IN THE HIGH COURT OF TANZANIA

(MTWARA SUB-REGISTRY)

AT MTWARA

CRIMINAL SESSIONS CASE NO. 15 OF 2022

(Original PI No. 1 of 2022 in the Resident Magistrate's Court of Mtwara at Mtwara)

THE REPUBLIC

VERSUS

GILBERT SOSTENES KALANJE..... 1st ACCUSED

CHARLES MAURICE ONYANGO.....2ND ACCUSED

NICHOLAUS STANSLAUS KISINZA.....3RD ACCUSED

MARCO MBUTA CHIGINGOZI.....4TH ACCUSED

JOHN YESSE MSUYA.....5TH ACCUSED

SHIRAZI ALLY MKUPA.....6TH ACCUSED

SALIM JUMA MBALU.....7TH ACCUSED

JUDGMENT

30th April & 23rd June, 2025

MWANGA, J.

The rule is, and it is nothing more than a rule of practice, that when the guardian becomes the aggressor, the fabric of society frays. The foregoing statement accurately represents the factual predicate for the judgment I am about to deliver shortly. The case presents a stark and troublesome paradox: that police officers who sworn to uphold the laws

and safeguard the citizens' lives stand accused of one of the most heinous crimes, which profoundly may lead to breach of the sacred trust reposed in them, whose very presence is meant to be a bulwark against fear, not its source. The court is keenly aware of the profound impact these allegations have on the collective sense of security. Today, this court is tasked with the solemn duty of dissecting these grave allegations and delivering justice where it has been so grievously undermined.

The police officers I am referring to and who are the accused persons in this trial are: SP Gilbert Sostenes Kalanje(OCCID); ASP Charles Maurice Onyango (OCS); ASP Nicholous Stanslaus Kisinza(ORCI); A/INSP Marco Mbuta Chigingozi (A/ISP); Inspector John Yesse Msuya (Medical Doctor); Shirazi Ally Mkupa (A/ISP); and (I/I/Coplo Salim Juma Mbalu. They are all charged with the murder of one **Musa Hamis Hamis** contrary to sections 196 and 197 of the Penal Code, Cap. 16 R.E. 2022. The particulars of the offence are that, on the 5th day of January 2022, at Mitengo Police Station within Mtwara District in Mtwara Region, the accused persons murdered one **Musa Hamis Hamis** (hereinafter to be referred to as the deceased).

To fully grasp the circumstances of the alleged catastrophic death of the deceased, a concise narration of the factual background of the case

leading to the accused persons' arraignment will serve to illuminate the matter.

The deceased, **Musa Hamis Hamis,** was a businessman who traded minerals, cash crops, and clothing in the Dar es Salaam Region and the Nachingwea District. It befell that, in October 2022, he visited the Luponda-Nachingwea District, where his parents reside, and informed them that he wanted to renovate their house. The deceased expressed to his parents that he had foreign currency, which he wished to exchange to fulfill his desire. He thus went to Mtwara Region with his fellow Said Makala for that purpose. Upon arriving, they slept at Sadna Lodge.

Meanwhile, on 20th October 2021, the third accused, **Nicholaus Stanslaus Kisinza,** gathered intelligence that two individuals with extraordinary spending were hanging around at Sadina Lodge. According to him, he suspected them of being motorcycle thieves. Afterwards, he directed his subordinate, Intel/Cpl **Salim Juma Mbalu,** the seventh accused, to collect and verify the intel information. Acting under such directives, the seventh accused successfully accompanied the sixth accused, conducted surveillance, and investigated the two male individuals. They confirmed their stay at Sadina Lodge and reported back to the third accused person about the findings, who also instructed them

to relay the information to the first accused, **SP Gilbert Sostenes Kalanje,** and the second accused, **Charles Maurice Onyango,** who were the OCCID and OCS of Mtwara Police Station, respectively.

Then, the 2nd and 3rd accused directed the fourth accused, A/Insp. **Marco Mbuta Chigingozi,** to effect the arrest of the two individuals, and conduct a search and seizure. The fourth accused organized a team comprising himself, the sixth accused, A/Insp. **Shirazi Ally Mkupa**, the seventh accused, Intel/Coplo **Salim Juma Mbalu,** the late Assistant Inspector **Grayson Gatian Mahembe**, and Assistant Inspector **Shadhili Simai Makame**.

Upon their arrival at Sadina Lodge, the fourth accused, with his team, found the deceased **Musa Hamis Hamis** in Room No.6 and placed him under arrest. After the search, they seized **TZS 2,300,000/=** from the suspect as cash. The suspect was subsequently taken to Mtwara Central Police Station, detained in the police lockup, and assigned a case registered with IR No. MTW/RB/1330/2020 and entered in detention register entry No. 271.

It appears that, following the arrest and interrogation of the deceased, further investigations were necessary. Hence, on the 21st day of October 2021, the second accused directed the fourth, sixth, and

seventh accused to accompany the deceased to his residence at Luponda Village to conduct further search and seizure. The second accused issued a movement order, No. 96774, to facilitate the movement of the investigators' team outside the Mtwara Region. As a result, the deceased was removed from the police cell/lockup to Luponda Village, Nachingwea District.

When they arrived, the fourth accused conducted a search and seizure at the home of the deceased in the presence of the deceased's mother, one **Hawa Bakari Ally**. His fellow police officers and those from Nachingwea Police Station accompanied him and stood guard, providing security for the entire operation.

During the search, the fourth accused seized **USD 13,558,** one solar panel, one solar battery, and one inverter charger at the house where the deceased was residing, as well as **TZS 1,050,000/=** at the home of **Saidi Ahmadi,** a friend of the deceased. One solar panel was left at the Nachingwea Police Station because it could not fit in the car. The remaining seized properties were transported to Mtwara Central Police Station together with the deceased. The said properties were handed over to the 1st and 2nd accused persons, who are believed to have unlawfully shared the same with the 3rd, 4th, 6th, and 7th accused persons.

On the 24th day of October 2021, the Second accused ordered G. 4011 CPL **Ikangilo** to release the deceased on bail without sureties. After his release, the second accused gave **Musa Hamis Hamis** TZS 130,000/= as bus fare and warned him against any attempt to repossess his properties from police custody. The deceased had no choice but to leave the police station and go to Nachingwea district, Lindi region, then to his home at Luponda village.

While at his home village, the deceased complained to his family and friends that the police had illegally dispossessed him of his properties. He also raised similar concerns with various government officials within Nachingwea district, who responded by channeling the complaints to the relevant authorities at the National Prosecution Services in Lindi, who later contacted the Regional Police Officer at the Mtwara Region for necessary action.

The 4th accused became aware of the deceased's complaint that he had been dispossessed of his properties by them, and he informed the 1st accused, whom he handed over the seized properties. The first accused then directed the fourth accused to summon Musa Hamis Hamis to Mtwara Central Police Station, where he was to meet the first accused at his office.

On January 2, 2022, the fourth accused notified Musa Hamis Hamis via phone call to go to the Mtwara Central Police Station as directed. Musa Hamis Hamis developed a sense of unease and shared the information with his mother, **Hawa Bakari Ally**, who advised him not to go alone, without even notifying the government authorities. She thus asked the deceased to contact his uncle, Salum **Abdallah Ng'ombo,** to accompany him to Mtwara Central Police Station.

Acting on his mother's advice, the deceased lodged his complaints and worries with the National Prosecutions Service office in Lindi region, where he was given a letter by the Regional Prosecutions Officer (RPO) in Lindi, referring the deceased's complaints to the National Prosecutions Service office in Mtwara region.

On January 4, 2022, Musa Hamis Hamis visited the National Prosecutions Service office in Mtwara Region, accompanied by his uncle, Salum Abdallah Ng'ombo, where his complaints were received. On January 5, 2022, the deceased received a response to his complaints from the National Prosecutions Service office in the Mtwara region, where he was given a letter informing him that his complaints were being addressed. Also acting on the call of the fourth accused, Musa Hamis Hamis and his uncle went to the Mtwara Central Police Station, where he

informed the fourth accused via phone of his arrival. The fourth accused instructed the late **A/Insp Grayson Gatian Mahembe,** who was present at the police station at the time, to handle the deceased and take him to the office of the first accused. The directions were fulfilled.

While at the office of the first accused, the deceased Mussa Hamis Hamis was interrogated and locked in the store to wait for further instructions. At the same time, the deceased uncle was waiting for the deceased to come out of the police station, but soon the first accused ordered him to leave the police station. The deceased uncle left but called the deceased via the phone, but his call was not answered. Later on, he received a text message from the deceased that read*, "waliniachia", "tukutane nyumbani".* Afterwards, the deceased's phone was no longer reachable.

On the same date, the first accused sought the assistance of the fifth accused, **John Yesse Msuya,** who was the In-charge of Mtwara Central Police Dispensary, and asked him to assist in eliminating the deceased by injecting him with poison as he was not cooperating to reveal his criminal syndicate/rackets in the stealing of motorbikes in the regions of Dar es salaam, Lindi and Mtwara. According to the fifth accused, he denied having ever engaged in such unprofessional conduct. Instead, he

advised that he would assist the first accused by injecting the deceased with "Ketamine" which would make the deceased feel disconnected and not in control /in a state of cognitive unconsciousness, so that, when he woke up, he would divulge all information relating to his criminal conduct and co-suspects in the regions mentioned.

Being content with the advice given, the first, second accused, and the late A/INSP **Grayson Gatian Mahembe,** removed the deceased from the office of the first accused, where he was locked in, and took him in the 1st accused's motor vehicle. They all boarded and went to the Mtwara Police Dispensary to pick the fifth accused, then drove to Mitengo Police Station.

While at Mitengo Police Station, the first and fifth accused, who were in the front seat, disembarked from the car, leaving behind the second accused, the late A/INSP Grayson Gatian Mahembe, who also later disembarked from the motor vehicle together with the deceased, and all went inside the Mitengo Police Station. They all met in an office-like store, which had been assigned to the first accused for interrogating the deceased, as he had earlier requested. The police guards at Mitengo Police Station were asked not to interrupt their activity.

Inside the said room at Mitengo Police Station, the first accused told the fifth accused to inject Musa Hamis Hamis, the young boy. The fifth accused heartlessly directed the poor, shirtless, shocked, and terrified young boy (deceased) to lie down and instantly injected him as he advised.

While the deceased was about to lose consciousness, the first accused interrupted the fifth accused, telling him that the process was taking too long. Hence, he took a cloth and blocked the deceased's nose and mouth to suffocate the deceased, losing consciousness under the watchful eye of the 2nd accused and Grayson Mahembe. According to the 5th accused, he became shocked because that was not what they had agreed upon, and he then decided to leave the room, staying outside. After that, the 1st and 2nd accused, and the late Assistant/Inspector Greyson remained a while in the room with the deceased. After approximately 45 minutes, they emerged and joined the 5th accused, and all left the Mitengo Police Station together, departing in their car. The deceased's body was left in the room, locked inside with a padlock.

During the night, the late A/INSP **Grayson Gatian Mahembe** was seen picking a stretcher from Mtwara Central Police Station and loading it into the back of a motor vehicle with Reg. No. PT 1918 made the Toyota

Land Cruiser, where he met with another police officer. The said motor vehicle was being driven by the first accused, while the Second accused was sitting in the passenger front seat. The first accused drove the said motor vehicle to the Mitengo Police station, where the first, second accused, and the late **A/INSP Grayson Gatian Mahembe** and another police officer disembarked from the said motor vehicle with the stretcher and went to the room where the deceased body was left. The first accused informed the junior police officers on guard, including PW5, Sgt. Jagadi at the Mitengo police station, that they had come to pick up a sick person. They placed the deceased body on the stretcher and carried the stretcher with the deceased body in the back of the motor vehicle. They then got back in their car and left. The evidence presented suggests that the first accused drove the motor vehicle from Mitengo Police Station to Hiari village forest area within Mtwara district, where they dropped the deceased body from the motor vehicle, abandoned the deceased body in the bushes, and returned to Mtwara Central Police Station.

On 7th January,2022, the deceased mother and PW2 started complaining about the disappearance of the deceased, who was last seen at Mtwara Central Police Station. They reported their claim to the RCO of Mtwara, ASP Yustino John Mgonja, who promised to investigate the claim.

An investigation into the whereabouts of the deceased commenced, whereby the 5th accused broke the ice and took the cats out of the bag. He narrated the entire incident that occurred on January 5, 2022, and revealed the involvement of A/Insp. Greyson. On the 21st day of January 2022, after being interrogated, the late A/INSP Grayson Gatian Mahembe also gave the full story on how the deceased was murdered and the partners in crime. He went further to show the police where the deceased's body was dumped in the Hiari Forest area. Following this revelation, A/ISP Greyson Gatian Mahembe was detained and locked up at the Police Station. On the same night, information spread that he had hanged himself while in custody.

At the scene of the crime in the forest area, the police recovered ten human bone remains. A sketch map of the crime scene was drawn, and photographs were taken. The deceased's bones were submitted to the Government Laboratories Authority for a DNA Profiling test.

On the 24th day of January 2022, the deceased mother was taken to the Government Laboratories Authority, where government chemists extracted DNA samples from her for DNA comparison with the bones that were found at Hiari forest area, a place located by the late A/INSP Grayson Gatian Mahembe. The DNA profiling test report confirmed that the bones

found in the bush were related and matched to Hawa Bakari Ally, the mother of the deceased. After such a thorough investigation, the accused persons were arraigned in court and charged presently.

When called to answer their charges, all accused pleaded not guilty, prompting the prosecution to parade twenty-eight (28) witnesses and sixteen (16) exhibits to prove its case. In contrast, the accused defended themselves and tendered three exhibits.

On different occasions, the Republic was represented by Matenusi Marandu, PSA; Paschal Marungu, PSA; Joseph Maugo, PSA; Chivanenda Luwogo, PSA; Kassim Nasiri, SSA; Ignas Mwinuka, SSA; Farida Kiobya, SA; Jaggad Jilala, SA; and Karangi Joels, SA. At the same time, Mr. Majura Magafu, Fredrick Ododa, Nehemia Nkoko, Allex Msalenge, Felister Awasi, Steven Lekei, and Emmanuel Ngongi, all learned counsels, represented the accused persons, respectively.

After the closure of the defence case, both parties expressed their desire to present their closing submissions, the prayers, which were cordially granted. Nonetheless, I do not intend to reproduce the entire set of evidence of the parties or the submissions in determining this case. I shall only apply them intermittently as the context demands.

I have carefully reviewed the evidence presented by both parties

and the final submissions made in support thereof. The fundamental issue to be addressed is whether the prosecution has proven the charge against the accused persons to the required standard, which is beyond a reasonable doubt.

It is a trite law, as stated under sections 110(1) and (2) and 112 of the Evidence Act, Cap. 6 R.E. 2022, that the person who alleges must prove, and the burden of proving so lies with the person who alleges. See also the cases of **Issa Mwanjiku @ White vs Republic,** Criminal Appeal No. 175 of 2018 [2020] TZCA (Unreported); **Nathaniel Alphonce Mapunda and Benjamin Mapunda Vs. R** [2006] TLR 395 and **Zombo Rashid Vs. R,** Criminal Appeal No. 7 of 2012 (CAT-unreported).

In that context, the court has always emphasized that such a duty shall never shift to the accused person. Such a position was stated in the case **Shauri Vungwa versus the Republic,** Criminal Appeal No. 458 OF 2021 [2025] TZCA 370 (17th April 2025), it was thus held at page 8 that:-

> *"We must also re-emphasise that, in criminal trials, the prosecution is bound to prove the case beyond a reasonable doubt, and* ***that duty never shifts to the accused person".***

Conversely, it is worth noting that the duty of standard of proof is provided for under section 3(2)(a) of the Evidence Act [Cap. 6 R.E 2022].

The same is echoed in the case of **Nathaniel Alphonce Mapunda and Another vs. R** (supra) when the Court observed thus: -

> *"i) As is well known, in a criminal trial, the burden of proof always lies with the prosecution. Indeed, in the case of MOHAMED SAID V R, this Court reiterated the principle by stating that in a murder charge, the burden of proof is always on the prosecution, and the proof has to be beyond a reasonable doubt.*
> *(ii) Where circumstantial evidence is relied on, the principle has always been that facts from which an inference of guilt is drawn must be proved beyond a reasonable doubt.*
> *(iii) In criminal charge, suspicion alone, however grave it may be, is not enough to sustain a conviction, all the more so, in a serious charge of murder".*

In another case of **William Ntumbi vs Director of Public Prosecutions**, Criminal Appeal No. 320 of 2019, the Court of Appeal, in explaining the term beyond reasonable doubt, referred the case of **Magendo Paul & Another v. Republic** (1993) TLR 219, where it was held:-

> *"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the*

accused person as to leave a remote possibility in his favour which can easily be dismissed."

The same stance is echoed in the case of **Matibya Ng'habi vs Republic** (Criminal Appeal No. 651 of 2021) [2024] TZCA 34 (14 February 2024) (TANZLII), at page 8, where it was held,

> *"At the outset, it is instructive to state that, this being a criminal case, the burden lies on the prosecution to establish the guilt of appellant beyond reasonable doubt. In* ***Woodmington v. DPP [1935] AC 462****, it was held, inter alia, that it is the duty of the prosecution to prove the case, and the standard of proof is beyond a reasonable doubt. The term beyond a reasonable doubt is not statutorily defined, but case laws have defined it. For instance, in the case of* ***Magendo Paul & Another v. Republic [1993] T.L.R. 219*** *the Court held that: "For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed."*

It is also more noteworthy that such a duty shall only be discharged if the prosecution successfully proves all the elements of the offence. See the case of **Shauri Vungwa versus the Republic(supra).** The proof of such an element cannot be taken lightly. Henceforth, the evidence presented to establish such elements should be robust enough to point in

one direction: that the accused actually committed the offence, and not any other person. There should be no possibility that someone else might have committed the offence. Reliance is placed in the case of **Republic versus Rashid Abdalah Njumwaki & 2 others** (Criminal session case 157 of 2020) [2024] TZHC 789 (13 March 2024) (TANZLII), at page 6, where the Court stated that:

> *"What amounts to proof beyond a reasonable doubt was well discussed in the case of Samson Matiga Vs. R, Criminal Appeal No. 205 of 2007, where the Court of Appeal held: "A prosecution case, as the law provides, must be proved beyond a reasonable doubt. What this means, to put it simply, is that the prosecution's evidence must be so strong as to leave no doubt to the criminal liability of an accused person. Such evidence must irresistibly point to the accused person, and not any other, as the one who committed the offence."*

In light of what is discussed above, the standard of proof "beyond a reasonable doubt" in so far as it concerned, it does not mean beyond the shadow of doubt but a relatively high degree of probability, as it was held in the case of **Miller V Minister of Pensions** [1947] ALL ER 372 – 373. Speaking through Lord Denning on the degree of proof in criminal cases, the Court observed:

"That degree is well settled. It does not need to reach certainty, but must carry a high degree of probability. Proof of beyond a reasonable doubt does not mean beyond the shadow of doubt..."

Subject to the foregoing, it is also pertinent to note that, for the prosecution to secure a conviction in the present case, which has more than one accused person, common intention should be proved as per section 23 of the penal code. For clarity, the section is reproduced here under: -

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

Expounding the doctrine of common intention, the Court of Appeal in **Issa Mustapha Gora & Another vs Republic,** Criminal Appeal No. 330 of 2019) [2022] TZCA 638 (19 October 2022) (TANZLII) had this to say:-

"In establishing common intention, it is crucial, therefore, that cogent evidence must be led to show that there was a meeting of the minds of two or more persons in pursuing a common plan to commit an offence."

Further, to constitute common intention, it is not necessary that there should have been any concerted agreement between the accused persons before the commission of the crime. Their common intention may be inferred from their presence, their actions, and the omission of any of them to dissociate themselves from the assault. This position was enunciated in the case of **Godfrey James Ihuya Vs R** (1980) TLR 1977.

Based on the above-cited authorities, it is incumbent upon this court to evaluate the evidence adduced to determine whether the accused persons committed the charged offence.

Before I address the issue above, I wish to clarify some points raised in this trial and in the submissions of the 1st, 2nd, 3rd, and 6th accused persons, which, to me, raise pertinent legal issues concerning the foundation of this trial.

According to the counsels as per PGO 13, there is no Police Station in Tanzania or Mtwara Region by the name of Mitengo Police Station. Thus, to them, the death is said to have occurred at a non-existent police station. Hence, they had a view that, there is variance between charge sheet and the evidence presented; and since the prosecution did not amend the charge sheet, the same is incurably defective, and the remedy is to dismiss the charge as the anomaly, impaired ability of accused persons to mount a defence due to ambiguity of such location.

On the other hand, prosecution counsels submitted that the prosecution brought evidence in the record showing that Mikindani Police Station was also known as Mitengo Police Station, even though the name Mitengo does not appear in the PGO. They referred to the evidence of PW3, PW2, and DW5.

They went on to submit that, being referred to in the Police General Order, has nothing to do with the quality of the information or the charge presented, since the information against the accused person meets all the conditions set under Section 132 of the Criminal Procedure Act, [Cap. 20 R.E. 2022 (the CPA), which provides that the charge or information will be sufficient if it contains a statement of the specific offence or offences with which the accused persons are charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

It is true, and I subscribe to the accused counsels' submissions that Mitengo Police Station is not listed in the PGO. However, I differ with their assertion that there is variance between the charge sheet and the evidence, as both the charge sheet and the evidence point out that death was executed at Mitengo Police Station. Regarding the allegation that Mitengo Police Station does not exist, my perspective diverges from that of the counsels. In my view, the learned counsels and the accused

persons, who are presumed to possess a greater understanding of such matters, appear to be mistaken about what constitutes a defective charge. The interpretation section, section 2 of the Police Force and Auxiliary Services Act, Cap 322, defines police station as follows: -

> *"A police Station means any place appointed by the Inspector-General to be a police station,* ***and includes any local area policed from such a station*****."**

My understanding of this section is that such a definition clarifies that a police station is a location officially designated as such by the Inspector-General, and it also encompasses the area under the station's policing jurisdiction. This means that any place explicitly appointed as a police station, as well as the surrounding area where the station's police force operates, is considered part of that police station. In this case, the Mikindani Police Station is responsible for providing policing services to and conducting activities in Mitengo, which is referred to by some witnesses as Mitengo Police Post, as evidenced by the fact that the Mitengo area is located within the Mikindani Police Station's jurisdiction. It has an in-charge, who, at the time of the incident, was PW25 (Paulo Mussa Kiula), and as explained by PW25, it has all the register books required for the police station. Thus, to me, Mitengo not being designated

as a police station in the PGO but a Police Post does not mean referring to it as a police station is fatal.

That notwithstanding, the core element of the charge sheet was the killing, the victim, the date, and the specific location (Mitengo), which is familiar and well known to the accused persons, and they have operated there regularly. It is within their jurisdiction as police officers from Mikindani Police Station. In other words, since the accused persons were made aware of the actual location where the alleged crime occurred, the defence that the charge sheet is defective solely due to the administrative designation of the police facility cannot stand. Further, the defence did not explain how that specific mislabeling caused substantial prejudice or confusion to them in the course of their defence. Thus, their assertions are unfounded and therefore without merit.

Additionally, during the trial, particularly during the examination in chief, the first accused raised a concern that the charge sheet does not specify the time of the offence. Indeed, the charge sheet only mentions other particulars apart from the time. In my considered view, the charge sheet cannot be defective simply because it does not provide the time of the commission of the offence. It would have been an issue if the charge sheet provided the time of the commission of the offence, but the evidence presented does not specify/prove the time stated in the charge

sheet. My stance finds solace from the case of **Majaliwa Zacharia @ Claud vs Republic,** Criminal Appeal No. 122 of 2021 [2025] TZCA 60 (24 February 2025), where it was held:-

> *"Much as the law requires disclosure of the actual time in the charge sheet where time is of essence in proof of an offence, the proposition in the instant case which was to be proved was that, the offence was committed on diverse dates between 8th August 2020 and 18th September, 2020 which means that the exact time of the commission of the offence was not known".*

That aside, the circumstances leading to the death of the deceased cannot allow one to ascertain the time. It is purely circumstantial in its context.

Having so found, it is imperative that I now focus on the substantive merits or otherwise of the case. As previously stated, the accused persons are charged with the offence of murder, whose ingredients are traced from section 196 of the Penal Code [Cap. 16 R.E 2022]. The section provides thus: -

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

By virtue of the provision of the law, it is apparent that, for the prosecution to secure a conviction in a case of this nature, three elements

must be established. **One**, that the person claimed to have been killed is dead, and his death is unnatural. **Two,** that he accused persons are responsible for such death, and **three**, that the alleged murder was actuated with malice aforethought. Given the three ingredients, I shall scrutinize the evidence presented to each element of the offence in detail, so as to ascertain if the prosecution has successfully discharged its burden of proof.

To start with the first element, the issue is **whether Musa Hamis Hamis is dead,** and if so, **whether he died of unnatural death.** In their submissions, the 1st and 2nd accused counsels submitted that there is no tangible evidence to prove that Musa Hamis Hamis is dead, as the cause of death was not established. I want to address this concern before addressing the first issue.

By the current legal position, murder can be proved circumstantially even without a postmortem report or production of the deceased's body. This principle was articulated in the case of **Mathias Bundala vs. Republic**, Criminal Appeal No 62 of 2004, CAT (unreported), where the court of appeal had this to say:-

> *"...it is not the requirement of the law that the cause of death must be established in every murder case. We are aware of the practice that death may be*

proved by circumstantial evidence even without the production of the body of the alleged dead person…It goes without saying, therefore, that it is now established law that a homicide can be satisfactorily proved without first establishing the cause of death."

In **Said Bakari Vs. R,** Criminal Appeal No. 422 of 2013, cited by the Court of Appeal in the case of **Sikujua Idd vs. Republic**, Criminal Appeal No. 484 of 2019 (unreported), it was stated that:

"It is established law that a charge of murder can be fully proved by circumstantial evidence. In determining a case centered on circumstantial evidence, the proper approach by a trial court and an appellate court is to critically consider and weigh all the circumstances established by the evidence in their totality and not to dissect and consider it piecemeal or in Cubicles of evidence or circumstances."

Similarly, this issue has also been settled in other jurisdictions, such as India. In the case of **Mani Kumar Thapa v. State of Sikkim,** AIR 2002 SC 2920, the Court held that:-

"in a trial for murder, it is neither an absolute necessity nor an essential ingredient to establish corpus delicti. The fact of the death of the deceased must be established like any other fact. Corpus delicti, in some cases, may not be able to

be traced or recovered. There are a number of possibilities where a dead body could be disposed of without any trace; therefore, if the recovery of the dead body is to be held to be mandatory to convict an accused, in many cases, the accused would manage to see that the dead body is destroyed to such an extent which would afford the accused complete immunity from being held guilty or from being punished. ***What is, therefore, required in law to base a conviction for an offense of murder is that there should be reliable and plausible evidence that the offense of murder, like any other factum of death, was committed, and it must be proved by direct or circumstantial evidence albeit the dead body may not be traced".***

Guided by the principles in the above authorities, it is apparent that proof of murder is possible without the physical presence of the deceased body.

The implications of requiring proof of cause of death to establish a murder charge were previously addressed by this Court in the case of **Republic vs Hamisi Said Luwongo @ Meshack**, Criminal Sessions Case No. 44 of 2023, where the court sternly cautioned that,

"It should be underscored that insisting on having a postmortem and body will have two repercussions in the criminal justice system. ***One*** *is that killing and destroying the body will be a complete immunity for murderers from*

being guilty or punished. ***Two,*** *many homicides will be unresolved for masking the murderers".*

Therefore, the defense counsel's assertions that there is no tangible evidence to prove that Musa Hamis Hamis is dead, as the cause of death was not established, lack a legal justification.

Reverting to the first issue raised, it was the evidence of Hawa Bakari (PW1), the deceased's mother, that her son, Musa Hamis Hamis, had gone missing since 5th January 2022, after he had reported to Mtwara Central Police Station when summoned by the accused persons. This evidence was corroborated by the testimony of Salumu Abdallah Ng'ombo (PW2), who escorted Musa Hamis Hamis to Mtwara Central Station on 05/01/2022 and left him there, but has never seen him again. There is also the testimony of Geofrey Simba (PW 20) who, on 21st January, 2022, while led by the late A/Insp Greyson Mahembe to Hiari forest area, witnessed several human ribs and bones exhibiting PE6 and PE7, which were identified and collected by A/INSP Ahobokile Mwandiga (PW 21) and Dr. Amosi Belege (PW 28). The said exhibits were subjected to a DNA profiling test by Fidelis Bugoye (PW9), the government chemist, and compared to the buccal swabs of PW1, the deceased's mother, revealing that the bones collected from the Hiari forest area were indeed human and truly belonged to Musa Hamis Hamis.

Thus, applying the principle explained in the above authorities on proof of death circumstantially, to the facts and circumstances in this case, there is no doubt that Musa Hamis Hamis is dead. Based on the evidence of DW5, he died a violent death, and his body was heartlessly dumped in the Hiari forest area. Thus, the first issue is answered in the affirmative.

Regarding the second element, the issue is **whether the accused persons before this court are responsible for the death of Musa Hamis Hamis.**

Undoubtedly, from the evidence advanced by the prosecution in court, none of the 28 witnesses testified to having seen the accused persons killing the deceased. Thus, their proof depends solely on circumstantial evidence,

By its nature, circumstantial evidence allows more than one explanation; hence, there is a need to consider different pieces of evidence that corroborate each other before any conclusion is drawn. It follows, therefore, that all the circumstances taken cumulatively should form a complete chain so that there is no escape from the conclusion that, within all human probability, the crime was committed by the accused and none else. This position was stated in the case of **Armand Guehi v R,** Criminal Appeal No. 242 of 2010 (CAT unreported).

Again, the Court of Appeal in **Gabriel Simon Mnyele vs. Republic,** Criminal Appeal No. 437 of 2007, (unreported) (TANZLI1) set down conditions to be satisfied in cases that rest on circumstantial evidence, it was held that: -

> *"It is common ground that for circumstantial evidence to found a conviction, it must be such that it irresistibly points to the guilt of the accused. From the authorities, we are settled in our minds that when a case rests on circumstantial evidence, such evidence must satisfy three tests: -*
>
> *(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused, (iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else".*

Thus, the prosecution is duty-bound to adduce exculpatory facts inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt of the accused person. Before drawing an inference of guilt from circumstantial evidence, it is also incumbent for the court to be sure that no other co-existing circumstances would weaken or destroy the inference. In the case of **Shilanga Bunzali Vs R,** Criminal Appeal No.

600 of 2020 (CAT unreported), the court had an opportunity to deliberate on the principles guiding the application of circumstantial evidence. In so doing, the Court observed thus:

> *"...the settled position of the law that, one, the circumstantial evidence under consideration must be that of surrounding circumstances which, by undersigned coincidence, is capable of proving a proposition with the accuracy of mathematics. See Lucia Anthony @ Bishengwe Vs. The Republic, Criminal Appeal No. 96 of 2016 (unreported); two, that each link in the chain must be carefully tested and, if in the end, it does not lead to the irresistible conclusion of the accused's guilt, the whole chain must be rejected. See Samson Daniel Vs. Republic (1934) EAC.A. 154]; three, that the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person. See Shaban Mpunzu @ Elisha Mpunzu Vs. Republic, Criminal Appeal No 12 of 2002 (unreported); four, that the facts from which an inference adverse to the accused is sought must be proved beyond reasonable doubt and must be connected with the facts from which inference is to be inferred. See Ally Bakari Vs. Republic (1992) TLR, 10 and Aneth Kapazya Vs. Republic, Criminal Appeal No. 69 of 2012 (both unreported); and five, the circumstances must be such as to provide moral certainty to the exclusion of every reasonable doubt- see* ***Simon Msoke Vs. Republic*** *(1958) EA 715".*

Furthermore, it is essential to note that circumstantial evidence may be more conclusive than eyewitness testimony. See the case of **Georgina Masala vs. Republic**, Criminal Appeal No. 128 of 2014 (unreported), and **Samson Daniel v. Republic** (1934) 1 EACA 46. In the latter case, the court observed that:

> *"Circumstantial evidence may be not only as conclusive but even more conclusive than eye witness.*"

Reverting to the case at hand, and to facilitate a more precise determination of the second issue, I propose categorizing the accused persons into three distinct categories namely; intelligence officers and investigators, which includes the 3rd, 4th, 6th and 7th accused persons, the second category is the medical doctor who is the 5th accused and the last category, investigators Incharge of Criminal Investigation at Mtwara Police Station, which includes the 1st and 2nd accused persons.

My analysis will first elucidate their roles in the investigation of the purported criminal case filed against the deceased Musa Hamis Hamis before determining their culpability in his demise.

Starting with the first category, it is the evidence of ASP Yustino Mgonja, the RCO of Mtwara, who testified as PW3, that on 05/01/2022, received a letter from the National Prosecutions Office (RPO) at Mtwara

with Ref. No. NPS/MTR/C. 40/5/111 of 5/1/2022 in his capacity as the RCO. It was referring to the complaints of Musa Hamis Hamis, the deceased, and the need for him to investigate the said complaint. In that letter, he stated that Musa Hamis Hamis was accusing some police officers from Mtwara Police Station of conducting a search at their home in Luponda Village, seizing and disposing of his property.

In gathering information, he revealed that on 20th October 2021, the 3rd accused received information that two individuals were overspending money at Sadina Lodge. Therefore, he notified the 1st accused, who organized a team to arrest them at Sadina Lodge. Also, on the same date, the 4th, 6th, and 7th accused persons, under the close supervision and instruction of the 1st, 2nd, and 3rd accused persons, arrested the deceased and seized cash amounting to TZS 2,300,000 from the deceased. He testified that the accused persons unlawfully detained the deceased under police custody with a false RB number MTR/RB/130/2021, as they initially alleged the deceased was involved in motorcycle theft. Still, the RB preferred by the accused persons is concerned with burglary and theft, contrary to the allegations made against them. He added that, on 21st October 2021, the 4th, 6th, and 7th accused persons left Mtwara Region heading to Luponda-Nachingwea

district in Lindi region with the deceased after noting that the deceased person had a sum of money in terms of foreign currency. Upon their arrival, they joined forces with PW4 Insp. Jacob Bernad Singano, District Criminal Intelligence Officer (DCIO) from Nachingwea Central Police Station, assisted them in searching for the deceased person's house and seized foreign currencies in both US dollars and local currencies. According to him, the 4th, 6th, and 7th accused persons returned to the Mtwara Central Police Station. However, no case was instituted against the deceased person; instead, the seized money was handed over to the first accused in the presence of the second and third accused. In his further testimony, he stated that the deceased was granted bail on October 24, 2021, with the condition to return on November 6, 2021. The evidence further reveals that PW1, Hawa Bakari Ally, the deceased's mother, and PW19, Said Bakari Minaly, the deceased's father, as well as PW4, Jacob Benard Singano, who were present during the search and seizure, participated fully in the search activities. They also testified that the seized items and the retrieved properties were handed to the team leaders, the 4th accused person. The accused persons who testified as DW4, DW6, and DW7 corroborated this fact. Furthermore, as per DW4's evidence, upon arrival at Mtwara Central Police Station, he handed over

the seized exhibits to the 1st accused person in the presence of the 2nd accused person.

Furthermore, according to PW3, the search and seizure were conducted legally, as the 4th, 6th, and 7th accused persons obtained the movement order from the OCS (2nd accused). He said, however, that what followed later was illegal, including the handling of the exhibits. According to him, when exhibits have been seized, the seizing officer is required to hand them over to the exhibit keeper at the CRO and must record this in the exhibit register (PF 16).

Further scrutiny of the evidence reveals that the 4th,6th, and 7th accused persons brought the deceased person healthier. He was bailed out until the 4th accused was instructed by the 1st accused person to direct the deceased to report to him. The directives were followed, and the deceased met him at his office in Mtwara Central Police Station on 5/01/2021. Attended by the late A/Insp. Greyson, the deceased, was taken to the office of the 1st accused person. That was the role of the 3rd, 4th, 6th, and 7th accused persons as per the prosecution in this case.

Next is the second category, which involves the 5th accused, the medical doctor. It was the prosecution's case, through PW3, that on 5 January 2022, the 1st accused approached the 5th accused, informing

him that they had a stubborn and hardcore motorcycle thief who was disturbing them because he refused to cooperate by revealing information. The 1st accused asked the 5th accused about the possibility of getting a poisonous or lethal injection to eliminate the deceased. According to the 5th accused, he refused and recommended that there be an anesthesia injection (ketamine) that could be used to inject the deceased, and upon regaining consciousness, he will reveal information on the conduct alleged to have been committed. The first accused accepted the proposal and requested immediate action.

At approximately 2:30 pm on the same date, 5/1/2022, while in his office at the Police Dispensary, the 1st accused, using his car, a dark blue Ford Fuga, picked up the 5th accused and the 2nd accused person, the late A/INSP Greyson and the deceased to Mitengo Police Station, where the 1st accused communicated to PW25, Inspector Paulo Mussa Kiula, the then In-charge of Mitengo Police Station/post, while heading to the office. After a while, PW25 showed them the office in which the 1st, 2nd, and 5th accused, A/Insp. Greyson and the deceased entered. The 1st accused then told the 5th accused that the deceased-"Mussa Hamis Hamis" was the young man he was to be injected. The deceased, was shirtless and had his hands tied up from behind. According to DW5, the deceased was on

the ground, in shock and tears, but he proceeded to inject him with Ketamine 1cc into the right-hand vein. The event was witnessed by the 1st and 2nd accused, as well as the late A/Inspector Greyson Gratian Mahembe, who were standing beside them. Upon completion of the injection, DW5 overhead the 1st accused saying he is delaying us ("huyu anatuchelewesha"). Then, he saw the 1st accused with a cloth that he used to cover the deceased's nose and mouth to suffocate him.

Upon observing the situation, DW5 opted to exit the room, leaving three other officers behind. That is the first accused, the second accused, the late A/INSP Greyson, together with the deceased. After some time, they left the room, leaving the deceased behind locked in with a padlock and keys, which were taken by the 1st accused. Afterwards, they left.

Furthermore, as per PW3, it was the 5th accused who broke the ice after the rumors that Musa Hamis Hamis had gone missing; he also mentioned the 1st and 2nd accused persons together with A/INSP Greyson, who led to the discovery of the deceased body in the Hiari forest area. Cpl/ Happy who testified as PW23, corroborated this evidence that she saw the 1st, 2nd,5th accused persons, and the late A/Inspector Greyson and the deceased who arrived with a civilian car on 05/01/2022 at 14:00 to 15;00 hrs at Mitengo Police Station, and that they entered in a room

but 5th accused got out after 10 minutes. The picture identification parade was conducted, and DW5 identified the picture of the deceased as the person he had seen at the Police Station. Cpl/Happy also corroborated this by identifying the picture of the deceased. This was basically the role of DW5 as per the prosecution's case.

Next is the third category, which involves the 1st and 2nd accused persons who were the OCCID and OCS, respectively. It is the prosecution's evidence, through PW3, that the 1st and 2nd accused blessed the search at Sadina Lodge and Luponda area, and it is the 1st accused who appointed a team to conduct a search and seizure. After that, it was the 2nd accused who issued the movement order in exhibit PE15 to go to Luponda Village within Nachingwea district for further search at Musa Hamis Hamis's home, knowing the deceased had committed no offence. The seized properties were handed over to the 1st and 2nd accused without a written handover, and no case file was opened. To date, those properties have ended in the possession of these accused persons.

According to PW5, the 1st and 2nd accused, who were accompanying the deceased, arrived at Mitengo Police Station on January 5, 2022. The first accused then requested a room to interrogate the deceased. They were provided with a room used as a store. It was his further evidence

that they also asked for a padlock and locked the deceased, then left with the keys. PW 23, Coplo Happy, also corroborated the evidence of their presence at Mitengo Police Station on January 5, 2022.

It is also evident from DW5 that the 2nd accused, as well as the late A/insp. Greyson was present when the 1st accused placed a cloth over the deceased's nose and mouth to suffocate him. Testified further that before the 1st accused did that, he revealed his intention to kill Musa Hamis Hamis by asking for a poisonous injection. Since DW5 is the co-accused, I shall discuss the value of his evidence later, but it also carries more weight.

Having found the role of each accused person in this case as per the evidence tendered, it is now opportune to see whether they are the ones who killed Musa Hamis Hamis.

Starting with the 4th,6th, and 7th accused persons, it is apparent that they acted on wrong information provided by the 1st, 2nd, and 3rd accused persons that the deceased was a hardcore criminal who steals motorcycles in the regions of Dar es Salaam, Lindi, and Mtwara. According to PW3, the RB regarding the purported case concerned the offence of burglary and theft. Nevertheless, these accused persons appear to have performed their duties, i.e., searching, seizing, and handling the deceased as a

suspect, as required by law. They handed the deceased, Musa Hamis Hamis, over to the custody of the 1st and 2nd accused persons, along with the exhibits, while healthier. Based on this, the prosecution evidence does not reveal any linkage or involvement of these accused persons in the incident of murder that occurred on 5th January,2022, at Mitengo Police Station. Neither showed that they had a common intention to kill the deceased. In their investigation, they seized deceased properties and recorded them in exhibit PE1. Thus, I am convinced that they did not participate in the killing of Musa Hamis Hamis. Therefore, the second element, whether the 4th, 6th, and 7th accused persons killed Musa Hamis Hamis, is answered in the negative.

Next is the third accused, the head of Regional Police Intelligence, who was aware of the search and seizure conducted at Sadina Lodge and Luponda Village. He was also aware of the investigation's outcome. What is alarming to me is that he did not reveal the existence of the complainant who was robbed of the motorcycle in Dar es Salaam to justify the information he acted upon in the arrest of Musa Hamis Hamis, the deceased. Again, no case file has been opened against the deceased. Up to the time he paraded his defence, he did not show the reality of the intelligence information received. Such conduct tells me that his mutual

intel information about the deceased stealing motorcycles was utterly false. He may have initiated the move to rob the deceased's properties in collaboration with the 1st and 2nd accused persons; nevertheless, no charges of stealing the deceased's property were filed against them. That being said, the prosecution has failed to establish direct or circumstantial evidence sufficiently to prove or link that the 3rd accused was aware of what was going on at Mitengo Police Station on 05/01/2022, nor was he accompanied by the 1st, 2nd, and 5th co-accused to that location. What can be depicted is that, after the deceased returned to the police station on 5th January, 2022, no traces were found, be it communications with both co-accused linking him with the death of the deceased. So, on that premise, it is not safe to conclude that the 3rd accused was involved in the murder of Musa Hamis Hamis. Thus, the second element is also answered in the negative against him.

Next is DW5, the medical doctor who is entrusted by society to play a multifaceted and indispensable role that extends far beyond the walls of clinics and hospitals, thus enhancing individual well-being, public health, and the advancement of medical science. Who also has to act with compassion and empathy, but injected the deceased with 1cc of ketamine at lockup to make him rant after gaining consciousness.

In his defence, the 5th accused admitted to the narration of the prosecution and added that he did not kill the deceased, and he revealed that he even reported the incident to the RCO. According to him, 1cc of ketamine injection cannot cause death, and according to PW9's report, the magot had no poison, which was found in the decayed remains, suggesting that the deceased did not die of poison. In addition, he said, what he did at the Mitengo police post fell within the scope of the PGO because the injection of ketamine was intended to prevent a disaster, which he was told the deceased had committed.

I believe this reasoning is flawed. In my view, administering ketamine under the circumstances for a non-medical purpose was highly dangerous and likely intended to facilitate serious harm. It is questionable why an innocent citizen, not a patient in need of treatment, in a police lockup was given a powerful dissociative drug like ketamine. What legitimate purpose could a doctor reasonably give in this situation of injecting a person in a non-medical emergency?

The justification that the purpose was for ranting is medically unsound and ethically abhorrent. This strongly suggests that the doctor ought to have known that the true purpose was likely harmful. Indeed, there was no medical or legal defense for administering a powerful drug

like ketamine to an innocent person in police custody to incapacitate the suspect for non-medical reasons. Furthermore, in his defence, DW5 stated that what he did was under his boss's supervision and directives, so he had to maintain his work ethic. In her submission, Ms. Felister stressed the same point, explaining that DW5 had to comply with the order of his superior officer and assist in gathering the intelligence information about the person he was informed was a notorious motorcycle thief from Dar es Salaam. She cited PGO No. 1 (5), which provides for respect to superiors in the police force, and PGO No. 106 (44) (e), explaining the effects of refusing to obey a lawful order.

With due respect to the learned counsel, I do not accept such an assertion, as it is medically unsound and highly implausible, given DW5's oath as a doctor and his understanding of fundamental human rights and criminal law, which would lead him to conclude otherwise. A reasonable and competent doctor would question such an order, and ask himself why an innocent citizen, or rather a culprit, is being sedated in a lockup, and what is the intended purpose. What is the medical justification? Instead of obeying that order, he had a professional and moral obligation to refuse the order, and potentially report the unlawful intent to the higher authorities or appropriate oversight bodies.

To be more specific, the PGO mentioned a lawful order. What DW5 did cannot be considered a lawful order. Therefore, that defence does not grant him immunity to what he did, as his professional medical knowledge and ethical obligation place a higher burden on him to discern unlawful orders and act under his medical oath.

As stated earlier, there was no justification whatsoever for administering a drug to a person to induce a state of ranting rather than using interrogative techniques. What he did is not permissible under the law; it was a torture technique, like any other torture prohibited by law. His defence exposes him to severe professional sanctions, as by rendering the victim unconscious and helpless, he might have made it significantly easier for the victim to be brutally assaulted and killed without any resistance or struggle.

However, much as the 5th accused may have acted grossly unprofessionally, but after DW5 had given his advice to the first accused, his state of mind shifted from murder to something else. In deed as per section 23 of the Penal code, he lacks common intention as the evidence reveals that, the only information Dw5 had was only the crime that the deceased allegedly committed.

More or less, he reported the incident to the RCO, though lately, and proceeded further to name the persons involved in the disappearance or murder of the deceased. He could have chosen not to do so if he were being untruthful. Apart from that, though denied murder charges, he acknowledged his contribution to the occurrence of the incident.

Of significance is that, since the prosecution was aware of his defence as recorded in his statement, they ought to have prepared and countered it. The lack of prosecution evidence contradicts his, so it shall be given the benefit of the doubt that he was telling nothing but the truth. Thus, the second element is also answered in the negative against the 5th accused.

Lastly, is the category grouping together the 1st and 2nd accused persons, who were OCCID and OCS of Mtwara Police Station, respectively, and were entrusted with investigation and administrative duties as in-charges of the at the district level. They were the ones who took the deceased's properties as per the evidence of PW3 and as corroborated by DW4. They were the last persons to be seen with the deceased alive on 05/01/2025. According to the evidence of PW3, the 1st accused instructed DW4 to inform Musa Hamis Hamis to report to his office, where he acted accordingly. And that on 05/01/2022, Musa Hamis Hamis

informed DW4 that he was at Mtwara Central Police Station, whereby DW4 instructed the late A/Insp. Greyson Mahembe to take him to the 1st accused's office. DW4 corroborated this evidence. Further corroborated by PW2 Salim Abdallah Ng'ombo that on 05/01/2022, he escorted Musa Hamis Hamis at Mtwara Central Police Station, and that A/insp. Greyson Mahembe took Musa Hamis Hamis to the office of the 1st accused. It was his further evidence that the 1st accused chased PW2 from the police station surrounding.

It is a settled principle of law that if an accused person is alleged to have been the last person to be seen alive with the deceased, in the absence of a plausible explanation to explain the circumstances leading to the death, they will be presumed to be the killer. See the case **Peter Didia @ Rumala vs Republic** (Criminal Appeal No. 421 of 2019) [2022] TZCA 709.

Thus, as rightly submitted by the prosecution, the 1st and 2nd accused were the last persons seen with the deceased alive; therefore, they had a duty to explain his whereabouts. In the absence of a plausible explanation for the circumstances leading to the death, they will be presumed to be the killers.

That aside, the 1st accused had already revealed his intention to kill the deceased to DW5 by seeking a poisonous injection, and as per DW5, it was the 1st accused who suffocated the deceased by placing a cloth on his nose and mouth.

In his submission, the 1st accused's counsel challenged the evidence of DW5, arguing that it does not constitute an oral confession as per Section 3(1) of the Tanzania Evidence Act and, therefore, cannot be used to convict the 1st accused. I want to discuss the value of DW5's evidence under the law.

In terms of section 33(2) of the Evidence Act [CAP. 6 R.E. 2022], it is unsafe to base a conviction on uncorroborated co-accused evidence since the same requires corroboration as a matter of prudence. This sound principle was also enunciated in the decisions of the Court of Appeal in the case of **Abubakari Issa @ Myambo v. R,** Criminal Appeal No. 34 of 2010 (CAT unreported), **Julius Charles @ Sharobaro and Two others v. R,** Criminal Appeal No. 167 of 2017 (CAT-unreported), and the recent one of **Nuru Venevas and 2 Others Vs. R,** Criminal Appeal No. 431 of 2021 (CAT) Tanzlii, where the Court of Appeal roared that, as a matter of prudence, the evidence of the co-accused must be corroborated for the same to be safely relied on to base a conviction on the incriminated party.

Corroboration as it known to law may as well come from word or conduct as the Court of Appeal held it in the cases of **Pascal Kitigwa** (supra) and **Mboje Mawe and 3 Others** (supra)

As stated earlier, according to the evidence of PW5, the 1st and 2nd accused visited Mitengo Police Station on 05/01/2022, accompanied by the deceased, who requested a room for interrogation. However, they were provided with a room used as a store. It was his further evidence that they also asked for a padlock and locked the deceased inside, then left with the keys.

It was also the evidence of PW6, G3951 SGT Jagadi, who was assigned to guard at the Mitengo Police station on 05/01/2022 that, at around 00:00 hours, the first accused, the second accused, the late Greyson Mahembe, and another person not disclosed went to Mitengo Police Station with a stretcher, informing the officer that they had gone to take their patient. At the same time, he had no information about the sick person at that station. Later, he saw the late Greyson Mahembe and another person carrying a motionless person on a stretcher. Furthermore, it was the evidence of PW17, Inspector Adelina Adolf Lyakana, who, on 05/01/2022, was at the Central Police Station at 1:00hrs, and he saw the

1st and 2nd accused, and the late A/Insp. Greyson Mahembe coming to the office while Insp. Greyson is bringing back a stretcher.

It is further revealed that the person referred to as a suspect was later positively identified through a photographic identification parade by PW23, WP 1026 Happness, and DW5 as a missing person who, on 5th January 2022, was brought to Mitengo Police Ptation by the accused persons before he went missing. (see Exhibit PE12 (a-k) tendered by PW18 SP. Albert Steven Makonda,

The said exhibit was admitted despite objections from the defence counsels, who argued that since the identification parade was conducted to identify the missing person, the pictures lacked names and phone numbers. Additionally, PW18 stated that there are nine pictures, including the deceased's picture; however, the tendered documents include 11 pictures, whereas the form lists only nine. Therefore, the same should not be admitted.

On the other hand, prosecution counsels contended that the objection is baseless because the lack of names and phone numbers in the picture is not a point of law; it goes to the contents of the exhibits. They cited PGO 231 (4) (b), which requires that pictures used in an ID

parade for a missing person do not need to be marked. As to the total number of pictures, they argued that it is subject to cross-examination.

Having considered the submission by both parties it is my respective view that the 11 pictures represented the complete set of pictures prepared by PW21 as explained by him in his evidence, and tendering all of them provides the courts with a full context of material available even if only nine of them were used in the parade. Again, the additional two pictures, even if not used in the parade, are simply part of the pictures taken by PW 21, and this does not alter the fact that the identification parade was conducted from 9 pictures presented. In my view, the additional two pictures are harmless and do not prejudice the accused in any way, as there is another set of evidence, such as the video recording in Exhibit PE3, which was tendered by PW8 and prepared by PW21. Such evidence corroborates the testimony of PW18, who conducted the initial identification process, and asserts that only nine pictures were used. In that case, it substantiates and confirms the total number of 9 pictures used in the parade. Hence, it strongly supports the reliability and fairness of the identification process. Given that it mitigates the concern about the additional two pictures, as those videos serve as the primary evidence of how the identification was conducted. In those videos, DW5 and PW23

identified the same deceased picture, which was the subject of the parade. Ultimately, the court is satisfied that the parade was conducted with nine pictures, and not eleven as the defence counsel wanted this court to believe. Therefore, common sense dictates that the identification parade must be accorded the weight it deserves.

It was also the evidence of PW3 that, after DW5 explained the incident of Mitengo Police Station, the late Greyson showed them where the deceased body was dumped, at Hiari forest, area where they discovered some ribs and bones in exhibits PE6, and PE7 in which as per PW9's report, the same belong to human being. Further, after the DNA profiling test was conducted in comparison to PW1's (deceased's mother) buccal swabs, the said bones revealed that they belong to Mussa Hamis Hamis. Therefore, the acts and conduct, as explained by those witnesses, are sufficient to corroborate DW5's evidence; hence, they are worth proving to support the prosecution's case.

It is apparent as well that all these circumstances irresistibly point to the 1st and 2nd accused persons as the murderers of the deceased person, Musa Hamis Hamis. Undoubtedly, this evidence meets the standard in the case of **Samson Matiga vs the Republic,** Criminal Appeal No. 205 of 2007, as the prosecution evidence is robust, leaving no

doubt about the accused person's liability; it irresistibly points a finger of guilt at the respective accused persons.

There is yet another defence from these accused persons that they never went to Mitengo Police Station, as they did not sign in the Officer Availability Book PF187. I have no query with that assertion; however, this is not a defence worth being mounted by the accused persons to exonerate them from liability. As high-ranking officers of the police force and in charge of the police station, who supervise the conduct of junior officers and oversee the operations at Mitengo Police Station, and who were aware of the procedures for recording their attendance in PF187 at such police station, and deliberately skipped it, cannot raise it as a defence. Such a defence is also defeated by the evidence of PW 23 and PW 25, who saw them at Mitengo Police Station concerning the handling of the deceased in question. That aside, given the nature of the activities they were to perform, they would avoid leaving a trace in the attendance register, so disregard it.

Again, the defence that they did not receive any foreign currency belonging to the deceased is also defeated by the evidence of PW3, corroborated by DW4, who testified that the seized properties, including

the foreign currency, were handed over to the 1st accused in the presence of the 2nd accused. Their denial of this fact is wanting.

Further, their evidence that they did not kill the deceased is unfounded. The series of events, as presented by the prosecution witnesses, points irresistibly to the two accused persons as the ones to blame. More or less, these accused persons told lies by denying having ever met with the deceased at the Mtwara Police Station. However, the 1st accused admitted to having been aware and ordered the deceased's arrest, while the second accused admitted to having ordered the deceased to be bailed out. They both acknowledge that though Musa Hamis Hamis was arrested, no complaint was ever filed against him, and no case file was opened against the deceased regarding motorcycle theft. What is discernible in their defence is that they were not telling the truth. As the law stands, the lies of the accused may corroborate the prosecution's case. See the case of **Nyamhanga Joseph @ Chalicha vs R,** Criminal Appeal No 359 of 2021) [2025] TCA 137 (28 February, 2025.

In addition to what I have reiterated earlier, though the 2nd accused was only beside the deceased when he was injected and suffocated, his conduct does not excuse him either. His common intention can also be manifested in his silence. When facing the scenario akin to the present one,

the East African Court of Appeal in the case of **Ongodia and Erima vs Uganda** (1967) EACA 137 was of the finding that:-

> *"Although Erima never spoke, his nodding of the head during the meeting was tantamount to a manifestation of common intention".*

What follows from the above decision is that even a single act of conduct is enough to constitute a common intention. In the present case, the 2nd accused participated during the start of investigation, handling of exhibits, accompanying the 1st accused to Mitengo Police Station, witnessed the suffocation of the deceased without doing anything, accompanied 1st accused and the late A/ Inspector Greyson Mahembe to Mitengo Police Station at the time of taking the deceased to Hiari Forest, all of which constitutes overt act sufficiently to infer a shared common intention. In my view, the second accused was an aider and abettor in this case. In criminal law, aiding and abetting means helping, inducing, encouraging, assisting, or counseling another person to commit a crime. Under section 22 of the Penal Code [Cap.16 R.E 2019], an aider or abettor is regarded as the actual or primary offender and shares the same culpability with the actual perpetrator of the offence. Additionally, according to Black's Law Dictionary, 8th Edition (2004), the terms "aid" and "abet" are defined as assisting or facilitating the commission of a crime or promoting its

accomplishment. In the present case, the mere presence of the 2nd accused at the scene of the crime in circumstances which indicated that he did not dissociate himself from the actions justified the conclusion that he was an aider and abettor in terms of section 22(c) of the Penal Code. The same supports the view that the 2nd accused was not a mere observer to the crime. He thereby becomes complicit in the murder.

Having so found, I am constrained to hold that the second element is answered in the affirmative, in respect of the 1st and 2nd accused persons.

Lastly, the third element as to whether the killing of Musa Hamis Hamis by the 1st and 2nd accused was actuated with malice aforethought. What amounts to malice aforethought is defined by the law under Section 200 of the Penal Code [CAP 16 R.E 2022]. The same reads:

> *"Malice aforethought shall be deemed to be established by evidence proving anyone 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 of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death 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".

The provision above illustrates what amounts to malice aforethought, including the accused's intention to cause death or grievous harm to a person, whether such person is dead or not. See also the cases of **Florence Mwarabu Vs. R**, Criminal Appeal No. 129 of 2003, (CAT-unreported) and **Mohamed Said Matula Vs. R** [1995] TLR 3.

There are various factors to be considered in determining whether the accused kills with malice or not, as demonstrated in several cases. For instance, in the case of **Enock Kipela Vs. R,** Criminal Appeal No. 150 of 1994 (CAT-unreported), the Court of Appeal had this to say:

"...usually, an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following: (1) the type and size of the weapon, if any, used in the attack, (2) the amount of force applied in the assault, (3) the part or parts of the body the blow were directed at or inflicted on, (4) the number of blows, although one blow may, depending upon the facts of the particular case, be sufficient for this purpose, (5) the kind of injuries inflicted, (6) the attacker's utterances, if any, made before, during or after the killing, and (7) the conduct of the attacker before and after the killing. "

Applying the above legal preposition in the instant case, it is apparent that the motive can be deduced from the conduct of the accused persons before and after killing. **One,** in this case, the 1st accused had already expressed his ill motive for killing the deceased to DW5. **Two,** DW5 admitted to having injected the deceased, who was under intense shock and horror, and at the time was neither sick. He therefore facilitated the death of the deceased regardless of whether the injection was poisonous or not. **Three,** the 1st accused's act of placing a piece of cloth over someone's mouth and nose to obstruct breathing and cause suffocation is an effective method of causing asphyxia and death. The act, by its very nature, suggests a deliberate effort to cut off the victim's air supply. Furthermore, there was no justification whatsoever for what they did, as the suspect was in a police lockup and thus unable to resist. There was no threat or provocation from the deceased. **Four,** the act of heartlessly dumping the deceased in the forest to cover up their actions suggests nothing but an ill motive and brutal conduct. Such horrible and inhuman conduct of the accused is a manifestation and proof that they intended to cause death. **Five,** the second accused was in every move right from the investigation stage, dispossessing the deceased's properties, when subjecting him to suffocation, and dumping the body in the forest. This proves that he had a common intention.

As alluded to above, to establish common intention, it is not necessary that there should have been any concerted agreement between the accused persons before the commission of the crime. Their common intention may be inferred from their presence, their actions, and the omission of any of them to dissociate themselves from the assault. See the case of **Godfrey James Ihuya Vs R (supra) and Ongodia and Erima vs Uganda (Supra).**

Before, I conclude this judgement, I wish to make reflection in the solemn words of **sarkar, Law of Evidence, 17th Edition Reprint,2011 by Sudipto Sarkar V R Manohar, Volume 2 on page 1904;** referring the case of **Dalbir Singh v State of U.P**..2009 CrLJ 1543(1545.1546: AIR 2009 SC 1674(2009)11 SCC 376] it was observed that:-

> "*Rarely in cases of police torture or custodial death, there is any direct ocular evidence of the complicity of the police personnel who alone can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unkown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues. The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, at times, even when prosecuting agencies are themselves fixed in the dock, ignoring the ground*

realities, the fact situation and the peculiar circumstances of a given case, often results in miscarriage of justice and makes the justice delivery system suspect and vulnerable. In the ultimate analysis the society suffers and criminal gets encouraged, Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach at times by the courts as well because it reinforces the belief in the mind of the police that no harm would come to them if one prisoner dies in the lock up because there would hardly be any evidence available to the prosecution to directly implicate them with the torture. ***The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may tend to gradually lose faith in the efficacy of the system of judiciary itself, which, if it happens, will be a sad day, for anyone to reckon with."***

I believe the court has fulfilled such a solemn duty as narrated in the above decision. That being said, this court is convinced that the ill motive behind the death of the deceased was aimed at covering the accused's act of robbing the deceased's property. Such unconscionable violence erodes public trust and undermines the very principle of justice. Indeed, the integrity of any society hinges on the unwavering principle that no one, regardless of their position or power, stands above the law. It is not expected that those who swore to uphold the law and safeguard

the lives of citizens would commit its most heinous violation. This is a betrayal of trust and a disregard for the importance of justice. The brutal killing of Musa Hamis Hamis is indeed an outrageous abuse of power. It is a tragic and unacceptable practice within a civilized society. It is intolerable and should not be condoned.

With all these facts and analysis combined, it brings me to the conclusion that the 1st and 2nd accused persons killed Musa Hamis Hamis with malice aforethought. Thus, the prosecution also proved the third element beyond a reasonable doubt against the respective accused persons.

On the contrary, the 3rd, 4th, 5th, 6th, and 7th accused persons are not guilty, as the prosecution has failed to discharge its burden of proof beyond a reasonable doubt. Therefore, they are acquitted of the charge forthwith and shall be set free unless lawfully held for any other purposes.

In the aftermath, the 1st accused, **GILBERT SOSTENES KALANJE,** and the Second accused, **CHARLES MAURICE ONYANGO,** are guilty of murder contrary to sections 196 and 197 of the Penal Code [Cap. 16 R.E 2019], now R.E 2022, and proceed to convict them accordingly.

Dated at Mtwara this 23rd day of June, 2025.

H.R MWANGA

JUDGE

23/06/205

SENTENCE

As this is a murder case, my hands are tied by my oath of office to uphold the Constitution and to respect the laws of the land. In our law on criminal offences, there is only one penalty for the offence of murder, and that is death by hanging.

Given that, and a mere fact that this Court has entered a conviction against the 1st and 2nd accused persons, I hereby sentence the First accused, **GILBERT SOSTENES KALANJE,** and Second accused, **CHARLES MAURICE ONYANGO**, to suffer **death by hanging until they die**.

H.R. MWANGA

JUDGE

23/06/2025

The right of appeal is explained to the accused persons.

H.R. MWANGA

JUDGE

23/06/2025

COURT: Judgment delivered at Mtwara this **23rd June 2025** in the presence of Mr. Matenusi Marandu PSA, Chivavende Luwongo PSA, Farida Kiobya SA, and Karangi Joels, SA for the Republic, and Emmanuel Ngongi, Advocate for 7th accused also holding brief of Majura Magafu for 1st accused; Fredrick Ododa, Advocate for the 2nd accused; Lightness Kikao, Advocate for 3rd Accused; Ahyadu Nannyohe, Advocate holding brief of Alex Msalenge for 4th accused and Seteven Lekey Advocate for the 6th accused; Felister Awasi, Advocate for the 5th Accused person.

H.R. MWANGA

JUDGE

23/06/2025