IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

CRIMINAL SESSIONS CASE NO. 146 OF 2015

REPUBLIC

VERSUS

1. DAUDI KUDEMA @ PONSIAN

2. BUDEBA PAULO

JUDGMENT

8th – 11th June, & 25th June, 2020

ISMAIL, J.

Daudi Kudema @ Ponsian and Budeba Paulo, the accused herein, are jointly and together charged with murder, contrary to section 196 of the Penal Code, Cap. 16 [R.E 2002], to which they all pleaded not guilty.

Gathering from the facts contained in the statement filed prior to and read at the preliminary hearing, the prosecution's allegation is that the deceased, a resident of Ihushi village, met his death at the hands of the accused persons and another assailant who is not in Court. It was alleged that on 26th July, 2014, at around 05:00 hours, the accused persons, jointly and together, murdered Ntaalamu Bahati. The murder incident was

allegedly executed at Ihushi village, Magu district in Mwanza region. After the incident, the accused persons, together with onother assailant who is not in court disappeared, before they were subsequently apprehended at Ihushi village and Nyahunge village in Sengerema district, and transferred to Magu police station where they were incarcerated. The deceased's body was found lying in a pool of blood, near Mwakilu Primary School in the same village of Ihushi, and it carried multiple severe injuries (wounds) on the head and the neck. A Postmortem examination was carried out in respect of the body, and the doctor who performed it opined that cause of the death was due to severe head injury due to multiple fractures of the deceased's skull.

Before commencement of the trial, three assessors, namely; Fransisca John, Jesca Bandio and Shumbana Juma were appointed to sit with me. These assessors were present during the whole of the trial proceedings and performed their roles appropriately.

According to the prosecution, following the incident, police officers who visited the scene of the crime, carried out a swoop that led to the arrest of the accused persons, on diverse dates. While the 1st accused was arrested at Nyehunge village on 17th August, 2014, the 2nd accused testified that he was arrested on 13th July, 2014 at Ihushi village. They

were then conveyed to Magu police station where they were questioned. Whilst the 1st accused recorded a cautioned statement in which he allegedly confessed to have killed the deceased, as contended by PW4, a police officer, 2nd accused recorded did not record any statement. The 1st accused's subsequent confessional statement made before the Justice of the Peace (PW 1) was not admitted as evidence owing to pregnant inconsistencies with the Guidelines and Instructions issued by His Lordship the Chief Justice on recording of extra-judicial statements. It is the 1st accused person's cautioned statement (***exhibit P4***) that contained his confession to the effect that he took part in killing the deceased, at a fee paid by the 2nd accused person. Out of the facts read during the preliminary hearing, the accused only admitted the following:

(i) That they were arrested on diverse dates as stated above;

(ii) That the accused were arrested and are charged with murder of Ntalaam Bahati;

(iii) That names and the addresses are theirs; and

(iv) That, as admitted by the 2nd accused, the deceased died an unnatural death.

Two exhibits were admitted at the said preliminary hearing, that is to say; the Sketch map of the Scene of the Crime (***exhibit P1***); and the

Report on Postmortem Examination (***exhibit P2),*** while the rest of the exhibits were tendered and admitted during the trial. These are; Police's request to Vodacom Tanzania and response thereto (***exhibit P3***); and the 1st accused's Cautioned Statements (***exhibit P4***). Tendered as well, were PW2's and PW4's witness statements (***exhibit D1*** and ***D2***, respectively).

At the trial, the prosecution side marshalled attendance of five witnesses in proof of its case. Opening the case for the prosecution was **Rose Mashallah,** the Justice of the Peace who allegedly recorded the 1st accused's extra-judicial statement whose admissibility was challenged by the defence. Following the Court's decision not to admit the said statement, the witness's involvement was truncated by the prosecution who felt that she had nothing useful to offer.

Next in the list was **Bahati Ntaalam**, who featured as PW2. He testified that he is the deceased's son who recalls that at 5.00 am, on the fateful day, he heard the deceased talking on a phone to unknown people who intended to hire him. The deceased requested PW2 to bring him his motor cycle and a rope which would be used to tie the luggage that the-would-be hirers had and then he left. He recalled that after 5 minutes, his cousin called to enquire if they had been invaded to which he denied. PW2 then received a second call which informed him that the deceased had

been attacked near Mwakilu Primary School in the same village. He testified that he visited the scene of the crime and found the deceased lying on the ground and carrying serious injuries on the rear part of the head and was lifeless. Then police officers and other people gathered at the scene of the crime. At the request of the defence, PW2 tendered his witness statement which was admitted as ***exhibit D1***.

E 2496 D/CPL Magesa testified as PW3. He testified that we was stationed at Magu Police Station in 2014 and he remembered that on 19th August, 2014, he was assigned to locate Daudi Kudema, the 1st accused, who was suspected of involvement in a murder incident. It was believed that he lived in Nyehunge village in Sengerema district. PW3 attested that information about the 1st accused's whereabouts was conveyed by the 2nd accused who is alleged to have hired him and owed 100,000/- as part of the consideration for the assignment. He testified that they located the 1st accused and arrested him, and that on interrogation, he conceded that he, together with Masumbuko, killed the deceased. Their efforts to locate Masumbuko failed.

F 2496 D/SGT Mansweat testified as PW4. His involvement in the matter entailed arresting the 1st accused, communicating with Vodacom, a mobile phone service provider to find a link between two phone numbers

which were suspected to have communicated in connection with the murder incident. The letter to Vodacom was tendered as ***exhibit P3***. PW4 went ahead to testify that he recorded the 1st accused's cautioned statement in which he confessed to the killing of the deceased, Ntaalam Bahati and that he executed the killing with Masumbuko and at the behest of the 2nd accused. In return, he was to be paid TZS. 300,000/-. The Cautioned Statement was tendered and admitted as ***exhibit P4***. In the course of his testimony, PW4 tendered his witness statement which was admitted as ***exhibit D2***.

The last witness was **Diana Deus**, who was PW5. Apart from being the deceased's wife and that he was informed of the deceased's death, this witness did not have anything of significance to these proceedings.

The accused who both gave their evidence on oath denied having participated in the killing the deceased at Ihushi village, within Magu district on 26th July, 2014 or at all. They have denied ever being involved in the alleged killing, or knowing each other prior to their arraignment in Court in respect of the these charges. The 1st accused whose cautioned statement (***exhibit P4***) is relied upon as the basis for their involvement in the murder incident denied making any confession while in interrogation or in police custody or at all. He testified that he was only coerced into

appending his signature on the papers whose contents were not made known to him. He stated that this happened after he had been beaten by the police officers while in custody at Magu police station. He further testified that his case changed from riding on a faulty motor cycle to an allegation of murder after he refused to pay a fine of TZS. 15,000/-, that was demanded by police officers at Nyehunge police station, where he was confined for the first time.

While acknowledging that some of the information may be true, the 1st accused stated that some of that information was obtained from his boyhood friend, Benedicto John with whom he was arrested in Nyehunge. He stated that Benedicto was called upon by police for interrogation while they were in police custody in Magu. He stated, however, that some of that information may be inaccurate or misleading. He maintained that the deceased was a person he had never met or heard of, and that he has never set his foot to Ihushi where the deceased lived and died. He denied knowing or being hired by the 2nd accused person who he says he met for the first time when they were arraigned in court on 9th September, 2014.

The 2nd accused denied that he was involved in the murder incident in which Ntaalam Bahati was killed. While admitting that he lived with the deceased in the same village and were known to each other, he denied

that he or his family had any quarrel or misunderstanding with the deceased. Recalling the day of the incident, the 2nd accused stated that he heard an alarm that led him to the scene of the crime where he found fellow villagers who gathered around the deceased whose body showed that he had been attacked by armed assailants. The 2nd accused denied hiring the 1st accused or anybody else to carry out the attack that killed the deceased as he had no reason to do so. Denying any knowledge of the 1st accused, he testified that he saw him when they met in Sengerema where they were being held and conveyed together to Magu police station. He admitted that on 9th September, 2014, he and the 1st accused were arraigned together in court on the charges of the murder incident that he did not participate.

Customary of all criminal trials, once evidence of the prosecution and that of the defence is heard and taken, the issue which normally falls for the court's consideration and determination is, whether the prosecution's evidence has proved the charges against the accused, beyond reasonable doubt. This is consistent with a plethora of Court of Appeal's decisions.

In ***Joseph John Makune v. Republic*** [1986] TLR 44, it was held:

"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case. The duty is not cast

on the accused to prove his innocence. There are few well known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities ...."

The mighty significance of this requirement was accentuated, yet again, in ***George Mwanyingili v. Republic***, CAT-Criminal Appeal No. 335 of 2016 (Mbeya-unreported), wherein it was reaffirmed as follows:

"We wish to re-state the obvious that the burden of proof in criminal cases always lies squarely on the shoulders of the prosecution, unless any particular statute directs otherwise. Even then however, that burden is on the balance of probability and shifts back to prosecution."

Indisputably, in this case, none of the witnesses for the prosecution adduced direct evidence to have seen the accused committing any act resulting into the death of the deceased. As such, evidence that the prosecution relies on is partly circumstantial, and partly confessional. Circumstantial evidence in this case arises from the testimony adduced by PW2, Bahati Ntaalamu, who stated in his witness statement that, at 05.00 on the fateful day, he was sleeping at their family home when he was woken up by the deceased, his father, who he heard talking on a phone by people he suspected to be the assailants who hired him so he can ride them on his motorcycle. Shortly after he was gone, he was informed that

the deceased had been attacked and killed by unknown assailants. PW2 suspected that the last number that was displayed on the deceased's person belongs to a person who hired the deceased and he is likely to be responsible for the deceased's brutal demise. Incidentally, the said number was that of the 1st accused person.

The murder incident in which the deceased was greasily killed drew the inference and impression, by the prosecution, that the accused were the culprits and perpetrators of the incident.

It is trite law, in our jurisprudence, that conviction in respect of an offence can be founded on circumstantial evidence, only if such evidence irresistibly leads to the conclusion that it is the accused - and no one else - who committed the crime. In other words, the inculpatory facts adduced by the prosecution must be incapable of any other interpretation than that the person in the dock is guilty of the offence charged. This position traces its history a couple of centuries ago, and its significance has been restated and re-emphasized in a litany of decisions across jurisdictions, including our very own.

In ***R v. Sadrudin Merali,*** Uganda High of Court Cr. A. No 220 of 1963 (unreported), Sir Udo Udoma, C.J., observed as follows:

"... It is no derogation to say that it was so for it has been said that circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by undersigned coincidence is capable of proving a proposition with the accuracy of mathematics".

Expressing identical sentiments over a century before in 1850 Henry D. Theory the American transcendentalist best known for his ant-materialist philosophy had this to say:

"some circumstantial evidence is very strong, as when you find a trout in the, milk".

The dicta are as true in this third millennium as they were in the second millennium and command the allegiance and respect of us all."

In ***Seif Seieman v. R***, Criminal Appeal No. 130 of 2005, CAT (unreported) the Court of Appeal had the following observation:

"Where evidence against an accused person is wholly circumstantial, the facts from which an inference adverse to the accused is sought to be drawn must be clearly connected with the facts from which the inference is to be inferred. In other words, the inference must irresistibly lead to the guilt of an accused person."

The reasoning the case of ***Seif Seleman*** (supra) was articulated and given a wider perspective in ***Sadiki Ally Mkindi v. The D. P. P.,*** Criminal

Appeal No. 207 of 2009 (Arusha Feb, 2012), the Court of Appeal held as follows:

> *"We would therefore set out the general rules regarding circumstantial evidence in criminal cases as elucidated in* ***SARKAR ON EVIDENCE****, Fifteenth Edition, Re-print 2004 at pages 66 to 68. These are:*
>
> 1. *That in a case which depends wholly upon circumstantial evidence, the circumstances must be of such a nature as to be capable of supporting the exclusive hypothesis that the accused is guilty of the crime of which he is charged. The circumstances relied upon as establishing the involvement of the accused in the crime must clinch the issue of guilt.*
> 2. *That all the incriminating facts and circumstances must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other hypothesis than that of his guilt, otherwise the accused must be given the benefit of doubt.*
> 3. *That the circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable*

doubt and must be closely connected with the fact sought to be inferred therefore.

4. *Where circumstances are susceptible of two equally possible inferences the inference favoring the accused rather than the prosecution should be accepted.*
5. *There must be a chain of evidence so far complete as not to leave reasonable ground for a conclusion therefrom consistent with the innocence of the accused, and the chain must be such human probability the act must have been done by the accused.*
6. *Where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated.*
7. *Circumstances of strong suspicion without more conclusive evidence are not sufficient to justify conviction, even though the party offers no explanation of them.*
8. *If combined effect of all the proved facts taken together is conclusive in establishing guilt of the accused, conviction would be justified even though any one or more of those facts by itself is not decisive."*

See also: ***Elisha Ndatamye v. R,*** CAT-Criminal Appeal No. 51 of 1999 Mwanza (unreported); ***Simon Musoke v. R*** (1958) E.A 715 at p. 718; and ***Mswahill v. R*** [1977] *LRT 25;* ***Bahati Makeja v. R,*** CAT-Criminal Appeal No. 118 of 2006; ***Mathias Bundala v. R,*** CAT-Criminal Appeal No. 62 of 2004; ***Waliii Abdallah Kibutwa & 2 Others v. R,*** CAT-Criminal Appeal No. 127 of 2003 (all unreported).

A scrupulous review of the testimony of the prosecution, reveals that the testimony that falls in the category of circumstantial evidence is that which is contained in the testimony of PW2, who contended that he heard the deceased talking to one of the assailants who masqueraded as a passengers before he left to pick them moments before it was reported that he had been brutally killed. The testimony is intended to bring an inference that the killers of the deceased are the very people who ostensibly hired him through that early morning call.

From this testimony, there arises a critical question as to whether such testimony lays down circumstances capable enough of supporting the exclusive hypothesis that the accused, in this case, one or both of the accused persons are guilty of the offence they are charged with. My unflustered answer to this question is in the negative. Nothing in the said passage comes close to providing incriminating facts and circumstances

which would be said to be incompatible with the innocence of the accused. It can never draw any hypothesis of guilt. PW2 has not cleared the air about how he knew that the deceased's assailants were his hirers and that, in this case, such hirers were any or both of the accused persons. The available testimony has failed, once again, to establish circumstances which provide an irresistible link or ability to knit the accused to a common intention. Nothing definite and decisive was told to enable this Court to draw a conclusion that this testimony falls in the threshold which is propounded in ***Sadiki Ally Mkindi*** (supra). Matters were not helped by the failure by the prosecution to do the following:

(i) To prove existence of communication between the deceased and the accused persons on the fateful day or at all;

(ii) To prove existence of communication between the accused persons themselves in order to infer any common intention;

(iii) Proof by PW5 to the effect that the her *simcard* was used by the deceased any time before his demise and that the same was registered in her name;

(iv) To prove that Diana Deus who testified in Court as PW5 was not different from Diana George in whose name the said *simcard* was registered;

(v) To prove that the *simcard* which bears the registration name of the 1st accused and is alleged to have communicated with the deceased was, at the time of the alleged communication, in the hands of the 1st accused.

The resultant consequence of this is to render this circumstantial evidence probatively deficient to base a finding of guilt thereon. In such circumstances, the only legitimate and plausible conclusion is to give benefit of doubt to the accused in respect thereof.

Disposal of the issue on the weight of circumstantial evidence takes us to the next question. This is on whether there is any other evidence, let alone or together with the circumstantial evidence, worthy of consideration in determining guilt or otherwise of the accused. The answer to this question is in the affirmative. This is mainly the testimony PW3 and PW4 and ***exhibit P4***, which is the 1st accused's cautioned statement. These are pieces of evidence on which the prosecution relies heavily. ***Exhibit P4*** was tendered when PW4 took the witness box and it sailed after a fierce objection from the defence, contending that its recording failed to conform to the requirements of the law on the mode of recording, and that its recording failed to conform to the requirements of section 50 (1) (a) of the Criminal Procedure Act. Having weathered the storm that came with the

objection and, after admitting it as evidence in support of the prosecution's case, work begins, in earnest, to make sense of the alleged confession and see if it presents a credible case that inculpates the accused persons. My unfleeting review of all the confessional statement brings a singular message of the accused's involvement in the death of the deceased, and that the death was pre-meditated by none other than the accused's themselves, the main architect being the 2nd accused who is alleged to harbor a bad blood with the deceased. The said exhibit gives a blow by blow account of the build up to the event and the manner in which execution of the plan was carried out to the perfection.

Notwithstanding this consistent message about the accused's culpability, there arises a few questions whose answers were not provided by any of the prosecution witnesses who testified in Court. These questions are especially important when it is considered that none of the prosecution's witnesses linked the 2nd accused person to the incident with which he is charged. Not even the arresting officers shed some light on how and why they singled him out for the arrest in connection to this murder, it being known that he was arrested before the 1st accused's arrest. The testimony of PW2 and PW5 who are members of the deceased's family was expected to give a clue on how the 2nd accused

related with the deceased and whether there was any sour relationship between them. While PW2 said nothing about it, the PW5 was categorical that there was nothing untoward between them.

It is also peculiar that in a case where the first suspect was the 2nd accused who provided a link on how the deceased's murder was planned and executed, and facilitated the arrest of the 1st accused person, he did not record his statement which would detail any of what has been alleged by the 1st accused and what motivated him to hire the 1st accused, part with his money and kill the deceased. This happened while the 2nd accused spent his time in custody for more than a fortnight before the 1st accused's arrest. The statement by the 1st accused person is to the effect that some of the payments were made through mobile money channels and that most of the conversation was done telephonically. Inexplicably, again, no printout or any semblance of proof was tendered to show that the duo communicated, premeditated about the death, and that money changed hands to facilitate what had been planned. Not even the phone gadgets were tendered in Court to prove that the accused ever owned phones and that those are the ones which were used to execute the entire plan. This means, therefore, that the prosecution's only reliance is on the 1st

accused's confessional statement. In law, this is permissible and section 33 (1) of the Evidence Act (supra) which provides as follows:

> *"When two or more persons are being tried jointly for the same offence or for different offences arising out of the same transaction, and a confession of the offence or offences charged made by one of those persons affecting himself and some other of those persons is proved, the court may take that confession into consideration against that other person."*

The latitude in the cited provision is not without limitation. Sub-section 3 is to the effect that no conviction should be solely based on a confession of a co-accused. This requirement has been emphasized through various decisions of the Court and the Court of Appeal. In ***Republic v. ACP Abdallah Zombe & 12 Others***, HC-Criminal Sessions Case No. 26 of 2006 (DSM, unreported) this imperative requirement was stated thus:

> *"It is also a truism that whether in the form of a confession, or any other types of evidence of a co-accused, to ground a conviction, it must be corroborated as a matter of law (in case of confessions) (s 33 (2) of the Evidence Act) or of practice in any other types of evidence of a co-accused (see Pascal Kitigwa v. R (1994) TLR (CA)."*

It worthy of a note that in ***Pascal Kitigwa*** (supra) the Court of Appeal stressed the fact that, while uncorroborated testimony of the co-accused may be used to convict the accused and it is not illegal, a convicting court must warn itself of the dangers of relying on such testimony. Significant, as well, is the fact that the corroborating testimony may also be circumstantial or based on the accused's conduct or words. The superior Court held thus:

> *"However, as correctly observed by the trial magistrate and the learned judge, even though the law is such that a conviction based on uncorroborated evidence of an accomplice is not illegal, still as a matter of practice, the then Court of Appeal for Eastern Africa and this Court have persistently held that it is unsafe to uphold a conviction based on uncorroborated evidence of a co-accused. In this case, the trial magistrate as well as the learned judge on first appeal apart from warning themselves of the danger of convicting on uncorroborated evidence of the second accused (DW2), went further to look for other evidence implicating the appellant. It is common ground that corroborative evidence may well be circumstantial or may be forthcoming from the conduct or words of the accused."*

My scrupulous review of the testimony as presented by the prosecution does not give me any semblance of the feeling that there

exists any circumstantial evidence or any inference that the 2nd accused's conduct or words were consistent with the culpability which can be said to corroborate the testimony of the 1st accused person regarding his involvement in the murder incident. Not even the testimony of any of the prosecution witnesses can be said to have injected any corroborative influence in the said co-accused's confession. I would, therefore, hold that holding the 2nd accused culpable in these circumstances is unsafe and unjust.

There is also a question of common intention of the parties which deserves a word or two about. Gleaning from the facts, it comes out clearly that common intention of the accused and their elusive accomplice is being brought to the fore, meaning that the accused shared a specific unlawful purpose which led to the commission of the murder incident. Section 23 of the Penal Code (supra) defines common intention as follows:

> *"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."*

This provision has received an extensive interpretation and the manner in which it ought to operate. In ***Republic v. ACP Abdallah Zombe***, an elaborate perspective of how this operates was accentuated. The learned Justice hald as follows:

"From these decisions, the following principles can be carved out:-

(i) For section 23 to apply it must be shown that an accused person shared with the actual perpetrator(s) of the crime a specific unlawful purpose which led to the commission of the offence charged.

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

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

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

See also: ***Tabulayenka s/o Kirya and Others v. R***_(1943) 10 EACA 51, ***R v. Mgundulwa s/o Jalu and Others*** (1945) 22 EACA 169, ***R v._Selemani s/o Ngulu and Another*** (1947) 14 EACA. 94 ***Wanjiro d/o Wamello and Another v. R***_(1955) 22 EACA 521 ***Lamambutu_s/o Makalya and Another v. R*** (1958) EA 706 ***R v. Ngerera s/o Masaga and Others*** (1962) EA 766, ***Godfrey James Ihuya v. R*** (1980) TLR 197 ***Alex Kapinga and Others v. R*** Criminal Appeal No. 252 of 2005 Mbeya (unreported) and ***Shija Luyenko v. R*** (Criminal Appeal No.43 of 1999 (unreported) (Mwanza)

As stated above, the link between the 1st and 2nd accused is sketchily found from the 1st accused's confessional statement and it has not been established, in any tangible way, by the prosecution through any of the witnesses who appeared in Court and testify. A lot of loose ends were left unattended and this makes proof of common intention a far monumental task that has not been accomplished by the prosecution. The *concerted agreement between the accused persons prior to the commission of the offence* has not been knitted in a manner which would enable this Court make a firm finding that it actually existed. This is exacerbated by the fact that culpability of the 2nd accused, the hirer, is dependent on the confessional statement of the 1st accused which we have held to be of no

strong probative value to hold him responsible. In the absence of the 2nd accused, the intention is no longer common and the 1st accused alone cannot be held responsible, especially where his actions were allegedly done at the behest of the 2nd accused, his employer. On this, I feel constrained to follow the path taken in ***Mathias Mnyemi & Another v. Republic*** [1980] TLR 290 in which it was held that *"where in the absence of the common intention it is not possible in the evidence to say which accused person jointly charged committed the offence, all the accused persons must be given the benefit of doubt."*

See also: ***Shija Luyeko v. The Republic***, CAT-Criminal Appeal No. 43 of 1999; ***The D.P.P. v. Daudi Mwayonga***, CAT- Criminal Appeal No. 155 of 1994; and ***Sovelwa Mwayonga v. The Republic***, CAT- Criminal Appeal No. 155 of 1994 (all unreported).

From the foregoing and, on the aggregate of all this, I am of the firm contention that the pregnant disharmonies highlighted in the entirety of this judgment cast a serious shadow on the prosecution's case and I am hardly persuaded that the prosecution has proved its case against any of the accused persons. My conviction is premised on the following principles as elucidated and quoted from the ***Republic v. ACP Abdallah Zombe*** (supra):

(i) *The burden of proof in criminal cases generally is always on the prosecution and the standard is beyond reasonable doubt. When the said burden shifts to the accused, the standard is on, a balance of probabilities (See* ***OKARE v R*** *(1955) EA 555,* ***SAID HEMED v R*** *(1987) TLR 117,* ***MOHAMED SAID MATULA v R*** *(1995) TLR. 3; and* ***(MSWAHILI v R*** *(1997) LRT. 25).*

(ii) *A mere aggregation of separate facts all of which are inconclusive in that they are as consistent with innocence as with guilt, has no probative value (****CHHABILDAS D. SUMAIYA v. REGINA****(1953) 20 EACA 14.*

(iii) *That a conviction should always be based on the weight of the prosecution case and not the weakness of the defence case.*

(iv) *It is not the quantity but the quality of the evidence which matters in deciding on the guilt or innocence of an accused person.*

(v) *Suspicion, alone, however strong cannot be the basis of a conviction (****SHABANI MPUNZU @ ELISHA MPUNZU v R*** *(Criminal Appeal No.12 of 2002 (Mwanza) unreported)."*

My position draws convergence with two of the three Lady Assessors who were of the view that guilt of the accused persons had not been established. I take that view considering that the view taken by 1st Lady

Assessor did not consider the highlighted shortcomings that have shrouded the prosecution's testimony.

Consequently, and in view of the foregoing, I find the accused not guilty of the offence with which they are charged. Accordingly, I acquit them and order that they be set at liberty forthwith unless held for any lawful cause. It is so ordered.

Right of appeal explained.

M.K. Ismail
JUDGE
25.06.2020

Date: 25th June, 2020

Coram: Hon. M. K. Ismail, J

Ms. Gisela Alex: State Attorney for the Republic

Mr. Alfred Daniel: Counsel for the 1st Accused

Mr. Mshongi: Counsel for the 2nd Accused

Accused: (name) **1. Daudi Kudema**

2. Budeba Paulo – All are present under custody and **represented** by **Messr. Alfred Daniel** and **Mshongi, Advocates.**

Interpreter: Leonard, English into Kiswahili and vice versa.

Notice of trial on information for **Murder** contrary to **sections 196 & 197** of the Penal Code was duly served on the accused, now before the court on **25.06.2020.**

Assessors:

1. Francisca John
2. Jesca Bandio
3. Shumbana Juma

Ms. Alex:

The matter is for judgment and we are ready.

Sgd: M. K. Ismail
JUDGE
25.06.2020

Mr. Daniel:

We are ready my Lord.

Sgd: M. K. Ismail
JUDGE
25.06.2020

Mr. Mshongi:

We are also ready.

Sgd: M. K. Ismail
JUDGE
25.06.2020

Court:

Judgment delivered in open Court, in the presence of the accused persons, their Counsel and the Counsel for the Republic, and in the presence of the Assessors, this 25th day of June, 2020.

Right of appeal explained.

M. K. Ismail
JUDGE

At Mwanza
25.06.2020