

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

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT BABATI**

**CRIMINAL SESSION NO. 11 OF 2016**

*(Originating from P.I No. 13 of 2014 in the District Court of Kiteto at Kibaya)*

**REPUBLIC.....COMPLAINANT**

**VERSUS**

**MOHAMED SELEMANI KIDARI @ NDWATA.....ACCUSED**

**JUDGMENT**

**21/02/2022 & 08/03/2022**

**GWAE, J**

This is the second trial, following an appeal by the accused challenging this court's judgment dated 29<sup>th</sup> day of May 2017 to the Court of Appeal of Tanzania. The Court of Appeal vide Criminal Appeal No. 247 of 2017 whose judgment was delivered on the 24<sup>th</sup> February 2021 directing that the case be re-tried before another judge and a different set of assessors. Hence, the instant proceedings.

The accused, **Mohamed Selemani Kidari @ Ndwata** is charged with the offence of Murder contrary to section 196 of the Penal Code,

Chapter 16 Revised Edition, 2002. He is alleged to have murdered one **Shaibu Ramadhani** ("bodaboda" driver) on the 20<sup>th</sup> day of July 2013 at Njoro Village within Kiteto District in Manyara region. When the charge was read over to him, the accused person patently pleaded not guilty to the charge.

In compliance with the order of the highest court of the land, the case was fixed and called on before the court for re-trial and throughout its hearing the Republic was duly represented by **Mr. Shaban Mwegole**, the learned Senior State Attorney (SSA) whilst the accused was represented by **Mr. Thadey Lister** learned counsel.

In proving the case against the accused, the prosecution paraded a total of five (5) witnesses namely; Selemani Hussein Jodayo (PW1), Nyange Shabani (PW2), Twalib Shabani (PW3), Yusuph Athumani (PW4) and E. 8924 SGT Athumani (PW5). Similarly, a postmortem report was tendered (PE1) in support of the prosecution case.

Brief evidence for the prosecution is as follows; that, on the 20<sup>th</sup> day of July 2013 at about 21:00 hrs at kijiweni where bodaboda cyclists park their motorcycles, PW2 saw a passenger hired the motorcycle belonging to

the deceased. According to him (PW2) at kijiweni there were tube lights and therefore he was able to properly identify the said passenger describing him to be "tall and brownish in colour ("maji ya kunde"). Shortly after PW2 was also hired by a passenger whom he took at Sekii area. On his way back to kijiweni (motorcyclists' centre) at around 22:00 he met a motorcycle, black in colour with two people in a very high speed. And he moved forward at about 1-2 kilometers, he met a person lying alongside the road. Having gone closer, he was able to identify the person to be the one who was earlier on hired by the passenger whom he saw at kijiweni area. That person was excessively bleeding on his head.

PW2 then furnished the information to Kijiweni whereby one Adam and PW1 went to the scene of crime and took the deceased to the hospital. PW2, PW3 together with three other persons namely; Adam, Kassim and Juma went back to the scene of crime with a view of tracing the motorcycle through the marks of the motorcycle's tyres. Upon making follow ups, they came to learn that, the motorcycle was thereafter being pushed as there were footsteps of two persons and marks of motorcycle tyres. Eventually, the tyre marks and footsteps ended at a residential house of PW4, Yusuph who is the brother of the accused. There after the people who were making

follow ups of the stolen "toyo" attacked the house where the marks ended and ultimately the accused together with another person got out of the house running away. The people who bolted the house immediately started chasing them. PW2 and PW3 chased the accused whom he (PW2) identified for the 2<sup>nd</sup> time. The accused stabbed PW2 with a knife on the head and he was unable to chase him anymore as he was dangerously injured and was taken to the hospital.

PW3 then continued chasing the accused and ultimately was able to arrest him and took him to the house of PW4 where they found and seized the motorcycle therein. While PW2 and PW3 were chasing the accused, PW4 had an opportunity of running away leaving the motorcycle inside his residential house and went to his elder brother known by the name of Juma. Later a police officer came to the scene of crime and directed the people who were thereat to take the accused person and the motorcycle to the police station where they gave their statements. At the police station, the case was initially investigated for the offence of armed robbery however the charge of armed robbery was changed to murder after the victim had passed away on the 22<sup>nd</sup> July 2013, it was when E.8924 SGT. Athumani (PW5) was

assigned to investigate the murder case and according to his testimony the accused refused to have his statement recorded.

It is further the evidence by the prosecution through PW1 and PW5 that the motorcycle which was tendered during first trial of the case was handed to the deceased's father one Ramadhani Labai who appeared as PW5 during the first trial.

After the accused being found to have a case to answer, he was availed an opportunity to prepare for his defence. On the part of the defence, the version is as follows; that, on the 20<sup>th</sup> day of July 2013 at about 10:00 hrs, he boarded a motor vehicle (Noah) that was from Tanga to Dodoma via Kiteto. He boarded the said Noah with a view of going to Matui village to buy an axe for his timber business and he was to disembark at Njia Panda or Ngusero area within Kiteto District. When they arrived at Kiteto District at Bingiri area, the said motor vehicle underwent mechanical problems. It took many hours for its repairs, and after it was fixed, they proceeded with the safari. At around 17:00 the motor vehicle got another mechanical problem and it was fixed.

They arrived at Njia panda at about 24:30 hrs, as he was walking towards Matui village he met a motorcyclist heading to Ikiso area however upon his request he boarded the motorcycle for the fare at the tune of Tshs. 3,000/=. The accused further testified that as they were about to reach Matui village at the house of PW4, the motorcycle got mechanical problems and the motorcyclist and him started pushing it. The motorcyclist asked the accused to host him to the place where he was going as it was then midnight. The accused and motorcyclist reached to the house of his brother, Yusuph (PW4) and the accused narrated the whole story to his brother. He also told him that the motorcycle belonged to the motorcyclist and that he was requesting for being accommodated on that night since his motorcycle was no longer fit for travelling due its mechanical problems. PW4 let the accused and the motorcyclist to spend their night.

However, after a short while at around 15:00 they heard noise coming from outside and stones were thrown to the house. Seeing that, the accused together with the motorcyclist got out and started running in order to rescue themselves. He was nevertheless arrested and seriously injured until he lost his consciousness. He became conscious while at hospital and his legs were broken. Police officer who was there then informed him that he was under

restraint on the allegation of robbery and stealing a motorcycle. The accused insisted that he did not kill the deceased and that he was not at the scene of crime (Njoro village) and that, he is incriminated of the offence of murder just because he hired a motor cycle that he late he came to know that the same was robbed. He added that the prosecution did not substantiate that the motorcycle in question was lawful property of the deceased by producing its registration card. The defence was also able to tender the statement of PW2 which was received in evidence and marked as DE1.

From the evidence adduced by both sides, it is undisputed that the deceased was murdered with a view of robbing his motorcycle, it is further undisputed that, the motorcycle allegedly hired by the accused got mechanical problem as a result the same was pushed up to the residential house of PW4. That, on the material date, the accused accompanied by another person went to PW4's residence. It is also undisputed fact that the accused was arrested on the material date or earlier hours of the following day while running from the mob justice and that, the accused was injured and was admitted at Kiteto District Hospital and later on referred to Dodoma General Hospital where he was treated for quite a long time.

It is now time for this court to determine whether the accused person is guilty or innocent of the offence of murder in question, in doing so, the following issues have to be addressed;

1. Whether the accused person was properly identified at the scene of crime and subsequently during his apprehension.
2. Whether the doctrine of recent possession can be applied in the case at hand.
3. If the above issue is answered in affirmative whether there was proper chain of custody in relation to the alleged stolen motorcycle.
4. Whether the circumstantial evidence adduced by the prosecution is directly connected and therefore capable of drawing adverse inference against the accused.
5. Whether the accused's defence of alibi raises serious doubt to the prosecution evidence
6. Whether the prosecution has proved the accused's guilt to the required standard.

In the determination of the first issue which reads; **whether the accused person was properly identified at the scene of crime and subsequently during his apprehension.**

According to the prosecution evidence, it was PW2 who was able to identify the accused to be tall and brownish. According to him, he identified



the accused at Kijiweni (Godwon) where motorcyclists used to park their motorcycles through a help of electrical tube lights. The accused is also said to have been identified when he was running from the mob justice in order to rescue himself. These two identifications of the accused by PW2 are also reflected by the DE1, statement of PW2. As the statement of PW2 is plainly recorded on the following day that is on 21<sup>st</sup> July 2013 while his memory was fresh. It follows therefore the accused might have been identified by PW2 for two times as adduced by the prosecution side. However, in the circumstances of this case in order for the said identification to be credible it was necessary to conduct an identification paraded since the PW2 was not familiar to the accused as per his testimony and his statement (DE1) that, the one who came at Kijiweni area while waiting for passengers was not known at the place (DE1-mara alikuja bwana mmoja ambaye hatumfahamu ila maumbile yake ni marefu, mnene wastani na mweusi akiwa anatafuta usafiri....). In the situation where an identifying person alleges to be not familiar with the one whom he alleges to have identified at the scene of crime, an identification parade is necessary to test the memory or guarantee assurance of the alleged identification at the scene in terms of the suspect's descriptions such appearance, colour, types of clothes worn on the material

date, distance, conditions favourable for the alleged identification for instance moon light, electricity light etc. This position was stressed in the case of **Kamuri Mashamba vs. Republic** Criminal Appeal No. 325 of 2013 (Unreported). Court of Appeal of Tanzania with approval of decision of the Court of Appeal in **Omaeri Mbezi and three others vs. Republic**, Criminal Appeal No. 227 of 2009, where the following precautions measures, depending on the specific facts of the case to avoid mistaken identities were stressed, these are,

- a) If the witness is relying on some light as an aid of visual identification, he must describe the source and extent of that light.
- b) The witness should explain how close he was to the culprit (s) and the time spent on the encounter
- c) The witness should describe the culprit or culprits in terms of body build, complexion, size attire, or any peculiar body features, to the next person that he comes across and should repeat those descriptions at his first report to the police on the crime, who would in turn testify to that effect to lend credence to such witness evidence.
- d) **Ideal upon receiving the description of the suspect (s) the police should mount an identification parade to test the witness's**

**memory and then at the trial the witness should  
be led to identify him again** (emphasis mine")

(See also a judicial decision in **Jaribu Abdallah vs. Republic** (2003)

TLR 271.

In our instant case, I have considered the PW2's testimony together with DE1, I am of the considered opinion that, there was a need to mount a parade of identification to test the memory of the identifying person (PW2). I am holding so as it is glaringly clear from the evidence adduced by the prosecution that, the deceased in this case was a new comer at kijiweni, PW1 when testifying stated that the deceased who was his nephew came to visit him and he had spent only 4 to 5 days until when he was murdered. More importantly, the PW2's evidence is to the effect that, he was not familiar with the accused as depicted in the DE1. And above all the circumstances that led to the said identification for both the first time (no distance between the identifying person and the one allegedly identified mentioned, questionable physical descriptions) and at the second time when it was in horrifying situation. In case, conditions for identification were not favourable, it follows that corroboration is necessary (See courts' jurisprudence in **Mohamed Bakary and others v. Republic** (1989) TLR

134 in **Karanja vs. Republic** (2005) 1 EA 78). Nevertheless, a formal identification seems to be not practicable since the accused was admitted in Dodoma since 2013 to 2015 and PW2 was also admitted following injuries he sustained during the accused's arrest.

This piece of evidence regarding identification of the accused by the PW2 at the scene of the crime and when the accused was running away from mob justice is therefore doubtful or rather not sufficiently credible due to the above stated reasons unless the same is corroborated with other pieces of prosecution evidence.

Coming to the second issue, **whether the doctrine of recent possession can be applied in the case at hand.**

Examining the evidence adduced by both sides, it is evidently clear that, the motorcycle though not tendered in court during re-trial as the same was handed over to the deceased's father vide order of the court (**Opiyo, J**) made on the 29<sup>th</sup> May 2017, yet it is amply established that the same was brought by the accused and that other person to the residential house owned by PW4, the evidence to that effect is from PW3, the one who arrested the accused and seized the motorcycle from the PW4's residence, PW4 and the accused (DW1). In order to justly invoke the doctrine of recent possession,

that person must be in actual or constructive possession and the property allegedly stolen must be identified by either the victim or the ones who were familiar with the property. The Court of Appeal of Tanzania in the case of **Joseph Mkumbwa and Another vs. Republic**, Criminal Appeal No. 94 of 2007 (Unreported) provided for essential requisite for the doctrine to apply as follows;

“For the doctrine to apply as a basis of a conviction, it must be proved *first* that the property was found with the suspect, *secondly*, that the property is positively proved to be the property of the complainant, *third*, that the property was recently stolen from the complaint, and *last*, that the stolen thing constitutes the subject of the charge against the accused.”

In our instant criminal case, I am of the considered view, that the accused cannot therefore deny to have been in possession of the recently stolen motorcycle in question despite his explanations that, he hired the same from that motorcyclist whom he met at Njia Panda and that he told his brother, PW4 that the owner of the motorcycle was the one whom he requested and obtained accommodation on that particular night. Think of the evidence that, the accused told his brother so, will it raise any doubt to the prosecution that, there were two persons who went with the recently

stolen motorcycle? My answer is no since under normal circumstances, it was not possible for him (accused) to tell his brother the truth in relation to the possession of the motorcycle since it was illegally obtained. More so, it was not expected from that other person to rebut the accused's assertion that the motorcycle is not his belonging for an obvious reason, that the said person was not known to PW4, so it was easier to the accused to tell PW4 that, the motorcycle was the property of that other person. Thus, since it was the accused and that other person who undisputedly went with the motorcycle and the ones who immediately ran away from the house owned by the PW4 after the invasion by the motorcycle searching persons. The evidence that the accused person was found in possession of the recently motorcycle is credible though the accused is found disputing knowledge that, the motorcycle was stolen save that he was the one hired it from that other person, this type defence shall be demonstrated with other pieces of evidence hereinafter.

Regarding the third issue, **if the above issue (2<sup>nd</sup> issue) is answered in affirmative whether there was proper chain of custody in relation to the alleged stolen motorcycle.**

As of now as per finding in the court's determination of the 2<sup>nd</sup> issue, the accused is found to have been in possession of recently stolen property,

the property which was robbed on the 20<sup>th</sup> July 2021 at about 22: 00 -12:00 hrs and was found in the residence of PW4. It is true as contended by the defence that there was no certificate of seizure nor was there any certificate of handing over of the said motorcycle that were produced during trial and this re-trial. In my view, it was essential for those who seized it to have prepared the same however in our case that necessary procedures were skipped by investigation team or arresting civilians, thus violation of section 38 (3) of the Criminal Procedure Act, Cap 20 Revised Edition, 2019, the requirement which judicially was demonstrated by the Court of Appeal of Tanzania in the case of **Mbaruku Hamisi and 4 Others v. Republic**, Consolidated Criminal Appels No. 141, wa143 & 145 of 2016 (unreported), where the Court of Appeal reproduced the following paragraph from its earlier decision in **Selemani Abdallah and Others vs. Republic**, Criminal Appeal No. 354 of 2008 (unreported): -

"The whole purpose of issuing receipt to the seized items and obtaining signature of the witnesses is to make sure that the property seized came from no place other than the one shown therein. If the procedure is observed or followed, the complaints normally expressed by suspects that the evidence arising from such search is fabricated will to a great extent be minimized."

In our case, I have however examined the evidence, and observed the following; that, the PW2 and accused (DW1) were seriously injured at Matui village when the accused and that other person who had not been apprehended to date were chased by PW2, PW3 and others, that, the owner of the house which was greatly destroyed was not present during the seizure of the motorcycle nor was there any person in that house except those who seized it, that, there was no any claim of ownership of the motorcycle by any person including the accused during its admission. That, the evidence of tracing of the robbed motorcycle adduced by PW2 and PW3 including that of DW1 is so directly connected to the extent that nothing was left to think of a different owner other than the deceased that is the evidence regarding where the deceased was hired, murdered and from the scene of fateful incidence to the place where it was impounded.

It follows therefore, despite the fact that, the chain of custody was broken but the evidence adduced is incapable of declaring the motorcycle to be the belonging of other person than the one who was murdered in the course of stealing by the thugs. More so, it should be remembered that it is not every time when the chain of custody is broken, the relevant property cannot be produced and received by the court in evidence regardless of its



nature (See a decision of the Court of Appeal in **Joseph Leonard Manyota vs. Republic**, Criminal Appeal No. 485 of 2015 (unreported)).

Now, to the fourth issue, **whether the circumstantial evidence adduced by the prosecution is directly connected and therefore capable of drawing an adverse inference against the accused.**

Considering the prosecution evidence which is mainly circumstantial in that the, the accused person was seen at the scene of crime while hiring the deceased's motorcycle, PW2 also testified to have seen a motorcycle black in colour being speedily ridden and while with two persons. When PW2 moved ahead, he saw the deceased person lying while excessively bleeding and unconscious. Later on, a tracing of the deceased's motorcycle was done, marks of the motorcycle's tyres were followed and shortly the motorcycle searching people, PW2 and PW3 inclusive saw both motorcycle's tyres marks and footsteps of two persons.

Furthermore, the marks of motorcycle tyres and footsteps led the PW2, PW3 and others (deceased's motorcycle searchers) to the place where the robbed motorcycle was found that is in the house of PW4 and it was when PW2 has testified to have another opportunity of identifying the accused person for the 2<sup>nd</sup> time to be the one whom he formerly identified

at motorcycles' operating centre. This piece of evidence is corroborated by DE1 whose relevant parts are reproduced herein under;

“...walianza kukurupuka na kuanza kukimbia, idadi ya waliotoka ndani ni wawili na mmojawapo nilimtambua ni yule ambaye alikuwa anakodi pikipiki ya swalehe.....mara baada ya kuona hivyo tuliamua kumfukuza mimi nikiwa nyuma yake nilifanikiwa kumpiga fimbo sehemu za shingoni.....”

If follows therefore, the available prosecution evidence which is incriminatory against the accused is circumstantial evidence as already stated above as there was no person who was seen murdering the deceased and or grabbing his motorcycle. The quality of circumstantial evidence required to prove the charge has been discussed in numerous decisions of our courts such as in the case of **Republic vs. Kerstin Cameron** (2003) T.L.R. 84, the Court of Appeal of Tanzania set the following applicable principles for grounding a conviction on circumstantial evidence, namely;

- (i) The evidence must be incapable of more than one interpretation;
- (ii) The fact from which an inference of guilt or adverse to the accused is sought to be drawn, must be

proved beyond reasonable doubt and must clearly be connected with the facts from which the inference is to be drawn or inferred;

- (iii) In murder cases, evidence should be cogent and compelling as to convince a jury, judge or court that upon no rational hypothesis other than murder can the facts be accounted for.

Applying the above principles to the instant case, it is clear that the evidence available against the accused, connecting him to the offence is that of PW2 as intimated herein above. To be clearer, there is minor uncertainty between where the deceased's body was found lying alongside the road and when PW2 met two persons in the black motorcycle speedily ridden (1-2 kilometers).

The accused's version is that he hired the motorcycle at Njia Panda. On the other hand, he admitted to have boarded the deceased's motorcycle ridden by that other person who was heading to Ikiso area as opposed to Matui village but he patently denied to have involved in the murdering of the deceased. I am now asking myself, if there is no dispute from both sides, when I objectively assess the testimonies of the parties' witnesses (PW2, PW3 and DW1), that, the people who were searching the deceased's motorcycle initially traced the marks of motorcycle's tyres and shortly after

they saw footsteps of two persons. Thus, they started following marks of both the motorcycle's tyres' marks and footsteps which ultimately led them to the house of PW4. The prosecution evidence which is admitted by the accused person in that, the motorcycle got mechanical problems after a certain distance and that the same was pushed up to the PW4's residence which means there were footsteps of two persons (accused and that other person whom he said he hired his motorcycle) and marks of the motorcycle's tyres.

Taking into consideration that the accused person is said to have been identified where the deceased was hired (kijiweni area) at 21:00 -22:00 hrs, the evidence adduced by PW2 that at 22: 00 hrs when he was turning back to kijiweni from sekii area he met two persons boarded in the black motorcycle which was ridden in high speed, the distance from where PW2 met the said persons (1-2 kilometers), undisputed fact from both sides that, marks of motorcycle's tyres followed by footsteps leading the house of PW4 where the deceased's motorcycle was impounded, 2<sup>nd</sup> identification of the accused by PW2 at the house of PW4, the subsequent conducts of the accused and his colleague of running and stabbing PW2 with knife in avoiding arrest. These pieces of evidence are incompatible with the

innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt unless the accused person has raised serious doubt in his defence to these pieces of evidence. Hence, the circumstantial evidence in question is capable of drawing an adverse inference against the accused.

**Now to the 5<sup>th</sup> issue on whether the defence of alibi raises doubt to the prosecution evidence**

Ordinarily, the defence is required to give a notice of its intention to rely on the defence of alibi to the trial court and prosecution as well before the hearing pursuant to section 194 (4) of the Criminal Procedure (supra), however in our case, the accused through his counsel gave notice of its defence of alibi in the course of hearing of the prosecution case under section 194 (5) of the Act.

Now it is the duty of the court to assess the defence of alibi given by the accused. The particulars of the said defence were to the effect that, the accused was not at Njoro village at 21:00 hrs to 12:00 hrs of the material date (20/7/2013) since he was on the way from Pori No. 2 where his residence was/ is, to Matui village and that he started his safari from 10: 00

hrs by using motor vehicle make Noah which was from Tanga to Dodoma via Kiteto District. According to his defence, the motor vehicle, severally suffered from mechanical problems forcing him to arrive at Njia Panda area late that is at about 24: 30 hrs, the night of 21/07/2013 where he hired the motorcycle which was heading to Ikiso and started his journey to Matui however the said motorcycle got mechanical defects.

It is common ground that whenever the accused sets up a defence of alibi that, he was not at the scene of crime on the material date he or she does not assume any responsibility for proving the alibi and it was upon the prosecution to negative or disprove such alibi by evidence and it is upon the trial court to evaluate the evidence of alibi alongside the rest of the evidence. This position was correctly stressed in **Sekitoleko v. Uganda** (1967) 1 EA 531 where it stated;

It is a general rule of law that the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else”.

(See also **Reginam 1v Johnson** (1962) 46 CAR 55

Despite the fact that, the accused does not bear the duty of proving his defence of alibi beyond reasonable doubt yet he ought to have at list proved that he really travelled by the said motor vehicle make Noah by tendering a ticket or any other piece of evidence. More so, I have examined the evidence of both sides and found that it is highly probable that the accused was seen at the centre (at Njoro area) and the one whom PW2 met at 22:00 hrs while boarding on the deceased's motorcycle. The evidence of PW2 is assessed credible for an obvious reason that if for reason best known by himself intended to incriminate the accused, why he did not testify that he identified the accused when he saw the motorcycle being speedily ridden in a short distance before he arrived at the scene of crime. Did PW2 have any ill motive against the accused he would have testified that he identified him (accused) when he spotted two persons boarding on the motorcycle and the same would have been reflected in the DE1, his statement recorded by police on the following day (21<sup>st</sup> July 2013).

My holding is also supported by the accused person's reply when cross examined by the counsel for the Republic as whether it is possible for a person from Njoro village to go to Matui village and vice versa on the same day, for clarity his reply is reproduced herein under;

“It is possible for a person to go to Njoro village from Matui village and turn back and vice versa. Hence, it is possible to be seen at Matui village and Njoro village within a short period”.

That being the court’s findings after having thoroughly considered the evidence adduced by both sides, I therefore find that the accused’s defence of alibi does not raise any serious doubt as to the prosecution evidence since it was possible for the accused to be at Matui village and shortly thereafter to be at Njoro village and vice versa depending on the nature of transport used.

In the last issue, **whether the prosecution has proved the accused’s guilt to the required standard.**

It is fundamental principle that, in criminal cases except in special cases, the burden of proof always lies on the shoulders of the Prosecution side and the standard of proof is beyond reasonable doubts (See section 3 of the Law of Evidence Act, Cap 6, R.E, 2019).

Considering the prosecution evidence, that, the accused was identified by PW2 at Njoro village especially at Kijiweni where the deceased parked his motorcycle on material waiting for passengers, though this piece of evidence requires corroboration nevertheless the same is sufficiently corroborated by



the PW2's evidence of seeing two persons embarking into motorcycle which was in high speed followed by undisputed fact that, the accused and another pushed the motorcycle from a certain area (lala) till to the house of the accused person's brother, PW4. The corroborative evidence of PW4, that the accused was taller than that other person who went with accused at his residence, this piece of evidence corroborates the evidence of the PW2 who testified that the one who hired the deceased was tall. Credibility of PW2 whose testimony is found to have not been tainted by any ill motive as he did not purport to have identified the accused while he saw two persons on the motorcycle in black colour (The deceased's property) as well as that of PW4 whose evidence is credible and the same is plainly found to have not been tainted with any ill wishes. Had PW4's evidence tainted with ill motive against the accused he would have testified that the accused told him that the motorcycle brought to his house was a fruit of robbery instead of, he was told by the accused that the motorcycle was the property of the accused's colleague.

The accused's version that he hired the motorcycle at Njia Panda with a view of exonerating himself from being the one who robbed the deceased, I find this version to be an afterthought, the prosecution evidence is so direct

and irresistibly connecting the accused with the offence. Had the evidence of identification of the accused at Njoro and at Matui village especially when getting out of the house of PW4 taking into account that no formal identification was conducted not supported by other pieces of evidence, this court would apprehend reasonable doubt as to the accused's guilt. As it is, I find that, there were no co-existing circumstances which would weaken the prosecution evidence or raises serious doubt. I would like to subscribe my holding, the Court of Appeal of Tanzania in **Crospery Ntagalinda @ Koro vs. Republic**, Criminal Appeal No. 312 of 2015 (unreported) had the following to say;

"It is necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference."

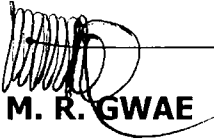
(See **Simoni Musoke vs. Republic** (1958) 1 EA 715).

Having carefully considered the entire evidence adduced by the parties as demonstrated herein above and having cautioned myself of the danger of convicting on the basis of circumstantial evidence and having taken into account that there was no possibility of that other person allegedly hired by accused to take any passenger after the banditry incidence (shortly after

robbing it from the deceased person). I am now fully satisfied without any scintilla of doubt that, the accused person's guilt has been sufficiently established of the offence of murder as unanimously opined by the three court's assessors whom I sat with throughout the re-trial of the case.

In the eventuality, I unhesitatingly find the accused person guilty as charged, therefore I hereby convict you **Mohamed Selemani Kidari @ Ndwata** of the offence of Murder contrary to section 196 and 197 of the Penal Code, Cap 16 Revised Edition, 2002

It is so ordered.

  
**M. R. GWAE**  
**JUDGE**  
**08/03/2022**

### **SENTENCE**

According to section 197 of the Penal Code, Chapter 16 Revised Edition, 2002 read together with section 322 of the Criminal Procedure, Cap 20 Revised Edition, 2002 the only sentence for the offence of murder c/s 196 is death, the accused is consequently sentenced to death whose execution is to suffer death by hanging.

It is so ordered.



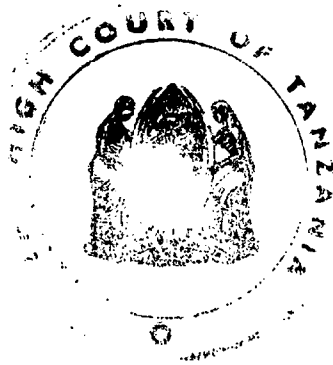
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**M. R. GWAE**

**JUDGE**

**08/03/2022**

**Court:** Right of appeal fully explained for an aggrieved party



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**M. R. GWAE**

**JUDGE**

**08/03/2022**