

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

**CRIMINAL SESSIONS CASE NO7 OF 2023**

**THE REPUBLIC**

*VERSUS*

- 1. JULIUS FRANCIS NDESHAU @ CHUGA**
- 2. RASHID ISSA MBOGO @ MWARABU**

**JUDGMENT**

27<sup>th</sup> May & 4<sup>th</sup> June, 2024

**A.P.KILIMI, J.:**

In this case the accused persons namely; **Julius Francis Ndeschau @ Chuga** and **Rashid Issa Mbogo @ Mwarabu** hereinafter first and second accused person respectively, stand before this court charged with the offence of Murder contrary to section 196 of the Penal Code Cap 16 R.E. 2019.

The particulars to their charge detailed by the prosecution were to the effect that, on 6<sup>th</sup> day of December, 2022 at Same township area within Same District in Kilimanjaro region all accused did murder one

Mathayo Mandley@ Tipelet@ Chambuji. Both of the accused persons pleaded not guilty to the charged offence.

For easy appreciation of the sequence of events leading to the arraignment of the accused persons, I find apposite to outline briefly the historical background of this matter. It was on the 6<sup>th</sup> day of December, 2022 at Same town the deceased together with his wife and child were sleeping at the house of his friend one Robert Christopher Kiure 'PW4'. The accused persons accompanied with other men went and knocked at their door asking for the deceased to get out. The deceased opened the door and three people entered introducing themselves as local militia commonly known as 'sungusungu' who were there to take the deceased as he was accused of stealing a mobile phone from Ezron.

Then they left with the deceased, while on the way they started beating the deceased on different parts of his body causing him severe injuries which made him weak and unable to speak. The condition of the deceased was critical by the time he was taken to the police station so the police ordered him to be taken to hospital where he died few hours later. Thereafter the incident was reported at Police Station, police officers visited the crime scene and drew a sketch map. On 12<sup>th</sup> December, 2022 an

autopsy was conducted at Same District hospital revealing the cause of death of the deceased to be due to Polytrauma with visceral Pulmonary Injury. Upon investigation the accused persons were arrested and after their interrogation they were arraigned for the offence of murder.

In their defence, briefly the first accused 'DW1' defended that on 06<sup>th</sup> December, 2022 at around 10:00 being on his way back from to where he resides, he met a group of people who introduced themselves as local militias, they arrested him and stayed with him until around 11:00 p.m. as he was released. DW1 further denied being a watchman or a member of local militia. He also denied to have participated in killing Mathayo.

In respect to the second accused 'DW2', said on 06<sup>th</sup> December 2022 at around 22:00 he closed his barber shop and moved on foot heading to his home, being on the way when he reached Kwasakwa street he met a group of people who were more than 10. They introduced to him as local militias and asked him to contribute money in order for them to let him pass on that way. DW2 gave them Tshs. 2,000/= and they allowed him to go home. After two days he received a call from police station requiring him to attend at the said station, he responded and thereat he was arrested and later charged for killing the deceased. He further denied being

responsible for killing the deceased and said he didn't even know the deceased before.

In substantiating the above facts, the prosecution was led by Rose Sulle assisted by Emma Luema both State Attorneys, whereas in the defence Mr. Leonard Mashabala learned advocate appeared for first accused while Ms. Patricia Erick learned advocate represented the second defendant.

To prove the above charge, the prosecution deployed six witnesses and four exhibits as follows; **Kalimu Elias Kakuru 'PW1'** is a medical practitioner who did autopsy of deceased body, he tendered a postmortem examination report which was admitted as **exhibit 'P1'**. Another is **Stivin Charles Shunda 'PW2'** a police officer who was at police station when the deceased was bought alleged to be a thief while still alive, upon seeing his condition he ordered for him to be sent to Hospital before doing anything. **Mohamed Ramadhan Nyangasi 'PW3'** is a police officer who attended the scene of the crime, thereat being led by Isaya Loshiro drew a sketch map, and the same was admitted in this court as **exhibit 'P2'**. Also, he witnessed the autopsy conducted by PW1.

**Robert Christopher Kiure 'PW4'** stated that he was the deceased friend who hosted him and his wife and child in his house on the tragic night of 06<sup>th</sup> December 2022. He told this court at around 04:00 hrs to 05:00 hrs deceased wife knocked at his door and told him that her husband had been taken by some people who identified themselves as sungusungu. He told her to go back to sleep and, in the morning, he advised her to report at police station. Later he was informed by deceased wife that the deceased had died.

Another witness is **Aminael Kabura 'PW5'** said is a Chairperson of Mbuyuni Hamlet who in order to stabilise security at her area, she decided to establish a group of seven young men to be local militias. The said group elected one Godfrey to be their chairman responsible for on duty roster for them. She named the two accused above and pointed them in the dock that were among the members of the said group.

The last prosecution witness was **F.3651 D/SGT JULIUS 'PW6'** is a police officer who recorded two statements, first of Christina Edward (wife of the deceased) and second that of Issaya Lushiro Nagoto @ Shinini who was identified by the wife of the deceased on the fateful night when he came with local militias and took her deceased husband.

These two mentioned above were not found by the prosecution, thus before the trial started, prosecution filed a notice under Section 34(B) (1) (2) (a) (e) of Evidence Act Cap. 6 R.E.2022 'Evidence Act'. Later at the hearing, PW6 tendered the said statements. This court admitted the statement of Christina Edward as **exhibit 'P3'** and that of Issaya Lushiro Nagoto @ Shinini as **exhibit 'P4'**.

Now, this being the murder case, it is settled law the prosecution is required to establish two things; *actus reus* which means is the act itself of killing unlawfully human being and *mens rea* which means ill intention 'malice aforethought'. Therefore, the two must be connected in order the offence of murder to be proved and the standard is proof beyond reasonable doubt. In the case of **Mohamed Matula vs Republic** [1995] T.L.R 3, the court had this to say:

*"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 appellant to establish his innocence"*

(See also the case of **John Makolebela, Kulwa Makolebela and Tuma Elias Tanganyika vs Republic** [2002] TLR 296, cited in the case of **Nchangwa Marwa Wambura vs Republic**, Criminal Appeal No. 44 of 2017. (unreported).

Therefore, the above two essentials' requisites to be proved, first, there must be a death which is unnatural. In this matter, according to the evidence it is undisputed that the deceased died being admitted at Same District Hospital, the evidence of PW2 a police officer in charge of CRO at Same Police Station said deceased was brought on 7/12/2022 at the said police station being seriously in bad healthy condition to the fact that he did not attend a case alleged to be committed by deceased than giving a group of people militia who brought him a PF3 and accompanied them to Same District Hospital.

At the Hospital the deceased was attended by PW1 who said in this court the deceased was having wound on his head which was bleeding, also his left arm had swollen and also, he saw some injuries on his chest and on his back which he said was caused by blunt object. He gave the

deceased preliminary medication while preparing to issue a referral to Mawenzi Hospital for CT scan, but unfortunately, he died.

PW1 later did an autopsy and revealed that the cause of death was due to intra-cerebral haemorrhage caused by Polytrauma with Visceral Pulmonary injury. He tendered in this court the Postmortem examination report which was admitted as exhibit P1. Before an autopsy he was introduced to the body of deceased by his relatives accompanied by police officers. In view of the circumstances above. I have no hesitation that the prosecution has proved the said Mathayo Mandley@ Tipelet@ Chambuji and died and his death was unnatural.

Second, commencing with the first limb of proving murder case as observed above, herewith is the issue whether the accused persons charged in this case caused the death of the deceased.

According to the prosecution evidence as briefly stated above, only one witness namely Issaya Lushiro Nagoto@ Shinini was an eye witness. However, this witness was not found, this instigated the prosecution to tender his statement under section 34B (1)(2)(a) and (e) of TEA in this court by a police officer one F.3651 D/Sgt Julius, 'PW6' and it was



admitted as exhibit P4. In that statement briefly said he saw the accused persons above together with others not arrested whipping the deceased with sticks on the said night of incident.

Having keenly gone through this statement exhibit P4 in relation to other evidence on record, I have the following observations;

According to the record of Preliminary Inquiry no. 7 of 2022 at the district court of Same which was brought to this court together with this case after committal proceeding, it shows that this witness who cannot be found was charged together with the accused person hereinabove on 13/12/2022, this means he was co-accused person to them, they did stay as remand prisoners together till 6/04/2023 when he was discharged after the DPP entered a nolle prosequi against him. Consequently, on the same day of discharge above his statement above P4 was written by police officer PW6. In his statement he said, and to dispel any possibility of distortion, I find it apposite to reproduce what he said as reflected at page 3 of exhibit P4. He is recorded to have said;

*" ... na muda wa saa 1900 hrs nikiwa Ruvu  
Marwa nilipata taarifa kutoka kwa Mwenyekiti*

*wa Kijiji cha Ruvu Marwa kuwa Mathay Mandley @ Chimbuji amefariki dunia, na askari polisi walifika na kunikamata, nilipohojiwa nilieleza namna ilivyotokea usiku wa tarehe.....na nilishikiliwa kwa kosa la mauaji”*

[ Emphasis added]

In English is translated as;

*"At around 19:00 hrs while I was at Ruvu Marwa, I received information from Ruvu Marwa village chairman that Mathayo Mandley @ Chimbuji died. I was then arrested by the police and when I was interrogated, I explained what happened on the said night of ..... Then I was detained and later charged for the offence of murder”.*

[ Emphasis added]

In my view of the above statement, **first**, this witness who cannot be found stayed in remand prison with the accused persons for the same offence for a period of more than three months. Therefore I think I cannot hesitate to say that they had an ample time to know each other. **Second**, despite the quoted statement above of this witness shows police

interrogated him immediately after his arrest and then charged and remanded him. However, the prosecution said nothing about the interrogation done to him before he was charged and remanded. Nevertheless, in respect to the statement tendered which was written by the said witness immediately after he was discharged by Nolle prosequi, the prosecution did not say whether the same resembles to the statement he said at police station at the time of his arrest before he was charged. Under the above circumstances, in my view his reliability remained questionable and this is because it is a trite law that the ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability. In the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry. (See Cases of **Jaribu Abdallah v. Republic** [2003] TLR 271 and **Marwa Wangiti Mwita & Another v. Republic** [2002] TLR 39).

**Third**, in that statement admitted as exhibit P4, this witness who cannot be found, contradicted himself and it is my considered opinion the said contradictions affect his credence of his statement. This is because at page 2 of exhibit P4 he is recorded to have said as follows;

*"Nakumbuka watu hao walijitambulisha kuwa wao ni sungusungu idadi kumi **majina yao sifahamu bali sura zao naweza kutambua.** Waliniambia kuwa niwapeleke alipolala Mathayo Mandley @ Chambuji"*

[Emphasis added]

In English is translated as;

*"I remember those people introduced themselves as militia, they were ten in number, **I do not know their names but I can recognise their faces.** They asked me to take them where Mathayo Mandley @ Chambuji was sleeping."*

[Emphasis added]

Later in the same statement at page 3 changed the above story and was recorded saying as follows;

*"mimi nawakumbuka watu hao waliompiga marehemu Mathayo s/o Mandley ambao ni Julius s/o Francis@ Chuga, Rashid s/o Issa Mbogo @*

*Mwarabu, Kabaya s/o? Godfrey s/o? na wengine ninawafahamu kwa sura"*

[Emphasis added]

In English is translated as;

*" I remember the people who assaulted the deceased Mathayo s/o Mandley those are Julius s/o Francis@ Chug, Rashid s/o Issa Mbogo @ Mwarabu, Kabaya s/o? Godfrey s/o? and others I recognised their faces"*

[Emphasis added]

I have considered the above discrepancies in relation to the gravity of the statement in relation to this matter, in my view the same goes to the root and corrode the credibility of the maker hence cannot be believed. I find apposite to fortify my view by observation in the case of **Goodluck Kyando vs Republic**. Criminal Appeal No. 118 of 2003 (unreported) when the court had this to say;

*"it is trite law that every witness is entitled to credence and must be believed and his*

*testimony accepted unless there are good and cogent reasons for not believing a witness".*

(See also **Dickson Elia Nsamba Shapwata and Another vs Republic** [2008] TZCA 17 (TANZLII).

Be that as it may, in this statement (exhibit P4), the witness said he was arrested by people militia 'sungusungu' at about 03:00 hrs, there is no dispute that at this time it was dark hours. I have read the whole statement, in view I think in that statement there are questions remained unanswered, such as how he managed to identify the accused persons, whether he knew them before and how, or if it was the first time to see them how he described each accused person. It is a trite law 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 **Jaribu Abdallah vs Republic**, Criminal Appeal No. 220 of 1994 and **Joseph Mkumbwa and Another vs Republic**, Criminal Appeal No. 94 of 2007 (Both unreported). It is therefore my considered opinion the above statement left important issues unanswered.

**Fourth,** at page 3 of the said statement exhibit P1 the maker of statement mentioned the date of the said night he saw the accused persons beating the deceased, however the said date is deleted and made another date within an existed deletion and bolded respectively which causes failure for any reader to grasp what was exactly the date he saw the accused persons. Thus, what the police officer who wrote the statement did is different to the normal procedure where if one make alteration, he signs to acknowledge the same. Moreover, no explanation given by the prosecution as to why the date appeared that way.

Thus, having said so, it means the date of commission of crime is uncertain, the same causes a variance of date found in the charge sheet and that found in the statement exhibit P4, hence in my view the above create uncertainty as to what was the correct date when the offence was committed. Therefore, in the absence of positive and cogent evidence to establish when this key witness as eye witness actually saw the accused persons, it would be improper in this case to assume that the prosecution has cleared all doubts as required by the law.

Another statement of the witness who was not found tendered, is the statement of Christina Edward, the same was admitted as exhibit P3. In this statement she introduced as the wife of the deceased, at page 2 she was recorded saying that she did not know who attacked his husband, but she saw who lastly walked away with the deceased, she said it was the group of men introduced themselves as sungusungu, in that group she identified only one, she mentioned him as Isaya Loshiro @ Shinini.

The fact that the statement of Isaya Loshiro @ Shinini was tendered in this court (exhibit P4) and the fact this statement has several flaws as shown above. Therefore, in my view the statement of Christina also lost strength in proving this case after lacking backup from Isaya Loshiro @ Shinini's who said in his statement he was an eye witness to the incident.

In respect to witness Aminael Kabura 'PW5' as Hamlet Chairman of the said area. She identified the two accused persons in the dock to be in the list of militias deployed by her throne to keep peace and security in his hamlet, but also, she told this court one who was responsible to make a roster of patrol in daily basis ws their leader one Godfrey. However, neither evidence of the said roster nor names of militia paraded on duty the day of



incident were tendered in this court, so as to show that the two accused persons were among militias on that day of incident. And this is because the said leader one Godfrey was also alleged with this incident of killing the deceased and escaped, thus nobody could tell names of militias deployed on the fateful day of incident.

Therefore, in view of the above analysis, the evidence of PW5 as hamlet leader shows that the two accused persons charged were highly suspected since are among the lists of militias she had in her possession as a leader. In this regard, it is a settled position of the law that mere suspicion, regardless of its gravity, cannot serve as the basis for a conviction in a criminal trial. (See: **Masota S/O Jumanne vs Republic**, Criminal Appeal No. 137 of 2016 CAT at Tabora (unreported) and **MT. 60330 PTE Nassoro Mohamed Ally vs. Republic**, Criminal Appeal No. 73 of 2022 CA (Unreported))

The remaining evidence connect the accused persons are investigative evidence of PW2 and PW3 who were the investigators of this case. They interrogated the accused persons. In my view of their evidence, since they did not tender any caution statement of any of accused persons,

there is no evidence to corroborate their evidence and what they knew under circumstances of this case remains to be hearsay evidence.

In view thereof and having considered the prosecution evidence as a whole, I am settled the prosecution has failed to prove the charge against all accused persons beyond reasonable doubt. Consequently, I hereby find **Julius Francis Ndeschau @ Chuga** and **Rashid Issa Mbogo @ Mwarabu** not guilty for the offence of murder contrary to section 196 of the Penal Code and I proceed to acquit them for this offence forthwith, further I proceed to order immediately be set free, unless they are otherwise lawfully in prison for another case.

Order accordingly.

**DATED** at **MOSHI** this day of 4<sup>th</sup> June 2024.



**A. P. KILIMI**  
**JUDGE**  
**4/06/2024**

**Court:** - Judgment delivered today on 4<sup>th</sup> day of June 2024 in the presence of Ms. Rose Sulle, State Attorney for the Republic, in the presence of Mr. Elisante Kimaro Advocate holding brief of advocates Patricia Erick and Leonard Mashabara for first and second accused respectively, and all accused persons present.

Sgd; **A. P. KILIMI**  
**JUDGE**  
**4/06/2024**

**Court;** Right of Appeal explained

Sgd; **A. P. KILIMI**  
**JUDGE**  
**4/06/2024**