

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(IN THE DISTRICT REGISTRY OF SHINYANGA)  
AT SHINYANGA**

**CRIMINAL SESSION CASE NO. 23 OF 2020**

**REPUBLIC**

**VERSUS**

**MUSA ABDALLAH @ HAMAD @ DOGO NYABUSA  
HUSSEIN RAMADHAN @ MVUKYE @ MAUSEN  
HABIAMBELE MISAGO @DONANSIA @ JANUARY@RAMADHANI**

**JUDGMENT**

24<sup>th</sup> November & 30<sup>th</sup> December, 2022

**MASSAM, J.**

The accused persons, ones Musa Abdallah @ Hamad @ Dogo Nyabusa, Hussein Ramadhan @ Mvukye @ Mausen and Habiambe Misago @ Donansia @ January @ Ramadhan stand charged with the offence of Murder contrary to Section 196 of the Penal Code, Cap 16 (Revised Edition 2002).

It is alleged by the prosecution that, on 1<sup>st</sup> June, 2017 at Mwime Makungu area, within Kahama District, in Shinyanga Region, the accused persons murdered one Jamal Simtovu @ Bakari @ Bekam

The facts presented by the prosecution which gave rise to this trial are that; the deceased was operating a motorcycle business with a motorcycle registered MC 638 BGB make sanlg, the property of Hamis Maghanga. From the night of 1<sup>st</sup> June, 2017, the deceased went missing till 5<sup>th</sup> June, 2017 when the police got information that at Nyasubi ward in the forest farm of Mwanankuli two dead bodies were seen and that one of them seem to be killed recently.

The police rushed to the place and the body of Jamal Simtovu @ Bakari @ Bekam was identified but the other one was not identified as it was already destroyed by animals. It was also noticed that, the Jamal's body had cut wounds caused by sharp object. Later on, the police got information that, the motorcycle with Reg. No. MC 638 BGB make Sanlg was in possession of the 1<sup>st</sup> and 3<sup>rd</sup> accused persons. Upon being arrested, the 1<sup>st</sup> and 3<sup>rd</sup> accused persons mentioned the 2<sup>nd</sup> accused person as their associate in robbing and killing the deceased. After the 2<sup>nd</sup> accused person was arrested too, all accused persons confessed before justice of peace to have killed the deceased in the cause of robbing the motorcycle. The accused persons latter led the police officers to the recovery of things that are connected with the murder of the deceased. The blood stains found in some of those things were sent to the Government Chemistry whose report showed that, the blood clots

are of the same person. As such the accused persons were charged with murder of Jamal Simtovu @ Bakari @ Bekam.

When the information of murder was read to the accused persons during Plea taking and Preliminary hearing, they pleaded not guilty to the information. Further, on 7<sup>th</sup> November, 2022 when the case came up for trial, the charge of murder was reminded to the accused persons, again they pleaded not guilty thereto, in the Republic side was represented by Mr. Jairo Jukael and Ms. Immaculate State Attorneys and in the defense side Mr. Jacob Somi advocate who represented 1<sup>st</sup> accused person Bakari Chubwa for 2<sup>nd</sup> accused person and Ms. Gloria Ikanda advocate for 3<sup>rd</sup> accused person.

In discharging the duty of proving the charge against the accused, the prosecution summoned twelve witnesses and tendered eight exhibits. The evidence of the prosecution and defense side can be summarized as follows:

John Malulu testified as PW1. His testimony was to the effect that, in 2017 he was a doctor stationed at Kahama Town Hospital. He testified that on 6<sup>th</sup> June, 2017 he was required to conduct post mortem examination. He said that, he together with a police officer went to the mortuary for it. He said the body was of Jamal Simtovu. He observed that, the cause of death was a big wound on the deceased's head. After



examination he filed the post mortem report. He tendered it to the court and the same was admitted as Exhibit P1.

D/C Godson testified as PW2. His testimony is to the effect that, in 2017 his working station was at Kakonko. He added that, on 2<sup>nd</sup> June, 2017 he together with a traffic, were working at the police barrier at Kihomoko village. They appeared two persons with a motorcycle which had no right-sidemirror. He said, the traffic stopped them. He went further describing the motorcycle being sanlg,red in color with registration No. MC 638 BGB. PW2 added that, as those persons had neither a driving license nor a registration card, they opted to take them and motorcycle for further investigation. He identified the two persons as the 1<sup>st</sup> and 3<sup>rd</sup> accused persons herein. PW2 prayed to tender the said motorcycle and the same was admitted as Exhibit P2. When cross examined PW2 stated that, as the 1<sup>st</sup> and 3<sup>rd</sup> accused persons had no registration card it was impossible for them to be ordered to pay fine.

SSP George Bagyemu testified as PW3. His testimony is to the effect that, in 2017 he was OC CID at Kahama District. While at his office on 2<sup>nd</sup> June, 2017 he received information of the missing of the deceased. He said the information was given by a boda-boda chairman and the deceased's relatives. The information was to the effect that Jamal Simtovu who was driving a motorcycle with Reg. No. 638 BGB

make SUNLG was missing since on 1<sup>st</sup> June, 2017. He said following that information he requested for a copy of registration card and opened an inquiry file with No. KAH/CID/PE/62/2017 after which he sent a police message for the arrest of anyone seen with such motorcycle. Luck that, on 4<sup>th</sup> June, 2017 he received a call from OC CID Kakonko that, the motorcycle was found there with the 1<sup>st</sup> and 3<sup>rd</sup> accused persons. He added that, he sent police officers to take it back together with the said accused persons. He went further stating that, on 5<sup>th</sup> June, 2017 he again received information on the two bodies of people seen at Mwanankuli forest. As they went at the scene, the deceased relatives managed to identify the victim's body. He said, he had to make a phone call to OC CID Kakonko telling him that, the accused persons have a murder case. He said that, on 6<sup>th</sup> June, 2017 the motorcycle arrived and he went to see the accused persons as well. PW3 told the court that, the accused persons told him to arrest their boss too who is the 2<sup>nd</sup> accused person. He added that, they managed to arrest him too. During cross examination the statement of PW3 was admitted as Exhibit D1. In reexamination PW3 stated that, he recorded his statement on 18<sup>th</sup> July, 2017 not 2019 as it is as it was a typing error.

Edina Sospeter Basimwaki testified as PW4. Her testimony is to the effect that, on 8<sup>th</sup> June, 2017 she was a Magistrate and Justice of Peace



at Kahama Primary court. She said that, the police officer brought the 3<sup>rd</sup> accused person who wanted to confess before a justice of peace. She added that, after she had given him his rights, she managed to record the 3<sup>rd</sup> accused extra judicial statement. She prayed to tender the same and it was admitted as Exhibit P3. PW4 went further stating that, he also managed to record the confessions of the 2<sup>nd</sup> accused person. She prayed to tender it in court and the same was admitted as P4.

Aloyce Kamandu testified as PW5. His testimony is to the effect that, on 2017 he was assistant OC CID at Kahama police station. He added that, on 2<sup>nd</sup> June, 2017 he was assigned to open an inquiry of a missing person, Jamal Simtovu. He also stated that, on 5<sup>th</sup> June, 2017 they received information on the two dead bodies found at the Mwanankuli forest. He attended the place where Jamal Simtovu was among the bodies found and identified by his wife, relatives and his co businessmen. He added that, they saw a big wound on the deceased head. He also testified to have received information on 6<sup>th</sup> June, 2017 from Kakonko on the arrested two accused persons with the motorcycle that had been driven by the deceased. PW5 told the court also that he participated in arresting the 2<sup>nd</sup> accused person after he was mentioned by his fellows accused. He added that, he was taken by the accused persons to the place where they killed the deceased at Mwime where

blood clots were seen, the accused too showed the bushknife used for killing the deceased which was hidden in the bush. PW5 stated to have prepared a seizure note. PW5 went further contending that, he also searched the 1<sup>st</sup> accused person's house and found a bucket with kanzu and barakashia with blood, side mirror and sport light of the motorcycle which was found with 1<sup>st</sup> and 3<sup>rd</sup> accused persons. He added that he prepared a seizure note for them too.

Vincent Ndesekio testified as PW6. His testimony is to the effect that, in 2017 he was a Weo at Mwendakulima, Kahama. On 5<sup>th</sup> June, 2017 he joined police officers who went to the scene where two dead bodies were found. At the scene, the body of Jamal Simtovu was identified. He added that, on 6<sup>th</sup> June, 2017 while at his office, he was called by police officers who informed him on the arrested killers of the deceased. He was thus required to join them going to Mwime area where the said murder occurred. He told the court that, they went with all the accused persons who showed the place where they killed the deceased and the place where they hidden the bush knife. He went ahead contending that, the accused persons took them to Mwanamkuli where they decided to hide the deceased's body. After that, they were taken to phantom area where the 1<sup>st</sup> accused resides. He added that, at his room they found site mirror, sport light, kanzu and barakashia stained with



blood. When cross examined, he replied that the recovered bush knife had no blood clots.

Najat Jafari testified as PW7. Her testimony was to the effect that, she is living at Nyasubi with her family. On 2017 she got a tenant who is called Laya. She added that, on 6<sup>th</sup> June, 2017 during the evening time, police officers went for a search in the room of her tenant. She witnessed a bucket with kanzu and barakashia with blood clots and two motorcycle sports lights and site mirror. When cross examined, she replied that, her tenant is Laya but the 1<sup>st</sup>accused joined her and they were living together as husband and wife. She added that, Laya told her that the 1<sup>st</sup>accused is her husband.

Innocent Kapere testified as PW8. His testimony is to the effect that, he is a WEO of Nyasubi. He added that, on 6<sup>th</sup> June, 2017 he was called by a WEO of Mwendakulima at Phantom. When he reached there, he found many people including police officers who wanted to search the room where the 1<sup>st</sup>accused person resides. He added that, he also witnessed the search where a bucket with kanzu with blood clot and barakashia. He added that sport light and site mirror were also recovered therein. The said things were all seized by police officers.

Iddsum Mapande testified as PW9. His testimony is to the effect that, he is a leader of boda-boda at Kahama, and on 2<sup>nd</sup> June, 2017 the



wife of Jamal Simtovu informed him that her husband is missing since 1<sup>st</sup> June, 2017, so he reported the matter to police. On 4<sup>th</sup> June, 2017 he was called by police officers who informed him that the motorcycle that was driven by Jamal Simtovu was caught at Kakonko. He added that on 5<sup>th</sup> July, 2017 he heard an alarm at Mwanankuli farm, sohe went to the scene where the deceased body was found and he thus decided to inform OCCID.

Leah Emily Kyomushola testified as PW10. Her testimony is to the effect that, in 2017 she was a primary court magistrate at kahama primary court and justice of peace. She added that on 8<sup>th</sup> June, 2017 while at her office the 1<sup>st</sup> accused person was brought to her, as he wanted to confess. After she followed requirement of law, she recorded his extra judicial statement. She prayed to tender the same and it was admitted as exhibit P5.

F 5276 D/C Shamshi testified as PW11. His testimony is to the effect that, in 2017 he was a policeman at Kahama. On 5<sup>th</sup> June, 2017 he together with other police officers after being ordered by OCCID they went to Kakonko in Kigoma region to collect the 1<sup>st</sup> and 3<sup>rd</sup> accused persons together with a motorcycle in question. He added that after they came back, he was ordered to record the caution statement of the 1<sup>st</sup> accused person and it was on 6<sup>th</sup> June, 2017.

E 5168 SGT Joseph testified as PW12. His testimony is to the effect that, in 2017 he was a policeman stationed at Kahama. On 9<sup>th</sup> June, 2017 he conducted a search to the house of Venance after he got information that a mobile phone connected to the murder of Jamal Simtovu could be recovered there. His search recovered a mobile phone make Itelwith black color and red strip. He added that, the wife of the 3<sup>rd</sup> accused person had told them that, her husband (3<sup>rd</sup> accused person) returned home with a bag that contained that phone which is not his. He added that, he filed the seizure certificate of it. PW12 prayed to tender it and the same was admitted as exhibit P6. He also prayed to tender the Itel mobile phone with Imei No. 353343088578197 and 3343088578189 and the same was admitted as Exhibit P7. He also said that he took the kanzu, barakashia and panga to the Government Chemistry who confirmed that the blood clots found in them are sample of male person. PW12 tendered the Government Chemistry report and the same was admitted as exhibit P8.

On these twelve witnesses as I said earlier, the prosecution case got closed. In terms of the provisions of section 293(2) of the Criminal Procedure Act, Cap. 20, the accused person was found to have a case to answer. After being addressed in terms of section 293(3) of the CPA, Cap 20 the 1<sup>st</sup> and 2<sup>nd</sup> accused persons opted to testify on oath together

with one witness and one exhibit. The 3<sup>rd</sup> accused person opted to testify alone on oath and would have two exhibits.

Musa Abdallah Hamad @ Dogo Nyabusa testified as DW1. His testimony is to the effect that, on 4<sup>th</sup> June 2017 he was arrested in the bus stand at Kakonko. He was travelling with Ruston bus from Kahama to Kibondo. He gave the reason for his arrest being that he was not a citizen of Tanzania. He said during on his arrest his things were seized which he was taking to Kibondo. He said that he was kept in custody till on 5<sup>th</sup> June, 2017 when he was transferred to Kahama. He tendered a bus ticket which was admitted as exhibit D2. He went ahead stating that, one Bwire asked his name then started writing. Then he was ordered to sign the same. He said that he was beaten by several police officers in order to sign the said document and later on he decided to sign it. Again, he added that on 8<sup>th</sup> June, 2017 he was taken out of lock up beaten and taken to court where he was told just to sign and leave. After that, he said the police went on talking with that police officer and he was then taken to hospital which filed the PF3. He then disputed that he did not lead the police to the scene, he did not write statement and that he met his fellow accused persons at court, he also denied to be arrested with a motorcycle. When cross examined, he agreed having



relationship with Najat's tenant but he never slept in that house but he agreed to have gone to that house of Najat on 6<sup>th</sup> June, 2017. He denied seeing the bucket with the said kanzu and barakashia. He added that, he knowsto read and write. He disputed the thumb in the extra judicial statement being his.

Hussein Ramadhani testified as DW2. His testimony is to the effect that, he is a bodaboda man at Kahama town. He said that on 5<sup>th</sup> June 2017 they received information on the dead body found at Mwanamkuli forest. He said that he went and saw the same. He said that, they decided to go to complain to the District Commissioner as they usually report to the police about killings of bodaboda especially in that forest but still goes and policemen took no action. According to the complaint which he made before Kahama DC he heard that there was a police officer who was looking for him. He was then arrested and taken to police station where he met with George Bagyemu who asked him as to why he complained that much to DC. He added that, after that he was beaten by police officers and locked up, later on he was taken to the Justice of Peace. He said that, he denied to have committed the offence charged, therefore the police officer took him to police station beaten up and sent again to another Justice of Peace on the other day. He said

that the said Justice of Peace was just writing to the paper and then ordered him to sign it. He said he signed it for fear of being killed. He said after that he was taken to the place where the victim body was recovered. As he was in bad condition, he failed to step down to the car. DW2 went on stating that, on their way to the court he was also taken to hospital where he also given a photocopy PF3.

Habyambele Misago Ramadhani testified as DW3. His testimony is to the effect that, he is a gardener who was living at Mwime since 2016. He said that on 3<sup>rd</sup> June, 2017 he was arrested while travelling with Casablanca bus to Kasulu. He said that he had a misunderstanding with his seat mate in the bus. When the bus was stopped by traffic, he was pointed to have misunderstandings in the bus. DW3 stated that in the course of ascertaining who had a problem, it was discovered that he was a Rwandese, thus the topic changed and taken back to Kahama police station for being non Tanzanian. He said at the police station he was beaten to admit killing of the deceased. He was then taken to immigration office where he was just ordered to sign some documents. He said that as his condition was bad, he was taken to hospital and back to lockup. When cross examined, he said that he was not arrested at Kakonko Kigoma but Manzese Kahama.

That marked the end of both parties' evidence. In view of the above evidence, the following issues call for determination: -

- 1. Whether the victim was met with unnatural death (if yes)**
- 2. Whether the accused persons are responsible for that death of the victim (if yes)**
- 3. Whether the accused persons with intention/malice aforethought killed the victim.**

Concerning the first issue, whether the victim was met with unnatural death, first, from both sides' testimonies, it is not in dispute that Jamal Simtovu @ Bakari @ Bekam is dead. The final submissions of the defense side join hands to this fact. According to the post mortem report which has been admitted in court as Exhibit P1, it shows that, the cause of the death of the victim is head injury/ brain damage.

The admitted post mortem report shows that, the deceased's body was found lying on the man-made forest while with a fracture on a skull. Such fractures on the vulnerable parts of the human body prove that, the victim was met with unnatural death. As there is no evidence disapproving this fact, then I see no need of dwelling much on this



issue. This is positively answered that, the deceased Jamal Simtovu was met with unnatural death.

Concerning the second issue as to whether the accused persons are responsible for the killing of the victim Jamal Simtovu, among the evidence from the prosecution side depends in proving this case is circumstantial evidence. This is because from the evidence on record, there is no body who testified to have seen the accused persons killing the deceased one Jamal Simtovu.

I am alive with the position of law on circumstantial evidence as envisaged in the court of appeal case of **Shabani Abdallah Vs. The Republic**, Criminal Appeal No. 127 of 2003(unreported) stated that:

*"The law on circumstantial evidence is that it must irresistibly lead to the conclusion that it is the accused and no one else whocommitted the crime."*

The same position was underscored in so many cases. See, Also **Nkeshimana John @ Diodone Vs. The Republic**, Criminal Appeal No. 229 of 2005, **Self Selemani V. Republic**, Criminal Appeal No. 130 of 2005 (both unreported), **Simon Musoke Vs. The Republic** [1958]

E.A. 715 at 718 and **Tipper Vs. Republic** [1952] A.C 480 to name but a few.

The main question is, does the available circumstantial evidence meet the test of the above cited principle of the law? On the testimony of PW9, we are told that on the 1<sup>st</sup> day of June, 2017 the deceased one Jamal Simtovu was doing a motorcycle business with a Motorcycle with Registration No. MC 638 BGB make sanlg. This witness testified that, the deceased went missing since that day of 1<sup>st</sup> June, 2017, therefore, on 2<sup>nd</sup> June, 2017 they decided to report the same to the police station. PW3 who is OC CID of Kahama on his part agreed to have received that information from PW9. He went further by sending a police message so that whoever is found with the said Motorcycle, should be arrested. As a result of his police message, PW3 testified that, on 4<sup>th</sup> June, 2017 he was informed by the OC CID of Kakonko that, they have arrested the 1<sup>st</sup> and 3<sup>rd</sup> accused persons with the said motorcycle at Kakonko barrier. PW2 testified to have arrested the 1<sup>st</sup> and 3<sup>rd</sup> accused persons at Kakonko barrier with the said motorcycle as they were driving without licence, the right-side mirror missing and they had no motorcycle registration card. PW11 corroborated the testimony of PW3 who said that he was the one who sent from Kahama to kakonko to collect the 1<sup>st</sup> and

3<sup>rd</sup> accused persons together with the said motorcycle with registration No. MC 638 BGB make Sanlg. PW11 testified to have gone to Kakonko and come back with the 1<sup>st</sup> and 3<sup>rd</sup> accused person with the said motorcycle. The said motorcycle was tendered in court and it was admitted as Exhibit P2.

This court does not have any flicker of doubt concerning the issue that, at Kahama on June, 2017 motorcycle make Sanlg with Registration No. MC 638 BGB went missing and its driver one Jamal Simtovu was found dead. The death which has been proved to be unnatural one. This stand has been confirmed even by the 2<sup>nd</sup> accused person when he testified to have even gone to complain to the District Commissioner for the several occurrences of killings of boda-boda men after the found of the body of Jamal Simtovu.

On that account then, it follows therefore that, whoever was found with the said motorcycle, its auto parts and mobile phone which all proved to be belonged to deceased must be presumed to be the killer of the deceased Jamal Simtovu until he gives plausible explanation on how the deceased's motorcycle came to his hands.

In reply to that situation, the 1<sup>st</sup> and 3<sup>rd</sup> accused persons decided to enter defence of alibi. The same was given without prior notice. That



leaves this court to decide whether to accord any weight to it or not. See, **Mwita Mhere and Ibrahim Mhere vs. Republic** [2005] TLR 107. The reason behind being that, the defense testimony will be taken to be as a calculated afterthought.

However, the 1<sup>st</sup> accused testified to have been travelling in a bus, so he was arrested at Kakonko bus stand for the reason that he is not a citizen of Tanzania. Likewise, to the 3<sup>rd</sup> accused person who stated to have been traveling in a bus that was stopped at Manzese in Kahama. His arrest followed the accusation that he is not a Tanzanian citizen. All of them in their testimony testified to have no grudges with all the prosecution witnesses including PW2 who testified to have arrested them with the said motorcycle at Kakonko and PW12 who conducted search to the house of 3<sup>rd</sup> accused person and found him with deceased mobile phone, and the wife of 3<sup>rd</sup> accused person supported that her husband came with the said mobile phone which does not belong to him. Also PW5 told this court that he was taken by 1<sup>st</sup> accused person to the scene as he was the one who cut the deceased with bush knife and he was the one who show him the place which he hid the said bush knife. With this situation, even when we are to take into consideration the 1<sup>st</sup> and 3<sup>rd</sup> accused persons defence, the same falls short.

I find it very difficult to believe that, the prosecution witnesses, specifically the police officers have fabricated this case against the 1<sup>st</sup> and 3<sup>rd</sup> accused persons who had no grudges with them and in case they had grudges with them[accused persons] they were supposed to cross examine them in their testimony but they failed to do so, The police officers would not leave the actual person(s) found with the said motorcycle and marshal a murder case against the 1<sup>st</sup> and 3<sup>rd</sup> accused persons for a mere accusation of being non-citizens. In this situation, for the 1<sup>st</sup> and 3<sup>rd</sup> accused persons to exonerate themselves from this murder, they were needed to give a thorough explanation on how they came into possession of the motorcycle which lastly was driven by the deceased and mobile phone which was used by deceased, as that evidence lacks from those accused persons, then I am firm that these accused persons killed the deceased. See, **Deogratias Nicholas @ Jeshi and Another vs Republic, Criminal Appeal No. 211 of 2010 CAT Mwanza** which stated that; -

*We also think that the law is certain that if a person is found with goods recently stolen from a person murdered in a house, that raises a presumption that the accused was the murderer and unless he can give*

*a reasonable account of the manner in which he became possessed of the goods, he would be convicted of the offence (See also **ALLY BAKARI AND PILI BAKARI v R** (1992), TLR 10).*

Further, there is prosecution evidence as testified by PW5 a police officer, PW6a WEO of Mwendakulima, PW8 a WEO of Nyasubi and PW7 a land lady of one Laya. These witnesses testified to have participated in searching the house of Laya who had relationship with 1<sup>st</sup> accused person. The 1<sup>st</sup> accused person never disputed firstly, to have relationship with Laya and secondly, to have been searched. Their testimonies show that, the search revealed Kanzu and Baraghashia with blood clots belong to 1<sup>st</sup> accused person, and the motorcycle spot lights and side mirrors belonged to deceased motorcycle which was arrested with it, as there is no evidence from the 1<sup>st</sup> accused person showing that on the material dates, he had some wounds that possibly caused blood on his Kanzu, then the same blood may be taken to have been sustained during the killing process of the deceased. Again, no evidence was brought on his side to prove his ownership of other properties which found in that room, as the testimony of PW12 was not objected by 3<sup>rd</sup> accused person that he was searched and found with the deceased



mobile phone, also 3<sup>rd</sup> accused person's wife did support that the said mobile phone was found in their room and was brought by her husband, and she admitted that the said mobile phone was not belonged to him, so 3<sup>rd</sup> accused person was supposed to tell this court that how did he came in possession of that mobile phone which alleged to belong to the deceased, so the said failure make this court to prove that 3<sup>rd</sup> accused person was connected with the killings of the said Jamal Simtovu thus why he was found in possession of his property.

With these kinds of prosecution evidence, I see that, they irresistibly point to the guilt of the 1<sup>st</sup> and 3<sup>rd</sup> accused persons as stated in the case of **Shabani Abdallah**(supra).

Now to the 2<sup>nd</sup> accused person. The record shows that, he was joined into this case after he was first mentioned by the 1<sup>st</sup> and the 3<sup>rd</sup> accused persons in their confessions. This is per the testimony of PW3. I am alive with the position of the law regarding conviction basing on confession of co accused. The same is provided under provisions of s. 33(2) of the Evidence Act, Cap. 6. The sub-section provides as follows:

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

On account of the above excerpt of law, it follows therefore that, for the 2<sup>nd</sup> accused person to be convicted, there must be independent evidence to corroborate that confession of the co accused. See, **MT 38870 PTE RAJAB MOHAMED AND OTHERS vs R** Criminal Appeal No. 141 of 1992 (unreported).

*no conviction can be founded on the uncorroborated  
confession of a co-accused*

The record is vivid that, the only remaining prosecution evidence against the 2<sup>nd</sup> accused person is the extra judicial statement which was tendered as Exhibit P4. The proceedings further show that, the 2<sup>nd</sup> accused person denied to have made that statement at all, hence repudiated. The law requires repudiated and retracted confession must be corroborated. See, **Amiri Ramadhan vs. Republic, Criminal Appeal No. 228 of 2005 CAT Arusha**. As this kind of evidence requires to be corroborated hence the same cannot corroborate another evidence as per **Remigius Hyera vs Republic, Criminal Appeal No. 167 of 2005 CAT** (unreported) where it was emphasized that ,corroborating evidence must be independent. Thus, the evidence of co accused still remains uncorroborated.

As the prosecution side tendered no exhibit to prove that all accused persons led the police officers to the discovery of material things that are connected with murder of Jamal Simtovu, according to the evidence of PW5 1<sup>st</sup> accused person was the one who lead him to the place where he hid the said bush knife and he was the one who lead him to the place where they killed the victim, 2<sup>nd</sup> accused person was not mentioned , in the evidence then I see this evidence to be of less value to stand alone with, in finding conviction of the 2<sup>nd</sup> accused person. On that account, I find it that, there is no evidence to remaining that this court may rely to convict the 2<sup>nd</sup> accused person. On that note, this issue is answered that only the 1<sup>st</sup> and the 3<sup>rd</sup> accused persons are the only accused persons responsible for the murder of the deceased one Jamal Simtovu.

Concerning the last issue as to whether the 1<sup>st</sup> and 3<sup>rd</sup> accused persons murdered the deceased with malice aforethought, I have the following; In the case of **Enock Kipala Vs Republic, Criminal Appeal No. 150 of 1994** (unreported), the Court had an occasion to consider a situation like the one at hand, it stated that:

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



- (i) The type and size of the weapon, if any used in the attack;***
- (ii) The amount of force applied in the assault;***
- (iii) The part or parts of body the blows were directed at or inflicted on;***
- (iv) The number of blows, although one blow may, depending upon the facts of a particular case, be sufficient for this purpose;***
- (v) The kind of injuries inflicted;***
- (vi) The attacker's utterances, if any, made before, during or after the killing; and***
- (vii) The conduct of the attacker before or after the killing. (Emphasis supplied)***

In connection to the above excerpt, as we have seen above on what the Post mortem report has provided. The victim's body had cut wound on the head. This is a vulnerable part of the human body. Further, the type of the object used for killing was sharp. On those premises it is thus right to conclude that, the accused person intended to cut the deceased to death. If the accused person's intention was not to kill, then attack should have not been with a sharp object and should have not been directed to the delicate part of the human body which is head.

Further, the record shows that the victim's body was found lying in the forest, this shows that, there was a move to hide the victim's body. Concealing the truth too depicts the accused persons ill motive, hence killed with intention.

On account of the above mentioned, this issue too is answered in affirmatively that, the 1<sup>st</sup> and 3<sup>rd</sup> accused persons killed the victim with malice aforethought.

All said and done, with this evidence, and for want of evidence from the defense to create reasonable doubt, I am settled that, the prosecution case has been proved beyond reasonable doubt as required by law against the 1<sup>st</sup> and 3<sup>rd</sup> accused persons.

In view thereof, the 2<sup>nd</sup> accused person one Hussein Ramadhan @ Mvukye @ Mausen is hereby found not guilty of murder hence he should be released unless held for some other lawful cause. Musa Abdallah @ Hamad @ Dogo Nyabusa and Habiambale Misago @ Donansia @ January @ Ramadhani are hereby found guilty of the offence of murder contrary to the provisions of sections 196 of the Penal Code, Cap.16 and they are accordingly convicted.

It is so ordered.

**DATED** at **SHINYANGA** this 30<sup>th</sup> day of December, 2022



  
**R. B. Massam**  
**JUDGE**  
**30/12/2022**