

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF SUMBAWANGA

SITTING AT MPANDA

CRIMINAL SESSION CASE NO. 11 OF 2021

REPUBLIC

VERSUS

1. SHIMBA ^{S/o} IGISHAMINALA@HATILI.....1ST ACCUSED
2. MAHANGILA ^{S/o} TIMBA.....2ND ACCUSED
3. LYANDE ^{S/o} SALU@KIYUNGA.....3RD ACCUSED
4. MBONJE ^{S/o} SALU@ KIYUNGA.....4TH ACCUSED

JUDGMENT

12th November, 2022 & 02nd January, 2023

A.A. Mrisha, J.

The deceased persons **Mwasi Mahangila** and **Mabula Igisha** loosed their lives on the same day that is 10.09.2020 while sleeping at their homes in the village of Ikuba which is located at Mlele District in Katavi Region. The two deceased persons are mother and son, and the source of their deaths is said to be associated with witchcraft beliefs.

It is alleged that the two were attacked by the well-known persons who used machetes, clubs and sticks to cut and beat them on several parts of their bodies which led to their deaths.

Following such brutal acts, an investigation was mounted by the policemen assisted by village leaders and villagers of Ikuba village; as a result all the four suspects of committing such capital offence were arrested, interrogated and charged with an offence of Murder Contrary to sections 196 and 197 of the Penal [Cap 16 R.E. 2019]. Their names are **Shimba Igishaminala@Hatili, Mahangila Timba, Lyande Salu@Kiyunga and Mboje Salu@Kiyunga.**

The said accused persons were arraigned before this court and an information was read over and explained to them in a language well understood to them. They denied all the facts connecting them with the commission of murder offence, save for their names, ages, and addresses. It is on record that before commencement of this case Mr. Dickson Makolo, Learned State Attorney representing the Republic informed this Court under Section 91(1) of the Criminal Procedure Code [Cap 20 R.E. 2019] (CPA) that the Director of Public Prosecution no longer wishes to proceed against the 2nd Accused one **Mahangila Timba.**

As a result of what transpired above, the remaining accused persons were three. For the sake of clarity, the 1st accused person will be Shimba Igishaminala, the 2nd accused will be Lyande Salu@Kiyunga and the 3rd one will be Mboje Salu@Kiyunga.

During the hearing of this case the prosecution brought eight witnesses and seven exhibits namely Caution Statement of the 3rd accused, Caution Statement of the 2nd accused, Post-mortem report of Mwasi Mahangila and Mabula Igisha, Caution Statement of the 1st accused, Extra Judicial Statement of the 2nd accused, Extra Judicial Statement of the 1st accused and a Sketch map of the scene of crime. The same were tendered by the prosecution side and admitted by this Court as exhibits **P1, P2, P3, P4, P5, P6** and **P7** respectively.

On the other hand, the defence side had three witnesses who are the first, second and third accused persons herein. They adduced their evidence as **DW1, DW2** and **DW3** and each of them enjoyed the legal service of private advocates. While **DW1** had the legal service of Mr. Sweetbert Nkupilo, Learned Advocate, **DW2** had it by Mr. Eliud Ngao and **DW3** enjoyed the legal service of M/s Gloria Lugeye, Learned Advocate.

Before deciding on the nature of the deceased' deaths, who caused their deaths and whether such deaths were caused by malice aforethought, I find it apt to provide a brief summary of facts of this case as narrated by both sides, starting with the prosecution side.

The first witness was Inspector Mkingila Nyamwelo (**PW1**). He testified that on 10.09.2020 while working at Usevya Police Station as Officer Incharge, he was informed by G.4308 D/C Joram (**PW8**) that two persons namely Mabula Igisha and Hatili Tungi had been brought to that station severely injured and could not talk and that there was another person who was found dead at the scene of crime which is called Kakulwe, Ikuba Village.

He then ordered **PW8** to issue them with a PF3 and escort them to Usevya Health Centre for treatment. That, thereafter **PW1** went to such Health centre and saw the said casualties. **PW1** added that with the aid of a Village Chairman one Massanja Shija, he managed to approach the house of Mwasi Mahangila and found her already dead and her body was full of blood with injuries.

On the following day morning he called Dr. Edward Christopher Sengo (**PW4**) and asked him to go and conduct a post-mortem of the

deceased bodies. Then he ordered **PW8** to draw a sketch map of the scene and accompany **PW4** to conducting a post mortem.

PW1 also testified that while at the scene collecting information, he realized that one of the deceased's children one Shimba Igishaminala, was among the suspects of the commission of such murder offence. He saw him at the scene and monitored him until his fellow policemen came; then he arrested him at around 1700 hours for interrogation. He remembers that the said suspect confessed to have participated in commission of a murder offence with his fellow whom he mentioned their names as Lyande Salu@Kiyenga and Mboje Salu@Kiyenga.

That after getting such information **PW1** assisted by his fellow policemen managed to arrest the rest of the accused persons at Usevya Health Centre around 0500 hours on 11.09.2020; then they took them to Usevya Police Station for interrogation. **PW1** managed to identify all the three accused persons at the accused dock.

During cross examination he said he does not know if his informers saw the accused persons committing the offence. That his evidence is the information he got from his whistle-blower. That he arrived at the scene around 1700 hours; he saw the 1st accused but he did not run. That Lyande Salu was mentioned by the 1st accused and participated to kill

the deceased. That the 2nd accused was arrested at Usevya Health Centre.

PW1 also said the 1st accused confessed freely in an open area and that the act of Mboje Salu to go and help casualties at the health centre may be a trick. That he believes the information he got from his whistle blower because he lives in the same village.

Such witness's evidence was followed by that of E.7940 D/C Tedson (**PW2**), H.577 D/C Faisari (**PW3**), Dr Edward Christopher Sengo (**PW4**) and G.5696 D/C Augustino (**PW5**); others were Hon. Vustan Ephraim Kundy (**PW6**), Massanja Igisha Hatili (**PW7**) and G.4308 D/C Joram (**PW8**). **PW2** testified to have recorded a Caution Statement of the 3rd accused after complying to all the legal requirements as per section 58 of CPA.

His prayer to have the same being admitted as an exhibit was attacked by an objection from defence counsel for the 3rd accused for his failure to avail such accused person with the right to call his relative or an advocate contrary to the relevant law. However, after hearing submissions from both counsel the Court overruled it and admitted such document as exhibit **P1** then its contents were read by **PW2** in court. Thereafter, **PW2** identified the 3rd accused at the dock.

On cross examination **PW2** said he did not see the body of Mwasi Mahangila but was told that she was killed by a machete used by Mahangila Timba, Mboje Salu and that Shimba Igishaminala hold a stick. That Lyande Salu was mentioned by Mboje Salu but he does not know if Lyande Salu participated in assaulting the deceased. **PW2** also said the 3rd accused stated about his participation in the caution statement, but he does not know if such accused was taken before a Justice of Peace.

PW3 testified to have been instructed by his superior boss to record a Caution Statement of the 2nd accused and he did that after introducing himself to such accused person and informing him of his rights as per the law. He then proceeded to record and read it over to the accused who certified to him that it's the same and correct. **PW3** identified it before the court and prayed for it to be admitted as one of the prosecution exhibits. Since there was no any objection from the adverse party then the same was admitted and marked as exhibit **P2**.

Responding to cross examination **PW3** said he does not know Mahangila Timba and he is not in court, but he saw him at Usevya Police Station. That Lyande Salu informed him about the incident but he did not mention a specific person who assaulted Mwasi Mahangila. That the 2nd accused did not tell him that he assaulted the deceased person. That the

2nd accused told him that Mboje Salu hold a panga while Lyande had a stick; then Mahangila, Mboje Salu and Shimba entered the house of the 2nd deceased who died due to injuries caused by a panga.

On his part **PW4** who introduced himself as a Medical Doctor of Usevya Health Centre testified that he is the one who conducted a post-mortem of two deceased persons namely Mwasi Mahangila and Mabula Igisha after getting instructions from the Officer Incharge of Usevya Police Station.

That upon reaching the home of Mwasi Mahangila and examining her body which was tainted by blood, he discovered that the cause of her death is haemorrhagic severe bleeding caused by injuries resulted from a cut by sharp object. He prepared a report and submitted it to the police. Then he went to Usevya Health Centre where he found a casualty one Mabula Igisha already dead.

He examined his body and discovered that it had a wound on its face front which showed it was caused by a blunt object because the lower skull was fractured leading to severe bleeding and the lower skull fracture caused brain damage and that led to the death of such deceased person. Thereafter, **PW4** identified such report in court and prayed the Court to admit it as exhibit. The same was admitted as

prayed and marked exhibit **P3** due to lack of objections from the defence counsel.

PW5 testified to have recorded a Caution Statement of the 1st accused person on 10.09.2020 at 1813hrs after explaining his rights to choose whether or not to make his statement, to call his relative of an advocate introduce himself to him. Then he gave him a statement to read and asked him to sign on it. **PW5** then prayed to tender such statement as an exhibit and this Court admitted it as exhibit **P4** because the defence counsel did not raise any objection to it.

When cross examined by defence counsel **PW5** said he does not know Mahangila Timba, but he is the one who killed Mwasi Mahangila according to the statement he recorded from the 1st accused person, and that from such statement he noted that Mabula Igisha was killed by Lyande Salu. That the 1st accused did not tell him that he used a panga to kill any deceased person.

On being re-examined **PW5** said the 1st accused person told him he went to the scene of crime and also participated to arrange the commission of an offence of murder. That the said accused led the guards to the scene and showed them where the deceased had slept as well as the place the offence was committed.

PW6 testified himself as a Justice of Peace in the District Court of Mlele. That, he attended the 1st and the 2nd accused persons who were brought before him at Usevya Primary Court on 11.09.2020 in custody of a police officer whom he named by a single name as Mrisho and who told him that the two suspects were charged with an offence of murder.

That, he is the one who recorded extra judicial statements of such accused persons after satisfying himself that the accused persons were not promised, threatened or forced to make such statements before him and that they wanted to make them on their free will and they knew the consequence of making such statement before him as a Justice of Peace.

He successfully tendered two statements despite objections raised by defence counsel for the 1st and the 2nd accused persons which were overruled by this court. The extra judicial statement of the 1st accused was admitted as exhibit **P5**, while that of the 2nd accused was admitted in court as exhibit **P6**.

According to him both of them confessed to have conspired in planning and effecting the murdering of one Mwasi Mahangila whom they alleged to have bewitching their relatives and cause them not to bear children; they also pointed out in their statements that they did not intend to

murder Mabula Igisha, but they did so because such deceased person interfered them with a view of saving his mother one Mwasi Mahangila.

When cross examined by defence counsel, **PW6** said he fetched such information from the statements he had recorded from said accused persons. Finally, on being re-examined **PW6** said that the 1st accused person told him on the fateful day he and his co-accused persons went to the house of Mwasi Mahangila for the intention of killing her.

PW7 who appears to be the son of the first deceased one Mwasi Mahangila, testified that on 10.09.2020 at night he was at his home which is located at Usevya, Ikuba Village. He received a call from one Kija Dotto who informed him that his mother was invaded; hence he should go there quickly. After getting such information he tried to call his young brother Mabula and his mother but the two were not reachable. That also happened even when he attempted to call his young brother one Atili Massanja.

That, he went to his mother's home where he found a group of people; then he entered into that house and found his mother one Mwasi Mahangila dead and she was lying on bed, her neck was cut. Thereafter he entered into the house of Mabula Igisha where he found him in bad condition bleeding on his nose.

That, he tried to call his brother who is the 1st accused about two times but he could not respond. On the third time the said accused's number was not reachable. It was later in the following day morning when **PW7** saw the 1st accused coming to the scene of crime and stay there until when he was arrested and interrogated by the policemen of Usevya Police station who arrived there. **PW7** identified the 1st and the 2nd accused persons at the dock.

When cross examined **PW7** said he does not know who killed his mother and he did not see the 1st accused killing his mother or his young brother. Finally, there was the evidence of G.4308 DC Joram (**PW8**). His evidence was in line with that of **PW1** and **PW4** that on 10.09.2022 he was accompanied by **PW1** and **PW4** went to the scene to conduct examination of the first deceased one Mwasi Mahangila.

That, while there he assisted **PW4** in conducting a post-mortem of such first deceased whose neck was injured by a blunt object, and after finishing such task he drew a sketch map after being instructed by his superior boss who is **PW1**. **PW8** also testified that prior to that he attended the 2nd deceased one Mabula Igisha and one Atili Tungi who were seriously injured and that the two were complaining of being invaded at their homes.

He said Mabula's head was swelling with blood which showed his wound was caused by a blunt object, and that Atili had a wound on his head. **PW8** identified a sketch map and prayed for it to be admitted and this Court admitted it as exhibit **P7** because the defence counsel did not raise any objection to it.

On re-examination he said after finishing to draw a sketch map and fill a post-mortem report, they went to Usevya Health centre and **PW4** conducted a post-mortem of the 2nd deceased one Mabula Igisha, then they handled over the two bodies to the relatives for burial ceremony.

After the closure of the prosecution case this court ruled out that all the three accused persons had a case to answer in relation to the charge to which they herein stand charged. **DW1** testified that on 10.09.2020 he was at his home Nyaruvye, Usevya with his family; his wife is Amina Juma. Then in the morning he went to his neighbour one Kija Sungwa to take his mobile phone which was on charge.

He looked at it and find a missed call of young brother one Massanja Igishaminala; he tried to call it but it was busy. That thereafter he was informed that his mother one Mwasi Mahangila was killed, then he went to her home and found her dead. While there he was approached by the police who arrested and took him to Usevya Police Station where they

covered his face and began to beat and force him to confess that he murdered his mother, but he denied to have done so.

That, he failed to walk and the police gave him a stick to support him, then they took him to their superior boss who began to complain why they brought him in such condition. Then the police asked him to sign certain papers, then they took him to a Justice of Peace. That, thereafter he was picked up on a vehicle with other persons who are Lyande Salu, Mboje Salu and Mahangila Ntimba and were taken to Mlele Police Station and were placed on lockup; their legs were swollen and had big pains.

That, on the following day their relatives went there and asked the police to allowed them to be treated but they refused. Then on 24.09.2020 they were taken to court. In conclusion, **DW1** said he did not kill the deceased persons but he was beaten by the police in order to confess. He also said the prosecution evidence was not true and was fabricated; hence he prayed this court to dismiss the charge against him because he did not commit the offence of murder.

When cross examined **DW1** said he did not make a statement to the police but he was forced to sign on papers. That the policeman who forced him testified in court but he did not cross examine him nor his

lawyer. That the policeman who tortured him testified in court but he did not cross examine him on the issue of torture. Also, **DW1** said the Justice of Peace testified in court that he was not beaten but he did not know that he was supposed to cross examine him.

When examined by this court **DW1** said the Justice of Peace (**PW6**) did not inspect his body as his clothes were covered by blood. That he did not tell his lawyer that he was beaten and injured by the police. On their side, **DW2** and **DW3** had the same story as that of **DW1**.

They admitted to have got information their relative Massanja Igishaminala (**PW7**) about the death of Mwasi Mahangila, the injuries sustained by Mabula Igisha which led to his demise and that they all went to the scene of crime and finally to Usevya Health Centre with a view of nursing the casualties who were Mabula Igisha and Atili Tungi.

They also said while at the hospital they were approached by the policemen who arrested and took them to Usevya Police Station where they placed them in a room and began to beat them and force them to sign on certain paper. They said they denied to have committed the offence of murder. **DW2** said he refused to sign a paper until the police call his lawyer or relative.

That, on the following day he was taken to the court and was charged with murder which he was not aware. He asked this court to dismiss the charge and set him free. On his part **DW3** added that he was charged with the offence of murder which he did not commit. He finally asked this court to dismiss the charge against him because **PW7** testified that he does not know who exactly killed the deceased persons.

Responding to cross examination questions **DW2** said he arrived at the scene after the incident. That a person who commits murder cannot go to the scene but can run away. That he took Magula Igisha to the hospital; he died later while getting treatment, he did not kill him. That he was assaulted by police and could not walk until on 24.10. 2020. That he did not cross examine such police who assaulted him nor did he make a statement to him and to the Justice of Peace.

On his part **DW3** said his house is not much far from the scene of crime, that a person cannot commit an offence and go back to sleep. That he and the co-accused persons did not arrange to commit the offence. That they went to the hospital just to help the victims and not intend to kill them. That he did not make a statement to police; they forced him to sign document but he denied. That the caution statement tendered by the police was not signed.

That the said police came to court to testify but he did not tell his lawyer about his signature nor did he tell him about his assaults. On re-examination **DW3** said he was at his home with his wife, that he was informed by his young brother Lyande Salu about the incident of murder.

From the above evidence it appears to me that the centre of dispute between both parties in this case revolves around the serious allegations levered against the three accused persons herein that they on the 10th Day of September, 2020 at Ikuba Village within Mlele District in Katavi Region they murdered two persons who are Mwasi Mahangila and Mabula Igisha.

In order for this court to arrive at a just decision, three issues need be raised and guide this court in reaching to that point. **One**, is whether abovementioned deceased persons died an unnatural death, **Two**, is whether it was the accused persons Shimba Igishaminala@Hatili, Lyande Salu@Kiyunga and Mboje Salu@Kiyunga who caused their deaths, and **three**, is whether in the causing such deceased's deaths the said accused persons had malice aforethought/intention to kill the said deceased persons.

It is a cardinal principle of criminal law that in every criminal case the prosecution has a duty to prove its case against the accused person and such duty is beyond any reasonable doubt. Such principle emanates from the statutory provisions as well as the caselaw. The provisions which bestow the prosecutions with such duty are sections 110 and 112 of the Evidence Act, Cap 6 R.E. 2019 (The TEA). As for the caselaw there are several authorities on that area, but to mention few, are the cases of **Joseph Makune vs R.** [1986] T.L.R. 44, **Mohamed Haruna@Mtupeni and Another vs R.** Criminal Appeal No. 25 of 2007 (CAT) (Unreported) and **Mashaka Juma and 3 Others vs The Republic**, Criminal Appeal No. 35 of 2022(HC) at Mwanza (Unreported). In **Joseph Makune vs R.** (Supra), the Court of Appeal (CAT) had the following to say, *"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence"*. Again, in **Mohamed Haruna@Mtupeni&Another Vs R.** (Supra), the Court of Appeal stated, thus *"...the burden is always on the prosecution. The standard has always been proof beyond a reasonable doubt."*

Having the above principles in mind, I will quickly answer the above points of law as obtained from section 196 of the Penal Code which

establishes an offence of murder. To start with the first issue; it is intended to guide this court in determining whether the two deceased persons Mwasi Mahangila and Mabula Igisha died an unnatural death. Both parties in this case are at one that the said deceased persons died on the night of 10th September, 2020 while asleep at their homes in Ikuba Village, Mlele District.

It is also undisputed fact between such parties, that the bodies of such deceased persons were found with serious injuries and were bleeding. There is also the evidence of **PW4** who is a medical expert at Usevya Health Centre in Mlele District which shows that after examining such bodies, he discovered that their wounds were caused by blunt and sharp objects and that the cause of their deaths was haemorrhagic bleeding. This evidence was corroborated by the evidence of **PW1**, **PW7** and **PW8** who testified to have reached at the scene of crime and witnessed such deceased bodies with cut wounds and blood stains. The same was not disputed by all the accused persons who confirmed to this court that they also witnessed such an unusual situation.

Yet there is documentary evidence of a Post-mortem report which was tendered by **PW4** and admitted by this court as exhibit **P3**. Suffice it for me to say that after considering all the above evidence, I am of the

considered view that the prosecution has managed to prove beyond any reasonable doubt, that the abovementioned deceased persons died an unnatural death.

Coming to the second issue as raised above, I wish to point out that I have carefully gone through the evidence adduced by the prosecution side. What I have noted is that the prosecution side in this has relied on two categories of evidence; one being **circumstantial evidence** and another one is documentary evidence of accused's **caution statements** as well as the **extra judicial statements**.

This is because none of the prosecution witnesses has testified before this court that he saw the accused persons murdering the accused persons Mwasi Mahangila and Mabula Igisha. So, the issue of identification is not a concern of this court's discussion. With documentary evidence, like I said earlier the prosecution side tendered three caution statements of the accused persons.

The same were admitted as exhibits **P1** (for the 3rd accused) **P2** (for the 2nd accused) and **P4** (for the 1st accused). Among the three only exhibit **P1** was objected; although the objection was overruled. The rest were admitted without any objection from the accused persons nor their

counsel. It also tendered two extra judicial statements which were admitted as exhibits **P5** and **P6** respectively.

I am aware that admissibility of a document is one thing and its weight is another. This was stated in the case of **Stephen Jason and Another v. R.**, Crim. Appeal No. 79 of 1999 CAT (Unreported) in which it was stated that, *"It is common ground that the admissibility of evidence during trial is one thing and the weight to be attached to it is a different matter."*

Also, in the case of **Nyerere Nyague v. Republic**, Crim. Appeal No. 67 of 2010 CAT (Unreported) it was stated that, *"Even if a confession is found to be voluntary and admitted the trial court is saddled with the duty of evaluating the weight to be attached to such evidence given the circumstances of each case."*

The above entails that the trial court has a duty to evaluate the weight of evidence before it even if the same is admitted in court. In the present case it appears that all the accused persons confessed before **PW2**, **PW3** and **PW5** to have murdered the deceased persons Mwasi Mahangila and Mabula Igisha. Exhibits **P1**, **P2** and **P4** show that at different times the first, second and third accused persons made their statements before **PW2**, **PW3** and **PW5** that before murdering the said

deceased persons they met at the pitch ground in Ikuba Village at 2300 hours, and planned how they will execute the murder of Mwasi Mahangila.

It is also evidenced from the above cautioned statements, that after making such plan the three went to the house of Mwasi Mahangila with machete and sticks and found her asleep, then the 2nd accused stood outside guarding leaving the 1st and the 3rd person entering such house and killed such deceased person. The statements do not end there; they also show that the deceased persons decided to kill Mwasi Mahangila because they were alleging her for bewitching their relatives and that they also killed Mabula Igisha because he was interfering them to affect the killing of Mwasi Mahangila.

The court record reveals pretty well that all the above three accused persons were present when such statements were being tendered by **PW2, PW3 and PW5** and their advocates were present but could never cross examine such prosecution witness whether it was true that the said accused persons made such statements before them.

If the above is not enough, there is another evidence of **PW6** who tendered the extra judicial statements which he recorded from the 1st and the 2nd accused person. Such statements have corroborated the

caution statements of the first, second and the third accused persons to the effect that they show that the said two accused persons confessed before **PW6** who is a Justice of Peace of Mlele District Court.

Again, the accused person never cross examined **PW6** whether it is true that they freely confessed before him to have committed an offence of murder. I have taken time to go through the contents of the above documents and realised that **PW2**, **PW3** and **PW5** complied with the procedural requirements of recording caution statement of an accused person as provided under Sections 53(c)(ii), 54(1) and 58 of the CPA.

Not only that, but also, I have observed the way **PW6** had recorded extra judicial statements of the first and the second accused person and noted that he complied with the Chief Justices' Guide available in **A Handbook for Magistrate in the Primary Courts-Revised and Updated Version**, January 2019. The statements show that **PW6** correctly asked the accused where and when they were arrested, which offence they were charged and if they were forced to make statements before him.

He also asked them if they really wanted to make such statement on their free will and if they knew that should they make such statements then the same will be used as evidence against them in a court of law.

It seems the accused confirmed to him that they were not forced, promised or forced to make such statements and that they were ready to make them on their free will. They also confirmed to him that they knew the consequence of making such statements before him. However, I should, as a passing word, advise Magistrates who records extra judicial statement to do so in the accused's own words, just like they use to take accused's plea and not recording as if they are telling a story.

On their side, the accused persons have complained that they were tortured and forced to make such statements before **PW2, PW3** and **PW3**. I do not think if such allegations are true. This is because when cross examined, they confirmed to have not cross examine such prosecution witnesses about the issue of torture, nor did they and even their advocates, tender any medical documents to show that they sustained injuries due to such alleged torture (beatings). More so neither the accused persons nor their advocates object the cautioned statement on the ground that accused persons were tortured and force to make such statements.

It is a trite law that failure to cross examine an adverse party's witness on a material point amounts to accession of such fact. This was

cemented in the case of **Damian Ruhele vs. Republic**, Criminal Appeal No. 501 of 2007 (unreported) where it was stated that, *"It is trite law that failure to cross examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence."*

It appears to me that by omitting to cross examine **PW2**, **PW3** and **PW5** on the important matter as the serious allegations of torture, the accused persons in this case accepted that the evidence adduced against them by such witnesses was nothing, but true.

Thus, taking all the above into account, I am satisfied that the documentary evidence tendered by **PW2**, **PW3**, **PW5** and **PW6** before this court was watertight and the confessions made by such accused persons before them were voluntarily made.

As for circumstantial evidence, there is the evidence of **PW7** which shows that soon after the murder of Mwasi Mahangila and one Mabula Igisha he was informed by his relative about their killings, then he called the 1st accused two times, but the accused could not respond to his call; then he tried for the third time but this time the accused was not reachable.

When defending himself before this court the 1st accused admitted to have seen a missed call of **PW7** who is his bloody relative. He rather

said he had gone to his neighbour one Kija Sungwa to take his mobile phone which was on charge. That after he had seen **PW7's** call he tried to call him but it was busy.

DW1 did not say if thereafter he approached **PW7** and asked him the purpose of his call at night, nor did he cross examine him if it is true that he did not respond to his call, and that on the third attempt by **PW7** he switched off his phone. Taking all that into consideration, why shouldn't this court and/or any reasonable man believe that **DW1** evidence was not true? I think, in such circumstances, it will be correct to answer that question in the affirmative as it seems clear that **DW1** really participated in the killing of the two deceased.

In the case of **Masumbuko Matata@Matata and Two Others vs Republic**, Crim. Appeal No. 318, 319 and 320 of 2009 (Unreported). The Court held that, *"...lies of an accused person can be used to corroborate evidence against him"*. Since the first accused person lied as indicated above, then I find that his lies have corroborated the evidence adduced against him by the prosecution.

There is another evidence of **PW1** which is to the effect that the conduct of the accused person to go to the scene and participate with other residents of Ikuba to nurse the victims of crimes was a trick. I take

such evidence into serious manner. The accused caution statements and the extra judicial statements of the 1st and the 2nd accused person reveals that the accused person committed such murder offence at midnight and soon after effecting their evil conducts they run to the river then later on they agreed to go back to the scene and participate in helping the victims and participate in burial ceremony.

If that is to be construed deeply, then one may come to a conclusion that the such accused persons intended to hide the truth that they are the ones who murdered Mwasi Mahangila and Mabula Igisha whom, it is not disputed that they were their close relatives. This is especially when one considers other factors including confessions of the accused persons to have murdered the deceased persons, their failure to question the prosecution witnesses on the important issues, as described above, their conducts after commission of the offence and their lies as to allegations of torture.

A totality of the above convince me to believe **PW1** that the accused persons used a trick in order to hide the truth as to their involvement in the murder the Mwasi Mahangila and Mabula Igisha. Having said the above, then the second issue is answered in the affirmative.

Next for consideration is whether the said accused persons had malice aforethought before causing the deaths of Mwasi Mahangila and Mabula Igisha. I think this last issue need not detain me in responding to it. Malice aforethought is one of the ingredients of an offence of murder. Section 196 provides that, *"Any person who, **with malice aforethought**, cause the death of another person by an unlawful act or omission is guilty of murder."*

The phrase is not expressly being defined under section 5 of the Penal Code (The interpretation section). However, the same can simply be defined as the conscious intent to cause death or great bodily harm to another person before a person commits a crime. See <https://dictionary.law.com>. From the above definitions, malice aforethought can also be defined as an intention of any person to cause the death of another person before committing an offence of murder.

In the present case, there is no doubt that the accused persons Shimba Igishaminala@Hatili, Lyande Salu@Kiyunga and Mboje Salu@Kiyunga are the ones who caused the deaths of Mwasi Mahangila and Mabula Igisha. That justified by the evidence of the prosecution side, which has successfully proved such ingredient of murder. From such evidence, it is also revealed that before causing such deaths, the said three accused

persons met at a pitch ground and planned how they could execute the murder of Mwasi Mahangila whom they were alleging to be a witch. Their plan was associated with arming themselves with machetes, sticks and clubs and they used such weapons to assault the deceased persons to death.

All that indicates that the accused persons in this case committed the murder of Mwasi Mahangila and Mabula Igisha with malice aforethought. Hence, this court is satisfied that the prosecutions side in this case has also passed the test of proving beyond any reasonable doubt that the first, second and third accused persons herein actually caused the deaths of the deceased Mwasi Mahangila and Mabula Igisha with a malice aforethought.

It follows, therefore that, from what has been advanced above, I am satisfied and hold that the prosecution in this case has proved its case against all the three accused persons to the standard required by the law. Hence, I find them guilty of the offence of Murder Contrary to sections 196 of The Penal Code, and I convict them as charged.


A.A. MRISHA
JUDGE
02/01/2023

SENTENCE

The offence of Murder has only one punishment under the law of the land. I have considered all the aggravating and mitigating factors from both sides. However, my hands are therefore tied to the requirement of the law that I must uphold. I do sentence the accused persons **Shimba Igishaminala @ Hatili, Lyande Salu@Kiyunga** and **Mboje Salu@Kiyunga** to suffer death by hanging as provided under sections 26(1) and 197 of the Penal Code Cap 16 R.E 2019.

It is so ordered.




A.A. MRISHA
JUDGE
02/01/2023

Right of Appeal is fully explained.




A.A. MRISHA
JUDGE
02/01/2023

Dated at Mpanda, this 02nd Day of January, 2023.




A.A. MRISHA
JUDGE
02/01/2023