

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA SUB REGISTRY

AT IRINGA

CRIMINAL SESSION CASE NO. 21 OF 2023

REPUBLIC

VERSUS

1. MAWAZO YASIN PESAMBILI

2. CHALSE MALAUNGA @ LINJOO

JUDGMENT

Date of Last Order: 15.03.2024

Date of Judgment: 20.03.2024

A.E. Mwipopo, J.

Geofrey George Mtei, people's militia at Ndiuka area, was patrolling Ndiuka E street on 22/12/2022 around 02:00 hours when he saw a person running in his direction. The person passed him running and went in the direction of Pepsi Godowns (Warehouses). Geofrey George Mtei identified the person to be Frank Masangula. Two people passed Geofrey Mtei chasing Frank Masangula. Geofrey George Mtei identified the persons to be Mawazo

Yasin Pesambili and Maasai. Geoffrey George Mtei followed them and found Mawazo Yassin Pesambili and Maasai assaulting Frank Masangula using sticks. He tried to stop them from assaulting Frank Masangula, but he was attacked with a stick. He left the scene and went to call his fellow militiamen for assistance. He returned to the scene at Pepsi Warehouses after 30 minutes with militiamen and the Street Chairman. They found Frank Masangula lying on the ground, already dead. They apprehended Mawazo Yassin Pesambili. They informed the police about the incident. Police arrived at the scene of the crime. Police officers arrested Mawazo Yassin Pesambili at the scene of the crime. Police officers went with the street chairman to a bar nearby and arrested Chalse Malaunga @ Linjoo. They took the deceased body to the Mortuary of Iringa Region Referral Hospital. They took suspects and witnesses to Iringa District Central Police Station.

Mawazo Yasin Pesambili and Chalse Malaunga @ Linjoo were arraigned in Court for murder contrary to sections 196 and 197 of the Penal Code, Cap. 16 R.E. 2022. It was stated in the particulars of the offence in the information that on 22/12/2022, in the Ndiuka area within the District and Region of Iringa, the accused persons jointly murdered Frank Masangula. The information was read to both accused persons who pleaded it was not true,

and the Court recorded their pleas as a plea of not guilty. The prosecution brought six witnesses and tendered two exhibits to prove the case. Each accused person testified on oath in defence. They did not call any witness or tender any exhibit in their defence.

The 1st prosecution witness to testify is Geoffrey George Mtei (PW1). He said in 2022, he was a people's militia (sungusungu) in the Ndiuka area, comprising five streets. On 22/12/2022, around 02:00 hours, while patrolling the Ndiuka E street near BMX bar, a person running toward Pepsi Warehouses passed him. Mawazo and Mmasai chased the person. Mawazo was in front, and Maasai was behind him. PW1 followed them. He found Mawazo and Maasai had caught the person who was running near Pepsi Warehouses, and they were assaulting him by using pieces of stick. Mawazo had a club like firewood, and Maasai had a stick and bush knife (sime). Mawazo was using a club to attack the deceased, and Mmasai was using a stick to attack the deceased. The bushknife was not used. PW1 said he could identify Mawazo and Mmasai as there was a bright electric light at the warehouse illuminating the whole area. PW1 asked them to stop assaulting that person, but he was attacked with a stick. He decided to seek help from his fellow militias as he was alone.

PW1 said he was able to find the street chairman and people's militia leaders, and they went together back to the area of the incident. At the scene of the crime, PW1 saw the person who was assaulted lying on the ground. The street leader and people's militia leader called the police, who visited the crime scene. The police said that the person was already dead. The police took the deceased body to the mortuary of Iringa Region Referral Hospital before they went to the police station to record a statement. PW1 stated that he knows Mawazo as a resident of the Ndiuka area and Mmasai as a watchman at Step In Bar, also known as BMX Bar. PW1 identified the accused persons in the dock.

In cross examination, PW1 said it took him approximately thirty (30) minutes to call street and militia leaders and return to the crime scene. Police officers arrived at the scene after more than one hour had passed. PW1 said they used to call the person who was chased and killed FK, and he was working in Ndiuka Street. Mmasai was the only Mmmasai working in the area. Mmasai was working at BMX bar. The 2nd accused had a stick and bushknife (sime) when he was arrested.

A police officer with No. G. 4395 D/CPL Lubeya (PW2) testified that on 22/09/2022, while working at Iringa District Central Police Station, he was

instructed by OC CID Iringa, to record the statement of the suspect, namely Chalse Linjoo, who was in police lock up. The OC CID Iringa informed PW2 that the suspect was accused of a murder offence and was brought to the police station around 06:45 hours on the same date. After preparing the room for an interview, PW2 took the suspect from the police lockup to the interview room. The suspect was in good condition and did not tell PW1 if he had any pain. PW2 said he used the investigation room for the interview, which had two chairs and a table. PW2 introduced himself by name and force number to the suspect and informed him that he was charged with a murder offence. He cautioned the suspect that he would record the interview on the offence he was charged with, and he was free not to say anything. He also told him that he may request the presence of his relative, friend or Advocate during the interview. The suspect answered that he is ready to give his statement without the presence of any relative, friend or Advocate.

PW2 said he started recording the suspect's statement at 08:15 hours and completed recording it around 08:30 hours. In the statement, the 2nd accused admitted to causing the death of the deceased by assaulting the deceased using a stick. The suspect said he attacked the deceased together with Mawazo Pesambili. After completing the recording, PW2 read the

statement to the suspect as he did not know how to read and write. The suspect said the statement was correct. The suspect put his thumbprint in the statement to certify it was accurate. PW2 certified that he recorded the statement correctly and signed it. PW2 tendered the cautioned statement of the suspect, namely Chalse Linjoo, and it was admitted as exhibit P1 for the prosecution despite the objection raised by the counsel for the 2nd accused. The Court ruled that the objection has no merits as the statement was recorded within a four-hour time limitation provided by the law from when the suspect was conveyed to the police station.

PW2 read the statement to the Court. The statement shows the 2nd accused assaulted the deceased by using a stick after the deceased broke the glass of the window of his employer's car. He attacked the deceased together with another person. PW2 identified the 2nd accused in the dock as Chalse Linjoo.

Deogratius Donatus Ndauka (PW3) witnessed the examination of the deceased body at the Mortuary of Iringa Region Referral Hospital on the morning of 23/12/2022. He said he identified the deceased to be his cousin Frank Masangula, who is also known as F. K. After he identified the deceased

body, the doctor examined the body. Then, the police allowed them to take the deceased body for the burial process.

Dr. Richard Nikodemu Kipyee (PW4) examined the deceased body on 23/12/2022 at Iringa Region Referral Hospital. He said the deceased relatives, namely Peter, Deogratias and Christina, identified the deceased as Frank Masangula in the presence of a police officer, namely Lubeya. The deceased, who is an adult male person, had cut wounds on the face and a depressed fractured skull. The deceased clothes were covered with blood. The cause of the deceased death is severe traumatic brain injury and severe bleeding. The cause of the death is injuries caused by a sharp object and a blunt heavy object. After examination, PW4 filled out the form for the post-mortem examination report. PW4 tendered a report on the examination of the deceased body, which was admitted as exhibit P2. Exhibit P2, which was read and explained to the Court, shows that the deceased had no sign of life, had multiple cut wounds caused by a sharp object in the head, and had haematomas in both arms, abdomen and back. The report shows that the cause of death was severe bleeding secondary to assault and severe traumatic brain injury secondary to multiple trauma to the head involving the skull.

A/Inspector Masauni Salum Mageni (PW5) is the police officer who arrested both accused persons. He testified that on 22/12/2022, around 02:00 hours, he was in the patrol police car in the Kihesa area with other police officers. Around 02:30 hours, he received a phone call about an incident at Ndiuka. After he finished attending the incident at Kihesa, they went to Ndiuka. It was around 03:00 hours when we arrived at the Tumbaku warehouse in the Ndiuka area where the incident occurred. They found the dead body of a person. They also found street leaders for Ndiuka A and Ndiuka B. The dead body had injuries in the head and back and was covered with blood. The deceased had a hematoma, as if he was defending himself from the assault. PW5 found a broken stick and a big stick in the area. He was able to see the deceased body and tools at the scene of the crime as there was an electric light which was illuminating the whole warehouse area. At the scene of the crime, PW5 found Mawazo Pesambili already arrested. Mawazo told PW5, and other people gathered that he owed the deceased some money. He assaulted the deceased together with Mmasai, who is the watchman of the BMX bar, which is close to the Tumbaku warehouse area.

PW5 said they went to the BMX Bar and arrested the Maasai watchman. They interviewed him about the incident, and he answered he

was looking for the deceased as he did break the glass of the window of the car at his place of work. The street leaders told PW5 that warehouse guards are also responsible for assaulting the deceased, but they have escaped. PW5 said he was told that the name of the deceased is Frank. Around 10:00, they finished the inspection and other investigations at the crime scene. They went to Ipogolo together with street leaders, deceased and suspects to look for warehouse guards. They failed to find them. They left Ipogolo together with the deceased, suspects, and street leaders and went to the Iringa region referral hospital around 06:00 hours to keep the deceased body at the mortuary. They handed the deceased body to the mortuary, left the hospital around 06:45 hours, and went to the Iringa police station. PW5 identified the 1st accused in the dock as Mawazo Pesambili and the 2nd accused as Maasai, whom he arrested.

The last prosecution witness is Raphael Mpunza (PW6). PW6 testified that he had been Chairman of Ndiuka E Street from 1994 to the present. On 22/12/2022, around 02:30 hours, he received a phone call from the people's militia about an incident in his administration area. They informed him there was a person at Tumbaku Warehouses suspected to be dead from assaults. PW6 went to the scene of the crime and found people militiamen and

Mawazo Yassin Pesambili, who was under the custody of militiamen. He also saw the deceased, whom he identified as Frank Masangula, the son of his brother-in-law. The deceased had injuries on the head and was covered with blood. Near the deceased body, there was a broken stick and another big stick. People's Militiamen told PW6 that Mawazo Pesambili and Maasai are responsible for the death of the deceased. One of the militiamen informed PW6 that he saw Mawazo Pesambili and Maasai assaulting the deceased. He called another street chairman from a neighbouring street, who came to the scene. A few minutes later, Police officers arrived at the crime scene. Police officers interviewed people's militiamen. After the interview, Mawazo was handcuffed. Police officers were informed that there was another suspect, namely Maasai. Police and PW6 arrested the Maasai at his workplace, Mwika Bar, which is close to the scene of the crime. PW6 identified the 1st accused in the dock as Mawazo Pesambili and the 2nd accused as Maasai. This was the end of the prosecution's case, and the state attorney closed the prosecution's case.

The Court found that the prosecution's case was made, and both accused persons must defend themselves. Mawazo Yassin Pesambili, the 1st accused person, testified on oath as DW1. He denied knowing Frank

Masangula, the deceased. DW1 said he is a resident of Kigamboni, Dar Es Salaam. In October 2022, he went to the Ndiuka area in the Iringa District and Region to care for his sick father. He denied the claims that he was arrested around 02:00 hours on 22/12/2022 at the Tumbaku Warehouses area. He said he was sleeping at his father's house in Ndiuka during the stated time. He does not know Geoffrey George Mtei (PW1). He noted that PW1 was not telling the truth that he saw DW1 and Maasai Chasing and assaulting the deceased. DW1 admitted to knowing Raphael Mpunza (PW6) as a resident of Ndiuka for a very long time. PW6 indeed found him under arrest at Tumbaku Warehouse. He admitted that PW6 found him already arrested at Tumbaku Warehouse. DW1 said he was arrested around 04:00 hours on 22/12/2022 by an unknown person at his father's house and was taken to the Tumbaku Warehouse. The police arrived and found him under custody of militiamen at Tumbaku Warehouses. The police officers handcuffed him after they arrived. Later on he was taken to Iringa District Police Station. The 1st accused denied to know Chalse Malaunga @ Linjoo. He said the whole prosecution's evidence was fabricated.

In cross-examination, DW1 said he did not have any conflict with PW6 and did not know if PW6 could fabricate anything against him. He did not know the reason for his arrest at the moment.

Chalse Malaunga @ Linjoo (DW2), the accused person, testified that from March 2022, he was residing in the Ndiuka area. He was a watchman at the bar located in Ndiuka. He reported at work from 19:00 hours, and his room is at the same bar where he was employed. He said he was charged with the murder of a person he did not know. On 22/12/2022, he was at his place of work. DW2 denied killing the deceased or knowing anything about the incident. He said he did not know PW1. He refused to chase and assault the deceased. He told the PW5's claims that the street chairman saw him attacking the deceased is not valid. A police officer arrested him at his place of work. He don't know Mawazo Pesambili. He did not assault or kill the deceased. He knows nothing about the incident.

In cross examination, DW2 admitted that he is Maasai and a watchman working at the bar. He is the only Maasai working at the bar. When he was arrested, he had a club and a bush knife. He did not record his statement with the police. He was alone at the bar when the police officers arrested him. There were no people drinking alcohol at the bar at the time of his

arrest. The reason for arresting him is based on suspicion. He does not have any conflict with the deceased. He was arrested alone. He didn't see Mawazo after his arrest. He said there has been no incident where a person broke the window of his employer's car in his place of work. He noted that PW1 was not telling the truth. This ended the defence case, and each accused closed his case.

The accused persons in this case were charged with murder offence contrary to sections 196 and 197 of the Penal Code, Cap. 16 R.E. 2022. In the murder case, the prosecution must prove that the deceased is dead, the accused person is responsible for the deceased death, and the accused person intended to cause the death of the deceased.

The standard of proof in criminal cases is beyond reasonable doubt as provided under section 3 (2) (a) of the Evidence Act, Cap. 6 R.E. 2022, and underscored in the case of **Hemed vs. Republic [1987] TLR 117**. In **Christian Kaale and Rwekiza Bernard vs. Republic [1992] TLR 302**, it was held that the prosecution has a duty to prove the charge against the accused beyond all reasonable doubt, and an accused should be convicted on the strength of the prosecution case. It is a settled principle that the accused person bears no duty to prove his innocence, and his duty is to raise

reasonable doubts in the mind of the Court. The presence of any reasonable doubts in the prosecution evidence should be resolved in the accused's favour.

Starting with the issue whether the deceased is dead, PW4 (the doctor) testified that he examined the deceased body for the cause of death and found the deceased had some injuries. He said the body was identified by deceased relatives, namely Peter, Deogratius and Christine, that it is the body of Frank Masangula. PW4 said the cause of death was severe traumatic brain injury and severe bleeding. The report of examination of the deceased body (exhibit P2) prepared by PW4 reveals in its summary that the deceased had no sign of life, had multiple cut wounds on the head, and had haematomas in both arms, abdomen and back. Exhibit P2 states that the cause of the deceased body is severe bleeding from assault and severe brain traumatic injury from multiple head trauma involving the skull. The exhibit P2 support the testimony of PW4. The evidence proves without doubt that the deceased is dead, and his death is not natural. The deceased death was caused by injuries he sustained.

Since the prosecution indicted both accused persons for murder offence, the next issue is whether the accused persons are responsible for

the deceased death. The prosecution's case relied on several pieces of evidence. There is the evidence of identification of eye witness who saw the accused persons assaulting the deceased, the arrest of the 1st accused at the scene of the crime, the confession of the 1st accused to PW5 and the confession of the 2nd accused in the cautioned statement (exhibit P1) recorded by PW2.

PW1 testified that he saw the accused persons assaulting the deceased using a stick at the scene of the crime during the incident. The evidence of identification of the accused persons by PW1 is direct evidence. It is the evidence of visual identification. The evidence of visual identification, though reliable, must be taken carefully before conviction. In the famous case of **Waziri Amani vs. Republic [1980] TLR 250**, the Court held that the evidence of visual identification is the weakest kind, and thus, before it is taken as a basis of conviction, it must be watertight. The Court of Appeal stated further that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the Court is fully satisfied that the evidence is watertight.

In the case of **Chacha Jeremiah Murimi and 3 Others vs. Republic**, Criminal Appeal No. 551 of 2015, Court of Appeal of Tanzania at

Mwanza (unreported), the Court of Appeal provided some guidelines for eliminating the possibility of mistaken identity. The Court held that:

"The most commonly fronted are: How long did the witness have the accused under observation? At what distance? What was the source and intensity of the light if it was at night? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally had he any special reason for remembering the accused? What interval has lapsed between the original observation and the subsequent identification of the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses when first seen by them and his actual appearance? Did the witness name or describe the accused to the next person he saw? Did that/those other person/s give evidence to confirm it?"

In the instant case, PW1 evidence is that on 22/12/2022 around 02:00 hours, he witnessed the 1st and 2nd accused persons chasing and assaulting the deceased person by using a stick at Tumbaku Warehouses in Ndiuka E Street. PW1, who was a people's militia during that time, asked them to stop assaulting the deceased, but he was attacked with a stick. PW1 decided to look for assistance from his fellow militiamen. He returned to the area after 30 minutes with the street chairman and leaders of the people's militia. PW1 said he identified the 1st accused as he knew him before the incident. At the

crime scene at Tumbaku Warehouses, electric light from the warehouses illuminated the whole area. He said he identified the 2nd accused person as the Maasai, who was working at BMX Bar, which was close to the area. PW1 said in the Ndiuka area, the 2nd accused was the only Maasai, and he was working at the BMX bar. PW1 said he was standing observing them at a distance of 2 meters from where the accused persons were assaulting the deceased.

However, PW1 evidence of the identification of the accused persons at the crime scene during the incident has some shortfalls. PW1 said he returned to the scene of the crime with the street chairman and leaders of the people's militia after 30 minutes. They found the deceased lying on the ground, and nearby, there was a piece of a big stick and a broken stick. He did not say if he named the accused persons to the street chairman and leaders of people's militiamen as the next person he met after the incident. There is no evidence from PW1 showing they found the 1st accused person at the crime scene when he returned to the crime scene together with the street chairman and militia leaders.

It is a settled principle that the ability of a witness to name a suspect at the earliest opportunity possible is the assurance of witness reliability, and

in the same way, unexplained delay or complete failure to do so affects witness reliability. In **Jaribu Abdallah vs. Republic [2003] TLR 271**, the Court observed:-

"In matters of identification, it is not enough merely to look at factors favouring accurate identification; equally important is the credibility of the witness. The conditions for identification might appear ideal, but that does not guarantee against untruthful evidence. The ability of the witness to name the offender at the earliest possible moment is, in our view, reassuring, though not a decisive factor."

The evidence in the record does not show if PW1 named the accused persons to the street chairman and people's militia leaders as responsible for the incident after he met them. The street chairman and militia leaders who came to the scene of the crime with PW1 were not brought to testify to confirm that PW1 identified the accused persons during the incident. I say so since PW6, Ndiuka E Street Chairman, in his evidence, said that when he arrived at the scene of the crime in his area of administration, he found that militiamen had already apprehended the 1st accused. The evidence suggests that PW6 was not the street chairman who went to the crime scene with PW1 and militia leaders after PW1 decided to look for help when he saw accused persons assaulting the deceased with sticks. The failure of PW1 to

name accused persons as responsible for the crime to the next person when the opportunity is presented affects his reliability and his identification of the accused persons. The omission raises doubts about the evidence of visual identification of the accused persons by PW1.

The evidence of PW6, the Chairman of Ndiuka E Street, brought the 1st accused into the picture at the crime scene. He testified that people's militia phoned and informed him that in Ndiuka E Street, there was a person suspected of being assaulted and died at Tumbaku Warehouses. PW6 went to the scene of the crime. He found the deceased person bleeding and had an injury to the head. Near the deceased body, there was a broken stick. He also saw people militiamen and the 1st accused, who was suspected to be responsible for the deceased death. PW6 said one of the people militiamen told him that he saw Mawazo Yasin Pesambili and Mmasai assaulting the deceased. Hence, they are responsible for causing the deceased death. PW6 did not mention the militiamen who witnessed the incident or give him information. The people militia told PW6 they had already informed the police about the incident. PW6 did not say how the 1st accused was arrested or if he has information about how the 1st accused was arrested. What PW6 said in his testimony is that he did find the 1st accused already at the crime

scene, apprehended by militiamen. There is no such evidence of the arrest of the 1st accused person. The omission raises questions as to why and how the 1st accused was arrested and brought to the crime scene. The person who arrested the 1st accused could say in his evidence the reason for arresting him. The omission raises further doubts about the prosecution's case.

There is a contradiction between the evidence of PW1 and PW6 as to how the street chairman arrived at the crime scene. PW1 said after he was assaulted at the crime scene, he went to call his fellow militiamen. He found leaders of militiamen and street chairman, and he went with them to the crime scene. But, PW6 said he received a phone call from one militiaman informing him about the incident. He went to the crime scene and found militiamen and the 1st accused under their custody. The discrepancy is not minor, as it affects the credibility of both witnesses.

The remaining evidence connecting the accused persons with the murder offence is confessional statements. There is an oral confession of the 1st accused to PW5 and the confession of the 2nd accused in the cautioned statement recorded by PW2. The evidence of confession is not direct evidence. It is circumstantial evidence. The Court may rely on circumstantial

evidence to convict the accused person where the evidence is intact, leading to only one irresistible conclusion pointing to the accused's guilt. In **Julius Justine and Others vs. Republic**, Criminal Appeal No. 155 of 2005, Court of Appeal of Tanzania at Mwanza, (unreported), it was held that:

"... the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established and that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused and that circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and no one else."

In the case of **Mark Kasiniri vs. Republic**, Criminal Appeal No. 39 of 2017, Court of Appeal of Tanzania at Arusha (unreported), the Court of Appeal, on page 15, restated principles governing the reliability of circumstantial evidence before conviction. The Court held:-

".....we deem it pertinent to initially restate the basic principles governing the reliability of the circumstantial evidence to convict, which include:

- i. That, the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established, and that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused, and that*

*the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and non-else (See. **Justine Julius and Others vs. Republic**, Criminal Appeal No. 155 of 2005 (unreported)).*

- ii. *That, the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt; and that before drawing an inference of guilt from circumstantial evidence, it is necessary to be sure that there are no ex-existing circumstances which would weaken or destroy the inference [See, **Simon Msoke vs. Republic**, (1958) E.A. 715A and **John Magula Ndongo vs. Republic**, Criminal Appeal No. 18 of 2004 (unreported)].*
- iii. *That, the accused person is alleged to have been the last person to be seen with the deceased in absence of a plausible explanation to explain away the circumstances leading to death, he or she will be presumed to be the killer. [See - **Mathayo Mwalimu and Masai Rengwa vs. Republic** (supra).]*
- iv. *That, each link in the chain must be carefully tested, and if, in the end, it does not lead to the irresistible conclusion of the accused's guilt, the whole chain must be rejected [see **Samson Daniel vs. Republic**, (1934) E.A.C.A. 154].*
- v. *That, the facts from which an adverse inference to the accused is sought must be proved beyond reasonable doubt*

*and must be connected with the facts from which inference is to be inferred. (See. **Ally Bakari vs. Republic [1992] T.L.R. 10** and **Aneth Kapazya vs. Republic**, Criminal Appeal No. 69 of 2012, (unreported)).*

- vi. *That, the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person. [See **Shaban Mpunzu @ Elisha Mpunzu vs Republic**, Criminal Appeal No 12 of 2002 (unreported)].*

Under section 27(1) of the Evidence Act, Cap. 6 R.E. 2019, the confession voluntarily made to a police officer by a person accused of an offence may be proved as against that person. The Court may convict the accused person relying on confession where it is satisfied that the confession is nothing but the truth even when he denies confessing or he made it involuntary, as it was held in **Tuwamoi vs. Uganda** (1967) EA 84 and **Hamis Athuman and Two Others vs. Republic [1993] TLR 110**. In the case of **Hemed Abdallah vs. Republic [1994] TLR 72**, the Court held that:-

"Once the trial court warns itself of the dangers of basing a conviction on an uncorroborated retracted confession and, having regard to all the circumstances of the case, is satisfied that the confession is true, it may convict on such evidence without any further ado."

In the present case, PW5 said he obtained the oral confession of 1st

accused at the crime scene during the interview. He testified that the police officers, including himself, visited the scene of the crime following the phone call from people's militia at Ndiuka that there was a dead person. At the scene of the crime, they found the street chairman, the people's militiamen and 1st accused. They interviewed the 1st accused person, who admitted to assaulting the deceased together with Maasai, working as a watchman at BMX Bar. PW5 and other police officers went to BMX Bar with PW6 and arrested the 2nd accused.

Oral confession of guilty is admissible under sections 27 (I) and 31 of the Evidence Act. However, the Court has to receive such evidence with great caution. In **John Peter Shayo and Two Others vs. Republic [1998] TLR 198**, it was held that:-

"As a general rule, oral confessions of guilty are admissible though they are to be received with great caution, and s. 27(I) and 31 of the Evidence Act, 1967 contemplates such confessions."

If provided by reliable witnesses, oral confession is sufficient to prove the case. In the case of **Chamuriho Kirenge @ Chamuriho Julias vs. Republic**, Criminal Appeal No. 597 of 2017, Court of Appeal of Tanzania at Mwanza, (unreported), it was held on page 21 of the judgment that:-

"It is settled that an oral confession of guilt made by a suspect before or in the presence of reliable witnesses, be they civilian or not, may be sufficient to ground conviction against the suspect."

In the present case, the oral confession by the 1st accused was provided to PW5, a police officer. Under section 27 (1) of the evidence Act, the confession voluntarily made to a police officer by a person accused of an offence may be proved as against that person. The question is whether the oral confession of the 1st accused to PW5 was given voluntarily. There is no evidence in the record showing that the oral confession of the 1st accused to PW5 was given voluntarily. The evidence in the record shows the 1st accused was under the custody of the people's militia when PW6 and PW5 arrived at the crime scene. After PW5 and other police officers arrived at the crime scene, the 1st accused was handcuffed. The evidence shows that when PW5 was interviewing the 1st accused, PW6 (street chairman) was present. But, PW6 said nothing about the oral confession of the 1st accused. Even though the PW5 said the 1st accused admitted to assaulting the deceased, which is among the facts constituting the offence, the 1st accused person did not admit to causing the deceased death. Thus, I find no evidence proving the 1st accused oral confession was voluntarily made. The circumstances at the crime scene during interview between PW5 and 1st accused were not

conducive for obtaining confession voluntarily. As a result, the Court could not rely on it.

Another confession is found in the cautioned statement of the 2nd accused (exhibit P1) recorded by PW2. The 2nd accused, in the cautioned statement, admitted to assaulting the deceased by using a stick on 21/12/2022 around 23:00 hours following the Act of the deceased causing commotion at his place of work. The deceased broke the windows of the car and threw stones at the bar. The 2nd accused said when he was assaulting the deceased, one person came and said he owed the deceased 40,000/= shillings. The person assaulted the deceased. The 2nd accused said he stopped that person from assaulting the deceased as the deceased was no longer making trouble. The 2nd accused returned to his place of work, leaving the deceased alive. He was arrested by police officers around 04:00 hours on 22/12/2022. In the cautioned statement, the 2nd accused denied to cause the death of the deceased.

The 2nd accused denied causing the death of the deceased despite admitting to assaulting him. The cautioned statement of the 2nd accused shows the incident of the 2nd accused assaulting the deceased took place around 23:00 hours on 21/12/2022. The evidence contradicts the testimony

by PW1 that the incident occurred three hours later (02:00 hours on 22/12/2022). The difference of three hours between the time the 2nd accused left the deceased alive and the time PW1 saw two people attacking the deceased brings in the possibility that another person might have assaulted the deceased and caused his death. As I have held earlier herein that the possibilities of mistaken identity were not eliminated from the evidence of visual identification by PW1, the content of cautioned statement of the 2nd accused shows the possibility of another person to be responsible for the deceased death.

All the shortfalls I have pointed out in the prosecution's evidence raise doubts about the prosecution's case. There are doubts about the evidence of virtual identification of the 1st and 2nd accused persons by PW1 at the crime scene, and the possibility of mistaken identity was not eliminated. There is another doubt that the confessions of the 1st accused person to PW5 were not voluntarily given. The confession of the 2nd accused person contradicts other evidence available on record. In the confession, the 2nd accused admitted to assaulting the deceased but refused to cause his death as he left the deceased alive. The evidence of PW1 contradicts the evidence of PW6 and exhibit P1. As a result, the evidence of PW1, PW6 and exhibit

P1 and all prosecution's evidence is not credible. The evidence pointing to the guilt of both accused persons does not exclude the possibility that the other person is responsible for the deceased death, as it was stated in **Shaban Mpunzu @ Elisha Mpunzu vs. Republic**, Criminal Appeal No 12 of 2002, Court of Appeal of Tanzania at Mwanza, (unreported).

Therefore, I find the prosecution's evidence was not sufficient to prove the offence of murder or any other offence against both accused persons. Consequently, I acquit Mawazo Yassin Pesambili and Chalse Malaunga @ Linjoo. It is so ordered accordingly.

Dated at Iringa this 20th day of March, 2024.



A.E. MWIPOPO
JUDGE