

**IN THE HIGH COURT OF TANZANIA**

**AT SONGEA**

**(ORIGINAL JURISDICTION)**

**(SONGEA REGISTRY)**

**CRIMINAL SESSIONS CASE NO. 11 OF 2021**

**THE REPUBLIC**

**VERSUS**

**1. JOFREY CORNEL GELLE**

**2. EDWARD HALI RASHIDI**

**JUDGMENT**

Date of Last Date: 24/02/2022

Date of Judgment: 14/03/2022

**BEFORE: S.C.MOSHI, J**

The accused persons Jofrey Cornel Gelle and Edward Hali Rashidi, the first and second accused person respectively are both charged with Murder contrary to section 196 and 197 of the Penal Code, Cap. 16 R. E. 2019. The particulars of the charge show that, Jofrey Cornel Gelle and Edward Hali Rashidi on 11<sup>th</sup> day of May 2020 at Bombambili area, within Songea Municipality, in Ruvuma Region murdered Hamad Said Jobe, herein

referred to as the deceased. Both accused persons pleaded not guilty to the charge.

During hearing of the case, I sat with three assessors, lady assessor Elizabeth Challe and Lucy Mapunda and Gentleman assessor Walter Ndimbo, respectively.

Ms. Tulibake Juntwa, Senior State Attorney and Mr. Frank Chonja, State Attorney represented the Republic whereas Mr. Melkion Mpangala, advocate represented the 1<sup>st</sup> accused while the 2<sup>nd</sup> accused was represented by Mr. Denis Lazaro, advocate.

Briefly the facts of the case as summarized from prosecution's evidence show that, the 2<sup>nd</sup> accused and the deceased were longtime friends, the relationship between the duo was confirmed by the 2<sup>nd</sup> accused's testimony. The two used to hang together, and deceased's family knew of their friendship, the testimony of PW2 Penina Saidi Jobe who is deceased's sister confirmed that. Also PW5, Diana Ngonyani, who is first accused's neighbor, and was living in same house with the first accused said that she used to see the second accused hanging together with the first accused. According to prosecution's evidence, on the fateful date the second

accused was seen at deceased's home, and PW2 heard 2<sup>nd</sup> accused telling the deceased that he was being called by Jofu Mjeshi, who was identified as the 1<sup>st</sup> accused, later they were seen going out together. At around 5.00 pm PW2 and PW9 Josephine Hinju saw 2<sup>nd</sup> accused supporting and walking the deceased back home. The deceased was not in good condition, he could not walk on his own. The second accused did not give any explanation as to what had befallen the deceased. However, later the deceased told PW2 Penina, PW3 Jofrey Fussi and PW9 Josephine Hinju that, he was beaten up by Jofu Mjeshi who accused him of stealing some money. It was revealed through PW5 Diana that, the stolen money belonged to Diana who lives in the same house with the first accused, upon noticing that some money was missing she asked the first accused about it but the first accused told her that he hadn't seen the money, she however asked the first accused to inquire about the missing money from his friends who used to visit his home. The first accused agreed to do so.

In defense the first accused denied to have beaten the deceased, he said that on that particular day he came back from work and had a rest, he later went for physical exercises and after that he spent a night at his fiancée's home. He denied to have ever known the deceased, he also

denied to have known the second accused. He also said that during that time he did not loose any money.

The second accused admitted that the deceased was his longtime close friend. However, on the fateful date, he did not go to fetch the deceased as stated by Penina (PW2). He said that, on that date he only went once to the deceased's home, at the time when he assisted the deceased to walk back home after finding him not feeling well in his (Deceased's) office. He further said that, he did not know Jofu (first accused), and that, he first saw him when they were taken to the district court for this case.

Having highlighted briefly on the facts, the following are testimonies, the prosecution had a total of nine witnesses, whereas the 1<sup>st</sup> accused and 2<sup>nd</sup> accused testified on their own behalf; as DW1 and DW2 respectively.

For the prosecution the case was as follows, PW1, SP Kulwa Kasile Misogalya, testified among other things that, on 7/7/2021 he was working as OC – CID of Songea. On 11/05/2020 at around 8.00 pm to 9.00 he was informed that, Geoffrey Fuss and Said Jobe reported a homicide incident, the deceased was Hamed Said Jobe who had been taken to Regional Hospital after being attacked, and he had succumbed to death. According

to deceased's relatives' statements; they learned that the deceased was beaten up before his death by Jofrey Cornel Gelle (Jofrey Mjeshi). He went to the regional hospital where they confirmed the death. He saw the body of Ahmad Said Jobe. During the time of follow up, he was with DC Omary, DC Benson and other investigation police officers. A murder case file was opened. He went to Bombambili area where both accused persons were living, by then the time was 12.15 am i.e. 12<sup>th</sup>. He was shown the first accused's room by Diana, and he entered the room with Diana. In the room he saw a TPDF Combat with No. MT. 110503 and an identity card. He was told that the first accused was working at Chabruma barracks. On 12<sup>th</sup> at 10:00 am he wrote a letter to the CO one Ntinga, and he asked him to hand over the soldier, MT110503 Jofrey Cornel. The soldier had submitted himself for the offence of murder, and by then he was put in the military cell.

After completing military procedures, on 13/5/2020 at 11.00 am the CO of Chabruma, 42 KJ major Ntinga handed the first accused to him. He put the first accused under arrest for murder of Ahmed Said Jobe. At police station the first accused admitted that he, and second accused had beaten

the deceased because he was suspected to have stolen some money. The 2<sup>nd</sup> accused was brought to the police station on 21/5/2020 at 1.00 pm.

However, during cross examination by Mr. Mpangala he said that he did not record accused persons caution statement.

PW2, Penina Saidi Jobe, is deceased's sister. she inter alia stated that, on 15/11/2020 she was at home, at Bombambili. She was living in a rented house with her mother and her brother (deceased), they were also living with a tenant whose name is Josephina Hinju.

On 11/5/2020 the deceased did different house chores, in the afternoon after lunch while in her mother's bedroom she heard her brother talking through a phone, he was coming back as he had gone out, she then went to the toilet, while at the toilet she heard Edward (second accused) , who is her brother's friend, calling her brother, Edward was coming from outside going towards her brother's s room. Edward used to hang together with the deceased. Edward told the deceased that he was being called by Jof Mjeshi (First accused). She saw Edward and her brother going away.

Thereafter, at 5.00 pm while at home with Josephina Hinju she saw her brother holding Edward, her brother was not in good condition, and he was

not walking properly, Josephine asked Edward what was wrong with the deceased? Edward did not reply. Edward was assisting her brother to walk, Edward took her brother to his home. After a while her brother called her in a faint voice. Josephina asked her to go and see her brother in his room. She entered her brother's room. She asked him what was wrong, the deceased said that he was beaten by Jofrey Mjeshi.

Jofrey Mjeshi is their neighbour, the distance from their home to Jofrey Mjeshi (1<sup>st</sup> accused) home is about ½ of the length of a football pitch. She used to see her brother having conversation with him at Jofrey's home, and sometimes the deceased used to wash first accused's car.

He saw her brother, he was hurt on elbows, the ankles, the hands and legs, on the joints that he couldn't event bend the limbs. His eyes had blood stains (*vilia damu*) and he was bleeding from the nose, and the nose and mouth were swollen. The deceased asked her to call Jofrey Fuss; who is a friend of her father, and is working at Bombambili market. Jofrey Fussi came, she entered in deceased's room, together with Jofrey Fuss and Josephine. Jofrey Fussi asked him what had happened? He said that he

was beaten by Jofrey Mjeshi who had alleged that he (the deceased) had stolen his (Jofrey's) money.

Jofrey Fuss phoned their father. Their father asked him to take him to hospital. Josephine Hinju and Jofrey Fuss carried him and put him on a motorcycle, Jofrey Fuss took him to hospital. She remained home with Josephine Hinju. At 6.00 pm Jofrey Mjeshi came to ask for the deceased. They told him that he had gone to hospital. He said he was going, he would come back. At around 8.00 pm Jofrey Fuss and her father came home and told them that her brother was dead.

Jofrey Mjeshi (1<sup>st</sup> accused) came, neighbors had started to gather, they told him that her brother was dead. 1<sup>st</sup> accused said that, "*Ndio nimempiga na hakuna mtu anaweza kunikamata kunipeleka polisi*". Her father was inside, he got out and started to chase Jofrey Mjeshi, but Jofrey Mjeshi fled away.

When Jofrey came and uttered those words she was outside at their home, he was at about three paces away. He saw him because at their home there was electricity light, a bulb. They were outside at home when the



news about murder was delivered. When Jof Mjeshi was uttering those words, he was bragging.

PW3, Jofrey Valentin Fussi, he is Saidi Ally Jobe's, friend for the past ten years, Hamad Saidi Jobe (Deceased) is a son of Said Ally Jobe; he died at Ruvuma regional hospital on 11/5/2020. On 11/5/2020, while working Penina Said Jobe who is Hamad's (deceased's) sister came to him, and she told him that Hamad was sick he wanted him to go. Penina said that, the deceased was beaten. He went to his friend's home where he saw Hamad lying on a mattress languishing in pain, his elbows were swollen, and he couldn't wake up. He raised him; he also saw that, his eyes had blood stains (*yamevilia damu*), the nose and lips were swollen.

The deceased told him that he was beaten by Jof Mwanajeshi. He told him that Jof accused him of stealing some money. He called his father through a phone, his father asked him to take the deceased to hospital. He put him on a motor cycle, he took him to the police station, he sat on a back seat while holding Hamad. They got at the police station where they were issued with a PF.3. Hamad couldn't climb down, he could not even talk! The police asked him some few questions and allowed them to go 1

hospital. He took him to Mji Mwema hospital, after examining the deceased they were referred to regional hospital.

At Songea regional hospital they were ushered to the doctor, by then the deceased was snoring (*anakoroma*). The doctor laid him on the hospital bed and started to attend him, later deceased's mother and father came. They were informed that the deceased had passed away.

The police were informed, the OC – CID came at around 11.00 pm. The OC – CID and other police officers, and deceased's father went to Jof Mwanajeshi.

During cross examination he said that, deceased's father got at the hospital at around 19:45 pm.

PW4, Said Ally Jobe, is deceased's father. On the fateful date he was at Namtumbo doing his business. At around 5.45 pm Jofrey Fuss called him, he told him that the deceased was beaten by first accused, and he asked him to take Hamad to hospital. He went to regional hospital, there the doctors told them that child was dead.

He was shown the body, he was bleeding from the nose, the nose was swollen, the lips and eyes were also swollen. They returned home and broke the news about the deceased's passing. While home Some people told him that Jof was bragging that "*niliyempiga ni mimi na hakuna mtu wa kunifanya chochote*". He went to get him but he slipped away and escaped. At 9.00 pm they reported the matter to the police. At 11.45 pm they went to first accused's home with the police, the OC – CID knocked the door, they saw one woman who was called Prista Kapinga and Diana who came out with her husband. They asked them the whereabouts of the first accused. The OC – CID entered in first accused's room. He came out with a combat and an ID. He heard the OC – CID telling Diana to tell first accused to go to the police in the morning. In the morning he went to hospital to identify the body at the hospital mortuary. The doctor came, they saw the body. The deceased was swollen and bleeding from the ears. The doctor examined him. He said that he died of head injuries. Thereafter they took him for burial.

He identified the youth who was bragging that he had beaten the deceased because at his home there is electric light, big bulb, tube bulb and a bulb at his home and at neighbours house. He used to see the first accused in

the neighborhood but he did not know that he was a soldier. The distance from where he was to the place where the youth was standing was about 1½ meters. The youth is the first accused person in the dock.

PW5, Diana Ngonyani, is first accused's neighbor, and Prisca's neighbor. She knew that, the second accused and first accused were friends.

On 10/5/2020 she looked for her money where she used to keep in her room, she did not see it, she asked her husband about the money but he also said that he didn't see it. She asked Prisca, but Priska also said that she didn't see it, it was Tshs. 204,000/=. It was 'Kikoba' money (Group's fund) and she was treasurer. She called the first accused who by then was at his place of work, and asked him about the money, first accused said that he did not see it. She asked him to ask his friends. The first accused agreed to ask his friends. She asked him to ask his friends because his friends used to come to his place. The first accused didn't tell her the friends whom he was to ask.

On 11/5/2020 the 1<sup>st</sup> accused came from work at 11.00 am. she went out at 4.00 pm and came back at 6.00 pm, she met 1<sup>st</sup> accused at the door, he was going out. At 8.00 pm deceased's mother and two other women came

to ask for 1<sup>st</sup> accused, they told them that he was not home. She said that her son Hamad is at ICU, and that 1<sup>st</sup> accused had beaten him.

At 1.00 am police came to look for 1<sup>st</sup> accused but they didn't find him

PW6, a medical doctor, Dr. Renatus Ferdinand Massawe, works as a general practitioner at Songea Regional Referral Hospital. On 12/05/2020 at 12.00 noon while on duty, at Songea referral hospital He was asked to perform a post mortem examination. The deceased was male, and was identified as Hamad Said Jobe. There was stained blood in the nose, in the ears, and the eyes (*yamevilia damu*). He examined the whole body and prepared a post mortem examination report. (Exhibit 'P.1').

His observation was that, cause of death was head injury. The indicators were outside; signs showed that there were blood stains in the brain. The doctor explained that, the signs were blood stains in the nose, ears and eyes. That indicates that the deceased was hit with a blunt object. He did not observe any other problem.

PW7, Major Joseph Kipesha Ntinda, TPDF Soldier, testified that, On 11/5/2020 he was at Chabruma 42KJ at Songea, Ruvuma region, he was Ag. CO (Naibu Kamanda wa kikosi). On 12/5/2020 ASP Kulwa brought a

letter, he said he intended to arrest Jofrey. He ordered an MP to lock – up Jofrey till the next day to avoid him being harmed by those who accused him. On 13/5/2020 the accused was locked up by MP Lefnant Lyatela who handed him to the police at 10.00 am.

PW8, G. 862 SGT Omary, a Police Officer, stated among other things as follows, he works at Songea police central station. On 12/5/2020 while on duty at Songea police station he was directed by OC – CID Kulwa to investigate a murder case. The deceased was Hamad Jobe. The accused(s) were Jofrey Gelle and Edward Halidi. He and DC Isaya, went to the crime scene at Bombambili where they recorded witnesses' statements. They also followed up the deceased's hospital report.

On 13<sup>th</sup>, May, 2020 they were told that one of the suspect, Jofrey Gelle was arrested and that he was to be brought to the station. In the afternoon the accused, Jofrey was brought to him he interviewed him, but he denied to have killed the deceased, he said that he had met the accused at his (accused's) homes at Bombambili, he had a conversation with the deceased, he said that, did not hurt him. After their conversation

he allowed him to leave. Later on in the same month, the second accused was arrested, he was brought by his mother.

The first and second accused persons were connected to the murder because on the date of the event they were with the deceased.

PW9, Joseph Hinju was a neighbor of the deceased, she was living in a rented house where the deceased was living with his family i.e parents and a sister. On the fateful date he saw the deceased doing house chores up to 3.00 pm when the deceased went out, nothing was out of the ordinary. He again, at 5.20 pm saw Edu (2<sup>nd</sup> accused) holding the deceased walking him back home, the deceased could not walk on his own, he was bleeding from the nose and mouth, and his face was swollen. Edu walked the deceased to his room, and the deceased called penina and asked her to call Jof wa Samaki. Hamad told Jofu Muuza Samaki that he was beaten up by Jofu Mwanajeshi, that Jofu Mwanajeshi had accused him of stealing some cash money, Tshs. 200,000/, Jofu hired a motor cycle, Penina and Jofu Samaki boarded Hamadi on the motor cycle. Hamad was taken to hospital while he remained at home. While at home Jofu Mwanajeshi came and asked for Hamad. She told him that he was taken to hospital. Jofu Muuza Samaki

came back at 8.00 pm and told them that Hamad was dead. Jofu Mjeshi came again for the second time and boasted that he has beaten hamad and they could do nothing. Hamad's father chased Jofu but Jofu fled away. Hamad, Edward (EDU) and Jofu were friends.

He further said that, it was night however he identified Jofu because the place was illuminated by Electricity light.

For defense, the first accused Jofrey Cornel Gelle testified as DW1, he inter alia stated that, he was living at Bombambili Miembeni street, he was a TPDF soldier. On 11/05/ 2020 he was at his place of work at 42 Chabruma at Lilambo Ward , he has been on duty since 7.00 am on 10/05/2020, he went home at 12.00 noon on 11/05/2020. At home he saw Diana Ngonyani, who is a tenant washing clothes at the yard. He greeted her, and proceeded to his room to have a rest. At 4.00 pm he went to Sokoine football field for exercises. After having exercises he returned home at 7.00 pm. After taking bath he went to visit his girlfriend whose name is Mebo Stephano. He spent the night at Mebo's place. He went to his place of work at 6.00 am.



At 1.00 pm while doing his tasks, he was called by a Military Police Commander (MP). He went to the MP where he met Leftnant Lyatera who informed him that he was directed by CO major Joseph Ntina to detain him in the lock up room as he was a murder suspect, and he was later taken to Songea Central Police Station. While at police they informed him that he was responsible for murder.

He refuted, Penina's testimony which was to the effect that the deceased said that Jofrey Mjeshi had beaten him up because he had stolen his money. He said that he is not called Jofrey Mjeshi, as his name is Jofrey Cornel Gelle, and also his money was never stolen.

He also denied Penina's testimony that he went to their home and said that it is not true that he had said that he had beaten the deceased and nobody could arrest him and take him to police. He said that it is not usual to boast of killing somebody, at the deceased's home.

He also said that, the testimony of Jofrey Fusi who said that he was told by the deceased that he (first accused) had beaten him because the deceased stole money is not true, as he is not Jof Mwanajeshi but he is Jofrey Cornel Gelle.

Also Penina Jobe and Jofrey Fusi who both heard the deceased, their testimonies contradicts each other while Penina said that the deceased told her that he was beaten by Jofrey Mjeshi because he had stolen his money, Jofrey Fusi who was with her said that the deceased said that he was beaten by Jof Mwanajeshi because he had stolen some money.

Regarding Josephine's Hinju testimony, he said that the testimony is false because she stated that she was told by the deceased that he was beaten by Jof Mjeshi because he had stolen T.shs. 200,000/= firstly his name is Jofrey Cornel Gelle not Jof Mjeshi and he was never robbed off T.shs. 200,000/= which was indicated by the witness.

He lastly refuted the testimony of said Jobe who said that he said that he had beaten him up and nobody could do anything as at that time he was at Ruhuwiko.

DW2, Edward Halid Rashidi, stated among other things that, he was living at Bombambili, Miembeni Street, he was living with his mother and two young siblings; one of them is 9 years old and the other is aged 4 years. On 11/5/2020 he woke up at 8.00 am. During that period his mother had travelled. He remained with his young sibling aged 9 years. He did some

house chores, had lunch, watched movies, had a nap and he woke up at 4.00 pm when he went out for a walk. He walked towards Bombambili bus stand. At the bus stand he met his friends and they chatted for a while, he then went to Bombambili market, there he met some of his friends and brothers. They chatted on different issues.

Thereafter he passed at his friend, Hamad's place of work. Hamad (the deceased) had an office, he was working with a computer, he was burning CDs and copying music to flashes and phones. He saw Hamad in his office. He was bent/leaning on a computer table. He was surprised to see him in that state, so he patted him on the shoulder. Hamad woke up, he asked him what was wrong, why was he leaning on the table, was the business not doing well?

Hamad told him that he was not feeling well. He again asked him, what was the problem? Hamad did not tell him the problem but he told him that he was not feeling well. He told him that he wanted to go home to have a rest. Hamad asked him to take him back home. He helped him, he was walking slowly, he supported him with his hand, they slowly walked to their home. They got at their home, at the yard, he met one elderly woman

whom by then he did not know her name. He later knew her here in court as Josephina Hinju. He greeted Josephina Hinju. He walked Hamad to his room. While in Hamad's room, he heard a female's voice from an adjacent room. He got out, that elderly woman asked him why his friend was in such condition? He told her that Hamad was sick. After that he left and went on with the walk.

He went back home at 6.30 pm; he continued to do house chores and washing up his sibling. He prepared dinner, he put his sibling to bed. He thereafter, went outside and sat on the porch (kivarandani). By 9.00 pm he heard people crying, from a neighbouring street. He also heard people saying that a person had died at mama Penina's house (kuna msiba). He got out, and he went to the wake/Vigil (msibani). He got there and saw many people, and he was told that Hamad had passed away. He stayed at the Vigil, they said that burial arrangements would be done on the next day i.e 12<sup>th</sup>.

He was told that they suspected that Hamad was beaten by Jof. On 12<sup>th</sup> at 12.00 noon, they carried the body to Mshangano, Namanyigu area. He

attended deceased's burial at Namanyigu. He was with many other people and deceased's family. Hamad was his friend for more than seven years.

On the fateful date he didn't sleep at the deceased's (msibani) because he was at home alone with a young sibling. After burial, his relationship with deceased's family was good. His mother used to call him and ask him to assist her to do different tasks.

He was detained on 21/5/2020, He told the police that he knew nothing about Hamad's death, and that he had passed at his office, and Hamad had told him that he was sick and that he had asked him to walk him home.

He stayed in remand until 4/6/2020 when they took him to Songea District Court, that is when he saw Jofu, they were brought to court. He was referred as second accused and Jofu was referred to as first accused. He was not related to Jofu in any way, he used to see him in the neighborhood.

He further said that, PW1's testimony to the effect that Hamad was attacked, is not true because when he got at his office, he said that he was sick. He did not say that he was attacked. It is not true that he went to

take the deceased because he was suspected of stealing. On that day he didn't meet the first accused. He knew nothing regarding theft.

He refuted the testimony of PW2, Penina said Jobe, who stated that she was in the toilet and that she heard him calling Hamad, as he did not go to deceased's home at the time, he walked Hamad back home and helped him at around 5.00 pm. The testimony of Josephine Hinju that Hamad was in bad condition, bleeding through the nose, mouth and ears and was not walking and had swollen face and Penina's testimony that the deceased had hurt "kiwiko" (elbow) and that couldn't walk properly is not true as he saw him in the office, he had no swelling, he was not bleeding and he didn't see any wound. Hamad was able to walk but slowly, and Renatus Massawe said that he examined the body, it was not swollen and it had no wound.

He also said that, the evidence of PW2 and PW9; Josephina is false, it is not true because when he walked back the deceased, he saw Josephine alone, at the yard, she was washing dishes. The testimony of Penina and Josephine is false, they have talked untrue statement, for example they said that the deceased was swollen and bleeding from the

mouth, it is not true. Josephine herein court said that, when he walked back Hamad, Penina was in her room.

He ended his testimony in chief by saying that, he was not the last person to be with Hamad on 15/11/2020.

The general rule in Criminal Prosecution is that the onus of proving the charge against the accused person beyond a reasonable doubt lies on the prosecution, see **JONAS NKIZE V REPUBLIC (1992) TLR** page 213-214 (HC). Murder is said to be committed when an accused person kills another with malice afore thought. Malice aforethought is defined as an intention to cause death or grievous harm to a person whether such person is the person actually killed or not or acting with knowledge that the act or omission causing death will probably cause the death or grievous harm or an intention to commit the offence (see section **200 of the Penal Code** (supra).

The main issue is whether the prosecution has proved beyond a reasonable doubt that the accused persons murdered the deceased. There is no dispute that Hamad Said Jobe is dead. The death was confirmed by Dr. Renatus Ferdnand Massawe, who is a medical doctor, he prepared a

Postmortem Examination Report (Exhibit P.1). It was doctor's observation that the deceased's death was due to "HEAD INJURY". Also Hamad's death was confirmed by deceased's father, PW4 Said Ally Jobe who witnessed the body in the Mortuary. The issue arising here is whether the deceased was murdered by the accused persons.

The evidence regarding cause of death of the deceased is mostly circumstantial. The inference is that the deceased died of injuries which were inflicted by the first accused. It is evident that, there is no direct evidence connecting the accused persons with the offence, none of the witness said that he/she saw the accused persons murdering the deceased. However, as indicated earlier, this case mainly revolves around circumstantial evidence. It is settled law that, for circumstantial evidence to be the basis of conviction, it must be incapable of more than one interpretation, see the case of **Hassan Fadhili v Republic**, 1994 TLR 89 (CA) and in **Shaban Mpunzu@ Elisha Mpunzu V. Republic**, Criminal Appeal No, 12 Of 2002 Court of Appeal, Mwanza Registry (Unreported), where the Court of Appeal held that, the evidence must irresistibly point to the guilty of the accused to the exclusion of any other person. Again, in the case of Simon **Msoke V. R [1958] E.A. and John Magula Ndogo V. R,**



criminal Appeal No, 18 of 2004 , Court of Appeal sitting at Dar es salaam, it was also explained that, the inculpatory facts should be inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilty; and that before drawing the inference of guilty from circumstantial evidence, it is necessary to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

There is evidence showing that the 2<sup>nd</sup> accused was the last person to be seen with the deceased, the principle of the last person to be seen with the deceased before his death or just within a reasonable period of deceased's death raises a presumption that the person last seen with the deceased, if no other thing or person could intervene them, is the person responsible for the death unless he gives a lucid or reasonable explanation how he parted with the deceased. See the case of **Juma Zuberi v. R** [1984] T.L.R.249 and the case of **Nathaniel Alphonse Mapunda And Benjamin Alphonse Mapunda V Republic** (2006) TLR 395 at p.402-403. In the present case there is evidence of PW2, Penina whose testimony I quote here at length, to the effect that, in the afternoon after lunch while in her mother's bedroom she heard her brother talking through a phone;

he was coming back as he had gone out, she then went to the toilet, while at the toilet she heard Edward (second accused), who is her brother's friend, calling her brother, Edward was from outside going towards her brother's room. Edward used to hang together with the deceased. Edward told the deceased that Jof Mjeshi (First accused) was calling him. She saw Edward and her brother going away.

Thereafter, at 5.00 pm while at home with Josephina Hinju she saw her brother being held by Edward, her brother was not in good condition, and he was not walking properly, Josephine asked Edward what was wrong with the deceased? Edward did not reply. Edward was assisting her brother to walk; Edward took her brother to his home. After a while her brother called her in a faint voice. Josephina asked her to go and see her brother in his room. She entered her brother's room. She asked him what was wrong; the deceased told her that he was beaten by Jofrey Mjeshi.

Josephine Hinju, PW9 supported Penina's testimony, she also saw the 2<sup>nd</sup> accused walking back the deceased who was assaulted and had bodily injuries, she said that, Edu was holding Hamad, Hamad was in bad condition, and Hamad was bleeding from the nose and mouth, and his face

was swollen. Josephine asked 2<sup>nd</sup> accused what had happened to the deceased but second accused said nothing.

Another piece of evidence is a dying declaration. There is deceased's oral dying declaration, that he was beaten up by the first accused. He said this while groaning in pain, at around 5.00 pm, the deceased told PW2 Penina Jobe, PW3 Jofrey Fussi and PW9 Josephine Hinju that he was beaten up by the first accused who accused him of stealing some money. Although basically it is hearsay but it falls within exceptions which are provided for under section 34 (a) of the **Evidence Act**, Cap. 6 R.E. 2019 which provides for incidences which statements of persons who cannot be called to be admitted, it reads thus:

*"When the statement is made by a person as to the cause of his death as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question, whether the person who made them was or was not, at the time when they were made under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."*

However, for a dying declaration to be the basis of conviction has to be collaborated, see **Frank Joseph @ Sengerema Versus the Republic**, Criminal Appeal NO. 378 of 2015, Court of Appeal sitting at Tabora (Unreported). After scrutinising the evidence I am of a considered view that, in the case at hand the dying declaration which was made before PW2, PW3 and PW9 was collaborated by the testimony of Diana, PW.5 who said that the first accused promised to ask his acquaintances about the lost money and the testimony of Penina, PW2 who heard the 2<sup>nd</sup> accused telling the second accused that the first accused was calling him, and saw the deceased and the 2<sup>nd</sup> accused going out together after lunch and saw the accused bringing back the deceased at 5.00, the deceased could not walk on his own, he was assaulted to the extent that he was bleeding from the nose and mouth, and his face was swollen, and 2<sup>nd</sup> accused was supporting him as he could not walk on his own. Pw2's evidence was similar to PW9's Josephina Hinju's testimony. Both witnesses said that in the morning till the afternoon time before going out with the second accused, the deceased was in good health, he did various house chores, and nothing was out of the ordinary.

The chain of events does indicate that the deceased's death was due to the injuries which were caused by the 1<sup>st</sup> accused as the deceased stated some few hours before his death. It is my view that, there is nothing which could have probably caused death between the time that the deceased informed PW2, PW3 and PW9 that he was beaten by the first accused and the time of his death. The deceased was taken to hospital immediately, and the deceased died while Pw3 and PW4 were at hospital waiting for the deceased who by then was being attended by the doctors and they were told of Hamad's passing away after PW4 got at the hospital at around 19.45 hrs. Also, the post mortem examination report (Exhibit P.1) shows death occurred ten hours prior to examination, the examination was conducted at 12.44 hours on the following day after the incident, the deceased was brought back by the 2<sup>nd</sup> accused at 5.00 pm and it is evident that he died before 8.00 pm, as by 8.00 pm the news of his death had already been conveyed to his family.

Another aspect is the accuseds' conduct after the occurrence of death, their conduct infers guilty mind, because PW2, Penina said that the deceased and 2<sup>nd</sup> accused used to go to 1<sup>st</sup> accused, and Diana, PW5 who is tenant of 1<sup>st</sup> accused and lives in same house with 1<sup>st</sup> accused said that

the accused used to go to first accused's home, then why did the first accused deny to have known the deceased and the 2<sup>nd</sup> accused? Also, there is evidence showing that the second accused knew the first accused but the second accused said that he did not know the first accused, he said that he saw the first accused in court but surprisingly he referred to him as Jofu, the name which first accused refuted to be his. From what I can gather, the two accused person knew each other, and from the evidence it was clarified that Jofu Mjeshi was the same person as the first accused, he was referred to as Jofu Mjeshi because he was a military soldier (mwanajeshi). It is evident that their denial is indication of an attempt to conceal their involvement.

Whether, the first accused bragged of beating the deceased, I think it was difficult to hear him and identify the person who so boasted in view of the circumstances of that area. The environment was not conducive to identify the person, first it was night, the brightness and intensity of the light was not well illustrated and, secondly, the evidence shows that many people had already gathered at deceased's home after receiving the news of deceased's demise, thirdly the evidence was not clear of the spot that PW2 was when those words were uttered.

The evidence as whole indicates that the incident was initiated after Diana's money went missing. This fact shows the reason for the 1<sup>st</sup> accused to beat the deceased, though motive is not relevant, it is evident that the 1<sup>st</sup> accused beat the deceased on the assumption that the deceased had stolen money which was missing from Diana's home. There is evidence showing how the 2nd accused, alluded the deceased to go to the 1<sup>st</sup> accused, and there is evidence showing that the first accused promised Diana to ask his friends regarding the missing money. In connection to this evidence, the deceased said that he was beaten because he was suspected to have stolen the missing money. I believe that what was stated by the deceased before his death is what transpired. I find that PW2, PW3 and PW9 were credible witnesses, the three stated what they heard the deceased saying. The fact that some money went missing was supported by PW5, Diana who had asked the first accused to ask his friends about it.

The other thing which arose in defense was contradictions in evidence between witnesses' evidence that the deceased had swollen elbow and knees and doctor's observation who said that the body was in ordinary state. It is my view that the variation is minor as there was no contradiction regarding the injuries which caused death of the deceased.

All the witnesses PW2, PW3 and PW9 observed that the deceased was bleeding from the ears, eyes, nose and mouth; their testimony was consistent with PW6's testimony, the doctor who according to the Post mortem Examination report, he noted blood stains in the nostril, ear and conjunctival hemorrhage, the state which according to the doctor's opinion was indicative of head injury, and according to his observations, the cause of death was head injury. It is settled that where there are inconsistencies must be addressed and be resolved. In the case of **Mohamed Said V. R [1995] TLR 03** the Court of Appeal held *inter alia* that:

*"where the testimonies by the witness contain inconsistencies and contradictions, the court had a duty to address the inconsistencies and try to resolve them where possible; else the court had to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter".*

As indicated above, I find that, there are no material contradictions which go to the root of the case. Despite some variations on the injuries which were not noted by the doctor, main injuries which led to death were noted by all witnesses. It is my view that, the contradictions which were pointed out do not raise any reasonable doubt on the prosecution evidence.

Again the 2<sup>nd</sup> accused said that he found the deceased in his office leaning on the table and that apart from being weak, there was nothing out of the ordinary but his explanation is inconsistent with the observation relating to



the state of the accused's body as shown by the medical doctor herein above. The deceased was taken to hospital within a short time frame after being brought back by the 2<sup>nd</sup> accused. Similarly, the defense that when he entered in deceased's house PW2 was in her room, hence he was not the last person to see the deceased, I find this argument absurd as PW2 is a sister of the deceased, she saw the 2<sup>nd</sup> accused walking the deceased home and reported the matter to her father's friend, PW3 immediately. Also, the 2<sup>nd</sup> accused was seen by Josephine Hinju walking the deceased back, Josephine saw that the deceased was hurt, he could not walk on his own. Therefore, the 2<sup>nd</sup> accused was the last person to be with the deceased till the time when the deceased was brought home.

Again, regarding first accused's defense, as shown herein above, there is evidence that the first accused, second accused and deceased were acquaintances, why did he lie that he does not know the deceased and second accused? There is evidence that during that time first accused had promised PW5 to ask his friends about the missing money, and on that particular day, despite the fact that the first accused had come from work between 11.00 am to 12.00. am in the morning, he had free time before going out at 7.00 pm to his fiancée to spend the night, he had time to rest!

PW5 left home around 4.00 pm. When she left, the 1<sup>st</sup> accused was still at home. The 1<sup>st</sup> accused had time even to go for exercises before going to his fiancée.

The issue of first accused's name; it was clarified that he was called Jofu Mjeshi because he was a military soldier (Mwanajeshi) and it is common ground that he is a TPDF soldier. I thus believe that the witnesses were referring to the first accused as Jofu Mjeshi. I find that, the prosecutions witnesses were credible, the witnesses referred to the 1<sup>st</sup> accused as Jofu Mjeshi because he is a soldier, the witness knew the 1<sup>st</sup> accused before the incident, hence there was no question of identity. In a case of **Haji Ibrahim v. Republic** (1975) LRT n. 56 the court held among other things that, that, *"Inconsistencies in a witnesses' evidence may make it unsafe to convict thereon, but such inconsistencies must be of such nature and gravity as would put a prudent tribunal to its inquiry."* In the case of **Haji Ibrahim** (Supra) appellants name was Haji Ibrahim but the witness referred to him as 'Mwarab', therefore there was an issue relating to the identity of the correct Arab, the court said that,

*"it was in evidence that P.W.2 had seen the appellant on divers occasions when he came to the district court in connection with the*

*criminal case. His face was therefore not unfamiliar to the witness. That he did not know his name does not sound material to me. It is sufficient to know that the appellant was "Arab" the witness had in mind and there was no problem of identification. The witness then knew the appellant. And I am unwilling to say this was an inconsistency of significant proportions, if any".*

At this juncture, the issue is whether prosecution has proved its case beyond any reasonable against the accused persons, that they caused death of the deceased with malice aforethought as charged. As indicated herein above, there is no evidence of the weapon or the manner in which the injuries were inflicted, however, the dying declaration shows that the first accused beat the deceased while asking him of the missing money. I wish to again quote Section 200 of the Penal Code which provides for circumstances which malice aforethought may be deemed to have been established; it reads thus:-

*Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—*

***a) An intention to cause the death of, or to do grievous harm to any person, whether such 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 ' such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused; [Emphasis is mine]***

*c) An intent to commit a felony;*

*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 a felony.*

Section 200 (a) and (b) above is relevant. The evidence as a whole indicates that the first accused persons conduct intended to cause grievous harm, which disappointingly led to the death of the deceased, in law, this act amounted to murder.

As far as the 2<sup>nd</sup> accused is concerned, it is true that he was the last person to be seen with the deceased however, in view of the deceased's dying declaration through which he specifically pointed out the 1<sup>st</sup> accused, I find him not responsible for causing grievous harm to the deceased; hence I find him not guilty of the offence of murder.

That being said, I differ with assessors' opinions, for the reason that they did not consider deceased's dying declaration and circumstantial evidence as a whole.

For the aforesaid reasons, I find that the prosecution has proved the charge against the 1<sup>st</sup> accused person beyond any reasonable doubt and that the defence side has failed to raise doubt on the prosecution's evidence against the first accused.

I consequently find the 1<sup>st</sup> accused Jofrey Cornel Gelle guilty of the offence of murder of Hamad Said Jobe; hence he is convicted accordingly.

The 2<sup>nd</sup> accused is found not guilty of the offence of murder, in the event, he is acquitted.

Right of Appeal is Explained.



  
**S.C.MOSHI**

**JUDGE**

**14/03/2022**

## **SENTENCE**

The first accused, Jofrey Cornel Gelle is convicted of murder C/S 196 and 197 of the Penal code. There is only one sentence. I thus, sentence the accused to death by hanging accordingly, in accordance with S. 197 and 26 (1) of the Penal Code Cap. 16 R.E 2019.

Right of appeal explained.

  
**S.C MOSHI**

**JUDGE**

**14/03/2022**

