

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MTWARA
AT MTWARA**

CRIMINAL SESSION CASE NO. 60 OF 2022

**THE REPUBLIC
VERSUS**

1.BADILU MUSSA HANNOGI @ BADI

2. SALUMU ALLY MAUJI

3.HALFANI ISSA NAMKOMOLELA @ MSUKUMA

JUDGEMENT

25th March & 15th April, 2024

MPAZE, J.:

Badilu Mussa Hannogi@Badi, Salumu Ally Mauji and Halfani Issa Namkomolela@Msukuma, the 1st, 2nd and 3rd accused person respectively, were jointly brought before this Court facing a charge of Murder contrary to sections 196 and 197 of the Penal Code [CAP. 16 R.E. 2022].

The information alleges that on 10th February 2022 at Hiari village within Mtwara District in Mtwara Region, Badilu Mussa Hannogi @Badi, Salum Ally Mauji and Halfani Issa Namkomolela murdered one Mohamed Juma Mohamed. They all pleaded not guilty to the charge, leading to the full trial.

During the trial, Ms. Christine Joas SSA assisted by Ms. Yasinta Peter SSA and Jagadi Gilala S/A appeared for the Republic. Initially, Mr. Songea and Ms. Thabita Ndumboro Learned Advocates appeared for all accused persons. However, at later stages, Ms. Thabita Advocate represented the 1st accused, Mr. Ahyadu Nanyohe Advocate represented the 2nd accused and Ms. Lightness Kikao Advocate represented the 3rd accused.

To prove its case, the prosecution called sixteen (16) witnesses and tendered 8 Exhibits. After the prosecution's case was concluded, all accused persons defended themselves, in addition, the first accused tendered a bus ticket which was admitted as Exhibit D2, to support his Alibi defence. Furthermore, the statement of PW1 was admitted as Exhibit D1 for all accused persons.

In summary, the evidence presented by prosecution witnesses revealed that the deceased, Mohamed Juma Mohamed, was a bodaboda rider who operated from Coco Beach. It was stated that on 10th February 2022 in the evening hours, the deceased was hired by two customers whom he left with, and since then he had not been seen.

The report of Mohamed Juma Mohamed's disappearance was made at Mtwara Central Police Station on 11th February, 2022. Efforts to find him, involving his relatives and fellow bodaboda riders, continued.

On 15th February, 2022, Silima Dotto Juma (PW1), the deceased's brother, along with a group of over 50 bodaboda riders, including Odilo Boniface (PW2), Yohana William Benedict (PW4), and Ernest Salum Bonomali (PW5), and the Village Executive Officer(VEO), Mr. Hugo Michael Boniface (PW3), successfully discovered the body of Mohamed Juma Mohamed in the Hiari forest dead.

Upon receiving the report, the police, accompanied by Medical Doctor Mathayo Yona Malaika (PW10) arrived at the scene, PW10 examined the deceased's body and determined that the cause of death was attributed to suffocation resulting from ligature around the neck. The Post-Mortem Report was admitted as Exhibit P3.

After the examination, the police allowed the relatives to retrieve the body for burial in the Msafa cemetery. The investigation into the perpetrators continued, and through informants, the police received information that the suspects were in Tunduru, Songea. Consequently, on 4th March 2022, A/INSP Michael Gyumi (PW6) was dispatched to Tunduru, Songea, to apprehend the suspects. He arrived at night and on 5th March, 2022, he reported to the Tunduru Police Station where he was assigned D/CPL Robert (PW7) who is stationed at Tunduru police to assist him in searching for the culprits.

PW6 and PW7 successfully apprehended the 1st and 2nd accused, Badilu Mussa Hannogi and Salum Ally Mauji, on the night of 5th March, 2022 at a guesthouse named Kika Guest House. Subsequently, they were taken to the Tunduru Police Station, where they were orally interviewed and confessed to their involvement in the murder offence.

On 6th March, 2022, a police vehicle from Mtwara went to Tunduru to pick up the accused persons. It arrived in the evening, and on 7th March, 2022, the accused were brought to the Mtwara Central Police Station at around 18:00hrs.

PW6 continued the investigation and succeeded in apprehending the 3rd accused on 9th March, 2022 in the Newala District. Later, he was taken to the Mtwara Central Police Station on 10th March, 2022.

The confession statement of the 1st accused was admitted as Exhibit P1 after a trial within a trial, the same was recorded by No. G1476 D/CPL Kea (PW8) who also was an investigator of this case. Similarly, the confession statement of the 2nd accused, which was admitted as Exhibit P2 after a trial within a trial, was recorded by No. F6749 SGT Said (PW9). On 13th March, 2022, Inspector Abubakar (PW11) supervised an identification parade, during which the 1st and 2nd accused persons were

identified by PW4 and PW5. The Identification Parade Register was admitted as Exhibit P5.

Bahati Magnus Mkauma (PW12) was among the people present in the identification parade line-up. He testified that during the identification parade, the witnesses were able to identify the 1st and 2nd accused.

PW4 and PW5 are also witnesses who provided evidence regarding seeing the 1st and 2nd accused with the deceased for the last time. Since the 1st and 2nd accused left with the deceased on 10th February, 2022 PW4 and PW5 have never seen again the deceased until 15th February, 2022 when they found him dead in the Hiari forest.

ASP Essau (PW13), who was the OCCID at the time of the murder of Mohamed Juma Mohamed, testified that on 10th March, 2022, the 1st and 2nd accused led them to the location where the deceased's body was disposed of.

PW13 explained further that at the crime scene, they found a yellow Manila rope, which the 1st and 2nd accused claimed was remnants of the rope used to strangle Mohamed Juma Mohamed. He seized the rope in the presence of PW3 the VEO and Mustapha Mpunga, the village chairman. The certificate of seizure and the yellow Manila rope were collectively admitted as Exhibit P5.

Two sketch maps of the crime scene, drawn by No. G321 D/CPL Denis (PW14), were collectively admitted as Exhibit P6. The first sketch map was drawn on 15th February, 2022 the day the body of the deceased was found, with PW14 guided by PW1. The second sketch map, according to PW14, was drawn after the arrest of the 1st and 2nd accused on 10th March, 2022, when they led them to the location where they disposed of Mohamed Juma Mohamed's body. This witness stated that he drew this second map guided by the 1st accused.

Stella Dastan Mamchoni (PW15) and Mary Nabifu (PW16), both Resident Magistrates, testified as Justices of the Peace who recorded the extra-judicial statements of the accused persons. PW15 recorded the extra-judicial statements of the 1st and 2nd accused, while PW16 recorded the extra-judicial statement of the 3rd accused. The extra-judicial statements of the 1st and 2nd accused were collectively admitted as Exhibits P7, while that of the 3rd accused was admitted as Exhibit P8.

Despite receiving these Exhibits, the defence counsel objected to their admissibility because they were not recorded in compliance with the Chief Justice guidelines and were recorded in violation of section 32 of the Criminal Procedure Act [CAP. 20 R.E. 2022].

However, this court decided to admit them, with an observation that their weight would be duly considered during the composition of this judgment.

In their defence, all the accused persons denied committing the offence. Specifically, the 1st and 2nd accused admitted being familiar with each other, but despite this familiarity, both vehemently denied any involvement in the murder of Mohamed Juma Mohamed.

The 1st accused stated that he left Mtwara for Tunduru on 9th February, 2022 and was apprehended there by unknown people on the roadside on 4th March, 2022 subsequently he was taken to the Tunduru Police Station. He further claimed that on 7th March, 2022, he was transferred to the Mtwara Police Station where he arrived around 15:00 to 16:00hrs. In other words, he stated he was arrested on a Friday and taken to the station on a Monday.

Upon examination of the calendar, it's noted that the Monday the 1st accused mentioned was actually on 5th March, 2022 not 4th March, 2022 as previously stated. Therefore, it appears he partially agrees with the testimonies of PW6 and PW7 that he was apprehended on 5th March, 2022 in Tunduru, but he disputes their claim of being the ones who arrested him.

The 1st accused further stated that while at the police station, his statement was never taken; instead, he was asked only three questions, to which he responded positively to two but remained silent on the third. The questions pertained to whether he had a spouse and children and whether he had parents and an heir. He alleged severe mistreatment while at the police station, claiming he was subjected to physical torture.

He also claimed he was never taken to a Justice of Peace, nor was he subjected to an identification parade. Additionally, he stated that on 10th March, 2022, he did not lead the police or anyone else to the scene of the crime.

In conclusion, the 1st accused maintained that since his arrival at the police station, he had not been taken anywhere except to the Mtwara District Court for the reading of this charge against him.

Similarly, the 2nd accused also denied committing the offence. He refuted being arrested in Tunduru and instead claimed that he was apprehended at the Mtwara bus stand on 5th March, 2022 at around 20:00hrs. He stated that he had travelled from Dar es Salaam to Mtwara in response to a phone call from the 1st accused, who asked him to come to Mtwara as '*kuna mishemishe*'.

Upon arrival, he called the 1st accused and was directed to wait for him at the main exit gate. While still waiting for the 1st accused, about five people appeared they forcibly grabbed him and pushed him into a small vehicle. While in the vehicle, he was subjected to physical assault. When he asked them why they were beating him, he was told he would find out soon.

He was taken to the police station where the mistreatment and beatings continued. On 7th March, 2022, he was asked only three questions; his name, place of birth, and place of residence. He said from that date until 11th March 2022 he was coerced into signing various papers that he did not understand the contents of. He claimed he signed them under duress using his thumbprint, as he did not know how to use a pen and thus could not have signed with it.

The 2nd accused also denied participating in an identification parade or being taken before a Justice of Peace. Furthermore, he refuted leading the police to the scene of the crime on 10th March, 2022.

The 3rd accused denied committing the offence, although he admitted to being a motorcycle trader. During cross-examination and examination by the court, he stated that the 1st and 2nd accused sold him a motorcycle, and he was unaware if those motorcycles were stolen

after the commission of the crime. He also said he was taken to a Justice of Peace, and that all that have been testified by the Justice of Peace against him is correct.

Based on the evidence presented by both sides, the question arises whether the prosecution has proven the case beyond a reasonable doubt.

The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence.

The standard has always been proof beyond reasonable doubt that the accused person can only be convicted on the strength of the prosecution case and not based on the weakness of the defence. See cases of **Joseph John Makune v. Republic** [1986] TLR, 44 and **Mohamed Haruna @ Mtupeni & Another v. Republic**, Criminal Appeal No. 25 of 2007 (unreported)

In murder cases, the prosecution side is expected to prove beyond reasonable doubt that the offence of murder has been committed by proving the following;

- (i) *Death of the deceased*
- (ii) *That the death was unnatural*

(iii) *That the death was caused by an unlawful act or omission of the accused*

(iv) *That the killing was actuated by malice aforethought*

This comes out very clearly in section 196 of the Penal Code [CAP. 16 R.E. 2022], which reads;

*'Any person who, **with malice aforethought causes the death of another person by unlawful act or omission commits an offence of murder**'*[Emphasis added]

According to the evidence given by the prosecution, it is evident that Mohamed Juma Mohamed is dead. This evidence is derived from the testimony of PW10, a Medical Doctor who confirmed the death of Mohamed Juma Mohamed through Exhibit P3. Other witnesses include PW1, a relative of the deceased, who, after a medical examination, took the body for burial.

Additional witnesses are PW2, PW3, PW4, PW5, PW8, PW13 and PW14 all of whom witnessed Mohamed's body being found dead in the Hiari forest.

As to whether the death was unnatural, this was confirmed by PW10, who stated that the cause of death was attributed to suffocation resulting from ligature around the neck. Based on these medical findings,

the court concludes that the death of Mohamed Juma Mohamed was unnatural.

On the requirement that the death should have been caused by an unlawful act or omission of the accused, this is where the real issue lies.

The pertinent question is whether or not the accused persons are the ones who killed Mohamed Juma Mohamed with malice aforethought.

Looking at the evidence produced by the prosecution side, this Court finds that there is no cogent direct evidence from the prosecution connecting the accused persons with the offence they stood charged with. Section 62(1) (a) of the Tanzania Evidence Act, [CAP. 6 R.E. 2022] requires that;

'Oral evidence must, in all cases whatever, be direct; that is to say- (a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it'

Based on the cited section above, none of the witnesses on the prosecution side testified about seeing the accused persons killing Mohamed Juma Mohamed. The evidence adduced by the prosecution witnesses linking the accused persons with the offence is circumstantial evidence.

In the case of **Jimmy Runagaza v. Republic**, Criminal Appeal No 1598 of 2017 the Court of Appeal had this to say;

'For the circumstantial evidence to sustain a conviction it must point irresistibly to the accused's guilt.(see Simon Musoke v. Republic, [1958] EA 715). Sakar on evidence, 15th Ed. 2003 Vol.1 page 63 also emphasized that in cases which rely on circumstantial evidence, such evidence must satisfy the following tests which are;

- (i) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;*
- (ii) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and*
- (iii) 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 no one else'*

Keeping these principles in mind, in determining whether the accused persons are the ones who killed the deceased, I will focus on examining whether this circumstantial evidence irresistibly points to the guilt of the accused persons.

The evidence linking the accused persons to the death of Mohamed Juma Mohamed includes the caution statements of the 1st and 2nd accused persons, the extra-judicial statements of all accused persons, and the testimonies of PW4 and PW5. These witnesses were the ones who witnessed the 1st and 2nd accused persons leaving with the deceased for the last time after they were picked up with the deceased in his motorcycle. Also, PW4 and PW5 were the witnesses who identified the 1st and 2nd accused persons during the identification parade.

Other evidence includes the testimony of PW11, who supervised the identification parade, and PW12, who participated in the identification parade of the 1st and 2nd accused. Furthermore, there is evidence from PW3, PW13 and PW14 who stated that on 10th March, 2022 the 1st and 2nd accused led them to the scene of the crime where the body of Mohamed Juma Mohamed was disposed of.

The question now is whether this evidence sufficiently proves that the accused are the ones who killed the deceased person.

Starting with the confession statements of the 1st and 2nd accused, in their defence and during the trial within a trial, the accused persons denied making any statements to the police. They claimed they were coerced into signing numerous papers on different occasions without

knowing their contents, under threat and torture. In its ruling on the trial within a trial, this court disregarded the evidence of torture despite the accused persons showing various marks on their bodies.

The court failed to link these marks and their explanations, as there was no evidence to confirm that the said marks resulted from torture inflicted on the accused persons to compel them to sign the caution statement. For instance, the marks on the 2nd accused were located on the wrists, an area where handcuffs typically leave marks, as explained by the 2nd accused himself.

The case of **Richard Lubilo & Another v. Republic**, Criminal Appeal No. 10 of 1995, emphasized the importance of PF3 when there are allegations of torture during the making of a confession statement.

In the case at hand, no PF3 was tendered to prove that the accused person was tortured before signing their statement apart from their mere words.

Moreover, examining the statement of the 1st accused made on 7th March, 2022 on page 24, after his narrative, he certified the statement using his hand stating that;

'Mimi Badilu Mussa Issa Hannogi Ninasibitisha kuwa maelezo haya nimeyatoa kwa hiyali yangu mwenyewe nimeyasoma yapo sahih kama nilivyoeleza'

On top of that, examining the caution statements closely, the 1st and 2nd accused elaborated in detail on how they carried out this incident and other similar murders. PW1, PW2, PW4, and PW5 described how on 12th February 2022 while searching for Mohamed Juma Mohamed, they found the deceased's body, but it was not of Mohamed Juma Mohamed. These accounts align with the caution statements of the accused persons, who explained that they were killing these motorcycle riders and dumping them in the Hiari forest.

The detailed descriptions provided by the 1st and 2nd accused on how they committed these murders and the motive behind the offence could not have been articulated by anyone other than those with personal knowledge of the events.

Considering all this, I don't have even a flicker of doubt that the admitted caution statements of the 1st and 2nd accused were not made voluntarily, I find what they said in their statements on 7th March, 2022 is nothing but true.

It is well-established that relying solely on a confession statement, especially one that has been retracted or repudiated, entails considerable danger. The court must be cautious and mindful of this danger, as highlighted in the case of **Bombo Tomola v. Republic, [1980] TLR, and Hemed Abdallah v. Republic [1995] TLR 172;**

'Generally, it is dangerous to act upon a repudiated or retracted confession unless it corroborated in material particular or unless the court after full consideration of circumstances, is satisfied that the confession must be true: and that once the trial court warns itself on the danger of basing a conviction on uncorroborated retracted confession and having regard to all circumstances of the case it is satisfied that the confession is true it may convict on such evidence without any further ado.'

Having thoroughly reviewed these statements, it becomes apparent that despite the accused persons claiming they were only asked three questions, there is additional information about their lives that they disclosed.

For instance, both accused persons admitted to being familiar with each other, and the 2nd accused stated in his statement that on the day they picked the deceased the one who carried the bag was the 1st accused this confirms what has been stated by PW4 and PW5 in their testimony.

Upon examining the third page of the 1st accused's caution statement, it is noted that he mentioned the 2nd accused as his friend who used to reside in Dar es Salaam. Furthermore, when asked by the court about their last communication, the 1st accused stated it was in 2021. Interestingly, on the same third page, the 1st accused mentioned that in 2021, he communicated with the 2nd accused regarding a person involved in motorcycle theft, suggesting they should join with him. Subsequently, all three met in Mtwara.

This statement is consistent with those of the 2nd accused, who stated in his defence that he received a phone call from the 1st accused while in Dar es Salaam, urging him to come to Mtwara for some '**Mishemishé**'. He emphasized during cross-examination by the state attorney that he recognized the voice of the caller as that of the 1st accused. However, the key difference lies in when the call was made while the 2nd accused claims he was called on 5th March 2022 the 1st accused, in his statement, stated that he called the 2nd accused last time in 2021.

This evidence suggests that the 1st and 2nd accused were cooperating in criminal activities, as indicated by the 2nd accused's acknowledgement of being summoned by the 1st accused for some '**Mishemishé**'

For these reasons, I consider the caution statements of the 1st and 2nd accused to be truthful, as they voluntarily admitted being the ones who killed Mohamed Juma Mohamed after robbing him of his motorcycle.

Apart from their confession statements, there is also evidence from PW4 and PW5, who are motorcycle riders, who witnessed the accused persons arriving at the Coco Beach area on 10th February 2022 at about 17:00hrs, where they usually parked their motorcycles and hired the deceased and left with him, they said since then they had never seen the deceased till on 15th February, 2022 when they found him dead at Hiari forest.

These witnesses were able to identify the accused persons both in court and during the identification parade. They testified that it was not the first time they had seen the 1st and 2nd accused coming to that area and hiring a bodaboda rider.

In their testimony, they described the appearance of the accused persons on that day, mentioning that the 1st accused was carrying a bag. This aligns with the confession statement of the 2nd accused, who stated that the person carrying the bag on that day was the 1st accused.

In the case of **Mathayo Mwalimu and Another v. The Republic** Criminal Appeal No. 147 of 2008 (unreported) discussing the issue of a person to have been lastly seen with the deceased said;

'In our considered opinion, if an accused person is alleged to have been the last person to be seen with the deceased, in the absence of a plausible explanation to explain away the circumstances leading to the death, he or she will be presumed to be the killer. In this case, in the absence of an explanation by the appellants to exculpate themselves from the death of HAMISIMNINO, like the court below, we too are satisfied that they are the ones who killed him.'

See also the cases of **Herman Faida v. Republic**, Criminal Appeal No. 479 of 2019 in Tanzania, **Julius Charles & Another v. Republic**, Criminal Appeal No. 36 of 2017 (unreported) and **Mathayo Mwalimu v. Republic**, Criminal Appeal No. 7 of 2008 (unreported).

From this evidence, I find the two witnesses reliable and credible because they were able to recount how the 1st and 2nd accused were the last persons seen with the deceased on 10th February 2022 without any hesitation or stuttering.

In their defence, the 1st and 2nd accused denied committing the offence. However, they did not explain if they had ever gone to Coco Beach at any time to hire a bodaboda. PW4 and PW5 described how the

1st and 2nd accused used to go there to hire a bodaboda. This testimony was not seriously challenged during cross-examination.

PW4 and PW5 also explained that they identified the 1st and 2nd accused in the identification parade, both accused in their defence denied participating in the identification parade. This court considers this defence to be untrue.

I have stated above that PW4 and PW5 are credible witnesses. These witnesses participated in identifying the 1st and 2nd accused in the identification parade. Other witnesses who participated include PW11, who was the supervisor of the identification parade, and PW12, who was also lined up in the identification parade. All of them described how the 1st and 2nd accused were identified in the said identification parade. That is why I said their defence of denying participation in the identification parade is false.

It has been stated in various cases that false testimony on defence corroborates the prosecution case and lowers the credibility of the accused testimony especially where it is on material issue.

In **Twaha Elias Mwandugu v. Republic** [2000] TLR 277, on the impact of lies given by an accused person in court the Court of Appeal had this to say;

'...Of course, we recognize that a conviction cannot be based on the accused person's lies, but if material, such lies may be taken into account in determining whether the alleged guilt of the accused has been proved.'

In the case of **William Onyango Nganyi @Dadii & 5 others v. Republic** Criminal Appeal No 9 of 2016 the Court of Appeal stated

'...Even though lies expressed by an accused in court cannot be the basis for convicting him, such lies if material will be taken into account in determining the guilt of the accused...'

See also **Richard Matangule and Another v. Republic** [1992] TLR 5 and **Pascal Mwita and 2 Others v. Republic** [1993] TLR 295 (CAT).

Applying for the above legal position, the accused's denial of their participation in the identification parade, which aimed to confirm their identification that they left with the deceased on 10th February, 2022 I find this denial is a lie which corroborates the prosecution case that the 1st and 2nd accused were identified.

I have deliberated why the 1st and 2nd accused decided to come up with this defence of denying their participation in the identification parade, but I have not found satisfactory answers.

PW4, PW5, PW10, and PW12 all testified regarding the identification parade and confirmed the involvement of the 1st and 2nd accused. There doesn't seem to be any plausible reason why all these witnesses would falsely implicate the 1st accused and 2nd accused in the identification parade if they were not involved.

Furthermore, after the identification parade, additional statements were taken from the accused themselves, I have examined the additional statement and noted that the same was recorded without following proper procedure as the accused statements were recorded without them being afforded their rights before taking their additional statement.

It has been stated in numerous cases that failure to follow proper procedure in recording the caution statement renders the statement fatal, therefore the additional statement of the 1st accused which was recorded on 10th March, 2022 and that which was recorded on 13th March, 2022 and that of the 2nd accused of 13th March, 2022 will be disregarded.

Another piece of evidence linking the 1st and 2nd accused with this offence is the evidence of PW3, PW13 and PW14 who informed the court that on 10th February, 2022 the the 1st and 2nd accused led them to the place where they disposed of the deceased body.

The witnesses stated on the way the accused showed them the remnants of Manila rope which they used to tie and kill the accused the certificate of seizure and Manila rope were admitted as Exhibit P5 collectively.

In his testimony, PW14 indicated that the route taken by the accused on 10th March, 2022 was different from the one taken on 15th February, 2022 which ultimately led them to the location where the deceased's body was found.

PW14 said the Manila rope received as the exhibit was found along the route taken on 10th March, 2022 which the accused themselves showed to the witnesses. In contrast, no such rope was found along the route taken on 15th February, 2022 indicating that if the 1st and 2nd accused had not led the witnesses to the crime scene on 10th March, 2022 this evidence related to the rope would not have been available.

This piece of evidence further strengthens my belief that it was indeed the 1st and 2nd accused who murdered Mohamed Juma Mohamed.

After carefully examining the extra-judicial statements of all the accused persons, I concur with the defence counsel's contention that the recording of these statements was not by the CJ's guidelines.

Various decisions have emphasized the importance of compliance with the CJ's guidelines, as seen in cases such as **Petro Teophan v. Republic**, Criminal Appeal No. 58 of 2002, and **Geoffrey Sichizya v. D.P.P.**, Criminal Appeal No. 176 of 2017 (CAT). In the case of **Japhet Thadei Msigwa v. Republic**, Criminal Appeal No. 367 of 2008 (unreported), it was explicitly stated;

'...when Justices of the Peace are recording confessions of persons in the custody of the police, they must follow the Chief Justice's instructions to the letter. The section is couched in mandatory terms. Before the justice of the peace records the confession of such person, he must make sure that all eight steps enumerated therein are observed'

The court went further to state that;

'The justice of Peace ought to have observed, inter alia the following

- (i) The time and date of his arrest;*
- (ii) The place where he was arrested*
- (iii) The place he slept before the date he was brought to him***
- (iv) Whether any person by threat or promise or violence has persuaded him to give the statement*
- (v) Whether he really wishes to make the statement of his own free will*

(vi) That if the makes a statement, the same may be used as evidence against him."

Upon examining Exhibits P7 and P8, I have observed that both PW15 and PW16 partially adhered to the Guideline when recording the extra-judicial statements. However, full compliance with all eight steps is required, and failure to adhere to even a single step renders the recorded statement defective.

In this case, PW15 and PW16 failed to comply with item iii of the Guideline, which requires questioning the accused person where he slept before being brought to a Justice of Peace.

Additionally, I noted that PW15 and PW16 were not the ones who inspected the accused persons. They both stated that the accused persons were inspected by an independent person. While the Guideline does not explicitly state that an independent person should conduct the inspection, it specifies that it should be done by the Justice of Peace personally.

Upon further consideration, the failure of PW15 and PW16 to inspect the accused persons may have been due to their gender, as they were women while the accused persons were men. However, this raises questions about whether there were no male Justices of Peace available

to perform this task, leading to PW15 and PW16 conducting the inspection instead. Additionally, the absence of details regarding the independent witness further undermines the reliability of Exhibits P7 and P8.

Failure of Justice of Peace to comply with the guidelines, then the statement recorded, even if initially admitted as an exhibit, ultimately lacks evidential value. Compliance with CJ's guidelines is crucial for ensuring the integrity and admissibility of evidence in court proceedings.

The impact of non-compliance with the Guide was well stated in the case of **Khalid Mohamed Kiwanga v. Republic**, Criminal Appeal No. 223 of 2019 (unreported), that;

'We will not treat with kid gloves any contravention of procedural requirements of the law which are meant to promote and protect the accused person's basic right to a fair trial'

Guided by the authorities above, this court is of the finding that, compliance with the Guide requirements is mandatory and not an option, as this will assist the trial court to know if the statement made by the accused was voluntary or not. Failure by the Justice of Peace (PW15 & PW16) to comply with the contents set in the Guide specifically items iii, renders the extra-judicial statement to be fatally defective and of no evidential value.

While further exploring the accused defence, the 1st accused relied on the defence of Alibi, claiming that he could not have committed the crime because he was elsewhere when the crime took place.

It is settled law that once an accused person raises the defence of Alibi he is not required to prove the same, what he is required is to present enough evidence to establish a reasonable doubt by showing that he was not present at the time or place of the crime, he had no reasonable opportunity to commit the crime and that he could not have committed the crime by any means.

The goal is to present compelling evidence that would create a reasonable doubt about whether the accused was present when the crime was committed.

The only evidence provided by the 1st accused to support his Alibi defence is a bus ticket issued on 9th February, 2022, showing that he travelled from Mtwara to Tunduru on that day. However, this evidence does not prove in any way that the 1st accused was in Tunduru on 10th February, 2022.

It is entirely possible to travel from Mtwara to Tunduru one day and return the next. If the 1st accused wanted this court to consider his defence, he could have brought an eyewitness or guest house receipts to

support his claim. As Exhibit D2 does not provide evidence of his presence in Tunduru on 10th February, 2022 the defence lacks credibility.

Perhaps the 1st accused may argue that he could not obtain an eyewitness while he was in custody. In this case, he could have instructed his lawyer or informed the court to help him summon the witness. For example, during cross-examination by the state attorney, he mentioned staying at two different guesthouses. Therefore, if his defence was nothing but true, he could have obtained an eyewitness from these guesthouses. However, he failed to inform the court why he did not have guest receipts to support his defence.

In the case of **Kubezya John v. Republic**, Criminal Appeal No. 488 of 2015 CAT (unreported), The Court had this to say;

'We wish to interject here that we are alive and that the accused person is under no legal duty to prove his innocence. But in situations where, like here the accused person is depending on the defence of ALIBI, he must demonstrate his alibi albeit on balance of probabilities...'

Glancing the defence put forth by the 1st accused it does not convince me to give it weight, as he has failed to demonstrate his defence on balance of probabilities. The arrest of the accused in Tunduru does not

necessarily mean that he was present there before the incident of the murder of Mohamed Juma Mohamed occurred.

The prosecution's evidence indicates that the deceased was hired by the 1st and 2nd accused on the evening of 10th February, 2022. PW4 and PW5 provided evidence of seeing the 1st accused with the 2nd accused, who hired the deceased bodaboda and left with him. Since then, the deceased was not seen again till when he was found dead.

Considering these factors, I find that the defence of the 1st accused has failed to create any doubt against the prosecution's evidence. Therefore, I do not accord any weight to the defence presented by the 1st accused.

The 2nd accused also claimed to rely on his defence of Alibi, stating that he failed to produce a receipt because it got lost during the chaos of his arrest. However, despite mentioning the lost ticket during his arrest, he did not provide specific details about which ticket he was referring to – the ticket for his travel from where to where and on what date.

If he intended to show that on the day of the incident, 10th February, 2022 he was elsewhere, away from the location where the incident occurred, it is doubtful whether he should have had a ticket. Even in his

oral testimony, the 2nd accused did not attempt to specify his whereabouts on 10th February, 2022.

If the 2nd accused wanted this court to believe in his defence as true, he should have provided an eyewitness. He stated that he has been living in Dar es Salaam since 2009 and came to Mtwara on 5th March, 2022. Therefore, by implication, he suggests that on 10th February, 2022, he was in Dar es Salaam. In this case, we would have expected him to have an eyewitness and not a bus ticket.

In the case of **Makala Kiula v. Republic** Criminal Appeal No. 2 of 1983 (unreported). The Court of Appeal, when discussing the consideration of the defence of Alibi in serious offences, had the following to say;

'If a person is charged with serious offence alleges that at the time when it was committed, he was in some other place where he is well known and yet he makes no effort to prove that fact, which if true could easily be proved, the court must necessarily attach little weight to his allegations'

If the 2nd accused meant the lost ticket was of 5th March 2022 from Dar es Salaam to Mtwara, this would not imply that on 10th February, 2022 the accused was not in Mtwara.

The 2nd accused also denied being arrested in Tunduru but claimed he was arrested at the Mtwara bus stand. He said he was apprehended by police officers whom he did not recognize. I find this evidence unconvincing because the police officers who arrested him, PW6 and PW7, testified and explained how the 1st and 2nd accused were arrested at the Kika guest house in Tunduru the evidence which was not seriously challenged in cross-examination.

Therefore, his defence that he was arrested in Mtwara seems to be an attempt to distance himself from the case. However, the truth remains that he was indeed arrested in Tunduru by PW6 and PW7.

For these reasons, I am satisfied and believe that the 2nd accused was not arrested anywhere else but in Tunduru. There is no compelling reason for the prosecution to claim he was arrested in Tunduru if he was indeed apprehended in Mtwara, as it does not change the fact that the accused was indeed apprehended.

For this reason, although the 1st and 2nd accused persons issued a timely notice regarding relying on the defence of Alibi, I find their defence unconvincing and unsuccessful in undermining the prosecution evidence, as PW4 and PW5 clearly stated they saw the two accused with the

deceased on 10th February, 2022. This notably weakens the accused's defence of Alibi.

Turning to the 3rd accused, none of the prosecution witnesses have been able to explain the involvement of the 3rd accused in the killing of the deceased. The only evidence implicating the 3rd accused in this offence is that he was buying stolen motorcycles from the 1st and 2nd accused.

Despite this testimony, this evidence did not prove in any way that the 3rd accused knew at the time he was buying the motorcycles that they were stolen or that they were linked to the murder. In light of this, I am unable to see the 3rd accused as guilty of the charge of murder as no common intention in committing the offence has been proved against him.

From all that I have discussed above, I am satisfied without any doubt that no one else other than the 1st and 2nd accused persons killed Mohamed Juma Mohamed.

Having established that the 1st and 2nd accused caused the death of the deceased; the question is whether they did so with malice aforethought.

Based on the evidence presented, which indicates that the 1st and the 2nd accused hired the deceased and later took him to the Hiari forest where they killed him, stole his motorcycle, and fled with it, it is clear that the accused planned to commit the offence with malice aforethought. This is evident from the act of tying up the victim's hands and feet and gagging his mouth to deprive him of air, as described by PW10 that the cause of death was attributed to suffocation resulting from ligature around the neck. This fact proves malice afore thought against the accused persons.

In the final analysis, and considering the totality of the evidence presented by both sides, it is plain that all the elements of the offence of murder against the 1st and 2nd accused have been proven beyond reasonable doubt. Therefore, I find the 1st t and the 2nd accused guilty of the offence of murder. Consequently, I proceed to convict them of the offence of murder under sections 196 and 197 of the Penal Code Cap 16 R.E 2022.

The 3rd accused is hereby acquitted and ordered his immediate release from custody unless he is lawfully held with another cause.

It is so ordered.



M.B Mpaze,

Judge

15/4/2024

SENTENCE

In punishing for this offence, my hands are tied, as I cannot impose any sentence other than that prescribed in section 197 of the Penal Code [CAP. 16 R.E. 2022], which reads together with section 322 of the Criminal Procedure Act, [CAP. 20 R.E. 2022]. In these circumstances, I hereby sentence and direct that the 1st accused, Badilu Issa Hannogi, and the 2nd accused, Salum Ally Mauji, each suffer death by hanging.



M.B Mpaze,

Judge

15/4/2024

Court: The right of appeal in terms of section 323 of the Criminal Procedure Act [CAP. 20 R.E. 2022] is fully explained.



M.B Mpaze,

Judge

15/4/2024

Court: Judgement delivered this 15th day of April 2024 in the presence of Mr Jagadi Gilala State Attorney for the Republic, all accused persons, Mr. Emmanuel Ngongi Advocate for the 1st Accused, Mr. Ahyadu Nanyohe Advocate for the 2nd accused and Ms. Lightness Kikao Advocate for the 3rd accused.



M.B Mpaze,

Judge

15/4/2024