**IN THE HIGH COURT OF TANZANIA**

**MTWARA DISTRICT REGISTRY**

**AT LINDI**

**ORIGINAL JURISDICTION**

**CRIMINAL SESSION CASE NO.35 OF 2012**

**REPUBLIC**

**VERSUS**

**JUMA ISSA MKUMBA @ TEJA**

# JUDGMENT

30th September, 2013 & 7th October, 2013

**MZUNA, J.:**

Juma Issa Mkumba @Teja stands charged with the offence of Murder c/s 196 of the Penal Code, Cap16 R.E. 2002 the offence which is alleged to have been committed on the 17th day of March, 2011 at Tandangongoro area within the District and Region of Lindi. He is alleged to have Murdered one Seleman s/o Issa Makalius.

The accused person pleaded not guilty and the Republic led by M/s Mwahija Ahmed the learned State Attorney called in three witnesses to prove their case. Similarly, the defence led by Mr. Y udathadei learned advocate for the accused called one defence witness being the accused person.

The facts in brief are that Regina d/o Thobias (PW.1) said that on 17th March, 2011 at about 4.00 PM heard the shouting voice of **"Mzee Maisha mimi nakufa**". She said Mzee Maisha is the name of her husband. She then went to where the voice came from. She passed at the hut of Mr. Vincent Kununda and when asked him on what was the matter he said it was Juma and Cosmas.

Since PW1's son was known as Cosmas she decided to go there and upon calling his son Cosmas the deceased responded by saying that he was Mr. Makalius not Cosmass and that **"Teja ananiua"**. He requested her to go there. PW.1 then saw the accused whom she knew as Juma Issa @ Teja slashing her with a panga at the upper side of the head, ribs/flank and hand. That, the cut wound was bleeding profusely.

The accused, it was so said, never ran away even after PW.1 had seen him. He ran away and was holding a panga after seeing Cosmas and Vincent Kununda who joined her.

The offence was committed in the coconut palm farm belonging to Mr. Tambeeni and was the landlord of the deceased. The deceased asked them to go and call Mr. Tembeeni. Vincent and Cosmass did so leaving PW.1 there. However, upon sensing that she was in a danger of being assaulted by the accused she decided to go to the village leaving the deceased alone helpless. On the way she met other villagers going to the scene.

PW.1 said she managed to identify the accused at the distance of 20 paces and said he is the one who committed this offence because he knew him as they reside in the same village. She said had no grudge with him.

According to Dr. Enock s/o Chilumba (PW.2) who conducted the Postmortem Examination Report he said the deceased had two big cut wounds at the back of the head "Occipital part" and at the upper part of the hand caused by sharp object and had also some bruises. That, the wound at the head was about 4 cm deep and open fracture with a fracture of the skull and was the major cause of his death.

PW3 No. E. 9331 S/Sgt Marco then the Ag. OC. CID after receiving the information that Selemani Issa @Makalius was murdered by Juma Issa @Teja, prepared the policemen and the Doctor (PW2). They reported at the scene. He was the head of the delegation.

He noted that the deceased's body which was at Hadija's house had two big cut wounds at the head and upper part of the hand. He then went to where the incident took place which was 200 meters away and was in the farm which had some cashew nuts trees and some coconut palms. He drafted the sketch map Exhibit P2. The information he had was that the accused had absconded and went to Ruangwa District. They managed to arrest him on 29/3/2012.

He said that from the hut to where the deceased was lying the vision is clear though there are some grasses. That you can easily see if a person is upright not when he is lying down.

He said the accused was charged based on the information he received from Regina (PW1) that she saw the accused slashing the deceased with a panga. However the said panga was never seen and so was not tendered in court.

That was essentially the evidence adduced for the prosecution.

In his defence on affirmation, DW.1 Juma Issa Mkumba said that on the alleged date of the incident which he does not remember, he was not in the village. That he went to Ruangwa at Namango Village which was in March 2012 for mining exploration *"shughuli ya kuchimba madini".* He was then arrested.

He admitted knowing the deceased Selemani Issa Makalius as a resident of Tandangongoro and sometimes at Kinyope villages and are related through his late father and used to visit him but had no quarrel with him. He admits that the deceased built his house in the farms where the murder is alleged to have taken place. He admits as well that PW1 is known to him as village mate and had no existing grudge with her.

That, he can not know the date of the incident because he was away. He denies knowing Vincent but knows Cosmass, son of Regina (PW1). He said further that the allegation that she (PW1) saw him committing this offence is not true.

He then concluded by saying that on the date of the incident he was at Ruangwa. He admitted during cross examination that though he said in

his police statement that he went at Ndanda to do farm work/casual labour (vibarua) that is not true as he was doing his business.

There are matters not disputed like the names of the accused and that of the deceased. That, both were residents of Tandangongoro Village. The postmortem report (Exh P1) was also not disputed.

**The first** question is who was the perpetrator of this offence? Whether the accused was seen and properly identified during the alleged attack?

Responding to the issue of identification during submissions, M/s Mwahija Ahmed the learned State Attorney for the Republic submitted that there is direct evidence of PW.1 who saw the accused (whom she knew before) committing this offence at day time and had no grudge with him. That she gave direct evidence under S. 62 (1) (a) of the Tanzania Evidence Act Cap 6 R.E. 2002.

That she was very consistent in her testimony which is relevant to the case. She was of a firm view that the prosecution evidence though of a single witness is credible as the law does not specifically say a required number to prove a fact. She referred this court to the case of **Yohanis Msigwa vs. Republic** 1990 TLR 148 (CA) which was interpreting S.143 of the Tanzania Evidence Act CAP 6 R.E 2002.

Mr. Yudathadei learned advocate attacked the evidence of PW.1 whose evidence he said is unreliable, inconsistent and untrustworthy. That PW1 said it was at the farm which had coconut palms and there was a

cashew nut tree which she said had some branches. That PW1 failed to say where she stood compared to the cashew nut tree.

That she was the only witness who claims to have witnessed the incident and therefore her evidence should not be believed instead should be tested to see if she is reliable and credible. That, the accused was not arrested at the scene of the crime. It was only after he was mentioned and there is no other person who alleged to have seen him at the scene prior to the happening of the Murder.

He also attacked the evidence of PW.3, the policeman who drafted the sketch map (exh.P2) that it did not feature in Exhibit P2 the alleged coconut palms and more serious the cashew nut tree though he admitted its existence. It was his view that though it was at day time, there was no clear vision. He asked us not to take the issue of identification lightly and that we can not believe her evidence alone in the absence of corroboration as the conditions for identification was unfavorable. He referred this court to the case of **Hassan Juma Kanenyera and Others vs. Republic** 1992 TLR 100 (CA) and **Abdallah Bin Wendo and Another vs R. [1953]1 EACA 166**

During the summing up to the Honourable Assessors, it was made clear to them that the most important question they had to decide was whether the accused person is responsible for inflicting the cut wounds on the deceased and similarly were addressed on the need to weigh the evidence of PW.1 on the issue of identification.

All the Honourable Assessors said believed that PW1 saw the accused. Hereunder is their own version:

The Honourable **first Assessor** said that:

> *"She said saw the accused, heard the deceased naming the accused that was killing him. She also mentioned the things which were at the scene like coconut palms and cashewnuts to the path. She also said about the shouting voice which suggested there was murder.*
>
> *The accused and the said PW1 knew each other. They had no grudge. She was very consistent **bila ya kuteteleka.**"*

The Honourable **second Assessor** said that:

> *"From the evidence adduced PW1 Regina has proved that this offence was committed. There was no dispute that the accused is the one who committed this offence because they knew each other. They all stayed in one village of Tandangongoro.*
>
> *The accused conduct of heading to Ruangwa shows that he absconded after committing the offence. The name Teja is the accused person alone in that village of Tandangongoro. He admitted to be his name."*

The Honourable **third Assessors** said that:

> *"The prosecution witness (PW1) stated very clear that she went at the scene and met the accused slashing the deceased with a panga. He cut him on the head and at the hand.*
>
> *She identified him by face and name. Her evidence was corroborated with that of the Doctor who said he saw the cut wounds at the head and the upper part of the hand".*

From the above transcript of their opinion, *the third assessor* said that she identified him by face and name. However I expected them to base their findings based on the issue as raised that there were some bushes and trees. When PW1 was cross examination by Mr. Yudathadei the learned Advocate she replied;

> *"The distance from my farm to the deceased's farm is not very far. My house is the third from that of the deceased. You can easily see the other person if one is at another point. There are some coconut and cashew nut trees."*

It is however clear that the word ***"Teja ananiua"*** influenced them very much while forgetting that they had the duty to see that the evidence left no any likelihood of mistaken identification. Let me deal with the issue of identification so exhaustively.

Although PW3 said that the cashew nut tree was not close to the scene, he never said the exact distance. Similarly, he could have said it was not close only if he was told where PW.1 the identifying witness stood as compared to its location. According to the sketch map Exhibit P2 he was led by Abdallah Juma. To my view it was very important for him to be led "kuongozwa" by PW1 instead of the said Abdallah Juma whose story if any was hearsay save for the location of the deceased's body. The only inference adverse to the prosecution for their failure to show in the sketch map Exhibit P2 the coconut palms and a cashew nut tree which PW1 said is very big is that if it was included it would have weakened their case. The above circumstances lead me to the conclusion that the condition for identification was not favourable.

The basis of that finding is that PW.3 said that there was a bush which could only enable a person to be identified when upright not when one is lying down. Similarly, PW.1 admitted that there was a big cashew nut tree but for undisclosed reasons, neither PW.1 nor PW3 could locate its position as compared to where the identifying person (i.e.PW.1) was. It is also said by PW.3 that if one could stand at the hut of Mr. Vincent Kununda and have a view to where the deceased was (about 35 meters), it was a clear view. Assuming this evidence is anything worth belief, one wonders why is it that PW1 after she had been told that it was Juma and Cosmass, yet could not see them until she had to call Cosmass, Cosmass only to be told by the deceased that he was not the one but the deceased and that was dying. He requested her to go there. It is during this time when PW.1 say then saw the accused slashing him with a *panga.*

Based on the above story, it is clear that PW.1 never knew the location where the shouting voice came from. Now, should we believe as the prosecution would say, that the voice could go far beyond the eye sight if there was a clear vision? This I would not agree. Instead, I would find that actually, PW.1 had no clear vision that is why she was guessing to verify where the actual location of Cosmass was. It is for this reason that she testified falsely that the deceased was slashed with a panga even on the flank (ubavuni) which was wrong. Based on the statement which she made at the police that she saw the deceased while he had already been cut on the head and definitely from the nature of the injury which the Doctor said was the cause of death, the deceased could not stand upright. That would cement my finding that that is why she could not locate his position. That,

leads me to a conclusion that though there was the aids for clear identification like light but still there was no clear view/sight.

The cited case of **Yohanis Msigwa** (Su pra) shows that what is important is the witness's opportunity to see what he/she claimed to have seen, and his/her credibility. Her evidence though she claimed to have seen him is wanting. So I do not agree with the opinion given by the Honourable third Assessor that she identified him by shape and name without clear view.

It was held in the case of **Raymond Francis vs. R** [1994] T.L.R. 100 CAT that:

> *"It is elementary that in a criminal case whose determination depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance".*

The principles governing visual identification were propounded in the famous case of **Waziri Amani vs. R** [1980] T.L.R. 250 that:

> *"...unless all possibilities of a mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight".*

The Court laid some established tests to determine the issue of identity among others being;

> *"...The time the witness had the accused under observation, the distance at which he observe him, the conditions in which such observation occurred, for instance, was good or poor lighting at the scene, and further whether the witness knew or had seen the accused before or not...".*

PW1 said knew the accused even before, said the accused wore the same cloth he wore in court, that it was day time at 4.00 Pm, that she stood at about 20 paces away from him. However this witness never said the time she had the accused under observation. She only said he never left even after he saw her for what she said it was due to the fact that she was a woman not male and therefore according to her was not a threat. But that could not make us know the exact time as well stated in the above case of **Waziri Amani** *(supra).*

That deficiency together with the fact that the condition for accurate and unmistaken identification are wanting coupled with the fact that the identification depends entirely on one witness, make me look for corroboration.

The necessity for corroboration was held in the case of **Abdallah Bin Wendo and Another (supra).** The court held that:

> *"Although subject to certain exceptions a fact may be proved by the testimony of a single witness, this does not lessen* ***the need for testing with the greatest care the evidence of such witness respecting the identification****, especially when it is known that the conditions favouring a correct identification are difficult.* ***In such circumstances other evidence, circumstantial or direct, pointing to guilt is needed."*** (Underscoring mine)

PW1 being the only identifying witness in very unfavourable conditions, we are told to be cautious and test her evidence so far as the issue of identification is concerned. This makes it of utmost importance to look for other corroborating evidence whether direct or circumstantial pointing to accused's guilt.

Now, where is such corroborating circumstantial evidence? We are told that the accused absconded after the incident and went to Ruangwa. This story featured when PW.3 was examined by court. That fact could have been proved if there are evidence which shows that the accused was at the village not at Ruangwa on the material date. Are there such evidence?

The learned State Attorney invited us to find that since the accused based his defence on alibi without having furnished court with notice as required under section 194 (4) of the Criminal procedure Act, then we should not believe his story.

I quite agree that the accused's defence was totally a conjuncture and an afterthought.

However, this court as well stated in the case of **Charles Samson vs. R** (1990) TLR 39 at Page 42 that *"is not excempt from the requirement to take into account the defence of alibi where such defence has not been disclosed by the accused before the prosecution closes its case".* Therefore since there was nobody who averred to have seen him in the village or that was seen passing through the deceased's farm on that material date, then we can not rule out that he was not at the scene or within the village.

Even PW3 never bothered to confirm if he was within the village on the material date. He only said was told so and believed the story that he absconded and went to Ruangwa after the incident which is hear say. Who

specifically told him? His neighbor or his friend whom the accused said never said notified him of his journey to Ruangwa?

The learned State Attorney further said that the accused was not consistent as sometimes said was present and then not present. That he gave a false story and therefore is capable of lying when he said in his police statement that he used to do casual labour as opposed to his story in court where he said was doing his own business, that we should use that inconsistencies and lies as evidence against him.

The prosecution to my view would have used the accused's contradicting statement if they had proved that the deceased was together with the accused prior to his death. If the accused could have given no explanation regarding who attacked him then such to my view would fall to what was held in the case of **August Mahiyo vs. Republic** 1993 TLR 117 (CA) that *"false; incredible or contradictory statements given by way of explanation if disapproved, become of substantive inculpatory effect"* . They only disapproved the allegation that he was doing casual labour which had nothing to relate with the commission of this offence. Above all, the accused was never seen in the company of the deceased prior to such death such that we could expect him say something about his death.

There is an "implied" evidence that the accused must pass to the deceased's shamba where murder was committed heading to his shamba. That can be seen in the opinion of the Honourable first Assessor when he said that:

*"As for the defence the accused never disputed knowing the said PW1 and the deceased. He also said knew where the incident took place. He said it is at the path where he passes leading to his farm for the above reasons the accused should be found guilty..."*

However, when the accused was examined by the Honourable third Assessor he said that:

*"I can not remember when I lastly passed at the farm of the deceased heading to my farm."*

And when the accused was examined by the Honourable second Assessor said that:

*"I can not know what preceded the other between the deceased's death and my journey to Ruangwa... I never knew his death until I was arrested."*

From the above story it can not be said with any degree of certitude that the accused was seen heading to his farm on the material date of the incident. What I can gather is that the Honourable Assessor was trying to use the defence case to corroborate the story which the prosecution never proved as even PW1 never said to have seen the accused immediately prior to the alleged Murder. The only prosecution witness who could have cleared such doubt was Vincent Kununda, who said it was Juma and Cosmas. Had he been present (as we are told he is dead), he could have told us if he saw him and secondly who was Juma he was referring to because there is also the possibility that there might be another Juma not necessarily Juma @Teja. His absence has necessarily made the prosecution case to crumble.

So even assuming he referred to Juma, the accused, can we bank on that statement? I would say no for the obvious reasons that it is hearsay evidence from a person who was not called as a witness.

Secondly, assuming that story is anything worth belief, it goes to discredit PW1 as a witness with interest to serve. I say so because even her son Cosmass was said to be with Juma, whom PW1 say is the accused. The law is very clear that "evidence of a person who has interest to serve also needs corroboration as such it can not be used to corroborate other evidence". That was held in the case of **Asia Iddi vs. R** (1989) TLR 174 (HC) and **Abraham Wilson Saiguran and 2 others vs. R** (1981) TLR 265 (HC) Ksanga, J (as he then was). I fully subscribe to that proposition. Naturally PW1 would like to implicate any other person to save the skin of her son, Cosmass. It is for that reason she was not consistent. At first she said in her evidence in chief that he heard the deceased saying that: **"Mzee Maisha mimi nakufa"**. When she was examined by the second Honourable Assessor she changed the version and said: **"Mzee Maisha mimi nakufa ananiua Teja."** In swahili we can say **"aliongeza chumvi"** to make the story more colourful definitely for her own interest.

To support that finding, I would refer to what Honourable Rutakangwa J.A held in the case of **Maselo Mwita @ Maseke and Another vs. R**, Cr. Appeal No. 63 of 2005 (CAT) at Mwanza, (unreported) that;

*"Even recognizing witnesses often make mistakes or deliberate lie."*

PW1 can not to my view (taking all the above circumstances), be precluded from such finding.

Thirdly, the statement of the deceased that ***"Teja ananiua"*** which would corroborate that of Vincent Kununda to show it was Juma @ Teja he referred to was killing him is only that of a dying declaration. Even if it was said "**Mzee Maisha mimi nakufa ananiua Teja"** it has no "correctness" as there is the possibility of "honest mistaken" especially if the condition for identification is not ideal. That was held in the case of **Afrika Mwambogo vs. Republic** 1984 TLR 240 (CA) at Page 244 that:

> *"The deceased's persistence in implicating the appellant, which seems to have heavily influenced both assessors, is thus mere evidence of consistency, and of honesty even, but not of correctness."*

Unfortunately the first assessor fell in the same error when he said:

> *"She (i.e. PW1) said saw the accused, heard the deceased naming the accused that was killing him. She also mentioned the things which were at the scene like coconut palms and cashew nut tree to the path. She also said about the shouting voice which suggested there was murder."*

One can say since it was at day time he must have identified him. However in a similar case of **Godson Hemedi vs. Republic** 1993 TLR 241 (CA) where the appeal was allowed on a Murder charge, the attacker committed the offence at about 4.00 Pm. His conviction was based on the dying declaration of the deceased who consistently mentioned him as her assailant. The appeal grounds were that firstly that the dying declaration

was uncorroborated and secondly that the appellant's defence of alibi was wrongly rejected. It was held that:

> *"The dying declaration of the deceased and the evidence of PW1 involve weakness and unsatisfactory features which sufficiently render such declaration unreliable and make PW1's evidence incapable of supplying the necessary corroboration to it"*

I do adopt the same holding in the present case. PW.1 evidence has some weaknesses and can not supply the requisite corroboration. Similarly from the nature of the attack which the Doctor PW.2 said was on the back of the head "occipital part", it is highly probable that the deceased was attacked from the back and possibly never saw the attacker. So the mere mentioning of Teja does not show "correctness".

The Honourable Second Assessor seems to have been influenced by the naming of Teja by the deceased which it was so found was the only person in the village. This would do if there was a strong case made out. It should be noted that the accused never denied to be known by such name as opposed to the case of **Sijali Juma Kocho vs. R** 1994 TLR 206(C A) where such denial was taken as good evidence that the accused wanted to distance himself from the commission of the offence. Their lordship held that:

> *"One wonders why. In normal circumstances one does not disown one's name. The only reasonable inference to be drawn is that the appellant did so as an afterthought in an attempt to avoid any association of his identity with the death of the deceased."*

That was not so in the present case.

Fourthly, common sense suggest that ordinarily it is quite unreasonable, very illogical and cruel for PW1 to go to the village to call the villagers leaving the deceased who was by then not dead alone. We were not told why the two (ie. Cosmass and Vincent Kununda) should go and not one to call Mr. Tembeeni as requested by the deceased? The village according to the sketch map Exhibit P2 is only 200 meters away from where the deceased was lying. Ordinary human conduct points to the contrary as well stated in the case of **Juma Kilimo vs. R,** Criminal Appeal N. 70 of 2012, CAT, (unreported) Rutakangwa, J.A. It was held that:

> *"An impression as to demeanour of a witness ought not to be adopted without testing it against the whole of the evidence of the witness in question, and we may add,* ***the entire evidence on record and to ordinary human conduct"*** (Emphasis mine).

(The case of **Byamungu s/o Rusiliba v. R** [1951] 18 EACA 233 which was followed and applied by the Court of Appeal in **Jackson s/o Mwakatoka & 2 Others v. R.** [1990] T.L.R 17 was applied).

The learned Judge also said, quoting P. Ekman in his book, **"Telling Lie: Clues to Deceit in the Marketplace, Politics and Marriage",** Norton, New York, 1985 says that *"most liars can fool most people most of the time."* quoted by Giles in his article, **"The Assessment of Reliability and Credibility"** (1996) 2 TJR 281 at page 285. That Justice Peter MacClellan, Chief Judge at Common Law, Supreme Court of New South Wales, treats as fallacious a point which their lordship said do agree.

Based on the above cited case law of **Juma Kilimo** (supra) ordinary human conduct does not rule in favour of PW.1.

Fifthly, we were not told what made Vincent Kununda not to join her to see what was the matter while the sounding voice suggested something awful and a threat to human life **"Mzee Maisha mimi nakufa"**. Does it mean that Vincent Kununda whose house is the first from where the deceased was, (as opposed to PW1 the wife of Mzee Maisha whose house was the third), never heard such voice? One would have expected the two to go and see it together. So, it is my considered view that Kununda could have been a material witness had he been alive. He was the neutral party unlike PW1 whom I have said above had her own interest to serve.

Sixthly, PW.1 does not say after she had met the deceased, did she bother to ask him if at all it was the accused who slashed him what was the cause? Were there any prior grudge leading to such assault? Failure do so which every prudent and cautious person is expected to do, suggests that from the nature of the attack, possibly she was horrified and took cover or ran away for fear of being attacked too. It is also possible the deceased from the nature of the assault was unconscious. If that was so, in view of the decision in the case of **Hamisi Said Mchana vs. Republic 1**984 TLR 319 (CA) then "since the declaration was made while the deceased was in a fluctuating capacity to talk it would be unsafe to base conviction upon it without corroboration." There is no such corroborating evidence.

I am aware, in view of the decision in the case of **Hassan Juma Kanenyera and Others vs R.** (supra) that:

> *"It is rule of practice not of law, that corroboration is required of the evidence of a single witness of identification of the accused*

*made under unfavouralbe conditions, but the rule does not preclude a conviction on the evidence of a single witness if the court is fully satisfied that the witness is telling the truth."*

Having not found other corroborating evidence now the ***third issue*** is whether PW1 is a witness of truth? Whether she is a reliable and credible witness? Is it safe to convict basing on her evidence?

Ms Mwahija Ahmed the learned State Attorney submitted that even if there could be some differences on her versions by contradicting, it is only minor contradiction which does not go to the root of the matter. She was of the view that minor contradictions should be disregarded. She referred this court to the case of **Fadhili Ramadhani Tembo vs. R** Criminal Appeal No. 304/2007 CAT at Arusha (unreported).

Mr Yuda Thadei, the learned defence counsel never touched on such contradictions. He however disputed the story that PW1 had such clear view and said that the issue of identification is serious matter and should not be taken lightly.

In determining this question, the Honourable Assessors were also asked whether they see the contradiction in PW.1 evidence and the variance in the statement whether they were minor or go to the root of the matter but nobody who touched on that.

I am aware as well stated in the above cited case of case of **Fadhili Ramadhani Tembo** (Supra) at Page 10, that this court has the duty to address on the alleged inconsistencies so as to resolve them and see if

they are "material contradictions that can affect the findings of the court" or as argued by the learned State Attorney, goes to the root of the matter.

One thing which is obvious from the nature of this case is the issue of direct evidence of seeing. The learned State Attorney's argument suggests that it was enough that PW1 said saw the assault. It does not matter where the assault was directed. If this is her argument she should agree as well that it will be difficult to assess the truthfulness of a witness. Is it enough for instance to say someone identified another by mere saying he put on a shirt without pointing the colour of that shirt? That is the same position we are faced with.

If one can say saw the assault on a certain part of the body then it is expected to find whether the direction of the assault was the cause of death. This to my view cements her credibility or reliability.

Here I should say that though PW.1 claims to have seen the accused slashing the deceased on the ribs or frank "ubavuni" but the Postmortem Report and the evidence of PW.2, the Doctor and the investigative policeman (PW.3) say the deceased had cut wounds on the head and upper part of the arm not at the frank.

Secondly, it was found that though she claims to have seen the accused slashing the accused on the head, however in her police statement she said when he saw the deceased the accused had already slashed him on the head. So she witnessed him slashing him on other parts of the body.

Personally I would say the contradiction is not minor because it goes to show that PW.1 is not a witness of truth. Further she was not so close such that she could have seen the person who committed the offence that is why she said saw him cutting on the ribs.

Thirdly it goes to show that the nature of the bushes or trees made her not have a clear view. The inconsistencies are therefore not minor as they go to the root of the matter and further do discredit her as untrustworthy. Sometimes, it is argued that variance in the witness statements show she was not tutored. This I would agree for simple matters not basic matters as in the case under consideration. PW.1 the key witness in this case, contradicted with what is contained in the Postmortem Report and what PW.2 and PW3 said.

It was held in the case of **Emmanuel Abrahamu Nanyaro vs. Penile Ole Saitabau** (1987) TLR 47 that:

*"Unreliability of witnesses, conflicts, inconsistencies in their evidence entitle judge to reject evidence".*

That is the only course available.

***The fourth issue** is whether there was malice aforethought?*

According to the learned State Attorney, malice aforethought existed and in this case it can be inferred by looking at the Post Mortem Report, the nature of the weapon used (a panga) which was inflicted on the head, the most vulnerable part of the body together with the number of fatal blows. She referred this court to the case of **Said Ally Matola @ Chumila**

**vs. R**, Criminal Appeal No. 129 of 2005 (CAT) at Tanga (unreported) where the court was interpreting section 200 of the Penal Code Cap 16 R.E. 2002.

In response, the defence counsel said that there is no malice aforethought in the absence of proof of motive. That they never bothered to make a follow up on the life history between the accused and the deceased. He therefore asked that the accused should not be found guilty. The learned defence counsel said it was not established what was the motive leading to the alleged Murder? That it is not shown that he went there in order to steal or that he had grudges with the deceased.

Both learned counsels have a point but that could be relevant if the prosecution had proved the issue of identification of the responsible culprit. In the absence of such proof, then malice or motive whether direct or indirect are of insignificant value and I will not labour much on it. However, it was never proved that though the accused said was closely related to the deceased through his late father, but there is no evidence suggesting they had any quarrel that would suggest he executed his ill motive.

The ***fifth issue*** is whether the demeanour of the accused disassociates him with this offence?

The learned State Attorney prayed for this court to ignore the defence evidence. That there was an unconvincing demeanor of the accused. She asked instead to believe and find that the charge was proved.

In response, Mr. Yudathadei, the learned counsel said on the issue of demeanor of the accused that he, being a Standard 3 leaver who was

never brought up by all two parents should not be punished for what happened in court as it may be due to his own upbringing.

On the said demeanor of the accused it is evidently clear that the accused showed no concentration during his defence case. At a certain time during his defence while seated, almost twice was told (at one time by his counsel and on the second time by court) not to leave his hand hanging and move it around at the top edge of the witness box. Even when he was given some water as it had been the case when witnesses give evidence, said ***"mimi jana nimelala na njaa, badaia ya kunipa chakula mnanipa maji?*** Literally translated to mean that why should he be given some water instead of some food because yesterday he slept on an empty stomach? He never drank water but after he had finished his defence case when he went to take his seat he asked for the bottle of water which he had earlier on ignored! Even when we were about to fix another date while in the accused's dock, he said ***"Mheshimiwa mimi si au mnifunge au mniachie ijuiikane tu"*** which literally means it is better he be either convicted or acquitted so as to know his fate instead of the prolonged trials. Wh en the court asked him what was his choice between the two it took him some time to think and then said **"niachiwe"** that is he should be acquitted.

Actually, there was an explanation that a day preceding his defence, all those who were late due to the ongoing session, never have had their lunch which is normally taken at 2.00 PM. Of course we talked with the

learned State Attorney and that problem never happened any further. Before testifying he had taken his porridge so he was fit.

It is from the foregoing sequence of events whereby the learned State Attorney had asked us to take into consideration and find his demeanour questionable.

There is some force in the defence argument and there are other factors I consider might have contributed. Of course character is very personal or a subjective test. However, there had been other accused who came for plea and preliminary hearing with him. Some were conditionally discharged and others were sentenced to imprisonment terms. Ordinarily that might have also been what the accused had in mind forgetting that his was a more serious offence (if at all it was not deliberate!). Another factor possibly it was a reaction after he had slept with empty stomach. May be Psychological Doctors could tell us if all these sequence of events had any connection with his nick name "Teja" though he denied using cocaine and the like when he was examined by the first Assessor. One thing I am sure is that it was never averred let alone suggested and I am not moved to think, his faculty of reasoning is not sound.

Nevertheless the above set of events can not associate him with the Murder of Seleman Issa Makalius unless there is such proof.

The ***sixth issue*** is whether the charge had been proved against the accused person?

According to the learned State Attorney she said it was so proved as opposed to the learned defence counsel who said it was not.

I could not understand the learned State Attorney submission when she said the accused is capable of lying. Did she want to move us shift the burden on him?

It is a well settled position of the law that in criminal prosecution the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution (See; **John Nkinze vs. R** (1992) TLR 213). We cannot base a conviction on the weaknesses or lies of the defence.

Although all three Honourable Assessors were of the view that the accused should be convicted as charged, I am of the different view for the reasons I have stated above especially on the fact that the condition for accurate and unmistaken identification was unfavorable. Secondly PW1 is the witness with interest to save and therefore her evidence must be taken with caution. Thirdly there is no evidence to corroborate her story which also needed corroboration. Above all we can not base the conviction on hear say and dying declaration without other independent corroborative evidence.

The prosecution and the Honourable Assessors with due respect, seems to base their findings of guilty on mere suspicion which it has been held time and again that suspicion whatever grave can not be the basis for the conviction. That was held in the case of **John Mgindi vs. Republic** (1992) TLR 377 (CA)

The prosecution led by M/s Mwahija, the learned State Attorney and Mr. Yudathadei the learned defence counsel have displayed their role at high level. They had their definite goals and are commended. They are urged to maintain that spirit in future.

In the final analysis, I agree as well submitted by the learned defence counsel that there is no evidence to found the conviction against the accused. I find that this charge has not been proved against the accused to the required standard of proof. I find him not guilty and do hereby acquit him under Section 235 (2) of the Criminal Procedure Act, CAP 20 RE 2002.

**M. G. MZUNA,**
**JUDGE.**
**7/10/2013**

**AT LINDI**

**DATE: 7th October, 2013**

**Court**: Judgment delivered this 7th day of October 2013 in the presence of M/S Mwahija Ahmed the learned State Attorney and Mr. Yudathadei the learned defence counsel.

Right of appeal explained.

**M. G. MZUNA,**
**JUDGE.**
**7/10/2013**

**Court:** The Assessors are thanked and discharged.

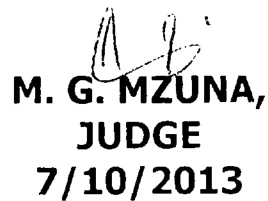
M. G. MZUNA,
JUDGE.
7/10/2013

**Court:** Accused is asked to say his permanent physical address under S. 235 (2) of the CPA Cap 20 R.E. 2002.

**Accused** I will be staying in Dar es Salaam, Mbagala, Vikindu.

My uncle is Omari Hassani Mtega where I normally go.

Cell leader?



**M. G. MZUNA,**
**JUDGE**
**7/10/2013**