

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB REGISTRY)
AT DAR ES SALAAM**

CRIMINAL SESSIONS CASE NO. 151 OF 2022

REPUBLIC

VERSUS

ISIHAKA MOHAMED.....1ST ACCUSED

ABUU ROBERT MCHAGUA2ND ACCUSED

NURDIN MOHAMED3RD ACCUSED

JUDGMENT:

22nd March & 15th April 2024

KIREKIANO, J.

The three accused persons namely Isihaka Mohamed, Abuu Robert Mchagua and Nurdin Mohamed stand charged with one count of murder contrary to sections 196 and 197 of the Penal Code, Cap.16 [R.E 2019]. It is alleged by the prosecution that, on the 08th day of October 2019 at Msanga Zalala Village, within Kisarawe District in Coastal Region, the three accused murdered Rashid Said (the deceased).

When the information was read over and explained to the accused persons; they pleaded not guilty to the information.

Briefly stated the facts leading to the accused person's arrest and trial are as follows; the deceased was a rider of a motorcycle with Reg. MC 470 BZU. He operated as a passenger motorcyclist popularly known as "*boda-boda*". His working area was around Chanika Ilala District and would normally retire home where he stayed with his father, Saidi Rashid. On 8th, October 2019, the deceased did not go back home. Efforts to trace him proved futile. Police were involved in the search for the deceased. On 12th October 2019, his dead body was found in shrubs at Msanga Zalala, Kisarawe District. Upon the conduct of a postmortem examination, the doctor opined that the cause of death was Asphyxia(suffocation) caused by strangulation.

It is the prosecution case that, the three accused persons on the material date 8/10/2019 boarded the deceased motorcycle and on the way strangled the deceased, causing his death, left the body in the shrubs and got away with the motorcycle.

The prosecution was led by Miss. Laura Kimario and Miss Amina Macha, assisted by Miss Doris Kawoja learned state attorneys. The 1st, 2nd 3rd accused persons respectively had the service of Mr Jerry Msamanga, Mr Frank Martin and Miss Hawa Turusia learned advocates.

In a bid to prove the information, the prosecution summoned nine (9) witnesses to prove the information. They are; PW1 Said Rashid Maulid, PW2 Prisca Steven Chamba, PW3, H 8522 Cpl Hamisi, PW4 F. 1890 Cpl Alwin, PW5 Ast. Insp. Leonard (formally G. 5923 DC Leonard), PW6 H 4003 D/Cpl Edgar, PW7 F. 718 D Sgt Dickson, PW8: Juma Hamis Mayamba and PW9 Maulid Said Mpolya.

According to PW1 Said Rashid, the deceased father, the deceased left at home on 8th October 2019 to work as "*boda-boda*" and never came back. He reported to the police at Chanika Police Station and checked into hospitals but he did not trace him. He spoke to a local leader Hashim Mvungi who gave him a lead that Rashid was taken by his friend and old school mate one Isihaka Mohamed and in this he was seen by Juma Mayamba.

It was PW1 version that following arrest of 3rd accused, on 12.10.2019 he accompanied the police to Msanga Zalala where the 3rd accused led the police to discover the deceased body. They eventually found a body of his deceased son and nearby he saw a belt near the body which was used to kill the deceased. He later identified the body to the doctor who conducted postmortem examination.

His story was corroborated by PW8 Juma Mayamba a motor cyclist. He said on 08/10/2019 while he was working at Chanika Mwisho he was in company of the deceased. Around 13:00 hours he saw Isihaka and his two colleague who he did not identify, they boarded the deceased motorcycle and went to the direction of Homboza.

When searching for deceased they passed at Msanga Zalala (along Homboza road) where they had a tip that the 1st accused was seen at the area.

PW5 Ast. Insp. Leonard was the police officer who led a team to take the deceased body from the scene of the crime at Kisarawe. He said after the 3rd accused was arrested; he was transferred to Kisarawe from Chanika together with his caution statement. The suspect (3rd accused) did lead the police to the scene at Msanga Zalala where they found the body. The body was identified by the deceased father (PW1). They took the body to the hospital for postmortem which was conducted on 13/10/2019.

When cross-examined by Mr Msamanga he said Nurdin (3rd accused) was brought to Kisarawe by PW3 Hamis.

The deceased body was examined by PW2 Dr Prisca Steven Chamba. According to her, the body of the deceased Rashid Said was identified to her

by Said Rashid (PW1). Upon examination, the body had started to decompose, the same had marks at the neck and had a bluish color suggesting the deceased had lack of oxygen. She thus opined that the cause of death was due to Asphyxia caused by strangulation. This was indicated in the post-mortem examination report **(Exhibit P-1)**

When cross-examined on the exact name of the deceased body, she examined she said the deceased was Rashid Said and not Said Rashid and that the body suggested that death occurred four days before.

The 1st accused was arrested by PW9: Maulid Said Mpolya at Rufiji on 15/10/2019. According to him he was a people militia no MG 513175 RSM at Bungu Rufiji. On this date the 1st accused in company of the 2nd accused who he named "Nurdin. He said the first accused was accused of stealing cashew nuts. The first accused was already in custody of angry civilians, He thus arrested the two and rescued them from angry villagers. He was then instructed by police to take him to Kibiti police station as there was report that he was wanted for murder.

The 1st and 2nd accused were transferred to Kisarawe from Kibiti by PW4 F. 1890 Cpl Alwin. On 17/10/2019 around 07:00hours he arrived at Kisarawe from Kibiti.

Having arrived at Kisarawe, the same date the first accused recorded caution statement before PW7: F 718 D Sgt Dickson, on 17/10/2019 from 08:00 and ended at 09:00 hours. According to PW7 the first accused in his caution statement (Exhibit P2) confessed before him that while in company of his fellows they killed the deceased on 08/10/2019 at around 14:00 hours and hide the deceased body in the bush at Kisarawe. They then vanished to Rufiji and then Kilwa to sell the same, they however did not pocket the money instead they ended stealing cashew nuts and was arrested at Rufiji on 15/10/2019.

The offence was investigated by PW6 H. 4003 D/Cpl Edgar. According to this witness he reviewed the caution statement of the 1st accused person and also the post mortem report, he was satisfied that the three accused did take a ride of deceased motorcycle, MC 470 BZU and committed the offence on 08/10/2019 when the deceased went missing by strangling the deceased. He did not go to the scene of the crime and he did not know about the sketch map of the scene.

The defence case was by three witnesses; the accused persons. They all disassociated themselves with the offence stating that they were not at the scene of crime on the alleged date.

DW1 Isihaka Mohamed the first accused, testified that he was arrested on 13/10/2019 at Mkengeni Rufiji District with the accusation of stealing cashew nuts. The next day on 14/10/2019 he was taken to the police station at Kibiti, and later on 16/10/2019, he was transferred to Kisarawe District. According to him, while at Kisarawe the police, tortured him forcing him to admit offence of murder which he did not commit. According to him on the fateful date of 8/10/2019, he was doing masonry work at Mbagala in the company of his colleagues but he did not mention their names. He said he did not know Rashid Said (deceased) nor Juma Mayamba (PW8).

The second accused DW2: Abuu Robert Mchagua defence was that he was arrested on 13/10/2019 at Majumba Sita, accused of gambling and he was then taken to the police station at Kisarawe. According to him he never killed the deceased, he did not know him nor the 1st and 3rd accused.

The third accused testified as DW3 Nurdin Mohamed he said on 12/10/2019 he was arrested by civilians who accused him of causing bodily harm to one Said Gesi. He was then taken to Kisarawe police station. His defence was that he was not involved at all and he never hired the deceased to ride him by his motorcyclist on 08/10/2019. On this date, he was at Pugu where he was working at his welding workshop. He denied

having gone to the scene on 12/10/2019 to show the police the deceased body nor stating police at Kisarawe named the 1st and 2nd accused.

That being the substance of the evidence, I wish at this stage to appreciate the final submissions which were timely filed by Miss Kimario for the republic but also Mr. Jerry Msamanga for the first accused and Miss Hawa Turusia for the 3rd accused. I have read the same, however, I will not reproduce the same at this stage, instead, I will refer to them as I address the contending issues in this trial.

In proving any criminal case the burden of proof lies on the prosecution side not the defence side. There are plenty of decision on this including the cited case of **Jonas Nkize Versus Republic [1992] TLR 213]** but also **Mohamed Haruna @Mtupeni and Another Versus Republic, Criminal Appeal No. 25 of 2007, Court of Appeal of Tanzania at Tabora (Unreported) at page 7 of the decision.** The burden and standard of proof were also elucidated by the court of appeal in the case of **Nathaniel Alphonse Mapunda and Benjamin Mapunda V Republic [2006] Tlr 395**, thus:

*As is well known, in a criminal trial the burden of proof always lies on the prosecution. Indeed, in the case of **MOHAMED SAID V R**, this Court reiterated the*

principle by stating that in a murder charge the burden of proof is always on the prosecution, and the proof has to be beyond reasonable doubt.

Now in this trial, to find conviction on the offence charged that is murder contrary to Section 196 and 197 of the Penal Code, [R.E 2019] it is upon the prosecution side to prove beyond reasonable doubt the three ingredients of the offences that is **first**, that the said Rashid Said is dead, **second**, death was not natural instead it was caused by an unlawful act or omission caused by accused persons and **third**, in causing death the accused person (s) acted with malice aforethought that is; intent to cause such death or grievous bodily harm to the deceased.

Given the above, I will now start with the first aspect of the death of the deceased. PW1 Said Rashid the deceased father testified that his son went missing from 08/10/2019. The deceased body was found at Msanga Zalala on 12/10/2019. PW1 and PW5, Ast. Insp. Leonard testified to have seen the deceased body at Mzanga Zalala. The body was identified by PW1 as Rashid Said's body.

It is also on record that before the conduct of the post-mortem examination, he identified the body to PW2 Dr Prisca Steven Chamba. This doctor examined the deceased body having confirmed his death she opined

that death was not natural but was due to Asphyxia caused by strangulation at the neck. This was according to the Postmortem examination Report, Exhibit P1.

Mr. Msalanga counsel for first accused referring to the postmortem report, (EXbit P1) argued that the same features two names Rashid Said and Said Rashid thus creating doubt as to whether the post mortem was for Rashid Said or Said Rashid.

I wish to address this aspect that, it is on record that before post mortem examination was conducted the deceased body was identified by PW1. In her testimony the doctor acknowledged mix up of names on part of her report (Exhibit P1). She was recorded to have said the deceased body was identified to her by PW1 she went on to say,

"I can assure this court that the deceased was Rashid Said"

I have taken in to account that PW1 "Said Rashid" was the deceased (Rashid Said) father who knew the deceased better. He saw the body, admittedly, there were discrepancies on name in Exhibit P1, this was after the use of name "Rashid Said" and later "Said Rashid" having considered the whole evidence, it is my observation that this did not detract from the material topic that "Rashid Said" the son of "Said Rashid" is dead.

With regard to submission by Miss Turusia for 3rd accused, according to her having reflected the evidence of PW2 Dr Prisca that the deceased had died 96 hours ago (equivalent to 4 days) before autopsy (13.10.2019) she doubted death on reason that following the doctor's opinion it would mean that the deceased died on 09th October, 2019 while the information allege on 08th October, 2019. Citing the case of **Sylvester Stephano Vs. Republic, Criminal Appeal No. 527 of 2016 CAT** to the effect that the discrepancy goes to the gist of the evidence case thus the prosecution case should be dismantled.

Having given thought this, I am alive of this court duty to address same to see whether it goes to the root of the evidence at issue. **Mohamed Said Matula V Republic; 1995 TLR 3 CAT** (considered). It is to be noted here that PW2 testimony on date of death was an opinion. This was not a big issue because; **one**, the question at this stage is whether Rashid Said is dead or other wise not when he died. **Two** in offences of murder the date referred in the information is that of the unlawful act and not that of the death. The information in this case was drafted correctly so. See **R. v Lujo s/o Mgombe [1946] 13 EACA 156**. In view of the above this court is thus satisfied that the said Rashid Said is actually dead. The first aspect is answer in affirmative.

The second aspect is whether the death was natural or other wise. According to evidence from the doctor, PW2 Prisca her opinion was that death was caused by lack of oxygen (Asphyxia) which she associated with this strangulation. There was also evidence from PW1 Said Rashid and PW7 Dickson that the deceased body was found in shrubs covered with grasses left to decompose before it was ultimately found. According to PW1 and PW5, at the scene there was a belt nearby suggesting that the same was used to strangle the deceased.

Miss Turusia wondered why no prosecution witnesses testified on the existence of the belt alleged used to kill the deceased as mentioned by PW1 PW2 and PW7. I agree this physical evidence could have been collected and tendered. I have however taken in to account the oral evidence by PW1 and P5 that there was such belt at the scene. with or without the belt, I have also considered that the deceased was 8.10.2019, reported by Pw1 and PW8 before his demise, that he was health operating his motorcycle. Finding his body in shrubs, all these facts combined suggests without a doubt that death was not natural but caused by a violent act.

The decisive question is who committed the unlawful act. The prosecution case is heavily rested on the confession statement of the 1st accused person, (Exhibit P-2), as well as alleged discovery of the deceased

body by 3rd accused person. The other circumstantial evidence is by PW8 Mayamba associating the first accused as the last person to be seen with the deceased.

It is common ground that all prosecution witnesses who testified did not directly witness the accused person killing the deceased, Miss Kimario for the prosecution is of the view that there is circumstance evidence enough to prove the information against the accused and in view of **Armand V Republic, Criminal Appeal No 242 Of 2010 Cat Arusha** the same may be relied upon.

Considering the what the way the prosecution evidence was tendered; I prefer to start with the evidence against the 3rd accused. This is because, it is the prosecution case that upon his arrest, he confessed to PW3 Hamis and in written confession and lead the police to discover the body and arrest of another accused person. PW3 said this witness confessed to him orally but it was directed that he should record his statement. As such it was evidence of PW5 Leonard that having read the caution statement the 3rd accused lead the police to the scene at Msanga.

The 3rd accused denied all these facts leading the state of evidence as the prosecution word against the 3rd accused word. The burden remains on the prosecution to prove that the accused actually Confessed and lead the police

to discover the body. Miss Kimario asked this court to consider 3rd accused oral confession to PW3 Hamisi.

I am alive to the position of law that oral confession may be proved against the maker. Under *section 3 (1) of the Tanzania Evidence Act Cap 6 confession means:*

Words or conduct, or a combination of both words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person who said the words or did the act or acts constituting the conduct has committed an offence.

Miss Kimario in her submission was of the view that this court can act on confession of the accused to PW3 that they killed the deceased in company with the first and second accused at Msanga Zalala then abandoned his body.

PW3 in his testimony said he received two people who accused the 3rd accused of murder. He did not decipher their names despite being prompted. He also said the 3rd accused orally told him that he committed the offence but made a written caution statement to police and he (PW3) transferred him to Kisarawe together with the statement. It is no where indicated how the written caution statement faded away. This was the

statement allegedly relied by PW5 that it was the 3rd accused who lead them to the scene. In **John Peter Shayo and 2 others vs Republic [1998] TLR 198** cited in **Tumaini Daudi Ikera vs Republic, Criminal Appeal No. 158 of 2009 (unreported)** the Court of Appeal observed as follows:

(i) Confessions that are otherwise inadmissible are allowed to be given in evidence under section 31 of the Evidence Act 1967 if, and only if, they lead to the discovery of material objects connected with the crime, the rationale being that such discovery supplies a guarantee of the truth of that portion of the confession which led to it

*(ii) As a general rule, **oral confessions of guilt are admissible though they are to be received with great Caution,***

(emphasis supplied)

Miss Turusia took a view that, since the prosecution also listed the Extra judicial Statement of 3rd accused as part of the exhibit intended to be produced at the trial it ought to be tendered to make a comparison with what was testified by PW3 Hamis and PW5 Leonard.

I am persuaded to agree with Miss Turusia on this considering the circumstances of the arrest of the 3rd accused. Going by testimony of PW3

Hamis, the two people (assuming they were there) who dragged the third accused to the station accusing him of murder, they knew better about this yet they were not summoned, unknown and PW3 did even disclose them. In normal cause of thing good citizen may wonder how can police detain a person accused with murder without bothering to know the accuser? After all, it was the evidence by PW3 that third accused did not make written confession to him leaving no room to salvage any thing from PW3. PW5 on the other hand in his statement said;

The suspect was brought from Chanika police station his name was Nurdin. I read the statement it was written by another officer from Chanika as suspect of murder of Rashid Said.

After receiving this statement, I took the suspect to OC - CID I talked to the suspect on the said statement, the OC- CID then directed the suspect to lead us to the scene where they threw the body of the deceased.

Now, since written caution statement was there (according to PW3 and PW5) and the same was not tendered, these are worrying circumstance I am unable to act on oral confession supposedly made to PW3 but also discovery to PW5. What this means is that this court, on the reason stated shall not act on the purported confession by the third accused to PW3 or PW5.

I shall now consider the evidence in caution statement (Exhibits P2) with regards to all accused person that is; first, second and third accused. The first accused, in his defence just like during admission contested this confession (ExbitP-2) saying that the same was not his free deposition instead he was forced by police to sign the same. It is on basis of this I find it prudent to take caution before relying on the statement which was retracted by the accused. This was fortified by the decision in the case of **Hemed Abdallah vs. Republic [1995] TLR 172 (CA)**, it was held that: -

*"Generally, 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, is satisfied that the confession must but be true.**" (Emphasis supplied)*

In a similar position, it was stated by the Court of Appeal in the case of **Michael Luhiye vs. Republic [1994] TLR 181 (CA)**, where the Court held that: -

"It is always desirable to look for corroboration in support of a retracted confession before acting on it but a court may convict on a retracted confession even without corroboration."

I have carefully considered the evidence in Exhibit P2, the prosecution case as I pointed at the beginning is that the accused person having boarded the deceased motorcycle killed the rider (deceased) and left his body at Msanga. In Exhibit P2 the first accused said;

Nakumbuka mnamo Tarehe 08/10/2019 Majira Ya Saa 13:00hrs Mimi Na Wenzangu Abuu s/o Robert Mchagua Na Nurdin S/O Mohamed tulikodi pikipiki ya rafiki yetu aitwae Rashid S/O Said kwa nia ya kwenda kunywa pombe huko msanga zalala.

"Baada ya kumaliza kunywa pombe, tulipanga tukampore pikipiki Rashid Said, na tulimwambia atupeleke kwenye banda moja la kuuza pombe Barabara ya kuelekea Rufiji. yeye ndiye aliyekuwa anaendesha pikipiki. Tulienda naye tulivyofika porini mimi nilimkaba kwa kutumia mkanda huku pikipiki ikiwa kwenye mwendo, ndipo pikipiki ikaanguka na sisi wote tukadondoka na wenzangu Abuu Robert Mchagua na Nurdin Mohamed wakaja na kunisaidia kumshika vizuri, mimi nikaendelea kumnyonga na ule mkanda akakojoa na kukata roho tukasaidiana kumbeba na kumpeleka porini na tukakata majani na kumfunika kichwani na kiwili wili chote. Na tulimpekua na kuchukua hela aliyokuwa nayo mfukoni kiasi cha shilingi elfu tano.

This is to say;

"I remember on 08/10/2019 at 13:00hrs I and my colleagues Abuu S/O Robert Mchagua and Nurdin S/O Mohamed hired a motorcyclist our friend Rashid S/O Said with the intention of going to drink alcohol at Msanga Zalala.

After we finished drinking, we arranged to rob Rashid Said, a motorcycle we told him to take us to a pub selling alcohol along the road to Rufiji. He was the one riding the motorcycle. We went with him as we reached the wild area, I suffocated him with a belt while the motorcycle was on the move, then the motorcycle fell and we all fall down and my colleagues Abuu Robert Mchagua and Nurdin Mohamed came and helped me to hold him properly, I continued to strangle him and by belt he urinated and lost his life and we helped each other to carry him to the shrubs and we cut the leaves and covered him in the head. We searched him and took the money he had in his pocket about 5,000 shillings"

While considering this there is evidence from PW8 Mayamba that on the fateful day he saw the 1st accused hiring the deceased on the very date. The deceased body was in the end according to PW1 and PW5 found at Msanga Zalala. The first accused also confessed in Exbit P2 that;

"Tulifika Rufiji majira ya saa 18:00hrs na tulimkuta ABDUL S/O MKWEGA tukalala pale kwake mpaka tarehe 13/10/2019 majira ya saa 08:00hrs ABDUL S/O MKWEGA alituambia tubaki pale aende kuuza hiyo pikipiki tukakataa na tukaondoka nae mimi ABDUL S/O MKWEGA tulienda mpaka KILWA tulipofika KILWA ABDUL S/O MKWEGA alitukimbia na kuondoka na ile pikipiki akatuacha KILWA MASOKO ilitubidi tuanze kurudi kwa mguu huku tukiwa tunaomba lifti na tulipata msaada wa lift tukafika Rufiji Jaribu mpakani tukashuka na kwa vile tulikua hatuna pesa ya matumizi ilipofika majira ya saa 12:00hrs tarehe 15/10/2019 tulivunja nyumba ya mtu na kuiba korosho kilo hamsini kwa ajili ya kuuza tupate fedha za matumizi ndipo tukakamatwa na wananchi tukapigwa na kupelekwa kituo kidogo cha polisi BUNGU na baadae tukapelekwa kituo kikubwa cha KIBITI tarehe 16/10 2019 na Askari wa Polisi (W) ya Kisarawe wakaja kutuchukua.

This is to say;

"We arrived in Rufiji at 18:00hrs and we found ABDUL S/O MKWEGA, we slept there until 13/10/2019 at 08:00hrs ABDUL S/O MKWEGA told us to stay there to sell the motorcycle we refused and we left with ABDUL S/O MKWEGA we went to KILWA when we arrived at KILWA ABDUL S/O MKWEGA ran from us at KILWA MARKETS

and left with the motorcycle we had to start to come back on foot and we asked for a ride on the way we got the lift to Rufiji Jaribu Border. Since we had no money to spend, at 12:00hrs on 15/10/2019 we broke into someone's house and stole fifty kilos of cashews for sale to get the money, we were arrested and the citizens beat us and took us to the out-post police station Bungu and then we were taken to the Kibit station on 16/10 2019 and the Kisarawe Police (W) came to pick us"

I have given this statement much thought, and considered the danger to act upon it. I am convinced that the same was the truth because this excerpt tally with PW9 Maulid testimony that the first accused was arrested at Rufiji on 15.10.2019 the dates connected with the offence and after steeling cashews. This was not controverted by first accused; in fact, it featured in own defence.

I have also considered the decision cited by Mr Msamanga for 1st accused, that is **The Republic versus Juma s/o Mohamed @Budagara HCT at Mwanza (available on Tanzlii), (at page 15).**

In this case the High Court considered the complaint on voluntariness of the statement and the fact that there was evidence that there was

evidence that the accused was taken to justice of peace but the statement made before justice of peace was tendered. In this Justice Mgeyekwa J (as she then was) cited **Ndorosi Kudekei v Republic**, Criminal Appeal No. 318 of 2016, the Court of Appeal of Tanzania when faced with a similar scenario had this to say:

In normal circumstances, the confession given to the Police Officer by the second accused person was required to be repeated before the Justice of Peace. Failure to have the Extra Judicial Statement of the second accused person may justify his claim that he was tortured.

I am alive to the desirability to have the confession before police officer repeated before justice of peace. However, in the cited case of **Juma s/o Mohamed @Budagara**, there was confession made to justice of peace but was not tendered. In this case it is different against first accused, there was no such statement made before justice of peace.

The circumstance in the cited case is akin to evidence against 3rd accused as I have indicated above. As such I do not find it a position of law that confession before police officer can not be proved in absence of confession before justice of peace. On the reason stated this court shall act

upon Exhibit P2 against the first accused that is to suggest that the 1st accused was the attacker.

Having decided to act on Exhibit P2, with regard to the 2nd and 3rd accused, We are now remaining with evidence in caution statement by the first accused Exhibit P2.

It is the law that confession by co accused if proved may be used against the co accused, however conviction shall not be solely based on confession of co accused in approaching similar scenario in the case of **Kulwa Athumani and 3 others Vs Republic Cr Appeal no 29 of 2005**. CAT DSM the court cited **Kashmira Singh v The State of Madhya Pradesh AIR 1952 SC 159 on page 160**, the court of appeal had the following to say in connection with section 30 of the Indian Evidence Act, which is in identical terms with our section 33 of the Evidence Act;

"The proper way to approach a case of this kind is, first to marshal the evidence against the accused excluding the confession altogether from consideration and see whether it is believed a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid".

With regards to the 2nd accused I have scanned the whole evidence, apart from evidence in Exhibit P2 there is nothing tangible connecting the 2nd accused with the charge. I also note here that even his purported arrest by PW9 was dented with the contradiction as PW9 in dock identification as he did not correctly identify the 2nd accused, instead he referred him as the third accused.

With regard to evidence corroborating Exb P2 **Miss Kimario** citing **Mathayo Mwalimu V Republic, Criminal Appeal No 147 Of 2008** to presume the first accused as the killer since the first accused could not give a reasonable explanation of the circumstances leading to the death of the deceased. I note here two things, **one** it is not the burden of the accused to prove his innocence and **two**, the theory of last person to be seen is a presumption and needs corroboration. This is the position articulated in many decisions including **Ijumaa Issa @ Athumani vs Republic (Criminal Appeal 53 of 2021) TZCA thus;**

*it is not always that when an accused appears to be the last person to be seen with the deceased, then, automatically he is the killer. The doctrine ought to be treated and applied with caution. as was observed in the decisions of this Court in **Twaha Elias Mwandungu v. Republic [2000] TLR 277**. Observed that the doctrine*

of the "last known person" has to be corroborated by other evidence.

It is on record in the evidence by PW8 Mayamba that he saw the 1st accused, boarding the deceased motorcycle. This was around 13:00 hours. This witness explained how he knew both the deceased and the 1st accused. I see no risk of mistaken identity here. As such, it was testimony of this witness that the deceased went to the direction which in the end was where the dead body was found. The timing between when the first accused was seen with the deceased and the deceased disappearance and death is so connected. Under the circumstance I find that the theory operates against the first accused and worth corroborating the evidence in caution statement Exhibiti P 2 that he was the killer.

I have also defence of alibi of the first accused. As indicated above 3rd accused person denied to have been at the scene of crime at Msanga Zalala on the material date 08.10.2019. Admittedly, this accused did not file and serve the defence side notice of this defence. It is as such the law that where notice is not filed under section 194 (1) of the **Criminal Procedure Act, Cap 20 [RE 2022]**, the accused had the opportunity under section 194 (6) of the Act to salvage the defence by furnishing the prosecution with

the particulars of the alibi at any time before the case for the prosecution was closed.

This was not done as such. Miss Kimario for republic was of the view that if at all the 1st accused wanted to rely on the defence of alibi, he should have complied with section 194 (4) of the Criminal Procedure Act [Cap 20 R.E 2022, thus this court his defense should be accorded no weight.

In this state of affair, I find it fitting to bring up the law as it stands on this defence as was succinctly articulated in **Charles Samson V Republic [1990] TLR 39:** - thus;

"(i) The court is not exempt from the requirement to take into account the defence for alibi, where such defence has not been disclosed by the accused person before the prosecution closes its case.

"(ii) Where such disclosure is not made, the court though taking cognizance of such defence, may, in its discretion accord no weight of any kind to the defence."

Considering that no notice nor particulars were furnished to the defence, it thus remains within the discretion of this court to accord weights to the defence or otherwise.

Now the first accused in his defence stated that on 08.01.2019 he was at Mbagala working as mason. Having been mentioned by PW8 that he was at Chanika it was expected that the first accused would summon the people kept company with to contradict PW8. Even when prompted by prosecution during cross examination he did not substantiate his defense, he said;

I was doing masonry work at Mbagala on 08/10/2019 I was in the company of my colleagues at the site (mason) I did not summon any of them.

It has been a while I do not know the owner of the house which we were building. I do not recall the names of my fellow mason.

Notwithstanding the manner in which this defence was posed, having considered the same I come to conclusion that; **one;** the accused story is not detailed enough it is improbable that he could not recall anyone at least by naming. **Two,** there is uncontroverted prosecution case from PW8 Mayamba that he was seen at Chanika boarding the deceased motorcycle. Based on the foregoing I am not persuaded that the defense holds any weight the same is rejected.

With regards to malice afore thought, It is the law that malice can be inferred from many aspects. In this case, I am guided by the principle

stated in **Enock Kibela Versus Republic Criminal Appeal no 150 OF 1994** where the Court of Appeal stated that for Courts to establish malice within the context of the Penal Code, they need to assess the following 7 aspects;

"(1) the type and the size of the weapon, if any, used in the attack (2), the amount of force applied in the attack, (3) the part or parts the blow or blows were directed or inflicted on, (4) the number of blows although, one blow may, depending on the facts of a particular case, be sufficient for this purpose, (5) the kind of injuries inflicted, (6) the attacker's utterances, if any, made before, during or after the killing and, (7) the conduct of the attacker before and after the killing."

In this case, I have considered the prosecution evidence that the deceased body was left crumbling in shrubs. This fact was proved by PW1 but also PW5 who collected the body. The state of the body was also proved by the doctor who examined the same. In this I consider the conduct of the attacker leaving the body in shrubs as it was shown in this case a clear demonstration of malice afore thought.

In the end based on the foregoing I find that the charge against the second and third accused is not proved in required standard, the second accused **Abuu Robert Mchagua** and 3rd accused **Nurdin Mohamed** are

found not guilty of the offence of murder contrary to sections 196 and 197 of the Penal Code Cap. 16 [RE. 2002] they are accordingly acquitted.

The first accused **Isihaka Mohamed** is found guilty of the offence of murder contrary to sections 196 and 197 of the Penal Code Cap. 16 [RE. 2002] he is accordingly convicted.



A. J. KIREKIANO

JUDGE

15.04.2024

COURT: Judgement delivered this 15th day of April, 2024 in the presence of Mr Cuthebert Mbilingi State Attorney for the Republic and in presence of Mr Jerry Msamanga, Mr Frank Martin and Miss. Hawa Turusia for 1st 2nd and 3rd accused respectively and in the presence of all accused persons.

Sgd

AJ. KIREKIANO

JUDGE

15.04.2024

Mr Mbilingi, S/A:

We pray for sentence according to law under section 19 of the Penal Code Cap 16.

Mr Jerry Msamanga adv for 1st accused:

We leave it to the court .

COURT: The offence of murder is punishable under section 197 of the Penal Code Cap 16, the 1st accused **Isihaka Mohamed** is thus sentenced to death by hanging. Right to appeal explained. It is so ordered.



A J. KIREKIANO

JUDGE

15.04.2024