

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

**SUMBAWANGA DISTRICT REGISTRY**

**AT SUMBAWANGA**

**CRIMINAL JURISDICTION**

**SITTING AT MPANDA**

**CRIMINAL SESSION NO. 12 OF 2022**

**REPUBLIC**

**VERSUS**

- 1. PRISKA <sup>D/o</sup> PIUS @ MISAMBO**
- 2. MAHONA <sup>S/o</sup> KULWA**

*03/03/2023 & 16/03/2023*

**JUDGEMENT**

**MWENEMPAZI, J.**

The accused persons are brought before this Court being charged with 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 27<sup>th</sup> day of June 2021 at Kamalampaka village within Mlele District in Katavi Region, the two accused persons named above did murder one person known as MISRI s/o COSMAS.

On the 04<sup>th</sup> day of October 2022, during the Preliminary hearing, the information of murder was read and explained to the accused persons in the language they understood and required to plead thereto, whereas they both

pleaded not guilty. In addition to that, they denied all the facts prepared under section 192 of the Criminal Procedure Act, Cap 20 R.E 2019, and were read over and explained to them. The two accused persons only admitted their names, whereas the first accused person admitted that the deceased was her husband and they both admitted that they were arrested.

During the hearing, the prosecution was being led by Ms. Flavia Shiyo, Learned State Attorney and the accused was being represented by Mr. Eliud Ngao, Learned Advocate. In this case, the prosecution called eight (8) witnesses and tendered seven (7) exhibits meanwhile, the accused persons both defended themselves, meaning they had no witnesses or exhibits to tender.

It is the trite in law that the offence of murder is proved when both actus reus and malice aforethought are proved by the prosecution. In doing so, they should make sure they leave no stone unturned to convince this court that the accused persons are guilty as charged.

As hinted earlier, the deceased was married to the first accused person, but they separated in 2018. Following their separation, the deceased went to live at Kamalampaka village with another woman leaving behind the first accused person with all the properties they accumulated during the subsistence of their marriage. On the other side, the accused started an affair with another

man known as Mohamed s/o William @ Penyapenya who later came to live with at the 1<sup>st</sup> accused persons residence and started to utilize the properties left behind by the deceased. The two newlyweds started selling the cattle left behind, this act angered the deceased.

On the 27<sup>th</sup> of June 2021 at about 20:00 hours, the deceased was invaded while at his home and he was assaulted with sharp objects, and thereafter the deceased's body was discovered by the village leaders lying on the ground who later reported the matter to the police station. The body had multiple wounds on it.

PW1, BEDA STEPHANO MUSOMA an adult who resides at Mpanda, who was then the OC CID of Mlele District, testified under oath that, on the 28<sup>th</sup> day of June 2021, he was informed about the incident by the Village Executive Officer known as Dastan. He gathered a team of police officers and summoned a medical doctor and they headed to Kamalampaka village. As they arrived at the scene of crime, PW1 then assigned duties to the team he had, whereas DR. JAMES MARK MASAGA, PW6 a medical doctor was assigned to examine the deceased's body.

In his examination, PW6 stated that the body of the deceased was lying down on the ground, with blood spread out on the ground. He said, the body

had wounds/injuries on the shoulders (right) and neck and as he examined the body, he was of the conclusion that, the death of the deceased has been caused by severe bleeding. And therefore, he then filled a Postmortem Examination report and handed over to the police. PW6 prayed for the report to be admitted in evidence as exhibit and this court did accept it and admitted it as Exhibit P5.

PW3, H. 1625 D/CPL RASHIDI a police officer residing at Inyonga was assigned by PW1 to draw the sketch map of the crime scene. In his testimony, on the 28<sup>th</sup> of June 2021 he was informed by then OC CID (PW1) that at Kamalampaka village there is a murder incident and therefore he should be ready as they will depart towards the said village. PW3 told this court that as they reached the crime scene, he was instructed to draw the sketch map of the crime scene and he did so by being helped by the village chairman. PW3 tendered the said sketch map in court as exhibit, and this court admitted it as Exhibit P2.

Earlier in his testimony PW1 told this court that he was informed about the event by the Village Executive Officer, though it was unfortunate he was not among the witnesses. However, PW1 said, from the information they obtained at the crime scene, he instructed Village Executive Officer to find the elder wife of the deceased, and after some moments had passed, indeed the

Village Executive Officer came back at the crime scene with the elder wife of the deceased, the 1<sup>st</sup> accused person. Whereas she was arrested and taken to Inyonga Police Station where she was interrogated, and she basically admitted having committed the offence.

PW4 was WP 9800 D/C ELIZABETH, another Police Officer who resides at Inyonga District. She was assigned to record the cautioned statement of the accused person who was arrested at the crime scene that is the 1<sup>st</sup> accused person. Being under oath she told this court that, and I quote;

*"On 28/6/2021 I was at police station of Inyonga. I was assigned a duty by Asp. Beda (OC CID) to record a caution statement of the accused. The accused was in the lock up, I took her to the small office where I recorded her statement. In that office there was a table and a chair. The suspect was Prisca d/o Pius. If I see her, I can recognize her. Here in Court, she is on the right-hand side in front of me at the dock.*

*In the room, I introduced myself by force number, name and rank. That I work in the investigation department. I told her that she is there for recording her caution statement. Before I recorded, I informed her rights. That she has the freedom to record a*

*statement before me or not to record and that if she opts to record then the statement may be used as evidence against her.*

*The suspect agreed that she was ready to record a statement before me. I thus started to record her statement. I started at 17:10 hours and finished at 18: 30 hours. After I had finished recording her statement, she read the statement she then signed. I also signed."*

This exhibit was tendered in court, and this court did admit it in evidence and marked it as Exhibit P3. Part of the contents of the said exhibit are as hereunder;

*".....ndipo alikuja rafiki wa mume wangu sana wa zamani ambaye ni MAHONA S/O KULWA @ LUSHINA akanipa taarifa kuwa mume wko ana mpango waw a kukuua ambaye ndiye marehemu kwa sasa ili achukue ng'ombe zake alizokuwa ameacha pale nyumbani. Mara ya pili akarudi tena kwangu MAHONA S/O KULWA @ LUSHINA akasema kuwa tayari wamepewa pesa hao wauaji hivi ninavyoongea na wewe tayari kawapa Tsh. 300,000/= hivyo akaniuliza upo tayari kufa, Mimi nikamwambia Hapana akasema kuwa ngoja niwalete kwako akawa amekuja pale nyumbani ba*

*NGASA S/O NGADO akasema kuwa nimeleta sasa muhusika huyu hapa akueleze kuwa tumeambiwa na mume wangu marehemu tukuue na mpango wote kukamilika ni Tsh. Milioni Moja mpaka sasa katoa Tsh. 300,000/=.....Baaada ya kuona mume wangu anataka kuniua na mimi nikaona niwatumie wale wale watu ambao mume wangu alitaka kuwatumia kuniua mimi kwa kuwaambia kuwa nitawaongeza pesa ambayo ni Milioni Moja na laki tatu Tsh. 1,300,000/= wakakubali"*

When crossed examined by the defence counsel, Mr. Ngao, PW4 told this court that, the 1<sup>st</sup> accused person mentioned other culprits in this offence that are the 2<sup>nd</sup> accused person, Juma and Ngasa s/o Ngado.

PW2 was ADAM S/O FAUSTINI MATERU a resident of Inyonga District and works as a Magistrate at the Inyonga Urban Primary Court. He testified under oath and testified as follows;

*"On 2/7/2021 I was in the office at Inyonga Primary Court, continuing with my duties as a magistrate. I remember on the date at afternoon hours, WP Elizabeth accompanying the suspect, Prisca d/o Pius. In my office, the police officer told me the suspect*

*Prisca s/o Pius wants to record her statement before me. After that I directed the police officer to leave the office. We remained me, the Court clerk (Angelina Michael) and Prisca Pius.*

*After the police officer had left, I introduced the suspect, that I am a justice of peace and a magistrate. I have been told that you want to record a statement before me. She said yes.*

*I thus inspected her and observed that she had no injury in her body. I also asked her when she was arrested. She told me that she was arrested when she was going to the scene of crime. She was arrested by the Village Executive Officer.*

*I asked her where they sent her, she said they took her to the scene and then to Inyonga Police Station. I asked her questions whether she has been threatened or forced to come for recording the statement, the suspect said no body has threatened her. I asked if she is ready to record the statement or not ready. She said she is ready to record the statement.*

*I informed her that if you record your statement, it will be written, and it may be used as evidence against her in the Court of law. She said she is ready to record the statement.*



*I thus recorded that I am satisfied that the suspect has voluntarily decided to record the statement before me, then she started giving a statement which I recorded. If I see the suspect, I can recognize her. She is there in the accused's dock. The first accused on my right hand.*

*I started to record her statement at around 13:00 hours. After I had finished recording, I read over the statement to her which she confirmed by signing and I also signed."*

This document was tendered in court, and it was admitted in evidence as Exhibit P1.

When cross examined by the defence Counsel, Mr. Ngao, PW2 said in the statement, P1 there is nowhere that the 1<sup>st</sup> accused person admitted killing the deceased. And he was Re-examined by Ms. Shiyo, PW2 said the 1<sup>st</sup> accused person told him that she gave money to the people who killed her husband.

Now the search for the other culprits was activated, and on the 30<sup>th</sup> of June 2021, the 2<sup>nd</sup> accused person was arrested at an auction and he was taken to Inyonga Police Station where he was interrogated by PW5, G.9929 D/CPL. FURAHA a Police Officer who also resides at Inyonga. He interrogated the

suspect by way of a cautioned statement. In his testimony being under oath he did testify as follows;

*"On 30/6/2021 around noon hours I was a Police Station Inyonga. While continuing with my daily duties I was instructed by OC CID to interrogate the suspect and record cautioned statement. The suspect was in the lock up. I complied with the directives by taking the suspect from the lock up to the interrogation room. It was Mahona s/o Kulwa. If I see him, I will recognize him. He is here in Court. The male accused person in the dock.*

*In the interrogation room I introduced myself to him, by names and that I am a police officer. That I am there to record his statement. I informed him the offence. That he is suspected to have murdered a person.*

*I informed him his basic rights which he must know before recording his statement. I informed him that he has a right to give a statement or not to record. That he may call a relative, friend or attorney whatever he will say will be recorded as it is, and it may be used later as evidence against him.*

*Then I asked him if he has understood. He said he has understood. I asked if he is ready to record a statement. He said he is ready. I asked the language he will be ready to record. He said he will use Swahili language.*

*After the preliminary I started to record his statement. I started to record at 13: 00 hours and finished at 14:00 hours. Then, since the accused said he doesn't know how to read, I read over the statement to him, he confirmed the statement. I therefore gave the statement to him he signed by pressing right thumb print and I signed also."*

This document was also adduced in court as part of evidence and the court admitted it as Exhibit P4. Part of the contents of this exhibit are as hereunder;

*".....namfahamu PRISCA D/O PIUS @ MWANAMISAMBO ndiye aliyekuwa mke wa marehemu na ndiye aliyenifuata na kunieleza kuwa kwa muda mrefu amekuwa katika mgogoro na mume wake MISIRI S/O COSMAS na kunieleza kuwa amepata taarifa kutoka kwa watu ambao hakuwataja kwangu kuwa MISIRI S/O COSMAS anataka amuuu na hivyo yule mwanamke akaniomba nitafute*

watu wa kumuua MISIRI S/O COSMAS, na nilivyouliza sababu ya kufanya hivyo alinieleza kuwa wamekuwa kwenye mgogoro wa kindoa kwa muda mrefu na hivyo mwanamke huyo alikuwa na hofu ya kunyang'anywa mifugo @ ng'ombe.....mwanamke huyu alianza kutulalamikia ndio tulipokutana siku hiyo tulikubaliana usiku wake tukakamilishe kazi hiyo na kweli tarehe 28/06/2021 majira ya 20:00 HRS, nikiwa na wenzangu NGASA S/O... na JUMA S/O....kwa Pamoja tulifika nyumbani kwenye mji mdogo wa marehemu.....Mimi na NGASA S/O tulibeba fimbo na mwenzetu JUMA S/O alibeba PANGA.....tulianza kumshambulia kwa kumpiga fimbo na alipoanguka ndio mwenzetu JUMAS/O akawa amemkata panga sehemu za kichwani na baada ya muda mfupi sana alikufa..."

When cross examined by Mr. Ngao, PW5 told the court that the 2<sup>nd</sup> accused person told him that he joined forces with Ngasa and Juma in killing the deceased.

PW8 was HUSSEIN RASHID MWITA a resident of Inyonga who by then was the Ward Executive Officer of Inyonga Ward. He recorded the extra judicial statement of the 2<sup>nd</sup> accused person. He too testified under oath that;

*"On 2/7/2021 I was a Ward Executive Officer of Inyonga Ward. My responsibilities are guardian of peace and supervisor of all developmental activities within the ward. On the date I was in the ward office at Inyonga continuing with my daily duties. At 15:00 hours I saw Afande Furaha and a suspect by the name Mahona coming to record an extra judicial statement in my office. I receive that them and introduced myself. Then I direct the police officer Furaha to leave the office so that the suspect is free. When I asked him if he knows me, he answered in a negative. I thus told him that I am a justice of peace. He should be free. I asked him if he is ready to record a confession statement. I asked him where he was arrested. He said he was at the auction where he went to sell goats. I asked him where he was sent; he said police station Inyonga. I asked him where he slept. He said at the remand/lock up Inyonga.*

*I interrogated him if he is ready to record his confession. He said he is ready. He told me that in April 2021 his sister-in-law Prisca went to him. She had something to discuss with him. So, they went aside to seek privacy. His sister-in-law said she wanted him to kill her husband because he wants to take cows which were left with her.*

*I asked him why he did not report to me. The accused Mahona remained silent. He told me that he did not deny. He however told her that he will need two other people and he mentioned Ngasa s/o and Juma s/o. He requested for time to consult them before they execute the job.*

*Mahona s/o Kulwa called Ngasa s/o and Juma s/o? and they met at the residence of Prisca. After agreeing, they went to the destined area and agreed, after discussion, to work on the assignment for Tshs. 1,000,000/= (one million only). They were paid Tshs. 700,000/= (seven hundred thousand only) and Prisca remained owing them Tshs. 300,000/= (three hundred thousand). They asked Prisca to assist in locating the target (Misri s/o*

*Cosmas). Then, Prisca called them that now the target is at his residence they should go.*

*At around 19:30 hours they went at the residence of Misri s/o Cosmas and hid themselves near the kraal. They stayed for half an hour he did not come out. They opened the kraal so that cows come out. Misri s/o Cosmas came out to return the cows. The assailant came out and they assisted him.*

*They assisted him to return the cows. Then after closing the kraal's door, he was returning inside. The accused struck him with a stick on the head he fell and lost consciousness.*

*Since it was near the house, they carried him and put him a bit far behind the kraal. Thus, Juma hacked him with a machete on the neck and head. They waited a bit to verify if he has died or not. When they were sure he is dead every one left on his way. That is when the accused said that is where we ended, I pray for your assistance.*

*If I see Mahona Kulwa I can recognize him. He is here in Court on my left side in the accused's dock.*

*I started to record the statement at 15:00 hours and I finished at 17:00 hours. After I had completed recorded, I read over the statement to the accused person. He then agreed that it was correct. He then signed."*

Again, this document was also prayed to be tendered as evidence, and this did admit it in evidence and marked Exhibit P7.

PW7 was F. 4373 D/CPL JAMES a Police Officer who resides at Kibo in Tanganyika District. He testified under oath that on 28/6/2021 his station of work was at the Police Station at Inyonga, and that on that date there was a murder incident at Kamalampaka village where a person known as Misri s/o Cosmas was murdered. PW7 continued that, the OC CID directed a team of investigators, whereas six police officers and one doctor were gathered and headed to the village of the scene. He said, as they arrived at the scene at around 12:30 hours, they confirmed that a person has been killed and it was Misri s/o Cosmas. And thereafter, they started investigating by interrogating people who were around the scene of crime, and among the people he interrogated was the son of the deceased. Thereafter, PW7 recorded the witness statement of Ngeta s/o Misri the son of the deceased and the 1<sup>st</sup>



accused person. PW7 then prayed to tender the witness statement as evidence and this court admitted the same as Exhibit P6.

When cross examined by Mr. Ngao, defence counsel, PW7 said that the witness told him that his father might be due to the existence of misunderstanding between the deceased and his mother.

Defence case was opened by the testimony made by DW1, PRISKA d/o PIUS @ MISAMBO. She testified under oath that;

*"On 28/6/2021 at around 8:00 hours I received a call from my son Revocatus who stays at Mapili. He asked if I have any information. I told him I don't have any information. He said, his father has died. He has been hacked with machetes. I thus left with my other son Ngetwa s/o Misri. We went to the scene of event (crime). When we were about to arrive, I met the Village Executive Officer and a sungusungu commander.*

*They stopped me, put me under arrest. They said they have been sent to arrest me as it is said I am involved in the event. Then we went to the scene of crime, I saw the deceased's body and then I was called aside by the police officer. He asked me where my*

*husband is. I told him it is him who has been killed. They asked me where is another one. I said do not have another husband.*

*He asked me when did my husband leave our home for the last time. I told him, he has two weeks. He then told me I am under arrest. I boarded the police motor vehicle. We left for Inyonga Police Station; I was placed in the lock up. I slept there and the next day they started to record my statement. They asked me if I was involved in the event, I denied that I am not involved. I was again placed in the lock up where I stayed for one and half month.*

*On 8/8/2021 they brought me to Mpanda Police Station. On 9/8/2021 I was brought to Court. They read over to me the charge of murder of Misri s/o Cosmas. I replied that I am not involved. I was not involved in the murder of my husband as alleged.*

*I pray this Court to disregard the prosecution evidence and release me.*

*That is all.*

When she was cross examined by the learned State Attorney, Ms. Shiyo, DW1 told this court that they were never separated with the deceased but only

that according to Sukuma culture, men are allowed to marry more than one wife and so the deceased did that and left everything with her because he had established another family.

DW2 was MAHONA S/O KULWA, he too testified under oath that;

*"My name is Mahona s/o Kulwa. I am a resident of Kamalampaka Village, Ipati Hamlet. In Mlele District.*

*On 31/6/2021 I was at the auction premises at Inyonga. I went to sell a goat in line with the needs at my home. I went to take tea. When I was coming out, I was told I am under arrest. They told me to board a motorcycle. I was taken to the Police Station.*

*At the Police Station I asked what is wrong. They told me I will know. I slept there on 31/6/2021. I was taken to the investigation room. I was asked if I know Misri s/o Cosmas. I said I don't recognize (simtambui). Then, the 1<sup>st</sup> accused was brought and I was asked if I know her. I said I don't know her. It ended there.*

*After I had recorded my statement, I was brought here at Mpanda Police Station. We arrived here on 8/8/2021 and the next day*

*9/8/2021 we were taken to Court. When taken to Court a charge of murder of Misri s/o Cosmas was read over to us.*

*Honestly, I did not participate in the murder of MISRI S/O COSMAS. I pray this Court to do justice. That is all."*

When cross examined by Ms. Shiyo, DW2 told this court that the statement purported to be recorded by him is not the statement which was read in court, and that he does not know either DW1 or the deceased.

Both learned counsels obliged to make their final submissions in a written mode, and this court gladly agreed to their option, and I should say 'thumbs up' to both counsels to comply with this court's schedule.

Ms. Shiyo submitted first that, there is no doubt that MISRI s/o COSMAS, now the deceased is not alive and that, his death was caused by an unnatural event. She added that, the 1<sup>st</sup> accused person confessed before PW4 who recorded her cautioned statement, Exhibit P3 where she confessed that she had hired the 2<sup>nd</sup> accused person to murder the deceased, as she wanted to possess the cattle left by the deceased after they had separated. The learned State Attorney proceeded that, the 1<sup>st</sup> accused also reiterated her confession before the justice of peace PW2 and the statement thereto was tendered and marked Exhibit P1.

Submitting further, Ms. Shiyo said that the 2<sup>nd</sup> accused person also confessed before PW5 who recorded his cautioned statement, Exhibit P4 where he admitted he murdered the deceased being assisted by Ngasa and Juma, as they were hired by the 1<sup>st</sup> accused person. Ms. Shiyo added that, the 2<sup>nd</sup> accused person repeated his confession before the justice of peace, PW8 who tendered the Extra Judicial Statement of the 2<sup>nd</sup> accused person and it was marked as Exhibit P7.

She therefore concluded that, the detailed confession by the accused persons determines the issue in affirmative that the accused person murdered the deceased with guilt mind. She then cited the case of **DPP vs Nuru M. Gulamrasul [1980] TLR 254** where the Court held that;

*"As the Court has consistently pointed out in the past, the very best of witness is an accused who confesses his guilt..."*

Again, she cited the case of **Hemed Abdallah vs Republic [1995] TLR 172**, where the court held that;

*"Once the trial court.....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."*

She insisted that, there is no doubt that exhibit P1, P3, P4 & P7 are nothing but the truth because were voluntarily recorded and no objection was raised to repudiate or retract on the reasons of torture or inducement when it was tendered.

Ms. Shiyo another case of **Vincent Ilomo vs Republic, Criminal Appeal No. 337/2017 CAT** at Iringa (Unreported) at Page 22, the Court observed;

*"It is a trite law that if an accused person intends to object the admissibility of a statement/confession he must do so before it is admitted and not during cross examination or during defence."*

She added, the Court did further stated at pg. 27 that;

*"...because here there was no allegation of torture which might have lingered in the mind of the appellant at the time he appeared before the justice. We emphatically add that for this process to be voluntary, it should not have anyone worrying about time ticking."*

Ms. Shiyo presented that, despite there was no objection on the voluntariness of P1, P3, P4 and P7, the accused persons did not cross examine to suggest that there were either threats or torture. She again referred this

court to the case of **Mohamed Katindi & Another vs Republic [1996] TLR 134**, where it was held that;

*"It was the obligation of the defence counsel in duty to his client and to the court, to indicate in cross examination the theme of his client's defence so as to give the prosecution to deal with the matter."*

She again cited the case of **Posolo Wilson @ Mwalyego vs Republic, Criminal Appeal No. 613/2015 CAT** at Mbeya (Unreported) at Page 8, where the Court held that;

*"If the appellant thought that the statement he made to PW3 was not voluntary and that it was extracted through beatings, he ought to have cross-examined PW1 & PW2 on the point."*

In relation to the above citation, Ms. Shiyo submitted that such confession is corroborated in the testimony of DW1 and DW2 that the confessions were recorded in their presence, and they voluntarily endorsed their signatures. She added, also the 1<sup>st</sup> and 2<sup>nd</sup> accused persons were seen in a meeting together with Ngasa and Juma as per the witness statement, Exhibit P6 and that, death occurred after their plan to kill the deceased was complete.

Ms. Shiyo did not end there, she again cited the case of **Jacob Asegelile Kakune vs DPP, Criminal Appeal No. 178/2017 CAT** at Mbeya (Unreported) at page 20, it was held that;

*".....we wanted to pronounce ourselves on.....contention that the conviction of the appellant was solely based on extra judicial statement.....other pieces of evidence is the existence of personal conflict between the deceased and the appellant."*

Ms. Shiyo then submitted that, the circumstances of the case at hand are strong and the evidence of PW7 who tendered the witness statement of Ngetwa s/o Misri irresistibly points at the accused persons as it is not at all aspects the murder incidences being witnessed by an eyewitness.

In addition to that, Ms. Shiyo again referred this court to the case of **Mabala Masasi Mongwe vs Republic**, Criminal Appeal No. 161 of 2010 CAT at Dar-es- Salaam (Unreported) at page 16, where the court held that;

*"To us this was not fatal because if every killing had to be eye witnessed then many homicides would remain unresolved. We believe so because killing may be by poisoning, starving, drowning and thousand other forms of death by which human nature may*



*overcome. Such killings can hardly be eye witnessed by independent witness."*

Ms. Shiyo submitted further that the confession of the 1<sup>st</sup> accused, and 2<sup>nd</sup> accused together with the weapon used to murder (sharp object) and nature of the wound inflicted to the deceased (PW1, PW2 and PW3) implicates that the accused persons had malice aforethought.

In support of her submission, Ms. Shiyo cited the case of **Elias Seif vs Republic [1984] TLR 244** at page 248, where it was held that;

*"The learned trial judge found the existence of the malice aforethought from the nature of the weapon used and the location of the injury inflicted.....on the evidence, there could not have been any and there was no lawful justification or excuse for killing the deceased."*

She then added the case of **Republic vs Betram Mapunda & Optatus Tembo [2000] TLR 1**, where it was held that;

*"The nature of the wound shows that the 1<sup>st</sup> accused person who inflicted it upon the deceased, intended to kill and the charge of*

*murder against him therefore is proved beyond reasonable doubt."*

After citing the case above, Ms. Shiyo then clarified further that the defence by both accused persons that they did not record their cautioned statements soon after being arrested is a lie because that defence was not raised/objected when Exhibit P3 & P4 were tendered, that the same were made on the next day after the day they were arrested. She insisted that, raising this defence at the defence stage indicates that they are cooked stories, and thus do not hold water.

Ms. Shiyo never got tired and referred this court to the case of **Samwel Mkika vs Republic, Criminal Appeal No. 47/2001 CAT** at Mwanza (Unreported) at page 15. She said, in this case, the Court held that;

*"...apart from the mere claim by the appellant in this appeal, no semblance of some back up evidence has been shown at least to indicate that the appellant was in fact subjected to torture."*

In conclusion, Ms. Shiyo submitted that, considering the strength of the prosecution evidence from PW1 to PW8 and the Exhibits tendered, her side is satisfied that the case against both accused persons is proved beyond

reasonable doubts, and that they urge this court to find the accused persons as guilty of murder and convict them as charged.

Mr. Eliud Ngao learned Advocate representing both accused persons submitted next, that it is the cardinal principal that in criminal cases, it is the duty of the prosecution to prove the guilty of the accused person and to do so beyond any reasonable doubt. In support of his submission, he cited the case of **Joseph Makune vs Republic [1986] TLR 44** at page 49, where the Court of Appeal held that;

*"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case."*

He then added that, from the cardinal principle of criminal law, the prosecution has failed to establish beyond reasonable doubts that the accused persons did kill the deceased. Mr. Ngao insisted that, PW1 adduced evidence that he was informed that one person had died but he was not told exactly as to who did kill the deceased. He proceeded that, again PW2 adduced the evidence that he recorded the extra judicial statement of the 1<sup>st</sup> accused person and she did not disclose exactly that she was directly involved in killing of the deceased. He said, what was narrated was a mere relationship persisting in the marriage of the deceased and the 1<sup>st</sup> accused person, and that there is no clear

connection of the evidence and the occurrence of the incident. Mr. Ngao added that, PW4 testified to have recorded the cautioned statement of the 1<sup>st</sup> accused person but the statement does not connect her with offence.

The learned Advocate for the defence then submitted that, the defence evidence by DW1 and DW2 has categorically established that the accused persons did not kill the deceased as alleged, and that the whole case is a mere fabrication through hear say. He added, the fact that the 1<sup>st</sup> accused person had conflict with the deceased does not constitute that she participated in the killing of the deceased person. Mr. Ngao referred this court to the case of **Republic vs Emmanuel s/o Nengo and Dotto s/o Elias, Criminal Session Case No. 137 of 2016**, HCT at Geita (Unreported), where Rumanyika, J. stated at page 6 that;

*"The law is well settled that however strong might be suspicion alone cannot be proof of the case against the accused."*

He winded up by submitting that, it is on the basis of all above submissions that his side submits that the prosecution side has failed to discharge its burden of proving this case beyond reasonable doubts and at any rate it cannot rely on the defence evidence, and therefore he, on-behalf of the accused persons prays for this Court to acquit them.

I should say, this is an interesting scenario, and I am looking forward to its end. Nevertheless, it has been an honour for me to hear all the testimonies from both sides, and indeed go through the entire exhibits as tendered by the prosecution side and the final submissions as filed by the counsels from both sides, and in that, I am fortified that the only issue in this case is ***whether the prosecution side had proved their case against the accused persons beyond the reasonable doubts as required by the law.***

As the scenario has been briefly retold above, the accused persons' involvement in this case is hinged on the statements they purported to have recorded voluntarily, in other words, as indeed in murder cases it is so rare to procure an eye witness, but in this case even suspiciousness, identification or circumstantial evidences could not be relied upon; as I said earlier that this is an interesting scenario, whereas the prosecution side only relies on the cautioned statements and extra judicial statements of the accused persons to warrant conviction.

I am in no contention with Ms. Shiyo that the Cautioned Statements and the Extra Judicial Statements were voluntarily made by both accused persons at the Police Station and at the Justices of Peace. And if so, it would have been easier for me to convict the accused persons basing on their own voluntary

statements they recorded. This fact was well discussed in the case of **Hemed Abdallah vs Republic** (supra) as cited by the learned State Attorney.

However, a scrutiny of these four exhibits, meaning the cautioned statement of the 1<sup>st</sup> accused person (P3), her Extra judicial statement (P1), cautioned statement of the 2<sup>nd</sup> person (P4) and his Extra judicial statement (P7), I have realized there are some inconsistencies and/or illogicality that do go to the root of this case. Even though the exhibits were neither objected nor retracted at any point by the accused persons, but for me to be on a safe ground of convicting them, I should be satisfied with the truthfulness of the contents in each statement as held in the case of **Iddi Muhidin @ Kibatamo vs Republic, Criminal Appeal No. 101 of 2008 CAT at Dar es Salaam** (unreported) at Page 14, that;

*"It suffices to state here once again that a court of law can only act upon a statement alleged to have been made freely and voluntarily although subsequently retracted, if there is material particulars, corroborating what is contained in the retracted statement. And, to corroborate a retracted statement, **all that is required is some evidence which implicates the accused***

***and which tends to show that what is said in the confession is probably true."***

**[Emphasis is Mine]**

It is my argument that the illogicality and inconsistency that are found within these four exhibits are the results of investigators of the case being the interrogators of the suspects. I will elaborate on this as follows; PW1, testified that after being given the information about the incident, he gathered a group of investigators and headed to the village of the crime scene. And at the crime scene, he assigned duties to the police officers he had and due to the information, they obtained while at the crime scene, he assigned the village executive officer to look for the wife of the deceased. Mind you, PW1 neither mentioned the names of the police officers who accompanied him to the scene apart from PW3 (who he assigned to draw a sketch map of crime scene), nor did he disclose where he got the information from that made him order the deceased's wife (1<sup>st</sup> accused) be looked for and be restrained. And when she was found and put under custody, at the Police Station, PW1 assigned a Police Officer to record her statement. See pages 3 & 4 of the typed proceedings.

On the other hand, PW3's testimony is that, after he and his colleagues were informed of the murder incident, they were told to prepare themselves to

head towards the crime scene village. PW3 said they were five police officers in number. And at the scene of crime, they were assigned duties whereas he was assigned to draw the sketch map of the crime scene.

Now, before I point out the illogicality and inconsistencies in the four exhibits tendered, I am inclined to draw an inference that, the investigators at the crime scene, were the police officers who interrogated the accused persons, because they were present at the scene of crime, and they had obtained some information at the scene of crime and therefore, they were detailed about the family of the deceased and the possible suspects to the incident, hence illogicality and inconsistencies of the four exhibits. It goes without saying that, it is preferable a police officer recording the cautioned statement be different from an investigating officer. That may guarantee the voluntariness and truthfulness of the statement. See, **Iddi Muhidin @ Kibatamo vs Republic** (supra).

Coming to the four exhibits, I will start with the 1<sup>st</sup> accused person with her two statements. When she was freely recording her cautioned statement as alleged, she said that the 2<sup>nd</sup> accused came to her and told her that the deceased has planned to kill her so that he takes the cattle herd he had left with her. Not long, the 2<sup>nd</sup> accused person came to her again with another



person purported to be the assassin and they told her that the deceased had already paid Tsh. 300,000/= out of the total payment of Tsh. 1,000,000/= so that they kill the 1<sup>st</sup> accused person.

To a prudent person, this is too illogical, it is normal to file a report to the authority upon any death threat, and even worse, seeing the person who is supposed to end your life is before your eyes, I don't think any person will be in the position of negotiating for murdering another person.

Let me proceed, in her extra judicial statement, the 1<sup>st</sup> accused stated that the 2<sup>nd</sup> accused came to her and said the deceased is furious and wants to kill her because she has got another man in her life. She, said that the 2<sup>nd</sup> accused left and returned to her after two weeks and asked her if she wanted to die, and she said no. Then, after two days, the 2<sup>nd</sup> accused phoned her and asked of her whereabouts, she replied that she is at home and the 2<sup>nd</sup> accused person went to her being accompanied by the assassin. While at her home, they told her that the deceased had paid them Tsh. 300,000/= to kill her and that remains Tsh. 700,000/=.

Again, to my understanding, it is impossible to keep in one's heart the information that one is about to be murdered without seeking the help of local authorities and police force. It is too illogical for the 1<sup>st</sup> accused person to keep

to herself the information that her husband has planned to kill her without involving, friends, relatives, local leaders or even the police force. However, the inconsistency seen is because she did not record most of the statement in the cautioned statement and that is why she could not reproduce them the same way at the Justice of peace.

After being told she is about to die, she decides to recount the amount the assassins were paid. In her cautioned statement, she stated that as they had already received Tsh. 300,000/= from the deceased, she will add Tsh. 1,000,000/= to make the total of Tsh. 1,300,000/= and the assassins agreed. Therefore, she borrowed Tsh. 200,000/= from a person called Juma, and her lover sold rice paddy and sent her Tsh. 300,000/= which makes the total of Tsh. 500,000/=. But the figure that appears on the cautioned statement is somehow tempered with so that the reader sees it as Tsh. 700,000/= (to tally the figure in the extra judicial statement) in which, the Tsh. 200,000/= which makes the total of Tsh. 700,000/= from the Tsh. 500,000/= obtained, has not been talked of anywhere. So, I am sure, in her cautioned statement, the figure the 1<sup>st</sup> accused referred to that she gave the assassins was Tsh. 500,000/= and not Tsh. 700,000/=.

Meanwhile in her extra judicial statement, she stated that after being told that the assassins were already paid Tsh. 300,000/= to accomplish their task, she reencountered the payment and she promised to pay them Tsh. 1,000,000/= so that the total be Tsh. 1,300,000/= and their target changes from the 1<sup>st</sup> accused person to the deceased. And therefore, she gave the assassins Tsh. 700,000/=. This amount tallies the tempered amount in the cautioned statement, to me this inconsistency raises doubts as to the truthfulness of the statements made.

Coming to the 2<sup>nd</sup> accused person, to start with, in his cautioned statement he stated that they went to kill the deceased on the 28<sup>th</sup> of June 2021 at around 20:00 hours. This alone is contrary to the charge sheet which states that the offence was committed on the 27<sup>th</sup> of June 2021.

In addition to that, the 2<sup>nd</sup> accused person stated that it was the 1<sup>st</sup> accused person who went to him and told him that she had received some information that she has been told by some people (she never revealed them to the 2<sup>nd</sup> accused) the deceased has paid them to kill her and the reason behind is that, they have been in constant quarrels for a long time, and that she is in fear of loosing the herd of cattle left with by the deceased, and so she

asked the 2<sup>nd</sup> accused to look for assassins who would kill the deceased before she is killed.

In this caution statement, the 2<sup>nd</sup> accused person states that he had his two trustworthy friends namely Ngasa and Juma who gathered to accomplish their task as assigned by the 1<sup>st</sup> accused, meanwhile she only referred to the 2<sup>nd</sup> accused person and Ngasa only as the people she had contact with in accomplishing the task. Nevertheless, the 2<sup>nd</sup> accused person states that as they gathered with his colleagues and the 1<sup>st</sup> accused person, they discussed the amount to be paid in accomplishing the task is Tsh. 1,000,000/= whereas on that day they received the sum of Tsh. 600,000/=. Now, this sum contradicts the sum mentioned by the 1<sup>st</sup> accused person in her cautioned statement and the extra judicial statement.

In his extra judicial statement, the 2<sup>nd</sup> accused person now states that they killed the deceased on the 27<sup>th</sup> day of June 2021, which tallies the date of the charge sheet. I believe, words were put in his mouth so that the date tallies the date on the charge sheet. I say saw because, even the sum stated that they received as advance payment, he stated to be Tsh. 700,000/= which tallies with the amount stated by the 1<sup>st</sup> accused in her extra judicial statement but also weirdly tallies with the tempered sum in her caution statement.

Moreover, the manner they executed the killings also made me wonder how is it possible for a person to be in constant inconsistency within two days of reproducing an action he had planned for over one month. The 2<sup>nd</sup> accused person in his cautioned statement stated that he and Ngasa had rods while Juma had a machete. That, he and Ngasa struck the deceased and that Juma hacked him with the machete, and after seeing the deceased had pass away, they left him whereas, his colleagues had a bicycle, and he was on foot, but they went separate ways.

Contrary to his extra judicial statement, the 2<sup>nd</sup> accused stated that he struck the deceased on the head with a rod, and he lost his consciousness and thereafter Ngasa and Juma started hacking him with machetes until he was dead. They then carried his body and abandoned it close to a kraal. He then took his bicycle and went his way likewise his colleagues.

At this juncture, I am in dilemma, as to how much did the assassins receive as an advance payment from the 1<sup>st</sup> accused person so that they accomplish their task? Was it Tsh. 500,000/= or Tsh. 600,000/= or Tsh. 700,000/=? Even worse, what was the reason for the 1<sup>st</sup> accused person to make a counteroffer so that the deceased be killed instead of herself, was that she had another lover or that the deceased wanted to take the cattle herd from

her. But seriously, in the year 2021 where most part of this country has established profound local authorities and police force, it is not logical for a person to be under death threat and yet sleep over it without notifying any local authorities or police force and only think of killing before being killed.

With the scrutiny I made as far as the four exhibits are concerned, as the prosecution case relies on these exhibits, I never expected to encounter illogical narration or inconsistency within them as I did. And so, they were to be corroborated so that the illogicality and inconsistency could be covered by another credible evidence such as exhibit P6.

Exhibit P6 was a witness statement of the son of the deceased and the 1<sup>st</sup> accused person, he is called Ngetwa s/o Misri. In his statement, there is nowhere that he has straightened the illogicality and inconsistency I encountered in the four exhibits I outlined above. He stated the year his father and mother separated, and the day he saw his mother with some people at their residence, but he never knew who they were and the date he was informed about the death of his father. Again, this statement does not support the statements in contention at all.

It is my fortified reasoning that a statement voluntarily being recorded will be consistent and in a chronological manner no matter how many times it

is reproduced. In this case at hand, it does not make sense that within five days as for the 1<sup>st</sup> accused and 2 days for the 2<sup>nd</sup> accused, they had forgotten what they had planned for over one month.

With regard to contradictions or discrepancies in the testimony of witnesses, it is settled law that the same does not necessarily make that evidence lose credence or become unacceptable. This was the position in the Court of Appeal case of **Said Ally Ismail vs Republic, Criminal Appeal No. 241 of 2008** (unreported) where it was held that:-

*"...it is not every discrepancy in the prosecution's witness that will cause the prosecution case to flop. **It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled ..."***

[Emphasis added]

I am of the view that the contents of the four exhibits, P1, P3, P4 and P8 are not reliable for me to stand on and declare conviction of the accused persons. In doubt of these exhibits where the prosecution evidence hinges, I am fortified to declare that the prosecution side has failed to prove the charges of murder against the two accused persons before me.

I therefore proceed to dismiss the charges of the offence of murder against both accused persons and order their immediate release from custody unless they are being held therein for other lawful reasons.

It is so ordered.



A handwritten signature in black ink, appearing to read "T. M. Mwenempazi".

**T. M. MWENEMPAZI**

**JUDGE**

**16/03/2023**