

TANZANIA / JUDGMENT

# republic vs yusuph ramadhan korongo and two others 2022 tzhc 15434 8 december 2022

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8 December 2022

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA  
(DISTRICT REGISTRY OF MOROGORO) ATMOROGORO ORIGINAL JURISDICTION CRIMINAL  
SESSIONS CASE NO.92 OF 2022 REPUBLIC VERSUS YUSUPH RAMADHAN KORONGO ACCUSED  
HUSSEIN ALLY NDIWINGE 2<sup>^</sup> ACCUSED FARAJI SELEMANI HAWAYA 3<sup>^</sup> ACCUSED

## JUDGEMENT

Hearing date on:24/11/2022 Judgement date on: 08/12/2022 NGWEMBE,3. The accused persons in this criminal session, namely Yosyph Ramadhan Korongo, Hussein Ally Ndiwinge and Faraji Selemani Hawaya to be referred to as the 1<sup>^</sup>, 2<sup>^</sup> and 3<sup>^</sup> accused respectively, are jointly charged with the offence of murder contrary to sections 196 and 197 of the Penal Code [Chapter 16 Revised Edition 2019]. It is particularized in the charge sheet that on 5<sup>^</sup> day of November, 2020 at Kisaki area Bwakila within Morogoro district in Morogoro region, did murder one Christopher John Mbuya. Upon due arraignment, the three accused persons pleaded not guilty to the offence of murder, hence the trial commenced. The Page 1 of 33 prosecution was led by Ms. Happiness Makungu assisted by Theodora Mielwa, learned State Attorneys for the Republic/prosecution, while Messrs. Hassan Nchimbi, Mkilya Daudi and Gabriel Kitungutu, learned advocates represented the 2<sup>^</sup> and accused persons respectively. The brief facts of the case are that, on 05/11/2020 the deceased Christopher John Mbuya, borrowed a motorcycle from one Abdul Omary, a motorcycle rider at Kisaki Station. When he left with that motorcycle, alas he did not come back at the time expected. The owner of the motorcycle tried to call him through his phone but in vain. The following day he reported the missing of Christopher to police station. They continued to search for Christopher as to whereabouts but in vain. Two weeks later, it was discovered that, Christopher was murdered, a motorcycle and his other personal items were stolen. His body was hidden in a gully. The three accused persons happened to be in possession of the motorcycle in the same date and soon after the deceased went missing. They fled with that motorcycle from Morogoro to Yombo Vituka Kwa Chande within Dar es Salaam. On 06/11/2020 the three jointly sold that motorcycle which was in possession of the deceased Christopher to one popular senior citizen called Chande Hemedi Mangambe for the consideration of TZS. 800,000/=.

Upon payment of that amount of money, they divided among them and disappeared to unknown places. In the course of hearing, the prosecution lined up nine (9) witnesses namely: - PF.18655 Kanyika William Lukonge (The then OCS at Kisaki Police Station); Abdul Omary (the owner of the motorcycle); PW3 D/Cpl Bernald (who took guard of the scene from 20 - 21/11/2022), Abel Andrew Sanga (Medical Doctor who examined the Page 2 of 33 deceased body), PF.22113, A/Insp Msai (a Police Officer from Duthumi Police Station who investigated the case), Salum Hassan Salum Simen (the host to the accused in Dsm), Chande Hemedi Mangambe (who purchased the motorcycle), Sarah Salvatory Buya (Justice of Peace) and Adela Patrick Nyambe (Justice of Peace). The prosecution also tendered 8 physical and documentary exhibits in the evidence which in total established a prima facie case against the accused persons. Upon invitation to defend, the three accused persons testified as defence witnesses, with no exhibit. The evidence from both sides, total of eleven witnesses is summarised hereunder. The first witness (PW1) PF.18655, Kanyika William Lukonge testified that on 06/11/2020 he was at Kisaki Police Station at around 16:30 PW2 reported the missing of Christopher. He received a report that Christopher John Mbuya, the bodaboda rider had gone missing since 05/11/2020 around 16:00 hours, and all efforts to trace his whereabouts had proved fruitless. PW2 in reporting to PW1 said, he was the owner of the motorcycle, the deceased had when went missing. The information file was opened at the Station and on 20/11/2020 the police secured information laying suspicion on Yusufu Ramadhan Korongo, the first accused in connection with the missing of Christopher. The first accused was at Sesenga looking for a fare to flee upcountry. Information was forwarded to Duthumi Police Station and he was eventually arrested at the e - money agent office. After interrogation, Yusufu Korongo confessed to have jointly with his friends killed the deceased. The second accused was arrested on the same day. Both confessed to have killed Christopher John Mbuya. They stated and located the place where they kept the deceased body. Page 3 of 33 The witness proceeded with police and deceased's relatives to the crime scene as per the accused persons' directions. The accused persons were left at Duthumi Police Station for their safe custody, otherwise they would be injured or killed by angry massive movement, especially bodaboda riders. It followed therefore that on the next day, that is, on 21/11/2020 the OCD and Medical Doctor went to the scene of crime where deceased body was lying for further investigation and examination of the deceased body. Further PW1 testified that he went to Dar es Salaam on 25/11/2020 together with Yusufu Korongo for further investigation on the motorcycle, which was sold thereto and also to take the third accused who was still in Dar es Salaam. Then they joined hands with Chang'ombe police Station, with the directions of Yusufu, they went to Mzee Chande who bought the motorcycle. With Yusufu and Mzee Chande himself and his neighbours, they went to Buza where the motorcycle was kept, number plate and one rear view mirror were removed but kept in a black pocket. Seized the motorcycle together with the plate and side mirrors. The certificate of seizure was tendered as exhibit PI. The motorcycle, number plate and side mirror were tendered and admitted marked exhibit P2 collectively. The accused persons and the exhibits were taken to Chang'ombe Police and then back to Morogoro. The witness identified the first and third accused in the dock. PW2 Abdul Omary, a bodaboda rider at Kisaki Station, testified under affirmation that, on 05/11/2020 Christopher John Mbuya (the deceased) borrowed his black motorcycle, make Houjue, registration No. MC 307 CNS around

16:30 hours for a day business. That he carried some passengers and did not come back. PW2 tried to call him, but in vain. He described the particulars of the motorcycle and tendered its Page 4 of 33 registration card which was admitted as exhibit P3. On 06/11/2020 he reported to Police Station at Kisaki for a missing Christopher. On 12/12/2020 he was called to Morogoro Central Police to identify a motorcycle, which he properly did. It was the same motorcycle that he lent to the deceased. There the Police informed him that Christopher had died. PW3 D/Cpl Bernald, took oath and testified that, on 20/10/2020, under the instruction of the In charge he went to Kitope area with some relatives of the deceased and managed to find the body in the ravine, near Makuyi farm, the body was naked, face was intact and the relatives including one Salvatory, (uncle of the deceased) identified and recognized the body of the deceased Christopher John Mbuya. This witness remained at the crime scene until the next day of 21/11/2020 when other police officers and medical doctor came to the crime scene. The said Medical Doctor one Abel Andrew Sanga, from Morogoro District Hospital appeared before this Court as PW4, took oath and testified briefly that, on 21/11/2020 around 8:00 hours when at his work place, was required to go to Kisaki, accompanying police officers to the crime scene. He narrated that when he reached there, he found the deceased body surrounded by many people. He examined the body which was decomposing, but he managed to find that the body was of a male person of about or more than 15 years of age. Equally, relatives identified the body to be of Christopher John Mbuya. After examining the deceased body, he prepared a post mortem examination report, which was tendered and admitted in court unopposed marked exhibit P4. Added, the death of the deceased was Page 5 of 33 due to use of force to hit on the deceased's head by blunt object which caused destruction to spinal cord. In cross examination, he maintained that, the death of the deceased was caused by head injury caused by a blunt object on the back of his head, and added that, at the time of examination, the body was surrounded by maggots. PW5 PF 22113, A/Insp Msai, a Police Officer from Duthumi Police Station, Investigation Unit, stated that, on 20/11/2020 when he was a constable, was instructed by PW1 to go and arrest Yusuph Ramadhani Korongo. He found and arrested him at the agent of money transfer. In the preliminary inquiry, Yusuph admitted to kill the deceased jointly with his colleagues. Further testified that, Yusuph informed him that one culprit called Faraji was at Dar es Salaam while Hussein was at Dakawa who was arrested on the same date on assistance of Yusuph. Yusuph had in his possession one deceased's handset with serial number 892550 and 9 sim cards said to be of other robbed victims. The handset and lines were seized in the presence of an independent witness called Mohamed Mangala, a civilian. The certificate of seizure was admitted as exhibit P5, while the mobile phone make Tecno and those sim cards were admitted as exhibit P6. Proceeded to explain on how Yusuph facilitated the arrest of Hussein Ally Diwingo (2<sup>nd</sup> accused). He called him and planned to meet at Mungi Bar where together may go to sale another motorcycle they had robbed. Hussein came there with another motorcycle and started to call Yusuph, that is when PW5 arrested him. He interrogated them and together they admitted to have Killed the deceased. They directed him to where the deceased body was dumped. He properly identified the Page 6 of 33 first and second accused In the dock. In cross examination PW5 stated that, he did not know Faraji accused). Insisted that the two accused persons admitted to have killed the deceased. PW6 Salum Hassan Salum Simen, a cousin to Faraji Hawaya, residing at Yombo Vituka Dar es Salaam with his

parents, gave evidence that, on 06/11/2020 at their home, around 03:00 hours midnight three accused persons without notice came to their home led by one bodaboda rider from Kwa Chande bodoboda station. They had a black motorcycle, make Houjue, registration No. MC 307 CNS, when were asked why they came without notice, they replied that they had no mobile phone. Faraji explained that the motorcycle belonged to Yusuph and that Yusuph had quarrelled with his wife who had taken the registration card of that motorcycle. That he was selling that motorcycle, thus asked PW6 to help them find the purchaser. They slept on that night. In the morning, PW6 went to Mzee Chande asking if he wanted to purchase a motorcycle. That Mzee Chande was convinced and agreed to purchase that motorcycle, for a price of Tsh. 800,000/=. That he paid cash Tsh. 700,000/= and the balance was paid by mobile money transfer to the 1<sup>st</sup> accused's phone number. PW6 was given Tsh. 20,000/= for facilitating that transaction. He testified further; Faraji remained while the rest left. After two weeks, on 26/11/2020 the police officers from Chang'ombe Police Station came home accompanied by Yusuph under arrest. After some questioning, he led them to Mzee Chande. They seized the motorcycle and was taken to Chang'ombe police, where he found Faraji. All were taken back to Morogoro with the motorcycle. He Page 7 of 33 properly identified all the three accused persons in court by pointing them. The purchaser of the Motorcycle is the next witness, Chande Hemedi Mangambe (PW7). Under affirmation he testified that, Kwa Chande area was named after him, he has been a resident therein for over 40 years. On 06/11/2020 in the morning PW6 faced him saying his relatives from Kisaki Morogoro were selling a motorcycle. He went to PWS's home and saw the motorcycle, it was black in colour make Houjue MC 307 CNS. He saw the three accused who were introduced to him as relatives of PW6. The owner of that motorcycle who was selling it was Yusuph. He proceeded to identify all three accused persons in the dock by touching them and naming them correctly. Proceeded to testify that they agreed to the sale price of Tshs. 800,000/= whereby he paid cash Tshs. 700,000/= and 100,000/= was paid through mobile money transfer to the first accused's phone number. Yusuph did not have the registration card, saying the card was detained by his wife, promised to furnish same within a week. Having purchased, he took out one rear view mirror to make the motorcycle fit in the room, also removed plate number. On 26/11/2020 at night, police went to his house, when they questioned him, he told them what he has testified before this court. Added, police seized the motorcycle and he signed the seizure certificate (exhibit PI), which he sufficiently identified in court. Sarah Salvatory Buya (PW8), under oath testified that, she is a magistrate who in year 2020 was working at Morogoro Urban Primary Court as a magistrate and also as a Justice of Peace. On 04/12/2020 a Police Officer G. 4962 DC Kobelwa came to her office with the third Page 8 of 33 accused Faraji Selemani Hawaya who wished to confess that he with others killed the deceased on 05/11/2020. That she recorded his Extrajudicial Statement. She explained how she followed the laid down procedures. Stated that, she ordered the police officer to stay away from the court premises and proceeded to examine the accused on whom she found no scars or any problem in his body. She explained to the accused about his rights, including the right to volunteer his confession. She prayed to tender the Extrajudicial Statement which after overruling the objection, was admitted as exhibit P8. She identified the third accused properly in the dock. In cross examination, she insisted that, the accused confessed to have killed the deceased in company with the 2<sup>nd</sup> accused persons. The last witness is Adela Patrick Nyambele (PW9), a

magistrate stationed at Kingulwira Primary Court and a Justice of Peace who testified to have duly recorded the first accused's confession on 24/11/2020 and that the first accused clearly confessed to have participated with 2<sup>nd</sup> and 3<sup>rd</sup> accused in killing the deceased. However, the statement was not admitted based on fault of some procedural rules of recording same. When invited for defence, the accused persons, being led by their respective advocates gave their testimonies on affirmation as DW1, DW2 and DW3 respectively. The common part of their defence is that they all admit to have had in their possession the black motorcycle make Houjue, registration No. MC 307 CNS (exhibit P2) on 05/11/2020 with which they travelled from Kisaki Morogoro to Yombo Vituka Dar es Salaam, where they sold it to PW7. They admitted all the evidences by the prosecution as true, except that they did not participate in killing the deceased. They all denied to know the deceased and that they did not kill him. DW1 further testified that he did not know the deceased, when he was arrested, he possessed nothing connecting him to murder of the deceased. He got the motorcycle from his friend named Livinus Mekero on 03/11/2020 requesting him to look for a purchaser. On 04/11/2020 he went to Faraji at Kisaki with that motorcycle. Faraji called his relative (PW6) who lives in Dar es Salaam and told him to go with the motorcycle. They travelled on 05/11/2020 to bring the motorcycle and all went as PW6 and PW7 stated save for the proceeds of sale of which Tshs. 600,000/= was sent to the owner, that is, Livinus Mekero and Tshs. 200,000/= was divided among the accused and PW6. He maintained that he never participated in killing the deceased, he neither directed the police to where the deceased body was dumped nor did he know the place where the body was dumped. Further denied to possess the deceased's mobile phone and being found with nine (9) Sim cards when he was arrested. However, he admitted to know Faraji and Hussein as his neighbours at Kisaki Morogoro. In cross examination he added that he had lost contact with Livinus Mekero and he does not know where he resides. DW2 Hussein Ally Diwingo testified that, on 05/11/2020 the 1<sup>st</sup> and accused came with a motorcycle and asked him to ride it to Dar es Salaam for a Tshs. 50,000/= pay. He agreed and upon arrival to Dar es Salaam, they sold the motorcycle and gave him Tshs. 50,000/=. When cross examined, he admitted that they travelled during night and that all what the prosecution adduced was true, save that he did not participate in the killing of the deceased. Page 10 of 33 DW3 Faraji Selemani Hawaya, testified that the accused came to his home looking for a purchaser of the motorcycle. He thus assisted him by contacting PW6 who in turn, told him to bring the motorcycle to Dar es Salaam. All others went as adduced by the Prosecution and other defence witnesses. He was arrested at Yombo Kilakala by civilians who took him to Chang'ombe Police Station and then transferred to Morogoro Central Police Station. The allegations of killing the deceased are not known to him. Prayed this court to let him free. He admits to have recorded an extrajudicial statement (exhibit P8) before a Justice of Peace (PW8) but he was tortured before going to the Justice of Peace so the statement was obtained by force. Advocate Mkilya made a final submission conceding that Christopher died, but no eye witness of that death was brought in court. The extrajudicial statement by the third accused was weak and needed corroboration. He supported his argument by citing the case of R Vs. Opit Eruli (1936) 3 EACA 128. To him the elements of the offence were not proved, he prayed the court to find the same and acquit all accused persons. Having summarized exhaustively the evidences adduced by both parties and the brief final submission by the defence counsel, I wish to outline briefly undisputed facts as

follows: first, Christopher John Mbuya died on 5<sup>th</sup> November, 2020 in a violent way by being hit with a heavy blunt object in his head; second, the pathologist's report upon post mortem examination shows that the deceased's death was due to trauma to the occiput caused by head injury damaging the skull and spinal cord. He observed a solitary intrusion of the cracked occipital bone fragment. The skull was filled with liquefied necrotic tissue mixed Page 11 of 33 with some hairs, also found cracked bones of the skull Intruded at 4.6 by 5.3 centimetres Inside the skull. Third, until his brutal murder, the deceased, a 15 years young male person (boy) was Involved with commercial motorcycling (bodaboda) at KIsakl. Fourth, on the material day, he had borrowed a motorcycle (bodaboda) from another motorcyclist PW2 of the same place at KIsakl, to make ends meet for that day. Fifth, the bodaboda he lent Is Houjue black In colour. Chassis No. LC6PCJK22L0011608, registration No. MC 307 CNS. Sixth, Christopher went missing Immediately after lending the said motorcycle for that whole day of 05/11/2020 and his phone could not be reached, therefore a report was made to the Police Station at KIsakl. Seventh, the three accused persons unequivocally admitted to have had the same motorcycle Immediate after disappearance of the deceased and on the same date that Is on 05/11/2020 they drove In night hours from KIsakl Dakawa - Morogoro around 19:00 hours and arrived at Yombo Vltuka kwa Chande, Dar es Salaam around 02:00 midnight with Intent to sell It. They were hosted by PW6's home, PW6 Is a cousin to the third accused. Eighth, In the morning of 06/11/2020, they sold that motorcycle to PW7. Moreover, It Is testified quite clearly that police Officers at KIsakl Police Station, having the Information filed on the missing Christopher John Mbuya, on 20/11/2020 they received another Information that, the accused Yusuph Ramadhan Korongo was suspected In connection to the murder of the deceased and was In preparation to flee upcountry. Officers from DuthumI Police Station successfully arrested Yusuph. Upon Interrogation, Yusuph furnished Information which led Into arrest of the second accused and then the third accused was equally arrested at Dar Page 12 of 33 es Salaam. All were placed to Chang'ombe Police custody and then were taken back to Morogoro, where investigation proceeded. It was later revealed that the innocent little boy Christopher John Mbuya was mercilessly murdered, robbed all that he had, including the motorcycle, TZS. 5000/=, mobile phone and all his clothes were stripped off, left naked. The naked body of the deceased was discovered some 15 days later, on 20/11/2020 in a gully at Kitope area near Makuyi Farms. Part of the body had started decomposing and covered with maggots. The head, face and fingers were intact. The body was identified and recognized by the deceased's relatives including his uncle one Salvatory to be of Christopher John Mbuya. The accused persons were suspected, and eventually arraigned before this court. Having that brief summary of what happened, obvious the three accused persons are facing accusations of murder contrary to sections 196 and 197 of The Penal Code/Cap 16 RE 2019. Section 196 creates the offence of murder and its constituents, whiie section 197 provides penalty to the offender of murder. I will quote the two sections in extenso: - "Section 196. Any person who, with maice aforethought, causes the death of another person by an uniawfui act or omission is guilty ofmurder. Section 197. A person convicted of murder shaii be sentenced to death. To prove the charge of murder, one shall establish all necessary ingredients, which from the provisions above are; the actual killing of the deceased that is actus reus and malice aforethought, that is ill intention Page 13 of 33 to cause death. It is on that line this court will look at whether the accused

persons killed the deceased. Therefore, the decisive issues before this court are three: -

- 1) Whether the deceased Christopher John Mbuya died an unnatural death.
  - 2) Whether the accused persons are the ones who caused death of the deceased unlawfully.
  - 3) If issue number 2 is answered in affirmative the subsequent issue is whether the killing was with malice aforethought. Despite the facts identified as undisputed, this court refers to the long-standing principles in respect to criminal justice and the law of evidence relevant herein. First, Burden of proof. The law is established and settled that in criminal cases, the prosecution bears a generally fixed burden of proof. This rule is universally accepted to be a pillar of criminal justice. The House of Lords in *Woolmington Vs. DPP* [1935] A.C. 462 particularly Lord Viscount Sankey, highlighting on the history of burden of proof he observed: - "Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner as to whether the prisoner killed the deceased with malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. In the same line of reasoning, our jurisdiction borrowed that principle and domesticated it as part of our criminal justice. Section 3(2)
- (a) and section 110 of the Evidence Act cap 16 R.E. 2019 provided it as a mandatory requirement in criminal justice in Tanzania. Moreover, the same principle has received numerous judicial precedents including the following cases. *Said Hemed Vs. R*, [1987] T.L.R. 117 (CA), *Magendo Paul & Another Vs. R*, [1993] T.L.R. 219, *William Ntumbi Vs. DPP*, Criminal Appeal No. 320 of 2019 and *Anthony Kinanila & Another Vs. R*, Criminal Appeal 83 of 2021, [2022] TZCA 356 are few chosen. On the burden and standard of proof, following *Woolmington*, the Court of Appeal of Tanzania in *Anthony Kinanila & Another Vs. R*, observed thus: - "As to the standard of proof which we shall also have the opportunity to consider In the Instant case, the prosecution has the duty to prove all the Ingredients of the offence beyond reasonable doubt and here, one should not waste time trying to Invent a new wheel as that Is exactly what was stated by the House of Lords In England way back In 1935 In *Woolmington Vs. DPP* [1935] AC 462 from where our present general principles of criminal law and procedure emanate. Then proceeded to state specifically the manner of proving murder cases. It stated: - "In a charge of murder like the one In the Instant case. It Is trite that the prosecution required to prove all the Ingredients of murder In order to win a conviction thereof. The said Page 15 of 33 ingredients which the prosecution must prove beyond reasonable doubt are;

- i) That the deceased is really dead. ii) That the death was caused by someone unlawfully. iii) That there was malice aforethought and iv) That the accused person directly or indirectly took part in the commission of the murder." Based on the well-considered principles and duties of prosecution in murder cases like this one, the proof of murder must be beyond reasonable doubt. Aligning the above principle with this trial, obvious the first issue of whether the deceased died unnatural death, the evidence left no doubt that he died unnatural death. The evidence established that the deceased met his death by being attacked and hit on the head by heavy object which fact was not disputed by the accused persons. It is evident that the deceased went missing from 05/11/2020. This was testified by PW1, PW2, PW3, PW4 and exhibit P4. undoubtedly, the deceased went missing from 05/11/2020 with a motorcycle and discovered some 15 days later, that is on 20/11 lying in a gully at Kitope area, Kisakj ward, dead and naked. PW1, PW3 and PW4 who went to the scene of crime testified to have seen the body of the deceased while started to decompose and was recognised to be of Christopher John Mbuya. PW4 a medical doctor who conducted a post mortem examination on his expertise diagnosed that the death of the deceased was due to head injury caused by a blunt object hitting at the back of the head. The post mortem report (exhibit P4) had all the information. Some relevant items in the report are quoted hereunder: - Page 16 of 33 "/>

have formed the opinion that death occurred between two to three weeks prior to my examination, and that it was due to probably blunt trauma to the occiput" On the general observation/in the report, it is recorded: - "A naked dead body landed on the right lateral position hyperflexed neck. The body was surrounded by tissue debris and maggots. The abdomen was tense and swollen... There was a solitary intrusion of the cracked occipital bone fragment measured 4.6 x 5.3 cm inside the skull. The skull was filled with liquefied necrotic tissues mixed with some hairs" With his expertise in medicine as revealed in his testimony, PW4 who has 5 years practical experience his opinion was based on the methodology relevant to his field, thus credible and reliable witness. It is pertinent at this juncture to note that, expert witnesses, though not binding upon the court in our jurisdiction, are much helpful to the case where some questions falling beyond common knowledge of judges and magistrates are required for proper adjudication. Equally in our case, the question among others, is whether the death was natural or not. An expert may tell the source of death and this court will be in a position to conclude whether such cause is natural or not. In this case, the court has no reason to doubt the examination made by PW4, together with other witnesses supported the observation of PW4. On the available evidences, this court is satisfied that Christopher John Mbuya is dead and that he died after being hit by a blunt object on the back of his head, as the result the skull cracked, neck was broken and the spinal cord was destroyed. This, in all dimensions of Page 17 of 33 reasoning, was an unnatural death. Thus concludes the first issue in affirmative. The second issue is who caused the death of the deceased and whether did so unlawfully. The prosecution stood firm that the accused persons are the ones who killed the deceased. But the accused persons in their respective testimonies denied to have participated in killing the deceased. However, as it plainly appears, there was no eye witness to the deceased's killing, the prosecution case against the accused therefore, depends on circumstantial evidence,

which entails also the doctrine of recent possession and confession of one accused person. In Poweirs Principles and Practice of the Law of Evidence, 8<sup>th</sup> Edition, Cutler and Charles, Butterworth (1904) circumstantial evidence is discussed in details as explained and illustrated at page 6 as follows: - "To give two simple illustrations: If a man be stabbed in a house, and another man be seen running from the house immediately after, with a blood-stained sword in his hand, the flight, the weapon, and the blood raise, in Iegai language, a violent presumption that the second man murdered the first. Similarly, in larceny, where goods have been stolen by a person unknown, and they have been found shortly after in the possession of the prisoner, juries are always told by judges that on this evidence alone they are bound to convict, unless they are satisfied with the prisoner's explanation of the manner in which he obtained the goods." I am mindful however, on the danger of acting on pure circumstantial evidence, if no care is exercised, may bring in a Page 18 of 33 misleading conclusion. From the same place in the book above, a caution is given as quoted hereunder: - "Lord Hale mentions a case, which he says was tried before a very learned and wary judge, where a man was condemned and executed for horse stealing, upon proof of his having been apprehended with the horse shortly after it was stolen; and afterwards it came out that the real thief, being closely pursued, had overtaken the man upon the road, and asked him to hold the horse for him for a few minutes. The thief escaped, and the innocent man was apprehended with the horse. In such cases, and generally, it is well to bear in mind, that where it is sought to establish a theory by circumstantial evidence, all the facts proved must be consistent with the theory" Having in mind the above views, our jurisdiction has unlimited precedents on similar doctrine of circumstantial evidence. It is settled, I presume in our jurisdiction that to ground a conviction on circumstantial evidence, such evidence must be incapable of more than one inference (see the case of Republic Vs. Kerstin Cameroon [2003] T.L.R 84). It must pass the main parameters set forth in many precedents such as; facts forming the evidence be proved beyond reasonable doubt; be capable of only one inference; and be incompatible with the innocence of the accused person. This was well-considered in the cases of Ally Bakari and another Vs. R, [1992] T.L.R 10 (CA) Protas 3 Kitogole and another Vs. R, [1992] T.L.R 51 (CA) and Ahamadi Chali Vs. R [2006] T.L.R 313 although in different cases the parameters are differently explained, the gist is never distorted. But the Court of Appeal in the case of Bahati Makeja Vs. R, [2010] T.L.R. 49 Page 19 of 33 presented comprehensive parameters for circumstantial evidence, as quoted hereunder: - "As in all, a survey of decided cases on the issue in this country and outside jurisdiction, establishes that such evidence must satisfy these tests: -

- (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established beyond reasonable doubt;
- (2) those circumstances should be of a definite or conclusive tendency unerringly pointing towards the guilt of the accused;

- (3) the circumstances, taken cumuatiueiely should form a chain so compiete that there is no escape from the concuision that within aii human probabiitiy the crime was committed by the accused and no one eise, and (4)the circumstantiai evidence in order to sustain a conviction must be compiete and incapable of expianation of any other hypothesis than that ofthe guiti ofthe accused and should be inconsistent with his innocence. Applying the caution through the tests established, all possibility of erroneous conclusion is eliminated. The standard will be strictly followed in testing the prosecution evidence in the case to see whether the circumstantial evidence led by the prosecution has attained the level of cogency required by law. To start with, it is now undisputed that, the deceased went missing with a motorcycle make Houjue, registration No. MC 307 CNS around 16:00 hours on 05/11/2020, it was discovered that he was murdered on the same date. Likewise, the same date when the deceased met his Page 20 of 33 death, the said motorcycle was found in the hands of the three accused persons. The accused themselves conceded that on 05/11/2020, just few hours after the deceased went missing, they traveled overnight using the motorcycle of the deceased from Kisaki Morogoro to Yombo Vituka Dar es Salaam, where they arrived around 02:00 hours on 06/11/2020. The purpose of travelling to Dar es Salaam was to sell such motorcycle of the deceased, and they actually sold it to PW7. Recollecting from above, the first premise is that the motorcycle which the deceased possessed when he went missing before meeting the tragic death, was stolen after killing the deceased and the motorcycle fell in possession of the accused persons on the same date just few hours later. To put it in the other way round, the accused persons were found in possession of the motorcycle, not more than an hour after the death of the deceased. From the evidence of PW6 and PW7, in selling the motorcycie the accused persons (third accused) stated that the motorcycle belonged to the first accused and that the first accused was in dispute with his wife, who had detained the motorcycie's registration card and all other properties, the statement which they knew was false. In the defence, the accused persons had the theory that somebody called Livinus gave the motorcycle to the first accused to find a purchaser. The third accused assisted to get a purchaser in Dar es Saiaam and the second accused was only taken for riding the motorcycle to Dar es Salaam. Livinus was not known to the accused persons and prosecution witnesses nor was he called to testify in court. The first accused testified just generally that he had the motorcycle since Page 21 of 33 03/11/2020 while PW2 established that the motorcycle was lost on the day when the deceased died. The facts as evaluated above bring in the doctrine of recent possession. Under the doctrine, where a person is found in recent possession of a stolen property or any article connected with any offence, such person is presumed to be the thief, guilty receiver or the perpetrator of any offence connected with that property, unless reasonable explanations are given on how the property came into his possession. Some of the earliest cases on this subject matter are the case of R Vs. Bakari Abdallah (1949) 16 E.A.C.A. 84; William Maziku Vs. R [1970] H.C.D. 174 and DPP Vs. Joachim Komba [1984]T.L.R 213. Recently in the case of DPP Vs. Orestus Mbawala @ Bonge

[2020] 2 T.L.R. 226 the Court of Appeal referred a number of its previous decisions, including that of Joseph Mkumbwa and Samson Mwakagenda Vs. R, Criminal Appeal No. 94 of 2007 (unreported), and reiterated what it stated previously that; - "Where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained. For the doctrine to apply as a basis of conviction, it must be proved, first, that the property was found with the suspect; second, that the property is positively proved to be the property of the complainant; third, that the property was recently stolen from the complainant; and lastly, that the stolen thing constitutes the subject of the charge against the accused" Page 22 of 33 In further reference to Rex Vs. Bakari s/o Abdulla (1949) 16 EACA 84, the court insisted, the doctrine of recent possession can extend to any offence incidental to or connected with stealing, irrespective of the gravity including murder. Other cases are Kandi Marwa Maswe Vs. R, Criminal Appeal No. 467 of 2015 and Joseph Sera Liumile Vs. R, Criminal Appeal No. 304 of 2013. In our case, it is proved that the deceased possessed the motorcycle which was stolen from him. Under the circumstance, the person(s) who stole the motorcycle from the deceased, killed him in order to attain the goal. This same motorcycle fell in the possession of the three accused within an hour later. The first accused theory was that he was given the motorcycle by one Livinus. I am obedient to the rule of evidential burden as earlier expounded and that the accused bears no burden to prove his innocence nor may he be convicted by the weakness of his defence (R. Vs. Kerstin Cameroon). However, in this case, the accused persons were in a duty to offer just a reasonable explanation on how they came into possession of that motorcycle. Another important consideration to this case is related to time frame the accused persons were found in possession of the motorcycle. Generally, there is no fixed time to be recent enough to justify invocation of the doctrine of recent possession, but set of facts relevant to the case will be decisive determinant in that respect. This was also held in Joachim Komba (supra). In that case where the stolen property was a common radio cassette, the Court held that 8 months period was too long for the doctrine to invoke, while in Samson Mzamani Vs. R,

[2002] T.L.R. 79, a case of armed robbery, the Court held two days to be recent when a wrist watch which was among the stolen properties was found in possession of the accused. Page 23 of 33 Each case will be treated on the basis of its circumstance; among the factors to consider, includes the nature of the property involved and the probability of that property passing through hands easily and smoothly, the identifiability and distinctiveness of the item stolen. In this case, among the properties stolen from the deceased was a motorcycle. I have considered that, few hours' time or may be three hours from when the deceased got lost and met his sudden death to when the motorcycle was discovered to be in the accused persons' possession, was very recent. Despite the explanation offered by the accused persons, which were not probable, I find no possibility of the motor cycle having passed any other hands than from the deceased at that point in time, to the accused persons and then to PW7 the next day. I am satisfied that in the

circumstance of this case, the doctrine of recent possession is properly applicable. I have referred to the accused persons' false statement to PW6 and PW7, which they did not dispute in their defence. That when they brought the motorcycle to Dar es Salaam, they stated that it belonged to the first accused. They explained further that on the missing registration card they lied to them that the card was detained by the first accused's wife together with other properties due to their family conflict. Above all, it was proved by PW2 that he was the true owner of the motorcycle and he tendered the registration card and unopposed was admitted in court marked exhibit P3. This is relevant in law and in a way has avoided all the possibility of one Livinus to have given the said motorcycle to the accused persons. I thus find no reasonable explanation offered against the prosecutions' evidences. Page 24 of 33 The other piece of evidence is the extra judicial statement by the third accused recorded before PW8. For easy of reference, I proceed to reproduce part of the statement hereunder: - "Mnamo tarehe 05/11/2020 tuHkodi pikipiki HAOJUE rangi nyeusi, namba za usajUi MC 307 CNS tuHkodi kwa Christopher John na mimi niikuwa na Yusuph Korongo na Hussein Aiiy jumia tuiikuwa watu wanne, tuiimwambia Christopher John atupeieke mashambani kwa ajiii ya kukodisha mashamba. Tuiivyofika kwenye mashamba Kitope, mimi niiishika kigongo kidogo ndipo niiimrushia Christopher John kichwani na aiianguka chini na Yusuph aiimkagua na aiichukua simu na Tsh. 5000/= na baadaye waiisaidiana na Hussein Aiiy na waiimuweka kwenye korongo. Ndipo tuiichukuwa pikipiki hiyo mpaka Dutumi na Hussein Aiiy aiikuwa ndiye dereva na Tshs 5000/= tuiiweka mafuta na He simu iiiiuzwa hapo Dutumi na Tuiiweka mafuta ndipo tuiiondoka kuelekea Dar-es-Salaam eneo la Yombo Vituka. Ndipo pikipiki tuiiuzwa kiasi cha Tshs 800,000/= kwa Chande ambapo kiasi cha Tshs 700,000/= aiitoa fedha tasiimu na Tshs 100,000/= aiimtumia Yusuph kwenye simu yake. Na fedha hiyo Tshs 800,000/= Tuiigawana mimi Tshs 200,000/= Hussein 200,000 Daiaii 200,000/= iiiiobaki aiichukua Yusuph. In the language of this court, the above can be summarised that on 05/11/2020 the three accused hired the deceased with his motorcycle to take them to Kitope area where they wanted to lease a farm. Upon arrival, Faraji took a club and hit Christopher John in the head, he fell down. Yusuph searched Christopher and took Tshs. 5000/= and a Page 25 of 33 handset. Hussein and Yusuph took the body and put him in the gulley. Thereafter they took the motorcycle to Duthumi, they sold the phone, the proceed was added to Tshs 5000/= and they bought fuel for the motorcycle. They drove to Yombo Vituka Dar-es-Salaam and sold the motorcycle to one Chande at Tshs 800,000/= and divided the proceeds among them. I have considered the seizure certificate (exhibit P5) which lists all the properties seized from the first accused on arrest. It was said that the tecno phone (exhibit P6) was among the deceased properties he had before meeting his death. No witness testified In court that such handset belonged to the deceased and that It was stolen In connection to the death. The extra judicial statement was to the effect that they sold the phone they stole from the deceased, proceeds added to Tshs. 5000 and bought fuel for the motorcycle. It Is hard for this court to conclude that the phone found In the first accused's possession on arrest, would be that of the deceased which the accused sold almost fifteen days earlier. Despite the fact that the prosecution case did not depend on the confession of the third

accused, I have warned myself before considering such retracted confession. In *Hatibu Gandhi and Others Vs. Republic* [1996] TLR 12 (CA), on retracted confession, the court held: - "The law regarding the value and weight to be attached to retracted confessions has been settled In East Africa In a number of cases, culminating with the case of *Tuwamoi v. Uganda*. One of the major legal propositions In *TuwamoTs* case Is that a court can convict the maker of an uncorroborated retracted confession If It warns itself of the Page 26 of 33 danger of acting upon such an uncorroborated retracted confession, and is fuiiy satisfied that the retracted confession cannot but be true." The above rule stands cherished in respect of confessions, correctly as Mr. Mkilya pointed in his final submission. Abundant decisions of this court and the Court of Appeal have demonstrated the principle, few of those cases are *Hassan Juma Kanenyera and Others Vs. R*, [1992] T.L.R 100, *Michael Luhiye Vs. R*, [1994] T.L.R 181 and *Ndorosi Kudekei Vs. R*, [2020] T.L.R 323. In the case at hand, the maker did not deny the truth of his confession, but only that he was tortured before being taken to the Justice of Peace, the allegations which were not argued at any serious point. Apart from that, the confession is corroborated by the evidence of PW1, PW4, PW5, PW6 and PW8. The post-mortem examination report (exhibit P4) corroborated the confession on the nature of the wound found on the deceased's head. Apart from that, it shows that the main facts stated in the confession were also stated by the prosecution witnesses and the defence narrative altogether, was coherent with the confession. I am satisfied that the confession was corroborated and taking all the circumstances, it was nothing but oniy truth. The court is satisfied that a motorcycle was positively identified and proved by PW2 (the owner) to have been in the possession of the deceased and was stolen at the time the deceased met his death. There is bold and clear connection between his death and the robbery or theft of the motorcycle and thus, constitutes the subject in the charge of murder herein. Page 27 of 33 Lastly, all accused persons and prosecution witnesses PW1, PW6 and PW7 joined hands that the motorcycle was found in the possession of accused persons. The other evidence testified by prosecution side is that of PW1 and PW5 who adduced in this court that, the first and second accused persons during interrogation, admitted to have killed the deceased and directed police officers to the place where they dumped the deceased body. When the latter followed the accused directions, they really found the body at the same place stated by the accused persons. Apart from all the above, there are conducts by the accused persons falling under the doctrine of *res gestae* rule as per section 10 of The Evidence Act; traveling overnight three persons in one motorcycle such a long distance from Kisaki Morogoro to Yombo Vituka Dar es Salaam; going to PW6 home without appointment at midnight; telling lies to PW6 and PW7 about the ownership of that motorcycle; and 1^^ accused plan to flee upcountry soon after the event of selling that motorcycle, altogether brings in the inference of guilt mind. I am aware that when the officers went to Kitope to retrieve the deceased body, they did not take the accused along for a good reason of fearing the infuriated people, particularly the bodaboda riders who were extremely angry, would kill the accused persons at the scene. In the eyes of this court, the reason was plausible. However, admission by the two accused persons and the details they offered, leading to discovery of

the body left no iota of doubt they knew the whole incidence of what happened to the deceased. Having searched for the deceased on whereabouts for about 15 I days in vain, also the way the body was hidden in a ravine at a secreted area, I am convinced the prosecution would not easily locate the body if Page 28 of 33 it was not for the accused persons admission and locating the body, as disclosed by PW1 and PW5. Considering the pieces of circumstantial evidences including the confession by the third accused, this court is satisfied beyond doubt that the second issue is answered in affirmative that, all three accused persons killed the deceased in furtherance of the crime of robbery and thus, the killing was unlawful. The last issue is whether the killing was done with malice aforethought. It is known under the maxim 'actus non facit reum nisi mens sit rea' meaning that the act is not culpable unless done with an evil mind, which is fundamental maxim of the whole Criminal Law (A History of Criminal Law of England, Volume 2(1883) by Sir James Fitzjames Stephen, pg.94). Malice aforethought is an evil intent to kill, a mens rea in homicide cases introduced in the year 1340 in English jurisdiction. In our jurisdiction, it is accommodated under section 196 of the Penal Code, which mentions malice aforethought as prerequisite element as elaborated in section 200, which explains the element in the following terms; - "Section 200. Malice aforethought shall be deemed to be established by evidence proving any one or more 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 or grievous harm to some person, whether that person is the person actually killed or not. Page 29 of 33 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. It is also settled, apart from the above, numerous factors should be considered to ascertain malice aforethought. Some of them were expounded in the case of Enock Kipela Vs. R, Criminal Appeal 150 of 1994 at page 7, where it was observed: - '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 use 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 blows 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 attacker's utterances, if any, made before, during or after the killing; and (7) the conduct of the attacker before and after the killing. In our case, the deceased was attacked in the back of his head by what seems to be a heavy blow of a blunt object (club), which led to the Page 30 of 33 fracture of the skull and instant death. When he fell down, the deceased was robbed of all his properties, the motorcycle, money, handset and the clothes he wore. Thereafter, the deceased body was

taken to a gulley in a way which was hard to discover. In *Fadhili Gumbo and Another Vs. Republic* [2006] TLR 50, it was held : - "If death is caused by an unlawful act in the furtherance of an intention to commit an offence, malice aforethought is deemed to be established in terms of section 200 (c) of the Penal Code, Chapter 16" In the case at hand, the demonstrated evidence shows that, the killing was done as part and parcel of the offence of robbery, positively suggesting that the perpetrators premeditated to kill the possessor of the motorcycle in order to steal it, malice aforethought was clearly established. From the extrajudicial statement, it is the third accused who attacked the deceased, however common intention was apparent. They had mutual and intelligible division of tasks. The first and second accused, searched the deceased and took the body to the gulley (korongo) and hid it before they left with his (deceased) motorcycle. The second accused took the duty to ride the motorcycle to Dar es Salaam. The relationship subsisted up to selling of the motorcycle and division of proceeds of sale of that motorcycle. The rule on common intention is clear under section 23 of The Penal Code, that each of the joint offenders is deemed to have committed the offence, same was held in *R Vs. Usumau s/o Mpangani* [1968] H.C.D. 390 where Lord Lupert Cross observed: - Page 31 of 33 "Since death or grievous bodily harm was a probable consequence of the attack upon deceased and the attackers acted with a common purpose, accused is liable for the death even though he may not himself have struck the fatal blow" All accused persons in this case were united, since from hiring the deceased to a secreted place, attacking him to death, up to when they sold the motorcycle in Dar es Salaam were jointly and together united with common intention. This being the case, I am settled in my mind that the accused persons together and with common intention killed the deceased with a clear malice aforethought. Having reasoned as done, and on the strength of the prosecution evidence, it is established beyond reasonable doubt that, the accused persons with malice aforethought, unlawfully killed the deceased Christopher John Mbuya, therefore, I find them guilty. I proceed to convict each of the accused persons, Yusuph Ramadhan Korongo, Hussein Ally Ndiwinge and Faraji Selemani Hawaya for the offence of murder contrary to sections 196 and 197 of The Penal Code [Cap 16 RE 2019 cu X > Vv. p. 3. NGWEMBE JUDGE 08/12/2022 AGGRAVATING FACTORS Ms. Happiness Makungu assisted by Theodora Mielwa - State Attorneys: My lord we do not have previous records of the convicts, but we pray the convicts be properly punished according to law because Page 32 of 33 they killed an innocent person with no justifiable cause. Thus, the sentence should remain as a lesson to themselves and others of similar behaviour. That is all. MITIGATION Mr. Daudi Mkirya for the accused: The accused persons are still young and have been in custody for quite long time, we pray this court to consider them for a lenient sentence. Kitungutu, defence counsel for the 3<sup>rd</sup> accused; I concur to the prayers made by advocate Mkirya, I pray to add that the accused person is still very young we pray for lenient sentence. SENTENCE Rightly as pointed out by the learned State Attorneys, the accused persons have no history of criminality, however, I find restrained to decide otherwise than to follow the letters of law. In law there is only one punishment to whoever is convicted for murder. Since there is no optional sentence, as per section 197 of the Penal Code Cap 16 R.E. 2019, it follows therefore that, the convicts Yusuph Ramadhan Korongo, Hussein Ally Diwinge and Faraji Seleman

Hawaya are hereby sentenced to suffer death by hanging in terms of Section 26 (1) of the Penal Code, Cap 16 R.E. 2019. Right of Court of Appeal clearly Explained. Uj X W\* .  
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