

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

CRIMINAL SESSIONS CASE NO. 5 OF 2023

THE REPUBLIC

VERSUS

- 1. NESTORY EUGENE TARIMO @ MUSHI**
- 2. JULIUS EUGENE MUSHI @ RASTA TARIMI**

JUDGMENT

17th & 24th May 2024

A.P.KILIMI, J.:

This is a murder case; wherein the two accused persons namely **Nestory Eugene Tarimo @ Mushi** and **Julius Eugene Mushi @ Rasta Tarimi** hereinafter first and second accused person respectively stand jointly and together charged with the murder of **Leon Vicent Machu @ Bahati** contrary to the provisions of section 196 and 197 of the Penal Code, Cap.16 R.E.2022. According to the charge, it was on 21st day of September, 2022 at Mweka Kibosho Area within Moshi District in Kilimanjaro Region, the two accused persons did murder the deceased mentioned above.

The brief background which led accused persons to be charged in this case is as follows, it was the morning of 22/9/2022 at Mweka chini Hamlet in Mweka village, one Stella Godfrey Kessy a Ward Executive Officer '**WEO**' received a call from Inspector Victor Mhagama informing her that there was an incidence of killing at her area of administration at Mweka chini Hamlet, she rushed to the said area, thereat she found other many people already there. Then she saw the dead body of a male person beside the road having bloody injuries on its head. She then informed the Police about the incident.

Later police officers arrived at the scene of the crime and attended the deceased body, thereafter Police officers, WEO together with other leaders of the said area and neighbours saw blood drops which showed to have been going somewhere. Then they followed those blood drops which streamed going to the direction of the house of the first accused which was nearby from where the body of the deceased was found. Upon reach the said house, they entered inside and saw lot of blood on bed, also items inside were all scattered in chaos manner showing therein there was fracas that took place. After necessary investigation procedure Police Officers moved the body at the scene of the crime to KCMC Hospital. In the course

of investigation second accused person was arrested nearby the house of the first accused while the first accused person was arrested at Coffee Plantations 'Chibo farms' which are also at the same area.

In this court all accused persons denied the charge, thus, the prosecution case led by Ms. Yasinta Peter Senior State Attorney and Ms. Phoibe Magili State Attorney paraded seven witnesses to substantiate their allegations. Briefly '**PW1**' Christopher Augustine Ndakideni councilor of that area of incident and '**PW4**' Stella Godfrey Kessy WEO, both told this court they attended the scene of crime and notified Police about the incident, moreover as leaders of the area they were together with police officers when they followed blood drops which led them to the house of the first accused person, they also testified how and what they saw inside the said house, that they saw lot of blood on bed and items inside were scattered in chaos manner showing therein there was fracas that took place. The above was also reiterated by '**PW6**' Idda Mamis Naisso, who said she is a close neighbour to the said house of the first accused, she was also who said the house belong to the first accused person, but also said the first accused person stays with the second accused person in that house.

'PW3' Brighton Francis Kisike, is watchman at Kilimanjaro coffee plantation commonly known as 'Chibo farms' which is on the same area, told this court after being informed by police about the incident and sent to him a photo of the first accused via whatsApp, he and his fellow watchman arrest the first accused person who was walking on way which is on the said plantations. **'PW2'** PF. 25123 A/INSP Merikiad Onna is a police officer who told this court he attended the scene of crime and drew a sketch map which was tendered and admitted as PE1, then moved the body of the deceased from the crime scene to KCMC Hospital. He further said he arrested the second accused person near the said house of first accused person, further he said him and two relatives of the deceased he named them as Zakharia Machu and Joseph Machu, attended an autopsy of the deceased body made by Doctor Gilbert, who told them after autopsy that the cause of death was due to two injuries on the deceased head.

'PW5' No. J4789 PC Said, is a Police officer at Central Moshi, he was instructed to write caution statement of Julius Mushi, he did that duty and tendered the said statement which was retracted by the second accused person but after trial within a trial the same was admitted and marked PE2

and lastly in prosecution case was '**PW7**' Demetus Chilumanga, who introduced himself as investigator of the case and wrote the caution statement of the first accused, he tendered the same which was not objected by the first accused person and admitted as PE3 , PW7 also attended KCMC with relatives mentioned above by PW2 for post mortem examination of the deceased body.

In defence case the first accused person had a legal aid of Ms. Flora Munuo whereas the second accused got service of Mr. Fred Kimaro both learned advocate; principally both accused person denied to commit the offence charged and added that all caution statement taken from them were not voluntary since they were influenced by torture.

Also DW1 denied living with the deceased or his young brother (DW2) by stating that his brother lived at his own place. DW1 further defended himself that he stays at his father in law home (the home of his wife) at Mweka and on that day of 22/09/2022 he left from his wife home going to work in Uru Mlangi area and on the way he met the militia of Chibo who arrested him and took him to the office of their company and one Arobogast told them that he was the one who murdered a person at

Mweka. The police came and took him to a central Moshi where he was interrogated the next day of 23/09/2022. DW1 stated further that he did not even know the deceased.

For the second accused Julius Eugene Mushi a (DW2) testified that on 22/09/2022 he was in church and one person come with a car and arrested him and took him to a police central station. By then he was not told the offence and was locked up until the next day of 23/09/2022 where he was taken to an interrogation room.

Having considered the entire evidence, the major issue in this matter for determination is whether the evidence tendered did establish that the two accused persons murdered or participated in the murder of the deceased. To prove the same the burden is placed on the shoulders of the prosecution and the standard required is not only prove but prove beyond all reasonable doubt. (see **George Mwanyingili vs Republic**, Criminal Appeal No. 335 of 2016 CAT (Unreported)).

This being a murder case, I have considered the requirement under section 196 of the Penal code which create this offence but also taking

regard the two accused persons are charged jointly, thus, the following are point for determination in proving the charge.

1. Whether death of Leon Vicent Machu @ Bahati died was unnatural.
2. Whether the death was caused by unlawful act or omission of the accused persons.
3. Whether there was common intention among the accused persons to execute an unlawful purpose.
4. Whether the killing was actuated by malice afore thought.

In respect to the first issue above, according to the evidence of PW2, a police officer who attended the scene of crime, he was shown the body of the deceased laying beside the road, he saw it having bloody head injury. Leaders who were at the scene of the crime named to him that the deceased is Leon Vicent Machu @ Bahati, those leaders were PW1 and PW4. But also, this witness attended the autopsy of the body at KCMC being accompanied by his fellow police officer PW7 who was investigator of the case, together with two deceased relatives who were mentioned by names as Zakharia Machu and Joseph Machu, these relatives identified the body and after the said autopsy took the body for burial. PW2 and PW7 mentioned a medical doctor who did an autopsy as Gilbert, who after that exercise told them the deceased died due to two head injuries. In view of

the above, I am settled that Leon Vicent Machu @ Bahati died, and his death was unnatural.

Secondly, who caused the said death? according to the evidence no eye witness saw the accused person committing murder of the deceased. This means the evidence adduced is entirely circumstantial evidence. In that regard therefore such evidence to be authentic must meet the conditions that were adopted by the Court of Appeal in **Ndalahwa Shilanga & Another vs Republic** [2011] TZCA 159 (TANZLII), where it was held that for circumstantial evidence to ground a valid conviction, the following three 3 conditions must be met; first; the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. Second; those circumstances should be of a definite tendency unerringly pointing towards the guilty of the accused; and third; the circumstances taken cumulatively, should form a chain so, complete that there is no escape from conclusion that within all human possibility the crime was committed by the accused and no one else.

Now, the evidence touching the accused person are as follows, first is their caution statements taken, for the second accused person, when his

caution was tendered, it was objected which caused this court to enter the realm of trial within a trial which was conducted but the objection was overruled and the caution statement was admitted as PE2. This is different in respect to the caution statement of the first accused person which was not objected and consequently admitted as PE2. Nonetheless, I have considered the defence of the first accused has endeavoured to establish that he was tortured, in my view of his evidence the fact that he did not cross examined after admission of the said caution statement, thus his defence is an afterthought due to his failure to object it, so that could have been tested its voluntariness when the same was tendered.

The next point which I think must be considered is whether these caution statements being retracted confession or not as above, are they suffice to infer the guilty of the accused person for the offence charged.

Principally there are two tests for confession to pass, first is test determines the admissibility of the confession. The second test is the evaluation of the confession, to determine, whether it is true including the need of and whether or not there is a need of corroboration. This stage determines the weight/value of the confession. If the court finds that there is corroboration it can convict. If the court finds no corroboration, it can

still convict if the court finds that the confession contains nothing but the truth, and after warning itself of the danger of convicting without corroboration. (See cases of **Ndalahwa Shilanga & Another vs Republic** (supra) and **Hatibu Tengu vs Republic**, Criminal Appeal No. 62 of 1993 unreported).

I have considered the above caution statements in the light of the above said principles, according to the circumstances of this matter, despite of the fact that the caution statement of the first accused person was not objected at the time of being tendered, I have considered other facts including alleged late retraction, I am of the view each statement above needs to be corroborated to amount conviction to the offence charged.

I have read both statements, each statement point fingers to another accused person and vice versa, therefore in my opinion being confession of co accused person they cannot corroborate each other because each need to be corroborated. It is a trite law a confession which requires to be corroborated cannot corroborate another evidence. (See **Ally Msutu vs Republic** [1980] TLR 1; **Jimmy Runangaza vs Republic** [2018] TZCA

188 (TANZLII); and **Swelu Maramoja vs Republic**, Criminal Appeal No. 43 of 1991 (Unreported).

Having considered the circumstances of the said two caution statements of the above two mentioned accused, as said above, I am settled they need to be corroborated by another piece of independent evidence. Now the next point for determination at this juncture is that, is there any independent evidence to corroborate the above statement. And I wish to starting with the first accused person.

I have checked all prosecution evidence, I am satisfied the evidence testified by 'PW3' Brighton Francis Kisike corroborate the caution statement of the first accused person, and the following are analysis of the above conclusion. PW3 after being informed by Police about the incident, he went on patrol using a motorcycle at Chibo farm accompanied by one watchman Nassibu Athman Babu, they met with a man, PW3 before introducing himself or knew that is the first accused person, he asked accused person where is going, he replied is going to his relatives. Then PW3 saw him look shocked, also he saw his clothes having blood stains, He then asked him what were those stains for, the first accused person told him that are blood

and further explained to him that, he returned to his home during night, therein he found Bahati being naked in his house chasing his children, with the aim to know them carnally against the order of nature, then the accused took hoe handle and beat him on his head.

It was after that conversation, PW3 arrested the accused person and sent him to farm office, there he asked his name, accused person introduced himself that is called Nestory Mushi. I have considered the above words first accused told PW3, basically are reflected in his caution statement, such as first accused when returned to his home found deceased half naked chasing his children aiming to sodomise them and used a handle to beat him. Moreover, I had an ample opportunity to see the demeanour of PW3, indeed he was coherent, calm and efficient in his testimony, in that regard I am settled he was saying only the truth, thus his evidence is credible and believable. (See **Goodluck Kyando vs. Republic** [2006] T.L.R. 363)

Another evidence corroborating the first accused person, is the evidence of PW1, PW2, PW4 and PW6, these witnesses attended the scene of crime and they saw blood drops/stains from the deceased body to the

house. PW6 Idda Naisso is the neighbour of the first accused person, told other witnesses above that the house belong to the first accused person. Also, both PW2, PW4 and PW6 saw a lot of blood on the bed which is in first accused person house. I concede with the defence that the said blood was not taken for DNA test to see whether really was the blood of the deceased person.

However, I have critically reasoned that, since the house belong to the first accused person and it was proved he dwell in that house, taking regard the accused person was not found in the said house or nearby of it, while there is such an incident which attracted many villagers his neighbours inclusive. In my view his act of being absent and later arrested by PW3 going away from his home as stated above, the place he was found going to opposite direction plus absence of plausible explanation of condition found in his house, I am of considered view common sense of humankind dictates that the first accused person had knowledge for what happened in his house, thus, I am settled the first accused person cannot escape being participated to the death of the deceased. Henceforth the above corroborate his caution statement.

In his defence the first accused person Nestory Eugene Tarimo Mushi 'DW1', first acknowledged that he was arrested at Chibo farm, second, he seems to rely on the defence of alibi that he was dwelling with his wife at their home somewhere else and not the house alleged to belong to him, and when cross examined, and in further cross examination said he stays with in-law and his elder child is 13 years old. In my view since neither of them were brought as witness in this court to support his assertion, his defence is not substantiated.

Correspondingly, the learned counsel for the second accused person alleged the testimony of the PW7 as an investigator told different stories compared to what he wrote as statement at police station, as I observed earlier in this session in **Republic vs Valerian Boniface Massawe** [2024] TZHC 2154 (TANZLII) , I said that statement of witness taken earlier cannot be similar word by word with oral testimony in court, what should be considered is matters of credibility of the witness during his oral testimony in courts which is subjected to cross examination if any and whether the same goes to the root of the matter. (See also **Daniel John Mwakipesile vs Republic** [2022] TZCA 582 (TANZLII) and **Evarist Kachembeho and Others vs Republic**, (1978) L.R.T no. 70.)

However, the said learned counsel tried to impeach the evidence of PW7 above, but fall short when he did not tender in court as evidence the statement of PW7 which he desired to impeach. This is contrary to the directives of the court in **Lilian Jesus fortes vs Republic** [2020] TZCA 1936 (TANZLII) where Court of Appeal at page 25 stated that;

"The procedure for impeaching a witness by using his previous writing requires the following to be done; First, the previous statement must be read to him. Secondly, the attention of the witness must be drawn to those parts which are intended to demonstrate contradictions. Thirdly, the statement should be tendered in evidence."

[Emphasis supplied]

(See also **Waisiko Ruchere @ Mwita vs Republic** (Criminal Appeal 348 of 2013) [2014] TZCA 216 (TANZLII)).

Furthermore, the first accused in his defence claimed that he had misunderstandings with one Arobagast because he refused to give him a piece of land, he needed from him, but also, he said he has a farm conflict with his neighbour Idda Naiso (PW6). I have considered his defence, despite of being flimsy, in my opinion he did neither connect the same with the allegation he is facing nor the said claims do not absolve those witnesses that they knew his house which the alleged blood drops ended in his house from the deceased body. And lastly, in his defence in respect to torture inflicted at Police station, first accused said the said torture was on 23/9/2022 while the prosecution tendered evidence that his caution statement was taken on 22/9/2022. Thus, I have failed to grasp how if torture existed next day affected his earlier confession, which he made without being tortured.

Therefore, the above analysis cumulatively, I am settled that, the above series of facts form circumstantial evidence are incapable of no interpretation other than the guilt of the first accused, thus I hereby reject his defence for being unsubstantiated, thus failed to raise any doubt on part of the prosecution. Subsequently, I find the first accused is responsible and actually caused the death of Leon Vicent Machu @ Bahati.

In respect to the second accused person, as said above, since his confession was retracted, and the fact that confession of his fellow co accused cannot corroborate (see **Ally Msutu vs Republic** (supra), I am enforced to look on whether there is any evidence to corroborate his caution statement. In my entire scrutiny of the prosecution evidence tendered none of the evidence touches the second accused person than first accused person caution statement, nevertheless, I have gone far to see whether there was any act which infers that the two accused persons charged had common intention. The doctrine of common intention in our jurisprudence is envisaged under section 23 of the Penal Code which provides: -

"23. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

[Emphasis supplied]

In my considered opinion, therefore, the wording of the above provision of the law, literally as they are, for the doctrine to apply there must be cogent positive evidence to establish that one or more persons had shared with the accused a common intention to pursue an unlawful act and that in the execution of the said pre-conceived plan an offence was committed by both or some or all of them.

I have entirely considered the prosecution evidence tendered, in my view no such evidence showing the above requirement of the law was procured and tendered by the prosecution to show that the two accused had common intention. Therefore, I am settled with the lack of cogent evidence the said doctrine cannot be invoked.

In view of what I have endeavoured to discuss above, I find the retracted caution statement of the second accused person 'PE2' have no any other evidence to corroborated, as I have stated above, since this statement requires corroboration in order to inter conviction, I am settled that the prosecution has failed to established its case beyond reasonable doubt against the second accused person. I therefore find the second accused person namely Julius Eugene Mushi @ Rasta Tarimi not

responsible to the causation of the death of the deceased, Leon Vicent Machu @ Bahati.

Consequently, I hereby find the second accused person is not guilty for the offence of murder contrary to section 196 of the Penal Code Cap. 16 R.E. 2022 and I proceed to acquit him for forthwith.

Back to the first accused whom I have held above is responsible to the causing the death of the deceased, the next issued to be considered after that holding, is whether the first accused person in doing so was having malice aforethought. In **Enock Kipela vs The Republic** [1999] TZCA 7 (TANZLII), the court enumerated requisites establishing malice aforethought when observed that: -

" ... Usually, an attacker will not declare to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following: -

(1) the type and size of the weapon if any used in the attack

(2) the amount of force applied in the assault.

(3) the part or parts of the body the blows were directed at or inflicted on

(4) The number of blows, although one blow may, depending upon the facts of the particular case, case, be sufficient for this purpose.

(5) The kind of injuries inflicted.

(6) The attackers' utterances, if any, made before, during or after the killing.

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

[Emphasis provided].

Later the court added and polished the above observation in **Obadia Kijalo vs Republic**, Criminal Appeal No. 95 of 2001 (unreported), and said that;

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

[Emphasis supplied]

(See also **Moses Michael @Tail vs Republic** [1994] TLR 195 and **Grosperry Ntagalinda @ Koro vs Republic** [2016] TZCA 661 (TANZLII).

I have considered the evidence of PE3 despite of not being objected was also corroborated as shown above, it shows existence of fracas between the deceased and the first accused person prompted by the children of the first accused's children when complained to him that the deceased is naked and want to do bad act to them. I find it pertinent to reproduce in his own language what the first accused said in that caution statement;

"Nakumbuka siku hiyo tulienda kufanya kazi ya kupakia mawe, mimi, Bahati na mdogo wangu Julius, tulipomaliza kila mtu alipewa pesa yake shilingi elfu kumi, tukaenda kunywa pombe, baada ya kunywa, mimi nikaondoka Kwenda kwa mke wangu nikamwacha Bahati na Julius.

Baada ya muda nikawaona Watoto wangu wanasema tumemwona Bahati hana nguo, basi nikaenda hadi nyumbani nikamwona Bahati ndani kwangu hana nguo, nilipoingia akanikamata nikapiga kelele ndipo mdogo wangu Julius akaja kunisaidia, baada ya kufika akasema ngoja kwanza tumkomeshe maana tabia yake siyo nzuri.

Swali; Je tabia hiyo ya Bahati ambayo siyo nzuri ni ipi.

Jibu; tabia ya kuwaingilia watu kinyume na maumbile, ndipo Julius alichukua mpini na kumpiga Bahati na mimi nikachukua fimbo nikawa na mpiga mala Bahati akaanguka kwenye kitanda huku anatoka damu maeneo ya kichwani.”

[Emphasis is mine]

In English may be translated as;

"I remember that day we went to work which is loading stones, me, Bahati and my younger brother Julius, when we finished everyone was given their money ten thousand shillings, we went to drink alcohol, after drinking, I left to go to my wife and left Bahati and Julius.

After a while I saw my children coming to me and they told me they saw Bahati without clothes, then I went to the house and saw Bahati inside my house without clothes, when I entered my house he grabbed me and I shouted and then my younger brother Julius come to help me, after arriving he said let us stop him first because his behaviour is not good.

Question: *what behaviour that Bahati had which is not good?*

Answer: the habit of him of canally knowing people contrary to the nature, then Julius took the handle and hit Bahati and I took a stick and hit Bahati who fell on the bed while bleeding from the head."

In my view of the above evidence, shows that before the said fracas between the deceased and the first accused person, the first accused person has no intention to kill the deceased but was motivated by his children after his mind sensed a bad act will be done to them by the deceased, actually in that fracas he raised an alarm to be helped, the act which shows that he behaved reasonably after realizing deceased might injure him also. Nevertheless, the prosecution did not tender in evidence the said stick or handle used by the first accused person.

Therefore, according to the circumstances above indicates that, **first;** the information he got from his children and the words he uttered prompted him to enter into fracas with the deceased, **second;** the above facts being coupled with the prosecution failure to bring the stick used by accused, which could have evidenced the toughens of weapon used, and **third;** since no evidence established by prosecution that the deceased died in the said house, therefore, the fact that first accused person did not leave

the deceased in the crime scene , but participated in moving the deceased to the nearby road, in my opinion the act of moving deceased to the said road, shows his mind knew the deceased could have been easily be attended by anybody, this is contrary if could have hidden the deceased or dump anywhere else so that nobody else could have seen him.

From the above stated reasons cumulatively, I am settled that there is no water tight intention to kill the deceased established by the prosecution, which in my considered opinion becomes advantageous to him, thus, I find the first accused person lacked malice aforethought in the death of the deceased.

Based on what I have demonstrated above, it is now my settled conclusion that, the first accused person Nestory Eugene Tarimo @ Mushi is not guilty of the offence of murder contrary to section 196 and 197 of the Penal Code, Cap.16 R.E.2022 and subsequently I proceed to acquit him forthwith for this offence charged.

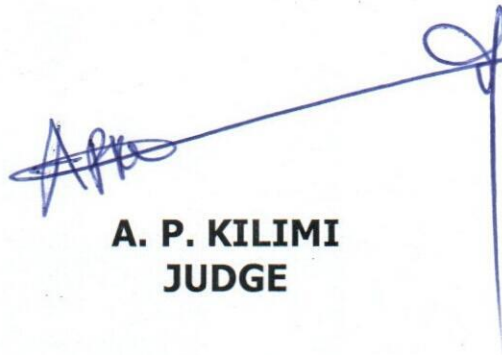
As an alternative thereof, by virtue of section 300(2) of the Criminal Procedure Act [Cap 20 R.E 2022], the first accused person one Nestory Eugene Tarimo @ Mushi is hereby found guilty of a lesser offence of

manslaughter contrary to section 195 and 198 of the Penal Code [Cap 16 RE 2022] for which there are sufficient evidence against him as stated above. Consequently, I proceed to convict the first accused person for this offence of manslaughter forthwith.

Order accordingly.

DATED at **MOSHI** this day of 24th May 2024.





**A. P. KILIMI
JUDGE**

SENTENCE

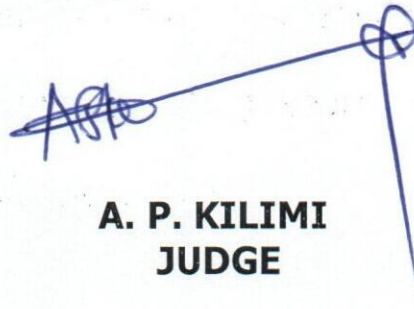
I have considered the aggravating factors established by the prosecution and mitigation from the defense, according to the **Tanzania Sentencing Guidelines, 2023** prescribes the procedures and factors to be considered when passing a sentence. Since the nature of the offence was motivated by gang which caused serious multiple wounds to the deceased, I am satisfied the punishment appropriate is High level

manslaughter which its punishment range from ten years as starting point and life imprisonment as maximum sentence. Thus, in view of the above stated mitigating factors, I find the first accused person deserves a minimum sentence under this level. Therefore, the accused person is I hereby sentenced to serve ten (10) years imprisonment. Subject to reduction of the period he spent in custody.

It is so ordered.

DATED at MOSHI this 24th day of May, 2024.




**A. P. KILIMI
JUDGE**

Court: - Judgment delivered today on 24th day of May 2024 in the presence of Ms. Rose Sulle, State Attorney and Ms. Emma Luena, State Attorney whereas in defence side, in the presence of Ms. Frola Munuo, Advocate for first Accused Person also holding brief of advocate Fred Kimaro for second accused, and all accused persons present.

Sgd; **A. P. KILIMI
JUDGE
24/5/2024**

Court: - Right of Appeal duly explained.

Sgd; **A. P. KILIMI**
JUDGE
24/5/2024