

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
AT SUMBAWANGA SUB-REGISTRY
CRIMINAL SESSION CASE NO. 2 OF 2017
(Arising from PI-Case No. 10/2016)

THE REPUBLIC

VERSUS

1. MALOCHA KANJI @VENANCE

2. MORIS TOGWA

Last order: March 11, 2024
Judgment: May 10, 2024

JUDGMENT

NANGELA, J.:

Mr. Didas s/o Kauzeni, a husband to Agnes d/o Thomas, is now a deceased person. Didas, a charcoal business dealer at Kisiwani Darajani area in Sumbawanga Municipality, left his home on the 09th day of May 2016 for a business errand. From that day, he never came back alive. Two accused persons, namely, Malocha Kanji @Venance and Moris Togwa, now stand charged with murder of Didas s/o Kauzeni in violation of section 196 of the Penal Code, Cap.16 R.E 2019.

The facts of this case are briefly that, on the morning of 9th May 2016, Didas received a call allegedly coming from one person named Malocha Kalinji. The phone call was first received by his wife Agnes Thomas who, having noticed the

name of Malocha Kanji as the caller, passed on the phone to her husband Didas Kauzeni who responded to the caller's call.

The caller had informed Didas to proceed to Mawenzusi Village to take charcoal from him. Since the late Didas was owning a Motorcycle, King Lion Brand, with Reg. No. MC-859 BFL, he left to Mawenzusi Village, his wife expecting him to return home safely as usual. That never happened. As time went by minute-by-minute, worry was engulfing her wife's heart regarding what might have befallen her husband. So, the night bade farewell to the day without Didas returning home as the light of the sun and songs of the morning birds decorated the following morning, the 10th of May 2019.

On that following day, and noting that her husband did not return home, his wife relayed her fears and concerns to one of the neighbours, Frank Matenya. She informed him that her husband had left to Mawenzusi the previous day but unusually never returned home. The neighbour calmed her fears advising, in his wisdom, that she better tarry a little longer to see if he would return. However, Mr. Didas's return never happened, a fact that added more worries to his wife.

Since it was known where the deceased had proceeded to the other day, a decision was arrived at to make a physical follow-up. As such, his wife and three of her neighbours, namely: Mr. Frank Matenya, Mr. Festus Teza; and Mr. Pius Kauzeni, embarked to Mawenzusi. A search for Didas Kauzeni had consequently been mounted and, after several days of searching, he was found dead in one of the Mawenzusi Village Mountains. In the course of time, the two accused persons herein were arrested and now they are facing charges of murder.

On the 19th of February 2024 the two accused persons were called to plead to the charges, having been read over and explained to them. The two denied the charges, and a plea of **NOT GUILTY** was entered. Their denial ignited the prosecution machinery and, in a bid to prove the prosecution case, a team of prosecution attorneys, led by Ms. Irene Mwabeza, Atupelé Makoga and Jackson Komba, learned State Attorney, lined up 7 witnesses.

On the other hand, the accused persons, enjoyed the legal services of Fr. Charles Kasuku and Ms. Lucy Sigula,

learned Advocates. The accused defended their case and called no witnesses than themselves.

Before I go to the merit of the case, I will summarize the testimonies of the witnesses who testified both in support of the prosecution case and the defence case as well. The first witness for the prosecution side was Ms Agnes Thomas, who testified as Pw-1. She is a wife to the deceased Didas Kauzeni and lives at Kisiwani Darajani Area in Sumbawanga Municipality.

In her testimony, Pw-1 narrated to the court how a call was made to his husband's phone on the date of 09th May 2019, which call she noticed by looking at the phone, that it was from one Malocha Kanji. Pw-1 told this court that her husband with whom she had two kids, had been called by Malocha to Mawenzusi Village to pick charcoal since he used to do charcoal business. She told this court that she was able to notice the name of the caller because she was the one who had the phone when it rang and that she saw the name "Malocha" before she passed the phone over to her husband to respond to the call.

She testified further that Mr. Malocha had told her husband to proceed to Mawenzusi and take charcoal, whose amount was undisclosed. Malocha who called my husband used to live at Mawenzusi Village. Pw-1 told this court that she was well acquainted with the said Malocha since, even before the fateful day, he had twice come to her house to visit her late husband. She stated that, the two knew each other.

According to Pw-1, when her husband left for Mawenzusi on that 09th day of May 2019 to get charcoal, boarded his Motorcycle, King Lion Brand, Number MC-859 BFL. Pw-1 told the court that the respective Motorcycle was the property of her husband. In her testimony, Pw-1 told this court that from that day of 09th May 2019, her husband never returned. Noting that he did not return home she went to report to her neighbour Mr. Frank Matenya on the 10th day of May, that, her husband Didas, had not return home since he left for Mawenzusi the other day.

It was Pw-1's testimony that, Mr. Matenya advised her to wait a bit longer to see if he was not turning out. Pw-1 told this court that she did wait till the next other day as well, but her husband never showed up. She then informed Mr. Frank

again on the 11th of May 2016 who advised Pw-1 that it was necessary to follow up the matter at Mawenzusi where Mr. Didas had gone to ascertain his fate.

Pw-1 told this court that, on 12/5/2016 herself together with Mr. Frank Matenya; Festus Teza; and Pius Kauzeni proceeded to Mawenzusi on Monocycles. She told this court that, while on their way, they met three people who were riding on the Motorcycle of Mr. Didas Kauzeni, Pw-1's husband. According to Pw-1, they were able to identify the Motorcycle, because of the Motorcycle's registration Card which Pw-1 had carried along and so, she noticed that the plate numbers displayed on the back of the Motorcycle carrying those three people were the same as the numbers on the Registration Card.

Pw-1 told this court that she was able to identify Mr. Malocha Kalinji, the first accused, as one of the persons riding on the Motorcycle and who fled away at that time when they had been stopped along the Mawenzusi road. Pw-1 told this court that she had recognised him because he had earlier visited her house in the past. Pw-1 testified further that after Malocha had run away from them, they were left with the

remaining two people who were riding on the same Motorcycle and asked them where the owner of the Motorcycle was.

According to Pw-1, the one who was riding the Motorcycle told them that the owner of the Motorcycle had left it with him and, that, he (the owner) had gone to buy "mpunga" (unprocessed rice) at "Bondeni". Pw-1 identified the person who fled from them as being the first accused and the one fundi riding the Motorcycle as being the 2nd Accused.

Since Pw-1 and the rest who accompanied her were not pleased by the responses given by the person who was riding the deceased's motorcycle, they impounded the Motorcycle and arrested the two people and reported to the VEO of Mawenzusi, one Derick Changalamka. She told the court that they went six of them, *i.e.*, the four of them and the two (one who was riding the Motorcycle belonging to Pw-1's husband and the other passenger who remained after the third person identified as Malocha had fled).

According to Pw-1, after they reached at the Mawenzusi VEO's office, they narrated their story to him and what they were after in Mawenzusi. Pw-1 told this court that, when the 2nd accused (being the person found riding on Mr. Didas's

Motorcycle), his response was the same, that, Didas Kauzeni had gone to Bondeni to purchase rice (Mpunga). Since the VEO was also unsatisfied, Pw-1 told this court that he decided that the one who was riding the Motorcycle of Dadas be brought to Sumbawanga Police Station and the other, having ascertained that he was a passenger, was discharged by the VEO right at his office.

According to PW-1, those who proceeded to Sumbawanga Police Station from Mawenzusi on that late hours of the evening were the VEO, Derick Changaramka, Mr. Festus, Mr. Frank, and Mr. Pius Kauzeni, accompanied with the culprit they had found riding Mr. Didas's Motorcycle. Pw-1 told this court since it was late evening, she was left at Mawenzusi Village.

Pw-1 told this court that, later a continued search for her husband was mounted at Mawenzusi Village and, that, on the 15th of May 2016, Didas Kauzeni, her husband, was found dead and thrown in a gorge in the bushes of Mawenzusi mountainous Village. She told the court that such heart-rending news found her at her home at Kisiwani Darajani, Sumbawanga Municipality.

Further according to PW-1, the Motorcycle was earlier tendered in court and admitted as an exhibit but after the case had earlier ended in court, she requested the court, by way of a letter, to be handed over the Motorcycle and, that, the Court did hand it over to Pw-1, in writing. She told this court that later, she decided to sell the Motorcycle. According to Pw-1 she was obliged to do so because, after the death of her husband, she tried to hire it to be operated as a Bodaboda to earn her a living and cater for the needs of her two kids but since the Bodaboda was not giving her money, she decided to sell it and used the monies to take care of the kids and do other things.

Pw-1 told this court that, the Motorcycle was handed over to her having written to the Court requesting that it be handed over to her after she identified it at the Police station. She told this court that she did sign a handing over document which she was given to sign by one, Mr. Chitimbwa, an employee of the court.

During cross examination, Pw-1 told this court that she sold the Motorcycle to a Zambian. She told the court that she knew of the demise of her husband via a phone call made to

her mother in-law since at the time she had no phone. He told this court that when she picked the call made to her husband on the 9th of May 2019, it was her husband who talked with Malocha. She also told this court that when they went to Mawenzusi, they were riding on two Motorcycles one belonging to Mr. Frank Matenya and the other belonged to Mr. Festus Teza.

When asked how many people he was able to identify on the date she noticed her husband's Motorcycle, Pw-1 told this court that, she was able to identify Malocha and later together with the two people who remained they went to see the VEO after Malocha had fled. He told this court that the two who remained were resisting to go to the VEO but since there were many people who had already gathered, they were forced to go. She told the court that it was already dark.

When he was re-examined, Pw-1 told this court that she stayed at Mawenzusi Village from 12/5/2016 up to 14th and it was not from 12/5/2016 to 16/5/2016. She said she got the news of the demise of my husband on 15/5/2016. That was all for this witness.

The second witness for the prosecution was Mr. Derick Changalamka, a peasant and resident of Mawenzusi Village, testifying as PW-2. Having taken oath testified that, he lives at Mawenzusi Village, and he is the Village Executive Officer (VEO) of that Village. He told this court that his duties included overseeing bylaws of the Village and the Village development in general.

PW-2 told this court that, on 12.5.2016 he was at Mawenzusi Village when, at around 5pm, he received some guests from Kisiwani Darajani Sumbawanga Municipality who were accompanied by two residents of Mawenzusi brought to his office. He named the visitors from Kisiwani as being Ms. Agnes Thomas, Mr. Frank Matenya, Mr. Festus Teza and Mr. Pius Kauzeni and those residents of Mawenzusi who came with along with them were one Moris Togwa (the 2nd accused) and the other was one Geoffrey Kiloni.

PW-2 was able to identify Mr. Moris Togwa in court as the person who was brought to him on the 12th of May 2016. He told this court that he even knew him prior for a long time as he was also from Mawenzusi Village and used to reside at Mawenzusi Village. PW-2 told the court that it was Mr. Frank

Matenya who was leading those who came from Kisiwani and told him that they were looking for their neighbour who went missing from Kisiwani, Nyanya Street at Sumbawanga Municipality.

PW-2 told this court that, Mr. Frank told him that, from the 9th of May 2016 their relative was unheard of, and they do not know his whereabouts, something which was not normal for him. PW-2 told the court that, Mr. Frank had narrated how their relative Didas Kauzeni headed to Lwinda, Mawenzusi for a charcoal business on the 9th of May 2024 and never returned and how, while searching for his whereabouts, they found Moris Togwa (2nd Accused) riding Didas's motorcycle which they had identified.

PW-2 told this court that, how he inquired from the 2nd accused Moris Togwa about the whereabouts of Didas and the accused's response that Didas Kauzeni had left the motorcycle to him and headed to Bondeni to buy rice (Mpunga). PW-2 told this court that unsatisfied he decided to take him to Police Station at Mazwi Sumbawanga for further questioning but that, while on the way, the 2nd accused asked for time for a short call but used that opportunity to flee away.

It was the testimony of PW-2 that, even so, himself and those in his company still decided to proceed without him and reported to the Police at Sumbawanga Police Station. PW-2 told this court that, he also handed over the Motorcycle Kinglion brand, Reg.No.MC. 859 BFL, which the 2nd accused was found riding to the Police. According to Pw-2, on May 17th, 2016, the 2nd accused Moris Togwa was arrested at Jangwani Village where he had sought refuge staying with some of his relatives.

PW-2 told this court that, it was Juma Ismail, Hansi Bahari and Moris's brother called Chama, who arrested him and took him to the VEO's office while PW-2 was at Sakalilo "Bondeni" area. PW-2 told the court that before the re-arresting of Moris, PW-2 had mobilised a search to look for not only Didas Kauzeni but also Moris Togwa who had absconded the other day. He told this court that the search involved the Village leadership of Mawenzusi.

During cross-examination, PW-2 told this court that he knew the 2nd accused and that, they had started the journey to Police at 8.pm and Moris escaped from their grip on that night of 12th May 2024, and got arrested for the second time

on the 17th of May 2016 at Jangwani. He admitted, however, that when the 2nd accused was re-arrested, he was not present but those who arrested him brought him to the Police.

The third witness to testify was Mr. Frank Matenya. He testified as PW-3. He told this court that he is a peasant. He told this court that, on the 10th of May 2016, one Agnes Thomas, (PW-1) a wife to Didas Kauzeni, came to his house informing him that her husband had been phone-called, on the previous day, by one Malocha to take charcoal from Mawenzusi but since then he did not return home.

He testified that, he had to call one of the members of their Street (Mtaa) and together they advised Pw-1 to wait a little till the next day. It was his testimony that, on the next day, which was the 11th of May 2016, Pw-1 that her husband still, her husband did not return home for the second day. According to PW-3, a decision was made, and the incident was reported to the Mtaa Chairperson, who, on the 12th day of May 2016, advised PW-1, PW-3 and the rest of the people who reported the incident to the Chairperson of the hamlet (Mtaa), to go and search for Didas Kauzeni at Mawenzusi where had gone to fetch charcoal.

PW-3 testified that, working on that advice, himself, together with PiusKauzeno, Festus Teza and PW-1 embarked to Mawenzusi Village riding on Motorcycles. He told this court that, at the entrance of the Village of Mawenzusi, they met a Motorcycle with three persons who they stopped because PW-1 had identified the Motorcycle they were riding on as the one belonging to her husband Didas.

He told this court that, PW-1 was as well able to identify one of the persons who had boarded the motorcycle, being Malochā as he used to come to her home several times. Pw-1 told this court that, after they had stopped those with the motorcycle, they noticed that its place number were similar as those on the Registration Card which PW-1 had carried along and the numbers Reg. **No. 859 BFL, "King Lion Brand"**.

PW-3 told the court that he identified the Motorcycle also as it was bought by Didas Kauzeni (the deceased) and himself (PW-3) and Festus Teza (who was a member of Serikali ya Mtaa (Nyanya Street), were present when the deceased purchased the Motorcycle. According to PW-3, when at the road junction they were still questioning the persons

they found riding on the Didas's Motorcycle about his whereabouts, one of the passengers, who was identified by PW-1 as Mr. Malocha, jumped off and ran away.

PW-3 told the court that, when the 2nd accused (Moris Togwa) had told them that the owner of the Motorcycle had gone to Rukwa. Since PW-3 and his colleagues were unsatisfied by the responses, it was agreed that they take the remaining two culprits to Mawenzusi Village Executive Officer (VEO). He told the court that he could identify the 2nd accused by face having seen him riding on the Motorcycle on that day, and he did identify him in the court room. He also told the court that the other person who ran away on that day was in the court room. He pointed the 1st accused as the person who had jumped off the motorcycle and ran away.

PW-3 told this court that, later before the VEO, it was agreed that they take the 2nd accused (Moris Togwa) to the Police Station at Sumbawanga and allowed the other person they had arrested to leave since it was ascertained before the VEO that he was a mere passenger. He testified to the court that as the VEO, Pius Kauzeni, Festus Teza, the 2nd accused, and himself started off to Sumbawanga Police Station riding on

three different motorcycles (one belonging to the late Didas Kauzeni which they had found the 2nd accused riding), on the way, near Ephata's farms, Moris Togwa asked that he be allowed to make a short call of nature.

However, upon being allowed to do so, he later took off on his feet from them and ran away and, since it was already night, they could not pursue him but decided to proceed to Sumbawanga Police Station to report the matters.

PW-3 told this court that, at the Police Station they recorded their statements, handed over the Motorcycle belonging to Didas Kauzeni to Police and returned home to set up plans regarding how they were to search for their missing relative, Didas Kauzeni. PW-3 told the court that, on the following day, they called for a Mtaa meeting and strategized how they could mount the search for Didas at Mawenzusi. He told the court that, on that day, the chairman of their Nyanya Street. Mr. Joel Ephraim Kauzeni, led the searching team.

It was Pw-3's testimony that, when they arrived at Mawenzusi Village for the search on the 15th of May 2026, Mr. Joel Kauzeni selected a team of seven people who went to a nearby house, and they found Mr. Malocha whom they later

put under arrest. He told this court that, later at around 4pm they were able to recover the body of Didas Kauzeni who was found dead and dumped in a gorge (korongo) at Mawenzusi Village.

He told the court that Police were informed and at 6pm they arrived at the scene of crime, carried out their initial investigation, recovered the body and took away Mr. Malocha (1st accused) with them.

On being cross-examined, Pw-3 told this court that Didas had gone to Mawenzusi Village to fetch charcoal because that was his business and that is what her wife (Pw-1) told Pw-3. He also told the court that the first trip to Mawenzusi was on the 12th of May 2016 where they reached at 4pm and later proceeded to the VEO's office. He told the court that on that day, it was Pw-1 who identified the 2nd accused Malocha.

During re-examination Pw-3 told this court that he was able to recognize the 2nd accused (Malocha Kanji) having found him, together with the second accused (Moris Togwa) riding on the motorcycle of the deceased Didas Kauzeni.

The fourth prosecution witness was Mr. Joel Kauzeni. He testified as Pw-4. He told this court that he lives at Kisiwani Area, "Mtaa wa Nyanya", Msua Ward, Sumbawanga Municipality, and that, he was a former Chairperson of "Mtaa wa Mzee Nyanya".

He testified that; on the 12th of May 2016, while in his Office at Mtaa as the Chairman of the Mtaa wa Mzee Nyanya, one Agnes (Pw-1) reported that her husband was missing as he did not return home, something which was not usual for him. Pw-4 testified that; Pw-1 had told him that her husband went missing since the 9th of May 2016.

It was the testimony of Pw-4 that, upon receiving such information, he convened a meeting of the members of his street, having been told by Pw-1 that on the date he left the missing persons (Didas Kauzeni), he had gone to one Malocha to do charcoal business at Mawenzusi, Molo ward, Sumbawanga Rural District. He told the court that a decision was made to send Mr. Teza, Mr Frank Matenya a neighbour of Didas Kauzeni and other two relatives to go to Mawenzusi Village to inquire about Didas's fate and whereabouts.

PW-4 testified that, on the same day he had sent them to Mawenzusi, he received news from Mr. Frank Matenya (Pw-3) by way of phone call, that, when they arrived at Ephata Farm area near Mawenzusi Village, they had met with three people on the Motorcycle which was identified as that of Didas Kauzeni and one of them ran away when they stopped them.

It was PW-4'S testimony that he advised that they send the Motorcycle to Mawenzusi Village Office and himself went to report to the Police at Sumbawanga Town about Didas Kauzeni who went missing and that, he had sent people to Mawenzusi who were able to recover Didas's motorcycle, but Didas Kauzeni, a resident of his street, was nowhere to be found.

PW-4 told this court that, later he was informed by Frank Matenya (Pw-3) on the same day that, he should expect their return and should wait for them at Sumbawanga Police Station. He told the court that, while he was still at the Police Station waiting, he got informed that, when Frank Matenya and those who were with him had reached near Ephata farms, a suspect they had arrested managed to run away. Pw-4 told the court that he advised them to still proceed to the Police Station at Sumbawanga to report since they had in their

company the VEO of Mawenzusi, and himself decided to go home.

Pw-4 stated further that, on the 13th of May 2016, he organised for a search team and proceeded to look for the deceased Didas Kauzeni. He testified that, on the 14th of May 2016, he convened a meeting of the whole street and increased the number of those involved in the search and increased their number. Pw-4 told this court that, later he made them return to Mawenzusi to search for the whereabouts of Denis (the deceased).

He testified that, on the 15th of May 2016 as they proceeded with the search at Mawenzusi Village bushes where people make charcoal and, remembering that the last the person who communicated with Didas was one, Mr. Malocha, he directed that the team should go to Malocha's house as it was not far. Pw-4 told this court that, in a group of seven he went to Mr Malocha's house, where they found Mr. Malocha and asked for his help.

According to PW-4, when Malocha followed them to a place where the search teams were gathered, PW-4 asked if Pw-3 could remember that person, a fact which PW-3 did

stating that he was the very person who ran away the other day when they met those who were riding on the Deceased's Motorcycle. Pw-4 told this court that upon asking him about the whereabouts Dadas Kauzeni, Malocha (1st accused) remained quiet, and he was thereby put under arrest.

PW-4 was able to identify the 1st accused while in the court room as the person he had ordered that he be put under arrest. He further told this court that, as they went ahead with the search for the deceased, at around 5pm they were able to recover his body which was dumped in a gorge (Korongo) in Mawenzusi Village mountains, about 60 meters or so in the area near Malocha's place, as Malocha lives in those bushes where they make charcoal. Pw-4 told this court that, they were able to identify the body of Didas Kauzeni by looking at his clothes, his driving licence, and ID, and was a person he had lived with for ten years or so.

He testified to have informed the Police in need for further help on the 15th and, that, around 6pm Police officers came to the scene of crime, statements were recorded and the suspect Malocha was taken to Police Station at Sumbawanga Police Station while the Dida's body was taken to the Morgue

and afterwards on the 16th May 2016 the relatives were given permission to take the body for burial.

Upon being cross-examined, Pw-4 told this court that, initially he did not go to Mawenzusi, but he got all prior information through Pw-3 (Frank Matenya). He told the court that on the 12th of May 2016 he did go to report at Sumbawanga the Police Station.

He also told the court that during the search, the Ulinji Villagers assisted in the search for the whereabouts of the deceased. He told the court that it was the 1st accused (Malocha) who was last with the deceased as that is what Pw-1 had informed Pw-4. He admitted that, before being told, he did not know Malocha, the first accused and that he was arrested when he was at home where he was found milking his cows. Pw-4 told the court that he saw the body of the deceased Didas with wounds at the back of the head and was lying prostrate on the ground.

Pw-4 told this court that, as he looked at the wounds, they were wounds inflicted by a blunt object and was not due to an animal attack but since he was not there when the deceased was attacked, Pw-4 admitted that he had limited

knowledge about the attack if any. He acknowledged to have identified the deceased and informed the police who came together with Dr. Ndenge (the DMO) from the Morgue Department. On being re-examined, Pw-4 told the court that, the Villagers from Ulinji Village came to assist in the search of the deceased because the late Didas Kauzeni hailed from their Village.

The fifth prosecution witness was Mr. Abogast Chitimbwa, who testified online as PW-5. His testimony was largely centred on the fact that, as an employee of this court who was involved the hearing of this case when it was earlier heard and concluded by the court, he was in charge of keeping the exhibits tendered, which include the Motor Vehicle, which was tendered earlier in court as exhibit.

PW-5 told the court that, after the case had come to an end, PW-1 (Agnes Thomas), being the wife of the deceased, wrote a letter to the court requesting to be handed over the Motorcycle which, at the time was in the custody of the court as one of the exhibits it had received. He told this court that he had received Pw-1's letter on the 7th of May 2019

and that on the 8th of May 2019 this court's registrar ordered that Pw-1 be given the Motorcycle branded King Lion.

PW-5 told this court further that, since Pw-1 had left her phone number, he only called her to pick the said Motorcycle and handed it to her after she had signed a handover documents which Pw-5 had prepared. He tendered both the letter from Pw-1 upon which an endorsement by the Deputy Registrar as well as the handing over note he had prepared for Pw-1 to sign. These two were admitted in court as **Exhibits P-1 (A)** and **(B)** respectively.

Having read their contents loudly to the court, PW-5 told this court that the documents were kept in the previous court file. Pw-5 told this court that what he gave to Agness (PW-1) was a Motorcycle King Lion Brand- Reg. No. MC 859 BFL.

During cross-examination PW-5 told this court that he was unable to remember the colour of the Motorcycle but that, he did follow all the requisite handover procedures in respect of that exhibit. He told the court that, he did not communicate with Pw-1 regarding the whereabouts of that motorcycle he had handed over to her. During re-examination he told this court

that the motorcycle's registration numbers were Number MC-859 BFL.

The sixth prosecution witness was **Dr. John Ladslaus Konjan** who testified as Pw-6. In his testimony, he told the court that he has a 29 years' experience as a medical doctor having been trained at Muhimbili Institute of Health and Allied Sciences (MUHAS) Mbeya Campus). He told the court that, his duties include treatment of patients and carrying out postmortem examinations while at the hospital premises. He testified that; on the 15th of May 2016 he did carryout one at Mawenzusi Village where he went with Police Officers having been summoned to accompany them for that purpose.

Pw-6 told this court that, a murder incident had taken place at that village, and they arrived there at around 5.30pm. He told this court that they found the body being thrown at the mountainous place in a gorge and was covered with grasses. Pw-6 told this court that, by the help of the police and relatives, they were able to recover the body from the gorge and, as a doctor, he examined the body. According to Pw-6, at the back of the deceased's head there was a wound resulting from being hit by a blunt object and, his stomach had

a bruise, meaning that the deceased was dragged to the place where he was thrown.

PW-6 told this court that, the deceased was a male person in the name of Didas Felician Kauzeni, and he was found lying face-down. He told the court that, the deceased was between 22-25 years in age and has spent about 36 or 48 hours since he died. He told this court further that, after examining the body and discovered that the deceased was hit by a blunt object, he found that the deceased's skull had broken, and much blood had been spilled.

He concluded that the cause of his death was due to a traumatic head injury. It was also the testimony of Pw-6 that he thereafter filled a post-mortem report and handed it to the Police who were investigating the incident.

When shown the document he filled he was able to identify it as the postmortem report as he could identify his handwriting, name and signature, the stamp of the hospital station, and his qualification as the person who filled it. The postmortem report was tendered without objection and was admitted in court as **Exh.P.2.**

Having read it over loudly in Kiswahili to the court, Pw-6 told this court that the cause of death was due to being hit on the backside of the head leading to severe loss of blood. He stated that, a blunt instrument can be a club or a hammer since had it been sharp instrument the wound would tell. During cross-examination, Pw-6 told the court that, he was the one who filled **Exh.P-2**. He told the court that, the observation that the death must have occurred in the past 36-48 hours was due to the condition of the body itself at the time of carrying out the postmortem.

The last witness for the prosecution was a police detective namely G.2527D/C Shedrack Samweli Lukali. He testified as Pw-7. In his testimony, he told this court how he was assigned the investigative duties in respect of the death of Didas Kauzeni. He told this court that, having been assigned the duties, on the 15th of May 2016, he was directed to go to Mawenzusi Village as the Police had been informed that a dead body of a person had been found there and one person was put under arrest.

Pw-7 told this court that, during their journey to Mawenzusi, they were accompanied by Pw-6 (Dr. Konjan) and

arrived at Mawenzusi at around 5pm or so. He told the court how having arrived there found the body of the deceased in a gorge at the mountainous part of the Village and that it had head injuries. He told the court that the body had been identified by the relatives as being that of Didas Felician Kauzeni. Pw-7 told the court that he drew a sketch map of the crime scene by free hand. The sketch map was tendered and received as **Exh.P-3**.

Having read out the contents of Exh.P-3, Pw-7 told the court that, since there was a suspect called Malocha Kalinji who was already arrested, they ferried the body to Sumbawanga Morgue and the suspect was locked in the custody of the Police. During cross-examination, Pw-7 told the court that, the body had been found in a gorge in the mountainous area of Mawenzusi Village. That was, in short, the prosecution case.

Having established that the accused had a case to answer, and in line with section 293 (2) of the CPA, Cap.20 R.E 2022, each of the accused persons was informed of his right to, among many other rights, give evidence on his own behalf; and call witnesses in his defence. The accused persons

decided to defend their case themselves under oath and without calling witnesses to their side.

On the 20th of February 2024, the defence case opened. The 1st accused Malocha Kalinji testified as Dw-1 while the second accused, Moris Togwa testified as Dw-2. In his testimony, Dw-1 told this court that, he was arrested on the 15th of May 2016 while at home with his family. He said that he had come to that place of his, because it was during harvesting time and resided there with his cattle and the family. He told the court that, the place he was residing is called Mawenzusi Village, Ninga hamlet.

Dw-1 testified that, during his arrest, he was at home with his family, milking his cows, and the family members were processing beans they had harvested. He testified that, about six people came to his home and told him that they were after their relative whose whereabouts was unknown. He told this court that, since they were looking after such a person whom they said got lost, Dw-1 joined them to do the searching and they went to search in the mountainous area and uphill.

Dw-1 told this court that, there he found many other people who were waiting in an area which seemed to have been chosen for them to meet. He told the court that, when we reached there, they divided themselves in two groups, one going towards the Village side and others was left to search the ravines. Dw-1 told the court that he was in the group of those who went towards the village but later him and the rest of his group heard the others calling them to retreat.

Dw-1 testified that, as they retreated to join the second group and find out why they had called them, they were told that a body of the person they were looking for had been found dead. He told the court that, the leader who was leading the search teams said that the person they had found in his shamba be arrested, and so, he was thereby put under arrest and the Police were called to the scene as they all waited.

Dw-1 told the court that in no way did he get involved in the death of Didas Kauzeni. He denied having he ever boarded the Motorcycle claimed that he was found riding on along with others. He testified that, he was only just arrested on the 15th of May 2016, and he was ferried to Sumbawanga

Police Station. He denied having made a phone-call to the said Didas Kauzeni who he denied having ever known.

During cross-examination, Dw-1 told this court that he indeed used to live at Mawenzusi Village as a resident of the Village. He told the court that, prior to his arrest, he did not know the 2nd accused or whether he was residing at Mawenzusi or not since he had not seen him before. He admitted knowing Derick Changalamka (Pw-2) as a person who was a VEO at the time of his arrest. He told the court that he used to live with his family and has never been involved in charcoal business.

He told the court that, at the place where he was arrested, no other houses were closer, but he used to go there only during the harvesting time to harvest his crops. He also told this court that, the rest of time if it was not harvesting time he used to be in the Village. Dw-1 told this court that, on the material time the crops he was harvesting were beans and the area of the shamba belonged to him. He denied that the deceased's body was found in his shamba and that he was not able to tell far in kilometres it was from his house. He told the court that, it was like 50 minutes walking distance from where

his house was to where the body was found. He denied knowing Pw-1 (Didas's wife) or the deceased Didas Kauzeni.

He also told this court that it was Pw-4 (who was the leader of the searching team) who ordered that he be arrested, and that he was not interrogated at the time of his arrest. Dw-1 stated that, when the body of the deceased was discovered, it was alleged that the person whom they had found in the nearby house (i.e., Dw-1) should be put under arrest, and so they arrested him. He admitted that they arrested him simply because he was found living at that hillside of the mountainous place.

Asked whether he had ever owned a motorcycle, Dw-1 told the court that, indeed he once owned one which he used to ride since 2012 to 2015 when it broke down and he kept it at home. Dw-1 denied knowing one Frank Matenya (Pw-3) and had never seen him. Dw-1 told the court that he has no quarrel with anybody who was carrying out the search but that, he was named only because he had been found in that place. He denied having seen Pw-2 and Pw-3 on the date of his arrest, and that, since it was a long time, he cannot remember all people he had seen on that date.

He admitted having seen those who were carrying out the search on that date while at home, but told the court that, he went on with his own business because he did not know what they were looking for.

During re-examination, Dw-1 told this court that, he had never had or dealt with business of charcoal as he normally use firewood for cooking. He told this court that, even the place where he used to live people do not make charcoal. He told the court that he only used to go to his farmhouse to do farming and, that, he neither knew the deceased nor had any relationship with him, only that he came to know of his name after being arraigned in court.

Asked whether he had ever owned a phone, Dw-1 told this court that he indeed had one, but it was around October 2015, and he could no longer remember his phone number, but it was "Zein Number". Dw-1 told the court that, he used to call some people who used to buy goats from him and one of them was called Raizon Saidia, whom he found in prison facing an offence of illegal campaigning while himself facing the charges of alleged killing of Didas Kauzeni. He denied that the deceased Didas Kauzeni was his customer. He said that he had

never handed his phone to Police since when he was arrested on the 15th of May 2016, he had no phone.

Dw-1 told the court that, the first prosecution witness was Agnes Thomas who he came to know while in court in 2019. He told this court that, he does remember what Pw-1 told this court, that it was him (Dw-1) who called his husband Didas Kauzeni on the 9th of May 2016.

However, Dw-1 denied having made a call to Didas Kauzeni (the deceased), not only knowing such a person. He told this court further during his cross-examination that, when Pw-1 testified about the phone, she did not even produce the phone and if indeed he (Dw-1) had ever called on her husband, for sure those who deal with phone networks could have retrieved that information which could have been brought to the court. He told the court that such information could have been downloaded, and it could be found that he indeed phone-called the deceased on the material date. That was all for Dw-1's defence case.

As for the second accused who testified under oath as Dw-2, he told this court that he used to live at Mawenzusi Village and that, he was uneducated. He told the court that he

was arrested only once in relation to the offence he is facing. He told the court that he is facing allegation of murder of Didas Kauzeni, a person he does not know. He told this court that he was arrested while at his home and was sent to Mawenzusi Village and later to Sumbawanga Police Station where he was put in custody facing charges of killing Didas Kauzeni.

Dw-2 told this court that it was not true that he was found with the Motorcycle belonging to the deceased or his head cap. He told the court that he could not remember the date of his arrest, but it was night-time around 8pm while at home with his mother who has long passed on. During his cross-examination, Dw-2 told this court that he used to live at Mawenzusi Village in 2016 and he is the last born of their family.

But Dw-2 admitted knowing Pw-2 although he maintained that he neither knew his second name nor being aware that he was the VEO. He denied knowing the 1st accused (Malocha Kalinji) or having ever seen him at Mawenzusi Village.

Dw-2 testified further while under cross-examination that, he used to do farming in the village as he has never gone to school and does not know how to ride a motorcycle. He denied knowing the VEO office and to have ever committed any offence or being brought to the office of VEO. He told this court that he only used to see Dereck and used to hear that he is the VEO at the Mawenzusi Village but was never taken to his Office. He told this court that, he remembers nothing which took place on the 15th of May 2016 at the VEO's office as he was not there but was at home.

According to Dw-2, neither did he hear anything at the Village concerning the search for a person who was later found dead nor was he made aware that people were searching for a person who went missing in Mawenzusi Village. He told the court that he used to spend time in their shamba having opened their cows' enclosure each day as they had five herds of cow. He told the court that he was astonished by his being arrested.

He admitted having been arrested at night and that he was sent to the VEO office on that day and later to the Sumbawanga Police Station around 2am aboard a police

vehicle. He denied that Police interrogated him as it was during the night, and he did not admit killing the deceased. He told this court that all what he told the Police was that he did not kill the deceased, and neither was he with Mr. Malocha nor that together with him they killed the deceased. He told the court that, all the prosecution witnesses were telling lies. He told the court that he never knew Pw-1 and that he has been in this court only once. He admitted that his case was once tried by this court, but he does not know who killed Didas Kauzeni.

Dw-2 did also tell this court that, in his first trial there was no motorcycle which was admitted as an exhibit and that Pw-5 had lied to the court as no motorcycle was brought to this court as exhibit. He said the court's deputy registrar lied as well when he endorsed that a motorcycle be handed over to Pw-1. He said even the Judge who heard his case earlier was a liar.

Dw-2 told the court further that he has never seen Pw-2 not did he know about his life. He denied having ever fled away from Pw-2 and Pw-3 on their way to Sumbawanga Police Station. He denied having been found in Jagwani Village as he

has never gone there. He denied having ever been interrogated by the VEO or heard about a murder incident which took place in his Mawenzusi Village. He admitted that murder is a big issue and if his mother would have heard about it, she would have shared the information with him but that she did not and was not informed of such incident either.

Dw-2 told this court that, he used to go to his maize shamba every day and return during dusk. He denied killing the deceased person and did not even know where his body was found. He told the court that he was not able to call any witness because he was arrested during the night.

On being re-examined, Dw-2 told the court that, when he was arrested, he was 20years old and found his co-accused Malocha at the Police Station. He admitted having been born at Mawenzusi Village where he has lived all time round. He said it was police who arrested him, and he never knew Pw-1, Pw-2 or Pw-3 nor ever seen them in Mawenzusi Village.

Dw-2 told the court that, it was true that his case was once heard here in this same court but that he only heard about a motorcycle which was tendered in the earlier proceedings but that was never tendered and those previous

in those proceedings were nullified. He also admitted that, when he was arrested it was night-time, and so he does not remember who first interrogated him. He also told this court that, he could not remember who interrogated him at the Police as it was night-time.

When asked by this court, Dw-2 stated that, it was true as he said that he was once brought to this Court and tried of this offence and the proceedings were nullified. He told the court that the Motorcycle was never tendered as exhibit in those proceedings. He said that Pw-5 lied to say that such was received in court as an Exhibit and the DR was also a liar as there was no motorcycle to hand over. He told the court that he has never seen a motorcycle, never owned one and does not know how to ride it though it is a means of transport. So far that was all for the second accused's case and with that, the defence case came to an end.

The learned counsels for the parties prayed for time to file closing submissions. I granted their prayer, and they did file their written closing submissions which I will consider together with the testimonies of the witnesses for each of them. Before I go to the nitty-gritty of this case, it is important

to state some few basic legal principles. First, it is a cardinal principle of law that he who alleges must prove. Sections 110 of the law of evidence harbour that principle. See also the case of **Jasson Samson Rweikiza vs. Novatus Rwechungura Nkwama**, Civil Appeal No.305 of 2020 (unreported).

Secondly, in criminal cases the duty to prove the charges against the accused is vested on the prosecution and proof against the accused must be beyond reasonable doubt. Where the onus shifts to the accused it is only on a balance of probabilities and not otherwise. See the case **Said Hemed vs. Republic** [1987] TLR 117. It means, therefore, that the accused person has no duty to prove his innocence, and neither can an accused person be convicted because his evidence was weak. See **Selemani Makumba vs. Republic** (Criminal Appeal 94 of 1999) [2006] TZCA 96 (21 August 2006). For that matter, as this court stated in the case of **Maruzuku Hamisi vs. Republic** [1997] TLR 1, what an accused is entitled to do is to raise the sceptre of doubt.

Having established the guiding principles as hereabove, a framework to guide the discussion needs to be set as well.

This in my view, is to be made of the key questions which this court needs to answer if the case against the accused persons is to be established or otherwise not. The guiding questions are:

- (a) Whether Didas Felician Kauzeni is dead and if so, whether his death was due to unnatural cause.
- (b) If the first question is in the affirmative, whether it was the first and second accused persons who killed the deceased and if so, whether they did so with malice aforethought.

As the first question hereabove stands, the prosecution has a duty to establish that the deceased is indeed dead and that his death was not natural but unnatural. This is to say that it must be shown that the offence of murder was indeed committed. See **Mariki George Ngendakumana vs. Republic**, Crim. Appeal No.353 of 2014 (CAT) (at Bukoba) (unreported). In the case at hand, the prosecution brought seven witnesses, one of them being Pw-4 and Pw-6.

In his testimony, Pw-4 (Joel Kauzeni) testified that he was a Street Chairperson of Mzee Nyanya Street from Kisiwani Area in Sumbawanga where the deceased DidiS Felician

Kauzen used to live before his death. Pw-4 told the court that after the disappearance of the deceased from the 9th of May 2016, he was informed and did organise the search which led to the discovery of the deceased's body in a gorge at Mawenzusi Village and that he identified that body as being that of the late Didas Felician Kauzeni.

According to Pw-4 he did recognize the clothes he used to put on, as well as his driving licence and his ID all of which were found with the body. Moreover, Pw-4 told the court that as he looked at the body, he saw that it had head injuries at the back as if he was hit by a blunt object.

As for Pw-6, the medical doctor who carried out the postmortem examination, he told this court that the body he examined was that of Didas Felician Kauzeni, having been identified by the deceased's relatives. Pw-6 examination revealed that the deceased's body had head injuries from the back of his head, having been hit by a blunt object which fractured his skull leading to loss of much blood from the injury. For that matter, Pw-6 had concluded in his report tendered and admitted in court as **Exh.P-2** that the cause of

the deceased's death was traumatic head injury, meaning that he did not die of natural but unnatural cause.

For the testimonies of Pw-4 who identified the deceased body as being that of Didas Felician Kauzeni who went missing from the 9th day of May 2016, coupled with the testimony of Pw-6 who carried out the autopsy of the same body and came up with a conclusion that the deceased died of traumatic head injury having been hit by a blunt object which fractured his skull; the first question is responded to in the affirmative. That is to say, the Didas Felician Kauzeni was dead and that his death was due to unnatural cause (or simply that he was murdered).

Since the first question is responded to in the affirmative, who then killed Didas Felician Kauzeni? Was it the two accused persons; and if so, did they kill him with malice aforethought? A response to those questions is a response to the 2nd issue I raised to guide my thinking while determining this case.

As I stated earlier, it is for the prosecution to establish, first and foremost, that, the offence alleged to be committed was indeed committed and; secondly, that, it was the accused

persons who committed it and with such sufficient malice aforethought to constitute the offence of murder. See the case of **Mariki George Ngendakumana** (supra). As regards the first limb, no doubt that murder of Didas Kauzeni took place.

As for the second limb, the prosecution side lined up several witnesses to prove that it was the accused persons who committed the murder. The first witness Pw-1 testified that on the date when the deceased went to Mawenzusi, he had earlier received a call from one "Malocha." Pw-1 testimony was to the effect that she had received the phone-call before passing the phone to her husband and she was able to see the caller's name was "Malocha" meaning it was the 1st accused person. She even told this court that, she knew Malocha even prior as she used to visit her husband.

Pw-1 and Pw-2 did also tell this court that when they went to Mawenzusi in search for the deceased, they met with the accused persons riding on the deceased's motorcycle and that Malocha, the 1st accused, ran away after being stopped along the entrance of Mawenzusi Village. But in his defence the 1st accused has raised a very pertinent question regarding whether indeed he had been the person who called the

deceased on the morning of May 9th, 2016. He argued that the prosecution failed to bring before the court any evidence to prove that alleged fact.

I think this is a valid argument. He contended that had it really been true that he was the one who phone-called the deceased inviting him to Mawenzusi and considering that this is an age of technology in which one can easily track a phone call and determine from whom it came from and at what time, the prosecution should have done their job properly and easily connect him to the crime.

As I stated this argument by the 1st accused is a very valid and does create doubt on Pw-1's version of the story regarding the 1st accused being the person who had called her husband on the 9th of May 2016. As I stated earlier hereabove, the duty of an accused person is not to prove his innocence but to raise doubts in the mind of the court regarding the cogency of the prosecution's case. This is a principle of law is based on the constitutional doctrine of the presumption of innocence. See the case of **Kennedy Owino Onyachi & Others vs Republic** (Criminal Appeal 48 of 2006) [2009] TZCA 48 (22 December 2009).

In my view, therefore, 1st accused has managed to make a hole in the prosecution's case and, as the law requires, any reasonable doubts left by the prosecution evidence should be resolved in favour of the accused person. But there is as well another point to consider as far as the arrest of the 1st accused is concerned.

In his testimony, the 1st accused testified that, he was arrested while at his farmhouse where he had been harvesting beans and milking her cows. He told the court that on the material date some six or seven people had visited him and told him that they were looking for their relative who went missing and so he joined them in the search only to be arrested because his house was closer to where the deceased's body was found.

On the other hand, Pw-4 told this court in his testimony how he went to the 1st accused's house on the day he was arrested and asked him for help and, that, as he followed the group that had gone there to search for the whereabouts of the deceased, Pw-4 asked Pw-3 if the 1st accused (Malocha Kalinji) was the person who ran away when Pw-3 met the second accused riding the motorcycle of the deceased.

He told this court that Pw-3 did confirm that he was that person. But it is on record that Pw-3 did not know "Malocha" in the first place, as he did testify that, on that day, it was Pw-1 who told them (including Pw-3) that, the person who ran away (and who was riding on the back of the motorcycle which the 2nd accused was found riding), was "Malocha".

In my view, it does not click in my mind that Pw-3 could easily recognise him while he (Malocha, it at all he was the one) had run away when the 2nd accused who was riding the motorcycle was stopped, and then still remember him on the day he was arrested. On the first time he when saw him, if at all the person he saw was the same Malocha Kalinji, it was not stated how long they engaged in conversation and, for that matter, Pw-3 had but little time of engagement or interaction with that person who Pw-1 alleged to be "Malocha".

In his testimony, Pw-3 also testified that he went to the house of Mr. Malocha on the day they were searching for the deceased' body and that, the house of Malocha was about 60 or so meters from where the body of the deceased was found dumped.

In my view, that fact, as well, cannot be a reason to hold that it was "Malocha Kalinji" who killed the deceased. As was well established in the case of **Daniel Lazarus Kumburu vs. Republic** (Dc Criminal Appeal No. 13 of 2016) [2016] TZHC 2180 (11 Mei 2016), mere presence of an accused person at the scene of crime is not a guarantee for his conviction or that he committed the offence. There must be more and better-connected dots to create the whole graphic. And, as I said earlier, the evidence regarding source of the alleged phone-call which Pw-1 stated that the deceased had received on the 9th of May 2016 could be a very helpful connecting factor which would have linked the 1st accused with the murder of Denis and, thus, beef-up the testimony of Pw-1.

It is unfortunate that the prosecution and/or whoever guided the conduct of the investigation, did not see value in that thread which could have shed much light regarding whether the 1st accused was indeed involved in the murder of Denis Feliciani Kauzeni.

In my humble view, given that nobody witnessed the murdering of the deceased Denis s/o Kauzeni, this case is entirely premised on circumstantial evidence. This kind of

evidence, as once observed by the Court of Appeal of Tanzania in the case of **Julius Justine and 4 others vs. Republic**, Criminal Appeal No. 155 of 2005 (unreported), is based on section 122 of the Evidence Act. Under such a provision, the court is entitled to draw inferences as to the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case. In view of that, the principle is that, where the prosecution case relies on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the appellant and incapable of explanation of any other reasonable hypothesis other than that of guilt.

The above principle is readily supported by a host of cases, some of them being the case of **Simon s/o Museke vs. Republic**, [1958] EA 715; **Director of Public Prosecutions vs. Elias Mwashitete and Another** [1997] TLR 319 (HC), **Ally Bakari and Pili Bakari vs. Republic** (1992) TLR 10; **Rex vs. Bakari Abdulla** (1949) 16 EACA 84 and **Hassani Fadhili vs. Republic** [1994] TLR 89 (CA).

In all these cases, the point was that for conviction of an accused charged with any criminal offence to be obtained based on circumstantial evidence, such evidence must irresistibly lead to only one inference or hypothesis, *i.e.*, the accused is guilty. Put differently, the evidence must be watertight leaving no other interpretation apart from the guilty of the accused person. As I consider the evidence against the 1st accused do not find it to be of such quality.

What about the 2nd accused? In my view, the evidence against the 2nd accused presents a somewhat different scenario calling for a different consideration as well. Essentially, there is no doubt, according to the testimonies of Pw-1 and Pw-3, that, the second accused Moris Togwa was on the 12th of May 2016 found riding the motorcycle which Pw-1 clearly identified as the one belonging to her husband Denis Kauzeni (the deceased).

Secondly, there is no doubt the 2nd accused was arrested, in the first place, by Pw-3 and his colleagues on that same date, *i.e.*, the 12th of May 2016, when Pw-3 and those in his company went to Mawenzusi Village in search of what

might have befallen their relative and neighbour Denis Kauzeni.

Thirdly, there is no doubt that Pw-3 and those with him, did, on that same day, take the 2nd accused, the other person who was a passenger riding on the motorcycle belonging to the deceased, and the motorcycle itself, to Pw-2 (the VEO) office. Fourthly, there is doubt, as per the testimony of Pw-2 and Pw-3, that, a decision was reached to take the second accused to Sumbawanga Police Station as he failed to give them reasonable explanations as to the whereabouts of the owner of the motorcycle he was found in possession.

Further there is no doubt based on the same testimony of Pw-2 and Pw-3 that on the night of the same day, while on their way to Police, the second accused managed to flee way from their grip and was later arrested on the 17th of May 2016 at Jangwani Village. Finally, there is no doubt, based on the testimony of Pw-2, Pw-3, Pw-4, Pw-6, and Pw-7 that the Denis Kauzeni (now deceased) was found dead in the same village of Mawenzusi Village on the 15th of May 2016, the village where the second accused person was arrested in possession of his motorcycle.

Considering the evidence of being found with the motorcycle of the deceased person and because this case is entirely premised on circumstantial evidence, it does attract a consideration regarding the applicability of the doctrine of recent possession. According to that doctrine, where a person is found in possession of stolen property and fails to give reasonable explanation, he is presumed to be the thief or a guilty receiver.

This doctrine was underlined in several cases, including the cases of **Juma Marwa vs. Republic**, Criminal Appeal No. 71 of 2001 (unreported) and **Mkubwa Mwakagenda vs. Republic**, Criminal Appeal No. 94 of 2007 (unreported), **Joseph Mkumbwa and Samson Mwakagenda vs. Republic**, Criminal Appeal No. 94 of 2007 (unreported), **Julius Justine and 4 others v. Republic**, Criminal Appeal No. 155 of 2005 (unreported), and **Manazo Mandundu and Another vs. Republic** (1990) TLR 92.

In the case of **Julius Justine** (supra) the Court of Appeal of Tanzania made a point of caution that, the doctrine of recent possession need to be applied with care, the reason being that it is a rebuttable doctrine which does not displace

the constitutional principle of presumption of innocence which is in favour of the accused. The Court did observe, however, that, circumstantial evidence is among the best evidence if taken with all necessary the precautions.

However, in the case of **Joseph Mkumbwa and Samson Mwakagenda (supra)** the Court of Appeal of Tanzania held, and I quote, that:

"Where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained. For the doctrine to apply as a basis of conviction it must be proved, first, that the property was found with the suspect; second, that the property is positively proved to be the property of the complainant; third, that the property was recently stolen from the complainant; and lastly, that the stolen thing constitutes the subject of the charge against the accused.... The fact that the accused does not claim to be the owner of the property does not relieve the prosecution to prove the above elements. "

There is not any debate to the proposition that the doctrine of recent possession does apply to murder cases as well and central to the prosecution is the proof of the fact that the property so found with the accused belonged to the deceased and/or was in his possession at the time of his death. This means, therefore, that the same must be properly identified.

Taking the cue from above and, there is no doubt that the Motorcycle, King Lion Brand- with Reg. No. 859 BFL was properly identified as a property of the deceased. The testimony of Pw-1 was to the effect that the deceased had gone to Mawenzusi on the 9th of May 2016, while riding on his Motorcycle. Pw-3 testified that he knew it as well since the day the deceased purchased it, Pw-3 and one Festo Teza were with him.

Moreover, when Pw-1, Pw-3 and the others two in their company went to Mawenzusi on the 12th of May 2016, just three days after the disappearance of the deceased, Pw-1 had carried with her the registration card of the said Motorcycle and that, it was the registration card which enabled her to nab the second accused after finding him riding on the motorcycle

on that day. It is as well a fact that when this case was initially tried the motorcycle was tendered in this court and after the case ended the same was handed over to Pw-1 via **Exh.P-1** and **Exh.P-2** which were tendered in this court.

In his defence, however, the second accused denied being arrested by Pw-3 in the company of Pw-1 and the other and denied also being taken to the office of Pw-2 (the VEO). He admitted being arrested on the 17th of May 2016 but by the Police and denied being found with the motorcycle in question or even knowing it. He even denied that such was ever tendered in this court in the previous proceedings which were later nullified, and for him, the **Exh.P-1 (A)** and **Exh.P-1 (B)** were based on a lie. He simply labelled the testimonies of Pw-1, Pw-2, Pw-3, and Pw-5 as mere lies as he has never seen a motorcycle nor owned one.

The second accused's defence was cemented by his counsel's closing submission where it was argued, based on the case of **Alhaji Ayubu Msumari & Others vs. Republic, Criminal Appeal No.136 of 2009** (unreported), that, the doctrine of recent possession was inapplicable in this case. He contended that the motorcycle was not produced in court

during the hearing of this case. He argued that, instead, there was brought to the court **Exh.P1 (A)** and **Exh.P-1(B)** which showed that the same was handed over to Pw-1.

The learned counsel for the accused argued further that the handing over document required Pw-1 to bring it to the court whenever it was needed. He further argued that there was no proof of any notice of intent to dispose it as per the Exhibits Management Guidelines and no registration card was ever produced to establish ownership.

However, it was made clear to this court by Pw-1 and Pw-5 how and why the motorcycle was handed over to Pw-1 and per **Exh.P-1(A)** and **Exh.P-1(B)**. Pw-1 did also explain what happened to it later and why it happened. I find that such testimonies of Pw-1 and Pw-5 were reasonable enough to make this court believe and act on them. They cast no reasonable doubt that the motorcycle was indeed brought to the attention of this court and was procedurally taken away under its sanction.

Further, in my considered opinion, there is no reason why this court should not believe the testimonies of Pw-1, Pw-2, and Pw-3 regarding not only the ownership of the

motorcycle and that on the 12th of May 2016 the second accused was found at Mawenzusi Village riding on it. Pw-1, Pw-2 and Pw-3 were all eyewitnesses who found the 2nd accused person with the motorcycle and even arrested him and the other person who was later released for being a mere passenger and another who fled the scene.

Essentially, the guidance which the law provides regarding eyewitnesses is that such witnesses like Pw-1, Pw-2 and Pw-3, are entitled to credence in their testimonies and must be believed unless there are cogent grounds for not believing them; see the Court of Appeal of Tanzania decision in **Goodluck Kyando v. Republic**, Criminal Appeal No. 118 of 2003, CAT at Mbeya (unreported).

It is as well my considered view that the second accused's defence, did not in any manner possible amount to a reasonable explanation able to exonerate him from the illegal possession of the deceased's motorcycle. I hold that view because, the prosecution evidence is tight enough to establish the fact that the second accused was found in possession of the motorcycle belonging to the deceased within the precincts

of the same village where the body of the deceased was two days later found lifeless and dumped in a gorge.

In that regard, it is my cogent finding that, as correctly argued by the prosecution in the closing submission filed in this court on the 27th of February 2024, the doctrine of recent possession does forcefully apply to the case at hand. In view of that, since no reasonable explanation were given to either Pw-1, Pw-3 or Pw-3 when they inquired from the second accused as to the whereabouts of the deceased, other than that the deceased had gone to "Bondeni- Rukwa" to buy paddy (unprocessed rice) (mpunga), one must raise eyebrows.

As it may be noted in his defence, the second accused chose to give a mere denial which could not raise any reasonable doubt in the mind of this court and, considering that, the deceased was not in the "Bondeni- Rukwa", a place where the second accused had intimated to Pw-1, Pw-2 and Pw-3 that he had gone, but in fact his body was two days later found lifeless in a gorge within the precincts of the same Mawenzusi Village, I find no doubt to hold that the 2nd accused person was fully involved in the murder of Didas Kauzeni.

In the case of **Abdallah Seif v. Republic, Criminal Appeal No. 122 of 2020, CAT at Dar es Salaam** (unreported), the Court of Appeal of Tanzania was of the view that, remote and fanciful possibilities cannot exonerate an accused from criminal liability. Such was the defence offered by the second accused person.

In the case of **Miller vs. Minister of Pensions** [1947] 2All ER 372, a case which the Court of Appeal of Tanzania referred to in the case of **Abdallah Seif** (supra), which also has been referred to by the defence counsel in his closing submission, it was held that the prosecution evidence should be of such a standard as to leave no other logical explanation to be derived therefrom other than that the accused committed the offence.

In view of the foregoing discussion, it is my findings that question whether the second accused was the killer of the deceased Denis Kauzeni is established and thus proved beyond reasonable doubt. That being stated, the question that follows is whether the killing was with malice aforethought. Malice aforethought is not an extrinsic but an intrinsic element. It is

something a person harbours deep in himself and may be driven by motive best known to himself/herself.

Such an element is therefore a mental element that cannot be easily fathomed easily and the adage that "**even the devil himself know the not the mind of men**", has been associated with establishing malice aforethought. In the case of **Enock Kipela vs. Republic**, Criminal Appeal No. 150 of 1994 (unreported), for instance, the Court of Appeal of Tanzania was of the view that, usually no attacker will want to plainly declare his intention to cause death or grievous bodily harm to his victim:

However, Section 200 of the Penal Code, Cap. 16 R.E 2022 provide our courts with some indicators of malice aforethought which, *inter alia*, include an intent to cause death or grievous harm, or knowledge that the act or omission causing death will probably cause the death of the person or others. To disentangle the difficulties of establishing malice aforethought, the Court of Appeal of Tanzania has provided guidance to the courts in the cases of **Obadia Kijalo vs. Republic**, Criminal Appeal No. 95/2007 CAT (unreported) and that of **Enock Kipela vs. Republic** (supra).

In the case of **Obadia Kijalo** (supra), the Court was of the view 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...”

However, in the case of **Enock Kipela vs. Republic** (supra) the Court was even more elaborate noting that, in ascertaining whether an accused person harboured an intention to murder a deceased or not, such may be inferred from various factors including the following:

“(i) The type and size of weapon which was used in the attack leading to the death of the deceased; (ii) The amount of force which was used by the attacker in assaulting the deceased; (iii) The part or parts of the body of the deceased where the blow of the attacker was directed at or inflicted; (iv) The number of blows which were made by the attacker, although one blow may be enough depending of the nature and circumstances of each particular case; (v) The kind of injuries inflicted on the deceased's body; (vi) The utterances made by the

attacker if any, during, before or after the incident of the attack."

As I look at the above, it is my finding that the 2nd accused had formed the necessary malice aforethought. I hold that view by because, as per **Exh.P-2**, the injuries inflicted on the deceased were blows meant to eliminate him given that his skull was found fractured due to the injuries he sustained. This, as per the case of **Enock Kipela** (supra). Secondly, the second accused's act of being found riding the deceased's motor vehicle does tell this court that the motive behind the killing was to dispossess the deceased of his property unlawfully.

I am, however, fully aware of the fact that motive is not an ingredient for murder, as stated earlier in **Obadia Kijalo vs. Republic** (supra) as well as in the cases of **Stanley Anthony Mrema vs. Republic**, Criminal Appeal No. 180/2005 CAT (unreported), and **Crospery Ntagalinda @ Koro vs. Republic**, Criminal Appeal No. 312 of 2015 CAT, (unreported). However, its presence, as cleared pointed out in those binding authorities, does potentially strengthen the prosecution case, while its absence will weaken it. In the

present case at hand, however, such a factor has potentially strengthened the prosecution's case.

It is my considered views, therefore, that the ingredient of existence of malice aforethought has been established and the second accused did commit the offence with malice aforethought. That brings this court the conclusion that the prosecution has proved beyond reasonable doubt that 2nd accused had not only committed the "*actus reus*" (murder of Didas Felician Kauzeni) and that such "*actus reus*" was committed with malice aforethought which is the necessary "*mensrea*" for murder.

Having established that the prosecution has proved the case against the second accused to the required standards, this court finds the second accused guilty of murder of Didas Felician Kauzeni contrary to section 196 of the Penal Code, Cap.16 R.E 2022 and hereby convict him of such an offence.

However, as for the first accused person, this court is of the view that the prosecution did not prove the case against him beyond reasonable doubt. More evidence ought to have been established to link him to the crime. The mere fact that Pw-1 mentioned his name as the person who phone-called her

husband on the date her husband proceeded to Mawenzusi and never returned alive, does not provide a strong link that removes all doubts regarding the correctness of that assertion. Had there been evidence of the phone-call between the deceased's phone and the 1st accused's phone that would have been a different story altogether. The inability to connect such a dot makes the prosecution evidence wanting.

For that matter, I hereby proceed to acquit him of the offence of murder he was charged with and set him free unless he is lawfully held for a lawful cause.

SENTENCE

As I stated herein above, the second accused is guilty of murdering Didas Felician Kauzeni, and this court has thereby convicted him of that offence. In a case of murder, once the accused is proved to have killed another with malice aforethought and gets convicted thereby, Section 197 of the Penal Code, Cap.16 R.E 2022 provides only one sentence, which is death penalty to that person so convicted and, that sentence is to be passed without any excuse recognized by law.

Having convicted the second accused Moris s/o Togwa, I hereby sentence him to death by hanging as provided by section 197 of the Penal Code, Cap. 16 [RE 2022].

Any party, hereto, who feels aggrieved by this judgement of this court has right to appeal to the Court of Appeal as provided for under the laws of this country.

It is so ordered

DATED AT SUMBAWANGA ON THIS 10TH DAY OF MAY

2024



.....
DEO JOHN NANGELA

JUDGE

Right of Appealing to the Court of Appeal is fully explained and guaranteed.



.....
DEO JOHN NANGELA

JUDGE

10TH OF MAY 2024

