

**IN THE HIGH COURT OF TANZANIA**  
**DAR ES SALAAM DISTRICT REGISTRY**  
**AT DAR ES SALAAM**  
**(ORIGINAL JURISDICTION)**

**CRIMINAL SESSIONS CASE NO. 39 OF 2012**

**THE REPUBLIC**  
**VERSUS**  
**ADAMU CHARLES MKUDE**

Date of last Order:09.06.2014

Date of judgment 03.07.2015

**JUDGEMENT**

**Feleshi, J:**

Adam Charles Mkude, hereinafter referred to as 'the accused' stands charged with the offence of Murder c/s 196 of the Penal Code, [Cap. 16 R.E 2002].

The information the accused was called to plead to allege that the accused on or about 16<sup>th</sup> day of June, 2009 at Mtendenni area within Ilala District, Dar es Salaam Region, murdered one **Sakina Muktasar** hereinafter referred to as 'the deceased'.

According to the autopsy report (Exh.P3), the deceased death was due to **asphyxia due/from strangulation**. The doctor also observed the deceased's body "**obsessed, bled through mouth and nose**" and had "**sub-conjunctival petechie hemorrhage and few bruises on the neck and small lacerations on lips**".

When called upon to plead to the information of murder, it is important to note that the accused entered the plea of *not guilty* and, as will be recapitulated latter, he informally advanced the defence of *alibi*.

In the bid to prove the charge against the accused, the prosecution called nine (9) witnesses who adduced oral evidence and (10) prosecution exhibits were tendered and admitted by the court. On its part, the defence resisted the prosecution's case by calling two (2) witnesses but not tendered any exhibit.

After his committal to this court for trial by the Ilala District Court on 30/4/2012, my Brother, Mr. Justice B.M. Mmilla, J. (as he then was) recorded the accused plea and conducted the Preliminary Hearing on 7/9/2012 pursuant to section 192 of the Criminal Procedure Act, [Cap.20 R.E.2002] hereinafter referred to as 'the CPA' and the Accelerated Trials and Disposal of Cases Rules, 1988- G.N. No. 192 of 1988.

Although the accused initially did not oppose to the tendering and admission of the Postmortem Report, Sketch Plan and Search Record, the Preliminary hearing proceedings show that he later on only admitted the aspect concerning the particulars of his names and that was the only item that constituted the list of the undisputed matters.

My Brother, Mr. Justice Utamwa, J. was subsequently assigned to try this case and he conducted the trial proceedings from 31/5/2013 to 6/6/2013.

He recorded the evidence of **Mrs. JYOTI VYAS (PW1)** and part of the evidence adduced by **D.3249 D/SGT Amos (PW 2)**. I further took over the case from him and having paid attention and complied with section 299 of the CPA I continued with the trial.

Mr.Mtumwa Kiondo, the learned Advocate throughout conducted the defence case from the preliminary hearing and its subsequent stages. This dedicated advocate therefore conducted the defence case before all three judges. The prosecution team initially formed by Ms Chimpaye, learned State Attorney (before Hon.Milla, J-as he then was) Ms Faraja George and Ms Anunciata, learned State Attorneys (before Hon.Utamwa, J.) was subsequently succeeded over by Ms Yasinta Peter assisted by Mr.Erick Shija and Ms Lilian Machage, learned State Attorneys as from 18<sup>th</sup> May, 2015 when I took over the case and continued with the trial to date. I am therefore very grateful to the superb job done by both counsels for the defence and the prosecution and also to the great aid I got from the Ladies and Gentleman assessors-Mr. Omary Abdallah Panzi, Sarah John Lugome and Moshi Mohamed Athuman who tirelessly throughout attended the proceedings of this case.

The evidence adduced at the trial, starting with the prosecution's case, is to the effect that **Mrs Jyoti Vyas (PW1)** until the fateful day and time was the deceased's neighbor in the 2<sup>nd</sup> floor at Flat No. 4 Mtendeni Street, Kagera in Dar es Salaam City. On 16/6/2009, whilst at home at or around 8.30 – 9.00 am (morning), she heard the deceased's screaming noises. She identified the voice as being that of the deceased. She went to her door which was also on the same floor in Flat No. 3. At the deceased's door outside she pressed the bell and the accused came out in response from the deceased's house. She asked him as to what was happening inside and the accused, whom she later on ably

identified him in court on 3/6/2013, replied that nothing had happened and he closed the door. Later on at 1.00 HRS (noon), Muhsin (the deceased's brother) came and opened the deceased's house using the extra key he picked from her (PW1). She saw many people at the deceased's door and from a distance saw the deceased's body lying on the floor. She did not see accused.

**E.6698 D/CPL Mbonye (PW5)** and **E.3897 D/CPL Benson (PW6)** were amongst the police officers who arrived at the scene. Inside the deceased's house **PW5** saw the deceased lying on the floor whilst her hands and legs tied up by sisal ropes and her mouth was sealed by a plaster. She was dead. They took the deceased's body to Muhimbili National Hospital (MNH). He prepared the Order for Post-Mortem and attended the Post-Mortem examination and thereafter they allowed the deceased's relative to continue with burial arrangement. He was given the Post-Mortem Examination Report which he handed it over to the office. **PW5** tendered the Order for Post-Mortem and the Post-Mortem Examination Report for admission and both documents were admitted in evidence as **Exhibits "P2 & P3"** respectively. According to **PW5** the Post-Mortem Examination Report (**Exh. "P3"**) revealed that the deceased died due to Asphyxia due to strangulation.

**E.3897 D/CPL Benson (PW6)** who arrived at the scene with his superior, the OC-CID, also saw the deceased's hands and legs tied up by ropes. He drew the sketch plan under the directives of Muhsin Ismail and **PW1**. He tendered it in court and it was admitted in evidence as **Exh.P.4**. On 17/6/2009 the case file was assigned to him. He read it and established from the statement of the deceased's brother (Muhsin) who was also the complainant that he (Muhsin) suspected the accused, who at that time had escaped, to have authored the murder of his sister. **PW6** also established that

the accused had previously pointed out to the complainant the workplace of his father at Karume Street. So, he used the information and successfully traced the accused's father, one **Charles Mkude Msavu (PW.4)** who agreed to lead him and his colleague D/Cpl Oscar to Ikule Village Ifakara District in Morogoro Region on 20/6/2009 where they managed to arrest the accused on the night of 21/6/2009 at around 23:00 HRS. They took him to Dar es Salaam on 23/6/2009.

Based on the piece of evidence he obtained from **No. E3249 D/S/SGT Amos (PW2)** who interrogated the accused on 24/6/2009 **PW.6** went with the accused to the shop of one **Emmanuel Kiwole (PW.3)** together with the searching party where from they recovered one digital Camera make SONYI and DVD Player make HITACH which were robbed from the deceased's home on the fateful day. The two items were tendered in court by the **PW.3** and were collectively admitted in evidence as **Exh.P.1. PW6** described and identified the two items (**Exh.P.1**) in court. He deposed that the search exercise was witnessed by the Street Chairman one Salma Kondo. He tendered the Record of Search which was admitted in evidence as **Exh.P.5.**

The witness (**PW6**) also sent the accused to the Justice of Peace at Kariakoo Primary Court Ilala where one **Hon.Mwajuma Diwani (PW.7)** on 26/6/2009 recorded his Extra Judicial Statement which was tendered by **PW7** and was admitted in evidence as **Exh.P.6.**

Therefore, **PW6** being the investigator of this case deposed that he established that the accused was present at his work place on the material day and had as usual at one point in time escorted the deceased's husband one Mukhtasar from the 2<sup>nd</sup> floor downstairs to board his car. He said the accused confessed to have been involved in the murder and was also implicated by the

digital Camera make SONYI and DVD Player make HITACH (**Exh.P.1**). That, his act of escaping from the scene of crime immediately after the incident of murder was nothing but a conduct that proved his involvement in the murder.

**No. E3249 D/S/SGT Amos (PW2)** recorded the accused's cautioned statement on 24/6/2009 from 10.10 HRS up to about 1.00 HR. however, this Court rejected its admission because it violated the provisions of the governing laws.**PW.2** also recorded the statement of Muhsin Ramadhan (the complainant) on 18/6/2009 which was later on admitted as **Exh.P.9**. Through that interview, he got detailed account on how that witness established the death of his sister whom, as deposed by PW.5 and PW.6 above, he found her lying down inside in one of the rooms with her hands tied up by ropes.

On his part, the accused's father, **Charles Mkude Msamvu (PW4)** related to the court that on 18<sup>th</sup> June, 2009 the accused visited him at his place of work and informed him that he was suspended from work because of the shortage that occurred to the cargo belonging to his Boss. He had a train ticket with him and he related to him that he wanted to go to the village to meet relatives and support his mother. He inspected him and found him with Tshs. 1,200/= only in his pocket. On 19<sup>th</sup> June, 2009 at 12.00HRS three police officers visited his work place and told him to accompany them to the Central Police where they inquired from him the whereabouts of the accused.

He told them that the accused had left for Ikule village Ifakara District in Morogoro Region. They asked him to accompany them and, as deposed by **PW.6**, he agreed and went to the village where they arrested him. **PW4** said that initially, the accused, whom he identified in court, used to operate a three-tired bicycle (Guta) in the City but he later on got the cargo loading and unloading employment from an Indian fellow and at all material time he was

living with him at Kigogo Randa Bar area in Dar es Salaam. He said, when the police officers went after him he thought that was in relation to the cargo shortage the accused had informed him before.

**Emmanuel Elinami Kiwoyi (PW.3)** gave evidence to the effect that on 24/6/2009 **PW.6** and other police officers went to his shop at Kigogo to search for robbed items. He told them that the only items he had were those entrusted to him by the accused. They wanted to know what were the items so he told them that it were one digital camera make SONYI and one DVD player make HITACH (**Exh.P.1**). The Street leader one Salma Kondo was called and witnessed the seizure of **Exh.P.1** from **PW.3** and signed in the Search Record (**Exhp.P.5**). The accused had deposited the two items as collateral for the loan of Tshs. 50,000/= he gave to him.

The accused and **PW.3** did not execute any handwritten agreement because they knew each other since 2000 and they were neighbours. The distance from **PW.3's** shop to the accused's home is not far. It is about 70 paces away. The accused had vowed to refund **PW.3's** money and retake his items as soon as he comes back from Morogoro where he was going to meet his relatives. The accused told him that the items were given to him as gift by his Boss who was about to travel. **PW.3** was aware that the accused was working at an Indian Boss.

**Mwajuma Diwani (PW.7)** gave evidence concerning, as PW.6 deposed, the accused Extra-judicial Statement. She deposed that on 26/6/2009 whilst at work at the Kariakoo Primary Court at 11.00 HRS **PW.6** brought to her the accused who gave his statement and was remorseful to what he had done. The accused stated that he was tricked by one Shukuru to kill his Boss (Sakina). **PW.7** identified the accused in court and tendered his Extra Judicial

Statement which after a trial-within-trial was admitted in evidence as **Exh.P.6.** during that session, **PW.7** deposed that the accused person did not register any complaint to her.

The prosecution further moved the court under section 34B2(a) of the Evidence Act, [Cap.6 R.E.2002] as amended by the Written Laws (Miscellaneous Amendments) (NO.2) No. 5 of 2012 and section 148 of the same Act and section 289 of the Criminal Procedure Act, [Cap.20.R.E2002] and re-called **PW2** and called **WP 2043 D/SGT Tatu** and **E.5494 D/CPL Masuha** to produce in court evidence contained in the recorded statements of witnesses who upon all reasonable steps being taken to procure their attendance could not be found. These are: first, the complainant, one **Muhsin Ramadhan** (deceased's brother); second, **Mukhtasar Ali Sayed** (the deceased's husband); third, **Juma Mtandu** (security guard); and four, **Amina Shabani** (deceased's house maid).

**WP 2943 D/SGT Tatu (PW.8)** tendered in court the statement she recorded from **Amina Shabani** who was the deceased's house maid. The statement was admitted in evidence as **Exh.P.7.** It is evidenced in **Exh.P.7** that the accused and her were all working at the deceased's home and she was surprised by his immediate disappearance.

**WP 2943 D/SGT Tatu (PW.8)** also tendered in court the statement she recorded from **Juma Mtandu** who was one of the Security Guard on duty at the deceased compound on 16/6/2009 morning. It was admitted as **Exh. P.8.** According to **Exh. P.8,** the accused had reported on duty at his work place on 16/6/2009 morning and **Juma Mtandu** saw him escorting his Boss Mukhtasar Ali Sayed on the fateful date.



**E.5494 D/CPL Masuha (PW.9)** on his part had recorded the statement of the deceased husband, one **Mukhtasar Ali Sayed**, which he tendered and was admitted in evidence as **Exh. P.10**. The evidence deduced from it gave an account of how **Mukhtasar Ali Sayed** found his wife dead and things distorted in the rooms and he itemized the camera and DVD player among others (**Exh.P1**) the things he missed in the house.

Turning to the defence case, two (2) witnesses adduced evidence to build the defence pursuant to section 293(2) of the CPA and no exhibit was tendered.

**Adamu Charles Mkude (DW1)** denied having been in Dar es Salaam on 16/6/2009 and further denied having any knowledge of almost all witnesses except **PW.4, PW.6** and **PW.7** who testified in support of the prosecutions' case. He generally and specifically denied any involvement in murdering the deceased leave alone not knowing the deceased or having worked in her home.

He deposed that after completing his Primary School education at Ikule Primary School in 2007, he came to Dar es Salaam in July 2008 and engaged himself in the business of selling second hand clothes (mitumba) for a month at Mburahati, Manzese and Tabata areas. Then he went back to the village where he engaged himself in farming until when he was brought in Dar es Salaam in 2009 under the **PW.6's** arrest. He said, the police officers did not find him with anything. He however, did not remember if his father (**PW.4**) had accompanied the policemen to Ikule Ifakara Morogoro. He further disowned the digital Camera and DVD player (**Exh.P.1**) and **PW.3** who produced them in court.

**DW.1** disowned the statement that was recorded by **PW.2** at the Central Police as well as the Extra Judicial Statement recorded by **PW.7** on the account that in both documents he was just required to sign on sheets of paper without

knowing their contents. However, he conceded that he did not raise any complaint to **PW.7**. He also deposed that no identification parade was conducted against him and that before leaving for Ikule in May, 2008 he informed my father (**PW.4**) and whilst there he did not involve himself in business.

**DW.1** further related to the court that he did not have any grudge with his father **Charles Mkude Msavu (PW.4)** and **E.3897 D/CPL Benson (PW6)**. He also said that apart from the oral threat there was no any police officer who had physically harmed him. During the defence hearing he was shown **Exh.P.6**. He looked at the Extra Judicial Statement (**Exh.P.7**) and acknowledged that it was signed by him.

**Fausta Msavu (DW2)** is the accused's mother. Her evidence was to the effect that, the accused last visited them at Ikule in June, 2009. However, two days later he was arrested by policemen on one Saturday at about 1.00 HRS at night in the presence of their Street Chairman called **Yusuph Mengi**. She also heard that **PW.4** was around. The arrest came before she had not even had sat down with the accused to exchange stories. During his arrest, the accused had nothing in his possession and he had not given her (**DW.2**) even a single cent. She said the accused went to the village just to look after their well being and to help her to harvest rice and engage in maize farming.

Whilst in Dar es Salaam the accused lived at home with his father (**PW.4**) and before living for Ikule he told her that he had informed his father (**PW.4**). She also knew their Street leader in Dar es Salaam was one **Salma Kondo**.

According to **DW.2**, after completing his Primary School education in 2007 under her good care at Ikule, the accused engaged in farm works until 2008 when he left for Dar es Salaam. While in Dar es Salaam PW.4 once told her that the accused operated a three-tyred bicycle (Guta). There was a time he had engaged himself in rice selling business. As regards the charge the accused is facing, **DW.2** deposed that she cannot say that the police framed up him in the charge because they are the machinery dealing with security and safety affairs.

At the closure of the defence case both parties, with the leave of the court, filed their written submissions. To ease the subsequent analysis and final findings I have opted to display the submissions nearly extensive as made by the learned counsels starting with the defence.

Mr. Mtumwa Kiondo, for the defence, submitted that the accused in this case admits only one aspect concerning the particulars of his names. He denied the rest of the facts and indicated so even in his purported extra-judicial statement whose paragraph 10 reads- "**Mtuhumiwa Ameeleza Hausiki Na Mauaji Haya Ila Mdogo Wake Shukuru Ndie Anaehusika Na Aliingia Ndani Kinguvu Na Kumkaba Marehemu.**"

He submitted that it is trite law that in criminal cases the guilt of the accused person must be established beyond all reasonable doubt. He cited the decision in **Ndege Maragwa vs. R** (1965) EACA where it was held inter alia that the burden of proof in criminal proceedings is on the prosecution throughout the case and it is the duty of the trial judge to look at the evidence as whole. He submitted that the principle was stressed in **Nathaniel Alphonse Mapunda and Benjamini Alphonse Mapunda vs. R** [2006] TLR 395 (CA) where it was held that- one, as is well known, in a criminal trial the burden of

proof always lies on the prosecution. Indeed in the case of **Mohamed Sadi Matula v. R** [1995] TLR 3 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 reasonable doubt; two, 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 reasonable doubt; and three, 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.

He submitted that the accused person cannot be convicted on the weakness of his defence. He said, in the case of **John s/o Makolobela Kulwa Makolobela and Eric Juma alias Tanganyika v. R** [2002] TLR 296 it was held that—"A person is not guilty of a criminal offence because his defence is not believed, rather a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt."

According to his scrutiny of the oral and documentary evidence adduced by the prosecution the defence did not find direct evidence by eye witness that the accused person committed the murder against the deceased **Sakina Muktasar**. He submitted that, as the prosecution wholly relies on circumstantial evidence, it is well known that the standard of proof required in cases based on circumstantial evidence is higher than that of cases based on direct evidence.

In the light of the above principle, he thus submitted that the circumstantial evidence adduced in support of charge against accused is not at all strong and the accused person's defence if properly considered raises serious

doubts as to his guilt. He denies committing the alleged murder and that he never worked as house boy of the late **Sakina Ramadhani**.

He submitted that the prosecution evidence was to the effect that the person alleged to have committed the offence is one **Adamu** whose father has not been known by the people whose statements had been filed to form part of the records. Surprisingly when **Adamu Charles Mkude** had been arrested no identification had been conducted. He said, in **Rashidi Ally v.R** [1987] TLR 97 it was held inter alia that in order to justify a conviction solely on evidence of identification such evidence must be watertight and that description and the terms of those descriptions on identification of the accused are matters of the highest importance of which evidence ought always to be given.

Mr.Kiondo further pointed other weaknesses and he invited the Court to resolve them in favour of his client:

He submitted that in the present case there is a contradictory piece of evidence and uncertainty by prosecution side all of which creates doubts as to the guilt of the accused person. First, is on the manner the body of the deceased met still lying in her room. He made reference to the statements recorded under section 34 B (2) (C) of the Evidence Act, 1967 from Folio C13 reads - "tulikuta maiti ya mwanamke ajulikanaye kwa jina la SAKINA D/O MUKTAR ulikuwa...imelazwa chumbani kwake akiwa **amefungwa kamba mikono na miguu na kuzibwa kwa plasta pua na mdomo.**" That on its part, the statement of **Amina Yahaya @ Mama Juma** purported to be house girl of **Muhsin Ramadhani** which was recorded as C<sub>7</sub> states that "... nilimuona dada SAKINA D/O RAMADHANI akiwa **amelala kifudifudi pembeni yake kukiwa na kamba ya katani.**" Also to the statement of **Amina Shabani** who purported to be house girl of SAKINA which were admitted as **Exh.P.7**

states / reads "...Mimi nilimuona marehemu SAKINA D/O RAMADHANI...**sikuona zaidi ila kamba ya katani zikiwa chini na shingoni.**" The other statement is that of **Mukhtar s/o Ali Sayed** who is purported to be husband of Sakina Ramadhani (recorded as Folio C and admitted as Exh.P.10) which reads-"... shemeji yangu MUHSIN s/o RAMADHANI alieleza ... alikuta... alimpata mke wangu SAKINA RAMADHANI ISMAIL **amewekewa matambara ya nguo mdomoni na huku kafungwa kamba mikononi ...**"And lastly is the statement of Muhsin Ramadhani purported to be a brother of **Sakina s/o Ramadhani** (which was recorded as Folio B and admitted as Exh. as P9 ) which reads- "... nilimuona dada yangu akiwa **amelala chini huku akiwa amefungwa kamba mikononi na pia mdomoni alifungwa kamba.**"

Secondly, the counsel submitted that the Post-Mortem Examination Report purported to have been signed by Dr. Innocent .J. Mosha of Muhimbili National Hospital (MNH) has been tendered by F. 6698 D/C Mbonye and the said Dr. I.J Mosha was not called to testify as material witness.

Thirdly, that the origin of the deceased is confusing. On cross examination by the defense counsel F. 6698 D/C Mbonye testified that the deceased was of **Indian/ Asian origin**. This is inconsistent with the Post-Mortem Examination Report which reveals that the deceased is an **African** female.

Fourthly, he submitted that inconsistent accounts had also been found on when the Post-Mortem Examination commenced and finished. On cross examination by the defense counsel **F. 6698 D/C Mbonye** testified that he witnessed the Post-Mortem Examination conducted on the 16<sup>th</sup> June 2009 and the report was handed over to him on the same date while the report itself is

dated 11<sup>th</sup> October 2010. He further submitted that in addition to that, the Post-Mortem Examination Report shows that the examination commenced at 11:00 HRS on the 16<sup>th</sup> June, 2009 while in his statement (C13) D/C Mbonye states tha-"Nakumbuka ...16/06/2009 majira ya 12:30 hrs ...tuliitwa... twende haraka mtaa wa Mtendeni ... tulikuta maiti ya ... SAKINA ... akiwa amefungwa kamba mikononi na miguu na kuzibwa kwa plasta pua na mdomo ...Tulimchukua hadi hospitali ya Taifa Muhimbili na kufanyiwa Post-Mortem nami nikiwa mmoja wapo niliyeshuhudia Post-Mortem hiyo ikifanyika." So, the counsel asked in his submission -is it possible for Post-Mortem examination to commence at 11:00 hrs while until 12:30 hrs the body of the deceases was still at the purported scene of incidence?

Fifth, he submitted that there is uncertainty on the causes of the death. The Post-Mortem Examination Reports revealed that the death resulted from Asphyxia due/from strangulation. In this regard the medical doctor who attended and administered the Post-Mortem Examination was a material witness to have been called to explain on Asphyxia and strangulation in relation to the alleged death.

He added that, the statement of the purported husband of Sakina Ramadhani one Mukhar S/O Ali Sayed (Folio) Exh P10 states that-"Bwana Muhsin s/o Ramadhani Ismail ambaye ni shemeji yangu ... aliniuliza alipo dada yake SAKINA D/O RAMADHANI ISMAIL, nilimweleza inawezekana ameenda Hospital ..." And, in reading also the statement of Muhsin s/o Ramadhani a purported brother of Sakina Ramadhni (**Exh. P9**), he states that- "...Nikaamua kumpigia mume wake naye akajibu kwamba ... huenda ameenda Hospitalini kutibiwa ambako huwa anaenda kutibiwa katika Hospitali ya Ibrahim Haji ... Baada ya kufika pale Hospitalini mie nilimuuliza muuguzi kama dadangu amefika

pale Hospitalini, na ...alianza kuangaliaa ndani ya kitabu na kubaini kwamba dada yangu alienda pale kwa mara ya mwisho siku ya Jumapili ya tarehe 14 June 09 ..."

Those circumstances, Mr. Kiondo submitted, shows that two days before June 16, 2009 the said **Sakina Ramadhani** was sick and it was very unfortunate that it was not made clear as to what was she suffering from. He said, on the other hand the Post-Mortem Examination Report states that the deceased bled and the cause of death is Asphixia due to strangulation. Therefore, under such circumstances he stressed it is impossible to say with certainty what caused the death between the alleged acts or the disease of which the deceased attended Hospital two days ago.

Sixth, Mr.Kiondo also submitted that in his statement (Folio C12) E 3897 D/Cpl Benson states "... huko Ifakara ni kweli tulimkuta ... akiwa na simu ya marehemu .... ". Surprisingly, he argued, the said phone has not been tendered and no evidence was adduced to prove that the phone is the property of **Sakina Ramadhani**.

Seventh, he further submitted that the statement of **PW.3** Emmanuel Kiwole @ Elinani (Folio C4) and his oral testimonies stated that-'Kuna kijana aitwaye ADAMU s/o ? aliniletea kamera moja aina ya Digital na DVD player moja. Aliweka kwangu kwa madai akipata pesa atanirudishia...ni jirani yetu...wakati ananikabidhi vitu **hakukuwa na mtu yoyote...**' Mr.Kiondo submitted that it should be recalled that the accused denies such transaction. So, if there is no one who witnessed the transaction how could it be believed to be true by the Court? The prosecution side also purports that those said electronic devices found in the shop premises of the PW.3 belong to one Sakina



Ramadhani. How has it been proved beyond reasonable doubt that the said devices are the property of **Sakina Ramadhani**?

Eighth, he submitted that the Prosecution side failed to bring material witnesses before the Court to testify and be cross-examined. No reasons why the makers of the respective statements have not been brought. **Section 34B (2) of the Evidence Act, 1967** clearly provides for grounds which neither had been stated nor proved to justify the non appearance of the material witnesses whose statements had been tendered. He cited decisions in **Mujuni Joseph Kataria vs. Samwel Antambala Luangisa & another** [1986] TLR 53 and **Hemed Said vs. Mohamedi Mbilu** [1984]TLR 113 and argued that they enunciated the principle of law of evidence that a court is entitled to draw adverse inference against the party who fails to call the witness.

Mr.Kiondo gave names of eleven witnesses who were material to the prosecution but not called to testify and be cross examined and who are the people whose statements had been recorded by the police officials in connection with the alleged offence with which the accused is charged. They are: (i) Muhsin Ramadhani-his statements (Folio B) recorded by **D/Sgt Ammosy** and admitted as Exhb P9 (ii) Mukhtar Ali Sayed –his statements (Folio C) recorded by D/C Masuha and admitted as Exhb P10 (iii) Shukuru Ngonyani-his statements (Folio C3) recorded by D/Cpl Benson (iv) Amina Shabani-her statements (Folio C5) recorded by WP 2043 D/Cpl Tatu and admitted as Exhb P7 (v) Amina Yahaya @ Mama Juma (Folio C7) recorded by D/C Masuha (vi) Juma Ntandu (Folio C8) recorded by D/Cpl Tatu and admitted as Exhb P8 (vii) Twaha Hussein (Folio C9) recorded by D/Cpl Benson (viii) Juma Abdallah @ Ally (Folio C10) recorded by D/Cpl Benson (ix) Jumanne Abdallah Mohamed (Folio C11) recorded by D/Cpl Muhaji (x) Police Officer No 15559 A/Insp

Mshinde who wrote record of search, and (xi) Dr. Innocent .J. Mosha of Muhimbili National Hospital (MNH) who wrote Report on Post-Mortem Examination purported to have been signed by him and same having been tendered by F 6698 D/C Mbonye.

He thus posed the question why the statements of other respective makers and the makers themselves had not been tendered or appeared before the Court for cross examination by the Defence side? He however incidentally answered it that - **if the same could be brought the truth that the accused did not commit the alleged offence could clearly be revealed.**

Ninth, he Kiondo questioned how could D/Cpl Benson drawn the sketch plan and recorded the statement of Juma Abdallah @ Ally (Folio C10) on 16/06/2009 at 10.30 am and 16.03 HRS respectively, while he stated in his statement that he commenced investigation on 17/6/2009? He quoted part of D/Cpl Benson's statement stating-"Mnamo tarehe **17/06/2009** majira ya **saa 09.00hrs** mimi nilikuwa ofisini nilipokea faili linalohusu MAUAJI ...**Shughuli za upelelezi zilianza mara moja**" to support his submission.

In the final analysis Mr.Kiondo concluded that it is crystal clear that the prosecution failed to discharge its burden of proof as there are a lot of doubts which show that the guilt of the accused was not been proved. Therefore, the doubts ought to be resolved in favour of the accused person and this Court be pleased to dismiss the charge against the accused in its entirety and acquit the accused person.

In her part, Ms Yasinta Peter, the learned State Attorney in her final submission submitted to the effect that it was not disputed that the deceased died due to **ASPHYXIA** as has been proved by Post-Mortem Report (**Exh.P.3**)

and corroborated by prosecution witnesses who saw the deceased body such as **PW.2, PW.5** and **PW.6**. She averred that that evidence was not objected to by the defence side. She said the only issue for determination is whether the accused person herein is responsible for murder of the deceased.

She submitted that the prosecution was duty bound to prove the essential elements of any criminal offence that is the *actus reus* that is the unlawful act done and *mens rea* that is the guilt mind as the elements of murder are established where there is *malice aforethought* and **unlawful act or omission**. The learned State Attorney cited the decision in **Enock Kipela v.R** (CAT) Mbeya Cr. App. No. 150 of 1994 (Unreported) when considering the factors constituting Malice aforethought. In that case the Court held that: "**...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 (2) the amount of force applied (3) the part or parts of the body the blows were directed at or inflicted on (4) the number of blows, although one blow may be sufficient for this purpose (5) the kind of injuries inflicted (6) the attacker's utterances, if any, made before, during or after killing and (7) the conduct of the attacker before and after the killing"**

Thus she submitted that the witnesses called by the prosecution adduced evidence establishing the itemed factors. She submitted that **PW1** was the deceased's neighbour who on the day of incidence on 16<sup>th</sup> day of June 2009 heard the deceased screaming. When she decided to come out of her house she found the accused, the houseboy of the deceased, and asked him what was

the screaming all about but the accused replied to her saying, there was nothing but she later found the deceased laying dead.

The learned State Attorney submitted that PW.1's piece of evidence is corroborated by the evidence of one **Juma Ntandu** a prosecution witness whose statement was tendered in Court by **PW8** one **WP 2043 D/SGT Tatu**. That his evidence proved that on the date of incidence the accused reported to his work place at the deceased house and escorted his BOSS, the deceased husband one **Mukhtar Ali Sayed** from his house downstairs where he boarded a car to his office, because he is suffering from his legs and after that he saw the accused returning back to the deceased house.

That the evidence of **Mukhtar Ali Sayed** in **Exh.P.10** tendered by **PW.9** one **E5494 D/CPL Masuha** clearly states that on the material date the accused herein escorted him downstairs to board a car to his office/work place and further that when he returned back to the scene of crime he found his wife dead, things were distorted in the rooms and itemized the missing things including the Sony digital camera and DVD player make Hitach among others which were later retrieved from **PW.3** one **Emmanuel Elinami Kiwole** where the accused had placed as collateral for the T.shs. 50,000/= he had borrowed from **PW.3**. The evidence to that effect was corroborated by the accused himself in his Extra Judicial statement. During trial, she submitted, the Sony digital camera as well as DVD player were tendered by **PW.3** and admitted collectively as **Exh. P1** without there being any objection whatsoever from the defence side.

The prosecution also submitted that the evidence of **Muhsin Ramadhan** admitted in Court as **Exh.P9** through **PW.2** one **D3249 D/SGT Amos** clearly

states that on the material date **Muhsin Ramadhani** took spare keys from **PW.1's** house and opened the deceased door and found the deceased dead.

In view of the above evidence the prosecution submitted that the evidence clearly entails that on the material date the accused person was in Dar es Salaam Region, Mtendeni Street within Ilala District in the deceased's house. It also entails that the accused person knew the deceased and her husband and they had employer vis-à-vis employee relationship the relation which was corroborated by the accused father **PW.4** one **Charles Mkude Msamvu** who testified saying in the course of their living the accused once told him he was employed by an Indian boss.

However, the prosecution submitted that in his defence, **DW.1** one **Adam Charles Mkude** who is the accused person herein evasively denied to have known the **deceased, her husband, Juma Ntandu, Emanuel Elinami Kiwole** as well as he denied his presence at the deceased house on the material day and even he denied his presence in Dar es Salaam on the material day contending that he went back to Ifakara, Ikule from Dar es Salaam in May 2009. That his evidence has been contradicted by the evidence of **DW.2** one **Fausta Msamvu**, his mother, who testified to the effect that the accused person went to Ifakara Ikule on June 2009 and not May 2009 as he claimed. That is to say, the circumstances surrounding this case clearly entail that the accused person was present on the material date and time on the 16<sup>th</sup> day of June 2009 on the place in question that is Mtendeni Street within Ilala District in Dar es Salaam Region and his refusal is just an afterthought, baseless and lacks legs to stand.

Therefore, the prosecution submitted that in the absence of an eye witness a purely circumstantial based case as the case at hand requires

corroboration as it was stated in the case of **Mswahili M v. R** [1977] TLR 25 where it was held that: **"in a case where facts are based solely on circumstantial evidence corroborating each other, a conviction is possible if the circumstantial evidence leads irresistibly to an inference of guilt and should be incapable of any other reasonable explanation"**.

The learned State Attorney submitted that in the case at hand it is clear that the evidences adduced by the prosecution witnesses corroborate each other in establishing the malice aforethought of the accused person to murder the deceased and his evasive denial lacks legs to stand hence should not be entertained by this Court.

She further submitted that the manner in which the deceased was found laying dead in his house while tied up with ropes on her legs, hands, the mouth and nose covered too as contended by the prosecution witnesses **PW.6** one **E 3897 C/P Benson** who is an investigator of the case is corroborated by evidence of **PW.1** the immediate neighbor, **PW.5** the police officer who went at the scene of crime and also the one who witnessed medical examination of the deceased body by the doctor at Muhimbili National Hospital who were all eye witnesses to the deceased body after her death. That the circumstances constituted the requisite malice aforethought against the accused in the murder of the deceased. That established the intention to either kill or cause grievous harm to the deceased. Under such a situation the intention was to cause the deceased not to cry for help, breathe and escape from attackers an act which establish the evil motive of the accused person and the actual act of killing as intended.

The learned State Attorney also submitted that even the accused himself confessed the same in his Extra Judicial statement taken before Justice of Peace at Kariakoo Primary Court by **PW.7** one **Diwan M.** an Extra Judicial statement which was tendered and admitted as in evidence as **Exh. P.6** after conducting the requisite trial-within-trial. In the **Exh.P.6** the accused person confessed freely to have planned and killed the deceased in consideration of one Digital Camera make Sony and DVD player make Hitach which he later placed them as collateral to one **PW.3**.

The prosecution further submitted that the accused raised defence of *alibi* did not furnish any notice, particulars of his *alibi* as required by Section 194 (4) of the Criminal Procedural Act [Cap.20 R.E 2002].

It further submitted that the conduct of the accused after the incident brought about a genuine suspicion to any right thinking member of the society, in the sense that **PW.4** one **Charles Mkude Msamvu** clearly stated it was **NOT** the accused usual habit to visit Ifakara Ikule just for mere greetings purposes. That was corroborated by the defence witness **DW.2** one **Fausta Msamvu**, the accused mother, who stated that most all the time the accused went to Ifakara was for the rice business purposes unlike accused person last visit to Ikule which was for visiting purposes as well as farming activities something which was not usual to the accused to do and that was immediately followed by his arrest.

Moreover, the fact that the accused person reported to work at the deceased house but was not found on the deceased house later on the material day in the absence of any reasonable notice to his boss one **Mukhtar Ali Sayed** whom he escorted earlier on the same morning of the material day surprised him and draws inference that it was the accused person who did the

killing of his wife one **Sakina Mukhtar**. This is clearly stated in the statement of one **Mukhtar Ali Sayed** in **Exh.P.10** tendered by **PW9** one **E5494 D/CPL Masuha**.

The prosecution also submitted that the above fact is corroborated by the evidence of **Amina Shaban** in **Exh.P.7** tendered by **PW. 8** one **WP2043 D/SGT Tatu. Amina Shaban**, the deceased house girl was surprised to find out the accused person was not present on her arrival around at 10 hours on the material day.

The prosecution submitted that the fact that the accused person run away to Ikule Ifakara in Morogoro Region from the scene of crime as he did in this circumstance while he was present on the material day until his arrest suffices to substantiate the accused conduct after the killing of the deceased.

That from the circumstantial evidence adduced by the prosecution witnesses which corroborate each other, exhibits tendered and admitted thereto leads us to an inference of guilt on the part of the accused person of an offence of murder as he stand charged contrary to Section 196 of the Penal Code (supra). The prosecution cited the decision in the case of **Tumuhire v. Uganda** (1967) ECA 328 at 331 where it was held that:"....indeed **circumstantial evidence in a criminal case is often the best evidence in establishing the commission of a crime by a person...**". It therefore begged that this Court find the accused person guilty of the offence so charged.

Having given the facts of the case and pointed out the consequent submissions made by both parties above, I would aptly wish to observe that: first, that the case at hand is based on circumstantial evidence in determining



how the deceased suffered her death; and secondly, that the analysis and findings of this case is solely premised on evidence adduced in court.

From the foregoing facts and submissions it can also be rightly said here that whereas the defence case is mainly pegged on denial to taking part in murdering the deceased and on defence of *alibi*, the case for the prosecution, on the other hand, is grounded on four pieces of evidence: one, that during the time of murder the accused was present in the deceased house and authored her death; two, that the accused made confession in his Extra Judicial Statement incriminating himself to have taken part in authoring the deceased death; three, the accused conduct immediately before, during and after the murder of the deceased strongly incriminates the accused for authoring the deceased death; and four, that the digital camera make SONYI and DVD Player make HITACH (Exh.P.1) seized from PW.3 were robbed by the accused at the time of murder.

At the conclusion of the trial, I summed up the evidence for the prosecution and the defence to the ladies and gentleman Assessors under section 298(1) of the CPA and solicited their opinion after first highlighting to them the salient areas of law and material facts of this case. I did so with a view to satisfying the object of section 265 of the CPA.

During the summing up, I urged the assessors to pay regard to several areas and the allied principles. They included: one, the meaning and prerequisites of murder and malice aforethought; two that in criminal cases the guilt of the accused person must be established beyond any reasonable doubt and the burden of proof is on the prosecution throughout the case and it is the duty of the trial court to look at the evidence as whole; three, that in criminal cases suspicion alone however grave it may be, is not enough to warrant a

conviction; four, that the law of evidence requires all facts, except the contents of documents, be proved by oral evidence and must be direct (seeing, hearing, perceiving or be the evidence of the person who holds an opinion or, as the case may be, who holds it); five, that 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 reasonable doubt; six, that the court is not exempted from the requirement to take into account the defence of *alibi*, where such defence has not been disclosed by an accused person before the prosecution closes its case;

Seven, that a confession made by a person in the custody of a police officer which is made in the immediate presence of a justice of the peace may be proved in evidence in the same manner and to the same extent as a confession in the like circumstances in the immediate presence of a magistrate may be proved provided it was made freely and voluntarily; eight, that it is a basic law that that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing such witness; and nine, that our law of evidence subject to the provisions of any other written law, sets no particular number of witnesses to be called in any case be required for the proof of any fact, what is important is the witness's opportunity to see what he/she claimed to have seen, and his/her credibility; and ten, that whenever the testimonies by witnesses contain inconsistencies and contradictions, the trial court has a duty to address the inconsistencies and try to resolve them where possible, else it has to decide whether the inconsistencies and contradictions are only minor or whether they go to the rood of the matter.