

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SITTING AT KARAGWE

ORIGINAL JURISDICTION

(BUKOBA DISTRICT REGISTRY)

CRIMINAL SESSIONS CASE NO. 71 OF 2016

THE REPUBLIC

VERSUS

FILBERT S/O AROBOGAST1ST ACCUSED

EDWARD S/O RUBAJENJERA @KATAIGWA@ MKOMBOZI.....2ND ACCUSED

JUDGMENT

12/11/2021 & 26/11/2021

NGIGWANA, J.

The accused persons; **FILBERT S/O AROBOGAST and EDWARD S/O RUBAJENJERA@KATAIGWA@ MKOMBOZI** are jointly and together charged with the offence of Murder contrary to the provisions of sections 196 and 197 of the Penal Code Cap 16 R: E 2002, now R: E 2019 (The Penal Code). It is alleged by the prosecution that the duo, on 24th day of August, 2015 at Rugela village within Karagwe District in Kagera Region, did murder one France s/o Marungu (hence forth the deceased). When the information of murder was read over and properly explained to the accused persons, they pleaded not guilty.

Briefly, the case for the prosecution is as follows; the deceased and the 2nd accused were headsmen of one Maria w/o Karusha at Rugela Village, Ward of Rugela within Karagwe District in Kagera Region. On 24/08/2015, the deceased disappeared, and on 26/08/2015, the 2nd accused reported to the Hamlet leader about the disappearance of the deceased, and on 28/08/2015, the matter was reported at Kayanga Police station. That on the same date, an alarm was raised, villagers gathered and were informed about the incident, hence scattered inside the bush tracing the deceased whereas, in the mid-day, they found the dead body of the deceased but it had no head and genital parts. However, the head was later recovered in shrub area 50 meters, west side from where the body was lying. An autopsy was conducted by the medical practitioner. Since the 2nd accused was living with the deceased, he was arrested as a suspect, where it was alleged that before the justice of peace, he admitted to have killed France s/o Marungu and mentioned the 1st accused person and another person known by a single name of Anderson. The 1st accused was successfully traced and joined with the 2nd accused and stood charged as described above.

Worthy of a note is that, when the facts were read during the preliminary hearing, matters which were agreed upon are; **one**, the names and residence of the accused persons, **two**, Contents of the postmortem examination report, **three**, Crime scene as per sketch map and **four**, that the accused were arrested and now stand charged with that offence of murder.

To establish and prove criminality against the accused persons, prosecution featured nine (9) witnesses and tendered six (6) exhibits. The witnesses were; D.8719 D/SGT Nyange **(PW1)**, Jackson s/o Kakwezi Ruhumbiza **(PW2)**, Pontian s/o Benjamin Chakazingo **(PW3)**, Evarist s/o Kyanomani **(PW4)**, MG.473848 Donati Karasha **(PW5)**, Xavery s/o Clavery **(PW6)**, Deus s/o Justus Tinchwa **(PW7)**, Edward s/o Masunga Katendele **(PW8)** and Pius s/o Peter Bagambilana **(PW9)**. The Exhibits tendered were; Report on Postmortem examination **(Exh. P1)**, sketch map of the crime scene **(Exh. P2)**, Extra-judicial statement of the 2nd accused **(Exh. P3)**, Extra- judicial statement of the 1st accused **(Exh. P4)**, Certificate of Seizure **(Exh. P5)** and one bush knife **(Exh. P6)**

On their part, the accused persons defended themselves under oath, and called one witness who testified in favor of the 1st accused, but no exhibits tendered. The 1st and 2nd accused persons testified as DW1 and DW2 while the featured witness by the first accused testified as DW3.

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. Samwel Angelo, learned advocate. On my part, I sat with the aid of Ladies and Gentleman Assessors namely; Stella Laurent, Joanitha Isaya and Faridu Musa. My legal assistant was Mr. E. M. Kamaleki.

The prosecution case began with **PW1 Nyange Nyanda**, a police officer stationed at Kayanga Station Investigation Section. He testified that, on 28/08/2015 he accompanied with the OC-CID of Karagwe District to Rugela

Village following the information that one France s/o Marungu was killed. He added that, upon reaching the crime scene, they found villagers and recovered the deceased's body which had no head. He added that the 2nd accused was already under arrest after being suspected to have murdered the deceased. PW1 added that **PW6** who is the WEO interrogated the accused orally and the accused confessed to have killed the deceased and explained to him in the presence of the of the Village Chairman (**PW3**) where to find the head. He further said following that information, PW3 and PW6 left the 2nd accused locked in the WEO's office, and headed to the crime scene where they joined villagers and managed to recover the head in the shrub area near the gully, almost 50 meters from where the body was lying. He added that he drew the sketch map of the scene of crime (exhibit P2) While the Medical Practitioner conducted an autopsy

He also said, from there, they headed to the WEO's office whereas he asked the WEO (PW6) to record the extra-judicial statement of the 2nd accused. It is his evidence that before they left the WEO's office, the 1st accused Filbert Arobogast was brought by militiamen, hence joined with the 2nd accused and both matched to Kayanga police station, and upon arrival, he recorded the cautioned statement of the accused persons according to law. He added that, each accused confessed to have committed the offence.

PW1 further added that, on 29/08/2015 while on the way to the scene of crime to trace the bush knife used to slaughter the deceased, the 2nd accused told him not to waste time going to the scene of crime because

the bush knife they used to kill the deceased was kept at his home, and as a result, they headed to the 2nd accused's home and upon arrival, the 2nd accused entered his house and came out with a bush knife and the same was seized from him and then, went back to Kayanga police station, and then took the 1st accused person to the justice of peace namely; Deous s/o Tinchwa (**PW7**) and his extra-judicial statement was recorded according to law.

When cross-examined by the defense counsel, he said that, the head was found on the west side (sun set direction's side) from the place where the body was lying. He also admitted that DW2 knew not how to write and read, but he was able to communicate in Kiswahili. PW1 further said he is not aware of the tribe or nationality of the 2nd accused.

PW1 admitted that the 2nd accused in his extra-judicial statement recorded on 28/08/2015, did not mention the bush knife, and that he disclosed to him on 29/08/2015 that they used the bush knife to kill the deceased. PW1 further said, at the WEO's office, the 2nd accused was locked in one of the rooms and the militiaman was outside guarding him. He also admitted to have issued two police forms (PF3) to each accused but he said, he took them to hospital once. He said he issued the PF3 for the second time because the accused persons upon arrival to the prison, claimed that they were beaten, therefore, not received since they had no PF3, but when he took them to Hospital, the medical doctor confirmed that they were okay.

When cross examined as to why they went to trace the head of the deceased without the 2nd accused who is alleged to have directed them

where they kept the same; PW1 said, they left him for security purposes as people were many and furious and the police were few though they had guns.

He said the seized bush knife had no blood stains. He also said when the file was ready for committal proceedings all documents were intact in the police file that is to say cautioned statements and extra-judicial statements, therefore, he cannot tell why the documents were not listed and read during committal proceedings.

When asked questions for clarification by 1st assessor PW1 said, the 2nd accused voluntarily stated that the bush knife they used to kill the deceased was at his home. When asked by 2nd assessor PW1 said, the investigation revealed that the accused was killed because he was a stumbling block against the 2nd accused's plans to sell the cows of his boss as he was reporting to the owner of the cows any attempt made by the 2nd accused to sell any cow, and that in that exercise of killing the deceased, the first accused was given a wage amounting to Tshs. 200,000/=. When asked by 3rd assessor, PW1 said that, the 2nd accused narrated to the WEO (PW6) where they kept the deceased's head.

PW2 Jackson Kakwezi testified that he was the supervisor of the Kraal of one Maria d/o Karusha in which headsmen were Edward Rubajenjera (2nd accused) and the deceased France s/o Marungu. He added that on 26/08/2015, the 2nd accused informed him about the disappearance of the deceased, whereas, on 27/08/2015 he went to Rugela and confirmed from the 2nd accused that the deceased had three (3) days missing, and upon

such information, he reported the matter to the police. He said that, since the 2nd accused was living with the deceased before his death, and since ~~he saw him and noticed that he was~~ **nervous and unease**, and as a result, he suspected him to have killed the deceased, hence he was matched to the WEO's office and locked in for investigation.

PW2 further said, an alarm was raised, people gathered and then scatted in the bush tracing the deceased's body, and managed to recover the body but had no head, and he went back to police to inform them that they have recovered the body, hence the policemen including PW1 and the medical practitioner joined them to the scene of crime. PW2 further said, while there, the WEO Xavery Clavery **(PW6)** arrived and informed them that he had interrogated that 2nd accused and told him that the head of the deceased was in the west side in the gully from the place where the body was lying, hence people scattered again towards the western part and recovered the decomposed head of the deceased in a shrub area almost 50 meters from the dead body. It is further the evidence of PW2 that, after postmortem examination, they were allowed to bury the body, and on 29/08/2015 the police while with the accused persons arrived at the home of the 2nd accused whereas, he witnessed the 2nd accused entering his house whereas he came out holding a bush knife which was seized from him via certificate of seizure which he (PW2) also signed **(PW2 identified certificate of seizure (exhibit P3) via name and signature and the bush knife (exhibit P4) via wood handle covered by cow skin**

When cross-examined by the defense counsel, PW2 said, the deceased went on missing since 24/08/2015, and he was duly informed by the 2nd accused about such disappearance but since the 2nd accused person was living with the deceased, and since he saw him not at ease, he suspected him that is why he was arrested.

PW2 also said the 2nd accused had never stolen the cows of Maria d/o Karusha, and therefore, he cannot tell why the deceased was murdered. He also said, he was not the eye witness of the incident of murder in the sense that he did not see on his own eyes the 2nd or both accused persons killing Francis s/o Marungu. PW2 also admitted that it is not a crime to possess a bush knife. PW2 further said, the 1st accused was arrested at Izimbya.

When asked questions for clarification by first assessor, he said, the 2nd accused had never mentioned to him that he murdered Francis s/o Marungu.

PW3 Pontian Benjamini testified that he worked as the chairman of Rugela village from 2009 – 2019, and on 26/08/2015 the 2nd accused reported to him about the disappearance of Francis s/o Marungu. He added that, upon such information, he advised the 2nd accused to report the matter to the Ward Executive Officer (WEO). He added that, on 28/08/2015, the 2nd accused was locked in the WEO's office after being suspected to have murdered Francis s/o Marungu, and as a result an alarm was raised and villagers went on tracing Francis Marungu in the forest and finally managed to recover his dead body, and the head was separated

from the body. He also said, he joined the PW6 and villagers the scene of crime and witnessed the recovered body.

PW3 added, he, together with the WEO (PW6) went back to the WEO's office and interrogated the 2nd accused who orally confessed to them that they have killed the deceased using a bush knife, and separated his head from the body, and that they have kept the head few meters on the west side from the place where the body was lying, and upon such information, they went back to the scene of crime and informed the villagers the narration of the 2nd accused, and then villagers scattered on the west side and managed to recover the decomposed head of the deceased in a shrub area near the gully.

When cross examined by the defense counsel, he said the 2nd accused was not beaten or forced to speak the truth though he was handcuffed and the reason given by the 2nd accused for killing the deceased is that, the deceased was an obstacle to the him whenever he wanted to sell the cows of his Boss. When further cross-examined, he said Jackson Kakwezi (PW2) had never made a report to him that the 2nd accused stole cows of his boss. PW3 said the 2nd accused told them that the head was in the gully (Karongo), but the same was recovered in the shrub area near the gully.

PW4 Evarist Kyanomani testified that, on 28/08/2015 an alarm was raised and he did go and joined his fellow villagers of Rugela village to trace Francis Marungu, and finally recovered the dead body which had no head; and the WEO (PW6) came and informed them that the 2nd accused has stated to him that the head in the gully located in west side.

He said, upon such information, people scatted on the west side and managed to recover the decomposed head of the deceased. He said, a sketch map was drawn, and the body was examined by the medical practitioner, and thereafter, relatives and villagers were allowed to bury the body.

PW5 MG.47 3848 Donati Karasha, a militiaman stationed at Rugela Ward testified that, on 28/08/2015 around 11:00hours an alarm was raised and he did go and were told to trace Francis s/o Marungu who disappeared on 24/08/2015, and in that exercise they managed to recover the dead body which had no head. He added that, after recovery of the body, he went back home, but around 15:00hours the WEO asked him to join another militiaman namely Adrian Clemence to trace the 1st accused Filbert Arobogast on the ground that he was mentioned by the 2nd accused to have also involved in the killing of the said Francis Marungu, whereas he did so, and finally managed to arrest him at Izimbya area within Bukoba Rural and brought him back to the WEO's office using a motorcycle. He added that on the way, the 2nd accused attempted to corrupt them by urging them to release him in the consideration of TZS 200,000/ but they refused the offer.

PW6 Xavery Clavery, Ward Executive officer, Rugela Ward testified that, on 27/08/2015, the 2nd accused and Pontian Benjamini (PW3) reported to him that Francis Marungu disappeared on 24/08/2015, and had been traced with no success. He said, he instructed the 2nd accused to report the matter to the Hamlet leader and Mr. Jackson Kakwezi (PW2) and on

28/08/2015, the 2nd accused was arrested under his instruction, after being informed by Jackson Kakwezi (PW2) that the 2nd accused was not at ease (**ana wasiwasi**), and then, he locked him into one of the rooms in his office and left to Karagwe for official duties leaving villagers tracing the deceased in the bush. It is his evidence that, while at Karagwe, he was phoned that Francis Marungu was found dead but the body was separated from the body, and upon the information, he headed to the scene of crime and witnessed the body, hence phoned the police, and the police arrived while accompanied by a medical practitioner.

PW6 added that, he, together with the village chairman (PW3) went back to his office and informed Edward Rubejenjera (2nd accused) that Francis Marungu was found dead, and they asked him whether he knew what really happened to the deceased. PW6 said in the course of interrogation, the 2nd accused confessed orally before them that, he, together with the first accused Filbert Arobogast and another person namely; Andrew had jointly and together killed the deceased for being an obstacle to the 2nd accused whenever he wanted to sell the cows of Maria w/o Karusha secretly, and that having killed him using a bush knife, they kept the head on the west side from the place where the body was lying. PW6 the 2nd accused made such information while shivering.

He added that, he instructed the militiamen namely; Donati Karasha (PW5) and Clemence to trace Filbert Arobogast. It is further the evidence of PW6 that upon such narration, they locked in the 2nd accused, and then headed back to the scene of crime and found villagers, policemen and the medical

practitioner, and informed them the oral confession of the 2nd accused, and as a result, villagers scatted towards the western part from where the body was lying, and few meters from there, the decomposed head was recovered in the shrub area near the gully, and then carried by Jackson Kakwezi (PW2) to where the body was, and then the medical practitioner conducted postmortem examination, and then the police allowed the villagers to bury the body.

PW6 further said, he, together with the police headed to his office where as around 15:00hours, the 1st accused was brought there by the militiamen, and joined with the 2nd accused, and after recording the Extra judicial statement of the 2nd accused, police matched both accused persons to Kayanga police station. (The extra-judicial statement was admitted as **exhibit P3**).

PW6 further said, on 29/08/2015 he joined the police and the accused persons to the home of the 2nd accused where the 2nd accused entered his house and came out holding a bush knife and then, the same was seized from the accused by police in his presence, and he duly signed the certificate of seizure (**Exh. P5**) as a witness.

When cross-examined by the defense counsel, PW6 said, he used to see the 2nd accused a Rugela village center, though he did not know his tribe and Nationality. That the 2nd accused told him he cannot write and read, but could hear and speak Kiswahili. PW6 said, he recorded the 2nd accused's extra-judicial statement in Kiswahili and then read it to him.

PW6 added that, (PW5) was outside, and not in the room in which the statement was made. When further cross-examined, he said, he interrogated the 2nd accused in the presence of two other persons. He said he, did not go with Edward to the scene of crime for security purposes.

When asked questions from clarification by 1st assessor he said that, Pontian Benjamin (PW3) was present when he was recording the extra-judicial statement of the 2nd accused.

PW7 Deous Justus Tinchwa testified that, on 29/08/2015 the 1st accused Filbert Arobogast was taken to him by Nyange (PW1) for him record his extra-judicial statement (**Exh.P4**) and he did so. PW7 added that having recorded the same he read it to the accused, whereas the accused consented to its contents hence signed by thumb print, and then he gave the statement to the police (PW1).

When cross examined by the defense counsel, **PW7** said during the time of recording the extra-judicial statement of the first accused, the office Attendant namely; Arobogast was present. He said he wrote the name of **Edward Rubajenjera** by mistake after being mentioned by the 1st accused, that is why he made alterations and signed.

When asked questions for clarification by 1st assessor, he said the accused made his extra-judicial statement voluntarily.

PW8 Edward Masunga testified that, in 2015 he was the OC-CID of Karagwe District, whereas on 27/08/2015 Mr. Xavery Clavery (PW6) reported to him about the disappearance of the deceased, and on

28/08/2015 the PW6 informed him that Francis Marungu has been found dead. He added that, upon such information he sought three police officers including Nyange (PW1) and the medical practitioner and all headed to the scene of crime, and upon their arrival he witnessed the deceased's body which had no head. He said while there, PW6 arrived and informed that the 2nd accused has told him that the deceased's head was in the gully located on the west side from where the body was lying. He said, he passed the information to the villagers who then scatted towards the west side and managed to recover the decomposed head of the deceased in a shrub area near the gully, and then the head was taken to where the body was, and the medical practitioner conducted an autopsy, and from there, he permitted the villagers to bury the body.

PW8 added that, he moved together with other police officers to the WEO's office where the 2nd accused was locked in, and handed over the 2nd accused to Nyange. (PW1) for investigation but, while there the 1st accused was brought by the militiamen and joined with the 2nd accused. That on 29/08/2015 a bush knife which the 2nd accused informed PW1 that they had used to kill the deceased was recovered at the home of the 2nd accused. He further said, he was the one who seized the said bush knife from the 2nd accused (**Certificate of seizure was admitted as exhibit P5 and the bush knife as exhibit P6**)

When cross-examined by the defense counsel, he said that, they did not take the 2nd accused to the crime scene for him to show where they kept

the deceased's head because villagers were many and were furious, hence his security would have been in danger.

PW9 Pius s/o Peter Bagambilana was the witness added by the prosecution following the defense filed by the defense side that the 1st accused would rely on the defense of **ALIBI**. He testified that, on the dates; 23, 24, 25, 26, 27 and 28/08/2015 the 1st accused was at Rugela village. He added that on 23/08/2015 he met the 1st accused and he congratulated him for purchasing a new motorcycle, and on 28/08/2015 at 11:00hours he met the 1st accused at Mkakajinja village and asked him to assist him (PW9) because his motorcycle had a tire puncture but the 1st accused was in hurry and unease, hence offered no assistance to him, and from there, the 1st accused rode the motorcycle towards Bukoba Rural. He said that, the first accused is his village mate and a known motorcycle rider "**Bodaboda**" therefore, not a stranger to him at all.

When asked question for clarifications by the 1st assessor as to whether the 1st accused explained to him why he was in hurry and unease, he said, the 1st accused explained nothing to him. He said later on he saw two militiamen taking the 1st accused to the WEO's office-Rugela. This marked the end of the prosecution case.

DW1 Filbert s/o Arobogast in his defense denied to have committed that offence. He testified that on 20/08/2015 his uncle namely; Amos Benjamin who was residing in Mwanza passed away; but the Mourning and burial was conducted at Izimbya-Rubare Village within Bukoba Rural District. He added that, following such information, on the very date;

20/08/2015, he travelled together with his wife to Izimbya for mourning and burial arrangement whereas on 23/08/2015 the deceased's body arrived to Bukoba Town and on 24/08/2015 arrived at Izimbya and burial was conducted in the same date.

He said, he went on staying there with family members until 28/08/2015 when the mourning was ended. He added that, while at Izimbya two militiamen came and arrested him without informing him the reasons for arresting him and then he was brought to Rugela Ward office. He stressed that from 20/08/2015 up to 28/08/2015 he was at Izimbya, thus it is not true that PW1 saw him on 23/08/2015.

He challenged the evidence of PW9 saying he did not explain and describe how he identified him on 23/08/2015 likewise on 28 /08/2015 during morning hours. He said at the WEO's office he was joined with the 2nd accused on allegation that they have killed Francis Marungu.

He further said, the 2nd accused was a stranger to him as he saw him for the first time on 28/08/2015 in the WEO's office. He said, he was never interrogated by the police that is why during the committal proceedings the alleged an extra-judicial statement was never read or made clear to him. He also said he was never taken to the justice of peace. He said, PW1 brought a written paper to him and forced him to sign by thumb print, and the extra-judicial statement was not availed to him during committal proceedings, but saw it at the trial stage. He said he was assaulted, and finally, the PF3 was issued to him. He then urged the court to see him innocent.

When cross-examined by the State Attorney, DW1 said he was assaulted to admit that they have killed the deceased but he maintained his denial. He further said, he saw the justice of peace (**PW7**) here in court, and that he saw **PW9** on 18/08/2015 and 19/08/2015. That the distance from Rugela to Izimbya is two hours public car drive. When further cross –examined he said, he had a conflict with PW9 because PW9 once seduced his wife however, he had never reported the matter to any person or authority. When cross examined as why his name was mentioned in a village having many youths, he said his name is famous as in 2015 he contested for Hamlet chairmanship vide CHADEMA. He denied to have ever requested the militiamen to receive for TZS. 200,000/=so as to release him or to have ever made an oral confession to them.

DW2 Edward Rubajenjera Kataigwa Mkobozi testified that, he is a Rwandese by nationality and he came in Tanzania in 2015 and based in Rugela village within Karagwe District in Kagera Region. He added that, in June, 2015 he procured a headsman job from Maria w/o Karusha, hence joined his co-headsman namely; Francis Marungu. He further said that, he stayed with Francis Marungu for one month, but he disappeared on 24/08/2015, and he traced him with no success.

He said, following such disappearance, he on 26/08/2015 reported the matter to the Hamlet leader one Prosperity Bigirwa and Mr. Jackson Kwakwezi (PW2) and on 27/08/2015 to the WEO as he had no conflict with Francis Marungu, as they lived together peacefully and they used to eat together. He added that on 28/08/2015 he was arrested and then

handcuffed and locked in the WEO's office as a suspect of the offence of murder.

He said, the room was small with no light, and air circulation was very poor and he stayed in that room for good eight (8) hours and was given no food. DW2 further said, the WEO (PW6), the Village Chairman (PW3) and militiaman came and opened the door and started beating him using a club uttering these Swahili words; "**Francis uliyekuwa unamtolea taarifa amekufa**". He also said, PW1 assaulted him to admit that he had a bush knife and he admitted since he had a bush knife at home but he told PW1 that he had never used the same to kill the deceased.

When cross-examined by the State Attorney, DW2 said no objection was raised as to the admission of the extra-judicial statement, and the defense counsel was the one who had the duty to do so. He said, he had no hatred with the deceased that is why he went on tracing him, and further reported the matter to the relevant authorities, and he did not escape after the disappearance of the deceased. He added that, the WEO took a paper and started writing but he did not know what the WEO was writing because he knew only Kinyambo and Kinyarwanda and for that matter, he said, he came to know here in court that what was recorded by the WEO was an extra-judicial statement. He also said, he was shivering due to the fact that he was locked in the WEO's office from 10:00hours to 15:00hours. He admitted that he had no conflict with the WEO. DW2 added that, he was beaten until he became unconscious by PW6 and the Militiaman, and that (PW6) is the one who told him to mention the name of Filbert

Arobogast because when the alarm was raised, he did not enter appearance. when asked as to how the WEO knew that the deceased's head was in the west side, DW2 said "**Nilizidiwa na kuwaambia kichwa kipo korongoni**"

On re-examination, DW2 said he was beaten and finally spoke lies to rescue his life.

When asked questions for clarification by 1st assessor, DW2 said Kinyambo is similar to Kinyankole/Kinyarwanda. That the deceased had the habit of going to the village centre to drink alcohol. That he saw the 1st accused for the first time on 28/08/2015.

DW3 testified that on 20/8/2015 his elder father namely; Amos Benjamin Passed away in Mwanza, and was buried in Izimbya on 24/08/2015. He added that DW1 and his wife arrived at the mourning on 20/08/2015 and stayed there until 28/08/2015 when he was arrested by the Militiamen.

When cross examined by the state Attorney, he said Amos Benjamin is the elder father of the 1st accused and he used to call him "**Baba Mkubwa**". That on 20-24/08/2015 they were preparing tents, the grave, cleaning the environments and gathering chairs. That there is only public transport from Rugela Village to Izimbya, whereas on 20/08/2015 the first accused used a public transport to Izimbya. He said, it takes about 2 and a half hours to reach Izimbya where the weather and the road is good, otherwise the car would use 6hours.

On re-examination, he said in the whole night of 24/08/2015, he was with the 1st accused. This marked the end of the defense case.

Upon the close of the defense case, the parties were invited to make oral submission or file written submissions (if any). Ms. Xaveria Makombe opted to file written submissions, while Mr. Samwel Angelo, advocate for the accused persons informed the court that he will make neither oral nor file the written submissions. It should be noted that, filing of closing submissions is not a mandatory requirement, meaning that, a decision in a case can be effectively rendered without the parties' final submissions. Since only the prosecution side had filed the written final submissions in this case, I undertake to consider them when analyzing and evaluating the evidence.

In the instant case, it is alleged that the accused persons have murdered France s/o Marungu.

Section 196 of the penal Code Cap 16 provides as follows;

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

This being a criminal case, in order to sustain conviction, 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 persons. It has to be so because the standard of proof in criminal cases is that of beyond

reasonable doubt. 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".

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"

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"

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 case is said to have been proved beyond reasonable doubt only if these fundamental elements are 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**. In that premise, the major issues in the case at hand are therefore, five as follows;

1. *Whether deceased namely; France s/o Marungu 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 address the 1st, 2nd and 5th issues together. In the case at hand, there is no dispute and the evidence is clear that France s/o Malungu is no more and that he died on 24/08/2015 during night hours and that his

death was unnatural and violent, and that whoever did the act was actuated with malice aforethought. During the preliminary hearing, the post mortem was admitted as **Exh. P1** with no objection. The same revealed that the dead body was of France s/Marungu who was identified by Jackson Kakwezi (PW2) and Xavery Clavery (PW6). The same further revealed that the head was separated from the body, and Genital organs to wit; testes and penis were chopped off. The cause of death as per report was Heart failure caused by Excessive bleeding. The evidence of PW1, PW2, PW3, PW4, PW5, PW6 and PW7 and PW8 is to the effect that on 28/08/2015, they found the deceased's body at the scene of crime and that the head was chopped from the body, and it was recovered few meters on the west side from where the body was lying. In her written submissions, Ms. Xaveria Makombe submitted that, the prosecution had managed through all witnesses save for PW9 to prove that the deceased is not only dead but also that his death was not natural and was violent. It is the finding of this court that, though no scientific examination which was conducted to prove that the head and the body belong to the same body but since the body and the head were duly identified by PW2 who was the supervisor of the deceased during his life time and PW6 who used to see him, there was no dispute on that fact, I am inclined to hold that prosecution has proved beyond reasonable doubt that the deceased France s/o Marungu is dead and that the death was unnatural.

It was the evidence of PW1, PW2, PW3, PW4, PW5, PW6, PW7 and PW8 that the head was chopped from the body and kept on the West side, at a

distance of about 50meters from where the body was lying. **Exh. P1**, also revealed that the head and genital organs were chopped off from the deceased's body. In the case of **Nassoro Khamis Ngwele versus The Republic, Criminal Appeal No. 188 of 2017**, the Court of Appeal of Tanzania explained some of the factors which helps the court to determine malice aforethought being the type and size of the weapon used in the attack and the part or parts of the body the blows were directed at or inflicted on. In the case at hand, the head and genital organs of the deceased were chopped. In the circumstances, this court is satisfied that the prosecution has managed to prove beyond reasonable doubt that whoever did the act was actuated by malice aforethought as defined under section 200 of the Penal Code Cap 2002, Now R: E 2019.

Having so found, the remaining pertinent issues for consideration and determination are issues No. 3 & 4. The prosecution, on one hand alleges that, there are the 1st and 2nd accused persons who are responsible for the death of France s/o Marungu (Deceased). The accused persons, on the other hand denied the allegations completely.

Ms. Xaveria Makombe, learned State Attorney in her lengthy filed submissions, sought to persuade the court that the prosecution had proved the case against the accused persons beyond reasonable doubt. First of all, she admitted that among all nine (9) prosecution witnesses who testified in court, there is no single witness who saw the accused persons or any of the them killing France s/o Marungu. She further submitted that the only

evidence connecting the accused persons with the offence of murder is based on their oral confessions and extra-judicial statements.

Makombe further submitted that on 28/08/2015 PW3 and PW6 orally interrogated the 2nd accused about the death of the deceased and the 2nd accused admitted to have killed France s/o Marungu, and in the course of interrogation, the 2nd accused mentioned the 1st accused, and then the 2nd accused told them where to find the deceased's chopped head, and the same was recovered. She made reference to the case **of 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"

She further submitted that in the case of **John Shini (Supra)** the Court of Appeal considered the oral confession made by the accused persons leading to the discovery of the deceased's body to be sufficient to implicate the accused persons with the offence of murder they were charged. She added that, since it was the 2nd accused who told PW3 and PW6 where to find the deceased's head, his oral confession was enough evidence which proves that the 2nd accused's involvement in the murder of the deceased though on cross examination, DW2 said, he was assaulted that is why he said so. The learned State Attorney submitted that, that reason seems to be an afterthought because if DW2 was not involved in the killing of the deceased, he would not have known where to find the deceased's head,

and since he did not cross-examine PW3 and PW6, it means the 2nd accused admitted that fact.

The learned State Attorney made reference to the case of **Martin Misara versus Republic, Criminal Appeal No. 428 of 2016** where the court held that;

"A party who fails to cross-examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from the trial court to disbelieve what the witness said"

The learned State Attorney further submitted that although the 1st accused was mentioned by the 2nd accused as his accomplice in killing the deceased, his confession was corroborated by oral confession made by the 1st accused to PW5 whereby the 1st accused person confessed to have been involved in the killing of the deceased and offered to bribe him with TZS 200,000/=.

Relying on section 143 of the Evidence Act Cap 6 R: E 2019, and the case of **Goodluck Kyando versus Republic [2006] TLR 363**, Makombe submitted that, it is trite that no particular number of witnesses shall in any case be required to prove any particular fact.

The learned State Attorney further submitted that, the 2nd accused orally confessed to PW1 that they have used the bush knife to chop off the deceased's head and that on 29/08/2015 the 2nd accused took PW1 and PW8 to his house and showed the bush knife which was admitted as **Exh. P6. While seizure note was admitted as Exh. P5.** Makombe further submitted that, it was the confession made by the 2nd accused which led to

the discovery of **Exh. P6**. She made reference to section 31 of the evidence Act, Cap 6 R: E 2019 which provides;

“ When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, is relevant”

Now, at this juncture the duty of this court is to determine whether the oral confession alleged to have been made by the 2nd accused to PW1, PW3 and PW6, and to PW5 by the 1st accused is sufficient to found conviction against them.

There is no doubt that an oral confession has the same weight as the written confession. It does not matter whether it was made before a civilian or not. As correctly submitted by the learned state Attorney, it is the position of law that an oral confession made by a suspect before or in the presence of reliable witnesses, be they civilian or not; may be sufficient to found conviction against the suspect. **See the Director of Public Prosecutions versus Nuru Mohamed Gulamrasul [1988] TLR 82**

The test for admissibility as per the case of **Posolo Wilson @ Mwalyengo versus Republic, Criminal Appeal No.613 of 2015 CAT (Unreported)** is the reliability of the witness whom the confession was made and whether an oral confession was voluntarily made. It was stressed in the case of **Mohamed Manguku versus Republic, Criminal Appeal No. 194 of 2004 CAT (Unreported)** 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 my considered view that, in order to say that, at the time of making the statement/oral confession, the suspect was a free agent and that he/she made the statement voluntarily, the prosecution must prove the absence of any form coercion, duress, threat, promise, torture or any other form of cruel, inhuman or degrading treatment or punishment. It should be noted that torture or inhuman or degrading treatment may be either physical or mental. Since there is no definitive list of what constitutes torture or cruel or inhuman or degrading treatment, this has to be decided on a case-by-case basis. The confession which is not a product of a free and unconstrained will can never be termed as a voluntary confession.

In the case at hand, the 2nd accused disputed to have made an oral confession to PW3, PW6 and PW1 voluntarily and to have been a free agent at the time of making his confession. The 1st accused also disputed to have made any confession to PW5. The evidence of PW2 is to the effect that the 2nd accused was arrested on 28/08/2015 on suspicion that he was responsible on the disappearance of the deceased. PW6 confirmed that he was arrested under his instructions during morning hours, and brought into his office, then he was handcuffed and locked in one of his office rooms under the watch the Militiaman. No explanation offered by the prosecution as to why the accused was not interrogated immediately after his arrest. PW6 went to Karagwe district, and when informed that the body which had no head was recovered during afternoon hours, PW3 and PW6 went back to the 2nd accused for interrogation. No explanation offered by the prosecution as to whether before he made his oral confession, the 2nd

accused's hands were untied, and whether before the interrogation the accused was given some food and water taking into account that he was confined since morning hours. There is no doubt that PW3 was a person in authority (Village Chairman) likewise PW6 (Ward Executive Officer). It is PW2 who first suspected the 2nd accused but he never asked him whether he was the one responsible for the disappearance of the deceased, PW2 was not involved by PW3 and PW6 to interrogate the 2nd accused. DW2 claimed that he was assaulted by PW6 and the Militia man using a club. PW3 and PW6 stated that, the 2nd accused did not confess orally before them that, they used a bush knife to kill the deceased. It is the evidence of PW1 that the 2nd accused confessed to him on 29/08/2015 but DW2 denied the same said he was beaten and he admitted that he had a bush knife at home, but denied to have ever used the same to kill the deceased. Under the circumstances of this case, this court is not satisfied beyond reasonable doubt that at the time of making the oral confession to PW1, PW3 and PW6 the 2nd accused was a free agent and that he did so voluntarily. It is the evidence of PW5 that they were two militiamen and that they transported the 1st accused from Izimbya to PW6's office using Motorcycle, and that the accused was handcuffed. The fact which was admitted by DW1.

It is undisputed that, a motorcycle is designed to carry the rider and one passenger. In this case, the motorcycle carried three (3) people. The 1st accused was handcuffed, and PW5 said, while on the way to Rugela, the accused made the oral confession to them. Again, this court is not satisfied

that the confession made under such a situation (if any) was made by a free agent.

~~As stated earlier, another evidence tending to connect the accused~~ persons with the offence of murder is their extra-judicial statement. Ms. Xaveria Makombe, learned State Attorney submitted that although the extra judicial statements of both accused persons were not listed in the information and were not read during committal proceedings, the prosecution filed the notice to add exhibits under section 289(4) of the Criminal Procedure Act, Cap 20 R:E 2019 as amended by the Written Laws (Miscellaneous Amendments) Act No.1 of 2020, and when the prayer was made in court, it was not objected by the defense counsel. She further submitted that on 29/08/2015 PW7 recorded the extra-judicial statement of the 1st accused in which during its admission, an objection was raised that the same was not voluntarily made and attracted a trial within a trial. However, in his defense, the 1st accused instead of centering on the objection raised, he said he never made any statement before PW7 and alleged that he was forced to sign it by PW1. The objection was overruled and the same was admitted as **Exh. P4**. It is her further submission that during cross examination, the issue of authenticity of Exh.p4 was raised because PW7 wrote the name of the 2nd accused in certification part, but later altered and wrote the name of the 1st accused, thus making the document authentic. Makome made reference to the case of **Zebedayo Mtetema versus the Republic, Criminal Appeal No. 484 of 2015 CAT** which the court held that alteration becomes authentic when dated and signed.

The learned State Attorney further submitted that, PW6 recorded the extra-judicial statement of the 2nd accused on 28/08/2015 whereby the 2nd accused admitted to have killed France s/o Marungu , and that during its admission, no objection was raised from the defense side, hence was admitted as Exh. P3. Ms. Xaveria further submitted that during defense hearing the 2nd accused challenged the admissibility of Exh. P3 alleging that it was not voluntarily recorded, but this is an afterthought since he did not state when his extra judicial statement was tendered in court so that a trial within a trial could be conducted. The learned State Attorney made reference to the case of **Nyerere Nyague versus Republic, Criminal Appeal No. 67 of 2010 CAT.** (Unreported) where it was held that;

"A confession or statement will be presumed to have been voluntarily made until an objection to it is made by the defense on the ground either that it was not voluntarily made or not made at all.... If the objection is made at the right time, the trial court must stop everything and conduct a trial within a trial".

She further submitted that, since the defense side did not object the admissibility of the extra-judicial statement of the 2nd accused person, they are barred from doing so during defense and since the 2nd accused confessed freely before PW6 his confession is the best evidence which proves that he was involved in the killing of France s/o Marungu. She made reference to section 28 of the Evidence Act, Cap 6 R: E 2019 which provides that;

"A confession which is freely and voluntarily made by a person accused of an offence in the immediate presence of a magistrate as defined in the Magistrates' Courts Act, or a justice of the peace under that Act, may be proved as against that person".

At this juncture the question is what weight should this court put on retracted/repudiated confession made by the 1st accused in his extra-judicial statement which was admitted as Exh. P4

In **Amos Binuge & ors v. Uganda, Criminal Appeal No. 23 of 1989**, the Supreme Court of Uganda held that;

"It is trite that when the admissibility of an extra-judicial statement is challenged then the objecting accused must be given a chance to establish by evidence, his grounds of objection. This is done through a trial within a trial...The purpose of a trial within a trial is to decide upon the evidence of both sides, whether the confession should be admitted."

In the case at hand, as correctly submitted by Ms. Xaveria Makombe, the 1st accused person through his counsel raised an objection that an extra-judicial statement was not voluntarily made. This is called repudiated confession because the accused person admitted that he made the statement recorded but now seeks to recant, to take back what he said, generally on the ground that he had been forced or induced to make the statement. In his defense, the 1st accused in examination in chief was led by the defense counsel, but he led DW1 as if the accused person had never made such a statement. However, the defense counsel was

reminded by the court from time to time to confine himself to the objection, but the reminder was not much helpful to him.

~~On cross examination, DW1 said he was tortured by PW1 and forced to sign the alleged extra-judicial statement. When cross examined as to why he did not mention the issue of torture during examination in Chief, DW1 said, he testified basing on how he was led by his defense counsel. Since the document was relevant and it was not shown that it was obtained through torture, knowing that its admission is one thing and the weight to be given to the evidence contained therein is another thing, the same was admitted as Exh P4. In the case of **Steven s/o Jason and 2 Others V R, Criminal Appeal No 79 of 1999 CAT Mwanza Registry (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"

Upon careful perusal of Exh.p4, the court discovered the followings;

One, the name appearing therein is **PHILBATH ALBUGAST** while as per information, the name of the 1st accused is **FILBERT S/O AROBOGAST**. The 1st accused in his defense disputed to have ever appeared before a justice of peace (PW7) and to have ever made an extra judicial statement before him. The prosecution had the duty to offer plausible explanation as to why the name appearing in the information is different from that appearing in an extra-judicial statement, but the prosecution did not discharge such a duty.

Two, at first PW7 certified the said statement as follows;

“Maelezo haya ya Edward Rubajenjera Kataigwa nimeandika na kumsomea na kudai ni ya kwake”.

Alteration was done, in which the name of the Philbath Albugast was written. The alteration was signed and dated by PW7 as required by the law as stated in the case of **Zebedayo Mtetema (Supra)**. However, in his evidence, PW7 told the court that he wrote the name of the 2nd accused by mistake after being mentioned by the 1st accused. I have gone through the two pages extra judicial statement to see whether the name of EDWARD RUBAJENJERA KATAIGWA was mentioned as said by PW7 and found that the name of **Edward Rubajenjera** appeared twice, but the name of **KATAIGWA** appeared only in the certification clause. Now, if at all at all the 1st accused a mentioned to PW7 the name **Edward Rubajenjera, the question is where did PW7 obtain the name of Kataigwa?** It should be noted that during trial within a trial as well as in his defense, the 1st accused alleged that he was just called by PW1 at police station or ordered to sign the documents which he was not aware as to what was written therein. It is the evidence of PW7 that he recorded the said statement in the presence of the Office attendant known as Arobogast, but the said office attendant was not among the prosecution witnesses appeared and testified in this case. In the premises, it cannot be said with certainty that the same is not free from doubt.

Another question is what weight should this court put on an extra-judicial statement of the 2nd accused which was admitted as Exh.p3. However, in his defense the 2nd accused person stated that the

same was not voluntarily made. I agree with Ms.Xaveria Makombe that as per the case of **Nyerere Nyague (Supra)** , a confession or statement will be presumed to have been voluntarily made until an objection to it is made by the defense on the ground either that it was not voluntarily made or not made at all.... If the objection is made at the right time, the trial court must stop everything and conduct a trial within a trial”

What happens if the objection was not raised at the stage where the court can conduct a trial within a trial?

I sought guidance from the case of **Moris Agunga and 2 Others versus Republic, Criminal Appeal No.100 of 1995** where the accused confession was admitted without objection but the accused in his defense during the trial retracted and repudiated the confession, the court however, held that the trial court was obliged to decide on the question of the voluntariness of the statement. Let the Court of Appeal speak for itself; *“The trial court had the duty to consider the appellant’s defense as to whether the confession was really voluntary, and if it found that the alleged confession was not voluntary, it should have discarded it all together not withstanding that its admissibility in evidence had not been objected”.*

In the case at hand, it cannot be said that an extra judicial statement was made free and voluntarily by the 2nd accused due to these reasons;

One, as per PW6, he recorded the extra- judicial statement of the 2nd accused in the presence other two persons including PW3 who was the Village Chairperson. When cross examined as to why the names of the said

persons were not indicated in the statement, he said, the same had no special space for them. He could not explain what role was played by the said two persons. On the other hand, the 2nd accused claimed that he was assaulted.

Two, it is the evidence of PW2 that on 28/08/2015, the 2nd accused was detained in the PW6's office from morning hours, the fact which was confirmed by PW6 who said the accused was arrested under his instructions, locked in one of his office rooms and finally recorded the 2nd accused's extra judicial statement. Certification of the same reads;

"Maelezo haya ya Edward R. Kataigwa nimeandika na kumsomea na kudai ni ya kwake kuanzia saa 9:00-10:00 jioni.

No evidence from the prosecution side that the 2nd accused was given water or breakfast or food before being called to make his statement. As I have stated earlier, in order to say the statement was made voluntarily, the prosecution must prove the absence of any form coercion, duress, threat, promise, torture or any other form of cruel, inhuman or degrading treatment or punishment. It should be noted that torture or inhuman or degrading treatment may be either physical or mental.

Three, in his defense, the 2nd accused person alleged that he is a Rwandise by nationality and that he entered the United republic of Tanzania in 2015 and therefore, was not conversant with Kiswahili, and that he had learnt Kiswahili in the prison, thus he was not aware as to what was recorded by PW6. PW6 admitted that DW2 knew not how to read and write, but he was conversant with Kiswahili language. **Item 4 of the**

extra judicial statement (Exh.p3) is very clear that a person who does not know Kiswahili must be given an interpreter and the name of the interpreter must be inserted there, but nothing was written there. It is my considered view that, PW6 had the duty to state clearly in item 4 that the 2nd accused was conversant with Kiswahili language and therefore, there was no need of an interpreter. In the circumstances of this case, this honorable court is not at all satisfied that an extra judicial statement of the 2nd accused was voluntarily made and that the same was nothing but true confession. Basing on what I have endeavored to explain herein above, the evidential value of Exh.p3 is weak, and that reason, I accord no weight on it.

It is the submission of Ms. Xaveria that the retracted confession of the 1st accused corroborated was corroborated by oral confession made by him to PW5, and the extra-judicial statement of the 2nd accused. The guidance on how to treat a repudiated and /or retracted confession was stipulated in the case **Tuwamoi versus Uganda** (Supra). 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".

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 Republic [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.

It is a legal position in our jurisdiction that a conviction cannot be based solely 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)**.

In the case at hand, the oral confessions made by the 1st and 2nd accused persons were found that were made while at the time of making them, they were not free agents. As regards the extra-judicial statement of the 2nd accused, it has already been discarded hence, had no corroborative value, and it should also be noted that weak evidence can never corroborate the weak evidence.

In the case at hand, the 1st accused through the defense counsel raised the defense of **ALIBI** hence duly complied with Section 194(4) of the Criminal Procedure Act, Cap 20 R: E 2019. He duly furnished the notice to the court and the prosecution side. It should be noted that, where an accused person raises the defense of alibi, **he has no duty to prove it. The duty lies on the prosecution to disprove a defense of alibi and**

place the accused at the scene of crime as the perpetrator of the offence. In *Sija Juma Kocho versus Republic* [1994] TLR 206 it was held that;

"It is not the burden of the accused to prove alibi though it would be reasonable if any witness would be called by the accused to confirm it". It was further held in the case of ***Kubezya John versus Republic, Criminal Appeal No.488 of 2015 CAT (Unreported)*** the court held that;

"We wish to interject here that we are alive that the accused person is under no legal duty to prove his innocence. But in situations where, like here, the accused person is depending on the defense of ALIBI, it is his duty to demonstrate his alibi albeit on balance of probabilities...."

In the case at hand, the 1st accused alleged that from 20/08/2015 up to 28/08/2015 he was at Izimbya mourning the death of his uncle. He called DW3 who testified in his favor that DW1 was at Izimbya in those dates, and was arrested at Izimbya. **To disprove the defence of alibi raised by the accused, the prosecution relied on the testimony of PW9** who said he saw the 1st accused on 23/08/2015 and congratulated him for purchasing a new motorcycle, and on 28/08/2015 at 11:00hours he met the 1st accused at Mkakajinja village and asked him to assist him (PW9) because his motorcycle had a tire puncture but the 1st accused was in hurry and unease, hence offered no assistance to him. When cross examined by the learned State Attorney, DW3 said, the one who passed away was DW1's **elder father** while DW1 testified that one who passed away was **his uncle**. DW1 further said, he did put track suits throughout

the mourning time, but DW3 said, the DW1 was also wearing normal trousers and shirts. DW1 said, from 20/08/2015 to 24 /08/2015, they were setting tents, while DW3 disputed that fact. Under the circumstances, the court finds that DW1 has not demonstrated his alibi to the balance of probabilities, therefore the court agrees that from 23/08/2015, DW1 was at Rugela village and that on 28/08/2015 during afternoon hours, he was arrested at Izimbya area. I therefore, accord no weight on the defense of alibi. However, being present in the village on the incident date is not in itself sufficient to show that the accused was involved in the killing of the accused, thus cogent evidence **placing the accused at the scene of crime as the perpetrator of the offence must exist**, the same is lacking in this case.

4th issue whether there was common intention between the accused persons. Ms. Xaveria submitted that, it was established from the oral confession by the 2nd accused to PW3 and pw6, but also found in their extra-judicial statements.

Considering the fact that the oral confessions and extra- judicial statements were found problematic as demonstrated in the foregoing pages, the same cannot form the base of proving that there was common intention between the accused persons to murder France s/o Marungu. In other words, the issue of common intention had not been proved beyond reasonable doubt in this case.

Having considered the case at hand as a whole, I found myself indebted to state that, it is doubtful as whether the prosecution

side was serious and duly prepared to investigate and prosecute this case. The reasons for such doubt are as follows;

First, Section 246(2) of the Criminal Procedure Act, Cap 20 R: E 2019 Provides that;

*“ Upon appearance of the accused person before it, the subordinate court shall read and explain or cause to be read to the accused person the **information brought against him as well as the statements or documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial**”.*

In the case at hand, during committal proceedings conducted on 27/7/2016 cautioned and extra- judicial statements were not listed in the list of exhibits and therefore, their contents were not read and explained to the accused persons. It is the evidence of PW1 that the documents were in the police file. If at all the statements were there as stated by PW1, the prosecution ought to have given reasons as to why the documents were not listed and furnished the copies to the court for them to be read and explained to the accused persons. Reading section 246 (2) of the CPA, it is clear that the accused person has the right to be informed in advance of the evidence that the prosecution intends to rely on for the purposes of preparation of his or her defense. Since the documents were not listed during committal proceedings nor were their contents read to the accused persons, there was non-compliance of section 246(2) of the CPA. See the case of **Francis Siza Rwambo versus Republic, Criminal Appeal No.17 of 2019 CAT** (Unreported).

Secondly, Plea taking and preliminary hearing was conducted on 14/11/2016. At that stage, the cautioned statements and extra-judicial statements were listed in the list of prosecution intended exhibits. However, no notice was given of their intention to use additional documents, as a result, the cautioned statements of the accused persons were withdrawn on 11/11/2021 from being admitted as exhibits because, before the admission, it was discovered that they were not listed, read out and explained to the accused persons during committal proceedings and no notice of additional documents was filed by the prosecution before they sought for admission of the same.

Thirdly, the notice for additional exhibits; to wit; extra-judicial statements of the accused persons was filed under section 289(4) of the Criminal Procedure Act, Cap 20 R: E 2019 as amended by the Written Laws (Miscellaneous Amendments) Act, No. of 2020 was filed on 21/10/2021, and the statements were supplied to the defense side on the same date. PW6 who tendered exh. P3 testified on 21/10/2021, likewise PW7 who tendered exh. It is undisputed that notice was not objected by the defense counsel, **but the issue is whether the notice was reasonable** taking account the fact that the prosecution side remained silent for good five (5) years from the date of plea taking and preliminary hearing. **In the case of Felex Mwova Vaasya versus Republic, Misc. Criminal Application No.48 of 2016,** the High Court of Kenya at Machakos while confronted with the issue as to whether the defense was supplied with the necessary documents within a reasonable time, the court held that;

"Providing the accused person with copies of statements by witnesses only a day before the trial did not give the accused sufficient time to prepare for his defense"

In the case at hand, it cannot by any means be said that the prosecution became aware of the extra-judicial statements on the date in which PW6 and PW7 appeared in court, that is to say on 21/10/2021. The prosecution knew on the plea taking and preliminary hearing stage that they would use the cautioned and extra-judicial statements of the accused persons. They should therefore, before hearing, have given notice of their intention to use additional documents and also availed the defense side of the substance of the documents within a reasonable time. The lack of the said documents in the list of documents given during committal proceedings and the lack reasonable notice creates much doubts on the prosecution case. See the case of **Seif Salum and Another versus Republic, Criminal Appeal No.119 of 2015** CAT (Unreported).

Fourthly, the prosecution side was **very aware that, there was no eye witness of the killing, and that the only evidence they had linking the accused persons with the offence of murder was the cautioned and extra-judicial statements of the accused persons. These questions therefore, cannot be avoided; One**, can it be said that it was an oversight on the prosecution side not to list the documents in the list presented during committal proceedings? **Two**, can it be said that it was an oversight on the prosecution side for not filing a reasonable notice? **Three**, can it be said with certainty that the said documents were really in place as alleged by PW1?. Taking into account seriousness of the

offence of murder, it is my considered view that it cannot be said by any means or by whatever standard that, that was an oversight. In my observation, the situation suggests three things, **one**, that there was gross negligence on the prosecution side or, **two**, that the documents were not there from the very beginning or, **three**, that the prosecution side had no intention to prosecute this case in accordance the law for one reason or the other.

Fifthly, it is the evidence of PW3 and PW6 that the 2nd accused is the one who told them that they have kept the deceased's head in the gully located in the west side from where the body was lying, and upon that information, they headed to the crime scene where they found the police and including PW1 and PW8. They did not bother to pick the 2nd accused from PW6's office so that he can lead them to where they kept the head, and they advanced a simple reason that they did not go with him for security purposes since the villagers were many and furious.

It is undisputed that murder is among the serious offences in our jurisdiction which attract death by hanging therefore, its investigation and prosecution need not be taken lightly. In the case of **Ndorosi Kudekei versus Republic, Criminal Appeal No.318 CAT** (Unreported), the appellant who was the accused person in the trial court led the police and other witnesses to the place where the dead body and the chopped off head were recovered. **That Court of Appeal found that that was very proper and good evidence to complement the accused's confession.** It is unfortunate that procedure was not observed in this

case. Taking into account that there was no eye witness of the killing, for the interest of justice, the police would have increased the number of police for security purposes. The 2nd accused would have been properly linked with the offence of murder. It is the evidence of all prosecution witnesses save for PW9 that the decomposed head of the accused was not found in the gully alleged to have been mentioned by the 2nd accused, but in the shrub area near the gully.

It should be noted that in the case at hand, the 2nd accused person denied to have committed the offence. He told the court that he lived with the deceased peacefully and they used to eat the food cooked by DW's wife, and that having noted the disappearance of the deceased, he did not run away, but he traced him and finally reported the matter to the relevant authorities, the matter which was confirmed PW2, PW3 and PW6. In present case, it was alleged that the motive for killing the deceased was because he was an obstacle to the 2nd accused as he reported any plan of the 2nd accused to sell the cows of his boss, but the 2nd accused denied that allegations. PW2 being the supervisor of the Kraal which was under the deceased and 2nd accused, PW3 being the Village Chairman, PW6 being the Ward Executive Officer (WEO) and PW8 being the OC-CID, had told the court that the deceased had never reported to them that the 2nd accused had the plans or ever sold the cows of his boss, and the said boss namely; Maria w/o Karusha was not among the prosecution witnesses. Under the circumstances this court finds that the 2nd accused had managed to raise reasonable doubt as to his guilt. The 1st accused on his side, denied to

have committed the offence, and that he knew the 2nd accused on 28/08/2015 in the office of PW6.

In this case, at the end of the summing-up, the Ladies and Gentleman assessors were divided. Two assessors; Joanitha Isaya and Faridu Mussa unanimously opined that 1st and 2nd accused persons are guilty of murder. Joanitha d/o Isaya opined that there is sufficient evidence linking the accused persons with the offence of murder, and the motive has been demonstrated and that, the accused persons in their extra-judicial statements have confessed to have killed France s/o Marungu. She further opined that; the defense of alibi raised by the 1st accused was very weak. Faridu s/o Mussa opined that, according to the evidence adduced, the prosecution had managed to prove the case of murder beyond reasonable doubt against both accused persons. That the evidence of PW6 and PW5 was very strong to show that there was common intention between the accused persons, that the defense of alibi raised by the 1st accused had not been proved by him to the balance of probabilities and that, the allegation by the accused persons that they knew not each other is baseless because both of were village mates.

On the other hand, the third assessor; Stella Laurent opined that, since there is no single prosecution witness who testified that he saw the accused persons or one them killing the deceased, basing on the evidence adduced, the case against the accused persons had not been proved beyond reasonable doubt thus the accused persons are not guilty of the offence of murder.

However, considering all the evidence adduced in court by both parties, the applicable law and principles, I have a dissenting view from that of the herein above two assessors; that the case had not been proved beyond reasonable doubt as against the accused persons. As correctly opined by one assessor, Stella Laurent, there is no any prosecution witness who saw the accused persons or any of them killing the deceased. The evidence proving murder must always be unshakably clear, linking the accused persons with the offence committed. Any reasonable doubt always must be in favor of the accused persons. The rationale for requiring such high degree of proof is the consequences of it when the same is proved beyond reasonable doubt, that is death by hanging. In this case, the prosecution relied on oral confession and extra-judicial statements of the accused persons. Since, I have found that it was not proved beyond reasonable doubt; **One**, that the accused persons were free agents at the time they made the alleged oral confessions, **two**, that, the extra-judicial statements were voluntarily made, and since there is no any other evidence linking the accused persons with the offence committed, it is obvious that this case had not been proved beyond reasonable doubt.

The 2nd accused person was arrested on suspicion basis. It is well settled by a plethora of judicial pronouncement of this Court and the Court of Appeal of Tanzania that suspicion, however strong it may be does not lead conviction in a criminal trial because it cannot take the place of proof. **See the case of MT.6033 PTE Nassoro Mohamed Ally versus Republic,**

Criminal Appeal No.73 of 2002 and Masoud Mgozi versus Republic, Criminal Appeal No.195 of 2018 CAT (Both unreported) as well as **Emmanuel Mathayo versus Republic, Criminal appeal No.34 of 2017 HC- at Arusha.** (Unreported).

In the case at hand, it is undisputed that the deceased died, and that his death was unnatural and violent because his head and genital parts to wit; testes and penis were chopped off using a sharp object. The major issue which detained me so much in this case was whether the brutal death of the deceased was caused by the accused persons, but the question had been answered in the negative, as I have said earlier that, there is no cogent evidence linking the accused persons with the death of the deceased.

So, however sympathetic this court may be to the circumstances under which the life of the deceased was eliminated, it is bound by the confines of the law because courts are not courts of sympathy but courts of law and procedures, and since the standard of proof required in criminal cases; to wit proof beyond reasonable doubt had not been met, there is no any other order this court can make than acquitting the accused persons as I hereby do. FILBERT S/O AROBOGAST and EDWARD S/O RUBAJENJERA@KATAIGWA@ MKOMBOZI are not guilty of the offence of murder, therefore, they are hereby acquitted and should be released from custody forthwith unless lawfully held. It is so ordered.

Dated at Karagwe this 26th day of November, 2021.




E. L. NGIGWANA

JUDGE

26 /11/2021

Judgment delivered this 26th day of November, 2021 in the presence of Mr. Haruna Shomari, learned State Attorney for the Republic, both accused persons, Mr. Samwel Angelo, learned counsel for the accused persons, Mr. E. M. Kamaleki, Judges' Law Assistant, Ladies and Gentleman Assessors; Stella Laurent, Joanitha Isaya and Fairidu Musa, and Ms. Lounsia- B/C.

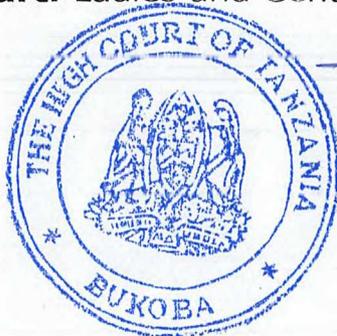



E. L. NGIGWANA

JUDGE

26 /11/2021

Court: Ladies and Gentleman Assessors thanked and discharged.




E. L. NGIGWANA

JUDGE

26 /11/2021