

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**SUMBAWANGA DISTRICT REGISTRY**  
**AT MPANDA**  
**CRIMINAL JURISDICTION**  
**CRIMINAL SESSIONS CASE NO. 52 OF 2016**  
**REPUBLIC**  
**VERSUS**  
**JOSEPH <sup>S</sup>/o SHEGEMBE**  
**JUDGEMENT**

*Date of last Order: 08/03/2022*

*Date of Judgement: 18/03/2022*

**NDUNGURU, J**

The accused person Joseph s/o Shegembe was arraigned for murder contrary to section 196 of the Penal Code, Cap 16 Revised Edition 2019. The prosecution side alleged that on 31<sup>st</sup> day of July, 2014 at Kanindi "C" Village within Mlele District in Katavi Region did murder one KASHINJE d/o SHEGEMBE.

He was arraigned before this court and the information of murder and or the charge sheet was read over and properly explained to him.

He pleaded not guilty to the offence, thus plea of not guilty was entered, hence full trial.

During the trial of this case, Mr Gregory Mhangwa, the learned State Attorney represented the Republic; whereas, the accused person was represented by Mr Lawrence John, the learned advocate. I also sat with three assessors namely Ester Nicholaus, Fortunatus Ndasi and Jastin William Sikomele.

In their effort to prove the case against the accused person, the prosecution brought a total of four (4) witnesses namely, ASP Paschal Mashauri, who testified as prosecution witness No. 1 (PW1), Peter Msiluka as PW2, Mashaka Yela as PW3 and Charles Magaka as PW4.

Upon the closure of the prosecution case, defence case opened after it was found that the accused person had a case to answer. In disproving the prosecution allegation levelled against him, accused person testified as DW1. He neither called a witness to testify on his favour nor tendered exhibit. The evidence for the prosecution is as follows; PW1, ASP Paschal Mashauri, a police officer stationed at Majimoto testified that on 31/07/2014 he was at Majimoto Police Station. While at the station he received a call from Hamlet secretary of Kangingi village informing him on murder event which happened at his Hamlet area.

With his fellow policemen he went to the scene. He arrived there at about 12:00 noon. At the scene he came to know there was a murder event the deceased was one Kashinje d/o Shegembe. He arrested Joseph Shegembe, the accused and his father. Having found him under citizen's arrest he asked them why they arrested him. The villagers said they arrested him because his clothes had blood stains. He also interrogated him. The accused admitted to have killed the deceased by a panga which he was also shown it. He was told by the accused the reason behind was that his sister (deceased) was bewitching him. That accused was told by a traditional witchdoctor who was living at Shinyanga.

He then took the accused to the police station. The accused took them to the neighboring house which he said to belong to his father where he had kept the panga he used. Having arrived at Majimoto police station, he handed the accused to Detective Coplo Jeremiah who is a deceased to interrogate and record cautioned statement

He also sent him to justice of peace to record confession statement. Justice of peace was Peter Msiluka who was WEO of Majimoto. It was him and D/c Jeremiah who sent the accused to justice

of peace. At the justice of peace, the accused was interrogated and recorded confession statement.

When cross examined by Mr. Lawrence John Defence Council PW1 stated that the murder event happened on 31/07/2014 and the accused was apprehended on the same date at noon. The accused was interrogated soon upon arrival at the police station on the same date.

The accused never named the witchdoctor. The accused was sent to justice of peace immediately after he has recorded cautioned statement. At the police station he was interrogated by D/C Jeremiah. It was Jeremiah who told him the accused had confessed.

When re-examined by Mr. Gregory Mhangwa State Attorney, PW1 replied that he assigned D/C Jeremiah to interrogate the accused and record the statement. It was Jeremiah who gave him the report that the accused has admitted/confessed to have committed the crime.

PW2, Peter Msiluka, a Ward Executive Officer, working at Mamba Ward testified that on 31/7/2014 at about 03 hours he was at the office, there came police officers one Mashauri and Jeremia with one person Joseph Shegembe.

The police told him that they have come to him with Joseph Shegembe so that he may interrogate him and record confession. The police officers got out leaving him with Joseph Shegembe. He inspected him he had no any wound. He was free. When he asked as to what had happened, the accused told him that, it was almost a year he is suffering. That he went to Shinyanga to witchdoctor who told him that the suffering he was facing was because he was bewitched by his sister one Kashinje. He was told upon arrival back he decided to kill his sister early in the morning by cutting her with panga. He recorded the accused's statement.

When cross-examined by Mr. Lawrence John Defence Counsel PW2 replied that the accused was arrested at Kaningi "C" Village. He was arrested on 31/07/2022 in the morning. What he heard was that the accused was apprehended by the citizens before the arrival of police.

On his part, PW3 Mashaka Yela, Peasant, resident of Majimoto testified that on 31/07/20016, he was asleep at about 00 hours there came one TANO the neighbor of his mother telling him that his mother has been attacked and cut with panga. He went to the scene at the home of his mother. From his home to his mother's home there was a

distance. At the scene he found his mother being cut with panga. The people gathered at the scene. In the morning the people started looking who committed the offence. In the process, the people brought Joseph Shegembe suspecting him to have committed the offence. The said Joseph Shegembe's pair trouser and shirt had blood stains he knew Joseph Shegembe, as his uncle.

PW3 stated that the accused person admitted before the people at the area of scene that he wounded the deceased saying he used the panga, he also showed the people where the panga, was. The people went to take the said panga which had blood. The police came and took the accused.

When cross-examined by Mr. Lawrence John - Defence Counsel PW3 stated that when the event happened, he was 17 years old. Now he is 25. He said the accused was arrested in the morning at about 08.00am. He did not witness/see the accused committing crime. He does not know who killed his mother. It might be he is not here in court. The accused was his blood relative.

It was his further testimony that the panga was found in the house where other people were living but not the house of the accused. The people who are living in the house where the panga was found are

still there. They were not asked how the panga was sent there. He was informed of the event by Mr Tano.

On re-examination PW3 replied that the accused was arrested by the citizens (people) before the arrival of police.

PW4 Charles Magaka, a peasant, resident of Challa village Sumbawanga testified that on 31/07/2014 he was at home sleeping at night. At about 01. Hours he was informed on the occurrence of murder. He was a ten-cell leader who phoned to him. He was informed that someone in their cell area has been invaded and wounded with panga. He went to the scene where he met other people.

At the scene, he witnessed the dead body. It had cut wound at the neck and head. In the morning the people traced on footsteps. They dispersed at that area. Then the people saw Joseph with blood on his clothes. When the people were mummering Joseph wanted to escape. The people arrested him and sent him to the scene. When arrested him Joseph admitted to have killed the deceased. He said he was the one who wounded the deceased. When they asked him the reason for doing that, he said he went to the witchdoctor who told him that the deceased was bewitching him. He said he wounded the deceased by using a panga. When he was asked where is the panga, he said to have kept in



the house he was sleeping at the corner. Then the people went to take it.

He saw the said panga when it was brought at the scene. Then the police came at the scene. When the police came, they interrogated him, he admitted to have committed the offence. The police then took the accused to the police station.

On cross-examination by Mr. Lawrence John - Defence Counsel, PW4 did not remember how old he was when the event happened. In 2014 when the event happened, he was a secretary of kitongoji chairman. He did not see the person who attacked the deceased. He did not remember Joseph exactly as it has been a long time now. He got informed on the event at about 00.00hours. The deceased had cut wounds on the neck and head. He did not remember the colour of the clothes the accused had. They did not examine the blood found in the clothes of the accused. The police arrived at the scene at about 12.00 noon.

PW4 stated that it was Joseph who showed where the panga was. The panga was inside the house. At the home where the panga was there were some people who were living. They once asked said Joseph came there at night. The panga had blood. When the police arrived found him at the scene. They also inquired him as to what happened.



The police interrogated the deceased he had no conflict with Joseph, he has never witnessed if Joseph had dispute with his sister (deceased). He has never received complaints against Joseph. Sungu sungu militiamen were there. At the scene there were many people. At the scene many people were asking the accused questions he was responding to the question.

On re-examination PW4 replied that when Joseph was interrogated, he admitted to have killed his sister because she bewitched him. It was Joseph who instructed the people where the panga was.

The court having found that, the prosecution has sufficiently established a case against accused person to require him to make his defence, the accused person was called to defend himself and he elected to testify under oath. He testified as DW1. He neither called witness to testify in his favour nor tendered exhibit. The summary of his evidence is as hereunder;

DW1, Joseph Shegembè, resident of Kanindi village testified that on 31/07/2014 he was at home. While at home was arrested by the citizens as some people named to have been killed the deceased while it was not true.

He was taken by policemen to the police station. While there he was interrogated but he denied to have been involved in committing crime. He was then sent to the court. Deceased was his sister. They were living peacefully. At the home village he lived peaceful, he had never been accused for any event. He did not know anything about the said panga nor where it was found.

He went on asserting that he has not been involved in committing murder which he was charged with. He rather prayed for the court to see him innocent and acquit him.

On cross-examination DW1 stated that he is living at Kanindi "C". From his home to the home of the deceased is not very far. He was living with his parents. His parents were present at home. He did not know why he was arrested. He never told people that he was the one who killed the deceased.

He did not know who showed them the said panga. He was born at Shinyanga he did not know witchcraft. He has never gone to the witchdoctor he was not involved in committing crime. One of his parents is dead. He did not want to escape his clothes had no blood stains. The witnesses were just implicating him. He said his clothes had no blood stains

When cross-examined by Mr. Lawrence John Defence Counsel DW1 replied that he has never seen those clothes which they said had blood. He did not know the panga which was talked about. His relatives have never visited him to the prison.

When defence case was closed, both the state attorney and the learned advocate for the republic and accused person respectively were given audience to address the court on final submissions. They all opted to file respective written submissions as scheduled by the court.

The defence through learned advocate Laurence John contended that prosecution has miserably failed to establish that the accused murdered the deceased on the following grounds;

He argued that there is high contradiction on the evidence brought by the prosecution regarding the circumstance which links the accused person with the offence. He submitted that PW1 when testifying said when he arrived at the scene of crime, he found the accused and his father who were held the villagers while other witnesses testified that it was only the accused who was found in the crime scene by the time police arrived.

Elaborating further defence counsel submitted that PW3 Mashaka when testifying stated that panga was found on the other house while PW4 Magaka stated that panga was found in the house occupied by the deceased person.

Submitting further on contradictions, defence counsel said PW3 stated that all people in the crowd at the crime scene gathering were questioning the accused person while PW4 Magaka said that the accused was questioned by each person in the crowd and admitted to the commission of the crime.

Defence counsel was of the view that the noted contradictions have to be resolved in favour of the accused person as per the case of **Jimmy Runangaza vs Republic**, Criminal Appeal No. 159 of 2017. Also, the case of **Mapambano Michael vs Republic**, Criminal Appeal No. 268 of 2015.

Defence counsel submitted that prosecution has failed to bring material evidence as regards caution statement taken by Inspector Jeremiah, panga linked with the crime, clothes of the accused which was said to have blood stains of the accused and the DNA test from government chemist which could prove that the blood stains in the

accused clothes and the panga and clothes is the same with DNA of the deceased.

Defence counsel was of the view that failure to bring material evidence make the case against the accused to fumble down which entitle the court to draw adverse inference on the prosecution as per the case of **Azizi Abdallah vs Republic** [1991] TLR 71. Also, the case of **Ignatus William @ Mjeshi vs Republic**, DC Criminal Appeal No. 67 of 2021 HC, Sumbawanga.

As regards circumstantial evidence, defence counsel submitted that the same must irresistibly points the accused as per the case of **Francis Alex vs Republic**, Criminal Appeal No. 185 of 2017. He further submitted that circumstantial evidence must irresistibly point to one conclusion, they must not suggest two or more reasonable conclusions as it was held in the case of **Simon Masoke vs Republic** [1958 E.A 715 and **Mtani vs Republic** [1983] TLR 179. Defence counsel was of the position that the circumstances of the case at hand suggest more than one conclusion surrounding the death of the accused person and the events linking the accused with such death are not enough to find the accused guilty of the offence charged.

The defence counsel further argued that there was no effort done by the prosecution and investigator of the case to prove that the alleged blood stains in the alleged clothes and panga contain blood stains is similar to that of the deceased hence offending the principle propounded in the case of **Francis Alex vs Republic** [supra].

Learned defence counsel further submitted that the evidence of PW4 was not reliable as he failed to recognize the accused person before the court. when he was testifying, he almost forgotten all the events when cross examined by the accused.

Defence consel argued that all evidence brought was hearsay evidence. PW1, PW2, PW3 and PW4 all did not mention people who informed them of the event through phone call.

He was the view that accused person has cast a reasonable doubt on the prosecution evidence. The story that the accused murdered the deceased because of the rituals falls short on the ground that there was no any cautioned statement or extra-judicial statement that was received by this court as exhibit which show that the accused confessed committing crime, also there was no any single witness who stated that the accused was sick at the time of his arrest something which would prove that he killed.

He argued that hearsay evidence is not reliable and the same amounts to no evidence at law as per the case of **Vumi Liapenda Mushi vs Republic**, Criminal Appeal No. 327 of 2016.

Defence counsel submitted that all prosecution witnesses treated the accused person as quilt person and not a suspect, thus cannot be trusted.

He finally submitted that defence side is of the observation that the accused person is not guilty of the offence of murder as charged and urged the court to set him free.

On his side prosecution through Mr Lugano Mwasubila, learned state attorney submitted that on the fateful day of 31<sup>st</sup> July, 2014 at or about 01:00hrs at Kasinde C village the deceased one Kashinde Shagembe was found dead in her house with cut wounds in the neck and other parts of the body.

Mr Mwasubila submitted that on the material day early in the morning the mourners saw the accused person put on trouser with blood stains. On the scrutiny about the blood stains in his cloth, the accused person rightly confessed before the mourners to have cut the



deceased with a machete to death, he alleged to have done that because the deceased bewitched him.

Mr Mwasubila further submitted that the accused person led the mourners to the place where the machete was put after committing the murder. The machete was recovered and found having blood stains thereon. The police officers were informed about the incident and arrived at the scene with Dr Anord Fungo.

The autopsy was conducted by Dr Anord Fungo and according to the post mortem examination report, the death of the deceased was due to Hypoxia due to severe hemorrhage. The accused person was arrested because of the blood stains on the trouser and his oral confession.

Mr Mwasubila submitted that prosecution paraded four witnesses to prove the case beyond reasonable doubt, unfortunately the cautioned statement was not tendered because the recording officer one E. 1351 D/CPL Jeremia lost his life before this retrial had begun.

He further submitted that PW3 and PW6 testified that the accused person voluntarily confessed before the crowd of mourners that, he was the one who cut the deceased to death by using a machete because she bewitched him.

He submitted that the accused person led the mourners to the place where the machete was recovered, whereas, a machete was retrieved. The evidence of PW3 and PW6 part with the testimony of PW4 because the accused person voluntarily confessed before him to have murdered the deceased by using a machete.'

Mr Mwasubila argued that the oral confession made by the accused person to the mourners including PW1 and PW6 together with PW4 is strong and watertight evidence to establish guiltiness of the accused person. He made reference to the case of Posolo Wilson @ Mwalyego vs Republic, Criminal Appeal No. 613 of 2015.

He argued that it was the accused person who led the mourners to the discovery of the machete which was used to murder the deceased, the machete which contained blood stains which altogether and undoubtedly was used by the accused person to curtail the life of the deceased.

He further submitted that the evidence of PW1 and PW4 in respect of the accused confession do not need corroboration as they testified on what they heard and how the accused person directly confessed to them. Also, the accused person confession led to the discovery of murder instrument. To buttress his position, he made reference to the

case of John Shini vs Republic, Criminal Appeal No. 573 of 2016, also **Mabala Masasi Mongwe vs Republic**, Criminal Appeal No. 161 of 2010.

He submitted that confession leading to discovery of the machete directly connects the accused person with the death of the deceased, whereas he voluntarily confessed to the mourners of his involvement and his trouser contained the blood stains. Oral confession is trite evidence which undoubtedly indicates that the accused person brutally murdered the deceased for his purported allegations that she bewitched him. He cited the case of **DPP vs Nuru M. Gulamrasul** [1988] TLR 82.

He finally submitted that he is very satisfied that the case against the accused person is proved beyond reasonable doubt, thus prayed the court to find the accused person guilty of murder and convict him as charged.

After thoroughly going through prosecution and defence case I summed up to court assessors who thereafter gave their respective opinions. In their considered opinion, all lady and gentlemen assessors have opined to the effect that the accused person be found guilty of the offence facing him and thus be convicted.

The main issue before this court is whether or not the accused did cause the death of the late Kashinje d/o Shegembe., and, if the answer to the main issue is in the affirmative whether he did so with malice aforethought.

In the instant case, it is alleged that Kashinje Shegembe met her untimely death on the 31<sup>st</sup> July, 2014 as a result of being assaulted by the unknown person. The issue is who assaulted the deceased leading to her death. According to the totality of the prosecution testimony, neither of the witness testified to have seen the accused assaulting the deceased with a panga, the accused is circumstantially connected with the death of the deceased and the oral confession he made before the crowd of people.

Like the direct evidence circumstantial evidence can also lead to a conviction of the accused of the accused, in short, the same is often the best evidence in establishing the commission of a crime by person, only if the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilty. Also, it is necessary that there be no other co-existing circumstances which would weaken or destroy the inference of guilty. If such circumstances existed, then the case is said

to have not been proved beyond any reasonable doubt. So long the available evidence hinges on circumstantial evidence the issue also to be resolved is whether the circumstantial evidence and oral evidence led by the prosecution proved the case against the accused person on the standard required in the criminal cases.

To find the accused person guilty of the offence of murder the available evidence must link the accused person with the offence he stood charged. That principle was pronounced by the Court of Appeal in the case of **Mohamed said Matula vs Republic** [1995] TLR 3 where the Court held that;

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

There is no dispute regarding the death of the deceased as evidenced by the testimonies of PW3 and PW4. But now the prosecution has to prove the link between the death and the accused person. As I have earlier stated neither of the prosecution witness testified to have seen the accused murdering the deceased. I asked myself as to whether the available evidence creates a chain of events to connect the accused

person with the offence of murder. This is because to convict the accused by circumstantial evidence the chain of events linking the accused with the death must be unbroken and therefore must lead to no other conclusion that the present accused person is responsible for the death of the deceased.

The story which connects the accused with the offence of murder begins with the evidence of PW1 ASP Mashauri. His evidence is to the effect that having arrived at the scene he found the accused person under arrest of the villagers. He was told by the villagers that they arrested the accused because his clothes had a blood stain. He also interrogated the accused person who admitted to have killed the deceased with a panga for the reason that the deceased was bewitching him. PW1 stated that he was shown a panga by the accused person. PW1 told the court that Detective Coplo Jeremia interrogated and recorded a cautioned statement of the accused person. Also, the accused was taken to Justice of Peace PW2 Ward Executive Officer who recorded a confession statement.

On his part PW2 Peter Msiluka who identified himself as justice of peace told this court that he recorded a confession statement of the accused person who admitted to have committed the offence.

PW3 Mashaka Yela told this court that having been informed by his neighbor he went to area of scene and he found his mother was cut with a panga. PW3 further stated that people gathered and they started looking for the footsteps. People suspected the accused person to have committed the offence due to his trouser and shirt had blood stain. PW3 said upon asked by the people who were at the scene the accused person admitted to have wounded the deceased with a panga. PW3 told this court that accused showed them a panga he used to assault the deceased.

While PW4 Magaka on his part, told the court that while sleeping he was informed of the murder incident through phone call. As a Hamlet leader he went to scene and found a dead body which had a cut wound at the neck and head. At the morning people traced the footsteps and they saw the accused person had blood on his clothes. People arrested the accused and he admitted to have killed the deceased. PW4 testified that among the people who were there at the scene were sungusungu.

Looking at the testimonies above, it is clear that several questions arise there from and the available prosecution evidence did not attempt to resolve them. First, the prosecution did not tender panga alleged to be used by the accused person in killing the deceased. The issue which



will be discussed in details later on. Failure to tender panga as exhibit to my view weakens the prosecution case. Also, second, no effort was made to do laboratory test (DNA) to establish relation/similarity of blood stain found on the clothes of the accused person with that of the deceased. The laboratory test of the blood would establish whether the blood stain on the accused clothes is that of the deceased or other person. This doubt ought to be cleared by the prosecution. The doubt was not resolved until the closer of the prosecution case. Therefore, the same is to be solved in favour of the accused.

Next to consider is whether the oral confession by the accused person in the presence of the villagers is admissible. Generally, oral confession/admission is admissible in certain circumstances but extreme care must be taken before taking its on its face value. See the case of **Ndalahwa Shilanga and Buswelu Busari vs The Republic**, Criminal Appeal No. 247 of 2008, unreported. In this case, prosecution witnesses PW3 and PW4 alleged in their testimonies that the accused person made oral confession that he was involved in the killing of the deceased on the material date. Such confession was said to be made in the presence of the group of people. Further PW4 alleged in his evidence that apart from ordinary people who were there, also the village vigilantes

(Sungusungu) were there when the accused person was making confession. Such kind of confession made in such environment was held by the Court of Appeal to be unreliable and need corroboration. In the Court Appeal case of **Regina Karantina and Another vs Republic**, Criminal Appeal No. 10 of 1998, unreported, discussing oral confession made to the group of people and in the presence of sungusungu, the Court held that: -

*"Although in law sungusungu were not policemen, in real life, they had more coercive power than ordinary citizens therefore feared. Such confessions must be corroborated as a matter of practice. We therefore think that such evidence was not only inadmissible but, if admissible, it unreliable and required corroboration."*

Likewise, in the present case, the presence of sungusungu at the area of scene to my view created atmosphere of fear to the accused person as per cited authority above. Thus, it can not be said that the accused person made confession voluntarily in this case.

Again, it has been stated by the prosecution witnesses PW1, PW3 and PW4 that confession made by the accused person in the presence of the group of people led to the discovery of the panga used to assault the deceased. Unfortunately, as hinted above such panga which was

said to be connected with the crime was not tendered in court as exhibit. Failure to tender the same weaken the prosecution case. In the case of **John Peter Shayo and two Others** [1998] TLR 198 it was held that;

*"Confession that are otherwise inadmissible are allowed to be given in evidence under s. 31 of the Evidence Act 1967 if, and any if, they lead to the discovery of material objects, connected with the crime, the rational being that such discovery supplies a guarantee of the truth of that portion of the confession which led to it."*

As stated above, the prosecution side made no effort to tender panga which is alleged to have been used by the accused person in killing the deceased, the doubt as regards the discovery of the panga ought to be resolved by the prosecution. But the same was not tendered in court. Therefore, the doubt is to be solved in favour of the accused.

Notwithstanding the foregoing, the proof by the prosecution is wanting in this case. PW1 when testified to the court said the accused person after being apprehended was taken to the Detective Coplo Jeremia to record cautioned statement, unfortunately the said police officer did not come to testify and the cautioned statement of the accused was not tendered in court as evidence.

It is also doubtful, if the accused person was the one who was involved in the killing of the deceased, in the absence of the Post Mortem Report. The prosecution did not tender the report which would enable the court to establish the cause of death of the deceased. In the circumstances of this case, the cause of death of the deceased was not proved by the prosecution. Thus, the link between the death of the deceased and the cause of death is also missing.

Again, PW2 who said to have recorded confession statement by the accused person did not tender the same. PW2 alleged that the accused person admitted to him that he has killed the deceased using a panga. PW2 only narrated what he was told by the accused.

As submitted by the defence counsel, the testimonies of PW3 and PW4 do not swim together. They are contradictory to each other as regards discovery of the panga. PW3 Mashaka told the court the panga used by the accused to assault the deceased was found in the house not occupied by the accused while PW4 told the court that the panga was found in the house occupied by the accused. Thus, they are not consistent as a result one could say they cannot be relied upon. Other, contradictory testimonies was that of PW1. PW1 in his testimony stated that the accused and his father were under arrest of the people and he

arrested them, while other witnesses told the court that it was only the accused person was under arrest.

I am aware that not every discrepancy in the prosecution witnesses may cause the prosecution case to flop. It is only where the gist of evidence thereof is contradictory then the prosecution case will be dismantled. See the case of **Said Ally Ismail vs Republic**, Criminal Appeal No. 241 of 2008, CAT at Mtwara, unreported and **Mohamed Said Matula vs Republic** [supra] and others cited by the defence counsel.

In the case of **Mohamed Said Matula** vs Republic, the Court of Appeal held thus,

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

The inconsistencies and contradictions occurred in this case have an impact in assessing the credibility of the witnesses testified before this court. PW1, PW3 and PW4 are contradicting as regards the place where the panga was found and as regards number of people who were

arrested at the scene of area. In that view, PW1, PW3 and PW4 were not credible witnesses. What they testified before this court cannot impress this court to treat them as reliable witnesses

In Criminal litigations, the prosecution is duty bound to prove any case beyond reasonable doubt, as it was held in the case of **John Makolobela, Kulwa Makolobela and Eric Juma @ Tanganyika vs Republic** [2002] TLR 296, by the Court of Appeal, that,

*"A person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilty beyond reasonable doubt"*

What I have narrated herein above, reveals that the testimonies of the prosecution have miserably failed to prove this case to the standard required as there is no chain of events which connects the accused person with the offence stand charged. Instead, the story by the accused person that he was living peaceful with his sister and he was arrested while not involved in the killing of the deceased is plausible thus cast reasonable doubt to the prosecution case.

In this case, there is no doubt that the deceased was cut/assaulted unnoticed at her home and since the accused person is the only person alleged to have killed the deceased for the reasons that his clothes had

blood stain, which the same was not proved if it was the blood of the deceased, it is my view that anybody will suspect that in any event, the accused must have been involved in killing the deceased. This may be true, but in law, ...suspicion no matter how grave cannot be the basis of a conviction in criminal charge. See the decision in the case of **Richard Mtangule and Another vs Republic** [1992] TLR 5.

In the result, I depart from the opinions of my esteemed lady and gentlemen assessors, and proceed to hold that the prosecution failed to prove this case against the accused person beyond reasonable doubt. Henceforth, I find him not guilty and acquit him of the offence he stands charged, that is murder contrary to section 196 of the Penal Code. I now order that the accused person Joseph Shegembe be set at liberty unless otherwise lawfully held in connection with any other criminal offence.

It is so ordered.



  
**D. B. NDUNGURU**

**JUDGE**

**18. 03. 2022**