

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**SUMBAWANGA DISTRICT REGISTRY**

**SITTING AT MPANDA**

**(CRIMINAL JURISDICTION)**

**CRIMINAL SESSION CASE NO. 10 OF 2021**

**REPUBLIC**

**VERSUS**

- 1. CHIBA <sup>S</sup>/<sub>o</sub> KULWA @LWIGI.....1<sup>ST</sup> ACCUSED**
- 2. THOMAS <sup>S</sup>/<sub>o</sub> MALONGO @ NCHIMIKA.....2<sup>ND</sup> ACCUSED**
- 3. MASESA <sup>S</sup>/<sub>o</sub> LWENGANJA.....3<sup>RD</sup> ACCUSED**
- 4. MGANGA <sup>S</sup>/<sub>o</sub> LUCHAGULA@ GELA.....4<sup>TH</sup> ACCUSED**

**JUDGEMENT**

13.12.2022 & 02.01.2023

**MRISHA, J.**

Chiba Kulwa @Lwigi, Thomas Malongo @ Nchimika, Masesa Lwenganija and Mganga Luchagula @ Gela the accused persons, were charged with the offence of murder contrary to sections 196 and 197 of the Penal Code, Cap 16 RE 2019 (The Penal Code). The prosecution alleged that 10<sup>th</sup> day of May 2020 at Kasekese village within Tanganyika District in Katavi Region jointly and together the accused persons did murder one Lumba Nhalima Daudi.

When the charge or information of murder was read over and properly explained to them, they pleaded not guilty to the charge, and thus plea of not guilty was entered, hence the full trial took off.

During the trial of this case, M/s. Hongera Malifimbo, the learned State Attorney represented the Republic; whereas, the 1<sup>st</sup> accused was represented by Mr. Eliud Ngao, the 2<sup>nd</sup> accused person was represented by Ms. Gloria Lugeye, the learned advocate, the 3<sup>rd</sup> accused was represented by Mr. Sweetbert Nkumpilo, learned advocate and the 4<sup>th</sup> accused person was represented by Ms. Pendoveera Nyanza, learned advocate.

To drive home the allegation levered against the accused persons, the Republic brought a total of five witnesses namely Dr. Rafael Michael Shirima who testified as prosecution witness No. 1 (**PW1**), Mr. Sule

Manota as **PW2**, G. 8430 D/C Emmanuel as **PW3**, F. 8605 CPL Mohamed as **PW4**, and G. 7679 D/C Andrew as **PW5**. The prosecution also tendered a total of four exhibits including a Sketch Map as exhibit **P1**, Post Mortem Report as exhibit **P2**, Cautioned Statement of 3<sup>rd</sup> accused as exhibit **P3** and Cautioned statement of 4<sup>th</sup> accused as exhibit **P4**.

Upon the closure of prosecution case, defence case opened after it was found that the prime facie case had been established against the accused persons. In disapproving the prosecution allegations levered against them, accused persons testified as **DW1**, **DW2**, **DW3** and **DW4**. They neither called a witness to testify on their favour nor did they tender any exhibit. The summary of prosecution evidence is as hereunder;

**PW1**, Dr. Rafael Michael Shirima, testified that on 12.05.2020 he was at working place Katavi Referral Hospital. On the fateful day at around 11:00 hours he was instructed by his superior to conduct post-mortem examination to the deceased body. The deceased body was kept at mortuary. He went to the mortuary with the mortuary attendant and two police officers whose names are Meshack and Emmanuel; two persons introduced themselves to them as the relatives of the deceased person. He did not remember the names of deceased's relatives.

He was told the name of deceased was Lumba Nhalima. He started the preliminary examination and discovered the deceased died, the clothes of the deceased (shirt and trouser) were covered with blood. The deceased body had a wound on the left side of the neck; another wound was below the navel and testicles which was removed (chopped) and his skin was removed. The wounds were caused by a sharp weapon. He continued with the primary examination on the left side cheek and discovered that the wound was 15-centimeter length, the wound on the neck, the skin of the neck was cut off, nerves were also cut off and blood vessels also were cut off, trachea was cut off and food throat was cut off.

According to him the cause of deceased's death was a body shock caused by severe bleeding after blood vein cut off at the neck and backbone. After finishing examination, he was given a special form called postmortem examination form. He filled the form, signed and stamped it and then submitted it to the police officer. He tendered it in court and it was admitted as an exhibit **P2**. **PW1** testified that Hypovolemic shock is internal body shock which cause heart to fail to transfer the blood to the part of the body, this caused by severe blood.

When cross examined by Mr. Eliud Ngao, Learned Advocate he replied that he discovered the wound was caused by a sharp object

something which shows that the same might have been inflicted by a knife, or spear.

When cross examined by Ms. Pendoveera Nyanza – Learned Advocate for the 4<sup>th</sup> accused **PW1** replied that the wound was caused by sharp object. The left cheek wound might have been caused by cheek of wild animal. The cause of the death was caused by several cut on major neck veins and arteries. The deceased body worn shirt and trouser and his clothes soaked with blood.

When re-examined by M/s. Hongera Malifimbo –Learned State Attorney **PW1** stated that he discovered the wounds were caused by sharp object. He did not know which weapons were used to cut the deceased.

**PW2** Sule Manota, testified that on 10.05.2020 he was at his grocery at around 08:00 hours where they came Thomas, Chiba and Lumba. He knew them as customers, and he knew them for a long time almost four years. **PW2** named the 1<sup>st</sup> accused, 2<sup>nd</sup> accused by their names, and said Lumba was already died (deceased person). **PW2** testified that on 10.05.2020 the three-persons came to his grocery carrying a drink called Diamond. **PW2** testified further that Lumba was very drunk but Chiba and Thomas were not drunk too much. He gave them chairs and they sat, they

stayed for almost half an hour. They left and went to their places/home. At around 09:00hrs, the three of them left, who are Chiba, Thomas and Lumba. On 11/05/2020 police officer came and knocked his house in the morning. He was asked by the police officer if Lumba came to the grocery yesterday. He responded that Lumba came to his grocery with Thomas and Chiba. He was with his bar attendant when Chiba, Thomas and Lumba came at the grocery. There were no customers other than the three mentioned persons. On 11.05.2020 he received the information as regard the death of Lumba around morning. Chiba, Thomas and Lumba resides at Kasekese village.

When cross examined by Mr. Eliud Ngao – Learned Advocate for the first accused he replied that he was selling beer, and he knew accused persons his customers. Sometimes they came together and other time they came differently. He said Chiba, Thomas and Lumba walked to his Grocery. He only saw them at the grocery, they left together. It was far from the grocery to their home. He could use one hour for walk to their place of residence. Between his grocery and their place of home they are persons living.

When cross examined by Ms. Gloria Lugeye, Learned Advocate for the 2<sup>nd</sup> accused, he replied that he was selling beer, he usually opened his

grocery at around 02:00 pm hours and he closed his grocery at 09:00 pm hours. The 1<sup>st</sup> accused and 2<sup>nd</sup> accused and deceased came to his grocery at around 07:00 pm hours. His grocery is an open area and he kept his items and his money in the premises. That his security to his business is to close his business on time. That Chiba, Thomas and Lumba at the time they came to his grocery were carrying a diamond drink. He did not see anything carried by the them rather than diamond drinks. He sat at his grocery. He did not drink alcohol. He said there was no guard. He did not kill the deceased person. The 1<sup>st</sup>, 2<sup>nd</sup> accused and deceased person left to his place and they accompanied each other. Between his bar/grocery and center people are living as there was no bushes.

When cross-examined by Mr. Sweetbert Nkupilo, Learned Advocate, he replied that he did not know Masesa Lwenganija (3<sup>rd</sup> accused). That on 0.05.2020 the 3<sup>rd</sup> accused was not at his grocery. Masesa was not present when the Chiba, Thomas and Lumba left from his grocery. He did not know weapons used to cut the deceased person. He did not see Masesa cutting the deceased person. He certified that three persons who left to his grocery were Chiba, Thomas and Lumba.

When re-examined by M/s. Hongera Malifimbo, Learned State Attorney, **PW2** stated that on 10.05.2020 they came three persons to his

grocery, who were Chiba, Thomas and Lumba and those three persons left from his place. He was at his grocery when they left. He closed his business on 09:00 pm.

**PW3**, G.8430 D/C Emmanuel, testified that on 10/05/2020 at around 23:00 hours he was at home, and he was called by his superior boss ASP. Meshack Lukomwa (OC - CID). He was instructed to go to Tanganyika Police Station and join his fellow police officer. He was informed of the incident of murder at Kasekese village. He met D/C Japhet, Sargent Antony and OC-CID. They went to Kasekese village. They arrived at Kasekese around 03:40 hours on 11/05/2020. They met persons and wanted to be shown a scene of crime. To the scene of crime, he found a male body lying on the ground died. The deceased appeared to be cut on his neck and also below his navel there was a wound and his private parts were chopped. **PW3** was told that the deceased name was Lumba Nhalima Daudi. The deceased body was on the road. He interrogated persons in the scene of crime and they told him the deceased person was at Kasekese Center drinking alcohol together with Chiba and Thomas Malongo.

That Thomas Malongo was at the scene of crime and he showed up at the time he interrogated persons, and he confessed that he was drinking

alcohol with Chiba and Lumba. Thomas Malongo stated he left deceased person with Chiba (1<sup>st</sup> accused person). **PW3** testified that a person who showed up at the crime scene is the second person on his left-hand side at the dock. **PW3** identified the 2<sup>nd</sup> accused person in the dock.

Further, **PW3** testified that Chiba was not present at the scene of crime. He picked up the deceased body and kept at the mortuary of Katavi Referral Hospital. They took Thomas Malongo together with Sali Lumba, Paul Lumba and Jonas Lumba, children of the deceased, for further investigation. He was informed by those children that the cause of the death of the deceased was his grandfather Mganga Luchagula because he invested the cattle to his father for grazing, but for some time his grandfather was not speaking with the deceased. The grandfather's name is Maganga, he was not present at the time of investigation. They arrested Chiba when he wanted to escape. He knew Chiba when he was arrested by police officer OC-CID. **PW3** identified Chiba in the dock as he worn on Islamic cap.

**PW3** identified the 1<sup>st</sup> accused person in the dock. **PW3** said Chiba mentioned his co-accused Masesa and Amosi Lumba that together they killed the deceased person. He made effort to look for Masesa. Masesa was arrested and when interrogated, he confessed to kill deceased person,

but he said the crime was engineered by Mganga. He knew Mganga and Masesa after they were arrested by a police officer. **PW3** identified 3<sup>rd</sup> accused and 4<sup>th</sup> accused in the dock.

When cross examined by Mr. Eliud Ngao – Learned Advocate, **PW3** replied that on 11.05.2020 they started looking for Chiba when they were informed that Chiba was with deceased before death. They arrested Chiba because he wanted to escape. **PW3** was informed by persons from the scene of crime.

When cross examined by M/s. Gloria Lugeye, Learned Advocate, **PW3** replied that Thomas Malongo was at the scene of crime as he showed up when he was mentioned that he was with the deceased person at center drinking. He took Malongo for further interrogation. Malongo confessed that he was with deceased person and Chiba drinking. When he finished drinking, he went home and left Chiba and deceased person.

When cross examined by Mr. Sweetbert Nkumpilo, Learned Advocate for the 3<sup>rd</sup> accused, **PW3** replied that he was informed that Moses Lwenganiya, was with the deceased person before his death. When cross examined by M/s. Pendoveera Nyanza – Learned Advocate for the 4<sup>th</sup>

accused, **PW3** replied that his duty is to prevent the commission of offences and protecting persons and their properties.

When re-examined by M/s Hongera Malifimbo, Learned State Attorney, **PW3** stated that he received the information that Chiba was involved in the commission of an offence on the day of incident. He was told by Thomas that he was together with Chiba and deceased drinking alcohol. At the scene of crime, he saw deceased body had wounds. **PW3** was informed that deceased person was drinking with Chiba and Thomas at Kasekese center. That Thomas was present at the scene of crime.

**PW4**, G. 8605 CPL Mohamed, testified that on 02.06.2020 at around 22:00 hours he was at the working station at Mpanda police central. He was instructed by his superior boss called SSP Evodus Kasigwa to interrogate Masesa Lwenganija and he recorded his statement. He knew Masesa Lwenganija after been shown by RCO. **PW4** informed the court that Masesa Lwenganija was the 3<sup>rd</sup> accused person. **PW4** identified the 3<sup>rd</sup> accused person at the dock. He testified that when at investigation room the 3<sup>rd</sup> accused was physically ok; he had no wound. He introduced himself to the 3<sup>rd</sup> accused and told him the offence he was suspected to commit. He informed his right to call his friend, relatives or advocate at the

time of recording his statement. Also, he informed him that he was not forced to make statement, unless he was willing to do so. The accused agreed to make statement alone. **PW4** recorded the statement of the 3<sup>rd</sup> accused. **PW4** was told by the 3<sup>rd</sup> accused that on 10.05.2020 at around 22:00 hours together with Chiba Kulwa, Amos Lumba, and George Lumba at Kasekese area at the grocery they discussed on who could commit murder. He started recording the statement around 22:00 hours. **PW4** tendered the cautioned statement in court and was admitted as exhibit **P3** following objection by the learned counsel for the 3<sup>rd</sup> accused, however it was overruled after a trial within trial.

When cross examined by Mr. Eliud Ngao, Learned Advocate for the first accused, **PW4** replied that he was not an investigator of the case and he was not present at the scene of crime. **PW4** did not know where the Panga was. When cross examined by M/s. Gloria Lugeye, Learned Advocate for the 2<sup>nd</sup> accused, **PW4** replied that the 3<sup>rd</sup> accused mentioned the names of Amosi Lumba, George Lumba, Chiba Kulwa and Sali Lumba who participated to the commission of murder. That Thomas Malongo was not mentioned by the 3<sup>rd</sup> accused.

When cross examined by Mr. Sweetbert Nkumpilo, Learned Advocate for the 3<sup>rd</sup> accused, **PW4** replied that he did not know the owner of the

Grocery/bar. He did not know the time grocery was closed. He recorded the evidential statement made by the owner of the Grocery and the statement made by 3<sup>rd</sup> accused.

When re-examined by M/s. Hongera Malifimbo, Learned State Attorney, **PW4** replied that his duty in the case was to record the cautioned statement of 3<sup>rd</sup> accused. He was informed by the 3<sup>rd</sup> accused about the incident.

**PW5**, G. 7679 D/C Andrew, testified that on 03/08.2020 at around 07:00 hours he was at Tanganyika Police Station with his superior boss SSP Evodius Kasigwa. At around 07:30 hours he was instructed to interrogate the suspect namely Mganga Luchagula Gela. The suspect was at the custody of Tanganyika Police Station. **PW5** identified the 4<sup>th</sup> accused at the dock. **PW5** took the 4<sup>th</sup> accused from lockup and sent him to the investigation room. **PW5** testified that the accused was in good health. Before he started recording the statement, he informed the accused of his right, he introduced himself, his position and the offence the accused was charged with. **PW5** testified that the accused confessed that he participated to the commission of murdering his nephew called Lumba Nhaliwa. He was told that on March 2020 they had a meeting with the children of deceased of the grandmother, among them was Amos. The

meeting was about to plan on how to kill the deceased. **PW5** tendered the cautioned statement of the 4<sup>th</sup> accused and was admitted in court as exhibit **P4** despite objection for its admissibility from the counsel for the 4<sup>th</sup> accused, however it was overruled.

When cross examined by Mr. Eliud Ngao, Learned Advocate for the 1<sup>st</sup> accused, **PW5** replied that he was not informed by the 4<sup>th</sup> accused who killed the deceased person. When cross examined by Mr. Sweetbert Nkumpilo, Learned Advocate for the 3<sup>rd</sup> accused **PW5** replied that the 4<sup>th</sup> accused did not mention Masesa Lwenganja that he committed the offence.

When cross examined by M/s Pendoveera Nyanza, Learned Advocate for the 4<sup>th</sup> accused, **PW5** replied that he did not know where he was arrested. He said the accused stated that he was arrested on 03.08.2020 around 06:00 hours. He started recording the statement of the 4<sup>th</sup> accused person at 07 30 hours. He stated that according to the statement of the 4<sup>th</sup> accused they convened two meetings. The first meeting was for conciliation between the deceased person and their children. He did not know Masule. Mganga Luchagula on his statement did not confess that he participated in the killing of the deceased, but he participated to the meetings. The accused knew the death of deceased through mobile phone.

When re-examined by M/s Hongera Malifimbo, Learned State Attorney, **PW5** stated that he heard the name of Chiba Kulwa from 4<sup>th</sup> accused, Chiba Kulwa was the person hired to cut the deceased person. He started recording the statement of 4<sup>th</sup> accused at 07:30 hours. He was told that the accused he was arrested on 03.08.2020 at around 0600 hours. That the accused was in good health when he saw him. Mganga Luchagula told him about the meeting conducted for executing murder. The 4<sup>th</sup> accused person participated to the meetings on how to execute the murder, and the money agreed to be paid.

The court having found that, the prosecution had sufficiently established a case against accused persons to require them to make their defence, the accused persons were called to defend themselves and they elected to testify under oath. The 1<sup>st</sup> accused testified as **DW1**, 2<sup>nd</sup> accused as **DW2**, 3<sup>rd</sup> accused as **DW3** and 4<sup>th</sup> accused as **DW4**. They neither called witness to testify in their favour nor tendered exhibit. The summary of their evidence is as hereunder;

**DW1** Chiba Kulwa, peasant, testified that on 10.05.2020 he was at Kasekese Bar drinking Alcohol, the Grocery called "*Kwa manota*". They were many at the Bar, but he was familiar with Thomas Malongo at the Bar. At the Bar he was drinking the beer, Diamond and Zed and they

bought at the bar. They went to Manota Bar because there were different drinks. After finished drinking every person went home. He went home Kaseganyama at around 08:00 hours. From the Bar to his place, it was around seven Kilometers. On 12.05.2020 he received the information of the death of Lumba Nhalima and on 13.05.2020 he attended the burial ceremony, but the deceased body was transferred to Shinyanga where he was buried. On 18.05.2020 he travelled to Mbeya for a business. On the fateful day, he was arrested by the police and he was told to help the investigation. He was taken to the police station at Mpanda Urban.

That, on 20.05.2020 he was asked if he knew Thomas Malongo and he replied positively, he told him he met Thomas Malongo on 13.05.2020 to the tragedy of Lumba Nhalima. He did not state anything after the question. On 08.06.2020 he was taken to the Court where he met Thomas Malongo, Sali Lumba, Jonas Lumba, Paul Lumba and Mathius Mwanherwa they were jointly charged with the offence of murder. He said he did not commit the offence nor participated in its commission.

When questioned by M/s Hongera Malifimbo, State Attorney, **DW1** replied that he resides at Kaseganyama. He has one wife and one child called Shija Chiba and his wife's name is Sado Mabula. At his village there is no bar, nor local bar (Kilda). He went many times at Kasekese area, he

used a bicycle, Motorbike or a car to go there. He knew Lumba Nhalima since 2013. He was informed that Lumba Nhalima was dead because he was cut with a Machete but he did not know where he was assaulted. That Thomas Malongo is not his friend; he was a leader advisor. He and Thomas Malongo were at the Bar. We left to the bar with Thomas Malongo. They brought beer, Zed and Diamond, Mr. Sule was selling beer. When they were three Thomas Malongo, Lumba Nhalima and him, Mr. Sule was the one who provided beer at the bar. They all left after finished drinking beer. No disputes that the deceased person was died the next day after they left to the Bar. When he left to the bar he went home and his wife was at home. His wife did not come to the Court to testify. Thomas Malongo was the second accused person. **DW1** identified the 2<sup>nd</sup> accused person at the dock. He had no quarrel with Thomas Malongo. Mganga Luchagula is the 4<sup>th</sup> accused person. He knew Mganga Luchuma Luchagula. **DW1** identified the 4<sup>th</sup> accused person at the dock. He had no conflict with 4<sup>th</sup> accused person. The 2<sup>nd</sup> and 4<sup>th</sup> accused person have no reasons to say something wrong to him

When cross examined by M/s Pendovera Nyanza, Advocate, he and Mganga they met at the remand prison. It would not be true if someone come and said that he and Mganga knew each other before. When cross

examined by Mr. Eliud Ngao – Advocete, **DW1** replied that he went home after he left bar. He did not know where they went.

**DW2**, Thomas Malongo, resident of Kaseganyama, Tanganyika District testified that on 10.05.2020 at around evening, he went at the Center of Kasekese, he went to the bar to drink beer; it was around 07:00 hours, they were at the Bar with Chiba Kulwa, Lumba Nhalima and he and other persons were there. At around 08:00 hours they left. At the time they were drinking no conflict arose. They left bar and took Bodaboda (Motorbike) and went home. From the place they drunk to his place is far because it is from one village to another village Kaseganyama.

He heard noise (yowe), he woke up with his children and his neighbor and went to the incident. It was around 10:00 hours when they went to the incident. He reached to the scene and found the deceased person died. He found a police officer at the scene and the police officers picked up the body and went to Hospital. He went back home. In the morning the police officer came to his place and he was arrested upon asked that he was drinking with the deceased last night. He was taken to the police station called Kilo. He was kept at the lockup; after two days he was told to make his statement. The statement was recorded and he was

taken back to the lock up until on 08.06.2020 when he was taken to the Court and charged with the offence of murder of Lumba Nhalima. **DW2** denied to kill Lumba Nhalima nor to have participated in commission of such offence.

When he was questioned by Ms. Hongera Malifimbo, State Attorney **DW2** replied that he lives at the same place with Chiba. That on 10.05.2020 he was with deceased at Manota's Bar. He left with the deceased person when he finished drinking beer. Same night he arrived to his place where he found his young wife called Ester Wilson. They heard noise (yowe) on the same night. Kaseganyama and Kasekesa are two different villages. He went to the scene after hearing the noise. He saw the deceased covered with a blood; it was a few hours since the deceased was cut/killed. They walked from his place to the scene.

He walked for twenty minutes from his place to the scene. He was with his children and neighbors to the scene. They were many, almost ten persons. No person came to testify that he was at his place when noise was made(screaming). They left Manota's Bar with the deceased and Chiba. No witness came to court and testified that he was with deceased person after they left at the Manota's Bar. Immediately after he left the

deceased, he heard deceased person died. Chiba is the person who sit on the right hand. **DW2** identified the 1<sup>st</sup> accused at the dock.

When re-examined by Mr. Eliud Ngao, Advocate **DW2** stated that they left at the bar and Chiba went to his home. When cross examined by M/s. Gloria Lugeye, Advocate **DW2** said the distance from the scene to his place is about twenty minutes by foot.

**DW3**, Masesa Lwenganja, resident of Kaseganyama village, Tanganyika District testified that he was arrested on 02.06.2020, at the farm when he was harvesting a rice at his farm. He was arrested with two police officers called Ndangala and Augustino. When he was arrested, he was with his wife Marry Shija. He was taken to the Mpanda Police Station. They kept to him to the lock up and they left him. They released him around 04:00 hours and sent him to another room and began to assault him by beating him on different parts of his body with mace and pliers which was used by D/C Augustino to squeeze his private part.

That the said policemen forced him to confess that he committed the offence but he refused to do so. He was then returned to the lock up. He stayed for 2 days, thereafter, two police officers came whom he mentioned as Augustino and Mohamed opened the lock up and took him to another

room where he found the table, maces and pliers; it was around 02:00 hours. He was told to remove his clothes and was told to seat on the table and was chained his hands while lying on the table. Augustino took a pliers and squeezed his private part but he denied to confess the offence of murder of Lumba Nhalima.

That he did not confess, but the Police officer Augustino wanted to piercing his eyes and he put his fingers to his eyes and caused his right eye to come out and hanging. Thereafter, he confessed that he committed the offence of murder because he was in danger. Mohamed continued recording his statement and after he finished doing that, he required him to sign the statement. After two days he was sent to a Justice of Peace accompanied by the police called Japhet.

When at the court he put a white Mask (Barakoa). After approaching the Justice of Peace, the Justice of Peace asked him to remove clothes and mask and he found his right eye swelling, on the part of the neck there was a wound and his body was swelling. He denied the participation of the killing of the deceased at Kasekese. He did not remember the name of the Justice of Peace. **DW3** went on to say that his cautioned statement and extra Judicial statement differ because he was told by Justice of Peace to be free. He was assaulted by Police officers. He also stated that the

evidence of **PW1** was a hearsay and asked the Court has to disregard it. Also, he attacked the evidence of **PW2** by arguing that the Court should disregard it because he did not attend at **PW2's** Bar.

Further, he said the evidence of **PW3** and **PW5** was hearsay evidence, hence, he requested, the Court disregard should also discount it. Furthermore, **DW3** submitted the same prayed in relation to the evidence of **PW4** because he was assaulted when he recorded his statement.

When cross examined by M/s. Hongera Malifimbo, State Attorney **DW3** replied he was arrested at Mwankula with his wife called Marry Shija. They were harvesting rice. He had no problem of lost memory. He was arrested by police officer called Ndangala and Augustino. He was interrogated by Police officer called Mohamed who testified before this Court. Marry Shija did not testify before the Court to prove they were arrested. He was interrogated by Mohamed and they are not relatives. He did not know him, he asked his names and he record the statement. He was sent to the Justice of Peace. He explained to the Justice of peace that he was assaulted, but the said Justice did not tell him to go to the Hospital. That he was able to walk by foot to the Justice of peace despite he was assaulted vigorously. His private part was swelling, but the Justice of Peace did not state before the Court. He did not attend any Hospital. He told the

Justice of Peace that he knew Chiba Kulwa. He did not tell Mohamed that he knew Chiba Kulwa. He did not examine the deceased body. He uses only one eye to see now. He told Justice of Peace that he was threatened by Mohamed that if he denies to confess, he would be pierced his eyes. The Justice of Peace did not appear before the Court to testify what he stated. **DW3** identified the 1<sup>st</sup> accused in the dock.

**DW4**, Mganga Luchangula, resident of Ifinsi, testified that the environment of Ifinsi is a jungle. He informed the court that from Ifinsi to Kaseganyama by foot he could walk for two days. That he could not go to Kasekese area, unless he had a reason because it is expensive to travel from Ifinsi to Kasekese. He had a good relation with Lumba Nhalima, who was his uncle. They were very close with Lumba Nhalima because they were only two in Mpanda as they loved each other. He told the court that on March, 2020 the deceased person came to him and he was informed him that he was quarreling with his son called Amos Lumba. He was asked by the deceased to go to his house and solve the problems. They went to Kasekese at his place and they had a meeting.

That was around 09:00 hours, they met and solve the problems amicably. After finishing the meeting, the deceased person slaughtered the goat. He finished eating at around 11:00 hours and the deceased person

escorted him to Mpanda Town and then took a bus that went to Kigoma. On the next day he received a call from the deceased and asked him whether he arrived safely. Since then, he did not return to Kasekese. He was informed about the death of the deceased through mobile phone when the deceased body was sent to Shinyanga for burial ceremony. **DW4** was showed exhibit **P4** (the cautioned statement), but he failed to identify it because he did not know how to read.

**DW4** told the court that the statement was not read over to him. He never returned back to the house of the deceased person. That he did not participate at the meeting for purpose of killing the deceased. He could not kill his relative. He urged the court to disregard exhibit **P4** as his evidence is worth to note.

When cross examined by M/s Hongera Maiifimbo, State Attorney **DW4** replied that the first meeting was conducted on March, 2020. He remembered the Police officer who recorded the statement, but not his name. That the police officer who recorded statement was not present at the meeting. He also testified that the first meeting was conducted on March, 2020 and the same was attended by three wives of the deceased and their children. That the deceased's first wife is called Mwanawambekeki. The deceased person has eight children. That the

meeting was attended by four children of the deceased person. That he was informed about the death of the deceased on June, 2020, one month after the death of deceased. Chiba Kulwa was not present when he recorded the statement.

After thoroughly going through prosecution and defence case, the main issues for the determination before this court are essentially three; these are: -

- (i) *whether the deceased one Lumba Nhalima alleged to have died is actually dead; if the answer is in affirmative,*
- (ii) *whether the accused persons Chiba Kulwa @ Lwigi, Thomas Malongo @ Nchimika, Masesa Lwenganija and Mganga Luchagula @ Gela, are responsible for the death of Lumba Nhalima,*
- (iii) *whether their action was actuated with malice aforethought.*

Along with answering the above three pertinent issues, three important legal issues need to be considered and determined in the

present case, which are; circumstantial evidence in criminal cases, doctrine of the last person to be seen with the deceased and confession statements.

To start with the first issue, it is evident from the evidence of **PW3** that this witness visited the area of scene and saw the dead body of Lumba Nhalima lying down on the ground at Kasekese village. He identified the body to be of Lumba Nhalima. Also, **PW1** who is the medical officer, accompanied with police officers namely Meshack and Emmanuel conducted a post-mortem examination at the mortuary. **PW1** through post-mortem report (**Exh. "P2"**) established that the cause of death was due to severe blood loss as a result of main vein cuts at the neck and back borne (Hypovolemic shock). The medical officer further opined that testicle of the deceased was chopped. Even, the defence side did not dispute that the deceased actually died. There is no any other piece of evidence which dispute with the above assertion/ proposition. Thus, the deceased, Lumba Nhalima is actually dead. The death was actually unnatural one as the deceased sustained several cut wounds on his body as stated by **PW1**, a Medical Officer.

As pointed above, the testimony reveals that the death of the deceased Lumba Nhalima was unnatural.

The second issue raised whether is the accused persons herein are the ones who were involved in the killing of the deceased. From the evidence on record as far as the cause of death of the deceased is concerned, is contained in the Post-Mortem Examination report (**Exh. P2**). The report, Exh. "**P2**" reveals that the cause of death is due to severe blood loss due to multiple deep sharp cuts to the neck blood vessels, trachea, backbone and neck which went deep into the inner parts of the body.

According the totality of the prosecution testimony, none of the witnesses testified to have seen the accused persons assaulting the deceased which resulted to his death. The accused persons are only circumstantially connected with the death of the deceased, that is to say, the prosecution case hinges on circumstantial evidence. The law is very settled that court of law may ground conviction based solely on circumstantial evidence. That means the said evidence irresistibly led to the inference that it was the accused persons and nobody else who committed the offence, and such evidence must also be incapable of more than one interpretation and the chain linking such evidence must be unbroken. See **Justine Julius and others vs Republic**, Criminal Appeal No. 155 of 2005; **John Mangula Ndogo vs Republic**, Criminal Appeal NO. 18 of

2004; **Shaban @ Elisha Mpunza vs Republic**, Criminal Appeal No. 12 of 2002; **Aneth Kapwiya vs Republic**, Criminal Appeal No. 69 of 2012, all unreported and **Ally Bakari vs Republic** [1992] TLR 10.

That for the court to find the accused person guilty of the offence of murder the available evidence must link the accused person with the said death.

The first link begins with the evidence of **PW2**, a key witness which is to the effect that on 10.05.2020 he was at his grocery at around 08:00 hours where they came Thomas, Chiba and Lumba (the deceased). He knew them as customers, and he knew them for a long time almost four years. **PW2** named the 1<sup>st</sup> accused, 2<sup>nd</sup> accused by their names, and said Lumba was already died (deceased person). **PW2** testified that on 10.05.2020 the three persons went to his grocery carrying a drink called Diamond. **PW2** testified further that Lumba was very drunk but Chiba and Thomas were not drunk too much. He gave them chairs and they sat, they stayed for almost half an hour. They left and went to their places/home. Further, he testified that at around 09:00hrs, the three of them left, who are Chiba, Thomas and Lumba (the deceased). That on 11.05.2020 police officer came and knocked his house in the morning. He was asked by the police officer if Lumba (the deceased) came to the grocery yesterday. He

responded that Lumba (the deceased) came to his grocery with Thomas and Chiba. **PW2** said he was with his bar attendant when Chiba, Thomas and Lumba (the deceased) came at the grocery. There were no customers other than the trio mentioned persons. On 11.05.2020 he received the information as regard the death of Lumba around morning. He said Chiba, Thomas and Lumba resides at Kasekese village.

The testimony of **PW2** the 1<sup>st</sup>, and 2<sup>nd</sup> accused persons with the death of the deceased on the principle that they were the last persons to be seen with the deceased. Now, applying the doctrine of the last person to have been seen with the deceased, I find the allegation against the 1<sup>st</sup>, and 2<sup>nd</sup> accused persons meritorious of proof. The law is very clear as regard the applicability of such doctrine as stated in the case **Mathayo Mwalimu and Another vs Republic**, Criminal Appeal No. 147 of 2018, the Court stated that;

*"In our considered opinion, if an accused is alleged to have been the last person to be seen with the deceased, in the absence of a plausible explanation to explain away the circumstances leading to the death, he or she will be presumed to be the killer."*

See also, the Court decision in the case of **Makungire Mtani vs Republic [1983] TLR 1983, Richard Mtangule and Another vs Republic [1992] TLR 5.**

In this case, the 1<sup>st</sup>, and 2<sup>nd</sup> accused persons were the last persons to be seen with the deceased while alive. I said so because, the testimonies of **PW2** in this case was that the two accused persons came to his grocery along with the deceased on the material day of 10.05.2020 at around 08:00 pm. **PW2** testified that he knew the two accused and the deceased for a long time as his customers. **PW2** further said the two accused and the deceased came to his grocery while carrying a drink called Diamond. **PW2** informed the court that Lumba (the deceased) was very drunk but 1<sup>st</sup> and 2<sup>nd</sup> accused were not and he gave them chairs and they sat. **PW2** testified that the trio stayed for almost half an hour before they departed together from his grocery and he said they left to the place of residence at around 09:00 pm. **PW2** insisted in his testimony that there were no other customers to his grocery than the 1<sup>st</sup> and 2<sup>nd</sup> accused along with the deceased; then they took the deceased to the house of Mama Dani. In his further testimony, **PW2** said on 11.05.2020 around morning he received information as regards the death of Lumba Nhalima.

Again, looking at the prosecution evidence, there is evidence of confessional statements of the 4<sup>th</sup> and 5<sup>th</sup> accused persons which implicates the 1<sup>st</sup> accused and other persons who were not charged in the case. Having identified such evidence what follows is to analyze such evidence in relation to the offence committed and look at its strength and see if it is capable of being acted upon.

Starting with confessional statements above mentioned, I have explained the way the two accused persons in their cautioned statements implicated themselves and their co-accused. The law is very clear that evidence of an accused person implicating himself and another is admissible and can be acted upon by the court to enter conviction against the accused person. This is provided under section 33 of the Evidence Act, Cap 6 R.E 2022. It provides, thus:

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

*that confession into consideration against other person."*

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

Also, the case law that provides that position is that of **Paschal Kitigwa vs Republic** [1994] TLR 65.

In his cautioned statement the 3<sup>rd</sup> accused alleged that the same was obtained through torture as he was beaten while 4<sup>th</sup> accused alleged that the law was not complied with as the statement was taken in violation of the provisions of the law. Both objections were overruled. Now what is the value of a repudiated or retracted confession? Normally repudiated or retracted confession is admissible and the court may act on it to convict, provided that it is corroborated by another independent evidence. But even without corroboration, if the court is satisfied that the confession is true. This position was established in the famous case of **Tuwamoi vs Uganda** [1967] EA 84.

The confession statement of the 3<sup>rd</sup> accused did not explain the motive behind the killing of the deceased, however the 4<sup>th</sup> accused

explained clearly the motive behind the killing; it is because the deceased deserted his first wife (mother of the children) who initiated the killing. In the statement of 3<sup>rd</sup> accused named Chiba Kulwa (1<sup>st</sup> accused), Jonas Lumba, Sali Lumba, Amos Lumba and George Lumba to have convened a meeting to plan to kill the deceased. Although Jonas, Sali and George who were also the suspect in this case, were discharged, the 1<sup>st</sup> accused is still held in this case. The 3<sup>rd</sup> accused's cautioned statement connects himself and the 1<sup>st</sup> accused in participating at meeting to plan the killing, also in executing the killing.

However, in his defence the 3<sup>rd</sup> accused refuted the allegation. In his cautioned statement, 4<sup>th</sup> accused named 1<sup>st</sup> accused and unknown persons to have killed the deceased after a meeting to plan the killing. The testimony of PW2 also corroborated statements of the 3<sup>rd</sup> and 4<sup>th</sup> accused implicating the 1<sup>st</sup> accused.

Though the cautioned statement of the 3<sup>rd</sup> and 4<sup>th</sup> accused do not corroborate each other, there is no doubt that that each participated in the killing of Lumba Nhalima. The 4<sup>th</sup> accused in his statement implicated himself in planning the killing only while also implicating the first accused in planning and executing the killing. The same to 3<sup>rd</sup> accused implicated himself and the 1<sup>st</sup> accused in both planning and executing the killing.

Although 4<sup>th</sup> accused did not actually executed the killing, but he had a role to play.

That shows all of them had common intention to kill. The principle of common intention is provided under section 23 of the Penal Code as follows:

*S.23- "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"*

Various decisions have interpreted the above provision, in the case of **James Ihuya vs Republic** [1980] TLR 197 the following principles were pronounced: -

- (a) for section 23 to apply it must be shown that an accused person shared with the actual perpetrator of the crime a specific unlawful*

*purpose which led to the commission of the offence charged.*

*(b) The offence committed must be a probable consequence of the prosecution of the unlawful purpose.*

*(c) To constitute a common intention, it is not necessary that there should have been any concerted agreement between the accused persons prior to the commission of the offence. Common intention may be inferred from their presence, their actions, and their omission of any of them to dissociate himself from the offence.*

*(d) Mere presence at the scene of crime is not enough to infer common intention.*

Having subjected the confession statements of the 3<sup>rd</sup> and 4<sup>th</sup> accused persons, there is no doubt that 3<sup>rd</sup> and 4<sup>th</sup> accused had common intention to kill the deceased as each of them explained how they participated in causing the death of the deceased.

In the case of **Mathias Mhinyeni and Another vs Republic** [1980] TLR 290, the Court of Appeal stated as regard common intention thus: -

*"Where a person is killed in the prosecution of a common unlawful purpose and the death was a probable consequence of that common purpose, each party to the killing is guilty of murder."*

In determining a case centered on circumstantial evidence, the proper approach by trial court and 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. See: **Stephano Muhiche vs Republic**, Criminal Appeal No. 29 of 1980, CAT, **Ali Bakari vs Pili Bakari** [1992] TLR 10 and **Kipkering arap Koske and Another vs Republic** [1949] 16 E.A.CA 135.

I am of the considered view that the available circumstantial evidence led to irresistible conclusion that the four accused persons namely Chiba Kulwa @ Lwigi, Thomas Malongo @ Nchimika, Masesa Lwenganija and Mganga Luchagula @ Gela did commit the charged offence.

However, in their defence case all the defence witnesses, **DW1**, **DW2**, **DW3**, and **DW4** denied to have been involved in the commission of the offence of murder they have been charged with. **DW1** and **DW2** admitted to have been drinking alcohol with the deceased at the grocery of **PW2** though they did not commit the crime. They all said to have left separately from the grocery. While **DW3** and **DW4** denied to have been at the grocery of **PW2**. The defence evidence failed to cast reasonable doubt on the prosecution case. However, an accused person cannot be convicted basing on weakness of his defence. His conviction should always be emanated on the strength of evidence adduced by credible and reliable witnesses of the prosecution.

Having said the above, I find that **PW2** is a witness of truth whose evidence is believable and reliable. Also, the statements of the 3<sup>rd</sup> and 4<sup>th</sup> accused are nothing but the truth of what transpired before the killing and during the killing. I find that the prosecution has successfully proved its case to the standard required by the law.

The accused persons being charged with murder, prosecution side has to prove the offence of murder both act of killing and malice aforethought. The 1<sup>st</sup> and 2<sup>nd</sup> accused being the last persons to have been seen with the deceased soon before his ultimate death, and 3<sup>rd</sup> and 4<sup>th</sup>

accused being the persons who had common intention as regards the plan to commit such offence and the way the killing was executed, there is no doubt that the killing was actuated with malice aforethought.

The prosecution therefore has proved the offence of murder against the four accused persons to the standard required by law that is beyond reasonable doubt and thus the accused persons in this case are all guilty of the offence of murder. I therefore convict them as charged.



  
**A. A. MRISHA**  
**JUDGE**  
**02.01.2023**  
**SENTENCE**

There is only one punishment for the offence of Murder once it is proved. My hands are tied by the law and I have to pronounce the sentence as per the relevant law. I therefore sentence the convicts Chiba Kulwa @ Lwigi, Thomas Malongo @ Nchimika, Masesa Lwenganija and Mganga Luchagula @ Gela to suffer death as provided under section 197 of the Penal Code Cap 16. I further direct that they shall all suffer death by hanging, as provided by Section 26(1) of the Penal Code Cap 16 R.E 2019.

It is so ordered.



  
**A. A. MRISHA**  
**JUDGE**  
**02/01/2023**

**Court:** Judgment delivered this 2<sup>nd</sup> Day of January, 2023 in presence of M/s Hongera Malifimbo, Learned State Attorney, for Republic and all the accused persons together with their advocates who are Mr. Sweetbert Nkupilo, Mr. Eliud Ngao and M/s Gloria Lugeye.



  
**A. A. MRISHA**  
**JUDGE**  
**02/01/2023**

Right of Appeal fully explained.



  
**A. A. MRISHA**  
**JUDGE**  
**02/01/2023**

**Dated at Mpanda** this 2<sup>nd</sup> Day of January, 2023.



  
**A. A. MRISHA**  
**JUDGE**  
**02/01/2023**