

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MWANZA SUB-T REGISTRY)
AT CHATO**

(ORIGINAL JURISDICTION)

CRIMINAL SESSION CASE NO. 144 OF 2019

THE REPUBLIC.....PROSECUTOR

VERSUS

1. LAMECK S/O SAMSON.....1ST ACCUSED

2. REUBEN S/O MAKANIKA.....2ND ACCUSED

JUDGMENT

Date of Last Order: 01.03.2023

Date of Judgment: 06.03.2023

M. MNYUKWA, J.

The accused persons, Lameck s/o Samson and Reuben s/o Mekanika stand charged with the offence of murder contrary to sections 196 and 197 of the Penal Code, Cap. 16 [RE: 2019] now [RE: 2022]. The prosecution alleged that on the 5th May 2018 at around 21.00 hrs at Rumasa Village in Chato District and Geita Region, the accused persons Lameck s/o Samson and Reuben s/o Mekanika did murder one Dotto s/o Nturu. Both accused persons denied the charge and hence the full trial



involve the calling of six (6) prosecution witnesses and two for the defence. The prosecution also tendered three documentary exhibits that were admitted during the hearing of the case.

During the trial, the prosecution side, thus the Republic was represented by Mr. Clemence Mango, learned State Attorney while Mr. Costantine Ramadhan, learned Advocate represented the 1st accused person and Mr. Innocent Kaijage represented the 2nd accused person.

I thank the counsels for their time and efforts in the finalization of this case. In this case, the death of the deceased was among the undisputed matters which was agreed upon and the postmortem report was admitted as exhibit P1 whereas PW1 a medical doctor sufficiently proved that Dotto s/o Ntururu died and his death was due to *head injury and acute haemorrhage due to trauma*.

To prove their case against the two accused persons, the prosecution lined up a total of 6 witnesses who are Halifa Mshana (PW1), G205 D/ Coplo Amos (PW2), F2513 D/ Surgent Nimludi (PW3), Ernest Mbalamwezi (PW4), Washa Kanila (PW5) and G206 D/Coplo Matete (PW6).



Halifa Mshana (PW1) testified that he is a medical doctor who works at Chato District Hospital from May 2015 to date. He testified further that on 05.05.2018 he was at his working station and was assigned a duty to examine a body of a deceased, male person approximately the age of 40-44. He went to Lutengo Rumasa in Kasaka reserve forest, in the scene of crime and investigated the body of the deceased and observed that the death had occurred within 24 hours and it has multiple wounds inflicted by a sharp object and there was a big wound on the right side of the head and the skull was fractured. He was informed that the dead person was called Dotto s/o Ntururu. It was his findings that the death was a result of loss of blood and a fractured skull. He filled the Postmortem examination report (PMR) which he was able to identify it before this court and prays the PMR to be admitted as an exhibit. The defence did not object and the PMR was admitted as exhibit P1.

When cross-examined, PW1 testified further that he went to the scene of crime around 8.00 am and examined the body of the deceased on 06.05.2018 accompanied by police officers. He testified further that after filling the report he wrote his statement at the police station on 08.05.2018.



PW2 G205 CPL Amos, an adult 39 years and a police officer, christian sworn and testified that, he is a police officer working with Chato police station for 13 years. He testified that, on 06.05.2018 he was at Buseresere police station and was informed by OCS one Isp. Witibu on the murder incidence and ordered him and other police officers to go to the scene of crime at Biharamuro forest reserve. When they reached to the scene of crime, they found the dead body in the bush. He was given a task to draw a sketch map and was led by the 1st accused person, Mr. Lameck Samson, and the wife of the deceased, Solome. He drew the sketch map and the accused signed. PW2 identified the sketch map and prays the same to be admitted as an exhibit before the court whereas the defence objected and after the court inquiry, the sketch map was admitted as exhibit P2.

When cross-examined PW2 testified further that, the 1st accused person was arrested on 06.05.2018 and was brought to the police station at around 9.00 hrs and he did not know about the 2nd accused person and that they were accompanied by the 1st accused to the scene of crime, they reached at around 10.00 am. As per exhibit P2, it shows that the sketch map was drawn at around 8.00 am. He testified further that, no formalities governing the drawing and signing of the sketch map. He named Nimludi



as a person who was with him when drawing the sketch map and he denied knowing Washa. He testified that there were people at the scene of crime who had already discovered where the body of the deceased was located, the 1st accused went direct to the bush where the body was hidden. He stated that the accused and Salome @Salu led him in the drawing of the sketch map and the accused told him that he does not know how to read and write and he did not indicate or testify that he read the contents of the sketch map to the accused before he signed. He stated that he knew the name of the deceased through his wife Salome who was at the scene of crime.

When he was further cross examined, PW2 stated that, the accused was arrested on 6/5/2018 around 9.00 in the morning and he insisted that, when they reached to the scene, the 1st accused led them to the place where the body of the deceased was hidden. He said that, in the scene of crime people were gathered alongside the place where the body of the deceased was, but they went with the 1st accused as part of the investigation since he was ready to show them where the body of the deceased was hidden.

PW3 F2513 D/ Surgent Nimludi, a police officer Christian sworn in and states that, he is a police officer working at Chato police station. He



testified that in 2018, he was stationed at Buseresere police station and he was assigned to investigate the murder of Dotto Ntururu on the incidence that was reported on 06.05.2018 as the deceased murdered on 05.05.2018 at Rumasa Village in Kasaka within the forest reserve. He was handed over the file to him with the two accused persons in the lock-up who are Lameck Samson and Reuben Mekanika. At around 8:30 am he recorded the statement of the 2nd accused who denied to have committed the offence and that he was arrested at around 5:00 am at his residence by a police officers who were accompanied by the 1st accused person and he denied to have involved into the commission of the offence.

He further testified that, the 1st accused person admitted to have committed the offence of murder and he led them to the scene of crime and showed them the body of the deceased. He testified that the statement of the first accused person was not taken when he orally admitted the commission of the offence for the reason that he led them to the scene of crime and it was part of the investigation. He said that, the 1st accused person was brought to the police at around 1.00 hrs and he led the police officers to arrest the 2nd accused. The 1st accused admitted to having murdered the deceased using a hoe as they had a



dispute over charcoal and hide the body in the bush with the aid of 2 other persons.

He went on that, he took the witness statement at the scene of crime where some people gathered including the chairman of the small village. He added that, when they went to the scene of crime they were accompanied by the medical doctor, the 1st accused person and other police officers. After completion of the activities in the scene of crime, they returned back to Buseresere police station at around 12.00hrs and the statement of the 1st accused person was recorded and he admitted to have committed the offence mentioning the 2nd accused, James Mathias and one Gegela. And that on 07.05.2018, the 1st accused person was sent to justice of peace and recorded his confession.

At the hearing, the extra judicial statement could not be admitted before the court.

When cross-examined, he testified that he was not present when the accused was brought to the police station and he took the caution statement of the 2nd accused on 06.05.2018 at around 8.30 am while the 1st accused was in the lock-up at Buseresere police station. He went on that, he wrote the caution statement of the 2nd accused person at around



started beating him followed by the 1st accused and ultimately Dotto Ntururu died.

He further testified that after recording the statement, the accused appended his thumb print signature and he hands him over to the police officer. PW4 prays the court to admit the extrajudicial statement taken as part of evidence and the defence side objected. After the hearing of the arguments of both parties on whether the extra judicial is to be admitted or not, the 1st accused extrajudicial statement could not be admitted as an exhibit.

PW5 Washa Kanila, 38 years old, a farmer and pagan affirmed and testified that, he is a resident of Kasaka small village at Lumasa and on 03.05.2018, at around 6.00 am, the 1st accused Lameck Samson, his neighbour and the deceased Dotto Ntururu, the son of his brother went to his residence to register their oral agreement on the division of charcoal as Dotto Ntururu found the 1st accused did cut trees and prepare a charcoal furnace on his farm. At that time the charcoal furnace was not readily burnt and they enter a verbal agreement before PW5 that when the charcoal is ready they will divide half for each.



8.30 am and he knows nothing if the sketch map was drawn at 8.30 and he did not witness the 1st accused person signing the sketch map. He went on that, he did not first take the 1st accused person's caution statement before going to the scene of crime because the investigation was incomplete. He testified further that, the caution statement of the 2nd accused person was not tendered because it is not part of the evidence in this case for the accused denied to have committed the offence.

PW4 Ernest Mbalamwezi, adult, 43 years a resident of Buseresere and an advocate sworn and testified that, on May 2018 he was working as primary court magistrate at Buseresere. On 07.05.2018 at around 12.45 pm the 1st accused was brought into his office by a police officer named Baraka who informed him that the accused wanted to confess to the offence of murder so he should record his extrajudicial statement. He testified further that he asked the accused who was ready to give his statement and after he inspected the accused to whom he did not find any scar on his body, he started recording his statement. PW4 testified that, the accused narrated his story whereas PW4 started recording and the accused stated that, on 05.05.2018 he was with Gegele @Gengele who informed the 1st accused that the deceased who is Dotto Ntururu was disturbing them and when the deceased arrived in the scene, Gegele



guard the body of the deceased and that he doesn't know at what time the 1st accused was sent to the police.

PW6 G206 D Coplo Matete adult a resident of Geita a police officer sworn and testified that, he is a police officer whose duty station, for now, is at Geita police station and in 2018 he was working at Buseresere police station and on 06.05.2018, at around 5.00hrs in the morning he was on duty at Buseresere police station when the 1st accused was brought to the police station by the people of Rumasa accusing him for committing murder of the person called Dotto Nturu. And that, he received the accused and informed the OCS inspector Witibu who came and interviewed people who brought the accused to the police station who told him that the accused and the deceased had an agreement to divide the charcoal which was a result of the 1st accused cutting trees from the deceased farm.

He went on that when the accused was asked, he admitted that it was him, and some other two persons James Mathias and Gegela who killed the deceased. He went further that the accused told the OCS that he knew the residence of the other accused and he led him and other police officers to the house of the 2nd accused who was arrested and went



to the house of Gegela who wasn't at home, therefore, could not be arrested.

He went further that he got information that the 2nd accused is named as Joseph Mathias. He testified that at around 12.50 hrs he recorded the caution statement of the 1st accused after he has informed the accused of his rights and for the reason that the accused informed him that he did not know how to read and write, after recording the statement he read it over to the accused person who then appended his thumbprint signature.

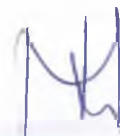
PW6 identified the caution statement and prays this court to admit it as an exhibit whereas the defence side objected and after the inquiry, the court admitted the caution statement of the 1st accused person as exhibit P3. He testified further that the 1st accused person mentioned James Mathias the 2nd accused whom he pointed a finger on the dock that they committed the offence together. He went on that the 2nd accused denied being called James Mathias and his name is Reuben Makanika.

When cross-examined, he testified that he took the statement of Washa Nkanila on 06.05.2018 at around 9.38 who told him about the agreement entered between the 1st accused and the deceased and that



He further testified that, on 05.05.2018 at around 20.00hrs, he received a call from Salu, the wife of the deceased asking about the whereabouts of her husband and at around 22.00 hrs she called again informing PW5 that Dotto Ntururu left home at around 5.00 am with a bicycle, hoe and sack to shamba. PW 5 went on that, he went to the deceased shamba at around 23.00hrs with his young brother where they found the body of the deceased on the bush. He informed relatives and leaders and on the investigation, they suspected the 1st accused person who entered an oral agreement with the deceased to divide the charcoal. PW5 informed the leader of *Sungusungu* who arrested the 1st accused and they went back to the scene to guard the body of the deceased. At around 8.00 am police officers arrived at the scene of crime with a doctor and the 1st accused person who showed the body of the deceased to the police officers and after examination, they have handled the body for burial.

When cross-examined, PW5 stated that, at around 9.45 am he was at the scene of crime and his statement was taken by police. He went on that he discovered the body before the arrival of the police and he didn't see the 1st accused killing the deceased. He further stated that, he was with the leader of *sungusungu* when the 1st accused was arrested at 00.00hrs but he did not accompany them to the police as he went to



was the reason that made him to suspect the 1st accused. He further testified that, he was at the police station when the accused was brought and he know exactly at what time the 1st accused was brought. He went on that the 1st accused person went to the scene of crime accompanied by Ins. Wutibu, Coplo Wokusima, Sgnt Nimludi, Coplo Amos and a medical doctor. He further testified that the 1st accused person was named James Mathias and during the arrest, the 2nd accused denied being James Mathias but his name is Reuben Makanika and incase the accused has two names, in the charge sheet both names must appear and he has no evidence that James Mathias and Reuben Makanika are the same person.

The prosecution case was marked closed and this Court ruled in terms of section 293(2) of the Criminal Procedure Act (CPA), [Cap. 20 R.E. 2019 now R.E 2022], that the accused persons, Lameck Samson (the 1st accused person) and Reuben Makanika (the 2nd accused person) have a case to answer and were addressed in terms of section 293(2)(a) and (b), (3) and (4) of the CPA whereas the accused persons chose to defend on oath without calling witnesses and tendering any document.

DW1 Lameck Samson, adult 28 years a farmer, pagan resident of Kasaka Rumasa affirmed and testified that before he was arrested his main activity was farming. On 05.05.2018 at the morning hours between



6.00 and 7.00 am and at night he was at home sleeping and he was arrested by *sungusungu* leader one Budodi who was accompanied by 4 other persons, he was beaten and asked about the incident of murder of the deceased which he denied to know and he was taken to Buseresere police station and handled over to the police with the accusation that he killed Dotto s/o Ntururu.

He further testified that, when he was received at Buseresere police station, Coplo Matete was not among the police who received him. He was taken to the investigation room and asked about the incident and he was beaten and returned to the lock-up and the 2nd accused was brought to the lock-up and he never know him before. He went on that, he was beaten by the police officers in order to admit knowing the 2nd accused but he stick that he know nothing of the 2nd accused.

He testified further that he did not accompany the police officers to arrest the 2nd accused person nor does he make any statement as he was only forced to put a thumbprint on the statement. He went on that, he was sent to the justice of peace on 06.05.2018 and he was given a piece of paper already written and asked to sign and when he was asked of the commission of the offence he denied having committed the crime. He testified further that, he stayed at Buseresere police station for 3 days



and was transferred to Chato police then to Chato District Court and arraigned and charged with murder. He testified further that he does not know the deceased and also he didn't know the 2nd accused person as he first met him when he was brought to the Lock up at Buseresere police station.

When cross-examined, he testified that he did not recall the police officer who received him at the police station though he denied that Coplo Matete was present.

DW2 Reuben Makanika, 40 years adult and a farmer affirms and testified that, he was arrested on 05.05.2018 night and was sent to Buseresere police station and asked if he was James Mathias and he denied it and was put into the lock-up with the 1st accused person whom he met him in the lock-up for the first time. He was then taken to the investigation room and beaten and asked about the murder incident which he denied either knowing or to be called James Mathias and he did not even know the deceased. He went on that he does not know how he is connected to the offence of murder and prays for this court to set him free.



When cross-examined, he insisted that he is not James Mathias but his name is Ruben Makanika and he once met the accused person in the police cell.

In determining the case before me, as it stood both the accused persons are before this court facing the charge of murder whereas the law is settled under Section 196 of the Penal Code, Cap. 16 [RE: 2019] which provides that:-

"Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder".

It is the prosecution who is duty bound to prove that it was the accused persons who murdered the deceased and at the time of committing the act of murder, the accused did so with malice aforethought.

The duty of the prosecution to prove the guilty of the accused beyond reasonable doubt is one among the cardinal principle in our jurisdiction and others in the administration of criminal justice system. This was also stated by the Court of Appeal in the case of **Director of Public Prosecutions v Daniel Wasonga**, Criminal Appeal No 64 of 2018 where it was pointed out that;



"It is momentous to state that, in our criminal justice system like elsewhere, the burden of proving a charge against an accused person is on the prosecution. This is a universal standard in all criminal trials and the burden never shifts to the accused. As such, it is incumbent on the trial court to direct its mind to the evidence produced by the prosecution in order to establish if the case is made out against an accused person."

In the case at hand PW1 a medical doctor, and exhibit P1 proved that the deceased, Dotto s/o Ntururu's death was unnatural in the way it was inflicted, the assailant contemplated and intend to kill, therefore, the assailants did it with malice in terms of Section 200 of the Penal Code, Cap. 16 [RE: 2019] now [RE. 2022].

Tasking, and the most contentious issue before me and which prompted the trial of this case is *whether it is the accused persons, Lameck s/o Samson and Reuben s/o Mekanika who killed the deceased Dotto s/o Ntururu.*

At the trial, the prosecution managed to parade 6 witnesses and as observed in their testimony, no prosecution witness testified to have seen the accused persons assaulting and causing death of the deceased.



Therefore, before this court, the prosecution case is built upon circumstantial evidence.

First, the evidence of a medical doctor, PW1 who testified to have examined the body of the deceased, and without doubt or objection, his testimony established that the deceased died and his death was unnatural.

Secondly, the evidence of PW2, PW3, PW4, PW5 and PW6, is in tandem with the 1st accused person that he was involved in the commission of murder and does not implicate the 2nd accused person. PW3 testified to have written the statement of the 2nd accused person which was not tendered as an exhibit but also he testified that the 2nd accused person denied committing the offence and denied that he was not called James Mathias as addressed but Reuben s/o Makanika. PW6 also testified that the person who was named by the 1st accused person was James Mathias but the 2nd accused person as it reads on the charge sheet is Reuben Makanika and the name of James Mathias does not appear on the charge sheet. In his defence, DW2 denied the murder charge and insisted that his name is Reuben Makanika and not James Mathias a person claimed by the prosecution to be named by the 1st accused person.



As I go to the records, I find no evidence which implicates the 2nd accused person to the death of the deceased. Both PW3 who wrote the 2nd accused statement and PW6 who arrested the accused at the police station, testified that DW2 denied being known as James Mathias the person who was named by the 1st accused and allegedly to be shown by the 1st accused. Also, while the charge sheet bears the name of Reuben Makanika the evidence of PW3 and PW6 testified against James Mathias who does not appear in the charge sheet and not against Reuben Makanika who is charged as 2nd accused person.

As stated earlier that the prosecution case is built up on circumstantial evidence, and the retracted confession of the 1st accused person. The law is settled that, for a conviction to be based on circumstantial evidence, the circumstances must be fully proved. (See- **Mswahili Mulugala vs R 1977 LRT 25, Hasani Fadhili V R (1994) TLR 89, Ally Bakari & Pili Bakari vs R (1992) TLR 10, Richard Matangule & Another vs R (1992) TLR.**

As I have earlier on indicated, it is the duty of the prosecution to prove the guilty of the accused beyond reasonable doubt, and that duty never shifts to the accused, and that the accused cannot be convicted on the weakness of his defence. Guided by the decision of the Court of



Appeal in **Twinogore Mwambela v The Republic**, Criminal Appeal No 388 of 2018 where it was pointed out that;

" In saying so, we are not shifting the burden of proof onto the appellant. Rather, we are alive to the position of the law that, an accused person in a criminal trial, can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence."

Based on the observation above, I proceed to find the 2nd accused not guilty of the offence charged for the prosecution evidence did not connect or implicate him. In that regard, I proceed to find the 2nd accused not connected to the case and I consequently set him free.

As stated earlier that the prosecution case is built upon circumstantial evidence. It is a settled position of the law that, for a conviction to be based on circumstantial evidence, the circumstances must be fully proved. All facts must be consistent with the hypothesis of the guilty of the accused person. Circumstances should exclude every reasonable hypothesis except the one sought to be proved. Circumstances must be conclusive in nature. Circumstantial evidence should not only be consistent with the guilty of the accused but should be inconsistent with his innocence. The above principle was highlighted in the case of **Hugo George Jim Son vs Director of Public Prosecutions**, Criminal Appeal



No. 144 of 2018 which referred with authority the case of **Mark Kasimiri vs Republic**, Criminal Appeal No. 39 of 2017, and the case of **Shilanga Bunzali v The Republic**, Criminal Appeal No 600 of 2020 where the above stated basic principles for consideration were outlined as follows:-

*"One, the circumstantial evidence under consideration must be that of surrounding circumstances which, undersigned coincidence is capable of proving a proposition with the accuracy of mathematics. See: **LUCIA ANTONY @ BISHENGWE VS THE REPUBLIC**, Criminal Appeal No. 96 of 2016 (unreported); two, that each link in the chain must be carefully tested and, if in the end it does not lead to irresistible conclusion of the accused's guilt, the whole chain must be rejected. See: **SAMSON DANIEL VS REPUBLIC**, (1934) E.A.C.A.154]; three, that the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person. See: **SHABAN MPUNZU @ ELISHA MPUNZU VS REPUBLIC**, Criminal Appeal No 12 of 2002 (unreported); four, that the facts from which an inference adverse to accused is sought must be proved beyond reasonable doubt and must be connected with the facts which inference is to be inferred. See **ALLY BAKARI VS REPUBLIC** (1992) TLR 10 and **ANETH KAPAZYA VS REPUBLIC**, Criminal Appeal No69 of 2012 (both unreported); and five, the circumstances must be such as to provide moral certainty to the exclusion of every*



*reasonable doubt-see **SIMON MSOKE VS REPUBLIC**
(1958) EA 715."*

Now, applying the above principles on the basis of the evidence adduced on trial, I now proceed to determine whether the circumstantial evidence available met the standard required to prove the offence charged against the 1st accused person.

First, at the trial court, PW5 testified that he know the 1st accused person as his neighbour for two years and on 03/05/2018 the 1st accused and the deceased entered into an oral agreement before him that for the reason that the 1st accused cut trees in the deceased farm and prepared a charcoal furnace without his permission, then they agree that when the charcoal was ready they would divide between the two. PW5 testimony was to the extent that On 05.05.2018 which was the day for the execution of the agreement, he received a call from the deceased wife that the deceased left home on 05.06.2018 early in the morning with a bike, a hoe and a sack to shamba. PW5 testified that, he went to the shamba where the charcoal furnace was and found the body of the deceased and PW5 reported the incidence.

On the part of the 1st accused, he denied the accusation testifying that he was at his home all the time. The chain of events suggests and



points towards the 1st accused person's involvement for the stated reasons that, one, the 1st accused person and the deceased knew each other and they had a dispute over a charcoal furnace. Two, the incident of murder took place the date the 1st accused and the deceased agreed to divide the charcoal. Three, the scene of crime where the murder was committed was the place the 1st accused and the deceased were required to meet to execute his agreement and, four, the wife of the deceased notified PW5 that the deceased left early in the morning to shamba with a bicycle, a hoe and a sack which indicate that he went to meet the 1st accused to divide the charcoal as agreed. A chain of evidence of PW5 so far suggests that in a human probability, the act was done by the accused.

Secondly, PW6's testimony was that he received the 1st accused person in the police station who was brought by *sungusungu* accused of murdering the deceased and when interrogated he admitted to having committed the offence. The 1st accused led the police officers to the scene of crime where they discovered the body and PW6 recorded the caution statement of the 1st accused exhibit P3 which he admitted to having murdered the deceased. The 1st accused agreed to be arrested and admitted in the police station and denied making a statement rather he was forced to thumbprint the statement already written. The 1st accused



who is DW1 retracted the caution statement that he was forced to thumbprint and he did not make that statement. In the cases of **BomboTomola vs Republic**, [1980] TLR 254 and **Hemed Abdallah vs Republic**, [1995] TLR 172, it was held that:-

"Generally, it is dangerous to act upon a repudiated or retracted confession unless it is corroborated in material particular or unless the court after full consideration of the circumstances, is satisfied that the confession must be true; and that once the trial court warns itself of the danger of basing a conviction on uncorroborated retracted confession and having regard to all the circumstances of the case it is satisfied that the confession is true, it may convict on such evidence without any further ado."

The 1st accused caution statement is long and detailed on the way the murder of the deceased Dotto s/o Ntururu took place. DW1 raised the concern during the inquiry but could not ignite a doubt in the side of the prosecution that indeed he was forced to thumbprint the caution statement which was already recorded. As I go through the caution statement which is exhibit P3, it is very detailed and no room that PW6 could have invented the story. Therefore, I discharge DW1 allegation that he was forced and I find that the statement was voluntarily made.

The Court of Appeal of Tanzania in the case of **Nyerere Nyague v Republic**, Criminal Appeal No.67 of 2010 upheld the decision in **Tuwamoi v Uganda** (1967) EA 91, set a principle that even where voluntariness of a repudiated or retracted confession statement has been cleared, a prudent court should always evaluate the entire evidence and assess the weight to be attached to it. The court observed that:-

"Even if a confession is found to be voluntary and admitted, the trial court is still saddled with the duty of evaluating the weight to be attached to such evidence given the circumstances of each case."

Applying the above principle in our case at hand, DW1 in his caution statement stated that the accused and his other colleagues named James s/o Mathias and Gegela used to prepare charcoal and on 03/05/2018 while at shamba, the deceased came and accusing him of cutting his trees in his farm without his permission. They agreed to settle the dispute and went to PW5 where they agreed that they will divide the charcoal when it was ready. On 05.05.2018 they met in order to divide the charcoal whereas 1st accused was with James Mathias and Gegela. The 1st accused and his colleagues James Mathias and Gegela decided to attack the



deceased using a hoe and killed him and took his body to the bush and his bicycle on an anthill and left home where at night he was arrested.

I have carefully compared the cautioned statement of the first accused and the testimony of prosecution witnesses especially, PW5 and PW3. Undoubtedly, the contents of exhibit P3 narrates the same testimony of PW5 and PW3. It is from this point I hold that DW1 confessed to having murdered Dotto s/o Ntululu and the circumstances point to his guilt.

Thirdly, DW1 denied having made the statement before PW6 claiming that he was given a paper to thumbprint. The exhibit after inquiry, it was cleared for admission and admitted as exhibit P3. DW1 did not cross-examine PW6 over the relevancy of the contents and could not show how his basic particulars were included on the caution statement which he denied making.

Fourthly, the evidence of PW2, PW3, PW5 and PW6 testified to the effect that, the 1st accused accompanied the police officers to the scene of crime and led PW2 when drawing the sketch map of the scene of crime. Even though there was some discrepancies in the sketch map tendered and admitted as Exhibit P2, this court find the discrepancies does not go to the root of the matter and therefore did not prejudiced the 1st accused. Some of the discrepancies pointed by the defence counsel is that, the 1st

accused signed by thumbprint only once while the other witness signed twice and that the time when the sketch map was drawn is inconsistency with the evidence of the prosecution witnesses tendered.

After carefully evaluating the discrepancies pointed out by the defence counsel and as I have earlier on noted, the same does not shake the positive evidence of PW5 who is an independent witness who was present in the scene of crime and saw the 1st accused on 06/05/2018 led the police including PW2 to show where the body of the deceased was hidden. Since there is no a particular requirement for a sketch map to be signed twice, I find this argument to be misplaced. Again, the inconsistency as to what time the sketch map was drawn, I find it to be a minor which did not prejudiced the 1st accused.

In the case of **Dickson Elias Nshambwa Shapwata & Another v Republic**, Criminal Appeal No 92 of 2007(unreported), it was stated that;

"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentence and consider in isolation from the rest of the statements. The court has to decide whether the inconsistencies and contradictions are only minor and whether they go to the root of the matter."



In the above case, the Court of Appeal quoted with approval the book authored by Sarkar titled **"The Law of Evidence"** 16th Edition, 2007 at page 48 that;

"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and these are always there however honest and truthful a witness may be. Courts have to label the category in which a discrepancy may be categorized. While normal discrepancies do not corrode credibility of a parties' case, material discrepancies do"

In that end, in totality, I find the prosecution case is in line with the laid principles regarding to the circumstantial evidence as stated in a number cases including the case of **Awadhi Gaitani @Mboma vs the Republic**, Criminal Appeal No. 288 of 2017, CAT and the case of **Shilanga Bunzali v The Republic**, (supra). The prosecution evidence is incompatible with the innocence of the accused, and it is incapable of explanation upon any reasonable hypothesis other than that of guilty of the 1st accused person. The evidence of PW2, PW5 and PW6 suggests that the 1st accused person based on the circumstances surrounding the murder of Dotto s/o Ntururu is guilty as charged.



In the upshot, I have reached the following conclusion. In the light of the shortfalls which I have endeavored to illustrate above, the offence of murder against REUBEN s/o MAKANIKA has not been established because there was no cogent evidence to link him with the murder case at hand. Therefore, the accused is acquitted. I order REUBEN s/o MAKANIKA to be released from prison unless he is otherwise lawful held.

On the other hand, I am satisfied that the prosecution's evidence is credible and reliable against the 1st accused person LAMECK s/o SAMSONI. I do not think that the positive evidence of PW2, PW5, PW6 and the cautioned statement of the first accused person is shakable. I find that the prosecution has proved their case beyond reasonable doubt against LAMECK s/o SAMSONI, the first accused person. In the event, I find that LAMECK s/o SAMSONI is guilty as charged. I, therefore, convict him of murder contrary to sections 196 and 197 of the Penal Code Cap. 16 [R.E 2019] now [R.E 2022].

DATED at CHATO this 06th March 2023.




M.MNYUKWA
JUDGE
06/03/2023

SENTENCE

Since LAMECK s/o SAMSONI, the 1st accused has been convicted of murder, I hereby sentence him to death by hanging.




M.MNYUKWA
JUDGE
06/03/2023

The right of Appeal in terms of Section 323 of the Criminal Procedure Act RE 2019 is fully explained.


M.MNYUKWA
JUDGE
06/03/2023