

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(SHINYANGA DISTRICT REGISTRY)**

AT BARIADI

CRIMINAL SESSIONS CASE NO. 48 OF 2021

THE REPUBLIC

VERSUS

- 1. HUSSEN S/O MALULU @ELIAS HUSSEN.....1ST ACCUSED**
- 2. BENARD S/O JOHN SABU @ BEN.....2ND ACCUSED**
- 3. MUNGO S/O KISANDU.....3RD ACCUSED**
- 4. ALPHONCE S/O PASCHAL @KIULA.....4TH ACCUSED**

JUDGMENT

14th & 24th March, 2023

KAGOMBA, J

The four accused persons herein are charged with murder instituted under Sections 196 and 197 of the Penal Code, [Cap 16 R. E 2022] (hereinafter "**the Penal Code**"). They are alleged to have murdered Saningo Ndwani @ Peter, on 20th May 2021, at Kidulya street, Isanga ward, within Bariadi District in Simiyu region.

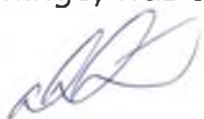
On the material date, Saningo Ndwani @Peter ("the deceased") was found dead within a fenced residential compound of his employer John Bahame Sabu (PW1). In that fenced compound there was not only the residence of the deceased's employer but also a boys' quarter as well as a godown for storage of cereals, which was one of the lines of businesses of



PW1. At 0300hrs, on that day, PW1 was awakened by his wife Yulitha d/o Benard who was the first to hear movements of some unknown people who had jumped into their compound. In a narration of events that resembled a well- scripted movie, PW1 vigilantly peeped through the window from his bedroom and saw two people walking towards an open godown where bags of sunflower (seeds?) were stored. He hastened to pick his gun and sneaked out of his house in pursuit of those uninvited guests.

According to PW1, he approached the two invaders from their back and shot his gun in the air while ordering them to surrender. One of the two invaders managed to run away but, as per famous Swahili adage, it was the fortieth day for the 4th accused person, Alphonse Paschal @ Kiula, who couldn't find his exit. He surrendered and was arrested by PW1, right there.

In the fracas leading to the arrest of the 4th accused person, neighbours were alerted and came to the scene to know what was happening and to render PW1 and his family a helping hand. The neighbours, or *mwano* people as they were described by PW1, surrounded the 4th accused person while interrogating him as to why he was there and who else were in his gang. PW1 was keen to know the whereabouts of his watchman, the deceased, who was a Maasai by tribe. He asked the *mwano* people and family to help in finding the whereabouts of Sandingo Ndwani @Peter, only to receive shocking feedback that his body was found lying on the ground behind the godown, apparently with no more life. Among those who found the body of Saningo Ndwani, was the 2nd accused person, Benard John Sabu @Ben. Poor Saningo, was dead as it was later confirmed by PW2 Dr. Mwanaidi Massawe,



who conducted a postmortem examination report of the deceased's body (**Exh. P1**).

Having realized the death of his watchman, PW1 called the police. H. 535 D/C Bwire (PW4), who unveiled to this court a substantial part of this tragic episode, was in the Bariadi Police Anti-Robbery unit undertaking a 24-hours anti-robbery surveillance. At around 0300hrs, he was ordered by his superior to visit the residence of PW1 where the murder incident had occurred. He rushed there accompanied by D/CPL Isack and P/C Hassan. Upon arrival at the scene of crime, they found the 4th accused person rounded by PW1 and his neighbours. PW4 H. 535 D/C Bwire also saw the body of the deceased. Upon interrogation, the 4th accused told PW4 that he had gone there to steal sunflower and that he was accompanied by one Mungo. He had previously told PW1 and the *mwano* people the same thing. So, according to PW4, the 3rd accused person Mungo Kisandu, was pursued and arrested at Mwamusasi area, within Bariadi District, after being mentioned by the 4th accused person.

PW4 further testified that after that tip about Hussen Malulu's participation, they asked Mungo to take them to Malulu's residence at Sarunda area where they arrested him too.

The script is not over yet. It was PW4's further testimony that he collaborated with his colleagues namely; CPL Carrision and ASP Mawingo to arrest Hussen Malulu, and that upon recording his cautioned statement at Police, Malulu made a confession on murder before PW5 -Insp. Ame Makame



Omary or SGT Ame (As he then was). That, Hussen Malulu, apart from confessing, he also told Police that he had lost his mobile phone in the metal scraps at the scene of crime. PW4, CPL Carrison, SGT Riziki and ASP Mawingo went back to the scene of crime with Hussen Malulu in a car at 0800hrs, where they found PW1 with some *mwano* people. Police asked them to assist in searching for the phone, which they all did.

PW3 Cosmas Salum, a Marson who builds houses for PW1, was also in the search team. He managed to spot a small black Nokia mobile phone, famously known as "Nokia *kitochi*", with IMEI 357759109255406 and 357759109705400, which PW4 put in a khaki envelope, and wrote the phone particulars on its top. Both the phone and its envelope were tendered and collectively admitted as **Exh. P2**.

PW4 further stated that after finding the said mobile phone, while at PW1's compound, they went to arrest Benard John Sabu @ Ben, the 2nd accused person, following the information supplied to Police by Hussen Malulu. During interrogation, Hussen Malulu had informed the Police that he went to the scene of crime that night to steal sunflower at the invitation of his friend Benard John Sabu who marshalled that evil mission.

Accordingly, PW4 and his colleagues went to the house where Benard John Sabu@Ben was quartered and picked his mobile phone so as to see if there was any communication flow on that incident between him and Hussen Malulu. According to PW4, at first there was neither message, outgoing calls or incoming calls. It appeared to them that all were deleted. However, before



leaving Benard's room, one message was received by his phone, telling Benard to look for that lost mobile phone of Hussen Malulu, which by that was already picked up by PW4. After reading that message, PW4 and his colleagues realized that Benard and Hussen Malulu were partners in crime as the latter had tipped them. For this reason, Benard John Sabu, was also arrested and taken to the Police Station for further interrogation.

Unlike his co-accused, Benard John Sabu didn't confess. However, the cautioned statement of Hussen Malulu (**Exh. P4**) didn't mince words in implicating him as a person who initiated the theft of sunflower, and that it was not the first time Ben collaborated with his friend Hussen Malulu to steal cereals from Ben's own home whenever he was in need of money. At the end of the investigation, the four accused persons were arraigned in court to face murder charge, for which they all pleaded not guilty.

During trial, the Republic was represented by Mr. Shaban Mwigole, learned Senior State Attorney assisted by Ms. Rehema Sakafu, learned State Attorney. The 1st accused person, Hussen Malulu, was represented by Ms. Zawadi Lazaro, learned Advocate; the 2nd accused, Benard John Sabu @Ben was represented by a duo of Mr. Deo Outa and Mr. Samwel Dugundiga, both learned advocates while the 3rd accused, Mungo Kisandu, was represented by Mr. Daudi Masunga, learned Advocate and the 4th accused enjoyed the services of Hon. Geni Dudu, a former Magistrate, now a learned Advocate.

The prosecution side called up eight (8) witnesses and managed to prove that on 20th day May 2021, Saningo Ndwani @ Peter, a watchman,



met his death at the scene of crime and that he suffered unnatural death. This was testified by PW1 John Bahame Sabu, the owner of the invaded premises, who saw the dead body of Saningo Ndwani @Peter with a bleeding head wound. A similar testimony was given by PW4 H. 535 D/C Bwire who came to the scene immediately after the incident was reported to police. The death was medically confirmed by PW2, Dr. Mwanaidi Massawe, who tendered the postmortem examination report (**Exh. P1**), showing that the cause of death was a head injury that was bleeding through the nose, mouth and ears, signifying that the same was unnatural. Throughout the trial, there was no dispute about Saningo's death. I shall therefore not labour much on this proved aspect of the offence.

Given the above background, the issue confronting this court is whether the accused persons, with malice aforethought, caused the death of the deceased by their unlawful act or omission. The law states, under section 196 of **the Penal Code**, thus:

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

To prove that it is the accused persons who murdered Saningo Ndwani @Peter, the prosecution relied upon the sworn testimonies of PW1 John Peter Bahame; PW3 Cosmas Salum; PW4 H.535 D/C Bwire; PW5 Insp. Ame Makame Omary (previously known as H.8338 SGT Ame); PW6 J1319 D/C



Hassan; PW7 Insp. Julieth Mwayole and PW8 A/Insp. Benson. They also tendered several exhibits towards this course.

PW1 saw two people in his compound and managed to arrest Alphonse Paschal, the 4th accused person. He also saw the other unidentified person escaping, before being shocked, later, to see his watchman already dead. He was there when his visitor PW3 Cosmas Salum found a mobile phone allegedly dropped in his compound by Hussen Malulu, which is definite component in the prosecution evidence.

PW4 D/C Bwire, being a police detective who visited the scene of crime immediately after the incident, played a major role in the initial investigation of the case and participated in the arrest of some of the accused persons, particularly Mungo Kisandu, who was mentioned by Alphonse Paschal. Both Alphonse and Mungo Kisandu mentioned Hussen Malulu as a member of their gang who actually murdered the deceased. As we shall see in due course, Hussen Malulu was firstly revealed as the killer in the cautioned statement Alphonse Paschal.

PW4 also collected the mobile phone of Hussen Malulu that was obtained at the scene of crime (**Exh. P2**). He also participated in the arrest of Benard John Sabu@ Ben and seized Ben's mobile phone Samsung Galaxy MO2s (**Exh. P3**). He testified on the connection between Benard John Sabu and Hussen Malulu, and how Hussen Malulu used the phone of his wife one Happy Mussa to send messages to Ben asking him to look for the dropped phone. PW4's testimony reveals the circumstantial evidence as to who killed



the deceased and how the rest of the accused persons got involved. He is, for that matter, a key prosecution witness.

PW5 Insp. Ame recorded the cautioned statement of Hussen Malulu, the 1st accused person (**Exh. P4**). He testified on the information given to him by Hussen regarding the mobile phone dropped at the scene of crime as well as his relationship with the 2nd accused person. According to Insp. Ame, Hussen Malulu orally confessed to him that he hit the deceased with "*mpini*". He also revealed his previous theft engagement with the 2nd accused.

PW6 J1319 D/C Hassan recorded the cautioned statement of Mungo Kisandu, the 3rd accused person, (**Exh. P5**). He testified that Mungo was a Bajaji/*guta* driver who went to the crime scene to carry cargo. PW6's evidence reveals that Mungo's didn't witness the killing of the deceased, but upon his arrival at PW1's residence he found three people already there.

Probably the most valuable testimony for the prosecution's case was to come from PW7 Insp. Julieth Mwayole. She is the one who conducted the cyber-forensic examination of four mobile phones seized by police. The investigated phones were described as: Samsung Galaxy M02s with IMEI 351743851479808/ 352128351479806 having a Vodacom sim card; Nokia with IMEI 357759109255406/ 357759109705400 having Vodacom and Airtel sim cards; Alcatel One Touch with IMEI 357370074680857/ 357370074680865 also carrying a Vodacom sim card, and Iyou with IMEI 354112101585516/ 354112101585524 with both Vodacom and Tigo sim



cards. According to PW7, the Regional Crimes Officer (RCO) for Simiyu was interested in information in those phones from 01/05/2021 to 25/05/2021.

PW7's Investigation Report (**Exh. P6A**) and Extraction Report (**Exh. P2**) revealed the call logs, short messages (sms), whatsapp chats, photos and audio/voice notes with contents relating to the murder incident. According to **Exh. P6A**, on 20/5/2021 at 3:11:42AM, which is the date and about the time when Samingo Ndwani@ Peter was murdered, the Samsung Galaxy M02s received a message from phone number +255687031602 with the name of **Jbs Eliza** stating: "***Et masai amekufa***" (contextually meaning: "so, the Maasai has died"). On the same date at 3:12:00AM a message was sent by that Samsung Galaxy M02s replying: "***Eee ndugu yaan daah***". (Literary meaning: "Yes, dear, daah).

At 4:09:59AM on the same date the Samsung received yet another message but this time from phone number +255683011209 stating "***Kaka wamekamatwa 2nafanyaje kuna moja aribak humo***" which literary means: Brother, they have been arrested, what do we do? There is one who remained in the compound".

At 4:13:00AM the same phone received a message from phone number +255683011209 stating "***alaf cm yake amendondosha huko kwenye machuma***", to literary means: he has dropped his phone in the metal scraps.

At 4:30:20AM the same Samsung Galaxy phone received yet another message from phone number +255683011209 stating: "***mda gan ivi***"



wameuwa kwer niambie bac' (literary meaning: what time did they kill, is it true? So, tell me", And at 4:30:57AM the said Samsung Galaxy replied to +255683011209 stating that "**Ni kweli wameua**" to mean: Its true they have killed.

According to **Exh. P6A** on the same date, at 4:37:25AM, the said Samsung Galaxy M02s received a message from +255683011209 stating: "**wengine wote waritoka asa yure mwingine arikimbia sehem abapo hapawezekani rabda ndo arie kamatwa**" to mean, literary, that all the others escaped, but the other one ran towards a difficult place, maybe he is the one who was arrested.

According to **Exh. P6A**, in the Nokia phone, PW7 found some sms and contacts. There were also some sms which were deleted which PW7 demonstrated in court how they were extracted as well as their appearance. She, however, managed to retrieve some of the messages, which relate to the conspiracy to commit the offence in issue. **Exh. P6A** shows the following retrieved messages, which PW7 stated that, their respective dates and time could not be obtained for a reason that such details are technically unretrievable. Those messages are:

Firstly, a message sent from the said Nokia phone to number +255746157082 stating: "**Bac mie nikalala nahawa jamaa wakalale2 kesho tena tutapanga au vep?**" to mean, contextually, that "let me go to bed and let those guys go to bed too, we shall plan again tomorrow, what do you say about this idea?



Secondly, the said Nokia phone sent another message to number +255786596858 stating that **"Man masai hajalala kwo mpaka kesho man 2pange njia nyingine"** to mean, the Maasai has not slept, therefore let's make alternative plan tomorrow.

Thirdly, the said phone sent another message to number +255786596858 stating: **"Mpaka msela amesema au tukamzime na chuma? Msela ana shida na ela nikamzuia 2lia kwanza"**. This literary means, that friend of ours suggested: should we silence (that man) by iron? Our friend needs money. I had to stop him from taking that action, I told him to be patient.

PW7 further testified that in the Alcatel and Iyou phones, she saw some incoming and outgoing calls. However, she told the court that those calls were not relevant to the request made by RCO Simiyu.

Finally, PW8 A/Insp. Benson, who is the main investigator of this case, testified last for the prosecution. He recorded the cautioned statement of the 4th accused person, Alphonse Paschal (**Exh. P7**). The 4th accused person was caught right at the scene of crime by PW1. Police took him from the hands of PW1 to Police station where he recorded his cautioned statement. His revelations enabled investigators to net the rest of the accused persons, starting with Mungo Kisandu, Hussien Malulu and later Benard John Sabu.



PW8 also recorded the cautioned statement of Benard John Sabu, who, despite the fact that he didn't confess before police, he was mentioned as the initiator of the theft idea and guided the gang from inside on how to execute their mission.

PW8 being the main investigator, collected evidence related to the case. Like PW4, he also testified on how the 1st accused made the vital role of 2nd accused known.

PW8 further testified that Hussen Malulu used the phone of his wife one Happy Mussa, with Airtel line ending with number "09", after dropping his phone which had a sim card registered in the name of Hussen's mother, one Veronica Masunga. That, Veronica Masunga also conceded before PW8 that Hussen's phone was, indeed, registered using her ID card. PW8 also identified in court Hussein's phone that was found at the scene of crime.

In his further testimony, PW8 stated how the seized phones were submitted to the Police Forensic Laboratory through RCO Simiyu, and the finding that the messages found therein related to the theft incident and killing of the Maasai. His testimony was followed by closure of the prosecution case.

Following the ruling of the court that a *prima facie* case was established against all the accused persons, and after addressing them on their rights under section 293(2) of the Criminal Procedure Act [CAP 20 R.E 2022], each of the accused opted to defend himself under oath.



Hussen Malulu, the 1st accused person, testified as DW1. In his defence, he denied to have ever married and retracted his cautioned statement, on grounds of torture. He also stated that the only questions he was asked by PW5 Insp. Ame and to which he responded, were on his name, seniority in his family and whether he had been to other regions, apart from Simiyu. That, the rest of what was recorded wasn't his. He also denied having any prior knowledge of his co-accused. He added that he had only one parent who is his father, as his mother passed away when he was still young. He said he doesn't have a mobile phone and disowned the phone that was found at the scene of crime.

When cross-examined by Mr. Shaban Mwigole, learned Senior State Attorney, DW1 completely denied knowing Happy Mussa, his alleged wife and Veronica Masunga, his alleged mother. He, however, conceded to have failed his standard VII examination and repeated Standard V to VII which details he had previously denied to have stated.

DW1 also conceded that he was arrested by D/C Bwire whom he had never quarreled with. He denied to have been taken to PW1's house by police to look for his phone, but when asked about the death certificate of her mother to prove she died, he fumbled before becoming evasive to most of the questions put to him by the learned Senior State Attorney.

During re-examination, he conceded that it's Insp. Ame who recorded his cautioned statement.



Benard John Sabu testified as DW2. He told the Court how he was trusted in running his father's new cereals business line after he had postponed his study at University of Dar es Salaam. He said on 19th May 2021, he had gone to Lukololo village and was given by his father Tshs. 12million and a Toyota Land Cruiser T522 AXV for collection of sunflower seeds.

He also told the court that the phone he uses and which he handed over at police station is a black Techno, implying a simple mobile phone suitable for hard village work. He described as a cheap lie the allegation that he wanted to steal sunflower while he himself worked to collect the same from the village and was given a lot of money to buy the same.

When cross-examined by Senior State Attorney, Shaban Mwigole, DW2 reiterated that he could not steal from home, and denied knowing the Samsung phone taken from him by D/C Bwire. He also denied knowing any of his co-accused. He however looked conspicuously shocked when spontaneously asked about the smart phone he used for taking selfies.

DW3 Mungo Kisandu testified that he was denied a right to call his relative or friend when recording his statement. That, he was threatened by D/C Hassan (PW 6) whom he accused to have recorded his own words in the cautioned statement and forced him to sign. He further stated that none of the prosecution witnesses proved his guilt.



During cross-examination, DW3 admitted that he is an entrepreneur who drives a tricycle (*Guta*) for carrying cargo. He also denied knowledge of the rest of his co-accused persons.

Alphonse Paschal, testified as DW4. He confessed that he was arrested at the scene of crime where he had gone to steal sunflower. He emphasized that he was seen by PW1 immediately after entering into the compound, hence he was tamed before doing anything. He denied killing the watchman, and like his co-accused, he denied knowing the rest of them.

In a new twist of evidence, DW4 stated that it was not Mungo Kisandu, the 3rd accused person who had accompanied him that night but another Mungo who was not arrested. He said that the other Mungo is not a Bajaji or *Guta* driver but he drives motorcycle "*bodaboda*". DW4 however shot on his own hand when he confusedly testified that he went with Mungo to steal sunflower using, not a Bajaji or *Guta* as alleged by prosecution, but a motorcycle (*bodaboda*). When cross-examined whether there are motorcycles for carrying cargo, he remained silent for a while and started to fumble. He also repudiated his cautioned statement **Exh. P7**. Like, his co-accused, DW4 lamented about time delay before being taken to court.

Having heard both the prosecution and defence cases, the Court invited the Senior State Attorney for prosecution and the learned defence advocates to make their final submissions. Both sides made valuable submissions. While prosecution held a conclusion that there existed sufficient circumstantial evidence to prove the charge against the 1st, 3rd and 4th



accused persons, the defence advocates pointed out some gaps and flaws in prosecution evidence. Generally, they concluded that the case against the accused persons was not proved beyond reasonable doubts.

The ingredients of the offence of murder are rather famous. For a conviction to be landed, someone must have died and the accused must have caused the death by their acts or omission. It must also be proved that they did so with malice aforethought, which can be proved under one or more of the circumstances stated under section 200 of the **Penal Code**, including *"(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 some 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 caused; and; (c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years.* The latter aspect appears to fit well in the case at hand.

In this case, there is no dispute anymore that PW1's watchman, Saningo Ndwani@ Peter, died. It is not disputed that he suffered unnatural death. Evidence adduced by PW1, PW2 and PW4 is sufficient to prove this fact. These testimonies have been narrated with sufficient details in this judgment. So, it has been proved that Saningo was killed by being hit with a blunt object on his head as per **Exh. P1**. Saningo no longer has the voice



to tell us who killed him. His soul shouts for justice. This court has to hear his voice and render him justice as it should do to the accused persons.

As to who killed Saningo, it's also not disputed that there is no direct evidence adduced to prove it. What the court has is the evidence of PW1 John Bahame Sabu who saw two people in his compound deep in the night. He pursued them and managed to arrest one of them who is Alphonse Paschal, 4th accused person. Alphonse Paschal confessed before this court that; indeed, he was apprehended by PW1 at the scene of crime. Testifying as DW4, Alphonse told this Court that he went there with his colleague one Mungo, for the purpose of stealing sunflower. Therefore, even if there is no direct evidence to show who murdered Saningo Ndwani@ Peter, this court has a clear and undisputed starting point.

In his defence, Alphonse Paschal stated that he was arrested soon after entering into PW1's compound and before he had done any wrong. He was reminded by the learned Senior State Attorney that the mere fact that he entered into someone's compound the way he did was wrong.

Testifying before this court, Alphonse put so much reliance on the testimony of PW1 that he arrested him before he had done anything. My evaluation of the testimony of PW1 reveals that he did not immediately see those who entered into his yard, as the 4th accused person wants this court to believe. PW1 was very clear in his testimony that his wife, Yulitha d/o Benard went to toilet while PW1 was asleep. While in the toilet she heard some movements ("vishindo") outside the house, within the compound. She came back to PW1 and awakened him. After being so awakened, it is when



PW1 peeped through the window where he saw about two people who had entered his fence. He quickly dressed up, definitely picked his gun up, then slowly opened the door and pursued those people. It certainly took some minutes to do all that. As such, it's not true that PW1 saw them entering, rather, he saw them while they had already entered. In my opinion, within that time it was enough for a thief to hit the watchman as it happened.

As correctly submitted by Mr. Shaban Mwigole, learned Senior State Attorney during his final submission, for theft to take place, the first thing thieves normally do is to remove the obstacle that may be in existence. In this situation the obstacle was the watchman, the late Saningo Ndwani @Peter. It is therefore a very fair and reasonable assumption that the first thing the 4th accused and his cohort did after entering was to hit the watchman so that stealing could be done smoothly. This is my firm opinion.

Now, it is immaterial whether it was Alphonse Pascal himself or Mungo or his any other colleague(s) who hit the deceased. Either way, it does not exculpate Alphonse from the murder charge he is facing. Section 23 of the **Penal Code**, clearly states: -

"23. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."



Whether common intention existed is a matter that has judicial guidance. In the case of **Shija Luyeko V. Republic [2004] TLR 254**, the Court of Appeal stated: -

"For a common intention to be established two or more persons must form a common intention to commit unlawful act together".

In **Jumanne Ahmed Chivinja & Another V. Republic**, Criminal Appeal No. 371 of 2019, CAT, DSM, and in **DPP vs. Nuru Gulamrasul [1988] TLR 82**, the Court of Appeal took a position that a person who confess to a crime is the best witness.

In this case, the 4th accused person, in his own testimony, testified as DW4 has confessed before this court that he had a common intention with his colleague Mungo, to steal PW1's sunflower. Since stealing is an unlawful act and since its commission resulted into the death of the watchman as a probable consequence, Alphonse Paschal and his colleague(s) are each deemed to have committed the murder of Saningo Ndwani @ Peter, under the circumstances of this case.

In his final submission, Hon. Dudu, learned Advocate representing the 4th accused, reflected on the testimony of DW4 by stating to the effect that, while at the scene of crime DW4 did hear the people who found the body of the deceased saying that the deceased died a while ago. I agree with him that DW4 testified so. I should, however, say that in the circumstances of this case, since the 4th accused and his colleague(s) intended to steal, and



as correctly put by Mr. Mwigole, learned Senior State Attorney, that stealing can successfully be done in absence of a barrier, the murder of the watchman cannot be viewed out of this context. As such, the assertion that the deceased died a while ago is unsupported by the chronology of events narrated by PW1. Respectfully, I disagree with this argument.

The other evidence which the court has, regarding who else participated in killing Saningo Ndwani @Peter, is from the repudiated cautioned statement of Alphonse Paschal (**Exh.P7**). While dealing with this testimony, the court is very much alive to the position of the law regarding the danger of entering conviction basing solely on retracted and repudiated cautioned statements. The court is also alive to the position of the law regarding the evidence of a co-accused as well as the need for extrajudicial statement. The learned defence advocates have cited some germane authorities on these matters. Hence the court proceeds from point of knowledge. All the precautions raised are law-based and intend to task the trial court to be extremely sure on the decisions it takes so as to render justice. I am going to do exactly that.

It is a cherished principle of law that each case has to be decided based on its own set of facts and obtaining circumstances. (See **Athumani Rashid vs. Republic** (Criminal Appeal 110 of 2012) [2012] TZCA 143 (25 June 2012)). It is for this reason, I think it is absolutely important, for the sake of justice, to examine the imports of the cautioned statement of Alphonse Paschal, who was the only accused arrested at the scene of crime. It is not disputed that the investigation of the case started off from the



information supplied by Alphonse Paschal, who after being arrested he was taken to police where his cautioned statement was recorded. I should state here that, following an inquiry, this court satisfied itself that the same was recorded by Alphonse Paschal as a free agent.

In the said **Exh. P7**, Alphonse lucidly stated that on 19th May 2021, at 20:00hrs while at "*Stendi ya Zaman!*" area within Bariadi town, he received a phone call from his friend called Hussen Malulu (the 1st accused person) who informed him of a job to be done that night, which was to steal sunflower from PW1's residence. He narrated how preparations were done for that job at Lake Oil Sarunda, and how they managed to gain access into PW1's compound with the assistance of the 2nd accused, Benard John Sabu, who guided Hussen Malulu where to pass through and the location of the watchman. In this exhibit, Alphonse also mentioned Mungo as one of those who were with him at the crime scene.

It is further stated in **Exh. P7** that, after entering the compound, Benard John Sabu came to them, where Alphonse Paschal was also present, and cautioned them about the watchman, whom he said, he had a bow and arrows. That, Benard told Hussen Malulu: "*kama mlinzi akikuzingua malizana nae*". (Literary meaning that, if the watchman makes troubles, finish him"). It is further stated that while in that process of stealing, the watchman woke up whereby Hussen Malulu immediately hit him on his head with "*mpini*", a huge stick used for holding a hand hoe, and the watchman fell down, right there. After the watchman was "silenced", the stealing proceeded, whereby one Mungo, who had come with Bajaji on invitation of Hussen Malulu, arrived



to carry the sunflower bag. He entered and was helping to carry a bag, whereby they heard a gunshot. That, following the gunshot, the rest of his colleagues managed to escape and he was arrested by PW1. That, he was interrogated and later taken to police for recording of statement.

While Alphonse Paschal has repudiated his confession in **Exh. P7**, the facts stated therein irresistibly leads to one conclusion; that the statement is his and what is stated therein is true. I shall briefly demonstrate:

The details and lucidity of the narration apart, it's from the tip given by Alphonse that police were able to arrest Mungo Kisandu and Hussen Malulu, who also gave a similar account of what happened, in substance. What strikes more is the fact that in his cautioned statement (**Exh. P4**), Hussen Malulu informed police of his Nokia phone (**Exh. P2**) which he dropped at the scene of crime while escaping, and upon following the phone up, it was truly found to be there by PW3 Cosmas Salum. In this scenario, it is the information supplied by the 4th accused person on involvement of Hussen Malulu and Mungo Kisandu that led to their arrest. The arrest of Hussen Malulu led to revealing of the dropped phone incident. In this regard, all these facts are relevant as per of section 9 of **the Evidence Act** [Cap 6 R.E 2022] which provides;

"9. Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue or which constitute the state of things under which they happened, or which



afforded an opportunity for their occurrence or transactions, are relevant”.

The above position of the law was also described in **John Peter Shayo & 2 Others v. Republic** [1998] T.L.R 198.

In her final submissions, Ms. Zawadi Lazaro, learned advocate for the 1st accused, Hussen Malulu, was of the view that prosecution side didn't prove the case against her client at the required standard. She cited several reasons including the fact that PW1, who is the owner of the premises neither recognized nor arrested her client at the scene of crime. That, PW1 also didn't see Hussen Malulu killing the deceased. All these arguments would stand if the case was to be proved by direct evidence. It is not disputed that there is no direct evidence in this case. The evidence relied upon by prosecution, as repeatedly stated herein is circumstantial, which unfortunately, tends to be subordinated to direct evidence.

In this connection, I take courage from the words of Georges, C.J when he was addressing assessors in **Republic v. Yusuph Mohamed Osman**, Dar es Salaam High Court Criminal Session Case No. 66 of 1966 (unreported), which is quoted in B.D. Chipeta's **Handbook For Public Prosecutors**, 3rd edition, Mkuki na Nyota Publishers, 2009, at page 222. His Lordship Georges, C.J said:

"I must tell you also that it is no criticism of evidence to say that it is circumstantial. It is often said that circumstantial evidence,



when it leads to one irresistible conclusion, is probably better than direct evidence”.

PW3 who found the phone, is an independent witness who went to the scene of crime to console PW1. Both PW1 and PW3 corroborated what was stated by Hussen Malulu in his oral confession to PW5 Insp. Ame, and in his cautioned statement regarding the phone as well as the place where it was dropped. Hussen Malulu told police that the phone was dropped at the metal scraps, and that is where it was exactly found. This piece of evidence, irresistibly leads to a conclusion that Hussen Malulu was in the criminal gang that invaded PW1, and *ipso facto*, what is stated in the repudiated cautioned statements of both Alphonse Pascal and Hussen Malulu is absolutely reliable.

Proceeding from the above premise, it's my finding that the evidence contained in **Exh. P4** and **P7**, when considered with the oral testimonies, made under oath, of PW4 H.535 D/C Bwire who testified on the lost and found phone of Hussen Malulu, and who also testified on the arrest of Benard John Sabu; the evidence of PW5 Insp. Ame Makame Omary, who recorded the cautioned statement of Hussen Malulu (**Exh. P4**) and to whom Hussen made oral confession, as well as the evidence of PW7 Insp. Julieth Mwayole, who did cyber-forensic investigation of the four mobile phones the contents of which relate to the murder of the deceased described therein as Maasai, there is before this court sufficient circumstantial evidence which leads to no other conclusion than that the 1st accused Hussen Malulu murdered Saningo Ndwani in collaboration with the 2nd accused person, Benard John Sabu and the 4th accused person Alphonse Paschal.



I have considered the defence put forth by the 1st, 2nd and 3rd accused persons. The 1st accused relied on the argument that he was forced to confess. This court found that he was a free agent when recording his cautioned statement before PW5 Insp. Ame Makame Omary. Besides, the court has satisfied itself that the cautioned statement contains sufficient truth to inculcate the 1st accused person.

The 2nd accused person relied on the argument that it was improbable for a trusted and life-focused university candidate to steal from his own father's property after having worked so hard collecting the same. His defence sounded like a well composed lullaby. Taken in isolation of other evidence adduced in court, the defence could make sense. Surely, how could a university-student-to-be steal from his own father? A quick reply would be no! But surely stealing from one's own parent is not uncommon. In this case, it is my firm finding that that is exactly what the 2nd accused intended to do. His colleague, Hussen Malulu revealed it to the world, in his impeccable circumstantial evidence.

Besides, the court was absolutely keen to assess the demeanour and credence of the accused persons, as well as prosecution witnesses. In my evaluation of the evidence adduced in court, I have formed a very strong view on the credibility of the cautioned statement of the 1st and 4th accused persons. The same is well corroborated by the oral confessions of the 1st accused and 2nd accused persons to PW5 and PW8 respectively. The



evidence of PW7 on the contents obtained in the phones, also added to revealing what was going on, even if she didn't state who did what.

In **Ibrahim Yusuph Calist @ Bonge & 3 Others v. The Republic**, Criminal Appeal No. 204 of 2011, CAT at DSM, the Court of Appeal outlined the several ways in which a court can determine whether or not what is contained in a statement is true. These are: **one**, if the confession leads to discovery of some other incriminating evidence. **Two**; if a confession contains a detailed, elaborate relevant and thorough account of the crime in question. **Three**; coherence and consistency with the testimony of other prosecution witnesses, and evidence generally and **lastly** the facts narrated in the confession must be plausible. Without any further doubts, all these facts have been sufficiently observed.

The gist of the evidence in those confession is the invitation made by the 2nd accused person to his friend, the 1st accused, to do what they had previously done. Previously, they stole sunflower, at two different instances, sold it and pocketed Tshs. 1,200,000 and 1,000,000/=. The number of bags stolen, how it was stolen and where it was sold have been clearly stated in the cautioned statement of the 1st accused person. The statement of 4th accused person also detailed how the current incident involving stealing of sunflower was planned and executed by Hussien Malulu at the invitation of his friend Ben. PW5 and PW7 gave a coherent account of the incident, which is substantially the same as what is in the cautioned statements.

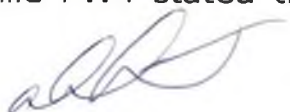


With all these facts, and considering the low credence the court assessed on the 2nd accused, the defence made by him has not moved the court an inch. I therefore disregard Bernard's defence as a concocted story devoid of truth.

The 4th accused person relied on the argument that his cautioned statement was not recorded by PW8 A/Insp. Benson but by one Neema. This defence is immaterial in view of the fact that he is found guilty on his own confession to this court, and the fact that he went to the scene of crime to commit an unlawful act which led to the death of the deceased.

As regards Mungo Kisandu, the 3rd accused person, after further scrutiny of prosecution evidence, it is apparent that he went to the scene of crime after the murder was committed. This was so testified by PW6 J1319 D/C Hassan. Furthermore, even in the cautioned statement of 4th accused person, Mungo Kisandu has been described as a person whose work is to carry cargo for others and was invited by Hussen Malulu for that purpose only. For those reasons, no common intention to steal could be established against him. He is therefore pronounced NOT GUILTY of murder. He should be released forthwith, unless held for some other lawful reasons.

Before winding up, there are shortfalls and flaws observed by the learned defence advocates in the prosecution case. Lack of certificate of seizure and lack of proof of owners of the mobile numbers investigated by PW7 were among such shortfalls. I also observed the same. It is surprising that while PW4 stated that he prepared the seizure certificate none was




tendered in court. It is also surprising how PW8 could be conformable with closure of prosecution case without bringing the mother of Hussen Malulu Ms. Veronica Masunga and Hussen's wife Ms. Happy Mussa to testify on the phones found in Hussein's possession. The behaviour of PW8 as the main investigator of the case is simply shocking. It has left more questions than answers on how the investigation and prosecution were handled in the final stage of the trial.

However, as I have demonstrated, there is impeccable circumstantial evidence on record, that has proved the offence against the 1st, 2nd and 4th accused persons beyond reasonable doubts.

That said, I have no hesitation whatsoever to make a finding that Hussen Malulu or Elias Hussen; Benard John Sabu@Ben and Alphonse Paschal are all GUILTY of murder of Saningo Ndwani@Peter. I accordingly convict them for murder under section 196 and 197 of **the Penal Code**.

As there is only one punishment for the offence of murder under section 197 of **the Penal Code**, all the three convicts are sentenced to death. Each of the them shall suffer death by hanging.

It is ordered accordingly.


ABDI. S. KAGOMBA
JUDGE
14/03/2022

Court: Right of appeal to the Court of Appeal duly explained.



A handwritten signature in blue ink, appearing to read "Abdi S. Kagomba".

ABDI. S. KAGOMBA

JUDGE

14/03/2022