

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**AT TABORA**

**SITTING AT URAMBO**

**CRIMINAL SESSION CASE NO. 15 OF 2019**

**REPUBLIC**

**VERSUS**

**1. MICHAEL S/O SAMSON**

**2. LADSLAUS S/O SILVANUS**

**JUDGMENT**

*25/5/2021-31/5/ 2021*

**BAHATI, J.:**

The accused persons, **Michael s/o Samson and Ladslaus s/o Silvanus** are jointly charged with an offence of murder contrary to section 196 of the Penal Code, Cap. 16 [R.E 2019]. They are alleged to have murdered one Magagala s/o Mazuka. The incident took place on 18<sup>th</sup> September 2018 at about 20:00hrs at Ulindwanoni village within Urambo District in Tabora. Both pleaded not guilty to the charge.

Throughout the hearing of this case, the Republic was represented by Ms. Upendo Malulu, learned State Attorney while the

accused persons were represented by Mr. Kanisius Ndunguru, defence counsel.

I sat with and enjoyed the assistance of Ms. Agness Amos Mipako, Ms. Hamisa Dawakali Masala and Ms. Munde Abisalome Maganga, lady assessors.

From the facts, it is undisputed facts that the death of Magagala s/o Mazuka was unnatural. This was confirmed by the evidence of prosecution witnesses. The report on post mortem examination which was tendered as exhibit "P1" during the hearing established the cause of death to be internal and external bleeding.

Basing on the state of the body, there can be no doubt that the deceased met a cruel death and whoever is responsible must have intended to cause death or grievous bodily harm. The issue for determination, therefore, is whether it was the accused persons with *malice aforethought* that caused the death of Magagala s/o Mazuka.

In proving the case against the accused person, the prosecution paraded a total of four (4) witnesses namely; Hamis Fungameza who testified as PW1, William Benedict Kaijage PW2, G.2979 Detective Constable Daniel PW3, and F 6776CPL Julius who testified as PW4. During the hearing, two exhibits were produced to prove that it was the accused persons who maliciously killed the late Magagala s/o Mazuka.

**PW1, Hamisi Fungameza Mbonayo** testified that in 2016 he was living at Mtapenda, Ulindwanoni Village, and at that time he was a Village Chairman. He informed that sometimes in 2016 he received a call from the hamlet chairman that there is a murder incident at Ibumba. He went to the scene of the crime and found the body of Magagala. He informed the Village Executive Officer who reported the matter to the police. Still, at the scene, he spoke to the villagers who informed him that, they knew nothing about the death of Magagala.

During cross-examination, he informed the court that he was not there when the deceased met his death until now he doesn't know who killed the deceased.

When assessors sought clarification he informed the court that he did not know who killed the deceased and the deceased used to drink alcohol.

**Dr. William Benedict Kaijage who was featured as PW2** testified that on 19/09/2016 he received a call from the police at Kaliua and they told him that there was a murder incident at Ibumba. They went to Ulindwanoni where they found the body of the deceased, Magagala Mazuka aged 55.

He informed the court that, he examined the body of the deceased and found him with wounds on his face and head, also he was bleeding, the

witness informed this court that the cause of death was severe bleeding and the wounds were caused by a blunt object.

During cross-examination, PW2 stated that the report does not state who killed the deceased. When the assessors asked for clarification, he said that he did not see the blunt object.

**PW3, G2979 D/C Daniel** testified that on 18/09/2016 he was called by OC-CID who informed him that there was the murder of Magagala Mazuka at Ibumba Village. He went to the scene of the crime at Ibumba and he was directed to draw a sketch map of the crime scene.

He added further that, one Phares Paulo assisted him to mark the place, he also interviewed him. The sketch map of the scene of the crime was admitted to this court as prosecution exhibit P2.

During cross-examination, he stated that in a sketch map he did not show who killed the deceased.

The last prosecution witness was **PW4, F6776 D/CPL Julius** who testified that on 01/10/2016 during evening hours he was at Kaliua, One ASP Mwangalilo OC-CID informed him that there was a murder incident that occurred on 18/09/2016 at Ulindwanoni. He stated further that, OC- CID wanted him to arrest two accused persons. The accused persons were Ladislaus and Michael Samson who were

mentioned by Lameck Samson that they are the ones who killed Magagala Mazuka at Kipara Kidane's bar.

That, on the same day, he was told to go to Mpanda, where he arrived on 02/10/2016 together with Lameck Samson. He then reported to Mpanda Police Station to get assistance to arrest other accused persons. They went to Itenga A village and arrived there at 03:00hrs.

That witness informed the court that, Lameck Samson took them to the place where the two accused persons went to hide. They succeeded to arrest them and returned to Mpanda police station at 06:45 hrs then he started to interview Ladslaus Silvanus whereby; he informed him of his right to call a relative or advocate before he was interviewed. He accepted to be interviewed. After recording his statement he read it to him and the accused signed. Then he took the statement of Michael Samson and explained to him his right to call a relative, advocate and informed him that the statement may be used against him, he agreed and after recording his statement he also signed.

When cross-examined he mentioned that the accused was in a good condition but in the statement, he has not stated the condition of the accused.

When sought for clarification by assessors, he said that Lameck was an accused person but he was not in court. He admitted that Lameck had a dispute with the deceased and he was just a suspect.

This witness prayed to tender the two statements altogether as prosecution exhibits but the prayer received an objection from defence on the ground that they were not taken voluntarily.

The Court conducted a trial within a trial, and in the end, the court overruled the objection leveled by the learned counsel Mr. Ndunguru and allowed the prosecution to tender the two cautioned statements as "Prosecution Exhibit P3".

Upon closure of the prosecution, this Court is required under section 293 (1) of the Criminal Procedure Act, Cap. 20 [R.E.2019] to consider whether the evidence adduced by the prosecution is sufficient to call the accused to enter his defence. The Court ruled out that the prosecution had established *a prima facie* case against the accused and in absence of any contrary evidence the accused could be convicted. Therefore, in line with **Section 293 of the Criminal Procedure Act, Cap. 20 [R.E 2019]**, the Court informed the accused of his right to defend the case under oath and call a witness for the defence. The accused persons chose to testify under oath and they had no other witness or exhibit to tender during the defence.



In his defence the accused person **Michael S/O Samson, DW1** testified that on 03/10/2016 he was arrested by police at his home and was taken to Mpanda where he was assaulted by two policemen, one he remembered by the name Julius.

He confessed to the police because he was assaulted and pierced by a screwdriver on his hand, stomach, and on his leg. The witness showed in court the scars which he says are the result of assault he stated further that, if the police could have not beaten him he would have not admitted.

On cross-examination, DW1 stated that he went to Mpanda in 2014 to his brother's place one Kulwa Masalu. He was arrested on 3/10/2016.

**Ladslaus Silvanus**, DW2 testified that he lives at Ibumba Kaliua, Tabora Region. He was arrested at Mpanda at midnight around 02:00hrs, he was taken to Mpanda Police station and he was assaulted by Julius and another policeman he doesn't recall his name.

He testified further that, the police wanted him to confess the death, he confessed because he was forced to do so. He added that he had an ear problem because he was slapped by Julius.

On cross-examination, this witness stated that he went to Mpanda in 2014, he doesn't know when and how the deceased died, and he reiterated that he did not kill him.

In re-examination, he stated that during Preliminary Hearing the information was he was arrested in 2018, not in 2016. The dates conflict.

When clarification was sought by assessors he stated that he lives at Ibumba and Magagala was also living at Ibumba and he did not know him. He went to Mpanda on 14/2/2014 he was arrested on 3/10/2016. The statement written in the caution statement was on assaulting Magagala s/o Mazuka

When sought clarification from assessors he stated that he knows Lameck because they live together in Ibumba. The policemen came with Lameck. He was assaulted by the police that is why he made the said cautioned statement.

After both sides had closed their respective case, the learned counsels made their final written submissions. Ms. Upendo Malulu, learned State Attorney submitted that the prosecution had proved the case against the accused persons beyond reasonable doubt because both accused the persons admitted to having killed the deceased person. The evidence of PW1, PW2, and PW3 as well as the accused's conduct of escaping to Mpanda from Tabora soon after the killing corroborates the confession at hand. Both the accused persons in their defence admitted that they had no grudges with the police who took their caution statements thus there is no reason on earth to fabricate the case.



The Prosecution further submitted that it is true the charge sheet before the court shows that the incident occurred on 18/9/2018 hence varies with the evidence adduced in court. However, she stated that the caution statements show that the incident occurred on 19/09/2016 but this can be cured by the rest of the evidence which shows that the incident occurred on 19/9/2016 and Magagala was already dead as per exhibit "P2". In the case of **DPP vs Shida Manyama @ Selemani Mabuba Criminal Appeal No. 285 of 2012 Mwanza CAT**, the court among other things cured the defects in the charge sheet by the evidence adduced at the trial.

She reiterated that the accused person knew exactly the charge which was facing them and hence the said defect can be cured by the evidence adduced that year 2018 instead of 2016 be treated as a slip of the pen. Again the evidence of PW1, PW2, PW3, and PW4 together with exhibits P1, P2, and P3 collectively have managed to prove the case against the accused person.

On his defence side, Mr. Ndunguru submitted that there is a variance of date between the information (charge sheet) and the prosecution evidence, the particulars of the offence show that the alleged murder occurred on 18/9/2018 but this allegation was different from the evidence of PW1, PW2, PW3, and PW4 alleged that on 19/9/2016 in the morning the body of the deceased was found at Ibumba Ulindwanoni, village Kaliua District in Tabora region instead the

accused are jointly charged on the 18/9 /2018 at Ulindwanoni village within Urambo District in Tabora region did murder one Magagala d/o Mazuka.

He submitted that it is a settled principle that a charge sheet is a foundation of a criminal trial. He further submitted that in the case of **Halid Hussein Lwambano v R, Criminal Appeal No. 473 of 2016(Unreported)** that the variance of the incident dates between the one indicated in the charge sheet and of hiring the bicycle as testified by PW6 is not minor. It goes to the root because it casts doubts regarding the identification.

Also in the case of **Abel Masikiti v Republic, Criminal Appeal No. 24 of 2015** the Court observed;

*“If there is variance or uncertainty in the date of the charge must be amended in terms of section 234(1) of the Criminal Procedure Act, Cap.20. If this is not done the preferred charge will remain unproved and the accused shall be entitled to an acquittal.”*

The prosecution is required under section 234(1) of the Criminal Procedure Act, Cap.20 to amend the charge sheet but it was not the case herein. Failure to make any amendment to the charge sheet occasioned a failure of justice on the part of the accused person and it is as good as the prosecution failed to prove the charge beyond reasonable doubt.

Hence failure to amend the charge sheet is also fatal and prejudicial to the accused person and it is not curable under section 388(1) of the Criminal Procedure Act, Cap.20.

The variance is noted in the information/sheet that the offence occurred within Urambo while all witnesses testified that the death occurred at Ibumba center at Ulindwanoni Kaliua village. He cited the case of **Naoche Ole Mbile v R, [1993] TLR 253** failure to comply with the above provision renders the trial nullity.

Another shortfall, the prosecution case was not proved beyond reasonable doubt because they did not call one Lameck Samson as a witness who informed PW4, DC Julius on the murder incident. The prosecution is supposed to collect all potential evidence to prove their allegation. If one Lameck Samson could have come before the court and testify would have assisted the court to know the truth and reach the right conclusion.

In the circumstances, Lameck Samson was supposed to be a witness and physically available to be cross-examined because of the allegation that he knew who committed the crime, and for this court to assess his credibility and reliability. What if Lameck s/o Samson was the actual perpetrator of the crime?

In the case of **Hemed Issa v Mohamed Mbilu 1984 TLR 11** where for an undisclosed reason, a party fails to call a material witness in his

side, the court is entitled to draw an adverse inference that if the party was called he would have given evidence contrary to the party's interest.

Also in **Aziz Abdallah v R [1991] TLR 71** where the court stated that;

*'The general rule and well-known rule is that the prosecution under prima facie case duty to call those witnesses who from their connection with the transaction in question can testify in material facts. If such witnesses are within reach but are not called without sufficient reason being shown the court may draw an adverse inference to the prosecution.'*

He further submitted that PW4, F 6776 D/CPL Julius was not among listed in terms of section 246(2) of the Criminal Procedure Act, Cap.20 that he would be among the witnesses to testify in court as well as the caution statement. The said evidence was illegally admitted in the record.

According to section 289(1) of the Criminal Procedure Act, Cap.20, there were no leave sought to add additional witness or to add exhibits to tender in evidence. Hence the prosecution has not proved the case beyond reasonable because the prosecution case was built on suspicion and uncorroborated evidence.

After the said summing up of the case to Hon Assessors, all unanimously pinned for the accused persons confession which was freely and voluntarily made, and thus the court should enter a conviction.

Having considered the prosecution evidence, it is apposite to determine whether the offence of murder was proved to the required standard. Murder is one of the capital offences and being one of the criminal offences, its proof must be satisfied to the level of beyond reasonable doubt. The proof of beyond reasonable doubt is a good doctrine and it is provided for under section 3 (2) (a) of the Evidence Act, Cap. 6 [R.E 2019]. The same doctrine has been amplified in several cases including the case of **Hemed v. Republic [1987] TLR 117** where the Court that:

*"...In criminal cases, the standard of proof is beyond reasonable doubt. Where the onus shifts to the accused it is on a balance of probabilities."*

Based on the above principle of the law, it is also an established principle that the onus of proving a criminal case beyond reasonable doubt lies on the prosecution. The burden of proving the offence beyond reasonable doubt does not shift to the accused person. The case of **Mohamed Matula v. Republic [1995] TLR 3** clarified this principle of law thus:



*“Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused; the onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence.”*

In the instant case, the accused persons faced the charge of murder contrary to section 196 of the Penal Code, Cap.16 [R.E 2019]. The section provides that;

*“A person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder.”*

Therefore, to establish the offence of murder, the prosecution's evidence must prove the following elements that the deceased died; the death was a result of an unlawful act as opposed to natural death; it must be proved that the accused person(s) were responsible for the murder; and that the accused person(s) had evil intent before executing the act of murder.

In the instant case, the evidence has proved that the deceased, Magagala Mazuka was killed by unknown murderers on the night of 18 September 2016. Also, the doctor's postmortem examination report revealed that the deceased was 'found dead due to internal and external bleeding'. Furthermore, PW1, PW2 and PW3 confirmed and



witnessed that the Magagala Mazuka is dead. Possibly, the most obvious question is who caused the brutal death of the deceased person on 18 September, 2016?

The evidence at hand is hinged on the cautioned statements of the accused persons. This court is seriously warned of the danger of relying on the confession of the accused person especially if such confession was repudiated or retracted. In the case of **Kashindye Meli v. Republic [2002] TLR 374**, the Court of Appeal of Tanzania stated that:

*“...It is now settled law that although it is dangerous to act upon a repudiated or retracted confession unless such confession is corroborated, the court may still act upon such a confession if it is satisfied that the confession could not but be true.”*

Under the principle of the law stated in the above case, where the confession has been retracted or repudiated, to base a conviction on such a confession it must pass three important tests, first, the confession must be corroborated by other independent witnesses; second, the confession must be established that the maker made it out of his free will and thirdly, its central theme is believed to be nothing but the truth.

As stated previously, the main issue for determination, in this case, is as to whether the prosecution has proved the case against the accused person beyond reasonable doubt. This is essentially so because

the burden of proof in criminal cases always lies on the prosecution and the standard of proof is beyond reasonable doubt, in **Said Hemed V R, [1987] TLR. 117; Mohamed Matula V R [1995] TLR.3** as exemplified above.

In principle, the prosecution has relied on the confession statement of the accused persons which were collectively admitted as exhibit "P2". The accused persons have repudiated or retracted confession statements. The defence counsel, Kanisius Ndunguru, insisted that the accused persons were not free agents when they made the confession statement. As correctly observed by the learned State Attorney that issue was resolved in the trial within a trial so it was irrelevant at this point of defence.

In my considered opinion, the issue here is, what is the law concerning repudiated confession? Can a conviction be founded on such a statement after the court has properly directed itself on the evidence and satisfied as to its truthfulness? The case of **Hatibu Gandhi and others Vs the Republic [1996] TLR 12**. Also in another case of **Tuwamoi Versus Uganda (1967) EA 84** at page 91 quoted with approval by the Court of Appeal of Tanzania in the case of **Umalo Mussa versus Republic, Criminal Appeal No. of 2005 (unreported)** stated that;

*"A trial court should accept with caution a confession which has been retracted or repudiated or both retracted and repudiated*

*and must be fully satisfied that in all the circumstances of the case that the confession is true.”*

It is however dangerous to act on uncorroborated retracted or repudiated confession. In the case of **Hemed Abdallah v. Republic [1995] TLR 172** the Court stated that:

*'Generally, it is dangerous to act upon a repudiated or retracted confession unless it is corroborated in material particulars or unless the court, after full consideration of the circumstances is satisfied that the confession must but be true.'*

Having examined the records carefully, it is in the cautioned statements of the accused persons where they are said to have admitted their involvement in the commission of the offence. I doubt this approach since these statements were not corroborated by either Lameck s/o Samson who in this case was a key witness who informed PW4, F.6776 D/CPL Julius, or otherwise. I am of the view that if one Lameck Samson could have appeared before this court would have assisted the court to arrive at the right conclusion as elaborated by the above laid down principles.

I am aware that, although there is no rule of law or practice making corroboration of a retracted confession essential; in this case at hand, corroboration of a retracted confession is desirable by independent evidence as no other evidence points to the accused as having been identified as people who committed the crime herein.

Above all, as each accused person repudiated their statement, it will not be safe to rely on it unless it is corroborated by independent evidence. In the case of **Ali Salehe Msutu v. R [1980] TLR** it was held:-

*"It has long been established as a rule of practice in East Africa, including in this country that repudiated confession, though as a matter of law may support a conviction, generally requires corroboration as a matter of prudence as is in the case with a retracted confession."*

This case hinged on caution statements and partly on circumstantial evidence that the accused was arrested by the police officer with the assistance of another person Lameck Michael who escorted him to Mpanda. But for reasons that are only known to the prosecution, therefore not on record, no witnesses were brought forward to support such allegations. It was only the Village Chairman Hamis Fungameza Mbonayo who never witnessed the actual commission of the crime in the village appeared in court to testify on the death of Magagala Mazuka. It is indeed settled law that one's failure to bring material witnesses warrants the court to draw an adverse inference against him leave alone non-production in a court of the suspect Lameck Samson which possibly was mentioned in the cautioned statements.

Also during the final submission, the defence counsel raised some deficits regarding this case at hand that has been stated previously which I will explain here.

The mere fact that here is a variance of date between the information (charge sheet) and the prosecution evidence, the particulars of the offence show that the alleged murder occurred on 18/9/2018 but this allegation was different from the evidence of PW1, PW2, PW3, and PW4 alleged that on 19/9/2016 in the morning the body of the deceased was found at Ibumba Ulindwanoni, village Kaliua District in Tabora region instead the accused are jointly charged on the 18/9 /2018 at Ulindwanoni village within Urambo District in Tabora region did murder one Magagala d/o Mazuka.

As rightly submitted by the defence that it is a settled principle that a charge sheet is a foundation of a criminal trial. In the case of **Abel Masikiti v Republic, Criminal Appeal No. 24 of 2015** the Court observed;

*“If there is variance or uncertainty in the date of the charge must be amended in terms of section 234(1) of the Criminal Procedure Act, Cap.20. If this is not done the preferred charge will remain unproved and the accused shall be entitled to an acquittal”.*

The prosecution is required under section 234(1) of the Criminal Procedure Act, Cap.20 to amend the charge sheet but it was not the



case herein. Failure to make any amendment to the charge sheet occasioned a failure of justice on the part of the accused person and it is as good as the prosecution failed to prove the charge beyond reasonable doubt.

Hence failure to amend the charge sheet is also fatal and prejudicial to the accused person and it is not curable under section 388(1) of the Criminal Procedure Act, Cap.20.

This court is also of the view that upon numerous decisions, this Court has held that it is incumbent upon the Republic to lead evidence showing that the offence was committed on the date alleged in the charge sheet to which the person accused will be expected to know and prepare his reply. **In Criminal Appeals Nos. 74 of 2003 Ryoba Mabiba@Mungare v. The Republic; 222 of 2004 - Christopher Raphael Maingu v. The Republic; 144 of 2005 - Simon Abongo v. The Republic; 195 of 2009 - Anania Turian v. The Republic; and 24 of 2015 - Abel Masikiti v. The Republic (all unreported);** the convictions were quashed and the respective sentences were set aside on account that the adduced evidence showed that the offence was committed on a date other than the one alleged in the charge sheet. To this end, the shortfall concerning the variance of dates would alone suffice to dispose of the case but, for the sake of completeness, I think am obliged to as well consider other shortfalls.



The other variance noted in the information/sheet that the offence occurred within Urambo while all testified it occurred at Ibumba center at Ulindwanoni Kaliua village. He cited the case of **Naoche Ole Mbile v R, [1993] TLR 253** failure to comply with the above provision renders the trial nullity.

Another gap in this case was that PW4, F 6776 D/CPL Julius who tendered the cautioned statements was not among the witnesses listed in terms of section 246(2) of the Criminal Procedure Act, Cap.20 that he would be among the witnesses to testify in court as well as the caution statement. The said evidence was illegally admitted in the record.

As submitted by the defence counsel under section 289(1) of the Criminal Procedure Act, Cap.20 on additional witnesses for the prosecution, and the Court having examined on the Preliminary Hearing, neither PW4, F 6776 D/CPL Julius nor the caution statements were listed to be among, and there was no leave sought to add additional witness or to add exhibits to tender in evidence. However, the court noted and warned the defence counsel as an officer of the court to assist the court to arrive at the right decision? In this case, he kept silent at the outset as this did not prejudice his clients and raised his final submission.

Considering the circumstances of the case, the evidence adduced by the prosecution, and the analysis referred hereinabove, I am of the view that since the prosecution evidence was floppy because the

prosecution did not bother to do its part completely. With this, I fully differ from the Hon. Assessors that the prosecution proved the case to the required standard following the reasons above stated.

Having warned on the dangers of convicting only on the accused's person's confession statements I would decline to convict. Therefore, the accused persons are set free unless held for other lawful reasons.

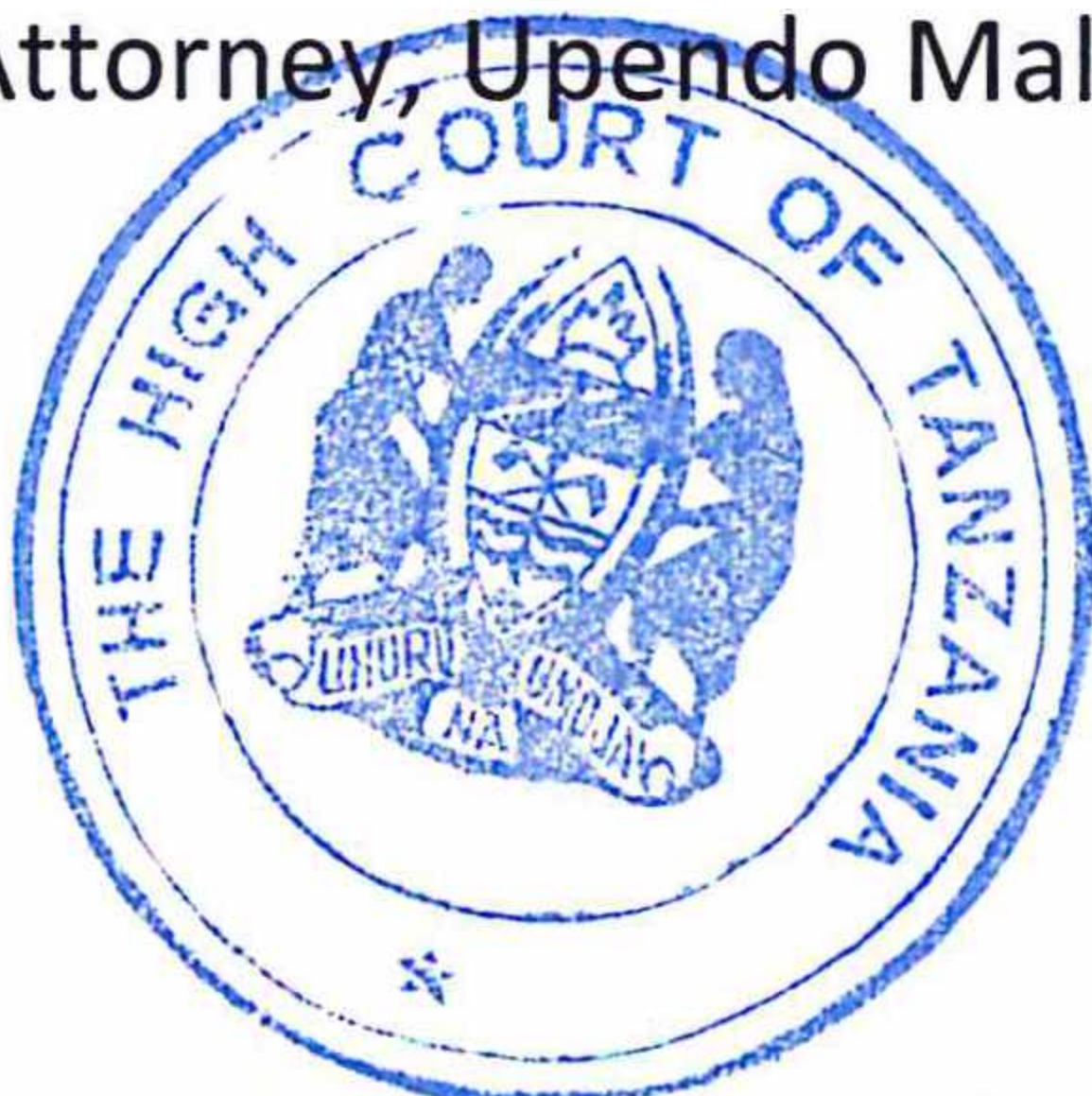
Order accordingly.

**A.A.BAHATI**

**JUDGE**

**31/5/2021**

Judgment delivered in the open court on this 31<sup>st</sup> May, 2021 in the presence of Kanisius Ndunguru, Learned Counsel and State Attorney, Upendo Malulu for Republic.



**A. A. BAHATI**

**JUDGE**

**31/5/2021**

Right of appeal explained fully.

**A. A. BAHATI**

**JUDGE**

**31/5/2021**