

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)
AT MPANDA**

CRIMINAL SESSIONS CASE NO. 53 OF 2018

(P.I. No. 20/2017 Katavi Resident Magistrates Court)

THE REPUBLIC

VERSUS

HUSSEIN S/O HASSAN @ ANTITI

JUDGMENT

26 & 28/10/2021

Nkwabi, J.:

If anyone in Makanyagio area had thought that the night of 7th June 2017 would pass calmly, that person was grossly wrong, not even Police Constable Faisal (PW1) who certainly was startled by being informed that a dead body of a male person was discovered near the room he rents at the area within Mpanda District, in Katavi region.

The accused person was arrested in connection with the murder and accordingly charged with the offence contrary to section 196 and section 197 of the Penal Code Cap. 16 R.E. 2002. It was alleged in the information that the accused person Hussein s/o Hassan Antiti on the 7th June 2017 at

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Makanyagio area within Mpanda District in Katavi Region did murder unknown person.

The accused person disputed the charge/information. He put forward an alibi and brought two exhibits in support of the alibi which was preceded by a notice of alibi duly filed on 08/09/2021 prior to the commencement of the trial. He had no witness to bear him out his defence though.

Meanwhile, in the course of the trial of this case, the prosecution is admittedly spryly represented by Mr. Gregory Muhangwa, learned State Attorney on the one hand and Mr. Gadiel Sindamenya, learned advocate equally avowedly dexterously advocated for the accused person on the other hand.

Definitely, the burden of proof lies in the prosecution to prove the offence beyond reasonable doubt. This is the cardinal principle in criminal justice provided by the law of Evidence Act, Cap 6 R.E 2019 as well as **Mohamed Said Mtula v Republic, [1995] TLR 3**. Further, speculation and

guesswork are openly unwelcome in criminal justice **Janta Joseph Komba & Others v. Republic Criminal Appeal no. 95 of 2006** and **Mohamed Musero vs. R. [1993] TLR 290 (CA)**. Additionally, Criminal trials, however, are not like a game of football but a serious business of convicting the guilty and acquitting the innocent **Hatibu Gandhi vs. R. [1996] TLR 12 (CA)**.

Cause of death of the deceased in the matter at hand according to prosecution witnesses is that the deceased died an unnatural death as he sustained multiple head injury as his head is allegedly was smashed by the accused person by use of a piece of brick hence suffered blood loss. Similarly, according to the medical report (exhibit P 4) admitted in evidence without objection during the hearing, death was caused as a result of severe head injury with hypovolemic shock secondary to severe haemorrhage.

The matters that are not disputed by the accused person are his name and his personal particulars and that he was arrested. However, he disputes that he is the offender. He maintains his virtuousness. He stressed, he confessed neither before the police officer nor to the justice of Peace, he categorically states that he was forced to sign a document which he did not make at the



police, as to the Justice of Peace, he only saw him for the first time when he came to testify in this court.

That being the position, main issues to be scrutinized and ascertained in this case are:

- i. Whether the deceased died unnatural death.
- ii. Whether the accused person is responsible for killing of the deceased.
- iii. If the 1st and 2nd issues are answered in the affirmative, then whether the accused person had malice aforethought for killing the deceased.

The prosecution case revolves around circumstantial evidence, there is also oral as well as documentary evidence (especially the allegedly confessional statements).

Several legal principles will guide this court in coming to its decision. These are:

- i. Ability of witness to name the culprit at earliest possible opportunity hence early arrest. **Eva d/o Salingo and 2 Others v. Republic [1995] TLR 220 (CAT).**
- ii. Circumstantial evidence to ground conviction must irresistibly point out to the guilty of the accused person. **Abdul Muganyizi v R. [1980] TLR 263 CA** and **Joram Ntabova & Another v R. [1980] TLR 282 (CAT).**
- iii. Retracted/repudiated confession may ground conviction if the court finds it nothing but the truth, corroboration is required however as a matter of practice and prudence. **R. vs. Gae Maimba & Another [1945] 12 EACA 82** and **Hatibu Gandhi vs. R. [1996] TLR 12 (CA).**
- iv. Grudges/hostilities and legal position, thus, if any, a high degree of consistence of the prosecution evidence is required. **Michael Haishi vs. R. [1992] TLR 92 (CA)**
- v. How accused defended himself, the accused denied he committed the offence. The case is fabricated against him. He further defended that he did not make any confession.
- vi. Weaknesses of the defence cannot be the basis for conviction **Christian Kale and Another v. Republic [1992] TLR 302**

(CAT). E.g., Contradictions and lies on the part of the accused person in his defence, can only be considered if the prosecution evidence is firm after the accused person enters his defence

Pascal Mwita and 2 Others. v. Republic [1993] TLR 295

(CAT).

The evidence of both parties in this case is that one of the residents of the house at the scene of offence, PW1 H. 577 D/Constable Faisal in July 2017, was residing alone at Makanyagio since 2016 the other tenant, Ally Mzenji, was in Zanzibar. He knows Hussein Hassan Antiti as he was living in a room close to that of his room. The accused person started living there in the year 2017.

On 07/06/2017 at 08:00 am when he was the Police Station a Police Officer Celicious told him that in the house of Abdi where he is a tenant, a person has been killed. He went to his room to know if everything was okay. He found his room was safe. He looked into the room of Antiti where he found the room open. He entered inside the room and saw blood stain on the wall of the room. There were blood marks from the room up to the ground too. He found blood stains all over the room. The accused person had told him

that he was sick suffering from disease of mind. PW1 did not see any weapon in the room.

The murder scene was inspected by PW3 H. 311 DC Emmanuel who went with other police officers as a team to the scene of offence. They visited the house and the place where the body had been thrown to. They found a dead body of a man. They looked around and saw a room which had blood on the door. They broke the door and found blood stains therein and blood trace. They asked who was the one residing in the room, they were told it was Antiti. Then they searched the room, they saw a bucket which had blood-stained clothes. The room had many properties. Then they went back to the Police Station where they started a man hunt of the one who was renting the room.

On 09/07/2017 at 09:00pm he arrested the accused person at the main bus stand in a grocery where he went to buy drinking water. He was at a corner sitting. He told him he was suspected of murder and sent him to the bus stand police out-post. PW2 H. 4119 D/Constable Ainea, a Police Officer drew up the sketch map of the scene of offence, exhibit P.1.

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The extra-judicial statement of the accused person was recorded by PW4, David Daniel Mbembela, the Justice of Peace. He recorded it on 15/06/2017 in the morning at 08:00 am as on 12/06/2017 he was busy. PW4 inspected the accused person at his (accused) will and saw he had an old healed small wound. The accused person said he was free to make a statement to PW4. In his statement (exhibit P.2) he said he had been struck by the deceased and the accused hit the deceased with a brick. In the room he hit the deceased to his death, then he went to sleep in Makanyagio Mosque. He said the accused said he was ready to freely make a statement before PW4 and insisted he had not been forced to make a statement.

The prosecution's evidence further, is to the effect that PW5 F. 2241 D/CPL. CELCIUS, recorded the caution statement of the accused person within thirty minutes only at 10:00 pm in which the accused person confessed to have killed the deceased who he arrested after stealing from his rented room. The caution statement was admitted in court as Exhibit P.3. Celcius denied that force was used to obtain the confession and stressed, the accused then was in good health condition.

The medical doctor who conducted the post mortem examination is PW6 Dr. Theopista, on 13/06/2017. She examined the body of unknown person who was male. The deceased had multiple injuries on the head. She then prepared a report to that effect which is exhibit P.4.

On being cross-examined by Mr. Gadiel Sindamenya, learned Advocate, she replied the dead body, appeared that the injury was caused with a sharp-edged object. The skull of the deceased was fractured hence brain got out.

On the prosecution side, there were too documentary evidence, exhibit P 2 the extra-judicial statement recorded by PW4 in which the accused person is allegedly readily confessed, to use his words, *"Ni kweli ninapenda kutoa maelezo mbele yako kwa hiari yangu."* He signed by writing even contrary to his claim in his defence that he does not know how to read and write.

In the extra-judicial statement, he said the house that was mentioned by the deceased is the one which he resides therein. He proceeded that he went on hitting that person with a brick on his head so that he goes to show him his

properties including certificate, bag, mosquito net, mattress and utensils and a table.

Basi mimi akili yangu ilianza kuweweseka, nikaanza kufuta ile damu, nikamtoa nje nikamuacha pale uchochoroni nilipomkuta akitokea ndani

The confession if detailed and contains the truth can be used to convict the accused person. There is a repetition of what he stated in his caution statement to PW5, he signed the caution statement like in the extra-judicial statement and fixed a thumb print. There was also, on the prosecution, exhibit P4 the post mortem examination report, the doctor opined that the cause of death is severe head injury with hypovolemic shock secondary to severe haemorrhage.

The accused person, Hussein, in his defence, put up an alibi in that on the fateful day he was in Sumbawanga as he had travelled to in April, 2017 on a date he does not remember. He came from Sumbawanga on 09/06/2017 by bus called Networking. His bus ticket was admitted as exhibit D.1. He said he was arrested on 09/06/2017 when he was from hospital. When he

reached at Bus Stand – the old one, that was the end of his safari, when he disembarked from the bus, he was stopped by police officer and was told he was under arrest. He was sent to the police out-post at bus stand and he left him there. After many hours, for 4 or five hours he was told he would be given a murder case. Later he was taken and sent to the Police Station while being beaten up. He reached at the Police Station at 09:00 pm. and was put in the police lock up. Then the OC-CID Pallangyo and F. 2241 came and when they came, OC-CID asked H. 311 where is the person who he had been phoned to give him a murder case. He had quarrelled with the police during political campaign as he is a CHADEMA member. They beat him up without any offence.

The extra judicial statement before the Justice of Peace is false as on that day (15/06/2017) he was sick being treated for T.B. at hospital, he stressed. His medical card was admitted in evidence and is referred to as exhibit D.2. He used to live at Makanyagio but at the material time he was residing in "Mji wa zamani area".

He said, the police testified alone except the doctor, is for their over benefit such as promotion. In this region murder cases are fabricated ones, he

expressed. No local leader was called to testify that is why he says this case was fabricated. He lamented the important witness Pallangyo did not come to testify as he fabricated the case on being informed by an informer who is unknown. It was during the campaign when he was a supplier of water to the CHADEMA Camp (Political Party). It is when he was arrested for the 1st time.

He is aged 28 years. When he was arrested, he was aged 28 years old. The age indicated in exhibit. D2 is the same he has today. He came to give evidence but he does not know why the defence counsel did not cross examine for him in relation to the defence. He spent the whole day at hospital on that day. He was required to give a specimen of cough on that day for examination. He denied knowing the caution statement. He was only asked of his name, and his tribe, he said.

He did not read the statement. He was made to sign by thumb print. He does not know why his defence counsel failed to object both the caution statement and the extra judicial statement towards their admission. He was

not sent to the Justice of Peace for confession. He merely saw the Justice of Peace for the first time when he came to give evidence.

He further said, the first case in respect of CHADEMA was not brought to court. He does not remember the Police Officer who beat him up, then. The Police Officers who testified in this court did not beat him during the incidence of CHADEMA. He does not know where Faisal was residing (renting a room).

In written submissions, the counsel for the accused person, Mr. Sindamenya, argued that the prosecution failed to prove its case as the case is fabricated, the evidence of witnesses were merely mental hallucinations as there is no substance in them, they contradict each other in respect of time of arrest and time recording accused person's statement, the bus stand the accused was arrested at. The object that was used to inflict the fatal blows, whether sharp object or blunt object (piece of brick). No local leaders were called to testify, even tenants of the house were not called to testify. That the accused was not at the scene of offence at the material time as he was in

Sumbawanga. He implored this court to find the accused person not guilty of the offence and ultimately acquit him of the murder charge.

On its side, the prosecution was adamant in its submissions that it proved its case beyond reasonable doubt (to the letter). That the incidence took place on 07/06/2017 at Makanyagio area within Mpanda District in Katavi region, where the accused person struck to death an unknown male person. It proved through 6 witnesses and 4 exhibits as narrated above. The alibi of the accused person is false and the bus ticket is irrelevant as he could have travelled to and from Sumbawanga on the same day. The lies of the accused person corroborate the prosecution case citing several authorities including **Paschal Mwita & 2 Others v R. [1993] TLR 295** and levelled the defence as remote possibilities which cannot displace solid prosecution evidence citing **Magendo Paulo & Another v R. [1993] TLR 29**. He urged this court to find the accused guilty of murder and convict him accordingly.

I will start discussing the 1st issue which is whether the deceased died an unnatural death. As I have indicated above, the cause of death of the deceased is well established in the evidence that is available in this case.

According to prosecution witnesses the deceased died an unnatural death as he sustained multiple head injury as his head was smashed allegedly by the accused person by use of a piece of brick hence suffered blood loss. Similarly, according to the medical report (exhibit P 4) admitted in evidence without objection during the hearing, death was caused as a result of severe head injury with hypovolemic shock secondary to severe haemorrhage. The prosecution, therefore, has proved beyond reasonable doubt that the deceased died an unnatural death. The first issue is answered by this court in the affirmative.

The next issue for consideration and determination by this court is whether the accused person is responsible for the unnatural death of the deceased. I have already indicated that the prosecution case is based on confession statements. The defence on the other hand, heavily relied on an alibi and stressed that this case is fabricated by the police for the police held a grudge with the accused on what transpired during election campaigns as he was a CHADEMA devotee.

I propose to begin looking at the probative value of the confession statements in my determination of the 1st issue. The prosecution is resolved

that the accused readily confessed to the police that is why it took a short time to record it. After that he repeated the confession before the Justice of Peace. On the other hand, the accused person strongly disputed to author the same. In the situation, I sought guidance from the authority of the Court of Appeal of Tanzania in **Kashindye Meli v. Republic Criminal Appeal No. 12 of 1996** (Unreported) (CAT) (Mwanza) and take its holding as mine in this case:

.... Like the learned trial Judge we are firmly of the view that the appellant's extra Judicial Statement was truthful. First, we can see no reason at all why the appellant could not tell PW4 (Justice of Peace) of any torture by the police if he had been tortured. Secondly, and more importantly in the statement the details pertaining to the sequence of events leading to the death of the deceased are such that no one else other than a participant to the murder could do so. In minute details the statement outlines what happened by the nature of the statement we are satisfied that the extra Judicial Statement was true and freely made by the appellant.

Had the accused person refused to confess before the Justice of Peace, then the authority that would have come to his assistance is the case of **Samson Kadeya Kazeze v. Republic Criminal Appeal No.137 of 1993** (Unreported) (CAT) (Mbeya):

... lastly the appellant complained that the trial Judge erred in admitting the confession of the appellant to the Police Officer. After the trial within trial, the trial judge ruled that the appellant had voluntarily confessed before D/SGT Dions and admitted the statement. On our part we think that he should have been more circumspect before admitting the appellant's.

Cautioned statement in view of the fact that when the appellant was taken before a Justice of the Peace to make an extra Judicial Statement no doubt to confirm what he was alleged to have stated in the cautioned statement before D/SGT Dions he declined.

If the appellant had voluntarily made the confession contained in the cautioned statement, why did he decline to do so before the Justice of the Peace?

The trial Judge gave a very curious reason for the appellant's refusal to make an extra judicial statement before the justice of the peace because an accused is freer before the Justice of the peace than before the police. In our view this is exactly the point. If the appellant felt he was not free to refuse to make the cautioned statement, then it was not freely made and it should not have been admitted.

However, we are satisfied that even without this confession, there was sufficient other evidence to support the appellant's conviction.

See also **Athuman Hussein v. Republic [1988] TLR 246** (CAT), **Hemed Abdala v. Republic [1995] TLR 172** at 174 and **William Mwakatobe v. Republic Criminal Appeal No. 65 of 1995** (Unreported) (CAT) (Mbeya)

.... In this case we are with respect to the learned trial Judge fully satisfied that the appellants confessions to the justice of peace were so detailed, elaborate and thorough that no other person would have known such personal details but the

appellants. Appellants retracted confessions were clumsy attempts to evade the consequences of their criminal acts.

The accused person's claim that the case was fabricated by the police does not find purchase with me. If the police had fabricated the case against him, what about the Justice of Peace. Had the Justice of Peace any reason to fabricate the extra-judicial statement? The answer is no, because even the defence could not dare to point a finger to him. Only it managed to say, is that, the accused saw the Justice of Peace for the first time in court implying that, then, he could have definitely not confessed before him because he was attending hospital. On this line of defence of the accused person, I agree with the view and position of the prosecution that the accused person was sent to the Justice of Peace in the morning, and after confessing, he was sent to hospital for treatment as per his appointment card, exhibit D2.

I understand that the prosecution's case on being reliant on the confession statements is backed by the authority of the Court of Appeal of Tanzania in **Paulo Maduka & 4 others v Republic, Criminal Appeal No. 110 of 2007** where the Court had these to say:

There is no doubt that a confession to an offence made to a police officer, is admissible in evidence. The very best of witnesses in any criminal trial is an accused person who confesses his guilty.

Certainly, in this case, the prosecution proved beyond reasonable doubt that the accused person freely confessed his guilty to the police officer (PW5) and the Justice of Peace (PW4) as indicated above.

Having discussed as above, I hold that both caution statement and the extra-judicial statements are truthful and comprise the true account of the commission of the offence by the accused person, I am of a firm view that the accused is responsible for the killing of the deceased. They are so detailed and explain why the accused person inflicted the fatal blows on the deceased as well as how he inflicted the same in that he inflicted them repeatedly on the head of the deceased by using a piece of brick.

As to his alibi which was backed by exhibit D1, the same is a fallacy and an afterthought and it does not assist him. If he had stayed in Sumbawanga for all that time, he would have brought, at least a witness to bear him out. I accept the claim of the prosecution the accused person fled his criminal act

lest he be held accountable, only to come back thinking that the dust had settled already and it would be difficult to bring him to the book as the incidence happened during the night. In dismissing the alibi, I am backed by

Ally Salehe Msutu v. Republic [1980] TLR 1 (CAT):

"In his alibi the appellant testified that he was in DSM for over 2 weeks before he was arrested. Since it is highly unlikely that he could have stayed alone throughout that period in DSM one would have expected him to produce witness. He did nothing of the sort and gave no explanation for not so doing. We are of course aware that as a matter of law an accused is not required to prove his alibi and it is enough for him if the alibi raises a reasonable doubt. We are however, of the view that the unknown and untested statement made by the appellant in his defence and unsupported as it was by any other evidence which in this case could easily have been obtained if the alibi had any trace of truth, has no basis in fact but is a fallacy of the appellant."

Based on the above discussion, I answer the 2nd issue in the affirmative.

The final question for this court's determination is whether the accused person had the malice aforethought in murdering the deceased. Guidance in determining such can be seen in **Saidi Ally Matola @ Chumila v Republic Criminal Appeal No. 129 of 2005** (CAT) at Tanga (unreported):

*As to the question of malice aforethought he submitted, referring to (CAT) **Enock Kipela v Republic, Criminal Appeal No. 13 of 1998**, that appellant's conduct, utterances, weapon used, the vulnerable part attacked all establish the same beyond reasonable doubt.*

... They all testified, and the court believed them, that the appellant then pronounced that he had brought the thief, picked up a hammer and struck the deceased with it on the head who lost stability and normal posture and that he was subsequently taken to the police by the appellant. The latter factor is supported by PW4, a detective police constable who was at the station.

In the totality of the evidence on record and as exemplified above we are satisfied, as did the trial Court, that it was the Appellant who administered the fatal blow on deceased's head.

The trial court was justified in disbelieving his contradictory defence by which on one hand he alleged the injury was caused by a mob attack and yet on the other he claimed the deceased stumbled on a rim and fell on an engine block. A mob which calculatedly makes just one blow, for all parameters of commonsense is difficult to comprehend. All his allegations of bad blood between him and the prosecution witnesses have no reasonable basis. He did not allege any incident between him and PW2 or PW3 which could possibly make them tell lies against him and he was specifically examined on this. That they were possible suspects is far-fetched because he himself did not allege that they specifically assaulted the deceased: a factor which could possibly make them off load the blame on him.

The accused person hit the deceased on the head by using a piece of brick several times (repeatedly). He had not only the intention of punishing a thief who stole his properties, but also to cause grievous harm to say the least. In the circumstances, his intention to kill him or at least cause him grievous

harm which proves malice aforethought. The 3rd issue is proved and answered in the affirmative.

In his submissions, Mr. Sindamenya outlined some contradictions on the evidence of the prosecution, however I am of the view that the same are minor and do not go to the root of the matter, and witnesses are not expected to be correct in minute details, see for example **Evarist Kachembeho and Others v. R. [1978] LRT 70.**

"Human recollection is not infallible witness is not expected to be right in minute details when retelling his story"

and **Dmitrive Kosya Koff and Another v. Republic Criminal Appeal No. 1 of 2001** (Unreported) (CAT) (Arusha).

We agree that there may well be some discrepancies in their evidence regarding such reckoning of time or the door through which the appellants entered the house. After all it is not unusual that in the course of normal life witnesses to the same incident give description of the incident variously. What is important is the essence of the matter and not the fine and minor details. The

incident took place in 1997 and they were testifying in 1999. So, variation or discrepancies of this nature are a common phenomenon in such cases. We think such variation and discrepancies were, but minor, they did not go to the root of the evidence.

See also **Nyakisia v. R. [1971] HCD no. 195.** Duffus P., **Spry v. P. & Lutta J. A. (E. A. C. A.) and Amiri Mohamed v. R. [1994] TLR 138** (CAT

The circumstantial evidence that the accused was residing in the room where the blood stains were found at the scene of offence as testified by prosecution witnesses and lies on the evidence of the accused person where in the cause of the trial, he claimed he does not know how to read and write corroborate the prosecution case as per **Pascal Mwita and 2 Others. v. Republic [1993] TLR 295** (CAT)

Quoted with approval the case of **R v. Erunasoni Sekoni s/o Eria and Another** (1947) 14 EACA 74.

"Although lies and evasions on the part of an accused do not in themselves prove the fact alleged against him they may, if on

material issue be taken into account along with other matters and the evidence as a whole when considering his guilt.

As to the complaint that some material witnesses were not called to testify, that are the leaders of the street and some tenants of the premises, this complaint has no merit on the strengths of **Shenyau v. Republic Criminal Appeal No. 27 of 1993** (Unreported) (CAT). (ARUSHA):

No particular number of witnesses shall in any case be required for the proof of any fact.

Finally, the first court assessor was of the opinion that the accused person is guilty of murder while the 2nd and 3rd court assessors were of the opinion that the prosecution failed to prove the charge against the accused person hence, he is not guilty. My decision is in line with the first Court Assessor who opined that the accused is guilty while I respectively differ with the (the 2nd and 3rd) who opined that the accused person is not guilty of the offence of murder.

In fine, I am satisfied that the accused person killed the deceased who is unknown male person in cold blood, in that he had intended to take out the deceased's life. The prosecution therefore has managed to prove the information/charge of murder against the accused person beyond reasonable doubt. I find him guilty of murder of the unknown male person and I accordingly convict him of murder under sections 196 and 197 of the Penal Code, Cap 16 R.E. 2002.

It is so ordered.

DATED at **MPANDA** this 28th day of October 2021.




J. F. Nkwabi
Judge

PREVIOUS RECORDS

Mr. Mwasubila: My Lord, he is the first offender, however, we pray for sentence in accordance with the law in that he has to be sentenced to death by hanging, let it be imposed.

MITIGATION

Mr. Sindamenya: My Lord, the convict is the first offender and committed the offence unintentionally, he is youthful and he suffers from T.B. We pray for a lenient sentence to him. That is all.

SENTENCE

Court: There is only one punishment for the offence of murder, that is, sentence to suffer death by hanging. As such I condemn the convict one **Hussein s/o Hassan @ Antiti** to death by hanging in terms of section 197 of the Penal Code Cap 16 R.E. 2002.

It is so ordered.




J. F. Nkwabi
JUDGE
28/10/2021

Court: Judgment and sentence delivered in open court this 28th day of October 2021 in the presence of Mr. Lugano Mwasubila, learned State Attorney for the Republic and Mr. Gadiel Sindamenya, learned advocate, for the accused person and the accused person present in person.

J. F. Nkwabi

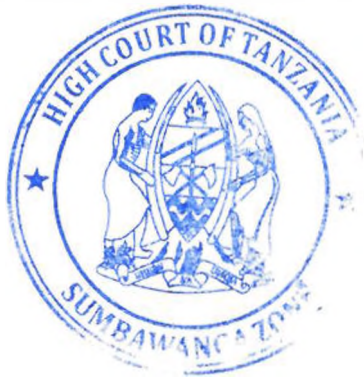
Judge

Court: Right of appeal is explained.




J. F. Nkwabi
Judge
28/10/2021

Court: Court Assessors are thanked and discharged.



J. F. Nkwabi

Judge

28/10/2021