

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**(MTWARA DISTRICT REGISTRY)**  
**AT MTWARA**  
**[ORIGINAL JURISDICTION]**

**CRIMINAL SESSION CASE NO 1 OF 2022**

*(P.I. Case No 7/2020 in the District Court of Lindi at Lindi)*

**THE REPUBLIC.....PROSECUTOR**

***VERSUS***

**SALUM IBRAHIM MIHEVA.....ACCUSED**

**JUDGEMENT**

*29/3/2023 & 28/4/2023*

**LALTAIKA J;**

The accused person herein **SALUM IBRAHIM MIHEVA** is charged with the offence of murder c/s 196 and 197 of the Penal Code Cap 16 R.E. 2019 (now R.E. 2022). According to the Information filed in this court to that effect, it was on the 17<sup>th</sup> day of November 2018 at Mnolela Mashambani Village within the District and Region of Lindi when the accused murdered one **ISSA S/O SELEMANI NG'ITU** (hereinafter the deceased).

The accused person took plea on 07/03/2023. He denied committing the offence hence the trial climaxed by this judgement. At the trial, the Republic appeared through Ms. Kijja Elias Luzungana, learned State Attorney. This being a capital offence, the state fulfilled its pledge of providing legal assistance to the accused person through skillful services of Mr. Ali Kassian Mkali, learned Advocate. I take this opportunity to register my sincere appreciation to both learned counsel for their dedication and insights that have contributed greatly to giving this judgement its current form and content.

Before unpacking the issues, law, and the art and craft of litigation exhibited by these able counsel on the application of such laws in favour of their respective parties, I find it imperative to expound, in a simple and straightforward manner, the real story behind the matter at hand. Bearing in mind that every case is unique in its own way, understanding of the story is essential in arriving to a logical and just decision.

On the fateful day, so the narrative of the prosecution goes, the accused was at Mashambani area, a farming part of Mnolela Village in Lindi. He saw a thirteen-year-old girl on her way to picking up raw cashew nuts in her grandfather's farm. The accused allegedly approached the young girl while holding a panga and asked her to choose between death and being raped. The young girl chose "the lesser evil" whereupon the accused started raping her in a bush by the roadside.

The story goes on to inform that a good Samaritan, described as an old man *mzee* in his sixties by the name of **Issa s/o Selemani Ng'itu**

was passing by and heard the cries of the young girl and wanted to intervene. The good Samaritan boldly inquired from the accused person what was happening. The accused allegedly responded that it was none of his [the Samaritan's] business because the two [accused and the young girl] were in agreement to have sex. This was countered by the young girl who raised her voice to inform the Samaritan that she was being raped.

No sooner had the good Samaritan taken a few more steps closer than the accused fatally attacked him with a panga. He was taken to Mnolela's Village dispensary where the medical personnel suggested he was rushed to a more advanced hospital. On the way to Nyangao Hospital, the deceased allegedly mentioned the accused as the person who had attacked him.

Acting on the above information, investigations commenced. The accused was arrested a year later, by civilians, at Kilidu Village in Mtwara. Upon completion of investigations, the accused was arraigned in court. As alluded to above, he vehemently denies any wrongdoing. It goes without saying that the onus is on the prosecution to prove the allegations herein.

In an attempt to discharge that duty, the prosecution lined up a total of seven (7) prosecution witnesses (referred hereinafter simply as PWs for short) and tendered in 2 exhibits. The next paragraphs are centered on evidence adduced by the prosecution through their witnesses as judiciously recorded by this court during trial.

**PW1 was Abilahi Issa Ng'itu**, a 36-year-old resident of Mnolela Village in Lindi. PW1 deponed that the deceased was his father. He is the second born among seven siblings and works as a peasant who cultivates

cashew nuts, sesame, and other crops. On 17/11/2018, while he was at his home in Mnolela, he received a phone call from Silimu Issa Silimu, whose voice he recognized. Silimu asked him to join him in Mashambani Area, which is in Mnolela Village. Abilahi went there using a motorbike, and he met Issa Silimu, his father Issa Selemani Ng'itu, and Mzee Yangayanga on the way. Abilahi saw that his father was covered with blood all over his body. He had no time to ask what had happened to him. Without wasting any more time, they all rode to Mnolela Dispensary. Upon arrival they were advised that due to the critical condition the patient was in, they had better proceed to Nyangao, a more advanced hospital, which they did.

PW1 testified further that on their way to Nyangao Hospital, his late father intimated that he was attacked by the accused person whose other name was ULEMWA. That was at a fuel station on the way to the hospital. They then went to Nyangao hospital, where doctors attended to them. After ten minutes, one of the doctors informed Abilahi that his father had passed away.

During cross examination, PW1 stated that he found his father covered by blood and unconscious, but he regained his conscious on the way to Nyangao Hospital. He also emphasized that his father had mentioned the names **Salum Ibrahim Miheva famously known as Ulemwa**, all these four names, in that order.

**PW2 was Issa Salum Silimu**, 35 years old, peasant, and resident of Mnolela Village. He deponed that on the 17<sup>th</sup> day of November 2018 he went for farming at Namauta Area. On his way back by a motorcycle, he reached a placed called **Namayanga** where he saw Mzee Issa Selemani N'gitu (the deceased) lying down by the roadside. His body was fully covered by blood.

PW2 was shocked because it was in the bush making the incident inconceivable.

PW2 managed to stop his motorcycle about 200 meters away. He was joined by one Daudi Namkanganila who advised him to call a member of the family of the deceased. He called Abilahi Issa (PW1). An older man called **Issa Yangayanga** joined them. He encouraged the two to approach the place where the deceased was lying.

Mzee Yangayanga asked his fellow elder what happened to which he, allegedly narrated that he was passing through a bush and saw a young girl being raped. He tried to intervene and was attacked with a panga. PW2 insisted that the deceased had mentioned the accused, but he never mentioned the name of the girl.

It was PW2's testimony further that upon arrival at the place where he had seen the old man, they saw a girl lying down. She was injured. Her private parts were bleeding, and she had a cut wound. She was naked. They clothed her back with her *gauni* and took her to Mnolela dispensary.

During cross-examination PW2 testified that he saw that the body of the deceased was covered with blood and next to him was a panga. On further cross-examination, PW2 stated that they took the old man (deceased) and only later did they go back to look for the young girl. They found the girl lying down but the panga was no longer there. PW2 testified further that the old man lost conscious after they left the dispensary enroot to Nyangao Hospital.

**PW3 was Imani Joseph Kajinga**, Medical Doctor. He deponed that on the 18<sup>th</sup> of November 2018 while in his normal duties at Sokoine Hospital he was asked to conduct post-mortem of a body identified to him by a

relative of the deceased. Upon examination, PW3 stated, he discovered that the deceased had a cut wound on the left region of the temporal region of the head. He also had a cut wound on the frontal face, a cut wound on the mandible region (bellow the jaw), a stubbed wound on the left side of the chest, a cut wound on the forearm almost completely cut off save for some muscles. The cause of death, avowed the witness confidently, was *hypovolemic shock* (loss of blood). Post-mortem Examination Report dated 18<sup>th</sup> November 2018 dully signed by Dr. Imani Joseph Kajinga was admitted in court as prayed by PW3 and **marked as Exhibit P1.**

During cross-examination by Mr. Mkali, the witness admitted that he did not measure the depth of the cut wound on the forehead. He also did not measure the size of the wound bellow the jaw. The depth of the stub wound was also not taken. During re-examination the witness was not quite sure whether measuring the depth of the stub wounds was necessary as per the protocols governing autopsy. He stated the obvious, I would say, that for a person to be alive and his heart function properly, blood is needed.

**PW4 was ASP Benard Simpemba**, a police detective. He testified that on the 30<sup>th</sup> day of June 2020 while at his workplace at Lindi Police Station he received a call from the then **OC-CID SP Placius Ngaya**. He was told that the person they were looking for namely Salum Ibrahim Miheva @Ulemwa had been arrested by civilians at Kilidu Village in Mtwara. PW4 was ordered to go after the accused arriving in the village on the same day around 12:00 (noon).

The witness and other askaris who accompanied him found that the accused was locked up in a village office. PW4 introduced himself to the village authorities and was allowed to take the accused with him to Lindi for

further police actions. During cross-examination PW4 stated that the accused had gone into the hiding in the rural farming areas making it difficult to get hold of him. He admitted that although the killing took place in 2018 the accused was not arrested until 2020.

**PW5 was one G 213 DC/CPL Hezron** a police detective. His testimony was a long one but in essence he deponed that on the 30<sup>th</sup> of June 2020 he was ordered by his *Afande* SP Ngaya to interrogate a suspect that was in the remand. His name was Salum Ibrahim Miheva @Ulemwa. He headed to the police lock up and picked up the suspect Salum Ibrahim Miheva @Ulemwa who was in a healthy condition. PW5 went on to narrate at some considerable length and painstaking details how he recorded the statement of the accused and the facts connected to the offence that he (the accused person) allegedly admitted. There being no objection from the learned defence counsel, the cautioned statement of the accused dated **30/6/2020** tendered by the witness was admitted and marked as **Exhibit P2**.

During cross-examination, the witness admitted that the cautioned statement contained an error inspired by tradition whereupon a mistaken entry is put into brackets instead of crossing it off thus causing confusion.

**PW6 was YYM (her actual name concealed to protect her privacy)**, 16 years old, resident of Kilwa Kivinje. She took up the podium and testified that she was the victim of the alleged rape and assault by the accused when she was 13 back in 2018. PW6 recalled that it was a cruel act against her and started crying bitterly in court.

Having regained calmness, PW6 narrated the ordeal thus: It was about 10:00 in the morning and she just left her home place, on her way to her

grandfather's farm to pick up (harvest) cashew nuts. On her way, she met a young man that she knew before namely Salum Ibrahim Miheva holding a panga. He moved from his side of the path to PW6's and started blocking her. He announced that he wanted to rape her. She refused and started running away only to be caught and dragged into the bush "*kichakani*".

PW6 testified further that as she kept resisting the rape, the accused asked her to choose between being killed or being raped. Fearing death, she chose to be raped. That's when she took out her clothes and the accused allegedly raped her. As she was screaming and in great pain, an old man called **Issa Selemani Ng'itu** went closer and asked Salum Ibrahim what he was doing. Salum Ibrahim replied that they had agreed, and he should go away. The Mzee refused to leave. He insisted that he needed to see what he was doing to a child. She raised her voice in an alarm that she was being raped. The accused decided to stab her with a knife on the neck.

PW6 went on to testify that as blood was coming out of her neck, the accused ran to the old man and attacked him with a panga. She insisted that she saw clearly the accused slashing the old man on different parts of the body. That old man cried out loudly "you are killing me" (*una niua una niua!*).

PW6 recalled the old man "Mzee" and herself were left in pain while the accused ran away. Asked how far it was from where she was lying to where the deceased was slashed, she replied that it was like "from this podium to that window" (pointing the open court's window about 8 meters from the witness doc). Although she was in great pain, the witness recalled, she could see what was going on. The accused had a knife in his trousers' pocket. That's where he allegedly got it out and stabbed the witness with it on the neck.



During cross-examination, the witness was insistent that there was no fight between the accused and the deceased. The accused went straight to the deceased after stabbing her on the neck and slashed *Mzee* Ng'itu with a panga. She confirmed that she knew the accused before as he was a fellow villager.

**PW7 was E4678 D/ SGT Rashid**, a police investigator. His testimony was that on the 18<sup>th</sup> day of November 2018, he was ordered by the then OC-CID for Lindi to conduct investigation on the **case file No MIN/IR/198/2018**. The case file **was on a murder incident that had taken place at Mnolela** village involving Salum Ibrahim Miheva @Ulemwa. As he embarked on the investigation, PW7 narrated, he discovered that the culprit (suspect) had run away so he started searching for him. That search culminated on 29/6/2020 when the suspect was arrested by civilians at Kiridu Village located in Mtwara Region.

Upon receipt of the news that the accused had been arrested he informed the OC-CID, ASP Ngaya. Afande Ngaya responded by sending a police officer who brought the accused to Lindi. The investigator deponed further that having gathered evidence and read all the witness statements, he was convinced that the accused had a case to answer for murder. He identified the accused in court by touching him on the shoulder and hoped that justice would be done.

After a brief consultation with his client, the learned defence counsel announced that he had no intention to cross-examine PW7. On closure of the prosecution case, this court made a finding that the accused person had a case to answer. The next part of this judgement is devoted to the defence

case and the evidence adduced therefrom. The defence case had one witness (the accused) and tendered no exhibit.

**DW1 was Salum Ibrahim Miheva**, 36 years old (formerly, that is before arraignment) he was a resident of Muungurumo area in Liwale District, Lindi. The witness started his testimony forcefully that he did not recognize the nickname @Ulemwa. He equally forcefully denied the allegations levelled against him namely rape and murder cases.

It was DW's defence that **PW1's** had asserted that the person (deceased) who had mentioned him had lost conscious and only regained conscious halfway to the hospital. He raised doubts on that evidence adding that the person who allegedly mentioned him was reported to have lost a lot of blood and could have mentioned anyone because he was not in his stable state of mind. DW1 went on to poke holes on the prosecution's case particularly **PW5's** tendered cautioned statement. He denied vehemently having recorded the statement stating that he suspected the statement was cooked or doctored in the police corridors.

DW1 lamented that **PW6 the purported victim**, had testified in the District Court of Lindi in the rape case where she never mentioned him. DW1 prayed that this court disregards the evidence of PW6 as it was "cooked evidence" (Ushahidi wa kupikwa). He prayed further that this court refers the evidence used to convict him for the offence of rape in the lower court. Lamenting even further, he reiterated that his name was mentioned by a sick man whose state of mind could not be relied upon. In concluding his defence, DW1 averred that the entire accusation was based on hate.

During cross examination, DW1 confirmed that Salum Ibrahim Miheva was his name and that he was aware that on the 7/3/2023 he entered a

memorandum of agreed facts with this court during plea taking and preliminary hearing. He also admitted that he did not cross examine PW6 to counter the allegation that he raped her. He added that he had no grudges with her and he was not sure if she was mentally sick or not.

On further cross-examination amid questions fired to him like live bullets by Ms. Luzungana, the accused confirmed that a panga can be used as a weapon against a person. He agreed that the late Ng'itu was older than him though he didn't know his exact age. He confirmed that Mzee Ng'itu had since died but emphasized that he could not possibly be expected to know what had killed him. On closure of the defence case, the learned defence counsel Mr. Mkali clarified that his client's prayer was that this court takes judicial notice of the judgement and proceedings of Lindi District Court.

It was time for final submissions of the learned counsel for both parties. On her part, Ms. Luzungana reiterated that the prosecution had discharged its duty to prove the offence of murder. The republic had paraded a total of seven (7) witnesses and tendered 2 exhibits for that purpose, avowed Ms. Luzungana confidently.

The learned defence counsel Mr. Mkali, on the other hand, asserted that it was undisputable that his client was able to offer his defence against the allegations leveled against him. He had managed to raise doubts on the prosecution case especially on the evidence on identification. The learned counsel averred further that the prosecution had failed to untangle the puzzle on identification arguing that the act of touching his client on the shoulder in court made no difference because they had seen him in another case on rape tried by the District Court.

In conclusion, the learned defence counsel averred that as for the dying declaration, he had clearly raised his doubts on how the same was declared.

**Having dispassionately considered** submissions by both counsel and keenly scrutinized the evidence adduced throughout the trial, there are four issues calling for my determination:

- (i) *Whether there was death of a person*
- (ii) *Whether the death was unnatural*
- (iii) *Whether the said death was caused by the accused*
- (iv) *Whether the accused caused the death with malice aforethought*

Many are times where the prosecution (and by extension) courts of law take the first issue above for granted. Although courts in criminal trials do not go as far as demanding death certificates it is advisable for a court to warn itself against taking this issue lightly. In the case of **Mohamed Said Matula v. Republic [1995]** TLR 3 the Court of Appeal of Tanzania held that proof of stealing a child was insufficient to conclude that the said child was dead.

A careful examination of records in the instant matter leave no doubt that a person by the name of **ISSA SELEMANI NG'ITU** died on the 17<sup>th</sup> day of November 2018 at Mholela Mashambani Village in the District and Region of Lindi in Southern Tanzania. Consistency of prosecution witnesses was overwhelming on this. Intriguingly **PW1 Abilahi Issa Ng'itu** testified that he was son of the deceased and proceeded to cry out loud in the witness doc. This court sympathized with the witness but it is duty bound to retain objectivity. The other equally relevant evidence was that of **PW3 Imani**

**Joseph Kajinga, MD** who conducted autopsy and tendered the Postmortem Examination Report. This takes me to the second issue.

The second issue is whether the death of the deceased was unnatural. The response is affirmative. The defence witness raised no doubt on this. More importantly, **PW3 avowed with scientific authority** that the death was caused by *hypovolemic shock* that is to say severe loss of blood. As alluded to above, the deceased was an old man in his 60's. Ordinarily people would consider senior citizens more vulnerable to such attacks. It is, therefore, safe to assume that had there not been such an unfortunate turn of events, the deceased would still be enjoying life with his family including grandchildren. I move on to the third issue.

The third issue which is likely to dispose of the entire case is whether the said death was caused by the accused. My analysis will focus on the offence, witnesses, evidence, and the principle discernable therefrom (OWEP). **On the offence:** homicide is as old as humanity itself. There are narratives going as far back as the error of Adam and Eve when Cain murdered his brother Abel. The offence of murder (and related offences such as manslaughter and infanticide) is not new in Tanzania.

The Court of Appeal of Tanzania has had many opportune moments to extrapolate the various dimensions of the offence including its essential ingredients (See among other authorities **Francis Alex v. R.** Cr. App. No. 185 of 2017 (unreported), **Lusagula Machia & Another v. R.** Cr. Appeal No 426 of 2013 (unreported) and its relation to other offences such as robbery (See **Juma Zuberi v. R.** [1984] TLR 249).

Apparently, murder is considered a very serious crime in Tanzania. It is among a few offences punishable by the death penalty. No where is the skill set for "attention to details" of a bench-holder required than when trying a matter whose aftermath is either life or death. Needless to say, that the burden of proof is always on the side of the prosecution. In the case of **Mohamed Matula v. Republic** [1995] TLR 3 the apex Court of our country proffered and handed down the following piece of wisdom:

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

As alluded to above, the prosecution paraded seven witnesses and tendered two exhibits. In the next two parts of this analysis, I will focus specifically on the witnesses and the evidence adduced therefrom.

**On witnesses** these are the heart of any trial. In our jurisdiction it is also trite law that no particular number of witnesses is required for the proof of any fact (See **Yohanis Msigwa v. Republic** [1990] TLR 148). Moreover, every witness "is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness." (See **Goodluck Kyando v. Republic** [2006] TLR 363.) Nevertheless, and probably more importantly for this analysis, this court is entitled to forming an opinion not to believe a particular witness. The Court of Appeal of Tanzania in **Mathias Bundala v. Republic**, Criminal Appeal

No. 62 of 2004, (unreported) spelled out (non-exhaustive) reasons for not believing a witness.

There was only one (1) eyewitness in this case. This is **PW6 YYM**. There are many reasons not to believe her story. She was 13 years old during the fateful incident. Picture this: a thirteen-year-old, just got raped and allegedly stabbed on the neck with a [pen] knife, blood oozing out, boldly tells the court she saw everything that was happening and could tell with certainty that the accused attacked the deceased with a panga several times. That is way too much than I can chew and digest. I am not concerned with the rape part as this court is *functus officio*. My worry is how the prosecution even dares to think such a witness can be trusted for identification of a suspect for murder. Although the learned State Attorney averred that the witness was no longer "a child of tender age" when she appeared in this court at age 16, her story is hard to believe, frankly.

Other witnesses were not as young but they succumbed to the same inconsistencies. For example, if PW6 was to be trusted at least on the distance between her and the deceased when both of them were attacked and left lying down in pain, it should have been impossible to take the old man to hospital and only much later come to look for the young girl in the bush. An elderly man called Mzee Issa Yangayanga according to PW2 asked the deceased what had befallen him to which he described his (the deceased's) good Samaritan's task. This would have been a useful witness. No reason was given for not summoning him up.

Although no duty is cast on the accused to establish his innocence as alluded to above, I think I should not leave this part on witnesses without commenting, albeit in passing, the conduct of the only defence witness (DW1). There was laxity in cross-examination of key prosecution witnesses. For example, after consultation with his lawyer DW1 decided not to cross-examine PW7. A valuable opportunity to learn from the witness why it took two years for the accused to be arrested was lost. This being a capital offence, I make no negative inference for such an omission. Conviction is based on the strength of the prosecution case and not weakness of the defence. This takes me to the part on evidence.

**On Evidence,** there is no doubt that the prosecution relied heavily on the testimony of PW6 analyzed above and the purported dying declaration of the accused. Having extracted very little (if any) evidentiary value from the testimony of PW6, I now turn to the dying declaration.

Essentially, a dying declaration or a dying statement is a form of evidence considered an exception to the general rule on admissibility of hearsay evidence. Historically, English law accorded great value in a dying declaration because of prevailing religious belief that "*[N]o person who is immediately going into the presence of his Maker, will do so with a lie upon his lips.*" (See Supreme Court of America's case of **Idaho v. Wright**, 497 U.S. 805 , 820 (1990) Quoting an old English case of **Queen v. Osman**, Cox Crim. Cas. 1,3( Eng. N. Wales Cir. 1881).



In Tanzania, although a large part of the spirit of the English law on reverence to dying declarations is maintained, (See for example **Rex vs. Mwinyimbegu and Another** (1933) EACA 70) the law requires that dying statements are treated cautiously (See **Rex v. Mnyovya bin Msuma** (1939) EACA 128.

I have taken considerable time to examine the purported dying declaration. I have very serious doubts that prevent me from acting upon it. These doubts are; **first** the statement is too clear to be true. As the defence witness had averred the deceased could not possibly mention all the four names **Salim Ibrahim Miheva @Ulemwa** (in that order). I can only imagine a description such as "that son of so and so who used to... is the one who attacked me" **Second:** the claim that the deceased had just regained his conscious makes the declaration more of a hallucination. **Third,** the demeanor of PW1 (the receiver of the declaration from his late father) was devoid of naturalness.

As much as I respect dying declarations "*kauli ya mwisho ya marehemu*" I make a finding that the purported dying declaration does not measure up to the standard required of a dying statement that can be acted upon by courts in our jurisdiction. (See **Republic v. Ally** (1971) HCD 306 and **Republic vs. Joseph Ngwaikamo** [1977] T.L.R 6 among other authorities.

The principle of law that I can derive from this OWEPI inspired discussion is standard of proof in criminal cases. **Section 3(2)(a) of the Evidence Act Cap 6 RE 2002** provides as follows:

*(2) A fact is said to be proved when  
(a) in criminal matters, except where any statute or other laws provide otherwise, the court is satisfied by the prosecution beyond reasonable doubt.*

See also **Hemed v. Republic [1987] TLR 117** in which the Court of Appeal of Tanzania expounded on the above standard of proof adding that "[w]here the onus shifts to the accused it is on a balance of probabilities."

I am fortified to make a finding that the prosecution has failed to prove the allegations levelled against the accused at the required standard. As per tenets of fair trial, any slight doubt is resolved in favour of the accused. The doubts here are not slight, they are massive. To this end, I see no need to discuss the fourth issue namely whether the accused caused the death with malice aforethought. It crumbles naturally.

Premised on the above, I hereby order that **SALUM IBRAHIM MIHEVA** be released from prison forthwith unless he is being held for any other lawful cause.

It is so ordered.



**E.I. LALTAIKA**

A handwritten signature in blue ink, appearing to read "E.I. Laltaika".

**JUDGE  
28/04/2023**

**Court:** Judgement delivered by my own hands in the open court in the presence of Mr. Melchior Hurubano, State Attorney, Mr. Ali Kassian Mkali learned defence counsel and the accused.



**E.I. LALTAIKA**

Handwritten signature of E.I. Laltaika in blue ink.

**JUDGE**  
**28/04/2023**

**Court:** The right to appeal to the Court of Appeal of Tanzania fully explained.



**E.I. LALTAIKA**

Handwritten signature of E.I. Laltaika in blue ink.

**JUDGE**  
**28/04/2023**