

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**SUMBAWANGA DISTRICT REGISTRY**  
**AT MPANDA**  
**CRIMINAL JURISDICTION**  
**CRIMINAL SESSIONS CASE NO. 62 OF 2019**

**REPUBLIC**

**VERSUS**

**1. SHIJA S/O BUDEBA @ NYANG'HANI**

**2. KULWA S/O MAIGE @ MSOBI**

**JUDGEMENT**

*Date of Last Order: 15. 03. 2022*

*Date of Judgement: 22. 03. 2022*

**NDUNGURU, J.**

The accused persons **SHIJA s/o BUDEBA @ NYANG'HANI** and **KULWA MAIGE @ MSOBI** stand charged with the offence of murder contrary to section **196 and 197** of the **Penal Code Cap. 16 Vol. I** of the Laws **Revised Edition 2002**. It is alleged that on 24<sup>th</sup> day of

September, 2018 at Katambike village - Ugala within Mpanda Municipality,  
in Katavi Region the accused persons murdered one **Mwandu s/o Lugata**  
© **Kubelabo.**

When the charge or information of murder was read over and properly explained to the accused persons. They all pleaded not guilty to the offence, and thus plea of not guilty was entered against them, hence this full trial.

During the trial of this case, Mr. Mwandalama, the Learned Principal State Attorney represented the republic; whereas, the accused persons were represented by Mr. Kifunda, the learned advocate.

To drive home the allegation leveled against the accused persons, the republic brought seven prosecution witnesses namely H. 4119 Detective Constable Ainea who testified as prosecution witness No. 1 (PW1), Dr. Alex Mrema as PW2, G. 5696 Detective Coplo Augustino as PW3, H. 9449 P/C Faraja as PW4, Rwelwe Muungwana as PW5, Assistant Inspector Rwezaula as PW6 and G.8136 D/Coplo Masuka as PW7. The prosecution also tendered four exhibits, namely Sketch Map of the area as exhibit P1, Post Mortem Report as exhibit P2, cautioned statements of the 1<sup>st</sup> accused and 2<sup>nd</sup> accused as exhibit P3 and as exhibit P4 respectively.

Upon the closure of prosecution case, the defence case opened after it was found that the prima facie case has been established against accused persons; thus, requires them to give their defence story. In disproving the prosecution allegation leveled against them, the first accused person testified as DW1 and the second accused as DW2. They neither called a witness to testify on their favour nor tendered exhibit. The summary of prosecution testimonies is as hereunder;

PW1 H. 4119 Detective constable Ainea, resident of Inyonga testified that on 24/09/2018 he was at Katambike village where the murder event had occurred. He said the deceased was one MWANDU. At the scene of crime, he was with Regional Crime Officer (RCO) one Abdallah Hussein. They went there to inspect the scene of crime. At the scene of crime, they found a dead body covered with grasses, but was seen hardly. They removed the grasses and found it a human body with a cut at his face near the eye. It was a male body. He was assigned by RCO to draw the sketch map of the crime scene. Having drawn he signed it. The PW1 tendered the Sketch Map of the area and admitted in court as exhibit P1 without objection. PW1 further told the court that the distance from where the body was found to the place the Sandal of the accused was found is 10 m.

PW1 concluded that the deceased was attacked at the place where the sandal was and was dragged to where the body was covered with grasses. The grass covered the whole body only part of the body ear was seen.

PW2, DR. ALEX MREMA, a medical officer, testified that in 2018 he was working at Katavi Regional Hospital and on 26/09/2018 he was at the office. At about 09.30am he was informed by his Medical Hospital In charge telling him that there is a dead body brought at the hospital. He was instructed to conduct post mortem/investigation on the cause of death. He then went to the mortuary where the body was kept

Outside the mortuary he met D/C Augustino and the relatives of the deceased. They went to the mortuary and found the male body, the body and clothes were full of blood. The body was identified to him to be the body of MWANDU LUGATA. He said the clothes were full of clotted blood. The body had three big wounds. He undressed the body to see if they were another wound. The wound was on the frontal bone (fuvu la mbele) and the wound which was very deep at the right side near the eye.

He informed the court that the body had started (kukakamaa) he meant the decaying process had started. Also, he said they were fracture on the front bone.

PW2 informed the court that he filled the Post Mortem Report which was admitted in court as exhibit P2.

PW3, G. 5696 Detective Coplo Augustino, Police officer, Resident of Mpanda testified that on 24/09/2018 he with other police officers being accompanied by RCO of Katavi one SSP Abdallah Hussein they went to katambike village in Ugala ward. They went to inspect the crime scene as they had information that one person has been murdered there.

At the scene they found the dead body of a male person who was identified to be Mwandu Lugata. The body was at the area where Mnada was conducted. He said the body was covered with grasses. They removed the grasses and he found the body had a wound/injury on the right-side part of head. He was assigned to record the witness statement of one SENGO the relatives of the deceased. They took the dead body to Katavi Regional hospital for further medical investigation.

PW3 told the court that on 25/09/2018 he was assigned to investigate the case. By then the suspects were not yet arrested.

PW3 said on 26/09/2018 in the morning, after the relatives of the deceased arrived at the police station, he went with them to Katavi Regional Hospital for witnessing Post Mortem Exam exercise. The relatives

identified the body to be of Mwandu Lugata, also the Dr. Alex conducted Post Mortem.

On 10/10/2018, he got information from the police officer who was working at Ugala Police post that informer has reported the persons who murdered the deceased. He was asked to tell OC CID to add police officers for arresting them. He informed OC CID, he prepared police officers including himself to go to Ugala, and others police officers were D/C Rwezaula and Masunga. From Mpanda to Ugala is 70 Kilometers. They left there at 06.00pm and arrived there at 20.00hours. At Ugala police Post they met D/C Faraja who arrested one of the accused, he introduced himself to be Shija Budeba.

PW3 stated that DC Rwezaula interrogated Shija Budeba and recorded his statement while they kept on looking others. On 11/10/2018 at about 07pm while with D/C Faraja he arrested Kulwa Maige (2<sup>nd</sup> accused). They arrested him at Kazaroho cell at Katambike village. He was at his home. He interrogated him orally and he admitted to have committed the offence. Kulwa Maige said 23/09/2018 he was told by his friend Shija Budeba that the brother of Shija has got quarrel with his wife. That his wife wanted them to kill the husband upon payment of 1,

500,000/=, that he involved one Masumbuko, they thus became three. That they went to the wife of the deceased to demand the advance. She paid them 650,000/= as advance payment.

PW3 further testified that on 23/09/2018 the accused persons then took the deceased to the liquor shop and made him drunk. After the deceased had become drunkard, they took him pretending to send him at his home. On the way Kulwa Maige who had piece of iron bar hit the deceased with a piece of iron bar on head. Upon satisfied that he was dead they carried him on the bicycle and went to desert him at Mnadani area having covered him with grasses. Kulwa Maige threw away a piece of iron bar. He said Kulwa Maige went home. He said noted that his fellow Shija Budeba was arrested, he used to hide in the bush and come back home at night. He took the 2<sup>nd</sup> accused to the police station where DC Masuka recorded his cautioned statement.

PW3 told the court that Masumbuko his whereabouts is unknown, however informed the court that he was satisfied that it was Shija Budeba, Kulwa Maige and Masumbuko who killed the deceased.

When cross-examined by Mr. Kifunda-Defence Counsel PW3 stated that on 11/10/2018 he arrested the 2<sup>nd</sup> accused one Kulwa Maige and he

orally interrogated him. He said the wife of the deceased one Magreth John promised to pay the accused persons Tshs 1,500,000/= upon completing the mission of killing the deceased. Magreth John was released by The National Prosecution office. He sent the accused to justice of peace on 12/10/2018. He sent the accused persons to the WEO of Ugala Ward one Relwe Sedeki.

On re-examination by Mr. Mwandalama P/State Attorney PW3 replied that it is the trial court which is required to find him credible or not.

PW4, H. 9449 D/C FARAJA, testified that on 10/10/2018 he got information from the informer, who informed him of the murder incident which happened at Katambike village-Ugala Ward, the deceased was called Mwandu Lugata, the people who were suspected in killing the deceased were Shija Budeba, Kulwa Miage and Masumbuko.

After such information PW4 said he informed OC CID on the event. He requested the policeman manpower for arresting the suspects. He informed him at 03.00pm. He was told to keep on working on it while he was coming. He managed to arrest the 1<sup>st</sup> accused one Shija Budeba on 10/10/2018 at about 07.00pm at his home. He interrogated him on murder of Mwandu Lugata. The accused admitted to have killed Mwandu Lugata,



who was his brother. He was told by Shija budeba that the deceased was the child of his elder father. He was told by 1<sup>st</sup> accused Budeba that in killing of the deceased, they were three men, himself, Kulwa and Masumbuko and two ladies; Diana who was the step daughter of the deceased and Magreth John the wife of the deceased.

PW4 further testified that he Shija Budeba told him the reason behind the killing was that the deceased was squandering the dowry in respect of the daughter Diana without involving Magreth John the mother of the daughter. The accused told him that the wife of the deceased hired them to kill the deceased for a payment of 1,500,000/= . That they were paid 650,000/= as advance payment. He said the money was given to Masumbuko Kasusumo their fellow.

They then planned how to kill the deceased. They took the deceased for drunk to the home of Kulwa. As it was at night, they left at the home of Kulwa through the home of Embasi going to the home of the accused. At home of the deceased, he said he was tired but Magreth John convinced him to go to Ugala Centre village by giving him 5,000/= when they were the on the way to Ugala Centre they killed him. Having killed him they carried the body to Mnadani area. By then it was 07.00pm on 10/10/2018

when he arrested the accused. He arrived at the station almost a quarter to 08. From the home of the accused to the police station it was almost 7 km. He took long time, because when he went to arrest him, he packed the motorcycle way far to make him not aware, further the road was not good.

PW4 said on 11/10/2018 he went to arrest another suspect one Kulwa. He was with PC Augustino. They went at the evening as they were informed that the suspect was always hidden.

He found the 2<sup>nd</sup> accused at his home. It was at 07.00pm. the accused was at his home with his wife. He interrogated him orally; and he admitted to have been involved in the crime. PW4 was told by Kulwa that it was Shija who involved him in killing. Kulwa said he was the one who hit the deceased with a piece of iron bar on head. Kulwa said Shija pressed the deceased on the Chest. While Magreth and Diana held the right and left respectively while Masumbuko chopped the deceased. Kulwa said having killed the deceased they took the body and dumped it to Mnadani.

Kulwa said the reason behind the killing was that Magreth was being humiliated because the deceased squandering the dowry of his step daughter without involving Magreth John.

PW4 told the court that the 2<sup>nd</sup> accused was arrested at 07.00pm and they arrived at the police post at 08.00pm.

When cross-examined by Mr. Kifunda Defence Counsel PW4 stated that his informer named Shija, Kulwa and Masumbuko to have been involved in killing Mwandu Lugata.

On re-examination by Mr. Mwandalama P/State Attorney PW4 replied that Kulwa and Shija gave him the story on how they were involved in murdering the deceased.

PW5 RWELWE MUUNGWANA SEDEKI, resident of Katambike village, Ward Executive Officer testified that on 12/10/2018 he was in the office working. PW5 told the court that while in the office at about 01.pm there came a police officer one Augustino. He came with two persons one Shija Budeba and Kulwa Maige. The police officer asked him to record confession statement of the two persons. He agreed.

PW5 said he removed the police officer, he introduced himself to Shija that he was a Ward Executive officer and told him to be free but he informed him the statement will be used as evidence against him.

As he was free, he asked him his name his residence and where he was before he was brought. Having recorded, he read the statement to

him he signed and he handed him to police officer. He then told the office attendant to bring Kulwa.

He introduced himself to Kulwa and he asked him if he had any wound, he said he did not have. He then started recording his statement he also admitted to have been involved in murdering Mwandu (the deceased).

PW5 further told the court that the first accused one Shija told him that on 23/09/2018 at night he was with Kulwa Maige and Masumbuko Charles, Mwanajoni and Diana Silas went to the home of Mwandu Lugata (deceased). That the accused awoke the mother of the deceased (Mwanajoni) who gave them 650,000/= for the purpose of killing Mwandu Lugata. That having received the said money they apprehended Mwandu Lugata. Masumbuko had a piece of Iron bar. The accused told Mwanajoni and Diana that the fact that money given was very little they have to participate in killing, Mwanajoni held the deceased right hand while Diana held the deceased left hand. Shija Budeba pressed the deceased on the chest, Masumbuko Charles held the legs while Kulwa hit the deceased with a piece of iron bar at the right side of the head (front head). Having killed him Mwanajoni took the bicycle they all carried the body to the place

where Mnada was being done where they deserted the body and took the grasses which were on the huts (vibanda) and covered the body. Having covered they left.

He said the reason behind the killing was that, the deceased was misappropriating family properties thus they had to kill him. So that Shija might take role of owning and control the properties. Shija and Mwandu Lugata (deceased) were brothers.

PW5 said Kulwa Maige also gave him the same story on how they arranged/planned to kill Mwandu. He said on 23/09/2018 at night he with the 1<sup>st</sup> accused and the deceased were at the liquor shop and they left the liquor shop went home of the deceased. At the home of the deceased, they awoke one Mwanajoni the mother of the deceased and one Diana. Mwanajoni gave them 650,000/= as advance payment for killing the deceased as they agreed 1,500,000/=.

That they apprehended (Kumweka chini ya ulinzi) the deceased. Kulwa had Iron bar and he was the one hit the deceased on head. He said Shija pressed the deceased on his chest, Mwanajoni held the right and Diana held the left hand, Masumbuko Charles held the legs. That having

killed him they took the dead body and threw it at Mnadani area having covered it with grasses. They used the family bicycle to carry a dead body.

PW5 narrated that at Mnadani area they took grass covering the huts and covered the body.

Having heard and recorded their statements he handed them over to the police officer one Augustino who brought them.

When cross-examined by Mr. Kifunda Defence Counsel PW5 stated that what he stated was from statement of 1<sup>st</sup> and 2<sup>nd</sup> accused. He did not remember if he recorded his statement at the police. He remembered to have recorded his statement before DC Augustino after three days from the date he recorded the statement of the accused 15/10/2018.

On re-examination by Mr. Mwandalama P/State Attorney PW5 replied that what he has stated was what Shija Budeba and Kulwa Maige told him.

PW6 ASSISTANT INSPECTOR RWEZAULA, resident of Misungumilo testified that on 10/10/2018 he was on duty at Mpanda police station. At about 04.00pm he was with other police officers Ndandala, Masuka and Augustino were assigned to go to Ugala village to support the police who was alone at Ugala to arrest the suspects of murder.

He left there at about 05.00pm he arrived at Ugala at about 07.00pm. From Mpanda to village was almost 70km. He used one hour and few minutes. Having arrived he traced PC Faraja at the office he said he was on the way from Kazaroho cell with the person he has arrested. PC Faraja arrived there at about 07pm.

Upon arrival DC Faraja handed the accused to Ndangala who was in charge. The Ndangala instructed him to interrogate the arrested person and record cautioned statement.

He informed the accused of his rights and he recorded the statement.

PW6 tendered the cautioned statement of the 1<sup>st</sup> accused Shija s/o Budeba which was admitted in court as exhibit P3.

According to such statement, PW6 stated that it was Shija, Kulwa, Masumbuko, Magreth John and Diana were the ones who killed Mwandu Lugata.

When cross-examined by Mr. Kifunda defence Counsel PW6 stated that on 10/10/2018 they went to Ugala using police vehicle. He went to Ugala having told that PC Faraja has arrested the murderer.

He remembered they were four policemen. They had weapons. The intentions were to proceed with investigation on murder event. The first

accused was arrested. The statement was to be recorded on time there was no need to bring him to Mpanda to record his statement. He was willing to record his statement.

In his statement the said they were five involved in the committing crime. According to him there were three male persons and two women. The female he named were Magreth and Diana. According to the accused statement Magreth held the deceased one hand likewise Diana. Diana was a step daughter of the deceased.

On re-examination by Mr. Mwandalama P/State Attorney PW6 replied that it was the court which has to evaluate his testimony and find if he was trustful.

PW7 G. 8136 D/COPLO MASUKA, a Police Officer testified that on 10/10/2018 at about 05.00 hours he was with Inspector Ndangala, DC Augustino and Rwezaula was assigned to go to Ugala police post to take the suspect of murder who was already arrested there.

He arrived at Ugala at about a quarter to 20.00. From there (Mpanda) to Ugala was 70km. He used police vehicle. Upon arrival his in-charge communicated with PC Faraja who said to be on the way with the suspect having arrested him.



Upon arrival DC Rwezaula was assigned to record the suspect (accused) cautioned statement.

On 11/10/2018 while at Ugala upon arrested the 2<sup>nd</sup> accused, he was assigned to interrogate him. He was called Kulwa Maige. The said Kulwa was arrested on 11/10/2018 in the evening by PC Faraja and D/C Augustino. The 2<sup>nd</sup> accused was brought at the police post at about 07.40 hours. He took the accused from the lock up as sent him to the investigation/interrogation room. He informed of his right to call relatives or advocate when giving his statement.

He recorded the statement of the accused. The cautioned statement of Kulwa Maige was tendered in court and admitted as exhibit P4.

PW7 said according to the statement the one killed the deceased are Kulwa Maige and his fellow.

When cross-examined by Mr. Kifunda Defence Counsel PW7 stated that DC Ainea was a police officer (PW1). DC Augustino was a police officer (PW3) DC Faraja (PW4) was also police officer. He knew Rwezaula (PW6) he was also police officer. He also a police officer. PW7 stated that the court has to trust them though they all are police officers.

On re-examination by Mr. Mwandalama P/State Attorney PW7 replied that the law does not prohibit the policemen to give evidence in court. His duty was to record what the accused was saying.

The court having found that, the prosecution has sufficiently established a case against accused persons to require them to make their defence, the accused persons were called to defend themselves and they elected to testify under oath. The first accused testified as DW1 and the second accused testified as DW2. They neither called witness to testify in their favour nor tendered exhibit. The summary of their evidence is as hereunder;

DW1 SHIJA BUDEBA @ NYANGHANI, a peasant, resident of Ugala testified that on 09/10/2018 he was at home with his wife and children. At about 06.00pm there came two people at his home. He welcomed them but they did not sit on the chair he gave them, they stood up.

They told him he was needed to the office at Ugala. He was told his in law and his child have been arrested. His in law was Magreth John and the child was Diana Silas. He asked them why they were coming at night late hours. He agreed and went with them to the office. He did not know

the two persons. It was his first time to see them. He has seen one of them here in court. He was PW3. He went to Ugala Ward office.

At Ugala, he was told that himself and his sister-in-law and child, had sold the deceased farm without involving the village government. The farm of one Mwandu Lugata. He told them that it was true that they have sold the farm so that a widow might go to Shinyanga. He wanted her to go to Shinyanga because she was the wife of the deceased who was his brother. So as a family they decided that she had to go to Shinyanga because they did not know the cause of death of the deceased. He said it was for the purpose of rescuing her. Having said so the police locked him up. On 10/10/2018 his father was brought by police. Who is called Budeba Lutanula. When asked he said it was true, they decided to sell the farm so that Magreth John could go back to Shinyanga to rescue him. It was when the police said; that they were informed that the proceeds of sale of the farm have been paid to those who were assigned to kill the deceased. At that time the said money was in the hands of his brother one Sambai Lugata. The police ordered the said money be sent to the police officer. His brother brought the said money next date on 12/10/2018 it was 1,500,000/=, it was about 10.00am. The father and the one who

purchased the farm were present there at the police. The Ward Executive Officer received the money. He was called Rwezaula (PW1) he came here to testify.

Having received the money WEO returned the money to the person who purchased the farm. He was told to leave the farm to vacate immediately. His father also was released to go home. His father told the WEO and police that he had to go back with me. The police and WEO said they would release him at their own time. He returned back to the lock up. It was at about 01pm. He stayed in the lock up for some time, he then was called and sent to one small room. While at the room he was told that he wanted to make Magreth to escape as they conspired to kill the deceased. It was the police and one Mgambo who came to arrest me.

DW1 denied to have been involved in killing the deceased. DW1 told the court that the police started beating him forcing him to agree, saying the lady had passed Mpanda. He kept on denying. He was sent back to the lock up. At night other police took him from the lock up. He started asking him the same saying he has killed his brother so that he could inherit his wife, he denied to have been involved to inherit his wife. He was asked

who could he kill? He said he could kill chicken or goat if got guests at his home.

He then started asking when he was born, he said in 1977, his name, he was then sent back to the lock up. PW1 was wrong, he just asked his name and residence. Rwezaula just asked him his name, his place of birth and where he was living. He prayed for the court to find him innocent as he was not involved in committing the said crime.

When cross-examined by Mr. Mwandalama P/State Attorney DW1 stated that he was arrested on 09/10/2018, he did not know the people who arrested him, and he did not have any conflict with them. He was present when they testified in court. DW1 said there was no question regarding the date he was arrested. His father was called Budeba Lutamula. He was the third born in their family and his wife was Miza Masonga. He has three children.

DW1 told the court that he denied to have been involved. The statement was objected that he did not give such statement. There was no any question to that effect. He heard his advocate disputing the allegation that when interrogating while on the way he admitted.

On re-examination by Mr. Kifunda Defence Counsel DW1 replied that what he told them was his names, place of birth, his family and occupation and the way he shifted from Shinyanga to Ugala only.

When asked question by lady assessor Mariam Mussa DWI replied that he and the deceased were living far in two different cells (vitongoji).

DW2 KULWA MAIGE @ MSOBI testified that on 12/10/2018 he was at home with his family. At about 20.00pm he found to have been surrounded by four (4) people. They kept him under arrest. They then introduced by their names and position. One was police officer by name of Faraja, he had a gun, the other was Mgambo by the name of Geoffrey Hamisi Mgambo Majaliwa, the other was a policeman who also testified in court one Augustino. Augustino asked him if he was kulwa. He said yes it his him. He asked him which business he had at his home; he said have none.

He allowed them to search. They searched and found nothing. They took him and walked to the place where the motor cycle was packed while was chained. They went to Ugala. At ugala, he was locked up. While at Ugala, at about 22.00 hours the police called him telling him to tell them the truth. He denied to know the deceased also to have been involved in murdering.

DW2 stated that the police came back after almost an hour while drunkard. He was then started beating him. He was forced to agree with the statement of the 1<sup>st</sup> accused that he was involved in killing. He kept on denying. The police kept on beating him for almost two hours. He was left in the lock up. At about 03.00 hours over midnight, the police came again. He was asked if he has the answer. He kept on insisting that he has not committed the alleged crime.

He saw him again on 13/10/2018 at about 10.00am. He took him out as his wife came to see him but later his wife was chased. He was returned back to the lock up. He started beating him again. He said it was Faraja who was coming and getting out while beating him.

DW2 prayed for the court to find him not guilty for the offence. The policemen have just implicated him. He had never committed the offence.

When cross-examined by Mr. Mwandalama P/State Attorney DW2 stated that he was arrested on 12/10/2018. He did know how to write and read. He was beaten by police. The fact of beating did not arise. Nobody can respond to it at this stage. The statement was not objected. If he could have raised the fact of being beaten it could have been a ground for objection. DW2 stated that he was beaten by Faraja. He was not given

PF3. Even when he was sent to the prison, he was not in good conditions though he was received. He has no witness from the prison nor PF3. He has no medical document.

DW2 stated that it was Masuka (PW7) who alleged to have recorded his statement, he did not know him before. He saw him that day for the 2<sup>nd</sup> time.

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 submit their respective oral submissions as scheduled by the court.

Defence through learned advocate Mr Kifunda Defence Counsel submitted that the prosecution had seven witnesses to prove the case.

Among them, five witnesses were the police officers and two of them were civilians. He submitted that it is the position of law that in criminal cases, it is the duty of the prosecution case to prove the case against the accused person beyond any reasonable doubt. He referenced to the decision of **Joseph Lupogi V. R** (1981) TLR 191 and **Gaidon Nelson Mapunda V. Republic** (1982) TLR 318.



Mr Kifunda further submitted that PW5 recorded extra judicial statement of the accused persons. However, he said the said confessions were rejected by the court. He was of the view that if the evidence of PW5 is disregarded, the only important evidence is that of PW1, PW3, PW4, PW6 and PW7 who are policemen. The court has been always reluctant to base conviction on evidence of the policemen alone. He referenced the position in the book titled **The Magistrates Manual** authored by Hon. Chipeta at page 74.

Mr Kifunda submitted that it was the role of the court to test credibility of the witnesses who were all policemen. He was of the view that the prosecution has never proved the case beyond reasonable doubt. He prayed for the accused be found innocent and be acquitted.

The prosecution on their side through Mr Mwandalama, Principal State Attorney submitted that the post mortem and evidence from the witnesses proved that the death of Mwandu Lugata encountered violent death.

The question as to who killed the deceased, was proved by the (accused) through oral evidence before PW3, PW4 and PW5 that they were the ones who killed the deceased. Further, their cautioned statements

(Exhibit P3 & P4), were admitted without any objection. Except the extra judicial statements which were denied for failure to follow legal procedure.

To buttress his stance, Mr Mwandalama said all the witnesses have stated that the deceased had wound on neck and on head as shown in the PF3 and also cautioned statement. That means it was the accused persons who were involved in killing.

Mr Mwandalama submitted that normally the accused can hardly express their intention to kill. But their intention can be deduced from where or at which part the blow/cut wounds were directed. He cited the cases of **Joseph Marwa Chaha V. Republic (1980)** TLR 272, **Said Ally Motola @ Chumela V. Republic**, Criminal Appeal No. 129 of 2005 CAT (Tanga) Unreported. He argued that in these cases, the Court quoted with approval the case of **Enock Kipela V. Republic** Criminal Appeal No. 150 of 1994 CAT (Unreported). The court said

*"Usually, an attacker will not express his intention to cause murder ....."*

Mr Mwandalama argued that through Exhibit P4 and P3 he found that the accused used piece of iron bar and knife, which are lethal weapons and the blow was directed on the head and neck which are sensitive parts of

the human body. The motive behind was financial gain of 1,500,000/= thus they had bad motive.

Mr Mwandalama further submitted that having killed they took the body far from the scene at Mnadani area and threw it at Mnadani area while covered with grasses so as to hide. Further, he said nobody reported the incident, that meant the accused had malice aforethought.

In the defence, he submitted that all the accused denied to have given statement to anybody. The 1<sup>st</sup> accused person testified on the land dispute and the proceed of the disputed land that was given to the WEO. The prosecution evidence was that they 1<sup>st</sup> accused arrested on 10/10/2018 and 2<sup>nd</sup> was arrested on 11/10/2018.

PW4 and PW5 were not cross examined on 1,500,000/=. The failure to cross examine and raised it in the defence was an afterthought. He referenced to the case of **Hatibu Gaudi & others V. Republic** [1996] TLR 12.

As he has stated, cautioned statements were admitted without objection, except extra judicial statement. In the defence, the accused denied to have offered their statement, something which were to be raised before admitting the statement. Thus, their objection at this stage is

baseless as per the case of **DPP V. Noor Mohamed Guramlasu** [1988] TLR 182.

He further argued that the five witnesses were policemen and two civilians the court and assessors should examine their demeanor so as to assess their credibility. Though extra judicial statement was rejected on point of law still the statement they gave to Justice of Peace be given weight to convict the accused.

He was of the position that the prosecution case has proved the case beyond reasonable doubt. Thus, prayed for the accused be convicted and sentenced accordingly.

The main issue before this court is whether or not the accused person did cause the death of the deceased, namely Mwandu Lugata @ Kubelabo, and, if the answer to the main issue is in affirmative whether he did so with malice aforethought.

In the instant case, it is not in dispute that as per exhibit P2 the deceased mwandu Lugata met his ultimately death on 24<sup>th</sup> Day of September, 2018 at Katambike village-Ugala within Mpanda Municipality in Katavi Region as a result of being assaulted by unknown person.

According to the totality of the prosecution's testimony, neither of the witnesses testified to have seen the accused persons assaulting the deceased person, the accused persons are only circumstantially connected with the death of the deceased person.

The available evidence hinges on circumstantial evidence the issue to be resolved is whether the circumstantial evidence led by the prosecution proved the case against the accused person on the standard required in the criminal cases. Though the Court has been very cautious before convicting on the basis of circumstantial evidence. As it was stated so in the case of **Said Bakari vs Republic**, Criminal Appeal No. 422 of 2013, unreported;

*"In determining a case cemented on circumstantial evidence, the proper approach by a trial court and appellate court is to critically consider and weigh all the circumstances established by evidence in their totality, and not to dissect and consider it piecemeal or in cubicles of evidence or circumstances."*

Apart from the fact that this case hinges on circumstantial evidence, it is also be clearly noted that it also hinges on the cautioned statements made by the accused persons.

Thus, it is to be noted that despite the above position for this court to find the accused persons guilty of the offence of murder the available

evidence must link the accused persons with the offence they stand charged. The position of the law was clearly stated in the case of **Mohamed Said Matula versus Republic** [1995] TLR where the Court of Appeal held thus;

*"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 person as evidenced by PW 1, PW3 and exhibit P2. According to the testimony of PW2 a Medical Officer who examined the deceased body said the cause of death was due severe traumatic brain injury which was caused by multiple wounds on the head. This proves that the deceased death was unnatural. The deceased met his death through cut wounds.

Now, the prosecution has to prove the link between the death of the deceased person and the accused persons. With the available evidence neither of the prosecution witnesses testified to have seen the accused persons murdering the deceased person.

To begin with the issue of circumstantial evidence. The law is very settled that court of law may ground conviction based solely on

circumstantial evidence. That means the said evidence irresistibly led to the inference that it was the accused persons and nobody else who committed the offence, and such evidence must also be incapable of more than one interpretation and the chain linking such evidence must be unbroken.

The question I may ask myself is whether the available evidence creates a chain of events to connect the accused persons with the offence of murder. As said above, the chain of circumstantial evidence linking the accused with the death must be unbroken and therefore must lead to no other conclusion that the present accused persons are responsible for the death of the deceased person, namely Mwandu Lugata @ Kubelabo

The chain of events begins with the evidence of PW1 H. 4119 Detective Constable Ainea who said he went to inspect the scene of crime. At the scene of crime, he found a dead body covered with grasses, but was seen hardly. He drew the sketch map of the crime scene. PW1 further told the court that the distance from where the body was found to the place the sandal of the accused was found was 10 M. He concluded that the deceased was attacked at the place where the sandal was and the body was dragged to where the body was covered with grasses.

PW3 G. Detective Coplo Augustino who investigated this case testified to this court that he interrogated 2<sup>nd</sup> accused one Kulwa Maige. He informed this court that brother of Shija Budeba one Mwandu Lugata had a quarrel with his wife one Magreth John. That Magreth John hired them to kill his husband upon payment of Tshs. 1,500,000/=. PW3 said Kulwa Maige involved another person namely Masumbuko in their mission to kill the husband of Magreth John. PW3 said Magreth John paid 650,000/= as advance payment for the mission. He further testified that on 23/09/2018, the trio suspects took the deceased to the liquor shop and made him drunkard. As they were pretending to return him at his home, Kulwa Maige who had a piece of iron bar hit the deceased on the head. PW3 said the trio suspects then carried the deceased upon satisfied that he was dead and then deserted him at Mnadani area, and they covered the dead body with grasses.

PW4 H. 9449 DC Faraja who interrogated the 1<sup>st</sup> accused Shija Budeba testified that the accused admitted to have killed the deceased one Mwandu Lugata. PW4 said in their mission to kill the deceased 1<sup>st</sup> accused told him that they were five, himself Shija Budeba, Kulwa Maige, Masumbuko, and two women Diana and Magreth John who was the wife of



the deceased. According to his investigation, PW4 stated that Magreth John hired Shija Budeba, Kulwa Maige and Masumbuko to kill the deceased for the payment of 1,500,000/= and Masumbuko received Tshs. 650,000/= as advance payment. PW4 further told the court that the accused and his fellows took the deceased to drink liquor at night, then they left to the home of Kulwa and then to the home of Embasi and lastly to the home of the deceased. At his home the deceased said to be tired, however Magreth John convinced the deceased to go to Ugala Centre by giving him Tshs. 5000/=. On the way to Ugala, accused and his fellows killed the deceased. PW4 told the court that the accused pressed the deceased on the chest, Kulwa hit the deceased on the head with iron bar, while Diana and Magreth held each other the right and left and Masumbuko chopped.

Evaluating the evidence of PW3 and PW4 their testimonies does not tally, but contradict to each other as regards who were involved in the commission of the crime, that is persons participated in the murdering of the deceased. According his investigation PW3 testified that it was Shija Budeba, Kulwa Maige and Masumbuko who killed the deceased, while PW4 stated it was Shija Budeba, Kulwa Maige, Masumbuko and two women one

Magreth John and Diana, who were five in number participated in the killing of the deceased.

Another incriminating evidence was that of PW5 Ward Executive Officer (WEO) who recorded confessional statements of both accused persons. PW5 testified to the court that on 12<sup>th</sup> of October 2018 while in his office at about 01:pm was asked by a police officer Augustino to record confession statements of the two suspects who are now accused persons. PW5 told the court that he adhered to the procedures before recorded the confession statements of the 1<sup>st</sup> and 2<sup>nd</sup> accused persons. Further, PW5 stated to the court that 1<sup>st</sup> and 2<sup>nd</sup> accused persons admitted in their statements that they participated in the killing of the deceased one Mwandu Lugata. He said mother of the deceased one Mwanajoni gave the accused persons 650,000/= for the purpose of killing Mwandu Lugata. Unfortunately, the such confession statements of 1<sup>st</sup> and 2<sup>nd</sup> accused persons as alleged recorded by PW5 were not admitted in court as evidence. What remains is the mere assertion of PW5. In the absence of recorded confession statements, his testimony is therefore valueless.

The other piece of incriminating circumstantial evidence which prosecution centre on are cautioned statements of the 1<sup>st</sup> and 2<sup>nd</sup> accused

persons which were tendered by PW6 and PW7 and admitted in court as Exhibit P3 and P4 respectively. In their respective defence both accused persons stated to have been beaten, but ideally did not deny to have recorded cautioned statements. Thus, such cautioned statements were not objected during the trial.

Looking the surrounding circumstances and taking into account all the aspects of the law, **section 27 (3)** of the Evidence Act in particular. I have not found any matter of facts to suggest involuntariness of the cautioned statements. However, my strict glance on both cautioned statements (P3 and P4), I may say such statements are quite different. It is my further finding that the two statements are different in terms of the way the accused conspired, the place where they met to conspire, the way the offence was committed, the persons involved in committing the offence, motive of committing the offence and the amount paid as advance. In Kulwa Maige's statement, it describes Nyahani Budeba and Masumbuko Kasusumo as persons who met at the residence of Kulwa and agreed thereof to commit the offence while in Shija's statement, it describes Magreth John as a person who called Shija Budeba, Kulwa Maige and Masumbuko at her residence and agreed thereof to commit the

offence. Also, in the statement of Kulwa, Magreth John is named as one who paid Tshs. 500,000/= as advance payment while in Shija's statement Magreth John is named as one who paid Tshs. 300,000/= as advance payment. Again, Kulwa's statement does not describe persons who were involved in the killing while Shija's statement describe persons who were involved and the role played by each one of them. Both statements do not describe the place of killing and the motives behind the killing of the deceased. Shija's statement describes Magreth John as the one who went home and took bicycle and carried the body of the deceased to Mnadani area while no such information is found in Kulwa's statement.

This brings me to the testimony of PW1 who drew a sketch map of the scene where the body of the deceased was discovered. PW1 stated that the deceased was attacked at the place where sandal was and then his body was dragged to Mnadani area. Relating the testimony of PW1 and the accused confessional statements, as regards the place where the offence was committed is not clear yet.

Again, regarding the number of persons who were involved in the killing, PW3 testified that the killing of the deceased involved three persons, Kulwa Maige, Shija Budeba and Masumbuko. He further stated

the trio persons went to the wife of the deceased and demanded an advance of Tshs. 650,000/= which were paid. PW3 in his testimony told the court that it was Kulwa Maige who hit the deceased on the head with a piece of iron bar. This piece of evidence by PW3 is contrary to what was stated by the 2<sup>nd</sup> accused himself in his cautioned statement. In his cautioned statement, 2<sup>nd</sup> accused stated that they were paid Tshs. 500,000/= as advance for the killing of the deceased and the accused did not describe the persons who were involved in the killing. Thus, the testimony of PW3 and that of PW2 contradict each other.

It is therefore considered view of this court that in the light of the above discrepancies and inconsistencies, it cannot be said the accused's cautioned statements tally together put in mind both accused persons were together before, and at the time of executing the killing. The statements are therefore contradictory to each other and they are not consistent as a result one could conclude that the accused's confession statements are not truthful and thus cannot be relied upon. That position of the law was clear as stated in the case of **Mohamed Said Matula vs Republic** [1995] TLR 3 that;

*'Where the testimonies by witnesses contain inconsistencies 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 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 accused's statement as regard their participation in the killing of the deceased. The credibility of a witness may be tested by his demeanor, or coherence of his own evidence or by its cogency in relation to the evidence of other witnesses, including that of the accused persons. See **Shaban Daudi vs Republic**, Criminal Appeal No. 28 of 2001. It must therefore be noted that when assessing the credibility of a witness all the evidence must be considered and assessed and not just selected portions of the evidence. See **Nelson George @ Mandela & 4 Others vs Republic**, Cons. Criminal Appeals No. 31, 93 & 94 of 2010, unreported.

If I disregard exhibits P3, P4 and testimony of PW2 and PW3 because they displayed inconsistencies and contradictions, the prosecution evidence value diminishes.

The accused DW1 in his defence testified that himself, his sister-in-law sold the deceased farm so that Magreth John could go back to

Shinyanga. DW1 further testified that he was told the proceed of sale of the farm have been paid to those who were assigned to kill the deceased. The police ordered the said money be returned. WEO received the money and returned to the person who purchased the farm. DW1 denied to have been involved in the killing of the deceased. DW2 testified that he was forced to admit the killing of the deceased. However, he insisted that he has not committed the alleged crime.

In the present case, I find some of the crucial witnesses were not summoned to testify at the trial. The prosecution did not summon crucial witnesses, Magreth John who was the wife of the deceased and Diana who was step daughter of the deceased who were alleged to hire and conspired with the accused persons in the killing of the deceased. Initially, these two persons were charged together with the accused persons herein, however, the prosecution discharged them. These two persons to my view, their evidence was so crucial to link the chain of circumstances. It was alleged that Magreth John was the one who paid the accused persons an advance payment for the killing of the deceased. Also, Diana who was alleged to participate fully in the killing. Also, the prosecution did not summon Bundala Kibululu who is alleged to host the deceased along with accused

persons in drinking liquor at his premises before the deceased met his untimely death in that night. This witness could testify to the court the persons who took the deceased in that night at his premise.

Thus, failure of the prosecution to summon some of these important witnesses would have prompted the trial court to draw adverse inference against them and the prosecution cannot take refuge under section 143 of the Evidence Act. As it was observed in the case **of Boniface Kundakira Tarimo vs Republic**, Criminal Appeal No. 350 of 2008, unreported the Court stated: -

*".....so, before invoking section 143 of the TEA regard must be heard to the facts of a particular case. If a party's case leaves reasonable gaps, it can only do so at its own risk in relying on the section. It is thus now settled that, where a witness who is in a better position to explain some missing links in the party's case, is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only a permissible one."*

In this case, I did my efforts to connect the chain of events so that I can draw an inference as to the guiltiness of the accused persons but my effort is in vain. The suggestions regarding the chain of events in this case by prosecution witnesses be unbroken stands far from the truth, I am not



in agreement with them. The inculpatory facts are compatible with the innocence of the accused persons and capable of explanation upon any other reasonable hypothesis than that of guilty.

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."*

In the final analysis, 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 persons with the offence stand charged.


In this case, there is no doubt that the deceased was assaulted unnoticed and his body was found with multiple cuts on the head as evidenced by exhibit P2 and elaborated by testimony of PW2 Medical Officer. The accused persons were the only persons suspected in the killing

of the deceased, but the testimonies by the prosecution was not strong enough to prove the case beyond reasonable doubt.

In the result, I depart from my esteemed ladies' assessors and gentleman assessor, and proceed to hold that the prosecution failed to prove this case against the accused persons beyond reasonable doubt. Henceforth, I find them not guilty and acquit them of the offence they stand charged, that is murder contrary to **section 196 of the Penal Code**. I now order that the accused persons, **SHIJA BUDEBA @NYANG'HANI** and **KULWA MAIGE @ MSOBI** be set at liberty unless otherwise lawfully held in connection with any other criminal offence.

It is so ordered.



  
**D.B. NDUNGURU**  
**JUDGE**  
**22/03/2022**