

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL JURISDICTION
CRIMINAL SESSION CASE NO. 25 OF 2022

REPUBLIC
VERSUS
JILALA S/O MAHEMBO @ JIHUSA

JUDGMENT

Date of Last Order: 04/04/2023

Date of Judgment: 16/05/2023

NDUNGURU, J;

The accused, Jilala s/o Mahembo @ Jihusa is charged with the offence of murder contrary to sections 196 and 197 of the Penal Code, Cap. 16 R.E 2019 (Now 2022). It was stated in the particulars of offence that; on the 17th Day of November, 2014 at Iyala village within Mbarali District in Mbeya Region the accused did murder one Uwezo Shiwa. The accused person pleaded not guilty to the offence.

In the facts read before this court during Preliminary hearing on 29/07/2022 state that the deceased, UWEZO S/O SHIWA was the

resident of Warumba village within Mbarali District in Mbeya Region. It was alleged that on 17/11/2014 the deceased left his village with the accused person by a motor cycle with Registration Number T 911 CKQ make SHANRAY the property of one Moshi Jackson. That the deceased and the accused were heading to Iyala village. That the two did not return, the act which raised doubts to the deceased's relatives and the villagers. That the relatives having reported to the village authorities about the non-return of the deceased, they (the relatives and villagers) mounted a search which bore no fruits.

It was further stated that, on 21/11/2014 the deceased was found dead in Ruhanga village while his body having injuries on the head. The incident was then reported to the Police Station in Rujewa. On 22/11/2014 police officers and Dr. Wedson Sichwale visited the crime scene. The sketch map of the scene was drawn and the deceased body was examined and a Post Mortem Report prepared. That the examination revealed that the cause of death was due to excessive blood loss.

Furthermore, it was stated that the police initiated investigation where it was found that on 18/11/2014 the accused person had handed the respective motor cycle to one Mashaka Jafari as a security for the

money Tanzanian shillings 220,000/= which the accused borrowed from Mashaka on the agreement of returning the sum. That the said motor cycle was later on, on 07/12/2014 identified by Moshi Jackson as his property which he gave to the deceased together with the accused on the fateful date i.e on 17/11/2014. It was stated further that the accused was arrested on 28/08/2016 in Mbeya city. That being interrogated he confessed to have involved in murdering the deceased. That he further confessed before a justice of peace one Hon. Mutala Sadick and was thereafter arraigned in the court for murder charge. All facts were denied by the accused serve for his name, the date of arrest and the fact that he was arraigned before the court to face the charge.

At the hearing of the case, the Republic appeared through Ms. Rosemary Mgeni assisted by Ms. Xaveria Makombe and Mr. Stephen Rusubamayila, all State Attorneys whereas the accused had legal representation of Advocate Emil Mwamboneke.

In the course of proving the case, the prosecution lined up a total of 10 witnesses and four (4) exhibits; to wit cautioned Statement of the accused person (exhibit P1), Post Mortem Report (exhibit P2), statement of Neema Mkondya (exhibit P3) and the statement of Agnes Ngonyani

(exhibit P4). On the defence side the accused person was a sole witness testified on his own behalf.

The prosecution witnesses' evidence can be summarized as follows:

The first one to testify was Moshi Jackson Lisasi (PW1) who said that on 16/11/2014 when at a certain grocery watching video was approached by the deceased accompanied by another person who was strange to him. The deceased was requesting for a motor cycle on account that he was in need to ferry his fellow to Madundasi village. That though the deceased's fellow was strange to him he recognized him as there was enough electronic light at the area and they were very close to each other and the discussion took a bit long time like half an hour.

He also narrated that in the next day, he left a switch and a motor cycle to his wife as when the deceased went to take it he would not be at home. PW1 told this court that his motor cycle was SHANGRAY make with Registration Number T. 911 CKQ. PW1 identified the accused on dock as a person he referred to be the one who was with the deceased on the date the deceased was requesting for the motor cycle. When PW1 was cross examined, he said that the motor cycle was found

deserted at the village office that it was then returned to him. He respondent further that the body of the deceased was found at Mjabaja hamlet at Ruhanga village. That the motor cycle was taken on 17/11/2014 in his absence but in the presence of his wife. That it was about nine years from the date he saw the accused to the date he came to identify him in the court. That he was not pointing finger to the accused as a killer.

Then second one was Abdulkarim Abas Mhanginonya (PW2). He testified that on 17/11/2014 while at Warumba village he received an information via a phone call of his sister (the deceased's mother) that Uwezo Shiwa's whereabouts was unknown since he left with his fellow whom they knew as a Sukuma man going to Iyala village. That they then reported the missing of their relative at the village authority on 18/11/2014. That, upon the report, the Village Executive Officer (VEO) disseminated the information to the villagers where a search was mounted.

PW2 also told this court that on 19/11/2014 he received an information that one Neema Mkondya had a phone number of the guy who left with their relative. That he obtained the said number from the café of the said Neema and called the guy who received a call but when

he was asked about Uwezo, the guy told him to wait. That he waited in vain as the guy was thereafter out of reach.

PW2 testified further that he reported the incident to the police station. On 21/11/2014 they were informed that the deceased body has been found dead at Ruhanga Village. When cross examined, he replied that he knew a referred Sukuma guy but did not know his name. That he did not see the two on 17/11/2014. That he had no proof if the number he was given was of the accused person. The deceased body was found at Mjabaja hamlet in Ruhanga village near the park.

The third witness, Masoud Abasi Mhanginonya (PW3) testified that on 17/11/2014 when he was with his fellow on a power tiller from Iyala village to Warumba village met the deceased with other two persons boarding one motor cycle. Asking where they were to, the deceased said that they were going to Ruhanga village. That between the two one of them was known to him and he identified him on dock to be the accused.

It was the PW3's further testimony that from that day he left the village he came to know about the death of the deceased on 21/11/2014 when he came back in the village. That he was told that ever since the deceased left did not get back alive. On cross

examination, PW3 directly responded that he did not know if the accused was responsible with the death of the deceased and that he did not know the other third person who was with the accused.

The fourth witness to testify was Linus Ngovamo (PW4). He said that on 18/11/2014 he was told by his sister (the mother of the deceased) that the deceased left on 17/11/2014 with his friend with a motor cycle of Moshi Lisasi but did not get back. That they gathered and searched him but in vein until 21/11/20014 when he was phoned and told about the finding of the body at Mjabaja hamlet the body came to be identified being the deceased. When cross examined, he said, he had never seen the deceased with the accused person that the deceased body was found in a bush/forest.

E.8265 D/SGT Roman (PW5), Police officer told this court that while he was at his duty station at Igulusi they were informed about the found of a dead body at Ruhanga village, him and other police officer went to the scene where they found the body started decomposing. That they were with a medical officer one Dr. Sichwale who conducted an examination. The examination revealed the body to have injuries on the head which was caused by a blunt object. That the body of the deceased was about 8 kilometres to Ruaha National Park. After post

mortem report being completed, they handed a body to the relatives for burial. Then he was assigned with the file for investigation.

That he was told during investigation that the deceased left in accompany of one Msukuma on 18/11/2014 with a motorcycle No. T.911 CKQ going to Iyala village. That in his further investigation he came to know the name of the said Msukuma to be Jilala Mahembo@ Jihusa (the accused person). That the same person was again mentioned in another murder case on the murder committed at Mapogolo village in 2016. That the very accused person had also left with a respective deceased on a motor cycle but never turned home until he was found dead.

PW5 went on stating that they later received the accused from the office of RCO - Mbeya when they were told that he was arrested at Mwanjelwa area in a Guest House within Mbeya city on 28/8/2016. That the accused being interrogated by one D/Coplo Goziberty he admitted to have killed the deceased. PW5 further said that he had seen the accused person at the police station in Rujewa and then at the dock. Also that, at Rujewa police station the accused person was identified by Mashaka Japhari to whom he left a motor cycle. On cross examination, PW5 said that the accused left with the deceased on 18/11/2014 that the motor

cycle was returned to the owner after he had produced a registration card. That the deceased had three wounds caused by a blunt object.

E. 4210 Detective Sargent Gosberty (PW6) told this court that he was the one who was assigned to record cautioned statement of the accused person on 28/8/2014. That the accused stated that he planned to kill the deceased after he suspected him of stealing his cattle. That the accused person tricked the deceased by requesting to ferry him from Warumba village to Iyala village. Then on the way he killed the deceased by a stick as there was a misunderstanding which erupted when the accused person asked the deceased about stealing of his cattle. That he hit the deceased twice on the head then took a motor cycle and left a scene. PW6 tendered a caution statement which was received as exhibit P1. During cross examination, PW6 said that the accused told him that he was arrested on 28/8/2016 for the offence of murdering one Mbuga Masanja. He also replied that the accused said to have committed the offence on 17/11/2014.

Wetson Mastala Sichwale (PW7), medical officer testified that on 22/11/2014 being called by the police officers at Igulus Station he accompanied them to Iyala village where the incident of dead body was reported. That they found the dead body alongside the road near the

bush and a farm. That the body had started decaying but he made examination of the body which had wounds on the head suggesting to be caused by a blunt object. That he prepared a post mortem report. That his examination discovered that the death was caused by excessive bleeding and at the scene there was full blood. He tendered a post mortem report which was admitted as exhibit P2. That he prepared a report in 2014 but it was indicated to have been prepared in 2016. On cross examination, he responded that the first report missed the name and age of the deceased thus he prepared another report. That at the scene the name of the deceased was not known. That he was later on given the deceased's name by the police. That he did not indicate in the report that the body had three wounds nor that it was caused by a blunt object. That he prepared two reports on the same body.

Mashalla Jafari Kalinga (PW8) told this court that the accused whom he did not know before went to his home on 1/12/2014 with one Karim Ngiga who was a hamlet chairman. The accused was seeking for Tanzanian shillings 300,000/= with the view of leaving a motor cycle. PW8 described the said motor cycle to be red in colour make SHANRAY with Registration No. T. 911. He testified also that the motorcycle was left to him as the security for the money the accused borrowed as he

told him that he had a sick father. PW8 also said that the hamlet chairman told him that he knew the accused person by the name of Mahembo.

PW8 further gave evidence that he gave the accused person Tshs. 220,000/= on the agreement of returning the sum after two days but he did not do so. That he and the hamlet chairperson then reported to VEO about the transaction and the non-return of the accused person. That thereafter they received information that in Iyala village a certain person was murdered and his motor cycle was stolen. Where the description of the stolen motor cycle resembled the one he had hence reported to police station of Rujewa and his statement was recorded. He then identified a person who left the motor cycle to be the accused person on dock. On cross examination, he said that since he saw the accused person on the day he borrowed money he had never seen him until he saw him in court. Then that he neither knew his name nor where he came from.

Zena Wilfred Sinda (PW9), this witness appeared before the court for the purpose of tendering a statement of one Neema Mkondya as she was the one recorded it on 25/11/2012. The statement was tendered under section 34B of the Evidence Act, Cap. 6 R.E 2019 and the same

was admitted as exhibit P3. Same applies to PW10, E. 8265 D/SGT Roman who tendered the statement of the deceased wife one Agnes Ngonyani. PW10 said that he recorded the statement on 27/11/2014 and the same was admitted as exhibit P4.

On the defence, the accused person (DW1) testified that, he was arrested on 28/8/2016 at Mama John area in Mbeya. That after he has been arrested, he was tortured at the Field Force Office in Mbeya then he was transferred to Rujewa police station where he was again tortured. He said that he was tortured on the accusation of reporting the Police to PCCB. That at Rujewa, policemen were directed by the RCO to make sure that he admits. That he was then tortured while asked to admit to have murdered. Then the police whom DW1 mention as Roman and Gozibert wrote something on a paper then gave him to sign. That he was forced to sign as he did not know what was written therein since he does not know how to write and read.

DW1 further testified that he was taken to the Primary Court at Rujewa before a certain female magistrate. That the magistrate observed how he was tortured, then directed him to go back to the police and ask them to send him to hospital for treatment. That he was never sent to hospital but was taken to court facing two murder cases.

DW1 refuted to have involved in killing people. He said that for this offence, on the said date of the event he was at Madundasi village. He thus requested this court to release him.

At the closure of the case for both sides, counsel for the parties prayed to address the court via final written submissions. The prayer was granted, they accordingly filled their respective submissions on 11/04/2023.

In their submissions, the learned State Attorneys for the prosecution said that they have managed to prove the case at the required standard. They argued that the accused person was the last person to be seen with the deceased. That the accused was well identified by PW1, Exhibit P4 statement of Agness Ngonyani and PW3. According to the learned State Attorney the accused person was identified by PW1 as the conversation they had took a time and they were close to each other and there was electricity light.

It was the State Attorney's view that the accused was a last person to be seen with the deceased as they left together but the deceased was found dead after 5 five days. He sought a reliance on the case of **Miraji Iddi Waziri @ Simana vs Republic**, Criminal Case Appeal No. 14 of 2018 Court of Appeal of Tanzania (unreported) that

where there is evidence that the accused person was a last person to be seen with the deceased there is presumption that he is the killer unless he offers a plausible explanation to the contrary. Nevertheless, the accused person defence did not offer one, she argued.

The learned State Attorney further argued that the evidence of the prosecution witnesses is supported by the accused's cautioned statement which was admitted without objection. According to the learned State Attorney the best witness is an accused person who confesses his guilt as it was put in the case of **Twaha s/o Ali and Others vs Republic**, Criminal Appeal No. 78 of 2004 CAT at Dar es Salaam (unreported).

Additionally, the learned State attorney argued that the accused person raised a defence of alibi without a prior notice in accordance with section 194(4) of the Criminal Procedure Act, Cap. 20 R.E 2022 and the case of **Hamisi Bakari Lambani vs Republic**, Criminal Appeal No. 108 of 2012 CAT at Mtwara (unreported) that he should have given notice of the defence of alibi before the hearing of the case. Further contended that the accused person did not cross examine PW5 and PW6 when they were testifying was thus estopped from denying what they testified as per the case of **Nyerere Nyague vs Republic**, Criminal

Appeal No. 67 of 2010. According to her the prosecution evidence are enough to base the conviction of the accused.

In turn, on his part counsel for the accused person essentially submitted that the prosecution evidence has based on circumstantial as there were no eye witness and did not prove the offence of murder as required in the case of **Mohamed Said Matula vs R.** [1995] TLR 3. It was the counsel's argument that the evidence that the accused person deserted the motor cycle to the VEO in Ipwan Village was mere words since it was not tendered nor its registration.

He went on submitting that there was no proof that a person who was seen with the deceased during night was the one who took a motor cycle on the fateful date. That the evidence of PW1, PW4 and PW5 are hearsay which in law is not reliable. Also that, there was material contradicting evidence between PW5 and PW7 one saying that the deceased body was along the road and another that was in Korongo the contradiction which ought to have resolved by a sketch but was not tendered.

In his view, the deceased would have been attacked by animal as his body was found near the park. Also that post mortem report is questionable on the two contradictory story of the PW7 that he made

report in 2014 but was later directed by the police to write the name of the deceased in 2016 since the name in 2014 was hard to find. That the police who conducted identification parade was not called as witness which rise doubt as to whether it was real conducted. Counsel raised another doubt that the witness who said to have identified the accused at the Identification Pared did not give a prior description of the accused before was taken to identify him.

Defence counsel further urged this court not to consider the statement of PW9 and PW10 for the reason that PW9 was not the one who wrote exhibit P3 since the same shows to have been written by WP 8907 DC Zenah, but was tendered by Zena Wilfred Sinda thus, the court cannot harmonize the two as it is contrary to section 34(1)(B)(c) of the Evidence Act Cap. 6 R.E 2019. According to him the evidence of the prosecution is weak to base the conviction of the accused as there was no evidence connecting the accused with the commission of the offence.

Having closed the evidence of both side and having considered the written final submissions by the counsel for the parties it remains this court's task to decide.

First and fore most the fact that the deceased really died is not disputed. This is according to the evidence of PW1, PW2, PW4, PW5,

PW7, exhibit P2, and P4. The evidence from all these witnesses said that the deceased was found dead at Mjabaja hamlet in Ruhanga village and his body was found on 21/11/2014 when it was started decaying. The evidence of PW2 and PW4 who said that the deceased was their relative is more reliable since they described in their testimonies how they identified the deceased's body to be of one UWEZO S/O CHIWA. Moreso, is the evidence that though the deceased's body had started decaying, was still in the place of being recognized.

It is also my considered view that since there was no any other piece of evidence on the contrary regarding the fact that the deceased body was found with wounds on his head as per the evidence of PW1, PW2, PW5 and PW7 I find the death was unnatural. I have not considered Exhibit P2, a post mortem report in this fact since it was not written anywhere that the deceased's body had wounds on his head. Thus, I have relied on oral account of the aforesaid witnesses.

The issue for determination now, is whether the prosecution has managed to prove the case at the required standard i.e beyond reasonable doubt that the accused person murdered the deceased.

Outrightly, I concur with the defence counsel that the evidence of the prosecution witnesses connecting the accused persons with the

charged offence is circumstantial; specifically on the doctrine of the last person to be seen with the deceased. This is also observed in the arguments made by the learned State Attorneys through their final submission.

Essentially, the doctrine of "last person to be seen with the deceased" is well illustrated by the Court of Appeal of Tanzania in the case of **Abel Mathias @ Gunza @ Bahati Mayani vs Republic**, Criminal Appeal No. 267 of 2020 CAT at Mbeya (unreported) quoting the case of **Miraji Idd Waziri @ Simana & Another v. Republic** (supra) described the doctrine in the following words;

"Simply means that; where there is evidence that an accused was the last person to be seen with the deceased alive then there is a presumption that he is the killer unless he offers a plausible explanation to the contrary".

Unlike in cases where there is no controversy about the accused person to be a last person to be seen with the deceased where a trial court will dwell looking at the accused's explanation whether plausible or not, in this case the accused has disputed not only the fact that he was a last person to be seen with the deceased but also that he did not

know the deceased nor the village in which the deceased lived. On that account, the prosecution had the duty to prove not only that the accused was last person to be seen with the deceased but also to prove if the accused ever had been with the deceased person. This is also true regarding the fact in the evidence of the prosecution that the accused person was not a resident of the village in which the deceased lived i.e Warumba village also that all the witnesses referred to a person whom they said that was a stranger to them, that is even why there was a struggle by the prosecution to show this court that the accused though was stranger, he was identified as there was conducive environment for him being non-mistakenly identified.

As I have hinted before, in this case the prosecution evidence has been marshalled under the circumstances that the accused person was last person to be seen with the deceased alive. And since the deceased was found dead it is the accused who killed him. Now, this court is faced with the task to find out whether there is evidence on the prosecution side which leaves no doubt that indeed, the accused person was a last person seen with the deceased.

In evaluating the prosecution evidence in connection with the above posed issue, I am constrained to be guided with the principles in

Mark s/o Kasimiri v. Republic, Criminal Appeal No. 39 of 2017, CAT at Arusha (unreported). In that case the CAT re-stated the principles in which courts should be guided so as to rely on circumstantial evidence towards convicting the accused person. It stated as follows:

*"In resolving this appeal, we deem it pertinent to initially restate the **basic principles governing reliability of the circumstantial evidence to convict which include:** -*

*i. That the circumstances from which an inference of guilty is sought to be drawn must be cogently and firmly established, and that those circumstances should be of a definite tendency unerringly pointing towards the guilty of the accused, and that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and non-else (See **JUSTINE JULIUS AND OTHERS vs REPUBLIC**, Criminal Appeal No. 155 of 2005 (unreported)).*

ii. That the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt; and that before drawing inference of guilt from circumstantial evidence, it is necessary to be sure that there are no ex-existing circumstances which would weaken or destroy the inference [See, **SIMON MSOKE vs REPUBLIC**, (1958) EA 715A and **JOHN MAGULA NDONGO vs REPUBLIC**, Criminal Appeal No. 18 of 2004 (unreported)].

iii. That the accused person is alleged to have been the last person to be seen with the deceased in absence of a plausible explanation to explain away the circumstances leading to death, he or she will be presumed to be the killer. [See - **MATHAYO MWALIMU AND MASAI RENGWA vs REPUBLIC** (supra)].

iv. That each link in the chain must be carefully tested and, if in the end, it does not lead to irresistible conclusion of the accused's guilt, the whole chain must

*be rejected. [see **SAMSON DANIEL vs REPUBLIC**, (1934) E.A.C.A. 154].*

*v. That the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person. [See **SHABAN MPUNZU @ ELISHA MPUNZU vs REPUBLIC**, Criminal Appeal No 12 of 2002 (unreported)].*

*vi. That the facts from which an adverse inference to accused is sought must be proved beyond reasonable doubt and must be connected with the facts which inference is to be inferred. (See **ALLY BAKARI vs REPUBLIC** (1992) TLR, 10 and **ANETH KAPAZYA vs REPUBLIC**, Criminal Appeal No. 69 of 2012 (unreported))."*

Driving from the above principles in connection with the instant case, the evidence available as the accused person to be seen with the deceased is that of PW1, PW3, exhibit P3 and P4. To his side PW1 said that he saw and identified the accused person on 16/11/2014 at night when he was with the deceased requesting for the motorcycle so as to go to Madundasi village. That PW1 left a switch and the motorcycle to

his wife on the next day. Then that on that day that is 17/11/2014 he was told by his wife that the deceased and his friend have taken the motorcycle.

PW3, on his part said that he met with the accused person and another person with the deceased travelling by a single motor cycle. That he greeted the deceased as they knew each other. That he identified the accused person since they stood nearby when he was greeting the deceased. He then identified the accused on dock.

In exhibit P3, the statement of one Neema Mkondya states that she saw at the first time one youth of Sukuma tribe whom she did not know before on 14/11/2014. The second time was on 18/11/2014 when he was in accompany of the deceased that the two left together but that youth left behind his phone number to one Rehema.

Also, in exhibit P4, the statement of Agness Ngonyani, the deceased's wife states that two friends of his husband (the deceased) went to her home on 14/11/2014. That among of the two was of Sukuma tribe and the other did not know his origin. Then that, one of those two friends of her husband left with him (the deceased) on 17/11/2014 by a motorcycle of their neighbour one Risasi.

These were all evidence which indicated that the deceased when was still alive left with a person whom they called as 'SUKUMA' the rest of the witnesses just gave evidence as to what they were told. And they did not disclose to whom they heard about the deceased leaving their village with another person.

Looking at the evidence of the witnesses as above stated in my analysis they did not prove that the accused person is the one who left with the deceased on the fateful date i.e on 17/11/2014. This is because, starting with the evidence of PW1 and having believed that he identified the accused person on 16/11/2014 at night, this court cannot certainly decide that the same accused person was the one who went with deceased on the next day when they took a motorcycle. As PW1 stated that he was told by his wife that the deceased left with his friend, there was a necessity of PW1 wife called as a witness so as also to identify the accused person if was the one she saw leaving with the deceased. This court may fall into error if it may just believe that the friend whom PW1 saw during night is the same person referred by her wife. Importantly to note that even the account that PW1's wife said the deceased left with his friend remains hearsay evidence given by PW1 since his wife did not testify before the court.

As to the statement in exhibit P4 the maker was not physically present so as to identify the accused person as the same guy who left with her husband. That again, this court remains in doubt if the guy referred therein is the accused person. After all he is neither named nor given description as to his appearance.

Equally, the evidence of PW3 is questionable as other witnesses said specifically exhibit P4 and P3 it was stated that the deceased left with the accused person only whereas PW3 said he met three persons. Then this court is doubting if the deceased from his home he was with one person (allegedly the accused) then the two on the way added another person could that another person not be a murderer?

Also, the statement in exhibit P3 said that the deceased was seen with a *Sukuma* guy on 18/11/2014. While PW1 and PW3 said that it was 17/11/2014. Unfortunately, as the maker of the statement was not physically present the discrepancy regarding dates was not harmonized making the account therein unreliable the effect of which is to be resolved in favour of the accused person.

Another shortfall is from the evidence that the accused person was the one who took the motorcycle to PW8. The evidence of PW5 was that the accused left the motorcycle to PW8 on 18/11/2014 whereas PW8

said that the motor cycle was taken to him on 01/12/2014. The contradictions by PW5 and PW8 in my view went to the root of the case. This is because the prosecution was trying to show this court that it was the accused who on 17/11/2014 killed the deceased and left with the motorcycle which the two used. Then that he deserted it on 18/11/2014. When comes the evidence of a witness who says that the motorcycle was taken to him on 1/12/2014 about two weeks when the information had already been disseminated leaves doubt as to the existence of the fact.

Moreover, there is evidence that one Karim Nginga was a person who introduced the accused person to PW8. And he said that he knew the name of the accused person as Mahembo. On my view that person was a material witness to the prosecution case. failure to call him as witness and in the absence of any explanation as to why was not called as witness this court draws adverse inference against the prosecution evidence. See **Adamu Angetile vs Republic**, Criminal Appeal No. 402 of 2020 CAT at Mbeya that:

"The principle of adverse inference finds its basis on an assumption that the evidence which could be, and is not,

produced would, if produced, be unfavourable to the person who withholds it."

Again, in connection with the motorcycle alleged to have been taken by the accused to PW8, the same was not tendered in court. It was just by oral evidence that the accused and the deceased left with the motorcycle the property of PW1 a SHANGRAY make with Registration No. T. 119 CKQ without this court seeing it nor its registration card tendered, its existence remains doubtful.

Following all these shortfalls in connection with the guiding principles as above listed regarding circumstantial evidence the chain of events have been not connected for this court to irresistibly conclude that the accused person was a last person seen with the deceased.

Having so found, the remaining evidence of the prosecution which connects the accused person with the offence is exhibit P1 (the alleged caution statement of the accused). According to the prosecution, the accused confessed to have killed the deceased. I quickly concur with the learned State Attorneys on a settled law that an accused person who confesses to a crime is the best witness. The said principle was pronounced in the cases of **Jacob Asegelle Kakune vs The Director of Public Prosecutions**, Criminal Appeal No, 178 of 2017 and

Emmanuel Stephano vs Republic, Criminal Appeal No. 413 of 2018 (both unreported). Specifically, in **Emmanuel Stephano** (supra) the Court of Appeal of Tanzania while reiterating the above principle stated that:

*"We may as well say it right here, that we have no problem with that principle because in a deserving situation, **no witness can better tell the perpetrator of a crime than the perpetrator himself who decides to confess.**" (Emphasis added).*

It is however the law that for a confession to be valid and base a conviction of the accused person the same should be freely made; see **Mohamed Haruna Mtupeni and Another v. Republic**, Criminal Appeal No. 259 of 2007 (unreported).

In this case, exhibit P1 was tendered without objection about the voluntariness of the maker. It was however, raised in the defence by the DW1 that the same was recorded and given to him to sign without being told of what was written therein since he is illiterate. He also complained that he was tortured at the Field Force Office in Mbeya and when he was transferred to Rujewa police station. When the accused was cross-examined on why he did not raise any objection or cross examine the

witness who tendered cautioned statement he replied that his advocate knew about it and he told him to object it.

It was further in the defence evidence that the accused after being forced to sign the papers which he did not know their contents the next day was taken to the Primary Court, that he told the Magistrate thereat about being beaten. Also, that the Magistrate told him to ask the police to send him to hospital for treatment.

Principally, as a general rule a confession or a statement will be presumed to have been voluntarily made until objection to it is made by the defence on ground, either that it was not voluntarily made or not made at all; see **Nyerere Nyague vs Republic**, Criminal Appeal No. 67 of 2010 CAT at Arusha (unreported) and **Seleman Hassan v R.** Criminal Appeal No. 364 of 2008 CAT. Nonetheless, the presumption is rebuttable if there are facts raised which need the consideration of the trial court. I am of this view due to the reason that, an accused person always has an opportunity to speak during defence case. His evidence during the defence is supposed to be considered and evaluated by a trial court. In that regard, when he raises the complaint of being tortured like in the present case, a court is duty bound to evaluate the same. For example, in the case of **Shihobe Seni vs Republic** [1992] TLR 330,

the Court of Appeal of Tanzania found it valid the argument by the counsel for the appellant where that counsel argued that;

*"..... once the statements were repudiated, **albeit** during the defence stage, the learned trial judge should have suo moto checked on the voluntariness, ..."*

Now, in this case the fact that the accused person is illiterate is undisputed. The fact also that the accused person was arrested in Mbeya city then transferred to Rujewa in Mbarali district has no dispute. This is also to the fact that the accused person was arrested for being suspected of murdering two persons and that he was acquitted in one of those accusation.

The prosecution case is that the cautioned statement of the accused was recorded soon after being arrested on 28/08/2016 whereas the defence case is to the account that the accused person's alleged cautioned statement was given to him to sign at Rujewa police station on the next day. This was the reason why counsel for the defence raised objection on the ground that the cautioned statement does not indicate the place where it was recorded. Indeed, exhibit P1 has a space for recording a place where cautioned statement was recorded however, it was left unfilled. I admitted the exhibit notwithstanding of the said

shortage on the reason that the filling of the place is not a legal requirement. I made it purposely bearing in my mind that admissibility is one thing and the weight to be attached to the admitted exhibit is another.

Admittedly, exhibit P1 has apparent gaps which leaves a lot to be desired. These include, the uncontroverted fact that after the cautioned statement being recorded the accused was taken to a justice of peace to the Primary Court at Rujewa. Nevertheless, what was recorded thereat was not tendered before this court. That is leaving this court to find truthfulness on the account by the accused person that he told the Magistrate about being beaten and that Magistrate told him to ask the police to send him to hospital. Again, being not made clear by the prosecution why the place where the exhibit was recorded was left unfilled this court doubts the account that it was recorded in Mbeya as soon the accused person was arrested. That means the account by the accused person that it was recorded in Rujewa on the next day remains to be found as a true account.

Moreso, this court finds that the accused person was arrested in connection of two different accusation of which the investigators were not certain as the result there was a requirement to prove to the hilt

that the accused freely confessed. For example, in exhibit P1 the accused person is quoted to have stated that:

"Mnamo terehe 28/08/2016 nilikamatwa tena kwa kosa la kumuua MBUGA S/O MASANJA hapo 04/08/2016....."

To be precise, all surrounding circumstances as above observed have raised doubt on the voluntariness of the accused person the effect of which cannot be held in favour of the prosecution side but to the accused person.

Conversely, for the shortfalls in the prosecution side as above stated, I find the prosecution have failed to prove the case beyond reasonable doubt that it was the accused person who murdered the deceased. In the event, I find the accused person, Jilala s/o Mahembo @ Jihusa not guilty of the offence of murder. I hereby acquit him forthwith.

It is so ordered.



J. Ndunguru
D.B. NDUNGURU,

JUDGE

16/05/2023