

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF ARUSHA

AT BABATI

ORIGINAL JURISDICTION

CRIMINAL SESSIONS CASE NO. 34 OF 2022

THE REPUBLIC

VERSUS

NATHANAELI MATEI NDITI@BABUU.....1st ACCUSED PERSON

MARTINE TIOPHIL @ KALIMANZILA@RASTA.....2ND ACCUSED PERSON

JUDGMENT

8th March & 2nd May, 2023

Kahyoza, J.:

Haji Hussein was hired to give two persons a ride on motorcycle from Sigino-Posta to Kiru-Kibaoni on 11th day of October, 2020. He disappeared from that day until 15.10.2020 when his body was recovered at Kiru hill. The body's hands were tied from behind, his neck was strangled with a rope as a rope was on his neck. The post mortem report revealed that **Haji Hussein** died of suffocation. He, therefore, died a violent death.

The prosecution arraigned **Nathanaeli Matei Nditi @ Babuu** and **Tiophil @ Kalimanzila @Rasta** with an information of Murder contrary to **Section 196 and 197 of the Penal Code, [Cap. 16 R.E. 2019 now, 2022]**. The prosecution alleged that on 11th day of October, 2020 at Kiru Ndogo a village within Babati District in Manyara Region, **Nathanaeli Matei Nditi @ Babuu** and **Tiophil @ Kalimanzila @Rasta**, the accused persons murdered Haji Hussein. **Nathanaeli Matei Nditi @ Babuu** and **Tiophil @ Kalimanzila @Rasta** pleaded not guilty to the information of murder.

The prosecution had a duty to prove not only that Haji Hussein is dead but also that **Nathanaeli Matei Nditi @ Babuu** and **Tiophil @ Kalimanzila @Rasta**, the accused persons are the ones who killed him and did so with malice aforethought. To discharge its duty, the prosecution summoned eleven witnesses and tendered six exhibits, the motorcycle (exh.P.1), motorcycle registration card (exh.P.2), the extra judicial statement of Martine, the second accused person (exh.P.3), the extra judicial statement of Nathanaeli, the first accused person (exh.P.4), the post mortem report (Exh. P. 5) and the seizure certificate (Exh. P. 6).

Indisputably, **Haji Hussein** died a violent death. Even if, the defence had disputed, I would have held that the prosecution witnesses, Dr.

Paschal Frank Mushi (**Pw10**), Abdul Hussein (**Pw2**) and SSP Richard Daudson Mwaisemba (**Pw9**) proved that **Haji Hussein** is dead and that he died a violent death. They deposed that the deceased's body had its hands tied from behind, its neck strangled and a rope was seen on the neck. The deceased's body was dirty. Dr. Paschal Frank Mushi (**Pw10**) who examined the dead body identified as **Haji Hussein's** body established that he died of suffocation. He prepared a post mortem report and tendered it and the Court admitted and marked it as (Exh. P. 5).

Having found that **Haji Hussein** died a violent death, the issues pending are; **one**, who killed him; and **two**, whether the killer did so with malice aforethought. I commence with the issue whether the killer had malice aforethought. In **Mosses Michael alias Tall V R.** [1994] TLR. 195 the Court of Appeal held that-

- (1) malice may be inferred from the amount of force which an offender employs in inflicting fatal injury; and further that*
- (2) the conduct of the accused may be indicative of the malice aforethought as it was in this case where the appellant was persistent in beating the deceased for long time and prevented intervention by persons who wanted to help the deceased.*

Malice aforethought can also be established from the nature of the weapon and the location of the injury sustained as held in **Elias Sefu v.**

Republic [1984] TLR 244. In the instant case, the use of rope to strangle the deceased's neck leading to suffocation, the amount used to strangle the deceased and the act of tying the deceased's hands from behind to overcome resistance are indicative of malice aforethought. The above circumstances indicated that the killer(s) intended to cause death or inflict grievous harm to rob the motorcycle as they did. Thus, the deceased's assailant(s) had malice aforethought.

The remaining issue is who killed **Haji Hussein**. The prosecution summoned no eye witness. It seeks to rely on the evidence of Abdul Hussein (**Pw2**) who deposed that he owned motorcycle with registration number MC 633 AXZ which he used operate as a passenger hire service. On 11.10.2020 at noon (12:00) while packed at Studio/Posta within Sigino village waiting for passenger, **Haji Hussein**, the deceased summoned him and told him that there were two passengers who wanted a ride to Kiru-Kibaoni. The deceased was operating a milling machine. Abdul Hussein (**Pw2**) went to the Milling machine met the passengers and negotiated fare to ride them to Kiru-Kibaoni. He told the passengers that he would charge them Tzs. 8,000/=. After negotiations, they settled at Tzs. 7,000.00. Abdul Hussein (**Pw2**) was not feeling okay he decided to request the deceased to give the passengers a ride to Kiru-Kibaoni. The deceased

accepted to ride the passengers and left Abdul Hussein (**Pw2**) to operate the milling machine.

At 12:30 pm **Haji Hussein**, the deceased sped off with the two passengers to Kiru-Kibaoni at the request of the passengers. Abdul Hussein (**Pw2**) waited for his friend to come back in vain. At 04:00 pm Paulo Hussein (**Pw3**) called Abdul Hussein (**Pw2**) inquiring the whereabouts of **Haji Hussein**, the deceased. Paulo Hussein (**Pw3**) was a relative and an employer of **Haji Hussein**, the deceased. As **Haji Hussein**, the deceased did not return, Abdul Hussein (**Pw2**) reported to police station at 09:00 pm. The police told him to wait until after 24 hours and make a report. Abdul Hussein (**Pw2**) deposed further that until the following day **Haji Hussein**, the deceased and the motorcycle were nowhere to be seen. On 12.10.2020, they commenced a search. They searched also for the deceased unsuccessfully on 13.10.2020. They went to Kiru-Kibaoni and to various places searching for **Haji Hussein**, the deceased and the motorcycle in vain. On 14.10.2020 Abdul Hussein (**Pw2**) received a telephone call that persons who stole his motorcycle were arrested at Gallapo.

Abdul Hussein (**Pw2**) described the passengers to whom **Haji Hussein**, the deceased, gave a ride that the first one was short with a

tumor/ hump on his back (kibiongo or nundu) and the second was tall and slim. He identified the second accused as person who had a tumor/hump on his back and the first accused a person whom he described as being tall and slim. He stated that he was able to identify them as they had a ten minutes' discussion before they agreed on the fare.

Paulo Hussein (**Pw3**) deposed that after 24 hours of **Haji Hussein's** disappearance, they made a report to Kiru police station. They police convened a meeting involving villagers of Kiru. One of the persons who attended the meeting stated that he saw a motorcyclist with two passengers whom he identified as Babuu and Kalimanzila. People of Kiru knew both Babuu and Kalimanzila. SSP Richard Dauson Mwaisemba (**Pw9**) deposed that after they received a report of motorcyclist who disappeared, on 12.10 2020 they joined the villagers to search for him. The following day that is on 13.10.2020 they heighten the search in vain. On 14.10.2020 while searching the disappeared motorcyclist, got a call from Hamis Hango that people suspected to be the last seen with the deceased were drinking in the pub called Timberland. He described the suspects that one was short with a tumor/hump on his back and another one was tall and slender. SSP Richard Dauson Mwaisemba (**Pw9**) told him to arrest them and take them to Gallapo police station. They arrested the suspects

and took them to Gallapo police station. SSP Richard Dauson Mwaisemba (**Pw9**) instructed his assistant, A/Insp. Aloys to Gallapo police station and bring them to Babati police station. A/Insp. Aloys brought the suspects to Babati as instructed at 08:00pm and informed SSP Richard Dauson Mwaisemba (**Pw9**) that the suspects admitted to kill the motorcyclist and sell the motorcycle to a person at Bumbuta village.

SSP Richard Dauson Mwaisemba (**Pw9**) interviewed the suspects who disclosed their names as Nathanael Matei @ Babuu and Martine Tiophil @ Kalumanzila @ Rasta. He added that they admitted to kill the motorcyclist and abandoned his body in the forest of Kiru Hill. He called the police and told them that they should go to recover the body and the motorcycle. His police told him that it was not safe to go with the suspects to go Kiru hill in search for the body as angry people may attack them. He instructed A/Insp. Aloys (**Pw11**) to go to Bumbuta to find the motorcycle that very night. On 15.10.2020 A/Insp. Aloys (**Pw11**) reported that they recovered the motorcycle.

A/Insp. Aloys who at the time he testified had been promoted to a rank of Inspector of police deposed as Insp. Aloys (**Pw11**), that following the instruction from SSP Richard Dauson Mwaisemba (**Pw9**) took the suspects/ the accused persons from Gallapo police station on 14.10.2020

to Babati police station. He testified the suspects (the accused persons) admitted to kill a motorcyclist and sell the motorcycle. He added that upon instructions that very night he took the suspects/ the accused persons to Bumbuta a village within Kondoa where they sold the motorcycle. He deposed that the accused persons told him that they sold the motorcycle to one Rashid.

They drove to Bumbuta that night while Martine was seating in the front seat and Nathanael sat behind. When they reached Bumbuta they disboarded and Nathanael led them to Richard's house. Richard Said Dinya (**Pw6**) told them that the motorcycle was at his mother's place at Pahi village. They drove to Pahi village that night. Having introduced themselves to Zuweni, Rashid's mother (**Pw7**), they summoned the assistant ten-cell leader as the ten-cell leader lived very far away, searched and recovered the motorcycle. They prepared a seizure certificate, which Zuweni Ramadani (**Pw7**), the ten-cell leader, the ten-cell leader's son and veronica, a woman police signed. He tendered seizure certificate as Exh. P. 6. They took the motorcycle, Richard Said Dinya (**Pw6**) and Zuweni Ramadani (**Pw7**), to Babati police station.

Richard Said Dinya (**Pw6**) and Zuweni Ramadani (**Pw7**) confirmed on oath Insp. Aloys (**Pw11**)'s testimony on how the motorcycle was

received. Richard Said Dinya (**Pw6**) deposed further that on 14.10.2020 Ulongo his brother in-law, a resident of Babati, went to his place with the accused persons. He introduced the accused persons as his friends. He told him their names as Babuu and Martin. Ulongo informed him that the accused persons needed money to attend their sick mother. He replied that he did not have money. Ulongo told him that they were prepared to pledge their motor cycle and that they wanted only Tzs. 470,000.00. Ulongo told him that his friends promised to repay the loan within a week and that should they fail he would repay the loan. He gave them Tzs. 470,000/= and in turn they pawned the motorcycle.

On 15.10.2020 at 01.00am police went to his place with Babuu looking for the motorcycle. He accepted to have it and that it was at his mother's place. He led them to their mother's place where they recovered the motorcycle. He deposed that the motorcycle the accused person took to him had no plate number and he asked them why it had no plate number. The accused persons replied that the plate number was damaged. He deposed that the motorcycle was red in color and its make was Star. He identified the motorcycle (Exh. P. 1) as the motorcycle the accused persons pledged to him for Tzs. 470,000/=.

Abdul Hussein (**Pw2**) deposed further that he bought the motorcycle, which the deceased rode on the day he disappeared, from Miraji Swahele Kimu (**Pw5**) at Tzs. 1,200,000.00. After he paid the purchase price, Miraji Swahele Kimu (**Pw5**) gave him a motorcycle registration card, he deposed. He deposed further that the motorcycle was stolen before he changed ownership. He tendered the motorcycle registration card in the name of Miraji Swahele Kimu as Exh. P. 2.

Miraji Swahele Kimu (**Pw5**) confirmed under oath that he sold the motorcycle with Registration No MC 633 AXZ to Abdul Hussein (**Pw2**) at a price of Tzs. 1,200,000/=. He deposed that on 12.7.2009 Abdul Hussein (**Pw2**) went to his place and offered to buy his motorcycle. He accepted the offer. After Abdul Hussein (**Pw2**) paid the purchase price, he gave him the motorcycle and the registration card. He deposed that the motor cycle was red in colour and its make was Star. He identified that the motorcycle (Exh. P. 1) to be the motor cycle he sold to Abdul Hussein (**Pw2**).

On 18.10.2020 the police summoned Abdul Hussein (**Pw2**) and Miraji Swahele Kimu (**Pw5**) to Babati police station to identify the motorcycle. Abdul Hussein (**Pw2**) went to police and found a motorcycle which was red in color, it's make was Star but it had no plate number. He had a

registration card so he compared the chassis and engine numbers on the registration card and on the motorcycle. They tallied.

Miraji Swahele Kimu (**Pw5**) deposed that he went to police on 18.10.2020 identified the registration card and the motorcycle he sold to Abdul Hussein (**Pw2**). The motorcycle had no plate number. It was red in colour and its make was Star. He compared the chassis and engine numbers on the registration card to the chassis and engine numbers on the motorcycle. They matched.

SSP Richard Dauson Mwaisemba (**Pw9**) deposed that after they recovered the motorcycle, they took the accused persons to show where **Haji Hussein's** body was abandoned. He summoned Paulo Hussein (**Pw3**), the deceased's relative to accompany them to identify the body. He took the suspects and went to Kimara Kiru. He met the village executive officer, Hussein Rashid Laila (**Pw4**) and found him at a meeting convened to discuss the incident of the motorcyclist who had disappeared. SSP Richard Dauson Mwaisemba (**Pw9**) asked Hussein Rashid Laila (**Pw4**) to calm his people and requested him to go to Kiru hill where the deceased's body was hidden. SSP Richard Dauson Mwaisemba (**Pw9**), Hussein Rashid Laila (**Pw4**), the accused persons, the police officers, Paulo Hussein (**Pw3**) and other people went to Kiru hill. SSP Richard Dauson Mwaisemba (**Pw9**)

deposed that he sat with Matei in the front vehicle and he was the one leading. Two kilometres from the village they stopped the vehicles, both suspects led them to a place where they found a dead body. They found a dead body 70 metres from the place they left the vehicles.

SSP Richard Dauson Mwaisemba (**Pw9**) deposed that the accused persons narrated how they killed Haji Hussein. SSP Richard Dauson Mwaisemba (**Pw9**) and Hussein Rashid Laila (**Pw4**) deposed that they found deceased's hands tied from behind, his neck with marks of being throttled and a rope made from a tree bark on his neck. SSP Richard Dauson Mwaisemba (**Pw9**) added that the body was in bad shape as four days had passed. He identified Nathanael Babuu that he was tall and slim. He identified the first accused person as Babuu and the second accused as Martine Tiophil @ Kalimanzira or Rasta.

Rhobinson Winfrid (**Pw8**), the ward executive officer and a justice of peace, recorded the accused persons' extra judicial statements on the 21.10.2020 at 13.00 hrs. The police officer took to him two suspects. They told him that the suspects wanted to confess. He ordered them to leave one suspect in office and go out his office with one of the suspects. He commenced with Martin whom he interrogated from 01:20 pm to 02:14pm.

He admitted to kill. He read the statement after he recorded it and they all signed. He tendered Martin's statement as Exh. P3.

Having finished to record Martin's extra judicial statement, he summoned the police and gave them the statement. He then started interviewing Nathanael and he did so in the absence of the police officers from 02:30 pm and finished at 03:15 pm. He tendered the statement of Nathanael as Exh. P.4.

The accused persons denied on oath to commit the offence. Nathanaeli Matei Nditi @ Babuu (**Dw1**) deposed that on 14.10.2020 while with Martin at Timberland bar within Gallapo, the police arrested them. They took him to Gallapo police station and later to Babati police station. On that day, they took him to one woman's house and ordered her to open a door. She opened and took out the motorcycle. On 15.10.2020 the police took him from the police cells and told to sign the document. He complied. Nathanaeli Matei Nditi @ Babuu (**Dw1**) testified further that again on 16.10.2020 the police took him from the cell to the garage (gereji) tortured him and forced him to sign a document. He signed a document which he did not know its contents.

On 21.10.2020 the police took him to a place, he had not visited before, where he found a man. The old man took out a paper and told him

to sign it. He signed it. He denied to kill or know Haji Hussein. He only knew Haji Hussein on the day he appeared before the trial court read the charges to him for the first time.

The second accused Martine Tiophil @ Kalimanzila @ Rasta (**Dw2**) gave his defence on oath. He deposed that police arrested him on 14.10.2020 at Timberland bar at Gallapo. They took him to Gallapo police station and later to Babati police station. The police took him to Richard's home and asked him where was a motorcycle. He told them that it was at his mother's place. He took them to his mother's place where the motorcycle was. On 15.10.2020 police officers took Nathanael from the cell and leaving him in the cell. They told him to sign a document. He signed without knowing the contents of that document. He added that on 16.10.2020, the police officer took him to an old man who told him to sign a document. He signed it. He testified that he was kept at police station for 23 days before he appeared before the district court.

During cross-examination, he denied to tell this Court when he was called upon to plea, that Nathanael ordered him to tie the deceased's hands from behind. He denied also to tell this Court that it was Nathanael who took a rope and strangled the deceased.

Who killed Haji Hussein with malice aforethought?

I pointed out above that there is no eye witness. The prosecution's case is whole circumstantial based isolated incidents which tend to link the accused persons with the offence of murder. It is trite law that *to justify a conviction on circumstantial evidence, the **inculpatory facts must be incompatible with the innocence** of the accused and incapable of explanation upon any other reasonable hypothesis than guilt of the accused.* See the case of **Alkadi Willium @ Supa Vs R** CAT, Criminal Appeal NO. 188 of 2005 (Unreported). In **Ndalahwa Shilaga and Buswelu Busahi V Republic**, Criminal Appeal No. 247 of 2008 (CAT-unreported) the Court of Appeal held that three tests need to be established before circumstantial evidence forms a base for conviction; which are-

1. *"The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established,*
2. *Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused person, and*
3. *The circumstances taken cumulatively should form a chain so, complete that there is no escape from*

the conclusion that within all human probability the crime was committed by the accused person and no one else."

I, before discussing isolated incidents or facts which the prosecution seeks to ground its case, wish to state that Martin Tiophil @ Kalimanzila @ Rasta, the second accused admitted a number facts when he was called upon to plead to the information. He narrated what happened before they killed Haji Hussein, how they killed him and what took place before they killed him. Martin Tiophil @ Kalimanzila @ Rasta attempted to denounce what he said while being cross-examined. It was too late for him to do so. He freely gave an account of events which to great extent matched with the prosecution's evidence. I am of the firm view that Martin Tiophil @ Kalimanzila @ Rasta told this Court the truth. He was not under any coercion and he volunteered the information after the first accused person had pleaded not guilty. Martin Tiophil @ Kalimanzila @ Rasta said the following after the Court called him to plead-

"Court: *Information of murder read over and explained to the accused persons in Kiswahili, the language they understand and they are requested to plead thereto.*

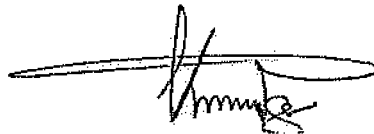
Accused persons plead:

1st ACCUSED PERSON: *"Si kweli" It is not true.*

2nd ACCUSED PERSON: "Mheshimiwa nakumbuka tarehe 11.10. 2020 mshitakiwa wa kwanza alikuja nyumbani kwangu na kunieleza tukapande mpunga. Tukaondaoka na kwenda kwenye kazi ya kupanda mpunga tukakutana na mwenye shamba. Mwenye shamba akatuuliza mnakwenda wapi tukamwambia tunakwenda kwenye shamba akatueleza mbona leo kazi haifanyiki kwa sababu ni Jumapili. Tukarudi kijiweni. Tulipofika kijiweni mshtakiwa alinieleza twende tukamuone rafiki yake. Alinieleza tutakwenda kwa miguu. Tukaenda kwa rafiki yake. Hakumuona rafiki yake. Nilimweleza kuwa turudi kijiweni. Mshatakiwa wa kwanza alimuita bodaboda mmoja aitwaye Hussen. Baadae alimweleza bodaboda kuwa twende msituni kuchukua miti. Nilimwambia siendi. Akaniomba twende wote. Tulienda hadi msituni. Tulipofika huko alimwambia bodaboda apaki pikipiki. Mheshimiwa Jaji, mshtakiwa wa kwanza alitwambia tusubiri pale akalete heja. Akandoka na baada ya kurudi akasema amekosa pesa na kumuomba bodaboda simu ili ampigie mwanamke wake amweieze mahali ameweka hela. Boda boda akampatia simu mshtakiwa namba moja. Hapo hapo akatoa panga kiunoni na kumuuliza kwa nini anatembea na mke wake. Nikasogea hadi pale na kuuliza anafanya nini. Akanitishia kwa panga kwa kuniwekea panga shingoni. Akaniamuru nimfungue bodaboda mikono. Niiikataa akanitishia kuniua mimi pamoja na bodaboda. Kwa kuogopa nikakubali kumfunga bodaboda mikono. Mshtakiwa akamnyonga bodaboda kikatili. Alinitishia nisipomfuata ataniua kama alivyomuua bodaboda. Nilichanganyikiwa na kuogopa nikamfuata. Mheshimiwa Jaji, kujinusuru asiniue nilikubali

kuongozana naye. Aliniamuru nisiseme chochote. Aliniamuru nipande kwenye pikipiki. Nilipanda pikipiki akaendesha pikipiki hadi kijiji cha Bumbuta. Tulikutanana na mwenyeji wake aitwaye Ulongo. Akaweka pikipiki rehani. Ulongo akatupeleka hadi kwa Rashid Said Dinya akaweka pikipiki rehani kwa kiasi cha pesa 470,000/=. Nilimshawishi turudi nyumbani ili tukifika Gallapo nitoe taarifa. Alikuwa ananifuata kila sehemu. Hata nikienda uani ananifuata. Hadi tukakamatwa na polisi. Huyu ni mtu mbaya sana nisinge sema hapa mbele yenu nikasema nje hapa angeniua. Naogopa maisha yangu. Tukitoka ataniua Mheshimiwa Jaji. Hivyo ndivyo ilivyokuwa.”

Court: *I construe the second accused person’s account of events as a plea of not guilty, hence, I enter a plea of not guilty for both accused persons.*



J.R. Kahyoza
Judge
2/03/2023

That done, I now discuss the incidents to find if they were proved. I will start with the contention that on 11.10.2020 the accused persons hired Haji Hussein, the deceased from Sigino village to Kiru-Kibaoni. The accused person said nothing on this fact. However, by implication they denied to hire the deceased as to their account of events started on 14. 10.2020 when they deposed that the police arrested them. It is on record,

uncontroverted or say proved, that Abdul Hussein (**Pw2**) was the owner motorcycle and the deceased was the milling machine operator. There is evidence from Paulo Hussein (**Pw3**) that the deceased was his employees operating his milling machine. Abdul Hussein (**Pw2**) deposed that the deceased called him to ride the passengers to Kiru-Kibaoni. As Abdul Hussein (**Pw2**) was not feeling okay he requested the deceased to ride the passengers and assisted him to run the milling machine.

Abdul Hussein (**Pw2**) bought the motorcycle from Miraji Swahele Kimu (**Pw5**), though he had not changed ownership. Abdul Hussein (**Pw2**) deposed he had a ten minutes discussion with the two passengers at 12:00 before they agree on the fare. He, therefore identified them. He described their appearance especially the second accused person. He testified that the first one was short with a tumor/ hump on his back (kibiongo or nundu) and the second was tall and slim. He identified the second accused as a person who had a tumor/hump on his back and the first accused a person whom he described as being tall and slim.

Abdul Hussein (**Pw2**) sufficiently identified that accused persons as passengers who hired him before he requested the deceased to ride them. That notwithstanding, the fact Martine Tiophil @ Kalimanzila @ Rasta admitted to this Court to hire and later to kill Haji Hussein corroborated the

evidence of Abdul Hussein (**Pw2**). There is yet another piece of evidence to prove that the accused persons hired the deceased, which that the accused persons confessed to Rhobinson Winfrid (**Pw8**), the justice of peace to hire Haji Hussein and later to kill him. I had no reason to question Rhobinson Winfrid (**Pw8**)'s credibility. He was a justice of peace and he deposed that he recorded the accused persons' confession in the absence of police officer. Thus, they were free. I find that the accused persons confessed to Rhobinson Winfrid (**Pw8**) to have hired Haji Hussein to ride them to Kiru-Kibaoni and later killed him.

There is also evidence from Richard Said Dinya (**Pw6**) that the accused persons took the motorcycle Exh. P. 1 to him and pledged it for a loan of Tzs. 470,000.00. The motorcycle, Exh. P. 1 was properly identified as the motorcycle the deceased rode, the property of Abdul Hussein (**Pw2**). Richard Said Dinya (**Pw6**) added that the accused persons were introduced to him by Ulongo, his brother in law. Richard Said Dinya (**Pw6**) is an accomplice. He was suspected and charged together with the accused person before he was discharged and made a witness. Richard Said Dinya (**Pw6**)'s evidence must be treated with caution and it must be corroborated. I find corroboration in Martine Tiophil @ Kalimanzila @ Rasta's admission made to this Court. Martine Tiophil @ Kalimanzila @

Rasta stated that after they killed Haji Hussein, they went to Ulongo who took them to his friend Richard Said Dinya (**Pw6**) where they pawned the motorcycle.

There is still another piece of evidence to prove that the accused person took the motorcycle to Richard Said Dinya (**Pw6**) from Insp. Aloys (**Pw11**). Insp. Aloys (**Pw11**) deposed that the accused persons told him that they sold the motorcycle at Bumbuta village and led him to Bumbuta village within Kondoa district.

The accused persons denied the evidence that they led Insp. Aloys (**Pw11**) to Bumbuta village. It is trite law that each witness including the accused person must be trusted unless there is a reason to find otherwise. I find Insp. Aloys (**Pw11**) trustworthy. His evidence was in one with the admission the second accused person made to this Court.

The accused persons refuted to take the motorcycle to Richard Said Dinya (**Pw6**) or know him before they appeared to the district court. As shown there is ample evidence from the prosecution to prove beyond all reasonable doubt that the accused persons took the motorcycle for sale or pledging to Richard Said Dinya (**Pw6**). In addition, the first accused person's advocate submitted that his client was not found in possession of stolen motorcycle. He argued that the persons found in possession of the

motorcycle were Richard Said Dinya (**Pw6**) and his mother, Zuweni Ramadani (**Pw7**). He added persons found in possession of the motorcycle are the ones who committed the offence and not his client. He referred this Court to the decision in **Said Mkuyu v. R.** (1972) HCD No. 41 where it was held that-

"...where an accused person is found in possession of stolen property. In the absence of probable explanation either through house breaking and stealing or receiving it to have stolen or unlawfully obtained it can be presumed that he came into possession of it."

The learned friend was astonished by the prosecution's failure to charge Richard Said Dinya (**Pw6**) and his mother, Zuweni Ramadani (**Pw7**) who were found with the stolen motorcycle and instead charged his client. I agree with the first accused person's advocate that there is overwhelming evidence that Richard Said Dinya (**Pw6**) and his mother, Zuweni Ramadani (**Pw7**) were found in possession of the motorcycle stolen during the commission of the offence of murder. However, the record has a reply to the learned advocate's riddle. The record shows that the accused persons are the ones who led the police to Richard Said Dinya (**Pw6**) to whom they had pledged the motorcycle. That evidence established that Richard Said Dinya (**Pw6**) and his mother, Zuweni

Ramadani (**Pw7**) did not partake in the commission of the offence. The doctrine of recent possession is a rebuttable presumption. A person found in possession of recently stolen property is presumed to commit the offence, **unless** he gives a plausible explanation on how he came into possession of the stole item. Richard Said Dinya (**Pw6**) and his mother, Zuwena Ramadani (**Pw7**) gave a plausible explanation.

I therefore, find it proved that the accused persons not only hired Haji Hussein to ride them on the motorcycle to Kiru-Kibaoni but also took the motorcycle, exhibit P.1 to Richard Said Dinya (**Pw6**) to whom they pawned it for a loan or sold it at Tzs. 470,000/=.

The last question to consider is whether they accused persons killed Haji Hussein. It is a simple question to answer, having found it proved that the accused persons hired the deceased to ride from Kimara village to Kiru-Kiru-Kibaoni, robbed the motorcycle he rode and took it to Richard Said Dinya (**Pw6**), it follows as day follows night that they must have killed him to rob the motorcycle. Apart from that logical follow of events, I find chain evidence to prove that the accused persons killed Haji Hussein. The second accused person admitted to this Court that the first accused hired and stooped the deceased in the bush/ forest. He ordered him (the second accused) to tie the deceased's hands from behind. The second accused

admitted to so. The second accused person told this Court that using the rope from bark of the tree, the first accused strangled the deceased to suffocate him. SSP Richard Dauson Mwaisemba (**Pw9**), Paulo Hussein (**Pw3**), Hussein Rashid Laila (**Pw4**) and Dr. Paschal Frank Mushi (**Pw10**) established that they found the deceased body's hands tied from behind and the rope on his neck. It proved that the second accused person's account on how they murdered Haji Hussein was whole true.

Yet, there is another prosecution evidence, that accused persons confessed to the justice of peace, Rhobinson Winfrid (**Pw8**). This is another piece of evidence which establishes that the accused person killed the deceased. I am alive of the position of the Court of Appeal in the case of **Nyerere Nyague Criminal Appeal No. 67 of 2010** (CAT-Unreported) where it held that: -

"...a confession or statement will be presumed to have been voluntarily made until objection to it is made by the defence on the ground either it was involuntarily made or not made at all."

I am aware also of the settled principle of law that an accused person who confesses to a crime is the best witness. The said principle was pronounced in the cases of **Jacob Asegelle Kakune v, The Director of Public Prosecutions**, Criminal Appeal No, 178 of 2017 and **Emmanuel**

Stephano v. Republic, Criminal Appeal No. 413 of 2018 (both unreported). Specifically, in **Emmanuel Stephano** (supra) the Court while reiterating the above principle stated that: -

*"We may as well say it right here, that we have no problem with that principle because in a deserving situation, **no witness can better tell the perpetrator of a crime than the perpetrator himself who decides to confess.**"*

Lastly, there is evidence from SSP Richard Dauson Mwaisemba (**Pw9**), Paulo Hussein (**Pw3**) and Hussein Rashid Laila (**Pw4**) that the accused person led them to the place where the deceased's body was recovered. It is on record that after Haji Hussein disappeared his relatives, villagers of Kiru and police, and Abdul Hussein (**Pw2**) and other motorcyclist (bodaboda) searched for him or his body and the motorcycle in vain on 12.10. 2020 and 13.10.2020. Haji Hussein's body was recovered on 15.10.2020 when the accused person volunteered to lead them to the place the killed and abandoned his body.

The accused persons refuted the allegation that they led the police and other people to the discovery the deceased's body. My task is to determine which evidence is credible. I am live of the fact the accused persons have no duty to establish their innocence but to raise doubt in the prosecution's evidence. I had no reason to disbelieve the prosecution's

evidence. SSP Richard Dauson Mwaisemba (**Pw9**), Paulo Hussein (**Pw3**) and Hussein Rashid Laila (**Pw4**) were consistent in their testimony. They deposed how the accused persons led them to a place the deceased's body was recovered. Not only that but also the second accused person's admission before this Court supported their testimonies.

I find it proved that **Nathanaeli Matei Nditi @ Babuu** and **Tiophil @ Kalimanzila @Rasta** killed Haji Hussein. The second accused person told this Court when he made an account of event that the first accused person coerced him to take part in the commission of the offence. He complied in fear to rescue himself, thus, he did not commit the offence. He did everything to save his life. The second accused person deposed that he had no chance to escape and report the incident as the first accused person did not give him that chance. He followed him every place he went including visiting the washroom. I find the second accused a principal offender. Had he not participated and he was willing to report the first accused he would have done so when they entered the pub at Gallapo. Section 22 of the **Penal Code** 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-

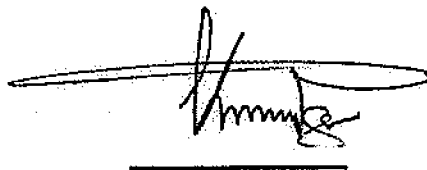
(a)

(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)

In the end, I find that the prosecution proved beyond all reasonable doubt that **Nathanaeli Matei Nditi @ Babuu** and **Tiophil @ Kalimanzila @Rasta**, killed Haji Hussein and did so with malice aforethought. I, therefore, find **Nathanaeli Matei Nditi @ Babuu** and **Tiophil @ Kalimanzila @Rasta**, the accused persons guilty of the offence of murder of one **Haji Hussein** and convict them with the offence of murder under sections 196 and 197 of the Penal Code [Cap. 16 R.E. 2019 now 2022].



John R. Kahyoza.

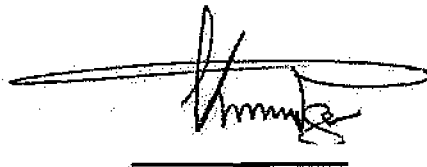
Judge.

2/5/2023

SENTENCE

Nathanaeli Matei Nditi @ Babuu and **Tiophil @ Kalimanzila @Rasta**, the accused persons have been convicted with the offence of murder under sections 196 and 197 of the Penal Code, [Cap. 16 R.E. 2022]. The sentence for offence of murder is that the accused must suffer death by hanging.

I accordingly, sentence **Nathanaeli Matei Nditi @ Babuu** and **Tiophil @ Kalimanzila @Rasta**, the accused persons to suffer death by hanging under sections 196 & 197 of the Penal Code [Cap 16 R.E 2022] read together with section 322 of the Criminal Procedure Act, [Cap. 20 R. E. 2022].

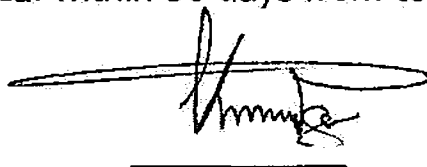


John R. Kahyoza.

Judge.

2/5/2023

Court: Nathanaeli Matei Nditi @ Babuu and **Tiophil @ Kalimanzila @Rasta**, have a right to appeal against conviction and sentence upon lodging a notice of appeal within 30 days from today.



John R. Kahyoza.

Judge.

2/5/2023

Court: Judgment and sentence delivered in the presence of Mr. Peter Utafu State Attorney assisted by Ms. Bernadeta and Mr. Ndibalema State Attorneys for the Republic, the accused persons and Mr. Ndonjekwa advocate for 1st accused person's advocate and holding Mr. Parchal Peter's brief for 2nd accused person. B/C Ms. Fatina present.



John R. Kahyoza.

Judge.

2/5/2023