

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB REGISTRY OF ARUSHA**

AT BABATI

ORIGINAL JURISDICTION

CRIMINAL SESSIONS CASE NO. 78 OF 2022

REPUBLIC

VERSUS

MWINJUMA MSOMELA ATHUMANI.....1ST ACCUSED
KHATIBU ABDALLAH SEBOHA.....2ND ACCUSED
MTUNTE MTAMBO MAGOMA.....3RD ACCUSED
MGOYA JUMA MGOYA.....4TH ACCUSED
CHIMWAGA BILINJE TUMBO.....5TH ACCUSED

JUDGMENT

13th February & 7th May 2024,

Kahyoza, J.:

Mary Aidama Lumolwa @ Mary Aidani Rumorwa, (Mary), a farmer died a violent death on 11.02.2019. She left her shamba going home riding a motorcycle, on her way, bandits waylaid, dragged her away from the road, raped and killed her. They stole her money and vanished. Police suspected, arrested and arraigned Chimwaga Bilinje, Mwinjuma Msomela, Khatibu Abdallah and Ramadhani with the offence of murdering Mary Mlorwa. The prosecution did not collect evidence upon which to ground a trial. The DPP entered a *nolle prosequi*. Upon a *nolle prosequi* entered by prosecution, the district court dismissed the charge and discharged the

suspects for want of evidence. Almost a year later, the police re-arrested Mwinjuma Msomela, Khatibu Abdallah and Chimwaga Bilinge and arrested for the first time Mtunte Mtambo Magoma and Mgoya Juma Mgoya, charged them with the offence of murder of Mary.

The accused persons were charged with an information of murder contrary to section(s) 196 & 197 of the **Penal Code** [Cap. 16 R.E 2019 now 2022]. It is alleged that, on the 11th day of February, 2019 at Pori kwa Pori area, Kimana village, within Kiteto District in Manyara Region, accused persons did murder one Mary Aidama Lumolwa @ Mary Aidani Rumorwa.

Mr. Peter Utafu, learned State Attorney, appeared for the Republic and learned advocates, Mr. Dominisus Nkwera, Mr. Godlisten Shayo, Mr. Kuwengwa Ndonjekwa, Mr. Philimon Maige and Mr. Festo Jackson, Advocates, appeared for the 1st, 2nd, 3rd, 4th and 5th Accused persons, respectively.

To prove the case, the prosecution's side summoned nine (9) witnesses; Dr. Priscus Setas Shirima (**Pw1**), Safari Fero Baha (**Pw2**), G.5432 Dc Mohamed (**Pw3**), George Anastazio Malema (**Pw4**), Inspector Ahmed Hussein (**Pw5**), G. 9198 D/Cpl Juma (**Pw6**), E. 1180 D/Sgt Emmanuel (**Pw7**), F. 5925 D/Cpl Seleman (**Pw8**), Mossy Soro Sasi (**Pw9**).

It also tendered five exhibits namely; a Report on Post-Mortem examination, Cautioned statements of the 2nd, 3rd and 4th accused person and extrajudicial statement of the 4th accused person were admitted as **exhibit (s) P1, P2, P3, P4 and P5**, respectively.

On the night of the 11th day of February, 2019, Safari Fero Baha @ Safari Feo (**Pw2**), Hamlet chairperson of Pori kwa Pori was informed as to the disappearance of Mary Lumolwa (the deceased), who left her premises in the morning hours to her farm, and never to return. He commissioned a search, but it was in-vain. The following day, the matter was reported to police. Mary's body was discovered dead in the forest.

On information from Safari Fero Baha @ Safari Feo (**Pw2**), George Anastazia Malema, (**Pw4**), went to the scene of crime and found the deceased body under a tree, covered with a piece of cloth and a Khanga from head to the legs. Deceased relatives and Safari Fero Baha @ Safari Feo (**Pw2**) identified the body to be that of Mary Aidama. The deceased face was covered with a piece of red cloth, bleeding from the nose, bruises on the neck, while the underpants and a tight underclothes were beside her body.

Doctor Priscus Setas Shirima (**Pw1**) examined the deceased body and found a naked adult woman body, her face covered with a red cloth, having marks on the neck, indicating that she was strangled to suffocate her, swollen face, bloody eyes, bleeding nostril, blood stains on her vagina and anus. He found also laceration on the vagina, showing that she was penetrated. Her underpants were besides her body, had dried fluid suspected to be sperms. He took samples for laboratory examination. It was Dr. Priscus Setas Shirima (**Pw1**)'s finding that the cause of death was suffocation due to strangulation. He prepared a post mortem report which he tendered and the same was admitted as exhibit P.1.

On 04. 09. 2020, Insp. Ahmed Hussein, (**Pw5**) while a special task of searching poachers, arrested Mgoya Juma Mgoya, (4th accused person) who was found in possession of a Sub Machine Gun (SMG), AK 47. It was testified further by F. 5925 D/CPL Selemani (**Pw8**), that, upon interview, Mgoya Juma Mgoya, the 4th accused person intimated that the said gun belonged to his brother one Mtunte Mtambo Magoma (3rd accused person) and that the said gun was used to commit various crimes including murder of Mary Aidan at Kiteto in 2019. That Mgoya Juma Mgoya admitted to have participated in the killing of Mary Aidan and mentioned Mtunte Magoma,

Mwinjuma Msomela and Khatibu to have participated with him in killing Mary, (the deceased), as reflected in his cautioned statement which was admitted as exhibit P.4.

Mossy Soro Sasi, (**Pw9**), Resident Magistrate stationed at Kiteto District, testified that she recorded the extrajudicial statement of Mgoya Juma Mgoya, the 4th accused person, who admitted to have participated in the killing of Mary, and mentioned Mwinjuma Msomela, Khatibu @ Suguti and the third one (whom his name she did not remember) to have met with him at Mtunte Mtambo's home and they agreed to go and rob Mary Aidan. They met the following day at bush at Njuta village. Mtunte Mtambo (Mtunte) who was a team leader covered his face with a mask. While four of them were in a hideout, Mtunte stood on the road. The deceased came riding her motorcycle, Mtunte stopped her and hit her with a bat of a gun, and the rest joined. Khatibu and another took a cloth and covered her face. Khatibu, the 2nd accused person, took the deceased's handbag, and handed it to Mtunte. Khatibu and another person raped Mary Aidan, while doing it they strangled her to death. The said statement was admitted as exhibit P.5.

G.5432 Dc Mohamed (**Pw3**), Inspector Ahmed Hussein (**Pw5**), and others, led by Mgoya Juma Mgoya, the 4th accused person, arrested Mtunte Magoma, who was also found with a handmade riffle. Inspector Ahmed Hussein (**Pw5**), testified that when Mtunte was arrested he was found with 27 ammunitions of riffle (Gobore), a bag used for carrying riffle, two elephant tails and hedgehog skin. E. 1180 D/SGT Emmanuel (**Pw7**), supported the evidence of G.5432 Dc Mohamed (**Pw3**) and Inspector Ahmed Hussein (**Pw5**), that, it was Mgoya Juma Mgoya, the 4th accused person who led the team to the arrest of Mtunte Magoma and that in his statement, Mtunte Magoma, the 3rd accused person admitted to have participated in the killing of the deceased and mentioned Mwinjuma, Khatibu and Chimwaga. His statement was admitted as exhibit P.3.

George Anastazio Malema (**Pw4**), testified that they arrested Khatib Abdallah (2nd accused person) on 15/09/2020, and he was found in possession of wild animals' horns and armadillo's shell. G. 5432 DC Mohamed (**Pw3**) testified that during an interview, Khatib Abdallah Seboha, the 2nd accused person, admitted to have participated in killing the deceased together with Mgoya Juma Mgoya, Mtunte Mtambo Magoma, Mwinjuma Msomela and Chimwaga Bilinje. The second accused person

narrated what happened at the scene of the crime, Mtunte Mtambo Magoma stopped Mary, hit her with the bat of a gun. He also narrated how, he covered her face with a cloth. They robbed and raped her. He added that, it was Chimwaga Bilinje (5th accused person) who told them that the deceased sold her tractor and that she was moving along with the proceeds of the sale. His statement was admitted as exhibit P.2.

On 15/09/2020, Inspector Ahmed Hussein (**Pw5**) and his colleagues, arrested Mwinjuma Msomela (1st accused person) at Jangwani Kiteto. G. 9198 D/CPL Juma, (**Pw6**) testified that during an interview, Mwinjuma Msomela admitted to take part in murdering Mary and that they were given two million each. When the said statement was up for admission, it was successfully objected and the same was declared not admissible.

On the 14/10/2020, Chimwaga Bilinje Tumbo was arrested and charged accordingly.

After it was established that the accused persons had a case to answer, they defended themselves on oath and tendered one exhibit, exhibit D2 (Judgment of Eco. Case No. 2 of 2021).

Mwinjuma Msomela Athuman, (Dw1), denied to murder Mary Aidan Rumolwa. He was arrested on 17/02/2019 charged before Kiteteo

District Court with an information of murder of Mary Aidan Rumolwa and discharged for want of evidence on 30/10/2019. On 09/09/2020 he was arrested and arraigned to this Court.

It was his defence that though, the prosecution alleged that the deceased was hit by a bat of the gun, it failed to tender any exhibit to that effect. He added that the prosecution failed also to tender the motorcycle that the deceased was allegedly riding at the time she was raided and killed. Also, that it failed to tender evidence to prove that the deceased sold her tractor, neither did they prove who bought the said tractor. He concluded that he was not aware that Mary Aidan Lumolwa is dead.

Khatibu Abdallah Seboha, (Dw2), testified that on February 2019 he was arrested on allegations that he was involved in the murder of a woman at Pori kwa pori. He was appeared before Kiteto District Court charged with the offence of murder and later discharged on 30/10/2019. Later, he was on 09/09/2020 arrested for murdering Mary Aidan. Declined to have made any statement to the police, and that he was forced to sign documents that he did not understand.

He argued that the prosecution failed to tender evidence to establish that he was in a conversation with someone to commit an offence and that

the prosecution failed to produce the gun that is allegedly he used to commit the offence. That he did not know his co-accused persons before their arrest.

Mtunte Mtambo Magoma, (Dw3), testified that on 05/09/2020 he was arrested. He deposed that, he neither knew Mary Aidama Rumolwa nor did he kill her. He deposed that case was fabricated as Afande Malema had promised to wage a revenge against him. He testified that he was tortured and forced to sign documents. He claimed his innocence.

Mgoya Juma Mgoya, (Dw4), testified that he was arrested on 03/09/2020. On 25/09/2020 he was charged with an offence of unlawful possession of the gun before Kongwa District Court in Economic Case No. 2 of 2021. He was taken to Kiteto police station, where he was tortured and asked to sign documents, he inclined to serve his life that was under constant pressure from the police. On 08/10/2021 he was taken to Kongwa District Court, tried and on 10/11/2022 found not guilty, a copy of judgment was admitted and marked as exhibit D.2.

He denied make any statement neither before F. 5925 D/CPL Selemani (**Pw8**) nor before Mossy Soro Sasi (**Pw9**), the justice of peace. He denied to have committed the offence of murder.

Chimwaga Bilinge Tumbo, (Dw5), testified that he was arrested by police officers on 15/03/2019 for allegations of murdering Mary Aidan Rumolo. He denied knowing her or the killing of her. He was charged with the co-accused persons save for the fourth accused person. Later, he was released.

On 16.10.2020 he was again arrested and arraigned to this Court. He denied to killed Mary. That he has no quarrels with Khatibu or Mwinjuma.

Parties adhered to the scheduling orders by filing their submissions on time, however, I wish not to reproduce them, but I will refer to them where necessary.

At the outset, I find it established that Mary Aidam Lumolwa died unnatural death. Mary Aidam Lumolwa's body was discovered dead. Fero Baha @ Safari Feo (**Pw2**), the Hamlet chairperson of Pori kwa Pori, proved that the relatives identified a dead body to be that of Mary Aidama Lumolwa @ Mary Aidai Rumorwa, the facts that were not contested. Dr. Priscus Setas Shirima (**Pw1**), reported that the cause of death was suffocation (Asphyxia) due to strangulation. He tendered the post mortem examination report as exhibit P.1.

Section 196 of **the Penal Code**, provides that a person is guilty of murder if he causes death of that person with malice aforethought. It reads-

"196. Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder.

It was held in **Mohamed Said Matula v. Republic [1995] TLR. 3** that to prove the offence of murder, the prosecution must prove not only that death has occurred but must link the accused with the commission of the offence.-

*"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."* (Emphasis added)

Given the foregoing legal position and the facts of this case, the pertinent issues for determination are-

1. Did the accused persons cause the death of Mary Aidama Lumolwa @ Mary Aidai Rumorwa?

2. If the answer to the first issue is affirmative, then, next issue will be, whether the accused persons did kill her with malice aforethought.

As pointed out above, there is no dispute that Mary Aidama Lumolwa is dead and that she died a violent death. Dr. Priscus Setas Shirima (**Pw1**)'s evidence and exh.P1, the post mortem report proved beyond reasonable doubt that Mary Aidama Lumolwa died unnatural death. The question is whether the accused persons before this court are the ones who killed Mary Aidama Lumolwa and did so with malice aforethought. It is obvious that the determination of this case revolves on circumstantial evidence, as there is no eye witness to the alleged heinous incident.

In **Mathias Bundala v R.**, Criminal Appeal No. 62 of 2004 (unreported) the Court of Appeal of Tanzania had this to say-

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

Indeed, the prosecution staged four substantial pieces of evidence to connect the accused persons with the offence of murder, **one**, cautioned

statements (confessional statements) of Khatibu Abdallah Seboha, the 2nd accused, Mtunte Mtambo Magoma, the 3rd accused and Mgoya Juma Mgoya, the fourth 4th accused; **two**, extra judicial statement of Mgoya Juma Mgoya, the 4th accused person; and **three**, is the evidence of co-accused.

To start with, the evidence against Khatibu Abdallah Seboha, the 2nd accused, Mtunte Mtambo Magoma, the 3rd accused and Mgoya Juma Mgoya, the 4th accused is that they confessed in their cautioned statements admitted as exhibits P2, P3 and P4, respectively. The accused person disassociated themselves with the statement showing that police tortured them forcing them to put their signature on the documents. After, a trial within trial, the Court found that Khatibu Abdallah Seboha, the 2nd accused and Mtunte Mtambo Magoma, the 3rd accused gave their statements as free agents, and that the recording of the statement of Mgoya Juma Mgoya, the 4th accused complied with the requirement of the law.

In the case of **Nyerere Nyague vrs Republic** (Criminal Appeal Case 67 of 2010) 2012 TZCA 103 (21 May 2012) it was observed 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.”*

Looking at exhibit(s) P2, P3 and P4 and considering the above position of the law, I find that the three statements transformed from being mere cautioned statements to confessions of guilt. Khatibu Abdallah Seboha, the 2nd accused, Mtunte Mtambo Magoma, the 3rd accused and Mgoya Juma Mgoya, the fourth 4th accused admitted to commit the offence of murder.

The statements may be relied upon to convict the Khatibu Abdallah Seboha, the 2nd accused, Mtunte Mtambo Magoma, the 3rd accused and Mgoya Juma Mgoya, the fourth 4th accused, for; **One**, that they were recorded in compliance to the law, in terms of the timing and the way they were recorded. I find no good reason to fault PW3, PW7 and PW8's testimony that these accused persons were among the six accused that were arrested on the 26th day of September, 2020, as a second batch. Also, that the statements of E. 1180 D/Sgt Emmanuel (**Pw7**), F. 5925

D/Cpl Seleman (**Pw8**) and Mossy Soro Sasi (**Pw9**) are true to the fact that what they recorded exactly what was stated by 2nd, 3rd and the 4th accused, respectively. As it was observed in **Goodluck Kyando vrs. R.**, Criminal Appeal No. 118 of 2003 (unreported), that a witness is entitled to credence unless there is reason to disbelieve him. It was held that-

“. . . it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness.”

Two, the three statements contain personal details of the accused persons and those related to the commission of the crime, in the sense that that detailed information could not have been supplied by anyone other than the accused persons themselves.

Three, that there were some common information that featured in all of the three statements, depicting coherence; from the fact that all the accused persons met at the house of the 3rd accused person a day before the fateful day, the fact that they agreed to rob Mary Aidama Lumolwa's money, to the fact that the respective accused persons admitted to have participated in attacking the deceased viciously, by hitting her with the bat of the gun, participated in knowing the deceased carnally and against the

order of nature, strangulated her leading to her death. Khatibu Abdallah Seboha, the 2nd accused stated in his statement that-

" na ilipofika majira ya jioni mimi na mwinjuma tukafuatana na kufika kwa kwa Mtunte s/o Mtambo Magoma na tulipofika tulimkuta mzee Mtunte Mtambo Magoma na....Chimwaga Bilinje ambaye ni mfanyakazi wa Mary Aidan Lumolwa ambaye mimi ni Jirani yangu...tulipofika tulikaa kidogo ndipo alipokuja mtu mwingine ninayemfahamu kwa jina la Mgoya s/o Juma Mgoya ambaye ni ndugu ya Mtunte Mtambo Magoma.....ndipo mzee Mtunte s/o Mtambo Magoma akatuambia ametuita kuna kazi anataka tufanye....kesho ya siku hiyo..kazi yenyewe ni kwamba kuna dada anaitwa Mary d/o Aidan Lumorwa ambaye ni Jirani yangu anafedha alizouza trekta lake hivyo tufanye kazi ya kumnyang'anya kwani hizo fedha anatembea nazo katika mkoba....taarifa hizo ameleta.....Chimwaga s/o Bilinje...tukakubaliana wote watano kufanya kazi hiyo...huko njutaa..siku ya pili yake sote tulifika pale tulipokubaliana...mzee Mtunte s/o Mtambo akajitokeza barabarani na kumsimamisha Mary D/O Aidan Lumorwa kwa kumuoneshea bunduki huku akiwa amevaa kinyago.....ndipo mzee Mtunte.....alimpiga kwa kitako cha bunduki kichwani na sisi wote tuliobaki pale tulipojificha tulimfuata yule dada na mimi nikamfunga kitambaa usoni...Mtunte alimshika shingo.....na kumvua mkoba uliokuwa na hela....tukamvua nguo na kuanzakumtomba na kumlawiti na wote watano tulimtomba na kumlawiti....tulikuwa tunamdhibiti kwa

kumkaba na ndipo hapo alifariki...mzee mtunte alitoa fedha katika ule mkoba na...na kutupatia kila mmoja wetu shilingi milioni mbili."

Mtunte Mtambo Magoma, the 3rd accused stated that-

"nilionana na Chimwaga bilinje ambaye ni msimamizi wa shamba na shughuli nyingine za marehemu Mary Haidami rumolwa...alinieleza kuwa marehemu anamiliki pesa nyingi zaidi ya Tshs. 20,000,000/= baada ya kuuza trekta.....muda wote anatembea nazo kwenye begi lake jeusi pia sielewani nae....na kila siku lazima aendenazo shambani asubuhi na baada ya muda mfupi anarudi nazo...tunaweza weka mtego njiani kwani anatumia usafiri wa pikipiki yake...nilimwambia siku inayofuata jioni afike nyumbani kwangu kuwa awe ameangalia tena mwenendo wa marehemu...atakuta nimeandaa kikosi cha kufanya unyang'anyi huo...niliwapigia simu Mgoya s/o Mgoya, Mwinyijuma Msomelwa, Khatibu Abdallah...kuwa kesho jioni wafike kwangu.....tulipanga mipango hivi kuwa... wakati anarudi nitamteka na bunduki yangu aina ya AK 47..nao sasa wamfungue kitambaa...lengo asipige kelele..tulkubaliana kukutana kwenye njia inayokwenda shambani kwake..siku iliyofuata 17ane walikusanyikamuda kama saa mbili marehemu alipita na pikipiki yake aina ya sanlag...akiwa amefunga begi jeusi kiunoni....tukiwa watu watano mimi mwenyewe Mtunte Mtambo Magoma,2) Mgoya Juma Mgoya, 3)Mwinjuma Msomelwa, 4) Khatibu Abdallah Seboha.....mimi nikiwa nimevalia kinyago na nikiwa na bunduki AK 47 niliwahi barabarani na kumwonyesha

*mtutu wa bunduki.....nikampiga kichwani na kitako cha bunduki..
Khatibu ...akiwa na Mwinjuma..wakaja na kitambaa.....walifika
Mgoya...na Chimwaga....tukashirikiana kumwingiza ndani ya
pori..sote watano kila mmoja alimbaka kwa kumtomba na kumfira
ndipo tulipogundua kuwa amekufa mimi nilichukua zile pesa...Tshs
28,000,000/= nah apo hapo kila mmoja nilimpatia tshs.
2,000,000/= ..nilibaki na 20,000,000/=.. .”*

The Mgoya Juma Mgoya, the fourth 4th accused stated-

*“..nilitoka nyumbani kwangu..na Kwenda..nyumbani kwa kaka
yangu Mtunte Mtambo Magoma.....nilikuta watu 18ane.....Mtunte
Mtambo Magoma, Mwinjuma Issa Msomela, Khatibu s/o? @ Suluti
na mtu wan ne ambaye sikumfahamu....ilikuwa mara ya kwanza
kumuona...mtego wa kumkamata Mary d/o Aidani, tuliingia porini
nay eye mtunte alibaki barabarani huku akiwa amevaa kinyago
(mask) ya kofia akiwa ameshika bunduki aina ya SMG..baada ya
muda tukasikia mlio wa pikipiki....mtunte alimsimamisha na
kumpiga na kitako cha bunduki kichwani, ndipo wote tulitoka
vichakani.. Khatibu...na yule ambaye simfahamu walimfunga Mary
s/o Aidani kitambaa chekundu usoni ili asiweze kuona na kupiga
kelele....Mtunte alimvamia shingo.....khatibu aliufungua mkoba toka
kiunoni...alivuliwa nguo zake.....na kumsogeza....mita arobaini na
tano au Hamsini....khatibu na Mwinjuma na yule mtu ambaye
nilikuwa simfahamu jina...wakati wa kumbaka walikuwa*

wanamkaba shingo kitendo kilichopelekea yule dada Mary d/o Aidan kufariki...nilipewa mgao wangumilioni mbili..”

From the above extract of statements, it is clear that not only did the statements give the narration of what took place, in terms of their relationship, the preparation and the execution of their plan, but also the same were corroborated by the evidence staged by the prosecution, in relation to the reason for the arrest of the suspects by PW3, PW4, PW5, PW7 and PW8, and the fact that the accused persons admitted to participate in the killing of the deceased; **Four**, in addition, the statements described role each accused person played in the commission of the offence, as per section 33(1) & (2) of **the Evidence Act**; **Five**, the allegation of torture was baseless as it was not backed by immediate complaint before the trial court, nor was there any visible marks of potential injuries, see the rule in **Steven Jason and Others vs Republic**, Criminal Appeal No.79 of 1999 (unreported).

The said accused persons denied the charges, however their defence failed to punch holes on well-established evidence by the prosecution. It was argued by the 2nd accused person and the respective submission made by Mr. Godlistern Paulo Ayo, advocate that the weapon (SMG/AK 47) was

not tendered during trial, thus, no corroboration. With due respect, I find this argument baseless, for it is sufficient for conviction to be secured by circumstantial evidence only, provided the court is satisfied as to the truthfulness of the cautioned statement. In **shibobe Seni and another vrs. Republic** (1992) T. L. R. 330 the Court of Appeal of Tanzania held that "once the confessions are repudiated, albeit during the defence stage the trial judge should *suo motu* check on their voluntariness, validity and or seek corroboration thereof."

In addition, as it was opined by PW1, the cause of death was suffocation as a result of strangulation, therefore to tender a gun aiming at proving that the deceased was hit by the back of the gun, bears no relevance to the cause of death.

As rightly submitted by the State Attorney, when making reference to the rule in **Mohamed Haruna @ Mtupeni & Another v. Republic**, Criminal Appeal No. 25 of 2007, indeed the best witness in criminal trial is an accused who freely confesses his guilty.

Mtunte Mtambo Magoma, the 3rd accused person alleged to have had blood with George Anastazio Malema (**Pw4**), due to land dispute between them. I find this farfetched, for his statement was not recorded by George

Anastazio Malema (**Pw4**), but E. 1180 D/Sgt Emmanuel (**Pw7**). The evidence in general do not support the contention that this case to be a product of fabricated evidence.

Mgoya Juma Mgoya, 4th accused alleged that he did not make his statement before Mossy Soro Sasi (**Pw9**). This is an empty allegation, I see no reason for the magistrate to vindicate the accused and the accused himself said anything as to the existence of any conflict with Mossy Soro Sasi (**Pw9**). I therefore, gather no justification on this allegation.

In addition, I did not unearth merit in a compliant that Mossy Soro Sasi (**Pw9**) was biased as she was assigned P.I No. 3 of 2019 which relation to the murder of Mary. It is true that, Mossy Soro Sasi (**Pw9**) was assigned P.I No. 3 of 2019, however, before the accused persons were committed for trial the matter was withdrawn. In addition, Mgoya Juma Mgoya 4th accused was not among the accused persons in P.I No. 3 of 2019. Thus, Mossy Soro Sasi (**Pw9**) was not exposed to the facts or any relevant information regarding P.I No. 3 of 2019 and the accused persons were not prejudiced whatsoever by Mossy Soro Sasi (**Pw9**) having mentioned the case waiting for completion of investigation.

The same was echoed in **Abubakari Issa @ Mnyamba vrs. The Republic**, Criminal Appeal No. 34 of 2010 (unreported), that "Suffice it to say, a confession by a co-accused would support a conviction if it is corroborated by other independent evidence." It is crystal clear that from the unveiled evidence, no conviction can result, in this circumstance, since there is no corroborating evidence against Mwinjuma Msomela, 1st accused, and Chimwaga Bilinje, 5th accused, apart from the confessional statements of the co-accused.

Lastly, I am compelled to answer if Khatibu Abdallah Seboha 2nd accused, Mtunte Mtambo Magoma 3rd accused and Mgoya Juma Mgoya 4th accused attacked and killed Mary Aidama Lumolwa with malice aforethought. I find it so, for, Malice aforethought as provided under section 200 of **the Penal Code**, Cap 16 R.E 2022 the law provides on the circumstances that the intent to kill can be established, including the intention to cause death. In **Enock Kipela v. Republic**, (CAT) Criminal Appeal No. 150 of 1994, (unreported) the Court said that:-

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

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

- (2) *the amount of force applied in the assault;*
- (3) *the part or parts of the body the blow were directed at or inflicted on;*
- (4) *the number of blows, although one blow may, depending upon the facts of the particular case, be sufficient for this purpose;*
- (5) *the kind of injuries inflicted;*
- (6) *the attackers utterances, if any, made before/ during or after the killing; and*
- (7) *the conduct of the attacker before and after the killing.”(Emphasis added)*

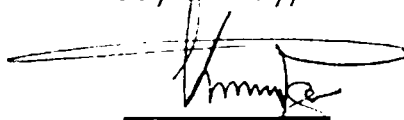
I am of the firm view that Mary's attacker intended to kill the deceased (malice aforethought), as reflected in the testimonies of Dr. Priscus Setas Shirima (**Pw1**), Safari Fero Baha (**Pw2**), and George Anastazio Malema (**Pw4**), in the statements of the Khatibu Abdallah Seboha 2nd accused, Mtunte Mtambo Magoma 3rd accused and Mgoya Juma Mgoya 4th accused and in exhibit P.1 that the assailants made vicious attack to the deceased's sensitive parts, by strangulation that led to suffocation.

In the end, I find Khatibu Abdallah Seboha 2nd accused, Mtunte Mtambo Magoma 3rd accused and Mgoya Juma Mgoya 4th accused guilty

and convict them with the offence of murder contrary to section(s) 196 and 197 of **the Penal Code** [Cap. 16. R.E. 2022]. I find **Mwinjuma Msomela Athuman**, the first accused and **Chimwaga Bilinje Tumbo**, the 5th accused not guilty of offence of murder, and I hereby acquit them accordingly.

It is so ordered.

Dated at **Babati** this 7th day of May, 2024.

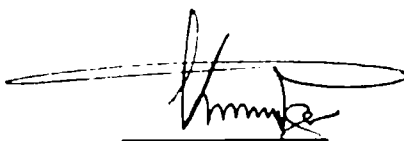


John R. Kahyoza
JUDGE
7/05/2024

Mr. Bizmana SA: Your Lordship, I pray for the sentence under section 197 of the Penal Code, for the convicts, Khatibu Abdallah Seboha 2nd accused, Mtunte Mtambo Magoma 3rd accused and Mgoya Juma Mgoya 4th accused, which will be lesson to the public.

Mr. Godlisten Adv.: Your Lordship, I have nothing to say.

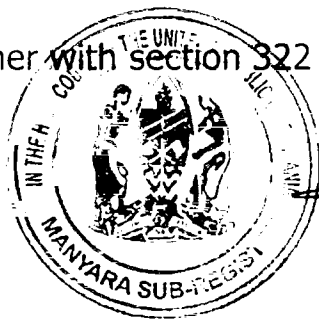
Mr. Ndonjekwa Adv.: Your Lordship, I have nothing to say, given the nature of the offence.



John R. Kahyoza
JUDGE
7/05/2024

SENTENCE

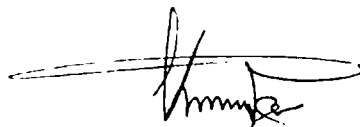
Khatibu Abdallah Seboha 2nd accused, Mtunte Mtambo Magoma 3rd accused and Mgoya Juma Mgoya 4th accused have been convicted with the offence of murder, which has only one sentence, that is to suffer death by hanging as provided under sections 196 & 197 of the Penal Code read together with S. 322 of the Criminal Procedure Act, [Cap. 20 RE 2022], the CPA. Consequently, I sentence Khatibu Abdallah Seboha 2nd accused, Mtunte Mtambo Magoma 3rd accused and Mgoya Juma Mgoya 4th accused 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
7/5/2024

Court: Judgment delivered in the presence of Mr Bizmana S/A for Republic, the accused person, Mr. Godlisten Ayo for the second accused person and holding Mr. Nkwera's brief for the first accused person, Mr. Ndonjekwa advocate for the third and holding Mr. Maige for the fourth accused person and Mr. Festo for the fifth accused person.

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', written over a horizontal line.

**J. R. Kahyoza,
Judge
7/5/2024**