

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

CRIMINAL SESSIONS CASE NO. 55 OF 2022

THE REPUBLIC

VERSUS

VALERIAN BONIFACE MASSAWE

JUDGMENT

7th & 21st May 2024

A.P.KILIMI, J.:

It is cardinal principle in this land, a person is presumed innocent until proved otherwise by a competent court of law. This right is protected by the Grundnorm of this Nation under article 13 (6) (b) of the Constitution of United Republic of Tanzania of 1977. Contrary to that is jungle justice or Mob justice, whereby a mob, usually several dozens or group of persons take the law into their hands in order to injure and kill a person accused of wrongdoing. Therefore, the said mob assumes the power of police, prosecutor, judge and executor of their own choice of punishment to the accused person. The above situation is very depraved since accused persons lose their chances to defend themselves to the alleged accusation.

In this matter, it was on the 9th day of February, 2022 at Kibosho area within Moshi District in Kilimanjaro Region, two deceased named as Omben Kassim Mmasi and Marios Kassim Mmasi, after being associated with the alleged stealing of Motorcycle, their life was ended after being attacked by a group of persons, beaten severely, dragged into the nearby ditch and burnt to death.

The incident was reported at Moshi Central Police station, police officers responded and attended the scene of crime whereat they found a crowd of people, they did preliminaries investigation and later took the said dead bodies to Mawenzi Hospital Moshi for further examinations.

In the course of investigation, police officers arrested the accused person namely Valerian Boniface Masawe and later was charged for the offence of murder of the two deceased contrary to section 196 of the Penal Code Cap 16 R.E. 2019. He denied to commit the offence.

At the hearing of this matter, the Republic was led by Ms. Yasinta Peter Senior State Attorney and Ms. Phoebe Magili State Attorney while the accused was represented by Mr. Engelberth Boniphace learned advocate.

Consequently, to prove the above charge the prosecution paraded a total of four witnesses namely; Jackson Valerian Munishi '**PW1**', ASP Leonce Reham Mwamunyi '**PW2**', Ridhiwan Ally Mushi, 32, Medical Officer, '**PW3**' and E7657 D/SGT Hassan '**PW4**'.

Briefly PW1 testified that on 9/2/2022, being at his home Kibosho Umbwe to greet his children, at 18:00 hours he went to a bus stand and shops at Weremi area. Thereat he saw people gathered; he went closer to see what was happening, at the scene he saw his uncle one Ombeni Kassim Mmasi being attacked by people. He said further people attacking him were four and he managed to identify the accused person Valerian Boniface Masawe and one Bombo Kimaro while the other two he was unable to identify them. PW1 stated that he was able to identify the accused and Bombo Kimaro as they grew up together in a village and they went to school together. He further said he saw the accused stabbing his uncle on the back with a knife then his uncle fell down others continued to kick him. PW1 could not help due to the strength of the group, he decided to call the police.

PW1 further testified that while the beatings of his uncle Ombeni continued, Ombeni's brother one Marios Kassim Mmasi intervened to rescue his relative and asked why they were beating his relative, PW1 heard Bombo Kimaro replying to him that if he was with his brother then they would beat him also. Then PW1 saw the group attacking Marios Kassim Mmasi by kicking him down, he also saw the accused person holding a stick and continued to beat him. PW1 further said he saw Bombo Kimaro taking a stone and hitting Marios Kassim Mmasi on his head. All victims being laying down motionless he believed they were already dead.

PW1 further saw accused person and Bombo Kimaro helping each other to move the victim Marios Kassim Mmasi and dump in the nearby ditch while Omben Kassim Mmasi was carried by the other two companion of accused to the same trench. Then PW1 saw accused and his fellows collecting banana shrubs and tree leaves putting on top of victims, then he saw Bombo Kimaro taking petrol from motorcycle and poured on victims, then took a matchbox and ignite fire on them whereby fire exploded.

PW1 further testified that he decided to follow up the police officers, but being on the way at Kibosho road, he saw a police vehicle and

stopped them, he took them to the scene of the crime. When police arrived, they found two bodies were already burnt, both naked and one of deceased Marious Kassim Mmasi his tongue was protruded. He informed the police the people who killed the deceased. Police took away the bodies for further investigation. PW1 further testified that he was later called to the police station for identification, where he identified the accused person on identification parade.

PW2 ASP Leonce Reham Mwamunyi, OC-CID Moshi told this court that on 9/2/2022 he received information from Jackson Munishi (PW1) around 17:00 to 18:00 hours, he said PW1 told him that two people were killed for stealing motorcycle at Kibosho Umbwe. He then prepared police officers and called the informer to show him the directions to the scene of crime. At around 20:00 to 20:30 hours they arrived at the crime scene. They found many people who after seeing them ran away. They found two male dead bodies burnt. The people who were there at the scene told them that, there was incidence of a stealing motorcycle by the deceased and the said motorcycle was being sold by the deceased. PW1 mentioned to them accused were Valerian Massawe and Mbombo Kimario, because he was at the crime scene therefore, he saw everything. They then took the bodies to

hospital. PW2 said investigation continued and the accused was arrested on 12/2/2022 with others in connection to the said crime.

PW4, No. E7657 D/SGT Hassan told this court that on 10/2/2022 he was assigned to investigate the incident stated above, He realised that one who reported the matter was Jackson Munishi who stated that his two uncles were killed by four people including Valerian Boniface Massawe (accused person) and one person he named as Bomboo, the other two were not mentioned their names. PW4 further said on 12/2/2022 he got information that the accused person was in Moshi at area 711. being accompanied with other police officers they went there and arrested him, and then accused was sent to Moshi Police Central Station. Later they called PW1 for identification parade. PW1 identified only the accused person. PW4 then went to a crime scene and drew a sketch map of the incident which was admitted as exhibit PE.3.

In cross examination PW4 testified that as investigator further revealed that at the incidence, he interrogated other people who did not want their statement be written, they told him that the deceased was killed by mob justice.

In defence case, the accused person Valerian Boniphace Massawe 'DW1' being led by Mr. Engelberth Boniphace a learned advocate said that on 9/2/2022 he was at his farm in Maili Sita and around sunset he reached near his home and heard the news from one Prosper Emil Massawe and other people that there were people killed. Later he met with Prosper Emily Masawe at Munishi Mwenge Village where he told him that he had to take him to the incidence as a rider of motorcycle commonly known as *bodaboda*. He carried him up to the place of incident. Thereat they found two people already killed and their bodies were in a ditch. Being at that area, he heard Prosper Emily Masawe communicating with the police.

DW1 further told this court that after three days deceased bodies were brought back to the village and he participated in their burial, but later he was arrested. DW1 stated that, he thinks he was arrested because he was a bodaboda driver. Further he stated that he knew Jackson Varelian Munishi (PW1), as he was born there at his village and they grew up together. But further DW1 added that he has two reasons on why PW1 mentioned him as the one who killed the deceased. First, is due to a woman

he wanted to marry who was called Light rejected him and PW1 alleged the said rejection was associated with his influence, thus caused misunderstandings between them. Secondly, DW1 said in 2021 PW1 was voted as the thief in the village meeting, thereafter PW1 alleged accused person was the one who engineered him to receive many votes because PW1 received 51 votes.

In cross examination, DW1 stated that he went back to Kibosho around 7:00 pm contrary to what PW1 testified that he was around there at 18:00 hours. He stated further that he did not notify the court that he will defend that at the time of incident he was not at that place. He also said he got information from Prosper Masawe and other villagers who he didn't recall their names and when he took Prosper it was about 18:45 hours and reached the area of incident at 19:00 hours.

His witness Prosper Emily Massawe 'DW2' told this court that on 9/2/2022 at around 18:30 hours as councillor of the said area, he got information from one of his resident that there was an incident that happened at Umbwe Sinde Village that two people Ombeni Kassim and Marious Kassim were burnt to death, He then went to Mwenge area where

riders of motorcycles park bodaboda, he met Valerian Boniface (accused person) and asked him to transport him to the incident, then they went together at the scene of the crime. DW2 further said thereat he saw the two bodies severely burnt. He tried to search for the chairman of the area without success and decided to move about 500 metres from the area with DW1 as rider and informed the police station by phone, police officers replied to him that they have already got the information and they were working on it. In cross examination DW2 stated that he did not know exactly at what time the killings happened, he further said his resident informed him that the said incident happened at 18:30 hours, he mentioned his informer as Gaudencia Massawe.

Now, in my determination of this matter, I have scanned the charge as stated above, only the accused person is charged for one count of murder which is under section 196 of the penal Code Cap 16. Essentially the wording of this provision provides for the following requisites; **first;** death of the deceased, **secondly;** that the death was unnatural, **thirdly;** that death was caused by unlawful act or omission of the accused and **fourthly;** that the killing was actuated by malice afore thought.

It also a trite law upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused. The onus never shifts away from the prosecution and no duty is cast on the accused person to establish his innocence. (See **John Makolebela, Kulwa Makolebela and Tuma Elias Tanganyika v. Republic** [2002] TLR 296; **Mohamed Said Matula v. Republic** [1995] TLR 3; See **Jonas Nkize v. Republic** [1992] TLR 213; **Said Hemed vs Republic** [1986] TLR117; **Furaha Michael v. Republic**, Criminal Appeal No. 326 of 2010 (Unreported) to mention few.

From the import of the above law establishing the offence charged, this court in disposing this matter will direct itself to prove the following issues; **first**; Whether the death of the two aforementioned deceased was unnatural, **second**; Whether the death was caused by unlawful act or omission of the accused person and **third**; Whether the killing was actuated by malice aforethought.

Starting with the first issue, according to the prosecution, PW1 was the eyewitness, the incident took its pace around 18:00 hours, thus he managed to witness the beatings of the two deceased and later saw when they were

dumped in a near ditch and burnt to death, this witness knew well the deceased as they were uncles to him. His evidence was corroborated with that of PW2 OC CID of Moshi who upon getting information he went to the scene of the crime with his troop of police officers and thereat he found the two bodies burnt to death.

In cementing the above kind of death, PW3 Medical Doctor, who being on duty at Mawenzi Hospital was called to make postmortem examination, he said in his observation that, he saw those bodies were burnt in open flame fire, also bodies were having injuries which show that it were caused by blunt object, and he concluded that the cause of death were 100% total burn surface at 3 degree burn, which means fire burnt them to the extent it reached the body muscles and hence severe haemorrhage. PW3 also tendered two post-mortem examination reports which were admitted without objection, the one for deceased Ombeni Kassim Mmasi was admitted and marked PE1 while that of Marious Kassim Mmasi was admitted and marked PE2.

Therefore, according to the above evidence, I am satisfied the prosecution has proved that the death of the two deceases was unnatural.

In the next issue, whether accused person is responsible to the cause of death. As briefly shown the evidence of witnesses above, PW1 said he knew the accused person very well because they grew and went to school together in one village. This assertion of PW1 was not disputed by the accused rather than being corroborated by the accused himself, when he testified in his defence that he also knows PW1 because he was born at his village and they grew up together.

PW1 further said at around 18:00 hours being at Weremi area he went closer to the people gathered and saw his uncle one Omben Kassim Mmasi being attacked by four people, among them he identified the accused person and one other whom he mentioned as Mbombo Kimaro, the other two he did not know them. PW1 while in dock, he said at the scene of crime accused person was wearing a big coat with khaki colour and trouser having milk colour while Bombo Kimaro was wearing black coat with a jeans trouser. He also mentioned the attire of other two who were in companion of them. PW1 further said when he stepped closer, he saw the accused person stabbing Omben Kassim Mmasi with a knife at his back who then felled down while others continued to kick him. PW1 decided to step aside and inform Police and mentioned to them the name of accused and that of Mbombo Kimaro.

When he returned closer, he saw the brother of the deceased who was called Marios Kassim Mmasi obstructing to help Ombeni, he then saw the other two who he did not know their names, kicking now Marios Kassim Mmasi down, he again saw the accused person who was having a stick in his hand continue to hit him. Then he saw Mbombo Kimaro took the stone and hit him on his head, by then Ombeni Kassim was down rolling, after several beatings to them, he saw them moving the deceased and dumped them in a sewage ditch which was nearby. The way he saw them after being dumped therein, they were not struggling as they stopped moving and remained quiet. He thus believed they were already dead, being watching PW1 saw Mbombo extracting petrol from the motorcycle, while he saw Accused person and others collecting shrubs of Banana and trees and put on top of deceased, then Mbombo Kimaro poured petrol on them, thereafter he took a matchbox and ignited fire on those shrubs, there after fire erupted. PW1 could not remain there, he decided to follow police officers.

I have considered the above testimony of PW1 under oath, I have the following observations; **First**, according to his evidence which was

supported with that of the accused, PW1 knew very well the accused person; **Second**, the incident happened at around 18:00 thus the issue of unfavourable condition of identification did not arise; **Third**, even before the mission of culprits accomplished PW1 informed the police and mentioned the names of the accused person that is Valerian Boniface Massawe and his fellow Mbombo Kimaro; In his own words in this court PW1 said and I quote;

"Then I decided to help, but they had powers than me, I took my mobile phone and called the police officer who was at Moshi town, he received the call and I reported to him and mentioned them, I saw Valerian Boniface Massawe and Bombo Kimaro beating the deceased."

Fourth he has described the attire of the two at the scene of crime, but also when crossed by learned counsel for accused, said he also described the same to police officers when he was reporting the matter. **Fifth**; when police officers attended the scene of crime found the incident of two bodied burnt as reported by PW1.

In my view his act of reporting and mentioning the culprits as above at the earliest opportunity has assured PW1 credence and reliability as the person who truly saw the incident and thus in conclusion of the

circumstances stated above, I am settled and believed that this witness is saying nothing but only the truth. (See **Marwa Wangiti Mwita and Another v. Republic** [2002] T.L.R. 39 and **Goodluck Kyando v. R** [2006] T.L.R. 363.

In his defence, the accused person 'DW1' principally relied on the defence of alibi, however there is no dispute that he did not notify or filing a notice to such effect before he entered his defence. However, I am mindful that an accused person is not required to prove his alibi. It is sufficient for him if the *alibi* raises a reasonable doubt, taking regard the practice has been that, the court would usually consider that defence whether it raises a reasonable doubt to affect the prosecution, even if the same was raised without notice. Moreover, this court in order to exercised its discretion bestowed under the provision of section 194 (6) of CPA is indebted to test the said defence and decide whether it accord any weight to the defence. (See **Ali Salehe Msutu v Republic** [1980] TRL 1; **Marwa Wangiti Mwita and Another vs Republic**, [2002] TLR 39 and **Charles Samson vs Republic** [1991] TLR 39.

In considering the above authority in relation to accused person defence, DW1 said on 9/2/2022 he was in his farm at Maili Sita from morning.

He stayed there doing farming activities until 7:00 pm when he went back at Kibosho. Despite of not bringing any supporting evidence that he was there all the time without moving to other place. He brought a witness one Prosper Emily Massawe "DW2", who according to his testimony when cross examined, he said he met with the accused person at 7:00 pm while the commission of the offence as stated by PW1 was around 18:00, further on the same cross examination, DW2 said openly that he did not state if the accused person is not responsible to the killing.

In my considered view of the above, DW1 did not fill all gaps that there was no possibility for him to go to the scene of crime at that time, this means circumstance allows him to go at the scene of crime and thereafter retreat to other duty as he did above when he was hired with DW1 as rider. Nonetheless, DW2 said he found the accused person with his motorcycle in a parking area of Bodaboda, no evidence produced by him to show when he parked there until he was hired by PW2.

In my view of the above evidence, I have seen the defence of the alibi raised by accused person, is lacking evidential back up to support the same, this means cannot raise reasonable doubt to the reliable evidence tendered

by prosecution as stated above. In **Makala Kiula vs Republic** Criminal Appeal No. 2 of 1983 (unreported), the Court of Appeal of Tanzania had this to say in respect of an incomplete alibi.

"If a person charged with a 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 allegation"

In the event I am settled the defence of alibi raised by accused persons, is of no evidential weight and that the same has failed to shake the prosecution's case.

Nevertheless, the accused person was in struggling to save himself, raised other three reasons to the effect that; **First;** he said the major reason for him to be arrested is because of being a motorcycle rider for transport people 'bodaboda'. However, in his defence he did not connect this assertion with any evidence that being a bodaboda was forced to be arrested and not others. **Second;** In respect to a meeting which was conducted at his village in the year 2021 for thief revealing, which he said villagers voted for PW1 as a thief. It is my considered opinion despite of not proving with evidence that

the said meeting existed, accused person did not state how PW1 hated him or created grudges more than others 51 who also voted for him.

And **third;** in respect to the allegation that a woman he wanted to marry but later rejected him due to influence of PW1, in cross examination accused person said he reported the said conflict to the Hamlet chairman who he mentioned by one name Priscus. In my view since he did not bring the said leader to this court to tell us whether the same actually existed, and if that created grudges between them, I failed to realise how this allegation connect PW1 to be insinuated to the commission of the offence charged, therefore I am settled this defence holds no water in saving the accused person.

Furthermore, at the hearing, the defence objected the tendering of sketch map of the scene of the crime, I subscribe with the contention by the defence counsel that the exhibit PE3 did not reflect the copy which he had, since it is presumed is the one read in preliminary hearing during the committal proceeding, a new statement in substitution cannot manage to survive instead. I therefore accord no weight on it.

Also the defence endeavoured to show contradictions of the statement of PW1 recorded by police and what he testified in this court, I may say that

usually statement depend on how it was recorded since witness are asked what to say, therefore, it may happened what was not asked during recording of statement, be asked in court, I think the answer cannot be ignored because it was not asked at police station, thus in that regard obvious statement of witness taken at earlier cannot be similar with oral testimony in court, in my considered view what matters is credibility of the witness at the dock while testifying either in examination in chief or cross examination. Then those contradictions will be gauged by the court whether goes to the root or not.

Therefore, I have considered the context and gravity of the alleged contradictions, I am of settled view does not go to the root of the matter or affected the credibility of PW1 on what he said here in this court as an eye witness. (See **Chrizant John vs Republic** [2016] TZCA 655 (TANZLII)).

In respect to identification parade I concede with the learned counsel for the accused person that the same was not proved, thus the evidence that PW1 identified at that parade to my opinion is nugatory.

Moreover, in my view, the accused person lied when he said that being in the lock up, police officer called Leonce Mamunyi 'PW2', told him he was arrested by the special operation which arrested many people as mere

suspect but there is a person called Jackson Varelian Munishi (PW1) came to police station and said he was involved in killing the deceased. PW2 testified in this court differently and said that, he was informed about the incident, while culprits including accused person being at the scene of crime.

It is a principle of law that an accused person has no duty to prove his innocence, but there are times when lies by such an accused may be resolved against him. (See **Miraji Idd Waziri @ Simwana and Another vs Republic**, [2020] TZCA 387 (TANZLII) and **Felix Lucas Kisinyila v Republic**, Criminal Appeal No 129 of 2002 (unreported)).

Lastly, I am aware that the nature of the incident stated above attracted many people to attend the scene of crime which may cause intricacies and obstructions, however as revealed by the evidence above of PW1 which was coherent and credible, I am of considered view, PW1 managed to identify the accused person as one among the four people who attacked the two deceased and caused their death. I wish to support my observation by the case of **Jaribu Abdallahs v. R**, Criminal Appeal No. 220 of 1994 (unreported), when the Court of Appeal stated that:-

"In matters of identification, it is not enough merely to look at factors favouring accurate

identification. Equally important is the credibility of witnesses. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence."

(See also, **Joseph Mkumbwa and Another vs. R**, Criminal Appeal No. 94 of 2007 (unreported).

In conclusion, having considered all the above defence evidence, I am satisfied the same did not raise any reasonable doubt to the extent of affecting the tight evidence of the prosecution case above. Consequently, I hold the issue is answered in affirmative that the accused person participated in the causation of the death of the two deceased.

The next point to be considered is whether the first accused had malice aforethought in causing the death of the two deceased. According to the Penal code Cap. 16 R.E.2022 provides that;

"200. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;

(d) N/A"

[Emphasis supplied]

According to the case of **Enock Kipela vs The Republic** [1999] TZCA 7 (TANZLII) the Court of appeal abridged further that 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: **first**, the type and size of the weapon, if any, used in the attack; **second**, the amount of force applied in the assault; **third**, the part or parts of the body the blow or blows were directed at or inflicted; **fourth**, the number of blows, although one blow may, depending upon the facts of

the particular case, be sufficient for this purpose; **fifth**, the kind of injuries inflicted; **sixth**, the attacker's utterances, if any, made before, during or after the killing; and **Seventh**, the conduct of the attacker before and after the killing.

According to the evidence of PW1 as stated above he saw a group of four people including the accused person beating the deceased Ombeni Kassim Mmasi and later when his brother Marious Kassim Mmasi came to rescue Ombeni, he was also joined in that beatings and further burnt to death. Specifically, for accused person, PW1 said he saw him stabbing with a knife on the back of Ombeni Kassim Mmasi and also, he saw him using a stick to beat Marious Kassim Mmasi after being kicked down by other culprits.

There is no dispute that the said weapons used by the accused person were not tendered in this court in order to establish infliction of injuries caused, but I have considered the circumstances of the commission of the offence, and the facts as evidenced by PW1 that, the act of accused person continue to corporate with other fellow culprits and did not dissociate himself from the companion of other culprits, for instance PW1 proved accused person and another offender called Mbombo Kimaro help each other to move Marious Mmasi to the ditch. Having considered the above evidence, in my

considered view, the accused person cannot exonerate himself in involvement to the commission of the crime intended.

In defence, it was endeavoured that the commission of crime was actuated by mob justice after one of deceased alleged to stole a motorcycle. In my opinion, principally, each matter depends in its particular facts, in the wording of the court of appeal in **Enock Kipela vs The Republic** (supra) the court had this to say;

"an attack in the course of administering "mob justice" which results in the death of the victim may, under the law of this country, constitute murder. Provided common intention existed, it would not matter who inflicted the fatal wound or wounds."

In view of the circumstances, it is unbelievable that the two deceased would have survived after being burnt by fire. According to the evidence, the one who use petrol to burn the two deceased was mentioned by eye witness PW1 to be Mbombo Kimaro, but before he did so, the other culprits including the accused person, were preparing to make it easier the burning of the two deceased, in his own words PW1 said and I quote;

"Then Mbombo took petrol from the motorcycle, and Accused person and others were collecting

(shrubs of Banana and trees) they put on top of deceased, he put petrol on it"

The above extract from the testimony of PW1, show that the accused person was in close collision with the other three persons not arrested in operation of the offence committed. In view the act of the accused person to collect those shrubs and put on top of the victims, shows the accused person knew when the fire will be ignited by any of his companion its consequence to the victims was burning to death.

I wish to refer an analogous case of **Mathias Mhnyeni and another v. Republic** [1980] T.L.R. 290, in that case the appellants were convicted of murder in the High Court. The first appellant enlisted the second appellant in assaulting the deceased whom he had suspected of having an affair with his former concubine. On the material date the second appellant held the deceased's hands to prevent the deceased from fleeing and from defending himself against the assault. That court convicted both appellants of murder on the basis of the doctrine of common intention. In upholding the decision of the trial High Court, The Court of Appeal held that: -

"Where a person is killed in the prosecution of a common unlawful purpose and the death was a

*probable consequence of that common purpose
each party to the killing is guilty of murder. "*

Therefore, in this case at hand, although the accused person did not ignite the fire which killed the two deceased, but acts of accused person before the said fire was ignited suffice to infer that he has common intention of killing the victims. Thus, I am settled the act of the accused person of collecting shrubs and put on top of the two deceased establish common intention between him with the one who ignite fire to the deceased. In **Godfrey James Ihuya vs Republic** (1980) TLR 197 the Court observed that:

"To constitute a common intention to prosecute an unlawful purpose ... it is not necessary that there should have been any concerted agreement between the accused persons prior to the attack of the so-called thief. Their common intention may be inferred from their presence, their actions, and the omission of any them to dissociate himself from the assault."

In view of the above authority, according to exhibit PE1 and PE2 the two deceased died due to 100 percent burnt injury, the accused person participated as shown above, I therefore of settled view that the accused person had malice aforethought after considering his acts he did immediately

before the act of burning the two deceased persons, certainly his acts fall squarely to the import of section 200 (b) of the Penal Code. I wish also to support what he did by the case of **Obadia Kijalo vs Republic**, Criminal Appeal No. 95 of 2007 CAT (unreported) when the court stated that:

*"It suffices to state that malice aforethought may be demonstrated by **looking** at the motive for the offence and **the conduct of the suspect immediately before and after the act or omission**"*

[Emphasize supplied]

In the final result and for the foregoing reasons, I am satisfied that the prosecution side has proved the offence charged beyond all reasonable doubts. I therefore find the accused person **Valerian Boniface Massawe** guilty for the offence charged and consequently, I hereby convict him for the offence of Murder contrary to section 196 and 197 of the Penal Code as charged.

It is so ordered.

DATED at **MOSHI** this day of 21st May, 2024.



A.P.K.

**A. P. KILIMI
JUDGE**

SENTENCE

Having considered what has been submitted to me during sentencing process by both Ms. Yasinta Peter learned Senior State Attorney and Mr. Engelberth Boniphace counsel for the defence. It is a trite law conviction on the charged offence, the law provides death by hanging as the only punishment for murder. Therefore, in compliance with sections 26 (1) and section 197 of the Penal Code Cap 16 RE 2022, the convict namely **VALERIAN BONIFACE MASSAWE** is hereby sentenced to suffer death by hanging.

It is so ordered



A.P.K.

**A. P. KILIMI
JUDGE
21/5/2024**

Court: - Judgment delivered today on 21st day of May 2024 in the presence of Ms. Yasinta Peter, Senior State Attorney assisted by Ms. Phoibe Magili, State Attorney whereas in defence side, in the presence of Mr. Engelberth Boniphace, Advocate for Accused Person, and accused person also present.

Sgd; **A. P. KILIMI
JUDGE
21/5/2024**

Court; Right of Appeal explained

Sgd; **A. P. KILIMI**
JUDGE
21/5/2024