

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE DISTRICT REGISTRY OF KIGOMA)**

**AT KIGOMA**

**ORIGINAL JURISDICITON**

**CRIMINAL SESSION CASE NO. 23 OF 2021**

(Murder Case No. 03 of 2021 Kigoma District Court)

**REPUBLIC**

**VERSUS**

**OSCAR S/O CHRISTOPHER AND 4 OTHERS.....ACCUSED**

### **JUDGMENT**

21/3/2022 & 29/3/2022

**L.M. MLACHA J**

The accused Oscar Christopher, Maulid Said @ Bandiko, Abdallah Issa @ Ndimu, Juma Hamisi Yacob and Jovin Deo Mnyanungu are charged of murder contrary to section 196 and 197 of the Penal Code, Cap.16 R.E. 2019. It is alleged that they murdered Nuru Noel on 15<sup>th</sup> May, 2021 at Mwanga Center area within the district and region of Kigoma. They denied the charges. The prosecution called 11 witnesses and tendered 7 exhibits to assist them in discharging their burden of proof. The accused were the only defence witnesses. They had no witness to call. The evidence adduced by the prosecution may be presented as follows.



PW8 PC Henry Jonas Mnyeti (40) told the court that on 15/5/2021 morning hours, while on the way to work (marine police), he saw people looking at the road side. On coming close, he saw a dead body at the road side. He was man. His leg, hands and face were swollen. He had no shirt. He appeared to have been beaten. He had a dark blue trouser. He called afande Msangi, the Assistant OC-CID. Afande Msangi came with other police men who included PW7 Assistant Inspector Thomas Wilfred Mpinga (34). They picked the dead body and sent it to hospital. PW7 told the court that they moved to the area being lead by PW8. They saw the dead body laid at the bridge. It was on the side of the road leading to Mji Mwema. He had no shirt and was sleeping on his stomach. He was dressed in a dark blue jeans trouser. He had bruises on the hands and on the left side of the head. They picked the body and sent him to Hospital. He drew the Sketch map exhibit P4.

The body of the deceased was later identified by relatives, examined by Dr. Bongo of Maweni Referral Hospital and buried.

It was the evidence of PW1 Shemkiwa Lameck (29) on the night of 14/5/2021 down to 15/5/2021 while on duty at Marungu market, Mr. Ndimu (3<sup>rd</sup> accused) and Mr. Mateo (not in court) came to him. They told him that

the guy who lived with him (the late Nuru Noel) had done something wrong. They required him to accompany them to Mr. Oscar (1<sup>st</sup> accused). He left his workplace under the control of a neighbor watchman and moved with them to Mwanga center. It was around 5:00 A.M. On arrival at Mwanga center, he saw Nuru Noel on the ground. Jovin (5<sup>th</sup> accused) was beating him with a piece of pipe. Oscar (1<sup>st</sup> accused) had a piece of iron bar. They were beating him all over the body except the head. The area is shopping center with electric lights from both sides of the road. He could see them clearly. Oscar attacked him with a piece of iron bar on the face saying '*huyu anaweza kutuharibia*' (he pointed at the scar on his face below the eyes). Meanwhile Ndimu and Mateo proceeded to attack Nuru Noel. Jovin had a pipe but Ndimu had a piece of electric wire. Mateo tied Nuru Noel on the hand and legs. They beat him using electric wires. He was also beaten. It was now down. Oscar said that they should wait for the boss Mr. Maulid Said @ Bandiko (2<sup>nd</sup> accused) to come from the mosque. He came soon thereafter dressed in a white robe (Kanzu nyeupe). He directed them to be sent to the store. It was across the road. They entered them in the store which had iron scraps and won out batteries. Maulid removed the white robe and put on ordinary clothes. He picked a piece of pipe and attacked Nuru



Noel on the legs and hands. He attacked Shemkiwa also. Juma (4<sup>th</sup> accused) came and attacked them using electric wires. It was now near to 8:00 A.M. The condition of Mr. Nuru Noel turned bad. He asked for water but they did not give him. His right hand appeared to be broken. His left eye had water. His shirt was torn apart and left in the store. People came but could not enter. They were chased away. Jovin said he needed blood. He ate the blood of Nuru Joel (*alilamba damu*). He then beat Shemkiwa with a piece of wire and left. One Musa Bandiko came and said that it was enough. Mateo came with a piece of iron bar to attack them but Musa prevented him. They had a talk outside. Maulid gave a motorcycle and directed them to take Nuru Noel to his home place. Mateo came and removed the ropes. They took Nuru Noel to the motor cycle. He was already very weak. They took him home. Ndimu was the driver. The deceased was seated on the motor cycle held by Mateo. They tied his legs to the motorcycle for he was very weak. Maulid beat Shemkiwa on the leg and said '*Na wewe nenda kwenu*'. He went to Msufini Police post but could not get any assistance. He moved to Msufini Dispensary where he was treated. He was on tablets and treatment for some days.



On 24/5/2021 he went to check the whereabouts of Nuru Noel from his mother at the market. She was yet to see him. They checked with Ndimu who directed them to see Oscar. They moved to the police station where they were advised to go to Maweni Hospital. It was already dark and decided to go there on the next day. On 25/5/2021 they cross checked at Maweni hospital wards but could not get him. They cross checked at the mortuary where they were told that there was a dead body which had stayed for 9 days. It was about to be buried. They cross checked and discovered that it was Nuru Joel. He had no shirt and had turned black. He could identify him through the trousers. He could also see his broken hand. They moved back to the police station to report. They buried him on 26/5/2021 at Mji Mpya.

On 7/6/2021 he was called and moved to the store of the second accused. The door was broken. He showed the police the place where they had been beaten. They could get the shirt of the deceased and sulphate bags which had blood. They were picked by the police on a search warrant which he signed. He could identify the shirt, trouser, the six bags and the search warrant in court.

It was the evidence of PW11 ASP MENAS TEMBA from the office of the RCO Kigoma that he received a woman named Benadeta on 2/6/2021 who told

him that her child had been killed by known people but the OC-CID was inactive. He informed the RCO SSP Kasoro who ordered the file to be brought. He read the file and heard the woman. He recorded an additional statement. He moved to the store of Maulid which they broke and entered. They found six bags of scraps metals with blood and a torn out shirt with blood. He filled an emergency search warrant and picked them. PW3 Karume Shabani Karume (30), the street Executive Secretary, was present. He was called to witness the search. The door was broken in his presence. They entered inside together. PW1 Shemkiwa who was present showed the police the place where they were seated. He also saw the six bags of scraps metals with blood patches and the torn shirt which had blood. He signed on the search warrant.

PW11 tried to talk to neighbours on what had happened but they refused to give co-operation. But on turning to the back, he met Children who told him that they saw Semkiwa (PW1) and another guy being beaten inside the room (store). The children piped through window holes and could see what was happening inside. He recorded their statements which included the statement of PW2 Anjela Masumbuko (12). When PW2 was called to give evidence she said that on 15/5/2021 morning hours, while at home, she



heard sounds from the store saying '*Nisaidieni*'. They heard '*pu*' sound. She knew both Maulid and Shemkiwa for a long time. She lived on the rear house behind the store. They piped through the holes at the window. They saw a person being beaten by an iron pipe. The sounds came from Semkiwa.

It was the evidence of PW11 that he read again the statements of Benadeta, Ibrahim, Semkiwa and Dr. Bongo. He discovered that the deceased had wounds. His hand and leg were also broken but all these were not reflected in the report of the doctor. He doubted the medical report. He consulted the RCO. They decided to exhume the body for a second post mortem examination. He contacted the NPS who made an application to the district court to exhume the body. It was granted and they could get an exhumation order. He also contacted Benadeta who brought the trouser.

On 12/6/2021 PW11, PW1, PW4 Dr. Sundai and 2 government chemists from Dar Es Salaam moved to the grave yard to exhume the body. The body was exhumed. Samples were picked. They were stored at the police exhibit room shortly before being taken to Dar es Salaam. The chemist could also cut parts of the six salphate bags which had blood. All were taken to Dar es Salaam. They were later returned to the store before being brought to court.



PW4 Dr. Frank Martin Sundai confirmed that he moved to the grave yard on 12/6/2021 in the company of PW11 and two government chemists for purposes of taking samples and conducting a postmortem examination. The body of the deceased was exhumed. He examined the body from the head to the legs. It had started to decompose. It had changed colour to black. The stomach was full of gas. He could not detect anything from the external features. He cut to check the bones of the hands and legs. He detected the following. There was a fracture of the right leg at the bottom. The bone joining right hand (clavicle) and the bone at the joint of the right leg (Patella) were broken. He could not assess the eyes because they had already decomposed. He picked samples for the chemist; nails from the left leg, some flesh at the bottom of the leg (Kisigino) and hair with its flesh from the head. He also picked flesh samples from the right leg and hand. He tendered the postmortem examination report, exhibit P1. He had the opinion that death was caused by respiratory and heart failure due to bleeding caused by breaking of bones. He added that breaking of the bones was caused by beating using a blunt object.

PW10 Ali Omari Kanenda (29) a chemist from the chief government chemist Laboratory Dar es Salaam told the court that he and Faraja Omari Mohamed





arrived in Kigoma on 12/6/2021 to pick samples from the deceased. They were received by PW11 Inspector Temba. They picked PW4 Dr. Sundai and moved to the grave yard. The grave was identified by relatives and it was opened. The body was exhumed. It was identified to be the body of Nuru Noel. The doctor picked samples and gave them to him. These were flesh from the leg near the foot, a piece of flesh with hairs from the head, flesh from the left hand and leg and two nails from the left leg. He received them from the doctor. He and PW11 returned to the police station at the exhibit room. PW11 showed him a shirt, trouser and six bags. They had blood. He picked samples. The samples were marked A1 to A8 and D1 to D4. A1 was a torn-out shirt with blood. It was believed to belong to the deceased. A2 to A7 were samples of cuts from the bags which had blood. A8 is the trouser of the deceased which had blood. D1 to D4 were samples from the dead body. He added that he is the one who cut the samples from the bags. He could identify the bags in court. He handled samples (A1 to A7 and D1 to D4) to PW5 Leonidas Daniel Michael (31) at the office of the chief government chemist Dar es salaam.

PW5 received the samples with a covering letter calling for DNA test. He gave them lab Number 1808/2021. He checked whether they contained

human flesh and human blood. He found that they contained human flesh and human blood. He established the DNA profile of each sample and moved to answer the questions in PF180. He prepared his report (Exhibit P2). He could identify the shirt, trouser and the cut samples A2 to A7. He added that the flesh and skin were destroyed in the laboratory as per the rules.

The report which was read in court showed similarities between the samples taken from the body of the deceased (D1 to D4) and those found in the trouser, shirt and the six bags (A1 to A8) meaning that the blood found in the bags and the clothes is none but the blood of Nuru Noel, the deceased.

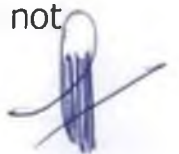
PW9 A/Inspector Moka Charles (37) was the exhibit keeper at the Central Police Station in 2021. On 7/6/2021 during the evening, he received exhibits from PW11. They were in connection with KIG/CID/SUDR/12/2021, six sulphate bags with scraps metals. They had blood patches believed to be the blood of human beings. There were also two locks (Kufuli) shengl type and a torn shirt, which had blood. He entered them in the exhibit book and gave them entry number 136 of 2021. The book is called PF16, Court Exhibit Register. He went on to say that on 9/6/2021 during the evening, PW11 came with other exhibits. He had a blue boxer (underpants) and a blue jeans trouser which had blood patches believed to be the blood of a human



being. He received and recorded them with reference 140 of 2021. On 12/6/2021 during the evening, PW11 came with a government chemist who took samples from the six bags. He cut pieces from places which had blood. He put them in an envelope and left. He returned with PW11 on 14/6/2021 to pick the samples. He took the shirt, trouser, the samples from the six bags and the samples from the body of the deceased. He could identify the six bags which he tendered in evidence (exhibit P5 collectively). He could identify the cut holes. He could also identified the shirt and trouser.


PW6 John Kamilius Chamafwa (48) told the court that he rented the store to Maulid, the second accused, from 1/1/2014 to date. He deals with scraps metals and the making of iron beds. He could identify him in court.

It was the defence of DW1 Oscar Christopher (40) that he worked for Mr. Maulid, the second accused a was a watchman. He guarded two premises which are separated by a road. One of the frames is the store. He also worked during the day assisting Mr. Maulid in the purchase of scraps metals. On 14/5/2021 while at his work place on the shops at Mwanga Community Center, during the night at 2:00 A.M., he heard something like a hammer beating the wall on the rear side. He moved to the area and saw 4 people. He raised an alarm which attracted many people. They moved but could not



get the thieves. On cross checking, he discovered it was just a crack on the wall. There was no theft. He waited till 6:00 A.M. and notified his boss who promised to come later. He came and business went as usual. He proceeded to work from 15/5/2021 up to 1/6/2021 without any problem. The police called him on 1/6/2021 and informed him that he was accused of murder of Nuru Noel. He denied. He went on to say that he knew Shemkiwa who was an employee of Maulid. He also knew Nuru Noel, the deceased, who was just a street boy. He requested the court to find him not guilty and set him free.

DW2 Maulid Saidi Bandiko told the court that the first accused is his night watchman. He also assisted him to buy scraps at the store during the day. He agreed to have a business of buying and selling scraps metals. He knows Abdallah Issa @ Ndimu who is the watchman for his brother Musa Saidi Bandiko. He also knows the 4<sup>th</sup> accused who is his employee. He designs and makes gates and iron beds. He denied to know the 5<sup>th</sup> accused. He has 3 frames on the right-hand side and 2 frames on the left-hand side of the road at Mwanga center. He comes there at around 8:00 A.M. and leaves at 6:00 P.M. daily. He goes to the mosque after work.



DW2 went on to say that on the night of 14/5/2021 down to 15/5/2021 he slept with his junior wife at Mlole, Block 'C' North Mwanga. He got a call from Oscar at around 6:00 A.M. who said that there was a problem at his business which resulted into a crake at the wall. He told him that he could come after passing at the mosque because there was no theft. He came later and proceeded with his activities up to 1/6/2021 when he received a call from the OC-CID who requested him to come with Oscar and Juma Hamisi Yacob at the police station. They moved to the police station. They were put under arrest accused of murder. He agreed to know Mr. Shemkiwa Lameck who was one of his employees. He left the job because he was a drunkard and a petty thief (mdokozi). He denied meeting them beating him. He saw him on 1/6/2021 not earlier. He denied that the shirt was found in his store. . He denied to kill Nuru Noel. He argued the court to set him free.

DW3 Abdallah Issa Shabani told the court that he was an employee (watchman) for Mr. Musa Saidi Bandiko before his arrest. He knows Oscar (1<sup>st</sup> accused) and Juma (4<sup>th</sup> accused) who are employee of Maulid Bandiko (2<sup>nd</sup> accused). He denied to know the 5<sup>th</sup> accused and Mr. Mateo. He knew Shemkiwa Lameck who was an employee of Maulid Bandiko. He denied knowing Nuru Noel, the deceased. He proceeded to say that on 15/5/2021



while on duty he heard an alarm "Mwizi". He could not hear properly for it was night and far. He could not move for he was alone at his work place. He remained there up to 8:00 A.M. when his boss came. He went home. He denied being involved in the killing of the deceased. He denied tying the deceased on a motor cycle. He went on to say that he was arrested on 4/6/2021 and sent to the central police. He was informed that he was accused of murder. He denied the charges. He asked the court to set him free.

DW4 Juma Hamisi Yakubu told the court that he is a welder. He worked at the business of Maulid. He know all the accused persons except the 5<sup>th</sup> accused. On the night 15/5/2021 he slept at home. He came at his workplace at around 8:00 A.M. and met his boys. He also saw Oscar and Maulid. He proceeded with work up to the evening and went home. He was not arrested up to 1/6/2021 when he and his boss were called at the police station. He asked the court to set him free.

DW5 Jovin Deo Mnyanungu told the court that he is a business cyclist (bodaboda). He knew Maulid Bandiko who deal with scraps metals before the arrest. He never knew the rest of the accused whom he met at the police station. He was arrested on 5/6/2021. He denied participating in

beating Shemkiwa and Nuru Noel. He used to see Shemkiwa there but he did not know Nuru Noel. He denied beating Nuru and sending him home with a bodaboda. He denied knowing anything about the death of Nuru Noel. He denied eating blood. He requested the court to set him free.

I sat with three assessors. One of them fell sick and could not be available to give her opinion. The remaining two assessors had the opinion that there was nobody who saw the accused killing and dumping him at the road side. They could not believe PW1 Semkiwa Lameck because he happened to share a room with Nuru Noel in past. He was also a former employee of the second accused who had lost his job. They could not believe PW2 also. They were also of the view that the evidence of the prosecution is contradictory. They had the opinion that there was no good evidence to convict the accused. They found the accused not guilty of murder and acquitted them.

I had ample time to hear the witnesses. I have read the records closely. I have also gone through the relevant law. I will start with the relevant law and principles laid in case law.

The offence of murder is established by section 196 of the Penal Code. Its punishment is contained in section 197 of the code. Murder is killing with



malice afore thought (section 200 of the Penal Code). Malice aforethought is otherwise known as the intension to kill. Malice can be seen by evidence showing the intension to kill or cause grievous harm to the deceased. Usually the attacker will not say that he intends to kill. The intension to kill is picked from the circumstances under which the crime was committed. The court will look at the weapon used and the place where it was applied, the words spoken by the accused (if any) in the course of committing the crime or thereafter, the conduct of the accused during the commission of the crime or after, to know if the accused intended to kill or not. See **Enock Kipela v Republic**, CAT criminal Appeal No. 150 of 1994 and **Mark Kasimiri v Republic**, CAT Criminal Appeal No. 39 of 2017 to mention a few. We will have to see if there is evidence showing that the accused are the ones who killed the deceased and if so, whether they killed him with malice afore thought.

The accused are charged jointly and together. They are alleged to act together in a joint enterprise and kill the deceased. We will have to see whether there was a common intention to commit the crime. Common intention to commit a crime is regulated by section 23 of the Penal Code. In **Elizabeth Elias @ Bella v R** CAT Criminal Appeal No. 293 of 2015 it was





held that under section 23 of the penal Code where there is common intention each of the person who formed such intension in effecting an unlawful purpose is deemed to have committed the offence. To constitute a common intension to prosecute an unlawful purpose e.g. to beat as alleged in this case, it is not necessary to have an agreement between the accused prior to the attack. Their common intention may be inferred from their presence, their actions and crission of any of them to dissociate himself from the assault. See **R v Tabulayenko Kirya and others** (1943) 10 E.A.C.A 51. The court further said that a person who gave comfort, encouragement and approval of the tortures can be held to have caused the death of the deceased. In **Mathias Mhyeni & another v R** (1980) TLR 290 (CAT) it was held that where a person is killed in the prosecution of a common unlawful purpose and the death was a probable consequence, each party to the killing is guilty of murder. See also **John Stephen and another v R** CAT Criminal Appeal No.292 of 2013 and **Richard Ndege v R** CAT Criminal Appeal No. 11 of 1979.

Evidence may be direct or circumstantial. Direct evidence is the evidence of a witness who says that he saw the accused committing the crime. This is the best evidence and can be used to convict a person if believed by the



court. Circumstantial evidence is evidence picked from the circumstances of committing the crime. Simply put, these are circumstances in the form of evidence which enable a court to reasonably infer or conclude the existence or non-existence of a fact in issue or the guilt of an accused person. In order to justify conviction on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused. See **Makame Junedi Mwinyi v. Serikali Ya Mapinduzi Zanzibar (Smz)** [2000] TLR 455. It is a situation where there is no direct evidence but the circumstance point to a certain person or persons. It can be the basis of a conviction but the court must be satisfied that the evidence points to the accused person and nobody else. See also **Republic v Kerstin Cameron** [2003] TLR 84 and **Lly Bakari & Pili Bakari v Republic** [1992] TLR 10 (CA).

In our case we have both direct evidence (PW1 and PW2) and circumstantial evidence (the rest of the witnesses, exhibits and the DNA evidence). We will have to see if the evidence can be used as to be the basis of a conviction.

Human DNA is defined by section 3 of the Human DNA Regulation Act 2009 to me Deoxyribonucleic Acid which is the genetic material present in the



Nucleus of the cells and mitochondria, which is inherited half from each biological parent. It is unique to an individual (barring twins) and can be used to identify a person's identity, trace familiar linkages or even reveal sensitive health information See **Ashok Kumar v. Raj Gupta & others**, Civil Appeal No. 6153 of 2021 Supreme Court of India.

It is sometimes called genetic blue print because it contains all instructions that determine an individual's genetic characteristics. It is found everywhere but the obvious places are the blood, semen, saliva, hair, skin, bones etc. See **Dharam Deo Yadav v State of U.P.** Criminal Appeal No.369 of 2006, Supreme Court of India.

In **Joseph Lugata v. R**, CAT Criminal Appeal No. 317 of 2009 (unreported) it was stated that Deoxyribonucleic Acid or DNA consists of long ribbon like molecules, the chromosomes, 46 tightly lie and coiled in nearly every cell of the body. These chromosomes – 23 provided from the mother and 23 from the father at conception, form the genetic blue print of the body. Different sections of the DNA have different identifiable and discrete characteristics. The Court of Appeal went on to say as under.

*'when a criminal leaves a stain of blood or semen at the scene of the crime it may prove possible to extract from that crime stain*

*sufficient sections of the DNA to enable a comparison to be made in the same sections extracted from a sample of blood provided by the suspect'.*

We will have to find out if the DNA evidence adduced by PW11, PW5, PW10 and exhibits P4 and P6 (collectively) can be used as a basis of a conviction.

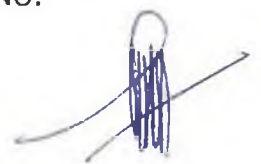
Speaking of the doctrine of recent possession the Court of Appeal had this to say in **Akili Chaniva v. R**, Criminal Appeal No. 156 of 2017 pages 9-10:

*'... the fact that after the death of the deceased the appellant was found in possession of the deceased property, without any proof of his ownership and his failure to give plausible account of the motorcycle, are clear incriminating circumstances which lead to an irresistible inference that the appellant was a party to the murder of the deceased'.*

Similar observations were made by the Court of Appeal in **Godfrey Lucas v. R** Criminal Appeal No. 23 of 2013 where it was held thus:

*'... where a person is found in possession of property recently obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained'*

See also **Mriko Gisengi Romara, Richard Nyambati @ Mombi Magari and Mwita Machaga Mwita v. R**, CAT Criminal Appeal No.



2013 of 2012 (unreported) for similar observations. We will have to find out if the existence of the shirt and sulphate bags with blood in the store of the second accused is good evidence to connect him and the other accused persons in the commission of the crime.

The evidence of visual identification is evidence of the weakest kind and most unreliable. Courts are advised to ensure that all chances of mistaken identity are eliminated. The court must be satisfied that the evidence before it is water tight and shows that the witness identified the accused properly. See **Waziri Amani v. R**, [1980] TLR 250, **Roria v. R** [1967] EACA, **R. v. Turnbull** [1977] QB 224, **Mburu and another v. R**, [2008] 1 KLR 1229 and **Raymond Francis v. R**, [1994] TLR 100 at page 103. In **Raymond Francis** it was stated that where determination depends essentially on identification, evidence on conditions favouring identification is of the utmost importance. More emphasis was added by the Court of Appeal in **Jaribu Abdalah v. R**, CAT Criminal Appeal No. 220 of 1994 where it was said that it is not enough merely to look at factors favouring accurate identification but it is equally important to look at the credibility of witnesses. We will have to find out whether the accused were properly identified by PW1 and PW2 and if so, whether the witnesses are credible.



And finally, chain of custody of exhibits. An examination of this area is important because we have exhibits which were picked from the grave and sent to Dar es salaam for DNA test. By "chain of custody" we have in mind the chronological documentation and or paper trail showing the seizure, custody, control, transfer analysis and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody, it is stressed, is to establish whether the alleged evidence is in fact related to the alleged crime or it was planted fraudulently to make someone appear guilty. See **PAULO MADUKA AND FOUR OTHERS VS R.** (CAT) Criminal Appeal No. 110 of 2007 pages 17-18. The underlying principle was laid down in the recent case of **CHACHA JEREMIAH MURIMI AND 3 OTHERS VS R.** (CAT), Criminal Appeal No. 551 Of 2015 where it was said thus:

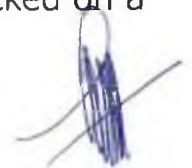
*"However, documentation will not be the only requirement in dealing with exhibits. An exhibit will not fail the test merely because there was no documentation. Other factors have to be looked at depending on the prevailing circumstances in every particular case. For instance, in cases relating to items which cannot change hands easily and therefore not easy to tamper with, the principle laid down in **Paulo Maduka** (supra) would be **relaxed***



So the court must be satisfied that the exhibits were properly handled to avoid any frauds in between. We will have to see if the samples were properly handled.

Going through the evidence, one will find that the following facts are not disputed. **One**, that Nuru Noel did not die of any disease known by doctors. His life was terminated by force. He was killed by some people and thrown at the road side. **Two**, most of the accused know both Nuru Noel and PW1 Shemkiwa Lameck. All of them said that they knew Shemkiwa Lameck who worked at the store of Mr. Maulid, the second accused. **Three**, that the store is owned by Mr. Maulid the second accused who was the employer of the first and fourth accused who worked there under different capacities. **Four**, that the first accused who was the watchman of the store and was on duty on the night of 14<sup>th</sup> May 2021. **Five**, that, the second accused dealt with scraps metal at the store. He was assisted by the first accused who worked as his assistant during the day and a watchman during the night.

The evidence from the prosecution shows that the deceased was beaten at the road side and later moved to the store where he was heavily beaten before he was picked and dumped at the road side. He was picked on a



motor cycle driven by Ndimu, the third accused and Mateo (not in court). He could not be sent home as directed by second accused. He was thrown at the road side at Bangwe. He was picked by the police who sent him to Maweni hospital. He stayed there from 15/5/2021 upto 26/5/2021 (11 days). He was examined by Dr. Bongo and released for burial. He was exhumed on the 12/6/2022 (17 days later). A second postmortem examination was done by PW4 Dr. Sundai who said that the body had started to decompose. It had changed colour to black. He could not detect anything from the external features. He cut to check the bones of the hands and legs and detected that there was a fracture of the right leg at the bottom. The bone joining the right hand (clavicle) and the bone at the joint of the right leg (Patella) were broken.

Dr. Sundai assisted the chemists to pick the samples for DNA test. The evidence showed the way the samples were picked from the grave and kept at the police exhibit room. It also shows the way the samples were picked from the sulphate bags. All the samples were kept at the exhibit room shortly before being taken to the chief government chemist where they were received, given a lab number and analyzed. A report was prepared and later brought and tendered in court as an exhibit. The





samples (except those picked from the body of the deceased) were later tendered in court as exhibit. Looking at the way the exhibits were handled I could not find any possibility of tempering in between. There was a good chain of custody.

The DNA report, exhibit P4 provides in part as under;

### **3.0 TAFSIRI YA MATOKEO**

3.1 .....

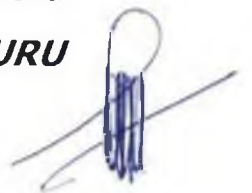
#### **3.2 Ulinganisho wa mpangilio wa vinasaba:**

- a.** Kielelezo '**A1**' (Shati rangi ya blue linalodhaniwa kuwa na damu ya marehemu **NURU S/O NOEL** lililokuwa eneo la tukio) kimedhihirisha kuwa na mahusiano ya mpangilio wa vinasaba na Kielelezo '**B1**' (Sampuli ya kipande cha nyama ya kisigino cha mguu wa kushoto wa marehemu **NURU S/O NOEL**) '**B2**' (Sampuli ya kipande cha nyama ya kichwa yenye nywele ya marehemu **NURU S/O NOEL**), '**B3**' (Sampuli ya kipande cha nyama ya mkono wa kulia na mguu wa kulia wa marehemu **NURU S/O NOEL**) na '**B4**' (Sampuli ya kucha mbili za mguu wa kushoto wa marehemu **NURU S/O NOEL**).
- b.** Kielelezo '**A2**' (Sampuli ya kipande cha mfuko unaodhaniwa kuwa na damu ya marehemu **NURU S/O NOEL**) kilichokatwa kwenye mfuko wa ngano wa Azam uliokutwa eneo la tukio ndani yake kuna vyuma chakavu) kimedhihirisha kuwa na mahusiano ya

*mpangilio wa vinasaba na Vielelezo 'B1' (Sampuli ya kipande cha nyama cha kisigino cha mguu wa kushoto wa marehemu **NURU S/O NOEL**), 'B2' (Sampuli ya kipande cha nyama ya kichwa yenye nywele ya marehemu **NURU S/O NOEL**), 'B3' (Sampuli ya kipande cha nyama ya mkono wa kulia na mguu wa kulia wa marehemu **NURU S/O NOEL**) na 'B4' (Sampuli ya kucha mbili za mguu wa kushoto wa marehemu **NURU S/O NOEL**).*

*c. Kielelezo 'A3' (Sampuli ya kipande cha mfuko unaodhaniwa kuwa na damu ya marehemu **NURU S/O NOEL**) kilichokatwa kwenye mfuko wa SIMBA CEMENT uliokutwa eneo la tukio ndani yake kuna vyuma chakavu) kimedhihirisha kuwa na mahusiano ya mpangilio wa vinasaba na Vielelezo 'B1' (Sampuli ya kipande cha nyama ya kisigino cha mguu wa kushoto wa marehemu **NURU S/O NOEL**, 'B2' (Sampuli ya kipande cha nyama ya kichwa yenye nywele ya marehemu **NURU S/O NOEL**), 'B3' (Sampuli ya kipande cha nyama ya mkono wa kulia na mguu wa kulia wa marehemu **NURU S/O NOEL**) na 'B4' (Sampuli ya kucha mbili za mguu wa kushoto wa marehemu **NURU S/O NOEL**).*

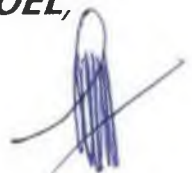
*d. Kielelezo 'A4' (Sampuli ya kipande cha mfuko unaodhaniwa kuwa na damu ya marehemu **NURU S/O NOEL**) kilichokatwa kwenye mfuko wa TWIGA CEMENT uliokatwa eneo la tukio ndani yake kuna vyuma chakavu) kimedhihirisha kuwa na mahusiano ya mpangilio wa vinasaba na Vielelezo 'B1' (Sampuli ya kipande cha nyama ya kisigino cha mguu wa kushoto wa marehemu **NURU***



**S/O NOEL**). **'B2'** (Sampuli ya kipande cha nyama ya kichwa yenye nywele ya marehemu **NURU S/O NOEL**). **'B3'** (Sampuli ya kipande cha nyama ya mkono wa kulia na mguu wa kulia wa marehemu **NURU S/O NOEL**) NA **'B4'** (Sampuli ya kucha mbili za mguu wa kushoto wa marehemu **NURU S/O NOEL**).

**e.** Kielelezo **'A5'** (Sampuli ya kipande cha mfuko unaodhaniwa kuwa na damu ya marehemu **NURU S/O NOEL** kilichokatwa kwenye mfuko wa **SIMBA CEMENT** uliokutwa eneo la tukio ndani yake kuna vyuma chakavu) kimedhihirisha kuwa na mahusiano ya mpangilio wa vinasaba na Vielelezo **'B1'** (Sampuli ya kipande cha nyama ya kisigino cha mguu wa kushoto wa marehemu **NURU S/O NOEL**), **'B2'** (Sampuli cha kipande cha nyama ya kichwa yenye nywele ya marehemu **NURU S/O NOEL**), **'B3'** (Sampuli ya kipande cha nyama ya mkono wa kulia na mguu wa kulia wa marehemu **NURU S/O NOEL**) na **'B4'** (Sampuli ya kucha mbili za mguu wa kushoto wa marehemu **NURU S/O NOEL**).

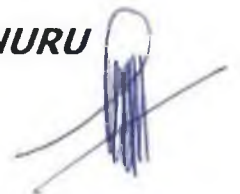
**f.** Kielelezo **'A6'** (Sampuli ya kipande cha mfuko unaodhaniwa kuwa na damu ya marehemu **NURU S/O NOEL** kilichokatwa kwenye mfuko wa **BUGURUNI SEMBE** uliokutwa eneo la tukio ndani yake kuna vyuma chakavu) kimedhihirisha kuwa na mahusiano ya mpangilio wa vinasaba na Vielelezo **'B1'** (Sampuli ya kipande cha nyama ya kisigino cha mguu wa kushoto wa marehemu **NURU S/O NOEL**), **'B2'** (Sampuli ya kipande cha nyama ya kichwa yenye nywele ya marehemu **NURU S/O NOEL**,



**'B3'** (Sampuli ya kipande cha nyama ya mkono wa kulia na mguu wa kulia wa marehemu **NURU S/O NOEL**) na **'B4'** (Sampuli ya kucha mbili za mguu wa kushoto wa marehemu **NURU S/O NOEL**).

**g.** Kielelezo **'A7'** (Sampuli ya kipande cha mfuko unaodhaniwa kuwa na damu ya marehemu **NURU S/O NOEL** kilichokatwa kwenye mfuko wa unga wa sembe uliokutwa eneo la tukio ndani yake kuna vyuma chakavu) kimedhihirisha kuwa na mahusiano ya mpangilio wa vinasaba na Vielelezo **'B1'** (Sampuli ya kipande cha nyama ya kisigino cha mguu wa kushoto wa marehemu **NURU S/O NOEL**, **'B2'** (Sampuli ya kipande cha nyama ya kichwa yenye nywele ya marehemu **NURU S/O NOEL**), **'B3'** (Sampuli ya kipande cha nyama ya mkono wa kulia na mguu wa kulia wa marehemu **NURU S/O NOEL**) na **'B4'** (Sampuli ya kucha mbili za mguu wa kushoto wa marehemu **NURU S/O NOEL**).

**h.** Kielelezo **'A8'** (Suruali ya marehemu **NURU S/O NOEL** yenye matone yadhaniwayo kuwa ni damu ya **NURU S/O NOEL**) kimedhihirisha kuwa na mahusiano ya mpangilio wa vinasaba na Vielelezo **'B1'** (Sampuli ya kipande cha nyama ya kisigino cha mguu wa kushoto wa marehemu **NURU S/O NOEL**, **'B2'** (Sampuli ya kipande cha nyama ya kichwa yenye nywele ya marehemu **NURU S/O NOEL**), **'B3'** (Sampuli ya kipande cha nyama ya mkono wa kulia na mguu wa kulia wa marehemu **NURU**



***S/O NOEL) na 'B4' (Sampuli ya kucha mbili za nguu wa kushoto wa marehemu NURU S/O NOEL)."***

The results indicate that there is a relation between the body in the grave and blood samples picked from the shirt and sulphate bags in the store, meaning that, the blood in the shirt and sulphate bags belonged to the deceased, Nuru Noel. It is also a proof that the shirt belonged to the deceased, Nuru Noel giving link to those who are alleged to beat him who are the accused persons. The two government chemists appeared professional. I could not doubt their evidence and the report.

I will now move to examine the central question, who killed Nuru Noel and send him to bangwe at the road side? The accused do not deny that Nuru Noel was heavily beaten, picked by a motor cycle and thrown at the road side. They don't deny that he had his hand clavicle, leg patella and right leg at the bottom broken. They don't deny that death was a result of the fracture of the bones and internal bleeding leading to heart and respiratory failure. Their defence is that they are not the ones who did it. They denied to have come across him on the night of 14/5/2021 and morning of 15/5/2021. They denied to beat him as alleged. They also denied knowledge of the existence of the matter. They all said that they



proceeded with their work peacefully without any knowledge of the crime up to 1/6/2021 where they were called by the OC-CID. The second accused denied further that the shirt and the sulphate bags were not found in his store.

This takes us to credibility of witnesses. Looking carefully, I could not doubt the credibility of PW1 Shemkiwa Lameck. He spoke with a lot of pains with his scar on the face. He appeared credible. He gave a clear account of what happened that night and in the morning. He said the way he was picked from his work place and sent to Mwanga center. He was picked by Mateo and Ndimu, the 3<sup>rd</sup> accused. On arrival he saw the deceased being beaten by a pipe and iron bar. He was also attacked by an iron bar on his face. He could show the scar on his face bellow the eyes, a permanent scar. They were later sent to the store where they were beaten again. The 2<sup>nd</sup> and 4<sup>th</sup> accused came later but beat them also. The 5<sup>th</sup> accused beat them and ate the blood of Nuru Joel. They were beaten together but the deceased was beaten more. They were beaten outside and later taken inside the store. They were beaten from 5:00 AM up to 8:00 AM which is a long time. There was electricity and

sun light. They were also at a close range. He knew the accused well before the date of crime. I could not doubt his account.

I could not doubt the credibility of PW11 ASP Menas Temba on the way the shirt and the sulphate bags were seized from the store. That also applied to PW3 Karume Shabani, the street secretary and PW1. They all said clearly that given the emergency and resistance from the person who was present at the store, the door was broken and upon entry, they found the shirt and the sulphate bags with blood. In the like manner I could not doubt the credibility of PW2 Anjela Masumbuko. She was young but firm. She appeared credible. I could not doubt her evidence. To the contrary the demeanour of the accused left much to be desired. They did not impress me.

I think that given the close range, the time taken (3) hours, the existence of electricity lights and later sun light and the fact that PW1 knew the accused well in advance, there was no possibility of mistaken identification. PW1 identified the accused properly.

PW2 did not say that she identified any of the accused. What she said is that she heard PW1 crying from the store. She knew his voice very well

because he worked at the store near their home. She checked through a hole at the window and saw him being beaten. He was with another. Her evidence is relevant to corroborate the evidence of PW1 that they were sent to the store and beaten. The evidence of PW1 and PW2 is direct and can sustain a conviction.

PW1 said that the accused had a brief discussion outside the store. On return, Maulid ordered Nuru to be sent home. When he cross checked with his mother after recovery from the beatings, he was told that Nuru Noel was nowhere to be found. Nuru Noel was found at Bangwe on the road side at the bridge without a shirt. PW1 learnt this fact later. His shirt was later found in the store of the 2<sup>nd</sup> accused.

Apart from the fact that there was nobody saw Nuru Noel being thrown at the road side but the fact that the accused had a discussion on what to do and the fact that the second accused was heard directing him to be sent home through a motor cycle driven by the 3<sup>rd</sup> accused (Ndimu) and later found at the road side at Bangwe, show that the deceased was thrown at the road side on a plan of the accused persons. It was their plan after noting that he was dead. The existence of the shirt and six





bags which had blood of the deceased at the store, proves the matter further. They give a clear link.

The evidence of the existence of the shirt and the six sulphate bags at the store of the second accused and the DNA evidence bring a strong circumstantial evidence against the first, second and fourth accused who worked there. The evidence of PW1 and PW2 give the connection to the rest of the accused. It is also clear that they acted together. The evidence of PW1 and PW2 show that they had a common intension to cause grievous harm to Nuru Noel for reasons best known to themselves whom they decided to damp at the road side after finding that he was dead. This evidence suggest that they planned to create a fake picture of an accident to cover up the matter. It is a conduct which reflect full malice necessary to prove the crime of murder.

That said, with much respect to the assessors, I find that the prosecution have proved their case beyond reasonable doubt. I find the accused guilty of murder contrary to section 196 and 197 of the Penal Code Cap. 16 R.E.2019 as charged and convict them accordingly





A handwritten signature in blue ink, appearing to be 'L.M. Mlacha'.

**L.M. Mlacha**

**Judge**

**29/3/2022**

### **SENTENCE**

There is only one sentence for Murder which is Death by Hanging. I personally do not want this sentence but my hands are tied.

I sentence you the said OSCAR CHRISTOPHER, MAULID SAID @ BANDIKO, ABDALLAH ISSA @ NDIMU, JUMA HAMISI YACOB AND JOVIN DEO MNYANUNGU to suffer death by hanging.



A handwritten signature in blue ink, identical to the one above.

**L.M. Mlacha**

**Judge**

**29/3/2022**