capital offence basing on evidence of co accused. The fourth accused was not present at the scene of crime thought he knew that robbery is going to happen to the deceased. The fifth accused was driving the Bajaj, he did not support the strangulation. The two accused persons are hereby acquitted as opined by the Lady Assessors. I agree with the Lady Assessors that the two are not guilty.

In the other hand, I agree with the Court assessors that, accused persons namely ALEX S/O ROBERT MWAKIMBWALA, ELIAS NICO MUSHI @ MANGI AND GIDION S/O NTULO @ MWAMKINGA are hereby convicted with the offence of Murder contrary to section 196 and 197 of the Penal Code Cap 16 R. E 2017 as charged.

Dated at Mbeya this 4th day of April 2022.




D. P. Ngunyale
Judge
04/04/2022