**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**MBEYA DISTRICT REGISTRY**

**AT MBEYA**

**CRIMINAL SESSIONS CASE NO. 7 OF 2020**

**REPUBLIC**

**VERSUS**

1. **JACOB S/O ENOCK SHINDIKA**
2. **BOAZI S/O MUDI SAIDI**
3. **RASHIDI S/O RAMADHANI MWAULEZI**
4. **JAPHET S/O BONIPHACE SANGA**

## JUDGEMENT

*Date of last Order: 02.12.2022*

*Date of Judgement: 30.12.2022*

**Ebrahim,J.:**

Jacob Enock Shindika, Boazi Mudi Saidi, Rashidi Ramadhani Mwaulezi and Japhet Boniphace Sanga **("the accused persons")** have been arraigned in this court collectively and jointly charged with the offence of murder **c/s 196 and 197 of the Penal Code, Cap 16 RE 2022.**

It is alleged by prosecution side that the above named accused persons on 15th day of August 2018 at Itumbi Hamlet in Matundasi Village within Chunya District in Mbeya region murdered one Mwasi Mwangembe **("the deceased").**

All accused persons pleaded not guilty to the charge.

In proving their case, prosecution called ten witnesses (10) and tendered seven exhibits (7). The defense side called four witnesses, the accused persons themselves and tendered two exhibits.

In this case, the deceased was the wife of **Mr. Luheta Nhandi Limbu** who testified as **PW1**. He told the court that the incident that led to the death of his wife occurred on 15th August 2018 at around 1930hrs at his home where he was living with the deceased, his two children and his young brother namely Mgema Nhandi Limbu. He said by then he was living at the compound of Mzee Omary Bariadi Mapesa, at Itumbi, in Chunya. He was in a business of buying gold and his office was at his house.

Narrating the unfortunate incident, he said on the said date of 15th August 2018 at around 1930hrs he was visited by the 1st accused i.e., Jacob as he was about to close the office. He said Jacob, wanted

to know if his fellows whom he had come with at PW1's place a day before had come. Then Jacob left and went to a nearby café. Soon after he left, there emerged four youngsters that Jacob was asking about holding one sulphate bag filled with sand containing gold. PW1 said they asked for a solution (material) to "chenjua" gold from the sand. Before they could begin their job Jacob appeared and they did the job "(chenjua)" for about 2 hours. As it was already late he asked them to leave the sand with him and continue the next day but they asked him to bear with them as they had no money to eat. He recognized and touched Jacob in the dock and also touched the 2nd, 3rd and 4th accused persons as the ones who accompanied Jacob. He said he could only remember them by face but did not know their names.

As they requested to proceed "uchenjuaji", PW1 left and returned later to check on them. It was when he was attacked by a heavy metal on the head by the 4th accused person. The 4th accused pulled a gun and the machete and cut him on his right hand near the fingers. Explaining the ordeal further, he said at the same time, Jacob and two other youngsters went to his young brother who was

nearby the door to his office and to his wife who was in the bedroom. He pointed to the 3rd accused as the one who accompanied Jacob with another person who is not in this case. As he tried to stand up, he said he was kicked by the 2nd accused and fell down. They said they wanted money and if he does not give them, they will kill him. Later, they tied his hands and legs by a rope and carried him to the living room. They also brought to the living room his wife who was naked holding an eight months' child, his young-brother and his three years old child who was put in a sulphate bag so that he could not cry. They said they would start killing them because the money is not enough and they went outside to argue about it. Eventually they agreed to kill them.

The 3rd accused took a damp cloth and put it in his mouth and tied it at the back of his head. He said his young brother was put at a nearby corridor and left him under the supervision of the 4th accused person. Others went to his wife and his young-brother who were about two steps from where he was. He gave them a key to the office where Jacob and two youngsters went to open the drawer and took 260gms of gold. Thereafter, the 3rd accused attacked his

wife and on the head by using a machete. They also cut his young-brother with a machete on the head.

PW1 testified also that before they left, Jacob pierced him near his eye and pierced both eyes of his wife and broke her jaws. He also pierced his young-brother's eyes and one of the eye was badly damaged in such a way that he can no longer see. When they left at first they were somewhat conscious and in a very bad state. Later, they totally lost conscious except for his young brother who did not lose conscious. PW1 gained consciousness at Chunya hospital and by then both his wife and young brother were also at the hospital.

Testifying on how he identified them, he said much as it was nighttime around 1930hours, he managed to identify them from a big and very bright solar light in his house and office. He explained also that there were two lights outside the house and one big light at the sitting room. There were also two lights at the veranda.

Speaking on how he knew the other three accused persons apart from Jacob, he said he had seen them several times because they

were his customers who would sell him gold and at times they asked him for money.

He said on 11.09.2018, he was called at the police station for identification of the accused persons and managed to identify the 2nd and 4th accused persons from the identification parade. He also identified the 3rd accused person on 15.11.2018. As for his wife, her conditioned worsened and she died on 17.09.2018.

Responding to cross examination questions, he said the 2nd and 4th accused persons have different heights and complexion. He also said that from1930 hours when the accused persons arrived to the time they finished attacking them, approximately 4 hours had passed. He also said that it was the 2nd time Jacob and his crew came to his place for business at night. He also said that he recorded his statements on 11.09.2018 and 15.11.2018 after identification parade.

The identification parade of the 3rd and 4th accused was prepared by **PW2 G.2420 Dt. Corporal Samwel.** He told the court that he prepared the parade in the morning hours of 11.09.2018. He took out

10 people who look similar by their appearance and handed them to police Nyangenyange who conducted the parade. He pointed to the 3rd and 4th accused persons as among people in the parade and whom he told them that he is taking them for identification parade.

Responding to cross examination questions he said 4 people looked similar by their physique with the 4th accused; and four people looked similar with the 3rd accused.

The death of the deceased person was confirmed by the testimony of **PW3, DR William John** who told the court that upon performing the post-mortem examination to the deceased on 18.09.2018, he observed that the deceased body had injuries on the head. Moreover, various bones on her head were broken. He said the injuries could have been caused by a sharp ending object. He also observed deep wounds on the deceased's head and concluded that the death of the deceased was her due to the injuries she sustained on the head. He tendered a Report on Post – Mortem Examination which was admitted as **exhibit "PE 1".**

**PW4: H. 3918 Det. Const. Humphrey Edward Ng'hwani,** testified to have travelled to Singida on 04. 09.2018 to collect the 3rd accused person Rashidi Ramadhani Mwaulezi who was already at Singida Central Police. He said they began their trip back to Chunya Mbeya on 05.09.2018 and arrived around 0500hrs of 06.09.2018. He recorded his cautioned statement the same morning of 06.09.2018 at 0800hrs. The cautioned statement of the 3rd accused person was admitted into evidence as exhibit **"PE 2"** after the court overruled the objection raised on the voluntariness of recording the statement after conducting trial within a trial.

PW4 also recorded the cautioned statement of the 2nd accused person and the same was admitted into evidence as **exhibit PE3** after the court overruled the objection raised in terms of **section 58(4)(a and (b) and (6) (a) and (b) of the Criminal Procedure Act, Cap 20 RE 2022.**

Responding to cross examination questions, PW4 said that Rashidi said he was arrested on 29.08.2022 and six days had passed before he had gone to collect him. He admitted that he Police at Singida had authority to record his statement.

**PW5: Mr. Raymond Felician Rukomwa,** prepared the identification parade on 15.11.2018 the 2nd accused was identified during the parade. He tendered the identification parade Register **(PF.186)** in respect of Boaz Mudi which was admitted as **exhibit "PE 4".**

**Superitendent William Paul Nyamakomago** testified as **PW6.** He testified that together with other police officers they visited the crime scene. They found PW1 at the hospital in Chunya and he told him that he knew Jacob Enock Shindika among those five people who had invaded them because he used to go to their house now and then **"kukamatisha dhahabu".** He also said that PW1 told him he could remember other culprits if he sees their faces. PW6 said he received information concerning Rashid Ramadhani Mwaulezi that he is in Singida on 29.08.2018 and he was arrested at Bwawani area in Singida after he contacted with OC-CID Singida.

On 04.09.2018, I he directed DC Humphrey to go to Singida to collect the accused. DC Humphrey returned with the 3rd accused on 06.09.2018 early in the morning. He testified further that they arrested Japhet Boniface Sanga at his home at Motondo, Matundasi Ward at

0100hours of 06.09.2018. They returned to the station at 0630 hours where they found Rashid had already been brought from Singida.

He testified that Boaz was arrested on 16.09.2018 around 2200 hours and he received information concerning Jacob Shindika that he was at Mwanza Nyahunge area in October 2018.

**PW7: ASP Blasius Stanslaus Nyangenyange,** prepared identification parade on 11.09.2018 around 1230hrs for Rashid Ramadhani and Japhet Boniface (the 3rd and 4th accused persons respectively). He said he was assisted by police Samwel and Daniel. He tendered Identification Parade Register (PF 186) for Rashidi Ramadhani and Japhet Boniphace which was admitted as **exhibit "PE5". PW8, E 3236 Det. Sgt Boniface** testified to have recorded the cautioned statement of Jacob Enock Shindika on 09.11.2018 at 1400hrs. However, the statement was not admitted into evidence as the court sustained the objection that the recording of the statement contravened the provisions of section **c/s 50 (1)(a) of the Criminal Procedure Act, Cap 20 RE 2022** which requires the accused person to be interviewed within 4 hours after his arrest. **PW9, G. 7709, Det Corporal Dickson** recorded the cautioned statement of Japhet

Boniface Sanga on 06.09.2018 at 0700hrs. The cautioned statement was admitted into evidence as **"exhibit PE6"** after the court overruled the objection raised in respect of **section 27(1) and (2) of the Evidence Act, Cap 6 RE 2022** where it was claimed that the accused person was forced to sign the statement that he did not record.

On 14.11.2022, counsel for the 1st accused person filed notice of alibi attaching a copy of bus ticket that on 15th August 2018, he was travelling from Mwanza to Dar Es Salaam by a bus namely Best Line with Registration No. T 618 CPD. Similarly, on 18. 11.2022, counsel for the 3rd and 4th accused persons filed notice of alibi that on the night of incident the 3rd accused person was in Singida Region and as for the 4th accused person he was at Matondo, Matundasi, Chunya at his home with his late wife.

Their notices were followed with a notice from prosecution side praying to add one witness and one exhibit (a letter) with two attachments one being a motor vehicle owner history and another motor vehicle Audit Trail Report. There being no objection registered

from defense side, **Pili Isihaka Ditopile,** a Finance Management Assistant from TRA was called into stand as **PW10.**

She informed the court that she works at Tanzania Revenue Authority (TRA) - Mbeya, as an in-charge in Vehicle and Licensing department which deals with registration of the vehicles and all other issues pertaining to the change of use, colour etc. She explained to the court the details regarding Motor Vehicle with Registration No.T618CPD that according to their system the said Registration Number is not a car but a Motor cycle make Sanlg registered in 2013. She tendered a letter responding to NPS office together with Motor Vehicle Audit Trail Report and Motor Vehicle Owner History which were admitted in evidence as **exhibits PE 7A, 7B and 7C** respectively. She explained that the first registration of the said motor cycle was on 20.09.2013 and the owner is WU ZHOU Investment Co. Ltd and the ownership has never changed todate. Responding to cross examination questions she said normally motor cycles registration starts with MC and all cars are registered by no. T. She responded further that in Tanzania there is difference between

registration numbers of Motor Cycle and Motor Vehicle and that WHU ZHOU has a Tin number.

After closing of prosecution case, the court found all four accused persons with a case to answer and addressed them in terms of **section 293(2)(3) and (4) of the Criminal Procedure Act, Cap 20 RE 2022**.

In their defence, all four accused persons protested their innocence. **Jacob Enock Shindika (DW1)** was the first defence witness. He told the court that he does the business of distributing gas at Komakoma, Mwananyamala, Dar Es Salaam. On 09.10.2018 he received information on the death of his young brother Revocatus Shindika and on 11.10.2018 they buried their brother at Sengerema. On 12.10.2018, around 1200hrs police arrived from Mbeya asking for their deceased brother but instead they took him to Nyahunge Police Post telling him that he was supposed to give his statement at Mbeya. He said he was taken to Sengerema from Nyahunge on the same day and to Mwanza Central Police Station on 15.10.2018 followed by a trip to Mbeya on 07.11.2018. They arrived in Mbeya on 08.11.2018. On 09.11.2018 around 0800 hours he arrived at Chunya

Police Station and was put in a lock-up. He said police did not ask him anything and OC-CID told him that he will be taken to Mbeya so that he can be taken back to Mwanza.

Testifying about his alibi, he said he bought a ticket on 14.08.2018 from Best line Bus Mwanza and on 15.08.2018 he travelled to Dar Dar Es Salaam. The Bus ticket – Best line with no. 3432 was admitted into evidence as **exhibit "DE 1".** He read the bus registration no. as T618CPD and that he arrived at Dar Es Salaam on 15.08.2018 around 2200hrs. He denied to know anything about the murder of Mwasi Mwangembe and he also denied knowing Boaz Mudi Saidi, Rashidi Ramadhani Mwaulezi and Japhet Boniphace Sanga until he met them at Mbeya Resident Magistrate Court on 03.12.2018 where they were all joined and the charge of murder was read over to them. He said his late brother Revocatus Shindika was a miner at Chunya, Mbeya, Itumbi. He prayed for the court to see that he is not involved.

Responding to cross examination questions, he admitted that Jacob and Revocatus are two different names and that the cautioned statements of the 2nd, 3rd and 4th accused person mentioned both

names of Jacob and Revocatus. He admitted also that he is not being confused with his brother. He further admitted to have given the bus ticket to his advocate before tendering it in court and that the Registration No. on the bus ticket he tendered in court is No. T618 CPD. **DW2 Boaz Mudi Saidi,** said he was arrested on 13.09.2018 as he was coming from Mbeya Town going to Makongolosi to buy illicit drugs namely bhang. He said by then he was 19 years old. On 14.09.2018 while at Chunya police Station he was taken to the interview room where he was asked where he buys and sells bhang. When he refused to volunteer the information police they beat him. He was taken to Chunya District Hospital on 17.09.2018 and issued with a PF3. The PF3 was admitted into evidence as **"exhibit DE2".** He was taken back to the police station and around 2300hrs OC-CID and Humphrey took him back to the interview room and wanted him to sign a paper that was already written or else they said they would make him disappear. He signed. He denied to have killed Mwasi nor to have been to the place called Itumbi in Matundasi Village. He narrated further that on 15.11.2018 he was taken out and told to stand in a line where a person passed infront of them and

then at the back and identified Athumani Said and left. He testified further that among others in the line was Boaz Hussein. He said he saw Jacob Shindika, Rashidi Mwaulezi and Japhet Sanga for the first time on 13.12.2018 at the Resident's Court Mbeya. He prayed to be set free.

Responding to cross examination questions, he said he was beaten by police so that he can show them where he was buying and selling bhang and it was the reason he was sent to the hospital. He also admitted that they did not torture him to talk about murder incident but rather to tell them where he buys and sells bhang. He said when he signed the statement, he had not told OC-CID about the 1st, 3rd and 4th accused person or his particulars. He admitted also that they did not raise objection that he was beaten and forced to sign and that he did not mention Kevin Alex during the committal.

Counsel for the 2nd accused prayed to call additional witness called Boaz Hosea who is a prisoner at Ruanda Prison, Mbeya. The summons was accordingly issued by the court. However, on 02.12.2022, counsel for the 2nd accused registered to the court that

they no longer wish to call such witness and the case was closed in respect of the 1st and 2nd accused persons.

The third defence witness was **Rashid Ramadhani Mwaulezi (DW3).** He said he was stopped by traffic police in Singida on 29.08.2018 and sent to Singida Central Police where he was interviewed for a traffic case. He said he was taken to Mbeya, Chunya after 5 days and on 06.09.2018 six police took him to the interview room and brought a paper which was already written wanting him to sign it. He refused and wanted to read it first but they did not let him. It was when they started beating and after being beaten and forced to sign, he signed.

Speaking about his alibi, he said on 15.08.2018 he was at home in Singida where he lives with his mother. Like the other two accused persons, he denied knowing the 1st, 2nd and 4th accused persons and that he saw them for the first time on 13.12.2018 in court. He denied to know anything about the offence he is charged with and that he has never been to the said village. He prayed to be set free.

Responding to cross examination questions, he insisted that he did not give his statement at the Police station and that he was beaten up to sign the statement. As for identification parade which was conducted on 11.09.2018, he said he was taken outside and told to take off his shirt. Three other people were identified but not him. Responding further, he said he was beaten by police Humphrey and that by 06.09.2018 he had not told Humprey the names of Jacob Shindika, Boaz Saidi and Japhet Sanga. He denied that DW2 and DW1 arrived in Chunya almost after one month as they said they arrived on 13.09.2018 and 09.11.2018 respectively of which by 06.09.2018 police did not know Jacob or Boaz because they came later. He said all his life he has been living with his mother who is still alive and that she is the only person who could confirm that on 15.08.2018 he was with her at Singida and no –body else.

The last defence witness was **Japhet Boniface Sanga** who testified as **DW4**. He said he was arrested on 03.09.2018 around 2100hrs while at home and taken to Chunya Police. He was not told the offence that he was charged with. On 06.09.2018 he was taken to a room and told to sign the statement found on the table. He asked if he could

read it but they refused. They hand cuffed him and put an iron rod between his legs and put him on the table. He said, to rescue his life he signed. He explained the distance between Matundasi and Itumbi to be like 3 to 4 kilometers and on15.08.2018 after finishing his job he went home to rest. On the night of 15.08.2018 he was at home sleeping with his late wife namely Sikujua Mwita. As for identification parade , he was lined up on 11.09.2018 together with like 10 or 11 people. He said police told him to wear shoes and a belt and a person passed by in front and at the back and identified four people who are not in court by touching them. He said he saw Mwaulezi for the 1st time in court. Responding to cross examination question, he said he went to Justice of Peace on 09.09.2018 at Chunya Urban Primary Court before Hon. Masele. He said he did not mention Jacob and Boaz in his statement but he was tortured until he signed. He knew Jacob and Boaz Mudi on 13.12.2018 when he was sent to court.

Responding to further cross examination questions, he admitted hearing the statement being read in court mentioning Jacob and Boaz and that Boaz said he arrived in Chunya Police Station on

13.09.2018 while he arrived on 06.09.2018. Thus, when he signed Boaz had not yet been brought to the police station. He agreed that he has not tendered death certificate to confirm the death of his wife because she died when he was in custody. He complained that the Republic has not brought his extra-judicial statement which he denied to have committed the offence but they brought his statement that he admitted the offence.

In light of the above reproduced evidence the issue is whether prosecution side managed to prove that the mentioned accused persons in this case murdered the deceased?

It is the position of the law that in a criminal case the burden of proof is always on prosecution and it never shifts - **Section 3(2) of the Evidence Act, CAP 6, R.E. 2022**. The standard of such proof is beyond reasonable doubt - **Boniface Siwinga V Republic**, Criminal Appeal No. 421 of 2007 CAT (Unreported). Further, it is a position of the law in a murder case like the instant one that prosecution side is required to establish two things; **actus reus** and **mens - rea with malice aforethought.** This position has been well expounded by the Court of

Appeal of Tanzania in the case of **Mohamed Matula V Republic** [1995] T.L.R 3, that:

> *"Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused; the onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence"*

Deriving from the above quoted principle, in this case there is no dispute regarding Actus Reus as the deceased one Mwasi Mwangembe is dead. Her death is exhibited by Exhibit PE 1 and the testimony of PW3. Therefore, the issue for consideration is whether with **Malice Afore Thought, Actus Reus** was committed by the accused persons.

As could it could be gathered from prosecution evidence, they are relying on the testimonies of PW1 as a direct witness who testified to have recognized the 1st accused person and identified the remaining accused persons on the incident night at his place. Another pieces of evidence relied by prosecution side are the repudiated cautioned statements of the 3rd and 4th accused persons as well as the cautioned statement of the 2nd accused person,

identification parade and all accused persons their being mentioned by co-accused.

As I begin to evaluate the evidence presented by prosecution, I find it apt to firstly address the issue of credibility and reliability of the testimony of PW1 as the key witness in this case. In the same vein, I shall address the issue of recognition and identification.

It is a rule of the thumb that every witness is entitled to credence and his/her testimony accepted unless there are good and cogent reasons not to believe such a witness. Good reasons for not believing a witness include the fact that the witness has given improbable or implausible evidence and or the evidence has been materially contradicted by another witness or witnesses. This position has been well addressed by the Court of Appeal in the case of **Khamis Said Bakari VR,** Criminal Appeal No. 359 of 2017 which cited with approval the case of **Goodluck Kyando vs Republic**, [2006] TLR 363 where it was held that:

> *"every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness".*

PW1 testified at lengthy that on the ordeal of 15.08.2018 which occurred around 1930hrs as he was about to close his office which is at the place that he lives. He then explained at length on the amount of time they took pretending to "chenjua" gold from their sand and later attacked him and his family and they left with money and gold. He explained the source of light at his place being a solar light and the fact that accused persons were at his place for almost four hours. He also said that it was second time that the 1st accused was coming to his place with his group. He testified also that he identified the 2nd and 4th accused persons on 11.09.2018 and the 3rd accused person on 15.11.2018.

The fact that identification parade was conducted on 11.09.2018 was confirmed by PW2 and PW7 being the police officers who conducted the said parade; as well as DW3 and DW4 who were present during the parade. As for the identification parade conducted on 15.11.2018 the same was confirmed by PW5 and DW2.

One may notice here that PW1 made different statement on the accused persons identified on 11.09.2018 that it was 2nd and 4th

accused while other witnesses said it was the 3rd and 4th accused persons. As for the parade conducted on 15.11.2018, it was only the 2nd accused who was identified and not 3rd accused person as testified by PW1.

Beginning with the issue of which accused person was identified when; I am convicted to assert that human recollection is not infallible and the same would not be a very alerting discrepancy because firstly the incident occurred almost more than four years now. Thus, in considering the passage of time people forget to tally some details. I am therefore of the views that the mixing up of dates of identification parade with the respective accused persons cannot cause the evidence of PW1 to be discredited considering that indeed the identification parade was conducted on the mentioned dates of 11.09.2018 and 15.11.2018. At this juncture I find it apt to seek my inspiration from the wisdom of the Court of Appeal in the case **Koivogui V Republic**, Criminal Appeal No. 469 of 2017 where it was held that:

> *"Thus, without prejudice, the discrepancies are minor and did not go to the root of the matter considering that, the prosecution*

*witnesses were testifying after the expiry of five years from the occurrence of the fateful incident. We are fortified in that account because human recollection is not infallible since a witness is not expected to be right in minute details when retelling his story...that, due to frailty of human memory and if the discrepancies are on details, the Court may overlook such discrepancies"*

In similar circumstances, the Court of Appeal in the case **Maramo s/o Slaa Hofu and 3 Others v. Republic, Criminal Appeal No. 246 of 2011 (unreported)** addressed the issue as to whether the minor discrepancies in prosecution case could damage the whole prosecution case and made the following findings:

*"... normal discrepancies are bound to occur in the testimonies of witnesses: due to normal errors of observations such as errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Minor contradictions or inconsistencies, embellishments or improvements on trivial matters which do not affect the case for the prosecution should not be made a ground on which the evidence can be rejected in its entirety"*

Inspired by the above guidance, I find no cogent reason to discredit the testimony of PW1 and I accordingly find him to be credible witness and I accord his testimony the weight it deserves.

Nevertheless, I shall now address the issue of identification and identification parade.

Admittedly, as already intimated earlier, prosecution case greatly relies on the evidence of visual identification by PW1 particularly of DW1. Court of Appeal said in the case of **Mengi Paulo Samweli Luhanga and Another V Republic**, Criminal Appeal No. 222 of 2006 (unreported) that:

> *"eyewitnesses' testimony can be a very powerful tool in determining a person's guilt or innocence".*

From that position of the law and on the basis of the powerful nature of eyewitness, Court of Appeal again in the case of **Salim S/O Adam @Kongo @ Magori V Republic**, Criminal Appeal No. 199 of 2007 illustrated the salutary principles of law on eyewitness identification that:

> *"(a) Evidence of visual identification is of the weakest character and most reliable which should be acted upon cautiously when court is satisfied that the evidence is watertight and that all possibilities of mistaken identity are eliminated (**Waziri Amani V Republic** (1980) T.L.R 250 and **Nhembo Ndalu V Republic**, Criminal Appeal, Criminal Appeal No. 33 of 2005 (unreported));*
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> *(b) In a case depending for its determination essentially on identification be of a single witness or more than witness. Such evidence must be watertight, even if it is evidence of recognition (**Hassan Juma Kanenyera V Republic** (1992) T.L.R 100 and Mengi P.S. Luhanga & Another V Republic (supra)) and,*
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> *(c) In identification cases, witness must clearly state in their evidence conditions favouring a correct identification or recognition of the accused (**Raymond Francis V Republic** (1991) T.L.R. 100, **Issa Mgara @ Shuka V Republic**, Criminal Appeal No. 37 of 2005, **Mathew Stephen @ Lawrence V Republic**, Criminal Appeal No.*

*16 of 2007, **James Kisabo @ Mirango & Another V Republic**, Criminal Appeal No. 261 of 2006 (all unreported)).*"

Coming to the evidence produced before the courts PW1 said he recognized DW1 as he knew him before because he was his customer and mentioned him by his name as Jacob. He touched him at the dock. He said he identified the other people that accompanied Jacob by their face but did not know their names. Hence, the identification parade was conducted to see as to whether he can identify the said people.

Again, as alluded earlier, this court already found PW1 to be a credible witness hence believing him that he recognized DW1 much as he was a single witness. He explained how DW1 and other people went to his office asking him as to whether the people that he came with the other day had come to his office. This clearly show that they were people who knew each other and DW1 used to visit PW1's office in several occasions. He said that DW1 and his group used almost four hours from when they came to his office to the time that they attacked them and pierced their eyes. They even had conversation with him wanting him to give money and gold. PW1 explained that he was using solar light with a very bright light in his

house as well as in his office, outside the house and at the veranda where "uchenjuaji" was done.

I am alive to the principle set in **Hassan Juma Kanenyera's** case (supra) on the rule of practice for corroboration on identification of a single witness in unfavorable conditions. In the mentioned case, the Court held as follows:

> *"it is a rule of practice, not of law, that corroboration is required of the evidence of a single witness of identification of the accused made under unfavourable conditions;* ***but the rule does not preclude a conviction on the evidence of a single witness if the court is fully satisfied that the witness is telling the truth"*** (emphasis is mine).

In this case I hurriedly conclude that the condition was favorable from the testimony of PW1 which was not seriously contested on the issue of light. I find the explained source of light was enough to identify a person you know whom you have an encounter on the ordeal for four hours. The court of Appeal accepted the evidence of recognition in the case of **Abdallah Rajab Waziri VR**, Criminal Appeal No. 116 of 2004, (CAT) where recognition was from match box light. In the case of **Fadhili Gumbo Malota& 3 others VR,** Criminal Appeal No 52/2003, CAT, DSM where the witness knew the accused by name. Coupled with the fact that he mentioned the accused at the

earliest stage to PW6 - **Ahmad Sekule and 9 others VR,** Criminal Appeal No 131/2009, CAT and **Wangiti Mwita & Another VR**, Criminal Appeal No 6 of 1995; the evidence of PW1 alone suffices to prove that indeed he recognized DW1 – See also **Section 143 of the Law of Evidence Act, CAP 6 RE 2022,** that no number of witnesses is required in law to prove a fact at issue.

I have arrived to the said position after I have had careful consideration of the defence of alibi levelled by DW1 in terms of **section 194 (4) and (5) of the Criminal Procedure Act, Cap 20 RE 2022**.

I am abreast of the position of the law that accused person has no duty of proving his alibi. It is enough for him if the defence raises a reasonable doubt. It is the duty of prosecution to discredit it. This principle was held in the case of **Obadia Msese V Republic**, Criminal Appeal No. 243 of 2008(unreported); **Leonard Aniseth V R** [1963] E.A 206; and **Hassan Mawazo VR,** Criminal Appeal No. 11/2014; to name but a few.

The question now comes as to whether the defence of alibi raised by the 1st accused person managed to shake prosecution case?

As evidence would reveal, DW1 supplied to the court a bus ticket that he bought on 14.08.2018 from Best Line Bus and that he travelled from Mwanza to Dar Es Salaam on 15.08.2018. The Bus ticket – Best line with no. 3432 was admitted as **exhibit "DE 1".** He read the bus registration no. as T618CPD and that he arrived at Dar Es Salaam on 15.08.2018 around 2200hrs. In order to discredit the defence of DW1, the notice of alibi prompted prosecution side to add another witness from Tanzania Revenue Authority (TRA)to seek clarification of the particulars of the said Motor Vehicle. According to the testimony of **PW10**, the said Registration Number is not a car but a Motor Vehicle make Sanlg which was registered in 2013 and it is owned by WU ZHOU Investment Co. Ltd. She tendered - **exhibits PE 7A, 7B and 7C** respectively to confirm her testimony.

DW1 in giving his testimony in chief said the Vehicle Registration Number as per exhibit DE1 is T619CPD.

I agree that there is no Tin number reflected in exhibits **exhibits PE 7A, 7B and 7C**. However, there is no evidence to dispute that the said documents were not extracted from Tanzania Revenue Authority which indeed is the authority dealing with the registration of all motor vehicles. Again, whether there are circumstances that the motor cycle can begin with letter T instead of MC, still there is no challenging evidence to show that there is a possibility that there could be two similar numbers on different motor cycles/motor vehicle. That would be the reason that once registration number T. 619CPD was keyed in TRA system, it only came with one information that the registered number is a motor cycle, owned by WU ZHOU Investment Co. Ltd, make SANLG, Model SL 125-5 Chassis No. LBRSRPJB06D9001691.

From the above therefore, and in considering the evidence adduced by PW1and even the fact that DW1 admitted that he is not being confused with his late young brother Revocatus, I find that prosecution has managed to discredit DW1's defence of alibi as what he brought to court as proof that he was not at the crime scene during the commission of the alleged offence is not true.

Much as the accused person has no duty to prove his innocence, the law is also clear that a lie of an accused person may corroborate prosecution evidence as held by the Court of Appeal in the case of **Nkanga Daudi Nkanga V Republic**, Criminal Appeal No. 316 of 2013.

For that reason and for other reasons that shall be apparent in the course of discussing other issues, I find that PW1 positively recognized DW1 on 15.08.2018 at his place.

Now coming to the issue of identification parade, prosecution evidence states that the 2nd, 3rd and 4th accused persons were identified during the identification parade.

The identification parade is done to lend assurance to the identification of an accused person/ suspect whose identification is not certain. The identification parade has corroborative value only and on its own it has no probative value. Same as dock identification where the accused has not been previously identified. Court of Appeal in discussing the value of identification parade

alluded in the case of **Yusuf Abdalla Ally V DPP**, Criminal Appeal No. 300 of 2009, CAT, Zanzibar that:

> *"An identification parade, on its part, is not substantive evidence. It is admitted only for the collateral purposes and usually is used for purposes of corroboration. The outcome of such parade is by itself of no independent probative value. It is for the purpose of ascertaining whether a witness can identify a suspect of the offence".*

Identification parades are conducted accordance to **PGO 232** issued by the Inspector General of Police by virtue of the powers bestowed on him under **section 7(2) of the Police Force and Auxiliary Services Act Cap 322 of the Revised Edition, 2019**. The order stipulates among other things the rights of the suspects, and maintaining of the records of the whole exercise. The need to comply with the procedure has been emphasized in the case of **Kanisius Mwita Marwa V R**, Criminal Appeal No. 306 of 2013, where a number of authorities on the subject have been cited. In the cited case of **Kanisius Mwita Marwa (supra)** the Court of Appeal made an observation as follows:

> *"The Order stipulates mainly the procedure of conducting the parade, the rank of police officers who can conduct the same. (in terms of Rule 2 (b) thereof, an Assistant Inspector and above), the rights of the suspect, and the making and maintenance of the*

*records of that exercise at the end of it all. The need to comply with the procedure in this regard has been emphasized in many cases, including those of Francis Majaliwa Deus and 2 others v. Republic (supra), Raymond Francis v. Republic [1994] T.L.R. 100, and Maisa Lucas Mwita @ Kipara v. Republic, Criminal Appeal No. 119 of 2011 (unreported).* ***Where such procedure may not have been followed, the evidence becomes worthless.*** *As already pointed out, the identification parade in our present case was organized and conducted by PW4. Going by the evidence on record, it is apparent that he did not inform the appellant the right of seeking the presence of his advocate, if any, when the parade took place.* ***Also, at the termination of the parade or during the parade, he did not ask the appellant if he was satisfied that the parade was conducted in a fair manner and did not make a note of his reply.*** *It is clear therefore, that the exercise was unsatisfactorily done.* ***In view of that, we cannot avoid to find and hold that that piece of evidence was worthless entitling us to expunge it from the record as we accordingly do.***

In this case both PW5 and PW7 who conducted the parades are correctly within the rank of Assistant Inspector and above.

However, **Rule 2(s) of PGO 232** provides thus:

*The officer conducting the parade will note carefully in his Identification Parade Register any identification or degree of identification made and any material circumstances connected therewith including any wrong identification, and any remark or objection made by the suspect.* ***He shall ask the witness who makes, the identification; "In what connection do you identify this person?" and shall similarly record precise details of the witness's reply.*** *No other questions are permissible.* (emphasis added).

I went through exhibit PE4 and PE5 and observed that no such answer was recorded to show that the mandatory question as set by the rules has been complied with. The flouting of such procedure is

among ones that has been censored by the Court of Appeal which necessitate this court to accord no weight to exhibits PE4 and exhibit PE5. I accordingly do.

Before going to the defence of alibi of the 2nd, 3rd and 4th accused persons, I shall now embark in discussing the retracted cautioned statements.

Counsel for the 2nd accused objected the admission of his statement on the basis that the provisions of **section 58(4)(a) and (b) and (6) (a) and (b) of the Criminal Procedure Act, Cap 20 RE 2022** was not complied with. The genesis of the cited provisions addresses the police officer recording the accused statement to show the statement to the accused and ask him to read or the police officer to read it to him or cause to be read to the accused person. Again, the law requires the police officer to cause the certificate to be written at the end of the statement and ask the accused to sign the certificate at the end of the statement and also the police officer to sign.

As it is there is no prescribed form set by the law. Nevertheless, the cautioned statement of the 2nd accused is clearly signed by the accused person to confirm that the statement is his and H.3918 D/C Humphrey – PW4 who recorded the 2nd accused's statement duly certified and signed that the accused person read his statement More so, the signatures of the accused person and that of PW4 are conspicuously present in the document.

The 2nd accused in his defence said he was arrested on 13.09.2018 at Chunya coming from Mbeya to purchase illicit drug commonly known as bhang. He tendered "**exhibit DE2" – PF3** to show that he was taken to the hospital on 17.09.2018. He also admitted that the police did not torture him to talk about murder incident but rather to tell them where he buys and sells bhang. He said when he signed the statement, he had not told OC-CID about the 1st, 3rd and 4th accused person or his particulars. He admitted also that they did not raise objection that he was beaten and forced to sign the statement.

From the above concession of the 2nd accused, there is no doubt that his statement was recorded in compliance with the law.

Furthermore, in reading the statement of the 2nd accused person, he explicitly said that he met with the 1st, 3rd and 4th accused person to plan on how to rob the house of Omary Mapesa. He explained at lengthy on how each and every one of them participated from going to the house of PW1 to torturing them including piercing their eyes. In the circumstances, I find no difficult to disbelieve his defence that he knows nothing about the murder of the deceased and that he knew the other accused persons when they met in court. I thus reject his defence and find it as an afterthought.

As for the 3rd accused person, he raised an objection that he was tortured. However, after conducting the trial within a trial, this court observed that the 3rd accused appended his signature in all places that he was required to do so to signify his willingness to do so. Moreover, he admitted that he met PW4 for the first time in Singida and PW4 did not know his history which he explicitly recorded in exhibit PE2. The statement was read in court but neither DW3 nor his advocate challenged the name of his mother not being Suzana Chambala Saamoja. Moreover, I am not shifting the burden but his defence of alibi leaves a lot to be desired. In considering the

offence that he is charged with, he did not even ask the court to see to it that his mother is being summoned to confirm his alibi. Therefore, like 2nd accused person, I also find his defence of alibi to an afterthought and that he voluntarily recorded his cautioned statement. I further find the statement to have the required evidential value to prove the offence of murder that he is charged with and it clearly narrates his direct involvement on the ordeal together with the 1st, 2nd, and 4th accused person.

The same observations falls on the 4th accused person. The fact that he was tortured was an afterthought. He brought no evidence to prove that he sought medical attention it is statement is conspicuously signed and he admitted that he had never seen police officers Dickson or Hassan or Humphrey before 06.09.2018. However, the statement i.e., exhibit PE6 explicitly narrates how they planned the robbery together with the1st, 2nd and 3rd accused persons and how they executed it. The statement tells the incidents after the robbery that they walked together with the 1st accused to Samweli to sell gold and with the money he obtained from the victim's house, he had Tshs. 4,615,000/-. Equally, his defence of alibi is

an afterthought and his cautioned statement proves his involvement in the commission of the offence.

The law on the retracted/repudiated cautioned statement can be derived from the principle set by the Court of Appeal of Tanzania in the case of **Hatibu Gandhi and Others Versus Republic** [1996] TLR 12, when it held that;

> *"A conviction on a retracted uncorroborated confession is competent if the Court warns itself of the danger of acting upon such a confession and is fully satisfied that, the confession cannot but be true."*

A more elaborate position regarding retracted/repudiated confession was given by the Court of Appeal for East Africa in the case of **Tuwamoi Versus Uganda** [1967] 1 EA 84 that:

> *"We would summarise thus a trial court should accept any confession which has been retracted or repudiated with caution, and must before finding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court.* ***But corroboration is not necessarily in law and the court may act on confession alone it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true".*** [Emphasis is mine].

What I could gathered from the foregoing holding is that, as a general rule, for a retracted/repudiated confession to form basis of conviction; it has to be corroborated by other independent evidence.

However, when the court upon seriously warning itself on the dangers of relying on uncorroborated confession finds what is said is nothing but true; the court can proceed to find conviction on such evidence.

Another piece of evidence for the prosecution that features in the instant case is the confession of a co- accused.

**Section 33 (1) and (2) of the Evidence Act, Cap 6 RE 2022** states that:

*33.-(1) When two or more persons are being tried jointly for the same offence or for different offences arising out of the same transaction, and a confession of the offence or offences charged made by one of those persons affecting himself and some other of those persons is proved, the court may take that confession into consideration against that other person.*

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

The principle of the law set under **subsection (2) of section 33 of Cap 6** above was emphasized by the Court of Appeal in the case of **Pascal Kitigwa V R,** (1994) TLR 65 where it was held that;

> *"It is also truism that whether in the form of a confession,* ***or any other types of evidence of a co accused****, to ground a conviction, it*

*must be corroborated as a matter of law (in case of confessions) (s 33(2) of the Evidence Act)* ***or of practice in any other types of evidence of a co accused"*** *(emphasis is mine)*

I have gone through exhibits PE2, PE3 and PE6 where in their statements, all accused persons mention the first accused person and each other being persons whom they planned to invade PW1 the act which they did and consequently there was a loss of life. PW1 said he heard the 1st accused wanting to pierce the victims' eyes because PW1 knows him. Moreover, the contents of exhibits PE2, PE3 and PE6 on what exactly happened are corroborated by the evidence of PW1. The Court of Appeal held in the **Iddi Muhidin @ Kibatamo V Republic**, Criminal Appeal No. 101 of 2008, that;

> *"to corroborate a retracted statement all that is required is some evidence* ***aliunde*** *which implicates the accused and which tends to show that what is said in the confession is probably true".*

Merging the spirit of the cited case with the present case, I find the evidence of PW1 fits well with the contents of exhibits PE2, PE3 and PE6.

Another issue for consideration is the application of the doctrine of common intention provided under **section 23 of the Penal Code, Cap 16 RE 2022** that:

> *"**When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another**, and in the prosecution of such purpose an offence is committed of such a nature that **its commission was a probable consequence of the prosecution of such purpose**, each of them is deemed to have committed the offence".* [Emphasis added]

The above piece of legislation was clearly explained in the case of **Shija Luyeko V. R** (2004) TLR 254 that;

> *"(1) That two or more persons, of whom the appellant was one, each formed an intention to prosecute a common purpose in conjunction with the other or other;*
> *(2) That common purpose was unlawful;*
> *(3) That the parties, or some of them, including the appellant, commenced or joined in the prosecution of the common purpose;*
> *(4) That, in the course of prosecuting the common purpose, one or more of the participants murdered the deceased;*
> *(5) That the commission of the murder was probable consequence."*

Tailoring the above position of the law and the explanation held in the above cited case, I find it to be in four with the facts of the instant case. The accused persons jointly planned to execute unlawful purpose of invading and robbing PW1. Each one of the accused had a role to play in the commission of the offence. This is shown by the weapons carried from machete to a gun. In the

course of commission of the offence, one Mwasi Mwangembe (the deceased) was killed. It is crystal clear that the accused persons were prepared to do whatever means necessary to execute their unlawful plan. That being the case therefore, there is no degree or distinction on the level of their participation. I subscribe to the position of the Court of Appeal in the case **Nathaniel Alphonce Mapunda and Another V R**, [2006] TLR,395 when it held that:

> *"The principle has always been that where a person is killed in the course of prosecuting a common unlawful purpose each party to the killing is guilty of murder".*

Moreover, under section **22 (a) (b) and (c) of the Penal Code, Cap 16, RE 2022,** the law clearly states that each person who actually committed the offence; who does or omits to do any act for the purpose of enabling the commission of the offence; who aids or abets another person in committing the offence; that person is deemed to have taken part in committing the offence and to be guilty of the offence. It follows therefore that the law does not restrict the commission of the offence to the actual doer, but to any person who aided and abetted the commission of the alleged crime. For

the above reasons therefore, I find that all the accused persons are principal offenders irrespective of their role.

I therefore find that all four accused persons accused persons committed the act of **actus reus** by killing the deceased.

The next issue now is whether the accused persons killed the deceased with malice afore thoug**ht.**

**Sections 196 of the Penal Code Cap 16, R.E. 2022** defines murder:

> *"Any person who, with **malice aforethought**, causes the death of another person by an unlawful act or omission is **guilty of murder**".*

Moreover under **section 200 of the Penal Code**, **Cap 16, malice aforethought** is established on proof of the following circumstances;

> *"(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*
>
> *(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*
>
> *(c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;*
>
> *(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence."*

Again, **In Stroud Judicial Dictionary 2000 Edition**, **'Malice Aforethought'** has been described as any one or more of those states of mind, **preceding or co-existing with** the act or omission by which death is caused, and, it may exist where that act is un-premeditated. The inference of **Malice Aforethought** has further been expounded in the case of of **Enock Kapela V Republic**, Criminal Appeal No. 150 of 1994, CAT (Unreported) said inter – alia that:-

> *"...usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained 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 or 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 the 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".*

The similar stance was illustrated in the case of **Simon Justine & Another V R**, Criminal Appeal No. 53 of 2006 (Unreported).

In this case, all four accused persons went to the house of PW1, attacked them by using the machete, iron rods, gun and used a

knife to pierce their eyes in the cause of robbing them money and gold. They blew fatal wounds on the head and eyes being delicate and vulnerable part of the human body. After the act the ran away leaving the victims some unconscious and bleeding. In fact, they even took time to discuss who should pierce their eyes. In every sense, their acts fit with the inference provided by law. Under the circumstance, I find all four accused persons in the prosecution of their common intention and with malice afore thought murdered Mwasi Mwangembe.

In the end, it is my finding that the Republic managed to prove the charge against the accused persons beyond reasonable doubt. I accordingly find the accused persons namely **Jacob Enock Shindika, Boazi Mudi Saidi, Rashidi Ramadhani Mwaulezi and Japhet Boniface Sanga** guilty and convict them of the charged offence of murder contrary to **section 196 of the Penal Code, CAP 16, R.E. 2022.**

**R.A.Ebrahim**

**Judge**

**30.12.2022**

**SENTENCE**

There being no other punishment for the convicted offence and in terms of **section 197 of the Penal Code Cap 16, RE 2022**, I sentence all accused persons namely **Jacob Enock Shindika, Boazi Mudi Saidi, Rashidi Ramadhani Mwaulezi and Japhet Boniface Sanga** to suffer death by hanging.


**R.A.Ebrahim**

**Judge**

**30.12.2022**

**Court:** Right of appeal against conviction and sentence fully explained.

**R.A. Ebrahim**

**Judge**

**Mbeya**

**30.12.2022**