

THE UNITED REPUBLIC OF TANZANIA
(JUDICIARY)

THE HIGH COURT
(MUSOMA SUB REGISTRY)

AT MUSOMA

ORIGINAL JURISDICTION

CRIMINAL SESSIONS CASE No. 181 OF 2022

THE REPUBLIC v. 1. JOHN MBATIRA @ MTUKE
2. SADICK SHABANI @ YOHANA
3. MANGA MGONOKI
4. STEVEN AUGUSTINO @ ODIERO

JUDGMENT

03.10.2023 & 10.10.2023

Mtulya, J.:

The body of **Mr. Rashidi Ally Hassan** (the deceased) was found floating facing downward in shallow waters of **Kyarano River** (the river) at Mwanzaburiga Village within Butiama District in Mara Region on 30th June 2022. The river crosses Mwanzaburiga Village from the upper parts of Butiama District flowing its waters to lowlands and valleys of Piga area. The river is well known to the residents of Butiama, Mwanzaburiga, Buturi and Piga areas. At Mwanzaburiga, the river separates Mwanzaburiga and neighboring Village of Buturi.

Residents of Mwanzaburiga and Buturi villages share business transactions and events, and some of the residents of Buturi cherish their pleasures of food and drinks at Mwanzaburiga Centre.

The police authorities at Butiama District Police Station (the police station) were informed of the incident of the deceased and in the morning hours of 30th June 2022 went at the crime scene with a medical doctor, **Dr. Salum Ahamada Salum** (PW2). PW2 was brought to the crime scene to examine the deceased's body and prepare a Postmortem Report (the Report) of the deceased to authenticate whether the death was natural. The police on their part, had dual roles of drawing a sketch map of the crime scene (the sketch map) and investigation of the crime. **Police officer, H.83 D/Cpl. Onesmo** (PW6), was tasked tetrad roles of the police authorities, namely: first, to visit the crime scene with PW2, second, to draw the sketch map of the crime scene; third, to investigate the matter; and finally, to record cautioned statements of two (2) suspects.

Following the visitation of the crime scene and report of PW2, police investigation took its course and revealed that five (5) persons are allegedly connected with the incidence. The investigation had uncovered that **Mr. Warioba Silimba** (PW3) and **Famu Heleman** (PW4) had witnessed persons moving with the deceased a day before the deceased was found dead at the river. PW3 and PW4 were summoned in this court to testify what they have witnessed on 29th June 2022.

According to PW3, on 29th June 2022, he was at the Mwanzaburiga Centre driving his Toyo towards Nyasirori and had witnessed **Mr. John Mbatira @ Mtuke** (the first accused) moving with the deceased along the road towards their residential homes. Later, when PW3 was returning from Nyasirori, he saw the deceased and first accused entering into the first accused's residence and a bit later on his third trip ferrying passengers, he saw the dual with many other persons at the same place of the first accused's residence.

However, according to PW3, in those many persons, he managed to identify four of them, namely: the deceased, the first accused, **Mr. Manga Mgonoki** (the third accused), and Mzee Osingo, and were all taking local brew at the same residence. PW3 testified further that on the next day, 30th June 2023, at 09:00 hours, he heard *Yowe* shouts from the villagers and upon following the *Yowe* cries, he found villagers gathered at the crime scene, where the body of the deceased was found. However, PW3 testified that he cannot tell with certainty what had transpired to all the people who were enjoying their drinks at the first accused's residence and had not witnessed the first and third accused persons killing the deceased.

On the other hand, PW4 testified that he was moving from Nyasirori to Mwanzaburiga Centre on 29th June 2022 at around 19:00 hours and along the way he saw several persons, including the deceased, Mzee Osiango, and the first to the fourth accused persons, at the border of Buturu-Mwanzaburiga Centre. According to PW4, he met them in two groups separated in thirty (30) meters distance, from the first group which composed of Mzee Osiango, the third and fourth accused persons and the second group composed of the deceased, first and second accused persons. PW4 testified further that he managed to identify them as he had a torch attached in front part of his punctured motorcycle and they had conversations in ten (10) minutes time.

According to PW4, he easily identified the deceased because he was good customer for food in their hotel located at the centre. PW4 testified further that on 30th June 2022, he heard the deceased had expired and took steps to inform the police on what he had seen a night before. However, PW4 testified that he cannot tell whether the deceased had met other persons along the way or when and how the deceased separated with the first and second accused persons or what transpired after the departure of PW4 and the trio persons in the second group.

The Republic also marshalled Peoples' Militia and Medical Doctor, **MG. 502135 Paul Gervas Lupima** (PW1) and PW2 to testify on arrest of the second accused and to tender the Report, respectively. According to PW1, on 13th July 2022, he had arrested the second accused at Mtaa wa Pili area of Nyehunge Village within Sengerema District in Mwanza Region in a company of two other persons, namely: PW6 and **Ms. Neema Rashidi**, a daughter of the deceased who went to the location for purposes of identification of the second accused. According to PW1, at the arresting point, they searched a bag belongs to the second accused and found a brown belt written R.H words. and signed a certificate of seizure to verify the finding and seizing of the belt. According to him, his role had just ended at Nyehunge Police Station where he registered the second accused to police authorities.

PW2 on the other hand had testified that on 30th June 2022, he went at the crime scene, examined the deceased's body and recorded the Report of the deceased which showed that the death was caused by grave attacks by use of blunt object directed at both the face and back side of the head to cause head-skull depression. According to PW2, there was a large amount of force used in attacking the deceased which had caused two (2) big wounds in the deceased's head and loss of plenty of blood due to excessive

bleeding. In order to substantiate his testimony, PW2 prayed to tender the Report, which was admitted without any protest as exhibit P.1. Exhibit P.1 shows that the death of the deceased was caused by: *traumatic brain injury with excessive bleeding*.

Following the narrations of PW2, PW3 and PW4, and being aware the death of the deceased was unnatural, the police authorities in Butiama District had started a manhunt of Mzee Osingo and the other four accused persons day and night in Butiama in Mara Region and Nyehunge in Mwanza Region, which led to arrest of all accused persons save for Mzee Osingo. In searching and arresting the accused persons, a total of eight police officers were involved, including PW6, G. 7338 D/Cpl. Haruna (PW5), investigation officer Hezron and others. PW5 and PW6 were marshalled in this court to testify and tender cautioned statements of the first, third and fourth accused persons and nexus of the second accused.

According to PW5, on 6th July 2022 at around 05:00 hours the first accused was arrested at his home residence at Mwanzaburiga and recorded him a cautioned statement at 08:00 hours at Butiama Police Station, and in the statement, he confessed to have participated in the killing of the accused and produced a detailed statement on how the attacks and killing took place.

The cautioned statement was admitted as exhibit P.2 after a trial within trial to investigate on compliance of section 50 (1) (a) of the **Criminal Procedure Act [Cap. 20 R.E. 2022]** (the Act) and section 27 (3) of the **Evidence Act [Cap. 6 R.E. 2022]** (the Evidence Act) and in brief, reads that:

Nakumbuka mnamo tarehe 29/06/2022 saa 17:00 hrs nilikuwa Senta ya Mwanzaburiga pamoja na marehemu aitwae Rashid Ally Hassani, tulikuwa tunatoka senta na tunaenda nyumbani kwangu. Tulipofika nyumbani kwangu, tukawakutata Osingo James, Manga Mkonoki na Sadiki Shabani, ambao walikuwa pale kwangu wanakunywa pombe za kienyeji...sisi tukaungana na waliokuwepo, tukawa tunakunywa pombe. Lakini siku nyingi, Osingo James, Manga Mgonoki, na Sadiki Shabani walipanga kumuua Rashid Ally ili wamnyang'anye simu na hela...basi tulipanga mara mbili tumpige na kumuua ili tuchukue hivyo vitu, lakini tukawe hatumpati. Huyu jamaa alikuwa na hela kwani watoto wake ndio wanampa. Tukiwa pale nyumbani, tukapanga kumuua Rashid Ally. Mimi John Mbatira, Sadiki Shabani, Osingo James, Steven Odiero na Manga Mgonoki...wakati huo, Rashid Ally alikuwa hajui chochote kinachoendelea...basi tukaenda. Tulipofika Mtoni Kyarano...hapo tukaanza kumpiga kwa kutumia mawe na rungu marehemu Rashid Ally...Mimi nikawaambia shughuliken muhakikishe mnamuua kwani asipo kufa atatusema. Basi Sadiki Shabani alikuwa na rungu akampiga nalo kichwani, akaanguka. Wakashirikiana kumpiga. Wengine walikuwa na mawe wakawa wanampiga... Baada ya kumuua, tukampekuwa mfukoni. Alikuwa na hela Tshs. 30,000/ na simu aina ya Sumsung Galaxy...kabla

hatujaondoka, tulimbeba marehemu na tukamtupa kwenye maji...Osingo James alichukua simu na kukimbia, Sadiki Shabani akachukua elfu thelathini na mkanda...

On the other hand, PW6 was marshalled to explain his four roles as a police officer, viz: first, to visit the crime scene with PW2, second, to draw the sketch map; third, to investigate the matter; and finally, to record cautioned statements of the third and fourth accused persons.

In his testimony, PW6 stated that on 29th June 2022, the police authorities in Butiama District were informed on the death of the deceased at Kyarano River within Mwanzaburiga Village, and was ordered by his boss OC-CID to visit the crime scene and in the next day of 30th June 2022 morning hours, rushed at the crime scene in a company of Assistant Inspector Sakila, PW2 and other police officers. At the crime scene, they found the deceased's body laying in low level waters of Kyarano River facing downward and they divided their roles for him and PW2, where PW6 prepared the sketch map whereas PW2 examined the body and prepared the Report. In the dual roles of visitation and preparation of the sketch map, PW6 prayed to tender the sketch map of the crime scene and was admitted without any protest from the defence side and was marked as Exhibit P.3.

In his investigation role, PW6 was involved in the arrest of the first, second and third accused persons and seized a brown belt marked R.H words. from a bag of the third accused. According to him, he arrested the first accused at his residence at Mwanzaburiga Village, second accused at his residence at Mwanzaburiga Village and third accused at Mtaa wa Pili area within Nyehunge Village in Sengerema District of Mwanza Region in different dates. Regarding the arrest of the fourth accused, PW6 testified that he was arrested at Mwanzaburiga Village by Peoples' Militia called Mataro, and was ferried to Kiabakari Police Station and later Butiama Police Station.

In his final function, PW6, testified to have recorded cautioned statements of the third and fourth accused persons and both had confessed to have killed the deceased at the crime scene on night hours of 29th June 2022. In order to substantiate his testimony, PW6 had prayed to tender all necessary materials related to his investigation, arresting and recording of the third and fourth accused persons cautioned statement, namely: first, brown belt printed R.H words and its associated certificate of seizure; and second, cautioned statements of the third and fourth accused persons.

However, the prayer was protested by the defence side learned counsels for five (5) reasons, namely: first, the statement

were recorded under torture and ill-treatment hence breached the law enacted section 27 (3) of the Evidence Act; second, the cautioned statements were recorded after a lapse of four (4) hours statutory time in recording statements of accused persons which violates section 50 (1) (a) of the Act; PW6 had testified that he travelled all the way from Butiama to Sengerema by using the vehicle of the deceased's daughter called **Ms. Neema Rashid Ally**, which conflicts interest of the Republic; fourth, the seizure certificate was not signed by an independent witness, the third accused's mother, **Gaudesia Jamagi**, who was present during the arrest of the third accused, search of the third accused's bag and seizure of the belt; and finally, PW6 performed more than one police duties to compromise investigation and cautioned statements of the accused persons.

All the indicated five (5) protests invited replies of this court, and after inquiries and rulings on the matters, this court was persuaded by the Republic to admit and marked them as exhibits in the case. The exhibits were marked as follows: first, the certificate of seizure duly signed by the second accused person, PW2 and PW6 as exhibit P.4; brown belt printed R.H words as exhibit 5; cautioned statement of the second accused as exhibit P.6; and

cautioned statement of the fourth accused as exhibit P.7. Exhibit P.

6, in brief, shows that:

Mnamo mwaka 2019, nilifika katika Kijiji cha Majengo Kata ya Kyanyari, Tarafa ya Makongo Wilaya ya Butiama na Mkoa wa Mara ambapo nilikuwa naishi kwenye Mji wa Bernard Jacob...kwa ajili ya kuchunga mifugo...nilichunga kwa miezi mitano. Nikahamia kwa Ndugu Warioba Mbatira @Burika...nilichunga kwa muda wa miezi minne, Nikatoka Kwenda kwa Mzee Katima na hapo nilichunga kwa miezi sita. Baadae nilienda kuchunga kwa Rashid Ally Hassan @ Muhaya na hapo nilichunga kwa muda wa miezi mitatu. Niliondoka baada ya kukosana na mwana wake Semen. Baada ya hapo nilienda kwa John Mbatira, Nilikaa miezi miwili bila kazi...baadae alinitafutia kazi kwa mdogo wake Mganya Mbatira. Nilichunga hadi kuondoka nyumbani tarehe 03/07/2022, kurudi nyumbani kwetu Nyehunge. Mwezi wa 6 /2022 majira ya 12:00hrs, huko katika Kijiji cha Mwanzaburiga tulikutana watu watano ambao ni John Mbatira, Manga Mgonoki, Osingo James na Steven Odiero, katika Senta ya Mwanzaburiga na kupanga tukio la kutaka kumuua Rashid Ally @ Hassan @ Muhaya kwa kuwa Manga alimtuhumu kutembea na mke wake, Osingo alidai alikuwa anatukanwa sana, hasa mzee alipokuwa na hela, John naye alikuwa anadai huyo mzee anakunywa pombe kwake huku hamlipi, mimi sikuwa na ubaya naye, japo nilishawishiwa na hao wenzangu na Steven alidai huyo Mzee alikuwa anatumiwa hela na alipita hapo karibu na kwake anaongea maneno ya kumtukana kwamba masikini... Tulipanga hilo tukio mara tatu, zote tukawa tumemkosa. Ilipofika tarehe 29/06/2022, majira ya saa 17:00 hrs alifika John Mbatira nyumbani kwake na alifika mzee Rashid Ally Hassan @

Muhaya, na wakati anafika, akatukuta hapo nyumbani kwake tukiwa na wenzangu, ambao ni Manga Mgonoki, Osingo James, ndipo John Mbatira aliniita na kuniambia mambo tayari na aliongea kwa kilugha, ndipo John Mbatira alitoa maelekezo kwa Manga Mgonoki na Osingo James kwamba waende hadi karibu kwa Steven Odiero ili mipango yote tuliokuwa tumeipanga tangia zamani imefanikiwa na huyo mzee alikuwa amelewa...ilikuwa tayari muda wa 20:00 hrs, ndipo mimi na John Mbatira, tulijifanya ya kumsindikiza Rashid Ally @ Hassan hadi maeneo ya karibu na Mto Kiarano na hao watu watatu walikuwa wamejificha kwenye vichaka...walikuwa wanamsubiri karibu na Mto. Alipokaribia, alikamatwa na hao wenzetu watatu waliokuwa kwenye vichaka karibu na kwenye mawe na kumuangusha chini huku akiwa amelewa. Alipigwa ngwala na Osingo James, kwani tayari tulikuwa hapo, huku Steven Odiero akiwa na tochi ya kicheni. Baada ya kuanguka alipekuliwa na kuchukua simu aina ya Sumsung Gallax kubwa na fedha taslimu Tshs. 30,000/= na aliyempekua ni Osingo James huku wengine tukiangalia kama watu wanakuja..alichukua mpaka mkanda wa kahawia (brown)...John Mbatira alisema kwamba huyu mzee tumemtafuta mara nyingi, hivyo tukimuacha tu, atatusema, tutakamatwa. Ndipo aliamuru tumuue, ndipo Osingo James alishika rungu hilo na baadae akanyang'anywa na Steven Odiera akachukua hilo rungu na kumpiga nalo kichwani akawa amezima. Ndipo John Mbatira alidai apelekwe kwenye mto ili hata watu wakimwona, watasema amekufa kwa ajili ya pombe kwamba ameanguka kwenye maji akiwa amelewa...baada ya kuwa ameshakufa, tulimbeba kwa ajili ya kwenda kumtupa kwenye maji, na kabla ya kuondoka tulianza kugombania hela Tshs.

30,000/=...nikaondoka tarehe 03/07/2022, baada ya kumaliza kufanya mauaji hayo mimi nilienda nyumbani ninapoishi, wengine wakaenda kunywa pombe kwa John Mbatira...

On the other hand, exhibit P.7 shows the following words, that:

Nakumbuka kuwa mnamo mwezi 6/2022 majira ya 17:00 hrs, huko katika Kijiji cha Mwanzaburiga Kata ya Kukirango tarafa ya Makongoro Wilaya ya Butiama Mkoa wa Mara, tulikutana na wenzangu John Mbatila, Sadick Shabani, Osingo James na Manga Mgonoki na mimi mwenyewe tulikutana kwenye huo mji kwa kuwa huyo Mzee Rashid Ally @ Hassan @ Muhaya amekuwa akipenda kujidai ana hela pindi anapokuwa amelewa na anamiliki simu kubwa ya tachi. Baada ya kukutana tulipanga tumuue Mzee huyo ambapo tulimfuata mara tatu akawa anabadilisha usafiri...Ilipofika tarehe 29/06/2022, majira ya saa 17:00 hrs, John Mbatila alitoka na Rashid Ally @ Hassan @ Muhaya senta ya Mwanzaburiga ambapo alienda naye hadi nyumbani kwake na hapo nyumbani aliwakuta wenzetu, Osingo James, Sadick Shabani, na Manga Mgonoki. Baadae John Mbatila alinipigia simu na kuniambia kwamba tupo nyumbani hapa kwangu, hivyo tumejiandaa kuondoka hapa kwangu na Rashid Ally @ Hassan na kuniambia niende njiani nikutane naye akiwa na wenzake pamoja na Mzee kwani walikuwa wanatembea naye kutoka kwake. Pia njiani nilipanda kidogo na kukutana na Osingo James na Manga Mgonoki na kuongozana naye huku John Mbatila na Sadick Shabano wakiwa nyuma. Hata hivyo, tulikutana na mtu hapo njiani akiwa anakokota pikipiki ambaye tunamfahamu na mimi nilishauri hili tukio tusilifanye kwa kuwa niliyefuatana naye ninamfahamu na hao wa

nyuma yetu atawajua, lakini Osingo James alidai hatojua chochote...watu hao waliokuwa na marehemu walitukaribia kwa kupitia njia ya vichakani na kumkamata Rashid Ally @ Hassan na kumlaza chini kabla hajauwawa. Tulimpekua na kuchukua pesa Tshs. 300,000/= laki tatu tu, simu kuwa aina ya Samsung Gallax ambayo aliondoka nayo Kwenda kusikojulikana, na aliyeondoka nayo ni Sadick Shaban na Osingo James. Hata hivyo, John Mbatila aliamuru tumuue kuogopa kama tukimuacha atatutaja...ndipo Sadick Shabani alimpiga marehemu jiwe maeneo ya kichwani...tulimnyanyua na kumpeleka hadi kwenye maji...baada ya kumwacha hapo, kila mmoja aliondoka hadi majumbani kwake hadi asubuhi, tarehe 30/06/2022, niliposikia yowe.

The registered materials brought by the Republic in the case were pointing fingers to the accused persons, and had persuaded this court to invite the accused persons to reply the same to assist this court to arrive at fair and just decision. The defence on its part, had summoned a total of four (4) witnesses, who were the accused persons themselves.

The first accused (DW4) on his part had testified that he was arrested at night hours around 23:00 hours on 5th July 2022 at his home residence of Mwanzaburiga Village and recorded exhibit P.2 by PW5 on 7th July 2022 after several torture and inhumane treatments, including removing his clothes while hand-cuffed, beatings by use of club and piece of iron bar launched on head and legs by police officers PW5, PW6 and Hezron. Regarding the death

incident and his relation with the second, third and fourth accused persons, the first accused had denied participation in the killing of the deceased and knowing the other accused persons. On reasons of his arrest, the first accused stated that it was PW5, PW6 and police officer Hezron who had fabricated the case for reasons well known to them and **Mr. Tawabu Yahya Issa**, learned State Attorney, is prosecuting the case to maintain good relations with PW5, PW6 and police officer Hezron. However, the first accused had declined to reply the materials brought by PW3 and PW4, and had failed to show this court on how a hand-cuffed suspect can take off his clothes while still in hand-cuffing chains.

The second accused (DW3) had testified to have been arrested on 13th July 2022 at his home Village of Nyehunge by PW1 and PW6 and was ferried to Nyehunge Police Station and later on 17th July 2022 he was brought to Butiama Police Station for interrogation and cautioned statement recording. According to the second accused, he was recorded exhibit P.6 after several clubs' attacks on his legs to cause wounds. The second accused had testified further that he does not know the other accused persons and that the prosecution witnesses had brought lies against him. Regarding details in exhibit P. 6, the second accused stated that he recorded very little information, but the police produced details of

exhibit P.6 and that the evidences of PW3 and PW4 were all lies. According to him, he does not know Kyarano River located at Mwanzaburiga Village and has never worked for the deceased.

On the other hand, the third accused (DW2) had testified to have been arrested by police officers at his home residence at Mwanzaburiga Village on 5th July 2022 around 00:00 hours and was taken to Butiama Police Station. According to him, he was forced for two days to confess killing of the deceased, but had denied involvement and his cautioned statement of 7th July 2022 shows his reluctance in confessing the alleged crime. Regarding evidences produced by PW3 and PW4, the second accused stated that they did not witness him committing any offence and, in any case, he does not know the deceased and whether he had expired or not. The third accused testified further that he met the other accused persons in prison custody and the case was fabricated to him by his enemies at Mwanzaburiga Village.

The fourth accused (DW1) on his part had testified that he lives at Buturu Village and was arrested by Peoples' Militia named Mataro at Mwanzaburiga Village, where he went for buying cooking oil, and after the arrest he was ferried to Kiabakari Police Station before being taken to Butiama Police Station on 27th July 2022. According to the fourth accused person, he did not participate in

the killing of the deceased and the case was fabricated against him by police authorities in Butiama District and that on the alleged killing date, he was at his residence sleeping. Regarding exhibit P.7, the fourth accused stated that he was tortured and forced by the police officers PW6 and other police officers to confess the murder of the accused as he was attacked by club in different parts of the body, was interrogated in a room with blood stains in floor tiles, stoves with hot charcoals and was called *Msenge* during interrogation, which in totality are inhumane treatment in words and conduct.

According to the fourth accused person, the police officers were calling PW6 as *Onesmo Mnyama* and the officers were calling the interrogation room as *hapa mahala pa kazi*. In the opinion of the fourth accused, the room was not an interrogating room, but a torture chamber. In his testimony, the fourth accused stated further that he does not know the death of the deceased, river Kyarano, other accused persons and that no one had witnessed him killing the deceased.

This court after receiving all materials on record, and before delivering this judgment today, it had invited the six (6) learned minds who participated in the case to interpret the materials in relation to the available laws in statutes and precedents. According

to the defence side, the Republic had declined to establish its case beyond reasonable doubt as required by the law and precedent in **Christian Kale & Another v. Republic** [1992] TLR 302. According to **Mr. Victor Kisaka**, for the first accused, PW3 and PW4 had brought in this court contradictory evidences, as PW3 testified to have seen the first accused drinking local brew with the deceased whereas PW4 stated that he did not smell any alcohol when he met the first accused and deceased.

Regarding the confessional statement of the first accused, Mr. Kisaka thought that it should not be relied as it is dangerous to act upon it and moved on to cite the precedent in **Hemedi Abdallah v. Republic** [1995] TLR 172. Mr. Kisaka submitted further that the police went at the crime scene with a forensic expert, but had decided to decline in extracting finger prints from the deceased's body as that was the best evidence as indicated in the case of **Jumbe Hamis v. Republic** (1980) TLR 57 and that the prosecution had declined to call **Ms. Sifa Salvatory**, the wife of the deceased to testify the truth as indicated in the case of **Aziz Abdallah v. Republic** [1991] TLR 71. Finally, Mr. Kisaka complained that PW3 and PW4 did not cite the accused persons the earliest possible to have assurance of their reliability as required by the Court of

Appeal (the Court) in the precedent of **Marwa Wangiti Mwita & Another v. Republic** [2002] TLR 39.

For the second accused, **Mr. Amos Wilson** thought the accused persons were brought in this case for two reasons, namely: first, circumstantial evidences under the principle of accountability of the last person to be seen with the deceased; and second, confessional statements of the accused persons. According to him, PW3 and PW4 did not witness the second accused killing the deceased and they declined to mention the accused person at the earliest possible time as per decision in **Marwa Wangiti Mwita & Another v. Republic** (supra). In the opinion of Mr. Wilson, this court should warn itself in acting for repudiated or retracted confession to convict the accused persons as directed in **Mkubwa Said Omari v. SMZ** [1992] TLR 365 and **Mbushuu @ Dominic Mnyaroje & Another v. Republic** [1995] TLR 97. According to Mr. Wilson, the confessional statement of the second accused was extracted in breach of section 50 (1) (a) of the Act and precedent in **Mpemba Mashenene v. Republic**, Criminal Appeal No. 557 of 2015. Finally, Mr. Wilson complained that PW6 had used private vehicle in the investigation; did not invite independent witness during arrest of the second accused and seizure of P.5, and played double roles which brings doubt to the prosecution case.

On his part, **Mr. Daud Mahemba** for the third accused, thinks that his client was not implicated by any prosecution witnesses. According to Mr. Mahemba, his client is connected by two instances, *viz*, first, he is mentioned by the first and fourth accused persons in exhibit P.2 and P.7 in the plan to commit the offence of killing the deceased; and second, he is cited to have been seen by the deceased before his expiry. In opinion of Mr. Mahemba, the two circumstances are not enough to hold the third accused responsible for the murder of the deceased.

Mr. Baraka Makowe, for the fourth accused submitted that issues of last person to be seen with the deceased and confession extracted from accused persons must be taken very cautiously in resolving criminal sessions case as directed by the Court in the precedents of **Paul Maduka & Five Other v. Republic**, Criminal Appeal No. 110 of 2007 and **Brasius Maona & Another v. Republic**, Criminal Appeal No. 215 of 1992. In his opinion, in the present case, the accused persons were tortured and PW4 had testified to have seen the accused persons on two groups along the road, and testified further that the road had several feeder roads. According to Mr. Makowe, it is uncertain whether it was the accused persons or other persons who had killed the deceased.

Mr. Mkowe submitted further that, in the instant case, there are other faults for this court to take into contemplation in resolving the matter, including: first, PW6 used private vehicle in the investigation and played double functions contrary to the practice in the precedents of **Hamisi Mheu & Another v. DPP**, Criminal Appeal No. 28 of 2022, **Shani Kapinga v. Republic**, Criminal Appeal No. 337 of 2007 and **Amani Ally @ Joka v. Republic**, Criminal Appeal No. 353 of 2019; second, the fourth accused be trusted in his evidence which displayed torture by police officers in extracting his confession as per case of **Samwel Mkika v. Republic**, Criminal Appeal No. 47 of 2001; and finally, there are contradictions in exhibit P.2 and P.6 hence should not be relied to convict the accused persons as indicated in the precedents of **Michael Lemberi Masolwa & Others v. Republic**, Criminal Appeal No. 282 of 2005 and **Abdallah Jeje @ Malimi v. Republic**, Criminal Appeal No. 195 of 2007.

The Republic on its part had marshalled **Mr. Tawabu Yahya Issa** and **Ms. Evangelina Ephrahim Mukarutazia**, learned State Attorneys for the Republic to prosecute the case and register final submission in support of the case. According to the dual learned minds, the Republic has established its case for three (3) reasons, namely: first, the accused persons were the last persons to be seen with the

deceased by PW3 and PW4 and did not produce plausible explanation, apart from denying to know the deceased or his death contrary to the precedent in **Miraji Idd Waziri @ Simana & Another v. Republic**, Criminal Appeal No. 14 of 2018; second, the accused persons are residence of Mwanzaburiga and Buturi where river Kyarano crosses, but they declined to have known the river, the deceased, and the deceased's death. According to Mr. Tawabu, these are lies and may corroborate the prosecution's case as indicated in the precedent of **Miraji Idd Waziri @ Simana & Another v. Republic** (supra); and finally, they have produced detailed information their confessional statement on how they planned and executed the murder against the deceased hence must be convicted for their action.

In the opinion of the Republic, the accused conspired to kill the deceased at different roles, but must be convicted for the same offence of murder regardless of their different roles as section 22 of the Penal Code provides for circumstances where each accused is deemed to have committed the offence. The Republic admitted that the present case is based on circumstantial evidence and confessional statements of the accused persons, but the current circumstances point fingers to the accused person.

Finally, the Republic had invited this court to read three (3) judgments of the Court, namely: first, **Mathias Bundala v. Republic**, Criminal Appeal No. 62 of 2004, which resolved that if every killing had to be witnessed, then many homicides would remain unsolved; second, **Hatibu Gandhi & Others v. Republic** [1996] TLR 12, which resolved that criminal justice system is not a football game, but a serious business of acquitting the innocent and convicting the guilty according to the law; and finally, **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010, which resolved that not every apparent contravention of the provision of the Criminal Procedure Act leads to the exclusion of the evidence in question.

I have glanced the facts of the instant case, evidences produced by the both sides witnesses, exhibit P.1 to P.7, and final submissions of the learned minds. First of all, I would like to take and use this opportunity to thank all learned minds involved on this case. It has been a calories consuming trial of almost ten (10) consecutive days with ups and downs in protests and replies of this court. However, all that was intended to achieve justice to both parties, the Republic and accused persons. It is fortunate that both sides are in agreement that the accused persons were brought in this court for two reasons, viz; first, circumstantial evidence that the accused persons were spotted by PW3 and PW4 on 29th June 2022 before the deceased was found

dead on the next day, 30th June 2022; and second, confessional statements of the first, second and fourth accused persons recorded by PW5 and PW6.

The law regulating circumstantial evidence is to the effect that: *the circumstantial evidences must produce more certainty with exclusion of every reasonable doubt and that to convict an accused person, the evidence must point irresistibly to the accused's guilty* (see: **Jimmy Runangaza v. Republic**, Criminal Appeal No. 159 'B' of 2017; **Peter Mabara v. Republic**, Criminal Appeal No. 242 of 2016; **Republic v. Maximilian Leonidas**, Criminal Session Case No. 1 of 2018 (Bukoba District Registry, unreported) and **Republic v. Manila Hamduni & Another**, Criminal Session Case No. 76 of 2017 (Bukoba District Registry, unreported). In that case, in order to remove doubts, the Court has been asking for corroborating factors (see: **Lucas Njoweka @ Jariba v. Republic**, Criminal Appeal No. 220 of 2005; **Shabani Mpunzu @ Elisha Mpunzu v. Republic**, Criminal Appeal No. 12 of 2002, **B. Mapunda v. Republic**, Criminal Appeal No. 2 of 1989; **Haruna Mohamed & Mathew Lwali v. Republic**, Criminal Appeal No. 30 of 2001; and **Benedict Ajetu v. Republic** [1983] TLR 190).

Lucas Njoweka @ Jariba v. Republic (supra), for instance, it was categorically stated that:

The fact that the appellants were the last known persons to have been with the deceased casts very grave suspicion on them, but it is in itself not conclusive proof that they killed the deceased...other cogent corroborating evidence is necessary...

This is the position of our superior court in judicial hierarchy and I think, this court must abide with the precedent without any reservations. If that is done by the Republic, the accused persons must register relevant materials as to where they have departed with the deceased (see: **Makungire Mtani v. Republic** [1983] TLR 179; **Mathayo Mwalimu & Another v. Republic** (supra); and **Miraji Idd Waziri @ Simana & Another v. Republic** (supra). In the precedent of **Makungire Mtani v. Republic** (supra), the Court held that last person to be seen with the deceased must explain at which point the dual had departed and that failure to give plausible explanation on what had transpired, the accused must be presumed as a killer.

In the present case PW3 and PW4 had testified to have seen the accused persons moving and enjoying their local brew on the

29th June 2022 and on the next day, the accused was found dead at the river Kyarano. The dual witnesses had recorded the statement on the next day and mentioned the accused persons at the earliest possible opportunity as required by the law in the precedent of **Marwa Wangiti Mwita & Another v. Republic** (supra).

In the instant case, PW3 stated during cross examination conducted by Mr. Kisaka that he informed the police authorities what he knew at the crime scene during interrogation and PW4 testified that he recorded witness statement on 30th June 2022, without any specification of time. However, both parties in this case had remained mute in asking PW4 the time of recording. On my opinion, the accused was discovered expired on 30th June 2022, and both PW3 and PW4 had recorded their statement on the same day, they complied with the directives of the Court in the indicated case. The dual witnesses PW3 and PW4 are credible and reliable witnesses which this court is persuaded to believe them.

In the present case, there are witnesses who corroborated exhibits P.2, P.6 and P.7 and were recorded witness statement at the earliest opportunity as required by the directives of the Court. I am aware there were complaints regarding exhibits P.2, P.6 and

P.7 registered in this court as they were taken via torture, force and ill treatment.

I have also consulted the law regulating confession as enacted in section 27 (1) & (3) of the **Law of Evidence Act [Cap. 6 R.E. 2022]** (the Evidence Act), which prohibit threats, torture and promise. I have also scanned interpretation of the enactment borrowed in **Tuwamoi v. Uganda** [1967] EA 84, where the East African Court of Appeal had resolved that, the main essential for the validity of a confession is that it was voluntary.

I have consulted the materials registered in this case and totality of evidence regarding exhibits P.2, P.6 and P.7., I find the detailed materials produced by the first, second and fourth accused persons can only be produced by persons who have knowledge of the event or have involved in the killing of the deceased. I am aware that this court must warn itself in basing its conviction on repudiated or retracted confession (see: **Mkubwa Said Omari v. SMZ** (supra); **Mbushuu @ Dominic Mnyaroje & Another v. Republic** (supra); and **Paul Maduka & Five Other v. Republic** (supra). However, evidences produced by PW3 and PW4 corroborated the prosecution exhibits in P.2, P.6 and P.7 show that the accused persons may have committed the alleged offence.

It is unfortunate that the accused have denied everything related to each other, river Kyarano and deceased or his death. We all aware the life in our villages. It is impossible for villagers to be unaware of the *Yowe* shouts and death of the deceased. It was categorically stated by the third accused person that the river Kyarano is well known to villagers in Butiama, Mwanzaburiga, Buturi and Piga areas of Butiama District. In brief, the accused persons were telling lies in this court. Practice shows that lies of the accused may corroborate the prosecution case (see: **Felix Lucas Kisinyila v. Republic**, Criminal Appeal No. 129 of 2002, **Salum Yusuf Liundi v. Republic**, Criminal Appeal No. 26 of 1984; **Kombo bin Khamis v. Crown**, 8 ZLR 122; and **Miraji Idd Waziri @ Simana & Another v. Republic** (supra).

It is unfortunate that the accused have registered a bundle of several complaints in the case, but decided to remain silent as where exactly have departed with the deceased. In the absence of plausible explanation on what transpired, the accused persons must be presumed as the killers (see: **Mathayo Mwalimu & Another v. Republic**, Criminal Appeal No. 147 of 2008 and **Makungire Mtani v. Republic** (supra).

I understand that this court is not supposed to convict accused persons in a serious allegation of murder case basing on

the weaknesses of the defence side (see: **Mushi Rajab v. Republic** (1967) HC 384 and **Christian Kale & Rwekaza Bernard v. Republic** (1992) TLR 302). However, in the present case, the evidences point irresistibly to the accused persons' guilty (see: **Jimmy Runangaza v. Republic**, Criminal Appeal No. 159 'B' of 2017; **Peter Mabara v. Republic**, Criminal Appeal No. 242 of 2016; **Republic v. Maximilian Leonidas**, Criminal Session Case No. 1 of 2018 (Bukoba District Registry, unreported); and **Republic v. Manila Hamduni & Another**, Criminal Session Case No. 76 of 2017 (Bukoba District Registry, unreported)).

During the hearing of the case and final submissions, five (5) other issues had cropped up, namely: first, exhibits P.2, P.6 and P.7 were recorded out of statutory time of four (4) hours enacted in section 50 (1) of the Act; second, PW6 had several roles to play in the case; third, certificate of seizure was not signed by an independent party; and fourth, the wife of the first accused was not called by the prosecution to testify; and finally, discrepancies were brought by the prosecution materials. All these complaints are unfortunate. I will explain:

First, I have read the exhibits P.2, P.6 and P.7. The facts of the case shows that Exhibit P.2 was recorded at on 6th July 2022 at 08:00 hours whereas the first accused was brought at Butiama

Police Station at 05:00 hours; facts also show that exhibit P.6 was recorded at Nyehunge Police Station on 13th July 2022 at 16:20 hours for an arrest of the second accused which took its course at 15:00 hours; and Exhibit P.7 was recorded at Butiama Police Station at 17:40 hours for an arrest of the fourth accused person who was arrested at 16:00 hours. In brief, all the three indicated accused persons were recorded within the requirement of four (4) hours enacted in section 50 (1) (a) of the Act.

Second issue on a complaint that PW6 had several roles to play in the case. The issue cannot detain this court. There is provision of the law in section 58 of the Act, which regulates statement of suspects and its sub section 4 provides that *a police officer investigating an offence for purposes of ascertaining whether a person under restraint has committed an offence may record a statement of that person*. However, the section has considered the rights of persons enacted in section 53 of the Act.

I am aware of the decision of the Court in the precedent **Amani Ally @ Joka v. Republic** (supra) and **Nyerere Nyague v. Republic** (supra). However, the decision in **Amani Ally @ Joka v. Republic** (supra) has declined interpretation of section 58 (4) of the Act. There are no any conversations with regard to the provision. In any case, the case regulated a situation where the

police officer (PW2) had displayed interest with the victim's family and investigated the matter. In the present case there is a police officer (PW6) who had investigated the case and recorded second accused's cautioned statement without any close relation with the deceased or deceased's family. Similarly, the precedent in **Nyerere Nyague v. Republic** (supra) regulated a situation where there is breach of the Act. In the present case, there is specific enactment of section 58 (4) of the Act which provide that: *a police officer investigating an offence for purposes of ascertaining whether a person under restraint has committed an offence may record a statement of that person*. On the similar note, the third accused person is cited by PW3 and PW4 and corroborated by evidences in exhibit P.2, P.6 and P.7.

Regarding the third complaint on the certificate of seizure as was not signed by an independent witness, that is replied by presence of PW1. In any case, the exhibits seizure certificate and belt do not go to the root of the matter. Similarly, on complaints of discrepancies on what weapon was used to attack, who attacked where, where the body of the deceased was located at the river, presence of feeder roads, are minor in the present case as there is already in place PW3, PW4 and exhibits P.2, P.6, and P.7 showing details of the plan and how it was executed. In any case, minor

contradictions and discrepancies cannot be avoided when considering the time taken and level of education of the prosecution witnesses (see: **Dickson Elia Nsamba Shapwata & Another v. Republic**, Criminal Appeal No. 92 of 2007).

Finally, the issue of summoning the wife of the deceased to testify for the Republic. In my opinion, there is no particular number of witnesses is required for the proof of any fact. That is the law enacted under section 143 of the Evidence Act and has already received the support of the Court in the precedent of **Yohanis Msigwa v. Republic** [1990] TLR 148). In the present case, the Republic sought that a total of six witnesses were enough to substantiate its allegation.

If everyone, who in one way or another, is involved in the transactions of the case is summoned, that will be not be a serious resolution of criminal sessions' cases of acquitting the innocent and convicting the guilty according to the law. It will be a football game (see: **Hatibu Gandhi & Others v. Republic** (supra). It will be a contest between *Makolo* and *Utopolo* at *Lupaso Stadium* in Dar Es Salaam, which this court has no specific schedule to entertain.

Having considered the evidences registered by both sides in the present case, I have formed an opinion that the prosecution has proved its case as per requirement of the law in section 3 (2) (a) of

the Evidence Act and practice of courts in the precedents (see: **Said Hemed v. Republic** [1987] TLR 117, **Mohamed Matula v. Republic** [1995] TLR 3, and **Horombo Elikaria v. Republic**, Criminal Appeal No. 50 of 2005), that all four (4) accused persons, **Mr. John Mbatira @ Mtuke, Mr. Sadick Shabani @ Yohana, Mr. Manga Mgonoki, and Mr. Steven Augustino @ Odiero**, are guilty to the charged offence of murder contrary to section 196 and 197 of the Penal Code.

Ordered accordingly.

Right of appeal explained.




F. H. Mtulya
Judge
10.10.2023

This judgment was pronounced in open court in the presence of all four accused persons, **Mr. John Mbatira @ Mtuke, Mr. Sadick Shabani @ Yohana, Mr. Manga Mgonoki, and Mr. Steven Augustino @ Odiero**, and their learned Defence Attorneys, **Mr. Baraka Makowe, Mr. Daud Mahemba, Mr. Amos Wilson and Mr. Victor Kisaka** and in the presence of **Mr. Tawabu Yahya Issa** and **Ms. Evangelina Ephrahim Mukarutazia**, learned State Attorneys for the Republic


F. H. Mtulya
Judge
10.10.2023

MITIGATIONS AND ANTECEDENTS

Makowe: My Lord, I know in cases like this after conviction, the penalty is only one, death sentence. However, on my side, I say this court to read the case of Mbushuu, that the penalty is inhuman barbaric and un-civilized. My Lord, this court has to ask itself since Mbushuu's case in 2005, as to whether we still in barbaric situation. My Lord, that is all for today.

F. H. Mtulya

Judge

10.10.2023

Mahemba: My Lord, I say that this court is one of the superior courts and it is a court of record. My Lord, it is a court of justice which can change the law. My Lord, section 197 of the Penal Code provides for a sentence of murder as to hang the convict to death, but that is against the Constitution which guaranteed the right to life. This court may consider that. That is all my Lord.

F. H. Mtulya

Judge

10.10.2023

Kisaka: I join hands with senior counsels, but there is no substitute of section 196 and 197 of the Penal Code. However, this is a court of record and may preserve the right to life of the accused persons and

that may lead to the changes of the barbaric law in our societies.
That is all my Lord.

F. H. Mtulya

Judge

10.10.2023

Tawabu: My Lord, we insist that this is a court of law and not a court of feelings. The decision we have just received is according to sections 196 and 197 of the Penal Code. My Lord, this is the law and there are no amendments to the law. My Lord, Judges do take oath to preserve law and Constitution of this State. The law provides for death sentence and that is the law and must be followed. My Lord, that is all for today.

F. H. Mtulya

Judge

10.10.2023

SENTENCE


Section 197 of the **Penal Code [Cap. 16 R.E. 2022]** provides that a person convicted of murder shall be sentenced to death. That is the enactment of the Penal Code. I am aware that capital sentence is a subject of conversations and criticisms from learned minds, activities and some quarters of our societies.

However, my hands are tied by the enactment of section 197 of the Penal Code and oath of the office of a Judge to preserves the

laws and Constitution of this State. In the end, and from the indicated premises, I sentence the accused persons, namely: **Mr. John Mbatira @ Mtupe, Mr. Sadick Shabani @ Yohana, Mr. Manga Mgonoki** and **Mr. Steven Augustino @ Odiero** to death, which shall be suffered by hanging.

It is so ordered.




F. H. Mtulya

Judge

10.10.2023

Right of appeal explained to the parties and their learned minds.

F. H. Mtulya

Judge

10.10.2023

This Order was pronounced in open court in the presence of the accused persons, **Mr. John Mbatira @ Mtupe, Mr. Sadick Shabani @ Yohana, Mr. Manga Mgonoki, and Mr. Steven Augustino @ Odiero**, and their learned Defence Attorneys, **Mr. Baraka Makowe, Mr. Daud Mahemba, Mr. Amos Wilson and Mr. Victor Kisaka** and in the presence of **Mr. Tawabu Yahya Issa** and **Ms. Evangelina Ephrahim Mukarutazia**, learned State Attorneys for the Republic.


F. H. Mtulya

Judge

10.10.2023