

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT GEITA**

CRIMINAL SESSIONS CASE NO. 05 OF 2021

REPUBLIC

VERSUS

- 1. ERASTO SIMON**
- 2. EMMANUEL MBUGA**

JUDGMENT

08th March & 17th March, 2023

Kilekamajenga, J.

The information contained in the court's file alleges that, the first accused (Erasto Simon) had a land dispute with Yanga Ndege prompting the former to hire the second accused for murder. In furtherance of such intention, the second accused involved one Shija Kulwa. Unfortunately, the second accused and Shija Kulwa mistakenly killed Simon Ndege who was Yanga Ndege's young brother. It is alleged further that, on the fateful day, Yanga Ndege, Simon Ndege and Henerico Thobias were sleeping in one room before their door was broken and the deceased pierced with a mattock (sururu).

One month after the incident, the second accused and Shija Kulwa were arrested. The first accused was also arrested three days after the arrest of the first accused. The identification parade was conducted and Yanga Ndege and



Henerico Thobias identified the second accused and Shija Kulwa. The first and second accused persons together with Shija Kulwa were arraigned for the offence of murder contrary to **section 196 and 197 of the Penal Code, Cap. 16 RE 2019**. Unfortunately, Shija Kulwa died in prison before the trial of the case and Henerico Thobias could not be procured for a testimony. According to the information filed in this court, the accused persons allegedly murdered one Simon Ndege on 05th day of October 2019 at Mgusu Ward within the District of Geita.

When the case came for hearing, the accused persons pleaded not guilty to the offense of murder prompting the prosecution to parade seven witnesses and tender five exhibits to prove the charge to the required standard. During the trial, each of the accused persons was assigned an advocate for legal representation. The learned advocate, Ms. Martha Nicholaus appeared for the first accused whereas the learned advocated, Mr. Forget Mongi represented the second accused. On the other hand, the two learned State Attorneys, Ms. Monica Matwe and Mr. George Masero appeared for the Republic.

The evidence adduced during the trial shows that, a police officer with force number F. 3040 Detective Sargent Joseph (PW1) who worked as an investigation officer in Geita informed the court that, on 13th November 2019, they received

information from an informer about the murder that occurred on 05th October 2019 at Nyakabale Village. The informer seemed to know the suspects and directed the police where they were. PW1 left with a team of other police officers to Nyawilimilwa village within Geita. At around 3 pm, they spotted the suspects around Nyawilimilwa Primary School. The police chased the suspects and fired gun on the air ordering the suspects to stop and finally arrested the two suspects. Among those two suspects, PW1 identified the second accused (Emmanuel Mbuga) before the court as one of the suspects arrested on that day. Immediately after the arrest, PW1 talked to the suspects who admitted the involvement in the murder at Nyakabale village. They took the suspects to Nyawilimilwa police post and finally to Geita police station for further interrogation.

The second prosecution witness (PW2), Yanga Ndege testified to be a resident of Manga Street, within Nyakabale village, the Ward of Mgusu within Geita District. He clearly recalled that, on 05th October 2019 while at Manga Street, he spent his night with Simon Ndege (deceased) and Henerico Thobias before they were attacked at 1 am. On that night, the door of their room was broken using a big stone and two people stormed in the room armed with traditional weapons. One attacker held an iron bar while the other one held a mattock (Sururu). PW2 light up his torch which was powerful than the one used by the attackers; though he

did not know their names, he marked their faces and appearance. In his testimony, he was content that, the attackers did not cover their faces and wore black shirts and trousers. One of the attackers applied the iron bar against the deceased whereas the other one pierced the deceased with the mattock on the head and chest. The event took about fifteen (15) minutes and he witnessed the murder of his young brother at a distance of just one foot step away. Thereafter, the attackers left and locked the door from outside. PW2 raised an alarm and people gathered including the village chairman who immediately phoned the police. The police arrived at the crime scene at 3 am and PW2 informed them that, he was suspecting the first accused (Erasto Simon) to plan the murder because they had a land dispute. Also, PW2 told the police that, one of the attackers was thin and tall and the other one was short and fat.

He testified further that, on 14th November 2019, he was summoned at Geita Police Station to identify the attackers. During the identification parade, twelve people lined up and he identified the attackers who lined at numbers five (5) and seven (7). He identified the second accused in the identification parade at number seven (7) but the other attacker who was the fifth in the line was not in court. He identified the second accused as the one who held the mattock; he was the attacker he described as slim and tall. PW2 told the court that, the first accused was his neighbour before shifting to Katoro; he therefore knew him very

well. He named the first accused's family members thus, Pili James (wife), James Erasto (son), Emmanuel Erasto (son), Faustine Erasto (son).

When cross examined, PW2 testified that, their compound had three houses. One of the houses was occupied by Ndimwe and his wife on that night. He slept in the other house with other two persons. They slept in one room because the other room was used by the deceased's children and the other one was used as a storeroom.

PW3 (Inspector James Mahanya) was assigned by the OC-CID to conduct the identification parade of the suspects. He followed all the required procedures before conducting the identification parade. He informed the suspects of their rights. During the parade, he lined-up twelve people for identification; among of them was the two suspects. On that date, there were two witnesses to identify the suspect. The first witness (Yanga Ndege PW2) correctly identified the suspects. He filled-in the identification parade register which was signed by him and the suspects. Thereafter, he told the suspects to change their line-up positions. The second witness (Henerico Thobias) also came to identify the suspects, who identified Shija Kulwa (suspect) who was at the seventh position. He also identified Emmanuel Mbuga (second accused) who was at the tenth position. PW3 filled-in the identification parade register which was also signed

the witness. Before the court, PW3 pointed finger to the second accused as the suspect identified at the seventh position. PW3 prayed to tender the two identification parade registers which were objected by the second accused on the reason that, though the identification parade was conducted, PW3 was not among the police officers who conducted the said parade. He further argued that, he did not sign the same identification parade register. The court overruled the objection and admitted the two registers as exhibit P1 and P2 respectively.

The fourth prosecution witness (PW4), Elias Lukanya Chagula was the street chairman of Manga within Mgusu Ward since 2014. On 05th October 2019, he was at home sleeping when he received a phone call from Yanga Ndege (PW2) informing him about the attack and death of Simon Ndege. He was further informed by PW2 that, there were three people sleeping in the room before the attack. PW4 phoned the OCS at Mgusu Ward; he later went to the crime scene and found Simon Ndege dead. He also witnessed the stone used to break the door. PW2 told PW4 that, he knew the attackers by their faces though he did not know their names. PW2 suspected the first accused was behind the plan because they had a land dispute. PW4 also confirmed on the existence of the land dispute between PW2 and the first accused that occurred in 2019. PW4 further confirmed that, one of the first accused's family member died and he attended

the funeral. Upon cross examination, PW4 was content that, the deceased was pierced with a sharp object.

The fifth prosecution witness (PW5), a police officer with force number F. 4037 Detective Corporal Laurian worked in the Criminal Investigation Department in 2019 at Geita. On 16th November 2019, he was assigned to interrogate Erasto Simon (first accused) at Mgusu police post within Geita. The accused was arrested on 16th November 2019 at Mgusu at 4 pm. Before the interrogation, he took the accused to the interrogation room and introduced himself. He further informed the accused about the accusations levelled against him; the accused was suspected of killing one Simon Ndege. The accused was okay and not sick. While they were only two in the interrogation room, PW5 continued to inform the accused about his other rights including the right to bring a friend, relative or lawyer before the interrogation; that, the accused was free to give the statement which could be used against him in court. After understanding the rights, the accused was free to record the statement in absence of a relative, lawyer or friend. During the interview, the accused confessed to hire two people, namely Emmanuel Mbuga (second accused) and another person who is not before this court. PW5 recorded the accused's cautioned statement from 4:30 pm to 5:20 pm and gave it to the accused to read and finally signed with his finger print. Before this court, PW5 identified the second accused's cautioned statement and

prayed to tender it as an exhibit. The admission of the statement was objected prompting the court to conduct trial within trial and finally admitted it as exhibit P3.

The sixth prosecution witness (PW6), a police officer with force number PF 20980 Assistant Inspector Robson Matambo also worked as an investigation officer in the Criminal Investigation Department in Geita. On 13th November 2019, while in the normal duties within the office, he was assigned to interview a suspect called Emmanuel Mbuga (second accused). He took the accused from the police lockup towards the investigation office and they were only two in the room. He continued to inform the accused on his rights; that the accused was not forced to give the statement; the statement could be used against him (accused); that the accused was being accused of murder; that he had the right to bring a lawyer, relative or friend before the interview.

However, the second accused did not require the attendance of any witness during the interview. PW6 recorded the second accused's cautioned statement from 4-5 pm. In the interview, the accused confessed to participate in the murder of Simon Ndege. However, instead of killing Yanga Ndege who was an initial target, they mistakenly killed Simon Ndege. The accused together with Shija Kulwa were hired by Erasto Simon (first accused) to kill Yanga Ndege who

was accused of witchcraft. They agreed to murder Yanga Ndege at the price of Tshs. 1,000,000/= which could be paid in three instalments. The accused, who was literate, read the statement and finally signed. PW6 identified the second accused in court and prayed to tender the statement which was objected. The court conducted trial within trial and the second accused's cautioned statement was admitted as exhibit P4.

The last prosecution witness (PW7) Dr, Stella Martine was requested by the OC-CID of Geita to examine the body of the deceased. She testified that, on 06th October 2019, while at her work station at Geita Referral Hospital, she was called in the mortuary to examine the deceased. The body of the deceased was identified by Yanga Ndege and Joseph Ndege, to be Simon Ndege. She examined the deceased in the presence of a police officer called Robson. In her examination, she found the deceased with wounds caused by a sharp object. The deceased was wounded on the right side of the head, on the right side of the chest, on the right hand and on the right side of the stomach. The deceased seemed to have been pierced on the right side of the stomach as there was a hole. The wound on the right side of the stomach caused the intestine to spill outside. PW7 concluded the cause of death to be excessive bleeding due to the cut wounds. She filled-in the post-mortem examination report which was admitted without objection as exhibit P5.

After the prosecution evidence, the court delivered a ruling in terms of **section 293(2)(a)(b) of the Criminal Procedure Act, Cap. 20 RE 2019** and informed the accused persons about their rights to give evidence under oath and call witness (es) for their defence. In the defence, the first accused summoned two other witnesses apart from his own sworn testimony whereas the second accused only relied on his own testimony. The first accused (DW1) informed the court that he never attended formal education and that he is married and has twelve children namely, James Erasto, Emmanuel Erasto, Elias Erasto, Donald Erasto, Gaudensia Erasto, Bahati Erasto, Miriam Erasto. He specifically named his daughters as Gaudensia Erasto, Neema Erasto and Asteria Erasto. He further informed the court that, all his children are alive. He further confirmed that, he lived at Nyakabale village before shifting to Katoro in 2012 and that, he knew Yanga Ndege (PW2) as he was his neighbour at Nyakabale village. He further testified that, on 16th November 2019, he was at his farm at Nyawilolelwa village before he was phoned by his daughter (Neema Erasto) about the arrest of his wife and children. He came back from the farm towards Mgusu village. On the way, he saw a parked police car loaded with his wife and child. He was also arrested and taken to Kasamwa police station where they arrived in the late evening. DW1 spent his night in the police lock-up until the next day where he was interrogated in the presence of armed police officers. He was taken back to the police lock-up before being shifted to Geita Police Station.

The first accused's wife, Prisca Buyole Shija (DW2) who aged 60 years old never attended any formal education. She further confirmed to bear twelve children with the first accused. She named all her children as, James Erasto, Emmanuel Erasto, Elias Erasto, Donald Erasto, Asteria Erasto, Boniphace Erasto, Paulina Erasto, Faustine Erasto, Wilson Erasto, Bahati Erasto and Neema Erasto. Her three daughters were Asteria Erasto, Paulina Erasto and Neema Erasto. Among the twelve children, only Emmanuel Erasto died after the first accused was arrested. She confirmed that, they lived at Nyakabale village before shifting to Katoro in 2014 and that Yanga Ndege was one of their good neighbours. On 2014, while at Nyakabale, her sister who aged 65 years died. She consistently denied to have lost her own child while at Nyakabale village but her six months old child died while they were in Sengerema.

She further told the court that, she was arrested together with her daughter (Asteria) on 16th November 2019 when coming from the market. Her daughter was later dropped at Buseresere police station before she was joined with her husband at Mgusu forest. They were taken to Kasamwa police station where she was interrogated and forced to sign some documents with her finger print. Her husband was also forced to sign some documents under gun point. On the third day, her son (Emmanuel and Elias) came and told by the police to pay Tshs. 5,000,000/= for her release. After a negotiation, her son paid Tshs. 2,000,000/=

and she was released from the police. Also, the police wanted Tshs. 10,000,000/= for the release of her husband. However, her husband was transferred to Geita Police Station making it impossible to pay the money for the release of her husband. Five months later, Emmanuel was arrested and stayed in custody for more than a week without her knowledge. The police used Emmanuel's mobile phone to contact DW2; she followed up and found her son at Geita Police Station. A police officer called Robson demanded Tshs. 5,000,000/= for the release of Emmanuel. She finally paid Tshs. 2,000,000/= and her son was released and further warned by the same police officer not to leak the information. However, her son was severely beaten leading to further ramifications that led to his death.

DW3 (Elias Erasto) corroborated the testimony of DW2 by confirming that, they were born twelve children from his parents. He named her three sisters as Asteria Erasto, Paulina Erasto and Neema Erasto. They shifted from Nyakabale village to Katoro in 2014 and that Yanga Ndege was their neighbour at Nyakabale. His father later went back and sold their land. She informed the court that, while at the college in 2013 her aunt (Mama Mkubwa) died. On 16th November 2019, his mother was arrested. On the next day, he followed up his mother at Kasamwa Police Station where he was told to pay Tshs. 5,000,000/= for her release though He ended up paying Tshs. 2,000,000/= and his mother

was released. Also, the police demanded Tshs. 10,000,000/= for the release of his father (first accused). As he had no money, they came the next day and found the first accused transferred to Geita Police Station. In April 2020, his brother, Emmanuel Erasto, was arrested; the police at Geita Police Station demanded Tshs. 5,000,000/= for the release of Emmanuel. They finally paid Tshs. 2,000,000/= and he was released though severely beaten. After the release of Emmanuel, the police warned them not to follow-up the case again nor leak the information to anybody. However, due to the torture, Emmanuel's health continued to deteriorate despite taking him to several hospitals including Bugando and Kamanga Hospitals in Mwanza. They finally discovered that, Emammuel sustained injuries on the nerves, kidney and liver. At the end, Emmanuel died.

The second accused, Emmanuel Mbuga (DW4), denied to have attended formal education. On 11th November 2019, he visited his uncle at Mwatulole though he did not find him. He kept waiting for his uncle at Mwatulole before he was hijacked by the police and driven in the car to Geita bus stand. He was shown a photo of a person who he recognised as his brother in law (Luhende Michael). The police wanted Luhende Michael as he was alleged to be a cattle thief. DW4 was taken to Geita Police Station where he was handcuffed and hanged on the table and tortured. He was taken to Kasamwa Police station and finally taken to

Samina forest where he was blind folded and threaten to be killed. He was taken back to Geita Police Station where he was tortured and fainted. He gained consciousness while in hospital. On 17th December 2019, he was taken to court where he met the first accused for the first time. On 22nd November 2019, he was paraded with other people for the identification parade. In his testimony, DW4 consistently denied knowing Yanga Ndege (PW2) and Erasto Simon (DW1).

After considering the evidence from both sides, it is pertinent to address certain issues in this case. The major issue however is whether the prosecution proved the case beyond reasonable doubt that the accused persons murdered the deceased. The law requires a criminal case to be proved beyond reasonable doubt. This requirement is established under **Section 3 (2) (a) of the Evidence Act, Cap. 6 RE 2002**. The section provides:

'A fact is said to be proved when—

(a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists;'

The above position of law is well founded and fortified through case law. The case of **Hemed v. Republic** [1987] TLR 117 for instance provides among other things that:

"...in criminal cases the standard of proof is beyond reasonable doubt. Where the onus shifts to the accused it is on a balance of probabilities."

While the standard of proof in criminal cases is on the proof beyond reasonable doubt, the onus lies on the prosecution. The accused simply raises doubt on the prosecution case. This position is fortified in the case of **Mohamed Matula v. Republic** [1995] TLR 3, thus:

"Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused; the onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence."

In this case, the accused persons are facing the charge of murder under **section 196 of the Penal Code, Cap. 16 RE 2019**. The section provides:

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

From the above provisions of the law, to sustain a conviction, there are four ingredients to be met: **First**, it must be proved that there was the **death** of a person; **Second**, the accused must have committed an **unlawful act** or **omission** which caused the death of the deceased; third, it must be proved

beyond reasonable doubt that the **accused** is responsible for the unlawful killing; fourth, it must be proved that the accused was moved by evil intent to kill (**Malice aforethought**).

The evidence at hand does not leave any doubt that Simon Ndege died on the night of 05th October 2019 at Mgusu within Geita District. The deceased's brother (PW2), who spent the night with the deceased, witnessed the brutal act that left the deceased in a pool of blood. The death was confirmed further by the street leader who was phoned by PW2 about the attack and death of the deceased. As a street leader, PW4 immediately went to the crime scene and found the deceased dead. He also participated in the funeral and the burial of the deceased. PW7 was assigned to examine the deceased's body at Geita Hospital. She also confirmed that the deceased was cut and pierced with a sharp object. Therefore, the pieces of evidence at hand confirmed without any doubt that Simon Ndege died.

The evidence further shows that, the death was not a natural one. The examination conducted by PW7 reveals that, the deceased was wounded on the right side of the head, chest, hand and pierced with a sharp object on the right side of the stomach. The post mortem examination report confirms the multiple cut wounds on the deceased's head, upper arm, chest and abdomen leaving the

intestine visible. PW2's testimony details how the deceased was brutally cut and pierced with the edges of a mattock in a small room until his last breath. PW4 also confirmed that, the death was a result of wicked minds of men as opposed to a natural death. The evidence further shows that, the person behind this wicked act had premeditated evil intention. He/she prepared a sharp object which is suggested to be a mattock; took some steps towards the house of the deceased; unjustifiably broke the door to allow unlawful entrance; and finally attacked the deceased to death. The person who is able to do all these acts, he/she had evil intention and in legal terms had malice aforethought.

Under the law, malice aforethought is explained under **Section 200 of the Penal Code, Cap. 16 RE 2022** thus:

*"Malice aforethought shall be deemed to be established by evidence proving **any one or more** of the following circumstances:*

- a) **An intention to cause the death** of or to do grievous harm to any person, whether that person is the person actually killed or not.*
- b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm – to same person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be counsel;*
- c) An intention to commit an offence punishable with a penalty which is graver than imprisonment for three years;*

d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence. (Emphasis added).

Also, according to the principle stated in the landmark case of **Enock Kipela v. Republic**, Criminal Appeal No. 15 of 1994, malice aforethought may be drawn from the acts of the attacker. The court stated that:

"Usually an attack will not declare his intention to cause death or grievous bodily harm whether or not he had that intention must be ascertained from various factors, including the following: (1) the type and size of the weapon, if any, used in the attack, (2) the amount of force applied in the assault, (3) the part or parts of the body the blow was directed at or inflicted on, (4) the number of blows, although one blow may, depending upon the facts of the particular case, be purpose, (5) the kind of injuries inflicted, (6) the attacker's utterances, if any, made before during or after the killing; and (7) the conduct of the attackers before and after the killing.

The evidence at hand portrays that the attacker used a mattock to strike the deceased. The big wounds were inflicted four times on the head, chest, upper hand and stomach. The attacker attacked the most sensitive parts of the body clearly unveiling the intention to kill. Immediately after the attack, the murderer left the crime scene leaving no trail behind. Though the court was not informed of the words spoken during the attack, the deceased's death was clearly a result of malice aforethought.

The major issue at hand is whether the accused persons paraded before the court killed the deceased as alleged. To address this issue, the court was availed with several pieces of evidence. The attack of the deceased was done at night where PW2, the deceased and Henerico Thobias were all sleeping in a room. Before this court, PW2 confidently testified how he saw two attackers armed with lethal weapons. One of the attackers held an iron bar, the second accused held a mattock which was used to strike the deceased to death. According to PW2's testimony, he light-up his torch immediately after the door was broken. He saw the attackers through an illumination which seemed to be brighter than the torch used by the attackers. Immediately after the attack, PW2 narrated the identity of the attackers to the villagers including to the village chairman (PW4) who immediately went to the crime scene. In his analysis, the second accused was slender and tall whereas the other attacker was short and plump.

I am acquainted with the law that, the identification of the accused at night must meet the established principles of the law. When the court has to rely on the evidence of visual identification at night, case law provides the qualities of such evidence. In the case of **Stuart Erasto Yakobo v. The Republic**, Criminal Appeal No. 202 of 2004, CAT at Dar es salaam (unreported) stated that:

"...visual identification should only be relied upon when all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence before it is absolutely watertight."

Furthermore, the case of **Waziri Amani v. Republic** [1980] TLR 250 lists the qualities for the evidence of visual identification thus:

*"Although no hard and fast rules can be laid down as to the manner a trial judge should determine questions of identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would, for example, expect, to find in the record questions such as the following posed and resolved by him: **the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred for instance, whether it was day or night-time whether there was good or poor light at the scene; and further whether the witness know or had seen the accused before or not.**"*(Emphasis added).

See also, the case of **Shiku Salehe v. Republic** [1987] TLR 193 and **R. v. Eria Sebwato** [1960] E.A. 174.

According to PW2's testimony, the size of the room allowed him to view the attackers at a distance of just one step away. In fact, he believed to be the target of the brutal murder but resemblance between him and the deceased

befogged the attackers. Therefore, he spotted the attackers at a closer-range. The attackers, who wore nothing on their faces, spent almost ten minutes to complete their villainy mission. In my view, the time was sufficient to make a correct identification as long as there was sufficient light. PW2 did not know the second accused before the attack. The second accused (DW4) also confirmed that, he never knew PW2 before; he only saw him at the identification parade. In my view, though PW2 saw the second accused at night through the torch light, the surrounding circumstances and condition allowed him for a correct identification.

Furthermore, almost one month after the event, PW2 was summoned at Geita Police Station for identification. The identification parade was organised by PW3 and involved twelve (12) people. PW2 correctly identified the second accused at the seventh position and the other attacker (Shija Kulwa) at the fifth position. See, exhibit P1 and P2. It is already an established law, for a worthy and credible identification parade, the witness must have given description of the suspect before the identification is conducted. In the case of **R. v. Mohamed** [1942] EACA 72, cited in the case of **Muhidini Mohamed Lila @ Emolo and three others v. The Republic**, Criminal Appeal No. 443 of 2015, CAT at Dar es salaam, the East Africa Court of Appeal stated that:

"that in every case in which there is a question as to the identity of the accused, the fact of there having been given a description and the terms of that description are matters of highest importance of which evidence ought always to be given first of all, of course by the person who gave the description, of purports to identify the accused and then by person to whom the description was given."

In the case at hand, after the attack, PW2 clearly described the attackers before the street chairman (PW4). Also, when interrogated by the police, he further reiterated the same description of the attackers. Before PW4 and his statement before, he described the two attackers thus: one of them slim and tall and the other one short and fat. During the trial, PW2 was content that, the slim and tall suspect was the second accused. I have no better reason to discredit this correct identification of second accused than declare the same trustworthy and credible.

Also, after the arrest of the second accused on 13th November 2019, he was immediately interrogated and confessed to have been hired by the first accused to kill Yanga Ndege. He also shared the deal with Shija Kulwa who agreed to accompany him for the murder. In his cautioned statement, the second accused seemed to have confessed to kill the deceased by mistake as they were hired to kill Yanga Ndege on the reason that, he (Yanga Ndege) bewitched the daughters of the first accused after the land conflict at Manga area.

The second accused agreed to kill at the price of Tshs. 1,000,000/= which could be paid in three installments. However, they received Tshs. 100,000/= as transport costs to Mgusu to execute the agreement. After the murder, an advance payment of Tshs. 500,000/= was paid by the first accused's wife (DW2). The second installment of Tshs. 300,000/= was paid to the second accused by the first accused's son called Emmanuel Simon. The final installment of Tshs. 200,000/= was paid by the first accused's son called Elias Simon (DW3). The first accused was also arrested on 16th November 2019 and immediately interrogated. He seemed to have confessed to plan the murder of Yanga Ndege who bewitched his daughter after refusing to get married to him (Yanga Ndege). It is unfortunate that, the hired murderer ended up killing the deceased who was Yanga Ndege's young brother. However, according to the first accused's confession before the police, he ended up paying the murderer Tshs. 500,000/= as they did not kill the intended person.

During the trial, both the cautioned statements of the accused persons were repudiated/retracted. The court conducted trial within trial to determine their admissibility. The court finally admitted the two confession statements as exhibits P3 and P4 for further analysis. I am aware, where there is no evidence to corroborate the accused's cautioned statement, the court may be taking a risk for basing a conviction based on the cautioned statement unless the statement

contains facts which are certainly true. In the case of **Tuwamoi v. Uganda** (1967) EA 84 the Court stated that:

"A trial court should accept with caution a confession which has been retracted or repudiated or both retracted and repudiated and must be fully satisfied that in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually, a court will act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary for law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true."

In Tanzania, the same position is taken in the case of **Hemed Abdallah v. Republic** [1995] TLR 172 where the Court observed that:

"Generally, it is dangerous to act upon a repudiated or retracted confession unless it is corroborated in material particulars or unless the court, after full consideration of the circumstances is satisfied that the confession must but be true."

In the case at hand, the two statements have some discrepancies on several issues. **First**, while the second accused alleged to have been paid the full amount (of Tshs. 1,000,000/= in three instalments) after the murder, the first accused alleged to have paid only Tshs. 500,000/= after they killed a non-target person. **Second**, the second accused alleged to have been hired to kill on the

reason that Yanga Ndege bewitched the second accused's daughters. However, the cited reason for the witchcraft seems to contradict each other as the first accused's cautioned statement points the reason for invoking witchcraft thus: Yanga Ndege wanted to marry the first accused's daughter, when denied, he bewitched her. However, this allegation lacked any corroborative evidence because even Yanga Ndege himself (PW2) vehemently denied this allegation. The reason for witchcraft stated in the second accused's cautioned statement is a land dispute which was supported by PW2 and PW4.

However, the dispute arose in 2019 when the first accused shifted from Mgusu to Katoro in 2014. He only went back to sell his piece of land in 2019; the dispute arose and was resolved by PW4. The allegation that the first accused ever lost her daughter as a result of witchcraft from Yanga Ndege before shifting to Katoro was not confirmed. He only had one funeral of his aged sister in law which occurred in 2013. The funeral was confirmed by Yanga Ndege (PW2), Street chairman (PW4), first accused (DW1), first accused's wife (DW2) and first accused's son (DW3). However, that was not the reason that made the first accused shift to Katoro; he shifted to Katoro after constructing his own house. This fact was not disputed by the prosecution.

Normally, a confession given freely may have no such major discrepancies. I am of the opinion that, the discrepancies in the two cautioned statements increased the risk on their reliance. Hence, I have carefully warned myself on relying on these statements because, despite the above discrepancies, they are not corroborated with extra judicial statements. Therefore, voluntariness of the accused persons when confessing before the police is questionable. I have taken the stance taken in the case of **Ndorosi Kudekei v. R**, Criminal Appeal No. 318 of 2016, CAT at Arusha (unreported) where the Court stated that:

"With the absence of the extra-judicial statement, the trial judge was not placed in a better position of assessing as to whether the appellant had confessed to having killed the deceased or not."

Based on the reasons stated above, I hereby discredit two cautioned statements (exhibit P3 and P4).

Also, the instant case suggests that, the murder of the deceased was planned by the first accused and finally executed by the second accused. This issue invites the application of **section 22 of the Penal Code, Cap. 16 RE 2022**. The section provides:

22(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing namely–

(a) every person who does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) **any person who counsels or procures any other person to commit the offence**, in which case he may be charged either with committing the offence or with counselling or procuring its commission.

(2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

(3) A person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind and is liable to the same punishment as if he had himself done the act or the omission.

Under the above provision of the law, a person who procures another person to commit the offense, the hirer becomes a principle offender. In this case, the only evidence that linked the first accused to the offense is the cautioned statement of both accused persons. However, having discredited such evidence, there is no further evidence to suggest that the first accused hired the second accused to murder. The only remaining evidence to link the first accused to the murder is the suspicion raised by PW2 that there was prior conflict between them.

However, this court cannot act on suspicion to convict a person for a capital offense such as murder. In the case of **Nathaniel Alphonse Mapunda and Benjamin Mapunda v. R** [2006] TLR 395, the Court insisted that:

"In criminal charge, suspicion alone, however grave it may be is not enough to sustain a conviction, all the more so, in a serious charge of murder."

Even the allegation that Yanga Ndege was the target of the intended murder was just a suspicion. The murderer might have their own motive of murder against the deceased. In conclusion, apart from the cautioned statements of the accused persons, I find no strong evidence to link the first accused to the murder of the deceased. On the other hand, there is strong evidence against the second accused. PW2 spotted him during attack; he did not know him before apart from marking his face and appearance during the incident. One month later, the second accused was arrested; PW2 correctly identified the two attackers during the parade and one of them is the second accused. PW2 being an only eye witness to the murder of the deceased was a credible witness and his identification was beyond questions. In the defence, the first accused did not raise any serious point than denying the allegation against him. DW2 and DW3 only portrayed how this case became a deal for the unscrupulous police officer(s). On his side, the second accused (DW4) told the court on how he was hijacked by the police in Geita while waiting for his uncle. I understand, a person

cannot be convicted based on his weak defence but on the strength of the prosecution evidence. In this case, I find weak evidence against the first accused but the evidence against the second accused is watertight and beyond reasonable doubt. I hereby acquit the first accused but convict the second accused for the offense of murder as per **section 196 of the Penal Code, Cap. 16 RE 2022.**

DATED at **Geita** this 17th day of March, 2023



Ntemi N. Kilekamajenga.
JUDGE
17/03/2023



SENTENCE

Having convicted the second accused, Emmanuel Mbuga, for the offense of murder, I hereby sentence him to suffer death by hanging. Right of Appeal explained to the parties.





Ntemi N. Kilekamajenga.
JUDGE
17/03/2023

