

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

CRIMINAL JURISDICTION

SITTING AT MPANDA

CRIMINAL SESSION NO. 10 OF 2022

REPUBLIC

VERSUS

- 1. SIDA ^S/O MWANZALIMA @ MILIGO**
- 2. NDEMELA ^S/O MWANZALIMA @ MILIGO @ BASU**
- 3. MWINAMILA ^S/O MWANZALIMA**

01/03/2023 & 16/03/2023

JUDGEMENT

MWENEMPAZI, J.

Children are poor men's riches. This was different to the deceased in this case one MWANZALIMA S/O MILIGO. As the three accused persons named above, the children to the deceased, were arraigned before this court for the offence of Murder contrary to Section 196 and 197 of the Penal Code [Cap. 16 R. E. 2019].

It is alleged that, on the 04th day of January, 2020 at Kanindi Village within Mlele District in Katavi Region, the three accused persons did murder the deceased in this case.

On the 04th day of October, 2022 this case was scheduled for plea taking. The charged was read over and explained to the accused persons and as they were called to plea thereto, they pleaded not guilty to the charge. They also denied all the facts prepared under section 192 of the Criminal Procedure Act, Cap 20 R.E 2019, as they were read over and explained to them. They only admitted their names, personal particulars and that the deceased was their father. They also admitted that they were arrested.

At the hearing, the prosecution was being led Mr. Gregory Muhangwa, Learned State Attorney and all three accused persons were being represented by Ms. Helena Haule, Learned Advocate.

In the course of proving their allegations against the accused persons, the prosecution called six (6) witnesses and tendered eight (8) Exhibits, whereas all three accused persons defended themselves, as they had neither witnesses nor exhibits.

Only a lazy sheep thinks its wool heavy. In proving the offence of murder, the prosecution side would not be expected to think the task as

heavy, because both actus reus and malice aforethought are to be proved to warrant conviction of the accused persons for the offence they are charged.

The gist of case behind the scene is that, it is believed that the deceased had misunderstandings with the accused persons. That, the deceased had owned a herd of cattle which he had them kept at far camp known as a 'Lubaga', and one of his sons was herding them. It was revealed that the deceased's sons were taking his cows and selling at the auction without his authorization. The deceased before his death went to the camp and found that the number of cows has been reduced. He then denounced his son and did not want him in his business.

PW1, H 1375 D/Cpl. Mussa, a Police officer at Inyonga Police Station, in his testimony told the court that, on the 05th day of January, 2020 being in the company of other police officers, he was informed about the murder incidence which occurred at Kanindi village. At the crime scene, he was deployed by his superior to draw the sketch map of the crime scene, he did that. Whereas, the sketch map was admitted in evidence as Exhibit P1. The witness said;

"While at the scene, we continued with the investigation.

There were stories that the sons of the deceased had misunderstanding/conflict with their father. We wanted to

know the source of the conflict. The deceased had cows which had been taken to the camp, and one of his sons was herding them. That, the deceased's sons were taking his cows and selling at the auction without his authorization, as he found out, he became furious and denounced his son."

PW2 was F. 5918 SGT. YASIN of Shanwe at Mpanda. He testified that on the 05th of January, 2020 he was assigned by the OC CID to record the statement of the 1st accused person which he prayed to tender in evidence and it was admitted as Exhibit P2 after the conduction of an inquiry as a result of the accused person repudiating that he had never recorded a statement before PW2. However, in his testimony, PW2 said;

"Basically, the 1st accused person told me that on October, 2019 he received a call from his young brother the 3^d accused person at the time the 1st accused was residing at Sumbawanga Rural District. He told him that he has received a call from one Masanja who has told him that their biological father has looked for people to kill them and their biological father has said that he has revealed that other targets are the 2^d accused, the 3^d accused person and their mother.

After he had received that information, he went to Kanindi village to inform his mother. Thus, in their discussion they

agreed to call Masanja and hear while they are recording. When they called Masanja he said the same thing. That their father is planning, looking for people to kill them. They agreed that instead for them to die they will kill their father. So, they agreed to look for money and pay Masanja so that he kills their father.

The 1st & 3^d accused, communicated with the 2nd Accused person @ BASU. He was herding the cows at the camp. They told him to sell cows so that they obtain Tshs. 2,600,000/= to pay Masanja. That, the duty of communication between Masanja and the suspects was left to the 3^d accused person.

On the 4/1/2020 in the morning the 1st accused received a call from 3^d accused who told him that Masanja has informed him that assassins have been found they are coming to execute their plan to kill their father.

At 00:00 hours, he was woken up by his in law who told him that he has received a phone call from the 3^d accused who has told him that their father has been killed.

The 1st left his home and came to the funeral where he attended a burial service. After burial he was arrested and placed under police custody at Majimoto."

PW4 was G. 7679 D/Cpl Andrew who resides at Misunkumilo at Mpanda. He too testified that on the 05th day of January, 2020 as he was at his work station at Majimoto, he was ordered by the OC CID of Mlele District to record a statement of a suspect of an offence of murder, who is the 3rd accused person. PW4 told the court that, he took the 3rd accused person to the interrogation room and after informing him of his rights, he was willing to record his statement which was admitted in evidence as Exhibit P4. PW4 said, the 3rd accused person said;

"He informed me that in October 2019 at around night hours while sleeping, he received a call from the unknown person to him, but he introduced himself as Masanja s/o Lusondagula. He told him that his father who is for now deceased, has instructed him to kill him and two brothers, who are the 1st accused person and the 2nd accused person. That, after he has been informed that, he called his brothers. He told them what he has been informed by Masanja s/o Lusondagula. They thus agreed to sell cows belonging to their father so that they pay Masanja s/o Lusondagula. The Money which was

obtained after selling the said cows was Tshs. 1,000,000/= (one million). That money was sent to Masanja s/o Lusondagula by the 2nd accused person. The latter was assigned the duty to sell the said cows. After he had sent the said money to Masanja s/o Lusondagula, they were all in one accord that they are going to kill their father.

Pursuant to that accord, they looked for Masanja s/o Lusondagula so that he may assist them in getting assassins to kill their father. In the agreement, they had to pay Tshs. 2,000,000/= (two million shillings). That money was obtained after selling again cows belonging to their father. That money was again sent the 2nd accused person to Masanja s/o Lusondagula.

After the agreement and payment on 04/1/2020, Masanja s/o Lusondagula communicated with the 2nd accused person and told him that he has found the assassins, that they are ready for the job. He also told the 2nd accused that they need a person who will show the residence of their father. Since the 3^d accused person stays at a nearby house to his father; he was assigned the duty to acquaintance the assassins so that he may lead them to the residence of his father.

At around 20:00 hours on the 4/1/2020 the assassins called the 3rd accused person to tell him that they are close to their residence. They need to be received and shown the residence of their father. He left and went to receive those young men and took them to his residence and showed them the residence of his father, and thereafter he left to his room and slept."

It was PW5's turn to testify. He was F. 4373 D/Cpl. James who resides at Tanganyika District. He too testified that on the 5th day of January, 2020 as he was at his, by then, work station at Majimoto Police Station, he was assigned by the OC CID of Mlele District to investigate a file with the number MTO/IR/08/2020 which concerned the offence of murder. He added, as he took the file, the suspects were only two, 1st and 3rd accused persons. That on the 07th of the same month, the 2nd accused person was arrested and conveyed to Majimoto Police Station after being mentioned by the 1st and the 2nd accused persons that they had together planned the killings of their father.

Therefore, PW5 was ordered to record his statement which was admitted in evidence as Exhibit P5. PW5 said the 2nd accused person told him that;

"He told me in 2019, October, while at home he received a call from his brother the 1st accused person, that their father was planning to kill them. His father said they are just roaming around and in turn they planned to kill him before he kills them.

That, the information came from a resident of Kasekese, Masanja s/o Lusandagula. They arranged to kill their father with Masanja s/o Lusandagula. They agreed that they will pay Tshs. 5,000,000/= but agreed to pay advance of Tshs. 1,500,000/=, so the 2nd accused sold cows and procured Tshs. 1,500,000/= then he went to send the money through the agent at Namanyere.

After he had sent the money, he went back to the village at Kabwe where they have a camp for herding their cows known as Lubaga.

*On 4/1/2020 in the morning hours, he looked for Sutamula who lent the 2nd accused person the sum of TShs. 3,200,000/= with the promise that he will pay back in terms cows on 5/1/2020. He left with the money up to Nkasi -Namanyere and sent the money in the same style he did before. He then informed his relative the 1st and the 3^d accused and **they***

were informed him the assassins (killers) are on the way.

The 2nd accused went back to Kabwe at the herding camp. He arrived at around 19:00 hours.

That, on the night at around 20:30 hours his father, Mwanzalima s/o Miligo was killed. In the morning of 5/1/2020 he was supposed to travel to Majimoto for the funeral. But he had an exercise or duty to pay the debt in term of cows as he promised. He therefore paid the cows. Until they were depleted."

After all the accused persons had recorded their cautioned statements, they were all taken to the justice of the peace, PW6 known as MICHAEL MATHEW KATANGA who resides at Mpimbwe District Council where he works as an accountant but before he was the Ward Executive Officer. He tendered the three extra judicial statements belonging to the three accused persons. They were all admitted in evidence as Exhibit P8, P6 and P7 respectively.

In his testimony, PW6 told the court that all the three accused persons one after the other confessed to have participated in the killing of their father, and that, the 3rd accused person was the first to get the information from Masanja that their father had arranged for their deaths, and he told the 1st accused person and they together shared the

information with the 2nd accused person and instructed him to sell some cows so that they pay Masanja more so that he kills their father instead of them.

PW3, SPERATUS KALUMINA a medical doctor residing at Mamba, Mpimbwe District testified that on 5/1/2020 in the morning as he was at his work station at Mamba Health Center he was informed by D/C James about the murder incident at Kanindi village. He was asked to accompany them so that he would conduct the autopsy on the deceased's body.

At the crime scene, he saw the body of the deceased lying down, and on its left side, the soil has been wetted with blood and so are the clothes on the body of the deceased. That, the body had cut wounds on the right side of the neck, and under the umbilical area it was stabbed and on the back the same, while his hand fingers were cut off.

PW3 was then of the opinion that the cause of the death was due to profuse bleeding secondary to cut wounds which caused hypovolemic shock. And thereto, he recorded his findings in the Post Mortem Examination report and he tendered it in evidence and it was admitted as Exhibit P3.

As the prosecution side rested their case, the defence side started off with their side of story as DW1 Sida s/o Mwanzalima @ Miligo testified first but not under oath. He testified that;

"I stay at Msia, Sumbawanga. Mwanzalima Miligo is my father. Before shifting to Sumbawanga, I was residing at Kanindi Village. I was staying with my parents.

On 4/1/2020 I was at my home, Sumbawanga. I was at home doing my duties; nothing special occurred on the day.

On October, 2019 there were no special information I received from my relative Mwinamila.

I had good relationship with my father. Nothing wrong happened between me and my family which caused me to shift. I have good relationship with my relatives who we are charged for the offence of murder together. I have never received any information from Mwinamila s/o Mwanzalima that my father wanted to kill me. I don't know Masanja Lusandagula. I don't know the person named JIDIGWA. On the 4/1/2020, I did not communicate with Mwinamila s/o Mwanzalima. Information that my father

has passed away I received on the 5/1/2020. I received from my aunt. She told me she had been informed by my uncle (baba yangu – mdogo) then I left Msia Village for Kanindi Village to the funeral.

When I went there I found my father has been killed (ameuawa). That was a bad experience. I was confused I found there were many people, and then we were handed over the body of the deceased for us to continue with the burial services.

Then the police asked the village chairman that we accompany the police to the police station. They did not arrest us. I was not told the reasons. At the police station they placed us in remand (lock up). We left our home at around 17:00 hours. We arrived at the police almost a few minutes later it is not far.

I did not know what continued outside as I was in the lock up. I stayed in the lock up for two days. Then I was released and sent at Inyonga. At the police, they did not take any statement from me. After all, they never told me the reason for taking me to the lock up. At Inyonga Police

Station I stayed for the whole month then I was taken to Mpanda Police Station. Then I was charged for the offence I don't know."

When cross examined by the learned State Attorney, DW1 replied that;

"I was not taken to the office of the Ward Executive Officer. I never recorded an extra judicial statement. At Majimoto Police Station I never recorded any statement. I was only forced to sign. I asked the police officer to read for me.

The other accused are my sibling. We had no communication in relation to the death of our father. It was testified that I recorded a conversation with Masanja. That is not true.

I left my parents' home as the time for me to be independent had arrived. I don't recognize the statement that I was given 13 cows."

DW2 was NDEMELA S/O MWANZALIMA, he too testified without being under oath that;

"I stay at Majimoto – Kanindi Village. Since I have never lived at Lubaga. I stay at Kanindi Village. I was involved in farming. I cultivate maize, rice, peanut and sweet potato. At

home I was staying with my father Mwanzalima s/o Milligo. I stayed there since I was born. I have never gone out of my parents' homestead. As to the number of children at home it is the concern of my parents. I am not related to Tayo Mwanzalima he is my brother to another mother.

I had no communication with my brother of SIDA S/O MWANZALIMA. I don't have a phone. We communicate normally not by phone. I have never heard that my father wanted to kill us; me and my brothers.

I got information that my father had passed away when I was at Rukwa – Mwadui. My uncle asked me to assist him in farming. I left in December, 2019. It is my uncle who told me that my father has passed away. My uncle is known as Maganga s/o. He told me that my father has died by being hacked with machete. I thus asked him permission to come at Kanindi. He permitted me. Thus I started my journey. I walked on foot. I used one and half day.

I found my relatives, my mother, my uncle, brothers and sisters. They told me they don't know the assailants. I inquired, they said it was night and the assailants were not identified when I arrived my father had already been buried.

After I had arrived and the discussion, the police came. They talked to my father (young father) then one of my fathers called me, when I approached him, he handed me into the hands of the police. The police told me to board into the motor vehicle. Then they took me to Police Station Majimoto. I was placed into the lock up. I had no watch, but it was in the afternoon. We spent a few minutes, it is not far.

I was placed into the lock up for a long period. It was afternoon hours. Then, I was taken into another room where I was asked to reveal what I knew. They asked my names, place of residence and religion. I did not state anything further.

After being taken back into the lock up I stayed until the next day when I was taken out. Then I was taken to the room where I found a letter. I did not know the content. But the police told me to sign.

I asked the content and the police refused to read over to me. He said I am teaching him how to work. He thus forced me to sign. He took a stick and threatened to beat me. I continued to refuse and he started to beat me thus I signed. They took me back to the lock up.

I was not taken to the ward executive officer. I remained in the lock up, until when they took me to the Police Station at Inyonga. There I was placed in the lock up. I staying for a longtime, almost one month. Then I was taken to Mpanda where a charge of murder was read over to me. I don't know that case. It was the case of murder of Mwanzalima s/o Mligo.

I don't know that case because on the date I was at my uncles' place; Continuing with agricultural activities. Since I was born, I had no quarrels with my father until I have reached this age."

MWINAMILA S/O MWANZALIMA testified as DW3, he was affirmed and did state as follows that;

"I am a resident of Kanindi Majimoto. I live with my parents and my wife. I am a peasant. Mwanzalima s/o Mligo is my biological father. I don't know masanja s/o

In October, 2019. I never received any call from Masanja s/o..... SIDA S/O MWANZALIMA is my brother we have been living well. When he was at home and after he shifted to Sumbawanga.

He would call and we would just greet each other. He would call to the phone belonging to my mother or that of father. I know Ndemela s/o Mwanzalima is my brother; later he was called to assist my uncle. I don't know Masanja Lusundagula. I have never received any call from Masanja s/o or any other person.

On the day my father passed away/was killed I was sleeping in my house and my father (my father's brother) in the same house. Our young father came to greet us, and I left my wife to sleep in another house belonging to my in-law.

It is normal my mother to wake me up. My mother was woken up by my younger mother and in turn she came to wake me up. When we went out, we were told my father has been killed. I was just told that I did not take any step because I am young and there were other older brothers.

My elders started to report to various neighbours and relatives. Then my father's brothers (baba zangu wadogo) came. Then I did not know what continued.

There came my younger mother (father's wife) who wake up my mother and then they came to the house we were

sleeping. I can't calculate the distance from the house my father was sleeping to the house we were sleeping. I did not know what had happened. I saw people coming and people calling the police. They came in the morning.

The police started to inspect and or examine the body of the deceased. Then they allowed us to bury the deceased. I also participated in the burial of my father it was on 5/1/2020 I did not know the exact time. Ndemela s/o Mwanzalima was absent but SIDA S/O MWANZALIMA was present.

After the burial services, we sat and discussed family issues. Our elders were active on that discussion. Me being young I could not sit with elders. I did not know the time. We continued with other activities then the police asked the chairman for permission to take me. They said they have a word/work to do with me. They came with motorcycles; they took me with my brother to Majimoto Police Station. It was 5/1/2020.

After arriving at the police station they placed me in the lock up. I stayed for two days. They did not tell me the reason. On the third day they took me out and was asked to sign. I

was not told anything and taken to Inyonga where I stayed for one month and later taken to court.

I was charged with the offence of murdering Mwanzalima s/o Miligo. I lived peacefully with my father we have never had any conflict."

As he was cross examined by the learned State Attorney, DW3 told the court that his father never owned a herd of cattle as alleged, and that they only had some cows for cultivation as his father was a farmer. That, he does not recognize the statement which was read over purporting to be his cautioned statement.

Counsels from both sides agreed on making their final submissions by way of written mode. Learned State Attorney submitted that it is uncontested that the death of the accused person was unnatural as he died as a result of Hypovolemic Shock due to multiple wounds as reflected in the testimony of PW3 and the Exhibit P3.

He added that, PW2 and PW4 were ordered to record the statements of the 1st and 2nd accused persons which were tendered in court and admitted as Exhibit P1 and P4 and that in these statements, both accused persons admitted to have committed the offence. Mr. Muhangwa stressed that, to them these are tangible evidence against the accused

persons. Furthermore, he said that the 3rd accused person was also cautioned and he too admitted to have participated in the commission of the offence, whereas the statement was admitted as Exhibit P5.

The learned State Attorney cited Section 27 of the Evidence Act, Cap 6 R. E. 2022 by rephrasing it as follows, **"A confession voluntarily made before a police officer by a person accused of an offence may be proved as against that person."** That, all the three accused persons implicated each other in their cautioned statements which is recognized under Section 142 of the Evidence Act (supra) which states that an accomplice is a competent witness and a conviction is not illegal where it proceeds with uncorroborated evidence of an accomplice.

Mr. Muhangwa submitted further that the court have the discretion to convict on the evidence of an accomplice even without corroboration if it is satisfied that the evidence is nothing but the truth. The learned State Attorney referred this court to the Case of **Paskali Kitigwa vs Republic [1994] TLR 65** (CA) where it was held that;

"A court may convict on accomplice's evidence without corroboration if it is convinced that the evidence is true, and provided it warns itself of the dangers of convicting on uncorroborated accomplice's evidence."

He further insisted for this court to visit the case of **Oscar Josiah vs Republic, Criminal Appeal No. 441 of 2015** at page 8, where the position of the court convicting the accused person accomplice's evidence was strengthened.

Mr. Muhangwa also reminded us that there is the evidence of the Justice of the Peace PW6 who testified and tendered all three extra judicial statements as he had recorded them each at a time. The learned State Attorney added by citing Section 28 of the Evidence Act (supra) which states;

"A confession which is freely and voluntarily made by a person accused of an offence in the immediate presence of a magistrate as defined under the Magistrates' Courts Act, or a justice of the peace under the Act, may be proved as against that person."

Considering their defiance, the learned State Attorney submitted that the accused persons had nothing to shake the prosecution's evidence, and that he prays their defence should not be entertained by this court and as all the accused persons rejected both the cautioned statements and the extra judicial statements, he believes that the denial of the said exhibits is just an afterthought.

He proceeded by submitting that, it is the principle that the accused person is precluded from denying the admissibility of an exhibit which has already been tendered and admitted by the court at an earlier stage. He said, in most cases as this case at hand, the objections were raised at a later stage of the proceedings which is not proper and thus should not be entertained. Mr. Muhangwa again referred this court to the case of **Hawadhi Msilwa vs Republic, Criminal Appeal No. 59 of 2019** where it was held that;

"Failure to object the admissibility of the cautioned statement, the appellant is now stopped from denying his statement at this stage."

The learned State Attorney concluded by citing the case of **Shihoze Semi & Another vs Republic [1992] TLR 330** where it was held that;

"In this case, the appellants missed the boat by trying to disown the statements at the defence stage. That was already too late. Objections, if any, ought to have been taken before they were admitted in evidence."

He therefore urged this court to find the accused persons guilty of the offence they are charged with and convict them accordingly.

The learned defense counsel, Ms. Helen Haule firstly submitted that as required by the law in criminal cases that prosecution side has to prove its case beyond reasonable doubt, she insisted by citing the case of **Nathaniel Mapunda & Another vs Republic [2006] TLR 395** where it was held that;

"In criminal charges, the burden of proof is always on the prosecution, and the proof has to be beyond reasonable doubt."

The learned counsel insisted, as the prosecution side summoned PW5 to testify, as he was the investigating officer in this case, he failed to procure the communication between the accused persons and the assassin and failed to apprehend him as he was the killer of the deceased and not the accused persons. Therefore, she prays for this court to dismiss these charges against the accused persons and set them free.

In resolving this murder mystery, I should firstly be thankful to the learned counsels of both sides as they have immensely assisted me in realizing that the only issue here is **whether the prosecution side had proved their case against the accused persons beyond the required standard of the law.**

As seen in the entire case, the prosecution case against the accused persons hinges on the exhibits which were tendered in court and marked as Exhibits P2, P4, P5, P6, P7 and P8. These statements, particularly Exhibits P2, P4 and P5 in which they are the cautioned statements of the accused persons, were argued by the prosecution to be voluntarily made by the accused persons, whereas the contents of these statements reveal that they admitted to have participated in the preparations of ending the life of their father.

The prosecution side also insisted that according to Exhibit P6, P7 and P8 (extra judicial statements) the accused persons were able to reproduce what they recorded in their cautioned statements, meaning they did confess to the participation of murdering their father, hence guilty of the offence.

It was on my mind through-out the hearing as to why all the three accused persons denied to have made the statements either at the police station or at the justice of peace despite the fact that an inquiry was conducted to determine their voluntariness in recording their statements and I was convinced that they did record the statements voluntarily and hence I admitted them in evidence.

But, as the accused persons attempted to repudiate the statements and they did that again at the defence stage, it is was inevitable for me to thoroughly read between the lines the contents of the six exhibits and relate with the murder mystery as it was revealed to me. In so doing, I do agree that indeed the accused persons voluntarily made the statements, but the contents in the statements I found them wanting in relation to the murder mystery as revealed.

In **Hemed Abdallah vs Republic (1995) TLR 173** the Court held that a conviction can be based on a retracted cautioned statement provided that the trial judge is convinced that the said statement is true. The learned judge revisited the cautioned statement and quoted:

"it is true I am a man of five prayers. This I just bad lack. I have been confronted by Satan, the devil. I do not know where to hide my face from the community that is around me in Tarakae. I regret to have killed an angel of God without cause. I plead to the community in Tarakea and especially the parents of the deceased to forgive me."

The learned judge described the above confession as:-

*"... the strongest evidence for the prosecution in this case. ... The accused repudiated the confession only in his defence. When P. W. 3 the police officer who took the accused's cautioned statement testified at the trial the question of admissibility or otherwise of that cautioned statement was not raised again. In **shibobe Seni and another versus Republic (1992) T. L. R. 330** the Court of Appeal of Tanzania held that **once the confessions are repudiated, albeit during the defence stage the trial judge should suo motu check on their voluntariness, validity and/or seek corroboration thereof.**"*

[Emphasis is Mine]

It is my strong opinion that, as the cautioned statements and the extra judicial statements were continuously being repudiated even at the defence stage the statements required corroboration to prove their truth. I will elaborate more as follows; The prosecution side claim that the deceased had cattle herd at a camp (Lubaga) and at the same time it came to our knowledge that the deceased also had more than one wife, even the

fateful day he was sleeping with his youngest wife. As I perused the statements, nowhere was any of the wives recorded to prove that the deceased had cattle herd which was being watched by the second accused person.

In addition to that, as the statements suggests that there were phone records made between the accused persons and the assassins, to my astonishment, neither the investigating officers nor the prosecution counsels found this aspect to be vital in proving that, **first**, the accused persons were in communication with the assassins, **second**, there was the selling of cows in order to obtain money to pay the assassins and **third**, that in indeed there were transfers of money from the accused persons to the assassins, particularly the one known as Masanja s/o Lusondagula.

At this point the prosecution side's evidence is in shambles, as they failed to produce the phone records which would have proved that the accused persons are indeed guilty of the offence they are charged with. In **Emmanuel Senyagwa vs Republic, Criminal Appeal No.22/2004 (CAT)** at **Dar-es-Salaam** (Unreported), it was held that;

"We think we are entitled to make an adverse inference from the failure to produce PF3 even after it was said that it was going to be tendered. That raises the question whether or not

there was really sexual intercourse. If no, then there was no rape."

As the matter of fact, I too am entitled to draw an adverse inference for the failure of the prosecution side to produce the said phone records and also the failure to call the wives or one of the deceased as material witness who were within reach to establish as to whether indeed the deceased had owned herd cattle or, whereas I believe without these cows, as the accused persons would not have managed to pay the assassins as the prosecution alleges, considering in their defence, the accused persons insisted that their late father did not have such number of cows as he was a farmer so he had only 10 cows, which they used for cultivation in their farms.

In **Aziz Abdalla v. Republic [1991] TLR 71 (CAT)** the Court was of the view that;

"Adverse inference maybe made where the persons omitted are within reach and not called without sufficient reason being shown by the prosecution."


To me, the entire story from the statements does not add up in order to convince me to consider the accused persons as responsible for the death of their father. I am aware of the principle that a conviction can

be grounded on a retracted confession without corroboration as highlighted in the case of **Michael Luhiye vs Republic (1994) TLR 181**. But, in this case at hand, the stories obtained from the Exhibits seriously required corroboration, and I hesitate to believe their contents.

In that, I am penning off by declaring that the prosecution side has failed to prove their case against the accused persons beyond the required standard of the law. I therefore proceed to dismiss the charges against all the three accused persons, and order their immediate release from custody unless their held therein for other lawful reasons.

It is ordered accordingly.




T. M. MWENEMPAZI
JUDGE
16/03/2023