

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOROGORO SUB-REGISTRY
AT MOROGORO**

**CRIMINAL SESSION NO. 24 OF 2023
REPUBLIC**

VERSUS

CHARLES MGASA @ KAGAMBO

JUDGMENT

4th & 12th March, 2024

KAMUZORA, J.

Two accused persons were aligned before this court for the offence murder. However, before the trial could commence, one of the accused persons Eusebi Rafaeli Rocky demised and the trial abated against him leaving the accused Charles Mgasa @ Kagambo on trial alone. It was alleged that the accused and his fellows namely; Eusebi Rafaeli Rocky (now the deceased) and Raphael Modest (not arrested) murdered Juma Mbaga at Tangeni village in an incident which took place on 10th April, 2022. It was further alleged that, they forced Ciprian Thomas Thobias PW5 to carry one of them and the deceased to Manembo street at Tangeni village where they abandoned the body in the canyon (korongo) at Bona

area. Raphael Modest fled away and disappeared while the accused Charles and the late Eusebi were arrested at different times and charged for the offence of murder.

The prosecution case was led by Mr. John Mkonyi and Mr. Jumanne Milanzi, learned State Attorneys who managed to bring six witnesses; Inspector Thecla Leonard Misajile, Doctor Liberatus Rwechungura, Kibwana Halifa King'omela, Dativa Macha, Ciprian Thomas Thobias and D,5266 D/SSGT Mkaze Amon Mmbughu. On the defence side, only the accused person testified and defended himself on oath. He was ably represented by Mr. Emmanuel Kimaro, learned Advocate.

PW1, Inspector Thecla Leonard Misajile is a Police officer who visited the scene of crime on 18th April, 2022 upon receiving information that the deceased's body was discovered at Tangeni village. She went to the scene together with other police officers and a doctor by the name of Rwechungura (PW2) from Mlali health centre. They found many people at the scene including the relatives of the deceased and the deceased's body was in the canyon. PW1 continued to testify that, they found a body of an adult male person which had started to decompose as there was bad smell coming out and flies were covering the body. That, after taking the body from the canyon, they discovered that all feet were amputated and the body had bruises on the lefthand palm and broken jaw. That, the

deceased was identified by the relatives as Juma Mbaga and after the doctor had examined the body, it was handled to the relatives for burial. She claimed that, some of the witnesses recorded their statements at the scene including Janeth, the deceased's mother and the uncle.

PW1 further testified that, after sometimes, Eusebi who is now reported to have died and Charles who is the accused herein court were arrested and sent to the police station for the murder of Juma Mbaga. When she was cross examined, PW1 agreed that they never recovered anything at the scene which connects the accused person with the offence of murder.

PW2, Liberatus Rwechungura, is a Medical Doctor, who examined the deceased's body. He testified that he was phoned by the police officer by the name of Lameck from Mzumbe police station and asked to go to the police station so that he could accompany them to the crime scene. He went with the police officers to Tangeni village, Mlali where he performed autopsy to the deceased's body which was found in the canyon and identified by the relatives as Juma Mbaga. To his observation, the deceased was an adult male person and the body had abnormal swelling, with bad smell and flies covering the body meaning that it had started to decompose. That, the deceased had injuries in different parts of the body; a cut on the nose, left palm, right jaw and feet were also cut (hakuna

Nyayo za miguu). PW2 formed an opinion that the cause of death was excessive bleeding from the injuries which in other words is called Hypovolemic shock caused by excessive blood loss. He explained that, there were sharpness in the injuries showing that a sharp object was used. PW2 further stated that, after examining the body he prepared a report on postmortem examination that was admitted as exhibit PE1. On being cross examined he added that he was not sure of the date the deceased was murdered but he estimated that the death took place between 6 to 7 days back.

PW3, Kibwana Halifa King'omela, is a witch doctor residing in the neighbouring village called Kauzeni, Mzinga. He testified that on 06th September, 2022 at about 15:00hrs he was visited by Raphael and Eusebi who wanted herbs to close a murder case. That, they told him that they killed Juma Mbagi and therefore, they wanted herbs to close the case, "tumeua mtu utufungie dawa ili kesi ife". That, when PW3 probed them, they mentioned their fellow culprit as Charles (the accused in court) but Charles did not go to PW3's house on that day. That, PW3 informed them that he had no such herbs but before they left, two women appeared and when Raphael and Eusebi saw them, they started running. That, people at that area assisted in chasing them and only Eusebi was arrested but Raphael fled away. That, Eusebi was sent to the Mtaa chairman and then

to the police station at Mzumbe. PW3 claimed that he knew all the three culprits by their faces and appearance because he used to see them at Tangeni where he usually goes to search for his needs.

PW4, Dativa Macha, is the mother of the deceased. She testified that on 18th April, 2022 at 13:00hrs, she was at home doing home chores when she heard neighbours talking that there was a person murdered. Eager to know that person, she joined other people to the scene at Mung'ongo Tangeni only to find that the person referred was her son Juma Mbagi. She was able to identify the body as that of her son and she saw the body with injuries on the nose, hand, jaw and some of the organs which are feet were missing. PW4 added that, the police went with the doctor who examined the body and thereafter, the body was handled to them for burial.

PW4 further testified that, in September, 2022 Emilian Gervas went to her house and told her that he had information on the people who murdered her son. That, Gervas told her that he heard Charles Kagambo claiming his money from Raphael telling him that he sent them to kill Juma Mbagi and they killed him but he had not paid them their money. That, upon receiving such news, PW4 went with Gervas to the Mtaa chairman by the name of January but they were not attended on claim that the

chairman was attending a meeting thus, they decided to inform the police at Mzumbe police station.

PW4 also testified that, on 06th September, 2022, she heard rumours that Eusebi and Raphael went to the witch doctor by the name of Kibwana at Luhungo ward, Mfime village and she decided to follow them. That, she found Eusebi and Raphael at the house of the witch doctor and when they saw her, they started running but Eusebi was arrested by villagers while Raphael fled away. That, when he was arrested, Eusebi started complaining as to why Cipi was not arrested while he was the one who carried the body. PW4 claimed that she knew Raphael and Eusebi before the date of incident as they were residing at Tangeni. That, she knew Charles Kagambo who was residing in Morogoro town at Bigwa area as she met him during burial ceremony of her aunt.

PW5, Ciprian Thomas Thobias testified that in 2022, he was residing at Tangeni Village and riding motorcycle for hire (bodaboda). That, on 10th April, 2022 at night hours he sent brother Ismail Kifalu to his house at Manembo street at Tangeni village using the motorcycle. That, on his way back, going to his house, he saw people ahead at Kikoya area Tangeni village. When he approached them, he was able to identify them as Eusebi Raphael, Charles Kagambo and Raphael Modest and they were holding Juma Mbagha who seemed weak as if he was sick or drunk. That,

Eusebi Raphael asked him to stop the motorcycle and ride with them but PW5 informed him that it was already late and he was going home. That, Eusebi insisted while threatening him that they will do to him what they did to Juma Mbagi and when altering those words, he was pointing at Juma Mbagi. That, PW5 agreed to take them and Eusebi did hike on the motorcycle while Charles and Raphael carried Juma Mbagi and sat him into the motorcycle between PW5 and Eusebi. That, Eusebi asked him to ride the motorcycle to Bona road and since it has rained and that place has hills, PW5 was riding in low speed. That, Charles Kagambo and Raphael Modest were following them while trotting behind them. That, when they reached at Manembo street, Eusebi asked him to stop and few minutes later, Charles Kagambo and Raphael Modest arrived and carried Juma Mbagi from the motorcycle. That, at all time they were holding Juma Mbagi as he could not stand on his own. That, the three told PW5 not to tell anyone what he saw and promised to do what they did to Juma Mbagi if he will disclose what he saw as they insisted, "hiki ulichokiona tukikisikia kwa mtu yeyote na wewe utakuwa kama huyu, huku wakinionyesha Juma Mbagi". He agreed and did ride the motorcycle back home but he was terrified and did not tell anyone. That, he later heard that Juma Mbagi was found murdered at Tangeni. PW5 claimed that he was still terrified because he was threatened by the accused persons thus,

did not disclose what he saw. That, in September, 2022, the accused persons were arrested and in October, 2022, PW5 decided to report to the police station and recorded his statement after he was sure that those who threatened him were arrested and no one could harm him.

PW5 added that he knew the accused by their names and faces even before the date of incident as he used to see them in their street. He pointed at the accused in court as Charles Kagambo. That, he also knew Juma Mbagu as he was a friend to the accused persons; Charles, Eusebi and Raphael. PW5 claimed that he identified the accused using motorcycle light as he was using full light of the motorcycle. He admitted to have not mentioned the light used to identify the accused in his statement but claimed that he was not asked such question. He claimed further that he did not know if Juma was dead at the time he carried him and he did not know what happened after he had left the accused persons and the deceased thus, cannot know the person responsible for murder. PW1 claimed that he does not know the whereabouts of Raphael, but he was informed that Eusebi died while in prison.

PW6, D.5266 D/SSGT Mkaze Amon Mmbughu, is the key investigator in this case. He testified that on 18th April, 2022, he was on duty at Dakawa police station and was assigned to go with other police officers and the medical doctor to the scene of crime at Tangeni village,

a place called Bona. That, they found many people at the scene and the body of an adult male person in the canyon. That, the body had injuries on the nose, jaw, left hand and the feet were cut. That, the doctor examined the body and PW6 prepared a sketch map of the scene that was admitted as exhibit PE2. That, after examination, the body was handled to the relatives for burial.

PW6 further testified that, on 06th September, 2022 he received information that three people; Charles Kagambo, Raphael Modest and Eusebi Raphael were responsible for the murder of Juma Mbaga. That, they went to Tangeni village and arrested Charles Kagambo but upon being interrogated, he denied the allegation of murder. That, on 07th September, 2022, the OC/CID, ASP Mtailuka directed him to interrogate Ciprian Thomas (PW5) and record his cautioned statement on the allegation for the murder of Juma Mbaga. That, he was informed that Ciprian went to the police station to report on his own. That, after he had interrogated Ciprian, he discovered that he could stand as a witness and not as accused person but the OC/CID directed for Ciprian to record the statement before the justice of peace. That, Ciprian narrated the same story before justice of peace.

PW6 further testified that the OC/CID directed him to continue with investigation and interrogate other people who were arrested; the witch

doctor Kibwana Khalifa and Eusebi Raphael. He interrogated Kibwana who informed him that Eusebi Raphael and Raphael Modest went to his house asking for herbs to close the case so that they could not be arrested for the murder of Juma Mbaga and they mentioned Charles Kagambo as one of them. That, after interrogating Kibwana, he discovered that Ciprian was telling the truth thus, he informed the OC/CID who directed him to record the statement of Ciprian as a witness. PW6 also sent the blood samples to the government chemists for examination. He also testified that, Raphael was not arrested but he heard later that he went back to Tangeni village and was killed by people.

PW6 concluded that, from his investigation he discovered that the people responsible for the murder of Juma Mbaga are Charles Kagambo, Eusebi Raphael and Raphael Modest because, they were seen by Raphael taking Juma to the area where he was found dead. That, Ciprian knew the accused persons even before the date of incident and the witch doctor claimed that they went to his house for herbs to close the case. That, the barmaid by the name of Ritha left the accused persons with the deceased when closing the bar and the same people were found at the house of the witch doctor looking for herbs to close the case.

In his defence the accused person Charles Mgasa Kagambo testified that, he resides at Kikoya- Tangeni, Mzumbe ward at Mvomero district in

the house owned by Raphael Modest. That, he was living with his lover by the name of Ritha who was working as a barmaid at the bar owned by Raphael Modest. That, on 10th April, 2022 he was working at the bar with Ritha but he was asked by his boss to go and fumigate beans in the farm. That, he went for work in the farm and later at night they closed the bar about 23:00hrs and went to sleep. That, one week later, he heard that a person by the name of Juma Mbagwa was found dead in the farms at Bona. That, he did not go to the scene because on that day he was in farm and when he went back home, he was informed that the body was already examined and buried.

The accused further testified that on 04th September, 2022 at morning hours, the police arrested him and Ritha and were sent to Mzumbe police station. He was retained there for five days and beaten before he was transferred Dakawa police station. That, at Mzumbe he was joined with other suspects who are; Shukuru Denge, Eusebi Raphael Roky, Kibwana Khalifa and Ciprian Thobias. That, they were all transferred to Dakawa police station except for Ritha. That, at Dakawa police station he was beaten up by the police and they stayed there for three months and two weeks before they were brought to court. That, only the accused Charles Mgasia and Eusebi Raphael were brought to court but others were released on the same day.

DW1 claimed that he was charged with this case because he had grudges with the deceased before the incident and people at their area are aware of the same. He believes that the person who could be responsible for murder is Ciprian Thobias because he is the one who claimed to have carried the deceased's body. On being cross examined, DW1 admitted that he knew Raphael Modest, Eusebi and the deceased Juma Mbaga as residents of Tangeni.

From the above evidence, there is no dispute that Juma Mbaga died and his death was instigated by the injuries inflicted to his body. The evidence from the prosecution witnesses supports the facts that the deceased was murdered. PW1 Inspector Tecla Leonard Misajile and PW6 D/SSGT Mkaze Amon Mmbughu are among the police officers who visited the scene where the body of an adult male person was recovered. They witnessed the deceased's body having multiple injuries in different parts. The body was identified by PW4 Dativa Macha as that of Juma Mbaga, her son. PW2 Liberatus Rwechungura is the doctor who examined the deceased's body and prepared a report on postmortem examination (exhibit PE1). The report reveals that the deceased's body was found with multiple cut wounds in different parts including the right jaw, hand and amputated feet. In his oral testimony before this court, the doctor also mentioned that there was cut wound on the nose of the deceased. He

explained that, there were sharpness in the injuries suggesting that sharp object was used to inflict the injuries. The doctor formed an opinion that the cause of death was excessive bleeding from the injuries, in other words, Hypovolemic shock caused by excessive blood loss. From that evidence, there is no doubt that the deceased was murdered but the issue in controversial is, who is responsible for the deceased's murder.

It is undisputed fact that the prosecution case is laid on circumstantial evidence. It is well settled principle that, the court before convicting on circumstantial evidence must be satisfied that such evidence does not suggest anything than the conclusion that the accused person is guilt. In other words, the circumstantial evidence must irresistibly lead to nothing else but the guiltiness of the accused person. See, the cases of **Mathias Bundala Vs. the Republic**, Criminal Appeal No 62 of 2004, CAT at Mwanza (unreported) and the case of **Justine Hamis Juma Chamashine Vs. the Republic**, Criminal Appeal No. 669 of 2021 CAT, at Morogoro. It is also understood that, the court should warn itself when dealing with a case which entirely lie on circumstantial evidence. See, the case of **Didas Siria Vs. the Republic**, Criminal Appeal No 20 of 1978, the CAT at Arusha, pg. 6. The question is whether the prosecution evidence in this case suggest nothing than the fact that the accused is responsible for the murder of Juma Mbaga.

While the prosecution side is convinced that the case was proved in the required standards for the evidence points at the accused person and his fellows, the defence side believes that the prosecution evidence leaves reasonable doubts specifically on the issue of identification, time spent in reporting the crime and lack of corroborative evidence. While the prosecution side believes that the accused and his fellows were identified on the date of incident, the defence side believes that there was no watertight evidence of identification. From the assessment of evidence and submissions by the learned State Attorney and the defence counsel, the following are issues for consideration: -

- 1. Whether there was proper identification of the culprits on the date of alleged incident.*
- 2. Whether the accused person murdered the deceased.*

Responding to the above issues, I am well aware that where a criminal case lies on identification, it become necessary for the court to carefully scrutinise evidence and see if there was proper identification of the culprits. For this stance, see the cases of **Waziri Amani Vs. Republic**, [1980] TLR 350 and **Philip Rukaira Vs the Republic**, Criminal Appeal No. 215 of 1994.

In the case at hand, it is alleged that the incident took place at night on 10th April, 2022 and the only available evidence on identification

is that of PW5, Ciprian Thomas Thobias. He claimed to have identified the accused person using full light of his motorcycle. He explained that, he was stopped by Eusebi Raphael while Charles Kagambo and Raphael Modest were holding Juma Mbagwa who seemed weak as if he was sick or drunk. He claimed that he knew all of them as they reside in the same street and talked to them on that night as they threatened him.

From PW5's testimony the following questions arise; whether the principle on the last person to be seen applies, whether there was condition favouring proper identification at the scene, whether there was any danger that could have made the accused not to report the crime and whether there is evidence connecting the accused with the offence of murder.

It was argued by Mr. Mkonyi, learned State Attorney that the defence side does not refute the fact that the accused and his fellows were the last persons to be seen with the deceased as they failed to cross examine the witnesses on that fact. He urged this court to be guided by the decision in the case of **Joseph Leanard Manyota Vs Republic** Criminal Appeal No 485 of 2015, CAT, and hold that failure to cross examine witnesses on the fact that the accused and his fellows were last persons to be seen with the accused, is a proof of that fact.

Looking to the holding of that case, it is my view that, the same does not set a principle that failure to cross examine a witness will always amount to admission of that fact. What is important is that, the evidence must be credible and link the accused with the offence charged. Being the last person to be seen is a presumption that the accused murdered the deceased but not conclusive evidence of murder. In the case of **Justine Hamis Juma Chamashine** (supra) it was observed that, *"where the evidence shows that the accused person was the last person to be seen with the deceased alive, there is a presumption that he is the killer unless he offers a plausible explanation to the contrary"*.

From the prosecution evidence, the accused person and his fellows whom for one reason or the other are not part in this trial, were allegedly the last persons to be seen with the deceased on 10th April, 2022. The deceased's body was found on 18th April, 2022 abandoned in the canyon near the area where PW5 alleged to have dropped the accused persons and the deceased. Neither of the prosecution witnesses testified before this court on the exact date of the deceased's disappearance. PW4 who is the deceased's mother did not tell the court if on 10th April, 2022 when the deceased was allegedly seen with the accused and his fellows he never went back home until he was found dead. It must be noted that, the evidence by PW5 reveals that on 10th April, 2022, Raphael, Charles

and Eusebi and were holding the deceased who seemed weak and could not stand or seat on his own without being supported but, he never mentioned if the deceased had injuries in any party of the body. The deceased's body was recovered 8 days later with multiple injuries. When testifying in court, the doctor estimated that the death took place between 6 to 7 days back. With such evidence, there is no proof on the exact date of the deceased's death and for that reason, the principle on the last person to be seen cannot be safely relied upon unless there is other cogent evidence building chain of event that leads to no one but the accused in court.

This takes me to the question on whether there was clear identification of culprit who murdered the deceased. In his final submission, the counsel for the defence referring the decision in the case of **Ciprian Mtungilei Vs. Republic**, Criminal Appeal No 244 of 2021, CAT at Bukoba and the case of **Anael Sambo Vs. Republic**, Criminal Appeal No 277 of 2007 (unreported) argued that, a witness must state how he identified the accused irrespective of whether he knew him before or not. He insisted that, in this case PW5 Ciprian failed to give distinctive clothing of the accused person even by colour at the time of incident or describe the intensity of the light that assisted him in identifying the accused persons. He urged this court to also consider the case of

Abdallah Vs. Republic, 2003 TLR 271, the CAT, pg. 272 and find that PW5's failure to describe the accused makes the credibility of his evidence questionable.

On the other hand, Mr. Mkonyi, learned State Attorney insisted that PW5 clearly explained how he encountered the accused persons and how he was forced by the accused persons to carry the deceased Juma Mbagi using his motorcycle on 10th April, 2022. To him, the accused persons were well identified by the witness as they were prior known by him.

It is a well settled principle that a witness claiming to identify the suspect at night hours has to state clearly the light and intensity of the light at the scene crime used for identification. There is plethora of authorities on that stance. There is no doubt that the incident took place at night and PW5 insisted that it was midnight. PW5 claimed to have identified the accused using full light of his motorcycle. He however admitted in his evidence that when recording his statement at the police station he never mentioned the light used and the intensity of that light. Since the incident took place at night, the condition favouring identification and the intensity of the light used to identify the culprit were crucial facts that needed to be recorded by the witness when interrogated at the police station. Failure to state the light and its intensity when

recording his statement at the police station make this court to doubt if the condition at the scene could favour proper identification.

It was argued by the prosecution side that PW5 knew the accused persons and he talked to them thus was able to identify them. In my view, whether the accused person was prior known to the witness, it is immaterial where the witness is unable to explain the condition at the scene which could favour proper identification. From his testimony, PW5 claimed that he was stopped by Eusebi while Charles and Raphael were holding the deceased but did not explain the distance to which they stood. He claimed that they carried the deceased to his motorcycle but did not state the direction they came from which could make him see them clearly and recognise them. What if they came from the back of the motorcycle, was the motorcycle bright enough to light up to the back of the motorcycle? We expected such fact to be demonstrated in evidence. PW5 also claimed that he was riding with Eusebi and the deceased in the motorcycle while others were trotting behind them and when they reached at their stop point, the two assisted in carrying the deceased from the motorcycle. Again, he did not tell the position they stood and if the motorcycle light could clearly light them for him see them clearly.

PW5 also claimed that both three accused persons threatened him and told him not to tell anyone what he saw as they will do to him what

they did to Juma Mbaga if he will disclose what he saw in the following words, "hiki ulichokiona tukikisikia kwa mtu yeyote na wewe utakuwa kama huyu, huku wakinionyesha Juma Mbaga". However, he never disclosed exactly the person who uttered the threatening words or if all of them uttered the same words at the same time. With such evidence, this court finds that there were need for demonstration by evidence of what transpired at the scene.

Apart from the intensity of the light at the scene, there is undisputed evidence that the PW5 knew the accused Charles and his fellows even before the date of incident. It was argued by the prosecution side that, since PW5 knew the accused person, he unmistakably identified them. In his defence, the accused did not deny knowing the deceased and PW5. He however, denied being seen carrying the deceased on the material date of incident. Thus, it remains the prosecution duty to prove that the accused was real seen at the scene by PW5.

There is no doubt that PW5 knew the accused person and his fellows before the date of incident. It is in evidence that PW5 was also mentioned as among the people responsible for the death of the deceased. PW4 when testifying in court claimed that when Eusebi was arrested he complained as to why Cipi who carried the body on the motorcycle was not arrested. Such evidence suggests that, knowing that he was

mentioned as a person who carried the deceased on his motorcycle, PW5 decided to surrender at the police station to cover his tracks. The police did not buy his story at first and decided to treat him as a suspect and recorded his cautioned statement. He was later categorised as a witness and recorded his witness statement as prosecution witness. With that incident, PW5 has interest to serve and could do anything to save himself and for that, he could possibly lie. In the case of **Hekima Madawa Mbunda and another Vs. Republic**, Criminal Appeal No 166 of 2019, CAT at Iringa (unreported), it was held that even a recognising witness can make error in identification and sometime may deliberately lie. In the circumstance of this case, the evidence based on identification by recognition cannot be safely relied upon unless all possibilities on mistaken identity are eliminated.

It was also submitted by the defence counsel Mr. Kimaro that the time spent by PW5 before reporting the crime is too long and raises doubt on credibility of his evidence. He argued that, under section 7 (1)(a) and (b) of the Criminal Procedure Act, Cap 20 RE 2022, after a person becomes aware of the commission of the crime punishable under the penal code, he is required to immediately report to the police officer or any person in authority. To him, the fact that PW5 reported the crime

after the accused persons were arrested can be interpreted under section 10 of the TEA to mean that he was the one responsible for the offence.

This court also asked itself the same question as why PW5 failed to report the incident if he real identified the culprits. In the case of **Jaribu Abdalla Vs the Republic**, [2003] TLR 271, the court observed that: -

"In matters of identification, it is not enough merely to look at factors favouring accurate identification, equally important is the credibility of the witness. The conditions for identification might appear ideal but that is not a guarantee against untruthful evidence. The ability of a witness to name the offender at the earliest possible moment is in our view reassuring though not a decisive factor....."

In his evidence, PW5 claimed that he was terrified because the accused persons threatened him. However, this court does not buy such an excuse for the following reasons; **One**, the witness (PW5) was clear that at the time he was forced to carry the deceased, he never knew if he was dead or alive. He never mentioned if the deceased had injuries on his body. He only saw him weak and could not support himself but did not know what exactly the accused persons did to Juma for him to be in that state. PW5 never mentioned if the accused persons were carrying any weapon or threatened him with a weapon. That, being the case, he was unable to demonstrate the danger he could face by deciding to report the matter after he had dropped them.

Additionally, PW5 was not living with any of the accused persons in the same house for him to claim that their threat made him not to report. If he did not report on that day, it was expected that after he became aware of the death of the deceased, he could have reported the incident. His claim for fear of being harmed does not justify his failure to report. This leaves doubt on whether he identified the people responsible for the crime and in fact, makes this court to doubt the credibility of his testimony.

Two, it is in evidence that the deceased was murdered and his body recovered on 18th April, 2022 but PW5 reported five months later in October, 2022. He claimed that he reported after the accused persons were arrested as they could no longer harm him. But he admitted in his evidence that only two accused persons were arrested and one among the three was still at large and for that, the danger if any, was still there. If his delay in reporting was because of fear of being harmed, he could have known that, such danger was still there for one of the accused persons was yet to be apprehended. In my view, PW5 was unable to establish any danger that could befall him by deciding to report the incident immediately after he was discharged by the assailants or when he became aware that the person he carried on his motorcycle, was found murdered. His delay in reporting brings doubt on whether he clearly

identified the assailants. The conducts of PW5 after the alleged incident makes this court to doubt the credibility of his testimony and an inference that may be, he made a report to clear his name from vindictive evidence showing that he carried the deceased's body on his motorcycle. Apart from not having clear and direct evidence on condition favouring proper identification, PW5 was unable to demonstrate the danger that could have him not to report the crime on the earliest possible moment.

On the last question as to whether there is evidence connecting the accused with the offence of murder, the prosecution side submitted that the available evidence directly points at the accused person and his fellows as people responsible for the death of Juma Mbagi. It was however argued by the defence counsel that prosecution evidence does not prove the case beyond reasonable doubt. He submitted that, the testimony by PW5 lacked corroborative evidence and since the available evidence is circumstantial, the prosecution had duty to produce expert evidence to prove that the accused had direct connection with the death of the deceased. He referred the High Court case, **Republic Vs. Miriam Stephen Mrita and another**, Criminal Session No 103 of 2018, at DSM, page 154 which held that corroborative evidence from the expert was necessary to support circumstantial evidence.

Referring section 143 of Tanzania Evidence Act, Cap 6 2022 and the cases of **Justine Hamis Juma Chamashine Vs Republic**, (supra) and **Isaya Renatus Vs Republic**, Criminal Appeal No 542 of 2015, CAT at Tabora, Mr. Mkonyi submitted that the prosecution side is free to present those witnesses which they think will prove their case. To him, the evidence presented by the prosecution side satisfactorily proved the case against the accused person. He explained that the evidence of PW5 was corroborated by PW3 Kibwana whom Eusebi and Raphael visited in need for herbs and confessed to him that they were responsible for the death of Juma Mbagha. That, such evidence was also supported by PW4 who claimed that Emilian Gervas informed her that the people responsible for murder were Eusebi, Raphael and Charles Kagambo. That, the evidence of PW5 was also supported by PW6 who is the investigator as he narrated the story of PW5 and Exhibit PE2 which is a sketch map of the scene of crime showing the place the deceased's body was recovered. He added that, the area where the body was recovered is the same area which PW5 claimed to have dropped the accused and the deceased. He insisted that such evidence although circumstantial, proves that the people who caused death to the deceased was Charles Kagambo and his two fellows. He was of the view that, since the accused and his fellows were the last to be

seen with the deceased, the court should draw an inference that they were the ones who murdered the deceased.

I agree with the submission by Mr. Mkonyi that the prosecution side are free to bring to court those material witnesses and exhibits which they think are relevant to prove their case. Indeed, out of a long list submitted during committal and preliminary hearing, only six witnesses were preferred by prosecution side together with two exhibits which are report on postmortem examination and sketch map of the scene. The argument by the defence counsel that the expert evidence was crucial in linking the accused with the offence is weak for he was unable to demonstrate how such expert evidence was much relevant in linking the accused person in court with the murder. I therefore subscribe to the argument in the above cited cases that the defence preference of evidence was not necessarily the prosecution preference in proving their case and failure to tender expert report in this case does not invalidate other available evidence.

Now assessing the available prosecution evidence, it is clear that only PW5 told a story related to the identification of the last people to be seen with the deceased. I agree with the defence counsel that circumstantial evidence need corroboration but my emphasis is the evidence that needs corroboration must in itself be credible. In other

words, we need credible evidence of PW5 before we could need such evidence to be corroborated by other witnesses and, or exhibits.

In this case, I do not find PW5 to have a credible story tale which needed corroboration by other witnesses. As well discussed above, there are number weaknesses observed in the testimony of PW5. Apart from the weaknesses in PW5's testimony, there is no other evidence which could be safely relied upon to corroborate PW5's testimony and come up with a conclusion that the accused person murdered the deceased.

The evidence by PW3 Kibwana is that, Eusebi and Raphael visited him in need for herbs and confessed to him that they were responsible for the death of Juma Mbagi. But such confession is weak and cannot be considered to support the case as it was not made to a proper authority. It is in evidence that PW3 admitted that the accused in court one Charles Kagambo never confessed to him for the murder as he was not among the people who went to his house to seek for herbs. For that reason, the evidence of confession by PW3 cannot be relied upon to conclude that the accused committed the offence.

Similarly, the evidence by PW4 is weak and cannot be relied upon to conclude that the accused murdered the deceased. PW4 claimed that Emilian Gervas told her that the people responsible for murder were Eusebi, Raphael and Charles Kagambo because Gervas heard Charles

Kagambo claiming for his money from Raphael on a claim that they killed Juma Mbaga for him. That evidence is purely hearsay and the principle of law is clear that hearsay evidence cannot be relied upon in conviction. The evidence by PW6 who is the investigator is also hearsay in relation to how the accused was identified as he narrated the story on what he heard from witnesses he interrogated, who also heard from other people. His direct evidence is only on what he witnessed after the deceased's body was discovered.


From the above discussion, this court is satisfied that there is no any prosecution witness who successfully established that the accused person is responsible for the death of Juma Mbaga. The circumstantial evidence in this case does not build unbroken chain of events sufficient enough to prove the case against the accused person. Subscribing to the wording in the case of **Didas Siria Vs. the Republic**, Criminal Appeal No. 20 of 1979 (unreported), it cannot be said that the circumstantial evidence in this case is such as to lead to the inevitable conclusion that the death of the deceased was the act or contravance of the accused person and that there is no alternative which can with reasonable probability account for the death of the deceased.

From the above discussion, this court finds that, the prosecution evidence leaves doubts in number of ways as it was demonstrated above,

and the same are resolved in favour of the accused person. The evidence from the prosecution witnesses in totality does not prove the offence of murder in the required standards, that is, beyond all shadows of doubt. I therefore find the accused person Charles Mgasu @ Kagambo not guilty of murder and acquit him from the charges.

DATED at **MOROGORO** this 12th day of March, 2024




D.C. KAMUZORA
JUDGE