

UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IRINGA DISTRICT REGISTRY
AT IRINGA
CRIMINAL SESSION CASE NO. 02 OF 2023

THE REPUBLIC
VERSUS
MOHAMED SALUM NJALI

JUDGMENT

Date of Last Order: 18.07.2023

Date of Ruling: 25.07.2023

A.E. Mwipopo, J.

The 25th September, 2022, was a bad day to Adeline Michael Kileo. He was a fan of the famous Tanzanian boxer known as Karim Mandonga who lost his boxing match to Shaban Kaoneka, and his wife namely Atika Chesco Kivenula was killed around the same time. Adeline Michael Kileo, who was watching a boxing match of Karim Mandonga versus Shaban Kaoneka at Manyara Bar located at Mawenzi Kitanzini area together with

his servant and his friend, returned home, which is situated in the same street, around 02:00 hours only to find the doors to the house were broken and his wife was in bad condition laying naked in the bed. He observed things in the room were thrown all over the ground and their child of five years old was absent. Adeline Kileo took his wife to Iringa Regional Referral Hospital for treatment only to be informed later on that she has already passed away. He went to report to the Iringa Police Station where he found his brother namely Prosper Michael Kileo, whom they live together in the same house, carrying his child. Prosper Michael informed police and Adeline that he saw Mohamed Salum Njali coming from Adeline's room running and he chased him and tried to catch him without success. He returned home to see why Mohamed Salum Njali was running from Adeline's room where he found things were thrown all over the room and Adeline's wife namely Atika Chesco Kivenule was in very bad condition without clothes. He decided to take the child and report to police station.

Police Officers, Adeline Kileo and Prosper Kileo went to the scene of crime. Adeline Kileo observed that deceased phone and the suit which belongs to his brother namely Augustine Michael Kileo kept in his room were stolen. They called hamlet chairman and they went to the house the

accused person was residing. Inside the room of the accused person, the police seized the stolen phone and suit. The accused person was arrested and taken to Iringa District Police Station. At police station, accused confessed to cause the death of the deceased in his cautioned statement. The accused person also confessed to cause the death of the deceased in his extra judicial statement recorded by the justice of peace. After completion of investigation, the accused person was arraigned in Court facing murder offence contrary to section 196 and 197 of the Penal Code, Cap. 16 R.E. 2022. The particulars of the offence in the information shows that on 25th September, 2022 at Mawenzi Kitanzini area within the District and Region of Iringa, the accused person did murder Atika Chesco Kivenule.

The information of the case was read over to accused person who denied to kill the deceased. The Court recorded that the accused person pleaded not guilty to the offence. The prosecution case opened and prosecution brought a total of 8 witnesses and 6 exhibits to prove their case. The Court did find that the prosecution case was made and the accused person has to defend himself. The defense case was opened and

the accused person denied to kill the deceased in his testimony. He did not call any witness or tender any exhibit in his defense.

The first prosecution witness to testify is Adeline Michael Kileo (PW1). He said that currently he is living with his brother Prosper Michael Kileo at Maweni Street in Kitanzini Ward. Formerly, he was living with his wife namely Atika Chesco Kivenule, brother namely Prosper Michael Kileo, child namely Magreth, and servant namely Geofrey Nyagawa. This was before the incident leading to the death of his wife that occurred on 25.09.2022. At that time, his daughter namely Magreth was aged 5 years. He lived with his wife for seven years and they got one child. PW1 said he own business of selling clothes and his shop is at Miyomboni Street in Iringa Municipality.

On 24.09.2022 around 13:00 hours, PW1 returned home to eat his lunch accompanied with his brother Prosper Kileo and Geofrey Nyagawa. They had their lunch and returned to the shop leaving his wife and child in good condition. They worked in the shop all three of them until around 19:30 hours when they closed the shop. Prosper Kileo told PW1 that he is going to the saloon to shave hair and after shaving he will go to stereo bar to watch boxing match. PW1 and Geofrey Nyagawa went to Manyara Bar

which is very close to the house they were living. There at Manyara bar PW1 met with his friend Mwakatobe. On that date, there was a boxing fight between Karim Mandonga and Shaban Kaoneka. Also, a boxer known as Twaha Kiduku was fighting with a boxer from Egypt. Around 00:30 hours on 25.09.2022, Mohamed Njali, who is their neighbor, came and asked PW1 to buy him a beer. He bought him one Safari beer and Mohamed Njali thanked him for buying him a beer. Then, Mohamed Njali congratulated Adeline for having a very beautiful wife with a very sexy shape. The words did not please PW1 and he told Mohamed Njali to respect each other. Mohamed Njali left. After 20 minutes, Mohamed Njali was not seen from the bar.

Around 01:30 or 02:00 hours on 25.09.2022, PW1, Geoffrey Nyagawa and Mwakatobe left the Manyara Bar heading home. When they arrived at the house, they found the gate is opened and it was dark. They found the entrance door is open also. They entered to the living room and found the door to the living room was open which was not normal. This shocked PW1 and he had a feeling that there is something wrong going on in the house. He went to his room and found his wife laying in the bed naked bleeding in her nose. The room was rough as things were thrown and scattered all

over the ground. He called for his child but she did not answer. PW1 asked his servant and friend to find a transport to take his wife to hospital. PW1 dressed his wife with clothes. After few minutes they came back with bajaji tricycle. Adeline carried his wife from the room to the tricycle and they went to Iringa Regional Referral Hospital. At Hospital, nurses took PW1's wife direct to the doctor as it was an emergency. After few minutes the doctor told PW1 that his wife has already died, that she was already dead when they reached the hospital.

PW1 went to report the incident to Iringa Central police Station. At police station, he found Prosper Kileo at police station gate carrying his daughter accompanied with police officers. PW1 told them that, his wife is dead. Prosper Kileo told PW1 that he saw the culprit who was coming from his room. He chased the culprit, but was unable to catch him. He said he was able to identify the culprit to be Mudi their neighbor. They went together with the police to the scene of crime and police inspected it. At the scene of crime, it was found that the deceased phone and one suits were stolen from PW1's room.

Police asked where Mudi was residing. PW1 and Prosper Kileo took police officers to the house where Mudi was residing. They called Street Chairman before knocking the door. They knocked the door and the door was opened. Police asked if Mudi was present and they were shown his room. Police knocked the door to the room where Mudi was living, but the door was not opened. The police break the door and entered inside the room. They found Mudi sleeping in the mattress which was in floor behind the door. The police and street chairman asked him where he was in the night and he answered he was at Miami bar. The police asked Mudi to show things he has stolen from PW1's house and Mudi took from the couch cushion (mto wa kochi) a phone and a suit inside a suitbag. The phone was shown to PW1 and he was able to identify the phone to belong to his wife. PW1 switched the phone on and entered the pattern numbers. The phone unlocked and PW1 was sure it is his wife's phone. The said phone is Infinix Hot 12. The phone has two lines for Tigo and Voda Company.

PW1 also identified the suit to belong to his brother which was kept in his room. The said suit is black in colour daro brand and the shirt was white polo brand. It was the suit which his brother did wear in the wedding of their sister. The said suit before the incident was in PW1's room hanging

behind the door. He was keeping the suit for his brother as he was travelling a lot. The street chairman asked Mudi why he did that? Mudi answered that he is responsible for raping PW1's wife. Mudi told them that he went to the PW1's house twice. The first time he went to steal and the second time he went to rape the deceased. The police seized the found properties and filed certificate of seizure. One police officer, Street Chairman and Mudi signed the form. PW1 said Mudi is Mohamed Njali and he knew his full name when he came to Court. Mohamed Njali is known in their street as Mudi. The things seized at Mohamed Njali's room were a phone and its two lines and a suit. The police took Mudi and seized things to the police station. PW1 identified the phone and suit seized in Mohamed Njali's room. PW1 said he has known Mohamed Njali for almost one year. The owner of the house was not living in the house. The house PW1 was living and the house Mohamed Njali was living share the wall.

In cross examination, PW1 said that it was around 03:45 hours when he went to the police station from Hospital. It was around 04:45 hours when they arrived at the house Mohamed Njali was residing. They went to the house Mohamed Njali was living together with the street chairman. PW1's brother who own the suit his name is Augustino Michael Kileo. PW1's

brother who chased Mohamed Njali is Prosper Michael Kileo. When asked by Court PW1 said Mohamed Njali is accused person in the dock.

Richard Nicodemu Kipyee (PW2) is the second prosecution witness. He testified that, he is a Medical Officer stationed at Iringa Region Referral Hospital. PW2 has a diploma in clinical officer from Mafinga College and a Degree in Medicine from Dodoma University. He has 14 years' experience as a Medical Officer. PW2 said on 27.09.2022 around 13:00 hours he examined a dead body at the mortuary of Iringa Regional Referral Hospital. It was the police who requested for post mortem examination of the deceased body. The body was identified by deceased relatives to be of Atika Kivenule. The deceased was adult female. PW2 examined the deceased body and he observed that the deceased is dead and the body had bruises on the front side of the neck. The deceased neck was abnormal as it was loosely moving to every side. In the neck, PW2 observed that hyoid bone was detached from the neck muscles. This bone separate tongue and trachea. The deceased was found to be 8 weeks pregnant after opening the deceased abdomen. The womb was 8 cm long which means she was 2 months pregnant. The fetus was already dead. It was not possible to know the approximation of the date of death as the

body was kept in the mortuary freezer where natural decomposition process stop. PW2 was of opinion the cause of deceased death was brain asphyxia caused by blockage of trachea. There was a force used to strangulate deceased neck as result the hyoid bone fractured. The fracture of this bone caused the blockage of air and as result the deceased failed to breath (acute respiratory failure).

After examination, PW2 filed the report on post mortem examination and handled it to the police officer. The report of post mortem examination which was tendered and admitted as exhibit P1 reveal that the cause of deceased death was acute respiratory failure secondary to oesophagus strangulation.

In cross examination, PW2 said that in Exhibit P1 he recorded that he saw uterus with 8 weeks GA. This proves that deceased abdomen was opened as the uterus is inside abdomen. Natural decomposition process do not take place when body is put in the mortuary freezer. The hyoid bone was fractured, but PW2 could not say at what time it was fractured.

Yasin Sauli Kisogole (PW3) is the 3rd prosecution witness. He said in his testimony he is a Chairman of Maweni Street since 2019. On

25.09.2022 around 05:00 hours while sleeping, he heard someone calling. PW3 asked who is it and that person said he is Adeline (PW1). PW3 know PW1 as ten cell leader at their area. PW1 told PW3 that his wife was raped to death by Mudi. The said Mudi is Mohamed Salum Njali. PW1 asked him to help them enter into the house Mudi resides. They went to the house where Mudi resides and found police officers and PW1's bother outside the house. They knocked the door and one young men (kijana) opened the door. They entered inside the house and informed the young men who opened the door where is Mudi. They were shown the room of Mudi. They knocked the door of Mudi's room, but the door was not opened. The police officers did break the door and entered inside the room. They found Mudi behind the door sleeping in the mattress on the floor. The police informed Mudi that he is under arrest for theft. The police asked Mudi to bring things he has stolen.

PW3 said Mudi took the touch phone and the suit bag containing a suit and shirt inside from the couch made up of woods. PW3 asked Mudi where did he got the phone and suit and he answered that he is responsible for the incident. PW1 identified the phone belongs to his wife and the suit was identified to be the property of PW1's brother. The voter's

identification card of Mudi was found which was written Mohamed Salum. Police asked Mudi about raping Adeline's wife and killing her and Mudi answered that he is responsible. The Police filled the certificate of seizure and Mudi and PW3 signed it. The things seized which were phone infinix made and suit with its shirt. PW1 showed the marks on the phone in the cover which are letter "M" and a cartoon drawing. The phone had two lines, one for Voda and another for Tigo. The suit was black in colour Daro make. The shirt was white written polo.

PW3 said he know Mudi who his full name is Mohamed Salum Njali for one year. Mudi is their neighbor living in their street. Mohamed Salum Njali was living in the house of one elderly women known as Ambali as the keeper of the house. PW3 said Mohamed Salum Njali is the accused person in the dock.

In cross examination, PW3 it was around 04:45 hours when PW1 called him at his house. He don't know as to when Mudi started to live in the street. PW3 has been living in the street for more than 10 years. The accused person voter's identity card was not seized. It remained with the accused person. Before he arrived at the house which Mudi resides, PW3

did not know what happened. He don't know the time police officers arrived at the house where Mudi resides. He don't know how the incident occurred. What PW3 know is he witnessed seizure of phone and suit at accused room. When they entered in accused room, PW3 observed Mudi had swellings on the face.

Prosper Michael Kileo (PW4) testified that he is a resident of Maweni street in Kitanzini area for almost ten years. He lives with PW1 who is his young brother and PW1'S servant. On 24.09.2022 PW4 was living with PW1, PW1's wife namely Atika Kivenule, their child and the servant of PW1. Atika Kivenule was living with PW1 for four or five years. The PW1's child is aged between 5 and 6 years. They were living in the house inherited from their late father namely Michael Kileo. PW4 said he is a driver. On days where he has no duty or car to drive he helps PW1 in his shop selling clothes at Miyomboni.

On 24.09.2022 around 13:00 hours, PW4, PW1 and PW1's servant went home for lunch and they eat lunch prepared by the deceased. They returned back to the shop. The shop was closed around 19:00 hours. After closing the shop, PW4 told PW1 that, he is going to stereo area to shave

and watch a boxing match between Karim Mandonga and Shaban Kaoneka. PW1 informed him that he is going to watch the boxing match at Manyara bar which is close to their home. PW4 went to stereo. After the boxing match ended, and the boxer PW4 love Karim Mandonga lost the fight he decided to go home. The distance from stereo where PW4 was to the house was like 30 or 40 meters.

When PW4 arrived home, he found the gate is open and the back door of the house was open also. He was frightened by seeing those doors open. He entered inside the house and at the first room on the right which is the room of PW1, a person came out of the room running heading to the living room. PW4 run after that person. The person hit himself in the corridor and went out of the house through a door which they normally don't use. PW4 continued to run after that person passing the building of Aman Store which has electric Lights. PW4 said he was able to recognize the person running to be their neighbor Mudi after he turned his head around. He knew Mudi by face. Mudi was wearing a baraghashia hat, boots, black coat and black trousers. They were very close almost one step apart when he identified Mudi. PW4 continued to chase Mudi while calling thief. At Vanesa lodge, PW4 was able to catch him, but Mudi was able to

slip away and run toward the direction of the house he was residing. At Vanesa lodge there was bright light from sport light which illuminated brightly at the area. It is the light which assured PW4 that the one he chased is Mudi. Sportlight has bright light and is used in sports grounds or in halls. The whole incident took like two minutes but not more than 5 minutes.

As PW4 have already recognized the criminal, he decided to go back home. At home, PW4 called for PW1's wife but she did not reply. The child who was inside came and told PW4 that, her mother was assaulted. The child name is Magreth Adeline Kileo. PW4 looked inside the room from the door and saw PW1's wife sleeping naked in the bed facing the ground. He told the child to cover her mother. The child took a blanket and covered her mother. As PW1's wife was not responding, PW4 had feeling that there is something wrong. He took the child and go around Vanesa lodge to ask for help. He called PW1, but his number was not available on air. PW4 asked the watchman of Vanesa lodge to come to the scene of crime to see what happened. They went back home together with the watchman. The watchman saw the situation and advised PW4 to report the matter to police station. PW4 went to Iringa central police station with the child. PW4

said the whole incident from chasing the criminal up to reporting to the police took approximately 15 to 30 minutes. He reported what happened and that it was Mudi who assaulted the deceased at their home. He told police that he know where Mudi lives. After few minutes further, PW1's servant came at police station to look for PF3. After few minutes, PW1 came to central police station crying and he told them that his wife Atika Kivenule is dead.

PW4 said they took police officers to the area of incident. Police inspected the scene of crime and they observed three doors of the house were broken. The broken doors were two entrance doors and the door to the room of PW1. PW1 observed that his wife's phone and the suit of their brother namely Augustino Michael Kileo which was kept in PW1's room were stolen. Augustino Michael Kileo is the business man who conducts his activities in Tanzania and South Africa. He used to coming to Iringa few time and leaves again.

PW4 said they took police officers to where Mudi resides. The house was close to their house. Police asked PW1 to call street chairman. The street chairman came and knocked the door. One person opened the door

and he told them that he was not the resident of the house. He show them the room of Mudi. The police did break the door to the room and they entered inside the room. They found Mudi laying in the mattress behind the door. Police informed Mudi that he is under arrest and asked him to bring things he has stolen. Mudi brought Infinix phone and a suit. The said phone belongs to Atika Kivenule as PW1 was able to unlock the phone through its pattern. PW4 said he also identified marks of the doll and letter "M" on the phone cover. Mudi also brought a suit which belong to their brother namely Augustine who is doing business in Tanzania and South Africa. The suit is black in colour Daro brand and the white shirt polo brand.

Mudi told police officers that, he went twice to the PW4's house. The first time he went to steal some properties after breaking, and the second time he raped Atika Kivenule. Police filed the certificate of seizure and they went to police station together with the street chairman, PW1 and Geoffrey for interview. Police also took Mudi and exhibits seized to police station. In the street, they know the accused person as Mudi. PW4 said he came to know the accused full name as Mohamed Salum Njali after he gave them his identify card which shows his name to be Mohamed Salum Njali. The

house where Mudi was living was owned by one elderly woman. After the woman was taken by her child, Mudi was brought to watch the house. For the period of one year they live as neighbor and they have no conflict whatsoever.

In cross examination, PW4 said that he identified Mudi for the first time when he turned his face at Aman Store. Mudi was wearing black trouser and black baraghashia hat. When he was chasing Mudi from the house, he appeared to know where to run to. It was between 01:00 hours and 02:00 hours when he returned home from watching boxing match. On the date of incident, Augustino Kileo was in South Africa. Mwakatobe is the friend of PW1. PW1 told PW4 that he was watching boxing match together with Mwakatobe at Manyara Bar. Mwakatobe later on came to the scene of crime. At police station they filed the form of the things stolen by the accused person and their statements were recorded. It was in the morning when their statement was recorded and other forms were filled. There was a form which was filled at the room of the accused person where phone and suit was seized and other form filled after they arrived with the accused persons at police station.

Police Officer with No. F. 3928 D/Sgt Edmund (PW5) was the 5th prosecution witness to testify. He said that on 26.09.2022 around 11:00 hours at Iringa Central Police Station he was ordered by ASP Eliud Kivuyo, OC CID Iringa, to take the accused person namely Mohamed Salum Njali, who is in police lock up, to the justice of peace to record extra judicial statement. He was informed that the Mohamed Salum Njali is accused of killing Atika Kivenule and he want to record his confession to the justice of peace. PW5 went to lock up and introduced himself to the accused person. He said that the accused person was in good condition. He took the accused to Iringa Urban Primary Court before Hon. Hassan Hamis Mlanga, the Primary Court Magistrate. PW5 said he introduced himself and the accused person to Hon. Magistrate. He informed the Magistrate that the accused person want to record his confession. The Magistrate introduced himself to them and he asked PW5 to go out of the office room. PW5 went out and stayed about 100 metres from the magistrate's room. After sometime, Hon. Magistrate called PW5 and informed him that he has completed to record the statement of the accused. The Magistrate handed to PW5 the envelope containing the accused statement and the accused person. The accused person was in good condition. PW5 said that he took

the accused person to police station. He handled the envelope to OC CID Iringa and took the accused person to the lockup.

In cross examination, PW5 said that after Police Incharge of C.R.O. handled the accused person to him, he took the accused person to Iringa Urban Primary Court. PW5 was able to know that the accused person was in good condition by looking at him. It was not possible to know if the accused person has a wound in stomach because he was wearing clothes.

Prosecution called Masauni Salum Mageni (PW6) as their sixth witness. PW5 said that he is Assistant Inspector of the Police at Iringa. He said that on 25.09.2022 around 04:30 hours he was at Kihesa area in a police patrol car with other police officers. They received a radio call informing them there is a citizen requesting their help as there is incident which has occurred. They went to the Iringa central police station. Where they found the person who introduced himself as Prosper (PW4). He informed them that there is incident of burglary in their house at Maweni Street and he was able to identify the thief as Mudi. He told them that he left his sister in law was in bad condition. Before they leave to visit the scene of crime, one person who identified himself as Adeline (PW1) came

to the police station and informed Prosper that his sister in law is dead. It was sad as PW4 and PW1 were crying. PW5 said later on he learned that PW1 and PW4 were brothers. PW4 is the elder brother of PW1. Police went together with PW1, PW4 and another young person to the house of PW1. Police officers who went to the scene of crime are Cpl. Innocent, Cpl. Hamisi and Cpl. Mohamed.

At the scene of crime, they found all doors were open. They entered inside the house to the room of PW1 and found the door was broken. The door had shoes marks. Inside the room, things were thrown around as if somebody was looking for something. PW1 observed that a suit and the mobile phone which belongs to his wife were taken. PW1 said that the suit was hanged in the wall and it belongs to his brother.

As the person responsible for the incident was identified to be Mudi and they know where he lives, PW6 told PW1 and PW4 to take them to the house Mudi resides. The house of PW1 and where Mudi lives are bordering each other. But to reach the house where Mudi lives, they went around passing Magari Mabovu road. After arriving, Police surrounded the house. PW6 asked PW1 to go and call the street chairman. After few minutes,

PW1 came with the street chairman (PW3). PW6 told PW3 there is a murder suspect inside the house and they want to arrest him. They knocked the door and one person who was sleeping in the living room opened the door. They asked the person who opened the door if Mohamed is present and at what time he returned home. He told them that Mudi is inside and he returned not long time ago. They asked him to show them the room of Mudi. PW6 knocked the door of the room for a long time, but the door was not opened. They decided to break the door and entered inside the room together with PW3. They found Mohamed was sleeping in the mattress which was on the floor behind the door.

PW6 said that they introduced themselves and put Mudi under arrest for theft and murder incident which occurred in the house owned by PW1 and his relatives. Mudi denied to kill anybody and said he did steal phone and suit in its bag. He said that he also has raped someone in the PW1's house. PW6 asked him to bring the phone and suit he took from PW1's house. Mudi took the phone and suit under the coach. The phone had a rubber cover. PW1 identified the mobile phone to belong to his wife and the suit to belong to his brother. Both found properties were taken from PW1's room. PW1 identified the phone by its plastic green cover, its grey

colour and a scratch mark of a letter M and a doll picture. Inside the phone there were two mobile phone lines for Tigo and Vodacom Companies.

Mudi told PW6 that he went to the house where PW1 raised twice. The first time he took mobile phone and the suit, and the second time he raped PW1's wife. PW6 seized the properties found in Mudi's room and filed the emergency certificate of seizure. The PW3 told the police Mudi's full name is Mohamed Salumu Njali. After filing the emergency certificate of seizure, PW3, Mudi and PW6 signed the certificate. PW6 took the accused person and the properties found in his room to the police station. PW6 said he handled the accused person to C.R.O and he took exhibits to exhibit room for safe keeping. The exhibits were registered in the register of the exhibit room and he labelled the phone with white collection fluid exhibit No. 480 of 2022. For the suit, PW6 attached a paper written No. 480 of 2022 inside the pocket of the suit. Mudi already removed two lines from the phone and he put the lines behind the plastic cover of the phone. The said exhibits were in PW6's hands as he is responsible for exhibit keeping.

PW6 said he handled the exhibits to police officer to be brought in Court as evidence on 28.06.2023. The suit seized was black in colour Daro

brand and the shirt was white polo brand. The suit and the shirt were inside the suit bag. PW6 tendered the certificate of seizure (exhibit P2), Infinix Phone grey in colour with its two lines for Tigo and Vodacom Company (exhibit P3), and a black suit Daro brand and a white shirt polo brand inside the suit bag (exhibit P4).

In cross examination, PW6 said that he do not know the owner of the house where the properties were seized. PW3 informed PW6 the name of the owner of the house, but he did not see the need to call the owner of the house. It was the accused himself and PW3 who told them the name of accused person. PW6 don't know if the accused person had identification card and he did not see accused identity card during search.

The justice of peace who recorded accused confession was another prosecution witness. Hassan Kassim Mlangi, (PW7), testified that he is Resident Magistrate stationed at Iringa Urban Primary Court. He said that he is also a Justice of Peace with duty of recording confession statement of suspects who have confessed to commit offence in their cautioned statement recorded by police officers as per provisions of the Magistrate's Court's Act and Chief Justice Circular. On 26.09.2022 around 11:00 hours

he was at Iringa Urban Primary Court. The Police officer known as Edmund (PW5) went to his office accompanied with an accused person namely Mohamed Salum Njali. PW5 informed PW7 that Mohamed Salum Njali is accused of three offences of rape, murder and stealing. PW5 told him that Mohamed Salum Njali has confessed on his cautioned statement recorded at police station to commit those offences and he want to give his confession statement to justice of peace. PW7 said he asked PW5 to leave the accused person in the room and has to go far from the room so that he may record the statement of the accused person. The police officer went out of the office and left the accused person with PW7.

PW7 said he told Mohamed Salum Njali that he is justice of Peace and he has to tell him about the incident. PW7 informed the accused person to be free if he want to confess. The accused person informed PW7 that he decided to confess to the police officer willingly and he is ready to give his statement to PW7.

PW7 informed the accused person that he was to inspect him if he has any wound and the accused person agreed. He inspected accused body and he did not see any wound or injury. The accused person

informed PW7 that he was arrested by police officers on 25.09.2022 around 05:00 hours where he resides at Maweni street in Kitanzini area. After his arrest, the accused was taken to Iringa Central police station where he stayed for one day in the police lockup before he was brought to Primary Court.

PW7 said that he informed the accused person that the information which he will give will be recorded and will be used against him in court as evidence. The accused person said that he understand that and he is willing to give his statement. PW7 informed him that he is free to tell him what he know about the case and he answered that he is willing and ready to give his statement. In his statement, the accused person admitted to commit the offence of rape, murder and stealing in the house of his neighbor. He said that he closed the mouth of the wife of neighbor during the rape incident by using hands. After he was satisfied, he left her in bad condition and he took her phone.

PW7 said that after recording the accused person extra judicial statement, he read the statement to him and he admitted that the statement was correct. He asked him to sign the statement and the

accused signed the statement and put his thumbprint. PW7 also signed the statement and put the official stamp. He put the statement in the envelope, called the police officer (PW5), and handled the accused person to him together with his extra judicial statement which was inside the envelope. PW6 tendered the extra judicial statement of the accused person which was admitted as exhibit P5 after the Court overruled the objection raised by the defense counsel on the tendering of the exhibit for failure to follow to directives in the Chief Justice's Circular. The Court in its ruling found that the objection goes to the weight of the statement rather than its admission.

In cross examination, PW7 said that at page 2 of extra judicial statement it was recorded that he got permission to inspect the accused person from the accused person himself and he was alone in the office when inspecting him. PW7 said he did not record in the extra judicial statement how he inspected the accused person.

The last prosecution witness is police officer with No. G. 4395 D/Cpl Lubeya (PW8). He said that on 25.09.2022 around 07:10 hours at Iringa Central Police Station he was ordered by OC CID Iringa ASP Hemed Kivuyo

to record statement of the accused person namely Mohamed Njali. PW8 was informed that the accused person is in the police lock up and was brought to police station on the same date around 06:00 hours after his arrest. He was informed that the accused person was accused for committing murder offence. PW8 said he prepared a room for interview, a pen, paper, table and chair. He took the accused person from the police lock up to the interview room. Inside the interview room, they were two of them. PW8 introduced himself by name, rank and informed the accused person that he is accused of murder offence. He told him that he want to record his cautioned statement. PW8 informed the accused person of his rights that he has right to call relatives, friend or an advocate to be witness during recording interview and that he is not forced to record the statement if he is not willing. If he is willing to record his statement, the same may be used against him as evidence in court. The accused person answered that he is ready to give his statement alone without the presence of relative, friend or an advocate. He said that he understood his rights. The suspect signed and put his thumbprint in the statement and PW6 also signed in the statement. PW8 recorded the accused statement by way of question and answer. It was around 07:22 hours when PW6 started to

record the accused's statement and he finished to record around 07:47 hours. The accused person was confessing to commit the offence of murder he was accused of. After completing to record his statement, PW8 gave statement to the accused person and he read it. PW8 read the statement to the accused person and he said the statement is correct. The accused person certified that the statement is correct and PW8 also certified that he recorded his statement correctly. During interview, the accused person was in good condition. PW8 tendered the cautioned statement of the accused person, but the defense counsel raised objection that the statement was recorded out of time provided by the law, some of the accused rights were denied, and the certificate in the statement shows that the statement was recorded under section 57 and 58 of the Criminal Procedure Act, Cap. 20. R.E. 2022. The Court overruled the objection raised as the same goes to the weight of the cautioned statement and not on its admissibility. The evidence in record proved that the accused person was arrested around 05:00 hours 25.09.2022 and was taken to police station. The accused statement was recorded from 07:22 to 07:47 of the same date which is just within 4 hours provided by the law from the time

he was arrested in connection with the offence. The statement was admitted as exhibit P6.

In cross examination, PW8 said that he was not present when the accused person was arrested. He don't know the time the accused person was arrested. He used 25 minutes to record accused cautioned statement. He did not record the time used to read the statement to the accused person. PW8 said he did not see any swelling in accused face. It was ASP Eliud Kivuyo (OC CID) who ordered PW8 to record the accused person cautioned statement. This was the end of prosecution's case.

The Court in its ruling found that the prosecution case was made to require the accused person to defend himself. The accused person (DW1) defended himself on oath without calling any witness or tendering any exhibit in his defense. In his defense, the accused person denied to kill the deceased. He said that on 24.09.2022 around 22:00 hours, he went to Manyara Bar to watch boxing match. At Manyara Bar, he ordered 4 Safari beer. The boxing match ended around 01:00 hours on 25.09.2022 and he went to Miami Bar which is located at Mlandege commentary to drink soup.

At Miami Bar, DW1 ordered a soup and four safari beer. Around 03:00 hours he went home to sleep.

While sleeping, DW1 suddenly found police officers inside his room. He did not see them entering. He found the door to his room broken. Police officers started to assault him by using police truncheon (kilungu) and kicks for almost 5 minutes. They told him that he is under arrest for murder offence. Inside the room, he saw a phone and a suit bag. Police told him that he has stolen those items and he has killed a person. One police officer told people who were around to call street chairman. Street chairman came. Police showed clothes inside the suit bag and phone to the street chairman. Police took him, chairman, and others to the police station. They arrived at police station around 04:45 hours. He knew the time they have arrived as he heard adhana calling from mosques. They put him in the lock up for about 4 to 5 hours.

Around 09:45 hours, the accused person said he was taken from lock up to investigation office. Inside investigation office, police officer informed the accused person that they don't want any disturbance. They asked for his name, age, tribe and religion and they recorded it in the paper. They

asked him to sign the paper, but the accused person wanted to know the content in those papers. Following the answer, police said he is stubborn. Police took handcuffs and tied his hands. They put a piece of wood between DW1's legs and tied hands. The piece of wood ends were put between two tables. He was hanging between the two tables for about 15 minutes. His hands were bleeding and he was screaming for pain. PW8 came and asked him if he will sign the papers. The accused person said that he agreed, and they took him down. Police took off the handcuff, gave him the papers and he signed. He was taken back to the police lockup.

In the next morning, the police officer namely Edmund (PW5) took the accused person to Ilala Primary Court to record statement to the justice of peace. PW5 told him to tell the justice of peace about the accusation he is facing. The accused person said he knew that he is accused of murder offence. He did not know how the murder occurred and who the deceased is. PW5 told him not to cause any chaos or disturbance to the justice of peace. They arrived at Ilala Primary Court and the justice of peace asked the accused person where he was coming from and he answered he was in the police lock up. He asked if he has any injuries and if he was assaulted. The accused person said he answered he has injuries

in his hands caused by handcuffs and he has another wound in his head. The justice of peace said the injuries are normal and asked him if he is able to walk. He said he answered that he can walk. The justice of peace introduced himself and said he will record the accused confession statement.

The accused person said the justice of peace took a pen and paper and asked for his name. The accused answered according to the question asked. The justice of peace asked him about the incident and he told him the same story as his testimony in this court. After completing to record the statement, the justice of peace asked him to sign the paper he was recording and the accused person signed. The justice of peace called the police officer who was standing in the door and handed him to the police officer together with the statement he recorded.

The accused person said further that it is not true that on the fateful date at Manyara Bar he asked PW1 for a beer as they did not meet. He did not meet with PW4 on 25.09.2022. Thus, it is not true that PW4 saw him coming from PW1's room. It is not true that PW4 chased him around Amani store and Vanesa Lodge areas. On the testimony of PW6 that he

seized a phone and a suit bag containing black suit and white shirt from his room, he said that he don't know how those items were found in his room. When he wake up, he found the phone and suit bag inside his room and police officers were inside the room. It is not true that he confessed to PW8 in the cautioned statement. He did not confess to commit the offence. They just asked for his name, tribe, religion and they forced him to sign the paper.

On the testimony of PW7 said that he confessed to kill the deceased, the accused person said that this is not true. PW7 asked him about his name and what happened before he was brought to him at Primary Court. The accused person said that he know nothing about this case and he is not responsible for the death of the deceased.

In cross examination, the accused person said he has lived at Maweni Kitanzini area for two years. PW1 and PW4 are residing at the same street and they know each other. He could drink even a crate of beer without getting drunk. He don't have anybody who saw him at Miami Bar. It is true that certificate of seizure (Exhibit P2) contained his signature and it was

not admitted when it was tendered. He said that he don't have PF3 to was tortured. This was the end of defense case.

idence adduced by prosecution witnesses proved that the nely Atika Chesco Kivenule is dead. The evidence of Adeline (PW1), who is deceased husband, showed that he found the deceased in their room in bad condition on 25.09.2022 around 02:00 hours. He took the deceased to Iringa Regional Referral Hospital where later on he was informed that she has already died. The testimony of PW1 is supported by Dr. Richard Kipyee (PW2) who examined deceased body on 27.09.2022. PW2 testified that in his examination, he found that the deceased had a loose neck and he observed that hyoid bone was detached from neck muscle. The deceased was two months pregnant and the foetus was dead. PW2 was of the view that the cause of deceased death was brain asphyxia caused by blockage of trachea. The report of examination of the deceased body – Exhibit P1 support PW2's testimony. Thus, I'm satisfied without doubt that Atika Chesco Kivenule is dead and her death was not natural.

The next question is whether the accused person is responsible for the death of deceased. In this case, the accused person is charged for murder offence under section 196 and 197 of the Penal Code, Cap. 16 R.E. 2022. To prove the offence, the prosecution evidence must prove that the accused person caused the death of the deceased by an unlawful act or omission, with malice aforethought. This is provided by section 196 of the Penal Code, Cap. 16 R.E. 2019. Under section 197 of Penal Code, a person convicted of murder shall be sentenced to death. The Penal Code provides further in section 195 (2) that unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether the omission is or is not accompanied by an intention to cause death or grievous bodily harm. The prosecution side are required to prove unlawful killing and malice aforethought. The said burden never shift from the shoulders of the prosecution and it is not the duty of the accused person to prove his innocence. The standard of proving the criminal case is beyond any reasonable doubt, failure of which raise doubts in prosecution's case and shall be resolved in favour of the accused person.

It was held by the Court of Appeal in the case of **Christian Kaale and Rwekiza Bernard vs. Republic [1992] TLR 302** that the prosecution has a duty to prove the charge against the accused beyond all reasonable doubt and an accused ought to be convicted on the strength of the prosecution case.

In the present case, the prosecution case depends wholly on circumstantial evidence. There is no eyewitness to the deceased's murder. None among prosecution witnesses testified to see the person who killed the deceased. However, absence of eye witness does not mean that the case could not be proved through circumstantial evidence if there is sufficient evidence implicating the accused person with the offence. Not every killing can be witnessed by an eye witness. The Court may convict on circumstantial evidence if facts leads to no other conclusion than that of the guilt of the accused person. In **Hamida Mussa vs. Republic [1993] T.L.R. 123**, the Court held that, I quote:

"Circumstantial evidence justifies conviction where inculpatory fact or facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt"

Similar position was stated by Court of Appeal in the case of **Samwel Marwa @ Ogonga vs. Republic**, Criminal Appeal No. 74 of 2013, Court of Appeal of Tanzania at Mwanza, (Unreported), where it was held that:-

"To pin liability on the basis of circumstantial evidence, the evidence must lead to no other conclusion except that the accused is the person who committed the offence he is charged with. If the evidence is capable of more than one explanation it does not meet the standard of proof set in this principle."

The facts which lead to conclusion that the accused person is guilty must be proved beyond reasonable doubts. In the case of **Ally Bakari vs. Republic [1992] TLR 10** the Court of Appeal held that: –

"Where the evidence against the accused is wholly circumstantial the facts from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be connected with the facts which the inference is to be inferred."

In the case of **Gabriel Simon Mnyele vs. Republic**, Criminal Appeal No. 437 of 2007, Court of Appeal Of Tanzania at Dar Es Salaam, (Unreported), the Court of Appeal provided a test when a case rest on circumstantial evidence. The Court held that:-

"It is common ground that for circumstantial evidence to found a conviction, it must be such that it irresistibly points to the guilt of the accused. From the authorities we are settled in our minds that when a case rests on circumstantial evidence such evidence must satisfy three tests:- (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused: (iii) 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 none else."

The prosecution evidence in this case rest on the evidence identification of PW4 who identified the accused person as the person he saw coming from the deceased room before she was found in bad condition, the doctrine of recent possession, and confession statements of the accused person to the police officer and to the justice of peace.

The evidence of visual identification is direct evidence. However, the same has to be taken with care. The law is settled that the evidence of visual identification is the weakest kind, and thus before it is taken as a basis of conviction, it must be watertight. The position was stated by the Court of Appeal in the case of **Waziri Amani vs. Republic [1980] TLR**

250. The Court of Appeal stated further that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence is absolutely watertight.

In the case of **Chacha Jeremiah Murimi and 3 Others vs. Republic**, Criminal Appeal No. 551 of 2015, Court of Appeal of Tanzania at Mwanza, (unreported), the Court of Appeal while discussing the possibility of mistaken identity in visual identification provided some guidelines for eliminating possibility of mistaken identity. The Court held that:

"The most commonly fronted are: How long did the witness have the accused under observation? At what distance? What was the source and intensity of the light if it was at night? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally had he any special reason for remembering the accused? What interval has lapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses, when first seen by them and his actual appearance? Did the witness name or describe the accused to the next person he saw? Did that/those other person/s give evidence to confirm it."

In this case, PW4 testified that around 01:00 hours on 25.09.2022 he was going back home from Stereo Bar where he was watching a boxing match between Karim Mandonga and Shaban Kaoneka. When he arrived at home, he found the gate was open. He entered and found the back door to the house was open. He entered inside the house and suddenly he saw a person running from PW1's room. He chased that person and was able to identify the running person as Mohamed Salum Njali, the accused person herein. PW4 said he know the accused person for almost a year as their neighbor living in the house adjacent to their house sharing the back fence wall. He was able to recognize the accused person as there was electric light at Amani Store and at Vanesa Lodge. The accused person was able to outrun him and he decided to return back home. At home PW4 called the deceased but she was not responding, he looked inside her room which was dark and he saw her sleeping without clothes. The PW1's child came and he decided to look for help from watchman at Vanesa Lodge. After seeing the situation at the PW1's room, the watchman advised PW4 to report the incident to the Police Station. PW4 went to police station and reported that there is burglary incident and he was able to identify the accused person as the person responsible.

The circumstances of the case shows that it was dark in the house when PW4 entered inside the house. It was in the middle of the night and inside the house it was dark. PW4 saw a person running from PW1's room and he decided to run after that person. He was close to him by one step and was able to recognize the person as the accused person turned his face at Amani Store area following the presence of electric light at the area. He continue to chase the accused and was able to see for the second time the face of the accused person at Vanesa Lodge. At Vanesa lodge there was sport light which illuminated the area well. He was sure it was the accused person who came out of PW1's room. He went home and later on he reported to police station. At police station, PW4 informed the police that he was able to identify the accused person as the person he saw coming out running from the deceased room.

The law is settled that naming the suspect at the earliest possible opportunity is an important assurance of the reliability of the witness. Likewise, failure to mention the suspect at the earliest possible opportunity may put the credibility of the witness in question. This position was stated by the Court of Appeal in **Marwa Wangiti Mwita & Another vs. Republic [2002] TLR 39** and in **Nebson Tete vs. Republic**, Criminal

Appeal No. 419 of 2013, Court of Appeal of Tanzania at Mbeya, (unreported). The act of PW4 to name the accused person before police officers that he is the person who he saw coming out of the deceased room is assurance that he was able to identify him. For that reason, I find that PW4 properly identified the accused person as the person he saw coming out of the deceased room on 25.09.2022 around 01:00 hours.

The evidence on record shows that after PW4 informed the police that he was able to identify the accused person as the person who did break their house, they went back to the scene of crime together with PW1 and police officers. PW1 observed that the deceased phone which is Infinix Hot 12 and the black suit and white shirt inside suit bag were stolen from his room. As the criminal was known, they went to the accused house together with street chairman to arrest him. Inside the accused room, the stolen phone, suit and white shirt were found. The police seized the property and certificate of seizure was filled. This evidence is found in the testimony of PW1, PW3, PW4 and PW6. The stolen properties were identified by PW1 and PW4. The said stolen properties were found within few hours after the incident. The Court may convict relying in the recent possession of the stolen property which is connected with the crime. In the

case of **Nelson George and 4 Others vs. Republic**, Consolidated Criminal Appeal No. 31, 93 and 94 of 2010, Court of Appeal of Tanzania at Mwanza, (unreported), it was held that:-

"In law, recent possession of property recently stolen or unlawfully obtained can be the basis of a conviction for any crime connected with the asportation of that property."

The doctrine of recent possession is applicable in this case as the stolen phone in the murder incident was found in accused possession soon after the incident. The prosecution evidence prove that the phone and suit were found in the possession of the accused person. These properties were positively identified to be the property of the deceased and PW1's brother which were recently stolen from PW1's room during the commission of the offence charged. PW1 and PW4 identified the phone and the suit by the special marks found in the properties which prove that the phone belongs to the deceased and the suit was in the possession of PW1 at the time of commission of the offence. Identification of a stolen property by special mark is sufficient proof of ownership as it was held in **Ramadhani Hamisi and Another Joti vs. Republic**, Criminal Appeal No. 513 of 2016

(unreported). PW1 and PW4 identified the deceased phone and the suit and shirt of their brother Augustine by their special marks.

The last piece of evidence that connect the accused person with the offence is his confession before PW8 and PW7. It is a trite law that a confession voluntarily made to a police officer by a person accused of an offence may be proved as against that person. The position is provided by section 27(1) of the Evidence Act, Cap. 6 R.E. 2022. The court may convict the accused person relying on confession where it is satisfied that the confession is nothing but the truth even when he denies to make the confession or he made it involuntary. See **Tuwamoi vs. Uganda (1967) EA 84** and **Hamis Athuman and Two Others vs. Republic [1993] TLR 110**.

In the case of **Hemed Abdallah vs. Republic [1994] TLR 72**, the court held that:-

"Once the trial court warns itself on the dangers of basing a conviction on uncorroborated retracted confession and having regard to all the circumstances of the case, it is satisfied that the confession is true it may, convict on such evidence without any further ado."

In the present case, the evidence of PW7 and PW8 shows that they recorded confession statement of the accused person. PW8, a police officer

at Iringa Central Police station, testified that he recorded the statement of the accused person on 25.09.2022 from 07:22 to 07:47. The cautioned statement of the accused person (exhibit P6) was retracted by the accused person. When PW8 was tendering the exhibit P6, defense counsel objected its tendering on ground that accused person was denied some rights during recording of the cautioned statement in the said statement. However, the statement shows that the accused person was afforded his rights during interview. There is no right which was not given to the accused person. Even in his evidence, the accused person said nothing about being denied right as he denied to record the statement. He said that he was forced to sign the statement by torture. Therefore, I find that the cautioned statement of the accused person was voluntarily made.

PW7 recorded extra judicial statement (exhibit P5) of the accused person on 26.09.2022. The counsel for accused person objected tendering of the confession statement on ground that paragraph 6 and 8 of the Chief Justice's Circular were not complied. I have read the exhibit P5 and I'm satisfied that the Chief Justice Circular which is the directive to justice of peace on recording extra judicial statement was complied by PW8. Exhibit P5 shows that PW8 examined the accused person after obtaining his

consent and he found the accused person in good condition without any injury or wound. The accused person also informed PW8 that he was not persuaded to give his statement by promise or violence. For that reason, I find the extra judicial statement of the accused person was voluntarily made. There is no cogent reason to doubt the testimony of PW7.

The accused person in his defense he denied to kill the deceased. He said that on the date of incident he was drinking beer at Manyara Bar before he went to Miami Bar. He returned home around 03:00 hours. He said that when he woke up, he found police officers inside his room and there was a phone and a suit inside a bag. He said that he don't know how the phone and suit alleged to be stolen were found in his room.

I'm aware that the accused person has no duty to prove his case. What he has to do is to raise doubt in prosecution case. However, the accused defense does not raise any doubt to prosecution' case. PW1 testified to see the accused person at Manyara Bar and he even bought him one safari beer. Around 00:20 hours on 25.09.2020 the accused person disappeared from the bar. The accused person admit to be at Manyara Bar, but he denied that PW1 bought him a beer and he did not

meet with PW1. The accused person tried to show that he was not present at the scene of crime during the incident, but the testimony of PW4 show that he was able to identify him coming out of deceased room. The evidence of identification of the accused person by PW4 is watertight.

The PW4 evidence is supported by the doctrine of recent possession where the phone and a suit stolen during the incident were found inside the accused room. His defense that he do not know how the property find its way in his room has no basis. There is evidence of PW1, PW3, PW4, and PW6 who testified to see the accused person handling to the police the said stolen properties. I have seen these witness testifying and I believe them to be witness of the truth. I see no reason to doubt their testimony.

Further, the cautioned statement and extra judicial statement of the accused person describe the circumstances and the manner in which the deceased met his death. The information found in the confessions are detailed. The events described therein could have only been given by a person who had knowledge of what happened. The confessions reveals how accused person went to steal to deceased room and how he returned to the room and closed deceased mouth when he was raping her. This all

signifies that the accused person had intention to commit offences of burglary and rape. The Penal Code provides in section 200(c) that malice aforethought is deemed to be established by the evidence proving an intent to commit an offence with a penalty which is graver than imprisonment for three years. Offences of burglary and rape which the accused person committed leading to the death of the deceased are punishable for imprisonment of more than 3 years. For that reasons, the malice aforethought is proved in this case without doubt.

Therefore, I find that prosecution proved beyond doubt the offence of murder against the accused person. Consequently, I convict accused person namely Mohamed Salum Njali for the offence of murder contrary to section 196 and 197 of the Penal Code, Cap. 16 R.E 2022.

SENTENCE

The conviction for the offence of murder under section 196 of the penal Code, Cap 16 R.E. 2022, attracts only one sentence of death by hanging. That means the court has no other option or discretion to impose a different sentence. For that reason and by virtue of section 26(1) and

section 197 of the Penal Code, Cap. 16 R.E. 2022 and section 322 (2) of the Criminal Procedure Act, 20 Cap 20 R.E. 2022, I hereby sentence Mohamed Salum Njali to suffer death by hanging. It is so ordered.

ORDERS

1. The mobile phone Infinix Hot 12 and the black suit and white shirt which were tendered as exhibits to be handled to the husband of the deceased namely Adeline Michael Kileo.



A handwritten signature in blue ink, consisting of stylized, overlapping loops and a long horizontal stroke.

A.E. MWIPOPO

JUDGE

25/07/2023

The judgment was delivered in open Court this 25th September, 2023, in the presence of State Attorneys for republic, the accused person and the defense counsel for the accused person.



A handwritten signature in blue ink, consisting of stylized, overlapping loops and a long horizontal stroke.

A.E. MWIPOPO

JUDGE

25/07/2023

Right of appeal fully explained.



A handwritten signature in blue ink, consisting of stylized, overlapping loops and a long horizontal stroke.

A.E. MWIPOPO

JUDGE

25/07/2023