

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

(TABORA REGISTRY)

(SITTING AT NZEGA)

CRIMINAL SESSION CASE NO.35 OF 2022

THE REPUBLIC

VERSUS

1. SHALU S/O LUWAYI @ KASEMA

2. ALPHONCE S/O PAUL @ TALUMA

3. BARNABAS S/O JONAS @MAHIMBO

JUDGMENT

Date: 4th May 2023 & 18th May 2023

BAHATI SALEMA.J:

Two innocent children of standard four at Uhemeli Primary School, Wamba Gibe and Richard Gibe were found slaughtered at the house of one Bibi Mwajuma. Their father was Mr. Gibe, a Uhemeli village resident within Nzega District, Tabora Region. The

deceased children's lives were exterminated on the 9th day of July 2021 by unknown perpetrators. The victims were grazing family cattle on a tragic day.

Following the incident, police conducted a manhunt that resulted in the arrests of SHALU LUWAYI @ KASEMA, ALPHONCE PAUL @ TALUMA and BARNABAS JONAS @ MAHIMBO. The accused persons were finally charged with two counts of murder contrary to Section 196 of **the Penal Code**, Cap. 16 [R.E 2022]

When the matter came for hearing, the accused persons pleaded not guilty to the information of murder. This plea prompted the prosecution to summon (**12**) witnesses and tender eight (**8**) exhibits. Exhibits included, two post-mortem reports (P1 and P2), a sketch map (P3), a photo (P4), a search warrant (P5), (P6)Machete "kisu bapa" and the caution statements of Barnabas and Shalu (P7 and P8). During the trial, the learned State Attorneys Ms. Jane Mandago and Mr. Merito Ukongoji appeared for the Republic, whereas Mr. Saleh Makunga and Ibrahim Kimwaga,

entered appearance as defence counsel for the first, second, and third accused.

In building up the prosecution's case, **PW1, Robert Gibe** (deceased's brother), testified that on 9/7/2021 at noon, he went to the well to draw some water for the cattle. He waited for his siblings at the well so that he would assist them in giving the cattle some water since they were not mature enough to draw some water from the well on their own. However, they never appeared. He waited for them from around 12 hrs to 14hrs but they did not turn up. He then went back home and informed his mother Lucia Richard. While at home, one Hassan passed by their house and asked for some water and he then left. He testified that Hassan was living at Bibi Mwajuma's place.

At that particular time, his father Mr. Gibe was not at home, he had gone to visit his sick relative in another village. They started searching for the missing children to no avail. At about 17 hrs he met Khasim, the houseboy of Barnaba Jonas, the third accused in

this case. After he asked the latter about the missing cattle and children, he told him that he had seen Hassan driving the cows ("*akiwaswaga*"). Robert Gibe then started to look for his mother and went to the neighbouring Andrea's place around 18 hrs. They then phoned the Village chairman, Seleman Seif, who told them that he was at the center.

They followed him and reported the matter to the police post and they were given RB. After they had reported the matter to the village chairman they raised an alarm ("***Mwano***"). People gathered at Gibe's place and the villagers started to look for the children until 21 hrs without success. While on their way, they met one Mhoja who told them that he had moved that evening from his place. After being informed they went to the place where that person was living. They then went where he had moved while other people went to Bibi Mwajuma's residence where Hassan was living.

Upon entering Bibi Mwajuma's place, they were informed that some drops of blood were seen in the house of Bibi Mwajuma

where Hassan lived. Inside they found the mattress with stains of blood. Since the room had no floor, they dug up but found nothing. Some people also were looking outside and noted newly tilled soil. They started to dig and found the bodies of two children who had been tied with ropes on their legs and hands. The children were already dead following being slaughtered. He further testified that the police were already at the place and took the bodies of his young brothers Richard and Wamba to Ndala Hospital.

During cross-examination, he stated that he was not present while the killings happened. The blood was seen at Hassan's grandmother's.

The evidence of PW1 was supported by **PW2, Seleman Seif**, the chairman of Tanuru village who informed the court that on 9/7/2021 at 18 hrs; he was called by one Lucia Richard, the mother of the deceased, informing him of the disappearance of her children. The village chairman testified that since he was at the center, he told her to meet him there. Together, they reported the

matter to the police at Ndala where she gave her statement on the disappearance of her two children and seven cattle. Thereafter, the two went to Gibe's place and raised an alarm to find the children. They tried to look for them until 21 hrs. but the children were nowhere to be found. While on the way, they met one Mhoja, a transporter who told them that he had moved one person called Shalu to another village. They divided, the chairman went to Shalu's place where he used to live and found he had moved to another place and thereafter they went to the place where he had relocated. One Barnaba went with another group to Bibi Mwajuma's place. He stated that while on the way, he received a call from Barnaba informing him that he had seen some blood stains in one room of Bibi Mwajuma. He then went back while others proceeded to Shalu.

Upon arrival at Bibi Mwajuma's place, he entered the room and found therein a bed with a mattress that had some blood stains. He stated further that, in the said room it was where Hassan

was living. As chairperson, after seeing the stains of blood, he informed the police who after a while arrived and entered the room, and they instructed to dig inside but could not find anything. They then started searching outside and noted that the soil had been tilled. The police asked Bi. Mwajuma if she left the place as it was, and they ordered the villagers to dig. While digging up to three feet down, they found one body of the 1st deceased, and while proceeding, they also found another body. The children were roped in and slaughtered. The police took the deceased bodies to Ndala Hospital.

He testified further to the court that, previously, there had been a quarrel between Gibe and Barnaba in respect of the place for drinking water for their animals ("*bwawa la kunyweshea wanyama*"). He told the court that he had his place for drinking water, and then Gibe hired it at the price of TZS 10,000/= but also Barnaba hired and used the same "*Bwawa*" for their respective cattle. Mr. Gibe was not happy with that, so he requested the

chairman to pay back his money since he did not want to share the facility with anyone else.

The Chairman further testified that the other team that went to Shalu's place informed him that they needed assistance since Shalu was inside. Before he sent other people there, Shalu came out of the house threatened them with swords and fled. Shalu was arrested on the following day at Nsimbo and the cattle were seized at Tabora.

During cross-examination; he stated that seven cattle were missing. He stated that Barnaba was cooperating with the villagers.

The third prosecution witness **PW3, F. 5168 Detective Corporal Chalu** testified that on 9/7/2021 while at Ndala Police Station around 18 hrs, he received Lucia and her son Robert, accompanied by Mr. Seleman, village chairman and informed him of the disappearance of two children and cattle. He gave them RB – 167/2021 District Ndala.

He further stated that around 24 hrs, he was called by the village chairman, Seleman Seif, informing him that there was a suspected house with the disappeared children. He informed OCD and other police to be on standby. Corporal Chacha arrived at the scene of the crime and found villagers surrounding the area. They entered the room with Bibi Mwajuma and other leaders. They found a bedrock "*chaga*" down with some blood, and a shirt with blood stains then started to dig the place without success. They then went outside and found a pit. Upon digging it open, they found one body and proceeded to dig and found another body. Gibe's children were slaughtered. They took the body to Ndala Hospital for further examination. During cross-examination, he stated that he did not arrest Shalu.

PW4, Lucas Kitambi a resident of Uhemeli – Ndala ward and village chairman. (***Serikali ya Kijiji***). He testified that he received a call from Paulo Kizogolo Hamlet Chairman at 22 hrs informing him of the missing children and seven cattle in the family

of Gibe. He then went to Gibe's place and found Paulo Kizogolo, Neema; VEO, and other villagers. They raised the alarm and started searching for the missing children. As they were divided; around 24 hrs they received information from one team on the finding of the children. They went to Bibi Mwajuma's place, where they met a crowd of people and found others inside. They found a mattress and clothes that had stains of blood on them. He called Afande Msuta, who arrived with other police. They started digging inside and did not find anything. They went outside and found a place that was dug. They started digging three feet and found the bodies of the children who were tied and slaughtered. Thereafter, the bodies were taken to Ndala Hospital. He further testified that the cattle were found in Tabora.

During cross-examination, he stated that upon entering the room, they found a mattress, chaga and other clothes.

PW5, Marius Odas, a doctor, was another witness who testified that he works at Ndala Hospital as a doctor. He was called

by the police to conduct a postmortem examination on the bodies that were already in the mortuary. He was requested by Inspector Thobias Chacha and Renatua Msuta. The bodies of Wamba and Gibe Richard were identified by their parents. After examination, he discovered that they had wounds on their necks and that they had been slaughtered. The cause of death was excessive bleeding. He filled out the form, which was admitted as "P1" and "P2".

PW6, Gibe Mazoya also testified to the court that he lives at Ndala, Uhemeli village and that the deceased Richard and Wamba Gibe were his children. He testified that on 9/7/2021 he went to Ibera Ward to visit his sick relative. He testified that he received information around 17 hrs from one of his neighbours, Maganga, that his children and the cattle were missing. He told this court that his children were studying at Standard 4 and on that day they had not gone to school and they wanted to help their brother, Robert Gibe. He further testified that he went back home and found the villagers were looking for the children and cattle. He then

accompanied the villagers, looking for them. His son Robert Gibe told him that they had heard from one Khasim, the herder of Barnaba's cattle who informed him that he had seen Hassan driving the cattle. They started looking for Hassan at the center and then decided to go to his grandmother's place Bibi Mwajuma Shaban to get information. Upon arrival, three people went to Mwajuma's place and they were told that Hassan had gone to Nzega at 17 hrs. They started dividing themselves. Basu, John and another person went to Kigwa to find the cattle while he was still there he was informed by Mr. Maganga to go back home only to find his two sons were already dead and their remains taken to hospital.

PW6 further stated that he previously had a dispute with Barnaba on the issue of the place for his cattle's drinking water, who had a well, and he started to use the water and made the well dirty. However, the dispute was resolved after he reclaimed his money from Seleman. Barnaba continued to use the well. He

testified that it was on Wednesday and the following week, his children died.

He also testified that apart from Barnaba, he had a dispute with his family relatives Haruna and Joseph, however, it was settled by his mother in 2019. He stated that the cattle were found in Tabora. He went and identified the sign of **000 na "mstari unakatwa, mavi ya mbuzi QQQ,"** and marked TNZG 151.

During cross-examination, he stated that he did not see the killers. He also stated that he had a dispute with his brothers, but it was resolved.

PW7, Abdala Jumanne, who was a mechanic, testified to the court that on 9/7/2021 while at home, a son of Mr. Gibe was looking for the children and cattle. They started looking for them in the bush and when they did not find them, they went to report the matter and were given RB. They started again to find the children without success. Later on, they were informed that there was one person called Shalu who had been transferred that

evening to another place in the same village. With the assistance of Mr.Mhoja, they went to the new place he had moved to. Barnaba @ Bonge told them to go to the place of *Bibi Mwajuma* and knocked. They went inside, and Barnaba went direct to search the left room where they found some blood stains. He testified further that there were two rooms, but Barnaba @ Bonge went directly to the left room, where they found some blood under the bed (mattress). They informed the police, who arrived and started to dig inside the room but they did not find anything. They then went outside and found a place that had been cultivated and they proceeded to dig until they found two bodies of dead children tied in both hands and legs. The bodies of the children were taken to the hospital.

During cross-examination, he stated that Barnaba had an idea to go to Mwajuma's place. He knew about the incident.

PW8, G 5170 Corp Zamoyoni, testified to the court that he works at Igunga, District, Ziba Police. On 10/7/2021 at Nsimbo,

police station, Igunga. It was around 9hrs when he received a call from PC Mpegiwe informing him of the murder of two children and requesting that he should block the road since the killer had escaped to Nsimbo. Upon being informed, he went to the road, took the motorcycle ("*boda*") and blocked the road. Thereafter, he saw the motorcycle coming and he stopped at least three motorcycles and started communicating with the police. When he stopped the third motorcycle, the passenger was unsteady, then he started running and people chased him. Thereafter, after seeing a crowd of people, he surrendered. He was arrested and locked up. After the interview, the accused told him that "I told them not to kill the children, but they have killed them". ("***Niliwaambia wasiwaue wale watoto lakini wamewaua***"). He then proceeded with his usual business and the police from Nzega arrived and left with him.

PW9, H. 9198 PC Oscar testified that he works at Nzega, District at the investigation department. On 10/7/2021, while at

home, he received a call from Inspector Thobias directing him to Ndala, where there was a murder incident. With other police, they dispersed and went to the village to investigate the murder. They were informed that Shallu fled to Nsimbo – Igunga District. He then reported the matter and directed Corporal Renatus Msuta to communicate with the police of Nsimbo to stop him.

After an hour, they were informed of the arrest of Shalu. They went with Renatus Msuta, Rosim and to arrest Shalu. Upon arrival and being interviewed, Shalu said he was responsible, and the cows were transported to Tabora to be sold to Mr. Alphonse. They then went to Tabora to arrest Mr. Alphonse at Isevya-Tabora with other policemen from Tabora. Alphonse confessed that he was a buyer of the said cows. After setting a trap, at Mnadani, the culprits started to run. With the aid of Alphonse who was communicating with them, they managed to find 7 herds of cattle. On 11/7/2021 around 12 hrs, they went to Nzega with Shalu and Alphonse in a police vehicle and arrived Nzega at 14 hrs.

During cross-examination, he stated that he was not present during the commission of the offence. He stated that Alphonse led them to find those who were sending the cattle to him.

PW10, Haruna Ramadhani, a resident of Mangashini, Nzega District, testified that he has been registered as a motorcyclist ("*bodaboda*") for 5 years at Nsimbo. On 10/7/2021 he was going to his usual duty at Nsimbo. On his way to the center, he saw Shalu walking. The latter stopped him as he was going to Igunga. He picked him up after he agreed on the charge, and then he started to go, while on the way Shalu was looking back all the time, he was suspicious. Before they arrived at the center the police stopped them and his passenger started trembling. There were at least three motorcyclists ("*bodaboda*") upon being asked by the police, he started running and was arrested by the public.

Later on, Corporal Zamoyoni went to ask him while the suspect was in the lockup. They stayed for 15 minutes, and the police came and left with Shalu.

PW11, G. 3539 Detective Corporal Hamis testified that on 10/7/2021 around midnight, the police were informed of the murder incident that had occurred at Ndala. He went to Nzega and then Ndala. He found two bodies of children namely Richard and Wamba slaughtered. He arrived at 5 hrs in the morning and proceeded with the investigation. At 6 hrs, while at the scene of the incident, he drew a sketch map of the incident, assisted by the village hamlet Seleman Seif. The sketch map was admitted as exhibit "P3".

PW12, G.4104 Corporal Laurent, who works at Ndala police station, testified that on 9/7/2021 around 23.45hrs, Corporal Charles directed him to go to the police station where he was informed that there was a report of two children missing while grazing. He told him that the villagers surrounded the house of Bibi Mwajuma suspecting the children were in there. They then went to the scene of the crime, and upon arrival, he met the village leaders and after a while, Asst. Inspector Thobias from Nzega arrived. He

called some of the leaders, and they told him about their doubts on the said house. They were informed that some of the villagers that entered the room found some blood clots.

They entered and started to search the house where they found the room of Hassan was disorganized. They took a search warrant and started recording. There were some blood stains and started digging inside since the floor had no floor. They found two shirts, clothes, "*chaga*" and a mattress. They also found some local medicines and a black sheet. The room belonged to Hassan the sibling of "Bibi Mwajuma". They did not find the children. They went outside and found a hole that had been dug. He further testified that he took photographs before and after the incident. He found the bodies of children who were tied up with pieces of clothing. After that, Assistant Thobias recorded the certificate of seizure. He then labeled and signed the photos for memory. The photos were admitted as exhibit "P4".

He went on to say that after that, they seized a short machete, two shirts and a mattress, women's parts of the bed, local medicine, a red bed sheet, and pieces of rope that were connected to the killings. The certificate of seizure was admitted as "P5". The kinds of stuff brought in this court were collectively admitted as "P6".

That marked the prosecution case, which was followed by the ruling in which the court found the *prima facie case* to have been established against the accused persons.

Therefore, in line with **Section 293 of the Criminal Procedure Act, Cap. 20**, the Court informed the accused of his right to defend the case under oath and call a witness for the defence. The accused persons, on the other hand, elected to testify under oath and they had no other witnesses or exhibits to tender during the defence.

In their defence, the accused were recorded as DW1, DW2 and DW3 respectively.

DW1, Shalu Luwayi Kasema testified to the court that he was arrested on 10/7/2021 at his farm in Nsimbo when he went to look for his watermelon. He further testified that he rented a house from Paulo Kizogoro who on February 2021 asked him to shift to another place since he wanted to load the room his the rice pads he had cultivated. The said room had been rented to Mr. Shalu. He added further that on 9/7/2021 at 20 hours during the night he moved to the neighborhood of one Seleman which was 3 houses from where he was before. He testified that he was arrested while he was at his farm but he was not involved in the killing of the two children. He prayed to the court to set him free.

The next defence witness was **DW2, Alphonse Paulo Taluma**. He testified to the court that he was a businessman buying cattle from Minada ya Sikonge, Mirumbe and Ntankwa. On 10/7/2021 he received a call from police who asked him to meet at a place called Salmin in Tabora and upon arrival he was arrested, alleging he had bought stolen cattle. The police proceeded to look

for other people while he was under arrest, and thereafter he was taken to the police. He testified to the court that he was never interviewed.

Last was **DW3, Barnabas Jonas Mahimbo**, who testified to the court that he lives in Uhemeli, Ndala, Nzega District and his business was butchery. He testified further that he owned cattle and had 2 herders namely; Khamis and Wambura. He used to buy undernourished cows from pastoralists that are thin, and thereafter he fed them to become huge and butchered them.

He testified that he once had a conflict with Mr. Gibe in respect of the well. He told the court that Mr. Gibe rented a well before, but it was resolved by Mr. Seleman Seif, chairman of Tanuru who returned his money. He further testified to the court that on 9/7/2021 around 17hrs, he heard an alarm and went where the alarm was raised, and joined forces to find the 2 missing children of Mr. Gibe. He added that while still searching the children, Robert, the son of Mr. Gibe told them that Khasim had seen Hassan driving

the cattle. Thereafter, they went to Mwajuma's place where Hassan used to live. The angry citizens had a torch, lighted from outside, and saw a child sleeping but they were not them. They entered directly into the room while Mwajuma was following them and found the mattresses and the bed was disorganized and finally, they found the bodies of the children outside having been slaughtered.

In general, the accused persons dissociated themselves from the offence leveled against them. They prayed for their acquittal.

That being the comprehensive summary of the proceedings, it is important to once again restate, that in the instant case, the three persons are faced with two counts of murder contrary to Section 196 of the **Penal Code, Cap 16**. The section provides that;

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

Therefore, to establish the offence of murder, the prosecution evidence must prove the following elements; **the person died**, the **death was a result of an unlawful** act as opposed to natural death, it must be proved that the **accused persons were responsible for the murder**; and that **the accused persons had evil intent before executing the act of murder**.

It is a settled principle that in a criminal trial, the key issue for determination by the court is whether the evidence adduced by the prosecution has proved the charge against the accused beyond a reasonable doubt. The accused cannot be convicted based on the weakness of his defence or inability to defend himself, or because of lies. They are required to be convicted based on the strength of the evidence adduced by the credible and reliable witness(es) of the prosecution.

Murder is one of the capital offence and being one of the criminal offence, its proof must be satisfied beyond a reasonable doubt. The doctrine of proof beyond reasonable doubt is provided

under Section 3(2)(a) of the **Evidence Act, Cap. 6 [R.E. 2022]**.

The same doctrine has been amplified in several cases, including the case of **Hemed v Republic** [1987] TLR 117, where the court held that;

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

Based on the above principle of the law, it is also established that the onus of proving a criminal case beyond reasonable doubt lies on the prosecution. The burden of proving the offence beyond reasonable doubt does not shift to the accused person. The case of **Mohamed Matula v Republic** [1995] TLR. 3 clarified this principle.

Beginning with the **first ingredient**, the prosecution evidence confirmed that Richard Gibe and Wamba Gibe died. The evidence of PW5, Merius Odas proved that the deceased, who were children, died and that their death was unnatural. The Post-Mortem Examination Report admitted as an exhibit "P1" collectively during

the hearing confirms that the two deceased persons' deaths were caused by severe hemorrhages after being cut on the anterior part of their necks.

Furthermore, the prosecution evidence by PW1, Robert Gibe, PW2, Seleman Seif, PW3, F. 5168 Detective Corp .Chalu, PW4, Lucas Kitambi, PW6. Gibe Mazoya and PW7, Abdala Jumanne all confirmed that and witnessed the death of the two children, Richard Gibe and Wamba Gibe.

On the **second ingredient**, the deaths of Wamba and Richard Gibe were not natural. They died as a result of the cut wound on the anterior part of the neck. The confirmation by the post-mortem examination report, which was not objected to by the defence clearly shows that the deceased's life was terminated by the accused person's unlawful act. Also, the photographs are revealed as "P4" exhibits.

Perhaps the most obvious question is who caused the brutal murder of the two innocent children? That is, the **third** ingredient

is who killed the children. It is not disputed that none of the prosecution witnesses who testified had seen the accused kill the deceased. The prosecution case hinges on the circumstances and factors surrounding the commission of the offence as well as the cautioned statements of the accused persons.

The law is settled that, where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In the case of **Mark Kasimiri vs R**, Criminal Appeal No. 37 of 2017, the Court of Appeal restated the following principles governing the reliability of the circumstantial evidence to convict the accused:

1. *"That the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established, and that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused, and that 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 and no one else.*
2. *That the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt; and that before drawing an inference of guilt from circumstantial evidence, it is necessary to be sure that there are no existing circumstances that would weaken or destroy the inference*
3. *That each link in the chain must be carefully tested and if, in the end, it does not lead to the irresistible conclusion of the accused's guilt, the whole chain must be rejected,*

4. *That the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person;*
5. *That the facts from which an adverse inference to the accused is sought must be proved beyond reasonable doubt and must be connected with the facts from which the inference is to be inferred."*

The court will be guided by the above principles in determining whether the circumstantial evidence in the case at hand infers the guilt of the accused.

In this matter at hand, there is clear evidence supporting the claim that the first accused unlawful act killed the deceased. The evidence of PW2, Seleman Seif, reveals that the accused shifted to another place on the day of the incident, and while the villagers went to his place, he fled away. Alike, the evidence of prosecution PW8, G.5170 Corporal Zamoyoni and PW10, Haruna Ramadhani, a motorcyclist ("*bodaboda*"), proved that the accused was arrested at Nsimbo trying to escape. Although the evidence against the

accused is circumstantial, that evidence is sufficient to warrant the accused's conviction.

Furthermore, **the accused's conduct** after the killing suggests that he had evil intentions against the deceased as he fled away. This is the position in the authority of **Pascal Kitwiga v R [1994]** TLR 65 (CA) held that inter alia;

"Corroborative evidence may be circumstantial and may well come from the words or conduct of the accused."

Besides circumstantial evidence, the prosecution also relied on the repudiated confession of the accused person, Shalu Luwayi Kasema who confessed to the commission of the offence. With this information, the second and third accused were eventually arrested.

As a matter of law concerning **retracted confessions**, I am aware that the rationale is that, generally, it is unsafe to convict the accused person based on uncorroborated retracted or repudiated confessions. However, the trial court may act upon an

uncorroborated repudiated or retracted confession provided that it is satisfied that the retracted or repudiated confession is true. In **Bombo Tomola v. Republic** [1980] TLR 254, Also in the case of **Hemed Abdallah versus Republic** [1995] TLR 172, the Court stated that:

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

Under the principle of law stated above, where the confession has been retracted or repudiated, to base a conviction on such a confession, it must pass three important tests, **first**, the confession must be *corroborated by other independent witnesses*; **second**, it must be established that the *maker made it of his free will*; and **thirdly**, its central theme must be believed to be nothing but the truth. It is therefore pertinent at this stage to examine the truth or otherwise of the caution statement of the accused.

Guided by the above position, I have gone through the confessions made by the first and third accused persons to find out whether the same is true. As narrated by PW14, Insp. Jafari Saidi on how the 1st accused Shalu Luwayi Kasema and the 3rd Barnabas Mahimbo confessed that the killing had been initiated and executed by Hassan. I wish to highlight some of the statements of Shalu Luwayi Kasema in the exhibit "P8";

"...Nakumbuka tarehe 10/7/2021 majira ya asubuhi nikiwa maeneo ya Nsimbo – Igunga nilikamatwa nimepanda pikipiki na askari polisi kwa tuhuma za kosa la mauaji la tarehe 9/7/2021 huko kitongoji cha Uhemeli Kata ya Ndala tarafa ya Puge- Nzega ambapo watoto wawili walichinjwa kabisa na kufukiwa katika shimo lililopo mbele ya nyumba ya Bibi Mwajuma. Ukweli ni kwamba nimeshiriki katika tukio hilo kuanzia hatua ya awali ya kula njama hadi kufanikisha mauaji hayo na kufanikiwa kupora ngombe idadi yake saba. ...kwa vile mimi nafahamu watu wengi wanaofanya biashara ya ng'ombe hasa za magendo/wizi niliweza kumpigia simu

Alphonse Paul Taluma wa Tabora nikamweleza hio dili naye akakubali mipango ikikamilika nimjulishe.

Tarehe 8/7/2021 na tulikuwa jumla ya watu wanne ambao ni mimi, Hassan Masoud @Bonge, Kulwa na Barnaba Bonge Mkurya tukaanza kupanga mikakati jinsi ya kufanikisha wizi huo wa ngombe, tukiwa katika mazungumzo Barnabas Bonge Mkurya akatuelezea kuwa lengo lake ni kwamba huyo Mzee aliyemtaja kwa jina la Gibe anataka ahame kabisa hapo kijijini kwani analoga mifugo yake na pia anamsumbua sana katika suala la malisho na sehemu ya kunyweshea mifugo yake. Pia akasema anataka ikiwezekana kufanya la kuwapoteza watoto wake wawili. 'Mimi nikahoji mbona hiyo kazi ngumu.'...

...Mimi kabla sijaingia ndani Barnabas Mkurya aliniletea kisu bapa kifupi nikaingia nacho ndani ya kile chumba tukiwa jumla ya watu watatu yaani mimi, Kulwa na Hassan Masoud Bonge tulianza kuwafunga kamba miguu na mikono."

I find this to be corroborated with the statements of PW8, G.5170 Corp Zamoyoni and PW10 Haruna Ramadhani since the

accused was arrested at Nsimbo escaping also the court admitted the exhibit of a machete in this court as exhibit "P6".

Furthermore, according to the caution statement of Barnabas Jonas Mahimbo as exhibit "P7" that;

"... Nakumbuka tarehe 10/7/2021 majira ya kama saa 3 nikiwa Ndala nilikamatwa na polisi kwa mauaji ya tukio la tarehe 9/7/2021 ambapo watoto wawili walifariki kwa kuchinjwa ndani ya nyumba ya Bi Mwajuma. Ukweli ni kwamba hilo tukio mimi nimeshiriki katika tukio hilo la kula njama Nilivyompa huo mchongo nikamwingizia kutaka wale watoto wa Mzee Gibe wapotee kabisa yaani ikiwezekana wanyongwe wafe wasionekane tena , sababu ya kufanya hivyo nilitaka huyo mzee Gibe ahame hapo kijijini kwani ana mambo ya kishirikina analoga ng'ombe zangu pia ni mgomvi sana hasa katika malisho na sehemu ya kunyweshea mifugo.

...Nilimpatia kisu bapa cha kufanyia kazi na mimi siku ya tarehe 9/7/2021 nilishinda buchani hadi saa mbili nilivyorudi nyumbani nikasikia mwano wa kutafuta hizo ng'ombe na watoto. Nilijifanya sielewi chochote juu ya

tukio hilo. Nilijumuika na wenzangu kuwatafuta pasi mafanikio."

This statement was also corroborated by the evidence of PW1, Robert Gibe, PW2 Seleman Seif, PW6, Gibe Mazoya, PW7, Abdala Jumanne, and PW13, Bibi Mwajuma Shaban who doubts the information in respect of the house of Bi Mwajuma and Barnabas went directly to the room of Hassan which was far from the sitting room, which means his action towards this circumstantially imputes his guilt. Also, the exhibit admitted in this court was machete "*Kisu Bapa*."

Apart from that, PW2, Seleman Seif and PW6, Gibe Mazoya during the trial stated that there was a conflict between Gibe Mazoya and Barnabas Jonas in respect of a place for drinking water for his cattle, which was settled by PW2, Seleman Seif. Even in his defence DW3, Barnabas Bonge @Mkurya admitted that they had a conflict that was resolved, but he stated that PW6, Gibe Mazoya warned him.

Also, this court admitted the exhibit of "*Kisu bapa*" which was also stated by the defence Witness DW1, and DW3 in their cautioned statements. Since these statements were corroborated by the prosecution, in this case, I am aware that, although there is no rule of law or practice making corroboration of a retracted confession essential; in the case at hand, corroboration of a retracted confession is desirable by independent evidence as no other evidence points to the accused as having been identified as people who committed the crime herein.

Both cautionary statements above mentioned the accused persons cooperating in killing Wamba Gibe and Richard Gibe. As stated earlier, there are statements by both accused persons on record detailing their involvement in the murder. Thus, as far as the prosecution evidence is concerned, the cautioned statements have implicated the first and third accused persons and are not extraneous facts.

Having carefully examined the caution statement of the accused person, this court is of the considered opinion that the above authorities make it possible for the court to enter a conviction on a corroborated, retracted, or repudiated statement as long as the court is fully satisfied that in all the circumstances of the case that the confession is true.

In the same way, in this case at hand, the conduct and motive of the first accused person after the incident circumstances have corroborative value to the prosecution's evidence that he was the one who killed the two children. The accused had a motive to kill the deceased. However, I am fully aware of the fact that motive is not an ingredient for murder but its presence strengthens the prosecution case and its absence weakens it. The case of **Stanley Anthony Mrema V. R**, Criminal Appeal No. 180/2005 CAT (unreported) is followed.

The **fourth** ingredient is whether there was **malice aforethought**. Although under the law, it may not be easy to

establish malice aforethought (because it involves the accused's mental intent); Section 200 of the **Penal Code, Cap. 16** provides for some indicators of malice aforethought. Further, in the case of **Obadia Kijalo V. Republic**, Criminal Appeal No. 95/2007 CAT (unreported), it was held that;

"It suffices to state that malice aforethought may be demonstrated by looking at the motive for the offence and the conduct of the suspect immediately before and after the act or omission".

In my view and under the circumstances of the case at hand, it is not difficult to ascertain whether the accused knew that their actions would lead to death. The law concerning malice aforethought is settled, and the same can be inferred from several factors. The Court of Appeal in the case of **Enock Kipela V R**, Criminal Appeal No. 150 of 1994 stated, *inter alia*, that;

"Usually an attacker will not declare his intention to cause death or grievous bodily harm, whether or not he

had the intention must be ascertained from various factors, including the following: (i) The type and size of weapon which was used in the attack leading to the death of the deceased; (ii) The amount of force which was used by the attacker in assaulting the deceased; (iii) The part or parts of the body of the deceased where the blow of the attacker was directed at or inflicted; (iv) The number of blows which were made by the attacker, although one blow may be enough depending of the nature and circumstances of each particular case; (v) The kind of injuries inflicted on the deceased's body; (vi) The utterances made by the attacker if any, during, before or after the incident of the attack".

Applying the above principles to the case at hand, the tests were met since the postmortem report stated that the deceased bodies were found with a big cut wound on the anterior part of their necks. This means that they were slaughtered. In my opinion, it suffices to infer malice aforethought that one of the accused's statement " Niliwaambia wasiwaue" . Further to that, the conduct of the 1st and 3rd accused persons before and after the death of

the deceased is also enough to establish that the killing was perpetrated with malice aforethought.

Equally, in **Crosperry Ntagalinda @ KoroVs R**, Criminal Appeal No. 312 of 2015 CAT-Bukoba (unreported) on page 36 the Court held that;

"On looking at the evidence on record, it is evident that the appellant had a motive to kill or cause grievous harm to the deceased. However, we are fully aware of the fact that motive is not an ingredient for murder. However, its presence strengthens the prosecution case and its absence weakens it".

Coming to the second accused person, Alphonse Paulo Taluma on whether the witness was an accomplice, this is based on the principle enunciated in the case of **Pascal Kitwiga v R [1994]** TLR 65 (CA).

" Evidence from a co-accused as in this case is accomplice 's evidence and 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; Although the law does not say that conviction on uncorroborated accomplices evidence is illegal, it is still unsafe, as a matter of practice, to uphold a conviction based on the uncorroborated evidence of the co-accused."

In this case, there is no sign that the evidence from the caution statement of the first accused incriminates the second accused. Having perused through the caution statement, I see no iota of evidence that implicates the second accused Alphonse Taluma that;

"Tarehe 8/7/2021 na tulikuwa jumla ya watu wanne ambao ni mimi, Hassan Masoud @Bonge, Kulwa na Barnaba Bonge Mkurya tukaanza kupanga mikakati jinsi ya kufanikisha wizi huo wa ngombe, tukiwa katika mazungumzo Barnabas Bonge Mkurya akatuelezea kuwa lengo lake ni kwamba huyo Mzee aliyemtaja kwa jina la Gibe anataka ahame kabisa hapo kijijini. "

There is no enough corroborating evidence from other witnesses and also the accused person himself throughout the case had not been mentioned by any witness. Therefore, in my considered opinion, the benefit of the doubt should go to the accused.

Therefore, in every aspect raised and looking at the evidence in total, it goes without saying that the prosecution has managed to prove the case beyond reasonable doubt for the 1st and 3rd accused persons. Considering the circumstances of the case, and the evidence aggravated by the prosecution and defence side, I am convinced, that the 1st and 3rd accused persons killed the two children, Richard Gibe and Wamba Gibe with malice aforethought. I am of the considered opinion that it casts no doubt on the prosecution evidence which I consider to be watertight.

The court also considered the evidence of Shalu Luwayi Kasema in his defence. He testified that he was arrested at his farm Nsimbo where he had gone to look for his watermelon and denied

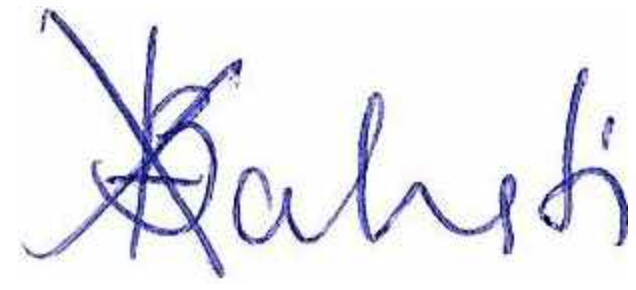
having been arrested while fleeing. Such defence has no basis, And the third accused, Barnabas Jonas Mahimbo, in his defence admitted to having conflict with the father of the deceased children in respect of the place for drinking water for his cattle which later was resolved by the chairman. I have noted that the subject defence had not raised a reasonable doubt. I, therefore, convict the 1st and 3rd accused of the offence of murder, as charged. However, the second accused is hereby acquitted.

SENTENCE

In murder cases, once an accused person has been found guilty, the only sentence prescribed is death by hanging. The law requires that an accused person who is found guilty of murder must be sentenced to death by hanging. I, thus, have no option but to impose the sentence as provided by law. That said, the accused persons **Shalu Luwayi Kasema @Kenedy and Barnabas s/o Jonas @Mahimbo @ Bonge Mkurya** are hereby sentenced to

suffer death by hanging as provided by section 197 of **the Penal Code**, Cap. 16 [RE 2022].

Order accordingly.

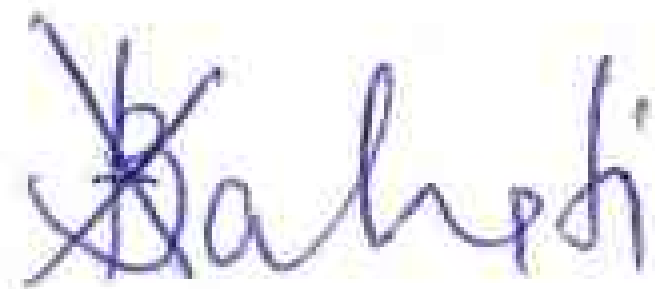


A. BAHATI SALEMA

JUDGE

18/5/2023

Right of Appeal to the Court of Appeal is explained and guaranteed.



A. BAHATI SALEMA

JUDGE

18/5/2023

