

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

**SUMBAWANGA DISTRICT REGISTRY**

**AT SUMBAWANGA**

**CRIMINAL JURISDICTION**

**SITTING AT MPANDA**

**CRIMINAL SESSION NO. 40 OF 2021**

**REPUBLIC**

**VERSUS**

**1. MABULA S/O MWANDU @ NYAU**

**2. MWIGULU S/O JOSEPH @ ZENGO**

**27/02/2023 & 23/03/2023**

**JUDGMENT**

**MWENEMPAZI, J.**

The accused persons have been jointly arraigned in this Court and 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 the accused persons on the 30<sup>th</sup> day of June, 2020 at Urwila Village within Mpanda District in Katavi Region murdered one MAIGE S/O MAKENZI.

When the charge was read over to the accused persons, they denied to have murdered the said MAIGE S/O MAKENZI. They also denied the facts

constituting the offence which have been prepared under Section 192 of the Criminal Procedure Act, Cap 20 R.E 2019. The accused persons admitted to their names and personal particulars (name, age, gender, religion and residence), and that they were arrested and charged with the offence of murder. The case had to go for trial.

At the hearing the prosecution was being read by Mr. Gregory Muhangwa, Learned State Attorney and the defence was being handled by Ms. Pendoveera Nyanza, Learned Advocate assisted by Ms. Angela Remi, Learned Advocate. However, on the subsequent dates, until the finalization of the trial, the defence was handled by Ms. Angela Remi, Advocate alone.

This case was instigated by the killing of MAIGE S/O MAKENZI who died a violent and or unnatural death. According to the prosecution evidence in particular, the testimony of Dr. Edward Masali Bucheye (PW1) he conducted an autopsy on the 31<sup>th</sup> August 2020. The body of the deceased was in the mortuary at Katavi Referral Hospital. He did that after being assigned to examine the body by his superior. That is which is among the duties of doctors to perform forensic examination in some instances as this one.

PW1 testified that he observed that the body had a cut wound on the face affecting the brain, nose and eyes. During cross examination the witness clarified further that the injuries were slightly above the eyes which affected both eyes and they were deep enough to affect the brain. In his opinion, PW1 testified that the injuries were caused by a heavy and sharp object. The wound was wide enough to be approximately five centimeters. The report filled after the examination of the dead body, Post Mortem Examination Report was tendered in Court and marked exhibit P1.

According to the report, the cause of death is traumatic Brain injury. In the report it is reported as follows:

*"Eyes were injured unable to see the pupils.*

*Skull fracture frontal – Nasal Bone. The skull and its contents including orbits and nasal cavities had depressed skull fracture on the frontal bone involving the nasal cavities with a number of anterior maxillar, anterior teeth extracted two cut wounds measuring 5 cm on the mandibular".*

There is no doubt according to exhibit P1 the deceased met his demise in a violent and an unnatural way.

The evidence led showed that the deceased met his untimely death on the morning of 30<sup>th</sup> August, 2020. The assailants escaped the scene. However, a report was made to the police who responded by visiting the scene of event. The prosecution brought WP 7593 D/C Salome, a police officer who recorded a witness statement of Ester Machia the wife of the deceased.

The arrangements of events was as follows, that on the 20<sup>th</sup> February, 2023 the prosecution filed in Court a notice to tender a witness statement under section 34B (1) and 2(a), (b), (c), (d) (e) and (f) of the Tanzania Evidence Act, Cap 16 R.E 2022 and section 10(7) of the Criminal Procedure Act, Cap 20 R.E 2022. The notice was annexed with a witness statement of Ester Machia and a witness summons early issued to Ester Machia with and endorsement that she has shifted to another place. The endorsement was made by Hamlet chairman, on the 12/02/2023. Also, a notice to call an additional witness under section 298(1) and (2) of the Criminal Procedure Act, Cap 20 R.E 2022. The defence did not file any objection thus the said WP 7593 D/C Salome testified as PW5.

PW5 testified that on 30/8/2020 she was assigned to record the witness statement of Ester Machia, which assignment she complied with on

the same day. In the witness statement she recorded, the witness stated that on the night they were invaded she was able to identify Mabula s/o and Mwigulu s/o who are their neighbors; they had sticks and clubs in their hands and after breaking doors, her husband ran away. The assailants ran after him, she in turn screamed making an alarm and she went to the house of their neighbor Peter s/o who escorted her to her father in law's house.

The witness statement of Ester Machia was tendered in Court as an exhibit P5. The evidence in connection with the said statement which is relevant for the present situation is that she was able to identify the accused persons as those who invaded their house and chased her husband who is now deceased. She was able to identify using the light from the solar bulb mounted in their house.

PW6 D/C Ainea testified that on 30/8/2020 he was one of the investigation team which visited the scene of crime. He was assigned a duty to draw a sketch map of the scene of crime. It was admitted as exhibit P6. The drawing show that from the house where the assailant invaded to the place where the body of the deceased was found is 50 meters. Thus, reading the sketch map exhibit P6 and Ester Machia's statement exhibit P5; the deceased ran for the distance of 50 meters before being over powered and

succumbing to death due to the attacks and beatings he received from the assailants. PW6 also testified that he was assigned to handle investigation file No. MPA/IR/3666/2020 in connection to the murder of Maige s/o Makenzi. Since they had already interviewed Ester Machia, the Police collaborated with sungusungu to arrest Mabula Mwandu @ Nyau and Mwigulu s/o Joseph @ Zengo were arrested.

In the detailed account of how they performed their duty, D/C Ainea testified that with continued investigation they got information that Mabula s/o Mwandu was at Kasinde Village. He was arrested by Assistant Inspector Paul Kishimba on 1/9/2020 and brought at Mpanda Police Station at 10:00 hours. He was placed in remand and later interrogated by D/Cpl. Celcius Mosha (PW7).

Mwigulu s/o Joseph @ Zengo was arrested on 4/9/2020 at Itenka area on the road to Mwankuru by D/Cpl. Celcius Mosha and Shija Mathias. After the arrest, he was taken to Mpanda Police Station at around 13:00 hours. He was interrogated and his caution statement recorded by Detective Salum.

In the bid to prove charges against the accused persons the prosecutions are duty bound to produce evidence which links the accused

persons with the unlawful acts leading to death of the deceased herein named. In our case the deceased was attacked by the assailants whereby the wife of the deceased, Ester Machia recorded a witness statement (Exh.P5) pointing at accused persons as perpetrators of the whole event. The witness in her statement, stated that she recognized the voice of Mabula and Mwigulu before the door was broken but later she was able to identify them when they broke into the house using the solar bulb mounted in their house. The investigator of the case, H. 4119 D/C Ainea, testified here in Court that Detective Salum Katikoga (PW4) interrogated Mwigulu s/o Joseph. He also recorded his statement. In his testimony here in Court, Detective Salum said the accused, Mwigulu s/o Joseph, when recording his caution statement told him how he was engaged and or recruited and how the executed they killing Maige s/o Makenzi.

He told him that he was called and recruited by Mabula Mwandu @ Nyau on the 29/8/2020. On that day there was a wedding ceremony in their village. When Mabula Mwandu called him, he wanted that they meet at the Kalabi river. He went there and met Mabula Mwandu with other three guys. He was informed the nature of the job, that it is killing Maige s/o Makenzi. He was also informed that they have been hired by Lugwisha who allege

Maige Makenzi has affairs with his wife and he wants to kill Lugwisha. Lugwisha wants Maige Makenzi be killed; and for the job, Lugwisha offered Tshs. 400,000/= before killing and Tshs. 300,000/= after they have killed Maige S/o Makenzi.

After the briefing and agreeing to work together, they went to the house of Mabula s/o Mwandu for dinner, then they went to the wedding; they left the wedding venue at around 1:00 hours going to the house of Maige Makenzi. After arriving, they surrounded the house, Mwigulu and other three guys were behind the house, Mabula and Ngasa went to the front door, kicked it open. Maige s/o Makenzi came out wearing under pants running in attempt to save himself; but the assailant ran after him, using sticks and clubs prepared for the job, they assaulted him until he died. They then collected sticks and Ngasa took the with him and they left going separate ways. Mabula s/o Mwandu@Nyau and Mwigulu s/o Joseph went to the wedding and the three guys went to town.

The caution statement by Mwigulu s/o Joseph @ Zengo was admitted as exhibit P4. The narration summarized herein above are contained in the said exhibit.

The accused Mwigulu s/o Joseph @ Zengo also recorded an extra judicial statement before Hon. Suzana G. Matemba (PW3), Justice of peace, which statement was admitted in evidence as Exhibit P3. According to PW3, after he had interviewed the suspect to establish that the suspect wanted to record an extra judicial statement voluntarily and being satisfied that indeed that is the situation, she started recording an extra judicial statement.

In general, the Extra Judicial Statement had the contents similar to the testimony of PW4, E 278 D/SGT SALUM. The suspect said he received an engagement call from a friend Mabula s/o Mwandu @ Nyau that he wants to meet with him at Kalabi river. He went there and found his friend and other three persons. They told him there is a job to attack and kill Maige Makenzi. After they had agreed to perform the job, they went to the residence of Mabula Mwandu @ Nyau, had dinner and left for a wedding ceremony where they spent time until at 01:00 hours when they left to go to the scene where they broke the house and the victim came out running in attempt to escape. They pursued him and attacked him. In the statement the relevant part is recorded as follows:

*"Majira ya saa 00:00 hours tulifanya maandalizi ya kutafuta fimbo kubwa ajili ya kukamilisha malengo yetu ya kuhakisha tunampiga*

*MAIGE S/O MAKENZI na kumuua. Majira ya saa 01:00 hours za usiku wa tarehe 30.08.2020 tulifika nyumbani kwa MAIGE na tukazingira nyumba yake, alikaa Ngasa na jamaa zake wawili na nyuma ya nyumba tulikuwa watu wawili, walio kuwa mbele ya mlango ambao ni Ngasa s/o na wenzake waliotokea mjini wallianza kuukanyanga mlango ambao ulikuwa mlango wa mbao, mimi na MABULA tuliye kuwa nyuma ya nyumba tulikuwa tuna tulikuwa tumemulika kwa kutumia torchi za betry, NGASA na wenzake wawili waliotoka mjini walifanikiwa kuubomoa mlango ukaangukia ndani ndipo Bwana MAIGE S/O MAKENZI akakimbia kutoka ndani akiwa amevaa chupi tu, ndipo tukaanza kumkimbiza walio kuwa nyuma ya MAIGE S/O MAKENZI wakimkimbiza ni NGASA S/O? na MABULA S/O NYAU na wale watu wawili walio toka mjini siwafahamu majina yao wakamzidi mbio na kumkamata na kuanza kumpiga na fimbo kubwa na kufanikiwa kumuua. Ndipo watu watatu wakaenda mjini ambao ni NGASA S/O? na wenzake wawili mimi na MABULA S/O NYAU tukaenda harusini tulikaa pale harusini hadi majira ya saa 04:00 hours za usiku majira hayo mimi nikaondoka maeneo ya harusi kuelekea nyumbani nikamwacha MABULA akibaki pale eneo*

*la harusi. Siku ya tukio hilo mimi nilivaa nguo aina ya suruali Jins rangi nyeusi yenye mabaka, raba nyeusi na jaketi lenye rangi ya pinki ambazo askari walizikuta nyumbani kwangu kwenye jaketi kulikuwa na madoa ya damu ambayo ilitoka kwenye mwili wa MAIGE wakati tunampiga na fimbo kubwa na kufanikiwa kumuua. Bwana MAIGE S/O MAKENZI nakumbuka fimbo tulizo tumia kumpiga MAIGE S/O MAKENZI zilikuwa na damu aliondokanazo Ngasa.*

PW7 F. 2241 D/SGT Mosha recorded the caution statement of Mabula s/o Mwandu @ Nyau. It was on the 1/9/2020 after the arrest of Mabula s/o Mwandu. After the preliminaries for recording a caution statement, Mabula s/o Mwandu @ Nyau agreed to record his statement. In his statement he informed the recording officer that on 22/8/2020 at 09:00 hours he went to the homestead of his friend and neighbour Lugwisha s/o Swea. They had conversations with him, and the agenda was that Maige s/o Makenzi has a plan to kill him (Lugwisha s/o Swea) so that he may continue with his relationship with the wife of Lugwisha s/o Swea. At the same time Mabula s/o Mwandu told Lugwisha s/o Swea that Maige s/o Makenzi had affairs with his elder wife.

The two struck a deal to kill Maige s/o Makenzi. The said Lugwisha s/o Swea contracted Mabula s/o Mwandu as an assassin together with other persons he will recruit in the course of preparations. Lugwisha s/o Swea agreed to pay them Tshs. 2,000,000/=. The money will come from the proceeds of selling cows. After the conversations he looked for parties to assist him in the killing of Maige s/o Makenzi. He found Mwigulu Joseph, Masanja, Ngasa s/o and another person he didn't know his name. They executed the assignment at around 1:30 hours on 30/8/2020.

The cautioned statement was received in Court as exhibit P9. He also recorded an extra judicial statement before PW2 Elisante Marco Pallangyo. The same was received as exhibit P2. In it the maker of statement confessed in the following words: -

*"Kuna mtu aitwaye Lugwisha Sweya wa eneo la Ulwila ndiye aliyewatuma yeye na Mwigulu Ngasa na Masanja Kasala kwamba wakampige Maige Makenzi. Mshtakiwa anasema walikuwa jumla watu watano. Anasema wengine ni Ngasa ambaye amemfhamu kwa jina moja na kuna mtu wa tano ambaye hakumjua jina. Mshtakiwa anasema walikuwa na marungu. Mshtakiwa anasema walipofika kwa marehemu walivunja mlango kwa kukanyaga.*

*Anasema marehemu Maige Makenzi alitoka ndani. Mshtakiwa anasema walimkimbiza marehemu kwa sababu alikimbia. Mshtakiwa anasema marehemu wakati anakimbizwa alipigwa kwa rungu akaanguka. Anasema aliyempiga ni mmoja wao ambaye hakumjua anasema marehemu akiwa ameanguka chini walimpiga wote kwa kutumia fimbo nene mpaka akafa. Mshtakiwa anasema marehemu alikuwa anawatongozea wake zao".*

Apart from the statements of the accused persons, and that of the wife of the deceased, the investigator H. 4119 D/C Ainea (PW6) testified that they recovered clothes which were worn by the accused person on the date they killed Maige s/o Makenzi. The clothes were seized and this is the relevant part of the testimony.

*"The leader of sungusungu Godfrey Muhubila assisted by Shija Mathias worked in two groups. While searching the suspects, the group of Shija s/o Mathias were able to see Mabula s/o Mwandu hiding in the bush. When they saw him he had a bag on his back. When he saw them he threw the bag and ran away. He ran away from sungusungu militiamen.*

*They took the bag which had been thrown, they found it containing clothes belonging to Mabula Mwandu after inspecting them they saw some had blood stains. In the bag there were one sweater, two pairs trousers jeans – blue and light blue in colour. They saw brown open shoes and two shirts. The items were in a black bag. They continued with the search and went to the home of Mwigulu s/o Joseph @ Nzengo. At home they found his wife.*

*When the asked they were told he is not at home. They entered the house. In the house they found clothes on the table. When they inspected they found a jacket which had blood stains. They took one jacket, a pair of trousers, rubber shoes and black jeans. Shija and Godfrey brought the clothes to the Police Station”.*

The suspect Mabula s/o Mwandu was arrested by Assistant Inspector Paul Kishimba on 1/9/2020, and the second accused Mwigulu s/o Joseph @Zengo was arrested on 4/9/2020 at Itenka area on the road to Mwankuru by D/Cpl. Celcius Mosha and Shija Mathias.

After the accused had been arrested and interrogated the accused admitted to have committed the offence of killing; and since the arrest had

also done in line with clothes which they were wearing, they also admitted and identified their clothes.

The second accused recognized clothes as follows: one jacket, one black trouser, black shoes and belt. The first accused identified the black bag, one sweater, two trousers blue and light blue, black bed sheet, brown open shoes and two shirts.

A certificate of seizure was filled for the clothes of Mabula s/o Mwandu where he recognized one sweater pink in colour, one bag (black), two pairs of trousers – blue and light blue, black bed sheet, brown shoes and two shirts. Also a certificate of seizure for Mwigulu s/o Joseph with the contents as one pink jacket with blood stains, one black pair trouser with blood stains, black rubber shoes and a black belt. The said certificates of seizure were admitted as exhibit P7 collectively.

With the evidence as summarized herein the Court made a ruling that the prosecution had made a prima facie case against the accused person. They were thus addressed in terms of Section 293(2) of the Criminal Procedure Act and the accused opted to defend themselves on oath. They had no witnesses. In their defence the accused persons testified denying

evasively to have committed the offence. The first accused person testified as DW1. In his testimony he denies to have committed the offence. But that he was coerced by the police to mention the names of those he is alleged to have committed the offence together.

In his testimony the 1<sup>st</sup> accused, DW1 testified that he received the news of the event as others that Maige s/o Makenzi has been invaded and assaulted until he died; he therefore went to the Maige s/o Makenzi's home stead like all other members of the village. He doesn't know who did it. But people kept saying and or mentioning Lugwisha s/o Swea. He admits that he knew Maige s/o Makenzi. He was his neighbor. He blames the police, in particular, D/C Ainea (PW6) that he told him to say what he said before Justice of peace.

The second defendant also testified an oath as DW2. He also testified that on the date of event he was sleeping at home. He heard that Maige s/o Makenzi has been invaded. He responded to the call and stayed at the funeral until dawn, 6: 00 hours. His participation at the funeral was for two days 30 – 31/08/2020. Then he received information from his other wife

Elizabeth Kashinje who resided at Itenka that his child is sick. He went there and stayed until on 4/9/2020 when he was arrested.

According to DW2 at first he denied that he knows Mabula s/o Mwandu but later he agreed and admitted to know him. Later he was taken to the justice of peace where he denied to know anything related to the event of the Murder of Maige s/o Makenzi. During cross examination by Mr. Gregory Muhangwa he testified as follows:

*"I have two wives. The one staying at Urwila is Angelina John. I don't know if police officers went to my home.*

*I don't know if they interviewed her because I was at Itenka and that is where I was arrested. Since I woke up at 3:00 hours that means at 1:30 hours. I was sleeping with her. Here I did not pray but when they took me at the lock up I said I was sleeping home.*

*I remember Detective Salum came in Court. I heard. He asked me few question but he said many things. I remember Suzana Matemu. There I said a few things but here she said a lot of things. I know Mabula s/o Mwandu I could not say I know him because they said he has been arrested allegedly for committing the offence*

*of murder I did not run away from Urwila. I was at my home at Itenka. I did not recognize any of the clothes which were tendered".*

After the defence side had rested their case, the prosecution counsel, Mr. Gregory Muhangwa, Learned State Attorney informed the Court that counsels for both sides have agreed to pray for leave to make their final submission in a written form. This court granted leave and both counsels duly filed their written submission on 27/02/2023.

In the submission by the prosecution, the counsel made a summary of the material contents of their case and posed questions which has to be answered in order to resolve the case as to whether the accused persons have committed the offence of murder or not. The two questions suggested were whether the accused persons committed the acts which led to the demise of Maige s/o Makenzi; and if answered in the affirmative, whether they did with malice aforethought.

The counsel has submitted that it is uncontested that the deceased met unnatural death as testified by PW1 EDWARD S/O BUCHEYE. That is also illustrated in exhibit P1, Post Mortem Examination Report. The summary

of the said evidence has been incorporated in this judgment herein above. The question is who are the perpetrators of the acts leading to the injuries and demise of Maige s/o Makenzi.

The evidence of WP 7593 D/CPL Salome is clear and unchallenged that she recorded the statement of ESTER D/O MACHIA on the 30<sup>th</sup> August, 2020. Ester Machia could not be procured to enter appearance for testifying when the case was called for hearing. In her statement which was admitted as Exh. P5 she stated that when the assailants went at their house she heard their voices and recognized to be the voices of Mabula s/o Mwandu@ Nyau and Mwigulu s/o Joseph and after breaking into the house she identified them. She managed to identify the accused person by recognizing their voices and later facial identity through the light from solar bulbs mounted in their house. More important she knew the accused persons prior to the event. The counsel has submitted that the issue of recognition could not arise as they were the same accused persons who invaded the deceased residence and eventually killed him. He submitted that it has been regularly pronounced that recognition is more reliable than identification. He cited the case of **Jumapili Msyete Vs. Republic**, Criminal Appeal No. 110 of 2014 at page 16 that:

*"In the present case, the type of identification relied upon is that of recognition, according to PW2 and PW3, the appellant was their neighbor in Ilembo Village. The appellant admitted that he was a resident of Ilembo Village..."*

The counsel submitted that the present case was not a matter of identification but rather the matter of recognition. He submitted that in the case of **Charles Nanati Vs. The Republic, Criminal Appeal N. 286 of 2017 (Appeal from the decision of the High Court of Tanzania at Dar es Salaam (Mwandambo J.)** in which the Court in **Nicholaus James Urion Versus the Republic**, Criminal Appeal No. 244 of 2010, quoted with approval the decision of the Court of Appeal of Kenya in the case of **Kenga Chea Thoya Versus the Republic**, Criminal Appeal No. 375 of 2006 (unreported) that:

*"On our re – evaluation of the evidence we find this to be a straight forward case in which the appellant was recognized by witness PW1 who knew him. This was clearly a case of recognition rather than identification and it has been observed severally by this Court,*

*recognition is more satisfactory more assuring and more reliable than that identification of a stranger”.*

The statement of ESTER MACHIA was tendered under Section 34(B) (1) and (2) (a), (b), (c), (d), (e) and (f) of the Evidence Act, Cap 6 R.E 2019. Which was not objected to, the witness said reported the matter to the police a few hours after the incident which according to the case of **Marwa Wangiti Vs. Republic [2002] TLR 39** strengthened her credibility. At the police station the witness named the accused persons by names.

The prosecution produced extra judicial statements recorded before Justices of Peace. The said extra judicial statements are exhibit P2 and P3. The accused persons are admitting, in their extra judicial statements to have committed the offence. According to section 2 of the Evidence Act, Cap 6 R.E 2019 it states that:

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

The accused persons, also admitted before the police officers at various times and dates when being interrogated. Their caution statements were admitted as exhibit P4 and exhibit P9. Being caution statements for Mwigulu s/o Joseph and Mabula s/o Mwandu respectively. The law provides under section 27 of the Evidence Act, Cap 6 R.E 2022, that:

*"A confession voluntarily made before a police officer by a person accused of an offence may be proved as against that person".*

The counsel prayed that this Court finds that the cautioned statements were made by the accused persons as free agents and use against them.

The Counsel also referred this Court to the case of **DPP VS. NURU M. GURAMRASUL [1980] TLR 254** where it was observed that:

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

He then submitted that a person who confesses his guilty is a best witness. The accused persons implicated each other equally, they are both accomplices' evidence which according to section 142 of the Evidence Act, Cao 6 R.E 2022 it is admissible. It reads: -

*"An accomplice shall be a competent witness against an accused; and conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice".*

Then Counsel submitted that such evidence may be used by the Court to found conviction even without corroboration; if satisfied that the evidence is nothing but the truth. He referred the case of **Paskali Kitingwa Vs. Republic [1994] TLR 65 (CA)** where it was held that:

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

The Counsel submitted that they have strong believe and opine that there was enough corroboration so the counsel prayed that the evidence is dully corroborated and convict the accused persons.

The counsel submitted that in most instances in our case the accused objected to the tendered evidence at later stages of the proceedings which is not proper. He cited the case of **Hawadhi Msilwa Vs. Republic**, Criminal Appeal No. 59 of 2018 where it was held that:

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

The Counsel for the prosecution therefore, prayed that this court disregards the objections made to the statements during hearing of the defence case.

On their part, the Counsel for defence has raised a concern that the prosecution has failed to prove the case against the accused persons beyond reasonable doubt. The reasons of failure are as follows: there are contradictions in the evidence of the witness brought by the prosecution, that the prosecution failed to call material and important witnesses without there being any reasonable ground and that the principles on circumstantial evidence have been violated as to render the evidence relied upon to be capable of more than one conclusion.

In that regard to the contradictions, the Counsel pointed out at caution statement recorded by E. 278 D/SGT. Salum who testified as PW5. She compared the original caution statement tendered in Court and the typed statement which was served to the Counsel in the dock brief. That

the original shows the 2<sup>nd</sup> accused recorded his caution statement on 4/9/2020 while the typed one shows the caution statement was recorded on the 1/9/2020. She submitted that it raises doubt on the genuineness of the tendered caution statement.

On failure to bring the material witness who was with the deceased on the night they were invaded, the counsel was straight to the point that there was defence in the evidence in respect of Ester Machia. First of all she was not called to testify and the prosecution did not show what efforts were made to procure her attendance. She submitted that although her statement was received and admitted as an exhibit that deprived them of an opportunity to cross examine her. The maker of the statement, Ester Machia, stated in her statement that she was able to identify by voice the 1<sup>st</sup> and 2<sup>nd</sup> accused also visual identification through solar light. The witness who tendered the exhibit, WP 7593 D/Cpl. Salome, in the defence view, had only a hearsay knowledge of the facts which occurred on the night. She could not clarify further even if she was cross examined by the defence. More so, she did not name the accused persons at an earliest possible time. The counsel for defence cited the case of **Marwa Wangiti Mwita and Another Vs. Republic [2002] TLR** where it was held that:

*"The ability of a witness to name a suspect at the earliest opportunity is an all important assurance of his reliability; in the same way an unexplained delay or complete failure to do so should put a prudent Court to inquiry".*

Failure to bring the witness, in their view, raise doubt especially when the prosecution did not lead evidence to show they took serious steps to look for the witness who made the statement tendered. The case of **Joseph Shabani Mohamed Bay, Michael Elia Kalinga, Damas Lulu Mponeja and Omari Athuman Danga vs. Republic**, Criminal Appeal No. 399/2015 (Tanzlii) was relied upon for the argument. In the case, it was held that:

*"A plausible evidence ought to have been led to establish that Amina could not be procured."*

The Counsel invited this Court to draw an adverse inference relying on the case of **Azizi Abdallah Versus Republic [1991] TLR No. 71 (CA)** where it was held:

*"The prosecutor is under prima facie duty to call those witnesses who from their connection with the transaction in question are able to testify on material fact. If such witnesses are within reach but*

*are not called without sufficient reason being shown, the Court may draw an inference adverse to the prosecution”.*

Thirdly, that there is no any witness out of seven witnesses who saw the accused persons committing a crime hence violating a principle of law in Section 62(1) (a) of the Evidence Act, Cap 6 R.E. 2019. In that way, the principle of law in circumstantial evidence required that the evidence must point out to the accused persons. The case of **Francis Alex Versus Republic**, Criminal Appeal No. 185 of 2017 Court of Appeal of Tanzania at Dar es Salaam (unreported):

*"We are alive to the position of the law in regard to circumstantial evidence that to ground conviction it has to irresistibly point to the guilty of the appellant”.*

The evidence in this case point to more than one conclusion. In this regard the Counsel has referred to the blood stains in the clothes tendered as exhibit P7. No efforts were made to establish the DNA linkage. She prayed that the charges be dismissed and accused be set free.

I have had an opportunity to hear this case and also to read the final submissions by the Counsels, for prosecution and for defence. The accused

persons are alleged to have murdered Maige s/o Makenzi on the night of 30/8/2020. In the trial we have seen the prosecution called PW5 WP 7593 D/CPL. Salome who recorded the witness statement of Ester Machia, the deceased's wife who was present with the deceased on the night they were invaded. It is the statement of this witness which led the police and sungusungu army to look for Mabula s/o Mwandu @ Nyau and Mwigulu s/o Joseph. Before we proceed with the consideration of the evidence in the statement, I find it pertinent to examine the legal foundation allowing us to rely on the statement. Whether the prosecution has laid the foundation to utilize the statement for the purpose of evidence in this case.

The prosecution on the 20/02/2023 filed a notice to call an additional witness, one WP 7593 D/CPL. Salome for the purpose of tendering a witness statement of Ester Machia under section 289(1) and (2) of the Criminal Procedure Act, Cap 20 R.E 2022 and also a notice to tender a witness statement under section 34B (1) and 2(a), (b), (c), (d), (e) and (f) of the Evidence Act, Cap 6 R.E 2022 and section 10(7) of Criminal Procedure Act, Cap 20 R.E 2022.

The hearing of this case commenced hearing on 20/02/2023 and on the same date the defence were served with both the notices. The defence never informed the Court that they are objecting to the calling of the witness nor objecting to the tendering of the witness statement when the witness prayed to tender it as evidence [ Refer testimony of PW5 WP 7593 D/CPL. Salome testified in Court on 21/02/2023 at page 24 of the typed proceedings.] It is clear that the defence did not object to the tendering of the witness of ESTER MACHIA by WP 7593 D/CPL Salome. In the case of Thomas Finest Msungu Byoka Mkenya Vs. Republic [2013] TLR 557 AT 560:

*"Ideally, it is good practice that a document should be produced in evidence by its maker or author except where it is impossible to secure his attendance due to unforeseen circumstances such as those mentioned under section 34B (2) (a) of the Evidence Act, Cap 6 R.E 2002, that is, if he is dead or unfit by reason of bodily or mental condition, etc. We say so because the maker or author will always be better placed to explain what the document is all about, the intricacies, if any, relating to the said document, etc. In the process, the said witness could always be examined and cross – examined on the said document".*

In this case the statement was tendered because the witness is said to have shifted to another place not known to call and all reasonable steps have been taken to procure her attendance but she cannot be found. The prosecution attached a summons which is endorsed by the harmllet chairperson Sauti – Street.

Under the circumstances I find no fault to its admission and utilization by the prosecution. As to the content of the witness statement, the witness explained why she was afraid to mention the accused persons early after she was assisted by Peter until when she arrived at the police station. Reasonably the circumstances may have been intimidating to her hence the delay which I find it acceptable.

The prosecution led the's Court in the final submission to show the relevance of the evidence for the purpose of proving charges against the accused persons. As pointed out, recognition of their voices by Ester Machia, then identification visually with the aid of Solar bulb led to their arrest later. The evidence as per PW6 shows that the statement pointed to the starting point of investigation. When the police teamed up with the sungusungu

were able to arrest Mabula Mwandu and Mwigulu Joseph on the 01/09/2020 and 04/09/2020 respectively.

The arrest of the accused persons led them to record their cautioned statements and extra judicial statements. Mabula s/o Mwandu recorded his caution statement before D/Cpl. Celcius Masha who interrogated him and also an extra judicial statement before Elisante Marco Pallangyo. The documents were admitted as exhibit P9 and P2 respectively. In both cases the story on what transpired is narrated with a clear flow of events. That, he was assigned by Lugwisha Swea to kill Maige Makenzi because the latter had an affair with his wife, and also Mabula Mwandu complained in the same time. In general, the reason is that Maige Makenzi was seducing other people's wives.

The second accused also had the similar story as Mabula s/o Mwandu save for the fact that he was called and engaged by Mabula s/o Mwandu to participate in the killing of Maige s/o Makenzi.

The two accused person again admitted that the clothes which were seized by PW6 belonged to them. This is exhibited by certificate of seizure exhibit P7 collectively for both accused persons.

It is clear in the facts that the involvement of the accused person is pointed out by Ester Machia, admitted by the accused persons after arrest in their statements and also the clothes which were seized by PW6.

The defence has complained and argued that though the clothes had blood stains but the DNA was not tested to link the same with the accused persons and the deceased. I think this is an afterthought. The argument would have been raised at the tendering process and strengthened with the defence.

In my opinion, since Ester Machia recognized the accused person at the scene and named them later as she knew them, there is no point at this stage to deny that the accused were not involved. The cases of **Jumapili Msyete Vs. Republic (supra)** and **Charles Nanati Vs. Republic (supra)** as cited herein above are relevant.

Therefore, it is my opinion and firm conviction that the arrest of the accused person in this case was firmly founded on cogent evidence of recognition and identification by Ester Machia and strengthened by their admission and confession. There is no doubt therefore the accused persons are the assailants who assaulted Maige Makenzi to death.

As to whether there is any malice afore –thought, it is clear from the nature of injuries inflicted to the deceased. PW1 testified that the deceased had traumatic brain injury due to beings truck with a heavy and sharp object. The accused persons in their admission and confession said they used clubs and stick to assault the deceased. Depending on the force used it was possible to create the injuries of the nature described as the brain is protected by the skull which may turn into a sharp object once broken. That I believe is a reasonable anticipation if the weapon used is blunt such as a club. Under section 200(c) of the penal Code, Cap 16 R.E 2022:

*"Malice aforethought shall be deemed to be established by evidence proving any one or more of the circumstances – (c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years".*

The accused persons in this case had a plan to assault Maige s/o Makenzi because he is used to have love affairs with their wives. They prepared sticks and clubs to use as weapons and executed their intent. The circumstances as they are clearly shown, they had malice aforethought

which it has been proved by their confession and their nature of weapons and injuries caused to the deceased person.

For the reasons I find the offence of murder has been proved against the accused persons; both *actus reus* and malice aforethought has been proved. The accused persons acted to assault the deceased and they did so with malice aforethought. I therefore find the accused persons are guilty and convict them with murder contrary to section 196 of penal code, cap 16 R.E 2019.

It is ordered accordingly.



  
**T.M. MWENEMPAZI**  
**JUDGE**  
**23/03/2023**

**Sentence:** The accused are sentenced death by hanging.

  
**T.M. MWENEMPAZI**  
**JUDGE**  
**23/03/2023**

Right of appeal explained to the parties.



  
**T.M. MWENEMPAZI**  
**JUDGE**  
**23/03/2023**