

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB REGISTRY OF MANYARA

AT MBULU

ORIGINAL JURISDICTION

CRIMINAL SESSION CASE NO. 34 OF 2023

REPUBLIC

VERSUS

THERESIA D/O ZACHARIA @ LANDA D/O SAGHANI.....1ST ACCUSED

JEREMIA S/O LOHAY.....2ND ACCUSED

JUDGMENT

27th May & 4th June 2024,

Kahyoza, J.:

Gwandi S/o Axweso, who was Theresia d/o Zacharia's husband, disappeared raising Axweso Boay Hhau (**Pw1**)'s suspicion that his son may not be alive. Axweso Boay Hhau (**Pw1**) probed **Theresia d/o Zacharia** regarding whereabouts of **Gwandi S/o Axweso**, who replied that she did not know her husband's whereabouts. Axweso Boay Hhau (**Pw1**) searched around and found clothes with dry blood stains. The clothes were suspected to be **Gwandi S/o Axweso**'s clothes. He reported to the hamlet chairman. Later, **Theresia d/o Zacharia** admitted to kill **Gwandi S/o Axweso**, her husband with the assistance of **Jeremia S/O Lohay**.

She eliminated her husband to live with **Jeremia S/O Lohay**, a man she had extra marital relationship with. In her defence, she denied to kill her husband, to know her husband's whereabouts, to have extra marital relationship with **Jeremia S/O Lohay**, the co-accused or to have confessed. **Gwandi S/o Axweso's** body was not discovered even after an in-depth search. **Jeremia S/O Lohay**, emphatically refuted to partake in murdering **Gwandi S/o Axweso**.

The prosecution arraigned **Theresia d/o Zacharia @ Landa d/o Saghani's** and **Jeremia s/o Lohay**, (the accused persons) with the offence of murder contrary to sections 196 & 197 of **the Penal Code** [CAP. 16 R.E. 2022]. It alleged that, on the 3rd day of November, 2022 at Arri village, within Mbulu District in Manyara Region, the accused persons did murder one **Gwandi S/O Axweso @ Theobald S/O Axweso** (the deceased). **Theresia d/o Zacharia** and **Jeremia S/O Lohay**, pleaded not guilty. To prove them guilty of murder beyond all reasonable doubt, the prosecution summoned Axweso Boay Hhau (**Pw1**), Damiano Qamara (**Pw2**), Estomihi Keneth Haule (**Pw3**) and G. 8686 D/CPL Imran (**Pw4**). It tendered one exhibit, the first accused person's extra-judicial statement (**exhibit P.1**).

Axweso Boay Hhau **(Pw1)**, a resident of Arri village and the deceased's father, testified that Theresia Zacharia was his daughter in law, married to Gwandi Axweso, his son. They lived one kilometer from his residence. That his son disappeared since 01.11.2022. On 30.11.2023 got information that his son's clothes were found scattered in the farm. He identified two sweaters; one brown in colour and the other with purple colour. They had dry blood stains. He called Theresia Zacharia, the first accused person to look at them. She did not identify them.

He became suspicious and went to report to **Damiano Qamara (Pw2)**, the Hamlet Chairman. Axweso Boay Hhau **(Pw1)**, **Damiano Qamara (Pw2)**, and a group of mourners went to the place where the clothes were found, they identified them and commenced a search. During the search, they found a pair of trousers and a t-shirt at the nearby farm. They raised an alarm and more people gathered. When it became dark they stopped the search and vowed to proceed the following day.

On 01.12.2022, Axweso Boay Hhau **(Pw1)**, **Damiano Qamara (Pw2)**, and other people proceeded with the search. Before the coming of police officers, they probed Theresia Zacharia as to what happened to her husband, and she told them that she killed her husband. And when they

entered their house, they found dried blood stains on the bed and on the top of the roof in the first accused person's bed room. When probed further, she went on showing them the place where they buried the deceased body. In course of further search, they came across the deceased mobile cellular phone and one shoe.

Upon the arrival of the police, Theresia was arrested and taken to the police station. **G. 8686 D/CPL Imran (Pw4)** deposed that the police interviewed her and she admitted to have killed her husband using an axe. Again, she showed the police officer where they buried the body, but the body was not found there. Finally, she said that the body was taken by the motorcycle to Dongobesh swamp "*titio*" or "*Bwawani*".

On another incident, police officers brought her and people asked her questions, and she told them that she killed him for he did not provide her with her upkeep to cater her needs. Also, that they were not in good terms, for there was an on-going dispute that their younger child resembled one Jeremia, and that it was Jeremia who was providing for her upkeep. Jeremia denied his involvement.

Later on 20.12.2022, the first accused person appeared before Estomihi **Keneth Haule (Pw3)**, a Resident Magistrate in the primary court, the justice of peace to whom she confessed.

After conforming with a Guide for Justices of Peace' (the CJ's Guide), **Estomihi Keneth Haule (Pw3)** recorded an informed first accused person's extra judicial statement. **Estomihi Keneth Haule (Pw3)**, narrated that after the police notified her that the suspect wanted to record an extra judicial statement, she asked her to leave her room and she remained with the suspect.

She found out that the suspect was conversant with Kiswahili language and addressed her in that language, so they did not need an interpreter. She introduced herself to the suspect and likewise the suspect did to her. She examined her body and found that the suspect had no scar and that she was prepared to give her statement voluntarily.

She recorded her statement, where the suspect told her that on 03.11.2022, together with Jeremia Lohay, they killed the deceased with an axe and buried him. That after two days, Jeremiah came with two people (thugs), excavated the deceased's body, and cut him into two pieces and parked them into two different bags. Jeremia and the two people left and she never knew where they went.

When the extra judicial statement was up for admission, it was objected on three folds; **one**, that the Justice of peace (JP) did not sit at

the District Court as provided by section 54 of the **Magistrate Court Act**, [Cap. 11 R.E 2019] (the MCA); **Two**, that the JP did not comply with the CJ's Guide on taking extrajudicial statements by the JP; and **three**, that the statement seemed to have been prepared before the actual recording of the statement before the JP, as it contains typed and hand written versions. In the aftermath, this court overruled the objection for the JP complied with the guide, that section 51 of the **MCA** does not expressly state where the JP shall sit when recording the statement, and that the typed version contained basic information that JP was duty bound to extract from the suspect in compliance to the CJ's Guide.

The said extra judicial statement was admitted and marked as **exhibit P.1**.

After it was established that the accused persons had a case to answer, **Theresia Zacharia** and **Jeremia Lohay** defended themselves on oath. They did not summon witness or tender exhibit.

Theresia Zacharia (Dw1), a resident of Arri village, testified that on 2.12.2022 left her home place, when she was back, she heard that there was an incident, (she did not specify the incident). She was asked as to the whereabouts of her husband and replied that he travelled. One

month later, police officers came and arrested her on 02.12.2022. On 03.12.2022 took her to court. Police officers tortured her with electric shock (here the witness was not lifting her face). On 20.12.2022 police took her to a primary court, where she told the magistrate that she did not know anything.

She testified further that her husband travelled on 12.11.2022 but he never told her where he was going. She refuted the evidence that she attended the villagers' meeting. Before she swore, she cried, and at some points she covered her face. She also admitted staying together with her husband and lived close to her in laws. That she had no quarrels with her in-laws, and that they loved her. She denied to know Jeremia, the second accused person. She concluded that she had no duty to know the whereabouts of her husband.

Jeremia Lohay (Dw2) a resident of Arri village, testified that on 02.12.2022 people raised an alarm for help, and commenced a search for **Gwandi S/o Axweso**. They did not recover **Gwandi S/o Axweso's** body. On the same day, he was arrested at the meeting by police officers at 06:00 pm for being suspected to have killed him. Police interrogated him

but he denied to have been involved in anything. He denied to have sexual relationship with Theresa, nor having a child with her.

To prove the offence of murder, the prosecution is bound to establish beyond reasonable doubt that a person alleged dead is actually dead and his death was unnatural and the accused person is the responsible and that the accused caused death with malice aforethought. The Court of Appeal in **Mohamed Said Matula v. Republic [1995] TLR. 3** held that-

*"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.**" (Empasis added)*

Given, the settled position of the law, issues pertinent to the case under consideration, are-

1. Is Gwandi Axweso dead?
2. If it is established that Gwabdi Axweso is dead, whether his death was unnatural.
3. Are the accused persons responsible for Gwandi Axweso's death?
4. If the answer on item 3 is in affirmative, then, did the accused persons kill the deceased with malice aforethought?

The prosecution's case is based on circumstance evidence as there was no eye witness. It is settled that the circumstantial evidence must be such as to produce moral certainty, to the exclusion of every reasonable doubt as it was emphasized in the case of **Simon Musoke v. R.**, [1958] 1 E.A.715 where the defunct Court of Appeal for East Africa among other things, held-

"In a case depending exclusively upon circumstantial evidence, the court must, before deciding upon conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt."

The Court of Appeal of Tanzania had an opportunity to pronounce itself in **Bahati Makeja V Republic**, [2010] T.L.R. 49 (CA) regarding conditions for relying on circumstantial evidence to convict, thus-

1. *"The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established;*
2. *Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused person;*
3. *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 person and no one else, and*

4. *The circumstantial evidence in order to sustain a conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and should be inconsistent with his innocence."*

The prosecution staged four substantial pieces of evidence to connect **Theresia d/o Zacharia @ Landa d/o Saghani** and **Jeremia s/o Lohay** with the offence of murder; **one**, is the extrajudicial statement of **Theresia d/o Zacharia @ Landa d/o Saghani**; **two**, oral confessions of **Theresia d/o Zacharia @ Landa d/o Saghani** on various occasions. **three**, evidence of co-accused and, **four**, other inculpatory circumstances.

To start with the extra judicial statement, it was unveiled by the prosecution side that the 1st accused person confessed to the alleged offence in her extra judicial statement (**exhibit P.1**) before JP.

The prosecution side must prove that the said extra judicial statement was freely and voluntarily taken, for it to form the basis of conviction. Section 28 of **the Evidence Act**, [CAP. 6 R.E. 2022] under which the statement of the 1st accused (extra judicial statement) was admitted reads as follows: -

*"28. A confession which is **freely and voluntarily made** by a person accused of an offence in the immediate presence of a*

magistrate as defined in the Magistrates' Courts Act, or a justice of the peace under that Act; may be proved as against that person."
(Empasis added)

I take notice that the voluntariness of the said statement by the 1st accused person was not objected to, rather the objection was based on the compliance of the law in the recording of the said statement. However, the 1st accused person challenged the voluntariness of the said statement during her defence, alleging torture by police officers, thus not voluntarily made (retracted).

In the case of **Emmanuel Lohay & Another v. R.**, Criminal Appeal No. 278 of 2010 at page 8, citing in approval the case of **Shihobe Seni vrs. Republic** (1992) TLR 330, the Court of Appeal of Tanzania held that:

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"It is trite law that if an accused person intends to object to the admissibility of a statement or confession he must do so before it is admitted and not during cross-examination or during defence. In this case, the appellants "missed the boat" by trying to disown the statements at the defence stage. That was already too late. Objections, if any, ought to have been taken before they were admitted in evidence."

The above notwithstanding, and for judicious determination, I am compelled to determine the merit of the said extrajudicial statement. It

follows then what was discussed in **Nyerere Nyague vrs Republic** (Criminal Appeal Case 67 of 2010) 2012 TZCA 103 (21 May 2012) by the Court of Appeal of Tanzania that-

*"even if a confession is found to be voluntary and admitted, the trial court is still saddled with the duty of evaluating the weight to be attached to such evidence given the circumstances of each case (See **Tuwamoi V Uganda** (1967) E.A 91 **Stephen Jason & Others v R** (supra). And lastly, everything being equal the best evidence in a criminal trial is a voluntary confession from the accused himself (See **Paulo Maduka and 4 Others v R** Criminal Appeal No. 110 of 2007(unreported))...*

But, of course, admissibility is one thing. That is the domain of the trial court. The weight to be attached to an admitted exhibit is another."

In **Richard Lutengo Vs Republic**, (CAT) Criminal Appeal No. 29 of 1996 (Mbeya) (Unreported) the Court of Appeal of Tanzania quoted with approval the case of **Tuwamoi Vs R**. [1967] E.A.84 at page 91 as follows-

*"The case of Tuwamoi is one of the classic cases on repudiated or retracted confessions or both, that the trial court must be satisfied with the **truthfulness of the confession** in all the circumstances of the case. Corroboration is not even necessary in law so long as*

caution is taken on the danger of acting on such evidence."

(Empasis added)

I had time to consider the extra judicial statement (**exhibit P.1**) during trial and found that it was a confession of guilt, and that the statement was recorded in compliance to the law. Estomihi Keneth Haule (**Pw3**), the Justice of Peace, a woman magistrate, was categorical that she inquired as to whether the suspect volunteered to give her statement and she confirmed that she was ready to record the same voluntarily and that she was not threatened or coerced to confess. She signed to signify her voluntariness to confess.

She was informed as to her rights; that the said statement could be used against her in court of law, and she was prepared to make her statement notwithstanding, thus she knew the fate of her making the statement. Estomihi Keneth Haule (**Pw3**) complied to all the requirements as per the CJ's Guide. She examined the suspect's body and the suspect was fine. I therefore, I find no good reason to fault Estomihi Keneth Haule (**Pw3**) testimony that the first accused gave her statement freely and voluntary. I have no doubts in mind that Estomihi Keneth Haule (**Pw3**) recorded the extra judicial statement in compliance of the law.

Even after the extra judicial statement was admitted, the defence raised a complaint that the first accused may have been forced to confess as the OSC did not write to the justice of peace to notify her that the first accused person wanted to confess. The defence referred to the "a Guide for Justices of Peace' (the CJ's Guide). I read the CJ's Guide, with due respect to the learned defence advocate, it does not state that the OSC must refer the suspect to the JP with a letter but it says in most cases that is usually. Paragraph 6 of the CJ's Guide reads, thus, -

*"A prisoner wishing to make a statement may be brought to the office of a justice under police escort and **usually bearing a letter from the Officer-in-Charge Police**, to the effect that the accused, who is under arrest in connection with an alleged offence wishes to make a voluntary statement to a magistrate or Justice."*

The word "usually" means in most often, frequently, habitually, generally, ordinarily, mostly, or normally. It does not anyway mean always or every time. Thus, the suspect who wish to make a confession may be brought to the Justice of Peace bearing a letter or without it, as it was in the presence case. Thus, the police's act of bringing the first accused person to Estomihi Keneth Haule (**Pw3**), the JP, without a letter does not connote that she was forced to confess or render her confession in admissible.

I wish to emphasize that there is no scintilla of evidence to suggest that the Justice of peace fabricated the evidence to vindicate the first accused person. To disown the confession, the first accused deposed that the police tortured her using electric shock. She did not explain as to who tortured her. She made a complaint during her defence while covering her face. Her demeanor was questionable she could not be trusted. Had she been tortured using electricity as she alleged she would have scars, marks, or injuries. Estomihi Keneth Haule (**Pw3**) deposed that she examined the first accused person's body and found no scar. I have already pointed out that, I had no reason to hold that Estomihi Keneth Haule (**Pw3**), the JP, lied on oath that the first accused gave the statement as a free agent and had no scar.

I am alive of the settled position of the law that an accused person has no duty to prove her innocence but to raise a reasonable doubt in the prosecution's evidence. I rejected the allegation of torture for three reasons; **one**, that the first accused person's allegation of torture was not backed by physical marks on her body, as pointed above; and **two**, she did not complain to the justice of peace before she (the JP) recorded her (the first accused person's) statement. I wish refer to **Hemed Kigodi v.**

Republic, [1995] T.L.R. 172 (page 174 over to 175) in which one of the reasons why the court rejected the appellant's claim of torture was that he had not disclosed that fact before the justice of peace.

I find that, the first accused lied that she was tortured. It is settled that the accused person's lies strengthen the prosecution's case. I am alive of the principle that an accused person has no duty to prove his innocence but he cannot escape a duty to tell the truth. The Court of Appeal commenting on the accused lies in **Miraji Idd Waziri @ Simwana & Another vs R.**, (Criminal Appeal 14 of 2018) [2020] TZCA 387 (7 July 2020) stated, thus-

"The second factor is that in explaining the deceased's whereabouts the first appellant told lies. It is an elementary 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."

In addition, I am of the firm view that the first accused confessed to Estomihi Keneth Haule (**Pw3**), the JP, due to the detailed information in the said extra judicial statement, which would not have come from any other person save the first accused person. To appreciate, I quote the exact words of the accused-

"Tarehe 3/11/2022 nikiwa na Yeremia Lohay, tulimpiga na shoka shingoni na kumuua aliyekuwa mume wangu aitwaye Teobali Akwesso. Mimi ndiye nilitangulia kumpiga marehemu na shoka na Yeremia akamalizia siku hiyo. Tulichimba shimo na kumzika nyumbani kwangu. Tarehe 5/11/2022, Yeremia alikuja na bodaboda na majambazi wawili; wakamfukua marehemu na kumkata kiuno na kuweka sehemu hizo mbili yaani kiuno Kwenda miguuni kwenye mfuko wake na kiuno Kwenda kichwani kwenye mfuko wake. Baada ya hapo wakaondoka na sikujua walikoelekea. Yeremia ni baba wa mtoto wangu na tulimuua mume wangu kwa kuwa alikuwa ananigombeza ndipo Yeremia alinishauri nimuue. Baada ya Yeremia kuondoka tuliendelea kuonana na kila nikimuuliza alikopeleka mwili wa marehemu, ananiambia amemtupa mbali kabisa. Ni hayo tu"

Literally to mean: -

"On 3/11/2022 together with Yeremia Lohay, we attacked by an axe on the neck and killed the used to be my husband one Teobali Akwesso. I was the first to attack the deceased with an axe the Yeremia finalized on that day. We dug a pit and buried him at my home. On 5/11/2022, Yeremia came with a commercial driven motorcycle with two bandits; they exhumed the deceased body and halved it, the part from the waist to the legs was put on one bag and the other part- from the waist to the head to the other bag. After that, they left and I didn't know where they were heading to. Yeremia is the father to my child and we killed my husband for he

was bitter with her thus Yeremia advised me to kill him. After Yeremia left they kept in touch and when she probed him where the deceased body was taken, he told me that they have disposed it very far away. That's all."

I find established by the first accused person's confession that the first accused used an axe to inflict a cut wound to her husband, that they dug a pit and buried the deceased, that two days after the incident Yeremia came with two bandits, exhumed the body, halved the body, and took it to a place unknown to the first accused person. It was in the testimonies of Axwesso Boay Hhau (**Pw1**), Damiano Qamara (**Pw2**) Estomihi Keneth Haule (**Pw3**) and G. 8686 D/CPL Imran (**Pw4**) of which I find them credible witnesses, that a search mounted did not led closure to a place where the deceased's body was hidden. I see no danger to act on the prosecution's evidence, a considerable weight is attached to the extra judicial statement, and it is the finding of this court that Theresia Zacharia, made her statement as a free agent.

It is trite law that the very best of witnesses in any criminal trial is an accused, who confesses his guilt. However, such evidence to bind the bind the accused, it must be proved beyond reasonable doubt the accused

made the statement freely and voluntarily. See the case of **Paulo Maduka & 4 Others v. R.**, (Criminal Appeal 110 of 2007) [2009] TZCA 69 (28 October 2009). The first accused person is the very best witness in this case as he confessed freely and voluntarily.

Apart from the first accused person's confession to the JP of peace, the prosecution's evidence was that the first accused confessed orally to people searching the deceased's body and later to police. Axweso Boay Hhau (**Pw1**) deposed that the first accused informed him on 10.11.2022 that she had not seen her husband. He came suspicious that his son may not be alive. On 30.11.2022 he got news that his son's clothes were scattered in the shamba. He went and found clothes he suspected to be his son's clothes. The first accused person told them that she did not identify the clothes. He reported to the hamlet chairperson and shouted for help. People responded. They commenced a search that day but all was in vain. As dark approached, they stopped and promised to go on with the search the following day.

The following day, that is on 1.12.2022, they continued with a search and this time many people were involved. Before police were informed, they asked the first accused person the whereabouts of her husband. She

told them that she killed her husband. They entered the room and found blood stains on the bed and on the roof. Axweso Boay Hhau (**Pw1**) added after the police went and asked the first accused what happened, she repeated that she killed her husband.

The first accused refused to have been present on the day it was alleged she orally confessed. However, Damiano Qamara (**Pw2**), the hamlet chairperson and G. 8686 D/CPL Imran (**Pw4**) deposed that the first accused confessed in their presence at the meeting. Damiano Qamara (**Pw2**) supported Axweso Boay Hhau (**Pw1**)'s evidence that the first accused person confessed orally to kill her husband before police went to the scene of crime.

I did not find any reason to doubt the credibility of Damiano Qamara (**Pw2**) and Axweso Boay Hhau (**Pw1**). Their evidence was coherent and demeanor proved that they were witnesses of truth. In addition, while the first accused person refuted the evidence that the villagers meet to search and probe her, the second accused admitted during cross-examination that on 1.12.2022, he was at the village meeting together with the first accused. Thus, the first accused person lied once again that the villagers did not meet and that she was not present at the meeting.

It is hard to believe the first accused person's lies. Lies of an accused person corroborates the prosecution's case. In the present case, the first accused person's lies that she did not attend the meeting corroborates the prosecution's evidence that she orally confessed at the meeting to kill her husband. See the decision of the Court of Appeal in **Felix Lucas Kisinyila v. R.**, Criminal Appeal No. 129 of 2002, Court of Appeal of Tanzania at Dar-es-salaam (unreported). And, here I am not shifting the burden of proof to the accused. Further still, I find evidential justification for this piece of evidence as the content of the oral confession tallies with the confession before the Justice of piece.

An oral confession made by a suspect, before or in the presence of reliable witnesses, may be sufficient by itself to ground conviction against the suspect. I wish to associate myself with the decision in **DPP v. Nuru Mohamed Gulamrasul** [1988] TLR 82 and **Martin Manguku v. R.**, Criminal Appeal No. 194 of 2004 (unreported). In the latter, the Court of Appeal insisted that an oral confession would only be valid if the suspect was a free agent when he said the words imputed to him.

The testimonies of Axweso Boay Hhau (**Pw1**) and Damiano Qamara (**Pw2**) speak loud and clear that after the first accused person was probed,

she admitted to have killed her husband. I have no doubt that the statement was made by the said accused as a free agent, as it was made before familiar people and what was admitted at police the accused made it as a free agent. Further, the first accused person did not raise it that she was threatened or that she did not admit, instead she preferred to lie that there was no such a meeting.

As to the other inculpatory circumstances, I wish to state that, the first accused person's demeanour contradicted her spoken words. In the case of **Yasin Ramadhani Chang'a vrs. The Republic** [1999] TLR 489 it was observed that: -

"Demeanor is exclusively for the trial court. However, demeanor is important in situation where from the totality of the evidence adduced, an inference or inferences, can be made which would appear to contradict the spoken words"

When the first accused person was speaking of the torture by electric shock at the police station, did not lift her face. Also, when she was telling the court that she told the JP that she knew nothing about murder incident, she covered her face. The first accused person's demeanor explains that the first accused person was either lying or was not in harmony with what she was testifying.

In connection to the demeanor, the first accused person showcased two conflicting personas in her defence; that of a wife and at the same time that of a cold-hearted woman. She claimed to have participated in the search of her husband, but, this court was taken by surprise to hear that she had no duty to know the whereabouts of her husband. The two cannot co-exist, she will not be considered to care about her husband and at the same time she proclaims to have no duty to know the whereabouts of her husband. In addition, she deposed that she did not take part at a search for her husband and refuted the evidence that the villagers met to search for her lost husband.

I am of the firm view that, oral confessions and the cited inculpatory facts corroborated the extra judicial statement. The Court of Appeal in **Paschal Kitigwa v. R.**, [1994] TLR 65 observed that-

"Corroborative evidence may be circumstantial and may well come from the words or conduct of the accused."

If the confession requires corroboration, then the conduct of the first accused in concealing the truth of the incident and in refuting that the villagers never met to search for her missing husband afford such

corroboration. The second accused was callous to her sudden disappearance of her husband.

Should one be charged with murder when no body is discovered?

To prove murder as stated above, the prosecution has to prove that a person alleged killed is actually dead. In the present case, the prosecution alleged that **Gwandi S/o Axweso** is dead. However, the prosecution did not produce the body of the deceased. It is settled in my mind that a deceased's body is a mere proof of a fact that the victim or person is actually dead and can be very useful in determining the cause of death and any possible link to the killer. But the production of the deceased's body is not the only evidence to establish death and the cause of death. The court of Appeal observed in **Leornard Mpoma v. R.**, [1978] LRT that-

"...death may be proved by circumstantial evidence without the production of the body".

There is also no doubt that the cause of death may be established without medical evidence. See the case of **Mathias Bundala vrs. Republic** (Criminal Appeal No. 62 of 2004) 2007 TZCA 16 (16 March 2007)

cited in approval the case of **Leornard Mpoma vrs Republic** [1978] TLR n. 58. The Court of Appeal further observed in **Grospery Ntagalinda @ Koro v. R.**, (Criminal Appeal 312 of 2015) [2016] TZCA 661 (22 February 2016) that-

"We are also fully aware that it is not the requirement of the law that the cause of death must be established in every murder case."

Given the above evidence, I am of the firm view that, the defence advocates' submission that *no body of evidence no murder 'corpus delicit'* is not accepted in every circumstance. Murder may be proved in the absence of the body provided there exists evidence that shows beyond reasonable doubt that someone has died. No doubt that the best evidence of death is the dead body or an identifiable portion of it. But to strictly hold that no body no murder would be unreasonable, and would lead to a miscarriage of justice, as for example when murders are committed in the circumstances rendering the recovery of the body impossible by the acts of the accused himself. In **R. V. Mgumbo S/O Bwanyigeta** [1973] LRT. N. 90, the accused was charged of murdering his father. He was seen by a witness leaving a "*pombe*" shop drunk and in a quarrelsome mood together with the deceased and that was the last time that deceased was

seen alive. However, after some time one set of confirmed human remains were found at the village of the accused. The accused had persistently claimed that his father had travelled.

In **R. V. Mgumbo S/O Bwanyigeta**, like in the present case there was no proof that the remains were the accused father's body. I wish to insist that in the absence of the best evidence of death, death would be proved by circumstantial evidence or else crafty killers would get away with murder. The issue is therefore whether there is circumstantial evidence to establish that **Gwandi S/o Axweso** is dead. The prosecution seeks to rely on the first accused confession. The first confessed before the JP and orally before the villagers that she killed her husband. She confessed as free agent. There is no better evidence than that of the accused person who confessed provided he or she made the confession freely and voluntarily.

The first accused explained how they killed **Gwandi S/o Axweso** and buried his body within their shamba. She further narrated how, after two days, the second accused exhumed the body, cut it into two pieces, loaded it to his motor cycle with help of other people she called thugs and moved it to the swamp "titio" at Dongobesh. The first accused stated that she did not know the exact place the body was left to decompose.

The first accused person's confession together with the disappearance of **Gwandi S/o Axweso** proved that **Gwandi S/o Axweso** is no longer alive. The circumstances of this case shows that the culprits intended to get rid of the body so as to elude justice. Though motive is not one of the elements of crime, but it shades a light on the general understanding of the reason as to why crimes happen. In this case, the motive is that the first accused person explained the motive was to get rid of **Gwandi S/o Axweso** once and for all and enjoy life with the second accused person.

In fine, I am of the firm view that **Gwandi S/o Axweso** is dead and his death according the first accused person's confession was unnatural one. He was axed and his body disposed of to unknown place. I have no doubt based on the first accused person's extra judicial statement that the first accused kill **Gwandi S/o Axweso**, her husband with malice aforethought. She described that she was the first to axe her husband on the neck before the second accused person took his turn to axe the deceased. Thence, the first accused person is guilty of the offence or murder. I convict her with the offence of murder contrary to sections of 196 and 197 of **the Penal Code**, [CAP. 16 R.E. 2022].

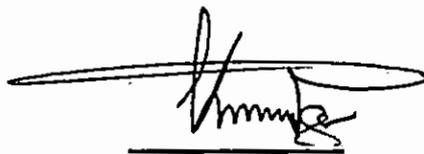
As to the second accused person, the only piece of evidence that connects him with the killing of **Gwandi S/o Axweso** is the evidence of a co-accused. The first accused person mentioned the second accused person as his co-culprit in the confessional statement. Mindful of the provisions of section 33 (2) of **the Law of Evidence Act**, I find him not guilty. Section 33 (2) states that-

"33 (2) notwithstanding subsection (1), a conviction of an accused person shall not be based solely on a confession by a co-accused."

I therefore, find **Jeremia Lohay** not guilty of the offence of Murder and acquitted him. As already said, I find the first accused person, **Theresia d/o Zacharia @ Landa d/o Saghani** guilty and convict her with the offence of murder contrary to sections 196 and 197 of **the Penal Code**, [Cap. 16 R.E. 2022].

It is so ordered.

Dated at **Mbulu**, this 4th day of June, 2024.

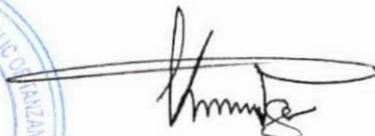
A handwritten signature in black ink, appearing to read 'John R. Kahyoza', written over a horizontal line.

**John R. Kahyoza,
Judge**

SENTENCE

Theresia d/o Zacharia @ Landa d/o Saghani, the accused person has been convicted with the offence of murder, which has only one sentence, that is to suffer death by hanging as provided under sections 196 & 197 of the Penal Code read together with S. 322 of the Criminal Procedure Act, [Cap. 20 RE 2022], the CPA. Unfortunately, the law does not permit me to impose a sentence other than to order the convict to suffer death by hanging. I have no room to consider neither the prosecution's grounds for imposing a stern sentence nor the defence's mitigations seeking for a lenient sentence. Consequently, I sentence **Theresia d/o Zacharia @ Landa d/o Saghani**, the accused person to suffer death by hanging under sections 196 and 197 of the Penal Code read together with section 322 of the Criminal Procedure Act.



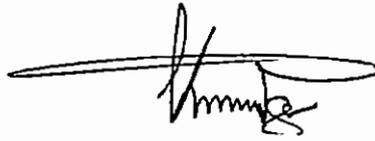

J. R. Kahyoza,
Judge
04/6/2024

Court: Judgment delivered in the presence of Ms. Mary Lucas, the State Attorney for Republic, the accused persons and Mr. Shirima and Mr. Basil

learned advocates for the first and second accused persons, respectfully.

B/C Ms. Fatina present.

Right to appeal after lodging notice within 30 days from today and upon being served with the record of appeal submit the grounds of appeal within 21 days explained.

A handwritten signature in black ink, appearing to read 'J. R. Kahyoza, J.', with a long horizontal flourish above it.

J. R. Kahyoza, J.
04/6/2024