

TANZANIA / JUDGMENT

Masele Machibya

COURT
TANZLIIDECIDED
1 January 2023

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (MOROGORO SUB REGISTRY)
AT IFAKARA ORIGINAL JURISDICTION CRIMINAL SESSIONS CASE NO. 14130 OF 2024 REPUBLIC
VERSUS MASELE MACHIBYA MASELE@MASELE NENGO 1'^ ACCUSED PERSON REHEMA
MASELE MACHIBYA 2"^^ ACCUSED PERSON MADENI FATUMA @ MADENI YEGELA 3'^^
ACCUSED PERSON Date of Last Order: 12/09/2024 Date of Judgement: 25/09/2024

JUDGEMENT

MAGOIGA,J. The accused persons, MASELE MACHIBYA MASELE @ MASELE NENGO, REHEMA MASELE MACHIBYA and MADENI FATUMA SAMBE@ MADENI YEGELA are jointly charged with murder of NDAMA HASSAN KEMA contrary to sections 196 and 197 of the Penal Code,[Cap 16 R.E 2022]. This court was informed that, on the 23"" day of August, 2023 at Kisegese Village, Namawala ward, Mngeta Dvision within Kilombero District in Morogoro Region, the accused persons allegedly murdered, one, Ndama Hassan Kema. The accused persons pleaded not guilty to the charge of murder. 1 Preliminary hearing was heid in accordance with the Acceierated Trial and Disposal of Cases Rules, 1988; whereby the prosecution stated in details all facts of the case. Briefly, the facts were that, the deceased and accused persons are relatives. On day of August, 2023 in the morning, PW1, PW2 and PW5, the deceased's children, discovered that the deceased was missing. Upon asking the second accused person, their mother, of the whereabouts of their father, the second accused toid them that he has traveiled without disciosing the exact piace where he had gone. Many reiatives were contacted but aii denied to have seen the deceased. On 27^^ August 2023, PW1 saw human leg behind their house and noted to be of the deceased. He caiied his relatives and contacted the neighbors who rushed to see the ieg. In the circumstances, the matter was reported to both the viilage authority and police. The search for the missing Ndama Hassan Kema was mounted. Eventually, at around 17 hours they found the body hidden in the bush aimost 500 metres from the deceased's homestead and PW1 and DW2 identified the body to be of deceased. The body was cut into two pieces from the waist and legs were alone. It was also discovered that there was an attempt to burn the body but the same was not compietei y burnt. Further investigative measures were done culminating into charging the accused persons with murder case they are facing now. A full trial was then held whereby the Republic called a total of seven witnesses and tendered in evidence two exhibits. While, the first and second accused persons were the sole witnesses in their defence case and had no exhibit to tender, the third accused person called one witness and also had no exhibit to tender. When this case was

called on for hearing, the Republic was enjoying the legal services of Mr. Emmanuel Kahigi, learned Senior State Attorney, assisted by Messrs. Dastan William and Simon Mpina, learned State Attorneys. On the other hand, the first and third accused persons were enjoying the legal services of Mr. Frank Malebeto, learned Advocate and the second accused person was represented by Ms. Stumai Omary, learned advocate. To appreciate what transpired during the hearing of trial, I will reproduce here under a brief summary of the evidence from both sides.

PW1- PAWA NDAMA KEMA under oath told this court that he is the son of the deceased. That, on 27th day of August 2023 around 16 hours while he was taking the cattle for grazing, he saw a leg of person behind their house which he recognized to be of the deceased. PW1 called DW2 (his mother), DW1 (his grandfather), his siblings. PW1 went on telling the court that when he tried to call neighbours, DW1 snatched his phone and advised that they deal with the matter at family level without Involving neighbours. Fortunately, Mwalu (PW2) managed to call Mr. ShImbi their physical neighbour who came and an alarm was raised and many people gathered. According to PW2, people started to find the other parts of the deceased body and around 17 hours they found the body hidden In the bush almost 500 metres from their home and he Identified the body to be of deceased after he saw the face. According to PW1, the body of the deceased was cut Into two pieces from the waist and legs were alone. People observed that the killers tried to be burn the body but was not burnt. Further, PW1 Informed this court that the village authority took up the matter and eventually the matter was reported to police and after the Investigation process the accused persons were arrested as the primary suspects. PW2-MWALU NDAMA KEMA, testified under oath and told this court that he Is the deceased's son. His evidence was more or less similar to the evidence of PW1 In terms of the way PW1 found the deceased's leg behind their house and as how the other parties of deceased's body were found on the bush. PW3-MICHAEL CHRISTOPHER MBALA - a medical doctor under oath told the court that on 28/8/2023 he examined the body of deceased identified by his relatives as Ndama Hassan Kema and found that the deceased's death was caused by severe bleeding due to multiple wounds inflicted on the deceased's body using sharp instrument. According to PW3, the body was cut into pieces where from the waist upwards and legs were separated and the right leg was not found at all. PW3 tendered in evidence the Post Mortem Report as exhibit PEL. PW4-MSABILA KEMA under oath told this court that after he received a phone call from PW1 on 28/08/2023 that his brother has been murdered, he travelled to Kilombero and went direct to the deceased's home at Kisege village where he confirmed that his brother had passed on. PW4 was among the people who identified the body to the doctor who examined the body and were allowed to bury it and the police went with DW1, DW2, PW1 and PW2 for interrogation and further investigations. PW5-MWANZA NDAMA after being tested in terms of section 127 of the Evidence Act,[Cap 6 R.E 2019], a finding was made that she had sufficient knowledge but did not know the meaning of an oath. She gave evidence without oath after promising to speak the truth and not lies. PW5 told the court that she is the daughter of the deceased. PW5 went on telling the court that on 24th day of August ,2023 when she wakeup she found her mother(DW1) was also sleeping with her and her younger sister. To her such was unusual. PW5 asked her mother why she slept 5 with them she replied that the deceased has travelled. She discovered that her father was dead on 27th day August 2023 after she saw the leg of her father behind their house. PW6-ASP DIVENTINE

NYAHORO under oath OC - CID Ifakara testified that, on 21st day August 2023 at night of 21 hours was informed by the Chairman of Kisegese Village that at his village there is a leg of human being in the homestead of Ndama Kema. According to PW6, him and other police officers drove to Kisegese that very night and arrived around 24 hours. They managed to see the leg of the human being and Pawa Ndama Kema told them that the leg is of his father and at about 20 metres they noted maggot and after few metres ahead, they managed to see a body of human being cut into 2 pieces. That, the 1st piece was from the waist upward, and that the legs from knees were cut. PW6 told this court further that, they marked the place and put it under surveillance of the chairman and the family. Further testimony of PW6 was that on 28/08/2023 in the morning they went back to the scene of crime together with the Doctor (PW3) to do Post Mortem Examination report and after examination of the body by the doctor, they allowed the deceased's relatives to bury him. In the circumstances, PW6 left with the 1st and 2nd accused persons together with Pawa Ndama Kema and Mwalu Ndama Kema for interrogation. It was the evidence of PW6 that, when they were in the motor vehicle, the second accused person started to narrate the whole story on how the deceased was killed by implicating the accused person and extends to the accused person to be the murderers. According to PW6, DW2 explained how DW1 and DW3 entered their sleeping room which was lit with solar light and managed to murder the deceased who was sleeping in their matrimonial bed and dragged his body outside the house. Took his clothes and burnt the deceased's clothes and she said that the reason was non payment of dowry of Tshs 500,000/= that the deceased was not ready to pay even after constant follow ups. PW6 explained further that, they returned at the scene of crime and the circumstances were clear that something was moved out of the room. That the place was seen to have been cleaned, put fresh sand and watered and they also found that the clothes were burnt. PW6 told the court that, he directed the 2nd accused person be cautioned and be taken to the justice of peace. According to PW6, the accused person was arrested on 21/11/2023. PW7-GARITHA FRANKLIN BITALIHO, a justice of peace gave out her testimony under oath and told the court that on 08th of September 2023 she recorded the extra judicial statement of Rehema Masele Machibya, the second accused person. PW7 tendered in evidence the Extra judicial statement which was admitted in court as exhibit PE2. That was all about the case for the prosecution. This court guided by the provisions of section 293(2) of the Criminal Procedure Act, [Cap 20 R.E.2022] found the evidence on record suffice to call all the accused persons to enter their defence. The court addressed all the accused persons of their rights, and guided by their advocates respectively, the first and the second accused persons opted to defend themselves under oath and that they will have no witness save for themselves and had no exhibits. The third accused person on the other hand opted to call two witnesses who at the end guided by his advocate he used one and dropped one witness and had no exhibit. DW1-MASELE MACHIBYA MASELE @ MASELE NENGO under oath testified to be a father-in-law of the deceased, like other prosecution witnesses he testified on the customary ceremony conducted on 23/08/2023, missing of the deceased starting from 24/08/2024, discovery of deceased's leg behind the house on 27/08/2023 and deceased body parts found at the bush severed using sharp object. DW1 admitted to have requested for dowry and that when the deceased explained why he will not pay him the balance agreed this time was contented and asked him to contribute Tshs.350,000/- towards the marriage of his grandson. DW1 denied to have killed the deceased. He denied the

testimony of PW1 that he snatched a phone from him in bid to avoid neighbours know that the deceased was missing. DW1 told the court that between 24/08/2023 and 26/08/2024 every morning he went for charcoal and when he asked of his in-law was told he has travelled but never called him because he had no credit. DW1 denied knowing Madeni Yageia (the third accused person). DW1 accused police that they tortured him and threatened to kill him. In essence, DW1 denied involvement of the killings and denied to have threatened his daughter Rehema Machibya (the second accused person). Lastly, DW1 admitted that, the deceased was indebted to him dowry balance of Tshs.500,000/- and called the testimony of DW2 as lies without explaining why her daughter would lie against him. DW2-REHEMA MASELE MACHIBYA under oath told the court that, on 23rd day of August 2023 after ceremony ended, she entered to sleep into her room at around 21:00 hours. While asleep, with her husband and her younger child in the room which was at ail material time lit up with solar energy with enough light to see and identify a person without problem. According to DW2, she was awakened by the sounds of 9 movement into the living room and she suddenly saw Maseie Machibya (DW1) who had a machete and Madeni Yegela (DW3) coming in the room in which she was sleeping with the deceased. DW2 went on telling the court that the two told her to keep quiet and ordered her to cover herself with the bed-sheet. It was the testimony of DW2 that she heard the first and third accused persons cutting the deceased who was very drunk and had slept with clothes and shoes. In the fracas, DW1 ordered her to enter inside the bed and heard them pulling something outside. She informed this court that, DW1 took the bed sheet and started to clean where there were blood stains and that DW1 ordered her to change the mattress and bring the fresh sand in the room but she refused. DW2 proceeded telling the court further that, DW1 cut the part of the mattress where there were blood stains and took the clothes with blood outside and burnt them while DW3 dragged out the body of the deceased and disappeared. DW2 told this court that at all the times DW1 was threatening to kill her if she will raise alarm and if she will tell anyone. Frightened and afraid to be killed, DW2 moved to the living room where her other children were sleeping and spend the rest of the night there. DW2 told this court that she lied that the deceased has travelled for the fear of being killed by DW1 until when it was discovered that the 10 deceased was killed. DW2 insisted that DW1 never gave her a chance to talk to the outsiders. Further to that, DW2 told the court that when police came and arrested her and DW1, on the way to police station, she told the police who were the murderers and she insisted that it was the 1st and 3rd accused persons who murdered the deceased. DW2 insisted that she never knew of the plan to kill her husband by two accused persons. DW2 crying in court told the court that she was surprised by the killing and the threats by her father went on until police intervened. DW3-MADENI FATUMA SAMBE @ MADENI YAGELA, affirmed and stated that on 23rd day of August 2024 he spent his day with George Mayaya and others drinking beers up to the evening hours. According to DW3 on that night he spent his night at the home of George Mayaya. In the morning on 24/08/2023 he took breakfast and went back to his home. DW3 denied to kill the deceased saying that he was not at the deceased's village and that he went only for burial ceremony on 28/08/2023. DW3 told the court that when he was called by PW1 and told that, Ndama Kema is dead, his reply was that he will call back in two minutes and wants to get clear explanation. Explaining why DW2 mentioned him as the murderer, DW3 told the court that it was because on 28/08/2023 11 he stiffly questioned her on

the death of the deceased as such is the reasons, she mentioned him as a culprit. In essence, DW3 raised a defence of alibi without notice that he was not at the home of the deceased and no way he could have killed him on the fateful night. DW4- GEORGE MAYAYA under oath DW4 collaborated DW3's evidence that on 23rd day of August 2024 he was with him and others drinking beers up to the evening hours. According to DW4, DW3 spent that night at his home and that DW3 left his house in the morning of 24/08/2024 after having breakfast. Having gone through the prosecution and defence cases respectively it is the duty of the court to analyze the evidence to determine whether the case against the accused persons has been proved beyond reasonable doubt. The three persons are faced with the charge of murder contrary to Section 196 of the Penal Code,[Cap 16 R.E 2022]. The section provides that; "Any person who with malice aforethought causes the death of another person by unlawful act or omission is guilty of murder." 12 Therefore, to establish the offence of murder, the prosecution evidence must prove the following elements; that the person died, the death was a result of an unlawful act as opposed to natural death, that the accused persons were responsible for the murder; and that the accused persons had evil intent before executing the act of murder. However, before going into analysis of the evidence and after hearing the evidence by both sides, I noted that there are facts which are not in dispute between the rivaling parties herein. These are: one, there is no dispute that Ndama Kema disappeared on 24/08/2023 and his left leg was found on 27/08/2023 near his house by PW1. Two, no dispute as well that his death was not natural but due to wounds inflicted on his body and cut into pieces, thus, died of haemorrhage. Three, there is no dispute as well that his remains were noted on 27/08/2023 and later on 28/08/2023 other parts of the body were recovered save for right leg which was not seen to date. Four, there is no dispute that the wounds were caused by sharp instrument or object. Now back to the issue raised above, starting with the first element, whether person died. As noted above, there is no dispute that death of a person has been proved and, in this case, Ndama Kema is dead. This is proved by the post mortem report (exhibit PE1) and oral accounts of PW1, PW2, PW3, PW4, PW5, and PW6. They all saw the deceased's body 13 and the cause of death, according to PW3, was due to severe bleeding due to wounds inflicted on the deceased's body. On the other hand, DW1, DW2 and DW3 in their defence readily admitted to see the leg found behind the deceased house and they also confirmed to see the two pieces of deceased's body found at the bush and that it was the body of Ndama Kema. Suffice it to say the first element has been established. As to the second element whether the death was a result of an unlawful act as opposed to natural death, it is apparent and there is a lot of evidence that the death of Ndama Hassan Kema was not natural. He died as a result of severe bleeding due to wounds inflicted on his body. The confirmation by the post-mortem examination report, which was not objected to by the defence clearly shows that the deceased's life was terminated by the perpetrators' unlawful act. Perhaps the most obvious question is who caused the brutal murder of the deceased? That goes the third ingredient that who killed Ndama Hassan Kema? It is not disputed that none of the prosecution witnesses testified to have seen the accused persons in this case kill the deceased save for the second accused person who saw what happened. In her extra judicial statement, DW2 had this to say in exhibit PE2 which also forms the basis of the defence of the second accused person. Exhibit PE2 reads in part as hereunder: 14 MAELEZO KAMILI: "SIJAMUUA BWANA YANGU, NDAMA KEMA. KUNA SIKU BABA YANGU AITWAE MASELE

MACHIBYA TULIMTENGENEZEA MBOGA, YAANJ KUMCHINJIA KONDOO KAMA MILA YA KISUKUMA, TULIALIKA WATU NA MAJIRANI. WANAUME WANAKAA KIBANDANI, WANAKUNYWA POMBE, WANAWAKE TUNAPIKA CHAKULA, TUKAWATENGEEA NA KUENDELEA KUNYWA POMBE. BAADA YA KULA MIMI NA WANAWAKE WENZANGU TUKAANZA KUNYWA POMBE. ILIPOFIKA JIONI WANAWAKE WENZANGU WAKANIAGA, WAKAONDOKA, NA MIMI NIKAWASHUKURU KUNISAIDIA KUPIKA CHAKULA. WANAWAKEHAO MMOJA NIMKEWA SHIMBIANAITWA MWANAMALETETWA, MWINGINE ANAITWA MWANAYOSE NA WATATU ANAITWA MWANAMACHEMI. WANAUME WALIKUWA WENGI SIWAKUMBUKI. BAADA YA WALE WANAWAKE KUONDOKA MIMI NIKATANGULIA NDANI KULALA, BWANA YANGU AITWAE NDAMA KEMA NIKAMWACHA NJE ANAKUNYWA POMBE. ALIPOMALIZA KUNYWA POMBE ALIINGIA NDANI KUMBE MLANGO HAKUUFUNGA, ALIUACHA WAZI. TUKALALA, USIKU NIKASIKIA WATU WANATEMBEA SEBULENI NIKAJUA LABDA MBUZI WANAINGIA NDANI. WALITEMBEA NA KUJA CHUMBANI, NILITAKA KUNYANYUKA WAKANIKATALIA WAKANIAMBIA NILALE, NISIPIGE KELELE NA NIJIFUNIKESHUKA ILI WASIJE WAKANIUA PAMOJA NA BWANA YANGU. MIMINILIJIFUNIKA NIKASIKIA WAMEMKATA PANGA, NILISIKIA KVASABABU TULIKUWA TUMELALA KITANDA KIMOJA WALIPOMALIZA, WAKANIAMBIA KUWA NIINGIE CHINI YA KITANDA, WAKANIPIGA NA UBAPA ILA WALIPIGA GODORO HIVYO UBAPA 15 HAUKUNIFIKIA NIKAININGIA CHINI YA KITANDA HALAFU WAKAVUTA BWANA YANGU WAKAMTOA NJE. WALIPOMTOA NJE BABA YANGU MZAZI AITWAE MASELE MACHIBYA ALIBAKI NDANI AKANIAMBIA KUWA NIKIPIGA KELELE WATANIUA NA MIMIL NILIWAONA HAO WANAUME WAKATI WANAINGIA CHUMBANI NA NILIWATAMBUA KUWA NI MASELE MACHIBYA AMBA YE NI BABA YANGU NA MWINGINE NI MADENI YEGELA. WALIOKUJA CHUMBANINIHAO WAWILIWENGINE WALIKUWA SEBULENI SIKUWAONA ILA NILIKUWA NAWASIKIA TU. BABA AKAWA ANANILINDA KULE CHUMBANI ANANIAMBIA KUWA NISIWAAMBIE WATU NA MIE ATANIUA. NA MIMIBASINIKANYAMAZA KIMYA. ALINIKATALIA KUTOKA NYUMBANI AKAWA ANANILINDA HATA NIKIENDA UANI ANANIFUATA. CHUMBANI KULIKUWA NA MWANGA WA TAA YA UMEME ILIKUWA INAWAKA NDIO MAANA NILIWAONA. KULE CHUMBANI BABA YANGU ALIKUWA ANANIWEKEA PANGA SHINGONI KAMA KUNITISHA, ANANIAMBIA NINYANYUE GODORO NISAFISHE DAMUZILIZOKUWEPO NA NIMWAGE MCHANGA NIKIKATAA ANANIAMBIA ATANIUA. BABA ALIKATAKATA GODORO NA KISUPIA AKACHUKUWA NGUOZA KITANDANI AKAENDA KUZICHOMA MOJO USIKU HUO HUO. WALIPOMVUTA BWANA WANGU NILIONA KUWA AMEKATWA SHINGONI KITANDA NIKIKUBWA HIVYO NILIVYOCHUNGULIA KIDOGO NILIONA. SABA HIVI MULE GEREZANI(MAHABUSU)KWENYE MACHUMA BABA ANANICHUNGULIA NA KUNIAMBIA TUKITOKA HUMU ATANIUA NA MIMI KWA MAPANGA, ATASHINDWAJEKUNIUA MIMI WAKATIALISHAMUUA BABA YAKE. YAANI ANANISEMA SANA MLE NDANI, HAKUNA RAHA. USIKU NALIA TU. BWANA 16 YANGU NIMEISHINA YEKWA MUDA WA MIAKA 9 WAMEMUUA KWA SABABU WANA TAKA MAHARL" From the above excerpt, one can deduce that, the confession has the following: one, that the second accused person totally denies to kill her deceased husband. Two, on the fateful night of 24/08/2023 with the help of electricity/solar light that was on, was able to see the and 3^ accused persons enter their sleeping room and identify them as killers of her husband. Three, that the accused person at all material time threatened the

second accused person that If she says to people what they did, he will kill her as well. Four, that the 3rd accused person Is the one who dragged the body of the deceased outside the house. Five, that the source of the killings was unpaid dowry of Tshs.500,000/. Six, that the accused person remained In the room after the killing and went on threatening the second accused person and keep following her all the time. It should be noted that, the use of confessions In criminal cases In not new In our jurisdiction. Our statute book on evidence has section 142 of the Evidence Act, [Cap 6 R.E.2022] which Is very clear and loud that conviction Is not Illegal because stems from evidence of accomplice. For easy of reference the said section provides: - 17 "Section ^142. An accomplice shaii be a competent witness against an accused person; and conviction is not iiiegai merely because it proceeds upon the uncorroborated testimony ofan accomplice.' Interpreting section 242 of the Evidence Act, the Court of Appeal in the case of Mike Nwankwo vs Republic, Criminal Appeal No 200 of 2021)2024 TZCA 773(20 August 2024) observed as follows; "According to this provision^ it is lawful to convict an accused person based on the evidence of a co accused. However, that is a position of the statutory iaw, hut its interpretation by this Court is that as a matter ofpractise, in order to soieiy base a conviction on the evidence ofa co accused, such evidence has to be corroborated. On that assertion,Ifind comfortin Court ofAppeal decision in the case ofPascal Kitigwa v. R[1994]T.L.R. 65, where it was heid that: [ii) Evidence from a co-accused as in this case, is accomplice's evidence and a court may convict on accomplice's evidence without corrohoration, if it is convinced that the evidence is true, and provided it 18 warns itself of the dangers of conviction on uncorroborated accomplice's evidence; (Hi)Although the iaw does notsay that conviction on uncorroborated accomplice's evidence is iiiegai, it is stiii unsafe^ as a matter of practice^ to uphold a conviction case on the uncorroborated evidence ofa co-accused. In the case of Paulo Maduka and 4 others Vs. Republic, Criminal Appeal No.110 of 2007 CAT at page 10 observed that: - " the verv best evidence of witness in anv criminal trialis an accused person who confesses his auitv. However,such claims of accused persons having made confession should not be treated casuaiiv bv court of justice. The prosecution should alwaysprove thatthere wasconfession made and the same was made freeiy and voluntarily. (Emphasis added). Further guidance in speaking of confession can be gathered from the case of Jacob Asagilile Kakune Vs. DPP, Criminal Appeal No. 178 of 2017 at page 14 where the Court of Appeal observed that: - "... an accused person who confesses to a crime is the best witness." 19 In this case, the so called, confession, I am entitled to say Is clear and was voluntarily made by the second accused person though she categorically denied killing her husband but threw all culpability to the and 2^^ accused persons. This Is what we call In law, evidence of accomplice. The use of evidence of accomplice In criminal cases Is equally not new In our jurisdiction. In the cases of Miraji Idd Waziri @ Simwana and another Vs. Republic, Criminal Appeal No. 14 of 2018 at page 13 the CAT and In the case of Godfrey James Ihuya and another Vs. Republic[1990]TLR 197 observed that: - "... We agree in principle thatevidence ofan accompiice needs corroboration for it to be acted upon against an accused. However,a conviction is notnecessariiviiieaaiforbeing based on uncorroborated evidence of an accomniice."(Emphasis added). Further guidance In the use of evidence by accomplice can be gathered form the case of Michael Mathias Vs. Republic, Criminal Appeal No.9 of 2007 CAT observed at page 8 that: - "... in appropriate cases, a conviction can be founded on uncorroborated evidence ofan accompiice where the court finds it to be true and

warns itself of the danger of convicting on uncorroborated evidence of an accomplice."^ (Emphasis mine). Basically, from the above guidance, what I gathered is that what is to be considered is that the confession or accomplice evidence was procured voluntarily, has been corroborated and where not corroborated is all about the truth of the matter at issue and the court has considerably warns itself of the dangers of convicting on uncorroborated evidence of accomplice. In the present case, as noted above, the prosecution witnesses did not see or witness what happened. The light of what happened comes from the second accused person. With the above in mind, I will now test the confession of an accomplice and see if it falls within the above guided principle before I say it has or has not met threshold of the above guidance. The gauging issues of voluntariness, corroboration and truth can be cumulatively determined. In my considered opinion, having regards to the circumstances and evidence on record in this case, I find the confession or the evidence of accomplice (exhibit PE2) was voluntarily made, it has been corroborated and is nothing but the truth. I will explain. One, the second accused person has been consistency from police to this court that with the electrical/solar energy on in the bed room she was able to see 21 the and 3rd accused persons on the fateful night armed with a machete enter their bed room and started cutting her husband. The issue of lights on was corroborated by the evidence of DW1 that in the houses there were lights on by solar energy. Two, the two accused persons are, no dispute, long time known to the second accused person and no reasonable grudges was raised between the two and even the questioning that the 3rd accused person raised was baseless and total lie. Three, I find that the second accused person offered satisfactory explanation why she did not report because of the threats from his father (first accused person). This was corroborated by the evidence of PW1 that when PW1 tried to call neighbours, DW1 snatched his phone and was totally against the idea. This piece of evidence was not controverted by the defence leave alone cross examined on the same. Four, the argument by DW1 that he went for charcoal was total lie because he never cross examined PW1 on that point that he was at charcoal and not present at home at all material time from 24/08/2023 to 27/08/2023 when things started unfolding. Five, the evidence of an accomplice was received in evidence without any objection apart from the objection on its addition through section 194 of the CPA. Six, the evidence of accomplice was also corroborated by the evidence of PW6 who saw remains of burnt clothes of the deceased as truly testified in the confession. Seven, the alibi of DW3 and his witness DW4 were all 22 lies because when DW4 was cross examined admitted that if DW3 went out and come back he could not know despite sleeping at his home. Eight, the accused person remained in the room and was threatening the second accused person not to raise alarm and not to tell anybody. This eliminated all possibility of mistaken identity to these people she knew of for long time. Generally, the extra judicial statement by the second accused documented well the execution of the murder against the deceased. The story was so clear that only an eye witness could tell this chronologic incident of the murder. There is no likelihood that the Primary court Resident Magistrate- the Justice of Peace who recorded extra judicial statement created the story of the murder that she did not witness. She could not have in the position to predict all stated in the extrajudicial statement made by the second accused which was corroborated by the prosecution witness. Undeniably, the story about the murder was given by the second accused person to the justice of peace. I don't find any doubt that the extra judicial

statements of the second accused persons contained true information about the murder of the deceased and therefore relevant in this case. I have also considered the fact that the second accused is the first accused's biological daughter and the uncle of the third accused. When cross examined by the learned counsel for the second accused, the first accused person stated that he had no grudges with second accused. However, the third accused alleged that he was mentioned by the second accused because he was making a serious follow up of the deceased death on 28/03/2024. But with due respect to the accused person, he didn't disclose which serious follow-up he made leading to discover the source of the deceased death which disturbed the DW2 to extent of allowing him to get into trouble considering the raised chaos on the source of death of the deceased. Therefore, I find nothing to hold that the second accused had different motives or malice of implicating and getting the first and third accused persons in sufferance. In the circumstances and having warned myself on the danger of relying on the evidence of co-accused, I am of the considered view that the evidence made by the second accused may safely be relied upon to convict the first and third accused persons. On the foregoing, I find that the confession or accomplice evidence in this case is nothing but the truth of what happened. Not only that it has been corroborated by the evidence of PW1 on the issue of DW1 trying his best to cover up the missing deceased not only to family members but even to neighbours. It has as well been corroborated with the burning of clothes by DW1 as testified by PW6. That is to conclude that not only that the evidence of accomplice in this case was voluntarily given but is the truth of what happened and it has been corroborated by independent evidence as noted above to support the evidence by the accomplice. The argument by the DW3 that he was mentioned because he queried DW2 is but nothing and an afterthought calculated by DW3 intended to escape justice. It is rejected. In essence the evidence of accomplice in this case as held above has satisfied all the requirements and I have as well seriously warned myself, but in all respects, defeats the defence of the first and third accused persons. The evidence of DW4 did not impress me and when cross examined admitted that despite DW3 sleeping in his home still could not know if he went out and come back that night to hide the truth of the matter. Before arriving at that conclusion my decision, I have also considered the defence by the first and third accused. The first accused person stated that he was sleeping with his grandsons PW1 and PW2 at the deceased's premises on the material date until morning when the deceased was found missing. However, in my view, his testimony neither shakes the prosecution case nor reduces the probability for him to commit the offence charged considering the fact that the house which he slept were in the same compound with the house which the deceased slept. 25

On his part, the third accused stated that on the material date he spent

the whole day with DW3 and he spent his night at the house of DW3. Thus, the third accused persons raised the defence of alibi. I have considered the defence as raised by the third accused person. Apparently, it cannot be said that the fact that the accused person slept in DW4 house suffices to disassociate him from the commission of the offence as there is still the possibility for him to go and commit the crime at the deceased's house and go back to sleep innocently at the former's house. Be that as it may, no prior notice of reliance on the defence of alibi was given

before the closure of the prosecution as required under section 194 of the CPA. Belatedly defence of alibi casts doubts on its authenticity. For the foresaid reason, and in view of what was held in the case of Mike Nwankwo vs Republic (Criminal Appeal No 200 of 2021) 2024 TZCA 773 (20 August 2024), I accord insignificant weight to the evidence adduced by the first and third accused. As to the 1st and 3rd accused persons, all above considered, it is my strong considered opinion that the 1st and 3rd accused persons acted in joint efforts to kill the deceased as charged. With that note, I now come to one conclusion that it was the first and second accused persons before this court who entered in the bed 26 room of the deceased, managed to murder the deceased, drag and threw him outside where his remains were recovered. With the above conclusion, I now have to examine the role of the second accused person in this matter. I have scanned through the evidence on record but no single prosecution witness testified that the second accused person had a prior knowledge or arrangement of killing of the deceased before the fateful night she witnessed his husband slaughtered by the 3rd accused person. It can be said, therefore, that the 3rd accused persons stormed into the bedroom on their own. The only evidence against her is that of PW5 saw her mother taking sand in the bed room in the morning of 24/08/2023. Another evidence is that of PW1 PW3 and PW5 that in the morning of 24/08/2023 and on subsequent days she lied to her children that their father has travelled. This piece of evidence has greatly tasked my mind as against the second accused person. The million question is, did she offer any plausible explanation of her conduct after witnessing the killing of her husband and kept quiet and lying? The answer is yes! I will explain. One, the second accused person was categorical that, his father at all material was threatening her from revealing the matter. This piece of explanation was supported by PW1 that even after the left leg of the deceased was seen, still DW1 did not want other people to know the truth. I take liberty to give benefit of doubt to the second accused person in the circumstances of this case. But that is not the end to her, yet there is evidence of PW5 which even if I believe it as the truth still under the constant threats which were persistent from the accused person, the second accused might have done the same under threats by DW1. Mere witnessing of the killing and keeping quite was not sufficient to impute common intention and implicate her for murder. This could be possible if no plausible explanation was offered. I saw DW2 testifying, she was coherent and spoke the truth which I have no reason not taking her words. For the above reasons, I find and hold that the second accused person does not fit in as accessory before the fact nor does she fit in as accessory after the fact of murder under section 213 of the Penal Code, [Cap 16 R.E 2022] which could have attracted lesser punishment in the circumstances of this case. For easy of reference, section 213 provides as follows: - Section 213. Any person who becomes an accessory after the fact to murder is guilty of an offence and liable to imprisonment for seven years." Had it not been that plausible explanation was offered by the second accused person, this court could have convicted the second accused

person to accessory after the fact to murder for seven years. However,

each case must be decided on its own facts. And the facts to this case do not give rise to such a situation. That said and done, I hereby find no evidence beyond reasonable doubt against the second accused person for the charge of murder facing her. The next question is whether they

did so with malice aforethought. This is in relation to the fourth element as to whether the accused persons had evil intent before executing the act of murder. The law concerning malice, aforethought is settled, and the same can be inferred from several factors. The Court of Appeal in the case of Enock Kipela V R, Criminal Appeal No. 150 of 1994 stated, inter alia, that; "Usually^ an attacker will not declare his Intention to cause death or grievous bodily harm^ whether or not he had the Intention must be ascertained from various factors^ Including the following: (i) The type and size of weapon which was used in the attack leading to the death of the deceased; (ii) The amount of force which was used by the attacker in assaulting the deceased; (iii) The part or parts of the body of the deceased where the blow of the attacker was directed at or inflicted; (iv) The number of blows which were made by the attacker, although one blow may be enough depending of the nature and circumstances of each particular case;

- (v) The kind of injuries inflicted on the deceased's body; (vi) The utterances made by the attacker if any, during, before or after the incident of the attack^ Applying the above principles to the case at hand, the tests were met since the postmortem report stated that the deceased bodies were found with multiple cut wounds and that the body was found in parts. This means that he was slaughtered and his parts severed from the whole body. Further to that, the evidence on record establish that the accused persons tried to burn the body of the deceased to me that is also enough to establish that the killing was perpetrated with malice aforethought. That said and done, and for the reasons I have endeavored to explain above, I am satisfied that prosecution have been able to prove their case beyond reasonable doubt that, it was the and the accused who 30 killed the deceased with malice aforethought. Hence, I am satisfied that the accused persons are guilty as charged and consequently proceed to convict them for the offence of murder contrary to sections 196 and 197 of the Penal Code, [Cap 16 R.E. 2022]. Considering the nature and quality of the prosecution evidence on record, I am of the objective judgement that the evidence on record did not prove the charge against the second accused person beyond reasonable doubt. Consequently, I hereby acquit the second accused person due to insufficiency of evidence from the prosecution. Further it is ordered that second accused person be immediately released from prison unless held for another lawful cause. Order accordingly. Dated at Ifajof^tFn^2:5^^ day of September, 2024 ■2: LU X S. M A O JUDGE 25/09/2024 COURT: Judgement delivered today on 25/09/2024 in the presence of Mr. Emmanuel Kahigi, learned Senior State Attorney assisted by Messrs. Dastan William and Simon Mpina, learned State Attorneys for the Republic and in the presence of the accused persons and their respective 31 advocates, Mr. Franco Malobeta for the and 3'''^ accused persons and Ms. Stumai Ormary^eameja^vpa he second accused person. LU S -1^ MA IGA JUDGE 25/09/2024 Aaaravat'inq factor by the Republic: Kahiqj, learned Senior State Attorney: My lord, this is murder, and punishment is one. We pray the court to sentence the accused person in accordance to law which is to suffer death by hanging. Mitigating factors by defence: Mr. Malobeta, Advocate My Lord, we pray for lenience in sentencing the first accused persons who are aged 67 and 58 respectively. They have regretted what they did. Sentence: Having heard the brief prayer by the learned Senior State Attorney to consider the law and sentence

the convicted persons in accordance with the dictate of the law and mitigating factors by learned advocate Mr. Malobeta for the and 3'^ accused persons, but I am mindful that this 32 being murder case, and according to law, has one sentence. As such my hands are tight to sentence otherwise than sentence provided by the law. That said and done, I hereby sentence the and 3rd accused persons to suffer death and are hereby condemned to suffer death by hanging. Order accordingly, a:- S. m: MAGQIGA ■ V, JUDGE X 25/09/2024 COURT: Right of appeal fully explained S. M. MAG JUDGE 25/09/2024 33

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://media.tanzlii.org/media/judgment/323949/source_file/d4eccf5ddc568c15/Masele_Machibya.pdf

CASE PAGE <https://chat.esheria.ai/case-law/tanzania/Murder-tanzlii-2023--6a3ea5243b1caa912981a120>

Prepared on 13 October 2026 · Esheria