

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(TANGA DISTRICT REGISTRY)**

**AT TANGA**

**CRIMINAL SESSION NO. 62 OF 2022**

**REPUBLIC**

**VERSUS**

**ISMAIL YAHAYA MUHAJI.....ACCUSED**

**JUDGMENT**

*27/7/2023 & 15/9/2023*

**NDESAMBURO, J.:**

Ibrahimu Ally and Benedict John @ Babutinga, the deceased persons were friends during their lifetime. On 24<sup>th</sup> September 2017 left Muheza for Tanga Urban and never returned to their families. Sad as it was, their bodies were found murdered lying on the floor in room 303 at Bomai Inn Guest House. Later on, Ismail Yahaya Muhaji, the accused person was arrested in connection with their murder.

Consequently, on 1<sup>st</sup> November 2017, the accused person was charged with two counts of murder contrary to sections 196 and 197 of the Penal Code, Cap 16 R.E 2022. The particulars of the offence of

the first count state that, on the 25<sup>th</sup> of September 2017 at the Guest House called Bomai Inn, murdered Ibrahim Ally. The accused also is alleged on the very same date and place that he murdered Benedict John @ Babutinga. The accused person pleaded not guilty to the information laid against him. The matter proceeded to a full trial where the prosecution summoned a total of 15 witnesses and tendered 11 exhibits while the accused was a sole witness and tendered 2 exhibits.

During the hearing, the Republic was represented by Mr. Paul Kusekwa, Mr. Thomas Gahiri and Mr. Wilfred Mbilinyi, all learned State Attorneys while the accused person had representation from Mr. Yona Lucas, a learned counsel.

Recounting what happened on the incident day, Kamali Ally, PW5 who was a watchman cum receptionist of Bomai Inn Guest House, his testimony was to the effect that on the 24<sup>th</sup> September 2017 at 7.30 pm, while on duty at Bomai Inn Guest House, he received two guests who after being satisfied with the room, they asked him to register them in the guest's registration book. The two guests identified themselves as Said Omali and Rashid Omary, and he

registered their names as requested and gave them room numbers 302 and 303 respectively, who later went to their room. He described Said Omali as black, and medium-sized and had worn a long-sleeved T-shirt with brown and grey colours. At the time he was attending to the two guests, there was an electricity light at the reception which assisted him in properly identifying the guests he was serving including Said Omali. He, later on, received three more guests whom he checked in.

At around 5:00 a.m., Said Omali knocked on his office door at the reception and asked him to open the door for him. He told him that he was rushing to Mgandini market, PW5 opened the door and Said Omali left.

PW5 proceeded to testify that at around 7.30 morning, his co-employees, Rose and Mariam, reported to work and released him. After an hour he received a phone call requesting him to go back to work. On his arrival, he was taken to room number 303 where he saw two bodies lying on the floor which he could not identify. The bodies had wounds on their heads and were tied with pieces of cloth. Later



on, he was taken to Chumbageni police station where he wrote the statement.

On the 8<sup>th</sup> of October 2017, he was called to Chumbageni police station where he was asked to identify Said Omali among the 10 people who were lined up. He did manage to identify him as he had worn the same T-shirt and from his face which he had marked it.

On cross-examination, PW5 testified that the two guests signed the guest's registration register as opposed to what he testified in the examination in chief. But later on, he changed his statement.

Asp Jumanne Njoka testified as PW3, that in 2017 he was stationed at Tanga District and working as OCCID. He recalls that in the morning hours of the 25<sup>th</sup> of September 2017, he received a call from Hassan Mgeni, owner of Bomai Inn Guest House who informed him that there was a murder incident at his guest house where two bodies were found lying on the floor in room 303. He sent A/Insp Charles to the scene of the crime who later on called him and confirmed that the incident was true.



PW3 along with other police officers including D/C Ilembo, PW10 a fingerprint expert went to the scene of the crime and found the bodies lying on the ground in room number 303. He testified that the deceased bodies had wounds on the head while hands and legs were tied with a piece of cloth. While in the room, with PW10, they saw signs of fingerprints and he commanded PW10 to lift the fingerprints. PW3 then interrogated PW5 who told him that, on the 24<sup>th</sup> of September 2017 he checked two men into room number 302 and 303 but one of the guests left very early in the morning.

On the 4<sup>th</sup> of October 2017, PW3 was informed by their informer that the suspect of the murder committed at Bomai Inn Guest House was seen at Vwawa in Mbozi District. He informed the Regional Crime Office (RCO) who commanded him to task A/Insp Felix and D/C Andelile to go to Vwawa to bring back the accused person.

During the cross-examination, PW3 told the court that, Rashid Omali was the person who rented room number 303 at Bomai Inn Guest House. He further said that he did not know if the accused person registered himself in the guest registration book.

Charles Hiza, PW4 was an officer of police sent by PW3 to the scene of the crime on the alleged date. His evidence was that he was sent to Bomai Inn Guest House while in there specifically inside room number 303 he saw the bodies of two men lying on the floor. He called PW3 and confirmed the happening of the incident. He further told the court that, within a few minutes, PW3 and Desdedict, a fingerprint expert, came in and PW3 gave orders on what to do. He was commanded to sketch a map of the scene of the crime which he did. He was also required to take the bodies to Bombo Hospital and later on along with relatives of the deceased persons went to Bombo Hospital where the postmortem examination was conducted.

PW4 further testified that on the 4<sup>th</sup> of October 2017, he received two relatives of the deceased person namely Kalist John and Hamis Athuman whom he took to D/C Juma, exhibit keeper for identifying mobile phones of the deceased persons which were seized from the accused person. D/C Juma brought up a bag with 13 mobile phones, and the two persons identified two Tecno mobile phones T 472 and 528 as relatives' properties. The witness tendered the sketch map which was admitted as Exhibit P7.

On cross-examination, PW4 testified that the bodies of the deceased person were not tied on the neck, but the hands and legs were tied. Moreover, their heads had several wounds. On the phones, he stated that the two mobile phones identified by the deceaseds' relatives were marked by the exhibit keeper. He also stated that he contained the scene of the crime waiting for PW3, OCCID to arrive at the scene.

A/Insp Ilembo, PW10 is a police officer and an expert in fingerprints. He testified as follows, that on 25<sup>th</sup> September 2017, he was commanded by PW3 to go to Bomai Inn Guest House where it was alleged that there was a murder incident. He was required to carry with him his inspection tools which he did.

PW10 having reached the scene of the crime and before getting inside room 303, wore gloves, opened the door and found two bodies lying on the floor. He inspected the area and recovered no exhibits but as an expert, he knew that there should be some fingerprint patterns left behind by the assailants. He then powdered some magnetic black powder on top of the table and wardrobe where he saw fingerprints, he lifted it through a lifting paper and thereafter he



shifted it to the lifting card. The witness further testified that; the fingerprints found on the wardrobe were marked as Exhibit X while the ones lifted from the table were marked Exhibit Y. He further said that he could not get fingerprints from the deceased' bodies as they were wet. He then left for Chumbageni police station where he stored the exhibit in the forensic office inside the closet.

On the 8<sup>th</sup> of October 2017, he was asked by D/sgt Abedinego to hand over the fingerprints that he lifted at Bomai Inn Guest House which he handed through a dispatch book.

The two bodies were shifted to Bombo Hospital and were examined by Dr. Francis T. Ngowi, PW1. He testified that in his examination of the body of Ibrahim Ally, the body had several wounds on the body and trunk area, a black mark on the neck showing signs of being tied by the robe, blood oozing from the ear and nose and had kerosine smell. He concluded that the cause of death was due to severe head injuries and tendered the postmortem report which was admitted as Exhibit P1.

In respect of the examination of the body of Benedict John @ Babutinga, PW1 testified that, upon examination, his body had various

injuries on his face, bruises and blood was oozing from his openings. His body too was smelling kerosine and his death was due to severe head injuries. PW1 tendered a postmortem report which was admitted as Exhibit P2.

On cross-examination, PW1 said that a strangled person's body will bear signs inside the body, with eye bleeding signs and blood marks on the neck which can be seen by the eye, however, he testified that there are also many other signs. He said that the body of Ibrahim Ally had signs of strangulation while the body of Benedict John had no such signs.

The eleventh witness for the Republic was SSP Mwamafupa, (PW11) who was an OCCID Mbozi in 2017. His testimony was that on 4<sup>th</sup> October 2017, he received a telephone call from ASP Masejo who by then was RCO Tanga who informed him that the murder suspect of an offence committed at Tanga with reference IR 2929/2019 is believed to be at Mbozi. He was furnished with an informer's telephone number and after communicating with the informer, he went to the areas where the suspect was residing. He prepared a search warrant and accompanied by 5 police officers, went and

reached the residence of the suspect. At the suspect's residency, they were welcomed by Justine Mwambene, who introduced himself as the suspect's tenant. He later on knocked the door of the suspect Ismail who opened it. After introducing and informing the suspect that they intended to search him, they asked Mwambene to search them, which he did. Thereafter, the police entered his room, searched and recovered 13 pieces of telephone handsets, 3 ATM cards, 8 SIM cards, 8 flash disks and 2 watches. Thereafter the seizure certificate was filled in and signed including the accused person. The witness tendered the seizure certificate which was admitted as Exhibit P9.

The accused person was thereafter taken to Vwawa police station. At the station at around midnight, Coplo Godfrey (PW12) who was there on a special task came in and introduced himself to PW11. Thereafter, PW11 ordered him to take the cautioned statement of the accused person which he did and handed the cautioned statement to PW11. The accused person did confess to having murdered the two deceased persons.

On the next day, he informed RCO Tanga who arranged for officers who go to Vwawa and collect the accused. On the 7<sup>th</sup> of



October 2017, he handed over the accused person, the cautioned statement of the accused person, statements of Justine Mwambene, Coplo Awani and Pc Essaya and all exhibits seized from the accused's house to A/Insp Felix.

In cross-examination, he stated that the handing over of exhibits at Vwawa police station was through a written document that is an occurrence book. He conceded that there was a need for him to testify on the search warrant and also, he had enough time where he could make arrangements. He admitted that he did not issue a receipt to the accused person after the seizure. His statement in court was contradicted by the statement he gave prior in which he said he was an acting OCCID.

PW12 was D/Sgt Godfrey who took a cautioned statement of the accused person. His evidence was that on the 5<sup>th</sup> of October 2017 at 00.00 night he was at Vwawa police station where he had gone for a special assignment. While at the police station, he was ordered by PW11 to take a cautioned statement of the accused person who by that time was in police cells. He took the accused person out of the cell and he signed in the detention book to a room which he had

prepared where only two of them were in. Having introduced himself, he informed the accused person of his rights, including the right to have his relatives or lawyer, and that his statement would be used as evidence in court. That the accused was ready and willing to give his statement and he signed to indicate his acceptance. Thereafter, PW12 recorded the accused's cautioned statement and thereafter the accused person signed after he had read over the statement and he also signed the statement. The cautioned statement was admitted as Exhibit P10 after a trial within trial.

The witness further testified that; the accused person confessed to having committed the offence of murder where he strangled both deceased persons after he had intoxicated them with valium tablets at Bomai Inn Guest House.

On cross-examination, PW12 stated that he did not use force to secure the cautioned statement of the accused person.

The evidence from the prosecution side, further shows that the accused person was transferred from Vwawa police station to Chumbageni police station by Insp Felix Mkini, PW6 in assistance with D/Cp Andelile. PW6 told the court that he went to Vwawa on 5<sup>th</sup>

October 2017 accompanied by D/Cp Andelile where PW11 handed the accused person together with various exhibits including 13 different phones, 8 sim cards, 2 watches, 8 disks, an envelope containing a seizure certificate and cautioned statement of the accused. They travelled and reached Chumbageni police station at midnight where the accused person was put in a cell while the exhibits were stored in the office of D/Cp Juma and on the next day, he handed to D/Cp Juma, an exhibit keeper.

While being cross-examined, PW6 admitted that he did not provide a detailed description of the exhibits that were handed over. Additionally, he acknowledged that there was a need for the exhibits to be documented before being handed over. He also conceded that in his earlier statement, he had not mentioned the inclusion of the cautioned statement of the accused among the exhibit that he carried from Vwawa to Chumbageni police station and he neither explained the reason behind it.

The exhibits taken from the Vwawa police station were received by Sgt Juma, PW2 an exhibit keeper at the Chumbageni police station. He testified that on 8<sup>th</sup> October 2017, he received exhibits from



A/Insp Felix, PW6. The exhibits that he received were marked TAN IR 2929/2017 which included 13 pieces of various mobile phones, 2 passports, 8 sim cards, 8 flash disks, 2 watches and 3 ATM cards. He registered and marked them as number 48 of 2017 and later on stored them in the exhibit room. The witness tendered the above exhibits which were admitted as Exhibit P3, P4, P5 and P6 respectively except for 2 watches and one ATM card.

On 9<sup>th</sup> October 2017, PW2 was approached by A/Insp Charles who wanted the exhibits he had received for identification purposes, he handed the exhibits to him who later on returned to him for safe custody.

During cross-examination, PW2 acknowledged that some exhibits were missing and had been misplaced within their exhibit room.

Abedinego Gideon testified as PW14, he is a retired police officer. He recalls having taken fingerprints of the accused person. He testified that on the 8<sup>th</sup> of October 2017, he took the accused person from the police cells to take his fingerprints, and he marked them Z P. He elaborated on the whole process where he placed the accused's

fingers in police form 14B (PF 14B) and having completed the exercise, he properly marked the exhibit as TAN/IR 2929 of 2017. He asked PW10 to hand over the fingerprints which he lifted from the scene of the crime which he did. He thereafter stored the exhibits in safe custody.

The witness further testified that, on the 8<sup>th</sup> of October 2017, Insp Felix, PW6 handed to him four statements of the accused person, Awani, Justine and Mwamafupa which he stored in safe custody.

PW14 proceeded to testify that, on the 11<sup>th</sup> of October 2017 he prepared the exhibits (the fingerprints he took from the accused and those which were lifted from the scene of the crime) to be transferred to the office of the Forensic Bureau in Dar es Salaam for examination. He handed the exhibits plus the letter to PW13, however before that he showed him what was inside and thereafter, he sealed the envelope and handed it to him. On 5<sup>th</sup> February 2018, he received an examination report from the Forensic Bureau.

About PW13, D/C Daudi a police officer, recalls an incident on 13 October 2017 where he was handed over exhibits by D/S

Abedinego to transfer to the Forensic Bureau in Dar es Salaam. The exhibits comprised of fingerprints taken in PF 14B and the others were in two cards. The exhibits were enclosed within an envelope and on top of it was marked TAN IR 2929/2017. Accompanying the exhibits was a letter with reference TAN/D/CID/B1/41/VOLIV/105. He travelled to Dar es Salaam where he was received by S/G Khama. Upon arrival, he handed over the exhibits which were registered as FB 74/2017. Further, on 4<sup>th</sup> February 2018, while in Tanga, he received orders to visit the offices of the Forensic Bureau in Dar es Salaam once again. There, he met with S/G Khama who handed him the examination report with the reference number TAN IR 2929/2017. The report was subsequently handed over to D/S Abedinego through a dispatch book.

While being cross-examined, PW13 affirmed that the exhibit he transported to the Forensic Bureau offices in Dar es Salam was not sealed and inside the envelope, there were three distinct exhibits each marked with a case number. He further stated that he took numerous fingerprints although he could not recall the exact numbers.

The fingerprint samples were examined by Khama Ng'azi Killo, PW15 a fingerprint expert from the Forensic Bureau at Dar es Salaam.



He testified how he received two exhibits from PW13 with the covering letter TAN/D/CAD/D.1/41/VOL IV/105. One of the exhibits was marked X Y, this was a sample lifted from the scene of the crime while the other had Z P taken on PF 14B bearing the name of Ismail Yahaya Muhaji. He examined the exhibit and made a report which he tendered as Exhibit P11 which comprises the report and fingerprint booklet. In his examination, he found the fingerprints lifted from the scene of the crime and marked X matched the fingerprints taken from the accused person.

On how the two mobile phones alleged to be properties of the deceased which were alleged to have been found in possession of the accused person were identified, the evidence of Ally Ibrahim Mnubi, PW8 shows that he did identify the two mobile phones as properties of the two deceased persons. On how the witness identified them, it was his testimony that he identified them through their make TECNO T 228 and T 472 and the physical identification.

Insp Chalamila, PW7 is a police officer who conducted the identification parade on the 8<sup>th</sup> October 2017. He testified that at the police station, he met D/Cp Kivuyo who was preparing the area where

the identification parade could take place and the participants of the parade. He testified that he informed the accused of his rights including the right to choose any place to stand in the line made up and change his clothes if he so wished. He also informed the witness that, he would have to pass through the line and if he could identify the accused, he should touch his shoulder. According to his evidence, PW5 identified the accused person. PW7 tendered Identification Parage Register (PF186) as Exhibit P8.

At the closure of the prosecution case, the accused was found to have a case to answer and subsequently, he gave his defence on affirmation denying to have participated in the killing of the two deceased persons at Bomai Inn Guest House. He testified that he was arrested on the 5<sup>th</sup> of October 2017 at 1100 hours at Vwawa when 8 police officers went to his house. Those police officers asked him to lie down facing the floor, then two police officers went inside his house and came out. Later on, four police officers went inside his house and shortly after that, he was asked to get inside his house together with his tenant. Two police went inside his bedroom and took his black

bag. The police asked his tenant namely Justine to sign a certain paper which he did not know its contents.

He was thereafter taken to Vwawa police station where he was detained up to 7<sup>th</sup> October 2017 when he was transferred to Chumbageni police station. On the 10<sup>th</sup> of October 2017, the accused person alleged that he was taken out of his cell by PW12 and taken to Saruji police station. PW12 was along with other police officers including PW3. At Saruji police station he was tortured and he lost consciousness. He regained consciousness and found his right thumb sheared with ink.

Those police officers took him back to Chumbageni police station where he stayed till 27<sup>th</sup> October 2017 and was taken out of his cell by PW12 to a room where he met other police officers. He alleged to have been tortured and he had no alternative but to sign and place his thumbprint on the pieces of papers that he was asked to sign. Some of the papers that he signed were blank while others were written.

On cross-examination, he admitted that he had not tendered any medical chit to prove that he sustained wounds after being



tortured. Further, he did not cross-examine PW3 and PW12 on the issue of taking him to Saruji police station. He insisted that his statement was not taken at Vwawa police station.

Upon the closure of the trial, both sides filed final submissions.

Mr. Lucas, a learned counsel for the accused, contended that the prosecution has failed to prove the case against the accused person beyond a reasonable doubt. He forwarded the following reasons: **First**, D/Sgt Godfrey, PW12 is not a credible witness. The learned counsel alleged that, in his testimony, PW12 testified that there is no process of signing in a daily attendance while D/Cpl Abednego testified that there is an occurrence book (OB), therefore PW12 is an incredible witness when his evidence is considered concerning other prosecution witnesses. To bolster his preposition, he referred this court to the case of **Nyakubonga Boniface v The Republic**, Criminal Appeal No.434 of 2016.

**Second**, the purported cautioned statement (Exhibit P10) does not present the true story and does not correctly relate to what happened and it establishes no guilt of the accused person. More seriously, it conflicts with other evidence of prosecution particularly

the postmortem reports (Exhibit P1 and P2) and evidence of other witnesses regarding the cause of death of the two deceases and therefore it does not support the offence of murder that the accused is charged with. The learned counsel refers the court to the case of **Tuwamoi v Uganda** (1967) EA 84 and **Jackson Protaz v The Republic**, Criminal Appeal 385 of 2020.

**Third**, the learned counsel also faulted the credibility of the identification parade and fingerprints for being worthless. He alleged that the identification parade was conducted contrary to law and relied on the decision of **Rashid George @ Mvungi v The Republic**, Criminal Appeal 424 of 2016. The learned counsel maintained that Insp Chalamila, PW7 at the termination of the parade failed to ask the accused if he was satisfied with the manner that the parade was being conducted. Likewise, Kamali Ally, PW5 while being cross-examined admitted that he was told by the police that he was required to identify a suspected person who committed the murder incident at the Bomai Inn Guest House. In addition, PW5 did not describe the alleged suspect before the identification parade contrary

to the holding in the case of **Hamis Ally and three others v The Republic**, Criminal Appeal No. 596 of 2015.

The learned counsel further alleged that there is no connection between the alleged fingerprints taken from the crime scene and the accused person due to the shortcomings he noted. There is no clear evidence that the purported fingerprints (X-Y) were lifted from the crime scene, the prosecution did not tender the fingerprint and photograph lifted from the crime scene and the chain of custody has been broken. He cited the case of **Mashaka Pastory Paulo Mahengi @ Uhuru and 5 Others v The Republic**, Criminal Appeal No.49 of 2015 and urged this court to disregard the evidence of the fingerprint for its failure to comply with Police General Order (PGO) 229.

**Fourth**, Mr. Lucas urged the court to draw an adverse inference against the prosecution for its failure to summon material witnesses and tender important documents without explanation. The material witnesses mentioned were D/Cpl Andelile who accompanied PW6 to Vwawa, Agripina who witnessed the search at the residence of the accused, and Rukia of Bomai Inn Guest House. The documentary



evidence includes the visitor's register of Bomai Inn Guest House and movement order to prove that PW12 travelled to Vwawa on the 4<sup>th</sup> of October 2017.

**Five**, there is serious doubt on how the accused person was named as a suspect and reported to the police as the prosecution witnesses have two versions of stories.

**Six**, the doctrine of recent possession in respect of the properties alleged to have been seized from the accused person cannot be applied in the instant case as there was no receipt issued by the police contrary to section 38(3) of the Criminal Procedure Act, Cap 20 R.E 2022 and some of the alleged properties were not tendered in court. If that was not enough, the prosecution failed to prove beyond a reasonable doubt that the seized items were owned or linked anywhere with the deceased person. The counsel placed his reliance on the decision of **Idd Muhidin @ Kibatamo v The Republic**, Criminal Appeal No. 101 of 2008.

Having submitted all that, the learned counsel was convinced that the charge against the accused person had not been proved to

the required standard and urged this court to find the accused person not guilty of the murder and acquit him forthwith.

On the other hand, in their final submission, the prosecution maintained that the fifteen prosecution witnesses and eleven tendered exhibits managed to prove all the elements of murder against the accused person at the required standard.

In so proving, the prosecution argued that the evidence of PW1 culpable with Exhibits P1 and P2 proved that the two deceased persons died of unnatural death and the cause of death was due to head injuries.

Further, the death of the two deceases was caused by unlawful acts of the accused person. In proving this element, the prosecution is banking on four pieces of evidence. **First** is the identification of the accused person at the scene of the crime. Relying on the decision of **Waziri Amani v Republic**, [1980] TLR 250, the prosecution submitted that the accused person was properly identified by PW5 at the scene of the crime and that the conditions for identification were favourable and eliminated all mistaken identity of the accused person.

Moreover, the accused was identified in the identification parade which was Chumbageni police station. The learned State Attorney maintained that the General Police Order (PGO) number 232 was adhered to whereby, PW5 did identify the accused person and that proved that PW5 properly identified the accused person at the crime scene. He submitted that both PW5 and PW7 were not cross-examined on how he was identified and further, the accused person did not deny having slept at Bomai Inn Guest House on the incident date. He cited the case of **Sebastian Michael and Another v Republic**, Criminal Appeal No. 145 of 2018 CAT (unreported) where it was held that failure to cross-examine a witness on material evidence amounts to acceptance. The prosecution, therefore, averred that the accused person was properly identified.

**Second**, it was also proved that the accused person was found in possession of the two deceased' mobile phones (Exhibit P11) seized from his house at Vwawa under the testimony of PW11 and which were identified by PW8, son of Ibrahim Ally, one of the deceased. The learned State Attorney, in addition, submitted that since prosecution witnesses were not cross-examined by the accused person on the two



identified mobile phones and did not deny that the phones were the properties of the deceased or claimed to be the owner, then it amounted to proper identification of the deceased's properties. He referred to the case of **Kija Nestory @ Jinyamu v Republic**, Criminal Appeal No. 455 of 2007 CAT which cited the case of **Nikandael Frediriko v R**, Criminal Appeal No. 35 of 1995 CAT (both unreported). He wrapped it up by urging this court to invoke the doctrine of recent possession and held the accused liable for the offence of murder.

**Third**, there is evidence from the prosecution that the accused fingerprints were found in room 303 at Bomai Inn Guest House where deceased bodies were found. The evidence from PW3 is vivid on how he cordoned off the crime scene area and later on PW10 came in and lifted the fingerprints and placed them on a lifting card which was detected on the table and cupboard and labelled X and Y. Further, PW14 took the accused's fingerprints when he was arrested and labelled it Z P. The samples were taken to the Forensic Bureau in Dar es Salaam. Upon examination of the samples by PW14, the fingerprints lifted from the scene of the crime matched that of the

accused person taken by PW14. That proves that the accused person is responsible for the death of the two deceased as the two persons including twins cannot have the same fingerprints as held in **Muganyizi Peter Michael and three others v Republic**, Criminal Appeal No. 144 of 2020 CAT (unreported).

The **fourth** piece of evidence that connects the accused person with the offence he stands charged with is the cautioned statement (Exhibit P10) he gave on the 5<sup>th</sup> of October 2017 while at Vwawa police station where he confessed to having murdered the two deceased persons. The learned counsel placed reliance on the decision of the Court of Appeal of **Majid Hussein Mboroy and two others v Republic**, Criminal Appeal No. 141 of 2015 (unreported) and insisted that following the confession of the accused person he is the best witness as he confessed his guilt. The learned counsel was also mindful that the retracted confession needs to be corroborated by other evidence in the trial and there is plenty of corroborative evidence from testimonies of PW5 and Exhibit P11. Besides, the court may proceed and convict the accused person even on uncorroborated evidence where it is satisfied that the confession is true as held by the

Court of Appeal in **Flano Masalu @ Singu v Republic**, Criminal Appeal No. 366 of 2018 (unreported).

The last legal issue that the prosecution submitted is whether the accused person killed the deceased person with malice aforethought. On this issue, the prosecution was adamant that the accused person planned to injure the deceased persons before the incident as it can be reduced from the cautioned statement and this fits well within the provision of section 200(a) of Cap 16. It was also their submission that the way the murder incident was planned and committed surely proves the malice aforethought as held in **Enock Kipela v Republic**, Criminal Appeal No. 150 of 1994 CAT (unreported).

In regards to the chain of custody of the exhibits seized from the accused person at Vwawa, the cautioned statement of the accused person recorded at Vwawa police station and fingerprints lifted at the scene of the crime, the learned counsel admitted that there was no documentation or paper trail tendered in court to establish the chain of custody but the prosecution witnesses who came across the exhibits testified how the documents were



exchanged and handled hence the chain of custody was maintained. The learned counsel referred the court to the case of **Muganyizi Peter Michael and three others** (supra) to back up their stance that the chain of custody can be established by documentation (paper trail) or oral account.

The learned State Attorney ended their submission by maintaining that the prosecution side proved the case beyond a reasonable doubt to warrant a conviction.

I have examined the evidence by both parties and the final submission made by the learned counsels. As earlier stated, the accused person is charged with an offence of murder contrary to sections 196 and 197 of Cap 16. Section 196 provides the following:

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

That being the case, the issue for the determination is whether the accused person caused the death of the two deceased persons and if the issue is answered in the affirmative whether the accused intended to kill the two deceased persons. This being a criminal case,

the prosecution bears the duty to prove the case against the accused person beyond a reasonable doubt. The burden of proof does not shift to the accused person and the accused person can only be convicted on the strength of the prosecution case and not on the weaknesses of his defence, see **Hemed v Republic** (1987) TLR 117. Therefore, the prosecution must prove beyond a reasonable doubt three ingredients of murder as stated in the case of **Philimon Jummane Agala @ J4 v The Republic**, Criminal Appeal No. 187 of 2015 CAT (unreported).

The three ingredients that need to be proven are as follows:

- i. That a human being died with an unnatural death.*
- ii. That the said unnatural death resulted from an unlawful act caused by the accused person.*
- iii. The accused person intended the death or at least serious bodily harm when doing that unlawful act.*

Based on the evidence adduced by the prosecution, the fact that two deceased persons namely Ibrahim Ally and Benedict John @ Babu Tinga died unnatural death is not contentious. The prosecution evidence adduced by PW1 proved that on the 27<sup>th</sup> of September 2017, an autopsy examination of the bodies of the two deceased was conducted. In his examination, he found the body of Ibrahim Ally with

several wounds with bleeding from his nose and ears. His neck had a black mark showing signs of strangulation similarly his body had a kerosene smell. PW1 concluded that the cause of death was due to a severe head injury. Likewise, the autopsy examination conducted on the body of Benedict John revealed various injuries on his face, bruises, blood oozing from his openings, and his body had a kerosine smell with some burn marks. The post-mortem reports of the two deceased persons were tendered and admitted as Exhibit P1 and P2 without objection, corroborated the testimony of PW1 that the cause of death of the two deceased persons was due to severe head injury. Therefore, it is not disputed that the above two persons died an unnatural death. Hence, the prosecution has proved this fact beyond a reasonable doubt, and this court accordingly holds so.

Moving straight to the second ingredient of whether the accused person is responsible for the unlawful killing of the two deceased persons, the prosecution relied on the evidence of 15 witnesses and 11 exhibits. None of the 15 prosecution witnesses testified to having seen the accused person committing the alleged murder, but that does not mean that it can exonerate the accused from the offence he



stands charged if there is sufficient evidence to implicate him with the offence. The Court may convict the accused person on circumstantial evidence if facts lead to no other conclusion than that of the guilt of the accused person. In **Hamida Mussa v Republic** [1993] T.L.R. 123, the Court held:

*"Circumstantial evidence justifies conviction where inculpatory fact or facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt".*

Having no eye witness to prove the case, the prosecution case hinges on four pieces of evidence that link the accused person with the offence he stands charged with. **One** is the identification of the accused person by PW5 at Bomai Inn Guest House where the alleged murder took place and subsequently the identification parade conducted at Chumbageni police station. **Two**, being found in possession of the two deceased persons' properties that is, the two mobile phones admitted as Exhibit P3. **Three**, forensic evidence by way of fingerprint, Exhibit P11 and **four** his cautioned statement, Exhibit P10.

The prosecution evidence on the identification of the accused person is of two limbs, that is a visual identification of the accused by PW5 when he checked in and out at Bomai Inn Guest House and the identification parade conducted at Chumbageni police station.

The prosecution is relying on the visual identification of the accused by PW5 and stressing that there were favourable conditions to eliminate all mistaken identities of the accused person and placed their reliance on the case of **Waziri Amani** (supra).

The principles relating to visual identification have been emphasized by numerous case laws in our jurisdiction, among them is the case of **Raymond Francis v Republic** [1994] TLR 100 where the Court of Appeal, among others, held that:

*"It is elementary that in a criminal case whose determination depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance"*

Guiding factors to be taken into consideration to decide whether or not the identification of the suspect/accused at the scene of the crime was watertight were stated in the case of **Waziri Amani** (supra). These include:

*"...the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, whether it was day or night time; whether there was good or poor lightening at the scene, whether the witness knew or had seen the accused before or not".*

In **Issa Mgara @ Shuka v Republic**, Criminal Appeal No. 37 of 2005 CAT (unreported), the Court observed as follows:

*"In our settled minds, we believe that it is not sufficient to make bare assertions that there was light at the scene of the crime. It is common knowledge that lamps be they electric bulbs, fluorescent tubes, hurricane lamps, wick lamps, lanterns, etc. give out light with varying intensities... Hence the overriding need to give sufficient details on the intensity of the light and the size of the area illuminated. "*

Further, in the case of **Magwisha Mzee and another v Republic**, Criminal Appeal No. 466 of 2007 CAT (unreported) it was observed that:

*"When it comes to issues of light, clear evidence must be given by the prosecution to establish beyond a reasonable doubt that the light relied on by the witnesses was reasonably bright to enable the identifying witnesses to*



*identify the accused person. The bare assertion that "there was light" would not suffice".*

Yet in another decision of the Court of Appeal on the guidelines in the identification of suspects, the case of **Jaribu Abdallah v R** (2003) TLT 271, the Court remarked as follows:

*"In the matters of identification, it is not enough merely to look at the factors favouring accurate identification. Equally important is the credibility of the witness. Favourable conditions for identification are no guarantee against untruthful evidence".*

In the case at hand, PW5 alleged to have identified the accused person at the scene of the crime and described him by the physique that he had a medium body size with black skin and the attire he was wearing with the aid of an electricity light. He saw him twice, when he was checking him in and by the time, he was getting out early in the morning and therefore coupled with sufficient light, he managed to identify the accused person. The statement on the identification of the accused person at the scene of the crime matches the statement that he gave at the police station and which was tendered as Exhibit D1. In the statement, PW5 had this:

*"mtu huyo ni **mfupi kiasi, mweusi** na ambaye hata nikimuona muda huu namkumbuka kwa sura yake, umbo lake na sauti yake kwa sababu kwa muda waliopanga na kuondoka naweza kuwatambua kwa sababu wakati wanaandikisha majina yao kwa kuwa **kulikuwa na mwanga wa kutosha wa taa ya umeme** hivyo niliwaona vizuri..."*

The learned State Attorney was adamant that, the accused person was properly identified while Mr. Yona did not submit on this area.

The question is whether PW5 properly identified the accused person and it should be borne in mind that, the person he was attending was not familiar with him. To my observation, it was not enough for PW5 to give out bare assertion that he identified the accused person as there was enough electricity light without sufficient details of the distance where the said electricity light was from where they were and the size of the area illuminated to rule out the possibility of mistaken identification. Likewise, the description given by PW5 that the accused was of medium size and black skin is too general to sufficiently describe a person he alleged to have identified,

as there are so many medium and black-skinned men around the world.

Furthermore, it is unlikely that PW5 identified the accused person to be among the guests he attended on the night of 24<sup>th</sup> September 2017 because he did not mention or even describe him to his employer or co-worker when he was called back to the scene of the crime on the 25<sup>th</sup> September 2017. He did not describe or name the accused to PW3 who testified to have interrogated him while at the scene of the crime, instead, he waited until he gave his statement at the police station. PW3 on his part did not testify anything about PW5 naming or describing the accused person to him when he first met him apart from saying that, PW5 informed him that he checked in two guests on the night of 24<sup>th</sup> September 2017. Likewise, in the statement he made at the police station, Exhibit D1, nothing is stated regarding him naming or describing the accused to his employer, co-worker or the police officers at the scene of the crime. On several occasions, the Court of Appeal has insisted on the importance of a witness to the suspect at the earlier opportunity as an assurance of his reliability. See, for instance, the cases of **Marwa Wangiti &**



**Another v Republic**, Criminal Appeal No. 6 of 1995 CAT (unreported) where it stated:

*"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry".*

In the above elaboration, therefore, I hold that the identification made by PW5 was doubtful, not watertight and insufficient to eliminate possibilities of all mistaken identification of the accused person at the scene of the crime. Therefore, PW5's evidence is unreliable and cannot be relied on by this court.

The second limb of this aspect is the identification parade. The prosecution is relying on the evidence of PW5 who identified the accused person following the identification parade which was conducted on the 8<sup>th</sup> of October 2017 and was submitted by the learned State Attorney, which was conducted in accordance with PGO. They also challenged the defence for its failure to cross-examine PW5 on his testimony that he identified him at the scene of the crime. Mr. Yona on his side, among others challenged the identification parade which was conducted by PW7 for not adhering to the PGO and further

PW5 did not give details of the suspect before the identification parade.

There is no dispute that the identification parade was conducted as the accused person was not known to PW5, however, the question is whether it was conducted in accordance with the laid down procedures. For the evidence of the identifying witness to be credible, the case laws guide us that, such a witness must describe the suspect before he identifies the suspect at the identification parade. In the case of **Yohana Chibwingu v Republic**, Criminal Appeal No. 117 of 2015 (unreported) the erstwhile East African Court of Appeal held:

*"That in every case in which there is a question as to the identity of the accused, the fact of there having been given a description and the terms of the description are matters of highest importance of which evidence ought always to be given first of all, of course by the person who gave the description, or purports to identify the accused and then by a person to whom the description was given".*

In the instant matter, PW5 was the identifying witness while PW7 was an officer who conducted the identification parade. From the testimony of PW7, after the identification parade was arranged, the

accused person was called to join the 9 participants, he informed him of his rights and he took his position. Thereafter PW5 was brought and he informed him what he was required to do which is if he can identify the accused person, he should touch his shoulder. PW5 did as directed and he did identify the accused. PW7 went on to testify that, PW5 told him that he did identify the accused by the look of his face.

From the evidence of the prosecution, there is no evidence that PW5 gave descriptions of the accused person to any police officer or any other person before the identification parade was conducted. In his testimony, PW5 told the court that on the 8<sup>th</sup> of October 2017, he was called to go to Chumbageni police station and having reached there, he found 10 people lined up. He was told to identify Said Omali by touching his shoulder if he knew him. The witness confirmed his statement while being cross-examined. PW5 told the court that he identified the accused person from the T-shirt that he was wearing as it was the same T-shirt, he had put on incident day and from his face which he had marked it. Likewise, PW7 did not mention that PW5 described the accused person before the identification parade.



The above was contrary to the requirement set in the decision of **Yohana Chibwingu** (supra) and raises doubts about the identification of the accused person therefore, it cannot be said that the identification parade was properly conducted.

As if that was not enough, the identification parade conducted did not adhere to the rules provided by PGO, especially rules d, k and o. From the testimony of PW7 apart from informing the accused of the purpose of the identification parade and informing him of his right to choose a place to stand in the line, change position and change clothes, he did not inform him of his right to have an advocate or relative nor that if he had any objection to any person participating in the parade. The prosecution did not even tell the court if the person selected to join the parade was of similar age, height, general appearance and class of life as of the accused person. D/Cp Kivuyo who was mentioned by PW7 as an officer who prepared the identification parade was not summoned to testify the same. In that sense, therefore, the identification parade was not conducted in accordance with the PGO and hence its evidence has little value to the case against the accused person.

The second evidence that links the accused person with the killing of the two deceased persons is the alleged fact that he was found in possession of the deceased persons' two mobile phones (Exhibit P11) that were identified by PW8 by their model and physical examination and hence the prosecution is relying on the doctrine of recent possession.

The doctrine of recent possession was elaborated in the case of **DPP v Joachim Komba** (1984) TLR 214 that if a person is found in possession of recently stolen property and gives no explanation depending on the circumstances of the case, the court may legitimately infer that he is a thief, a breaker or a guilty receiver. The Court of Appeal of Tanzania in the case of **Manazo Mandundu and Another v Rz** (1990) TLR 92 held that in befitting circumstances, the doctrine of recent possession could be invoked not only to support shopbreaking and theft but also murder.

Court of Appeal dealt with the issue of applicability of the doctrine of the recent possession in the decision of **Joseph Mkumbwa & Samson Mwakagenda v R**, criminal Appeal No. 94 of 2007 (unreported), where it held:

*"Where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place where the property was obtained. For the doctrine to apply as a basis of conviction, it must positively be proved, **first** that the property was found with the suspect, **second**, that the property is positively the property of the complainant; **third**, that the property was recently stolen from the complainant; and **lastly** that the stolen thing in possession of the accused constitutes the subject of a charge against the accused. It must be the one that was stolen/obtained during the commission of the offence charged. The fact that the accused does not claim to be the owner of the property does not relieve the prosecution of their obligation to prove the above elements."*

In the instant matter, the alleged properties which the prosecution claims to belong to the two deceased persons are two mobile phones which were admitted as Exhibit P3. Applying the four principles to the evidence before this court; first, as per the certificate of seizure, Exhibit P9 among the exhibits which were found in the house of the accused person, were 13 mobile phones including the two phones which are alleged to be the properties of the two



deceased persons. Exhibit P9 was signed by the accused person acknowledging that the items mentioned there were recovered from his house when he was arrested at Vwawa, therefore, it cannot be disputed that the two phones were found in possession of the accused person. Mr. Yona is attacking this piece of evidence for the failure of the police to issue a receipt as required by section 38(3) of the Criminal Procedure Code, Cap 20 R.E 2022, however, in light of the Court of Appeal decision of **Jibril Okash Ahmed v R**, Criminal Appeal No. 331 of 2017, I hold that the anomaly is minor and does not affect the substance of the seizure certificate that the two mobile phones were found in possession of the accused person.

The second condition is whether the two mobile phones were proven to be the property of the deceased persons. When PW8 testified before this court, he said that he identified the two mobile phones to be the property of the two deceased persons. He identified the mobile phones through their make (Tecno T 228 and T 472) and physical identification. Apart from the testimony given by PW8, there is no other prosecution witness who testified regarding the ownership of mobile phones. Mr. Yona submitted that the prosecution failed to

prove that the phones were owned or linked to the deceased person. Can that identification be said to have sufficiently established that the two mobile phones found in possession of the accused persons were properties of the two deceased persons? The answer is no. This is because the identification made by PW8 on the two mobile phones by Tecno T 228 and T 472 and their colour is not enough or even exceptional identities that can differentiate the mobile phones from other mobile phones of the same make and colour. One would expect the prosecution to bring evidence such as the receipt used to purchase the mobile phones indicating the IMEI number and names of the deceased persons or the evidence from the telephone service provider company that would prove that the telephone numbers of the deceased persons together with the IMEI were being used in those handsets found in possession of the accused person. This goes along with the decision of the Court of Appeal in **Lomayan Kivuyo @ Babuu v R**, Criminal Appeal No. 531 of 2016 CAT (unreported) where the owner did not identify the stolen property, the Court held thus:

*"We also agree with the submissions of both parties in exhibit P2, the alleged stolen phone was not specifically identified by the complainant. PW1 did not give*

*distinguishing marks of the phone to prove that it belonged to her."*

Moreover, there is no evidence brought by the prosecution to prove that, the deceased persons had their mobile phones when they entered Bomai Inn Guest House and ultimately met their death. In short, there is no evidence that links Exhibit P9 and the deceased persons.

The prosecution in the final submission, relied on the decision of the Court of Appeal of **Kija Nestory @ Jinyamu** (supra) and urged this court to find that, there was a proper identification of the deceased persons' properties as the accused person did not claim to be the owner of the property or challenged the mobile phones being properties of the two deceased persons. I hesitate to say that, the facts of the above case are different from the case at hand. In the above-cited case, the stolen goats were identified by the witnesses, unlike this case. Further, the prosecution is not relieved from their obligation to prove the four elements of the doctrine of recent possession only because the accused person has not claimed to be the owner or deny that the properties are owned by the deceased as



held in the case of **Joseph Mkumbwa & Samson Mwakagenda** (supra). For those reasons, therefore, I hold that the doctrine of recent possession is inapplicable in the instant matter.

The third piece of evidence that links the accused person with the killing of the two deceased persons is the evidence of fingerprints. The prosecution evidence is that the fingerprints that were lifted from the scene of the crime match that of the accused person taken upon his arrest. The prosecution places its reliance on the examination report, Exhibit P11 and evidence of witnesses. Mr. Yona vehemently disputes this issue. This court will examine the fingerprint evidence to find out whether it connects the accused with the offence he is charged with.

In deciding this aspect, I wish to quote the provision of section 47 of the Evidence Act, Cap 6 R.E 2022 which governs the fingerprints expert opinion. The section provides as follows:

*"When a court has to form an opinion upon a point of foreign law, or of science or art, or as to the identity of handwriting or finger or other impressions, the opinion, upon that point of persons (generally called experts) possessing special knowledge, skill, experience or training*

*in such foreign law, science or art or question as to the identity of handwriting or finger or other impressions are relevant facts”.*

The PGO No. 229 is also crucial as it governs handling, labelling, recording, custody, packing and final disposal of the exhibits. The PGO provides that exhibits are vital evidence and hence proper care must be taken in handling them.

Finally, I would like to cite the position of case law which provides that:

*“Fingerprint identification is valuable because fingerprints are unique, no two fingerprints are alike. Even identical twins, with identical DNA, have different fingerprints. Fingerprints are unique, and do not change throughout one’s life time or as one ages. Thus, fingerprint examiners can trace a fingerprint back to its source. See Hillary Moses, Fundamentals of Fingerprint Analysis, CRP Press, 2015 and **Robert John Buckley v Regina**, [1999] EWCA, 34 Crim 1191) and **Smith R v (Rev. 1)**, [2011] EWCA, cited by the Court of Appeal in **Mashaka Pastory Paulo Mahengi @ Uhuru and Five Others v The Republic**, Criminal Appeal No. 49 of 2015 (unreported).*

In this matter, there is no dispute that, the prosecution has not brought evidence of a photograph of the scene of the crime as provided by paragraph 5(a) of PGO No. 229. From the evidence of PW10 while at the scene of the crime, he detected and lifted fingerprints from the table and wardrobe. The fingerprints lifted from the wardrobe were marked as X while those which were lifted from the table were marked Y. Exhibits X Y were kept in safe custody at their office.

Later on, the accused person was arrested and his fingerprints were taken by PW14 in form PF 14B and labelled as Z P. The exhibits were thereafter shifted to the Forensic Bureau in Dar es Salaam for examination. PW15 conducted the examination and after the analysis, he concluded that the fingerprint samples lifted at the scene of the crime and marked X matched the fingerprint samples taken from the accused person which were marked Z P. In his report, Exhibit P11 he concluded as follows:

**"HITIMISHO**

*Sina shaka yoyote kwamba alama ya kidole iliyopo kwenye  
**kielelezo "X"**- Kadi ya alama za vidole zilizopatika*



*kwenye eneo la tukio **zinalingana** na alama za vidole namba 2,3,4 na 5 za mkono wa kulia zilizopo kwenye sampuli za alama za vidole zenye jina la **ISMAIL S/O YAHAYA @ MUHAJI**. Nimeianisha **FB/SC/FP/74/2017 "X"** ni ya mtu ambaye amechukuliwa sampuli za alama za vidole kwenye **PF 14B** tarehe **08/10/2017** zenye jina la **ISMAIL s/o YAHAYA @ MUHAJI**"*

It is also important to note that, PW10 was an officer who lifted the fingerprint sample from the scene of the crime. He testified that he marked the fingerprints found on the wardrobe as Exhibit X while the one lifted from the table was marked Exhibit Y. It was the fingerprints marked X which PW15 relied on in his report.

The above authorities coupled with the background will assist this court to answer the posed question. I have examined the sketch map tendered in court as Exhibit P7, the furniture indicated in room 303 is only two; a bed and a table. The sketch map does not in any way show that there was a wardrobe. The question that immediately disturbed my mind is the reliability of the testimony of PW10 who testified that he lifted fingerprints from two areas that is from the wardrobe and table which he marked as X Y respectively. If that was the case, why was the wardrobe not indicated in the sketch map? The

wardrobe being a crucial furniture ought to have been shown on Exhibit P7 as it was the furniture where the fingerprints were lifted from and which confirmed/ matched the accused's fingerprints taken after his arrest.

In addition, the prosecution did not bother to tender the photographs of the scene of the crime as evidence. In my observation, the photographs are critical as far as the fingerprints are concerned. These photographs could have potentially clarified the uncertainties regarding the presence of a wardrobe at the scene of the crime, where the fingerprints marked X were lifted.

Moreover, it is worth noting that the lifting cards marked as X Y along with PF14B, are not part of the evidence. The absence of these exhibits has weakened the prosecution's case.

There is an issue of the chain of custody of the fingerprints which was also raised by the learned counsel for the accused person in his submission, however, I refrain from discussing it due to my holding above.

To conclude this part, it was the prosecution's duty to establish its case beyond reasonable doubt. Specifically, they were required to demonstrate that the fingerprints marked X which matched the fingerprints taken from the accused person were indeed lifted from the scene of the crime. Without this evidence, it cannot be definitely established that the fingerprint marked X connects the accused person with the case at hand. Therefore, I affirm this stance.

The last piece of evidence that connects the accused person with the offence he stands charged with is the cautioned statement where he is alleged, to have confessed to murdering the two deceased persons. It is on the record that, at the trial and in his defence, the accused person has denied giving the cautioned statement contending that he did not make it, he therefore retracted the statement. Despite that, the cautioned statement was admitted as Exhibit P10 following a trial within trial which was conducted after the court was satisfied that the statement was voluntarily made by the accused person.

Having so ruled that the confession was voluntarily made, the issue which arises at this juncture is the weight to be attached to the



admitted cautioned statement in proving the accused guilty or otherwise. It is trite law that a confession voluntarily made to a police officer by an accused person may be proved against him, see section 27(1) of the Evidence Act, Cap 6 R.E 2022. Moreover, as per section 3(1)(a) – (d) of Cap 6, for the court to rely on it, it must satisfy itself that the accused person has admitted all ingredients of an offence he stands charged with.

Notwithstanding the aforementioned provisions, the Court of Appeal has consistently highlighted on various occasions that for a confession statement to be accepted as admissible evidence, it must be given voluntarily. Moreover, in cases where the confession has been repudiated or retracted, the court is obligated to seek corroborating evidence to support its reliability. That has been restated in various decisions by the Court of Appeal, among them is the decision of **Richard Lubilo and Another v Republic**, Criminal Appeal No. 10 of 1995 CAT (unreported) where it was stated that:

*"In order for any confession to be admitted in evidence, it must first and foremost be adjudged voluntary. If it is involuntary that is the end of the matter, and it cannot be admitted. If it is adjudged voluntary and admitted but it is*

*retracted or repudiated by the accused, the court will then as a matter of practice look for corroboration. But if corroboration cannot be found, that is, if the confession is the only evidence against the accused, the court may find a conviction thereon, if it is fully satisfied that the confession is true."*

See also **Ali Salehe Msutu v Republic** [1980] TLR 1, the Court of Appeal stated as follows:

*"a repudiated confession, though as a matter of law may support a conviction, generally requires as a matter of prudence corroboration as is normally the case where a confession is retracted"*

Despite the above holding on the need for corroboration where the accused person has retracted or repudiated his confession, the Court of Appeal later observed that the court can convict the accused person on uncorroborated confession provided that it warns itself of the danger of acting on the sole evidence of the confession and if it believed the same to be true. In **Mashimba Dotto @ Lukubanija v Republic**, Criminal Appeal No. 317 of 2013 CAT (unreported), it observed as follows:

*"The Judge was certainly correct in saying that under normal circumstances a conviction could safely lie so long as the court warns itself on the danger of acting on the statement without corroboration. It is trite law that as a matter of practice, a conviction would not necessarily be illegal but it is a matter of practice in such cases for a trial court to warn itself ..."*

Since, in the case at hand, the accused person retracted the confession statement tendered in court, there is a need to find out whether there is corroborative evidence and in the absence, whether the conviction against him can be secured based solely on his retracted cautioned statement. Before relying on the uncorroborated confession statement, this court has to warn itself of the danger of convicting on uncorroborated evidence and it must believe that the confession of the accused person is nothing but true.

Having gone through the evidence on the record, I could not find any independent piece of evidence that will corroborate the confession statement. This is because the court had earlier declined to invoke the doctrine of recent possession, likewise, it did discount the evidence of PW5 on identification and the evidence of fingerprints and hence cannot be used to corroborate the confession statement. That



being the case, I can firmly hold that there is no other independent evidence that this court can rely on to corroborate the retracted confession statement.

Now, I move straight to the issue of whether the conviction against the accused person can be secured solely based on the retracted cautioned statement. To do that this court will ascertain whether the contents of Exhibit P10 carries a true account of what happened in respect of the death of the two deceased persons. In the current matter, the accused's cautioned statement before the court explains how he committed the murder. It goes on to explain that, he intoxicated the two deceased with a mixture of valium medicine and a soda. The two deceased persons took the concoction thinking that it was medicine for increasing male fertility and became unconscious. The accused then strangled the two men to death and tied them. Having strangled them, he placed their bodies on the floor.

The cautioned statement is hereby quoted from page 5 and it reads as follows:

*" ... mnamo majira ya saa 1900 nilishuka kwenye basi standi ya mabasi ya zamani na kuwakuta wananisubiri*

wote wawili yaani Ibrahimu s/o Ally na Benedicto @ Babu Tinga ninavyokumbuka walikuwa wamebeba kibegi kidogo rangi nyeusi kilichokuwa kinaonyesha kuna kitu ndani ambacho nilikuwa nimebeba kibegi changu cha rangi nyeusi na nyekundu ndani nikiwa nimeweka kitambaa rangi nyeusi mita kumi mishumaa minne na mafuta ya taa lita mbili zikiwa kwenye chupa za maji ya uhai na vidonge vya aina ya valiamu vidonge kumi vyote hivyo nilivinunua Dar es Salaam vyote vikiwa kwa ajili ya kukamilisha adhima yangu ya kuwadhuru maadui zangu tukiwa hapa Tanga mjini Ibrahimu Ally alitoa wazo tukalale Bomai Inn ... tulivyofika nyumba ya kulala wageni ya Bomai Inn tulimkuta mtu mmoja mwanaume alitupokea na Ibrahimu s/o Ally na Benedicto @ Babu Tinga waliandikisha chumba kimoja namba 302 na kingine namba 303 kati ya vyumba hivyo wao wawili walilala chumba namba 302. Iliyofika muda wa 04:00 hrs mimi nilitoka kwenda kwenye chumba na kabla ya kwenda kwenye chumba chao wote walikuja chumbani kwangu na kunieleza kuwa wao wanaenda kuoga na mimi niandae dawa zao za nguvu za kiume. Kutokana na kauli hiyo mimi nilianza kuandaa kama ifuatavyo...Baada ya hapo niliondoka na mchanganyiko huo ukiwa kwenye sehemu mbili hadi chumbani kwao na kuwakuta wamekaa chumbani kitandani ambapo kila mmoja nilimpatia chupa ya dawa hiyo ikiwa wanaamini ni dawa ya nguvu za kiume na mimi nikijua kwamba sio dawa



za nguvu za kiume nia yangu walewe ili niweze kutimiza hatima yangu ya kuwadhuru maadui zangu baada ya kunywa na baada ya kama dakika ishirini kwa kukisia walilewa na kulala kitandani na wakiwa hawafahamu kinachoendelea nilianza na Benedicto @ Babu Tinga kumvua nguo zote na kuziweka kwenye kibegi changu huku nikiamini kwamba kuna pesa ili nikapekue mbali baadaye nilimvua Ibrahimu s/o Ally ambaye nguo zake niliziweka kwenye kibegi changu baada ya hapo nilichana fulana yake ya ndani (singlendi rangi nyeupe) na kuitumia kufunga miguuni na mikononi kwa kukutanisha mikono na baadaye miguuni na baadaye nilichana kitambaa cheusi na kumfunga shingoni kisha kumkaba kutumia kitambaa hicho hadi kufa baadae nilichana singlandi alivyovaa Ibrahimu s/o Ally na kumfunga mikononi kwa kuunganisha mikono mithili ya pingu na miguuni nilimfunga kitambaa cheusi na baadae kuchana kitambaa cheusi na kumfunga shingoni na kutumia kumkaba hadi kufa. Vitendo vyote hivyo nilivifanya wakiwa kitandani. Baada ya kuhakikisha wamekufa niliwavuta chini na kuwaangusha chini na kuwalaza chini ya sakafu wakiwa wamelala chali baadae ya hapo niliweka mishumaa miwili kila mmoja na mishumaa hiyo ikiwa nimeikata vipande sita na kuwawekea kichwani na miguuni kipande kimoja baadae nilichukua mafuta ya taa na kuwamwagia miilini mwao kisha kuwasha mishumaa kwa kutumia kiberiti cha njiti. Madhumuni ya kufanya hivyo ni



*kuwaunguza moto wasifahamike na kupoteza ushahidi baada ya hapo na ikiwa kama majira ya saa 05:45 hours kwa kukisia niliondoka na kuomba mlinzi anifungulie na alinifungulia na mimi kumueleza kuwa ninaenda sokoni Mgandini kuangalia biashara yangu. Nilivyoondoka na kibegi changu chenye nguo zangu na suruali zao zote mbili. Kwenye tukio hilo nilikua peke yangu na sina mtu yeyote niliyepanga nae kufanya tukio hili zaidi yangu mimi mwenyewe".*

In any event, the detailed narration of how the accused person allegedly arranged the killing and finally killed the two men contradicts the evidence put forth by the prosecution. This inconsistency casts doubt on the credibility of the cautioned statement. Several noteworthy points have been identified. **First** is the number of guests who checked in at Bomai Inn Guest House. The accused person's cautioned statement claims that three individuals went to Bomai Inn Guest House and these were the two deceased persons and the accused himself, while PW5's testimony indicates that only two people were checked in, who were later identified as the accused person and Ibrahim Ally, one of the deceased persons. The variance in the number of people creates uncertainty regarding the reliability of the

accused cautioned statement. **Second**, the cause of death of the deceased persons and this was also raised by Mr. Yona. The cause of death that is mentioned in the accused person's cautioned statement is intoxication and strangulation, this does not complement the testimony and contents of PW1 and Exhibits P1 and P2 which described the cause of death as a severe head injury. Although PW1 mentioned that the body of Ibrahim Ally had signs of strangulation he confirmed that the cause of death was severe head injuries. The confession also contradicts Exhibits P1 and P2. It should be noted that both Exhibits P1 and P2 do not state anything in respect of intoxication and strangulation as causes of death. Moreover, PW12 in his testimony told the court that the accused person confessed to having strangled to death the two deceased persons which also contradicts the cause of death. These conflicting explanations cast doubt on the veracity of the accused person's cautioned statement. **Third**, the accused person's cautioned statement omits any reference to the infliction of wounds on the deceased bodies, especially head injuries which were the cause of death. In contrast, PW1's testimony and Exhibits P1 and P2 describe multiple wounds, kerosene burns

injuries, and rope marks around the neck of Ibrahim Ally. These variations raise concerns about the credibility of the accused person's cautioned statement. **Fourth**, PW1 while being cross-examined admitted that, persons whose death was due to strangulation bear various signs and that, in the performance of pathology, when they encounter doubts as to the cause of death, they normally open the body for further investigation. In re-examination, PW1 confirmed that the cause of death of the deceased was severe head injuries. Given the highlighted inconsistencies, it becomes apparent that the evidence provided by the prosecution contradicts the confession made by the accused person. These discrepancies create reasonable doubt on the truth of the cautioned statement and hence a doubt on whether the accused committed the killing. From the above, I do not doubt that the statement made did not sufficiently incriminate the accused person with the offence he stands charged with.

Apart from that, there is another controversy concerning the cautioned statement. The evidence before this court is not certain that the cautioned statement was among the exhibits that were carried from Vwawa to Chumbageni police station. PW6 in his



testimony did not mention the cautioned statement among the exhibits which he took from Vwawa to Chumbageni police station along with the accused person. PW6 further testified that he handed the exhibits to PW2. However, in cross-examination, he admitted that he did not mention the cautioned statement among the exhibits that he took from Vwawa and later on affirmed that during the re-examination. Surprisingly PW2 testified to having received exhibits from PW6 recorded them in the exhibit register and assigned them number 48 of 2017, but the cautioned statement, a crucial exhibit was not among the exhibits that he mentioned. In addition, the exhibit register was not tendered as an exhibit which could clear doubts. In my considered view, such uncertainty hinges on the prosecution's case.

Lastly, in passing, in this case, prudence demanded that the prosecution to produce the necessary documents that could corroborate its case. One particularly significant document was the guest register book, which guests signed upon checking in. From my observations, this document held crucial information. Given the advancements in technology, it has the potential to provide valuable

evidence that could help identify and hold the individuals responsible for this terrible incident accountable for their actions.

Furthermore, it is essential to note that the accused was arrested on 4 October 2017, at Vwawa and subsequently transferred to Chumbageni police station on 10 October 2017. However, he was not brought before the court until 1 November 2017, which amounts to over a month since his initial arrest. Section 32 (2) of Evidence Act, Cap 6 R.E 2022 provides:

*"Where any person has been taken to custody without a warrant for an offence punishable with death, he shall be brought before a court as soon as practicable".*

The above section stipulates that once an accused facing capital offences is apprehended, he must be arraigned before a court of law as soon as practicable. The failure to do so contravened the provisions of the aforementioned section. In this case, there is no adequate explanation provided for the delay, and in my considered view, the unexplained period of about a month in delaying arraigning the accused person before the court is not a period that could safely be said within the dictates of section 32(2) of Cap 6 that is as soon as

practicable and it casts doubt on the prosecution case against the accused person.

All being said, the posed issue of whether the accused person caused the death of the two deceased persons is answered in negative and the second issue of whether the accused intended to kill the two deceased persons becomes redundant.

In conclusion, after a thorough examination of both the prosecution's and the defence's evidence, I hold a strong finding that the prosecution's evidence is lacking in strength. Consequently, the prosecution has failed to establish their case beyond a reasonable doubt. Subsequently, **Ismail Yahaya Muhaji** is not guilty of the two counts of murder he stands charged with. He is accordingly acquitted.

It is so ordered.

**DATED** at **TANGA** this 15<sup>th</sup> day of September 2023



  
H. P. NDESAMBURO

**JUDGE**