IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SITTING AT KARAGWE

ORIGINAL JURISDICTION

(BUKOBA REGISTRY)

CRIMINAL SESSIONS CASE NO. 126 OF 2016

THE REPUBLIC

VERSUS

MUGISHA S/O KATULEBE.....1ST ACCUSED

DERICK S/O YUSTAS.....2ND ACCUSED

WINSTONE S/O WILSON @ FRED.....3RD ACCUSED

IGNATUS S/O RESPIQIUS.....4TH ACCUSED

KAMUHANDA S/O INNOCENT.....5TH ACCUSED

ZAKARI S/O ZEKERIA.....6TH ACCUSED

JUDGMENT

05/11/2021 & 12/11/2021

NGIGWANA, J.

The accused persons namely; **Mugisha s/o Katulebe, Derick s/o Yustas, Winstone s/o Wilson@ Fred, Ignatus s/o Respiqius, Kamuhanda s/o Innocent and Zekeria s/o Zakaria** are jointly and together charged for the offence of murder contrary to sections 196 and 197 of the Penal Code Cap 16 R: E 2002, Now R: E 2019. It is alleged by

the prosecution that on 29th day of December, 2015 at Kaisho village within Karagwe District in Kagera Region, the accused persons did murder one person known by a single name of "Rugema" (hence forth the deceased). When the information of murder was read over and properly explained to the accused persons, they all pleaded not guilty.

The brief facts of the matter are that; on 27th day December, 2015 the deceased left from his working place with some money to buy live stock from his neighbor's kraal/cattle yard, but since he left, he never came back. That, following his disappearance, his co-headsman known by the name Kakuru reported the matter to Emmanuel Francis (PW1) whereas, on 31/12/2015 started tracing the deceased. That, PW1 finally learnt that on 29/12/2015, the deceased bought a cow/calf from the first accused at a price of TZS 180,000/=. It was later discovered that the deceased was killed and then his body was completely burnt. The matter was reported to the police, and the investigation started and eventually, the accused persons were apprehended on allegations that they are the ones who killed the deceased, and stood charged as described above.

Worthy of a note is that, when the facts were read and explained to the accused persons during the preliminary hearing, matters which were agreed upon are; **one,** the names and particulars of the accused persons, **two,** that the accused persons were all headsmen, **three**, that the accused persons were arrested on allegations that they murdered the deceased, and **four**, that the accused persons stood charged with the offence of murder. Also, at that stage, three exh/ibits were tendered with

no objection to wit; Government Chemist report, Postmortem examination report and sketch map of the crime scene.

To establish and prove criminality against them, prosecution featured four witnesses and tendered five (5) exhibits. The witnesses were; Emmanuel Francis (PW1), Nassan Ntaganda (PW2), F. 3969 CPL Filbert (PW3), and Kajenzi Geofrey (PW4). The Exhibits were; Government Chemist report ***(Exh. P1)***, Report on Postmortem examination ***(Exh. P2)***, sketch map of the crime scene ***(Exh. P3),*** Cautioned statements of the 1st and 6th accused persons (***Exh. P4 and P5*** respectively).

Out of those four witnesses and five exhibits, the prosecution managed to establish the case of murder against all six (6) accused persons, thus the court invited them to make their defense whereas, they elected to testify under oath. They neither called any witness to testify in their favor nor tendered exhibits. The 1st, 2nd, 3rd, 4th, 5th and 6th accused persons testified as DW1, DW2, DW3, DW4, DW5, and DW6 respectively.

At the hearing of this case, the Republic was represented by Ms. Xaveria Makombe, learned State Attorney while the accused persons enjoyed the legal services of Mr. Adalbert Kweyamba, learned advocate. On my part, I sat with three gentlemen assessors namely; Faridu s/o Musa, Francis s/o Kishenyi and Ismail s/o Said Rweyemamu. My Law Assistant was E. M. Kamaleki.

The prosecution case began with PW1 who deposed that he is resident of Kanogo village in Karagwe District dealing with farming and livestock-keeping. That on 29/12/2015, he was informed by Kakuru that the

headsman who was known by a single name of Rugema had sold two bulls, and then matched to the neighboring kraals to buy cattle, but he did not come back as expected. He further deposed that, on 31/12/2015, he started tracing him whereas, in that exercise, he arrived at the Kraal of his fellow pastoralist known as Mulisa and found two headsmen who informed him that Mulisa had sold two bulls to Rugema, and as a result, he called Mulisa vide telephone and confirmed the information. He further told the court that following the said confirmation, he believed that the deceased was still around and that he would turn up, but having seen that he delayed to return until 08/01/2016, he went on tracing him while accompanied with Nassan Ntaganda (PW2) and Finias, and on 9/01/2016 during night hours, they found the 2nd and 4th accused persons taking care of the Kraal of Mathias Audax and asked them the whereabouts of the deceased. He further said, the 2nd and 4th accused persons in the presence of the 1st accused made an oral confession that the 1st accused had assaulted, and strangled to death and finally burnt the deceased's body. PW1 further said, the 2nd and 4th accused persons told them that at the scene of crime, the 1st accused had a spear, bush knife and a stick in which he threatened and ordered them together with the 3rd, 5th and 6th accused persons to fetch firewood for him, and they did so out of fear. PW1 further deposed that, when he asked him the truth of the said narration, the 1st accused admitted that it is true that he had murdered the deceased and burnt his body and he did so after he had sold a cow to him at a price of Tsh. 180,000/= and with the aim of conning the deceased, claimed that the deceased was a cattle thief, the fact which was not true. He said, following such oral confession, he reported the matter to the police and the

police arrived while accompanied by a medical doctor, and at the crime scene, pieces of remained bones were collected for further investigation.

When cross examined by the defense counsel, he said, he did not witness the incidence of murder in his own eyes. When asked questions for clarification by the first assessor, PW1 said, on the material night, his team had eight (8) people. When asked the second assessor, PW1 said Mugisha (1st accused) sold a cow/calf to the deceased but later on, he refused to hand over the cow to the deceased, instead he decided to kill him.

PW2 Nassan s/o Ntaganda and PW4 Kajenze Geofrey had similar evidence which supported the evidence of PW1. It is the evidence of PW2 and PW4 that on 08/01/2016 they joined (PW1) to trace the deceased who had gone missing since 27/12/2015 and on 9/01/2016 around 2:00hours they arrived at the Kraal of Audax Mathias and found the 1st accused there while the 2nd and 4th accused persons were found in the neighboring kraal and joined them with the 1st accused, and when asked the whereabouts of the deceased, the 1st accused denied to know his whereabouts, but the 2nd and the 4th accused persons on their side made an oral confession that the deceased had been assaulted by Mugisha (1st accused), Audax Mathias, Alphonce Fidel and Mwinamula Kakombo and finally strangled to death by Mugisha on allegation that he was a cattle thief. It is further the evidence of PW2 and PW4 that when they asked the 1st accused the truth of the said narration, he voluntarily made an oral admission before them that he had assaulted, strangled to death and then burnt the deceased's body. That, the 1st accused led them to the scene of crime where they saw ashes and pieces of burnt bones which were collected by the police for investigation.

When cross examined by the Defense counsel, PW2 said, he cannot state with certainty that the collected pieces of bones were human remains. When cross examined, PW4 said, the deceased was not a stranger to him though the 3rd, 5th and 6th accused persons were completely strangers to him as he did not see them on 9/01/2016. On re-examination, PW4 said he saw ashes and pieces of bones at the scene of crime, and he witnessed the arrest of the 1st, 2nd and 4th accused persons. When asked questions for clarification by the 2nd assessor, PW4 said, they were not accompanied by any local leader. When asked by 3rd assessor, PW4 said, the deceased was burnt few meters from Mugisha's Kraal and that the rest of the accused persons played the role of fetching fire wood and they did so out of fear.

PW3 E. 3969 CPL Filbert testified that he is a police officer stationed at Kayanga police station-investigation section. He added that, on 09/01/2016 around 8:00hrs he joined the OC-CID one Edward Masunga of Karagwe District, and other policemen including D/C Emmanuel, D/C Kangele and the Medical Doctor and then headed to Kaiho village following the incident of murder reported to the OC-CID. He added that, they arrived at the crime scene around 11:00hrs and found among others Sgt. Charles and D/C Peter both of Mkalilo police post, also 1st, 2nd and 4th accused persons while handcuffed. He said, the OC-CID asked the 1st, 2nd and 4th accused persons the whereabouts of deceased and then Mugisha (1st accused) confessed orally before the OC-CID that he had murdered the said deceased and burnt his body, and that fire wood were fetched by the 2nd, 4th accused persons and other three (3) persons who were not there by then, that is to say the 3rd, 5th and 6th accused persons. He said the 1st, 2nd and 4th accused

persons led them to the place where he saw ashes and pieces of skeleton suspected to be of human being. He said, the medical doctor conducted the postmortem examination, and then, they picked the pieces of bones for further investigation, in which they were finally sent to the Government Chemist. He added that on the same date, they managed to arrest the 3rd and 5th accused persons, then headed to Kayanga police station and on 10/01/2016 the 6th accused person was arrested. He added that, at Kayanga Police station, he recorded the cautioned statement of the 1st accused according to law (the same was objected but eventually admitted as exhibit P4 after overruling the objection in the trial within a trial). He added that in the said cautioned statement, the 1st accused person confessed to have murdered the deceased and then burnt his body. He added that, he also recorded the cautioned statement of the 3rd accused Winstone s/o Wilson, and on 10/01/2016, he recorded the cautioned statement of the 6th accused person (The same was admitted with no objection and marked as exhibit P5). He further said, on 14/01/2016 extra-judicial statements of the accused persons were recorded. PW3 who was the investigator of this case further said that, the investigation has revealed that the deceased was murdered by Mugisha s/o Katulebe and that the 2nd, 3rd, 4th, 5th and 6th accused persons played the role of fetching fire wood for the 1st accused.

When cross-examined, by the defense counsel, PW3 said that, the Postmortem Report showed that the one who conducted an autopsy was a Clinical Officer. He added that the whole body was burnt, thus there was no physical body there. That the bones were taken to the Government

Chemist, therefore, the Government Chemist is the one who can ascertain whether the bones were human remains or not. PW3 also admitted to have seen the Government Chemist Report, and that, the Government Chemist did not ascertain as to whether the bones collected from the crime scene were human remains or not. That cautioned statement of the 1st accused was not recorded within four (4) hours, because the accused was arrested in the remote area, and the weather was not conducive as there was heavy rain, and finally the motor vehicle developed mechanical defects. He added that he took the accused persons to the justices of peace on 14/01/2016 because there was a challenge to procure justices of peace to wit; Primary Court Magistrates, Ward Executive officers and District Administrative Offices, though he admitted that Karagwe District has 22 Wards and several primary courts. He said, the 2nd, 3rd, 4th, 5th and 6th accused persons fetched fire wood for Mugisha (1st accused) but they had the duty to refuse the order of the first accused.

When asked questions for clarification by 1st assessor, PW3 said, they found the 1st, 2nd and 4th accused persons under police arrest and other ten people. When asked by 2nd assessor PW3 said that he trusted the statements of the accused persons. When asked by 3rd assessor, PW3 said they were not accompanied by any local leader. That marked the end of the prosecution evidence.

The 1st accused person (DW1) in his defense denied to have committed the offence of murder. He added that on 09/01/2016 during night hours while at the Kraal of Audax Mathias, he was invaded by about ten people who had sticks and started assaulting him on allegation that he is troublesome

person. He said, on that night he identified the 2nd and 4th accused persons only but also witnessed fresh blood on the 4th accused's head. He added that, his hands were tied by ropes and then they were asked the whereabouts of the deceased, but he told them that he knew nothing about the deceased. He further said, he was assaulted by the said persons until he confessed before them that he murdered and burnt the deceased's body.

DW1 also said, he made the said admission to rescue his life from the assault, and 9/01/2016 during morning hours policemen arrived, whereas they were led by the said persons to the place where there were ashes and pieces of bones of a cow he burnt because it had a dangerous sickness which can easily spread to other livestock. He admitted that the bones were collected by the police.DW1 further said he was assaulted by PW3 and D/C Emmanuel forcing him to admit that he had murdered the deceased whereas, later on, he was matched to Kayanga police station and eventuality PW3 brought a written paper and forced him to sign by thumbprint. He urged the court to see him innocent.

When cross examined By Xaveria Makombe, learned State Attorney, DW1 said, he was arrested on 9/01/2016 around 2:00hours and that he was with the 2nd and 4th accused persons but the 2nd and 4th accused persons were not assaulted. When further cross examined, he said, the persons who arrested him were accompanied by the 2nd, 3rd, 4th, 5th and 6th accused persons as they were not strangers to him. He said, he sustained injuries as a result of the assault and was treated at Kayanga Prison.

When asked questions for clarification by 1st assessor, DW1 said, he never saw the deceased and to his understanding the pieces of bones collected were of the cow which he burnt few meters from the Kraal. When asked by 2nd assessor, he said, no person ever went to the Kraal of Audax Mathias to buy livestock. When asked by 3rd assessor, he said he was not aware whether it was necessary to seek for PF3.

The evidence of DW2, DW3, DW4, DW5 and DW6 is similar that on 29/12/2015 a certain man who was stranger to them was assaulted by DW1, Audax Mathias, Alphoce Fidel and Mwinamula Kakombo, then dragged into a shrub area whereas, DW1 strangled him to death and then threatened and forced them using a spear, bush knife and a stick to fetch fire wood for him and they did so out of fear because DW1 was a troublesome, dangerous and notorious person ready to kill or cause grievous harm to anyone at any time. It is their evidence that, having fetched the firewood, DW1 ordered them to leave the place and they did so. That they kept the fetched firewood beside the body lying on the ground.

It is further the evidence of DW2 and DW4 that on the 29/12/2015 around morning hours the deceased arrived to the kraal of DW1 in which he bought a cow from DW1 at a price of Tsh.180,000/=, and was shown the cow but later on, DWI with the mission of conning him, claimed that the deceased was a cattle thief, and from he killed him. That, they were arrested on 9/01/2016 with DW1 and they narrated to the arresting people and the police how the deceased was killed by DW1, and how he forced them to fetch firewood for him. That, they were not beaten on material

night, and that DW1 made an oral confession that it is true he assaulted, strangled to death and completely burnt the deceased's body, and he made such confession voluntarily.

DW6 added that his statement was recorded at police but he did not understand his rights, the contents written in the said statement since he was not familiar with Kiswahili language, however, now days he can talk little bit since he had been in custody since 2016 and the mode of communication in the prison is Kiswahili. That, he was very conversant with Nyambo language and no more. He therefore he urged the court to disregard the statement and find him innocent.

When cross examined as to how DW1 overcame all of them, each said DW1 was a dangerous person, and had threatened to kill each of them if they would not fetch firewood, and since they have already seen a man lying on the ground and since they had no weapons to resist the 1st accused, they opted to fetch the firewood to rescue their lives. That marked the end of the defense evidence.

It is trite that in all criminal trials, once the evidence of the prosecution and that of the defense is heard and taken, the next question for court to determine is whether the prosecution has proved the charge against the accused beyond reasonable doubt. The prosecution evidence must be cogent enough leaving no doubt to the criminal liability of the accused persons linking them with murder of the deceased. The prosecution therefore, must produce credible and reliable witnesses whose evidences

irresistibly point to none save only to the accused person/persons. Section 3 (2) (a) of the Evidence Act Cap 6 R.E 2002 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****"*

The standard of proof in criminal cases was insisted in the case of **JONAS NKIZE V.R [1992] TLR 213** where this court through Katiti, J. (as he then was) stated that;

"*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".*

Similarly, the court of Appeal of Tanzania in **Furaha Michael versus The Republic, Criminal Appeal No. 326 of 2010 (Unreported**) held that;

"*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"*

Consistently, the Court of Appeal in the case of **George Mwanyingili versus Republic, Criminal Appeal No.335 of 2016 CAT (Unreported**) had this to say;

"We wish to re-instate the obvious that the burden of proof in criminal cases always lies squarely on the shoulders of the prosecution, unless any particular statute directs otherwise. Even then however, that burden is on the balance of probability and shifts back to the prosecution"

In our jurisdiction, murder is among the most serious offences whereas, when proved to the required standard, attract only one capital punishment to wit; death by hanging as per section 197 of the Penal Code Cap.16 R: E 2019. For that reason, its evidence and proof must be unshakably clear, leaving only remoteness possibilities or negligible errors which may be neglected by any person confronted to decide on the same. See the case of **Republic versus Mtei [1971] HCD No.451** and **Republic versus Anzigar Hermsn Deonis and Another, Criminal Session Case No.02 of 2019** HC -Mtwara (Unreported). The onus never shifts away from the prosecution and no duty is cast on the accused person to establish his or her innocence. See **Said Hemed versus Republic [1986] TLR 117**

In homicide cases like this one, the court is satisfied that the case has been proved beyond reasonable doubt only if these fundamental elements have been established and proved; first and more most**, death of the deceased**, secondly, **that the death was unnatural**, thirdly, **that death was caused by unlawful act or omission of the accused,** and fourthly, **that the killing was actuated by malice afore thought.** However**,** it should be noted that **where the charge/information involves more than one accused the court must see whether there was common intention.** For that reason**,** the major issues in the case at hand are therefore, five as follows;

1. *Whether the alleged deceased namely; Rugema really died*
2. *whether his death was not natural*
3. *Whether the death was caused by unlawful act or omission of the accused persons*
4. *Whether there was common intention among the accused persons to execute an unlawful purpose*
5. *whether the killing was actuated by malice afore thought*

I would like to start with the **first issue whether Rugema really died**. In this case, the prosecution fully relied on PW1, PW2, PW3 and PW4. It is incontestable that none of the four witnesses adduced evidence to the effect that he saw on his own eyes the accused persons or any of them killing Rugema (deceased).

Along with that, it must be noted that death may be proved by production of the postmortem Report or Government Chemist Report. In the case at hand, the prosecution in their attempt to prove the death of the deceased, tendered the Post Mortem Report which was admitted as **Exh.P2** and the Government Chemist Report which was admitted as **Exh.P1**. The documents were tendered during preliminary hearing. The Government Chemist wrote in the report the following words; "Kielelezo **hakikutoa majibu kwa sababu ni mabaki yaliyoungua kwa kiasi kikubwa**" while the Clinical officer indicated in the Postmortem report that the deceased's body was identified to him by Emmanuel s/o Francis (PW1) and Tibesi s/o Ibandamile and the cause of death was fire after being burnt.

However, it is the evidence of PW1, PW2, PW3 and PW4 at the scene of crime no human body was recovered except ashes and pieces of burnt bones which were collected and sent to the Government Chemist to ascertain whether they were human remains or not. In the defense side, DW1, DW2 and DW4 also said no human body was recovered at the scene of crime on 09/01/2016. Neither the Government Chemist nor the Medical Doctor appeared in court to testify and be subjected to cross- examination in respect of their reports. Under the circumstances, I accord no any evidential value to the documents because expert opinion does not bind the court. I sought the guidance in the case of Yusuph **Molo versus the Republic, Criminal Appeal No.343 of 2017 (Unreported**) where the Court of Appeal held that;

"Expert opinion is not binding to the court in arriving to its decision but it rather persuasive"

However, it is very important to know that there are other ways in which death may be proved even without thc production of thc body of thc alleged dead person. Such ways are as follows;

(a) Evidences of witnesses who state that they knew the deceased and attended the burial or,

(b) Evidences of the persons who saw the dead body or

(c) By circumstantial evidence. See **Seif Selemani versus Republic, Criminal Appeal No. 130 2005** and **Mwale Mwansanu versus The**

Director of Public Prosecutions, Criminal Appeal No. 105 of 2018 CAT (Both unreported).

In the case at hand, none of the prosecution witnesses who testified that he attended the burial ceremony of the deceased or that he saw the deceased's body, therefore (a) here above is not applicable.

The remaining evidence of the prosecution as regards the death of the deceased is heavily predicated on the oral confessions of the 1st, 2nd, and 4th accused persons, cautioned statement of the 1st accused person as well as circumstantial evidence. PW1, PW2, PW3 and PW4 told the court that the 1st, 2nd and 4th accused persons have orally confessed before them that the deceased was killed and burnt. DW1's cautioned statement is to the effect that the deceased really died and his body was completely burnt. The 2nd, 3rd, 4th 5th and 6th accused persons in their defense evidence admitted that the deceased was killed.

Furthermore, circumstantial evidence proving the death of the deceased in this case is as follows; DW1 led the police to the place where the deceased's body was burnt to wit; a shrub area in which ashes and burnt bones were seen. DW2, DW3, DW4, DW5 and DW6 in their defense admitted and confirmed that they saw the body lying on the ground, and DW1 was beside the body, and Rugema had not been seen again. With no doubt, circumstantial evidence is also strong to the effect that, Rugema really died.

Undoubtedly; DW1's cautioned statement (Exh.P4), oral confessions by DW1, DW2 and DW4 to PW1, PW2, PW3, and PW4 and circumstantial

evidence as I have endeavored to explain herein above, sufficed to prove that Rugema really died. That means therefore, the first issue has been answered in the affirmative.

Coming to the 2nd issue as to whether the death was natural. This issue should not detain me. The oral confession made by DW1, DW2 and DW4 to the four prosecution witnesses is to the effect that the deceased was assaulted and strangled to death, and then his body was burnt. The 1st accused cautioned statement is on the same effect. DW2, DW3, DW4, DW5 and DW6 in their defense have admitted and confirmed that the deceased was first assaulted, then strangled to death. On that premise, the deceased's death was un natural and violent. This issue also had been answered in the positive.

3rd issue, Whether the death was caused by unlawful act or omission of the accused persons & 4th issue, whether or not there was common intention between the accused persons.

It should be noted that, the law presumes any homicide to be unlawful unless it is accidental or excusable or authorized by law. It is also position of the law that in a joint trial involving more than one accused, the evidence against each accused must be considered separately, and the court must address the issue as to whether there was common intention. Therefore, the case against each accused person must be such as to prove the guilty of that particular accused person beyond reasonable doubt. See **Munyole versus Republic, Criminal Appeal No.97 of 1985,** Court of Appeal of Kenya at Kisumu.

In the case at hand, as stated earlier, there are six accused persons. The 1st accused (DW1) in his cautioned statement has confessed to have murdered the deceased but also has incriminated the 2nd, 3rd, 4th, 5th and 6th accused persons, however, no evidence adduced in court corroborating DW1's cautioned statement to the effect that, the 2nd, 3rd, 4th, 5th, and 6th accused persons were involved in the killing of the deceased. It is a legal position in our jurisdiction that a conviction cannot solely base on a confession by a co-accused. There must be in addition, other independent testimony to corroborate it. See section 33 (2) of the Evidence Act Cap 6 R: E 2019, and the case of **Ganja Mhela Nyama versus R, Criminal Appeal No.93 of 2019 HC Mtwara (Unreported**)

When invited to make their defense, each accused that is to say, DW2, DW3, DW4, DW5 and DW6 denied to have committed the offence of murder. They admitted to have been arrested on 09/01/2016 save for the 6th accused who was arrested on 10/01/2016, and matched to Kayanga police station where their cautioned statements were recorded and on 14/01/2016 their extra-judicial statements were recorded. It is their evidence that DW1 called and ordered them to fetch firewood for him.DW2 added that DW1 had a spear, stick and bush knife and used the same to threaten them and uttered the words" **Nikisikia mtu yeyote amesema neno, nitampoteza katika pori hili".** DW2 further said, having completed fetching firewood, they were ordered by DW1 to leave the place and they did so because DW1 was a troublesome and dangerous person, therefore, they complied with DW1's order out of fear. When asked a

question for clarification by 1st gentleman assessor, DW6 replied as follows; **"Mugisha alikua mbabe sana, hakuna mtu anayemuweza"**

From the evidence of DW2, DW3, DW4, DW5, and DW6, it is undoubted that they have admitted to have visited the crime scene after being called by DW1, and found DW1 with the human body lying on the ground, and were ordered to fetch firewood for him, and they did so out of fear**. For that matter it is proper to determine whether the doctrine of common intention is applicable in this case**.

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 22 (1) of the Penal Code Cap 16 R: E 2019 provides that;

When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing namely;

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence.

(d) any person who counsels or procures any other person to commit the offence, in which case he may be charged either with committing the offence or with counseling or procuring its commission.

(2) A conviction of counseling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

(3) A person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind and is liable to the same punishment as if he had himself done the act or the omission.

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 **BomboTomola versus Republic [1980] TLR 254** the court while addressing the issue of common intention had this to say;

"*The question which arises is who was the author of the fatal blow or blows which broke the spinal cord? Obviously, if the appellant was the author of the fatal blow or blows, she could be found to have caused the death of the deceased, but if, on the other hand, the fatal blow or blow were administered by the second accused, the appellant would not be fond legally responsible for the death of the deceased unless the situation falls either under the provisions of section 22 or section 23 of the Penal Code, which deal with parties to a criminal offence and offence omitted by joint offenders in the prosecution of a common purpose*"

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, having seen what amounts to common intention, and having gathered from the evidence and facts of the case that after the deceased being killed by DW1, he called the 2nd ,3rd, 4th, 5th, and 6th persons who participated in the exercise of fetching firewood, but since they did so out of fear following DW1's threats, and were not told by DW1 why he needed the firewood, and that having fetched the same, they left the place, it is my considered view that the doctrine of common intention does not apply in this case.

Another issue which needs to be resolved here is whether or not under the circumstances of this case, DW2, DW3, DW4, DW5 and DW6 can be convicted of the minor offence of Accessory after the fact.

Section 387(1) of the Penal Code provides:

*"A person who **receives** or **assists another** who is, to **his knowledge**, guilty of an offence, in order to **enable him to escape punishment**, is said to become an accessory after the fact of the offence"*

From the herein above provision, three conditions must be established and proved for the accused to be convicted as an accessory after the fact.

(i) *The crime must have been completed.*

(ii) *The person assisting the accused must have knowledge that the accused person committed the offence.*

(iii) *The actions of the accused must result in helping the accused escape or avoid consequences of the principal crime.*

In the case of **Nicodemo versus R [1969] HCD 25** the court discussed in detail on accessory after the fact and held that:

"*To be convicted as an accessory after the fact, an accused not only must* ***know*** *or* ***have reason to know about the offence****, but must take steps for the* ***purpose of enabling the offender to escape punishment***"

In the case, at hand the 2nd, 3rd, 4th, 5th and 6th accused persons arrived at the scene of crime when the offence of murder was already committed. They had knowledge that the offence of murder was committed or had reasons to have known since the DW1 had a spear, bush knife and a stick and the human body was lying on the ground. Though, it's their defense evidence that DW1 did not tell them why he was in need of firewood, they had a reason to have known taking into account that, that place was not a kitchen or a home but a shrub area and DW1 had no food to cook or meat to roast but had a human being body beside him. With all the circumstances, they fetched fire wood for him. With no doubt, a right-thinking person can easily conclude that DW1 was assisted by the 2nd, 3rd, 4th, 5th and 6th accused persons to get firewood so as to burn the deceased's body in order to escape or avoid consequences of Murder.

However, it should be also be noted that, they have told this court in their defense that, they did not fetch the firewood voluntarily, but were threated and forced to do so otherwise, they would have been killed too, and that DW1 had dangerous weapons to wit; spear, bush knife and stick, and they

knew him as a dangerous and troublesome person, and on their side, they had no weapon to resist, and by that time they watched the human body lying on the ground and since in the **Goodluck Kyando versus Republic Criminal Appeal No. 118 of 2003 it was held that,** It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing him, in the case at hand, the court has no good and cogent reasons to disbelieve the 2nd, 3rd, 4th, 5th and 6th accused persons.

In the administration of justice, it is admitted that every case is unique and must be considered and decided on its own merits. In that premise, I consider the case at hand as a unique case, and therefore, I will decide it in its own merits.

Undoubtedly, when a person under threat or another form of pressure which he/she is unable to resist, commits a crime along with others, or assist another, he is not a willing participant in it but a victim of the circumstances. Likewise, a person who merely witnesses a crime, and does not give information about it to anyone else out of terror is not an accomplice. Taking into account the evidence as a whole, circumstances of the case and applicable legal principles, it is my considered view that the 2nd, 3rd, 4th, 5th, and 6th were the victims of the circumstances, hence cannot be held liable of the minor offence of Accessory after the fact.

As regard to the DW1, there is plenty of evidence to prove that he is the one who killed the deceased. To start with his oral confession.

Any oral confession does not carry less weight than that made in writing once the witness of the same to whom it was made is accepted in court, and therefore, may be sufficient in itself to found conviction against the suspect. This position was elucidated by the Court of Appeal of Tanzania in the case **john Shini versus Republic, Criminal Appeal No. 573 of 2016 CAT (Unreported)** where the court held among other things that,

"*It is settled that, an oral confession made by a suspect before or in the presence of reliable witnesses, be they civilian or not may be sufficient by itself to found conviction against the suspect*"

However, in the case of **Mohamed Manguku versus Republic, Criminal Appeal No. 194 of 2004 CAT (Unreported)** the Court of Appeal stressed that;

"*oral confession would be valid if at the time when the suspect stated such words /or made such confession imputed to him, he was a free agent*"

It is the evidence of PW1, PW2, PW3 and PW4 that DW1 was not forced or threated to make his oral confession, the fact which was confirmed by DW2 and DW4 who were present when DW1 confessed orally that on 27/12/2015 he sold a cow to the deceased at the price of TZS 180,000/=, and 29/12/2015 when the deceased went to pick his cow, the deceased was assaulted and then, he (DW1) strangled him until he met his death on allegation that he was a cattle thief, the fact which was not true. He also admitted that, he burnt the deceased's body. Since the four prosecution witnesses said DW1 was neither threatened nor forced to make his oral confession, and since DW2 and DW4 who were with DW1 at the time of

arrest have confirmed that none of them was beaten, threated or forced to make the oral confession, but were just asked to speak the truth, the court is satisfied that the oral confession of DW1 was voluntarily made and that DW1 was a free agent.

Another evidence is the cautioned statement of DW1 tendered by PW3 and admitted as Exh p4.

It is trite that a confession is a criminal suspect's acknowledgment of guilty, it is usually in writing and often including the details of the offense. A free and voluntary confession is deserving a highest credit, because it is presumed to flow from the strongest sense of guilt and therefore, it is admitted as proof of the crime to which it refers. Therefore, in law the evidence of an accused person who confess is the best evidence if it is made voluntarily and a conviction can be based on it. DW1 repudiated his cautioned statement, the court conducted a trial within a trial and overruled the objection for want of merit after being fully satisfied that the same was voluntarily made and both the Criminal Procedure Act and the Evidence Act were complied with, and therefore the confession is true Part of DW1's cautioned statement reads;

"Ilikua tarehe 27/12/2015 majira ya saa 14:00 nilikutana na Rugema akanipatia TZS 180,000/= kwa ajili ya kumuuzia kimasha changu nilichopata kwa kugaiwa na tajiri yangu.Tulikubaliana kufika zizini tarehe 29/12/2015 kumchukua ngombe huyo. Tarehe 29/12/2015 nilikuta Rugema kafuata ngombe wake tuliouziana tarehe 27/12/2015.Tajiri yangu alianza kusema mimi na Rugema tunamwibia mifugo yake....ndipo Alphonce

alipoambiwa juu ya taarifa hiyo , alimfunga kamba mikono yote na kuanza kumpiga kuwa mtu huyo ni mwizi wa ngombe .....Mimi nilimnyonga shingo.... akafariki, nilimwaga mafuta ya petroli juu yake..... niliwasha moto juu yake, baada ya kutenda kitendo hicho sikumtaarifu mtu yeyote juu ya jambo hilo..... polisi walifika, nilianza kuwaonyesha sehemu tuliyomchomea Rugema moto iliyokuwa na majivu na mifupa kidogo....."

It should be noted that the court may act on a confession alone if it is fully satisfied that it is true after considering all material points and surrounding circumstances. See **Tuwamoi versus Uganda [1967] E.A 84**.

However, as a rule of practice, a repudiated or retracted confession calls for great caution before it is accepted and before founding conviction upon it. Usually, the court will act upon a retracted or repudiated confession when it is corroborated in some material particulars by some independent evidence accepted by the court. 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".*

It should also be noted that the question of admissibility is settled at the point of production of the confession in court and the test is whether such confession conformed to the provisions of the Criminal Procedure Act Cap 20 R: E 2019 and the Evidence Act, Cap 6 R: E 2019.The settled legal position is that admission of the confession is one thing while the weight to

be attached is quite another. In this case, **In 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".

In the case at hand, as I have stated earlier, exhibit P4 was voluntarily made and was recorded according to law and for that reason, even in absence of corroboration, the court can still act upon it safely. However, that does not mean that corroboration is lacking in this case.DW1's cautioned statement has been corroborated as we shall see soon.

According to Black's Law Dictionary*, to corroborate means to strengthen, to make a statement or testimony more credible by confirming facts or evidence. Corroborative evidence in a way is a supplementary testimony to the already given evidence and tending to strengthen or confirm it.*

It was held in the case of **Ezera Kyabanamizi versus R, [1962] E.A 309** that a statement made by a co-accused person, whether orally or written, implicating his/her co-accused, can only be used to supplement substantial evidence already in place where in **Gopa Gidamebanya and Others versus R. [1953] 20 EACA 318** it was held that;

"The confession of co-accused is intended to be used to corroborate and even to supplement the evidence in those exceptional cases in which,

without its aid, the other evidence falls short by a very narrow margin of that standard which is requisite for a conviction. There must be a basis of substantial evidence to which a confession or statement may be added. If there is substantial evidence against the accused and there remains some lingering doubt the confession may be taken into account to set that little doubt at rest".

In the case at hand, confession of DW1 was corroborated by the evidence of PW1, PW2, and PW4 to the effect that DW1 made an oral confession to them on 09/01/2016 that he has murdered the deceased and led them to where the body of the deceased was burnt and, they witnessed ashes and remains of burnt bones. It was also corroborated by the oral confessions of DW2 and DW4 made to PW1, PW2, PW3 and PW4 in the presence of DW1 on the day of their arrest that, the deceased was assaulted and strangled to death by DW1.

It should also be noted that evidence of a co-accused can be used to corroborate other evidence on record. In the case at hand, the cautioned statement of DW1 was also corroborated by the evidence of his co-accused persons DW2 and DW4 to the effect that on 27/12/2015 DW1 sold a cow to the deceased, but the same was never given to him, but instead he was assaulted and killed. It was further corroborated by the evidence of DW2, DW3, DW4, DW5 and DW6 to the effect that the deceased was strangled to death on 29/12/2015 by DW1 and that, they found him seated beside the deceased's body.

DW1 was afforded an opportunity to cross-examine his co-accused persons, but he made no cross-examination on the evidence leveled against him by his co-accused persons concerning the killing of the deceased and that connotes acceptance of the said evidence. In other words, failure to cross-examine amounts to admission of the testimony given. See **Mohamed Hamisi versus Republic, Criminal Appeal No. 114 CAT (**Unreported).

In this case, circumstantial evidence is also strong to prove that the deceased was killed and burnt by DW1. In the case of **Halima Mohamed and Another Versus Republic, Criminal Appeal No. 30 of 2001 CAT (un-reported)** it was held that;

"*In a criminal case in which the evidence is based purely on circumstantial evidence, in order to found a conviction on such evidence, it must be established that the evidence irresistibly points to the guilt of the accused to the exclusion of any other person".* In **Ally Bakari and Pilly Bakari Versus Republic [1992] TLR 10,** it was held that;

"*The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from the circumstances".*

In the case at hand, the scene of crime was close to the Kraal of DW1. DW2, DW3, DW4, DW5 and DW6 in their defense admitted and confirmed that they saw the body lying on the ground, and DW1 was beside the body, and DW1 put the fetched firewood beside the lying body, but on

9/01/2016, the human body was not there, likewise the firewood, but witnessed ashes and pieces of burnt bones and Rugema has not be seen alive to date. Indeed, the circumstances have connected the 1st accused with the killing of the deceased.

The last issue is whether the killing by DW1 was actuated by malice afore thought.

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 2019 Provides that;

Malice aforethought shall be deemed to be established by evidence proving any one nor more of the following circumstances-

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person
actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence.

It should also be noted that **malice aforethought** can 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 may, depend 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, and the conduct of the attacker before and after the killing".

In the case at hand, it has been revealed that the deceased bought a cow from DW1 and that he was paid TZS 180,000/= but when the deceased went to pick his cow, he was assaulted and strangled by DW1 to death on allegation that he was a cattle thief, the fact which DW1 knew that it was not true, and that reveals malice aforethought that he was equipped with. By his confession, DW1 executed the killing by strangling the deceased on

the neck. Malice aforethought was further revealed by the act of burning the deceased's body. It shows that DW1 had the full intent to kill, and planned the killing and carried it out into actions. In the circumstances, the court is satisfied that the killing was actuated by malice aforethought.

DW1 in his defense disputed to have committed the offence and alleged that at the scene of crime, he burnt a cow which had a dangerous decease to stop the spread of the decease to the healthy livestock that is why ashes and burnt bones were found there. This finds that this piece of evidence is intended to mislead the court. That fact was never raised by DW1 neither in his oral confession nor in his cautioned statement, and has not called the owner of the livestock to tell the court that one of his cows had a dangerous decease and was really burnt by DW1.His allegation that his cautioned statement was not voluntary made is baseless as I have explained in the foregoing pages. In **Felix Lucas Kisinyila versus Republic, Criminal Appeal No. 129 of 2002, CAT at Dar es Salaam Registry (unreported) it was held that;** Lies of the accused person, may corroborate the prosecution case. This court is alive that the accused has no duty to prove his innocence, what he can do is to raise a reasonable doubt as to his guilt, but in the instant case, DW1 has failed to raise any reasonable doubt as to his guilt.

At the end of the summing-up, the Gentlemen assessors unanimously opined that the 1st accused is guilty of the offence of murder. As regards 2nd, 3rd, 4th, 5th and 6th accused persons, they unanimously opined that they are not guilty of the offence of murder. Faridu Mussa opined that there is no evidence linking them with murder, and that, they were forced to fetch

firewood by DW1 who had a stick, spear and a bush knife, thus gave a verdict that they are not guilty of the offence of murder. Francis Kishenyi opined that according to the evidence adduced, the herein above accused persons did not kill the deceased, but were, after the deceased being killed, forced to fetch firewood therefore, gave a verdict that they are not guilty of murder. Ismail Said Rweyemamu opined that, no evidence linking them with the offence of murder and that, after the offence of murder being committed, they were forced to fetch firewood, hence not guilty of the offence of murder. I am in total agreement with the unanimous verdict all three assessors that the 2nd, 3rd, 4th, 5th and 6th accused persons are not guilty since no substantial evidence linking them with murder. Consequently, they are hereby acquitted of the offence of murder on the ground that the case against them had not been proved beyond reasonable doubt.

E. L NGIGWANA

JUDGE

12/11/2021

As regards the 1st accused (DW1) Faridu Musa opined that the accused assaulted and strangled the deceased to death and finally burnt his body thus the accused had malice aforethought, therefore, he is guilty of murder. Francis Kishenyi opined that the evidence has revealed that the one who murdered the deceased was DW1 and he did so with malice aforethought as he deceived the deceased by not giving him a cow which he bought from him (DW1), instead he assaulted and strangled him to

death, and burnt his body completely thus, guilty of murder. Ismail Said Rweyemamu opined that the evidence adduced in court has shown that the deceased was strangled to death and then burnt by the 1st accused and he did so with malice aforethought hence guilty of murder. I am in total agreement with the Gentlemen assessors that the 1st accused (DW1) killed the deceased with malice aforethought, therefore guilty of murder.

I therefore convict the 1st accused Mugisha s/o Katulebe for the offence of murder under section 196 and 197 of the Penal Code Cap 16 R: E 2002, now, Cap R: E 2019.

It is ordered accordingly.

E. L NGIGWANA

JUDGE

12/11/2021

SENTENCE

In our jurisdiction, the offence of murder under section 196 of the penal Code Cap 16 R: E 2019, upon conviction, attracts only one sentence which is death by hanging. That means the court has no option or discretion to impose a different sentence.

By virtue of section 197 of the Penal Code, I hereby sentence the 1st accused person Mugisha s/o Katulebe 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, I hereby direct that the accused shall suffer death by hanging. It is so ordered.

Right of appeal fully explained.

E. L. NGIGWANA

JUDGE

12/11/2021

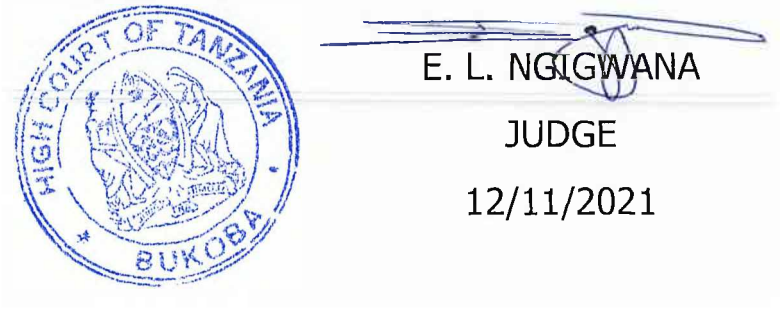
Court: Judgment delivered this 12th day of November, 2021 in open court in the presence of the 1st, 2nd, 3rd, 4th, 5th and 6th accused persons, Ms. Ms. Xaveria Makombe, learned State Attorney for the Republic, Mr. Adabart Kweyamba, learned advocate for the accused persons, E. M. Kamaleki, Judges' Law Assistant, three Gentlemen Assessors; Faridu Musa, Francis Kishenyi, and Ismail Said Rweyemamu, and Ms. Lonsia B/C.

E. L. NGIGWANA

JUDGE

12/11/2021

Court: Gentlemen Assessors thanked and discharged.



E. L. NGIGWANA

JUDGE

12/11/2021