

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB REGISTRY OF MANYARA

AT BABATI

ORIGINAL JURISDICTION

CRIMINAL SESSION CASE NO. 47 OF 2021

REPUBLIC

VERSUS

SAMWEL MGOMELWA @ PETRO.....1ST ACCUSED
RAMADHANI IDD @ BAKARI.....2ND ACCUSED
MANDA ULINJE @ MOMBO.....3RD ACCUSED
AMINI MASILIMU @ ZABLONI.....4TH ACCUSED
GEORGE KAONWA @ MTAGWA.....5TH ACCUSED
YASIN ALLY @ ISSA.....6TH ACCUSED
LAMECK PAULO @ MTUKO.....7TH ACCUSED
ELIA LENDAMA.....8TH ACCUSED
ANDASON CHUYO @ LUBEREJE.....9TH ACCUSED

4th December, 2023 & 5th March, 2024

G.N. BARTHY, J.:

JUDGMENT

The accused persons herein stand charged with an offence of Murder contrary to section(s) 196 & 197 of the **Penal Code** (Cap 16 R.E 2019). It



is alleged that, on the 2nd day of September, 2020 at Kazingumu area, Laalaa village, within Kiteto District in Manyara Region, did murder one NJOKUTI S/O MORINGE @ MBAAZI.

The accused persons pleaded not guilty to the charge, prompting the prosecution side to call witnesses to prove the allegations against them.

At the hearing of the case, Ms. Chema Maswi assisted by Mr. Raphael Kapela, Mr. Raphael Rwezahula and Ms. Rose Kayumbo, State Attorneys, appeared for the Republic: Mr. Godrisen Shayo, Mr. Joseph Mniko, Mr. Festo Jackson, Mr. Basil Bohay, Mr. Simon Shirima, Mr. Raymond Kim, Mr. Kalori Chami, Mr. Joseph Masanja, Mr. and Mr. Paschal Peter, Advocates, appeared for the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th accused person(s), respectively.

In order to prove the alleged offence, the prosecution's side marshalled eleven witnesses, to wit; Dr. Hassan Mkwachu (**PW1**), G. 5310 D/Cpl Musa (**PW2**), Gift Kisioki Masiaya (**PW3**), Halidi Chubi Sweya (**PW4**), G. 9659 D/Cpl Cleopa (**PW5**), E. 6329 D/Sgt Kassimu (**PW6**), G. 2260 D/C Moshi (**PW7**), PF 23109 A/Insp Gregory (**PW8**), F. 3115 D/Sgt James (**PW9**), Wp. 8162 D/Cpl Tajiri (**PW10**), A/Insp Oscar Kusare (**PW11**): coupled with eight exhibits namely; a Report on Post-Mortem examination, a mobile phone



hand set – make Itel in blue and black colours (the phone), a Sketch Map plan and Cautioned statement(s) of the 1st, 2nd, 9th, 8th and 3rd accused person were admitted as **exhibit(s) P1, P2, P3, P4, P5, P6, P7 and P8**, respectively.

The prosecution case started with **Dr. Hassan Mkwachu, MD** as **PW1**, a Medical Doctor stationed at Engusero Health Centre, testified that on the 12th day of September 2020, he received information about a human body buried in a pit near a pond. Accompanied by E. 6329 D/SGT. Kassimu (PW6), they arrived at the crime scene in the Kazingumu area and confirmed the presence of a body. After introducing themselves to the crowd, and following an excavation, they removed the dead body, identified as a male of black ethnicity, and placed it near the pit.

The respective village chairperson and the villagers identified the body as that of a man named Njukuti Molinege @Mbaazi (the deceased). Dr. Mkwachu conducted a post-mortem examination on the deceased's body, revealing that it was tied up with ropes on the hands, legs, and neck. Wounds on the head, face, and hands caused by a sharp object were observed.

The body, was already in a state of decomposition, emitting a foul



odor, exhibited swelling, and maggots were present. Dr. Mkwachu estimated that more than 7 days had passed since the deceased's death. Although there was no evidence of death by strangulation, as the neck was intact, the skull was broken, resulting in severe bleeding and traumatic brain damage.

A bangle was found on the deceased's left hand. The Report on Post-mortem Examination (Exhibit P.1) was admitted without objection, indicating that the cause of death was excessive bleeding secondary to Traumatic Brain Injury.

During cross-examination, Dr. Mkwachu explained that relatives of the deceased were present, and after the examination, they were allowed to take the body for burial arrangements. He clarified that not all strangulation cases require the neck bone to be broken. Upon re-examination, he concluded that it was not possible to determine the exact date of death.

Another witness, **G. 5310 D/CPL Musa** as **PW2**, a police officer and investigator, testified that on the 13th day of September 2020, he was assigned by SP George Malema, OCCID, to investigate a police case file with Ref. No. KR 1084/2020.



The case file contained a post-mortem report, a sketch map plan, and statements from witnesses, all related to the murder of Njokoti Moringe, also known as Baraza, which occurred at Kazingumu area on the 2nd of September 2020. At that time, no suspect had been arrested. Intelligence information suggested that the deceased was killed by a local militia group in the Kazingumu area at Laalaa village.

On the 20th day of September 2020, G. 9659 D/CPL Cleopa (PW5) and A/Insp Lusekelo managed to arrest three suspects: Amini Maslimu, also known as Zablon, George Kaonwa, and Yasini Ally, the 4th, 5th, and 6th accused, respectively. During interrogation, they admitted to commit the alleged offence with other accomplices who were yet to be arrested. The 4th accused also confessed before a justice of peace.

On the 26th day of September 2020, six additional suspects were arrested, bringing the total to nine. They also admitted to participating in the killing of the deceased, Njokuti Moringe, on the 2nd day of September 2020.

On the same day, at 06:00 hrs, PW2, accompanied by Isioki Masiaye (PW3), Halid Chugi (PW4), and D/C Cleopa (PW5), arrived at the house of the 4th accused to recover the phone he admitted to taking from the



deceased after the murder. The accused, in good condition, led the convoy to his house in Laalaa village, where he worked as a mobile phone mechanic. The accused handed over the mobile phone, an Itel model with dark blue and black colors, to the police officers.

However, the phone had no battery, SIM card, cover, and memory card. PW2 prepared a seizure certificate, which was not admitted due to non-compliance with section 246 of the Criminal Procedure Act [Cap 20 R.E 2022] (the CPA).

The suspect was returned to Kibaya Police Station, and the phone was handed over to D/C Thomas (the exhibit keeper), who labeled it KIB/IR/1084/2020 Murder. The mobile phone was admitted as exhibit P2, and all parties signed the chain of custody form. PW2 also identified the 4th accused in the dock.

During cross-examination, PW2 admitted to not interrogating any of the suspects or visiting the crime scene. He was also not aware of the exact number of "sungusungu" (local militia group) members in Kazingumu Hamlet, despite the accused persons claiming to be members.



The 4th accused requested the OCCID to make his statement before a justice of peace, and PC Gregory recorded the statement. The plastic cover on the phone was organized by the exhibit keeper and labelled accordingly. PW2 maintained that it was not mandatory to tender the chain of custody.

Upon re-examination, PW2 stated that the phone was marked by the exhibit keeper and labelled before being presented to the police, with the label attached to the plastic cover.

Another witness **Kisioki Masiaya**, who was **PW3**, a resident of Partimbo village and a relative of the deceased, testified that he had not seen the deceased for about three months before his ordeal. Nevertheless, his death was not natural.

On the 12th day of September 2020, at 2:00 PM, he was informed by the Irera Hamlet leader that his younger brother, Njokuti Moringe, also known as Mbaazi, had passed away. Upon arriving at Kazingumu hamlet, he encountered a crowd of people, including the village chairperson, gathered near the pit where the body of Njokuti Moringe was laid down.

He identified him by a missing tooth on the upper jaw, an old scar on

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the left side of his face, and a copper bangle on his left hand. Upon closer inspection, he noticed a scar on the head that appeared to have been inflicted by a sharp object. There was also a wound near the eye and bruises on his hand, indicating that he was dragged. Additionally, the body had already started decomposing. PW3 could not participate in the funeral ceremony as he was angered (the witness portrayed a distressed demeanor).

On the 24th day of September 2020, at 5:00 AM, PW3, along with PW2, Halidi Chugi (PW4) – the village chairperson, and D/C Cleopa (PW5), arrived at the house of the 4th accused, whom he had never known before. The accused led them to his house, where he retrieved a small mobile phone, an Itel model in blue and black, with no battery, SIM card, memory card, and cover. When questioned, he claimed to have taken it from the deceased after murdering him.

PW3 maintained that the said phone was the very phone used by the deceased. A form was prepared and signed by all, including the 5th accused person. PW3 identified the phone in court and identified the 5th accused at the dock as the one who led to the recovery of the phone.

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During cross-examination, PW3 responded that he was able to identify the suspects better than PW2. He added that the deceased's body had fresh wounds, appearing to be within 2 or 3 days, but already decomposed. He admitted to not making any statement at the police station.

Furthermore, he mentioned that there was no dispute between the pastoralists and peasants in their locality, and the old scar was sustained when he fell during cattle grazing errands. He emphasized that the deceased was not a cattle thief.

In re-examination, PW3 affirmed that he identified exhibit P2, the phone, by its color and make. He stated that Amini Maslimu, a member of the "sungusungu," was the one who murdered his relative.

Halidi Chubi Sweya, testifying as **PW4**, a village chairperson, testified that he knew all nine accused persons as his co-villagers and identified them at the dock. On the 12th day of September 2020, he was informed by the villagers that there was a body near the slope. Upon his arrival, he saw a dead body covered with sand and subsequently made a call to PW6.

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Then, the police officers arrived with a doctor. They removed the body from the pit to the ground level. Relatives of the deceased managed to identify the body, which had wounds on the head, face, and various parts of the hands with bruises. It appeared that the wounds were not recent and were caused by the use of a sharp object. The deceased was naked, tied with ropes around the neck, and wore a bangle on his hand. After examining the body, they were allowed to proceed with burial arrangements.

On the 26th day of September 2020, at 05:00hrs, PW4, along with PW2, PW3, D/C Cleopa (PW5), and the 4th accused, arrived at the house of the 4th accused. The accused went inside and came out holding the phone. When questioned about the ownership of the phone, he replied that he took it from the deceased after they killed him and his associates.

The mobile phone was dark blue, an Itel model, without a SIM card, cover, or memory card. One of the accused's relatives identified the phone as belonging to the deceased. The police officer prepared some documents, and they all signed. PW4 also identified the mobile phone during the trial.

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During cross-examination by Mr. Ayo, the counsel for the 1st accused, PW4 replied that the deceased's body was not buried in the graveyard, though a person can be buried at any place of their choice. He stated that in his village, there is no group called "sungusungu."

He admitted to knowing the deceased before and claimed that he did not commit suicide. He stated that the death was estimated to have occurred on the 2nd day of September 2020, and on the day it was discovered, the body was not decomposed. He was interrogated by the police at his home on the 19th day of September 2020. He also knew the 4th accused to be a mobile phone mechanic. He further added that there were houses near the area where the body of the deceased was found. He maintained that the accused persons were not members of "sungusungu," but rather normal civilians and good people.

During re-examination, he stated that he was not shown his statement made at the police station.

A handwritten signature in black ink, appearing to be "Mr. Ayo", written over a horizontal line.

G. 9659 D/CPL Cleopa, PW5, the police officer and an arresting officer, testified that on the 20th day of September 2020, at 03:00hrs, he was ordered by his OCCID to go to Kazingumu hamlet of Laalaa village to arrest suspects connected to the case with Ref. No. IR 1084/2020 involving the death of Njokuti Moringe Mbaazi.

PW5, accompanied by Assistant Inspector Lusekelo, arrived at 04:00 hrs and arrested three suspects, namely; Amin Maslimu Zabloni, George Kaonwa, and Yasini Ally (the 4th, 5th, and 6th accused, respectively). They were taken to the police station, and the suspects were handed over. The remaining suspects were not arrested as they were not present in their respective houses.

On the 26th day of September 2020, at 04:00hrs, they arrested the other six suspects, namely; Ramadhani Mgomelwa, Ramadhani Idd @Bakari, Manda Ulinje @Mombo, Lameck Paulo @Mtuko, Elia Lendama, and Andason Chayo @Lubereje (the 1st, 2nd, 3rd, 7th, 8th, and 9th accused, respectively).

Again, PW5, accompanied by PW2, PW3, PW4, and the 4th accused, arrived at the house of the 4th accused.



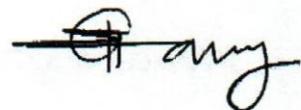
The door was knocked, and the 4th accused's wife and mother came out. He asked them for the keys to the

kiosk. The accused went in and came out holding the phone, which he handed over to PW2. When questioned about whose phone it belonged to, he replied that he took it from the deceased after they murdered him.

These statements were made in the presence of the village chairperson and the deceased's relatives. One of the deceased's relatives had seen the deceased using the said mobile phone, which was dark blue – an Itel make with no battery, SIM card, cover, or memory card. The police prepared a certificate of seizure, and they all signed.

PW4 managed to identify exhibit P2, the mobile phone, and the 4th accused at the dock. During cross-examination, he responded that the 4th accused said he was a mobile phone mechanic. However, the suspects were arrested based on intelligence information gathered by the OCCID.

The phone was recovered about 6 days after the 4th accused's arrest. The arrest of the six suspects was carried out on the 20th, not the 19th day(s) of 2020. He concluded by stating that he never knew the role of each suspect

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nor the last person with whom the deceased spoke before his untimely death.

E. 6329 D/SGT Kassimu, as PW6, a police officer and investigator, testified that on the 12th day of September 2020, he was informed by PW4 about the discovery of a dead body. He then informed the OCCID, who ordered him to summon the doctor.

Upon arriving at the Kazingumu area, they encountered the villagers and PW4. Additionally, they observed a deceased male, partially buried in sand. They excavated the body and placed it on level ground. The body was unclothed, with multiple wounds on the forehead and hands, and bound with a sack rope around the neck. The injuries appeared consistent with those inflicted by a sharp object, resulting in significant swelling.

The body had decomposed considerably, indicating it had been there for over seven days. PW4 and other villagers identified the body as that of Njokuti Moringe @Mbaazi, recognizing him by a scar on his forehead, missing teeth, and a copper bangle.

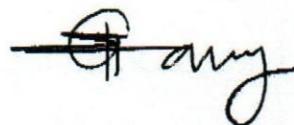
PW1 conducted a post-mortem examination, determining severe

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bleeding from the wounds as the cause of death. PW1 then prepared a report on the examination, which he handed to PW6. Subsequently, the deceased's relatives were permitted to proceed with burial arrangements. PW6 proceeded to record statements from various individuals, including PW4's statement, which he transcribed. With PW4's assistance, he created a sketch map plan of the crime scene, which all parties signed.

All collected exhibits were then surrendered to the OCCID, except for the sack rope, per the OCCID's instruction to hold it for PC Thomas. PW6 identified the sketch map plan, which was admitted into evidence without objection and marked as exhibit P3. Despite these efforts, they remained unaware of the identities of the deceased assailants.

During cross-examination, PW6 affirmed that the rope found on the deceased extended from the neck to the hands and legs. He acknowledged that according to exhibit P3, the nearest residence to the body's location belonged to Mzee Twaha, although no statement was obtained from him. PW6 admitted to retaining the rope, bangle, and slipper, none of which were presented as exhibits.

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Although PW6's statement implied that the slippers belonged to the deceased, no DNA test was conducted to confirm this. He also confirmed that no forensic examination was conducted at the crime scene, nor were efforts made to secure the scene or collect additional exhibits. PW6 conceded that exhibit P3 was incomplete, failing to accurately depict the distance from where the body was found to where it was placed, including the presence of a ditch ('korongo').

Moreover, neither the chairperson of Kazingumu hamlet nor the ten-cell leader was involved in the process, nor were other residents near the crime scene. PW6's statement indicated that the deceased was hanged with the sack rope.

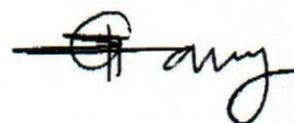
G. 2260 D/C Moshi, PW7, an investigator from the police force testified that on the 26th day of September 2020, he was instructed by SP Malema to record the statements of the suspects. The first statement he recorded was that of Samwel Mgomelwa, also known as Petro (the first accused). After preparing the interrogation room, he introduced himself to the accused and informed him of his rights.



The accused volunteered to record his statement in the absence of anyone and acknowledged that the statement might be used against him in a court of law. He confirmed his caution by signing with a thumbprint, and PW7 counter-signed with a pen. The recording of the statement began at 09:02 am and concluded at 10:20 am.

In the accused's statement, he admitted that on the 2nd day of September 2020, in the company of his associates, at Kazingumu – Laalaa village of Kiteto, they murdered Njukuti, also known as Mbaazi. He described witnessing Ramadhani strike the deceased with an iron bar on the rear head and forehead, resulting in Njukuti's death. Samwel, as a 'sungusungu' leader, directed others to his house to retrieve tools for concealing the body.

The first accused proceeded to name George, Amini, Lameck, and others, though some names were forgotten by PW7. He recounted how they dragged the body to a brick furnace in an attempt to frame the furnace's owner. Before burying him, they searched the body and found two 10,000/= currency notes, sharing Tsh. 2,500/= each among themselves.

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Additionally, PW7 witnessed Amini (the 4th accused) taking the deceased's mobile phone from his pockets with the intention of selling it and splitting the proceeds among them.

Following the recording of the statement, the investigator read it to the accused, who confirmed there was nothing to add or alter and signed it to acknowledge. PW7 counter-signed each of the six pages. The accused informed him that he was arrested on the 26th of September 2020 at 5:45 am. The cautioned statement for the first accused was tendered and admitted as exhibit P4.

During cross-examination, PW7 stated that the 1st accused stated the offence occurred on the 2nd day of September 2020 and implicated other accomplices. He further clarified that the accused denied striking the deceased twice with an iron bar or giving orders to kill, hit, or pre-plan the deceased's murder. He also mentioned that the deceased's body was discovered on the 3rd day of September 2020.

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Another witness **PF. 23109 A/Insp Gregory, PW8**, an investigator from the police testified that on the 20th day of September 2020, at 8:50am, he was instructed by OCCID George Malema to interrogate a suspect by the name of Amin Maslimu, also known as Zabron. He prepared a room, introduced himself to the accused, and informed him of his rights.

PW8 accused agreed to record his statement in the absence of anyone and acknowledged that the statement might be used against him in court. He signed it to signify his voluntariness. The recording of the statement commenced at 7:00 am and concluded at 8:30 am.

Then, the 4th accused stated that on the 2nd day of September 2020, at 8:00 pm, in the company of his associates, they assaulted Njukuti Moringe, also known as Mbaazi. He participated by finding the rope used to tie the deceased. Subsequently, they took the deceased away, extracted Tsh. 20,000/= from him, and divided it among themselves. They also confiscated the phone from the deceased's pockets.

PW8, after recording the statement, read it back to the accused, who affirmed and signed it with his thumb on each of the five pages to acknowledge its contents. PW8 also signed it to confirm its accuracy.



He then escorted the accused to the CRO, noting that the accused was in good condition at that time. The statement was brought to the attention of the OCCID. PW8 also identified the 4th accused person in the dock.

On the 26th day of September 2020, PW8 was again instructed by OCCID George Malema to interrogate Ramadhan Idd, also known as Bakari. He followed the same procedure, and the recording of the statement took place between 8:28 am and 9:40 am.

In the statement of the 2nd accused, it was mentioned that, in their 'sungusungu' group, they received orders from their chairman to kill Njukuti Moringe, also known as Mbaazi. The 2nd accused admitted to using a stick to assault the deceased. Additionally, Lameck, also known as Surambaya, had an iron bar and a screwdriver, which he used to stab the deceased above his eye.

He said Amin Maslimu, also known as Zabroni, provided the rope used to tie the deceased and buried him with it. They confiscated Tsh. 20,000/= from the deceased, and Amin Maslimu received 2000/= from the share.

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The following day, they convened at the 'Sungusungu' chairperson's place and collectively agreed to keep the incident a secret.

After recording the statement, PW8 reviewed it with the accused, who affirmed its accuracy. The accused then signed it with his thumb and the name 'Rama' to authenticate it. He also counter-signed on each of the five pages. PW8 confirmed the recording's accuracy and then returned the accused to the CRO in good condition, forwarding the statement to the OCCID. Additionally, PW8 identified the 2nd accused person in the dock.

PW8 presented the statements of the 2nd and 4th accused. However, the court admitted the cautioned statement of the 2nd accused as exhibit P5. Yet, the court declined the admission of the cautioned statement of the 4th accused due to fatal omissions.

During cross-examination, PW8 clarified that he did not participate in the arrest of any suspects. However, he mentioned that the offence was committed on the 2nd day of September 2020 and disclosed the accused's accomplices in his statement. He further acknowledged that he did not ascertain the literacy level of the accused.

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He admitted that the 4th accused informed him about taking the deceased's mobile phone but did not specify its color. Furthermore, he confirmed that the 2nd accused referred to the accused Lameck as Surambaya.

Also, **F. 3115 D/SGT. James, PW9**, an investigator from police force, testified that on the 26th day of September, 2020 at 1:50 morning hours, he was instructed by OCCID Malema to take the suspect for an interrogation. The name of the suspect was Andason Chuyo Lubereje. He prepared a room, introduced himself to the accused and informed the accused his rights.

PW9 agreed to record his statement in the absence of anyone and that he was aware that the said statement might be used against him in the court of law. He acknowledged that he was cautioned by signing the same by thumb print, also PW9 signed it with a pen. The recording of the statement started at 08:02hrs and ended at 08:55hrs.

It was in the statement of the 9th accused that on the 2nd day of September, 2020, they were called with their "sungusungu" chairman by the name of Samwel Mgomelwa,

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where they were instructed to apprehend one Maasai by the name of Mbaazi of which they did, bit him up and took him to a ditch. He said he had a stick and Amiri Maslimu had a piece of iron bar, Lameck Ally Abdallah and others also had sticks.

He said that they attacked the man after he had passed away, they ran away. On his way, he saw people holding spade to be used to burry the body. Therefore, they convened a "sungusungu" meeting, and it was agreed that the incident was to be kept secret.

After the recording of the statement, PW9 was content with his statement and he signed it to acknowledge it. He then counter signed on every page of three pages in total. He certified and signed it in compliance to section 58 of the CPA. It was said that the accused, was in a good condition at all the time. PW9 identified the 9th accused at the dock.

Then on the 20th day of September, 2020 at morning hours, PW9 was instructed by George Malema to take the suspect to the justice of peace to record his extra judicial statement. The name of the suspect was Amini Maslimu and he was in good condition. He took him to Kibaya Primary Court, and handed him over to the primary court magistrate.



He was later on called by the court clerk and went to take the accused, together with an envelope – the accused was back to the lock-up and the envelop to the OCCID. He identified the 4th accused at the dock. The cautioned statement was admitted as exhibit P6.

Responding to cross examination, PW9 stated that the they were “sungusungu” members, but did he not give any proof to that effect. He went on stating that on the 26th day of September he was not aware of the murder incident, neither did he know as to when the 1st accused was arrested. He further replied that he was not involved in the arrest of the accused persons. When further probed, he stated that Mawili and Sokoine were some of the assailants who were mentioned by the 9th accused.

In Re-examination, he stated that he did not ask police officer Gregory if he had interrogated or assaulted Andason.

WP. 8162 D/CPL Tajiri, PW10, a police officer testified that on the 26th day of September 2020, at 7:40 am, she was instructed by OCCID Malema to take the suspect for interrogation.



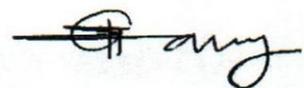
She then escorted Eliah Lendama to a room she had prepared, introduced herself to the accused, and informed him of his rights.

He then agreed to record his statement in the absence of anyone, being aware that the said statement might be used against him in a court of law. The accused was in good condition; he acknowledged he was cautioned by signing with his thumbprint, and PW10 also countersigned it with a pen. The recording of the statement commenced at 07:52 hrs.

After the recording of the statement, PW10 read it over to the accused who had nothing to add or alter, and he signed it to acknowledge it. Then PW10 countersigned on every page. PW10 tendered the statement, and it was admitted as exhibit P7.

Responding to cross-examination, she stated that on the 26th day of September, she was not aware of the murder incident, nor did she know when the 1st accused was arrested. She did not inspect the body of the accused.

Furthermore, she was not involved in arresting the accused persons, nor did she go to the scene of the crime. She added that blank spaces on

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dates were left because the accused told her that he did not remember them. However, the typed statement included the dates.

She conceded that some pages in the statement were not marked, but she maintained that the statement contained all the necessary pages. She further stated that the accused had the right to call his relatives, but he declined. Additionally, Lendama told her that in the commission of the crime, he used a stick, while Ramadhani used an iron bar.

The said statement was recorded from 7:52 am and finished at 9:00 am. According to exhibit P7, he stated that the deceased was attacked by almost 10 people, but he only mentioned 6. She did not indicate who crossed the statement, as she did not cross the form. It was during the conversation with the accused that he expressed concern about potential assault, although she did not witness any other accused being assaulted. She also clarified that she never recorded the statement at the police station.

In re-examination by Ms. Kayumbo, she reiterated that she did not physically record the statement, but rather wrote her statement herself.

A/I Oscar Kusare, PW11, an investigator from the police force



testified that on the 26th day of September, 2020, at 7:22 hours,

he was instructed by SP John Malema to record a statement from Manda Ulinje Mombo. He proceeded to prepare a room and, after introducing himself to the accused, informed him of his rights.

DW9 agreed to record his statement in the absence of anyone and was aware that the said statement might be used against him in a court of law. He then signed by thumbprint, and himself with a pen. The recording of the statement started at 08:30 hrs and finished at 08:30 hrs.

It was in the statement of the 3rd accused that on the 2nd day of September, 2020, at 22:00 hrs, he was followed by his fellows; one Lameck, Ramadhani, Samwel Mgomelwa, Yusuph, and many others, and went to meet with their commander, head of the Local militia known as "sungusungu," Samwel Mgomelwa who instructed them to kill a man who was said to be a cattle thief.

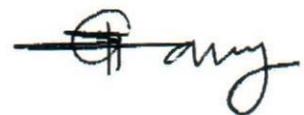
The said man later known to be Mbaazi was drinking at the house of the said leader at that time. The accused was involved in killing Mbaazi near the bridge.

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Then Ramadhani took a piece of iron bar and hit the deceased. Another person strangled his leg, then they started to hit him with the stick, including himself until he died. Then some went to bury the body while others were doing patrol. After the ordeal they never met, until after some couple of days later.

After the recording of his statement, PW11 read it over to him but the accused had nothing to add or alter then he signed to acknowledge it to be correct. She certified and signed it in compliance with section 58 of the CPA. He also said the accused was in good condition at all times. PW11 was able to identify the 3rd accused at the dock. PW11 tendered his cautioned statement which was admitted as exhibit P8.

Responding to cross-examination, PW11 stated that the suspect told him they were "sungusungu," but there was no proof. He also admitted that it was crucial to have the time and date in which the suspect was arrested in the statement. He stated that he certified at the end of the statement after it was read to the accused.

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He further admitted that he was required to sign on each place he crossed the words, by the use of brackets as seen on page 1 and 2, which are the only pages bearing brackets. He added that the accused told him that he assaulted the deceased by the use of a stick. He referred to page 3 which, in actual sense, was page 4. He also mentioned that the background of the suspect's family did not feature in the first paragraph of the statement. His certification was the end of the accused statement.

He mentioned other assailants to be Lameck, Yusufu, Amosi s/o Warder, John s/o Masanja, Leonard s/o Ndorobo, Mchiwa, and Daniel. He mentioned the name Yasin to be one of the "sungusungu" members. However, he denied knowing Anderson Chuyo Lubereje; he was not mentioned in exhibit P8, but he mentioned him in his statement about his involvement.

In Re-examination, PW11 maintained that he never knew Manda Ulinje before he was assigned to record his statement. He stated that the accused told him they were "sungusungu" members.

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The prosecution side rested their case, and the court ruled that all the accused persons have the case to answer. They were informed of their right to fend for themselves and call witnesses.

The accused person testified under oath as **DW1, DW9, DW2, DW3, DW4, DW5, DW6, DW7** and **DW8**, respectively: with no witnesses or exhibits.

Samwel Mgomelwa, DW1, A resident of Kazingumu testified that on the 26th day of September, 2020, during the night, police officers stormed into his house, arrested him, and put him into a police vehicle. In the said vehicle, he saw Samwel Meso – the hamlet chairperson for Kazingumu. After the arrest, they stayed at Kazingumu bus stand for the whole night. Then, Lameck Paulo Mtuka came to inquire about his arrest, but he was assaulted, arrested, and put into the said vehicle.

On the same day, they arrived at Kibaya Police Station in the morning hours. He was kept in a lock-up and later sent to the interrogation room with police officer Mushi.

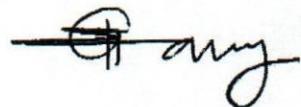
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Then, he was informed that he was suspected to have been involved in the killing of one Mbaazi, but he denied knowing Mbaazi or the allegation.

DW1 stated that his clothes were stripped off, he was handcuffed, and hanged on two chairs by Officer Mushi and another officer whom he did not recall. They assaulted him and took him to another room. Officer Mushi took a written paper, the contents of which were foreign to him, and he was forced to sign it – which he did. He was given his underwear and taken back to the lock-up.

He stayed at the police station until the 2nd day of October, 2020, when he was arraigned before the court. DW1 did not recall the police officers who arrested him. He denied knowing anything about "sungusungu" or being a member of "sungusungu," claiming he was already old at 75 years. He also denied drinking or selling any local brew.

After the deceased body was found, the village chairperson spread the news, and the villagers gathered. He participated in the burial service. DW1 prayed to this court to be acquitted of his offence.

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Responding to cross-examination, he admitted to not having told the court where he was on the 2nd day of September, 2020, at 22:00 hrs. He also never mentioned anything with respect to Amini Maslimu, Anderson Lubeleje, Mande Ulinje, and George Kaonwa. He also denied knowing Elia Lendama. He further responded that he was arrested on the 26th day of September, 2020, in the morning hours.

He admitted to having stated before the court that he was beaten by the police; however, he did not report it to the magistrate when he was arraigned. He did not receive any medical treatment while at the police station. He further maintained that he was forced to sign documents on various occasions. However, he did not know where the police got his details.

Another defence witness, **Manda Ulinje, DW2**, a resident of Kazingumu, testified that on the 26th day of September, 2020 at morning hours, he went to Kibaya police station to bail out his relative one Samwel Chidogoe @Simambwaa. To his dismay, he was arrested on Murder allegation.

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On the 12th day of September, 2020, while at Kazingumu area, the body of the deceased was found. On the same day, Haridi Chubi, Samwel Masambwaa and others were arrested from the village.

Again, on the 26th day of September, 2020, as he was still at the police station, he was told to take off his shoes, then the police started to assault him everywhere. He was then locked inside a room and police officer Oscar informed him he was suspected to have been involved in the killing, he denied to know the allegation.

They continued to beat him with a club, compelling him to confess to the murder. The beating continued, until he fell down. Then officer Oscar took some papers and forced him to sign them, but he maintained his innocence. He was taken back to the lock-up, on the next day, the torture continued as officer Oscar went to take him with a black gun, still DW2 claimed that he refused to sign them. He was beaten up and threatened with a gun, but he still refused to sign the papers.

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DW2 went on stating that, officer Oscar took him to the hospital the next day where he got the treatment and he was issued with PF3, which was kept by police. He maintains that he was not involved with the murder and prayed to be acquitted by this court.

Responding to cross examination, he admitted to have not told the court on his whereabouts on the 2nd day of September, 2020. However, on the 12th day of September, 2020, he participated in digging the grave, although he did not know who had died. Dw2 did not report to the court on his allegation of being assaulted, on the day he arraigned, nor did he report anywhere that he was beaten. Though Oscar testified that he gave his statement voluntarily, he did not cross examine him on the same.

Third one being **Amin Maslimu**, as **DW3**, a resident of Kazingumu, testified that on the 12th day of September, 2020, while he was at Mbalambogo area, the rumours spread saying that the dead body had been found in the bush. He did not know who died and did not go to the scene.

Then on the 19th day of September, 2020 at 15:00hrs, while sleeping at his home, the police officers arrived and they arrested him together with his uncle, one Yared Zabron and his father one Maslimu Maslimu.



They stayed at police station until the 2nd day of October 2020 where they were arraigned at Kiteto District Court for the offence of Murder of one Mbaazi Njukuti. DW3 denied to know other suspects; claiming he came to know them after the reading of the charge.

He also denied to have been a "sungusungu", commit the offence, or know the deceased. He also denied to have any involvement with the mobile phone, which he claimed to have seen before this court for the first time. He therefore prayed this court to find him innocent and acquit him.

Responding to cross examination, he replied that he did not state where he was on the night of the 2nd September, 2020.

There was also **George Kaonwa**, as **DW4**, a resident of Kazingumu testified that on the 20th day of September 2020 at 11:00hrs, while he was at his house in Kazingumu, a police officer went to arrest him and took him to Kiteto Police Station. He remained at the police station until the 2nd day of October 2020 when he was taken to court.

He denied being a member of the "sungusungu" group, stating that he had only heard about the group during this court proceeding.



Furthermore, he asserted that he was framed with the murder case in an attempt to discredit him. He denied knowing Njukuti Mbaazi and prayed to be acquitted of the allegation.

In response to cross-examination, he stated that he did not know the time they arrived at the police station. Additionally, he could not recall the date the offence was committed. Furthermore, he expressed ignorance about who had killed the deceased and did not know their name. He mentioned that he became aware of the other accused persons when they were brought before the court.

Yasini Ally Issa, as **DW5**, a resident of Kazingumu testified that on the 20th day of September 2020 at 07:00hrs, while he was at his house in Kazingumu, Halidi Chubi's wife approached him, asking for a ride on his motorcycle to Kiteto Police Station. Upon arrival at the police station and inquiring about Halidi Chubi, they were arrested and detained in a lockup, where he encountered other accused persons. They remained at the police station until the 2nd day of October 2020 when they were brought to court.

In response to cross-examination, he stated that he could not recall his whereabouts on the 2nd day of September 2020. Furthermore,



when further questioned, he asserted that he did not know the other accused persons prior to this case, and therefore they could not have conspired against him in relation to this matter.

Lameck Paulo Mtuka, identified as **DW6** and a resident of Langtomon, testified that on the 29th day of September 2020 at 06:00hrs, while he was at his house, Mzee Samwel Mgomelwa informed him that his father had been arrested and that the police vehicle was still parked at the bus stand. Upon inquiring at the police station about his father, he was arrested and taken to Kibaya Police Station, where they were both detained in a lockup.

At the police station, officers took Samwel away, and upon his return, he was only wearing his underwear, holding his clothes in his hands, crying, and having difficulty walking. When questioned about his condition, Samwel revealed that he had been severely beaten. They remained at the police station until the 2nd day of October 2020 when they were taken to court and had charges read to them.

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DW6 denied the allegations against him, claiming that he was framed by greedy police officers seeking bribes from Maasai people to dispossess them of their land. He emphasized that he was not a member of the "sungusungu" and asserted there was no such group in their village.

During cross-examination, DW6 stated that Samwel Mgomelwa is a brother to his mother and that he had never quarreled with him before. He denied being beaten at the police station and claimed not to know the individuals mentioned in connection with the case.

Elia Lendama, identified as **DW7** and a resident of Kazingumu, testified that on the 25th day of September 2020, during the night, while at his house, police officers arrived and arrested him. He was then taken to the police station. The next day, he was taken to a room referred to as the garage or interrogation room, where he sustained injuries to his leg and lost teeth. He denied allegations of killing anyone in the valley.

DW7 described being forced to undress, handcuffed on the legs and hands, and tied with a rope between two chairs while being beaten all over his body. He claimed that he was coerced into signing papers by a female police officer after denying to do so repeatedly.



He was then sent back to the lockup.

It wasn't until the 2nd day of October 2020 that he was brought before the court on murder charges, where he became aware of the other accused persons.

Under cross-examination, DW7 maintained that he was never taken to a hospital or made any reports about the beatings. He denied confessing to killing Njukuti @Mbaazi and claimed he never requested medical treatment despite being promised it. He insisted that he was not allowed to speak when arraigned before the court and that he did not know the police officer who tortured him. He also asserted that he had no prior quarrels with the other accused persons

Andason Chuyo Lubereje, as **DW8**, a resident of Kazingumu testified that on the 2nd day of September 2020, he was at his house in Kazingumu. However, on the 26th day of September 2020, at 05:00hrs, he was arrested by police officers at his house and taken to Kiteto Police Station. He was kept in a lockup for some time before being transferred to another room, where he was asked to undress.

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He further stated that his legs were cuffed, and the police placed a large pole between his legs and hands. They then suspended him and began beating him while he was naked. When it became apparent that DW8 was not cooperating, they resorted to attaching a cable to an electric socket and connecting it to his scrotum. He recounted that they stopped after he defecated on himself. Subsequently, he agreed to sign some papers to end the torture.

On the 2nd day of October 2020, he was brought before the court, charged with murder. He denied any involvement in the murder and prayed to be acquitted by the court.

During cross-examination, DW8 stated that he had left his medical reports at the police station. He maintained that on the 2nd day of September 2020, at 22:00hrs, he was at home. However, he admitted to not disclosing anything about his family background. When further questioned, he stated that he could not recall the day he was tortured and that he signed the papers while in pain.

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Ramadhani Idd Bakari, testifying as **DW9** and also a resident of Kazingumu, stated that on the 26th day of September 2020, between 02:00hrs and 03:00hrs, he was arrested by police officers at his house. He was handcuffed, blindfolded, and taken to Kiteto Police Station.

He was initially detained in a lockup then he was taken to another room, where he was interrogated about the allegation of murder of Mbaazi Njukuti. He denied the accusation. DW9 stated he was stripped naked, handcuffed, and suspended with a rope. Also, claimed he was stuffed with the piece of mattress into his mouth. Despite enduring torture, he maintained his innocence and stated that he had never been a member of the "sungusungu" group.

He recalled nothing of significant to what had happened on the 2nd day of October 2020 and professed ignorance about the murder, praying to be acquitted by this court.

During cross-examination, he acknowledged discrepancies between his previous statements in April and his testimony before the court. He denied providing any information about his family background. He also mentioned sustaining wounds on his head and genitalia from the torture,



but did not provide any documentation regarding his treatment. He claimed to be unaware of the whereabouts of his medical documents, concluding the defence evidence.

That marked the end of the defence's side. The parties opted not to make final submissions and left it to this court to determine the verdict of the accused person.

Now, the issue before this court is whether the prosecution has discharged its burden of proof beyond reasonable doubt regarding the charge of murder against the accused persons.

For the prosecution to successfully prove its case, it must demonstrate through the weight of evidence that the accused person committed the offence charged, as provided under Section 3 (2) (a) and 110 (1) of the Evidence Act, Cap 6, R.E 2019.

In discharging this onus, the prosecution must successfully prove the three elements of the offence of murder in accordance with Section 196 of the Penal Code, namely;

- i) That there is death of a person



- ii) That death was caused by an unlawful act or omission
- iii) That in causing death the accused acted with malice aforethought.

These ingredients will be tested each with the available evidence to establish as to whether the prosecution has discharged its burden of proof beyond reasonable doubts.

To begin with the first element which requires to determine whether there was the death of the deceased Njokuti s/o Moringe @ Mbaazi. In establishing death of the deceased, both sides are in agreement that the deceased's body was discovered on the 12th day of September, 2020 as depicted in exhibit P3.

The death of the deceased was also proved by PW1 the doctor who examined the body, there was also PW2 the relative of the deceased who identified the body. Again, other village leaders like PW3 and PW4 they saw the deceased body. Therefore, the death has been proved as one of the elements of the offence.

Another element is that the death was caused by an unlawful act or omission. The provision of section 203(b) of the Penal Code provides that,



the person is deemed to have caused the death of another person, although his act is not the immediate cause of death. This can be done by inflicting bodily injury on another which would not have caused death if the injured person was submitted to proper surgical or medical treatment.

From the evidence of both sides, it has also not been in dispute that the deceased Njokuti s/o Moringe @ Mbaazi died unnatural death. As his body was found with fresh wounds caused by sharp object and that his skull was opened. The same is amplified by exhibit P1 and PW1's testimony that the cause of death was excessive bleeding secondary to traumatic brain injury.

Another element that needs to be proved is that the death was caused by an unlawful act or omission. The provision of section 196 of the Penal Code, provides;

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

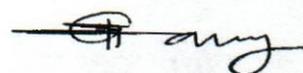
The evidence, as revealed by both sides, indicates that PW1 stated and Exh. P1 showed that the body of the deceased was found with fresh wounds



and a cut skull, indicating that the death was not from natural causes, as established in the second element above. Therefore, the cause of death was due to an unlawful act committed against the deceased person. Consequently, this court is tasked with determining who committed the murder of the deceased.

According to the evidence presented by the prosecution side, it is stated that after the body of the deceased was recovered from the temporarily hidden grave, the investigation of the case commenced, leading to the arrest of the accused persons present before this court. PW2, the investigator of the case, stated that after the death was reported and some of the suspects were arrested, they confessed before the police and before the justice of the peace to have committed the offence.

This evidence was supported by PW7, PW8, and PW9, who recorded the cautioned statements of the 1st, 2nd, and 4th accused persons who confessed to committing the offence of murder and mentioned other accused persons as their accomplices in the commission of the said murder.

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Additionally, DW4's confession led to the recovery of the mobile phone used by the deceased, which was identified by his relative PW3. However, the said mobile phone had no SIM card or battery and its cover.

All the accused persons, in their defence, denied committing the alleged offence. However, they admitted to having known or heard about the unusual death suffered by the deceased. Those who were said to have confessed to the commission of the crime maintained their innocence, stating that they were forced to sign papers whose contents they did not know after being brutally battered.

Confronted with akin situation, in the case of **Mohamed Said Matula v. Republic** [1995] TLR, 3 the court had this to say;

*"Upon a charge of murder being preferred, **the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused; the onus never shifts** away from the prosecution and **no duty is cast on the appellant to establish his innocence.**"* [Empasis supplied].

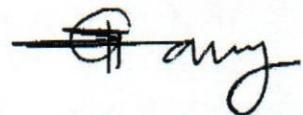


Then, the pertinent questions to be resolved from the foregoing provisions, are; whether the accused persons jointly and together cause the death of Njuguti s/o Moringe @ Mbaazi and if the first question is answered in affirmative, whether the accused persons possessed malice aforethought at the time of the attack on the deceased.

I will address the two issues above together in determining if the prosecution side has the proved the offence of the accused persons they stood charged.

However, regarding this issue, it is clear that the evidence available is based on circumstantial evidence and the confessions of the accused persons incriminating one another. There is no witness attested to have witnessed the alleged heinous incident being committed.

Guided in the principle stated in the case of **Mathias Bundala v. Republic**, Criminal Appeal No. 62 of 2004 (unreported) the Court of Appeal of Tanzania held that;

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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.

The emphasis was also stressed in the case of **Alkadi Willium @ Supa v. Republic**, Court of Appeal of Tanzania, Criminal Appeal No. 188 of 2005 (Unreported) it stated;

*...to justify a conviction on circumstantial evidence, the **inculpatory facts must be incompatible with the innocence** of the accused and incapable of explanation upon any other reasonable hypothesis than guilt of the accused".*

[Empasis added].

In dealing with circumstantial evidence, the evidence must be tested to ascertain whether it leads to proving the offence, the case of **Samson Daniel v. Republic**. (1934) 1 EACA 154, it was held that;

*"And in dealing with circumstantial evidence, **each link in the***



chain must be carefully tested and, if in the end, it does not lead to the irresistible conclusion of the accused's guilt, the whole chain must be rejected". [Emphasis added].

The jurisprudence of the court went further to establish conditions to be fulfilled when dealing with circumstantial evidence, as held in **Bahati Makeja v. Republic**, Criminal Appeal No. 118 of 2006 Court of Appeal of Tanzania at Mwanza (Unreported), where the following conditions were stated;

1. *"The circumstances from which the inference of guilt is sought to be drawn must be **cogently and firmly established**,*
2. *Those circumstances should be of a definite tendency unerringly **pointing towards the guilt of the accused person**,*
3. *The circumstances **taken cumulatively should form a chain so, complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused person and no one else, and***



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

Indeed, the prosecution presented four substantial pieces of evidence to connect the accused persons with the offence of murder. Firstly, cautioned statements (confessional statements) of the 1st, 2nd, 3rd, 8th, and 9th accused, incriminating other accused persons. Secondly, a mobile phone handset – an Itel model in blue and black colors alleged to belong to the deceased person – that was claimed to be found in possession of the 4th accused person, implying the doctrine of recent possession. Thirdly, an oral confession by the 4th accused person to the justice of peace.

To begin with evidence on confession of the 1st, 2nd, 3rd, 8th and 9th accused, it was revealed by the prosecution side that the said accused persons confessed in their cautioned statements (exhibits P4, P5, P8, P7, and P6, respectively) made at the police station.



I take notice that this court had already decided the 1st, 2nd and the 9th accused gave their statements as free agents, that the statement by the 3rd accused was admitted without objections, and that the recording of the statement of the 8th accused complied with the certification requirement as per the law.

Regarding the confessions made by the 1st, 2nd, and 9th accused, their statements in the cautioned statements require further scrutiny before attaching any weight to them. As it was held in the case of **Nyerere Nyague v. Republic** (Criminal Appeal Case 67 of 2010) 2012 TZCA 103 (21 May 2012), the court 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)...

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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."

Upon reviewing exhibits P4, P5, and P6, and considering the aforementioned legal standpoint, I conclude that these three statements have transitioned from mere cautioned statements to actual confessions regarding the commission of the offence of murder by the 1st, 2nd, and 9th accused persons.

The rationale behind this conclusion is two fold. Firstly, these cautioned statements were recorded in accordance with the law. Secondly, the testimonies of PW7, PW8, and PW9 confirm that the recorded statements accurately reflect what was conveyed by the 1st, 2nd, and 9th accused, respectively. The weight attributed to their testimonies is substantial and credible. This is in line with the precedent set forth in **Goodluck Kyando v. Republic**, Criminal Appeal No. 118 of 2003 (unreported), wherein it was observed that

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“. . . 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.” [Emphasis added].

Their cautioned statements contain personal details of the accused individuals which could only have been provided by the accused themselves.

Also, their statements share common information, such as the 1st accused being identified as the leader of the local militia group, commonly known as “sungusungu,” at the hamlet level.

Another shared fact is that on the 2nd day of September, 2020, the 1st, 2nd, and 9th accused, along with others, convened at their leader’s home, where they were instructed by the 1st accused to confront the deceased, Mbaazi. All parties confessed to participating in the aggressive assault that resulted in the victim's demise. Notably, the 1st accused stated in his statement that:

“...waliondoka na kumuacha Mbaazi... pale kwangu akiwa analeta fujo.....nikaamua kumpigia simu Lameck s/o Paulo....na kwa kuwa mimi ndie mwenyekiti wa sungusungu wa kitongoji cha Kazingumu walifika kwa haraka na kumchukua yule Mbaazi... mimi nlikuwa nyuma nawafuatilia....vijana wa sungusungu....ambao ni Lameck

Mtuka, Yassin Ali, Anderson Chiuyo, Elia Lendama, George Kaonwa, Amin Maslimu na Ramadhani ndipo walianza kumshambulia na niliona Ramadhani akimpiga na nondo kichwani akimpiga mara mbili na wengine kumpiga kwa kutumia fimbo...alidondoka tukaamua kumuangalia vizuri tukagundua kuwa amefariki..tulimpekua na Ramadhani alichukua pesa Tshs. 20,000/= na kuamua tugawane pesa hizo...amani maslimu yeye alichukua simu...mimi nikawaambia waende nyumbani wakachukue majembe tuchimbe shimo tumzikie... ndipo kwa kutumia Kamba tulimfunga shingoni"

Additionally, in the cautioned statement of the 2nd accused, it is noted that he stated;

"mimi nikiwa kama sungusungu wa Kijiji cha kazingumu...tulikutana... Na kamanda wetu Samwel Mgomelo...., Lameck Mtuka@ Surambaya, Manda s/o?. Amin s/o Maslimu, Yasin s/o Mgumu, George s/o Kaonwa, Elia s/o Lendama, Anderson Chuyo wengine...kamanda wetu alitueleza kuwa..Mbaazi ni Mwizi wa mifugo hivyo anataka tukamuonye..alitukabidhi na kutaka twende kumfundisha adabu na tuliongozana na kamanda na tulianza kumpiga masai yule mimi nilikuwa na fimbo Pamoja na wenzangu..tulimshambulia mtu yule hadi alipodondoka chini...na alikuwa ameshakufa.... Lameck..alimchoma na bisibisi kwenye jicho...baada ya kuona amefariki tulipanga

tumzike....amini Maslimu alitoa Kamba aliyokuwa nayo na kumfunga marehemu shingoni ili kumbeba Kwenda kumfukia."

Furthermore, in the cautioned statement of the 9th accused, he was quoted as stating the following:

"..sungusungu wenzangu ambao ni Rameck s/o Mtuka, Amin Maslimu, Ramadhani Idd, Manda Ulinje, Yassin Ally, George Kaonwa Elia Lendama tuliitwa na kamanda wetu wa sungusungu aitwaye Damwel Mgomelwa nyumbani kwake... inatakiwa apigwe kwani inaonekana ni Mwizi wa Mbuzi.... Samwel Mgomelwa alitoa amri ya kumkamata Mbaazi na kutuambia tumpeleke bondeni na kummaliza....wakati tunampiga mimi nilikuwa na fimbo na nilimpiga mgongoni... baada ya kuona Mbaazi amekufa mimi nilikimbia..",

Gathering evidence from their cautioned statements, it is evident that they provided a detailed account of what truly occurred on the fateful night. This is further corroborated by the prosecution's evidence regarding the date of the offence, the reasons for the suspects' arrest by the investigators (PW2 and PW5), and the accused persons' admission to their involvement in the killing of the deceased.



Not only did the accused persons admit to committing the offence, but they also implicated other assailants, with their cautioned statements mutually supporting one another.

The court also considered the accused persons' claims of being forced into making their cautioned statements under duress. However, the court found no grounds to doubt the veracity of their admissions, as affirmed in the case of **Stephen Jason and Others v. Republic**, Criminal Appeal No. 79 Furthermore, despite the accused persons' denials, their defence failed to sufficiently challenge the prosecution's evidence.

In light of these circumstances, I am convinced that the 1st, 2nd, and 9th accused persons were among the assailants responsible for the death of Njokuti Moringe Mbaazi.

Regarding the 3rd accused, the court acknowledges that the prosecution successfully demonstrated beyond a reasonable doubt that the 3rd accused admitted to participating in the killing of the deceased. In his statement, he stated the following

"nakumbuka usiku wa tarehe 02/09/2020 majira ya saa 22:00 hivi nilikuja kuitwa na sungusungu kwa majina ni Lameck s/o ?, Yusufu s/o ?, Amos s/o Waja, John s/o Masanja, Leonard Ndorobo, Mchiwa s/o?, Daniel s/o ? na walinambia twende kwenye doria palepale kijijini,tukaanza kumpiga na

alianza kumpiga Ramadhani s/o? kwa kutumia nondo sehemu za kichwani.. na wengine ni Lameck alimpiga mtama akaanguka alimpiga fimbo....tukaendelea kumshambulia na mimi nilikuwa na fimbo....baada tulitawanyika....kuna kundi liliondoka namarehemu na sisi wengine tukaamuriwa tuendeleo na doria.....baada ya siku kama tatu hivi walikuja wamasai na kudai kwa kamanda ambaye ni Samwel Mgomera kuwa kuwa kazi aliyofanya ni nzuri kwani yule marehemu alikuwa ameshatuchosha..... tukiwa kwenye doria tulifika kwa mwenyekiti wa sungusungu...na kutuambia kuwa kuna mmasai...kwamba huyo mmasai ni mwizi wa ngómbe na mbuzi..na kusema kuwa ni msumbufu pale kijijini na kusema tummalize, ndivyo hivyo akaagiza kuwa tumuue..."

It is evident that in this statement, the 3rd accused admits to his participation in the killing of the deceased. Moreover, his name was mentioned in the statements of the 2nd and 9th accused as being among the accomplices in the crime that resulted in the death of Mbaazi.

The defence attempted to challenge the credibility of the prosecution witnesses regarding the recording of the statement; however, such attempts are weak and clearly an afterthought.



Since the statement of the 3rd accused person was admitted without objection, he is now barred from contradicting it thereafter. This rule was established in the case of **Shihoze Seni and another v. Republic** [1992] TLR. 330 and **Juma Kaulule v. Republic** Criminal Appeal No. 281 of 2006 (unreported).

I find PW11 to be a credible witness, especially concerning Exhibit P8. Therefore, there is sufficient evidence to support that the 3rd accused committed the offence in the company of other accused persons and caused the death of Njokuti Moringe Mbaazi.

As for the 8th accused, although his statement was objected to, it was admitted within the purview of Section 169 of the CPA. Upon reviewing the said statement and considering PW10's testimony, I am firmly convinced that PW10 is a credible witness who accurately testified that the 8th accused confessed to killing the deceased, and that the accused made the statement voluntarily.

Additionally, his name was mentioned in the statements of the 1st, 2nd, and 9th accused as being among the assailants. Despite the defence counsel's attempt to question her credibility regarding the recording of Exhibit P7, it is evident that her testimony remained reliable, confirming that what she

recorded were the actual words of the 8th accused. Furthermore, his statement was never objected to under the provisions of section 27 (1) of the Evidence Act. Considering his narrative of what occurred on the fateful night, he stated

"nilisikia filimbi....nikiwa mwenyewe nilifika hapo nyumbani.....niliwakuta Rama, Lameck, Manda, Yasini na wengine....pia nilimkuta mwenye nyumba Samwel s/o Mgomelwa.....tulikuta kelele za Masai anayejulikana kwa jina la Mbaazi akiwa amelewa pombe ya kienyeji aina ya Kangala ambayo inauzwa hapo hapo nyumbani kwa kiongozi wetu wa sungusungu....baadhi ya sungusungu nikiwemo mimi Rama, Yasin, Amini, George, Manda, Lameck....tukaanza kumsukuma masai....tulianza kumpiga ili aondoke..ambapo mimi nilimpiga kwa kutumia fimbo kwenye mgongo na Ramadhani alimpiga kwa kutumia nondo kichwani na akaanguka moja kwa moja na alimrudishia tena nondo ya utosini na damu ikaanza kumwagika chini tena nyingi...tukagundua kuwa amefariki...tukamfunga shingoni kwa sababu alikuwa mtu mnene na mfupi pia damu nyingi ilimwagika ndipo alifungwa shingoni tukaanza kumburuza....kisha tukamweka kwenye shimo na kumfukia."



In this circumstance, it can be said without the shadow of doubt that the 8th accused person was among the assailants who caused the death of Njokuti Moringe Mbaazi.

Regarding the 4th accused person, the prosecution side relied on Exh. P2, a mobile phone handset, suspected to be the personal belonging of the deceased and that the same was recovered from the premises belonging to the said accused. It was further stated that, the 4th accused person he voluntarily led to the discovery of the said phone as led by PW2 in a company of PW3, PW4 and PW5, where he admitted to have taken the handset from the deceased after they murdered him.

This evidence lacked reliability in connection to the commission of crime since the mobile phone was without the battery with specific Imei number, Sim card or any other special receipt or evidence from mobile service providers company that would have identified Exh. P2 to belong to the deceased.

In the circumstances of this case the court cannot easily invoke the doctrine of recent possession. As it was held by the Court of Appeal for Eastern Africa in the case of **Rex v. Bakari s/o Abdulla** [1949] 16 EACA



84 held that the doctrine of recent possession can extend to any offence incidental to or connected with stealing including murder by observing that;

"That cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or of breaking and entering but of murder as well, and if all the circumstances of a case point to no other reasonable conclusion the presumption can extend to any charge however penal."

The doubts surrounding the identification of Exh. P2 were crucial, as they do not establish ownership or proof by the deceased. Therefore, I accord no weight to it in proving the offence.

However, the confession of the accused person regarding the commission of the offence is sufficient in itself to secure a conviction against the accused. In this regard, refer to the case of **Director of Public Prosecutions v. Nuru Mohamed Gulamrasul** [1988] TLR 82. Also, see the case of **Martin Manguku v. Republic**, Criminal Appeal No. 194 of 2004 (unreported), where the Court emphasized that such an oral confession would only be valid



if the suspect was a free agent when uttering the words attributed to him. Additionally, refer to **Posolo Wilson @Mwalyego v. Republic**, Criminal Appeal No. 613 of 2015 (unreported).

The testimonies of PW2, PW3, PW4, and PW5 clearly indicate that when the 4th accused made his statement, he did so as a free agent, as he also confessed before prosecution witnesses, his wife, and his mother when the police led him to his house. This evidence was never challenged by the prosecution. Therefore, I conclude that the 4th accused was among the assailants who participated in the killing of the deceased, Njukuti Moringe Mbaazi.

However, some evidence presented during the trial was disjointed. For instance, while Exh. P3 states that the offence was committed at Partimbo village, the charge indicates that the murder incident occurred at Laalaa village. Nevertheless, I consider this discrepancy to be minor and non-fatal, as the entirety of the evidence and documents tendered does not support the commission of the offence.

Additionally, the fact that during the trial PW3 identified the 5th accused as the 4th accused did not diminish the quality of his



testimony. Errors are inherent to human nature – I find it reasonable to accept that his mistake was made innocently, and I see no compelling reason to doubt the witness.

Turning back to the 5th, 6th, and 7th accused persons, the only evidence attempting to link them to the killing of the deceased comes from the confessional statements of other accused persons. Mindful of the provisions of section 33 (2) of the Law of Evidence Act, which states verbatim

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

The same sentiment was echoed in the decision of **Abubakari Issa @ Mnyamba v. 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



the 5th, 6th, and 7th accused persons, apart from the confessional statements of the co-accused.

Having established that the 1st, 2nd, 3rd, 4th, 8th, and the 9th accused persons killed the deceased persons, it is incumbent at this stage to examine the evidence tendered by the prosecution side to determine if the element of malice aforethought has been proven under section 200 of the Penal Code.

As the law provides on the circumstances that the intent to kill can be established, including the intention to cause death. This was categorically stated in the case of **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994, Court of Appeal of Tanzania, (unreported), where the Court held 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:

- (G)** *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]

It goes without saying that in the case at hand, the assailants intended to kill the deceased, as evidenced by the statement of the 3rd accused, who revealed that the 1st accused ordered them to kill the deceased for allegedly being a cattle thief. This intention to kill, demonstrating malice aforethought, was further corroborated by the statement of the 9th accused.

The vicious attack on the deceased's head, including the repeated use of an iron bar, was clearly calculated to result in the deceased's death. The assailants were fully aware of the consequences of their actions. In an attempt to conceal their heinous conduct, the accused persons collectively decided to dispose of the deceased's body to evade justice.

As previously articulated, I am confident that the circumstances inferring the guilt of the 1st, 2nd, 3rd, 4th, 8th, and 9th accused persons have been firmly and cogently established. The cumulative circumstances form a compelling and irrefutable conclusion pointing to the guilt of the mentioned accused persons and no other conclusion. The prosecution has therefore successfully

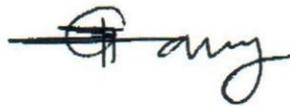


discharged its duty of proving guilt beyond a reasonable doubt, while the defence failed to undermine the veracity of the prosecution's evidence.

Therefore, I find the 1st, 2nd, 3rd, 4th, 8th, and 9th accused persons (Samwel Mgomelwa @ Petro, Ramadhani Idd @ Bakari, Manda Ulinje @ Mombo, Amini Masilimu @ Zabloni, Elia Lendama, and Andason Chuyo @ Lubereje, respectively) guilty of the offence of murder, contrary to sections 196 and 197 of the Penal Code, and I hereby convict each of them accordingly.

On the other hand, I find George Kaonwa @ Mtagwa, Yasin Ally @ Issa, and Lameck Paulo @ Mtuko (the 5th, 6th, and 7th accused persons) not guilty of the charged offence of murder, and I hereby acquit them accordingly. I also order their immediate release from custody, unless they are detained by lawful order.

It is ordered accordingly



**G.N BARTHY
JUDGE
5/3/2024**

SENTENCE

Once a person is convicted of the offence of murder under section 196 of the Penal Code Cap 16 R: E 2019, now 2022, the law provides for only one sentence, which is death by hanging. By virtue of section 197 of the Penal Code, I hereby sentence the accused persons, Samwel Mgomelwa @ Petro, Ramadhani Idd @ Bakari, Manda Ulinje @ Mombo, Amini Masilimu @ Zabloni, Elia Lendama, and Andason Chuyo @ Lubereje, to death; and in terms of section 26(1) of the Penal Code and section 322 (2) of the Criminal Procedure Act, Cap 20 R: E 2019, now 2022, I hereby direct that the accused shall suffer death by hanging. It is so ordered.



G.N. BARTHY
JUDGE
5/3/2024

Right of appeal is fully explained.



G.N. BARTHY
JUDGE
5/3/2024

