

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOB A SUB-REGISTRY

SITTING AT BIHARAMULO

CRIMINAL SESSIONS CASE NO. 102/2022

REPUBLIC

VERSUS

PHILBART S/O MUKARU@ WHITE.....1ST ACCUSED

LAMECK S/O TWINOMKAMA MARTINE.....2ND ACCUSED

JUDGMENT

27/07/2024 & 09/03/2024
E. L. NGIGWANA, J.

On 12th day of July 2020, Clavery Joseph@Kamongo, who was a motorcyclist (Bodaboda), went missing and as a result, his colleagues reported to the Village authorities and finally to Bukoba Police station. Search was conducted whereby on 29/07/2020, his body was found laying face down in a small river at Rwamurumba area. The deceased's neck was tightly tied by a black wire. At the time of recovering the deceased's body, it was realized that his motorcycle and his mobile phone were missing.

The investigation commenced and as a result, the accused persons were arrested in connection of the incident and finally charged for Murder contrary

contrary to sections 196 and 197 of the Penal Code, [Cap 16 R: E 2019] now [Cap. 16 R.E 2022].

It was alleged that the accused persons on 12th day of July 2020, at Butaibaga Village within Bukoba District did murder one Clavery s/o Joseph@Kamongo. The accused persons denied the allegations.

In a bid to establish and prove criminality against the accused persons, the prosecution paraded twelve (12) witnesses namely; Athumani Ally (PW1), Salvatory Medhod (PW2), A/Inspector Juma Hassan (PW3), Wilson Rwekamwa (PW4), Florence Theonest (PW5), Devotha Venant (PW6), H3703 D/C Eliapenda (PW7), Jamir Jamal (PW8), Augustine Michael Ndyamukama (PW9), WP 5939 D/CP Eva (PW10), Ramadhani Kassim (PW11) and Simon Julius Mwika (PW12), and tendered thirteen (13) exhibits including two certificates of seizure (Exhibit P1 & P6), motorcycle with Registration No. MC 192 BGC Bajaji Boxer (Exhibit P4), Motorcycle rental agreement (Exhibit P5), Phone/handset make Tecno with IMEI number 353010104935240 (Exhibit P7), two CDRs (Exhibit P8 & P9), One affidavit (Exhibit P10), and two confessional statements (Exhibits P12 & P13)

On their part, the accused persons defended themselves under oath as DW1 and DW2 respectively and tendered no exhibits. After the closure of the

defence case, parties prayed to file their final written submissions, the prayer which was duly granted.

At the hearing of this case, the Republic was represented by Ms. Edith Tuka, Mr. Amani Kyando and Mr. Elias Subi learned State Attorneys whereas the 1st accused person enjoyed the service of Mr. King Manase; learned Advocate and the 2nd accused person enjoyed the service of Ms. Ester Sentozi, learned advocate. My Law Assistant was Hon. E. M.Kamaleki.

It is a cardinal principle that in criminal cases, Murder being among them, the burden of proof lies on the prosecution and the standard of proof as per section 3 (2) (a) of the Evidence Act, [Cap.6 R.E 2022] is beyond reasonable doubt. The section 3 (2) (a) of the Act, provides that;

"A fact is said to have been proved in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists"

This standard was insisted in the case of **Furaha Michael versus Republic**, Criminal Appeal No. 326 of 2010 (Unreported) where the Court of Appeal had this to say;

"The cardinal principle in criminal cases places on the shoulders of the prosecution the burden of proving the guilt of the accused beyond all reasonable doubt".

Similarly, in the land mark case of **Jonas Nkize v.R [1992] TLR 213** this court through Katiti, J. (as he then was) had this to say on the standard of proof in criminal cases;

"The general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our law, and forgetting or Ignoring it is unforgivable, and is a peril not worth taking".

It is worth noting that the onus never shifts away from the prosecution and no duty is cast on the accused person to establish his or her innocence. The accused only needs to raise some reasonable doubt on the prosecution case. See **Said Hemed versus Republic** [1986] TLR 117, and **Pascal Yoya@Maganga versus Republic**, Criminal Appeal No.248 of 2017 CAT (Unreported).

In a charge of murder like the one in the instant case, it is trite that the prosecution is required to prove beyond reasonable doubt all the ingredients

of murder in order to win a conviction thereof. See **Anthony Kinanila and Another versus Republic**, Criminal Appeal No.83 of 2021 CAT (Unreported).

The ingredients which] the prosecution must prove beyond reasonable doubt are; **Firstly**, the death of the deceased. **Secondly**, that the death was unnatural. **Thirdly**, that the accused person directly or indirectly took part in the commission of the murder. **Fourthly**; that the killing was actuated by malice aforethought and **fifthly**; where the charge/information involves more than one accused like in the case at hand, whether there was common intention.

In that respect, the major issues in the instant case are therefore, five as follows;

- 1. Whether deceased namely; Clavery s/o Joseph@Kamongo died.*
- 2. Whether his death was unnatural.*
- 3. Whether the accused persons directly or indirectly took part in the commission of the murder.*
- 4. Whether the killing was actuated by malice aforethought.*

5. Whether there was common intention among the accused persons to execute an unlawful purpose.

1st & 2nd issues.

Basically, death may be proved by production of the postmortem Report or evidences of witnesses who state that they knew the accused and attended the burial or, evidences of the persons who saw the dead body or by circumstantial evidence. See **Seif Selemani versus Republic**, Criminal Appeal No. 130 of 2005, **Mwale Mwansanu versus The Director of Public Prosecutions**, Criminal Appeal No.105 of 2018 CAT (Both unreported) and **Mugisha Katulebe nad 5 others**, Criminal Sessions Case No. 126 of 2016 HC-Bukoba (Unreported). Below is the summary of the evidence adduced before this court in relation to the 1st and 2nd issues.

PW1 Athumani s/o Ally who was the deceased's Land lord, testified that on 29/07/2020, he arrived at the crime scene whereas he and other people, who were searching for the body identified it to be one of Clavery Joseph. He added the deceased's neck was tightly tied by a black wire However; PW1 did not describe the deceased's type of clothes and their colors.

PW2 Salvatory Medhod testified that as a Chairman of Kizigo Hamlet close to the scene of crime, he arrived at the crime scene and saw the dead body of a male person which was identified to be of one Clavery Joseph@Kamongo.

He added that the deceased's neck was tightly tied by a black wire. It was his further evidence that the deceased body was naked on the chest and abdomen, and the trousers were below the knees.

PW5 Florence Theonest who is a leader of Motorcyclists testified that he knew through the Chairman of Iskira Hamlet Mr. Twaha Dauda that Clavery Joseph went missing since 12/07/2020; therefore, they started searching him since he was their colleague.

PW5 added that, on 29/07/2020, they found the body of Clavery Joseph laid face down in the river at Rwamrumba area. It was PW5's further evidence that the deceased's neck was tightly tied by a black wire.

PW5 added that, after postmortem examination, the body was handed over to them for burial, and they buried the body at Isikira Hamlet in the Ward of Kanyangereko within Bukoba Rural.

PW6 Devotha Venant who introduced herself as the deceased's wife told this court that she visited at the place where deceased's body was found,

whereby she saw the body and identified as that of her husband Clavery Joseph@ Kamongo.

PW6 further testified that she saw a black wire which was tightly tied on the deceased's neck. It is her further evidence that after postmortem examination, the police handed over the body to them for burial, and they buried the body at Isikira Hamlet in the Ward of Kanyangereko within Bukoba Rural. She described the deceased's clothes as red t-shirt and black trousers make jeans.

PW9 Augustine Michael Ndyamukama who is a medical practitioner testified to have on 29/07/2020, performed postmortem examination on the body Clavery Joseph. He added that the body was identified by the by the deceased's wife and other since people were many.

He added that the deceased' neck was tightly tied by a black wire, with deep mark around the neck. It was PW9's evidence that the deceased died due to suffocation which led to total hypoxia.

The report on postmortem was admitted without objection and marked Exhibit P11. PW9 described the clothes of the deceased as black trousers

make jeans and a red t-shirt, though according to him, the chest part was naked.

In their defence, the accused persons did not admit or dispute the death of Clavery Joseph@Kamongo. However, DW1 disputed to know him. Furthermore, both accused persons advanced no defense to dispute that the death of the deceased was unnatural.

In their final written submissions, the learned State Attorneys Mr. Amani Kyando and Mr. Elias Subi submitted that according to the evidence of PW1, PW2, PW5, PW6 and PW9, the deceased really died and his death was unnatural. They made reference to Exh.P11 where PW9 indicated that **"the cause of death was due to strangulation by hand black wire that led to complete suffocation then caused complete hypoxia then caused death"**.

On his side, Mr. King Manase learned counsel for the 1st accused, in his written submission urged the court not to believe the witnesses, PW1, PW2, PW5, PW6 and PW9 on the ground that their evidence is contradictory as far as the deceased's clothes and color of the said clothes are concerned.

He submitted that PW1 did not describe the clothes and their color, while according to PW2, the deceased's body was naked on the chest and abdomen, and the trousers were below the knees and buttocks were naked and PW6 testified that the deceased had a sleeved t-shirt and black trousers.

He further submitted that, according to PW9, the deceased body was naked on the chest and had black trousers make jeans. According to the learned counsel, the contradictions were major and he cited the case of **Mathias Bundala versus Republic**, Criminal Appeal No.62 of 2004, CAT (unreported).

The learned counsel also attacked the report on postmortem examination (Exhibit P11) on the ground that, nowhere the name of PW9 is indicated as the examiner, and that the designation of PW9 is controversial; being Principle Asst. Medical Officer. It is his further submission that a principle is a noun meaning a rule or theory which explains how something works.

He differentiated it from the word Principal and posed a question; how is it possible for someone to forget his proper title in his academics and qualifications.

He further submitted that, according to Exhibit P11, the deceased's body was identified by his wife namely Niera w/o Clavery while PW6 has said that she is wife of the deceased and that, she is the one who identified the deceased's body.

Submission by Ms. Ester Sentozi, learned counsel for the 2nd accused is to the effect that; there is no dispute that Clavery Joseph@Kamongo is dead and that his death was unnatural as depicted in Exhibit P11, and that the deceased was unlawfully killed as the circumstances of his death show that his death was not sanctioned by the law.

Having seen the evidence adduced in court and closing submissions by the parties, my duty is now to determine whether the prosecution has managed to prove that Clavery Joseph@Kamongo died, and if the answer is in the affirmative, whether they have managed to prove that the deceased's death was unnatural.

As earlier pointed out in this judgment, death may be proved by production of the postmortem Report or evidences of witnesses who state that they knew the accused and attended the burial or, evidences of the persons who saw the dead body or by circumstantial evidence.

In the instant case, postmortem report on examination of the deceased's body was produced and admitted as Exhibit P11 without objection from the defence side.

PW9 who conducted an autopsy confirmed that the deceased's neck was tightly tied by a black wire, with a deep mark around the neck. According to him, Clavery Joseph died due to suffocation which led to total hypoxia. He stated the cause of death in Exhibit P11 as follows; **"the cause of death was due to strangulation by hand black wire that led to complete suffocation then caused complete hypoxia then caused death"**.

I agree with Mr. King Manase that, the person appearing as an addressee in Exhibit P11 is the coroner namely Andrew W. Kabuka. However, PW9 testified that he is the one who performed postmortem examination and prepared the report. The same bears PW9's name, handwriting, signature and official stamp; and that made it evident that postmortem examination was performed by PW9 and not W. Kabuka.

Again, writing the term **"Principle Assistant Medical Officer"** instead of **"Principal Assistant Medical Office"** in my view was just a human error which in my view; is not fatal.

Even if we assume that the Exhibit P11 is fatal, still there sufficient oral evidence PW2, PW2, PW5, PW6 and PW9 who saw the dead body of Clavery Joseph@Kamongo but also the evidence of PW2, PW5 and PW6 who attended the burial ceremony of the deceased at Isikira Hamlet.

The learned counsel for the 1st accused in his final submissions submitted on the issue contradictions in the witnesses' testimonies. It is trite that where there are contradictions in any of the testimonies, it is the duty of the trial court to determine whether they are material going to the root of the case or just minor which may be disregarded. This position was emphasized by the Court of Appeal in **Marando Slaa Hofu and 3 others v Republic**, Criminal Appeal No.246 of 2011 where it held-

"Contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case. However in considering the nature, number and impact of contradictions, it must always be remembered that witnesses do not always make a blow by blow mental recording of an incidence. As such contradictions should not be evaluated without placing them in their proper context in an endeavor to determine their gravity, meaning whether or not they go to the root of the matter or rather corrodes the credibility of a party's case."

In the case at hand, the contradictions regarding the deceased's clothes and their color or whether the chest part was naked or not, are minor contradictions which can neither negate the fact that Clavery Joseph @Kamongo died nor negates that his body was properly identified by the witnesses who were deceased siblings taking into circumstances that all witnesses including close relatives of the deceased testified before this court to have witnessed the burial ceremony.

I therefore disregard the contradictions for being minor, and shake hands with the Mr. Amani Kyando and Mr. Elias Subi; both learned State Attorneys, and Ms. Sentozi, learned counsel for the 2nd accused that the first ingredient of the offence has been proved. In other words, the first issue has been answered in the affirmative.

I now turn to the **2nd issue**. It is also common understanding that unnatural deaths are all deaths that cannot be described as deaths by natural causes or act of God.

Basically, the law presumes every killing to be unlawful unless it occurs as a result of an accident or is authorized by the law. In the case of **Guzambizi Wesonga versus Republic (1948)** 15 EACA, it was held that;

"Every homicide is presumed to be unlawful except where the circumstances make it excusable or where it has been authorized by the law. For homicide to be excusable, it must have been caused under justifiable circumstances, for example in self defence or in defence of property"

In the instant case, it is the evidence of PW9 that the deceased died due to strangulation by hand black wire that led to complete suffocation then caused complete hypoxia. PW1, PW2, PW5 and PW6 confirmed that the deceased' neck was tightly tied by a black wire.

Basing on evidence adduced by PW1, PW2, PW5, PW6 and PW9, I shake hands with the Mr. Amani Kyando and Mr. Elias Subi, both State Attorneys, and Ms. Ester Sentozi, learned counsel for the 2nd accused that the death of the deceased Clavery Joseph@Kamongo was unnatural. To that extent, the 2nd ingredient/issue has been proved to the required standard.

3^d Issue.

It is trite law that in order to sustain conviction in a murder case, the prosecution evidence must be cogent enough leaving no doubt to the criminal liability of the accused person linking him/her with the offence. The prosecution therefore, must produce credible and reliable witnesses whose evidences irresistibly point to none save only to the accused person. This

position was emphasized by the Court of Appeal in the case of **Mohamed Matula v. Republic** [1995] TLR 3 where it was held that;

*"Upon the 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 shift away from the prosecution and no duty is cast on the appellant to establish his innocence"*

The guilty of the accused can be proved either by direct evidence, circumstantial or through confessional statements of the accused.

Direct evidence is what a witness says he/she saw or heard or did while circumstantial evidence is the evidence of surrounding circumstances which by un-designed coincidence is capable of proving a proposition with accuracy.

Circumstantial evidence must be a combination of facts creating a network through which there is no escape for the accused, because the facts taken as a whole do not admit of any inference but of his guilt. The absence of direct evidence is indeed the very essence of resort to circumstantial evidence.

In the case at hand, the prosecution featured twelve (12) witnesses but none of them testified to have seen the accused persons killing the deceased. In other words, there is no eye witness to the killing of the deceased. The prosecution therefore; depends entirely on:-

- (a) *Circumstantial evidence/doctrine of recent possession;*
- (b) *Confessional statements of the accused persons, and*
- (c) *Digital evidence/electronic evidence.*

It is worth noting that evidence of recent possession is circumstantial which depending on the facts of each case, may support any charge. See **Raymond Hermes Odhiambo v Republic** [2002] eKLR.

Starting with the doctrine of recent possession; In the case of **Samwel Marwa @ Ogonga versus Republic**; Criminal Appeal No. 74 of 2013, Court of Appeal of Tanzania at Mwanza (Unreported) held that the following elements must be proved for the doctrine of recent possession to apply: -

- (a) *It must be proved that the property was found in the possession of the suspect.*
- (b) *The property seized must be positively identified to be the property of the complainant.*
- (c) *It must be proved that the property was recently stolen from complainant.*

- (d) *It must be proved that the stolen thing in possession of the suspect/accused constitutes the subject of a charge against the accused person.*
- (e) *The property must be the one that was stolen/ obtained during the commission of the offence charged.*

Similarly, in the case **Joseph Mkumbwa and Another versus R [2011] TZCA 118 TANZLII** the Court of Appeal held that;

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

Below is the summary of the evidence adduced by both prosecution and defence in relation to the doctrine of recent possession, followed by final written submissions.

PW11 Ramadhani Kassim@Ishozi, testified that he is a motorcyclist (boda-boda) and in July 2020, he happened to drive a motorcycle with Registration Number MC.192 BGC make Bajaj Boxer, (**Exhibit P4**) after entering into an oral contract with the 1st accused person to run it for Tshs.7000/= per day.

It was his further evidence that, a week later, the said motorcycle developed mechanical defects and as a result, he took it to a motorcycle technician known as one Jamir s/o Jamal (PW8) and that upon checkup, PW8 informed him that the spare parts will cost **TZS 40,000/=**.

PW11 added that, since he had no such amount, he informed the 1st accused who immediately turned up to PW8's garage where it appeared that he had no money too, to pay him for the checkup he made therefore, he pledged a mobile phone make Tecno (**Exhibit P 7**) as a security and then dragged the motorcycle to his own home.

PW8 Jamir s/o Jamal testified confirming that he is a motorcycle technician having his garage at Rwamishenye area within Bukoba Municipality. He

added that he knew the 1st accused through PW11. PW8 testified confirming to have checked the motorcycle brought to him by PW11, and found the cost of spare parts was TZS 40,000/=. He also testified confirming that PW11 had no such amount and as result, he informed the 1st accused who also had no money.

PW8 further said, the 1st accused person came and pledged as security the two lines mobile phone make tecno promising that he would come the next day with TZS 40,000/=so that he can take back his mobile phone, and having pledged his phone, the 1st accused dragged the motorcycle away but he never came back.

PW3, Inspector Juma Hassan testified that on 9/08/2020, while accompanied by other policemen and PW11, PW11 led them to the home of the 1st accused, and upon arrival, it was already 10/08/2020. It was PW3's further evidence that they successfully sought PW4 to witness search of the 1st accused's house, and as a result, he seized from the 1st accused the motorcycle with Registration Number MC192 BGC which was identified by PW10, WP5939 D/CPL Eva who is the investigator, as the motorcycle which was reported to have been ridden by the deceased before he met his untimely death.

PW4, Wilson s/o Rwekanwa, who is a the Chairman of Kagondo-Kaifo Hamlet testified to have witnessed search at the 1st accused's house and seizure of the motorcycle (Exh.p4) and he signed a certificate of seizure (Exh.P1). PW10 testified to have seen and identified the motorcycle (Exh.p4) in the house of the 1st accused as the motorcycle which was ridden by the deceased on 12/07/2020 before he met his death.

PW5, Florence s/o Theonest who is the motorcyclist leader at Ntoma where the deceased used to park his motorcycle, and PW6, Devotha d/o Venant who introduced herself as the wife of the deceased, confirmed before the court that the deceased, before meeting his death, was using the Motorcycle with Registration Number MC192 BGC (Exh.P4). She tendered in evidence the hire contract which was admitted as exhibit P5.

In his defence, the 1st accused (DW1) disputed to have been arrested on 10/08/2020. According to him, he was arrested on 8/08/2020 on allegation of selling unlawful local brew "gongo". DW1 added that, upon his arrest, his house was searched by the police and seized from him a bush knife (Exh.p2) and his phone makes Tecno.

He added that the motorcycle (Exhibit.P4) was not found in his house or seized from him. He alleged that he knew about the motorcycle during

committal proceedings since it was listed in the list of the prosecution exhibits. He disputed to have signed Exhibit P1.

When cross examined, he admitted that they did not cross-examine PW3, PW4, PW10 and PW11 on the date of his arrest. He also admitted that he did not cross-examine PW4 on whether he is a leader of his locality or not. He also admitted that Exh. P1 was admitted without objection.

In their final submissions the learned State Attorneys Mr. Amani Kyando and Mr. Elias Subi submitted that according to the case of **Ally Bakari and Pili Bakari v.R [1992]** T.L.R 10 (CAT), for the ground of conviction to ground conviction, must meet the following criteria, **one**, that the property was found with the suspect, **two**, the property is proved to be the property of the complainant (deceased), **three**, the stolen thing constitutes the subject of the charge.

To bolster their stance, they also cited the case **Joseph Mkumbwa and Another versus The Republic**, Criminal Appeal No.94 of 2007 which was referred in **Ntuluwambula s/o Ukenyenge@ Abas s/o Charles versus Republic, Criminal Appeal No. 341 of 2021** CAT at Tabora.

They ended up their joint submission stating that all three criteria stated in the case of **Joseph Mkubwa** (Supra) have been positively tested, and therefore, the 1st accused is responsible for the death of the deceased as no other grounds stated to exonerate him from causing the death of the deceased.

In his final submission Mr. King Manase for the 1st accused, pointed out the contradictions between testimonies of PW3 and PW4 since PW3 testified that DW1 came out holding a bush knife while PW4 said, he is the one who notified 1st accused to open the door and the accused person had nothing in his hands.

He further submitted that according to PW3, three items (Exhibit P2, P3 and P4) were seized while PW4 talked about one item only to wit; a motorcycle (Exhibit P4).

He added that, according to PW3, the accused had only one room, and three people were found therein, that is to say; the 1st accused person, his wife and the 1st accused's father-in-law while PW4 testified that the accused house had two rooms; that is to say; one bed room and a living room.

According to Mr. King, the evidence of the independent witness has two suggestions; **one**, no search and seizure was done in the respective night to the 1st accused's house and therefore; Exh.P1 is a concoction. **Two**, the independent witness did not accompany PW3 entering the searched house.

He went on submitting that PW11 who was said by PW3 to have led them to the home of DW1 did not mention in examination in chief, cross examination or re-examination to have seen a motorcycle brought in the police motor vehicle from the 1st accused's house.

On her side, the learned counsel for the 2nd accused had no final submission in relation to the doctrine of recent possession.

Having seen the evidence of both sides and final submissions on the doctrine of recent possession, as I have pointed out earlier, my duty at this juncture is to look at the evidence adduced in the case at hand and determine whether the elements necessary for the doctrine of recent possession to apply, have been proved by the prosecution.

The first element is that it must be proved that the property was found in the possession of the suspect. The evidence of PW3 is very strong to the effect that on 10/08/2020 while accompanied with other police

officers and PW11, were led by PW11 to the house of the 1st accused and upon search, seized the motorcycle with Registration Number MC192 BGC make Bajaj Boxer which was confirmed by PW10 to be the motorcycle which was reported in BU/IR/333/2020 to have been stolen after the commission of the offence of murder.

PW10 testified confirming that she identified the said motorcycle through its registration Number MC192 BGC. PW11 confirmed that he led the police to arrest the 1st accused person.

According to PW3, a certificate of seizure was signed by the accused and two independent witnesses including PW4.

PW4 who is the independent witness confirmed that the said motorcycle was seized from the accused 1st accused person (White). He added that the 1st accused lives at his hamlet, thus not an alien person to him. He confirmed that he signed a certificate of seizure (Exhibit P1) but also, the 1st accused signed.

The evidence of PW3 and PW4 was corroborated by the evidence of both PW8 and PW11 to the effect that, after seeing that the accused had no money to pay the motorcycle technician (PW8), he dragged the said

motorcycle to his home. It should also be noted that the Exhibit P1 and P4 were admitted without objection.

The defence of the 1st accused that he was not arrested on 10/08/2020 on allegations of murder but on 08/08/2020 on allegations of selling "gongo". He also told the court that the motorcycle (Exhibit P4) was not seized from him, or that, he never signed exhibit P1. However, it is the finding of this court that such defence has not raised any reasonable doubt on the prosecution.

I am saying so because **one;** Exhibit P1 was admitted without objection therefore the complaint that the signature appearing in Exhibit P1 is not his signature is an afterthought. Exhibit P1 is to the effect that the motorcycle (Exh.P4) was seized from the 1st accused (DW1).

Two, DWI and his defence counsel did not cross-examine PW3, PW4, PW10 and PW11 on the date of his arrest, and according to the said witnesses, he was arrested on 10/08/2020. The legal position as per the case of *Nyerere Nyague vs Republic*, Criminal Appeal No. 67 of 2010 [2012]TZCA 103 TanzLII(unreported) is that, a party who fails to cross examine a witness on a certain matter deemed to have accepted that and will be estopped from asking the trial court to disbelieve what the witness said. In that regard, the

1st accused is estopped from asking this court to disbelieve the witnesses who said he was arrested on 10/08/2020, and that the motorcycle (Exh.p4) was seized from him.

The contradictions as regards the number of people found in the house of the 1st accused or whether the 1st accused was awakened by PW3 or PW4 or whether the accused had a bush knife or not are minor contradictions as they do not negate the fact that the motorcycle with Registration Number MC 192 BGC was seized from the 1st accused on 10/08/2020'. I thus disregard them.

PW4, when testifying told the court that the incident took place in 2020, but has been called to testify in 2024, therefore, there may be some errors in memory due to lapse of time.

As per position set by the Court of Appeal in the case of **Marando Slaa Hofu and 3 others versus Republic (Supra)**, contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case. Similarly, in the case of **Dickson Elia Nsamba Shapwata & Another versus Republic**, Criminal Appeal No. 92 of 2007 (unreported), addressing the issue of contradictions and discrepancies, the Court of Appeal had this to say;

"Invariably in all trials, normal contradictions and discrepancies occur in the testimonies of the witnesses due to normal errors of observation, or errors in memory due to lapse of time or due to mental disposition. A material contradiction or inconsistency is that which is not normal and not expected of a normal person, and that courts have to determine the category to which a contradiction, discrepancy or inconsistency could be characterized. In the premises, the Court held that minor contradictions, discrepancies or inconsistencies which do not affect the case for the prosecution, cannot be a ground upon which the evidence can be discounted and that they do not affect the credibility of a party's case"

Also see **John Kigilikola versus Republic**, Criminal Appeal No. 31 of 1999 (CAT) (unreported) and **Oswald Mokiwa @Sudi versus Republic**, Criminal Appeal No.190 of 2014 (CAT).

Guided by the herein above decisions of the Court of Appeal, I strongly hold that the contradictions pointed by Mr. King Manase, are minor contractions which do not affect the credibility of witnesses in the prosecution case, thus I disregard them.

Furthermore, the argument by Mr. King that PW11 did not state in examination in chief or cross examination or re-examination on whether the

motorcycle (exhibit P4) was brought into the police motor vehicle on the material night is baseless because PW11 was not led by the prosecution to testify on that particular area, therefore, it was upon Mr. King Manase to cross-examine PW11. Undoubtedly, the situation would have been different had he cross-examined PW11 and received the answer that there was no motorcycle brought by the police into their motor vehicle.

As regards to the issue of colour of Exh.P4, explanation was given by the prosecution witnesses (PW3) and (PW10) that initially, the motorcycle had a black cover covering the fuel tank and engine guards but also the seat was black, and since they did not remove the cover, they considered the same black. It is again, their evidence that since, the same was kept in an open police yard with no roof, from 2020, the cover was damaged by rain and sun, whereas the fuel tank engine guards revealed red color.

PW5, PW6, PW8 and PW11 testified that the motorcycle was black but none of them testified that the same had no black cover or that he/she removed the cover to see true colour of the motorcycle.

Since the Registration number and Chassis number of Exh.P4 are similar to those recorded in Exh.p1, it is the finding of this court that the motorcycle

tendered in court and admitted as Exh.4 is the very motorcycle seized by PW3 from DW1 on 10/8/2020.

Having said all that, I shake hands with the prosecution that the prosecution has proved that the motorcycle with Registration Number **MC192 BGC** make Bajaj Boxer (**Exh.p4**) with chassis Number **MDZA18A27GWL59134** was found in possession of the 1st accused (DW1).

The second element is that the property seized must be positively identified to be the property of the complainant/deceased. The evidence of PW1, PW5 and PW6 is very strong to the effect that the deceased was a motorcyclist (bodaboda). PW5 who is the leader (Secretary) of motorcyclist and PW6 who is the wife of the deceased confirmed that the deceased was ridding the motorcycle with Registration Number MC 192 BGC make Bajaj Boxer. PW6 tendered in evidence the so called "**Mkataba wa kukodisha pikipiki**" dated 13/10/2017 (Exhibit P5) Part of it reads;

"Mimi Onesmo Rujwahuka kama mkodishaji mmiliki wa pikipiki MC192 BGC aina ya Bajaji Boxer namkabidhi pikipiki hii MC 192 BGC aina ya Bajaji Boxer mkodishwaji Clavery Joseph kwa ajili ya kufanya biashara ya bodaboda na atakuwa analipa shilingi 50,000/= kwa kila wiki kwa kipindi

cha mwaka mzima toka tarehe 13/10/2017 na mkataba utaisha mwezi was kumi 2018"

According to PW6, after the expiry of the contract, the motorcycle became the property of the deceased. PW5 and PW6 confirmed that, until the day of his disappearance, the deceased was ridding the said motorcycle but it was not recovered at the crime scene. Both PW5 and PW6 identified Exhibit P4 as the motorcycle which the deceased was ridding before he met his untimely death.

The fact that the motorcycle registration card was not tendered in evidence and the fact that Rwajwahuka Onesmo was not called as a witness, in my view, has not affected the prosecution since PW6 testified how motorcycle came into possession of the deceased and that he was ridding the same before he met his untimely death, the fact which was confirmed by PW5.

It should also be noted that the accused persons do not claim to be the owners of the said motorcycle jointly or severally.

To that extent, I shake hands with the prosecution that the motorcycle with Registration Number **MC192 BGC** make Bajaj Boxer with chassis with

chassis Number is **MDZA18A27GWL59134** has been positively proved to be the property of the deceased Clavery Joseph@Kamongo.

The third element is that the property was recently stolen from the complainant/deceased. It was the evidence of PW10 that it was reported to the police through **BU/IR/333/2020** that the deceased and his motorcycle with Registration Number MC192 BGC make Bajaj Boxer, went on missing since 12/07/2020.

PW5 and PW6 confirmed that the deceased and his motorcycle went on missing, but on 29/07/2020, the deceased body was recovered. According to PW3, PW4 and PW10, the said motorcycle was found in possession of the 1st accused on 10/08/2020, and as a result, it was seized as depicted in exhibit P1.

Since the motorcycle went on missing from 12/07/2020, but it was recovered on 10/08/2020 that is to say; it was recovered within thirty (30) days after the commission of the offence, it goes without saying that the same was recently stolen.

It is worth noting that the 1st accused person did not explain how the same stolen motorcycle came into his possession rather than disputing to be found

with it. PW8 and PW11 explained how the 1st accused dragged the said motorcycle to his home premises and PW3 testified that he seized the same from DW1, the fact which was confirmed by PW4 and PW10.

Under the circumstances, the only inference to be drawn is that it the 1st accused (DW1) who killed the deceased. See **Justine Hamis Juma Chamshine versus Republic**, Criminal Appeal No.669 of 2021 CAT at Dsm (unreported).

As pointed out earlier in this judgment, in the case at hand, the prosecution side depends also on **confessional statements of DW1 and DW2**. It is trite that a confession statement is regarded as the best evidence because it comes from the accused himself who admits to have committed the offence in question. A confession must be voluntary and must provide the true account of the accused in the commission of the offence.

Basically, the evidential value of the confession is considered to be the best if was taken from the accused person as a free agent. See **Muganyizi Peter Michael and Others versus Republic**, Criminal Appeal No.144 of 2020 CAT, at Mwanza (unreported).

In the case at hand, both DW1 and DW2 have repudiated their cautioned statements. The 1st accused (DW1) alleged that he never made a cautioned statement at Bukoba Police Station in relation to this case while the 2nd accused claimed that the said statement was not the statement, he made at Bukoba Police Station. The court conducted a trial within a trial and finally, overruled the objections whereas, the cautioned statement of the 2nd accused was admitted as Exhibit P12 and the cautioned statement of the 1st accused was admitted as Exhibit P13.

Below is the evidence adduced in court in relation to confessional statements of both accused persons, followed by closing submissions from the prosecution side and the defence side.

PW10, WP 5939 D/CPL Eva, testified that she recorded the cautioned statement of the 2nd accused after she had followed the required procedure. She added that, she introduced herself to the accused and informed him the allegations of murder facing him.

She further told the court that she informed the accused that he is not forced to make his statement and if he opts to make his statement voluntarily, the same may be used as evidence against him in the trial. She

added that she informed the accused that he is entitled to have the presence of his relatives or friends or an advocate during the interview.

PW10 further said, after warning the accused and informing him his rights, the accused understood the warning and his rights, and thus made his statement voluntarily.

PW10 further told the court that the 2nd accused narrated the story to her on his participation in the commission of the offence of murder. PW10 added that she started recording the said statement on 10/08/2020 from 10:20 hours and finalized at 13:07 hours.

It was her further evidence that after she had written the statement, the 2nd accused she gave it to the 2nd accused and he read it before she asked him to verify and sign it. She went on testifying that the 2nd accused (DW2) wrote the verification clause and signed. PW10 added that she verified the same as per the law.

However, in the course of tendering the same in evidence, its admissibility was objected by DW2 through his advocate Ms. Ester Sentozi on the ground that the cautioned statement which is sought to be tendered for admission was not the one made by the 2nd accused person at Bukoba police station.

As earlier pointed out, this court conducted a trial within a trial and finally, overruled the objection, whereas, the cautioned statement of the 2nd accused was admitted as Exhibit P12.

In his defence, DW2 testified that he never made Exhibit P12 or admitted to have committed the offence of murder. According to him, he signed the documents brought to him by inserting his thumbprint. He also denied to have mentioned the 1st accused to the police. According to him, he saw the 1st accused for the first time between 9/8/2020 and 10/08/2020 at Bukoba police station.

PW12, Simon Julius Mwika, a retired police officer testified that on 10/08/2020 while on duty at Bukoba police station, he was assigned to record the cautioned statement of the suspect Philbart Mukaru@ White (DW1) and he did so according to the law.

He added that he introduced himself to the accused and then informed him the allegations of murder facing him. It was his evidence that the 1st accused introduced himself to him by the name of Philbart Mukaru@White.

He added that, the interrogation room was conducive with sufficient air circulation and sufficient light; two chairs and one table. He further told the

court that he warned the accused that he is not forced to make his statement and anything he says will be written down and may be used in court as evidence against him. He also said that, he informed the accused that he is entitled to the presence of the relative, advocate or friend during the interview.

PW12 further said, the accused understood his rights and opted to make his statement voluntarily in the absence of the relative or advocate or friend. According to PW12, he did not make any promise or threaten or torture the accused in order to make his statement.

It was his evidence that he started recording the statement of the accused at 6:00 hours and finished at 9:00 hours. It was his evidence that having recorded the same, the accused read it, understood and confirmed through his signature and verification clause that the statement reflects exactly what he narrated to him (PW12).

PW12 Further said, having finished the assignment, he returned the accused back to the police cell and took the cautioned statement to the OC –CID.

However, in the course of tendering the same in evidence, its admissibility was objected by DW1 through his advocate Mr. King Manase on the ground

that the cautioned statement sought to tender for admission was never made by the 1st accused, and the verification clause and signature of the 1st accused (DW1) were obtained through torture.

This court conducted a trial within a trial as per the law, and finally overruled the objections, and admitted the cautioned statement of the 1st accused as Exhibit P13.

In his defence, DW1 denied to have ever made Exhibit P13 or admitted to have murdered Clavery Joseph@Kamongo. He added that he was severely tortured at Bukoba Police station for three (3) days consecutively and finally certain papers were brought to him and asked to sign and write his verification clause and he did so to rescue his life, but he knew not what he was verifying or signing. He disputed to ever seen the deceased.

However, he admitted to have been asked his name, place of birth, names of his parents and his wife.

In their written final submissions, Mr. Amani Kyando and Elias Subi submitted that, despite the fact that Exhibits P12 and P13 were repudiated, they corroborate other prosecution witnesses; PW2, PW6 and PW9 the effect that the deceased Clavery Joseph@Kamongo was killed using black wire.

They further submitted that in Exhibits P12 and P13, the accused persons admit to have taken the motorcycle (Exh.p4) of the deceased and his mobile phone thus corroborated the evidence of PW3, PW4, PW7, PW8 and PW11.

It is their submission that, the accused persons have narrated in detail their participation in the killing of the deceased.

They concluded their submission by referring this court to the case of **Muganyizi Peter Michael and others versus Republic** (Supra) to show that after warning itself on the danger of basing conviction on repudiated confession, the court may still convict basing on it even without corroboration.

In his brief closing written submissions, Mr. King Manase, learned counsel for the DW1 submitted that, as per the case of **Kashindye v. Republic [2002]** TLR 374, it is dangerous for the court to act upon a repudiated or retracted confessions unless such confession is corroborated.

He went on submitting that in the case at hand, it is a fact that the prosecution has no any material evidence which may be used to corroborate the cautioned statements in this case; all tendered evidence is very weak in the parameters of the criminal justice.

On her side, Ms. Ester Sentozi, learned counsel for the 2nd accused (DW2) submitted that the only evidence which indicate that 2nd accused killed the deceased is his cautioned statement which was admitted as Exhibit P12 and cautioned statement of the 1st accused person which was admitted as Exhibit P13 and since the same were repudiated, it is dangerous to act upon them unless corroborated in material particulars or unless the court, after full consideration of the circumstances, is satisfied of its truth. To bolster her stance, she cited two cases **Bombo Tomola v. Republic [1980] TLR 254 and, Kashindye Meli versus Republic (Supra).**

It is also her submission that in the case at hand, no grounds upon which the court can hold a 100% that Exhibit P12 contains nothing but an absolute truth upon which it can wholly heartedly convict the 2nd accused unless it is corroborated.

It is her further submission that, since the cautioned statement (Exhibit P13) of the 1st accused was repudiated, it cannot corroborate the cautioned statement (Exhibit P12) of the 2nd accused. To bolster her stance, she cited **Mkubwa Said versus SMZ [1992] TLR 365.**

Now, having seen the evidence of both sides in on confessional statements, and closing submission from both sides; prosecution and defence, the issue

for determination is whether it is safe for this court to act upon Exhibits P12 and P13 to form the basis of conviction.

Undoubtedly, I shake hands with both the prosecution and the defence that, as matter of practice, repudiated confessions require corroboration. However, that does not mean that, in absence of corroboration, the same cannot form basis of conviction. See **Muganyizi Peter Michael and others versus Republic** (Supra).

The land mark case of **Tuwamoi v. Uganda [1967] E. A 84** has provided a warning and how the court may invoke the accused person's retracted or repudiated confession to form basis of conviction. The court stated as follows;

*"A trial court should accept with caution a confession which has been retracted or repudiated or both retracted and repudiated and **must be fully satisfied that in all the circumstances of the case that the confession is true.** The same standard of proof is required in all cases and usually, **a court will act on the confession if corroborated in some material particular by independent evidence accepted by the court.** But corroboration is not necessary for law and the court may act on a confession alone **if it is fully satisfied after considering all the***

material points and surrounding circumstances that the confession cannot but be true” (Emphasis added)

Similarly, in the case of **Hemed Abdallah versus Republic [1995]** TLR 172 the Court of Appeal held that:

“It is dangerous to act upon a repudiated or retracted confession unless it is corroborated in material particulars or unless the court, after full consideration of the circumstances of the case is satisfied that the confession must be true”.

In another case, **Steven s/o Jason and 2 Others Versus Republic, Criminal Appeal No. 79 of 1999 CAT (unreported)**, it was held that;

*“Admission of an exhibit such the cautioned statement in question is one thing and the weight to be given to the evidence contained therein is another thing. **This depends on the totality evaluation of the evidence at issue and other pieces of evidence available on record”***
(Emphasis supplied)

The Court of Appeal in the case of **Flano Alphonse Masalu @ Singu And 4 Others v. Republic**, Criminal Appeal No. 366 of 2018 (CAT-unreported) when dismissing the appellant’s complaint on the court’s reliance on

uncorroborated retracted confession to convict him on the offence of Armed Robbery had this to say;

*"...the learned trial magistrate did not have to warn himself of the dangers of basing conviction solely on the uncorroborated retracted confession. All the same, in the circumstances of this case, **we are of the firm view that had the learned trial magistrate done so, he would still have proceeded to convict the first appellant solely on the retracted confession. We so hold as we are mindful that the said confession is so detailed and elaborate; that it gives a narrative of the first appellant's personal facts as well as the sequence of events leading to the armed robbery that no other person except a perpetrator of the crime would have known. We would thus sustain the first appellant's conviction solely on the confession.**" (Emphasis is mine).*

In the case at hand, it is my considered view that despite the fact that the statements (Exhibits P12 and P13) which are 13 and 12 handwritten pages respectively, were repudiated, the confessions are so elaborative on account of personal particulars of each accused, how they met, their prior arrangements, the execution of the killing, the weapon used, where they got it, the role played by each accused, and items stolen from the deceased,

facts which could not have been given by any person except the person who committed the offence.

In the case of **Emmanuel Lohay and Udagene Yaloocha v. Republic**, Criminal Appeal No. 278 of 2010 (unreported), it was emphasized that a confessional statement must:

"...shed some light on how the deceased concerned met his death, role played by each of the accused persons, such details as to assume the courts concerned that the maker of the statement must have played some culpable role in the death of the deceased"

As far as the case at hand is concerned, I am of the settled position that Exhibits P12 and P13 shed enough light on how the deceased demise happened and the role that each of the accused person played in terminating his life.

Part of Exhibit 12 reads;

"....Tukaendelea na safari, tulipofika mbele ndipo Philbart s/o Mkalu @White akaniambia kuwa anataka kukojoa, nikasimamisha pikipiki akashuka Philbart@White pia Clavery naye akashuka na ndipo nikaona Philbart @White amemkaba Clavery shingo kwa kutumia ule wire niliomba nyumbani kwangu. Hapo ndipo Clavery aliponiita mara moja Lameck. Mimi sikumjibu

kitu, ndipo Philbart akaniambia "wewe tulia, niachie hii kazi" Baadaye akaniambia nisogeze pikipiki mbele kwani nilikua nimeipaki barabarani. Baada ya kusogeza pikipiki mbele niliwaona wameanguka wote chini lakini White akiwa bado amemkaba Clavery mpaka nguvu zikamwishia kabisa na ndipo White alinipigia mluzi, nikaacha pikipiki na kumfuata na ndipo akaniambia ameshamaliza kazi na kuniambia kuwa tumtoe pale tumshushe chini na kabla hatujamteremsha huko chini, Philbart@White alimkanyaga Clavery kifuani kwa kutumia mguu wake akawa anamwangalia kama amekufa kisha akaniambia tayari tumbebe tumpeleke chini ambapo tulimwingiza kwenye uchochoro, kisha White akasema tumvue nguo, kisha mimi nikamvu Clavery sweta la juu na Philbart White akamvua viatu na koti la ndani na kisha akasema koti la ndani mlukua na simu ndogo ya batani an pesa Tshs 5000/= ambazo hiyo pesa tuligawana mimi nikachukua tshs 2000/= and Philbart akachukua Tsh.3000/= pamoja na viatu, makoti yote mawili and simu. Baada ya hapo ndipo Philbart Mkaru@White alimfunga Clavery ule wire mara ya pili shingoni kisha tukamdumbukiza kwenye maji kifudifudi kisha tukamfunika na majani tuliyoyakuta hapohapo chini na kisha Philbart@White akaniambia kwamba sijaanza leo hii kazi nisubirie, kisha akafunga mikono yake (Viganja) akatamka: YA MUNGU MENGI UTANISAMEHE NI HALI TU YA MAISHA" Baada ya hapo tukaondoka wote

kwa pamoja, tukaendea pikipiki tukapanda nikaendesha kupitia barabara ya Rwamrumba tukatokea barabara mpya hadi Kagondo.... Ndipo tukaipeleka kwake na kuingiza ndani....."

Part of Exhibit P13 reads;

"..Baada ya kusimama, ilikuwa muda wa saa 22:00hours usiku, nikawa nimemshika Roba Clavery. Lameck akawa ameshuka kwenye pikipiki na pikipiki akaiweka mbele kidogo, Clavery akasema kuwa amekuwa mpole, Lameck akawa amerudi, baada ya kufika Clavery alisema kwamba Lameck unanifanyizia? Akajibu kwamba pumbavu, mimi nipo kazini pamoja na kuwa nilikua nimembana sana akaendelea kulalamika akadai kuwa Lameck ndugu yangu wewe ndiyo wa kunifanya hivi. Lameck akasema ulikua unajifanya mjanja, leo lazima nikuue. Hapo ndipo alivuta wire na kumfunga shingoni na kunipa na mimi. Wakati ananikabidhi waya wa ilikuwa imepitishwa shingoni, baada ya mimi kushika waya niliongea neno moja kwamba ndugu yangu utanisamehe haya ni maisha na ndipo tukamfunga kamba za kutosha, ndipo nikamweleza Lameck tuondoke , akanieleza kuwa hapa ataonekana, mimi huku ni mwenyeji, tumpeleke kwenye kimto, ndipo nilimvua nguo, akampiga planja akamkuta akiwa na kiasi cha Tshs. 5000/= na simu aina ya tecno. Baada ya kumaliza kumtoa hivyo tulimfunika majani ndipo tukaanza safari ya kuja Bukoba maeneo ya Kagondo..... baada ya kukaa nayo ilibidi nitafute

askido au bodaboda wa kuendesha pikipiki ambaye anaitwa Ramadhani Kassim, tulikubaliana kwa siku awe ananiletea Tsh.7000/=, aliendesha kwa muda wa siku 7 akawa amenilipa siku sita tu kiasi cha Tshs 42,000/=, pikipiki ikawa imeharibika na baada ya kuharibika Ramadhani Kassim akawa ameipeleka kwa fundi ambaye anaitwa Jamil Jamal.....na baada ya kunieleza ndipo tulienda na kuangalia pikipiki nikakuta fundi amefungua pikipiki na alinieleza gharama inahitajika kiasi cha Tshs. 40,000/=. Kw vile mimi sikua na kiasi cha pesa hiyo nilmweleza hela sina naomba nikuachie simu yangu aina ya tecno na hiyo simu ilikuwa mali ya marehemu Clavery Joseph@Kamongo, baada ya kuwa tumemuua tukachukua na simu yake na mimi ndiye nilikua nimebaki nayo.....”

It is apparently clear that the statements of both accused are consistent with the evidence of PW5 and PW6. According to the said witnesses, the deceased and his motorcycle went on missing but later on, the deceased's body was found laid face down in the river. The statements are also consistent with the evidence of PW2, PW6 and PW9 that a black wire was tightly tied on the deceased's neck.

Furthermore, the statement of the 1st accused is consistent with the evidence of PW8 and PW11, the 1st accused entered into oral contract with

PW11 to ride the motorcycle, and later on, the same developed mechanical defects, PW11 took it to PW8, and the 1st accused pledged the phone to PW8 as security.

The statement of the 1st accused also is consistent with the evidence of PW7 that the phone which pledged as security to PW8 was phone which the deceased was using before his death. In that premise, it goes without saying that the statements have been duly corroborated.

Basically, the statements reveal how the accused persons met and knew each other. However, in their defence, each testified to have met each other for the first time in the police cell.

Reading Exhibits P12 and P13 between lines, it is the finding of this court that such a defence was intended to hide the truth and mislead the court. Exhibits P12 and P13 were recorded by two different police officers.

In the course of reading Exhibit P13 in court after being admitted, PW12 who is a retired police officer had some difficulties in reading. According to him, the light in the court room was not sufficient and that since he had retired, reading and writing are no longer his daily work. I found that there

was a need for this court to make comparison of his handwriting to satisfy itself on whether the exhibit P13 was recorded by him.

However, after making comparison of his hand writings taken in court ("C" and "D") and Exhibit P13, I was satisfied that exhibit P13 was recorded by PW12.

The 2nd accused objected Exh.12 on the ground that, that was not the statement he made at Bukoba Police station. He further alleged that he thumb printed some papers at Police. He admitted his level of education is form IV.

Despite the fact that during a trial within a trial, his defence counsel did not cross-examine the prosecution witness on the signature and verification clause which the witness said it was written and signed by 2nd accused, and that implies acceptance of what the witness said, the 2nd accused disputed the verification clause and signature. This court found that there was a need to make comparisons of the handwritings of the 2nd accused.

It is trite that proof of a handwriting or signature has to be either by direct evidence or by the other additional types of evidence or modes of proof. As far as direct evidence is concerned, the proof of handwriting or signature

has to either come through admission by the accused as the writer or from the evidence of the witness in whose presence the document was written and signed.

Besides, the proof could be obtained in other three types of evidence or modes of proof, one, through opinions of a handwriting expert as provided for under section 47 of the evidence Act, [Cap 6 R.E 2022]. Two, by evidence of the person who is familiar with the handwriting of a person who is said to have written a particular writing as per section 49 of the evidence Act, [Cap 6 R.E 2022], and three, through comparison by the court with a writing made in the presence of the court or proved to be the writing or signature of the person.

After carefully comparing the writings and signatures of the 2nd accused person made in court as they appear in the handwritten plea taking proceedings, handwritten committal proceedings and his writings he made in court in paper "A" and "B" and those appearing cautioned statement which during a trial within a trial was admitted as ID1 for identification, now Exhibit P12, I was strongly convinced that they were written by the same person meaning; the second accused (DW2).

Therefore, the defence by the 2nd accused that he never made or signed and verified Exhibit P12, in my view, is another attempt to exonerate himself from criminal liability.

Furthermore, in his defence, DW2 raised the question of torture, but since admission of Exhibit P12 was not objected on the ground that it was obtained through torture, the issue of torture is an afterthought in relation to exhibit P12. In other words, it has nothing to do with Exhibit P12.

DW1 admitted his signature and verification clause in Exhibit 13 that they belong to him but he alleged that they were procured through torture. He showed some scars alleging that he got under the police custody, but since he tendered no PF3 and he had not said that he asked for the same but he was denied, and since he had admitted the verification clause and signature, it is my considered view that his act of denying is just an attempt to avoid criminal liability which has nothing to shake in the prosecution evidence.

After considering all the material points and the entire surrounding circumstances on the confessions by the accused persons, I am satisfied that

Exhibits P12 and P13 contain nothing but the truth, therefore; can both form basis of conviction even if they could have not been corroborated.

It is also worth noting that a co-accused confession as per the law may be relied upon as against the maker and his co-accused in the joint trial like this. See section 33 (2) of the Evidence Act, Cap 6 R.E 2022, Festo **Androa Asenua & Another versus Uganda**, Supreme Court Criminal Appeal No.001 of 1998, and **Paschal Kitigwa v R** [1994] TLR 65.

Furthermore, I am also more than satisfied that there is more than ample corroborative evidence in support of Exh.p12 and P13 as I have earlier pointed out, sufficiently to support the conviction of the two accused persons.

Another piece of evidence in the case at hand is **digital/electronic evidence**. The same was adduced by PW7 **H3703 D/C Eliapenda** who works with Cybercrimes Investigation Unit at the office of the Regional Crimes Officer Kagera Region.

PW7 testified that on 29/07/2020 around 8:00 hours, while at work, A/inspector Juma (PW3) gave him Airtel phone number to wit; **0693991775** which was said to be used by the deceased Clavery Joseph@Kamongo; for

investigation purposes. PW3 confirmed to have handed over the said phone number to PW7 for investigation purposes.

It was PW7's testimony that after being given the phone number used by the deceased person, he communicated with Airtel mobile Communications Company requesting the International Mobile Equipment Identity (IMEI) and managed to obtain an IMEI number **353010104937240** which was used in the deceased person's phone before he met his untimely death and deprived the same.

It was his further evidence that he also communicated with Vodacom mobile communications Company, Halotel mobile communications and Tigo mobile communications Company and got the response from Halotel whereas, after IMEI analysis, it was found that the same handset with IMEI number **353010104937240** was eventually using a phone number **0621783044**, and as a result, Call Data Record (CDR) was issued.

PW7 went on testifying that CDR (Exhibit P8) shows when the call took place (date & time), how long the call lasted (in minutes), who called whom (source and destination phone numbers), type of communication (call or text message), IMEI number and location of the user of the phone.

PW7 added that, Exhibit P8 revealed that the deceased's phone number **0693991875** was registered in the name of Aisha Haji Hamisi whereas the number which was used in the deceased's handset after his death as per CDR (Exhibit P9) issued by Halotel revealed that phone number to wit; **0621783044** was registered in the name of Abdilazack Ismail Kajuna, thus traced him and finally arrested Jamir Jamal (PW8) since he was the one using the said phone number.

He added that upon the arrest of Jamir Jamal (PW8), he admitted ownership of phone number **0621783044** but disputed cell phone number T132 make Tecno IMEI Number 353010104935240 (Exhibit P7) saying that, the same belongs to White (DW1) as he, after removing Sim Card, pledged it to him as security, and he did so in the presence of his motorcyclist called Ishozi (PW11)

It was PW7's further evidence that he managed to arrest Ishozi (PW11) who then confirmed to know White (DW1) but also confirmed that White (DW1) pledged his phone to PW8 as surety since he had no money to pay PW8 for the work done by PW8 to wit; checking White's motorcycle to discover the mechanical defects.

PW7 further told the court that registration and use of the phone's lines are two different things, therefore, he did not trace Abulazack Ismail Kajuna or Asha Hamisi Haji. The said persons were not called as witnesses.

On his side, PW8 confirmed that his phone number was not registered in his own name and he gave explanation that during the time of registration, he had no identity card, therefore, he was just assisted by Halotel agents who were walking in the streets. According to PW3, he obtained the deceased's number from his relative.

According to PW8, though the phone number was registered in the name Abdulazack Ismail Kajuna, he was the one using the same and he was really found using the hand handset which was handed over to him by DW1.

Indeed, I am alive of position of the law that before being admitted, electronic evidence or digital evidence may need to be authenticated that is, the witness of the evidence must make a presentation sufficient to support a finding that the evidence is what it purports to be.

PW7 tendered for admission in evidence affidavit (Exhibit P10) sworn by the Principal Officer Viettel trading as Halotel to confirm the authenticity CDR issued by Halotel (Exh.P8) which was to the effect that phone number

0621783044 was registered in the name of Abdulazack Ismail Kajuna via NIDA BIOMETRIC.

According to PW7, CDR issued from Airtel Tanzania (Exh. P9) was not accompanied by an affidavit, but each was stamped by Airtel to authenticate the same. The same revealed that phone number to wit; 0693991875 was registered in the name of Asha Hamisi Haji, via NIDA BIOMETRIC.

During admissions of the CDRs, objection was raised on ground of relevance because the phone number alleged to be of the deceased Clavery Joseph @Kamongo, the CDR revealed that it was registered in the name Asha Hamisi Haji while the phone number alleged to be of PW8 Jamir Jamal was registered in the name of Abdulazack Ismail Kajuna but the objection was overruled since registration and use are two distinct things. The objection was not on authenticity of the CDRs rather on its weight of which the latter remains in the domain of the trial court for evaluation in the judgment.

According to PW7, he did not trace Abdulazack Ismail Kajuna or Asha Hamisi Haji, and it is true that said persons are not among the 12 prosecution witnesses. However, since it is true that registration and use of the phone number are two different things, and since PW8 who was found in possession of the handset with IMEI number 353010104935240 which was

pledged to him as security by DW1, and since DW1 was traced and found in possession of the deceased's motorcycle, and since, each accused person had confessed in his cautioned statement that after killing the deceased they stole from him a motorcycle and a phone make Tecno, and DW1 specifically confessed to have taken the phone and later pledged it to PW8 as security, it is my considered view that, the fact that the phones were not registered in the name of PW8 or the deceased, does not cast reasonable doubt on the prosecution case.

I am aware that the evidence of the Call Data tendered in court by PW7 is purely on electronic evidence which is of circumstantial nature. Under section 3 and 18 of Electronic Transaction Act (ETA) No.13 of 2015 (R.E 2019), (ETA) and section 78A of Evidence Act (TEA), Cap 6 (R.E 2019), electronic evidence is admissible in our courts. Moreso, under the best evidence rule, electronic evidence is best evidence so far as the one wishing to tender it, has laid down the foundation on its integrity and authenticity of the evidence to be tendered.

Since the prosecution while tendering exhibit P8 which was stamped and signed, they accompanied with an affidavit and (Exhibit P10) as well so did to exhibit P9 which was tendered being stamped, in my view; they were

thus authentic. This court through the case of **Leonard A. Munghor versus Novart Kaijage Zedekiah** Civil Case No.04 of 2021, High Court of Tanzania at Bukoba (Unreported) the affidavits and certificates were held to be mandatory to authenticate electronic evidence in the form of print out. See also **Simbanet Tanzania Limited versus Sahara Media Group Limited** Commercial Case No. 2 of 2016, High Court of Tanzania, Commercial Division at Dar es salaam (Unreported).

In the case at hand, the nature of electronic evidence tendered proves the case under circumstantial evidence and if taken in totality with other circumstantial evidence afore discussed and other available evidence in this case to the entirety, adds weight to the prosecution case and thus accords it with high probative value.

In **Sikujua Idd v. Republic**, Criminal Appeal No. 484 of 2019 (unreported) the Court of Appeal had this to say;

"It is established law that a charge of murder can be fully proved by circumstantial evidence. In determining a case centered on circumstantial evidence, the proper approach by a trial court and an appellate court is to critically consider and weigh all the circumstances established by the

evidence in their totality, and not to dissect and consider it piece meal or in cubicles of evidence or circumstances".

From the here in above decision, it is apparent that circumstantial evidence must be a combination of facts creating a network through which there is no escape for the accused because the facts taken as a whole, do not admit of any inference than that of his guilty.

In the case at hand, circumstantial evidence (recent possession and Call Data Record) has created a network through which there is no escape for DW1 owing to the reason that the facts taken as a whole do not admit any inference but that DW1 committed the offence of murder to wit; the killing of Clavery Joseph@Kamongo.

Again, **confessional statements** (Exh.P12 and P13) are to the effect that the two accused persons have jointly killed the deceased. To that extent, the third issue has been answered in the affirmative. In other words, the prosecution has proved to the required standard that the accused persons herein have killed the deceased Clavery Joseph@Kamongo.

4th Issue.

Undoubtedly, murder is said to be committed when an accused person kills another with malice aforethought. Section 200 (1) of the Penal Code [Cap 16 R: E 2022] simply defines malice aforethought either as an intention to cause death of a person or knowledge that the act causing death will probably cause death of some person. There must be a premeditated or planned intention to cause death.

However, malice may also be established when the harm is directed at a sensitive and vulnerable part of the body. In other words, **malice aforethought** may be inferred from the nature of the weapon if used or/and the geographical location of the body on which the attack was made, and the conduct of the accused.

In the case of **Enock Kipela versus Republic, Criminal Appeal No. 150 of 1994 CAT** (Unreported) at page 6 the Court observed that;

"Usually, an attacker will not declare to cause death or grievous bodily harm, whether or not he had that intention must be ascertained from various factors, including the following: the type and size of the weapon, if any, used in the attack, the amount of force applied in the assault, the part or parts of the body the blows were directed at or inflicted on, the number of blows, although one blow may, depending upon the facts of the particular

case, be sufficient for this purpose, the kind of injuries inflicted, the attacker's utterances, if any, made before, during or after the killing, and the conduct of the attacker before and after the killing"

In the case at hand, the postmortem report shows that the deceased was tightly tied on the neck with a black wire and there was a deep mark around the neck. According to the Medical Doctor (PW9), the cause of death was strangulation by hand black wire that led to complete suffocation then caused hypoxia. PW1, PW2, PW5 and PW6 confirmed that the deceased's neck was tightly tied by a black wire.

The type of weapon used to wit, a black wire, the part of the body attacked to wit; neck; all indicate that the killing of Clavery Joseph Kamongo by the accused persons was actuated by malice aforethought.

Furthermore, the accused persons in their cautioned statements have disclosed how they planned and executed the killing of the deceased with malice aforethought, preferably aimed to deprive the deceased his motorcycle without being noticed. To that extent, I am satisfied that the prosecution proved malice aforethought of both accused persons.

5th Issue.

8

In the instant case, there are more than one accused person therefore, it is mandatory to determine whether the accused persons had common intention. Common intention is the meeting of the mind of the accused persons which is necessary to be present in joint charges. However, common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to disassociate himself from the assault/act. However, it should be noted that the mere presence of the accused person in the scene of crime is not final and conclusive prove of common intention. *Section 23 of the Act further provides that;*

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence"

It should be noted that in order to make the doctrine of common intention applicable, it must be shown that the accused persons shared with another a common intention to pursue a specific unlawful purpose, and in the prosecution of that unlawful purpose, an offence was committed and that

the doctrine of common intention would apply irrespective of whether the offence was murder or manslaughter, and it is not necessary to make a finding as to who actually caused the death. **See Ismail Kisegerwa and Another versus Uganda, CA, Criminal Appeal No.6 of 1978.**

In Abdi Alli versus R. [1956] E.A.C.A, 573 the Court of Appeal held that:

"The existence of common intention being the sole test of joint responsibility, it must be proved what the common intention was and that the common act for which the accused were to be made responsible was acted upon in furtherance of that common intention. The presumption of common intention must not be too readily applied or pushed too far"

In the case at hand, Exhibits P12 and P13, reveal that accused persons met and made prior arrangement, then procured Clavery Joseph@Kamongo, traveled using the deceased's motorcycle and finally killed him and then threw his body into a river. The statements also revealed that after they have killed him, they stole his items including his motorcycle, and both DW1 and DW2 headed to Kagondo area within Bukoba Municipality. Therefore, to that extent, the issue of common intention has been proved beyond reasonable doubt.

In the upshot, it is apparent that all ingredients of murder have been proved beyond reasonable doubt and having considered the totality of the evidence placed before me, I find the accused persons guilty of the offence of murder. Consequently, I hereby convict each accused of the offence of Murder under section 196 and 197 of the Penal Code, [Cap 16 R: E 2022]. It is so ordered.



E. L. Ngigwana

Judge

08/03/2024

Judgment was pronounced in open court this 8th day of March 2024 in the presence of the convicts namely Philbart Mukaru@White and Lameck Twinomkama@Martine who appeared through Video conference Facility linked from Biharamulo prison, their learned advocates Mr. King Manase and Ms. Ester Sentozi, and in the presence State Attorneys Mr. Amani Kyando and Elias Subi, who all appeared by way of video conference, Hon. E. M.Kamaleki, and Ms. Queen Koba.



E. L. Ngigwana

Judge

08/03/2024

Antecedents.

Mr. Amani Kyando. (S/A)

My Lord, we have no previous record of the accused persons. However, I pray to this court to abide by the law to wit; section 197 of the Penal Code. That is our submission My Lord.

Mitigations.

Mr. King Manase; Defence counsel for the 1st accused.

My Lord, on behalf of the first accused person, I have nothing as far as mitigation is concerned owing to the reason that section 197 of the Penal Code does not provide for alternative sentence.

Ms. Ester Sentozi; Defence counsel for the 2nd accused.

My Lord, since the penalty for the offence of murder has been provided under section 97 of the Penal Code, and since the court cannot provide an alternative penalty, we have nothing to submit on mitigation.

1st convict: - I pray for court's wisdom and God's mercies to prevail.

2nd convict: - Let the wisdom of the court prevail.

Sentencing Order

I have heard the submissions of both parties. In our jurisdiction, upon conviction for the offence of murder under section 196 of the Penal Code, [Cap. 16 R: E 2022], there is only one sentence which is death by hanging.

By virtue of section 197 of the Penal Code, [Cap.16 R.E 2022], I hereby sentence the convicts Philbart s/o Mukaru@White and Lameck s/o Twinomkama@Martine 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 2022], I hereby direct that each convict shall suffer death by hanging. It is so ordered.



E. L. NGIGWANA

JUDGE

08/03/2024

Sentencing order pronounced in open court this 8th day of March 2024 in the presence of the convicts namely Philbart Mukaru@White and Lameck

Twinomkama@Martine who appeared through Video conference Facility linked from Biharamulo prison, their learned advocates Mr. King Manase and Ms. Ester Sentozi, and in the presence of State Attorneys Mr. Amani Kyando and Elias Subi, who all appeared by way of video conference, Hon. E. M. Kamaleki, and Ms. Queen Koba B/C.


E. L. NGIGWANA

JUDGE

08/03/2024

Right of appeal against both conviction and sentence explained to the accused persons




E. L. NGIGWANA

JUDGE

08/03/2024