

IN THE HIGH COURT OF TANZANIA

In the District Registry at Mwanza

ORIGINAL JURISDICTION

HIGH COURT CRIMINAL SESSION CASE NO. 119 OF 2012

(Original Criminal Case No. 25/2012 of Nyamagana District Court at Mwanza)

THE REPUBLIC

VERSUS

YUSUPH S/O HAMADI MAGESA @ BABUU

Last Order date: 16/03/2018

Hearing dates: 06th, 09th & 10th of November, 2015 & 14th, 15th & 16th of March, 2018

Judgment date: 28/03/2018

Counsels:

For the Republic: Mr. Kidando R., learned Senior State Attorney

M/s Gisela Alex, learned State Attorney

For the Accused: Mr. Outa, learned Advocate

JUDGMENT

MAKARAMBA, J.:

This is Judgment in a case in which **YUSUPH S/O HAMADI MAGESA @ BABUU**, the accused, is facing a charge of murder c/s 196 and 197 of the **Penal Code, Cap.16 R.E. 2002**. It is alleged that on **29th day of January 2011**, at **NORTH-MECCO-NYAKATO**, within **NYAMAGANA** District in **MWANZA** Region, the accused did murder one **BEJAMIN S/O SAMSON @ TAIFA**, the deceased. The accused pleaded "**Not Guilty**" to the charge.

The accused having pleaded "**Not guilty**" to the charge of murder, the prosecution therefore had the burden of proving the offence of murder against the accused beyond any reasonable doubt. At the **Preliminary Hearing (PH)** conducted on **21/11/2012** before **Hon. M.G. Mzuna J.**, the following matters were recorded in the **Memorandum of Matters Not in Dispute**, namely:

- (1) That, the name of the accused and the deceased as per the charge/information;*
- (2) That, one Benjamin s/o Saimon @ Taifa is dead and his death was unnatural;*
- (3) That, on the eventful day the accused and the deceased were together dancing disco prior to his death; and*
- (4) That, the accused was arrested and then charged in court after the deceased's death.*

In view of the matters not in dispute, what remained for the prosecution was to prove that:

- 1. *The alleged death of BENJAMIN S/O SAIMON @ TAIFA, the deceased, was under the contrivance of the accused, YUSUPH S/O MAGESA @ BABUU; and***
- 2. *It is the accused person before this Court who actually killed the deceased.***

In establishing its case against the accused, the prosecution brought a total of four (4) witnesses who testified under oath during the trial, namely; **E.8153 D/Sgt. Sagali (PW1)**, **E.5197 D/Sgt. Juma (PW2)**, **Inspector Mbogo (PW3)** and **Idrissa Juma Munungwa (PW4)**. The Prosecution also tendered in

evidence four exhibits, the **Sketch Map** of the crime scene (**Exhibit P1**) and the **Postmortem Examination Report** of the Deceased (**Exhibit P2**), which were tendered and admitted in evidence during the **Preliminary Hearing** before **Hon. Mzuna J.**, on **04/11/2012**. The **knife (Exhibit P3)**, which is alleged that the accused used to stab the deceased with, and the **Cautioned Statement** of the accused (**Exhibit P4**), which was recorded by a Police Officer with **No.E.5197 D/Sgt.Juma** on **31/01/2011** from **10.00 hrs.** to **12.00 hrs.**, were both tendered and admitted in evidence during the hearing of the case before the predecessor presiding Judge **Hon. Mlacha, J.**, on **06/11/2015** and **09/11/2015** respectively.

It is alleged by the prosecution that it is the accused who handed over the knife to the police. It was received in evidence without protest from the defence. The **Cautioned Statement** of the accused (**Exhibit P4**) was however, received and admitted in evidence only after the presiding predecessor Judge **Hon. Mlacha, J.**, had, in his Ruling dated **12/10/2015**, overruled one of the two objections the learned Counsel for the Defence, **Mr. Outa**, had raised in protest to its being admitted in evidence. The two points of preliminary objection raised by **Mr. Outa** were that, the procedure for recording the **Cautioned Statement** had not been complied with and that, the confessional "**extra judicial statement**" (sic!) was not voluntarily made by the accused.

The presiding predecessor Judge **Hon. Mlacha J.**, having excused the sitting Court Assessors, so as "**to give room to conduct a 'trial within a trial'**", heard some witnesses namely; **Fratern W. Temba (PW1), F.2464 D/Cpl. Theophilous (PW2)** and the accused (**DW1**). The impugned **Cautioned Statement** and the **PF3** of the

accused were produced and marked as **Exhibit "A"** and **Exhibit "B"** respectively. Ultimately, the presiding predecessor Judge overruled the first limb of the objection raised by Mr. Outa, and admitted in evidence the **Cautioned Statement** of the accused as **Exhibit P4**. Mr. Outa promptly prayed to withdraw the second limb of the objection on the involuntariness of the confession, which prayer the presiding predecessor Judge readily granted.

Due to the transfer of the presiding predecessor Judge, I took over the case and continued with the trial, at a stage where three (**PW1, PW2 and PW3**) of the four prosecution witnesses had already testified. Having complied with the requirements of section 299 of the **Criminal Procedure Act, Cap. 20 R.E. 2002**, and the accused having readily acceded to proceed with the trial from where it had stopped, I continued with the trial by receiving in evidence the testimony of the last prosecution witness, **PW4, Idrissa Juma Munungwa**.

The events leading up to the murder of **Benjamin s/o Saimon @ Taifa** with which the accused **Yusuph s/o Hamadi Magesa @ Babuu** now stands charged, took place on the evening of **29/01/2011** at **North Mecco-Nyakato** area within **Nyamagana District in Mwanza Region**. I take judicial notice that the **29th day of January 2011** was a Saturday. On the fateful evening of the Saturday of **29/01/2011**, there happened to be a wedding ceremony at which both the accused and deceased, as per the testimony of **PW4 (Idrissa Juma Munungwa)** attended, but without being invited. In his defence, the accused (**DW1**) denied ever being at such a wedding and not knowing **PW4**, who had claimed in his testimony of knowing each other and even having played football together.

In his testimony at the trial **PW4** stated that on the evening of the eventful day of Saturday of **29/01/2011**, having had his dinner, went to the place where the wedding ceremony was taking place arriving there at around **7.30 pm**. He found the accused already there and dancing with a **light skinned huge sized woman** whose name he could not remember although he had previously seen her at **Nyakato Sokoni**. **PW4** testified further that, he saw the deceased, **Benjamin s/o Saimon @ Taifa**, pointing his finger at the accused **Yusuph s/o Hamadi Magea @ Babuu**, who was standing behind the light skinned huge sized woman, while the deceased holding his hand to his chest covered with a black jacket, bleeding profusely, whereupon the deceased fell down on the ground and that immediately thereafter he saw the accused running away towards the direction to his home. When asked a question by **Court Assessor (Constantine Lukoma)**, **PW4** stated that **Babuu** was talking to his friends where he was standing and that he knew that the deceased was pointing at **Babuu** because he ran away after being pointed at by the deceased. **PW4** explained also that he was standing in front of **Babuu** and that there was a short distance between where the deceased was dancing from to where **Babuu** was standing and that the deceased and **Babuu** were close to each other.

According to the testimony of **PW2** who passed by the crime scene on his way back to the Police Station while in a car with another Police Officer and a father they had arrested in connection with a case of child abduction, he saw a huge crowd of people at the place where there was a wedding ceremony and music being played. **PW2** narrated further that they took the deceased who at the time was breathing with problems to the Police Station where they obtained a **PF3** and took the

victim to the **SekouToure Hospital** for treatment but he was later informed by the deceased father that the deceased had died at the hospital while receiving treatment. A postmortem examination was carried on the body of the deceased and as per the **Postmortem Examination Report (Exhibit P2)**, the cause of death of the deceased **Benjamin s/oSaimon @ Taifa** was described as being due to ***"hemorrhagic shock due to pericardial hematoma die to chest wound on the left chest due to sharp object."*** The Medical Officer who examined the body of the deceased stated further in **Exhibit P2** that, ***"the said deceased found with a stab wound – left chest – 2cm max length penetrating through the 5-6th intercostal space to the middle right ventricle of the heart."*** The knife (**Exhibit P3**) which the prosecution alleges that the accused used to stab the deceased with on the fateful Saturday evening of **29/01/2011** was tendered and received in evidence, apparently being the ***"sharp object"*** described in **Exhibit P2**. On the part of the defence, the only witness was the accused himself and he testified under oath as **DW1**. The accused did not offer in evidence any exhibit.

On **16/03/2018** after having summed up the evidence of the prosecution and defence for the assessors as required under section 198(1) of the **Criminal Procedure Act, Ca, 20 R.E. 2002**, each of the three Court Assessors who sat with me on the trial gave his or her respective opinion. Two of the three Court Assessors having given their opinions returned a verdict of **"Guilty"** against the accused. One Court Assessor having given his opinion returned a verdict of **"Not Guilty"** against the accused. I propose to address myself on the opinions of the Court Assessors in due course, but let me first deal with the prosecution

and the defence evidence with respect to a number of issues which have cropped up in the course of the hearing of this case. I propose to begin with the evidence in respect of the events which took place at the crime scene on the fateful evening of Saturday, the **29th day of January 2011**, at **NORTH-MECCO-NYAKATO** leading to the deceased being stabbed to death.

As per the testimony of **PW4**, on the eventful day of Saturday the **29th of January 2011**, there was a wedding ceremony at which both the accused and the deceased were present albeit without being invited. In his testimony however, the accused (**DW1**) has denied being at the wedding ceremony as alleged by **PW4** or even knowing **PW4** and that he only saw **PW4** here in court during the trial. On the evidence on record, it is only **PW4** who claims to have seen what happened on the evening of **29/01/2011** when the deceased is alleged to have been stabbed by the accused using a "**sharp object**", which caused severe bleeding leading to his death. However, **PW4** when being cross-examined by Mr. Outa, learned Counsel for the defence as to whether he (**PW4**) saw the deceased being stabbed and the person who had stabbed the deceased, **PW4** simply responded that, he neither saw the deceased being stabbed or even the person who had stabbed the deceased. In the course of his testimony, **PW4** gave some quite contradictory account of the time he alleges that the events causing the death of the deceased took place.

During the trial, **PW4** was contradicted by Mr. Outa, learned Counsel for the defence on his statement to the police and his testimony in court. In the statement **PW4** gave to the Police on **30/01/2011**, **PW4** is recorded to have stated that the event happened on **29/01/2011** at **23.00 hrs.** However, in his testimony in chief while being led by **Mr.**

Kidando, learned Senior State Attorney for the Republic, **PW4** stated that the event happened on **29/01/2011** at **8.00 pm**. On being contradicted on this apparent discrepancy between the time of the occurrence of the event as indicated in his statement to the Police and his testimony during the trial, **PW4** stood steadfastly by both statements as being the correct account of the time the event of stabbing happened.

It was also the further testimony of **PW4** that on the eventful day he left home for the wedding ceremony having taken his dinner and that, upon arriving at the place where the wedding ceremony was taking place around **7.30 pm**., he found the deceased already there dancing with a **light skinned huge sized woman** to the tunes of the music which was being played by the DJ. **PW4** described the deceased as being his "great friend."

PW1, E.8153 D/Sgt Sagali also described the time during which the alleged event is said to have occurred on the fateful evening of the Saturday of **29/01/21011**. On being cross-examined by Mr. Outa, **PW1** stated that he (PW1) arrived at the place where there was a wedding ceremony and that music was being played and it was at **23:45 Hrs**. **PW1** stated further that he arrived at the place in a car in the company of another Police Officer, **D/Charles Naftali**, and a suspect of a case in which a father was being accused of child abduction which **PW1** had been assigned to investigate. However, in his statement to the Police dated **29/01/2011**, **PW1** stated that he arrived at the area at **22.40 hrs**.

At the trial **PW1** testified in chief that upon passing by MECCO area on his way back to the Police Station between **Nundu** and

NyakatoSokoni, that is when he came across a crowd of people who were in a wedding ceremony at **North of MECCO** at a place called **Kangae**. **PW1** stated further that at the place where the wedding ceremony was taking place there was a boy with a **Red T-shirt full of blood** whose name he was told that it was **Benjamin** and who was still breathing slowly. **PW1** stated further that he discovered that the boy who had been injured had been stabbed with a knife on his left rib side because the wound was still bleeding.

PW1 stated further that **Benjamini** was lying on the **"foundation"** where there was stream of blood flowing. **PW1** stated further that in their search for reports about the incidence they managed to arrest one boy called **MaroMachota** and upon questioning him he told them that the **"guy"** who had killed the deceased was **Yusuph** popularly known as **Babuu**. **PW1** stated further that they picked the victim from the area, and took him to the Police Station, where they opened a file, and issued the victim with a **PF3** and **D/C Charles** took the victim to **SekouToure Hospital** for further management. **PW1** told this Court that the boy they had arrested directed them to where **Yusuph** was and that they went there and met with his **mother** and his **sister** and demanded from them to know where **Yusuph** had spent the night, but upon searching his room they could not find him there.

Another prosecution witness, **PW2, E.5197 D/Sgt.Juma** stated that, on **31.01.2011** he was assigned the task of investigating the murder case of **Benjamin**. **PW2** stated that he went to the crime scene and **got a secret report** that, it was **Yusuph**, a **Form Two Student at Binza Secondary School** who had killed **Benjamin**. **PW2** stated further that, the Police **laid a trap to nab Yusuph**, and guided by their **"secret**

agents" they made a follow up on the whereabouts of **Yusuph** and arrested his parents so that they could show them where **Yusuph** had gone. **PW2** stated further that his (**Yusuph**) parents led the police to the house of one a **Mr. Deus** at mid night, whereupon his father knocking at the door, they entered inside and arrested **Yusuph**.

Clearly on the evidence on record, none of the prosecution witnesses, namely; **PW4, PW1 or PW2** in their respective testimonies during the trial stated that they actually saw the accused stabbing the deceased with a knife. Both **PW1** and **PW2** seem to have relied on hearsay from what they fondly referred to as "**secret agents**" as to the fact of the accused being responsible for stabbing the deceased with a knife on the material day of **29/01/2011**. Curiously, if indeed as **PW4** stated that there were many people at the wedding ceremony, it is baffling that the accused having committed such a heinous crime would simply manage to melt away from the crime scene and disappear to some unknown place. It does not require a lot of imagination to know that, for some yet unknown reasons **PW4** decided to come up with a fiction and not concrete facts as to what he actually claims to have seen taking place at area where there was a wedding ceremony on the eventful day of **29/01/2011**. **PW4** having went to that area at **7.30pm**. and having found the deceased already there, it is more improbable than probable that the deceased was stabbed at **8.00 p.m.**, and the Police Officer, as per **PW1** testimony arriving at the crime scene at **23.45 hrs.**, to find the deceased lying on a "**foundation**" with stream of blood flowing but still breathing albeit with some difficulty. Given the seriousness of the wound the deceased sustained as evident in the Post Mortem Examination Report (**Exhibit P3**), the account of the prosecution witnesses who

claim to have been at the crime scene at the time the alleged event is said to have happened or immediately thereafter has failed to establish to the required standard the participation of the accused in the alleged stabbing to death of the deceased. The testimony of the only eye witness of the event, **PW4**, in my considered view has raised some serious contradictions as to the time the alleged stabbing event occurred such that it has left this Court with only one conclusion, that, **PW4** was not a witness of truth of what he alleges to have seen taking place at the crime scene on the eventful evening or night of **29/01/2011**.

The other piece of evidence which in my opinion was so critical in this case was the description of the state of the place where it is alleged the murder event happened, particularly with regard to the intensity of light. In so far as the question of the intensity of light is concerned, even assuming for a moment that the event took place at **8.00 pm** or **22.40hrs. or 23.45 hrs.** still, it would be reckoned as being during night time thus bringing into question whether there was sufficient light to enable **PW4** to see all that he claims to have seen taking place at the crime scene during that time of the day. In his testimony in chief, **PW4** told this Court that at the place where the wedding ceremony was taking place there were **two large electric bulbs with very bright light** which made him able to see clearly everything that was taking place there. However, while describing what happened when the Police Officers arrived at the crime scene, **PW4** told this Court that, the police had used a **torch** to beam at the deceased who was lying on a bench like chair made of sand. When cross-examined by **Mr. Outa** if he (**PW4**) remembers if power went out at the time and whether there was a generator which was being used to generate power, **PW4** did not

seem to remember any of these facts. As I stated earlier, be it **8.00 hrs.** or **22.40** or **23.45 hrs.**, it was at night. If indeed there was bright light from two electric bulbs as **PW4** wishes thus Court to believe, why would the Police use a torch to beam at where the deceased was found lying down. Chances are that it was dark thus making it difficult for PW4 to be able to see and recognize the person who had stabbed the deceased. It is no wonder therefore PW4 could not be able to see the deceased being stabbed and the person who had stabbed the deceased. It is for these reasons that the evidence in this case seems to revolve mainly around circumstantial evidence.

As it was succinctly propounded by the Court of Appeal in its decision in the case of ***MalongoMahaja and 2 Others v. R., Criminal Appeal No. 236 of 2015***(CAT)(Tabora) where the only evidence is of circumstantial nature linking the accused with the death of the deceased, it must irresistibly lead to the inference that the accused and nobody else killed the deceased. I the nature of things most of the evidence in this case point at the suspicious behavior of the accused and particularly the accused running away, if ever he did, immediately after being pointed at by the deceased, if he ever did, as PW4 has narrated during the trial. This Court cannot rely on suspicion to found a conviction on the basis of circumstantial evidence as it was determined by the Court of Appeal of Tanzania at Mtwara in its decision in the case of ***Mohamed Selemani vs. R. Criminal Appeal No. 105 of 2012***. At page 6-7 of that decision, the Court of Appeal cited with approval the decision of the Supreme Court of India in ***Balwinder Singh v. State of Punjab, 1996 AIR 607*** that:

*"In a case based on circumstantial evidence the court has to be on its guard to avoid the danger of allowing suspicion to take the place of legal proof and has to be watchful to avoid the danger of being swayed by emotional considerations, however strong they may be, to take the place of proof (See, also **SARKAR ONEVIDENCE**, 15th Ed, p.65).*

The Court of Appeal of Tanzania in **Mohamed Selemani case** (above) also cited the decision in **R. V. Kipkering Arap Koske and Kimure Arap Matatu [1949] 16 E.A.L.R. 135**, where the Eastern Africa Court of Appeal held as follows;

*"That in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused" (See, also **Attorney General v. Murakuru [1960] E.A. 484 at 488-489; Ilanda s/o Kisongo v. R [1960] EA 780; Shaban Mpunzu @ Elisha Mpunzu v. R, Criminal Appeal No. 12 of 2002 (CAT) unreported).***"

On the trite principles to guide a court of law when dealing with circumstantial evidence, the decision of the Court of Appeal of Tanzania in the case of **Godlizen Daud @ Mweta and Solomon Joel @ Soloo v. Republic, Criminal Appeal No. 259 of 2014 (unreported)**, (CAT) (Arusha) comes into consideration. At page 11 of its Judgment

the Court of Appeal restated the principles for grounding a conviction on circumstantial evidence, as follows;

- (i) The evidence must be incapable of more than one interpretation;*
- (ii) The fact from which an inference of guilt or adverse to the accused is sought to be drawn, must be proved beyond reasonable doubt and must clearly be connected with the facts from which inference is to be drawn or inferred;*
- (iii) In murder cases, evidence should be cogent and compelling as to convince a jury, judge or court that upon no rational hypothesis other than murder can the facts be accounted for."*

On the evidence on record, the prosecution has not been able to establish clearly the various circumstances in the chain of events such as to rule out reasonable likelihood of the innocence of the accused.

When cross-examined by **Mr. Outa** as to whether he was seated or standing at the wedding ceremony given that he had not been invited, **PW4** stated that he was standing just about **three paces** in front of the place where the deceased and the light skinned huge sized woman were dancing from and that, the accused was standing behind that woman. **PW4** stated in examination in chief that while so standing, abruptly the accused patted him on his shoulder from behind and that is when **PW4** saw the deceased pointing his finger at the accused while holding his hand to his chest bleeding profusely and immediately he collapsed in front of **PW4**. **PW4** stated further that he saw the accused running away immediately after he had been pointed at by the deceased. However, when **PW4** was contradicted by **Mr. Outa** on what **PW4** had stated in his statement to the Police, which he read loudly in

Court, it came out that there was a time when **PW4** had told the deceased that he (**PW4**) was feeling tired and that he was going upstairs to get some rest.

Clearly if what **PW4** explained as regards where he was positioned at the place where the wedding ceremony was taking place, and what he says he saw taking place there, then it is hard to believe if indeed what **PW4** stated is what actually took place. In my considered view, it could not have been humanly possible for the deceased who was dancing while the accused standing behind the woman the deceased was dancing with, for the accused to stab the deceased on his chest and for the accused to pat **PW4** on his back while **PW4** heading upstairs, and then all of a sudden the deceased to fall in front of **PW4**, while at the same time the deceased pointing his finger (*kusonda*) at the accused who was standing behind the light skinned huge sized woman **PW4** alleges was dancing with the deceased. Besides, it was the testimony of **PW4** that the accused was chatting with his three friends when the dancing was going on, thus making it a guesswork as to whom of the friends of the accused the deceased was pointing his finger at, if ever he did. Clearly the allegation that, the accused stabbed the deceased and that the accused pointed a finger at the accused as the person responsible for the stabbing borders on mere speculation and no borne out of the evidence on record.

Furthermore, **PW4** stated that it is the people who were at the wedding who had helped with picking up the deceased who by then had been seriously injured and bleeding profusely and put him on a bench-like chair made of sand, where the Police found him lying down when they arrived at the crime scene. It is curious indeed as I pointed out

earlier in this Judgment that, the many people who were at the wedding ceremony completely failed to give the suspect a chase and arrest him, who as it would seem ran away from the crime scene with the murder weapon (the knife), otherwise it would not have been possible as the Police alleges, for the accused later on to lead the police to the place where he is said to have hidden that knife, if he ever did.

Let me now turn to consider the evidence as to the unearthing of the murder weapon, the knife (**Exhibit P2**), which was admitted in evidence without any protest from the defence during the Preliminary Hearing.

It was the testimony of **PW2, E.5197 D/Sgt. Jumathat**, on **31.01.2011** he was assigned by **Inspector Mbogo** the murder case of **Benjamin Simon @ Taifa** who had been stabbed by a knife and rushed to **Sekou Toure Hospital**, where he later died while receiving treatment. **PW2** stated further that it was **Yusuph's** parents who led the police to the house of one **Mr. Deus** at mid night (although he did not state the date), and that upon **Yusuph's** father knocking at the door, the Police entered inside and arrested **Yusuph**. When cross-examined by **Mr. Kidando**, the accused while testifying for the defence as **DW1** stated that, the Police Officers who came to arrest him at his **Aunt's house** were with his father who had shown the police to the place. **PW2** told this Court that the accused was taken to the **Nyakato Police Station** where a **File RB 653** was opened and that it is **Yusuph** who sent to **PW2** the **knife** which it is alleged that he used to stab the deceased with.

PW2 stated further that on **31.11.2011** at **10:00hrs.** he removed the accused from police lock up and started to record his

Cautioned Statement. PW2 stated further that the accused retrieved the knife from the house of a **Pastor** at **MECCO** where the accused had hidden it. That they picked the knife in front of the **Pastor** at **01:00 am** and handed it to the **CRO In charge** and in turn it was handed over to the **Exhibit keeper** where **PW2** picked it up and brought it to Court and tendered it in evidence. When he was cross-examined by **Mr. Outa** learned Counsel for the defence, **PW2** stated that while seated at the sitting room of **Yusuph's** Uncle one **Deo Mathias** and **Yusuph's** father present as well as some other five police officers, **PW2** questioned the accused about the knife and that it is the accused who led the Police to the place where he had hidden it. **PW2** also stated that he knew that there was a weapon involved and wanted to get it as Exhibit. When asked a question by **Court Assessor Constantine Lukoma**, **PW2** stated that there were six of them present when they were looking for the knife and that, it was **Yusuph** who had picked it from outside the house in a **waste water pipe** where he had hidden it. **PW3, Inspector Mbogo** when testifying in chief stated that the Police managed to get the knife that was used in committing the crime and that, when he asked the accused from where he got it, the accused told him that he had picked it from a **chips dealer** (seller!) who had recognized the accused and added that the accused had stolen the knife from the chips seller who was going to be a witness in this case. However, when **PW3** was cross-examined by **Mr. Outa**, he could not remember the name of the chips seller. When asked a question by **Court Assessor Asma Said**, **PW3** stated that by the time the accused was brought to him, the knife was already with the Police. When cross-examined by **Mr. Kidando**,

DW1 denied ever showing the Police where he had hidden the knife with which he is accused of using to stab the deceased.

On the evidence of **PW2** and **PW3** there is clearly notable contradiction as to whether it is the accused himself who had handed over the knife to the Police or whether it is the accused who led the police to the place where he had hidden the knife and that it was retrieved from a waste water pipe. If indeed the knife was retrieved from outside a house and a **Pastor** witnessed its retrieval why didn't the Prosecution bring to Court this alleged Pastor, if ever he existed, to give independent evidence to corroborate what **PW2** and **PW3** had stated with regard to the retrieval of the knife. The failure by the prosecution to bring such a crucial witness has not been explained and this Court is entitled to draw an adverse inference over such failure.

Furthermore, the knife, which in my considered opinion was such a vital piece of evidence in this case, its retrieval and custody should have adhered to the strict requirements of the law as to the preparation and production of a ***Certificate of Seizure***, which was to have been signed by the accused, the alleged Pastor as witness, and the Investigating Police Officer.

The legal consequence of failure by an investigator of a criminal case to issue a **receipt or certificate of seizure** of items or things seized during a search was succinctly explained by the Court of Appeal of Tanzania in the case of ***Abdaila Musa and Juma Rashid v. The Republic, Criminal Appeal No. 221 of 2011 (unreported)***, where the Court sitting at Mwanza stated at page 7 of its Judgment thus;

"The evidence that the boat engine was found in possession of the 2nd appellant is also doubtful because no receipt of seizure was issued to show that it was found in the house of the 2nd appellant. There was not even an independent witness who was called to witness the recovery of the boat engine from the house of the second appellant. Section 38(3) of CAP.20 requires the officer making the seizure to issue a receipt for the property seized and person(s) from the house from where the property is seized to sign on the receipt. Short of that receipt, the evidence of the recovery of the boat engine from the house of the house of the 2nd appellant becomes suspicious."

Insisting on the mandatory requirement under 38(3) of the **Criminal Procedure Act, Cap.20 R.E. 2002** for investigators to issue a receipt for anything seized as a result of a search, the Court of Appeal of Tanzania in its decision in the case of **Abuhi Omari Abdallah and 3 Others vs. The Republic** (unreported) sitting at Dar es Salaam stated at page 19 of its Judgment thus;

"However, when arresting the appellants and seizing the money, the police had failed to comply with the mandatory provisions of section 38(3) of the CPA, by which investigators are required to issue a receipt for anything seized as a result of a search."

Furthermore, as it would seem, in this case the chain of custody with regard to the handling of the knife from the time of its alleged retrieval from a waste water pipe near the house of the Pastor to

handing it over to the **CRO In Charge** and in turn to the **Exhibit keeper** where **PW2** picked it up and brought it to Court and finally its tendering in evidence should have adhered strictly to the standards set out in case law. Absence of such custody clearly the chain has been broken such that it has watered down the evidential weight to be attached to the knife as a piece of evidence to establish the existence of the murder weapon.

The legal requirement for Police Investigators to document each step involved in a search to the stage of exhibiting items or things seized in that search as a way of completing the "**chain of custody**" was succinctly restated by the Court of Appeal of Tanzania in its decision in the case of ***Makoye Samwei @ Kashinje and 4 Others v. The Republic, Criminal Appeal No. 32 of 2014 (unreported)***, where the Court sitting at Tabora stated that;

"Thus, the "chain of custody" requires that from the moment a piece of evidence is seized or collected, its every handling, custody or transfer must be documented up to the time of its production in Court as an exhibit...Unfortunately, in the situation at hand, this salutary principle pertaining to criminal investigations was not heeded to."

In the instant case, clearly the Police Investigators have totally failed to comply with the mandatory requirements under 38(3) of the **Criminal Procedure Act, Cap.20 R.E. 2002** by not issuing a receipt or certificate of seizure for the knife which they claim was seized during the search at the compound of the house of the alleged Pastor and not at the house of the accused. Consequently, the chain of custody from the moment the knife was unearthed from the waste water pipe, its

handling, custody or transfer up to the time of its production in Court has been broken. PW1 who as I am made to understand was the one who was overseeing the search at the house of the alleged Pastor and collection of the knife completely failed to follow the legal procedures as expounded by the Court of Appeal of Tanzania in ***Makoye Samwel @ Kashirije and 4 Others vs. The Republic, Criminal Appeal No. 32 of 2014 (unreported)***.

Furthermore, there is the mysterious disappearance of the alleged "chips seller" from whom it is alleged by **PW3** that the accused stole the knife. This "chips seller" was not called by the prosecution to give independent evidence to corroborate the evidence of **PW3** that, the accused stole the knife from a "chips seller."

Let me now revisit the testimony of **PW2, E.5197 D/Sgt. Juma** with respect to the alleged two feuding groups of youths. In his testimony **PW2** stated that, while seated at the sitting room of **Deo Mathias** where they had been directed by **Yusuph's** parents, the accused told **PW2** that on **28.01.2011** while going to attend Tuition, he met a group of rogue boys who beat him up using a piece of wood with nails, seriously wounding him. When cross-examined by **Mr. Outa** learned Counsel for the Defence, **PW2** stated that, **Yusuph** had lodged a complaint with the Police Station as per **RB of 28.01.2011**. **PW2** stated further that it is after he had checked the RB that he came to learn of the existence of the **two groups of youths** who were fighting and chasing each other. **PW2** stated further that **he did not know if the deceased was dancing with a woman** and there is no witness who stated that they were fighting over a girl and that he never questioned Edson. In his testimony **PW3** also talked of a fighting

between two groups of boys essentially over bhang and girls, although fighting over girls was not the cause of the crime. **PW3** stated also that, the accused had planned for a revenge, that there were about two police cases, one in which the accused was the complainant.

In his testimony as **DW1, Yusuph Hamadi Magesa @ Babuu** stated that, on **28.01.2011** at **02:00 p.m.**, which was a Friday he was attacked by a group of youths among whom there was **PETER JOACHIM** and **ZUBERI** while at **NUNDU Primary School** where he had gone for evening classes (tuition) who used a piece of wood with nails seriously injuring him. **DW1** stated further that he reported the matter at the **Nyakato Police Station** where he was given a **PF3** given his condition so as to get treatment and was told to go back to the Station on **Saturday at 02:00p.m.**, which he did. However, he was told that because the Investigator, one Abdallah who was handling his case was not present he was told to come back at **10:00p.m.**, at night and when he went there, a Police Officer came and introduced himself to him by the name of **ABDALLAH**. **DW1** stated further that his was not dealt with but on Sunday he was arrested and locked-up and found himself facing a murder charge. **DW1** stated further that having on that Sunday washed his new school uniform, his sibling by the name of **DOTTO HAMAD** came and told him that he had passed by the shopping Centre and there were some Police Officers who had come there enquiring about a person by the name of **BABUU** who is being accused of stabbing a person at a wedding ceremony (*mkesha waharusi*) with a sharp object. **DW1** stated that he spent the whole of that Sunday at home and having taken dinner at around **04:00p.m.**, his sibling came back again and told him that the Police had come back again

asking for **BABUU**. **DW1** stated that he decided to go to his Aunt's home at **Mkuyuni** where he was arrested by the police.

On the evidence of both the prosecution witnesses, **PW2** and **PW3** and even of the defence **DW1**, it is without dispute that there were groups of feuding youths. There is no evidence on record that the deceased and the accused were also members of rival groups and whether the deceased was among the group of rogue youths who had attacked the accused on the Friday of **28.01.2011** at **Nundu Primary School** so as to provide the basis for the motive of the accused entertaining the idea of hatching a revenge against his attackers.

I have gone through the **Cautioned Statement** of the accused, (**Exhibit P3**). I have noted some similarity in the narration of events as a prelude to the eventful day of **29.01.2011** between what the Police Officers who testified during the trial stated with respect to the feuding youths and what the accused has stated and also about the accused going to report to the **Nyakato Police Station** on **28.01.2011** after having been attacked by a group of the rogue youths who invaded compounds of the **Nundu Primary School** where the accused had gone for tuition.

Let me now make some comments on the opinion of the two Court Assessors who in their respective opinions found that on the evidence on record the prosecution had established its case against the accused. One of the **Court Assessors, Asma Said**, on her part she found the behavior of the accused after the event highly wanting. She wondered as to why did the accused, having reported to the police about being attacked by a group of rogue youths, on a Sunday while washing his clothes upon being informed by his sibling about the Police looking for

him, he decided to run away to hide at his Aunt's place. This shows that the accused is guilty.

The other **Court Assessor, Martha Makuru** correctly noted that in this case in the absence of direct evidence, the evidence was largely circumstantial. However, on her part she stated that, two matters have made her find the accused guilty. In the first place, the fact of the accused voluntarily leading the police to where he had hidden the knife and the police having found it there. Secondly, the fact of the accused pleading with this Court to be sympathetic on him, showing that he is feeling guilty. Thirdly, the fact of the deceased patting **PW4** on his back and pointing his finger at the person who had stabbed the deceased and the accused running away from the crime scene and finally the accused himself confessing that there were groups of youths who had conflict.

On the part of the remaining **Court Assessor, Constantine Lukoma**, he opined that for him the conflicting evidence of the prosecution witnesses as to the time in which the event happened as being **8.00 pm** and another saying it was **23:45 hrs.**, has made it difficult to tell when the event occurred. Furthermore, of the four prosecution witnesses none confirmed that they saw **Yusuph** stabbing the deceased with a knife, although **PW4** claims that he was very close to the deceased on the eventful day, thus creating some doubts on the prosecution case.

On the evidence on record and from the analysis I have made of such evidence, I am constrained to agree with the two Court Assessors who, after their respective opinions, returned a verdict of "**Guilty**" against the accused. I am in agreement with the Court Assessor who after his opinion returned a verdict of "Not Guilty" for the reasons I have

endeavoured to explain in this Judgment, which also constitute the reasons for me differing with the two Court Assessors.

I wish to state here that in the present case, in the absence of direct evidence, the bulk of the evidence has been purely circumstantial. Much as the suspicious behavior of the accused after the event could be called to question, and particularly the act of the accused going to his Aunt's house on the evening of Sunday (**30/01/2011**) following the events of Saturday (**29/01/2011**) and particularly having been informed by his sibling about the Police looking for him; or the accused denying being at the wedding ceremony on the evening of **29/01/2011** or knowing **PW4**; all of these circumstances are mere suspicion on which this Court cannot rely to found a conviction in a such a serious offence such as the one under consideration. The prosecution was required to bring concrete evidence to establish the various strings in the chain of circumstances such that when pieced together would form a complete whole to show that it is the accused before this Court and nobody else who is responsible for the death of the deceased.

It is for the above reasons that I have differed with the opinions of the two Court Assessors and find that the prosecution has failed to establish the guilty of the accused beyond any reasonable doubts, which doubts are to be resolved in favour of the accused.

In the whole and for the above reasons, the prosecution has failed to prove its case against the accused beyond any reasonable doubt. The case of the prosecution against the accused fails. It is accordingly hereby dismissed in its entirety.

The accused, **YusuphHamadiMagesa @ Babuuis** hereby discharged from the offence of **Murder c/s 196 and 197** of the **Penal Code Cap. 16** of the Laws and is hereby acquitted.

The accused person **YusuphHamadiMagesa @ Babuushall** immediately be released from the remand prison custody where he is being held and set at liberty forthwith unless he is being held there for some other lawful matters. It is so ordered.

.....

R.V. MAKARAMBA

JUDGE

28/03/2018