

**IN THE HIGH COURT THE UNITED REPUBLIC OF TANZANIA  
SUMBAWANGA DISTRICT REGISTRY**

**SITTING AT MPANDA**

**(CRIMINAL JURISDICTION)**

**CRIMINAL SESSION CASE NO. 28 OF 2020**

**THE REPUBLIC**

**VERSUS**

**1. BARUTI <sup>s/o</sup> PHILIPO @ BOKI**

**2. JOHN <sup>s/o</sup> SAMWEL @ MJESHI**

**JUDGEMENT**

28.11.2022 & 03.01.2023

**MRISHA, J**

Accused persons, **Baruti Philipo @ Boki**, and **John Samwel @ Mjeshi** stands charged with the offence of murder contrary to section 196 and 197 of the Penal Code, Cap 16 RE 2019 (hereinafter referred to as the "Penal Code"). It is alleged that on 20<sup>th</sup> day of June 2019 at Kasimba area within Mpanda Municipality in Katavi Region did murder one **Frank s/o Benedicto** (*hereinafter referred to as "the deceased"*).

When the charge or information of murder was read over and properly explained to the accused persons, they both pleaded not guilty to the offence, and thus plea of not guilty was entered, hence full trial.

During the trial of this case, Ms. Hongera Malifimbo, the learned State Attorney represented the Republic; whereas, the accused persons were both represented by Mr. Sweetbert Nkumpilo, the learned Advocate.

To drive home the allegations levelled against the accused persons, the republic brought a total of four witnesses namely **Japhet Chambo**, who testified as prosecution witness No. 1 (**PW1**), **Zakaria Alisen Chundu** as **PW2**, **G. 5969 D/CPL** Augustino as **PW3**, and **H.751 D/C-** Kennedy as **PW4**. The prosecution also tendered a Postmortem Examination Report, Witness Statement, Sketch Map and Cautioned Statement as Exhibits **P1**, **P2**, **P3** and **P4** respectively.

Upon the closure of prosecution case, defence case opened after it was found that the prime facie case has been established against accused persons; thus, requiring them to give their defence story. In disapproving the prosecution allegations levelled against them, the first accused person testified as **DW1** and the second accused testified as **DW2**. They neither called a witness to testify on their favour nor

tendered exhibits. The summary of prosecution testimonies is as hereunder;

**PW1**, Japhet Chamba, a Medical Doctor at Mpanda Regional Hospital testified that on 22.06.2019 he was at home. He received a call from nurse and she told him that they received a dead body and the body was kept at mortuary. He was assigned to conduct post-mortem and he complied with an order to conduct post mortem. After relative one Zakaria Chundu identified the deceased body, he did examination where he saw wounds from the deceased body; there was big wound and small wound on chest, legs and at the backs of the body and his body swollen. He found sand and dust in the mouth and nose of deceased body and blood clot. **PW1** discovered also that the wound was caused by blunt object and he opined that the cause of death was due to suffocation/Neurogenic shock caused by sand and dust which was in the mouth and nose. He thereafter filled in a report on examination which was produced and admitted in evidence as exhibit **P1**.

When cross examined by Mr. Sweetbert Nkumpilo, Learned Advocate, **PW1** replied that the deceased body could be examined at any time even after a month. After a month he cannot know the cause of death of deceased body. He stated that a blunt object does not have

sharp part for an example stick and stone. He further replied that the deceased failed to breath because there was a sand in his nose.

When re-examined by M/s Hongera Malifimbo, State Attorney he clarified that he saw the deceased body dirty and covered with blood and dust. He saw the wound that caused the cloth to be covered with the blood. He stated that it might be that the sand entered into deceased's nose at the time was struggling to survive.

**PW2**, Zakaria Alisen Chundu testified that on 22.06.2019 he was at home and he received a call from police officer and he was told to go to Referral Hospital to identify the deceased body. He went there met a Medical Doctor who led him to the mortuary then he identified the body of Frank Benedicto (deceased person) which was covered by dust and sand to his eyes and mouth with a wound in his body and the body was swollen. He was told that the deceased body was found at Kasimba area.

Thereafter, he was told by a doctor that the cause of death was due to suffocation and beatings. After investigation, he took the deceased body to be buried.

When cross examined by Mr. Sweetbert Nkumpilo, Learned Advocate he replied that the mother of the deceased is called Meriyu

Chundu, however she is died. That the cause of death was due to suffocation and also the deceased was beaten.

**PW3**, G5969 D/CPL Augustino, a police officer testified that on 21.06.2019 he was at his working place which is Mpanda Police station, doing his work. His superior one ASP Damazo called him, and he went to his office and met him and another person and he was introduced such person, his name was Iddy Juma. He was informed that such person was present at the scene of crime. However, he was instructed to record the statement of the said person. He took him to the interrogation room for purpose of recording the statement. Before starting to record, he informed the person of his right including introducing himself to Iddy Juma. He informed him the reason of recording his statement and also told him the statement could be used as evidence in Court and he agreed to offer the statement. **PW3** recorded the statement offered by Idd Juma which was produced in court and admitted as exhibit **P2**.

When cross examined by Mr. Sweetbert Nkumpilo, Learned Advocate **PW3** replied that he tendered the statement of Iddy Juma because he is nowhere to be found. Further he replied that he did not know what efforts were taken to find such witness. That he did not know if Iddy Juma was living at Majengo in Mpanda. He did not know

whether the summons was actually issued in order to call Iddy Juma. He did not go to Majengo area to find Iddy Juma; even to ask a street leader. He never had a letter to prove that Iddy Juma is no longer available, lives at Majengo. He said his testimony is a hearsay and he was informed by Iddy Juma of his home at the time he recorded his statement. He did not see the incidence of killing, but he was informed by the witness Iddy Juma.

That, according to Iddy Juma there were many people who assaulted the deceased person by using stones and bricks.

When re-examined by M/s Hongera Malifimbo, State Attorney PW3 stated that he was told by Idd Juma that he was living/residing at Majengo area, and he did not go at Idd Juma's home. He replied further that he was not assigned any duty of finding Iddy Juma. That all incidents he testified, he was told by Iddy Juma at the time of recording his statement. He was told that he was able to identify three persons who are John @ Mjeshi, Boki Philipo and Emmanuel Philipo. That he knew the incident through the information he got from Iddy Juma. That he did not know the cause of death of deceased person, as he was not a doctor.

**PW4** H.751 D/C Kennedy, a police officer testified that on 20.06.2019 he was on duty at his office Mpanda Police Station. He received instruction from his immediate boss to be prepared and go to Kasimba, Ilembo Ward as there was an incidence of killing. They altogether went to the crime scene, and upon reaching there he was instructed to draw a sketch map which was produced in court and admitted as exhibit **P3**. He informed the court that he also interrogated the accused Baruti Philipo @ Boki and recorded the caution statement of such accused person which was also produced in court and admitted as exhibit **P4**.

When cross examined by Mr. Sweetbert Nkumpilo, Learned Advocate, he replied that deceased person was beaten as he was suspected to commit theft. He did not know how many people did beat the deceased. He did not see any of them beating the deceased person. He did not see the two accused persons beating the deceased person. Immediately after incident was reported, he and his fellow went to the crime scene. There he found the deceased lying down, pieces of bricks and the deceased's body had sand. He was assisted by Idd to draw a sketch map at the scene of crime. He was told by Idd that a group of people were beating the deceased.

When re-examined by M/s Hongera Malifimbo, State Attorney, he stated that deceased person was suspected to be a thief. That he was not in the crime area at the time the offence was committed. The incident was reported on the same day. He and his fellow arrived at the scene of crime immediately after the incident was reported. That group of people starts with two persons. That at the scene of crime he found a person called Iddy Juma who assisted him to draw sketch map.

The court having found that, the prosecution had sufficiently established a case against accused persons to require them to make their defence, the accused persons were called to defend themselves and they elected to testify under oath. The first accused testified as **DW1** and the second accused as **DW2**. They neither called witness to testify in their favour nor tender exhibit.

The summary of their evidence is as hereunder;

**DW1**, Baruti Philipo, resident of Katumba, Mpanda District testified that on 25.06.2019 he was arrested by a police officer at Pembejeo Guest House. He further stated that Pembejeo Guest House was owned by his father called Philipo Ndeleimana, the Guest House is located at Majengo, Mpanda. That he was arrested at midnight as he was suspected to own stolen property, it was a Mobile phone made Infinix Note. 3. He was asked where he got Mobile phone and he replied that he purchased



from the person known by a single name of Msukuma. Police officer told him to go to the person he mentioned who sold the Mobile phone. They arrested the person and interrogated and confessed to have sold the Phone to him. Thereafter, he was sent to the investigation room and the Police officer introduced himself and he was then interrogated by Police officer Kennedy. He told him on 20.06.2019 he was at the Camp, Katumba with his fellow football players. He denied to have beaten a person suspected to be a thief on 20.06.2019 who stolen maize by the name of John Samwel and James Madison. He denied such allegation, however the police officer stood up and told him to sign the paper. He requested the police officer to read out the statement but he denied. He signed the paper because he was under arrest, he was following the instruction. He was not free to decide. Then he was sent to Court and charged was read to him. There upon he discovered that he was charged with the offence of murder. He denied to be present at the crime scene. He said all prosecution witnesses testified that they were informed. He testified that the person who was there at the crime scene was not called to testify before this Court. He prayed to this Court to disregard the evidence of the prosecution because no witness testified to have seen him committing the offence of murder.

When cross-examined by M/s Hongera Malifimbo, State Attorney **DW1** replied that Baruti Philipo is also known as Boki, his father also owns a plot located at Lungwa. That he was arrested at Pembejeo Guest House. He stated that he was arrested at his room. He was suspected to possess a stolen property. He said Wambura Philipo was a receptionist of the Guest House. He bought the phone from one Msukuma and he paid Tshs. 120,000/=. He did not call the witnesses to testify because Msukuma and Wambura Philipo were not aware of the offence of murder. He said he has a friend called Arbert. Emmanuel Philipo is his brother and John Samwel is not his friend, but they were charged with the offence of murder together. Police officer called Kennedy record is the one who recorded his statement. When re-examined by Mr. Sweetbert Nkumpilo, Learned Advocate he stated that he was arrested and suspected to own the stolen property which is Mobile phone Infinix Note. 3.

**DW2** John Samwel, resident of Kichangani, Nsemulwa, Mpanda District testified that on 26.06.2019 he was arrested by a police officer at his place/home, early in the morning. Police searched him at his place and they did not find anything and they took him to the Police station. Police officers did not tell him what they searched for. He was remanded at Mpanda Police Station for one week and half. After one week, he was

taken to the investigation room by a police officer whom he did not know his name. He was interrogated, and on 20.06.2019 he was at Mnadani at Kakese. He was informed by the Police officer that on 20.06.2019 he beaten a person suspect to be a thief. He replied to them that on the fateful date, he was at Kakese Mnadani. Thereafter, the police returned him to the custody. On Monday 08/07 2019 he was sent to the Court and charged with the offence of murder. They were two accused persons; him and Baruti Philipo @ Boki. He knew Baruti Philipo @ Boki after they were jointly charged with the offence of murder. He was not present at the crime scene, as he was at Mnadani Kakese buying cattle.

He prayed to the Court to disregard the evidence of the prosecution because the witnesses did not mention that he was at the crime scene. It was his testimony that the key witness who mentioned him as was at the scene did not come to testify before the Court. He testified that no reason was given by the prosecutions side for the witness who was at the scene of crime but was not called to testify.

When cross examined by M/s Hongera Malifimbo, State Attorney he replied that he purchased Cattle and sold meat at a different markets called Sibwesa, Kakese and Mwese. He could buy three cattle at the Market. He does slaughter at Mpanda at around Mpanda Hotel. That on

20.06.2019 he was at Kakese market, he was alone and he bought four Cattle cost 2 million Tshs. He bought cattle from different persons. He did not remember the name of a person who sold the Cattle to him. On 21.06.2019 he slaughtered one cow. He received receipt and permit when he bought cattle, he failed to submit before the court, even the book he registered when he went to the slaughter house. He did not have grudges with Boki.

When re-examined by Mr. Nkumpilo, learned advocate he stated that on 20.06.2019 he was at Market of Kakesi, buying cattle. After thoroughly going through prosecution and defence case, the main issues for the determination of the case at hand before this court are essentially three; they are:

- (i) whether the deceased one Frank Benedicto alleged to have died is actually dead; if the answer is in affirmative,*
- (ii) whether the accused persons Baruti Philipo @ Boki, and John Samwel @ Mjeshi are responsible for the death of Frank Benedicto,*
- (iii) whether their action was actuated with malice aforethought.*

To start with the first issue, it is evident from the evidence of **PW2** a witness and also a relative of the deceased that he visited the mortuary and he identified the dead body of Frank Benedicto being covered with sand and dust in his eyes and mouth. Also, the medical officer Zakaria Alisen Chundu (**PW1**) conducted post-mortem examination at the mortuary. The medical officer through post-mortem report (**Exh. "P2"**) established that the cause of death was due to suffocation/neurogenic shock as a result of severe pain. The medical officer further stated that the dead body had sand in the nose and mouth. Thus, there is no any other piece of evidence which disputes with the above assertion/ proposition. Thus, the deceased, Frank Benedicto is actually dead and his death is unnatural.

As pointed above, the testimony reveals that the death of the deceased Frank Benedicto was unnatural and brutal. From the evidence on record as far as the cause of death of the deceased, is contained in the post mortem examination report (**Exh. P1**). The report, **Exh. "P1"** reveals that the cause of death is due to suffocation as a result of severe pain in his body.

The second issue raised, whether it is the accused persons who killed the deceased.

Accordingly, the totality of the prosecution testimony, only one witness is said to have seen the accused persons assaulting the deceased which resulted to his death. None of the remaining other witnesses testified to have seen the accused assaulting the deceased, as **PW1** only conducted medical examination on the deceased body, **PW2** only identified the deceased body of his relative at the mortuary, **PW3** only recorded statement of the witness one Idd Juma which were tendered in court as witness statement under **section 34 B** of the Law of Evidence Act, Cap 6 RE 2022 and **section 10 (7)** of the Criminal Procedure Act, Cap 20 RE 2022 admitted in court as exhibit **P2** and **PW4** a police officer who drew sketch map of the scene of crime and recorded cautioned statement of the first accused Baruti Philipo @ Boki which were tendered in court and admitted as exhibit **P3** and **P4** respectively.

It is a principle of law that for the court to find the accused person guilty of the offence of murder the available evidence must link the accused persons with the said death. See the Case of **Mohamed Said Matula versus Republic** [1995] TLR 3.

The offence of murder facing the accused persons is a grave one; hence the proof of which need be cogent evidence. Idd Juma was a

crucial witness in this case. **PW3** one **G. 5969 D/CPL** Augustino tendered Idd Juma's statement (Exhibit P2) under section **34B** of the Evidence Act. M/s. Hongera Malifimbo, learned State Attorney during the hearing of this trial on 16.11.2022 informed this court thus: -

*"This matter is coming for hearing but we failed to get witness today; we pray for adjournment because we want to file a statement before the court and also, we want to file another statement for the purpose of reading the statement of witness who is not found under section 34B (1) and (2) of Evidence Act, Cap 6 RE 2019 and addition witness under section 289 (1) (2) and (3) of Criminal Procedure Act, Cap 20 RE 2022."*

The court granted the prayer, after the learned advocate for the accused persons objected to it.

The provisions of section 34 B relating to admission of a witness statement has six sub-sections. A written statement by any person who cannot be called to testify is admissible in terms of section 34 B (2) of the Evidence Act. Six conditions for admissibility of such a statement are stated therein in paragraphs (a) to (f) quoted, the conditions are: -

- (a) *Where maker of the statement is not called as a witness, If he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend.*
- (b) *If the statement is, or purports to be, signed by the person who make it;*
- (c) *If it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he willfully stated in it anything which he knew to be false or did not believe to be true.*



- (d) If, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings;*
- (e) If none of the parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence, and*
- (f) If where the statement is made by a person who cannot read it, it is read to him before he signs and is accompanied by a declaration by the person who read it to the effect that it was so read.*

In the case of **Shilinde Bulaya vs The Republic**, Criminal Appeal No. 185 of 2013, **Fadhil @ Seleman vs The Republic**, Criminal Appeal No. 283 of 2011, **Director of Public Prosecution vs Ophant Monyancha** [1985] TLR 18 and **Twaha Ali and 5 Others vs R**, Criminal Appeal No. 78 of 2004, all unreported, the Court insisted that

all the above conditions laid down in all paragraphs, that is from **(a)** to **(f)** of sub-section **(2)** of section **34B** of the Evidence Act, are cumulative and must all be met for a witness statement to be admissible under section **34B (1)** and **(2)** of the Evidence Act.

Now it is the duty of this court to see and satisfy itself whether the above conditions were met before the statement of Idd Juma was tendered and received as an exhibit **P2**.

As hinted above, it is the learned State Attorney who informed this court that Idd Juma could not be procured. Efforts (reasonable steps) made to trace his whereabouts were not disclosed to this court so that it could be satisfied that section **34B (2)** could be employed in tendering Idd Juma's statement **(Exhibit P2)**. All reasonable steps as articulated under section **34B** above ought to have been taken; they include tracing the witness place of residences (domicile), work or affidavit, if any from his relatives. See the case of **Joseph Shaban Mohamed Bay and 3 Others vs Republic**, Criminal Appeal No. 399 of 2015, unreported CAT, DSM.

From the record at hand no tangible evidence was rendered to sufficiently establish that there were concerted efforts to procure the attendance of the witness. In my view endorsement by a Street

executive Officer that the witness's whereabouts is unknown following the effort made, is not sufficient evidence that the witness could not be found. It is my consideration also that where a witness is not found and his statement is received, the weight to be attached to the evidence therein, should be less than the weight attached to the evidence of a witness who testified orally and stood cross examined. Exhibit **P2**, therefore, did not meet all the requisite conditions as stated above.

The next issue, what is the consequences of a statement which was tendered as exhibit and received as exhibit in clear violation of section **34 B (2)** of the Evidence Act. Facing with the same situation, in **Shilinde Bulaya's case** [supra], **Fadhil Heri Seleman @ Seleman's case** [supra] and **Twaha Ali and 5 Others case** [supra], the Court of Appeal categorically stated that where all conditions are not complied with the statement should be expunged or discounted.

On the strength of the above cited authorities, the statement by Idd Juma (**Exhibit P2**) is hereby expunged from the record. It follows, therefore that there remaining testimony is that of **PW4** who drew sketch map and recorded cautioned statement of the first accused Baruti Philipo @ Boki. (Exhibits **P3** and **P4** respectively).

As regards a cautioned statement, I am aware that even in absence corroboration, confession alone can ground conviction. See **Tuwamoi vs Uganda [1967]** E.A 84 and **Michael Luhiyo vs Republic [1994]** T.L.R 181. However, under the circumstances of this case, where there is only one cautioned statement, I have warned myself and taken a precaution to rely on such cautioned statement, which in my view, could further need more corroboration. Short of that the cautioned statement of the first accused person (i.e., **Exhibit P4**) and the sketch map (**Exhibit P3**) which merely proves an area of scene, the same cannot prove the offence of murder against the duo accused persons beyond reasonable doubt.

In the premise, the prosecution has failed to prove its case against the accused persons namely Baruti Philipo @ Boki and John Samwel@ Mjeshi, beyond any reasonable doubt; henceforth I find them not guilty of an offence of murder contrary to section 196 of the Penal Code, and I acquit them as such. I now order that the said accused persons, be set at liberty, unless they are otherwise lawfully held in connection with any other criminal offence.

It is so ordered.



  
**A.A. MRISHA**  
**JUDGE**  
**03.01.2023**

Right of Appeal is fully explained.



  
**A. A. MRISHA**  
**JUDGE**  
**03.01.2023**

**Dated at MPANDA** this 3<sup>rd</sup> Day of January, 2023.



  
**A. A. MRISHA**  
**JUDGE**  
**03.01.2023**