

IN THE HIGH COURT OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)

SITTING AT MPANDA

CRIMINAL SESSIONS CASE NO. 19 OF 2022

REPUBLIC

VERSUS

1. KIJA ^{s/o} MASSANJA @MAJANJA

2. PAULO ^{s/o} LUBINZA @KADASHI

..... ACCUSED

JUDGMENT

27th June & 27th July, 2023

MRISHA, J.

As it had been his usual business, **Pindya ^{s/o} Ndege**, a husband of two wives and a number of legal issues all of whom he was under a legal duty of providing with maintenance, left at his home Kamlenga Hamlet within Sibwesa ward of Tanganyika District in the early morning of 01.09.2020 with a view of selling his live stocks to wit cattle, at Mnyagala Cattle Auction market in order to get some money for his personal and family uses.

None of his family members ever expected him to have thereafter encountered a tragedy that would have caused his demise and leave them helpless, when he left his home for that purpose. However, after a heavy task of tracing who the killer was, it came to the attention of his wife, village leaders and the Police force, that **Kija s/o. Massanja@Majanja, Paul s/o. Lubinza** and one **Dadi s/o. Stesheni** are the ones who killed **Pindya s/o. Ndege**.

Unluckily, the efforts to trace **Dadi s/o. Stesheni** could not ripe fruits, as a result, **Kija s/o. Massanja@Majanja** and **Paul s/o. Lubinza** were arrested, interrogated and jointly charged with one count of **Murder contrary to sections 196 and 197 of the Penal Code**, Cap 16 R.E. 2022(the Penal Code). After being arraigned before this court, all of them pleaded not guilty. This necessitated the matter to be heard inter parties as per the procedural requirement.

When the matter was called for hearing, both parties were duly represented by the learned advocates. While the prosecution Republic was represented by Ms. Hongera Malifimbo, learned State Attorney, Ms. Hellen Haule, learned Advocate, appeared for both accused persons.

In order to prove their case, the prosecution brought a total of eight witnesses and four exhibits, while on the adversary side, the above

mentioned accused persons testified as the only defence witnesses. The two did not tender any documentary evidence. The evidence adduced by both sides can be summarised as follows:

Starting with that of the prosecution side, PW1, **Mathias ^s/o Kasandiko** who is a chairman of Kamlenga Hamlet within Sibwesa ward in Tanganyika District, testified that on 19.09.2020 he was approached by one **Paulo ^s/o Massanja** who told him that his brother one **Pindya s/o Ndege** was missing since 01.09.2020.

On the following day which was 20.09.2020 one **Kyaya ^d/o Gula** who is the wife of **Pindya ^s/o Ndege**, went to the home of PW1 and told him that her husband did not get back since he left home on 01.09.2020 and that she was suspecting a young man one **Kija ^s/o Masanja@Kajanja** who is the nephew of **Pindya ^s/o Ndege** and one who moved the cattle from Pindya's home to Mnyagala cattle auction market after being instructed by **Pindya**.

That after being so informed, PW1 called and directed the vigilante commander to go to the Village Chairman to find **Kija ^s/o Massanja** whom it was narrated that he had gone there to take a letter authorising him to find his uncle. However, upon returning, the said commander

informed PW1 that he did not find **Kija** at the VEO's office, but at a local bar drinking alcohol.

Following such feedback, **Kija** was arrested by the said commander and other men on 20.09.2020 at around 0600 hours and was taken to PW1 who interrogated him in connection with disappearance of his uncle, but he said he did not go to the VEO to seek a letter and that he left **Pindya s/o Ndege** and his friends at Mnyagala.

It was a further testimony of PW1 that on 21.09.2020 **Kija** was interrogated in his presence by the vigilante commander and a chief of vigilante whereupon he confessed to have killed his uncle one **Pindya s/o Ndege** and that he was not alone, but he participated with **Paul s/o Lubinza**. PW1 said suspect was living in his hamlet; hence he knew him very well.

PW1 went on to testify that on 21.09.2020 the second accused person was arrested around evening when the police came to his office, then the two accused persons led the police and other persons including him, to the scene of crime where they had kept the body of **Pindya s/o Ndege** (the deceased person).

Upon arrival, they found some remains of a human body, the clothes like a shirt, trouser with blood stains, together with other items like a pant, a

batch of keys which were all identified by the deceased's wife one **Kyaya s/o Gula** to be of **Pindya s/o Ndege**. PW1 described the human remains as the skull with teeth and one leg.

He said he believed the said remains and items were of **Pindya s/o Ndege** because it was the 1st accused who led him and the policemen to the wetland where they discovered the same. They thought the deceased body had been eaten by wild animals like hyena because they just found the remains of a human body scattered.

During cross examination, PW1 said he used to know **Pindya s/o Ndege**. He told this court that 03.09.2020 is the date the first accused moved **Pindya's** cattle to Mnyagala Cattle auction after being instructed by **Pindya s/o Ndege**.

That the wife of **Pindya** was worried because her husband did not return home since 01.09.2020. He did not know if the two had misunderstandings before. That **Kija** (the first accused) confessed that he killed the deceased on 03.09.2020 and that immediate after the accused confessed to him, he reported the matter to the police officer by phone.

Also, PW1 responded that people were many at his office, but the first accused was not beaten when he confessed before him, the chief of vigilantes and the deceased's wife.

On re-examination, PW1 said they went to the wetland and found remains of the deceased body. They went to the scene of crime with all the accused persons and the first accused is the one who led them there. He did not hear if there were other persons than the first and second accused persons, who were involved in the commission of a crime.

PW2, **Jidinga ^s/o Lugwisha** told this court that he is a vigilante commander of Kamlenga hamlet. That on 20.09.2020 he received a call from PW1 who instructed him to find and arrest the first accused person whom it was alleged that he had left home with **Pindya ^s/o Ndege**, but the said deceased person did not return at his home.

That upon receiving such instruction, he was accompanied by the Chief of Vigilante one **Charles ^s/o Moto** to trace the first accused person and managed to apprehend him drinking alcohol at Sibwesa Centre; then they matched him to PW1 who is a chairman of Kamlenga hamlet.

That, upon interrogating him, the first accused person told them that after selling cattle he went back home leaving the deceased heading to

Mpanda Town to buy some maize, later he changed the story by saying he left the deceased at Mnyagala Cattle auction.

That on 21.09.2020 the first accused told PW2, PW1 and a Chief of vigilante that he wanted to tell them the truth whereupon he told them that he was with his uncle one **Pindya s/o. Ndege** at Mnyagala cattle auction and after selling cattle they got 2,200,000/= Tshs. as proceeds of that sales.

PW2 also said that in his statement the first accused told them that thereafter he participated with **Dadi s/o. Stesheni** and **Paul s/o. Lubinza** to kill **Pindya s/o. Ndege**. He also testified that after confessing so, the first accused told them that before killing the deceased, he was communicating with **Paul s/o. Lubinza** and **Dadi s/o. Stesheni** while on his way with **Pindya s/o. Ndege** until when they reached at the wetland area of an elder commonly known as 'Mzee Kidelya', then he used his torch light to direct his co assailants where the deceased was then **Dadi s/o. Stesheni** attacked and started beating the deceased with sticks on the head until he lost his life.

That following such brutal act they searched the deceased's pockets and stole Tshs. 2,200,000/= and divided the same to each other whereby

Kija got Tshs. 500,000/=, then he dragged the deceased body in the wetland after covering it with some dry paddy stalks.

That, soon after such confession by the first accused person, the second accused who was nearby was also arrested then the two accused persons led them together with the policemen to the scene of crime and showed them where they had kept the deceased body.

Upon arrival, they found the remains of the deceased body with bad smell, they also found one leg, one finger, one trouser, an underwear and a batch of keys covered by a piece of cloth which all were identified by the deceased's wife as belonging to the deceased person. PW2 also narrated that the first accused told them he killed the deceased person on 03.09.2020.

In his response to cross-examination questions, PW2 said that he was instructed by a hamlet chairman to find and arrest the first accused who was accused by the deceased's wife for returning home without the deceased person.

That the first accused told him and other persons that after selling cattle he gave money to the deceased then he communicated with **Dadi ^s/.** **Stesheni** and **Paul ^s/.** **Lubinza** and told them the money was with the deceased. He also told them that before the incident, he was

communicating with the abovementioned persons by using mobile phone and torches.

When re-examined by Ms Hongera Malifimbo, PW2 said that the deceased's wife identified the trouser, boxer underwear and a batch of keys as belonging to her husband. He also told them that he killed the deceased on 03.09.2020 and that it was the accused persons who led them to the scene of crime.

The above PW2's evidence was followed by that of **Charles s/o Gerald Moto** who testified as PW3. He said that on 20.09.2020 he joined PW2 to find and arrest the first accused person following the allegations that he had left home with the deceased to Mnyagala Cattle Auction to sell cattle, but the deceased went missing.

They managed to apprehend the first accused and matched him to PW1 for interrogation in connection with the missing of the deceased person who was his uncle. That, upon being interrogated the first accused told PW3 and other persons including PW1 and PW2, that he had killed the deceased person with **Paul s/o Lubinza** (the second accused) and one **Dadi s/o Stesheni**.

That the first accused told them that they killed the deceased in order to steal the money he had obtained after selling his cows. From that sale

the deceased got 2,200,000/=. They killed him at the wetland of mzee Kadelya which was near to the deceased's cow shed. The first accused confessed on 21.09.2020 thereafter PW3 and his colleagues reported the matter to Sibwesa Police Post. Later they started finding **Paul s/o Lubinza** and apprehended him on the same date. After arrival of the police, the accused led them to the scene of crime and showed them where they had kept the deceased body and covered it with some dry paddy glasses. At the crime scene they found human bones, a bone of leg and a piece of trouser. They also found a boxer (underwear), a shirt with blood stains and a batch of keys. They also found a skull and the deceased's wife identified it.

When cross examined, PW3 said that the first accused confessed that he killed the deceased with his fellow assailants in order to take his money and they did that after the first accused informed his fellows that the deceased had some money.

At the scene of crime, they reached at around 2200 hours on 21.09.2020 and the police had the torches. The deceased's wife managed to identify the deceased after seeing the skull, a piece of shirt and his teeth. It is not true that the first accused killed the deceased

because he had a probate dispute with him. He was called by a hamlet chairman on 21.09.2020.

When responding to re-examination questions, PW3 said he was called by a hamlet chairman on 20.09. 2020. On 21.09.2020 the policemen went to the crime scene, but he does not remember the exact time the police went there. PW3 also said that the first accused is the one who told him that killed the deceased. Upon being examined by court, PW3 said there were two wives of the deceased at the scene of crime.

PW4, **Kyaya^d/o Gwila**, a member of Sukuma tribe and whose evidence was interpreted in court by her interpreter one Mr. **Josiah^s/o David Mallongo**, testified that the deceased person one **Pindya^s/o Ndege** who was her husband left home on 01.09.2020 leaving her at home alone, but she did not know where he had gone.

That, on 03.09.2020 the first accused approached and told her that he was instructed by his uncle one **Pindya^s/o Ndege** (the deceased) to pick three cows and match them to Mnyagala Auction for selling. The accused told her that her husband had gone to Mpanda town to inquire about maize price. Thereafter, the said animals were handled over to the first accused by the deceased sons.

PW4 testified further that before leaving home, her husband had worn the trouser, a pant and a **khack** shirt and that on 04.09.2020 the first accused approached and asked her to give him another cow; she asked him about her husband and the accused replied that her husband would come back, but he never showed up.

That on 19.09.2020 PW4 reported to PW1 about her husband's missing. On 20.09.2020 the first accused was arrested and when interrogated by the hamlet chairman about deceased's whereabouts, he said that he killed the deceased with his friends whom he mentioned as **Paulo s/o Lubinza** and **Dadi s/o Stesheni**.

The accused told them that he killed the deceased with his friends by using sticks; the incident took place on 03.09.2020 at Mzee Kidelya's wetland area. PW4 said she knows **Paulo s/o Lubinza** and **Kija s/o Massanja**, but she does not know **Dadi s/o Stesheni**.

It was also the evidence of PW4 that on 21.09.2020 **Paulo s/o Lubinza** was arrested after being mentioned by **Kija s/o Massanja** then the two accused led her together with the police and the villagers to the scene of crime whereat they found underwear, trouser, a shirt and a batch of keys. They also found a skull and a leg and PW4 identified the items to be belonging to her husband; hence she noted that the

human remains were of her husband who wore the said clothes and hold a batch of keys when he left at his home on 01.09.2020.

During cross examination, PW4 said her husband (the deceased) left home on 01.09. 2020. She knew the first accused before he went to her home to pick the cattle, but he was not at PW4's premises. On 03.09.2023 her husband was not present at home and that between 03.09.2020 and 19.09.2023, she did not report the matter to the hamlet chairman (PW1) because she believed what the first accused told her about the deceased person.

Also, PW4 testified that the first accused led them to the scene of crime; it was night, so they used torches to identify the deceased remains and other items. The remains were of her husband because she saw his shirt tainted by blood stains. Upon being re-examined, PW4 said that **Kija s/o Massanja** took cattle at her home on 03.09.2020 and 04.09.2020.

PW5, **Dr. Hassan s/o Said Migeto** testified that he is a District Medical Officer of Tanganyika District Hospital and that on 21.09.2020 he went to the scene of crime which is Sibwesa ward, to conduct a postmortem examination of the deceased body after being instructed by the police of Tanganyika Police Station.

That before reaching there they passed at Sibwesa Police Post where they picked the policemen of that Post together with two suspects who were said to know the scene of crime. They reached at the scene of crime at night. The place was wet and there were people setting fire near the crime scene. While there they saw the remains of a human being which were skull, hip bones fractured femur.

They also found a trouser, underwear and a shirt which had blood stains. The place was covered by some dry paddy glasses. He further said that the skull they found there was of a human because a human skull differs with that of an animal due to teeth arrangement and that some areas of a skull are not prominent just as the forehead compared to those of animals; also, the human bones are big compared to those of animals. He also said the bones were fractured maybe due to wild animals.

PW5 also testified that in the course of examining the skull he noticed that the front bone and occipital bone had damage and dry blood clot and added that normally a skull does not have damage unless a person is born with abnormality.

Hence, it was his observation that the damage on the skull might have been caused by a heavy object through beatings. Having stated the above, PW5 prayed to tender a post-mortem examination form he had

filled, as an exhibit. Since there was no objection from the defence counsel, the same was admitted by this court as exhibit P1.

During cross examination, PW5 said that he went to the scene of crime on 21.09.2020 where he conducted a post-mortem examination; he was with the police officers. That the decay of a human body depends on the cause of death, sometimes it may start decomposing within three hours. He did not know when the deceased died. Upon examining the skull, he observed that the cause of death was a cerebral haemorrhagic further directed the Police to take the remains to the Government Chemistry for DNA tests.

Next to the above prosecution witness, was Hon. **Robert Igogo Nyando**, a Justice of Peace who testified as PW6. His testimony was that on 01.10.2020 while performing his duties at Mpanda Urban Primary Court as a Resident Magistrate, he received the first accused person one **Kija s/o Massanja** who was brought to him by a Police Officer one **D/C Japhet** in order for him to record his Extra Judicial Statement.

That thereafter, he directed the said police to leave the court premises and remained with the accused and one **Michael s/o Milala** who was a Court Clerk and began to introduce himself to the accused and asked him if he was willing to make his statement before him. The accused

confirmed to him he was willing to make his statement before him. Then after inspecting the accused who so consented, PW6 noted the said accused had some fresh wounds, which he told him, were resulted from the beatings inflicted by the vigilantes after being arrested.

He proceeded to testify that the accused confirmed to him that he wanted to make his statement on his free will as no one had promised, threatened or intimidated him to go and make his statement before him. The first accused then started telling him that on 20.08.2020 he was at the Centre of Kanoge with one **Dadi s/o Stesheni** and **Paul s/Lubinza** (the second accused) who requested him to get involved in killing a person called **Pindya s/o Ndege** who was alleged to have borrowed 2,000,000/= Tshs with an interest of 500,000/= from a certain person, but did not return the money.

That in his statement the first accused told PW6 that he planned to fulfil the plan of killing the said person on 03.09.2020 and on that date the accused person went to Mnyagala Cattle Auction market with **Pindya s/o Ndege** to sell cattle where after sale **Pindya s/o Ndege** got Tshs. 2,200,000/=.

Thereafter the first accused person and **Pindya s/o Ndege** began their journey of going back home and as they were on the way, the first

accused person was communicating with the second accused person and one **Dadi s/o Stesheni** until when they reached at the wetland belonging to Mzee Kidelya where the first accused his fellow assailants by torch light where **Pindya s/o Ndege** was, then **Dadi s/o Stesheni** suddenly attacked **Pindya s/o Ndege** and beat him on his neck, as a result **Pindya s/o Ndege** fell down and became unconscious.

That **Paul s/o Lubinza**(the second accused) joined the team to beat **Pindya s/o Ndege** with a stick and after realizing that the said person died, he searched he pockets and took 2,200,000/= Tshs., out of which the first accused was given 500,000/= and the remaining amount was divided between the second accused and one **Dadi s/o Stesheni**.

PW6 further told this court that the first accused narrated to him that after taking that money from the deceased person, they dragged his body to the bush and covered it with some dry glasses. After finishing to record the Extra Judicial Statement, PW6 read its contents to the first accused who agreed on what was recorded from him and signed the statement by his right thumb, then PW6 endorsed on the statement and stamped the same with an official stamp.

He told the court that the statement he recorded from the first accused was voluntary made; so, he prayed to tender it as an exhibit. Neither the

first accused nor his counsel raised an objection on the same. Hence, this court admitted the said statement as exhibit P2.

In his reply to cross-examination questions, PW6 said that he asked the first accused when and where he was arrested and his answer was that he was arrested on 20.09.2020, taken to Tanganyika Police Station and thereafter brought before him. The said witness also that the first accused freely consented to make his statement before him and that he recorded what the accused was telling him. That in his statement the first accused told him that he was communicating with his colleagues through mobile phones. During re-examination, PW6 said the accused was apprehended on 20.09.2020.

PW7, **H. 699 D/C Melkiad** testified to have been the police officer who went to the scene of crime at Sibwesa on 21.09.2020 after been instructed by his superior and led by the accused persons whom he identified as **Kija s/o Massanja@ Majanja** and **Paul s/o Lubinza**.

At the scene of crime, while with other police officers and village leaders, he found the remains of a human body covered by some dry glasses and other items which he described as one skull with teeth, bones, underwear together with a shirt and a trouser two of which were tainted by blood stains.

PW7 also testified that the remains of a human being body were examined by PW5. That thereafter, he was instructed to draw a sketch map of the scene of crime with the aid of PW1. PW7 prayed to tender the said sketch map as an exhibit, but the same was not admitted as an exhibit due to the objection from the defence counsel that the document was not among the documents listed during committal proceedings.

Another piece of evidence by PW7 was to the effect that after returning to his working station which is Tanganyika Police Station, he was instructed to record the caution statement of the first accused. Before doing so, he took the accused from the lockup and matched him to an interrogation room where he introduced himself to the accused and proceeded to inform him of his rights including the right to call his relative, advocate or a friend when he makes his statement, also a right to choose the language to be used during interrogation.

He also informed the accused that he was not forced to make his statement before him and if he makes it then it will be used in a court of law as evidence against him and the accused agreed and chose to make his statement alone in Swahili language. He began to tell PW7 about his plan to kill **Pindya s/o Ndege** with the second accused person and one

Dadi s/o Stesheni which they sat on 22.08.2020 while at the centre of Kamlenga hamlet, within Sibwesa Ward.

That through his statement the first accused confessed to him that on 03.09.2020 he communicated with **Paul s/o Lubinza** and **Dadi s/o Stesheni** when he was on his way back home with **Pindya s/o Ndege** after **Pindya** had sold his cattle at Mnyagala Cattle Auction and obtained 2,200,000/= Tshs.

That after reaching at the scene of crime at around 2000 hours, the first accused used his mobile phone torch to direct his fellow colleagues where **Pindya s/o Ndege** was, then **Paul s/o Lubinza** and **Dadi s/o Stesheni** started beating **Pindya s/o Ndege** on several parts of his body as a result he fell down and died. According to PW7 the first accused told him that after the deceased died, **Paul s/o Lubinza** and **Dadi s/o Stesheni** searched the deceased's pocket and took from it 2,200,000/= which they divided to each other whereby the first accused got 500,000/=.

That on 20.09.2020 the first accused was arrested by vigilantes per the instructions of PW1 and on 21.09.2020 he was interrogated by the vigilantes and PW1 whereby he confessed that he killed **Pindya s/o Ndege** on 03.09.2020 with his fellows whom he mentioned as **Paul s/o**

Lubinza and **Dadi s/o Stesheni**. Thereafter, the first accused mentioned **Paul s/o Lubinza** to PW1 and PW2; as a result, the said second accused person was also arrested.

PW7 also testified that after being arrested and interrogated, the first and second accused persons led him, his fellow policemen and village leaders including PW1 to Mzee Kadelya's wetland and showed them a place they had killed the deceased and covered his body with some dry glasses and after reaching there, they found the remains of a human body as well as clothes including a shirt, trouser and an underwear.

Also, according to PW7 the first accused told him that before being arrested he was approached by deceased's wife and other relatives who asked him about the deceased's whereabouts and he replied to them that the deceased had gone to Mpanda town. When PW7 prayed to tender the first accused's caution statement as an exhibit, Ms. Hellen Haule objected its admission on the ground that the accused was forced to make his statement and was beaten by police.

Following such objection, a trial within a trial was conducted in order to ascertain if the first accused made the confession voluntary. After hearing of that trial, the court was of the view that the accused made his confession voluntary; hence it admitted the document as exhibit P3.

Responding to cross examination questions, PW7 said that the first accused told him he killed the deceased with his friends in order to get some money. When he was recording the caution statement the first accused was of good health and mentally fit. He recorded the accused's caution statement from 0808 to 0939 hours.

He also said the accused told him he knew **Paul s/o Lubinza** and **Dadi s/o Stesheni**. He went to the scene of crime with the accused persons. He was not the investigator of this case, he was assigned other duties. Upon being re-examined, PW7 said the investigator of this case was **F.6702 D/C Japhet**. He recorded the caution statement of the first accused on 21.09.2020 while at Tanganyika Police Station. He was not instructed to find **Dadi s/o Stesheni**, but as a police officer he is allowed to arrest him.

The last prosecution witness was **G. 8430 D/C Emmanuel** (PW8) who testified that while recording the second accused's caution statement, the said accused person confessed before him that on 21.08.2020 he met with the first accused at Kamlenga centre where his co accused told him to find one **Dadi s/o Stesheni** in order to talk about a certain deal. Soon thereafter, **Dadi s/o Stesheni** joined them after being called.

That while there the first accused told them about the deal of killing his uncle one **Pindya s/o Ndege** in order to get some money from a person residing at Kapanga in Tanganyika District, but he did not mention to them the name of that person. After a short talk they agreed to kill **Pindya s/o Ndege** on 03.09.2020 at night.

PW8 said in his statement the second accused told him that on that date as **Kija s/o Massanja** and **Pindya s/o Ndege** were on their way home after selling Pindya's cows at Mnyagala cattle Auction, **Kija** communicated with him and Dadi s/o Stesheni through mobile phone and informed them that they were on their way; the two hidden at the bush while holding sticks.

That upon approaching the wetland of mzee Kadelya, **Kija s/o Massanja** used his mobile phone torch light to show signs and directed to his colleagues where **Pindya s/o Ndege** was, then soon after parting ways **Dadi s/o Stesheni** assaulted **Pindya s/o Ndege** with a stick on his head as a result, **Pindya s/o Ndege** fell down and **Paul s/o Lubinza** also hit **Pindya s/o Ndege** on the neck who started bleeding on his mouth, nose and on the head, then after three minutes he died.

That thereafter, **Paul s/o Lubinza** searched the deceased's pocket and took therefrom 2,200,000/= Tshs. which they divided to each other whereby **Kija s/o Massanja** was given 500,000/=. It was also the evidence of PW8 that **Paul s/o Lubinza** narrated to him that after stealing that money he participated with **Kija s/o Massanja** and one **Dadi s/o Stesheni** to drag the deceased body to the wetland of Mzee Kadelya and covered it with dry grasses, and then they disappeared.

That the second accused also told PW8 that he was arrested after been mentioned by the first accused who was the first person to be arrested by vigilantes. PW8 also testified that on 21.09.2020 the two accused persons led them to the scene of crime.

After adducing his evidence, PW8 prayed to tender the caution statement he recorded from the second accused person for it to be admitted as an exhibit. Ms. Hellen Haule had no objection to that prayer; hence the same was admitted as exhibit P4.

During cross examination, PW8 said the second accused was brought to Tanganyika Police Station on 21.09.2020; the accused told him that **Kija s/o Massanja** is the one who called and informed him about the deal of killing his uncle. Also, PW8 said he was instructed to record the

caution statement of the second accused person who told him about what transpired at the scene of crime.

During re-examination, PW8 said his responsibility was to record the caution statement of the second accused person. The said accused person told him that he killed the deceased by using a stick. That the first and the second accused persons are the ones who led the police to the scene of crime on 21.09.2020 and showed the remains of the deceased's body.

After the above evidence was closed, the court was satisfied the evidence was sufficient to enter a prima facie case against all the accused persons herein. After being addressed of their rights, each of them testified as follows: -

DW1, **Kija Massanja@ Majanja** while admitting to have been arrested on 20.09.2020 at Kamlenga hamlet, Sibwesa Ward, within Tanganyika District in connection with the allegation of killing his uncle one **Pindya s/o Ndege**, testified that on 03.09.2020 he was at his uncle one **Ng'homba Digila** with a view of greeting him. His uncle resides at Sibwesa within Kamlenga Hamlet.

That his uncle disappeared from his home for about 14 days; He remembers that on 19.09.2020 he went to Sibwesa Police Post and

reported to the Officer In charge of that Post about his uncle's disappearance. He told the said officer that his missing uncle had three wives and that for the last time he slept at his senior wife.

That the said police officer instructed him to call his uncle's senior wife and he did so, but such wife did not go to Sibwesa Police Post, instead she went to PW1 who then instructed the vigilante to go and pick him at Sibwesa Police Post. According to DW1 when that vigilante approached the Officer In charge of Sibwesa Police Post and told him he was instructed to take DW1 to PW1, the said police tried to resist saying that DW1 had gone there to report about his uncle's disappearance, but after the vigilante insisted to pick him, the said officer handed him to the vigilante on condition that the vigilante should not harm him.

That upon arrival at the office of the hamlet chairman DW1 was interrogated several times by the vigilante and the chairman regarding the whereabouts of his uncle, but he said he knew nothing, that is when he was severely beaten and put in the lockup. That before reporting the matter the Chairman of Kamlenga Hamlet instructed villagers to go and search for his uncle in the river.

That, thereafter, the Hamlet Chairman reported the matter to the Policemen of Sibwesa Police Post who later arrived there at around 2200

hours and conveyed him to Sibwesa Police Post and proceeded to Kamlenga Village with the Hamlet Chairman one **Mathias s/o Masandiko** (PW1) who directed them to the scene of crime.

DW1 further testified that upon arriving there he was left in the police vehicle hand cuffed, hence could not see anything outside. On 21.09.2020 at 0100 he was taken to Tanganyika Police Station and in the morning of that date he was taken from the lockup by PW7 and his fellow police officer one Afande **Kazungu** whereby he was matched to an interrogation room.

While there in, the two policemen started interrogating him about his family and his uncle's whereabouts, then they began to beat him with a mace and force him to confess that he is the one who killed **Pindya s/o Ndege**, but he denied being involved in that incident. He further said that on the same date he was charged with an offence of murder which he said he did not know. DW1 finally said that at the scene of crime it was night; hence he did not see the remains of a human body.

During cross examination, DW1 said **Pindya s/o Ndege** and **Ng'homba Digila** are all his uncles. On 03.09.2020 he went to his uncle one **Ng'homba Digila**. His uncle **Pindya s/o Ndege** left his home on 01.09.2020 when he was not there.

That **Ng'homba s/o Digila** knew about disappearance of **Pindya s/o Ndege** because he accompanied DW1 when he went at Sibwesa Police Post to report about missing of **Pindya s/o Ndege**. He did not have any quarrel with PW1, PW2, PW3 and PW4. The police officers forced him to make his statement to the Justice of Peace; they told him they will breakup his legs if he could refuse to make one. Also, in his replies DW1 said that he did not see **Paul s/o Lubinza**; he met with him on 21.09.2020 at Tanganyika Police Station.

DW2, **Paul s/o Lubinza@ Kadashi**, testified that on 19.09.2020 he went to Sibwesa to see his first wife. He did not know **Kija s/o Massanja** and **Dadi s/o Stesheni** because **Dadi s/o Stesheni** was not living at Sibwesa but was living at Kayenze, within Mambwe hamlet.

That on 20.09.2020 he was at Kamlenga Hamlet then an alarm was called by the Chairman whereby villagers were assembled at Kamlenga Primary School ground. Upon reaching there he saw many people who were interrogating **Kija s/o Massanja** about his uncle one **Pindya s/o Ndege** while beating him, then at around 1100 hours the Chairman created two groups and instructed them to go and search for a person who was allegedly missing. DW2 was in the first group.

According to DW2 after a long search his group did not find anything, but the second group which went to the wetland paddy area of mzee Kadelya managed to find the bones, then during evening he was arrested by vigilantes while at Kamlenga centre; the vigilante conveyed him to Sibwesa Police Post and arrived there at 2000 hours where he met the first accused whom he saw being beaten in the morning at Kamlenga Primary School Pitch ground.

DW2 further testified that at 2100 hours the policemen from Tanganyika Police Station arrived there and picked him in their vehicle requiring him to join them in search for the third accused person one **Dadi s/o Stesheni**. The police communicated with Kamlenga Hamlet Chairman and asked him to take them to the place that person was residing.

They all went to Kayenze hamlet with the direction of PW1, but they did not succeed to find **Dadi s/o Stesheni** at his home place. Thereafter, they went back to Sibwesa ward and the said Hamlet Chairman directed them to the scene of crime; they reached to the wetland and were unable to enter with a Police vehicle because of some terraces. Hence, the police dropped them down; hand cuffed them and began to use torches with PW1. When they lightened at the scene, DW2 did not see the items which were mentioned by prosecution witnesses, but he only

saw the bones; he did not see the clothes. That the bones were collected, put in a plastic bag and given to DW2 and DW1 to carry while they were taken to Tanganyika Police Station for further interrogation.

DW2 further testified that on 21.09.2020 in the morning while at Tanganyika Police Station, he was taken from the lockup by the Police and matched to an interrogation room. The room had two chairs, one table and one bench. On the table there were one electric iron, one mace and praise. He was frightened to see those items and because of that he decided to confess before PW8 that he committed the offence.

However, it was the testimony of DW2 that after being taken to a Justice of Peace one **Hon. Elisante Marco Pallangyo** of Mpanda Urban Primary Court (who did not testify before this court), who asked him if he was willing to make a statement before him, he replied that he was willing to do so, and when given a chance to make his statement, he just said to him that he knew nothing about the offence and the incident. That was his testimony before this court.

During cross examination, DW2 said he shifted to Kamlenga from Itenka A on August, 2020; he was dealing with the business of selling cattle at different cattle auction markets like Kapanga, Sibwesa, Mnyagala and Karema within Tanganyika District. He did not know if there was cattle

auction market on 03.09. 2020. On that day he was at Itenka building his house with his mason one **Bujiku s/o Misalaba** until on 19.09.2020.

Also, DW2 said that **Bujiku s/o Misalaba** and his second wife, who resides at Itenka, did not come to testify before the court. He met with the first accused at Sibwesa Police Post and was with him when they were taken to Tanganyika Police Station. That he did not know that **Dadi s/o Stesheni** resides at Kayenze, Mambwe, also he did not know **Pindya s/o Ndege**.

DW2 replied further that the second group found the remains of a human being at the wetland of Kadelya that is why he was arrested with the first accused and taken to the wetland of Kadelya, but he did not know if the first accused was there. DW2 also said that he was with the first accused when taken to the scene of crime. His caution statement was recorded by a police officer called **Emmanuel** (PW8) who informed him that he was suspected of killing **Pindya s/o Ndege**.

As indicated above, the accused persons herein are facing a serious charge of **Murder c/s 196 and 197 of the Penal Code**. It is serious because it involves a death sentence penalty to the convict, unless the

trial court decides otherwise as per section 26(2) of the Penal Code, or where the same is not proved on the standard required by the law.

Therefore, at the outset, I wish to point out that in order to win conviction, the prosecution must prove its case beyond any reasonable doubt as required of it under section 110 of the Evidence Act, CAP 6 R.E. 2022, short of that the accused person will be entitled to the benefits of doubt left behind by the prosecution side.

Proof beyond reasonable doubt refers to the cardinal principle which entails that in any criminal trial, the accused person must not be convicted because he has put forward a weak defence, but rather the evidence led by the prosecution incriminates him to the extent that there is no other hypothesis than the fact that the accused person committed the offence with which he stands charged. (See **Anthony Kinanila and Another vs The Republic**, Criminal Appeal No. 83 of 2021 (unreported)).

However, apart from providing a proper meaning of '*proof beyond reasonable doubt*', as indicated above, the Court of Appeal in **Anthony Kinanila's case**(supra) subscribed as a common knowledge, what was stated by Lord Denning in the English case of **Miller v. Minister of Pensions** (1972)-2 ALL ER 372 in which it held thus:

"proof beyond reasonable doubt does not mean proof beyond the shadow of doubt and the law would fail to protect the community if it admitted fanciful probabilities or possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with a sentence "of course it is possible but not in the least possible" then the case is proved beyond reasonable doubt".

Coming to the case at hand, it appears that the evidence that implicates the accused persons herein is solely circumstantial in the sense that none of the eight prosecution witnesses has testified to have seen the said accused persons or either of them committing the offence of murder by killing one **Pindya s/o Ndege**.

Hence, there is a need for this court to consider the principles under which circumstantial evidence can be sustained, viz a vis the evidence adduced by both sides in order to see whether the offence of murder has been proved against the accused persons on the standard required by the law.

It is an elementary principle of law that circumstantial evidence must not lead to any hypothesis other than the accused guilty (See **Republic vs Emmanuel Agaton Ndunguru**, Criminal Sessions Case No. 64 of 2017

and **Kibelo Mwana vs Republic**, Criminal Appeal No. 173 of 2008 (unreported).

In the latter case, the Court of Appeal while subscribing to the decision in the case of **Simon Musoke V.R** (1985) EA 715 at page 718, held that:

"... in a case depending conclusively upon circumstantial evidence, the court must...find that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilty."

Basically, there are four ingredients of murder that must be proved beyond a reasonable doubt. The prosecution must prove:

- (i) There is a death of a person,
- (ii) The death was unnatural,
- (iii) The death was caused by an unlawful act or omission of the accused person(s).
- (iv) The act causing the death of the deceased was accompanied by malice aforethought.

To start with the first ingredient above, usually in order to prove occurrence of death as an ingredient of an offence of murder, there must be direct evidence to show that a certain person is actually dead, and his death was unnatural. That requires also the evidence of a medical expert who conducted a post-mortem examination of the deceased body at the scene of crime.

However, not in all cases direct evidence may be inevitable in order to prove existence of a certain fact. The above court's position is fortified in the principle that each case has to be decided per its own circumstances (See **The Republic vs Hussen s/o Malulu @ Elias & 3 Others**, HC at Shinyanga (unreported)).

The evidence adduced by PW1, PW2, PW3, PW4, PW5 and PW7 who testified to have arrived at the scene of crime which is the wetland of mzee Kadelya at Kamlenga Hamlet, in the ward of Sibwesa within Tanganyika District, reveals that upon reaching there they did not find the body of the deceased person one **Pindya s/o Ndege**.

It is, however, their evidence that at the crime scene they found the remains of a human body like a skull, a leg and some bones which they believed to be of no one, but the deceased person, due to the fact that apart from those remains, they also found a shirt, a trouser, a pant

commonly known as a "boxer" and a batch of keys all of which were identified by the deceased's wife who is PW4 as the items the deceased had when he left home on 01.09.2020.

According to the evidence of PW5 who is a medical expert and whose evidence is corroborated by exhibit P1, after examining the skull and the bones he found at the scene of crime, he came to a conclusion that the same was of a human being because a human skull differs with that of an animal due to teeth arrangement and that some areas of a skull are not prominent just as the forehead compared to those of animals; also, the human bones are big compared to those of animals.

PW5 has also testified that in the course of examining the skull, he noticed that the said skull front bone and occipital bone had damage and there was dry blood clot and added that normally a skull does not have a damage unless a person is born with abnormality. It was therefore, his observation that the damage on the skull might have been caused by a heavy object through beatings; he also said the bones were fractured maybe due to wild animals.

On my side, I am aware of the principle of law that expert opinion is not binding to the court in arriving to its decision but is rather persuasive.

(See **Yusuph s/o Molo vs The Republic**, Criminal Appeal No. 343 of 2017, CAT at Iringa (unreported)).

However, that does not mean expert opinion is not important and cannot be admitted. It is therefore, my considered view that owing to the reasons which I have given above, I am persuaded that the evidence of PW5 is credible and fits the circumstances of this case. Hence, I find it to be admissible.

Having considered the above evidence, I am of the considered opinion that the evidence of PW2, PW3, PW4, PW5 and PW7 is credible and worth of being believed due to the fact that none of the accused persons has denied the fact that one **Pindya s/o Ndege** died, and that the said remains of a human body including the bones, were found at the scene of crime on 21.09.2020.

Also, I am fortified in that observation because there is no dispute that the clothes and a batch of keys found at the scene of crime were the ones the deceased had on 01.09.2020 when he left his home at Kamlenga Hamlet. Also, both parties in this case have not parted ways on the fact that between 03.09.2020 and 21.09.2020, the deceased person was missing until when the said remains and other items were discovered at the scene of crime.

In the circumstance, I agree with PW5 that the deceased person might have been eaten by wild animals, because he was killed on 03.09.2020; presumably his body began to decompose thereafter attracting wild animals to come closer in to eat the decomposed body. Thus, taking all the above into account, I am of the considered view that the prosecution has successfully proved that the deceased actually died and his death was unnatural.

Having answered the first and second ingredients in the affirmative, I now proceed to determine whether or not it is the accused persons herein who caused the death of the deceased person. As indicated above, none of the prosecution witnesses saw them killing the deceased person. In the circumstance, and given the fact that both of them have denied to have been involved in the incident of killing the deceased person, it is difficult to hold them responsible for causing the death of that innocent man unlawfully, unless there is another evidence which incriminates them for doing so.

As it has been shown above, the instant case is based on circumstantial evidence. The same can be breakup and tested into several aspects. **First**, there is evidence to show that before his demise the deceased

instructed the first accused to go and pick four cows at his home and lead them to Mnyagala Cattle Auction market for selling.

Second, there is also evidence to show that the first accused matched the said cattle on 03.09.2020 as instructed and handle over to the deceased who sold them and obtained 2,200,000/=, but after such business the deceased did not return at his home, and when approached by deceased's wife(PW4) who asked him about deceased's whereabouts, the first accused lied to her that the deceased had gone to Mpanda town to inquire about maize prices, until the said accused was apprehended by PW2, when he confessed before PW1, PW2, PW3 and PW4 that he was with the deceased person at the cattle auction.

That, he also confessed before them that after selling cows, he purported to escort the deceased to his home, but upon reaching at the wetland of Mzee Kadelya, he used his mobile torch light to direct the second accused and one **Dadi s/o Stesheni** where the deceased was, and the two invaded the deceased person and started beating him with sticks on the head, neck and other body parts until he died, then they stole 2,200,000/= from deceased's pocket and divided the same to each other.

Third, it is the prosecution evidence that after being arrested and interrogated, the two accused persons confessed to have committed the offence of murder by killing the deceased and led the police, village leaders and other villagers to the scene of crime where they had hidden the deceased body with some paddy glasses and, as result the remains of deceased human body and other items like clothes and a batch of keys were discovered. They also confessed an offence of murder, narrated the same story as above, and gave a detailed account of their involvement in commission of an offence of the said offence through their caution statements they made at different times before PW7 and PW8.

Fourth, there is also prosecution evidence to show that after being arrested, the first accused mentioned the second accused and one **Dadi s/o Stesheni** as the persons he participated to have planned and caused the death of the deceased person who was the first accused's uncle in order to obtain some money obtained after cattle sales.

The above evidence was adduced by PW1, PW2, PW3, PW4, PW6, PW7 and PW8. PW5 corroborated his fellow witnesses by confirming that he found the remains of deceased body at the crime scene. On their side, the accused persons and their advocate did not challenge the above

prosecution evidence during cross examination; they generally denied to have been responsible for the death of the deceased person.

As for the first aspect above, PW4 has added that the first accused went to her home on 03.09.2020 and told her and the deceased's children that he was instructed to pick cattle therefrom by the deceased, and the said children handled such cattle to him because it was his usual conduct of matching cattle to the auctions after being instructed by deceased. Again, that evidence was not denied by the first accused. Hence, I find it to be true.

Coming to the second aspect, it is an elementary principle of law that an accused person has no duty to prove his innocence, but there are circumstances when lies by such an accused may be resolved against him. (See **Miraj Idd Waziri @ Simwana and Another vs The Republic**, Criminal Appeal No. 14 of 2018, CAT at Dar es Salaam(unreported)).

In the present case, and as it has been shown before, the first accused lied to the deceased's wife who is PW4, until when apprehended by PW2 and PW3, then he confessed before PW1, PW2, PW3 and PW4 that on the material date he was with the deceased person and that he participated with the second accused person and one **Dadi** s/o.

Stesheni to kill the deceased. The first accused also lied in his testimony when he said upon reaching at the scene of crime he remained in the police vehicle, but that version is contrary to what he stated in his caution statement and extra judicial statement; also, his co accused's testimony clearly indicates that he dropped from the said vehicle with the second accused and headed to the place where the bones were discovered.

Not only that, but also, I have observed that even the second accused told lies when he said that PW1 is the one who led the police to the scene of crime. That is a big liar, because first the second accused and his advocate did not cross examine PW1 and the rest of prosecution witnesses who mentioned him and the first accused as the ones who led the police and village leaders to the scene of crime where the deceased body remains and other items were discovered.

Second, if his version was true then the second accused person could have disowned his caution statement when PW8 prayed to tender it as an exhibit something which he did not. The contents of exhibit P4 clearly reveal that the second accused confessed before PW8 that he led the police to the scene of crime. Hence, I find that the above stated

principle of law relating to lies of an accused person, also applies against the second accused.

On the third aspect, it appears that apart from confessing before PW1, PW2, PW3 and PW4 to have committed the offence of murder, the first accused person reiterated his previous confession before PW6 and PW7 by giving a detailed account of his involvement in the commission of the offence of murder to which he stands charged.

It is on record that when cross examined by Ms. Hongera Malifimbo, the first accused person said he had no previous conflicts with those two prosecution witnesses which tell that there was no possibility for such witnesses to have fixed him with such serious allegations.

Nevertheless, it seems to me that the first accused objected the admission of his caution statement (Exhibit P3) when PW7 implored this court to admit it as an exhibit, as opposed to the second accused who, apart from implicating the first accused and one **Dadi ^s/o Stesheni** in his statement (Exhibit P4), did not object the prayer of PW8 that his caution statement be admitted as such, but waited until defence hearing when he attempted to disown his previous confession.

The above necessitates a need to look on various principles regarding the reliability of confessions of an accused person(s) as in the instant

case. The Court of Appeal in **Emmanuel Lohay and Another vs The Republic**, Criminal Appeal No. 278 of 2010(unreported) stated, inter alia, that:

"If objection had been taken under section 27 above the trial court would have been duty bound to conduct a trial within trial to determine the admissibility or otherwise of the statements"

In abiding to the above principle, this court conducted a trial within a trial just after the first accused raised an objection on the admission of his caution statement through his advocate one Ms. Hellen Haule, although the said trained mind did not cite the provisions of section 27 of the TEA, and in the end, it found that the confession by the first accused person was voluntarily made before PW7 as the same was not tainted by vitiating factors which are stipulated under sub section (3) of section 27 above.

And, if the above is not enough, I have revisited the proceedings of this case and noted that when PW6 prayed to tender the first accused caution statement as an exhibit, Ms. Hellen Haule who represented both the first and second accused persons, did not raise any objection against that prayer and consequently the same was admitted as exhibit P2.

The effect of the above admitted document is that it contains statement which the first accused believes to be nothing, but true. The evidence of PW6 which the first accused nor the second accused did not deny, shows that apart from implicating the second accused and one **Dadi** ⁵/₀, **Stesheni** whom he participated with to commit the offence of murder, the first accused also told PW6 that he was beaten by the vigilantes.

However, there is nowhere in exhibit P2 it is shown that the first accused complained to PW6 that he was tortured by the police including PW7. All that entails that the first accused's extra judicial statement was made freely and voluntary before PW6. Hence, I find credence in the evidence of PW6 who properly observed the Chief Justices' Guidelines.

As for the caution statement of the second accused person, it is obvious that he did not object its admission when PW8 prayed to tender it as an exhibit, and because of that the same was admitted as exhibit P4. However, it appears that when adducing his evidence before this court, the said accused person attempted to disown that confession which is contained in the caution statement he previously did not object.

A question that requires my quick answer is whether the second accused was right to disown his caution statement during defence hearing.

In order to resolve the above crucial question, I am inclined to borrow the wise words of their lordship Justices of Appeal in the case of **Sylvester s/o Fulgence and Another vs The Republic**, Criminal Appeal No. 507 of 2016(unreported), while citing their previous decision in **Emmanuel Lohay and Another**(supra) in which they said thus:

"It is trite law that if an accused person intends to object to the admissibility of a statement/confession he must do so before it is admitted and not during cross examination or during defence."

Guided by the above principle of law, I find and hold that the second accused missed a boat when he attempted to disown his caution statement during defence hearing contrary to the principle of law stated above. Hence, he is estopped from doing so and I find his confession to have been voluntary made by him.

Also, in determining whether or not what is contained in the statement, be it caution or extra judicial statement, is true, a trial court can use several ways as were outlined by the superior Court in the case of **Michael Mgowole and Another vs Republic**, Criminal Appeal No. 205 of 2017(unreported) thus: -

"First, if the confession leads to discovery of some other incriminating evidence ...),

***Second**, if the confession contains a detailed, elaborate relevant and thorough account of the crime in question, that no other person would have known such details, but the maker.*

***Third**, since it is part of the prosecution case, it must be coherent and consistent with the testimony of other prosecution witnesses, especially with regard to the central story (and not every detail) and the chronology of events,*

*And, **lastly**, the facts narrated in the confession; must be plausible".*

In his caution statement before PW7, the first accused was recorded to have said the following: -

*"...baada ya kufika katika eneo la shamba la Kadelya, **Dadi** ^{s/o}. **Stesheni** na **Paulo** ^{s/o}. **Lubinza** walimulika tochi ili nijue sehemu walipo, nilipowaona tulianza kukutana njiani ndipo tulikutana wakafanya kama wanampisha **Pindya** ^{s/o}. **Ndege** kisha **Dadi** ^{s/o}. **Stesheni** alimpiga **Pindya** ^{s/o} **Ndege** mara tatu shingoni na kichwani kwa kutumia mti mnene akaanguka chini na **Paulo** ^{s/o}. **Lubinza** naye alimpiga mara tatu kichwani; alipokufa akiwa amejilaza chini **Paulo** ^{s/o} **Lubinza** na **Dadi** ^{s/o}. **Stesheni** walianza kumgeuza huku wakimpekua kwenye mifuko ya suruali*

nyeusi wakachukua pesa Tshs 2,200,000 ndipo tulimshika **Pindya s/o Ndege** tukamuinua na kuanza kumbeba kumpeleka sehemu palipokuwa na nyasi za mpunga humo katika shamba la Kadelya tukamlaza na kumfunika na nyasi hizo. Funguo tatu tuliziacha zikiwa zimefungwa kwenye kishikio na kitambaa cha marehemu."

Again, when making his extra judicial statement before PW6, the first accused stated that:

"Tulipofika eneo hilo la mbuga za Kadelya **Paulo** alinimulika na tochi kwa ishara kwa mbele na mimi nilimuonyesha tochi ya simu akawa ametuona. Tulimkuta huyo **Paulo** na **Dadi** wakiwa na mipini ya mti iliyochongwa. **Dadi** alianza kumpiga marehemu na mpini kwenye shingo kwa nyuma na kuanguka chini na akiwa chini **Paulo** alimpiga na fimbo marehemu. Baada ya hapo tulimkagua mfukoni na kuchukua hela aliyokuwa nayo milioni mbili na laki mbili. Tulirudi tena alipo marehemu na kumbeba na kumficha kwenye nyasi porini."

On his side, the second accused person was recorded by PW8 to have stated the following: -

"Mimi na **Dadi** wote tulikuwa tumebeba fimbo kila mmoja. Tukiwa tumejificha porini Kija alinipigia simu akanieleza wanakaribia

kufika, hivyo tusogee karibu na mbuga ya Kadelya. Tulijificha porini. Wakati huo mimi na **Dadi** tulikuwa tunaangalia mwanga wa tochi kwani **Kija** alikuwa anamulika huku anachezesha mwanga wa tochi kutupa ishara kuwa ndiye yeye. Ndipo tulitoka sehemu tulipokuwa tumejificha na kuanza kutembea kuwafuata na tulipokaribia tulijifanya kama tunapishananao. Kisha hapo hapo **Dadi** alimpiga kichwani **Pindya** ^s/. **Ndege** fimbo sehemu ya kichwani ndipo **Pindya** alipepesuka, akiwa anapepesuka na mimi nilimpiga fimbo ya shingoni akawa ameanguka chini na **Kija** naye alikuwa ana fimbo na alitumia kumpiga kichwani baada ya kuanguka chini, kisha damu zilianza kumtoka **Pindya** ^s/. **Ndege** puani, mdomoni na kichwani. Baada ya kama dakika tatu alifariki ndipo nilimpekua **Pindya** kwenye suruali aliyokuwa amevaa na kumkuta na pesa 2,200,000/=. Kisha tulimbeba **Pindya** na kumpeleka porini mbugani na kumtupa kisha tulimfunika na majani makavu yamipunga. Kisha tuligawana hela. **Kija** alichukua laki tano na **Dadi** alichukua laki tisa na mimi nilichukua laki nane. Baada ya hapo tulitawanyika."

From the above excerpts, it is clear that the first and second accused persons' confession led to discovery of some other incriminating

evidence, they contain a detailed, elaborate relevant and thorough account of the crime in question which is murder of the deceased person one **Pindya s/o Ndege**, that no other person would have known such details, but the maker who are the accused themselves.

Also, it is obvious that as part of the prosecution case, the confessions of such accused persons, is coherent and consistent with the testimony of other prosecution witnesses who are PW1, PW2, PW3, PW4, PW6, PW7 and PW8, especially with regard to the central story and the chronology of events leading to causation of deceased's death. And, lastly, it is my view that the facts narrated by the two accused persons in their confessions, are plausible.

The prosecution evidence also indicates that the accused persons are alleged to have formulated a common intention to commit an offence of murder. Section 23 of the Penal Code provides that: -

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

In the case of **Republic vs Mugisha ^{s/} Katulebe and 5 Others**, Criminal Sessions Case No. 126 of 2016, HC TZ at Bukoba, this court through Hon. Ngigwana, J. stated that: -

"Common intention is the meeting of the mind of the accused persons which is necessary to be present in joint charges...in order to make the doctrine of common intention applicable, it must be shown that the accused persons shared with another a common intention to pursue a specific unlawful purpose, and in the prosecution of that unlawful purpose an offence was committed and that the doctrine of common intention would apply irrespective of whether the offence was murder or manslaughter, and it is not necessary to make a finding as to who actually caused the death".

In the present case, it is the evidence of the prosecution side that before murdering the deceased person, the accused persons herein together with one **Dadi ^{s/} Stesheni** who as I have said, is still at large, met at Kamlenga centre and planned how to kill one **Pindya ^{s/} Ndege**.

That can be ascertained from the evidence of PW1, PW2, PW3, PW4, PW6, PW7 and PW8 which is corroborated by exhibits P2, P3 and P4. In his caution statement before PW7, the first accused person said that: -

*"Mnamo tarehe 22.08.2020 majira ya saa 2000 hours nikiwa katika senta ya kitongoji cha Kamlenga nilikutana na **Paulo ^{s/o}**, **Lubinza** na **Dadi ^{s/o}**, **Stesheni** ambapo tulikaa senta pembeni tukaanza kupanga namna ya kumuua **Pindya ^{s/o}**, **Ndege** kwasababu **Paulo ^{s/o}** **Lubinza** alisema kuwa kuna mtu mkazi wa Kapanga anamdai **Pindya ^{s/o}**, **Ndege** pesa Tshs. 5,000,000/=...Tulikubaliana wote kuwa tutafanya tukio la kumuua **Pindya ^{s/o}**, **Ndege** siku ya mnada wa Mnyagala tarehe 03.09.2020."*

The same statement was made by the first accused before a Justice of Peace who is PW6. Also, when confessing before PW8, the second accused said the following: -

*"Tarehe 22.08.2020 majira ya saa 2000 hours tulikutana Senta ya Kamlenga tukiwa mimi, **Kija ^{s/o}**, **Massanja** na **Dadi ^{s/o}**, **Stesheni**. Baada ya kukutana **Kija ^{s/o}**, **Massanja** alianza kutuambia kuwa kuna tenda ya kumuua **Pindya ^{s/o}**, **Ndege** kisha tulimuuliza kuwa tajiri ni nani akasema ni jamaa mmoja wa kijiji cha Kapanga ambaye hakumtaja jina na kwamba tukitekeleza dili hilo atatulipa Tshs. 5,000,000/=. Tulipanga kwenda kumuua **Pindya ^{s/o}**, **Ndege***

*siku ambayo ni ya mnada wa Mnyagala ambayo **Kija** ^{s/o}*

***Massanja** alidai atakwendanaye mnadani na ng'ombe."*

From the above confessions by the first and second accused persons, I find the doctrine of common intention to apply in this case. I say so because it is clear from the prosecution evidence, that the accused persons herein formed a common intention to commit a to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence of murder was committed of such a nature that its commission was a probable consequence of the prosecution of such purpose. In the circumstance, I find and hold that each of them is deemed to have committed such offence. Owing to the reasons which I have endeavoured to assign above, I answer the third issue affirmatively that the accused persons herein are the ones who caused the death of the deceased person.

The last question is whether the said accused persons caused death of the deceased person with malice aforethought. In order to ascertain whether the accused was actuated by malice aforethought, one has to look on various circumstances depending on a particular case. Section 200 of the Penal Code provides that: -

"Malice aforethought shall be deemed to be established by evidence proving any one nor more of the following circumstances—

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person...;

(c) N/A

(d) N/A

In the instant case, the evidence adduced by PW1, PW2, PW3, PW4, PW6, PW7, PW8 and corroborated by exhibits P2, P3 and P4, is to the effect that before killing the deceased the first and second accused person together with one **Dadi s/o. Stesheni** formulated a common intention to kill the deceased in order to obtain some money. The first accused person whose statements were recorded by PW6 and PW7 respectively, and the second accused person whose statement was recorded by PW8, justifiably confessed to have formulated a common intention to kill the deceased. In my view, those confessions justify their intention to commit the offence of murder.

Therefore, I find that the circumstances indicated under paragraphs (a) and (b) of section 200 of the Penal Code are sufficient to show that the accused persons herein killed the deceased person with malice aforethought.

Also, in the case of **Enock Kipela v. Republic**, Criminal Appeal No.150 of 1994, the Court of Appeal described the circumstances under which malice aforethought can be ascertained. It stated, *intel alia*, thus:

*"...usually, an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following: (1) **the type and size of the weapon**, if any used in the attack; (2) **the amount of force applied in the assault**; (3) **the part or parts of the body the blow were directed at or inflicted on**; (4) **the number of blows...**; (5) N/A; (6) N/A; and (7) **the conduct of the attacker before and after the killing**"* [Emphasis added]

In the case at hand, it is evident that in causing death of the deceased person the first and second accused together with one **Dadi s/o Stesheni** used sticks to assault the deceased on the head and neck. In their confessions, the accused have narrated that it took almost three

minutes for the deceased to die; that indicates a great force was used by them to inflict a number of blows on the deceased person leading to his death.

Also, it appears that after killing the deceased, the accused persons and their fellow assailant who is still at large, dragged the deceased body in the wetland of Mzee Kidelya after covering it with some dry paddy glasses. That conduct also indicates that the accused persons had malice aforethought of killing the deceased person. Basing on the above reasons, I am therefore answering the fourth and last issue in the affirmative.

Having reasoned as appears above, I am satisfied that the offence of murder contrary to section 196 of the Penal Code to which the accused persons **Kija ^{s/o} Massanja @Majanja** and **Paulo ^{s/o} Lubinza @Kadashi** stand charged, has been proved by the prosecution side beyond any reasonable doubts. Hence, I find all the said accused persons guilty of murder and I convict them, as charged.

It is so decided.




MRISHA
JUDGE
27.07.2023

DATED at **SUMBAWANGA** this 27th Day of July, 2023.




MRISHA
JUDGE
27.07.2023

PREVIOUS CRIMINAL RECORDS

Mr. Abdon Andrew Bundala - learned state attorney: we have no previous records of the accused persons, but the Government has lost manpower. We pray this Court to punish the accused persons according to the law. That is all my lord.

MITIGATING FACTORS

Sweetbert Nkupilo - Learned Advocate: for nature of the offence charged, the punishment is only one, therefore we pray to this Court to punish the accused according to the law.

SENTENCE

The offence of murder has only one punishment under the law of the land. My hands are therefore tied due to the requirement of the law that I must uphold. I do sentence accused persons **Kija Masanja @**

Majanja and Paula Lubinza @ Kadashi to death. I direct that the accused person suffer death by hanging until they shall die.




MRISHA
JUDGE
27.07.2023

Court: judgment delivered via Video link from the High Court of Tanzania, Sumbawanga District Registry in presence of Mr. Abdon Bundala, learned State Attorney and Mr. Sweetbert Nkupilo, learned Advocate who hold brief for Ms. Hellen Haule, Learned Advocate for both accused persons, who were are at the Resident Magistrate Court at Mpanda this 27th Day of July, 2023.




MRISHA
JUDGE
27.07.2023

Right of appeal is dully explained to the accused pursuant to the provision of section 323 of the Criminal Procedure Act.




MRISHA
JUDGE
27.07.2023