

THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT

(MUSOMA SUB REGISTRY)

AT MUSOMA

ORIGINAL JURISDICTION

CRIMINAL SESSIONS CASE No. 13 OF 2023

THE REPUBLIC v. 1. JOSEPHAT KAWAWA @ ATHMANI

2. MASHAKA JUMA @ MANGU @ JESHMAN

3. MKONGWE MARWA @ KINOZI @SOMATAMA

JUDGMENT

16.10.2023 & 18.10.2023

Mtulya, J.:

On 26th August 2022, **Mr. Said Hamis** (the accused) was invaded and assaulted by use of *panga* to death along the way at Kyamasabita Hamlet within Nyasirori Village in Masaba Ward of Makongoro Division in Butiama District, Mara Region. The deceased was a teacher at **Masaba Secondary School** (the school) and business man running two distinct shops of M-pesa transactions and garments selling at Nyasirori Village Centre within Butiama District in Mara Region.

In the indicated shops, he engaged his wife, **Mwanaidi Athumani** (PW2), to take care of the garments shop's business whereas the M-pesa transactions Kiosk species of business was reserved for his young brother, **Mr. Isihaka Hamis** (PW1). On the fateful day, 26th August 2022, as usual, the sun raised and the deceased, PW1 and PW2 had left their home residence at Masaba

Primary School for work at Nyasirori Centre and during the sunset, they were on their way back home. The record is silent on how they accessed their engagements in the morning hours, but record is vivid on their way back home when the sun was down. On this day, 26th August 2022, the deceased had passed-by at the garments and M-pesa shops to ride PW2 and their two children, namely **Ms. Nurat Said** (Ms. Nurat) and **Ms. Nasra Said** (Ms. Nasra). for home using a *toyo* species of motorcycle. In this journey, PW1 was ahead of the deceased's motorcycle pedaling a bicycle in support of the move back to their residence.

The journey went well until when they wanted to cross the school, along the road, they found a sisal tree blocking the road and PW1 had tried to remove the same. However, he found himself invaded, attacked and injured by the bandits to cause wounds on head and hand. For the deceased, it was worse. He was attacked on head several times to death.

The incident was reported to the police and investigation took its course and led to the arrest of three (3) accused persons, namely: **Josephat Kawawa @ Athmani** (the first accused), **Mashaka Juma @ Mangu @ Jeshman** (the second accused) and **Mkongwe Marwa @ Kinozi @ Somatama** (the third accused).

The accused persons were brought in this court for allegation of murder of the deceased contrary to sections 196 and 197 of the

Penal Code [Cap. 16 R.E. 2022] (the Penal Code). The Republic claimed that the accused persons were spotted by PW1 and PW2 and the first accused had confessed commission of the offence before police officer, **H. 83 D/Cpl. Onesmo** (PW6) and extra judicial statement before justice of peace **Ms. Tumaini Salum Mkongi** (PW5). The four (4) indicated witnesses, a villager **Mr. Edward Mwandu** (PW3) and Medical Doctor, **Dr. Jafari Hamis Majengo** (PW4) were summoned on 12th October 2023 to testify for the Republic in this court, whereas all three (3) accused persons were marshalled in defence side to protest the allegation.

The testimony of PW1 shows that he was driving a bicycle ahead of the deceased's motorcycle pedaling his bicycle towards their home residence on 26th August 2022 at evening hours. According to PW1, he pedaled ahead of the motorcycle at five (5) steps to enjoy the headlight of the motorcycle, but upon arrival next to the school, he spotted a sisal tree crossing the road blocking a passage.

PW1 testified further that, he wanted to remove the sisal, but was invaded by six (6) persons and was able to identify the accused persons, and it was the third accused who initially attacked him on head by *panga* whereas the first, second and third accused persons together attacked the deceased on head and other parts of the body by use *panga*.

According to PW1, after the attacks, the accused persons had grabbed a bag from him which had M-pesa transactions monies and cellular phones whereas the other bag had a laptop belonged to the deceased. Before that, according to PW1 the accused persons had appeared at M-pesa Kiosk in noon hours and the first accused had requested withdraw of Tanzanian Shillings Two Million (2,000,000/=Tshs) via M-pesa wire and was confirmed presence of a bundle of the indicated amount. However, according to PW1, he had left the Kiosk for allegation of following his cellular phone back home and he never returned for the transactions.

On the question how PW1 was able to identify the accused persons at night hours, he testified that he managed to identify them because: first, there was high intensity of light emanated from the deceased's motorcycle which could flash up to twenty (20) meters; second, there was a moonlight; third, he knows accused persons face and names; and finally, they live in the same village of Nyasirori.

PW1 testified further that PW2 was present and witnessed the attacking incident and had shouted *yowe* to attract assistance from the villagers and the villagers had echoed the *yowe* whistle. In ending his testimony, PW1 stated that he mentioned the accused persons before *yowe* villagers and mentioned them again during

witness statement recording at Butiama District Hospital (the hospital).

PW2 was marshalled during hearing of the case and testified that she whistled the *yowe* to attract assistance from the villagers after witnessing the accused persons attacking the deceased on different parts of the body by *panga*. According to PW2, the deceased had two (2) shops of garments and M-pesa and had engaged PW2 and PW1 respectively, and on the evening hours of 26th August 2023, they were moving from the shops to their residence, accompanied by the deceased, PW1, and their two lovely daughters, Ms. Nurat and Ms. Nasra.

However, according to PW2, upon arrival at the Secondary School's sisal fence along the road, they found a sisal blocking the road and when PW1 was busy trying to clear the road by removing the sisal, a total of six (6) bandits emerged from the sisal fence and started to attack the deceased and PW1 by *panga* on heads and hands. According to PW2, she managed to identify the three (3) accused persons in the group of six (6) persons and that after the attacks, they grabbed two (2) bags containing monies and laptop and escaped the scene of the crime.

PW2 testified further that she mentioned accused persons before *yowe* people and police authorities in Butiama District at the crime scene and was able to identify the accused persons from the

deceased's motorcycle lights, moonlight and had lived with the accused persons in one village and knows their activities at the village. According to PW2, the attackers were in five (5) meters and the attacking incident took like five (5) minutes. During hearing of the case, both PW1 and PW2 had correctly identified the accused persons in the court's dock.

An indigenous of Nyasirori Village, PW3 was called in the case to testify on two (2) *yowe* whistled on two different days regarding killing incident, arrest of the first accused person and citation of the accused persons during the *yowe* calls by PW2. According to PW3, on 26th August 2022 around 19:45 hours, he heard *yowe* shouts and rushed to the *yowe* direction and upon arrival he found the deceased already expired.

PW3 testified further that PW2 had identified the attackers and mentioned them on the same night hours and the second *yowe* was shouted on the second day around 04:00 hours where a manhunt was initiated. According to PW3, the manhunt had produced arrest of the first and second persons in different locations at 13:00 hours and were brought before the police at 15:00 hours. Finally, PW3 testified that on the fateful day, there was moonlight to enable a person to identify another person.

The unnatural demise of the deceased and extent of injuries before his expiry was produced by PW4's testimony. According to

PW4, he examined the deceased body at the hospital on 28th August 2022 at 09:00 hours and found three (3) huge wounds on the head caused by a sharp object to cause *orbital fossa*. Regarding the cause of death, PW4 testified that the death was caused by excessive bleeding of *hemorrhage species* and finally prayed to tender postmortem report of the deceased, which was admitted as exhibit P.1 without any protest from the defence. The postmortem shows that the source of death is: *huge cut-wound vertically through facial region approximately 14cm in depth with length of approximately 13cm from right eye to occiput region*. Concerning the head-skull conditions, the report displayed that: *the skull was cut from the right palpebral region to the occiput region with brain matts out with clotted blood*.

The Republic also brought in this court PW5 and PW6, who were involved in recording the first accused's extra judicial statement and cautioned statement respectively. PW5 had testified that on 2nd September 2022, she was at her office at **Kukirango Primary Court** (the primary court) attending his usual duties and around 13:00 hours police officer **D/Cpl. Wilson** appeared with the first accused for extra judicial statement recording.

According to PW5, after following all necessary steps, including ordering **D/Cpl. Wilson** and **MG. Thobias** to leave scene of recording for twenty-five (25) steps, pronouncing his rights and

cautioning him the statement may be invited in court for exhibit, she went on recording the extra judicial statement. In order to authenticate the statement, according to PW5, the statement was read before the first accused and upon understood the contents, he signed the same in writing and thumb print.

In the statement, according to PW5, the first accused had confessed participation in the killing of the deceased, produced details of the plan and people who associated in the killing of the deceased and specific roles of each individual assailant. In order to justify her evidence in testimony, PW5 prayed to tender the extra judicial statement to be part of the exhibits in this case, and it was admitted as exhibit P.2 without any protest from the defence. Exhibit P.2, in brief, shows the following narrations from the first accused person:

Tulikuwa watu sita yaani mimi mwenyewe Mashaka Juma, Tindo, Thomas, Magesa na Somatama, kati yao mimi, Mashaka na Somatama tunatoka kijiji cha Nyasirori hao wengine ni wageni ambao tulikutana tarehe 26.08.2022 majira ya jioni. Sisi watatu tulienda kuandaa sehemu ya tukio kwa kuziba njia na kuelekezwa na Somatama kuwa kuna watu wengine watakaohusika kumshika Mwalimu Said. Hivyo tuliweka katani kwenye njia ambayo ilikuwa nyembamba na kukaa umbali wa hatua 20 mpaka 25 wakati Magesa, Tindo na Thomas walikaa njiani. Baada ya muda mfupi majira ya saa moja na nusu jioni Mwalimu alipita na

ndipo walimkamata na kumkata Mwalimu na panga mpaka umauti ulipofika ila sijui kama alifia eneo la tukio au hospitalini. Wakati huo tukio limetendeka sisi tulikuwa pembeni tunasikia milio ya kelele na panga baada ya hapo tuliondoka kila mtu na kundi lake.

However, before P.2 was written down by the justice of peace, the accused had already confessed before PW6 on 27th September 2022 at Butiama Police Station (the police station). According to PW6, on the night hours around 19:45 hours of 26th August 2022, the police authorities at Butiama District were informed of the attacks launched to the deceased and PW1 at Nyasirori Village by a group of more than five (5) people and three (3) accused persons were identified.

Subsequent to the report, PW6 testified that, the police rushed at the crime scene and noted the incident actually happened and the three (3) accused persons were mentioned by PW1 and PW2 during the *Yowe Assembly*, which was summoned immediately after the attacks against the deceased and PW1. According to PW6, PW1 and PW2 had repeated mentioning the accused persons before him during witnesses' statements recording at the crime scene and hospital on the same day.

According PW6, following the citation of the accused persons, the villagers had initiated search for them and successfully arrested the first and second accused persons on the second day, 27th August 2022 around 13:45 hours and the third accused on 31st August

2022. PW6 testified further that the accused persons were handled over to the police authorities at 15:00 hours and recorded the first accused's cautioned statement from 16:00 hours to 17:00 hours, where he confessed participation in the offence of killing the deceased.

According to PW6, he followed all legal steps in recoding the first accused's statement, including explaining his rights and cautioned him that the statement may be used against him in court of law, before he started recording him. In explaining the circumstances under which the first accused was interrogated and recorded the cautioned statement, PW6 stated that he was recorded in voluntary, free without any torture, ill treatment or promise in a comfortable room of three (3) tables, six (6) six chairs, and a bench.

In the statement, according to PW6, the first accused confessed participation in attacking the deceased and mentioned the first and second accused persons to have taken part in the attacks against the deceased at the crime scene with different roles. In order to authenticate the statement, both PW6 and the first accused had entered their signatures in writing and thumb print.

Regarding the arrest of the third accused person, PW6 testified that he was arrested on 31st August 2022 and brought before the police station. However, according to PW6, the second and third accused persons, upon interrogation and cautioned statement

recording, the dual had refused involvement in attacking the deceased. As the first had confessed involvement in the killing and the dual had refused participation in the attacks, PW6 prayed to tender the first accused person's cautioned statement to be part of the record in the case.

However, the prayer was protested by the defence for want of proper application of three (3) sections in two distinct statutes, namely: first, section 50 (1) (a) of the **Criminal Procedure Act [Cap. 20 R.E. 2022]** (the Act) for want of four hours' time period in recording suspects statement; second, section 58 (3) (a)-(e) of the Act for want of a display of the procedure in recoding cautioned statement; and finally, section 27 (3) of the **Evidence Act [Cap. 6 R.E. 2022]** (the Evidence Act) for want of voluntary confession.

However, all the three (3) indicated points of objection were overruled by this court for want of merit and cautioned statement of the first accused person was admitted as exhibit P.3. In brief, P.3 shows that:

Ninakumbuka mnamo tarehe 26.08.2022 majira ya saa 14:00 hrs huko katika kijiji cha Nyasirori Kata ya Masaba Tarafa ya Makongo Wilaya ya Butiama na Mkoa wa Mara nilikutana na wenzangu mbao ni SOMATAMA@ Mongwe s/o Marwa na MASHAKA S/O JUMA @ JESHIMAN na tulikutania katika senta ya Nyasirori kwenye stoo ambapo walidai kwamba tarehe hiyo kwa nini tusimteke Mwalimu SAID S/O? ambaye ana Mpesa ndipo mimi

nikauliza tukiwa hawa watatu ndipo SOMATAMA @ MKONGWE S/O MWITA akajibu kuna watu wengine kutoka Bunda tumewaambia na wanasema wako tayari kuungana na sisi. Baada ya hapo mimi nilipewa kazi moja kwenda kuuliza mdogo wake hapo dukani ana uwezo wa kutoa Milioni Mbili Tshs. 2,000,000/= ambapo nilienda dukani hapo na kumkuta mdogo wake Mwalimu alikuwa humo kwenye duka la Mpesa ndipo nikamuuliza na kuniambia hiyo hela ipo hivyo leta tutoe. Mimi nikaondoka kwenda kuwapa taarifa wenzangu ambao walinituma kwamba hela hiyo ipo. Hata hivyo huyo SOMATAMA@ MKONGWE S/O MWITA ALIWASILISNA NA HAO WATU WA BUNDA WAKAWA NA WAO WAMEFIKA MUDA WA SAA 15:00 HRS AMBAPO WALIKUJA WATU WATATU AMBAO WALIKUWA KWENYE PIKIPIKI AMBAPO MMOJA AALIJITAMBULISHA Rajab s/o?. Lakini baada ya kumuona kumbe jina lake ni MAGESA S/O CHACHA, wa pili alijitambulisha kuwa jina lake DENIS wakati anaitwa TINDO S/O NYAMHANGA huku wa mwisho alitwa IBRAHIM @ THOMAS S/O MASANA na baada ya hao kufika tulienda, mimi na wenzangu wawili ambao tulikuwa wenyeji na hao ndio mara yangu ya kwanza kuwaona. Na wao walikubali sehemu waliyokuwa wamejifichia ambapo sisi watatu tulienda hadi kwenye eneo tulilokuwa tumepanga kumteka Mwalimu na kuweka katani kubwa kwenye njia ya kupita na badae mimi na MASHAKA S/O JUMA tulijificha huku SOMATAMA @ MKONGWE S/O MWITA alienda kumuangalia Mwalimu akitoka, kutoka tu atuambie ambapo tayari hao wenzetu na wao wa Bunda walikuwa tayari wameshasogea eneo la tukio huku

wakiwa na mapanga ndipo ghafla tulipata taarifa kutoka kwa SOMATAMA @ MKONGWE S/O MWITA kwamba Mwalimu tayari anakuja na mdogo wake huku aliendesha baiskeli ambapo kila mtu alisogea eneo hilo ambalo lilikuwa na Katani ndipo ghafla Mwalimu alionekana akiwa na pikipiki yenye taa kali alimmulika mdogo wake aliyekuwa mbele ambapo baada ya kufika, kwenye katani tulimweka chini ya ulinzi na kuanza kumshambulia kwa mapanga huku tukitaka tupate hilo begi baadaye Mwalimu alipoona hivyo na yeye alikuja akataka kumsaidia mdogo wake ndipo alikatwa panga na THOMAS S/O MASANA na kuchukua begi lake baada ya kuanguka na aliyemkata panga mdogo wake mwalimu alimkata alikuwa ni TINDO S/O NYAMHANGA@ DENIS ambaye alimkata panga kichwani na baada ya tukio hilo mke wake alipiga kelele ndipo kila mtu aliondoka kivyao ambapo baada ya tukio hao watu watatu wa Bunda, begi zote mbili pamoja na Mapanga waliyokuwa wamekuja nayo na hatukujua tumechukua Tshs. Ngapi kwenye hayo mabegi na mimi na wenzangu wawili tulikimbia pamoja na wale waliondoka mazima na hata mgao hatukupewa. Hata hivyo, baadaye kikao cha kujitoa Muhanga kwenda kwenye kikao cha ulinzi shirikishi kilichofanyika kwa ajili ya tukio hilo nilitaka nisijulikane lakini, baadaye nilikamatwa hapo kwenye yowe, nikahusishwa na tukio hili. Jumla ya watu nilioshirikiana nao katika tukio hili walikuwa watano na mimi wa sita na wote tulipotezana bada ya kufanya tukio hilo.

Following the materials produced by the Republic in the case, the accused persons were called to reply the allegation of murder

against the deceased as the materials had displayed that the accused persons may have committed the offence. In replying the materials, the first accused (DW1) had denied any involvement in the commission of the offence. According to him, he was arrested on 27th August 2022 by *Yowe villagers* and connected to the unnatural expiry of the deceased without any proof, and that he was arrested in morning hours, brought to the police at 12:00 hours, arrived at the police station at 14:00 hours and recorded statement at 19:00 hours, but denied involvement in the commission of the crime.

According to the first accused, after his denial on the participation in the crime, on the next morning, 28th August 2022, he was transferred to a torture chamber located at **Mulyaza Police Station**, where he was tortured and humiliated in a state of hunger for seven (7) hours from 09:00 hours to 16: 00 hours to confess the crime. Citing some instances of torture, the first accused stated that the police had inserted a club into his private parts, did put him in *mzani* state of affairs and the police officers stated that *sisi kukuhumiza wewe, hapa kwetu sio tatizo*.

According to the first accused, these kinds of threat in words and conduct, and for the need of shielding his life, he had to confess the crime and to give details of what had transpired during the killing of the deceased. Regarding his signature and thump print in the statement, the first accused person stated that he was forced by

PW6 to register his signatures and even after taking the same, PW6 declined to read the statement before him to appreciate the contents.

Replying on exhibit P.2, the first accused persons stated that he was forced to record the contents similar to the contents in P.3 by the PW6 and police officer Wilson, who were next to PW5 during the recording of exhibit P.2, and that if he declines to do so, will be taken back to the torture chamber in Mulyaza Police Station. Similarly, the first accused complained that exhibit P.2 was never read before him to understand its contents.

However, the first accused admitted that he did not state where he was on 26th August 2022 at evening hours; he told PW6 that he participated in the killing of the deceased; exhibit P.2 and P.3 have consistence, but they were never read before him; and that he pronounced two words only: *mimi sihusiki*, and all other words were added by PW5 and PW6 for their own purpose.

The second accused (DW2) on his part had testified that he does not know either the deceased or killing of the deceased which took place on 26th August 2022 at Nyasirori Village. According to him, he was arrested on 27th August 2022 and brought to the police for cautioned statement and had denied commission of the alleged offence.

However, the second accused testified that he heard *Yowe* shouts on 26th August 2022, but was not aware what exactly transpired and he has no connection with the first and third accused persons. The second accused testified to have been surprised by citation of his name in the commission of the crime from PW1, PW2 and the first accused, as he does not know them.

The evidence of the third accused, on the other hand shows that he was at Mwanzaburiga Village with his grandmother *Kanyoro* on 26th August 2022, evening hours and was arrested by the police on 31st August 2022 at *Mterani* area in Mwanzaburiga Village of Butiama District, when buying home use commodities, including fish. Regarding the death of the deceased and evidences produced by PW1 & PW2 and exhibits P.2 & P.3, the third accused person stated that he does not know them and he lives at Mwanzaburiga Village which is separated by Nyasirori Village by seventeen (17) Kilometers. Concerning the first and second accused persons, the third accused person stated that he does not know them, and the they first met at the court of law and using the same police vehicle and could not ask him why he mentioned him in P.2 and P.3.

In totality of defence materials, all three (3) accused persons were complaining fabrication of the case by the Republic and prayed this court to find them innocent to the alleged killing of the deceased. This is the court of law and justice and always securitize

materials brought before it and considers the law before landing to its conclusion.

In the instant case, there is an allegation of PW1 and PW2 to have witnessed the accused persons attacking the deceased with panga at night hours; and second, confessional statement of the first accused. The two (2) indicated issues are to be resolved by inviting the law regulating direct evidence and second, the law regulating conviction based on confessional statements of the accused persons.

The law regulating direct evidence is enacted in section 62 (1) (a) of the Evidence Act and provides that: *oral evidence must, in all cases whatever, be direct, that is to say, if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it.* According to precedents available at the Court and this court, a witness must show that he *had the opportunity to see what he claimed to have seen* (see: **Johana's Msigwa v. Republic** [1990] TLR 148; **Republic v. Kamhanda Joseph Abel & Five Others**, Criminal Sessions Case No. 46 of 2018; **Republic v. John Mbatira @ Mtuke**, Criminal Sessions Case No. 181 of 2022; and **Republic v. Mroni Samo @ Ryoba**, Criminal Sessions Case No. 12 of 2023).

In determined whether a witness had the opportunity to see what he claimed to have seen, a witness must be credible and reliable. According to the Court, a witness who testify consistencies

statements and his demeanor is inviting may be believed and his testimony accepted, unless there are good and cogent reasons for not believing him. That is the thinking of the Court Appeal (the Court) (see: **Sabato Thabiti & Benjamini Thabiti v. Republic**, Criminal Appeal No. 441 of 2018 **Goodluck Kyando v. Republic** [2006] TLR 363; and **Republic v. Mroni Samo @ Ryoba** (supra).

However, practice shows that a witness who mentions an accused at the earliest possible opportunity, he is considered to be the best witness and his reliability is assured (see: **Marwa Wangiti Mwita & Another v. Republic** [2002] TLR 39; **Republic v. Nyataigo Mwita @ Makende**, Criminal Sessions Case No. 154 of 2022; and **Republic v. John Mbatira @ Mtuke** (supra).

In the present case, PW1 and PW2 have registered consistence statement displaying to have seen the accused persons attacking the deceased by use of *panga*. They mentioned the accused persons before the *Yowe villagers* as it was corroborated by PW3 and immediately later before PW6 at the crime scene and hospital. These witnesses must be trusted.

I am aware it was night hours, but PW1 and PW2 had explained in this court on how were able to identify the accused persons from the high intensity of motorcycle light, short distance of about five to six meters and moonlight. They also testified to have known the accused persons as village mates before the incident had happened.

According to the Court, the indicated circumstances are more than identification. It is recognition and that recognition is more satisfactory, more assuring and more reliable than identification of a stranger (see: **Kenga Chea Thoya v. Republic**, Criminal Appeal No. 375 of 2006; **Nicholaus Jame Urrio v. Republic**, Criminal Appeal No. 244 of 2010; and **Mussa Saguda v. Republic**, Criminal Appeal No. 440 of 2017). This court has been following the move the Court without any reservations (see: **Republic v. Pete Msongo @ Patrick**, Criminal Sessions Case No. 179 of 2022 and **Republic v. Mroni Samo @ Ryoba** (supra).

I have perused enactment of section 27 (1) & (3) of the **Law of Evidence Act [Cap. 6 R.E. 2022]** (the Evidence Act), which prohibits threats, torture and promise from an interrogating officer to a suspect. I have also scanned interpretation of the enactment in **Tuwamoi v. Uganda** [1967] EA 84 by the East African Court of Appeal and this court in **Republic v. John Mbatira @ Mtuke** (supra), and found that the main essential for the validity of a confession is that it must be voluntarily extracted.

I have consulted the materials registered in this case and totality of evidence regarding evidence of PW6 and exhibit P.3, and persuaded by the detailed materials produced by the first accused, which shows that the materials can only be produced by persons

who have knowledge of the event or have involved in the killing of the deceased.

I am conscious that this court must warn itself in basing its conviction on repudiated or retracted confession (see: **Mkubwa Said Omari v. SMZ** [1992] TLR 365; **Mbushuu @ Dominic Mnyaroje & Another v. Republic** [1995] TLR 97; and **Paul Maduka & Five Other v. Republic**, Criminal Appeal No. 110 of 2007. However, evidences produced by PW1 and PW2 corroborated the prosecution evidences of PW3 and PW6 complimented by exhibits in P.2 and P.3 show that the accused persons have committed the alleged offence.

I am aware that that the accused persons have denied involvement in the killing of the deceased, but have declined to register relevant materials to protest the timing of the killing event of the deceased at the crime scene. The first accused had opted to remain silent on where he was on night hours of 26th August 2022.

Similarly, to the second accused who had produced denials in every question regarding the involvement on the subject. Much as I am aware at one point in time, he testified that he heard *yowe* shouts at the crime scene on 26th August 2022 evening hours, but testified that he could not recall what had transpired. This is to corroborate the evidence of PW3 who testified that the second accused was present at the crime scene during the *yowe* calls, but

he immediately escaped the scene of the crime after his citation by PW2. In PW3's words: *alichenga haraka na kuondoka*.

Regarding the evidence of the third accused person, he heavily relied presence at his home residence when the offence of attacking the deceased was taking its course at the crime scene. According to the third accused, he testified to be with his grandmother *Kanyoro* on 26th August 2022, evening hours at Mwanzaburiga Village. However, he declined to call his grandmother *Kanyoro*. According to the Court, failure to call material witnesses may make this court to draw an adverse inference against the accused persons (see: **Wambura Marwa Wambura v. The Republic**, Criminal Appeal No. 115 of 2019 and **Stanley James @ Mabesi v. Republic**, Criminal Appeal No. 115 of 2022; **Republic v. Mroni Samo @ Ryoba** (supra).

In the present case, the first accused had complained on time limitation under section 50 (1) (a) of the Act and display of the procedure under enactment of section 58 (3) (a)-(e) of the Act, and produced materials to show that he was arrested on 27th August 2022 at 12:30 hours and recorded statement on 2nd September 2022, after torture at Mulyaza Police Station and that the P.3 was not read before him. The protests will not detain this court, PW3 testified that the first accused was arrested on 27th August 2022 at 13:00 hours and handled him over to the police authorities at 15:00 hours. The evidence was supported by PW6 and exhibit P.3. PW6

testified that the first accused was brought to the police station at 15:00 hours and started to record him at 16:00 hours and completed at 17:30 hours. The testimony of PW6 is supported by exhibit P.3 which shows that the recording of the statement started at 16:00 hours to 17:30 hours.

Similarly, the protest on the procedure enacted in section 58 (3) (a)-(e) of the Act was complied as depicted in P.3 and with specific certification at the bottom of the fourth page. With such certification, the accused cannot claim that the procedure was not complied, taking consideration that I ruled against the objection under section 27 (3) of the Evidence Act.

I am aware that the accused persons were required to raise some doubts to the prosecution case by bringing necessary materials. However, in the present case they declined to do so. I am also conversant that it is not proper to convict the accused on basis that he is found to be a liar (see: **Mushi Rajab v. Republic** (1967) HC 384) or weaknesses of his defense (see: **Christian Kale & Rwekaza Bernard v. Republic** (1992) TLR 302).

However, in the circumstances of the present case and considering materials brought by prosecutions side, it is vivid that PW1 and PW2 have witnessed the accused attacking the deceased on the head and hands by use of *panga*. The evidence of the

accused had declined to shake these materials brought by eye witnesses PW1 and PW2.

In the present case, another directive of the Court was followed by the Republic. The Court has directed that where an accused has confessed commission of an offence, the safest course is to have the confession repeated to justice of peace and the justice of peace be summoned to testify in court (see: **Bushiri Msahaka & Three Others v. Republic**, Criminal Appeal No. 45 of 1991. In the precedent of **Bushiri Msahaka & Three Others v. Republic** (supra), the Court resolved that:

*Those charged with the duty of investigating criminal cases are **reminded once again that upon an accused person intimating to make a confession, the safest course to adopt is to have them repeat his statement before a justice of peace.***

(Emphasis supplied).

In the present case, the Republic has complied with the move by taking the first accused to PW5 after his confessional statement before PW6. The directive and move of the court were followed by this court without any reservations in the precedents **Republic v. Massanja Karume @ Mohamed & Another**, Criminal Sessions Case No. 13 of 2018 and **Republic v. Mokiri Wambura @ Makuru**, Criminal Session Case No. 70 of 2022). To maintain certainty of decisions from this court, I will support the move and hold that the

first accused cannot dispute P.2 in the present circumstances. In any case, if we lose confidence and trust to justice of peace, we will be losing trust and confidence to our superior court. I shall not cherish the move of disputing directives of the Court.

The next question is whether, the accused persons had attacked the deceased with *malice aforethought* as enacted in section 200 of the Penal Code and interpretation of the Court in the celebrated precedent of **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994. The Court in the precedent has placed seven (7) important factors to be considered in resolving *malice aforethought* in the following words typed at page 6 of the decision:

...usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following: (1) the type and size of the weapon, if any used in the attack; (2) the amount of force applied in the assault; (3) the part or parts of the body the blow were directed at or inflicted on; (4) the number of blows, although one blow may, depending upon the facts of the particular case, be sufficient for this purpose; (5) the kind of injuries inflicted; (6) the attackers utterances, if any, made before, during or

after the killing; and (7) the conduct of the attacker before and after the killing.

In the present case, the materials produced by PW1 and PW2 corroborated by exhibit P.1 show that the accused was attacked by the deceased in sensitive parts of the human body head and hands to cause *multiple wounds* hence death of the deceased. From the materials on record, it is vivid that the accused had killed the deceased with malice aforethought.

In the circumstances of the present case, I am satisfied that the prosecution has proved its case beyond doubt as per requirement of the law in section 3 (2) (a) of the Evidence Act and precedents in **Said Hemed v. Republic** (supra) hence I find the accused guilty to the charged offence of murder contrary to sections 196 and 197 of the Penal Code.

Ordered accordingly.

Right of appeal explained.



F.H. Mtulya

Judge

18.10.2023

This Judgment was pronounced in open court in the presence of the accused persons, **Mr. Josephat Kawawa @ Athmani, Mr. Mashaka Juma @ Mangu @ Jeshiman** and **Mr. Mkongwe Marwa @ Kinozi @ Somatama** and their learned Defence Attorneys, **Mr. Daudi Mahemba** and **Mr. Evance Njau**, and in the presence of **Mr.**

Abdulheri Ahmad Sadiki and **Ms. Natujwa Bakari Idd**, learned
State Attorneys for the Republic


F.H. Mtulya

Judge

18.10.2023

MITIGATIONS

Mahemba: My Lord, on behalf of the first accused person, I say that, this court may not abide with section 197 of the Penal Code. My Lord, this court may invite article 14 of the **Constitution of the United Republic of Tanzania**, which provides for right to life. My Lord, this court may do so. My Lord, sentencing the accused person under section 197 of the Penal Code will add more deceased persons than cure. My Lord, we pray for other sentence than death penalty. That is my prayer My Lord.

F.H. Mtulya

Judge

18.10.2023

Njau: My Lord, for the second accused, I pray that this court to abide by article 14 of our Constitution. My Lord, if death is pronounced, the life of the second accused person will be gone. We cannot resume his life, My Lord. My Lord, I pray the same to the third accused person. This court may do so, My Lord. There is leniency that may be considered in this case. My Lord, we pray you decline section 197 of the Penal Code. My Lord, for the second and third accused persons, that is all.

F.H. Mtulya

Judge

18.10.2023

1st Accused: My Lord, I pray this court to consider the time I spent in prison custody. My Lord, I wish to prefer an appeal. I pray a copy of the pronounced judgment. That s all My Lord.

F.H. Mtulya

Judge

18.10.2023

2nd Accused: My Lord, I pray this court to consider my stay in prison custody. I also pray for a copy of judgment. That is all My Lord.

F.H. Mtulya

Judge

18.10.2023

3rd Accused: My Lord, I pray for a lenient sentence. I am very old in terms of age and my family depends on me. I pray so My Lord.

F.H. Mtulya

Judge

18.10.2023

ANTECEDENTS

Sadiki: My Lord, we have no previous record of the accused persons. However, My Lord, there is penalty in cases like this enacted under section 197 of the Penal Code. My Lord, this section has no alternative. This court has to abide by the law. That is our submission My Lord.

F.H. Mtulya

Judge

18.10.2023

SENTENCING ORDER

I have heard the submissions and prayers of both parties, and I am aware of the contest on the penalty of death enacted under section 197 of the Penal Code. It is unfortunate that the enactment was enacted in compulsory terms without any alternatives. This is a court of law and justice. It is so concerned with the enactment, but that is the law. I will abide with the law. Having said so, I sentence the accused persons, **Mr. Josephat Kawawa @ Athman, Mr. Mashaka Juma @ Mangu @ Jeshiman** and **Mr. Mkongwe Marwa @ Kinozi @ Somatama**, to death that shall be suffered by hanging.

It is so ordered.

Right of Appeal explained to both parties.




F.H. Mtulya

Judge

18.10.2023

This Sentencing Order was pronounced in open court in the presence of the accused persons, **Mr. Josephat Kawawa @ Athmani, Mr. Mashaka Juma @ Mangu @ Jeshiman** and **Mr. Mkongwe Marwa @ Kinozi @ Somatama** and their learned Defence Attorneys, **Mr. Daudi Mahemba** and **Mr. Evance Njau**, and in the presence of **Mr. Abdulheri Ahmad Sadiki** and **Ms. Natujwa Bakari Idd**, learned State Attorneys for the Republic.


F.H. Mtulya

Judge

18.10.2023