

**THE UNITED REPUBLIC OF TANZANIA  
IN THE HIGH COURT OF TANZANIA  
[DISTRICT REGISTRY OF DAR ES SALAAM]**

**AT DAR ES SALAAM**

*SEATING AT IFAKARA*

**CRIMINAL SESSIONS CASE NO. 32 OF 2021**

*(Original PI Case No 9 of 2019, In the District Court of Malinyi)*

**REPUBLIC**

**VERSUS**

**1. LEONARD NGOSO**

**2. ZABRON BENJAMIN @ JOHN**

**JUDGEMENT**

*Hearing date 28/2/2022*

*Judgement date on 18/3/2022*

**NGWEMBE: J.**

Before this court, **LEONARD NGOSO** and **ZABRON BENJAMIN @ JOHN** stand charged for murder of Leonard Zidadu contrary to section 196 and 197 of the Penal Code Cap. 16 R.E. 2019. According to the charge sheet, the alleged murder occurred on 15<sup>th</sup> November, 2019 at around 18:00 hours in the evening, at Usangule B area, within Malinyi District in Morogoro Region.

The source of that killing originated from a family conflict between the deceased Leonard Zidadu and his wife Pili Ngegeshi (Husband and wife) who ended up in serious fight. In the cause of that fight, **Zabron Benjamini @ John** being a foster child of the deceased, (Child of Pili

Ngegeshi), tried but failed to settle their conflict. At the beginning the conflict was preliminarily settled, but later erupted again. In that new fight, the 2<sup>nd</sup> accused hit the deceased on his head with a stick and pushed him down. The wife (**Pili Ngegeshi**) directed **Zabron Benjamin @ John** to seek assistance from their neighbour, who is the 1<sup>st</sup> accused.

Upon arrival of the 1<sup>st</sup> accused to the house of the deceased, he found him seated down, as such, he took traditional strings (rope), tied the deceased on his neck, both hands and legs, then took him in a room, where he was strangled to death. Consequently, on the same night, the deceased body adjacent to his house.

On 17<sup>th</sup> November, 2019 the 1<sup>st</sup> accused went over to the deceased family to claim payment of (TZS. 500,000/=). It was on the verge of that claim of money, the family decided to sale their properties to pay the 1<sup>st</sup> accused, in the process they were arrested by villagers assisted by Militiamen (Sungusungu) and later were re-arrested by police from Mtimbira police post. In the cause of interrogation, the accused persons led police to where the deceased body was buried. Eventually, the two accused persons were arraigned in this Court charged for the offence of murder.

When the charge and information was read over to the accused persons, the 1<sup>st</sup> accused pleaded not guilty, while the 2<sup>nd</sup> accused pleaded guilty, however, due to the gravity of the offence, it was recorded not guilty for purpose of inviting the public prosecution to prove the offence against him beyond reasonable doubt.



During trial of this case, the court was assisted by three court assessors namely Cletus Lipongola, Ashura Mfaume and Peter Magwiza. Parties were represented by learned counsels, while the Republic were represented by learned Principal State Attorney Flora Masawe assisted by Caristus Kapinga, the defense case was advocated by learned counsel Benard Chuwa. Thus, in establishing a *prima facie* case against both accused persons, the Republic came up in court armed with five (5) prosecution witnesses and four (4) exhibits namely:- **ASP John Boscal John Katekela, Gloria Godson Malijani, Dr. Ernest Mataura, Nyenye Machibya, and G. 2988 D/CPL Simoni.** The defense case was blessed by **Leonard Ngoso and Zabron Benjamin @ John.**

The exhibits admitted in court were:- **Report on Post Mortem Examination (p1); Sketch map of the crime scene (p2); Extra Judicial Statement of the 2<sup>nd</sup> accused (P3) ; Hand hoe, spade and Stick (p4 a, b & c).**

Briefly, the prosecution evidence is summarized as follows; ASP John Boscal John Katekela (PW1), identified as police officer working at the head quarter of police in Dodoma. On 17/11/2019 he was an Inspector of Police working as incharge in Mtimbira police post within Malinyi District.

While he was at his office, received a phone call from Sheboficha informing him that at Mpululu village in Usangule Division, there was murder and some of the accused were arrested by villagers under assistance of militiamen (Sungusungu). Immediately thereafter, he went to the scene of crime accompanied with D/CPL Simon and D/CPL Wilson. At the scene of crime, they rearrested three accused persons who were





already arrested by villagers. The two accused persons identified them in the dock save Pili Ngegeshi who is not part of the accused in this trial.

That he witnessed angry villagers who wanted to kill the accused persons. Thus, took them to police post with a view to serve their lives and for interrogations. The three accused persons confessed to have killed the deceased Leonard Zidadu, a husband of Pili Ngegeshi and buried him close to his house on the same night of 15/11/2019.

That on 18/11/2019 together with OCD, OC CID and Medical Doctor, with three accused persons, went to the scene of crime. The third accused person (Pili) was found to be irresponsible to the killing and burial of the deceased. The 1<sup>st</sup> accused person led them to the place where the deceased body was buried. It was adjacent to the deceased house, he added. In that event there were many villagers who witnessed the pit hole where the deceased body was buried.

When the body was uncovered from the pit hole, the whole multitude of villagers identified him and started crying all over the place. They observed that, the body had strings on both hands, legs and on his neck.

Testified further that the medical doctor examined the body and handed over to Police and police handed over to the relatives for burial ceremony.

Added that the 2<sup>nd</sup> accused took police to a place where the 1<sup>st</sup> accused used witchcraft and or traditional medicine to wash their bodies with a view to protect them from being arrested. From the scene of crime to that place were about 50 meters.

Gloria Godson Malijani (PW2), identified as Resident Magistrate working at Malinyi Primary Court. Testified that sometimes on 18/11/2019 she worked at Mtimbira Primary Court, while at Mtimbira primary court, about 09:00am while was at her office, police and the 2<sup>nd</sup> accused person entered into her office. In the cause of recording his confession the accused freely disclosed his participation in the death of the deceased.

That prior to recording his confession, she described to him all his rights including inspecting his body if at all has any unusual things. The accused was found with a scar on his head, which occurred prior to the eventful date. Thus, she was satisfied that the accused was health physically and mentally. Hence, proceeded to record his confession. She identified the confession by her name, handwriting, signature and stamp. Same was admitted unopposed in court marked exhibit P3. To satisfy the legal requirements, the confession was read over loudly in court.

The third witness (PW3) was Dr. Ernest Mataura, working as medical doctor at Mtimbira Health Centre. Described his qualification as an Assistant Medical Officer. That on 18/11/2019, while at Mtimbira, he accompanied Police to the scene of crime within Mtimbira village to examine a deceased body. While at the scene of crime, he examined the male dead body, observed a wound on his face and strings tied on his hands, legs and neck. As a result, the deceased eyes were out and his tong was out indicating strangulation. Also, he observed stool in his pit short and trouser. Thus, concluded that the source of death of the deceased was strangulation. Therefore, he prepared a Post Mortem



Examination Report, which same was admitted in court during plea and preliminary hearing as exhibit P1. To comply with legal requirements, he proceeded to identify it and read loudly in court.

The fourth prosecution witness was Nyenye Machibya (PW4) who expressed that he is a pagan or none believer, however he was affirmed and proceeded to testify that, he lives at Mpululu in Mtimbira village since 2012 to date. Both accused persons are well known to him, to prove it, he mentioned their names as; Leonard Ngoso; and Zabron Benjamin.

Added that on 16/11/2019 Zabron Benjamin called him and informed that they are selling Iron sheets, bricks and a farm. As a result, he went therein and purchased 1000 bricks for a total shillings of sixty thousand (TZS. 60,000) only. However, he did not purchase iron sheets and a farm.

When he inquired as to where about the father of that house, he was told, he has gone to look for another farm land elsewhere. Insisted to call him so that he can verify, if it is true that he is shifting the place. Pili Ngegeshi and Zabron responded that his mobile phone is not working.

To satisfy on the whole process, he was the one who called Hamlet leader, who immediately came to the scene of crime. While he was inquiring on the matter, many villagers came therein, inquiring on whereabouts the father of that house. Soon thereafter, himself, the two accused persons and wife of the deceased were arrested by villagers assisted by militiamen (Sungusungu).

While under arrest, the wife (Pili Ngegeshi) of the deceased disclosed that her husband was murdered by Leonard Ngoso and Zabron (accused persons). Upon interrogation by the villagers, the two accused persons, confessed to have killed and buried the deceased.

Proceeded to testify that, police were informed and immediately came to the scene of crime. They re-arrested the two accused persons and a wife of the deceased and took them to Police Post. Also, Police instructed those villagers to take care of the scene of crime until the following day.

In the following day, police and Medical Doctor came to the scene of crime, together with the accused persons. The 1<sup>st</sup> accused led the delegation to the grave of the deceased. Uncovered it and found the deceased body therein. The body had strings on hands, neck and legs. Finally, testified that, he had no conflict with the two accused persons.

On cross examination, he testified that he witnessed the 1<sup>st</sup> accused person taking the deceased plough and iron sheet, but he did not know the number of those iron sheets.

Added that the deceased body was put in a pit hole adjacent to his house. However, he denied to witness the killing of the deceased.

The last prosecution witness was G. 2988 D/CPL Simoni (PW5), who is a police officer working at Mtimbira Police Post since 2015. That on 17/11/2019 he was informed by his incharge (John Bosco Katekele), that at Mpululu area the villagers have arrested accused persons suspected to have committed murder.

Jointly went to Mpululu area, which is within Mtimbira village, at the scene of crime, they found multitude of people including the accused persons, put at the center surrounded by angry villagers who wanted either to kill or injure them. Pili Ngegeshi explained that her husband was killed and buried by the two accused persons.

They re-arrested the accused persons, and together took the instruments use to bury the deceased body to Police Post. Those exhibits were registered in the exhibit register bearing numbers MTI/IR/379/2019 kept safety in the exhibit room.

**PW5** identified the hand hoe, spede and stick, same were admitted in court as exhibit P3 (a) (b) and (c) collectively.

Proceeded to testify that he recorded the statement of the 1<sup>st</sup> accused who admitted to have murdered Leornad Zidadu on 15/11/2019 by strangulation, using strings and he was promised to be paid TZS. 500,000/= as reward for killing the deceased.

That on 18/11/2019 he was present when the accused led them to a place where they burred the deceased body. They uncovered the pit hole and found the deceased body with a wound on his head, string on neck, hand and legs. The Medical doctor examined the body and found that the source of death was strangulation. Thereafter, relatives were allowed to proceed with burial ceremony.

Thereafter, the accused persons took them to a place where they went to wash their bodies with traditional medicine.





Having closed the prosecution case, this court under section 293 of Criminal Procedure Act Cap 20 R.E. 2019, guided by the holding of the Court of Appeal in **DPP Vs. Morgan Maliki & Nyaisa Makori, Criminal Appeal No. 133 of 2013**, the Court held:-

*"a prima facie case is made out if, unless shaken, it is sufficient to convict an accused person with the offence which he is charged or kindred cognate minor one. Which means that this stage, the prosecution is expected to have proved all the ingredients of the offence or minor, cognate one thereto beyond reasonable doubt."*

Having that guidance in mind, the court ruled both accused persons to have a case to answer. Thus, the prosecution managed to establish and prove a *prima facie* case against both parties. Therefore, proceeded to call them to defend by explaining all their statutory rights prior to their defense.

The defence case was blessed by two defence witnesses, who are the two accused persons whose evidences were brief. Commencing with Leornad Ngoso, testified that he is 35 years old engaged in peasantry at Mtimbira village in Usangule B area. Admitted that, the deceased was his neighbour at Mtimbira. The distance from his house to the deceased house was about 400 steps.

Added that on 15/11/2019, at the evening time, he was at his house and did not go anywhere. On 17/11/2019 he left home at around 3:00pm together with Peter Chimola, Kurwa Ganyaso and Mabula James, together went to Leonard Zidadu to purchase cows. Those cows were known to him for they were grazing together. Many people were purchasing properties of Leonard Zidadu. The seller of those properties

were Zabron Benjamin and Pili Ngegeshi. Upon inquiry on where about the owner, he was informed that the owner has left to another place to look for more suitable land.

While was in the deceased house, he was arrested by militiamen in presence of Hamlet leader together with the 2<sup>nd</sup> accused and his mother Pili Ngegeshi. Upon interrogation, Pili Ngegeshi disclosed that Leonard Zidadu was murdered by Leonard Ngoso and Zabron Benjamin. Then Police arrived to the crime scene and took them to police post.

On 18/11/2019, together with Zabron Benjamin were taken to the scene of crime. They went to the deceased grave and uncovered it; they found the deceased body in there. However, he denied to have murdered the deceased Leonard Zidadu and prayed this court to find him innocent.

On cross examination, he admitted to know the deceased as his neighbour. Also admitted to know Zabron Benjamin and he knew his home place. Above all he admitted to have been arrested by Sungusungu, accompanied with Hamlet leader and he participated in uncovering the pit hole where the deceased body was dumped. That the deceased body had strings on the neck, hands and legs.

When was asked about his family, he admitted to have two wives with thirteen (13) children, but denied to have confessed on the killing of the deceased.

The second defence witness (DW2) was Zabron Benjamin John, aged 22 years old. That, he was engaged in agriculture and is living at Shinyanga in Kahama District at Burugwa Ward. He visited his mother at Mpululu area in Mtimbira village within Malinyi District.



Admitted to know Leonard Ngoso after the deceased introducing him to his neighbour. The deceased was his foster father (baba wa Kambo).

In the evening at around 7:00 pm on 15/11/2019, he arrived at home and found serious fight between his foster father and wife (mother). The foster father took spede and went to where his wife was with intent to hit her, instead he went to where he was, intended to hit on his head. He was hit on his right side of his head, but he managed to run away. The source of that conflict was demand of money planned to give it to the 1<sup>st</sup> accused Leonard Ngoso as initial dowry for his daughter intended to be married to Zabron Benjamin.

However, upon return at home for the second time, he found the deceased continuing beating his mother, and when he saw him, changed the goal post by beating the 2<sup>nd</sup> accused with a stick. In turn he took the same stick and hit him on his head. Pili Ngegeshi (mother) directed him to call their neighbour (1<sup>st</sup> accused) to come and resolve that conflict. That he complied by calling the 1<sup>st</sup> accused. Upon return from their neighbour, he found the deceased with match box intending to burn down their house. When he tried to solve that conflict, the deceased came up full armed to fight him, but he pushed the deceased down. Immediately thereafter, the 1<sup>st</sup> accused arrived and found the deceased still down there, abusing his wife and the 2<sup>nd</sup> accused. Upon brief inquiry, he promised to silence and solve that conflict once and for all.

He proceeded to take strings and tightened the deceased on his neck, both hands and legs. Then he took him in one of his rooms, after around 10 minutes, the 1<sup>st</sup> accused went out to where they were,



instructed his mother to go inside her bed room and sleep. Proceeded to order him to follow his instructions. At last told him to prepare TZS. 500,000/= as consideration for silencing the deceased.

The 1<sup>st</sup> accused took hand hoe and spade, also took machete which he used to reduce the length of the stick of the hand hoe, went outside and dig a pit hole near banana tree and buried the deceased.

Then went to about 50 meters away near the tree called "Mwiche" where they washed their body with traditional medicine, washed the hand hoe and spade and went back home.

On 17/11/2019, when he was looking for money to pay the 1<sup>st</sup> accused, a total of TZS. 500,000/=, her mother decided to sale two cows for a total of TZS. 300,000/= and bricks to Nyenye for TZS. 60,000/= and were in the process of selling iron sheets and their farm.

While were in the process of looking for that amount of money, the 1<sup>st</sup> accused arrived in their house insisting to be paid his money as reward for killing the deceased. When the 1<sup>st</sup> accused arrived to the deceased's home he took plough and iron sheets as part of his rewards. Thereafter, hamlet leader and six young men (Sungusungu) appeared and arrested them.

That on the very day, the 1<sup>st</sup> accused confessed to have killed the deceased. Then they were taken to the scene of crime and to the place where the deceased body was buried. Hamlet called police who came immediately and arrested them and were taken to Police Post.

On 18/11/2019 police took them to the scene of crime under leadership of the 1<sup>st</sup> accused. The deceased body was found therein.



Finally, he confessed to have ordered by the 1<sup>st</sup> accused to participate in burying the deceased body after being killed by the 1<sup>st</sup> accused. Added that he had no intention to kill but to solve their conflict.

After both parties closing their cases, I proceeded to order the learned counsels to file their final arguments, which they complied with. Among others, the prosecution argued quite rightly, that in this case the eye witnesses are the accused themselves. Expectedly the wife of the accused one Pili Ngegesi was expected to adduce certain evidences though did not witness the killing of the deceased. According to the testimonies of DW2, such witness was ordered by DW1 who is the 1<sup>st</sup> accused to go inside her room and sleep.

Moreover, the learned State Attorney was right to introduce the elements of murder. The most crucial elements are *actus reus* meaning availability of a dead body with clear evidence that he/she was killed as opposed to natural death. The second element is *mens rea* or availability of clear intention to kill the deceased. Upon proof of those two prerequisites murder will be proved. To support his arguments, he cited the case of **Leonard Joseph @ Nyanda Vs. R, Criminal Appeal No. 186 of 2017** (CAT – Dar es Salaam) whereby the Court discussed extensor on credibility of witnesses. Thus, insisted that the prosecution witnesses were credible and reliable.

Argued further on confession of both accused persons at the time of arrest and the behavior of the 1<sup>st</sup> accused that, on the date of arrest he went to the deceased family to demand payment of his award of shillings five hundred thousand (TZS. 500,000/=) for killing the



deceased. Such confession of both accused persons, supported the incidence of killing the deceased. Cited section 33 of the Evidence Act that in law conviction may be found from the confession of co-accused though such confession should be corroborated by other evidences.

Concluded his submission by exonerating the 2<sup>nd</sup> accused on murder but may be found guilty on lesser offence due to lack of *mens rea* as per the case of **R. Vs. Bainbridge [1960] 1 QB 129** where the court held that. Agreeably, if the evidence is so strong against an accused person as to leave only a remote possibility in his favour, which can easily be dismissed, the case is proved beyond reasonable doubts (see the case of **Magendo Paul and Another Vs. R, [1993] TLR 219**). Rested by pointing all fingers to the 1<sup>st</sup> accused person as liable for murder, but the 2<sup>nd</sup> accused person may be found liable to a lesser offence to murder.

In turn the learned defence counsel, stood firm to exonerate both accused persons from any liability of murder, despite the confession of the 2<sup>nd</sup> accused. Rightly, referred this court to section 300 (2) of Criminal Procedure Act when read together with section 240 of the Penal Code Cap 16 R.E. 2019, the 2<sup>nd</sup> accused confessed to have assaulted the deceased but had no intention at all to cause death. Therefore, convinced this court to consider him for a lesser offence.

Arguing on the involvement of the 1<sup>st</sup> accused in the alleged killing of the deceased, he raised three doubts that; the string or rope used to strangle the deceased to death was not tendered in court by the prosecution; second failure of the prosecution to call the deceased wife as a witness so she can testify on what exactly happened on a fateful





night is fatal; and third the confession of the 2<sup>nd</sup> accused contradicted with the testimonies of other prosecution witnesses. As such, he concluded by insisting that the 1<sup>st</sup> accuse was not responsible to the death of the deceased. Hence, asked this court to acquit them.

Upon final arguments of the learned counsels, this court proceeded to comply with section 298 (1) of CPA by summarizing all proceedings and evidences to the wise assessors prior to their opinions. The importance of assessors in criminal trials was emphasized in the case of **Washington Odindo Vs. R, [1954] 21 EA CA 394**. Therefore, I complied with such legal requirements, but their opinions will be discussed later on.

In determining this case, among others, I will be guided by the available evidences adduced by both parties and legal arguments advanced by learned counsels. Also I find important to be guided by the wisdom of justices of appeal in the case of **DPP Vs. Peter Roland Vogel [1987] TLR 100 at page 104** where their lordships held:-

*"It is deplorable that any bench -holder could treat court proceedings before him as a football match, with doubtless, the parties themselves being the ball and kicked around by their counsel, however inept they may be. It is a duty of a judge conducting a case to try the case and determine it on its merits doing justice to each party according to law"*

Lord Chief Justice Godard in the case of **R. Vs. David Flynn 54 Criminal Appeal R, 17** held:

*"Criminal trial is to acquit the innocent and convict the guilty"*

In murder cases like this one, certain ingredients must be established and proved by reliable evidences from reputable witnesses. First, the death must be established that was caused by deliberate act of another person as opposed to natural death. Second, the murderer had malice aforethought or *mens rea* or intention to cause or kill the deceased. This understanding of murder is clearly defined in section 196 of the Penal Code, and section 200 of the same Act.

In law intention is not a physical thing which can be touched, but may be established and proved upon considering certain circumstances as rightly provided for in section 200 of the Penal Code. The law provide four circumstances when established proves malice aforethought that:-

- a) *An intention to cause death of or to do grievous harm to any person, whether that person is the person actually killed or not;*
- b) *Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous harm is caused or not, by a wish that it may not be caused;*
- c) *An intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;*
- d) *An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence"*





Any of these circumstances, may result into Malice Aforethought, or intention to kill or *mens rea*, and murder may be established. Therefore, the evidence leading to the conviction of murder must leave no doubt that the accused or accused persons are the only who committed the offence. Thus, deserve statutory sentence. In the case of **Habib Vs. R, (1971) HCD 370** the court held:-

*"It is established law that a conviction should be based on the strength or affirmative prosecution case"*

Therefore, the issue before this court is whether the prosecution has successfully, established the offence of murder against the accused persons. In responding to this issue, the following principles should be born in mind: - first, the burden of proof lies on the shoulders of the prosecution; the offence of murder must be established and proved beyond reasonable doubt; and the accused persons shall not be convicted on the basis of the weaknesses of their evidences/defenses; rather, the conviction (if any) shall be based on the strength of the prosecution case. The weak defense case (if any) may only enhance the prosecution case, but not convert it as failure of the accused persons to prove innocence.

Proving the offence **beyond reasonable doubt** is statutory as per section 3 (2) (a) of the Evidence Act Cap 6 of R.E. 2019. The section means no other logical explanation can be derived from the facts except that the accused person committed the offence.

In this trial, the fundamental issues of proof are:-

- i. Whether the deceased was killed or died natural death?

- ii. Whether the accused persons were responsible for the act of killing the deceased?
- iii. Whether the accused persons had malice-aforethought at the time of killing, if it will be proved that they are the one who killed the deceased.

In answering these issues, I find essential to point out undisputable facts, which may help to answer these issues. First, the deceased on the fateful date was alive, healthy and performing his normal duties; second, prior to his death, he was engaged into conflict and fight with his wife Pili Ngegeshi; third, the 2<sup>nd</sup> accused was a foster son of the deceased and went to live in the deceased family temporarily from Shinyanga; fourth, the 2<sup>nd</sup> accused knew where the 1<sup>st</sup> accused was living and in fact he was a close neighbor of the deceased, thus they knew each other after being introduced by the deceased himself; fifth, the death of the deceased was hidden by his family members and by both accused persons. However, the incidence was revealed in the cause of disposing off his estate. Sixth, the deceased was murdered and burred in a pit hole, while having strings (ropes) in his neck, both hands and legs. Also was burred while dressed with his clothes.

These undisputed facts, answers the first question in affirmative that Leonard Zidadu was killed and burred in a pit hole on the same night he was murdered. The remaining fundamental question is who killed the deceased? To answer this question, demand thorough evaluation of the evidences adduced in court.

The testimony of DW2 left no doubt in his confession both in writing and in his oral evidence under oath. That he confessed to have witnessed





the killing of the deceased and that the 1<sup>st</sup> accused forced his mother to go to sleep while forcing him to participate in burying the deceased body. Such confession at one hand incriminated his co-accused. The law section 33 of the Evidence Act Cap 6 R.E. 2019 allows conviction by the confession of the co-accused person. For clarity the section is quoted hereunder:-

*"When two or more persons are being tried jointly for the same offence or for different offences arising out of the same transaction, and a confession of the offence or offences charged made by one of those persons affecting himself and some other of those persons is proved, the court may take that confession into consideration against that other person"*

There are several precedents on admissibilities of confession. One of the ingredients for proper confession was considered by the Court of Appeal in **Criminal Appeal No. 122 of 2002, Rhino Migire Vs. R**, where the Court held:-

*"For a statement to qualify as a confession it must contain the admission of all the ingredients of the offence charged as provided for under section 3 (c) of the Evidence Act"*.

In this trial, the 2<sup>nd</sup> accused admitted all ingredients of the charge sheet, and the way he was forced by the 1<sup>st</sup> accused to participate in digging a pit hole and buried the deceased body. Such confession as per exhibit P2, qualifies to be admitted by a competent court of law.

According to subsection 2 of section 33 of the Evidence Act, the confession of co-accused to cause conviction, such confession should be corroborated by an independent witness. This position was well



repeated in many cases decided by the Court of Appeal including **Criminal Appeal No. 122 of 2002, Rhino Migire (Supra)** the Court held that, it is unsafe to convict an accused person based on uncorroborated evidences of a co-accused person.

Being aware of that ingredient of law, I have no slight doubt the confession of the 2<sup>nd</sup> accused was fully corroborated by PW1, PW3, PW4 and PW5 having witnessed the body of the deceased uncovered from the pit hole tightened with strings on his neck, two hands, legs and dressed with his clothes.

Moreover, they witnessed the deceased body being uncovered from a pit hole which was prepared by the accused. Above all, they witnessed the hand hole and spade which were used to dig that hole and finally, they witnessed a stick used by the 2<sup>nd</sup> accused to bit the deceased. All those instruments were admitted in court unopposed. Therefore, the evidence of PW1, PW3, PW4 and PW5 together with exhibits, undoubtedly corroborated the confession and oral testimonies of the 2<sup>nd</sup> accused.

In this trial, the court expected, the prosecution to call two key witnesses, namely Pili Ngegeshi (wife of the deceased) and Hamlet leader who participated in arresting the accused persons on the scene of crime. Their evidences would help to consolidate the already testified evidences by other prosecution witnesses. Even without their evidences, yet the prosecution case was established and proved by other witnesses.

Considering deeply on the defense of the 1<sup>st</sup> accused (DW1), obvious comprised general denial. Testified further that on 15/11/2019, at the evening time, he was at his house with his family and he did not go



outside of his house. However, on cross examination, he admitted to know the deceased as his neighbor also admitted to know the 2<sup>nd</sup> accused – Zabron Benjamin who also knew his house. Above all he admitted to have been arrested by Sungusungu, accompanied with Hamlet leader at the house of the deceased on 17<sup>th</sup> November, 2019.

Moreover, he admitted to have participated in uncovering the pit hole, where the deceased body was dumped and buried. He further witnessed that the deceased body had strings on the neck, hands and legs. Such testimonies are similar to the confession of the 2<sup>nd</sup> accused and other prosecution witnesses.

The learned defence counsel was very particular in his written arguments that in fact the prosecution failed to produce relevant exhibits like strings, which were used to strangle the deceased into death; failed to call eye witnesses, like the wife of the deceased and I may add even the hamlet leader was an important witness. Despite all those shortcomings in the prosecution side, yet the evidences testified in court by prosecution witnesses, left no doubt, leave alone reasonable doubt, that the 1<sup>st</sup> accused killed the deceased and the 2<sup>nd</sup> accused was aware of it and he participated in digging a pit hole and dumped the deceased body therein covered with soil.

I would therefore, conclude that *actus reus* was committed by the 1<sup>st</sup> accused person and the 2<sup>nd</sup> accused person was aware of it and participated in digging a pit hole and dumped the deceased body therein covered with soil.

Another important ingredient to prove murder is availability of *mens rea*. I have discussed herein above, on the necessity of intention to kill.



Obvious due to the available evidences, I find no other conclusion than clear intent of the 1<sup>st</sup> accused to kill the deceased. DW2 testified that the 1<sup>st</sup> accused upon his arrival to the scene of crime, he took tradition ropes, (strings) tightened the deceased on his neck, both hands and legs, then took him in a room where he strangled him to death. Such act had no other intention than to kill the deceased.

In any event, the reasoning of justices of Appeal in the case of **Magendo Paul & Another Vs. R, [1993] TLR 219** is applicable herein, where they held:-

*"If the evidence is so strong against an accused person as to leave only a remote possibility in his favour which can be dismissed, the case is proved beyond reasonable doubts"*

Accordingly, the evidences on the intention of the 1<sup>st</sup> accused person leaves no doubt he intended to kill the deceased and in fact he actualized his intention by killing the deceased by strangulation.

Considering the intention of the 2<sup>nd</sup> accused to kill the deceased, obvious, I agree with both counsels, that his intention does not appear clearly. Based on his age of 21 years, slightly above the age of majority of 18 years, though his age was not proved by any viable evidence, and following the prevailing circumstances, which led in the death of the accused, and bearing in mind the threatening acts of the 1<sup>st</sup> accused, obvious his acts was consequential after death of the deceased. Accordingly, the *mens rea* of the 2<sup>nd</sup> accused does not arise.

It is statutory that killing a person without malice aforethought does not amount into murder. It can fall under any cognate offences, which is manslaughter. Conviction on manslaughter may attract sentence up to



life imprisonment as maximum punishment. But when murder is proved beyond reasonable doubt, its sentence is only one as provided for under section 197 of the Penal Code. Even the mode of execution is also statutory as per section 26 of the Penal Code. To pronounce appropriate sentence is within the domain of the trial court and rarely the appellate court may interfere with it. The second rule of thumb on sentencing is based on aggravating circumstances, which may agitate for a stiff sentence, and mitigating factors may call for lenient sentence. This position likewise was discussed by the Court of Appeal in the Case of **Robert Nicholaus Vs. R, Criminal Appeal No. 195 of 2010** (CAT – Mwanza).

While I am approaching to the end of this judgment, I find important to discuss briefly on the opinions of court assessors. In fact, all court assessors had unanimous opinion that both accused persons were liable to the death of the deceased.

Much as I agree with their opinion, yet I tend to differ with them only on the intention of the 2<sup>nd</sup> accused. His intention to kill is not clear, thus lack of *mens rea*. Consequently, deserve cogriate offence of Manslaughter.

Having so said and done, I proceed to convict Leonard Ngoso into murder as charged contrary to section 196 & 197 of the Penal Code cap 16 R.E. 2019. Also, I proceed to convict Zabron Benjamin John into manslaughter contrary to section 195 and 198 of the Penal Code R.E. 2019.



**Order accordingly**

**P.J. NGWEMBE  
JUDGE  
28/2/2022**

**SENTENCE**

Upon conscious consideration of the mitigating factors advanced by the learned defense counsel for the 1<sup>st</sup> accused person, when compared to the applicable laws, the two are not balanced. Since the law is very strict in respect to the offence of murder. Section 197 of the Penal Code Cap 16 R.E. 2019 provide only one sentence. The court has no discretion to pass different sentence than what is provided by the law. Since there is no alternative punishment, this court cannot refuse to apply that law as it is, unless changed otherwise, the statutory sentence is death by hanging. Accordingly, the convict Leonard Ngoso is sentenced to death by hanging as provided for under sections 197 and 26 of the Penal Code Cap 16 R.E. 2019.

The 2<sup>nd</sup> accused being convicted for manslaughter, and considering the mitigating factors advanced by the learned defense counsel and being mindful on the fact that, the accused demonstrated cooperation from the beginning to this trial, and that he has been in custody for four years now, I find justice will be done and seen to be done if he is sentenced leniently. Accordingly, the 2<sup>nd</sup> accused Zabron Benjamin @ John shall serve custodial sentence for the period of two years.

**It is so ordered.**



**P.J. Ngwembe  
Judge  
18/3/2022**



**Court;** this judgement is delivered today this 18<sup>th</sup> day of March, 2022 in open court in the presence of Caristus Kapinga, learned State Attorney for the Republic, and Saul Silalumba learned advocate for the accused.

**Right to appeal explained**



**P.J. Ngwembe**

**Judge**

**18/3/2022**

**ASSESSORS**

1. Peter Magwira,
2. Ashura Mfaume,
3. Cletus Lipongola.

**Order:** Exhibits which are hand hoe, spade and stick admitted as exhibits in this case shall be destroyed immediately under supervision of the Court.



**P.J. Ngwembe**

**Judge**

**18/3/2022**

