

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SUMBAWANGA
AT SUMBAWANGA

CRIMINAL SESSION CASE NO. 38 OF 2021

REPUBLIC

VERSUS

ADAM ^{s/o} MIZIMU.....ACCUSED

JUDGMENT

27th March, 2023 & 3^d April, 2023

MRISHA, J.

This criminal session case portrays a unique situation in which a person is found dead in unusual circumstances, and it becomes very difficult to ascertain on the spot who actually caused his death, until when the good Samaritans provide some sufficient information to the Justices of Peace, the law enforcement agent(s) and the court of law about what transpired with the deceased person before and after his demise.

It goes like this; the accused person **Adam ^{s/o} Mizimu**, the deceased person **Alex ^{s/o} Mwananjela** and one **Said ^{s/o} Kazanda** were good friends who used to live together in one house belonging to **Ester ^{d/o} Silas**, their landlady, at Ilanga Village, within Sumbawanga District in

Rukwa Region. Their main economic activity was fishing and selling of fish. On 21.09.2019 in the evening hours the accused was seen by the said landlady being with the deceased and one **Said ^s/o Kazanda** while leaving home and proceeded to a local bar to enjoy some local brew after spending the day fishing and selling their fish.

Beyond their landlady's expectation, the deceased and the rest of his two friends did not return home until the morning of the following day when the deceased's body was found in an unfinished house which is closer to the one, he had rented with his two friends.

Following death of the deceased person, the said accused person was arraigned before this court with one count of murder contrary to section 196 and 197 of the Penal Code, CAP 16 R.E. 2019(the Penal Code). In the above information it is alleged that on 22.09.2019 at Ilanga Village within Sumbawanga District in Rukwa Region the accused person **Adam ^s/o Mizimu** murdered one **Alex ^s/o Mwanajela**.

He pleaded not guilty to the above charge, hence the prosecution which was represented by Ms. Safi Kashindi and Ashura Ally Pazi, learned State Attorneys, brought seven witnesses and three exhibits in order to prove its case against him. **Didas ^s/o Julius@ Massanja** testified as PW1, the police officer No. **H.9960 D/C Elias** testified as PW2, Doctor

Crispin ^s/o Gilata testified as PW3, **Ester ^d/o Silas** who testified as PW4 and **Suleiman Haroub Juma** who testified before this court as PW5.

The rest of the prosecution witnesses were **Agness ^d/o Mwananjela** who testified as PW6, and the Police officer **D/Sgt Alex** who testified as PW7. The exhibits tendered were the Post-mortem examination Report, the Accused Caution Statement and the Sketch map of the crime scene. The same were admitted as exhibits P1, P2 and P3 respectively.

The prosecution evidence adduced by the above witnesses can be summarised to the effect that on the material date which is 22.09.2019 morning the body of the above-mentioned deceased person was found by the passers-by including **PW4**, lying on the floor of an unfinished house which is adjacent to the one belonging to **PW4**.

The deceased's body was seen with some fresh blood on the nose and its face was covered by some muds and there were some marks from outside leading to the said house which indicated that after killing the deceased the assailants dragged the deceased body to that unfinished house.

Having witnessed such unusual incident **PW4** reported the matter to one **PW1**, a Hamlet Chairman who arrived at the scene of crime and

she told him that in the evening of 21.09.2019 she had seen the accused leaving his house with the deceased and one **Said s/o Kazanda** and that the three were heading to the local bar.

PW4 told the said **PW1** who is a Hamlet leader, that the accused, the deceased and **Said Kazanda** did not come back until in the morning of the following day that is 22.09.2019 when she saw the accused person near her house but he disappeared after people discovered the deceased's body in the unfinished house.

The matter was reported to Muze Police Post, the police arrived at the scene of crime with a doctor and interrogated **PW4**, deceased relatives and other villages. Then **PW7** drew a sketch map and thereafter **PW6** who is the deceased's relative, identified the deceased body and introduced the deceased to **PW3**, a Medical Doctor of Mtowisa Health Centre Sumbawanga District, who then conducted a post-mortem examination of the deceased body to ascertain the cause of deceased death.

At all this time neither the accused person, nor **Said s/o Kazanda** appeared at the scene of crime. Then an investigation of the case was mounted and on 06.05.2020 the accused person was arrested by **PW2** at Kasisi Village who remanded him in custody due to lack of power at

Muze Police Post, until the following day morning when he handled him over to **PW5**. The accused was then interrogated by **PW5** on 22.09.2019 at 0800 hours.

Also, **PW5** testified that before interrogating the accused person he introduced himself to him who also introduced himself to him, then he informed the accused person of all his rights which include the right to choose whether or not to make his statement before him, the right to call his relative or a lawyer, the right to choose the language to be used and also the right to reduce his statement into writing or let him to write the same.

He said the accused consented to make his statement in Swahili language and let him to write it. He also said that after writing the statement he read it over to the accused person who certified to him that what he had written therein was correct; finally, the accused endorsed on the statement and he did the same.

It was also the evidence of **PW5** that after complying to all the above legal requirements he began to record the accused's statement who confessed to have caused the death of the deceased person by assaulting him on his nose with a fist alleging that the deceased was

pressing him and one **Said s/o Kazanda** to give him his share of fish sale proceeds which they had sold on 21.09.2019 after fishing.

PW5 went on to testify that the accused person through his confession the accused said they were all drunk as they were going back home after drinking local brew at the local bar, but the deceased was too much drunk and wanted to fight them claiming for his share, that is why he decided to assault him, as indicated above.

Regarding the documentary evidence, there was no objection from the defence side in relation to exhibit **P1** which was tendered by **PW3** and exhibit **P3** which was tendered by **PW7**. **PW3** and **PW7** read the contents of the exhibits each of them tendered after the same were cleared for admission.

As for exhibit **P2** which is the accused Caution Statement, Mr. Peter Kamlyalile, learned Advocate representing the accused person, objected **PW5's** prayer that the same be admitted by this court as an exhibit to form part of the prosecution evidence.

He submitted that the same contravened the provisions of section 50(1)(a) of the Criminal Procedure Act, CAP 20 R.E. 2022 (the CPA) which requires the same to be recorded within four hours period. His objection was opposed by Ms. Kashindi who said the same did not

contravene the above provision of the law and that the omission by **PW5** to record accused's statement within four hours, did not go to the root of the case at hand because the evidence of **PW5** which is corroborated by that of **PW2**, reveals that **PW5** failed to record the said statement within the prescribed period due to complication resulted from lack of electricity at Muze Police Post.

Having heard the contentions from counsel for both parties, I was convinced that the modus operandi applied by **PW5** in recording of the accused's Caution statement did not contravene the provisions of CPA as the same was cured by section 51(1) of the CPA which provides the exceptional circumstances, and the accused was not prejudiced anyhow. Hence, I sustained the prosecution's prayer and proceeded to admit the accused caution statement as indicated above. Then **PW5** read the contents of Exhibit **P2** aloud as required by the law.

Each of the above witnesses was cross examined and some were re-examined after adducing their evidence. When cross examined by the defence counsel **PW1** said the deceased died at night on 22/09/2019, however he did not know whether he died on 21/09/2019 or 22/09/2019. That he participated in the process of drawing sketch map from the start to the end, that the owner of the house is the one who

informed Police Officer who draw Sketch map. **PW1** also replied that the sketch map shows the deceased person is **Alex s/o Mwananjela** and that the killing was committed on 22/09/2019 at 07:00 hours. He also said he knew the accused person before the incident of murder.

He added that he didn't see the accused person killing the deceased person, but he found many people at the crime scene. On being re-examined **PW1** said that he was informed about the incident of murder on 22/09/2012 at around 07:00 hours and that he guided the police officer in the process of drawing a sketch map.

Also, in reply to the cross-examination questions **PW2** said the investigator in this case is **PW5**, that the deceased died on 22/09/2019, he know the persons who killed the deceased are **Adam Mizimu** and **Said Kazanda**, he did not see them killing the deceased, but he received a hearsay information from the neighbors that **Adam s/o Mizimu** killed deceased.

He continued to respond that the informers told him that the said two suspects were living with the deceased person in the same room and that on 21/09/2019 they saw the deceased together with his two friends **Adam s/o Mazimu** and **Said s/o Kazinda**, but the two disappeared after the incident. He added that upon reaching at the scene of crime he

saw the deceased with no injuries on the face and head, but he was bleeding on the nose and his face was covered by mud. He also said that **PW5** interrogated the accused person around morning and not at night. Finally, **PW2** said the deceased person before his death was with the accused person and **Said s/o Kazinda**.

In his reply to re-examination questions, **PW2** said he testified in court that the accused person and **Said s/o Kazinda** were together with the deceased and that he got that information after interrogating the deceased's relatives and the neighbours.

PW3 when probed by the defence counsel said that exhibit **P1** which is a Post mortem report is correct and true. In the form the words "severe head injury" is not there, the only words used are "head injury". That Head injury and severe head injury are different; he prayed for this Court to take the words written in his Report i.e. head injury. He said the deceased had head injury, that the person who has severe head injury can take between half an hour to two hours before he dies.

He added that it is a suspicion that the deceased died between 00:00 hours to 01:00 hours and that the information he received is that the deceased was injured on 22/09/2019. That the time he filled in the form shows it was on 21/09/2019 which is the date deceased sustained

injury. He also said he was having 6 years' experience at the time he filled report and it was not his first time to fill a form similar to that. He added that the deceased had no big injury on the face; also, there was no big injury on the head of the deceased body.

On being re-examined **PW3** said he conducted Post mortem examination on 22/09/2019 which he documented as the date of deceased's death. That the incident happened at night and the deceased was injured on 23:30 hours and he suspected that he died within two hours at midnight that is between 00:00 hours to 01:00 hours after he was injured.

He also clarified that severe head injury is an outcome of the deceased before suffering death and the deceased person before he died went through a series of events. **PW3** also said that the post mortem Report was filled properly and all information which was filled was correct

On her part **PW4** when cross examined said Alex died on 22.09.2019 at around 07:00 hours, she saw the deceased on that date and time mentioned, she did not know whether he died on 21.09.2019 or 22.09.2019, that **Adam s/o Mazimu** resides at Kasisi village. That she didn't know where **Adam s/o Mizimu** slept on 22/09/2019, but she

saw him in the morning. That on 21.09.2019 at around 18:00 hours she saw **Adam s/o Mizimu** with the deceased; they went to the bar.

Also, **PW4** said she did not know who was with the deceased at night and that she did not see the person who killed **Alex s/o Mwananjela**, nor did she tell anyone that **Adam s/o Mizimu** and **Said s/o Kasanda** killed the deceased. She also said that she saw deceased body; he was bleeding on his nose, not on his mouth and that the deceased's body had no swell on his face, but he was covered with sands.

When re-examined **PW4** said that she saw the deceased with **Said s/o Kazanda** and **Adam s/o Mizimu** on 21/09/2019 at around 18:00 hours, but thereafter she did not see the deceased again until on 22/09/2019 when she saw the body of the deceased to the unfinished house. That on 22/09/2019 she saw Adam at home and there was an incident of murder of Alex that Alex and Adam were friends. It was not right for Adam to leave the place because his friend has got problem/died.

PW5 when cross examined said he was the investigator of this case. That the deceased was injured on 21/09/2019 at around 23:00 hours and that he died due to injuries caused on 21/09/2019. On 22/09/2019

deceased was not injured, also on the same date deceased was not beaten by accused person. That after medical examination on 22/09/2019 deceased was found died; he can say deceased died on 22/09/2019. He knows the Post mortem form. The date of the death of deceased person should be filled in the Post Mortem report.

That he and his fellow policemen found deceased dead on 22/09/2019 in the morning. That a medical doctor is the one can provides the exactly date when the deceased died because has experience and he is a professional. That according to exhibit **P2** it shows that the deceased was injured on 21/09/2019 around 23:00 hours and that the deceased person is the one who started fighting, and he was beaten one punch on his nose and no weapon was used. That on 06/05/2020, **PW5** was at Muze Police Post, he interrogated the accused person on 07/05/2020 at around 0800 hours and he confessed. He did not interrogate the accused at mid night.

That the accused was residing at Mnazi village with his family but because of his fishing business he slept at Ilanga village. At Muze Police Post there was no solar energy; they used a mobile phone torch.

That before he started interrogating the accused, he saw him with good condition and he also asked him if he had any problem and replied he

was ok. The accused confessed he committed the offence but **PW5** did not send him to the Justice of Peace. In Muze village there is Executive village chairman. On 2019 there was a Primary Magistrate Court at Muze village. That he knows the Executive village chairman is a Justice of Peace, but he did not send the accused to the Executive village chairman, even to the Primary Court Magistrate. That he did not see the accused person kill the deceased. When re-examined **PW5** said the incident of death happened on 22/09/2019.

PW6 when probed by the defence counsel said that the deceased person died on 22/09/2019, but she did not see accused person killing the deceased. She said she did not know who killed the deceased. The last to be cross examined was **PW7**. In responding to cross examination questions **PW7** said used a tape measure to get distance from one point to another, that he from the deceased house and the house in which the deceased body found, was three meters; it is not a long distance. That according to village chairman the incident happened on 22.09.2019, the sketch map was drawn on 22.09. 2019. He returned to Muze Police Post and opened a case file of murder and continued with investigation.

PW7 added that all information filled in the sketch map is correct. The map shows deceased died on 22/09/2019 at around 07:00 hours. That

point A-B is closer to point A-D even by looking on the sketch map. He was there when post-mortem examination was conducted by a doctor and participated when doctor conducted the same. The Post mortem report shown that the death was happened at 23:00 hours on 22.09.2019. Upon being re-examined **PW7** said the death of the deceased occurred on 22/09/2019 that is according to the information was received.

After the closure of the prosecution case the accused was found with a prima facie case in respect of information of murder which he stands charged. Having being informed of his rights of defence he began to enter his defence as the sole defence witness (**DW1**) with the aid of his advocate.

He testified that he was residing at Mnazi village, Kasisi hamlet, he was a fisherman. That the deceased **Alex s/o Mwananjela** and **Said Kazanda** were his partners as they used to do fishing together. On 21/09/2019 he was doing fishing with **Alex s/o Mwananjela, Said s/o Kazanda**; they returned from fishing around 1600 hours.

He went on to say that at around 06:00 hours evening he was together with the deceased and one **Said s/o Kazanda** but left them on the way and went to his home which is Kasisi Hamlet, the two persons

reside at Ilanga village, Masatwe hamlet. That on 21/09/2019 he slept at his home, Kasisi village and **Alex s/o Mwananjela** remained with **Said s/o Kazanda** as they were residing together at the same house.

He also testified that on 22.09.2019 he left home around 09:00 hours and went to his colleagues' place in order to go for fishing, but when he reached to the house, they were living he found a lot of people in their house; his colleagues were not there. He asked persons what happened and they replied to him that his friend who is **Alex s/o Mwananjela** whom they used to fish together died. Thereafter he told the deceased's relatives that he was going to hide the fishing tools first at the place called Forodhani. Thereafter he returned back at the funeral ceremony and participated in the deceased's burial ceremony.

That after the burial of deceased body he and other people continued with funeral ceremony for two days. Thereafter, he continued with his fishing activities until on 06/05/2022 when he was arrested at Mnazi, Kasisi area and was charged with the offence of murder of **Alex s/o Mwananjela**. That the information charge shows that he killed the deceased on 22/09/2019, but he denied to have killed the deceased.

DW1 also testified that he neither resided with the deceased person nor sleeping with them. That he did not know that the deceased person was beaten and he is not the one who beat **Alex s/o Mwananjela**. He added that on 21.09.2019 he left the deceased person with **Said s/o Kazanda**. He concluded that he did not kill **Alex s/o Mwananjela** and prayed this court to dismiss the information and acquit him so that he can join his family.

When cross examined by Ms. Ashura Ally, **DW1** responded that resides at Mnazi, Kasisi area with his family, that his wife is **Eliminata d/o Didas**, and three children. That he made a statement at Police Station and the same was read over before this Court. That he heard his statement when it was ready over. **DW1** also said he was beaten at Police Station but he did not say before the Court that he was beaten when **PW5** prayed to tender his caution statement.

He also replied that on 21/09/2019 he went to his home leaving behind his colleagues and that he found his family at home, but he did not see the importance of calling anyone whom he had found at his home place. Finally when the court asked him some questions for clarification **DW1** responded by saying that he told **Deus s/o Donat, Agness d/o Mwananjela, Side s/o Mwananjela** that he was going to

Forodhani/customs to hide the fishing tools belonging to him and his colleagues. That he was told by **Ester d/o Silas** that she found deceased died in the unfinished house.

As it has been indicated above the accused **Adam s/o Mizimu** stands charged for one count of Murder contrary to section 196 and 197 of the Penal Code. Section 196 establishes the offence of murder while the later provides a penalty for an accused who is found guilty and convicted for committing such homicide offence.

The former provision provides that, *"Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder."*

Thus, in order to establish an offence of murder as per the above provision of the law, one has the duty to prove all ingredients forming the said offence beyond any reasonable doubt. Such duty is solely casted on the prosecution side, and not the accused person, save for some exceptional circumstances. The accused need only to raise some reasonable doubts on evidence adduced against him for him to be given a benefit of those doubts.

The basis in which such prosecution duty is provided can be ascertained in a number of cases and provisions of the law which are section

110(1)(2) and 112 of the Evidence Act, CAP 6 R.E. 2019 (the TEA). Also, in the case of **Maliki George Ndengakumana v. Republic**, Criminal Appeal No. 353 of 2014 CAT at Bukoba (Unreported), the Court of Appeal stated that,

"It is the principle of law that in criminal cases the duty of the prosecution is two folds, one, to prove that the offence was committed and two, that it was the accused person who committed it." (Also, see the case of **Antony Kinanila & Another v. The Republic**, Criminal Appeal No. 83 of 2021, CAT at Kigoma (Unreported) in which the Court of Appeal cited with approval the English case of **Miller v. Minister of Pensions** (1972)- 2ALL ER 372.

Before determining whether the prosecution has properly exercised the above legal duty, I find it apt important to state that the prosecution case is based on circumstantial evidence. This is because none of the seven prosecution witnesses has testified to have seen the accused person killing the deceased person on the material date. That being the case, then I have to consider the principles governing the applicability of circumstantial evidence to see whether the available evidence meets the conditions for applicability of circumstantial evidence.

In the case of **Jimmy Runangaza v. Republic**, Criminal Appeal No. 159 of 2017(unreported) three conditions for the circumstantial evidence to be relied upon to mount a conviction were given. In providing the same the Court of Appeal stated, as follows: -

*"In order for the circumstantial evidence to sustain a conviction, it must point irresistibly to the accused's guilty (See **Simon Musoka v. Republic**, [1958) EA 715). Sarkar on Evidence, 19th Ed. 2003 Reprint Vol. I page 63 also emphasized that on cases which rely in circumstantial evidence, such evidence must satisfy the following three tests which are:*

- 1) the circumstances from which an inference of guilty is sought to be drawn, must be cogent and firmly established;*
- 2) those circumstances should be of a definite tendency unerringly pointing towards the guilty of the accused; and*
- 3) the circumstances taken cumulatively, should form a chain so, complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else."*

Another condition was added in the case of **Mark s/o Kasimiri v. The Republic**, Criminal Appeal No. 39 of 2017, CAT at Arusha (unreported) at pages 16 & 17 in which the Court of Appeal stated thus,

"iii. That the accused person is alleged to have been the last person to be seen with the deceased in absence of a plausible explanation to explain away the circumstances leading to death, he or she will be presumed to be the killer..."

I will be guided by the above principles to determine whether the prosecution side in the present case has sufficiently exercised its duty to the required standard in proving that the offence of murder of **Alex s/o Mwananjela** was committed and that it is the accused person one **Adam s/o Mizimu** who committed it.

Four questions need to guide this court in testing whether such duty of the prosecution has been properly exercised. One, is **Alex s/o Mwananjela** dead? Two, if the first is answered in the affirmative, then the second will be, was his death unnatural? Three, is it the accused person who caused his death? And fourthly, if it is the accused person who is responsible for causation of the deceased's death, then the fourth and last question is did he intend to do so?

I will deal with the first and the second questions cumulatively as they are intertwined. It the prosecution evidence that **Alex s/o Mwananjela** was found dead on 22.09.2019 in the morning and his body was found in the unfinished building. That is grasped from the evidence of **PW4** which is corroborated by the evidence of **PW1, PW2, PW3, PW5** and **PW7** who arrived at the scene of crime on different times and found the deceased's body lying on the floor of an unfinished building which is located near the house of **PW4**.

The evidence of such prosecution witnesses shows that the deceased's body was seen with some muds on its face and its nose was bleeding and his clothes had blood scars. Also, **PW3** who conducted a post-mortem of the deceased body and tendered the same as exhibit **P1** testified that the cause of death of the deceased was due to haemorrhagic shock due to being hit by a blunt object.

Not only that, but also the above prosecution evidence was not denied by the accused person who according to the evidence of **PW4** which was also corroborated by that of **PW1** and **PW5** whose evidence reveals that he the one who recorded the accused's caution statement on 07.09. 2019. In my view such evidence clearly proves the **Alex s/o Mwananjela** is dead and his death was unnatural.

As to who caused his death, it the evidence of **PW4** that on 21.09.2019 at evening hours she saw the accused with the deceased person and one **Said s/o Kazanda** leaving her home and went to the local bar to take some drinks. Beyond her expectation she neither saw the deceased nor the accused nor **Said s/o Kazanda** getting back after drinking until the following day of 22.09.2019 morning when she found the deceased body in the unfinished house near her home when she was on her way to fetch some water.

It also the evidence of **PW4** that the accused was around on that following day but he suddenly disappeared until when he was apprehended on the next year. **PW4's** evidence is corroborated by the evidence of **PW5** who said on 07.05.2019 the accused confessed to him that he caused the death of the deceased person by hitting him with a fist on the night of 21.09.2019 because the deceased was pressing him and **Said s/o Kazanda** to give him his share resulted from proceeds of fish sales. **PW5** reduced the said confession into writing with the consent of the accused person who certified its contents to be correct after they were read over to him.

PW5 prayed to tender the accused caution statement as an exhibit, but neither the accused nor his counsel objected its voluntariness which tells

that the accused made his statement before **PW5** voluntarily. Section 27(1) of the TEA provides that, *"A confession voluntarily made to a police officer by a person accused of an offence may be proved as against that person."*

I am aware of the need for a police officer to take the accused person to a Justice of Peace when he finds that the accused confesses to commit a crime. Through an Extra Judicial statement properly recorded as per the Chief Justice's guidelines the trial court will be able to ascertain if the suspect was willing at the time of making his statement and he knew the implications of making his statement or not and to enable the court to know the circumstances which prevailed at the time the statement was taken and be in a position to determine if the said statement was made voluntary or not (*See the case of **The Republic v. Juma Mohamed & Another**, Criminal Session No. 59 of 2016, HCT at Mwanza (unreported).*

However, as I appreciate the above position of this court, I wish to say that the circumstances of this case are distinguishable and do not necessitate compliance to require an Extra Judicial statement. As I have indicated above, the issue of voluntariness of the accused's caution statement was not questioned by the accused nor his advocated and

that is why the same was cleared for admission without going to a trial within a trial.

In my view the rationale behind having section 27(1) of TEA is to admit the confession made before a police officer as a proof against the accused person, if the trial court finds that the same was made voluntary. The policemen are human being just like any others, and not all of them can be questioned when it comes to the issue of recording confession of accused persons. What matters for the trial courts is to see whether they complied with the legal requirements in recording caution statement of suspects, and if the accused does not question the issue of voluntariness of the statement.

Like I have pointed above, neither the accused nor his advocate raised the issue of voluntariness of the caution statement (Exhibit **P2**) at the time **PW5** prayed to tender it before the court as an exhibit; the accused complained of being tortured at the stage of being cross examined by the prosecution attorney.

In my view that was a wrong path; the accused ought to do so right at the time when the document was sought to be tendered as an exhibit and not at the time he entered his defence. After all he did not even mention the name of a police who tortured him and he appeared in

good condition at all times this case was being heard. Hence, I find his complaint baseless as the same is an afterthought.

Apart from the above, the accused person is alleged by **PW4** to have been the last person to be seen with the deceased person on 21.09.2019 in the evening hours. Of course, **PW4's** evidence shows that he was seen with another person whom **PW4** has named as **Said s/o Kazanda**. It appears that that other person took to his heels and is still at large.

I have gone through the contents of exhibit **P2** which is an accused caution statement and noted that through his statement the accused explained properly his participation in commission of an unlawful act of assault which within few hours caused the death of the deceased person. I will let the said document to speak for itself,

"...niliongozana na Alex s/o Mwananjela ambaye ni rafiki yangu na Kwenda naye Ilanga kuomba nafasi ya kuvua kwenye ngarawa, hivyo tulienda naye na kuanza kuvua, ambapo tulivua pamoja na Said s/o Kazanda, tulienda na kurudi majira ya saa 1500 hours jioini ambapo tuliiza Samaki hao Forodhani Ilanga kwa wateja ndipo tulirudi nyumbani ambapo tulikuwa tunaishi pamoja kwenye chumba ambacho Said s/o Kazanda na Alex s/o Mwananjela

walikuwa wamepanga. Tulikaa hapo hadi kwenye majira ya saa 1820 hours jioni, tulitoka Kwenda kunywa pombe za kienyeji kwenye vilabu ambapo tulikunywa hadi usiku kwenye majira ya saa 2300 hours na kurudi zetu nyumbani tukiwa watatu mimi, Said s/o Kazanda na Alex s/o Mwananjela. Tukiwa tumekaribia nyumbani Alex s/o Mwananjela alitaka alipwe pesa yake elfu kumi aliyokuwa anatudai, baada ya kuwa tumeuza Samaki siku hiyo kwani tuliua elfu sitini hivyo ingawa ilikuwa ni ishirini elfu ambapo tulimpa elfu kumi mwanzo ndipo tulimwambia asubuhi lakini akawa hataki, akaanzisha ugomvi na kutupiga kwakuwa alikuwa amelewa tulimwangusha kwenye matope na mimi nilimpiga ngumi puani hadi alitoka damu nikijua ni mzima, tulimkokota hadi kibanda kilichopo karibu na tulipopanga na kumweka tukiamini ni mzima ndipo asubuhi hakuamka pale watu wakasema amekufa, ndipo mimi na Said s/o Kazanda tulikimbia

The accused person in his defence gave no plausible explanation to explain away the circumstances leading to death of the deceased person who, as it has been indicated above and admitted by himself, was his best friend. He only confined himself by give a different story trying to throw a ball to one **Said s/o. Kazanda** which story I find to be a lie and

an attempt to escape the cloud which shades upon him. I will clarify why I have said so.

In his defence he said on 21.09.2019 at evening hours he was with the deceased and **Said ^s/o Kazanda** then departed home together but on the way, he left them and proceeded to his home when he met his wife and his three children. When cross examined by Ms. Ashura Ally the accused said he did not see the importance of calling any of his family members as his witnesses to prove he was not at the scene of crime.

He also claimed that after being told by **PW4** that his friend died and was found in the unfinished building, he participated in the funeral ceremony and the burial of the deceased. However, he did not cross examine **PW4** about his presence at the funeral ceremony or burial activity. It is a trite law that failure to cross examine a witness on an important matter is tantamount to an acceptance of the witness's truth. This was stated in the case of **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007(unreported) CAT in which it was stated that,"

"It is a trite law that failure to cross examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence"

Basing on the above principle of law I find that failure of the accused person to cross examined **PW4** who said she saw him as the last person with the deceased and that on the following day he disappeared at the scene of crime mean that he accepted the truthfulness of **PW4's** evidence.

Again, the accused's attempt to raise an alibi defence has in my view failed to convince this court to attach a weight on it. This is because he failed to call neither his wife nor his children as defence witnesses to corroborate his story that he was not at the scene of crime rather he spent the night with them. While discounting the appellant's defence of alibi in the case of **Sijali Juma Kocho vs. R** [1994] T.L.R 206, the Court of Appeal held as follows: -

"Admittedly, he was under no obligation to prove the alibi but in the face of the allegations made against him, one would reasonably expect him to call the said uncle to bear him out. However, the appellant declined to do so despite suggestions to him in cross examination. In these circumstances therefore no weight can be attached to his alibi and the trial learned Judge rightly discounted it."

In the instant case, it is obvious that the accused person could have been expected to call his family members to prove his alibi; however he declined to do so despite the suggestions to him by the learned prosecution attorney. In such circumstances no weight can be attached to his purported alibi and I proceed to discount the same.

It is due to the reasons which I have given above, I am of the considered view that the prosecution circumstantial evidence has proved beyond any reasonable doubt that it is the accused person who caused the death of the deceased person one **Alex s/o Mwananjela**.

Next for my determination is whether in causing death of the deceased person the said accused person had malice aforethought which is provided under section 200 of the Penal Code. This is a crucial part in an offence of murder for the court to determine whether the accused committed the offence of murder or a lesser offence to that offence.

The case of **Enock Kipela v. Republic**, Criminal Appeal No.150 of 1994 provides the circumstances in which malice aforethought can be ascertained. In that case it was stated inter alia that,

"...usually, an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following:

(1) the type and size of the weapon, if any used in the attack; (2) the amount of force applied in the assault; (3) the part or parts of the body the blow were directed at or inflicted.... (7) the conduct of the attacker before and after the killing”.

In the present case it is evident that the accused person hit the deceased on the nose leading to internal fracture and bleeding. That is proved by **PW3** a medical expert, whose evidence show that he examined the deceased body and noted that the deceased had swelling and his nose was bleeding and that the cause of his death was haemorrhagic shock caused by a hit of blunt object; such evidence is corroborated by Post-mortem examination Report which is Exhibit **P1**. In his confession (exhibit **P2**) the accused narrated that he assaulted the deceased with a fist on the nose until some blood came out.

He went on by saying that after pushing the deceased who fell down, he and his co assailant dragged him to the unfinished house. That accused narrations clearly explains the accused malice aforethought towards the deceased because as under normal circumstances no one would have expected the accused and his co assailant to drag assault the deceased until he saw some blood and thereafter proceed to drag and hide his body in an unfinished house instead of taking measures by taking their

friend to the nearby health centres or seeking assistance from **PW4** and **PW1**, a hamlet leader.

Hence, considering the above accused's conducts before and after causing death of the deceased as well as, omission to take sufficient measures as I have pointed above, I find that the accused person was actuated by malice aforethought when he caused the death of the deceased person.

What is the way forward? In my considered view the above circumstantial evidence meets all the conditions to be relied upon to ground a conviction; the same taken cumulatively, sufficiently forms a chain so, complete that there is no escape from the conclusion that within all human probability the offence of murder of the deceased person one **Alex s/o Mwananjela** was committed by the accused person herein and no one else. Hence, I find him guilty of an information of Murder contrary to section 196 of the Penal Code, and proceed to convict him, as charged.


A.A. MRISHA
JUDGE
03.04.2023

Dated at Sumbawanga this 3rd day of April, 2023

I thus enter a verdict of guilty and proceeded to find that the offence of murder against accused person has sufficiently been proved according to the requirement of the law. Therefore, I find the accused person guilty of the offence of Murder contrary to section 196 of the **Penal Code**, and I hereby convict him forthwith.



A. A. MRISHA
JUDGE
03.04.2023

SENTENCE


There is only one punishment for the offence of Murder once it is proved. My hands are tied by the law and I have to pronounce the sentence. I sentence the accused person **Adam ^s/o Mizimu** to suffer death by hanging as provided under sections 26(1) and 197 of the Penal Code Cap 16 R.E 2019.

It is so ordered.



A. A. MRISHA
JUDGE
03.04.2023

Right of Appeal is fully explained.


A. A. MRISHA
JUDGE
03.04.2023

Dated at Sumbawanga this 3rd day of April, 2023.




A. A. MRISHA
JUDGE
03.01.2023

ORIGINAL

Date - 03/04/2023

Coram - Hon. K.M. Saguda, Ag.DR

For republic - Present

For Accused - Present

Accused - Present

BC - Miss Jackline Kabata

Ms. Ashura Ally State Attorney for republic, Mr. Kamyale for Defence.

The matter is coming for judgment we are ready for it.

Sgd: K.M. Saguda
Ag. Deputy Registrar
03/04/2023

Mr. Kamyale for Defence: We are also ready for judgment.

Sgd: K.M. Saguda
Ag. Deputy Registrar
03/04/2023

Court: The judgment delivered this 03/04/2023 in the presence of Ms. Ashura Ally for Republic while Mr. Kamyale for defence however in the presence of accused person and the presence of B/C Ms. Jackline. That is all.



K.M. Saguda
Ag. Deputy Registrar
03/04/2023