IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MUSOMA

CRIMINAL SESSIONS CASE NO. 56 OF 2018

REPUBLIC ..... PROSECUTOR

VERSUS

JUMA MUGAYA @MUGAYA JUMANNE MASEMELE ..... 1ST ACCUSED

ALOYCE NYABASI NYAKUMU @ DIWANI ..... 2ND ACCUSED

NYAKANGARA WAMBURA BIRASO @ JAMES MGAYA

MAGIGI @ NYAKANGARA MAGIGI ..... 3RD ACCUSED

MARWA MAUA MGAYA @ SERA MAU ..... 4TH ACCUSED

NYAKANGALA MASEMELE MGAYA @ ROBERT

BONIFACE @ ROBERT BONIFACE MAGIGI ..... 5TH ACCUSED

SADOCK ALPHONCE IKARA @ NYABUGIMBI

NYAKUMU @ SADOCK ALPHONCE ..... 6TH ACCUSED

KUMBATA BURUAI @ BWIRE ALEX GEORGE ..... 7TH ACCUSED

NGOSO MGENDI NGOSO @ MASINI

NGOSO @ JOHN ..... 8TH ACCUSED

SURA BUKABA SURA @ PHINIAS YONA @ EPODA ..... 9TH ACCUSED

JUDGMENT

10th December, 2020 & 15th January, 2021

M.M. SIYANI, J

On the night of 16th February 2010, seventeen (17) people were brutally killed by unknown armed assailants. The culprits ambushed three houses in a compound at Mgaranjabo street, Buhare area in Musoma District. They assaulted the victims with machetes and swords. At the

incident time, the first house which was owned by Kawawa Kinguye, was occupied by ten (10) people. Eight (8) people out of the said ten occupants including a child aged between 7 – 8 months, perished. In a second house owned by Moris Mgaya, six (6) people were killed leaving one injured survivor. In the last house owned by Dorica Mgaya three people were murdered and six (6) others survived the assault.

Although the incident left several survivors who lived to tell the tale, none of them identified the culprits. The only clue as to those responsible for the killings, was a statement by Kulwa Kawawa (one of the two survivors from a house owned by Kawawa Kinguye). She made a statement before a policer officer No. E240 DC Javila (PW1) that she heard her father asking one of his assailants by the name "Diwani" before his death as to why he had decided to kill him. Nobody however knew the said "Diwani" and therefore upon arriving at the scene, the police authority decided to use a tracker dog to pursue the culprits. As such, a police dog No. 1495 handled by S/Sgt Hashimu (a dog handler) was brought to the scene of crime and having sniffed the scene, the dog led ASP Kakoki (PW3) and other police officers to a 5 kms journey. They followed the tracker dog passing in between several people until when they reached Nyegina village where they met a man who was carrying a

male child on his bicycle. Having seen the man, the dog jumped at him signifying his presence at the scene of crime. He was the 2nd accused person in this case one Aloyce Nyabasi Nyakumu @ Diwani who was arrested immediately.

Upon interrogation by D/Cpl Obeid (PW16), the 2nd accused person confessed to have been among those who participated in the killings at Mgaranjabo area, Buhare. He also incriminated one Juma Mgaya (the 1st accused) who upon his arrest by D/Sgt Laurent, mentioned Nyakangara Wambura Biraso (the 3rd accused), Kumbata Buruai (the 7th accused), Sadock Alphoce Ikaka @ Nyabugimbi Nyakumu (the 6th accused) and others who are still at large. It was the prosecution's case that while incriminating others, each of these suspects, confessed to have assaulted and killed the victims with their machetes in revenge for the death of one Fredy Mgaya.

Therefore, investigation which started with the sniffer dog identification of one of the suspects, led to the arrest of the accused persons, namely, Juma Mugaya @ Mugaya Jumanne Masemere, Aloyce Nyabasi Nyakumu @ Diwani, Nyakangara Wambura Biraso @ James Mgaya Magigi @ Nyakangara Magigi, Marwa Maua Mgaya @ Sera Mau, Nyakangala

Masemere Mgaya @ Robert Boniface @ Robert Boniface Magigi, Sadock Alphonce Ikaka @ Nyabugimbi Nyakumu@ Sadock Alphonce, Kumbata Buruai @ Bwire Alex George, Ngoso Mgendi Ngoso @ Masini Ngoso @ John and Sura Bukaba Sura @ Phinias Yona @ Epoda. They are jointly and together charged with seventeen (17) counts of murder for unlawful killing of Kawawa Kinguye Kinguye, Bhuki Kawawa Kinguye, Nyanyama Kawawa Kinguye, Meliciana Kawawa Kinguye, Juliana Kawawa Kinguye, Kinguye s/o Kawawa Kinguye, Nyarukende Kinguye, Magdalena Kawawa Kinguye, Nyasimbu Moris, Mgaya Moris, Irene Moris, Magret Moris, Maheri Moris, Nyangeta Moris Mdui, Umbera Mgaya, Joseph Asopheret and Dorica Mugaya contrary to section 196 and 197 of the Penal Code Cap 16 RE 2002.

As noted above, following their arrest and interrogation, save for Ngoso Mgendi Ngoso @ Masini Ngoso @ John (the 8th accused person) and Sura Bukaba Sura @ Phinias Yona @ Epoda (the 9th accused person), the rest of the accused persons, confessed to have participated in the killings. Evidence led by the prosecution, shows that Sadock Alphonce Ikaka @ Nyabugimbi Nyakumu and Kumbata Buruai confessed before police officers; No. D. 6298 D/Sgt Rabiel Tenga (PW14) and No. E. 2636 D/C Deusdedit (PW21) and repeated their confessions before a justice of

peace one Swalala Mathias Mathayo (PW11). The confessions of Sadock Alphonce Ikaka @ Nyabugimbi Nyakumu, were tendered and admitted in court as exhibits P43, P35, and those of Kumbata Buruai are exhibits P38 and P36. Kumbata Buruai also orally confessed before one Msafiri Magendi (PW13) and Wilhemina Bwire (PW19). Similarly, Juma Mgaya, Aloyce Nyabasi Nyakumu @ Diwani, Nyakangara Wambura Biraso and Nyakangara Masemele Mgaya, made their confessions before D/C Deusdedit (PW21), D/Sgt Rabiel Tenga (PW14), No. D.6122 D/Sgt Obeid (PW16) and WP 3347 D/Sgt Zuhura (PW20). The confessions were tendered and admitted in court as exhibit P42, P37, P40 and P41, respectively.

Through the tendered confessions, the accused persons revealed that the killings, were an act of revenge of the death of one Fredy Mgaya who was killed by mob justice at Buhare village in the year of our Lord 2005 after Kawawa Kinguye (one of the victims) raised an alarm having suspected the said Fredy Mgaya and his two colleagues to be thieves. Common in the said statements is that all nine (9) accused persons together with others who have either died or still at large, had prior arrangement to terminate Kawawa Kinguye's family which was successfully executed on 16th February, 2010.

According to D/Sgt Laurent (PW4), Juma Mugaya @ Mugaya Jumanne Masemere was arrested in Shinyanga and later transferred to Musoma. On 27th February, 2010, ASP Kakoki (PW3) received the 1st accused person at Bunda Police Station and searched his residence. Therefrom he recovered, among other things, a sword and a machete (Exhibits P26) which were subjected to DNA test to establish if the same were used in connection with the incident at Mgaranjabo. In the same vein, the premises of Nyakangara Wambura Biraso @ James Mgaya Magigi @ Nyakangara Magigi (the 3rd accused person) at Buruma village were also searched by ACP Nelson Sumari (PW7) and two mattresses (one, make Tan Foam) a phone make Nokia and a blue shirt which were believed to have been stollen from the scene, were recovered together with one machete. A Tan Foam mattress cover was also subjected to DNA test. A search in the premises linked with Kumbata Buruai @ Bwire Alex George (the 7th accused person) by SSP Kibona (PW9) led to recovery of a black trouser, a light blue tracksuit, jacket and white shirt written "Paradigm". The rest of the accused persons, were found with nothing in connection with the instant case.

DNA samples collected by A/Insp Simkoko (PW10) were sent to Government Chemical Laboratory and assigned to Gloria Machumve

(PW23) who conducted the forensic DNA profiling test by comparing the DNA samples taken at the crime scene, victim's blood, buccal swabs from the surviving victims, their relatives, the accused persons and several items recovered and seized after the incident. According to PW23's DNA Report (exhibit P44) among others, the test was done in respect of a Mattress cover from exhibit P29 which was identified to be the property of the late Kawawa Kinguye recovered from Nyakangara Wambura Biraso (3rd accused); a sword (exhibit P26) which was seized from Juma Mgaya (1st accused) a blue shirt (exhibit P34) which was seized from Aloyce Nyabasi Nyakumu (2nd accused), buccal swab which was taken from the 4th accused person one Marwa Maua Mgaya @ Sera Mau and another mattress which was recovered from Kihengu Kyanzi a mother of the 8th accused person one Ngoso Mgendi Ngoso.

According to exhibit P44, when a DNA profile from the mattress cover (exhibit P29) was compared with the DNA blood samples (A15) from a room occupied by Kawawa Kinguye, Buki Kawawa and Nyanyama Kawawa, the result matched. It is therefore a finding of the report (exhibit P44) that, the mattress recovered from the 3rd accused person one Nyakangara Wambura Biraso, had a link with a male DNA profile from blood samples taken in a room used by Kawawa Kinguye, Buki

Kawawa and Nyanyama Kawawa, who died in the incident of this case. A DNA profile taken from a sword which was seized from the 1st accused person Juma Mgaya, was compared with DNA profile from the victims in the house owned by one Moris Mgaya and again the result matched. The DNA profile test in respect of buccal swab of the 4th accused person and a blue shirt seized from 2nd accused person disclosed no link with the scene of crime.

In defence the accused persons maintained their innocence by denying having either attended the preparatory meetings or participated in the killings of 17 people at Mgaranjabo. Except for the 8th accused person whose allegedly confession statement was not tendered in court and the 9th accused person who did not confess, the rest of the accused persons repudiated their confessions. They argued that they were tortured and forced to sign the confession statements. That notwithstanding and despite not challenging its voluntariness, the 6th accused person, faulted his extra judicial statement (exhibit P35) on the reason that the same was not read to him to know the contents therein.

Regarding the search and recovery of items linked with the crime scene, the prosecution side tendered no search evidence in respect of the 8th

and 9th accused persons. However, there was no contention from the defence side about the search conducted in respect of the 2nd, 3rd, 4th 5th and 6th accused persons.

On the other hand, the 1st, and 7th accused persons strongly denied having been searched at all by either ASP Kakoki (PW3) or SSP Kibona (PW9). It was the 1st accused person's defence that as he was not searched, then a machete, sword and a light blue jacket (exhibit P26) allegedly recovered from him and listed in exhibit P25, were not his properties and that he was merely forced to sign the certificate of seizure while under police custody. The 7th accused person simply denied having been found with a white shirt with a word "Paradigm" (P31), a black trouser, and light blue tracksuit (exhibit P33). He contended that items indicated in the certificate of seizure (exhibits P30 and P32), were unknown to him.

With regard to the 3rd accused person, despite admitting to have been searched, he contended that, only one mattress, make Dodoma, a cell phone make Nokia C 1200, and jeans trousers, were seized from his house. It was therefore testified by the 3rd accused person that what

was tendered in court as exhibit P28 and P29 were different from what were seized from him.

Except for the 4th and 5th accused persons who, admittedly, are relatives and were arrested together, the rest of accused persons disputed to know each other prior to their arrest in connection to this case. It was their defences that they only came to know each other while in remand prison and so it could have been impossible for them to name each other as alleged by the prosecution. For that reason, they denied to have any meeting prior to the incident. It was testified that even some of their names were given to them by police officers following their arrest. The 2nd accused person for example stated that the name "Diwani" was not his but the same was given to him by police. Similarly, for the 3rd and 8th accused person, who contended that the names "James Mgaya Magigi@ Nyakangara Magigi" and "Masini" were given to them by police officers.

It was also the defence case that none of the accused persons was at the crime scene at the time when Kawawa Kinguye and his family were killed. However, it was only the 2nd, 3rd, 4th, 5th and 7th accused persons who disclosed their whereabouts on the fateful day. According to their

testimonies, the 2nd accused person was at Nyegina, the 3rd accused person was at Nyasura and the 4th and 5th accused persons were at Buruma village while the 7th accused person was at Bunda.

On their part, the 4th and 5th accused persons, claimed to be under the age of 18 years when they were arrested in 2010. While the 4th accused person said he was 14 years, the 5th accused person claimed to have been 16 years old. It was their defences that being minors as such, they were not treated fairly as children from the moments of their arrest.

After closure of the defence case, parties had a chance to make their final submissions. While the accused persons' final submissions were made by Mr. Ostack Mligo, Ms Tumaini Mkingo, Mr. Geofrey Malobe, Ms Flora Okombo, Mr Wambura Kisika, Mr Kulwa Sanya, Ms Marry Joachim, Mr. Daudi Mahemba and Ernest Mhagama the learned counsel, the prosecution side final submissions were made by Mr. Ignas Mwinuka, State Attorney under the guidance and assistance of Mr. Renatus Mkude, Principal State Attorney, Mr. Valence Mayenga, Senior State Attorney and Mr. Yese Temba, State Attorney. For convenience, I shall refer similar arguments from the defence counsel jointly and specific arguments, separately when summarising their final submissions.

Through their final submissions, the learned defence counsel had similar arguments on; failure of the prosecution side to prove the case to the required standards, circumstantial evidence, chain of custody, identification, search and seizure, torture, confessions, incriminating statements from co accused, inconsistency evidence and DNA report. There were specific arguments on age of the accused, dying declaration, dog evidence and arrest of the accused persons.

It was a common argument from the defence counsel that the case was not proved beyond reasonable doubts against all accused persons. For that reason, they urged the accused persons to be acquitted from the charges. On how the accused persons were arrested and linked with this case, counsel Mligo for the 1st accused person, contended that the said accused person was arrested at Bunda and not at Shinyanga as alleged by D/Sgt Laurent (PW4). He argued that there was no proof regarding to the 1st accused person's travel and arrest at Shinyanga. Consequently, since this is a doubt, he submitted, this court should follow its decision in **Abel Petro @ Misalaba Vs Republic,** Criminal Appeal No. 94 of 2020, Mwanza District Registry (unreported) by resolving the said doubt in favour of the accused person.

On items (Exhibit P24, P25 and P26) which were alleged to have been seized from the 1st accused person, it was submitted by counsel Mligo that there were contradictions in the prosecution's testimonies ASP Kakoki (PW3) and A/Insp Simkoko (PW10). According to the learned counsel, while ASP Kakoki's testimony indicates he only saw some blood stains on a jacket when seizing the same from the 1st accused person and that he also seized a sword and machete in a mere suspicion that they might as well been used to commit the offence despite containing no blood stains, A/Insp Simkoko's testimony shows that the same sword, had some blood stains and that is why he decided to subject both the machete and sword to forensic DNA analysis. Counsel Mligo went on to state that while A/Insp Simkoko labelled a machete as D13 and a sword as D19, the forensic DNA profiling report (exhibit P44) by Gloria Machumve (PW23) named the sword as D13 and a shirt seized from the 3rd accused person was labelled as D19.

The inconsistency above, he submitted, revealed improper documentation of exhibits and again he invited the court to follow its decision in **Mpanda Mlologa and 7 Others Vs Republic,** Criminal Appeal No. 373 of 2018 Dar es salaam District Registry (unreported) where improper handling of exhibits leading to a broken chain of

custody, was held to be a fatal irregularity. Counsel Mligo was firm that inconsistence in evidence can only be ignored where the same does not go to the root of the case and so in his opinion, the inconsistency being on weapons allegedly used to commit the offence, was relevant and goes to the roots of the case as it was observed by this court in **DPP Vs John Lambikano,** Criminal Appeal No. 18 of 2020, Kigoma District Registry (unreported)

As far as the confession statements tendered by the prosecution (exhibits P35. P36, P37, P38, P40, P41, P42 and P43) against the 1st, 2nd, 3rd, 5th, 6th, and 7th accused persons are concerned, it was a common submission by the defence counsel that the same were repudiated on the reason that the accused persons were forced to sign them after being tortured. It was submitted that being repudiated; the confessions, require competent corroboration before the same can be acted upon and supported such position with the decisions in **Mkubwa Said Omar Vs SMZ** [1992] TLR 365 and **Mbushuu @ Dominic Manyaroje and another Vs Republic** [1995] TLR 97. As such the learned counsel, urged the court not to accord weight to such confessions despite admitting them as evidence.

On her part, Ms Tumaini Mkingo, the learned counsel for the 2nd accused person, contended that the caution statements should not be considered by the court because they contradict each other. She submitted that while exhibit P40 (the 2nd accused person's cautioned statement) indicates that the 2nd accused person did not attend any meeting which planned the killing of Kawawa Kinguye and his family, exhibit P43 (the 6th accused person's cautioned statement) indicates that the said 2nd accused person, attended the alleged meeting. Another inconsistency was pointed out by Ms. Mary Joachim, the learned counsel for the 7th accused person. Her concern was on the items seized from the 7th accused person. She argued that while D/Sgt Rabiel Tenga (PW14) testified that the 7th accused person told him that he wore a blue tracksuit (exhibit P33) when assaulting and killing Kawawa Kinguye and his family, Maximillian Robert (PW18) claimed the same tracksuit belonged to Joseph Asopheret who died on the material night.

Regarding identification of the 2nd accused person through a dying declaration by the late Kawawa Kinguye, Ms Mkingo submitted that the incident happened at night where except for the flashlights from the culprits, there was no any other source of light to facilitate proper identification. She, therefore, urged the court not to accord any weight

on such evidence. Similarly, on the identification of the 2nd accused person by a sniffer dog, the learned counsel while referring to the case of **Abdul Rajak Murtaja Daferdar Vs State of Maharastra** (1970) AIR 283, urged the court not to rely on such evidence because there was no evidence given by a dog handler on the competence and experience of the said dog.

With regard to the 8th accused person, it was submitted by counsel Mahemba that the DNA report indicates there was a sample taken from mattress cover which was seized from Kihengu Kyanzi, a mother of the 8th accused person one Ngoso Mgendi Ngoso. However, the said mattress was not tendered in court neither was Kihengu Kyanzi procured to testify. In his opinion, counsel Mahemba believed that such failure by the prosecution to summon Kihengu Kyanzi, deserves drawing of an adverse inference against them.

Both counsel Flora Okombo and Kisika Wambura submitted on the age of the 4th and 5th accused persons. They contended that these two accused persons were under 18 years of age when arrested in 2010. While it was argued that the 4th accused person was 14 years in 2010, it was submitted that the 5th accused claimed to be 16 years. In that

regard, it was argued that they ought to have been treated in accordance with the law of the child as from the moments of their arrests. In view of the learned counsel, being children, the 4th and 5th accused persons were unfairly treated and so evidence against them should be disregarded.

The Republic's final submissions were made by Mr. Mwinuka who in his view, believed that the testimonies from twenty-three (23) witnesses procured by the prosecution side and forty-four (44) exhibits tendered during trial of this case, has proved the guilty of the accused persons. He contended that the standard of proof in criminal cases is not beyond any shadow of doubt, rather in terms of the decisions in **Capt. Lamu and Another Vs Republic,** Criminal Appeal No. 145 of 1991, CAT Mwanza (unreported) which quoted **Miller Vs Minister of Pensions** [1947] 2 ALL ER 372, **Sophia Seif Kingazi Vs Republic** Criminal Appeal No. 273 of 2016, CAT (unreported) and **Chandrankat Joshubhai Patel Vs Republic,** Criminal Appeal No. 13 of 1998, CAT Dar es salaam (unreported) the prosecution's burden is to clear only those reasonable doubts.

It was argued by Mr. Mwinuka that during the preliminary hearing of the instant case, all the facts regarding the accused person's names, their arrest, deaths of 17 people named in the information and its causes were not disputed by the accused persons. Therefore, according to the learned State Attorney, the only issue that remained in dispute was who killed the said 17 people. To respond to that question, Mr. Mwinuka submitted that the prosecution tendered evidence on the accused's oral confessions, cautioned statements and extra judicial statements. He contended that the 3rd, 4th, 5th and 6th accused persons made an oral confession before ACP Nelson Sumari (PW7) and the 7th accused person confessed before Msafiri Magendi (PW13 and Wilhelimina Aron Buriro (PW19) to have fully participated in the killings. On cautioned statements, Mr. Mwinuka argued that the 1st, 2nd, 3rd, 5th, 6th and 7th accused persons confessed before the police officers and such confessions were admitted in court as exhibit P42, P40, P41, P37, P43 and P38 respectively. In the same vein, it was submitted that the 6th and 7th accused persons confessed before a justice of peace and their extra judicial statements were admitted in court as exhibit P35 and P36.

Citing the case of **Ally Mohamed Mkupa Vs Republic,** Criminal Appeal No. 2 of 2008 CAT (unreported), Mr. Mwinuka, argued that the

best evidence in any criminal trial, is of a person who confesses freely and voluntary to have committed the offence. It was submitted that a confession may include words or conduct or combination of both words and conduct from which when taken alone or in conjunction with other facts, may draw an inference that the person who said the words or did the act or acts constituting the conduct, has committed an offence. Mr. Mwinuka went on to submit that the contents of the accused persons' confessions were so connected and contained detailed accounts of the initial stages of the plan to kill the deceased persons in the name of revenge. He contended that the confessions described the role played by the accused persons and others who are still at large. Mr. Mwinuka submitted further that the confessions indicate the sequence of events leading to the death of the deceased persons which in his view, could not be given by a person who was neither a part to a plan nor had a knowledge of it something which the learned State Attorney believes was a guarantee of their truth on the fact that the confessors murdered the deceased.

As such and despite being retracted or repudiated, Mr. Mwinuka urged the court to convict the accused persons basing on their confessions. He submitted further that a repudiated confession can be a sole basis of

conviction where the same is so detailed and elaborative as it was the case in **Hatibu Ghandi and Others Vs Republic,** [1996] TLR 12 which was cited with approval by the Court of Appeal in the case of **Flano Alphonce Masalu @ Singu and Others Vs Republic,** Criminal Appeal No. 366 of 2018 CAT Dar es salaam (unreported).

That notwithstanding, Mr. Mwinuka submitted, even if the court would need other pieces of evidence to corroborate the confessions, the Postmortem Reports (Exhibits P1 - 17), Sketch Maps of the scene of crime (exhibits P18 – P21), Pili Kinguye (PW2), Nyandora Kawawa Kinguye (PW5) and Maria Kawawa (PW22) testimonies and photographs taken immediately after the incident tendered and admitted as exhibits P22 correlate with the confessions on the motive and mode of the killings. He argued that the contents of the confessions reveal that the accused persons had a common intention to kill and so basing on the decision in **Solomon Mungai and Other Vs Republic** (1995) EA 782 which was cited with approval in the case of **Elizabeth Elias @ Bella Vs Republic,** Criminal Appeal No. 293 of 2015 CAT (unreported), conviction can be entered against all accused persons on the basis of their acting in concert.

On the doctrine of recent possession and expert evidence, the learned State Attorney submitted that some of the accused persons were found with the items believed to have been stolen after the killing incident at Mgaranjabo. Mr. Mwinuka submitted that the 3rd accused person was found with a mattress make Tan foam (exhibit P29) which was identified by PW22 to be the one which was used by her parents before their killings. There were also exhibits P31 and P33 which were found with the 7th accused person and identified by Maximillian Robert (PW18). According to the learned State Attorney, such evidence on exhibit P29, corroborated the testimony of Gloria Machumve (PW23) on her forensic DNA profile findings (exhibit P44) which linked same with the scene of crime. It was therefore submitted that in terms of the decision of the Court of Appeal of Tanzania in **Mussa Ramadhan Kayumba Vs Republic,** Criminal Appeal No. 487 of 2017 CAT Dodoma (unreported) proof of being found with stolen item, suffices to be a conviction ground against a person found with it not only for burglary or breaking but murder as well.

On evidence of the identification of the 2nd accused person by a sniffing dog, Mr. Mwinuka conceded that there is no legal jurisprudence in Tanzania. He therefore based his arguments on persuasive authority

from Uganda in the case of **Wilson Kyakurugaha Vs Uganda** Criminal Appeal No. 51 of 2014 where the following conditions were set before dog evidence is considered: First; there must be evidence showing that the dog has some training. Second; the dog handler must have also some training. Third; there must be some evidence which shows how the dog managed to sport the suspect. In view of Mr. Mwinuka the contents of exhibit P39 (statements of S/Sgt Hashim who was the dog handler) and PW3 testimonies supported the three criteria as elaborated in **Kyakurugaha's** (supra) case as the same disclosed the experience and expertise of both the dog handler and police dog No. 1495.

Regarding the defence testimonies, the learned State Attorney argued that, the same were characterised with general evasion on material facts and that the accused persons lied in court to the extent of corroborating the prosecution's case. In his view, Mr. Mwinuka submitted that the defence evidence did not shake the prosecution's evidence apart from merely raising incomplete sets of alibis. He submitted that before one relies on the defence of alibi, a notice of intention to rely on such a defence, must be issued to the court and the prosecution side as early as possible something which was not complied with by the defence in this case neither were there, evidence tendered to support the claim. In

the circumstance, the learned State Attorney urged the court to accord no weight on the same and referred the cases of **Director of Public Prosecutions Vs Nyangeta Somba and Twelve Others** [1993] TLR 69 and **Maramo Slaa Hofu and 3 Others Vs Republic**, Criminal Appeal No. 246 of 2011, CAT Arusha (unreported) which quoted with approval the decision on **Makala Kiula Vs Republic**, Criminal Appeal No. 2 of 1983 CAT (unreported) where similar position was reached.

Mr. Mwinuka submitted as well on what he believed to be lies and after thoughts on the part of the 1st accused person. He contended that while giving his testimonies, the 1st accused person denied having disclosed to the police his personal particulars and that he merely heard the police saying they were at his house the previous day. However, when cross examined, the said 1st accused person changed the story and said he gave the police those particulars. Similarly, the 2nd accused person defence is that he was arrested because of a fight with a village chairman over a land conflict before changing the reason of his arrest to selling illicit liquor. According to the learned State Attorney, such change of stories by the 1st and 2nd accused persons, was an indication of lies on their part which may corroborate the prosecution's case as it was the case in **Nkanga Daudi Nkanga, Vs Republic**, Criminal Appeal No.

316 of 2013 CAT at Mwanza (unreported) and **Felix Lucas Kisinyila Vs Republic**, Criminal Appeal, Criminal Appeal No. 129 of 2002 CAT at Dar es salaam (both unreported).

Responding to the 1st accused's defence that he was arrested at Bunda following a misunderstanding with one Mpangalala over his girlfriend, Mr. Mwinuka argued that, that issue was not raised at the time when D/Sgt Laurent (PW4), who arrested him testified in court. The learned State Attorney had similar views on the failure of the 2nd accused to cross examine PW3 regarding his arrest just as it was the case for the 3rd accused person who despite defending himself to have been found with a mattress make Dodoma, did not cross examine ACP Nelson Sumari (PW7) who claimed to have searched him and seized a mattress make Tan foam. Likewise, though it was the 3rd, 4th and 6th accused persons defences that they were tortured by the arresting officers, yet there was no cross examination in that regard to PW7 who, allegedly, arrested them.

It was further submitted by Mr. Mwinuka that during cross examination and throughout their defences, the accused persons claimed that their cautioned statements were recorded out of the prescribed time. The

learned State Attorney maintained that such question was required to be raised at the time of admission and not during cross examination or while giving their defence testimonies. To him, the statements were recorded within the time articulated by the laws and even if the same would have been recorded out of time, the court should consider the exceptional circumstances and complications in investigation of the instant case as a valid ground that justified the delay. He cited the case of **Yusuph Masalu @ Jiduvi and 3 Others Vs Republic,** Criminal Appeal No. 163 of 2017 and **Chacha Jeremiah Murimi and 3 Others Vs Republic,** Criminal Appeal No. 551 of 2015, CAT Mwanza (unreported).

Concerning recording of more than one confession by one officer as it was done by D/C Deusdedit (PW21) in the instant case, Mr. Mwinuka argued that such a practice is not prohibited by any law and referred the case of **Dickson Elia Nsamba Shapwata and Another Vs Republic,** Criminal Appeal No. 92 of 2007, CAT Mbeya (unreported), in his support. On failure by PW21 to certify in the cautioned statements (Exhibit P42 and P43) that the same were read over to the accused persons, it was submitted that the omission was curable because the contents of the statements themselves shows that the same were accordingly read over

and when giving his testimonies, PW21 stated to have read the same to them. To support his argument, the learned State Attorney cited the cases of **Director of Public Prosecution Vs James Msumule @ Jembe & 4 Others,** Criminal Appeal No, 397 of 2018, CAT Iringa (unreported) and **Mohamed Hamis @ Sakis Vs Republic,** Criminal Appeal No. 97 of 2008, CAT Mbeya (unreported), where the Court of Appeal ruled out that lack of certificate is a mere procedural issue which does not affect the weight attached to the substance of the caution statements. In the same vein, the learned State Attorney submitted that the absence of certificate of seizure on a cellular phone make Motorola C110 (exhibit P27) did not lower the evidential weight of such exhibit where there was a proof that the accused person was found with the said phone as it was observed in the case of **Seleman Nassoro Mpeli Vs Republic**, Criminal Appeal No. 3 of 2018, CAT Dar es salaam (unreported)

On the searches conducted in this case where it was argued by the defence team that the same contravened section 38 of the Criminal Procedure Act, the learned State Attorney submitted that, the searches in this case were conducted in emergence under section 42 of the Criminal Procedure Act. Arguing in line with the findings of the Court of

Appeal of Tanzania in the case of **Moses Mwakasindile Vs Republic** Criminal Appeal No. 15 of 2017, CAT, Mbeya (unreported) Mr. Mwinuka contended even in cases where a certificate of seizure indicates that the complained search was done under section 38 of the Criminal Procedure Act, the court should look on the circumstances of evidence as adduced by the prosecution witness and find that the searches in the instant case were done under emergence as stipulated by section 42 of the Criminal Procedure Act, Cap 20 [RE 2002]. The learned State Attorney had also the same view with regard to failure by ACP Nelson Sumari (PW7) to secure independent witnesses when seizing items in respect of exhibit P28. He argued that while it was important to have an independent witness to a search, the absence of one is not necessarily fatal to the prosecution's case as it was observed in **Sophia Seif Kingazi Vs Republic,** (supra) which approved the findings in **Tongora Wambura Vs Republic**, Criminal Appeal No.212 of 2006 CAT at Arusha (unreported).

In response to the defence team arguments that there were some material contradictions and discrepancies between what was testified in court by the prosecution's witnesses *vis-a-vis* their former statements, Mr. Mwinuka argued in line with the decision of the Supreme Court of

South Africa in **S V Mafaladiso en Andere** 2003 (1) SACR 583 which cited by the High court of South Africa, Guateng Division, in the case of **Ntokozi Allister Sehle Segalo Vs State** HC Case No. A543/2010. The learned State Attorney submitted that to discredit a witness who made a previously inconsistent statement, it must be shown that the deviation was material and contended that there were no sensible contradictions between the two in the instant case. That notwithstanding, it was argued that not every discrepancy or inconsistency in witness' evidence is fatal to the case and that minor discrepancies on detail due to lapse of memory on account of passage of time, should always be discarded as the law does not notice or concern itself with trifling matters. In view of Mr. Mwinuka, while urging the court to find the discrepancies minor, he prayed the court decide whether the same are minor as such or go to the roots of the case as it was stated by the Court of Appeal of Tanzania in **Crospery Ntagalinda @ Koro Vs Republic,** Criminal Appeal No. 312 of 2015 CAT, Bukoba (unreported)

Finally, it was submitted by Mr. Mwinuka in response to the defence's claim on violation of the principle of chain of custody on DNA samples collected by A/Insp Simkoko (PW10) and submitted to Gloria Machumve (PW23) for forensic analysis. Mr. Mwinuka argued that A/Insp Simkoko's

testimonies indicated how he took and transferred the samples to PW23 whose testimonies show that having received the same she kept, labelled and preserved all the samples in integrity. In view of the learned State Attorney therefore, the absence of documents in respect of how the samples were handled did not amount to breach of chain of custody in the circumstances of this case and referred to the case of **Chacha Jeremiah Murimi and 3 Others Vs Republic** (supra) where the court of Appeal of Tanzania held that documents will not be the only requirement in handling of exhibit and that courts of law should consider other facts.

In summing up to assessors, I guided them on the nature of evidence and the law governing; dying declaration and identification, confessions and incriminating statements by co-accused persons, search and seizure, doctrine of recent possession, expert evidence (Forensic DNA profiling report and sniffing dog evidence), circumstantial evidence, chain of custody, age of the accused persons, inconsistency and contradictory evidence, malice aforethought and the defence of alibi. Upon inviting their opinions, there was a consensus conclusion from the ladies and gentleman assessors that evidence tendered by the prosecution, has proved the offence of murder against the 1st, 2nd, 3rd,

5th, 6th and 7th accused persons. All three assessors also entered a verdict of not guilty in favour of the 4th accused person. The ladies and gentleman assessors however, had conflicting conclusions as to the fate of the 8th and 9th accused persons as it will be shown in later.

The above stated, the offence of murder with which the accused persons stand charged, requires the prosecution side to prove mainly three ingredients. These are first; that there is a human being who died an unnatural death, second; that the said death must be a result of an unlawful act by the accused persons and third; that death was intended by the accused persons when doing that unlawful act. In considering whether the prosecution side has proved its case beyond reasonable doubts, I will start with the first issue; whether Kawawa Kinguye Kinguye, Bhuki Kawawa Kinguye, Nyanyama Kawawa Kinguye, Meliciana Kawawa Kinguye, Juliana Kawawa Kinguye, Kinguye s/o Kawawa Kinguye, Nyarukende Kinguye, Magdalena Kawawa Kinguye, Nyasimbu Moris, Mgaya Moris, Irene Moris, Magret Moris, Maheri Moris, Nyangeta Moris Mdui, Umbera Mgaya, Joseph Asopheret and Dorica Mugaya, died deaths which were unnatural.

As noted earlier, the fact that these 17 people have died, was not contested by the accused persons. It was also a common ground that their deaths did not arise from a natural cause, rather their lives were brutally cut short by whoever assaulted them. Key evidence in this issue came from exhibits P1, P2, P3, P4, P5, P6, P7, P8, P9, P10, P11, P12, P13, P14, P15, P16 and P17. These are postmortem examination reports which were tendered during the preliminary hearing of this case and admitted without objection from the defence side. According to the said postmortem examination reports, (Exhibits P1 to P17) all the above named 17 people, died as a result of severe loss of blood (haemorrhage) following multiple cut wounds. There were also testimonies from Pili Kinguye (PW2), Nyandora Kawawa Kinguye (PW5) Asopheret Siti (PW6), Victoria Manyonyi (PW8) Maximilian Robert (PW18) and Maria Kawawa (PW22). While PW5, PW18 and PW22 who witnessed the killings. PW2, PW6 and PW8 knew the deceased and saw their dead bodies with cut wounds after the incident.

Since there was no contention on the causes of their deaths, as per the postmortem reports, then the fact that Kawawa Kinguye Kinguye, Bhuki Kawawa Kinguye, Nyanyama Kawawa Kinguye, Meliciana Kawawa Kinguye, Juliana Kawawa Kinguye, Kinguye s/o Kawawa Kinguye,

Nyarukende Kinguye, Magdalena Kawawa Kinguye, Nyasimbu Moris, Mgaya Moris, Irene Moris, Magret Moris, Maheri Moris, Nyangeta Moris Mdui, Umbera Mgaya, Joseph Asopheret and Dorica Mugaya, died unnatural deaths, was proved beyond reasonable doubt and I accordingly hold so.

The first question being answered as such, the remaining issues for my determination are whether Kawawa Kinguye Kinguye, Bhuki Kawawa Kinguye, Nyanyama Kawawa Kinguye, Meliciana Kawawa Kinguye, Juliana Kawawa Kinguye, Kinguye s/o Kawawa Kinguye, Nyarukende Kinguye, Magdalena Kawawa Kinguye, Nyasimbu Moris, Mgaya Moris, Irene Moris, Magret Moris, Maheri Moris, Nyangeta Moris Mdui, Umbera Mgaya, Joseph Asopheret and Dorica Mugaya were unlawful killed by the accused persons and that in doing so, they intended death to occur.

Apparently, evidence tendered and summarised above, indicates the prosecution's case has been built on the following premises. One; Kawawa Kinguye left a dying declaration which named a person called "Diwani" as his assailant; Two; the 2nd accused person was arrested after being identified by a sniffer police dog. Three; save for the 8th and 9th accused persons, the rest confessed to have been involved in the

killings at Mgaranjabo. Four; Upon their arrest the 1st, 3rd and 7th accused persons were searched and several items linked with the incident of this case were recovered and seized and Five; Items seized from the accused persons and subjected to forensic DNA profiling test, proved a link with the scene of crime.

Basing on the above premises, I will therefore be analyzing the tendered evidence as I respond to the question whether the prosecution's side has proved the guilty of each of the accused persons for unlawful killing of 17 people as charged. I will start with the alleged dying declaration of Kawawa Kinguye. In law, the last words of the deceased as to the cause of his death is what is known as dying declaration which is admissible in court as evidence against the named person. It is on record through DC Javila's (PW1) testimony that before his death, Kawawa Kinguye was heard by his daughter one Kulwa Kawawa Kinguye asking one of his assailants by the name "Diwani" as to why he has decided to kill him. Among the nine (9) accused persons charged in this case, the 2nd accused person has been named as Aloyce Nyabasi Nyakumu @ Diwani.

Through his defence, the 2nd accused person denied to be called "Diwani" and stated that he was so branded as "Diwani" by police

officers after his arrest. However, during the preliminary hearing, the said accused person, did not dispute his names. As such the fact that the 2nd accused person is called "Diwani" was recorded in the memorandum of undisputed facts and so relieving the prosecution from the burden of proving the same. Through their opinions, two of the assessors in this case opined that the late Kawawa Kinguye properly identified the 2nd accused person one Aloyce Nyabasi Nyakumu @ Diwani, to be one of his assailants. The remaining assessor was of the opinion that evidence of PW1 being mere hearsay evidence, was not reliable and so there was no proof of identification of the said accused person.

I have humbly reviewed and analysed the entire evidence on record, I am firm that since PW1 did not hear the deceased uttering those words which named a person called "Diwani", his testimonies as to the alleged Kawawa Kinguye's dying declaration, amounts to double hearsay evidence which is not the best evidence and therefore inadmissible. See **Magdalena Sanga Vs Republic,** Criminal Appeal No. 19 of 1980 CAT Dar es salaam (unreported). I have also considered the testimony of Maria Kawawa Kinguye (PW22) who despite witnessing the incident, failed to identify any of the culprits because the house where the

incident took place was dark with no light save for the culprits' flashlights. In my view, such conditions, could not have favoured a correct identification through the alleged dying declaration. Therefore, with much respect to the two assessors, and with what I have adumbrated above, I share the views of the remaining assessor by holding that the prosecution side has failed to prove a fact that Kawawa Kinguye left a dying declaration which named the 2nd accused person as his assailant.

The above being determined as such, I will now address the question of admissibility and reliance of dog evidence. While it was the prosecution's case that the arrest of the 2nd accused person was a result of him being tracked by a police sniffer dog No. 1495, the 2nd accused person strongly denied having spotted by the alleged dog, stating that he was arrested by police officers while at his house. Evidence led by the prosecution through ASP Kakoki (PW3) who was among the arresting officers and S/Sgt Arnold (PW15) who recorded the statements of S/Sgt Hashimu (a dog handler) is that having sniffed the crime scene particularly a big stone which was believed to have been used to break the doors of the houses of the victims, a police dog No. 1495 led them to the 5 kms journey to Nyegina passing several people before jumping

at the 2nd accused person one Aloyce Nyabasi Nyakumu who was thereafter arrested accordingly.

Dog evidence is normally considered as expert evidence which basing on its nature, can be highly influential in criminal prosecutions. However, if not scrutinised, dog evidence can be more prejudicial than it is probative. There is therefore a need to establish the necessary foundations of both the dog and its handler before such evidence, is relied upon by a prudent court. Admittedly, our criminal jurisprudence regarding admissibility of evidence of sniffer dogs is still developing. Except for what is provided generally under the Police General Orders (PGO No. 43), on handling of police dogs, there are no principles guiding the courts on admissibility and reliability of dog evidence.

In Kenya, Uganda and India, courts of law have taken the position that admissibility of tracker dog evidence, would depend on proof of competence and experience of both a dog and handler. Addressing such an issue, the High Court of Kenya, observed the following in case of **Omondi and Another Vs Republic (1967) E.A 802.**

> *'But we think it proper to sound a note of warning about what, without undue levity, we*

may call the evidence of dogs. It is evidence which we think should be admitted with caution, and if admitted should be treated with great care. Before the evidence is admitted the court should, we think ask for evidence as to how the dog has been trained and for evidence as to the dog's reliability. To say that a dog has a thousand arrests to its credit is clearly, by itself, quite unconvincing'.

Similarly, in **Uganda Vs Muheirwe and Another**, HCT-05-CR-CN-011 of 2012 at Mbarara High Court District Registry, the High Court of Uganda (Gaswaga, J) proposed the following principles when dealing with such evidence:

1. *The evidence must be treated with utmost care (caution) by court and given the fullest sort of explanation by the prosecution.*
2. *There must be material before the court establishing the experience and qualifications of the dog handler.*
3. *The reputation, skill and training of the tracker dog [is] require[d] to be proved before the court (of course by the handler/ trainer who is familiar with the characteristics of the dog).*

4. *The circumstances relating to the actual trailing must be demonstrated. Preservation of the scene is crucial. And the trail must not have become stale.*
5. *The human handler must not try to explore the inner workings of the animal's mind in relation to the conduct of the trailing. This reservation apart, he is free to describe the behaviour of the dog and give an expert opinion as to the inferences which might properly be drawn from a particular action by the dog.*
6. *The court should direct its attention to the conclusion which it is minded to reach on the basis of the tracker evidence and the perils in too quickly coming to that conclusion from material not subject to the truth-eliciting process of cross-examination.*
7. *It should be borne in the mind of the trial judge that according to the circumstances otherwise deposed to in evidence, the canine evidence might be at the forefront of the prosecution case or a 'lesser link in the chain of evidence."*

The decision in **Uganda Vs Muheirwe** (supra) was approved by the Court of Appeal of Uganda in the case of **Kyakurugaha Vs Uganda**

(Criminal Appeal No. 51 of 2014) [2014] UGCA 49 (18 December 2014) which is available at *www.ulii.org*, where the Court stated:

> *We would approve of the first 6 principles as providing sound guidelines in dealing with dog evidence..... in the 'first place with regard to admissibility we regard it essential that the training and experience of the dog handler and his association with the dog in question be established. Secondly there must be established in evidence the nature of training, skill and performance of the dog in question with regard to the particular subject at hand, be it tracking scents, or drugs, or whatever specialized skills it allegedly possesses so as to establish its credentials for that skill. The foregoing are prerequisites before the admissibility of such evidence. Nevertheless, once admitted it is clear that such evidence must be treated with caution as it is possible that it may be fallible.'*

In **State of Uttar Pradesh Vs Ram Balak & Another** (2008) 15 SCC 551, available at *https://indiankanoon.org/doc/1245959/*, the Supreme Court of India referring para 378, Am. Juris. 2nd edn. Vol. 29, p. 429 on admissibility of tracker dog evidence, stated the following.

> *.... most courts in which the question of the admissibility of evidence of trailing by blood-hounds has been presented, take the position that upon a proper foundation being laid by proof that the dogs were qualified to trail human beings, and that the circumstances surrounding the trailer were such as to make it probable that the person trailed was the guilty party, such evidence is admissible and may be permitted to go to the jury for what it is worth as one of the circumstances which may tend to connect the defendant with the crime.*

Having considered the guidelines in dealing with dog evidence as developed by different jurisdictions, I am of the opinion that the following principles should be examined before dog evidence is used against an accused person. First; the qualifications of the dog handler must be properly established, in general, and then evidence must be given in relation to the behaviour and skills of the particular tracker dog. Second; there must be detailed basis evidence about the reliability of the dog in issues and about the skills and reliability of the individual dog as a tracker, before evidence can properly be adduced from a dog-handler about the tracking of a scent by a specific dog and third

evidence on preservation of the crime scene (where the same is involved) is of the uttermost importance.

In the instant case, S/Sgt Hashim, was the dog handler of a police dog with force No. 1495 which, allegedly, facilitated the arrest of the 2nd accused person. According to S/Sgt Arnold (PW15) a police officer who recorded his statements, the said dog handler passed away in 2018 and therefore he could not be procured to testify in court. His previous recorded statements were therefore tendered by PW15 and admitted in court as exhibit P39 under section 34 B (1) and (2) (a) of the Evidence Act Cap 6 [RE 2002].

I have gone through the contents of exhibit P39. In essence, the statement indicates that S/Sgt Hashim was trained to handle dogs at Moshi Police College way back in 1988. In this case, he handled a dog No.1495 PD who was also trained to sniff and identify criminal suspects. The exhibit P39 reveals further that on the material morning, the respective police dog sniffed the stone which allegedly was used by the culprits to break one of the doors of the house at the scene of crime and from there he led the police officers to Nyegina village which is approximately five (5) km from the crime scene where the 2nd accused person was spotted by the said dog and arrested accordingly.

Evidence in respect of the contents of exhibit P39 was supported by the testimonies of PW3 one of the police officers who accompanied the dog handler in tracing the culprits and therefore allegedly witnessed the moment when the dog identified the 2nd accused person by jumping at him. Basing on such evidence, it is obvious that both the dog and the handler had some basic required trainings. Although there was no evidence from either ASP Kakoki (PW3) or S/Sgt Arnold (PW15) on the success story of the dog in identifying criminal suspects, the testimonies from A/Insp Simkoko (PW10), D/Sgt Rabiel Tenga (PW14) and PW15 indicate that the scene was protected by police tapes. While the absence of evidence on experience of the dog, may affect the evidential weight that ought to have been attached to exhibit P39, the fact that there exists in it, evidence on the training of the dog and the handler and the measures taken to protect the scene, make it reliable.

The above said and done, the question whether or not the 2nd accused person was arrested after being identified by a police dog, need not detain more as the record is clear that when the preliminary hearing was conducted on 10th September, 2019, the 2nd accused person admitted the facts regarding his arrest which indicates that he was arrested on

16th February, 2010 at Nyegina village having been spotted by a police dog. The 2nd accused person signed the memorandum of undisputed facts to ascertain his stance on the same fact. It is the law under section 192 (4) of the Criminal Procedure Act, that facts admitted through preliminary hearings, are normally taken as proved and unless otherwise directed by the court, the prosecution side are relieved from the duty of establishing the same. Therefore, since the fact that the 2nd accused person one Aloyce Nyabasi Nyakumu @ Diwani was arrested after being tracked by a police dog, was not disputed during the preliminary hearing, his later defence in denial as to the same fact, is an afterthought. As it was for the ladies and gentleman assessors, I hold that the 2nd accused person was tracked by a police dog and arrested accordingly.

Having determined the above as such, the prosecution side also relied on what was believed to be the accused persons' confessions. Such evidence shows, save for Ngoso Mgendi Ngoso @ Masini Ngoso @ John and Sura Bukaba Sura @ Phinias Yona @ Epoda (the 8th and 9th accused persons respectively), the rest of the accused persons confessed to have participated in assaulting and ultimately killing the 17 people at the incident of this case. It was therefore, the prosecution's case that

Sadock Alphonce Ikaka @ Nyabugimbi Nyakumu and Kumbata Buruai (the 6th and 7th accused persons) confessed before a police officer No. D. 6298 D/Sgt Rabiel Tenga (PW14) and No. E. 2636 D/C Deusdedit (PW21). The two, were also alleged to have repeated their confessions before a justice of peace one Swalala Mathias Mathayo (PW11). The 7th accused person was also alleged to have orally confessed before one Msafiri Magendi (PW13) and Wilhemina Bwire (PW19). Both their cautioned statements and extra judicial statements were tendered and admitted in court as exhibit P43, P38, P35 and P36 respectively. Similarly, Juma Mgaya, Nyakangara Masemele Mgaya, Aloyce Nyabasi Nyakumu @ Diwani, and Nyakangara Wambura Biraso made their confessions before D/C Deusdedit (PW21), D/Sgt Rabiel Tenga (PW14), No. D. 6122 D/Sgt Obeid (PW16) and WP 3347 D/Sgt Zuhura (PW20). The confessions were tendered and admitted in court as exhibit P42, P37, P40 and P41 respectively.

Except for extra judicial statement of the 6th accused person of which its voluntariness was not challenged, the accused persons repudiated and retracted the statements. They denied to have made the statements and argued that they were merely forced to sign the same. It was the defence case that they were tortured by being beaten with clubs,

burned by electric iron and being left without food for several days. Each of these accused persons, showed what appeared to be old scars in their respective bodies and contended that they sustained the same through police torture while being forced to confess.

Although an established principle of law is that, confession evidence from an accused person, is the best evidence in any criminal case, such a principle is rested on the premise that the alleged confession contains a voluntary and true account of what transpired in relation to the commission of the offence. That means, a conviction can only be based on a retracted or repudiated confession statement, where the court, is convinced that the said statement is true or where the same leads to the discovery of material objects connected with the crime. See **Hemed Abdallah Vs Republic** [1995] TLR 173 and **John Peter Shayo and 2 Others Vs Republic** [1998] TLR 198.

On the other hand, where the confession has either been retracted or repudiated, courts of law should find collaborative evidence to justify its reliance. See **Shihobe Seni and another versus Republic** [1992] TLR 330 and **Mkubwa Said Omar Vs SMZ** [1992] TLR 365. Underlying the need to have an evidence of retracted/repudiated confessions,

collaborated by other material evidence, the Court of Appeal of Tanzania observed the following in **Paschal Petro Sambula @ Kishuu and 3 Others Vs Republic,** Criminal Appeal No. 112 of 2005.

> *'..... It was upon this confession that the conviction of the 3rd appellant and the other two appellants was founded. Since the 3rd appellant had repudiated/retracted it and was not corroborated by material evidence, it could not form the basis for convicting the appellants.'*

As noted earlier, save for the 6th accused person's extra judicial statement, the remaining confessions from the 1st, 2nd, 3rd, 5th, 6th and 7th accused persons one Juma Mugaya @ Mugaya Jumanne Masemere, (exhibit P42), Aloyce Nyabasi Nyakumu @ Diwani, (exhibit P40), Nyakangara Wambura Biraso @ James Mgaya Magigi @ Nyakangara Magigi (exhibit P41) Nyakangala Masemere Mgaya @ Robert Boniface @ Robert Boniface Magigi (exhibit P37) Sadock Alphonce Ikaka @ Nyabugimbi Nyakumu @ Sadock Alphonce (exhibit P35 and P43) and Kumbata Buruai @ Bwire Alex George (exhibit P36 and P38) respectively were retracted/repudiated in the instant matter.

On his part, and while disputing to have confessed either in planning or participating in the killings, the 1st accused person contended that he signed the statements which were not read over to him, having been beaten a lot in his knees and stabbed with a bayonet. It was also his defence that, prior to his arrest, all the co accused persons, were strangers to him and as such he could not have mentioned them before PW21. The 2nd accused person had similar version of defence. He claimed that he signed the confession statements after being tortured by being beaten and left without food for four days. According to him, he therefore signed the said documents having noted his health condition was deteriorating as a result of the inflicted torture.

The 3rd accused person also disputed confessing before WP 3347 D/Sgt Zuhura (PW20). He claimed as part of his defence that, following his arrest on 28th February, 2010 he was taken before PW20 who forced him to sign some documents while being beaten. Similarly, the 5th accused person alleged having been tortured for three days while being forced to confess the killings. He stated that he was beaten, burnt by an electric iron and so he signed the recorded statements after witnessing another suspect dying as a result of torture.

The 6th accused person's defence, shows he was tortured by police officers who forced him to confess the killings and that on 1st March, 2010 he signed the confession statements (Exhibit P43) after witnessing the death of his fellow inmate one Bundala Nyantaryabukima who according to him, died for torture while under police custody. As it was for the 1st, 2nd and 3rd accused persons, he therefore testified that signed the statements without knowing its contents. On the side of the 7th accused person his confessions were repudiated on the reason that force was used to obtain his signature. He contended that the contents of exhibit P43 were not his as the police officers simply grabbed his right thumb and put the same in paper. As far as his extra judicial statements is concerned, the 7th accused person denied making them before Swalala Mathias Mathayo (PW11).

Admittedly, except for the 4th accused person whose admission of his cautioned statement was declined on the reason that the same was involuntarily given, the remaining cautioned and extra judicial statements from the accused persons above, were ruled to be voluntary made and therefore admitted after each of them was subjected to a trial within trial test. That notwithstanding, through their defences, the 1st, 2nd, 3rd, 5th, 6th and 7th accused persons maintained as indicated above,

that they were tortured and forced to sign the statements. In the case of **Nyerere Nyague Vs Republic,** Criminal Appeal No. 67 of 2010, the Court of Appeal of Tanzania while upholding the decisions in **Tuwamoi Vs Uganda** (1967) EA 91 and **Stephen Jason & Another Vs Republic,** Criminal Appeal No. 79 of 1999, set it as a principle that even where a voluntariness of an otherwise repudiated or retracted confession statement has been cleared, a prudent court should always, evaluate the entire evidence and access the weight to be attached to it. The court thus observed:

> *'Even if a confession is found to be voluntary and admitted, the trial court is still saddled with the duty of evaluating the weight to be attached to such evidence given the circumstances of each case.'*

To discharge the above duty, I will evaluate the entire evidence from both sides in respect of the confessions. Common in all the tendered confessions is the fact that the accused persons formed and executed a motive to kill in revenge for the death of Fredy Mgaya. Therefore, as it is for the cautioned statements of the 2nd, 3rd, 5th, 6th and 7th accused persons, through exhibit P42, the 1st accused person for example

appears to clearly implicate himself by confessing the role played by him from prearrangement meetings to execution of a plan to kill Kawawa Kinguye and his family in revenge for the killing of the said Fredy Mgaya way back in 2005. The contents of his confession show how the killing was carried and the role played by each of the culprits. Explaining how the killing was carried, exhibit P42 indicates:

> *Nakumbukuka mnamo tarehe 15/2/2010 majira ya saa 00:00hrs nikiwa mimi na Makiko Mugasa, Juma Kinoko, Bundala Nyantaryabukima, Ikaka Nyabugimbi,, Kumbata Buruai, Sadock Nyabugimbi, Mbita Kitenyi, Dura Dochi, Isore Mbogo na Masemere James Magigi tulienda eneo la mlima Balimi huko Buhare nyumbani kwa Kawawa kwa ajili ya kulipiza kisasi kutokana na mauwaji ya Fredi Mgaya aliyeuwawa mwaka 2005 na wenzie wawili na tuliweza kufanya mauwaji ya watu kumi na saba katika familia ya Kawawa kwa kuwakatakata na mapanga katika miji mitatu tofauti. Sababu ya sisi kufanya mauwaji hayo ni kwamba mnamo mwaka 2005 huyu marehemu Fredi Mgaya ambaye ni baba yangu kwa ukoo kuuwawa huko eneo la mlima Balimi Buhare Musoma ambapo aliuwawa yeye na wenzake wawili wakazi wa Kijiji cha Nyegina baada ya kusingiziwa kwamba ni wezi wa mifugo*

ambapo Kawawa ndiye aliyewatuhumu kuwa wamemwibia mbuzi na ndipo alipowapigia yowe na hatimaye kuuwawa na wananchi.... Hivyo baada ya mauwaji hayo tulikaa miezi mitatu ndipo tulikaa kikao cha ukoo na kupanga kwenda kulipiza kisasi nyumbani kwa Kawawa na katika kikao hicho tulikaa nyumbani kwa Tabu Mugaya ambaye ni dada yake na marehemu Fredy Mgaya na watu wengine tuliohudhuria kikao hicho ni mimi na Makiko Mugasa ambaye ni Babu yangu. Juma Kinoko ambaye babu yangu na babu yake walichangiana urafiki wa damu, Bundala Nyantaryabukima ambae ni rafiki yake Makiko Mugasa ambaye huyu ni kaka wa marehemu, Ekaka Nyabuglmbi ambaye huyu ni mpwa wa Bundala Nyantaryabukima pamoja na Isore Mbogo, Dura Dochi na mwalimu Mbita Kitenyi hawa ni marafiki wa Makiko Mugasa na hawa wote tulikaa kikao na kuazimia kwenda kulipa kisasi cha kumuua Kawawa ambaye ndiye aliyesababisha kifo cha marehemu Fredy Mgaya na mnamo tarehe na mwezi sikumbuki mwaka 2006 tukiwa mimi, Makiko Mugasa, Juma Kinoko, Bundala Nyantaryabukima, Ekaka Nyabugimbi Kumbata Buruai, Mbita Kitenyi, Dura Dochi na Isore Mbogo tuliondoka Kijiji cha Buruma saa 17hrs kwenda Buhare na tulifika nyumbani kwa Kawawa saa 21hrs.....

The above statements from exhibit P42, show the first attempt to have Kawawa Kinguye killed failed, but nonetheless claimed the lives of innocent people. The same statement seems to find the support of Maria Kawawa Kinguye (PW22) who was one of the daughters of the late Kawawa Kinguye and whose testimony indicates the following in relation to the 2006 incident:

> *I remember in 2006 we were also invaded and my uncle one John Kinguye and my aunt Nyanteka Minguye died. I also survived that attempt despite being injured in the left eye and on the chest with a machete.*

Exhibit P42 shows further that having failed to terminate Kawawa Kinguye in 2006, the 1st accused person and his colleagues found the opportunity to try a second attempt in 2010. According to the statement, on 15/2/2010, the 1st accused person was informed by Makiko Mugasa through a phone call to attend a meeting at Buruma which ultimately decided that their long time waiting to avenge Fredy's death was over and that Kawawa Kinguye should be killed that night. For easy of reference, I find it prudent to reproduce the contents of the said statement:

...Pale nyumbani niliwakuta Masemere James Magigi, Makiko Panga Mugasa, Juma Kinoko, Isore Mbogo, Dura Dochi, Mbita Kitenyi, Kumbata Buruai, Ekaka Nyabugimbi, Nyakangara Wambura Magigi, Nyamagati Maheka ambaye huyu ni mganga wa kienyeji aliyetupatia dawa ya kutafuna pindi tumalizapo kazi basi akili yetu isiruke, itulie na baada ya kula chakuia cha jioni, tuliondoka pamoja na kuelekea eneo la Mlima Balimi-Buhare.Tulipofika Nyabuhuzi..tulikutana na Aloyce akiwa na watu wawili ambao siwafahamu. ..Huyu Aloyce ni Rafiki yake Makiko Mugasa na hapo zamani alikuwa anakuja kulangua pombe ya moshi kijijini Buruma...tulipofika nyumbani kwa Kawawa tulizingira nyumba....ndipo Aloyce, Makiko Mugasa walichukua jiwe kubwa ambalo lilikuwa eneo hilo na kuvunja mlango wa nyuma....walioingia ndani ni Juma Makiko, Aioyce na wageni wake wawili, Bundala Nyantaryabukima,Ekaka Nyabungimbi na Dura Dochi...Mimi na wengine tulibaki nje tukiwa na mapanga yetu kwa ajili ya kuwalinda wenzetu walioingia ndani. Ndipo nilisikia sauti ikisema kwa lugha ya Kikwaya kuwa "nafwa nafwa" mana yake nakufa nakufa...walitoka nje na Makiko Mugasa alisema kwamba tumemkuta Kawawa na tayari tumemmaliza twendeni.

Tuliondoka kuelekea kwenye miji mingine uelekeo wa njia kubwa....na tulipofika hapo ndipo huyu Aloyce alichukua jiwe lililokuwepo hapo nje na kupiga mlango na walioingia mle ndani ni Makiko Mugasa, Aloyce na watu wake wawili na Bundala Nyantaryabukima na mimi nilibaki nje...wakiwa humo nilisikia kelele zikisema kuwa "sina fedha chukueni elfu thelathini..nilikuwa nalangua maziwa nikaacha na sasa nalangua samaki"...na ndipo walipotoka nje tulianza kuelekea nyumba ya tatu ambayo ilikuwa ya nyasi...na huyu aloyce alipiga teke mlango na tuliingia mimi na Aioyce, Makiko Mugasa na wageni wawili wa Aloyce.

The above piece of evidence from exhibit P42 is in my view, very elaborative on how the plan to have Kawawa Kinguye killed in revenge for the death of Fredy Mgaya, was executed and in fact there is great corroboration between what has been stated in exhibit P42 and testimonies from some of the prosecution's witness. Several things caught my attention here. First; the fact that the assailants broke the doors using a stone, find support from Nyandora Moris (PW5) testimonies. This witness was one of the survivors of the killings and

who witnessed the incident. In her own testimony in this court PW5 stated the following:

> *I remember we were sleeping with my grandmother the late Dorica Mgaya whose house is not far from my father's house. There were two students one Maximilian Robert and Joseph Asopheret who used to go to read in the neighbor's house where there was electricity. The two left around 8pm and returned around 00hrs am shortly after their return my grandmother said she heard an alarm at my father's house. I thought she was dreaming. Then we heard footsteps coming our way. Then my grandmother said "she will die with all her children. I decided to hide under the bed. Then people broke the door by using a big stone. They had flashlights. I saw four people. [Underlined emphasis supplied]*

Second; I also find a link between who lifted a stone to break the doors as per exhibit P42 and tracking of the 2nd accused person by a police dog according to the testimonies of PW3 and exhibit P39. While exhibit P42 indicates, a person called Aloyce was the one who took a big stone and broke the door of the house owned by Kawawa Kinguye so that the assailants could enter inside and kill, the contents of exhibit P39 (the

dog handler's statements), shows when a police dog was brought to the scene that night, the same was led to sniff the stone which was believed to have been used to break the door and from there, the said dog led the police to Nyegina village where Aloyce Nyabasi Nyakumu, the 2nd accused person in this case was arrested after being tracked by that dog. PW3 being among the police officers who arrested the 2nd accused person, had a similar story. Explaining how the dog tracked the 2nd accused person and his arrest, PW3 stated the following:

> *The dog sniffed the house of Kawawa Moris and then Dorica. There after the dog went behind the house of Dorica. We followed the dog. There was a farm and we saw there three bags make Omega. The dog sniffed them. We handled the bag to forensic unit. Then the dog went forward. He passed the fence and we followed him we reached a river where we met some people. We crossed the river. We met other people who were going to their farms as they had hoes. Then we met a certain person who had a bicycle and a child. The dog jumped at that man who was on a bicycle. We therefore arrested that man.*

Third; the number of occupancies in Maximillian Robert's (PW18) room on the material night. According to exhibit P42, when the 1st accused

person entered the third house he went to a room where he found two young men and attacked them using his machete. The contents of the cautioned statements of the 1st accused person, indicates in that regard:

> *Niliingia chumba cha mkono wa kulia na mle chumbani niliwakuta vijana wawili wakiwa wamelala kitandani na kulikuwa na neti ya rangi ya blue. Ndipo nilikata kijana mmoja kwa panga sehemu za begani na wa pili nilimkata sehemu za kiunoni.*

Although both Nyandora Kawawa Kinguye (PW5) and Maximilian Robert (PW18) stated that the above said room was occupied by three people (Joseph Asopheret, Maximilian Robert and Keya Mgaya), according to PW18, Keya Leonard survived as he hid himself under the bed when the culprits entered the house. This might be the reason why he escaped unscratched as his assailants did not spot him.

As far as the 2nd accused person is concerned, his cautioned statements (exhibit P40) indicate almost the same story. He was involved in the plan by Masemere Mgaya to avenge the death of Fredy who was killed by a mob justice way back in 2005, following an alarm raised by

Kawawa Kinguye. Narrating how the 2nd accused person was dragged in the killings, exhibit P40 indicates:

> *Baada ya kukutana na Masemere Mugaya aliniambia kuwa anataka kulipa kisasi kwa kumuua Kawawa Kinguye wa Buhare kwa sababu alipiga yowe na watu wakampiga ndugu yake aitwaye Fredy Mugaya mwaka 2005 kwa kuwasingizia kuwa wamemwibia mbuzi wake. Akanambia kuwa mimi pamoja na Ruhuta Misenyero tumsaidie katika kutelekeleza mauwaji....Alinambia nitoe msaada kwani na mimi naweza kupata tatizo akanisaidia. Tarehe 13/2/2010 saa 11:00hrs asubuhi...Ruhuta Misenyero alifika nyumbani na kunambia kuwa mpango wetu umekamilika na kazi hiyo ya mauwaji itafanyika tarehe 15/2/2010 saa za usiku.*

On how the killings were carried, exhibit P40 details the 2nd accused person involvements as from 17:00 hours on 15/2/2010 when he left with Ruhuta Misenyero to a meeting point at Nyabuzi Bisumwa where it was agreed that a journey to Kawawa Kinguye's premises would start around 21:00 hours. According to the said statements, on reaching there, the 2nd accused person found Masemere Mugaya, Juma Mgaya,

Makiko Mgaya and Nyakangara waiting for them. They therefore went to Mkirira where they joined others. From there, the statement is self-explanatory but reproducing the contents of exhibit P40, below is what happened in brief:

> *Kipindi hicho ni kama saa sita hivi, tuliongozana hadi kwenye nyumba ya bati ya Kawawa Kinguye ambapo njiani mimi niiichukua jiwe kubwa kiasi nikamtwisha kichwani Makiko Mugasa tukaenda hadi kwenye mlango wa nyuma wa nyumba ya Kawawa ambapo Makiko aiivunja mlango kwa kutumia jiwe hilo na ndipo mimi, Nyakangara Mugaya, Makiko Mugaya, Ruhuta Misenyero @ Kurungusha Pamoja na Juma Mugaya tuliingia ndani. Mimi na Makiko Mugaya tulikwenda moja kwa moja hadi chumba anacholala Kawawa na mkewe ambacho kiko mwisho wa nyumba hiyo upande wa kulia.... Makiko Mugaya alimkata panga Kawawa sehemu ya kichwani na begani na mimi nilimkata panga mkewe Kawawa sehemu za mgongo na karibu na shingo Pamoja na mtoto wake ambaye aiikuwa amelaia na mama yake. Mimi baada ya kuona nimeua huyo mama na mtoto wake nilitoka nje.*

On the side of the 3rd accused person, his cautioned statement (exhibit P41) indicates that he participated in the prearrangement meeting to kill Kawawa Kinguye in revenge for the death of Fredy Mugaya who was his grandfather. According to him those meetings were convened and chaired by his grandfather one Masemere Mgaya. He was therefore among those who traveled to Buhare on 15/2/2010 to execute the plan. Exhibit P41 reveals that around 21:00 hours on the material night, while in the company of Masemere Mugaya, Nyamagati Mahika, Bundala Nyantaryabukima, Juma Kisiri, Nyakwaka Kisiri, Nyakisamwa James, Sadock Alphonce, Kumbata Alphonce, Ekaka Alphonce, Simba, Sura Bukaba, Nyamazuru Buruai, Kumbata Buruai, Ngoso Masini, Juma Mgaya Masemere, Juma Kinoko and Makiko Panga, traveled on bicycle to Mkirira where they were joined by Aloyce Nyabasi and Ruhuta Misenyero and others. From there, the group proceeded to Buhare area where they invaded a total of three houses and assaulted the victims therein with their machetes something which resulted to the deaths of 17 people. On how Kawawa Kinguye and his family were killed, exhibit P41 explains:

> *Majira ya saa 00:00hrs au 00:30hrs usiku tulifika nyumbani kwa Kawawa Kinguye.... Ruhuta Misenyero @ Kurungusha na Aloyce Nyabasi walianza kutupangia majukumu ya kufanya*

ambapo mimi nillpangwa maeneo ya nje kulinda kwenye mji wa bati na wengine wawili ambao mimi siwafahamu kwa majina na wengine kupangiwa miji mwingine miwili ya nyasi na bati iliyoko juu upande wa kushoto toka kwa Kawawa.... Nikiwa nipo hapo nalinda ndipo Aloyce Nyabasi @ Diwani, Ruhuta Misenyero na Makiko Panga walienda nyuma ya nyumba ya bati kuchukuwa jiwe ambalo liiikuwepo hapo na walimtwisha Aloyce Nyabasi @ Diwani kichwanl na kuvunja mlango uliokuwa unatazama miimani na kisha Juma Makıko, Nyamagati Mahika, Ruhuta Misenyero @ Kurungusha, Juma Kisiri, Bundala Nyantaryabukima, Ekaka Alphonce @ Nyabugimbi, Aloyce Nyabasi @ Diwani na wengine watatu sikuwafahamu kwa majina waliingia ndani na kila mmoja akiwa ameshikilia panga mkononi Pamoja na tochi....nilisikia yowe la sauti ya mwanaume... Baada ya muda kidogo nillingia ndani ya nyumba hiyo.....nilimulika tochı niliyokuwa nayo, niliona damu nyingi zikiwa zimetapakaa kweye sakafu na mimi nilichukua godoro moja la sponji liiilokuwa na damu kiasi na kutoka naio nje....na walipotoka nje wallsema hapa tayari tumeshawauwa watu sita, hivyo tuliondoka kuelekea kwenye mji wa nyasi.

As the extract above reveals, it was part of the 3rd accused's confession that, having entered inside Kinguye's house he took one mattress which was later recovered by the police upon his arrest. Exhibit P41 is also clear on how the 3rd accused person was arrested almost two weeks later. For easy of reference, I have reproduced the contents of exhibit P41 on how the 3rd accused person was arrested and how a mattress which was taken from Kawawa Kinguye's house on the fateful night, was recovered as hereunder:

> *Tarehe 28/2/2010 usiku nikiwa nyumbani kwangu nimelala walifika askari polisi na kunigongea mlango na nilipofungua niiikamatwa na askari na hapo nyumbani walichukua magodoro mawili ya sponji, simu moja aina ya Nokia 1600, panga moja na nguo suruali moja aina ya jinsi na shati moja la mikono mirefu rangi ya bluu. Kati ya magodoro mawili yaliyochukuliwa, moja ni lile ambalo niliiochukua nyumbani kwa Kawawa Kinguye na suruali ya jinsi na shati la rangi ya bluu lenye mikono mirefu ndilo ambalo mimi nilikuwa nimevaa siku hiyo tulipokwenda kuuwa kwenye mji wa Kawawa.*

Similar story on how Kawawa Kinguye and his family were assaulted on the night of 16th February 2010 can be seen in exhibit P37 (the 5th accused person cautioned statements), exhibits P43 and P35 (the 6th accused person cautioned and extra judicial statements) exhibits P38, and P36 (the 7th accused persons cautioned and extra judicial statements)

I have examined the contents of exhibit P43 where the 6th accused person gave his account of incident, the reason why the executions were and who carried the same. As it was for other cautioned statements, exhibit P43 also tend to suggest the killings were pre-arranged to avenge the death of Fredy Mgaya and that the 6th accused person participated in those preparation meetings and travelled to Buhare to carry the same. According to the statements, while at Kawawa Kinguye's house, the 6th accused person was among those who entered inside and assaulted the occupants therein. He named those who entered in that house having broken the door by a stone to be Nyakangara Mgaya @ Wambura, Juma Mgaya, Masemere Mgaya, Makiko Panga and Nyamagati Mahika. On the role played by each of the assailants while inside that house, exhibit P43 states:

Ndani ya chumba tulikuta mama na mume wake na Watoto wawlli wamelala kitanda kimoja na mimi nilimkata baba panga moja na mimi ndiye niliyekuwa wa kwanza kumkata sehemu za jirani na bega karibu na shingo na hapo ndipo Juma Mgaya alinambia kwamba unafanya kazi ya kutegea hebu pisha mimi nimshughulikie aone. Na hapo ndipo nllimpisha na yeye aliendelea kumkata yule mwanaume na Nyakangara Wambura aliendelea kukata mwanamke na baadae waliendelea kukata Watoto wawili ambao nilishuhudia wakifa. Na mtoto mwingine alikatwa shingoni na mwingine kichwani na mwanamke waliendelea kumkata shingoni na sehemu mbalimbali.....Akina Juma Kinoko, Nyamazuru Buruai, Aioyce Nyabasi walirudi kukata kata watu vyumba vyengine..

The prosecution procured in court one Swaiala Mathias Mathayo (PW11), a primary court magistrate stationed at Musoma Urban primary court at a time of the incident of this case and therefore a justice of peace for that purpose. Through his testimonies he contended that the 6th accused person repeated his confession before him. Through exhibit P35, the 6th accused person appears to incriminate himself and named those who participated in the killings. Of concern, is that his role in Kawawa Kinguye's house seems to be the same as it was stated in

exhibit P43. He confessed to have assaulted Kawawa Kinguye with a machete around the shoulder before he let the 1st accused person to carry on the assault. In his own words, the 6th accused person stated through his extra judicial statement:

> *Ndio tuliingia nyumba hiyo tukiwa na panga na upinde na wengine walikuwa na sime Pamoja na tochi. Katika zoezi hilo mimi nilimkata panga mzee wa mji mzee Kawawa chini ya bega mgongoni ambapo mwenzangu Juma Mgaya alisema tupishe tufanye kazi naona kazi unayoifanya haifai tupishe tukuonyeshe kazi tunayofanya utasababisha watu watukute humu bure. Ndipo nilipompisha Juma Mgaya akafanya kazi hiyo, akawakata kata pale wakafa.*

As far as the 7th accused person is concerned, the testimony of Msafiri Magendi (PW13), who witnessed his arrest, shows Kumbata Buruai who was found sleeping inside a room of a woman called Lucia, made a lot of efforts to escape. As he was finally apprehended by local militiamen, he started crying while lamenting that he knew was going to die in prison because of Mgaranjabo killings. At his rented house, his landlady Wilhelimina Aron Buriro (PW19) who witnessed his search testified to have heard him, during the search, confessing to have participated in the killing at Mgaranjabo. His cautioned statements (exhibit P38) which

was recorded by D/Sgt Rabiel Tenga (PW14) indicates that following his arrest, the 7th accused person told the police that apart from the killings, he also stole a black trouser (exhibit P33) and white shirt (exhibit P31). He volunteered to lead the police to his aunt's house where a shirt was recovered and later to his rented house at Chilinge Bunda where a trouser was also recovered. He even showed the police the clothes he wore on the incident night.

Describing what happened at Mgaranjabo on 16/2/2010, exhibit P38, like the rest of the confessions in this case, discloses the motive behind the killings to be avenging the death of Fredy Mgaya. The statement indicates among other facts that while at Kawawa Kinguye's house, the 7th accused person remained outside the premises. He however, confessed to have actively participated in a second house where having entered therein, he attacked one of the occupants by cutting his posterior chest with his machete. Although through his extra judicial statements, the 7th accused person denied to have entered any of the three invaded houses that night, but similar in both; the caution statements (exhibit P38) and his extra judicial statement (exhibit P36), is the fact that one; while the killings were carried on, the 7th accused person's involvement was on the second house, two; he was given Tshs

300,000/= to participate in the killings and three; that at the scene, he got among others, a black trousers as his share.

I have given a length of thoughts to the confessions of the 1st, 2nd, 3rd, 5th, 6th and 7th accused persons as discussed above. In deciding the amount of weight to be attached to each of these confessions, I have considered the accused person's defence that they were tortured to sign the same. Admittedly, all these accused persons had scars in their bodies. No evidence was however, tendered by either the 1st, 2nd, 3rd, 5th, 6th or the 7th accused person, to support the claim of torture and therefore it is impossible to ascertain whether those scars had anything to do with the alleged torture. That notwithstanding, save for the 6th and 7th accused persons, the confessions given to the police by the 1st, 2nd, 3rd and 5th accused persons, were not repeated before a justice of peace. Such failure to have extra judicial statements of these accused persons, may justify their claim that they were tortured to sign the statements as in normal cause, a person who freely confess before a police officer would not have found it difficult to repeat such confession before a justice of peace.

In **Ndorosi Kudekei Vs Republic,** Criminal Appeal No. 318 of 2016 [TZCA] 49 (11th April, 2019) available at *www.tanzlii.org,* the Court of Appeal facing with a case where only a cautioned statement and not an extra judicial statement was tendered, observed the following:

> ..... *what was placed before the court in evidence, was the cautioned statement only (exhibit P1), whereas the whereabouts of the extra judicial statement which was made to the justice of peace was nowhere to be seen. With the absence of the extra judicial statement, the trial judge was not placed in a better position of assessing as to whether the appellant really confessed to have killed the deceased or not.*

In **Samson Kadeya Kazeze Vs Republic** Criminal Appeal No. 137 of 1993 (unreported) the Court of Appeal of Tanzania observed a similar stance and stated the following:

> *The trial Judge gave a very curious reason for the appellant's refusal to make an extra judicial statement before the justice of the peace because an accused is freer before the justice of the peace than before the police. In our view this is exactly the point. If the appellant felt he was*

> *not free to refuse to make the cautioned statement then it was not freely made and it should not have been admitted.*

In another case of **Richard Lubilo and Another Vs Republic** Criminal Appeal No. 10 of 1995 (unreported) where there was evidence of torture through a PF3 (exhibit D1) that the cautioned statement by the 2nd appellant which incriminated the 1st, 2nd and 3rd appellants, was obtained through torture, the Court of Appeal of Tanzania, observed that such a confession was inadmissible even under section 29 of the Evidence Act regardless of its truth. The Court had this to say:

> *Where torture is alleged, this Court has taken a more serious view and has implicitly presumed an associated confession to be vitiated and incapable of admission under section 29 (of the Evidence Act, 1967). This position is well stated in, inter alia,* ***Maona & Another Vs Republic,*** *Criminal Appeal No. 215 of 1992, and* ***Marus Kisukuli Vs Republic,*** *Criminal Appeal No. 146 of 1993*

From the above authorities it can be concluded that, a presence of an extra judicial statement, may act as an assurance of voluntariness of a cautioned statement. That means where it is alleged that a cautioned

statement was involuntarily obtained let us say through torture, the absence of extra judicial statement may as well bring doubt on voluntariness of the said confession. Basing on the decisions in **Maona & Another Vs Republic, Marus Kisukuli Vs Republic** and **Richard Lubilo and Another Vs Republic** (supra), it is therefore the law that a confession obtained through torture, is inadmissible regardless of its truth. In other words, where a claim of torture has not been established, the court can consider the truthfulness of an otherwise involuntary confession under the auspice of section 29 of the Evidence Act Cap 6 RE 2019. See **Thadei Mlomo and Others Vs Republic** [1995] TRL 189.

The above said, it is my understanding that while in **Richard Lubilo and Another Vs Republic** (supra) there was a PF3 which directly proved that the appellant was tortured to obtain the alleged confession, in the instant case, there was neither a PF3 from any of the accused persons nor direct evidence to substantiate the defence's claim of torture. Torture in this case, can only be inferred by the absence of extra judicial statements which could support the voluntariness of the caution statements in respect of the 1st, 2nd, 3rd, and 5th accused persons. That is notwithstanding the fact that the accused persons have old scars in their bodies since considering the circumstances of this case,

it is impossible to stop at one conclusion that the said scars were a result of torture inflicted to the accused persons to secure their signatures in the confessions. That is because, these scars can be a result of anything else as it was evidenced by the 2nd accused person's cautioned statement when he stated that he obtained his scars through a car accident way back in 1989. Explaining the source of his scars, the 2nd accused person stated the following through exhibit P40:

> *Mimi sijawahi kushtakiwa kituo cha pollsi na majeraha niliyo nayo yalitokana na ajali ya kupinduka na gari mwaka 1989 ambapo nilipinduka kwenye gari aina ya Land Rover iiikuwa Buhemba.*

The above statement from the 2nd accused person, ascertains a possibility that the source of the old scars in his body might not necessarily be torture. Deriving from such premises, it is obvious that existence of scars alone, cannot be a proof of torture in relation to his confession. As there was no other evidence like PF3 as it was in the case of **Richard Lubilo and Another Vs Republic,** I find it safe to consider, the confessions tendered in this case for the purposes of ascertaining its truthfulness or otherwise as it was observed in the case of **Hemed Abdallah versus Republic** (supra).

That being the case, I have thoroughly examined the contents of exhibits P35, P36, P37, P38, P40, P41, P42 and P43. In my opinion despite being repudiated, these confessions are so elaborative on the planning and eventually execution of the killings which could not have been given by any person except one who had knowledge of it. The 1st accused person for example, shows through exhibit P42 that he participated in the first attempt to have Kawawa Kinguye terminated which unfortunately led to a death of another person. His cautioned statement explains the following:

> *Ghafla niliona bibi kizee mmoja akitokea ndani ya nyumba lle...nillmmulika na tochi na kumkata na panga na bibi huyu aliendelea kukimbia akipiga yowe na kupita kwenye fensl ya katani.....mimi nilikuwa bado nalinda wenzangu walioingia ndani na muda huo walitoka... na kusema "tumemuua kijana na siyo Kawawa ambaye ndiye tulikuwa tumemfuata" na hapo ndipo tuliamua kuondoka.*

The fact that the first attempt to kill Kawawa led to the death of a man other than Kawawa, can also be found in Maria Kawawa's (PW22) testimonies who stated that in 2006, the culprits invaded their house

and killed two people including one John Kinguye. Despite being given in 2010, exhibit P42 explains with clarity an incident which occurred four years back. In my considered opinion, that is an assurance of the truth of the said statement and that the maker of the statements had knowledge of it. The same clarity as to what happened to Kawawa Kinguye and his family can be seen in the remaining confessions as I have indevoured to show and when a confession is like that, a court can safely act on it as it was observed by the Court of Appeal of Tanzania in **William Mwakatobe Vs Republic,** Criminal Appeal No. 65 of 1995 (unreported)

> *In this case we are with respect to the leaned trial Judge fully satisfied that the appellants confessions ..... were so detailed, elaborate and thorough that no other person would have known such personal details but the appellants. Appellants retracted confessions were clumsy attempts to evade the consequences of their criminal acts.*

In **Stephen Jason and Two Others Vs Republic,** (supra) the Court of Appeal of Tanzania had similar conclusion on confession statements when the following were observed:

The detailed account of the initial stages of the plan to kill the deceased, the role played by each of the appellants in the plan and the sequence of events leading to the death of the deceased, could not in our view, be given by a person who was not either a part to the plan or had knowledge of it.

Through his caution statements (exhibit P40) the 2nd accused person stated that before his arrest and connected with this case, he used to deal with selling of illicit liquor commonly known as *pombe ya moshi* or *gongo*. A part of an extract from his statements, indicates:

Nakumbuka mnamo tarehe 11/2/2010 muda na saa 15:00hrs alasiri mimi nilikuwa natoka Kijiji cha Kamigegi kutafuta pombe ya Moshi nikiwa na baiskeli yangu na madumu mawill...tarehe 16/2/2010 asubuhi saa 08;30hrs nilimchukua mjukuu wangu..nikawa nampeleka zahanati ya nyegina ndipo njiani, nilikutana na na askari polisi akiwa na mbwa ambaye alinirukia akitaka kuning'ata..na hapo ndipo askari aliniponiweka chini ya ulinzi. Baada ya kunikamata walinipelelka hadi nyumbani kwangu na kufanya upekeuzi ndani ya nyumba yangu lakini walipata dumu

moja ambalo lilikuwa linanuka pombe ya moshi gongo.

When testifying in court, the 2nd accused person conceded that indeed selling of *gongo* or *pombe ya moshi* was his business. Refuting the prosecution's claim that he was arrested by a sniffing police dog, the 2nd accused person stated:

That was a liar.... I was not spotted by a dog and even if that happened, the dog would have spotted me because of alcohol smell as I used to sell 'gongo.'

The fact that similar statements found in the repudiated statements were also repeated by the accused person in defence, is a clear indication that the contents of exhibit P40 contains some true facts. Indeed, similar facts can be seen in the 1st accused cautioned statements (exhibit P42) when the following were stated in relation to the 2nd accused person:

Huyu Aloyce ni rafiki yake Makiko Mugasa na hapo zamani alikuwa anakuja kulangua pombe ya moshi kijijini Buruma...

Exhibit P40 is elaborative on where Kawawa Kinguye and his wife Bhuki Kawawa were assaulted. While using his machete, a person called Makiko Mugaya attacked Kawawa Kinguye in the head and at the shoulder, the 2nd accused person assaulted his wife at the posterior part of the chest and near the neck. Such piece of evidence is corroborated by exhibit P1 and P2, (the postmortem examination reports) which shows the body of Kawawa Kinguye had multiple wounds on the head and on the back and that of Bhuki Kawawa had multiple cuts wounds on the neck and at the back.

As far as exhibit P37 is concerned, I am also of the same position that the same contains a true account of what happened to the victims of this case as narrated by the 5th accused person. His caution statement (exhibit P37) is well corroborated by the 6th accused person's extra judicial statements (exhibit P35) on the planning of incident of this case. Both exhibit P35 and P37, show the 5th accused person was involved in the preparatory meetings to terminate Kawawa Kinguye in revenge for the death of Fredy Mgaya.

Moreover, some of the statements in the 5th accused person's confession, finds supports from the survivor's testimonies. For example,

exhibit P37 shows, the 5th accused person assaulted a woman in a third house with a grass roofing. The statement reveals in detail, the role of the 5th accused person from planning to its execution. Of particular interest, is the fact that, exhibit P37 shows the 5th accused person assaulted one of the women in a house which had grass roofing. Such piece of evidence, seems to find support from Nyandora Kawawa Kinguye's (PW5) testimonies. According to his confession, the 5th accused person was so specific when he described a person, he assaulted by using his machete to cut her neck, to be a woman. For easy of reference, I have reproduced the contents of both exhibit P37.

> *Tulipotoka pale tulikwenda mji wa juu kidogo ambako niliona nyumba moja iliyoezekwa kwa nyasl, nao tulivunja kwa kupiga teke na nakumbuka aliyepiga teke alikuwa ni Juma Mgaya. Pale tuliingia ndani wengi na mimi nilimkata panga binti mmoja panga la shingo. Paie tulichukua vitenge kwenye sanduku. Vitu Nilivyochukua mimi ni suruali mbili rangi kama ya njano na mashati mawili.*

PW5 was among the occupants of Dorica's house that night. Explaining the situation in the room when the culprits entered, PW5 stated the following:

> *In the room there was Nyasinde Bita, Sephroza Bita, Magesa Charles and Nyandora Moris who is me. Nyasinde also came to hide under the bed and Sephroza covered herself with my grandmother's blanket. I was about 12 years by then. Nyasinde Bita was 13 years. Sephroza Bita was 11 years. My grandmother and aunt were attacked by pangas in several parts of their bodies. My aunt was slashed in her neck. My grandmother was also slashed with panga in her neck.*

The above pieces of evidence show a nexus between the 5th accused person's confession and PW5's testimony. In my opinion, it would not have been possible for a person who had no knowledge of the killings, to know not only that among the victims in that house, was a woman but more so, she had her neck cut by a machete. There was also evidence of (exhibit P22) photographs taken at the scene after the incident of this case. Among the 34 photographs, one of them indicates a grass roofed house which supports the 5th accused person's confession that indeed, there was such a house.

The above being stated, I am aware that one retracted or repudiated confession cannot corroborate a similar retracted confession from another accused person since each requires corroboration. Therefore, being repudiated, these confessions statements cannot corroborate each other. See **John Cherehani and Another Vs Republic,** Criminal Appeal No. 189 of 1989, Court of Appeal of Tanzania, (unreported). However, as I have tried to show above (even without referring similar statements in the confessions) the accused persons confessions contain well and elaborative statements on how the executions were planned and carried out in revenge for the killing of Freddy Mgaya, something which guarantee its truth and for that they can be acted upon by any prudent court. I am fortified in this conclusion by the decision in **Mukami Wankyo Vs Republic** [1990] TLR 46 where the Court of Appeal of Tanzania observed that confessions which contains true statements can be safely relied. The Court thus stated the following:

> *Thus, fortified we are satisfied that ..... the confession contains nothing but the truth, and can safely be relied upon to convict the appellant in keeping with the rule stated in the* ***Tuwamoi Vs Uganda*** *[1967] E.A page 84.*

Through their defences, the 4th and 5th accused persons, raised the question of age. They contended that they were under 18 years of age when arrested in 2010. While the 4th accused person stated that he was 14 years in 2010, the 5th accused claimed to be 16 years. Apparently, it is part of our law under section 4 of the Law of Child Act No. 21 of 2009, that any person below the age of 18 is regarded as a child and that the procedure of dealing with children in conflict with law, is different from normal procedure laid down under the criminal procedure laws. Children who find themselves in conflicts with the law, enjoy some protection which start at the moment of their arrest, investigation, prosecution and even sentence imposed. It is therefore, the best practice that where a question of age of the accused person is intended to be raised in defence, the same should be raised at the earliest stage of the trial to enable the court to determine it.

In this case, the 4th accused person raised the question of age when his confession statement was tendered and repeated the same through his defence testimony. I find such a claim justifiable because even ASP Nelson Sumari's (PW7) testimony supports the fact that when arrested on 28th February, 2010, the 4th accused person who was younger than

the 5th accused person, was 15 years old. Through his testimony PW7 stated the following:

> *We decided to arrest the two children of Masemere that is Marwa and Nyakangara.... They looked young at that time. Marwa Mau was the youngest and followed by (Nyakangara) Masemele. .....The children of Masemele were young of between of 15 - 18 years....*

In my view, PW7 testimony's above, proves that the 4th accused person being the youngest among the two children of Masemele who were arrested in connection to this case, was 15 years old in 2010, was a child.

On the other hand, the prosecution led evidence through D6298 D/Sgt Rabiel Tenga, (PW14) which indicates that the 5th accused person was an adult of between 18 and 20 years old when arrested. The 5th accused person did not draw the attention of the court as to his age at any earlier stage. He waited until when he was giving his defence testimony to raise it and even through such testimony, the 5th accused person himself, neither knew the date nor the month, except for the year of his birth.

Even when exhibit P37 was tendered, the 5th accused person did not object its admissibility on any of the reason of violation of the law of the Child Act. Therefore, in my opinion, since the question of age was so crucial in determination of this case as far as the 5th accused person is concerned, raising it in his defence, amounted to an afterthought. That notwithstanding, I have scrutinised the entire evidence from the defence side and I am settled that apart from merely saying he was born in 1994, the 5th accused person did not tender any other evidence to support his defence. His claim that he was a child when arrested in 2010 is therefore, unsubstantiated.

Having ruled as above, it was the prosecution's case that following the arrests of the 1st, 3rd, 6th and 7th accused persons, they were searched and several properties linking them with the offense were recovered and seized. According to PW3, when searched, the 1st accused person who was arrested after being incriminated by the 2nd accused person, was found in possession of among others, a sword which contained some suspected blood stains. Being suspicious that the sword might have a link with the killing incident at Mgaranjabo, A/Insp Simkoko (PW10) took a swab sample from the said sword and subjected the same to DNA test. A Forensic DNA Profiling Test Report (exhibit P44) prepared and

tendered by Gloria Machumve (PW23), revealed that the sword contained the blood of the victims of the assault from the house of the Moris Mgaya. On being interrogated, Juma Mgaya also mentioned Nyakangara Wambura Biraso, who when arrested and searched by ASP Nelson Sumari (PW7), he was found with among others, a mattress with a blue cover make Tanfoam (Exhibit P29). The said mattress was identified by Maria Kawawa Kinguye (PW22) a daughter of late Kawawa Kinguye and the survivor of the incident of this case, to be the one which was being used by her late father. As such, the cover of the recovered mattress, was also subjected to DNA test and according to PW23 the results linked it with the DNA of a male victim from the house of Kawawa Kinguye.

In defence, the 1st accused person denied having either been searched or found with a sword (exhibit P26). The 3rd accused person also denied to have been found with a mattress make Tan foam (exhibit P29). In essence their defences were that they were not found with exhibit P26 and P29 which were subjected to DNA test. Moreso, the accused persons challenged the way the DNA samples were handled from the moment of their collection to the time they were tendered in this court. It was contended that there was improper or no documentation on

handling of the samples and therefore there was a break of chain of custody. In that regard, it was also argued that there was inconsistency on the naming of the exhibits which were a subject of a forensic DNA profiling report (exhibit P44). Picking an example, it was argued that while samples from a machete and sword seized from the 1st accused person were labelled by A/Insp Simkoko (PW10) as D19 and D13 respectively, exhibit P44 shows D13 was a sword instead of a machete.

My response to this will be brief because first; when tendered in court, the 1st and 3rd accused person did not object admissibility of exhibit P26 and P29 which according to ACP Nelson Sumari (PW7) was seized upon searching the 1st and 3rd accused houses. As such the defence's claim that the 1st and 3rd accused persons were not found with these items, was therefore an afterthought. Secondly; on chain of custody, there was evidence from PW23 whose testimonies show she received sealed packages containing the DNA samples from A/Insp Simkoko (PW10) on 9th March, 2010 and 30th March, 2010. According to her, these exhibits were labeled and kept in a laboratory room which is special for receiving such kind of samples and she was the custodian of the said exhibits.

The purpose of recording the chain of custody in respect of exhibits intended to be used as evidence in court, is to establish a link between those items and the crime and so remove the possibility of such exhibit being fraudulently tempered with. While it is common that chain of custody may be proved by paper trail as it has been observed in so many decisions like **Paulo Maduka and Four Others Vs Republic,** Criminal Appeal No. 110 of 2007, **Meshack Abel Vs Republic,** Criminal Appeal No. 297 of 2013, **Zainabu Dotto Nassoro Vs Republic,** Criminal Appeal No. 348 of 2018, and **Abuhi Omari Abdallah and 3 others Vs Republic,** Criminal Appeal No. 28 of 2010 (all unreported), in terms of the decision of the Court of Appeal of Tanzania in **Charo Said Kimilu and Another Vs Republic**, Criminal appeal No. 111 of 2015 (unreported), the same may as well be proved by oral evidence which shows that from the moment of its seizure, the chain of custody of the particular exhibit, was never broken. It is therefore a correct position of law in our country that even where there is ample and credible evidence that an exhibit exchanged hands, documentation is not the only proof of its handling. A chain of custody of an exhibit can be proved by witnesses who were present while the exhibit exchanged hands, provided the court believes them.

In this case, although there was no proof of documentation tendered in court on how the exhibits passed from A/Insp Simkoko to Gloria Machumve (PW23), these two witnesses are the only ones who dealt with the same and according to their evidence, the samples never shifted to a third person. Their evidence is that, A/Insp Simkoko (PW10) collected the samples and handled them in personal to PW23 who having received them, became not only the sole custodian who but also analysed the samples and prepared a report (exhibit P44). In my view, while appreciating that proof of chain of custody through paper trail is important, but as it was stated in **Charo Said Kimilu and Another Vs Republic**, (supra) there was no need of paper documentation in the circumstances of this case. The oral account of PW10 and PW23 on the movement of the samples in respect of exhibit P44, sufficiently establishes the chain of custody of the said exhibits and that the same was not broken. It is also my view that the nature of the samples themselves being DNA swabs extracted from a sword (exhibit P26) and piece of mattress cover (exhibit P29) which were sealed and preserved accordingly were not ones that could have been easily tempered with.

Third; on improper labeling of exhibits, it is correct that when A/Insp Simkoko was testifying in court on 17th September, 2019 said he labeled

samples from a machete and sword seized from the 1st accused person as D13 and D19 respectively and submitted the same for forensic DNA test. This piece of evidence contradicts not only with the labelling in exhibit P44 which shows that D13 contained DNA findings from a sword and D19 was in respect of a DNA findings from a shirt seized from the 3rd accused person, but also A/Insp Simkoko's own statements which were tendered and admitted as defence exhibit D3. It is on record that while in both exhibits D3 and P44, sample D13 and D19 were in respect of a DNA samples from a sword and a shirt respectively, A/Insp Simkoko's testimony in this court shows D13 covered DNA sample from a machete.

I have considered the inconsistency and attributed it to the period of more than nine (9) years that has lapsed from the time when A/Insp Simkoko (PW10) collected the samples to the time when he testified in this court and I hold a firm view that such long time, can impact negatively on the witness's memory. As human being's memory normally fades away with time, I find that the wrong account of A/Insp Simkoko in court as to the labelling of the exhibits, was a memory issue associated with lapse of time. I believe there was a lapse of memory on how he labeled the collected samples. That is why when responding to

the questions posed by Mr. Mahemba, the learned counsel for the 8th accused person, A/Insp Simkoko (PW10) indicated that gap by stating the following:

> *There was a mattress seized from Nyakangara Wambura Biraso which I took a piece of its cover and mark as D1. The sample from the sword was marked as D19. The panga which was seized from Juma Mgaya was marked as D13. The exhibits were put in a container and sealed before being sent to the Government Chemist Office. If given time to refresh I can name all the exhibits.*

The above being the case; and having considered the gist of A/Insp Simkoko's testimonies, I find the discrepancy to be minor and so did not affect his credibility. This position is supported by a decision of the Court of Appeal of Tanzania in the case of **Mathias Bundala Vs Republic,** Criminal Appeal No. 62 of 2004 (unreported) which reaffirmed a similar position reached in **Kiroiyann Ole Suyan Vs Republic,** Criminal Appeal No. 114 of 1994 (unreported) where unequivocally the following was observed:

> *When a witness gives evidence after a long interval, say six years, following the event, allowance ought to be given for minor discrepancies. In the case at hand the witnesses were testifying after a lapse of nine years. Such expected trifling contradictions should be appropriately ignored.*

Another item alleged to have been stolen from the scene, was a white shirt (Exhibit P31), black trousers and a light blue track suit (Exhibit P33). These items were identified by Maximillian Robert (PW18) to be the properties of Joseph Asopheret who died in the incident. Exhibits P29 (a mattress make Tan foam), P31 (a white shirt with a word paradigm), P33 (a black trouser and light blue track suit) which belong to victims of the incident were recovered from 3rd and 7th accused persons. Except for exhibit P31, there was no objection on the admissibility of these exhibits.

The law is settled that where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with person or place where from the property was obtained. For this doctrine of recent possession to apply as a basis of conviction, it must be proved, **firstly**; that the property was

found with the accused, **secondly;** that the property is positively proved to be the property of the victim, **thirdly,** that the property was recently stolen from the victim, and **lastly**, that the stolen thing constitutes the subject of the charge against the accused. See **Mustapha Ramadhani versus Republic, Criminal Appeal No. 242 of 2008** (unreported) cited with approval in the case of **Mohamed Hassani @ Said Vs Republic,** Criminal Appeal No. 410 (unreported).

To prove the exhibits P29, P31 and P33 were recovered from 3rd and 7th accused persons, the prosecution relied on evidence of ACP Nelson Sumari (PW7) and SSP Kibona (PW9) who tendered seizure certificates. While admissibility of exhibit P28 (a seizure certificate in respect of the items recovered from the 3rd accused person) was objected, there was no objection in respect of admissibility of exhibits P30 and P32 (seizure certificates in respect of a white shirt and a black trouser, allegedly owned by the late Joseph Asopheret and recovered from the 7th accused person). There was either no explanations on how the 3rd and 7th accused persons came into possession of these items. In criminal law, such unexplained possession of the properties allegedly stolen from the scene of crime by the accused persons, may be a presumptive evidence against them not only on the charge of stealing or receiving with guilty

knowledge, but also of any serious crime like murder, where there are reasons to believe that such offences were committed in the same transaction. I find support in this stance from the Court of Appeal decision in **Juma Marwa Vs Republic,** Criminal Appeal No. 71 of 2001 (unreported) where the following were stated:

> *'The doctrine of recent possession provides that if a person is found in possession of property recently stolen and gives no reasonable explanation as to how he had come by the same, the court may legitimately presume that he is a thief or a quilt receiver'*

Similar position was also reached by the Court of Appeal of Tanzania in **Seif Salum Vs Republic,** Criminal Appeal No. 150 of 2008 (unreported). The Court thus stated:

> *'.....The appellant failed to explain to the court how he acquired the possession of the stolen goods. Under Criminal Law the unexplained possession by an accused person of the fruits of crime recently it has been committed is presumptive evidence against the accused not only on the charge of the theft or receiving with guilty knowledge, but also of any aggravated crime like murder, when there is reason for*

concluding that such aggravated and minor crimes were committed in the same transaction'

As said, these exhibits were identified by Maximillian Robert (PW18) and Maria Kawawa Kinguye (PW22). PW18 for example was so specific on how he identified exhibit P31. In his own words, he stated the following when identifying a white shirt recovered from the 7th accused person:

When we reached to central police station Musoma, I was shown several male and female clothes. I managed to identify a white shirt with short sleeves which belonged to Joseph Asopheret. I identified it because on the pocket there was a word "paradigm". The shirt had also some two small holes (vitundu) which were sustained when Asopheret was ironing it using a charcoal iron. If shown today I can still identify it through the same marks which are "paradigm" word and the two small burnt holes.

I had an opportunity to see exhibit P31 which contains the said shirt. Apart from the words "paradigm" which could be seen by any person, the fact that PW18 disclosed those two small burnt holes in the shirt which cannot be easily seen unless shown by a person who actually knew the same, persuaded me to believe that indeed, he was a witness

of truth and that he knew well the said shirt. Similarly, PW22 gave detailed explanations on how she identified exhibit P29. For easy of reference, I have reproduced an extract from her testimony as hereunder:

> *The mattress had a blue cover make Tan foam Arusha. It had pink flowers. By that time the mattress had around 7 years at home because I remember the same was purchased before Meliciana was born and Meliciana died as a result of the assault, when she was five (5) years old. Nyanyama Kawawa being so young used to sleep with my parents. I knew that mattress because I used to make my parents bed (nilikuwa natumwa na mama kukitandika kitanda) sometimes when my parents used to go to farm, they left me with Nyanyama who sometime urinated in the bed so I used to take the mattress out to dry the same in the sun.*

From the evidence above, I now hold that the 3rd and 7th accused persons were found with exhibit P29 and P31, items believed to have been stolen after the killings at Buhare. In that regard, they were expected to give reasonable explanation on how they came into the possession of those items. See **Maruzuku Hamisi Vs Republic** [1997] TLR 1.

Now let me consider the accused person's defence of alibi. It is the law that once proved that a person alleged to have committed the offence was not at the scene at the time of commission of the offense, the defence of alibi may exonerate an accused person from criminal liability. However, for such a defence to be invoked, whoever intends to rely on it must give notice of his intention to rely on that defence either before the hearing of the case or after the closure of the prosecution's case. Besides raising a defence of alibi, neither of the accused persons issued a notice of alibi. The practice has been that the court would usually consider that defence even if the same was raised without notice. In **Marwa Wangiti Mwita and Another Vs Republic,** [2002] TLR 39 the Court of Appeal of Tanzania stated the following in respect of alibi raised without notice:

> *The absence of notice required by section 194 of the Criminal Procedure Act of 1985 does not mandate or authorise the ought right rejection of an alibi though it may affect the weight to be placed on it.*

Therefore, where a defence of alibi is raised after prosecution case has been closed and without any prior notice that such defence would be

relied upon as in the instant case, a court should not treat the said defence like it was never made. It should instead, take cognizance of the defence and may then exercise its discretion to accord no weight to the defence. See **Mwita Mhere and Ibrahim Mhere Vs Republic** [2005] TLR 107.

As noted, apart from not issuing notice of intention to rely on the defence of alibi, the accused persons gave a general account of where they were, on the material night. The 2nd accused person for example said having returned from his business on 15/2/2010, he remained at his house at Nyegina village till his arrest on 16/2/2010. The 3rd accused person claimed that he was at his house located at Nyasura village and he only heard the news of the killings through Victoria Radio on 15/2/2010. The 4th and 5th accused persons were at Buruma village while the 7th accused person was at Bunda.

I have examined the entire evidence as tendered by the defence, indeed as observed, the defence of the alibi raised, has no evidential back up. Without shifting the burden of proof to the defence, it is the law that whoever intends to rely on alibi, must first issue notice and support his such a defence through evidence which can raise reasonable doubt.

Failure to do so entitles the court to accord no weight to it. Taking into consideration of the nature and gravity of the offence charged in this case, it was expected that, if the alibi contains any sort of truth in it, the accused persons would bring evidence to support the same. In **Ally Salehe Msutu Vs Republic** [1980] TRL 1, the Court of Appeal observed the following in a similar set of facts:

> *We are of course aware that as a matter of law an accused person is not required to prove his Alibi and it is enough for him if the Alibi raises a reasonable doubt. We are however, of the view that the unknown and untested statement made by the appellant in his defence and unsupported as it was by any other evidence which in this case could easily have been obtained if the Alibi had any trace of truth, has no basis in fact but is a fallacy of the appellant.*

Therefore, being raised without notice and in absence of supporting evidence, such a defence was incomplete. In **Makala Kiula Vs Republic** Criminal Appeal No. 2 of 1983 (unreported), the Court of Appeal of Tanzania had this to say in respect of an incomplete alibi.

'If a person charged with a serious offence alleges that at the time when it was committed, he was in some other place where he is well known and yet he makes no effort to prove that fact, which if true, could easily be proved, the court must necessarily attach little weight to his allegations'

To conclude on this issue, I would like to hire the wisdom of the apex court of our land in **Ally Amsi Vs Republic,** Criminal Appeal No. 117 of 1991 CAT (unreported), where a raised alibi was found to be false, it was observed that such attempt to mislead a court through a false alibi, may jeopardise the accused's position for he or she might be considered a liar without however exonerating the prosecution from its duty of proving the case beyond reasonable doubt. The Court thus stated:

"... Ordinarily when an accused puts up an alibi which is demonstrated to be palpably false and it is established that he was in fact at the place and time the alleged crime was committed, his task can be very difficult and his position unenviable. For one thing he will have been proved to be a liar who tried to mislead the court into believing that he was not around so could have perpetrated the alleged crime. For another he

will have denied himself the opportunity of raising other possible defences such as provocation or self defence which might be true or which might have at least raised some doubt.

In the event I find the defence of alibi raised by 2nd 3rd, 4th, 5th and 7th accused persons, of no evidential weight and that the same has failed to shake the prosecution's case.

The above being determined, it is obvious that apart from the accused person's confessions, evidence led by the prosecution in this case was purely circumstantial. An established principle of law is that circumstantial evidence can prove the case if taken together, the same points irresistibly to the accused that he or she is the one who caused the death of the deceased person. As it was stated in **Republic Vs Kerstin Cameron** [2003] TLR 84, to ground a conviction on circumstantial evidence, the following must be established:

(a) That the prosecution evidence must be incapable of more than one interpretation;

(b) The facts from which an inference of guilt or adverse to the accused is sought to be drawn, must be proved beyond reasonable doubt and

must clearly be connected with the facts from which the inference is to be drawn or inferred;

(c) *In murder cases, evidence should be cogent and compelling as to convince a jury, judge or court that upon no rational hypothesis other than murder can, the facts be accounted for.*

In the case at hand, the 2nd accused person was arrested after being tracked by a police dog. Upon being interrogated, he confessed and named among others, the 1st accused person who when arrested and searched was found with sword (exhibit P26). That sword according to the forensic DNA report, (exhibit P44) had blood link with victims in Kawawa Kinguye's house. The report shows the blood in the sword was from a male victim in a room which was used by Kawawa Kinguye, Bhuki Kawawa Kinguye and Nyanyama Kawawa. According to exhibit P1, P2 and P3 (Postmortem Reports) the only male victim in that room was Kawawa Kinguye. Evidence from exhibit P43 (the 6th accused person's confession) shows as he was assaulting Kawawa Kinguye, the 1st accused person was not satisfied with the way he was assaulting him and so he was told to let him deal with the said male victim. Below is an extract from the 6th accused person's confession statement as he let the 1st accused deal with Kawawa Kinguye.

..... mimi nilimkata baba panga moja na mimi ndiye niliyekuwa wa kwanza kumkata sehemu za jirani na bega karibu na shingo na hapo ndipo Juma Mgaya alinambia kwamba unafanya kazi ya kutegea hebu pisha mimi nimshughulikie aone. Na hapo ndipo nilimpisha na yeye aliendelea kumkata yule mwanaume.

The above pieces of evidence lead to one conclusion that the male DNA blood found in the 1st accused's sword was that of Kawawa Kinguye who was killed in the incident of this case.

The 1st accused person also incriminated the 3rd accused who upon being searched was found with a mattress (exhibit P29) which was identified by Maria Kawawa (PW22) to be the one which was used by her parents. The mattress had also DNA traces of a male victim in the same room used by Kawawa Kinguye, his wife Bhuki and their daughter Nyanyama. It can therefore be concluded that the mattress which was found with the 3rd accused person belonged to the late Kawawa Kinguye and had his blood DNA traces.

The 7th accused person was also found with among other things a white shirt with a mark "paradigm" (exhibit 31), and a pair of black trousers

(exhibit P33). These clothes were identified by Maximillian Robert (PW18) to be school uniforms which were used by Joseph Asopheret one of the victims who perished on the material night. Although the 7th accused person objected the admissibility of exhibit P33, he however, did not object admissibility of a certificate of seizure in respect of a search (exhibit 32) which was witnessed by Msafiri Magendi (PW13) and Wilhelimina Aron Buriro (PW19). That means he conceded that the search which led to recovery of the school uniforms (exhibit P33) was conducted against him as testified by SSP Kibona (PW9).

The above evidence points a guilty finger to the 1st, 2nd, 3rd and 7th accused persons. I believed that such inculpatory facts are incompatible with the innocence of these accused persons and they are incapable of explanation upon any other reasonable hypothesis than that of their guilty.

The above notwithstanding, it is clear from the prosecution's case, that the only evidence against the 4th, 8th and 9th accused persons is that of incriminating confession statements from the 3rd, 5th, 6th and 7th accused persons. In exhibits P35 (extra judicial statements of the 6th accused person) P36 (extra judicial statements of the 7th accused person), P38,

(cautioned statements of the 7th accused person) and P41 (cautioned statements of the 3rd accused person; the 4th, 8th and 9th accused persons, are mentioned to be among those who planned and eventually participated in killing of the victims of this case. While the 9th accused person was also named in exhibit P43 (cautioned statements of the 6th accused person), the 4th and 8th accused person's names were revealed in exhibit P37 (cautioned statements of the 5th accused person) and P43 (cautioned statements of the 6th accused person).

In terms of section 33 (1) and (2) of the Evidence Act Cap 6 RE 2019, incriminating statements by co accused as against another, can be considered. However, no conviction can be legally grounded basing solely on such confessions. See **MT 38870 PTE Rajab Mohd and Others Vs Republic** Criminal Appeal No. 141 of 1992 Court of Appeal of Tanzania, (unreported). The law requires such statements to be competently corroborated to warrant a conviction against the incriminated person and as such, a confession by a co-accused person can only be used as lending assurance to other evidence against the co-accused. See **Ezera Kyabanamaizi and Others Vs Republic,** (1962) 1 EA 309 and **Gopa Vs Republic** [1993] 20 EACA 318.

Underlining the need to such evidence being corroborated, this court (Kisanga, J as he then was) stated the following in **Selemani Rashid and others Vs Republic** [1981] TRL 252.

> ..... *I see no good reason for departing from the rule of practice as laid down by the Court of Appeal because, I see that the rule does provide an important safeguard against possibilities of convicting the innocent. Thus, for example an accused person who has committed an offence may take a true confession of that offence. That is well and good and he may properly be punished for it. But he may for different motives which may not be apparent, decide to implicate an innocent person. He may do so, for instance, out of an old grudge or some misunderstanding or purely out of malice simply in order to get a companion in sufferance. Such possibilities could not be ruled out and should it happen then there be no doubt that it amounts to a serious miscarriage of justice.*

As prior noted, in this case the ladies and gentleman assessors had a consensus opinion that there was no evidence against the 4th accused person. They however parted ways on the fate of the 8th and 9th accused persons. Whereas as the first assessor believed that such

evidence proved as well the guilty of the 8th and 9th accused person, the second assessor had the opposite conclusion and therefore opined that there was no strong evidence against the 8th and 9th accused persons. On her part, the third assessor's opinion was that the prosecution side has failed to prove the charges of murder against the 9th accused person but found the 8th accused person guilty as charged.

I share the views of the ladies and gentleman assessors in respect of the 4th accused person. I also share the same opinion with the second and third assessors in respect of the 9th accused person. However, I differ with the conclusion of first and third assessors on the fate of the 8th accused person because there is no iota of evidence from the prosecution side which corroborates the incriminating statements against the 8th and 9th accused persons. I believe no matter how true the incriminating statements may be, the absence of other pieces of evidence that support it, leaves such co accused's incriminating statements, unreliable. Therefore, having thoroughly tested the prosecution evidence and the cited authorities, I am of the settled view that incriminating confessions in the circumstances of this case, incapable of leading to a conviction on charges of murder as against the

4th, 8th and 9th accused persons and I acquit them accordingly from the said charges.

On the other hand, I find the 1st, 2nd, 3rd, and 7th accused person's confessions through exhibits; P36, P38, P40, P41, P42, to have been sufficiently corroborated by the strong circumstantial and expert evidence from forensic DNA profiling findings and tracker dog which I have discussed at length above. In the same vein, being so comprehensive and detailed, I find the contents of the confessions of the 5th and 6th accused persons (Exhibits P35, P37 and P43) which explains in clarity the initial stages of the plan to kill Kawawa Kinguye, the role played by each of the assailants in executing the said plan and consequently leading to the killings of 17 people, to be true account of what happened at Mgaranjabo area on the night of 16th February, 2010. As it was in **Stephen Jason and 2 Others Vs Republic,** (Supra) I am certain, therefore, that such confession statements could not be given by a person who was not either a part to the plan or had knowledge of it.

All said and done, I am satisfied that the 1st, 2nd, 3rd, 5th, 6th and 7th accused persons, are responsible for the killing of Kawawa Kinguye

Kinguye, Bhuki Kawawa Kinguye, Nyanyama Kawawa Kinguye, Meliciana Kawawa Kinguye, Juliana Kawawa Kinguye, Kinguye s/o Kawawa Kinguye, Nyarukende Kinguye, Magdalena Kawawa Kinguye, Nyasimbu Moris, Mgaya Moris, Irene Moris, Magret Moris, Maheri Moris, Nyangeta Moris Mdui, Umbera Mgaya, Joseph Asopheret and Dorica Mugaya, the conclusion which was shared by the ladies and gentleman assessors.

Having found the 1st, 2nd, 3rd, 5th, 6th and 7th accused person responsible for the unlawful killing of Kawawa Kinguye and 16 others as listed in the information, the last question for my determination is whether the killings were premeditated (malice aforethought). The law in relation to what is entailed by malice aforethought is settled that the same can be inferred from a combination of several aspects basing on the conduct and acts or omission of the accused persons either prior to, during and or after the incident. Malice aforethought may therefore also be established with evidence on the knowledge that the act or omission could probably cause death or grievous harm to another person and or mere evidence on intention to commit an offense punishable with a penalty graver than imprisonment for three years.

In the instant case, the victims were assaulted with machetes and swords and consequently all 17 people, died because of severe loss of blood (haemorrhage) following multiple cut wounds in different sensitive parts of their bodies. Both exhibits P1-17 (Report on Postmortem Examinations) and exhibit P22 which contains 34 still photos taken by A/Insp Simkoko (PW10), show the extent of the wounds inflicted to the deceaseds. Such deep cut wounds which extend from the heads, necks and posterior chests of the victims, is an indication of nothing but an excessive force applied when inflicting the same. In my view, whoever inflicted these kinds of injuries, intended to terminate the lives of these people. In **Enock Kipala Vs Republic,** Criminal Appeal No. 150 of 1994 the Court of Appeal of Tanzania (unreported) observed the following in relation to malice aforethought:

> ..... *usually, an attacker will not declare his intention to cause death or grievous harm. Whether or not he had that intention must be ascertain from various factors, including the following; (1) the type and size of the weapon, if any used in the attack; (2) the amount of force applied in the assault; (3) the part of parts of the body the blow were directed at or inflicted on; (4) the number of blows, although one blow may, depending upon the facts of a particular*

case, be sufficient for this purpose; (5) the kind of injuries inflicted; (6) the attackers utterances, if any, made before, during or after the killing; and (7) the conduct of the attacker before and after the killing.

Malice aforethought can also be inferred where there is a proof that death was a natural consequence of the act and that the accused person foresaw it as a natural consequence of the same. See **Nanjonjo Harriet and Another Vs Uganda,** Criminal Appeal No. 24 of 2002 [2007] UGSC 10 available at *www.africanlii.org*.

As such and with all that I have endeavoured to say, I believe the tendered evidence, has satisfactorily proved the question of malice aforethought against the 1st, 2nd, 3rd, 5th, 6th and 7th accused persons. Therefore, in agreement with the ladies and gentleman assessors' opinion, I hold that, these accused persons definitely intended to kill the victims when assaulted them with lethal weapons.

In the final result and for the foregoing reasons, like it was for all three ladies and gentleman assessors, I am satisfied that the prosecution side has proved its case to the required standards and on my part no reasonable doubts exist as to the guilty of the accused persons. I

therefore find the accused person one **Juma Mugaya @ Mugaya Jumanne Masemere, Aioyce Nyabasi Nyakumu @ Diwani, Nyakangara Wambura Biraso @ James Mgaya Magigi @ Nyakangara Magigi, Nyakangala Masemere Mgaya @ Robert Boniface @ Robert Boniface Magigi, Sadock Alphonce Ikaka @ Nyabugimbi Nyakumu@ Sadock Alphonce and Kumbata Buruai @ Bwire Alex George**, guilty of unlawful killing of **Kawawa Kinguye Kinguye, Bhuki Kawawa Kinguye, Nyanyama Kawawa Kinguye, Meliciana Kawawa Kinguye, Juliana Kawawa Kinguye, Kinguye Kawawa Kinguye, Nyarukende Kinguye, Magdalena Kawawa Kinguye, Nyasimbu Moris, Mgaya Moris, Irene Moris, Magret Moris, Maheri Moris, Nyangeta Moris Mdui, Umbera Mgaya, Joseph Asopheret and Dorica Mugaya** and consequently, I hereby convict them for the offence of Murder contrary to section 196 and 197 of the Penal Code in respect of 17 counts as charged.

DATED at **MUSOMA** this 15th January, 2021

M.M. SIYANI

JUDGE

SENTENCE

Having considered what has been submitted to me during sentencing process by both Mr, Mayenga the learned Senior State Attorney and Mr. Ostack Mligo, the leading counsel for the defence, it is obvious that the law in this country provides death by hanging as the only punishment for murder. Therefore, in compliance with sections 26 (1) and 197 of the Penal Code Cap 16 RE 2002, the convicts one **Juma Mugaya @ Mugaya Jumanne Masemere, Aloyce Nyabasi Nyakumu @ Diwani, Nyakangara Wambura Biraso @ James Mgaya Magigi @ Nyakangara Magigi, Nyakangala Masemere Mgaya @ Robert Boniface @ Robert Boniface Magigi, Sadock Alphonce Ikaka @ Nyabugimbi Nyakumu@ Sadock Alphonce and Kumbata Buruai @ Bwire Alex George,** are hereby sentenced to suffer death by hanging. It is so ordered.

M.M. SIYANI

JUDGE

15th January, 2021