

**IN THE HIGH COURT OF TANZANIA  
DAR ES SALAAM DISTRICT REGISTRY  
AT DAR ES SALAAM  
CRIMINAL SESSION NO. 79 OF 2015**

**REPUBLIC**

**VERSUS**

**1. MSAFIRI EMMANUEL DANIEL } ..... ACCUSED PERSONS  
2. JAILOS AIDAN }**

**JUDGMENT**

**MKASIMONGWA, J.**

Before the Court stand MSAFIRI EMMANUEL DANIEL and JAILOS ALDAN, the 1<sup>st</sup> and 2<sup>nd</sup> Accused respectively, charged with Murder contrary to section 196 of the Penal Code [Cap. 16 R.E 2002]. It is alleged by the prosecution that the two accused persons on the 8<sup>th</sup> day of November, 2013 at Jeti Kiwalani area within Ilala District in Dar es Salaam Region, did murder one ALLY SULEIMAN. They all pleaded not guilty to the charge.

In order to prove the charge, the prosecution called to the court eight witnesses. They are E 4564 D/CPL DOTTO (PW1), SELEMAN HEMED (PW2), E 3273 D/CPL ISMAIL (PW3), E 775 CPL MSELEMU (PW4), MBAROUK SEIF KHELEF (PW5), RAJAB HASSAN KHALFAN, (PW6), PF. 20056 AS/INSP. ULEDI (PW7) and DR. HASSAN CHANDE (PW8).

In short the prosecution case is as that MBAROUK SEIF KHELEF (PW5) is a Medical Doctor working with the Ministry of Health attached to Ilala Municipal Council. He is the owner of a Motor vehicle with registration Number T 864 AHQ make Nissan CIRAFU, Salon Car. In 2013 he gave the vehicle to SELEMAN HEMED (PW2) who is his father in law so that it earns him some money. This story is confirmed by PW2. The later entrusted the vehicle to ALLY SELEMAN (Deceased) to drive and used it as a Taxi. On 8/11/2013 one E 4564 D/CPL DOTTO (PW1), a police officer who was then stationed at Buruguruni Police Station and worked in the Ant Robbery Unit of the Police Force reported at work at 6.00 am in a work shift that ended on 9/11/2013. He was the shift in-charge and at 23.00 hrs while was at work together with D/CPL Nyaga, D/C Noel and other police officers he was notified by their Control Room that there was seen at JET Area Kiwalani and near the Frank Godown, a Salon Car, Black in colour and people dumping a human being as it disappeared. He was required therefore to make a follow up the information by visiting the place. They came to the place where they found a male person lying unconscious beside the road bleeding from his nose and ears. The man who was emitting foam from his mouth was not able to speak and was snoring. They picked and issued him with a PF3 and rushed him to AMANA Hospital where upon being examined was transferred to Muhimbili National Hospital where he was admitted. Later on 16/11/2013 PW1 was informed by CPL Mselemu of Sitakishari Police Station that the man has been identified as being

ALLY SELEMAN HEMED a resident of Karakata who was robbed a car by the people who dumped him at the place he was met.

The prosecution evidence, as adduced by SELEMAN HEMED (PW2), is also to the effect that on 8/11/2013 ALLY SELEMAN, went for his work and could not come back home. He was not even reachable by his mobile phone and his friends too were not aware of his whereabouts. Three days of his disappearance PW2, who is the father of ALLY SELEMAN, came and reported the incidence to the police station. At the police station PW2 was told that his car was found at Chalinze. Accompanied by E 3273 D/CPL ISMAIL (PW3) and E 775 CPL MSELEMU (PW4), PW2 came to Chalinze Police Station where he saw and identified a Motor vehicle to be his property and which was being driven by his missing son one ALLY SELEMAN. At the Police Station there were also two male suspects. According to PW4 and PW5 at Chalinze they met the Motor vehicle affixed with IT 1340 Registration Number and PW2 told them that those were not the real Registration Number of Motor Vehicle. He mentioned the proper Registration Number to be T 864 AHQ. PW4 contended in evidence that upon searching into the car, they found two Car Registration Number plates with Number T 864 AHQ, contrary to those found which are provided for by a Special Department for motor vehicles driven on transit to outside the country. Along with the motor vehicle, the two suspects were taken to Stakishari Police Station at Dar es Salaam. At the police station, the suspects that are the 1<sup>st</sup> and 2<sup>nd</sup> accused persons were interrogated by PW4 and PW3, respectively on the car theft.

According to PW2 the Police Officers at Stakishari Police Station asked the two suspects picked at Chalinze to lead them to the scene of crime. PW2 also was present at the scene of crime and while was there he received a call telling him that his son ALLY SELEMAN was found at Muhimbili National Hospital and that he was unconscious. He told this to the police officers. PW4 who was assigned to investigate on the case along with D/CPL Ismail and D/C Jonas proceeded to Muhimbili National Hospital so that they record statement of the witness one ALLY SELEMAN. They however, could not do so because ALLY SELEMAN was unconscious hence unable speak. PW4 then proceeded to the scene of crime where on being led by PW1, he drew its sketch map plan which he produced in court to be exhibit. The same was admitted in evidence marked as **Exhibit P2**.

The prosecution's case also is as that on 17/11/2013 PW4 was informed by PW2 that ALLY SELEMAN is dead and that he died at Muhimbili National Hospital. Upon being instructed by the OC-CID the two suspects were interrogated on a charge of murder. Whereas PW3 did interrogate the 2<sup>nd</sup> Accused PW4 interrogated the 1<sup>st</sup> Accused. Their cautioned statements were recorded in which they confessed committing the offence. PW3 and PW4 tendered the cautioned statements of the 2<sup>nd</sup> and 1<sup>st</sup> accused person's respectively to be exhibits and were admitted in evidence and marked **Exhibit P1** and **Exhibit P3**, respectively. On being requested by the police, DR HASSAN CHANDE (PW8) performed a Post Mortem Examination on the deceased body of one Ally

Seleman. He did so after also two witnesses had identified the deceased. Having examined the body, PW8 opined that the deceased's death was due to Head Injury. He tendered the Report on Post Mortem Examination in court as Exhibit and the same was admitted in evidence and marked **Exhibit P4**.

The prosecution's case is further to the effect that RAJABU HASSAN KHALFAN (PW6) is the Motor Cycle (Bodaboda) driver at Chalinze. On 11/11/2018 at 10.00 pm was in his way back to Chalinze from Chalinze Mzee when he saw a car parked and there were about six people one of whom stopped PW6 so that he picks him to Chalinze searching for a mechanics as they have got a breakdown. As the man was embarking on the motorcycle others seem to have been disturbed and there was a sort of commotion hence he disembarked. Instead he asked PW6 to look for the mechanics at Chalinze. PW6 promised to do so and he gave him his mobile phone numbers. While was at Chalinze PW6 received a call from the man telling if he missed a mechanics then he should find them any person willing to buy car scrapers. PW6 became suspicious and therefore proceeded to Chalinze Police Station where he reported the incidence. Upon receiving the information PW7, the Vehicle Inspector Police Officer, accompanied by PW6 and PC Justice and the driver on duty came to the place the car was parked. At the place there were only two young men standing leaning on the parked car and upon asking them as to what was the problem they said that they were on their way to Arusha and that they got breakdown. The police officers asked them to open the car

and they found therein a piece of an iron bar, a machete (sime) and a small bag black in colour, in which they found motor vehicle Registration Number Plates of a Motor Vehicle with registration No. T 864 AHQ, whereas the vehicle had a Black Number plate with No IT 1340 affixed. The motor was NISSAN SAVIRO SALOON dark Green coloured. The police were suspicious and therefore arrested the young men who are the accused persons in this case. Their names are MSAFIRI EMMANUEL and JAILOS AIDAN. Along with the motor vehicle the suspects were brought to Chalinze Police Station. The incidence was reported to the Region Headquarters and then to the Headquarters of the Police. On 12/11/2013 both the suspects handed over to the police officers from Stakishari Police Station in Dar es Salaam where the car theft had been reported. PW4 tendered in evidence that a motor vehicle make NISSAN CIFERO, Saloon, Two Registration No. T 864 AHQ, Number Plates, Two Registration No. IT 1340 plates which were admitted in evidence marked as **Exhibit P4** collectively. Eventually the accused were charged in court as shown above.

On the basis of the above prosecution's evidence, all the accused persons were found to have a case to answer. They all opted to have a sworn defence and they had no any witness to call. In his defence MSAFIRI EMMANUEL (DW1) stated that on 8/11/2013 at 9.00 pm he was at Banana on his way back home from his work place that is MUZA OIL INDUSTRY when he was arrested by police officers; one of them was MSELEMU, suspected of theft. He was then taken to Sitakishari police station, where he

spent the night in the police lockup. On the following day MSELEMU came possessing four pieces of paper and told that his relatives had come to bail him out and was asked to sign them. The 1<sup>st</sup> accused person wanted to read the papers when he was told that there was no need to read them. He signed them and was taken back into the police lock up until on 28/11/2013 when he was brought before Ilala District Court charged with murder jointly and together with the 2<sup>nd</sup> accused whom he first came to see in court on that material day. At the police station he was not interrogated so his statement was never recorded by the police.

Also in defence, the second accused one JAILOS AIDAN (DW2) the Chips Frying Businessman, contended that on 9/11/2013 at 10.00 am he was at his work place when the police officers came and arrested him suspected of being Idle and Vagabond. With him there were also arrested three co-workers and three customers. They were taken to Sitakishari Police station where his fellows were granted bail and he was denied bail. On 10/11/2013 a police officer one ISMAIL took him out from the police lock up so that he records his statement. It is when he was informed that he was being suspected of murder that occurred at the Airport area. He was taken back into the police lockup without his statement being recorded where he stayed until 28/11/2013 when he was taken to Ilala District court charged with murder together with the first accused person. In court it is alleged that they murdered one ALLY SELEMAN and they were sent to Remand Prison.

That is the whole evidence in this case. As said earlier, the Accused person stands charged with murder. To constitute the offence of Murder it must be proved that: -

1. A human being is dead.
2. The accused person did kill that human being
3. The accused person did kill that human being with malice aforethought.

It is the duty of the prosecution to prove each element constituting the offence with which the accused stands charged, the standard of proof being beyond reasonable doubt so that the accused is found guilty of the offence. In the case at hand the court has to decide whether Ally Suleiman is dead. In that respect, we have the evidence of one SULEMAN HEMED (PW2) that he is the father of Ally Suleiman. The later who was a taxi driver went on missing on 8/11/2013 along with the car with Registration No. T 864 AHQ. On 9/11/2013 night PW1 one E 4564 D/Cpl DOTTO with other police officers, upon being informed that there had been seen a person being dropped out of a Black Salon car which ran away, came to the scene which is at JET Area, Kiwalani near the Frank Godown. At the scene, they met a male person lying beside the road bleeding in the nose and ears. The person was snoring unconscious. They eventually took him to Muhimbili National Hospital for treatment where he died sometime later. PW4 came to the Hospital and requested for Post Mortem Examination be conducted upon the deceased's body. One Dr. HASSAN CHANDE (PW8) examined the deceased body in the presence of PW3 and that



the body was identified to him by Mbarouk Seif and Ally Kharith as being that of Ally Suleiman. According to PW8, the death was due to Head Injury. PW8 prepared a Report on Post Mortem Examination which he tendered in court as Exhibit and the same was admitted in evidence marked as **Exhibit P5**. This evidence in my view proves the fact that Ally Suleiman is dead.

The subsequent issue is whether the accused persons did kill the deceased Ally Suleiman. It is unfortunate that in this case we do not have the direct evidence against the accused person. The available evidence is to the effect that; the deceased was a Taxi Driver. He was driving the motor vehicle with Registration Number T 864 AHQ NISSAN CIFARO belonging to PW5 which he gave to PW2 for the later to earn for his life. The motor vehicle salon car was dark green coloured and it generally seemed to be black. According to PW1 he was informed that a certain Car-Dark in colour had dumped a person where he went and met the man. Again there is ample evidence given by RAJABU HASSAN KHALFAN (PW6) and PF 20056 A/INSP. ULEDI (PW7) showing that on the 11/11/2013 during night time, the accused persons were met in actual possession of a motor vehicle affixed with IT 1340 Registration Number. Upon search there in the car there we discovered two car Number Plates bearing No T 864 AHQ. The car, two Car Number Plates No. T 864 AHQ and two Car Number Plates No. IT 1340 have been tendered and admitted in evidence marked **Exhibit P4**, collectively. According to PW2 and PW5 they identified the car with which the accused persons were met possessing to be

the same the deceased was given to drive operating the same as a Taxi. What we learn from the prosecution evidence is that the accused persons did rob from the deceased the said car after they had seriously injured him. A question then follows and that is whether PW5 and PW2 did properly identify the car (Part of Exhibit P4) in court to be the same owned by PW5 and then given to PW2. Here we have just oral evidence not supported by any documentary evidence showing ownership of the Motor Vehicle. Whether the evidence proves the fact beyond doubt or not is a question I will consider after further analysis of the evidence. Here I will consider again, **Exhibit P1** and **P3** the cautioned statements of the 2<sup>nd</sup> and 1<sup>st</sup> Accused persons respectively. Going by the two exhibits, the two accused persons formed a common intention to steal a motor vehicle and send it to Arusha where they had a readily market for it. On 8/11/2013 at night time the two came to Karakata Road junction at the Airport area and hired a taxi which was black in colour and they directed the driver to their destination. At a distance of about 100 meters from the tarmac road they came to a certain bush where the two pretended to have missed their way so that the driver stops. When the driver stopped, the 1<sup>st</sup> accused person drew piece of an iron bar he was keeping in his blackish bag and hit the driver three times on his head. They quickly came out of the car, carried out the driver and dumped him into the bush before they drove the car away. In their statements again the accused persons also stated that they drove the car to Vingunguti near Mashujaa Bar where they parked it. The two also hired a Sign

Writer who prepared them two car Registration Number Plates for a forged IT 1340 and they removed those T 864 AHQ and put the IT 1340 plates. In their statement the two accused persons stated further that when they were driving to Arusha, the car suffered a breakdown and it is when they were met in possession of the car and brought to the police station at Chalinze by PW6 and PW7 and later at Dar es Salaam. These statements are in my view confessional ones. A confession to an offence made to a police officer, is admissible in evidence. Secondly a confession of guilty made by the accused person free from the blemishes of compulsion inducement, promises or even self-hallunations turns him to be the very best witnesses in any criminal trial. See **Paulo Maduka and Four Others Vs. R. Criminal Appeal No. 110 of 2007, Court of Appeal of Tanzania, at Dodoma (unreported)**. Going by this evidence it is evident that the accused persons were found in actual possession of the motor vehicle with Registration Number T 864 AHQ which, PW5 is its owner and he gave it to PW2. The evidence also shows that PW2 gave it to the deceased to drive as a Taxi. It is evident also that the person the accused person hit is the deceased. Going by the nature of the injuries suffered by the deceased as per **Exhibit P5**, the testimony of PW8 corroborates the accused persons' confession that they hit the deceased on his head using an iron bar. It is the firm finding of this court that the deceased died killed by the accused persons.

Last is whether the accused persons killed the deceased with malice aforethought. What is "Malice aforethought" is provided

for by the Blacks Law Dictionary. The Dictionary defines the term as:

*“A predetermination to commit an act without legal justification or excuse ... An intent, at the time of killing, willfully to take the life of a human being, or an intent to act in callous and wanton disregard of the consequences to human life ...”*

The law, Section 200 of the Penal Code reads as follows:

*“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances*

- a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*
- b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*
- c. an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;*

*d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence”.*

In deciding on the existence or otherwise of malice aforethought there are various factors to guide the Court. The factors were well stated by the Court of Appeal of Tanzania in the case of **Enock Kipela v Republic, Criminal Appeal No. 150 of 1994** (unreported) in which it was stated:

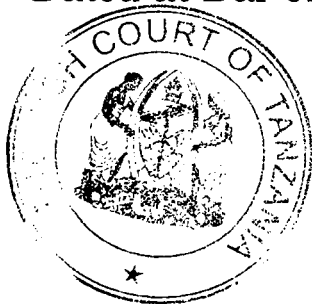
*“... usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following: (1) the type and size of the weapon, if any used in the attack; (2) the amount of force applied in the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

In our case, it is evident from the evidence adduced that the accused persons had determined to commit a robbery and proceeded into robbing a motor vehicle with Registration No T.864 AHQ which was being possessed driven by the deceased Ally Suleiman. In the robbery, the accused persons were armed with an

iron bar with which the 1<sup>st</sup> accused hit the deceased three times on his head which is a vulnerable part of a human being's body. The nature of the injury the deceased had sustained as it is clearly shown in the Report on Post Mortem Examination (**Exhibit P5**) interprets the amount of force the 1<sup>st</sup> Accused person had applied on the assault that it was high. After having assaulted the victim the accused persons threw him in the bush where he could not get any assistance to rescue his life. Gauging these facts with the guidelines shown above, the accused persons cannot be disassociated with their intention to kill the deceased. They had therefore killed one Ally Suleiman with malice aforethought.

As the accused persons did kill one Ally Suleiman and since they killed that Ally Suleiman with malice aforethought the court finds them all guilty of Murder contrary to section 196 of the Penal code [Cap. 16 R.E 2002] and they are hereby convicted of the offence as charged.

Dated at Dar es Salaam this 13<sup>th</sup> of June, 2018.



  
E. J. Mkasimongwa

JUDGE

**13/6/2018**