

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(DAR ES SALAAM SUB – REGISTRY)**

**AT DAR ES SALAAM**

**CRIMINAL SESSIONS CASE NO. 120 OF 2021**

*(Originating from PI No. 08 of 2020 of the District Court of Temeke at Temeke)*

**THE REPUBLIC**

**VERSUS**

**SAID HAMISI BAKARI @ MUDDY**

**JUDGMENT**

**POMO, J**

This is a murder case. Said Hamisi Bakari@ Muddy (the accused person) stands charged with an offence of Murder Contrary to Section 196 and 197 of the Penal Code [Cap. 16 R.E.2019]. The particulars of the offence as transpired from the information are that, the accused person, on the 19<sup>th</sup> day of April, 2020 at Moringe Mbagala area within the District of Temeke in Dar es Salaam Region, murdered one SADA JUMA (the deceased).

The accused person pleaded not guilty to the charge. In proof of the offence brought in court a total number of eight (8) witnesses namely; Fatuma Ally Omary (PW1); Mwajuma Ally Omary (PW2); Asha Said (PW3); Dr. Prof. Amos Roger Mwakigonja (PW4); Adina Omary Ally (PW5); Ashura

Yusuph (PW6); ASP Benard Nyambalia (PW7) and E7700 D/CPL Evodious (PW8). Also, tendered two (2) exhibits, Medical Examination Report (admitted as Exhibit P-1) and Sketch Map of the scene (admitted as Exhibit P-2). On the other side; the defense had one witness, the accused person himself.

During the trial, Mr. Job Mrema, learned Senior State Attorney assisted by Irene John and Salma Jaffer, both learned State Attorneys appeared for the Republic whereas Mr. Mainda Omary, learned Advocate, represented the accused person.

Briefly, the factual setting giving rise to the arrest, arraignment and the ultimate prosecution of the accused is that, on the fateful date, the accused person was at home at Moringe Mbagala street together with other family members including the deceased who had just arrived from Nachingwea. That, after having dinner, the deceased who was 13 years by then went to sleep with her cousin namely Adina Omary Ally (PW5)-10 years old and that later on that night, the accused is alleged to have gone to that room where the deceased was sleeping, threatened the child who was sleeping with the deceased (PW5) to look the other side (at the wall), then he had carnal knowledge of the deceased against the order of nature before strangling her to death. The body was found dead the next morning and the matter was reported to the police station whereby police officers went to the crime scene

and took the body to Muhimbili National Hospital Mortuary. The autopsy was conducted and revealed that the deceased's death was due to ASPHYNXIA DUE TO SMOTHERING DUE TO RAPE-SODOMY. The investigation of the incident commenced immediately afterwards and ultimately the accused was linked with the killing of the deceased hence his apprehension.

I will now briefly narrate the testimonies. From prosecution side, their evidence was as follows; **Fatuma Ally Omary (PW1)** - the deceased's mother, testified among other things that, she resides at Nachingwea in Mtwara region and on 18/4/2020 during the Corona break, she managed to cause her daughter (the deceased) Saada and the other kid namely Ramia to travel to Dar es Salaam where her sister namely Mwajuma Ally Omary (the accused wife) was staying. She testified to the effect that, she communicated with her sister through the phone upon their arrival at Dar es Salaam. That, on the next day around 9:00 am, she received a call from Shaffii Mohamed who is her uncle whom asked her to close the shop and go immediately to her aunt namely Bibie Selemani residing at Kilimahewa in Nachingwea. At her aunt residence is where she was informed that her daughter (Saada) had passed away. PW1 told the Court that she was informed that, the cause of death was the convulsions sickness "*degedege*", and was so told by her aunt on Bibie Selemani. That from there people gathered for mourning and the body was transported to Nachingwea for burial.

According to PW1, after burial, she was called to police station at Maturubai at Kizuiani at Mbagala in Dar es Salaam. At the police station is where she was told that her deceased daughter was raped, sodomized and strangled by the accused. Upon being informed, she told the police officers that she expected this as in the year 2019, the accused did the same to her relative one Ashura Yusuph (PW6) who was then 18 years old, where he wanted to rape her inside the same house, same room in which Saada was raped, sodomized and strangled. That Ashura was an home maid by then at Moringe kizuiani in Dar es Salaam and for such attempt made Ashura terminate her employment.

When cross examined PW1 had testified, at the time the deceased was a standard six pupil and it was corona breaks for schools as were closed thus she allowed the deceased to come to Dar es Salaam to the accused residence believing that he has stopped those behaviours.

**Mwajuma Ally Omary (PW2)** was the second witness and is the accused's wife. She testified to the effect that, she resides in Nachingwea since last year. In 2020, she remembers Saada Juma died. By then she was living in Dar es Salaam at Moringe street in Mbagala ward. According to PW2, she was living with her husband (the accused). She admitted that in 2018 she was living with her young sister Ashura Yusuph (PW6). PW2 testified

further that, on April 2020 did ask her younger sister (PW1) to come to Dar es Salaam with her daughter (the deceased) when she was at Nachingwea , because it was corona break and she agreed. However, they failed to travel together on the same date but while she was already in Dar es Salaam on 18/4/2020, the deceased and the other kid Ramia Abdallah were transported through the bus and arrived at 5 pm in the evening, received and picked at Mbagala bus terminal by PW2. After that, they went together home at Mbagala Moringe.

According to PW2, at 6:00 pm she prepared food for that night and they ate and started watching the TV. At 11:00 pm she went to prepare the room for the deceased and Adina Omary to sleep. The room was within the same building. She then asked them to go to sleep and they went. That PW2 and her husband (The accused) and Raima Abdallah remained in their room and slept.

According to PW2, before she went to sleep, she had closed the house door by using a padlock. That was the living room entrance door which is made of iron bar and went to put the key to a table in a room where the accused and Adina were sleeping. That, to ensure they don't go outside as the toilet was outside the house, PW2 put for them a bucket in their room for urination.

According to her, she told them not to switch of the light then went to sleep. The light was of tubelight and was sharp.

PW2 continued to testify that, she woke up at 6:45 am morning and walked away from her room. It was on 19/4/2020. She went to the living room and found the main door is unlocked and asked the accused if he is the one who opened the door who denied. That, she then went to the room where the children slept; the deceased and Adina were sleeping and she started waking up the deceased but could not respond. PW2 shake her but still couldn't wake up. She then asked the accused to come and see that child. The accused went to that room where the children slept and stood there watching the child and asked PW2 what has happened, he then asked for help from people outside the house. That the accused went outside and met a local authority leader within their street namely SIWA who phoned Mbagala police station and the police promised to come. Due to the police officers' delay, the accused went to the Police station and came back with police officers together with a doctor. According to PW2, they entered the room in which the deceased body was laying and the doctor observed it and said the child is dead and had been raped. After that, the body of the deceased was taken to the hospital.

PW2 proceeded to testify that; on the morning of 20/4/2003 while at the police station at Maturubai for directions on how to be given the deceased's body from the hospital for burial, the accused phoned and told her that he was needed at the police station at Maturubai Mbagala for interrogations. Thereafter she saw her husband, the accused, having been arrested by the police.

PW2 further testified that, Asha Said is her younger sister who in the year 2019 used to visit their home. That, one day while on the way from visiting a patient, Asha Said told PW2 that the accused had seduced her to make love affairs with him.

When cross examined, PW2 testified that, in that area where they lived complaints as to bandits and rape are there. In their street there was no community police (ulinzi shirikishi) and insisted that anyone from outside could jump in the house and commit crime. That the complaint on Aisha being seduced for sex by the accused came before the incident of Saada.

Another witness was **Asha Said Kuchagba** (PW3) of Masasi Lindi, who basically testified that she came to know about the death of the deceased upon receiving a phone call from her sister Mwajuma Ally (PW2). That she knows the accused and in 2018 she visited their home in Dar es salaam on a date she doesn't remember however arrival time was at 06:00PM evening.

The food was prepared and they ate. They finished eating at 8:00PM then they started watching the TV. They were three, herself, her sister (PW2) and brother-in-law (the accused). Around 10 PM on that date all went to sleep as the accused said he wanted to go to work early next day. However, during night time, at a time she couldn't recall, PW3 felt someone was on her body. When she looked, it was the accused, her brother-in-law. That time he already had touched her private parts. He touched her vagina and inserted his finger. When she asked him, the accused replied to her that "*you are an adult and not a younger person.*" That he recognized him because the room had tube light and whenever she went to sleep, she never switched off the light. That on that date, the accused was wearing a towel, and was not wearing anything to his chest. His penis was already erectile and when she refused his wish, he turned back to his room.

Apart from that, PW3 also mentioned the other incident of 2019 on a date and month she couldn't recall, when she was no longer going to the accused home. That, the accused went to her home at Bugudadi and met her with her two friends. Welcomed him inside. While there, there a time PW3 went outside her room. The accused followed her and held her hands back and started making tongue kiss with her. PW3 refused and moved away; the accused became angry.



PW3's evidence was in resemblance to the evidence of **Ashura Yusuph Mkulilwa (PW6)** of Nachingwea who is the other relative of the accused wife. Generally, testified that she recalls that, sometimes back the accused had entered in the room where she was sleeping, only to find him touching on her private parts and the breast, the act which shocked her. She woke up and became astonished to see her brother-in-law. She asked him, what was wrong. PW6 then shouted "*mama*" then the accused went away, took water into the kitchen and went to his room. When she woke up in the morning she went to her sister and waked up her and told her what her brother- in -law did to her. That, her brother-in-law came to her room and wanted to rape her. Her sister (PW2) told her to shut up.

The other witness paraded by prosecution was **Prof. AMOS RODJA MWAKIGONJA (PW4)** who examined the body of the deceased at mortuary of the Muhimbili National Hospital and the one tendered the Postmortem report (Exhibit P1). He testified to the effect that, he is a doctor a pathologist holding a degree of doctor of medicine from the university of Dar es Salaam acquired in 1994, Masters of medicine in an anatomical pathology from the University of Dar es Salaam in 2002 and PhD from the University of Karolinska Institute of Stockholm Sweeden. Also, He hold Fellow of the College of Pathologist (FC Path) of East and Central Africa of 2014. That he has an experience of 21 years as a pathologist, a doctor also a lecturer. That he

works at Muhimbili University and Muhimbili National Hospital. That his duties are to conduct surgical pathology and cytology (investigating the cells of human body) also, examines the dead bodies, (forensic and clinical pathology).

According to PW4, on 21/04/2020 while he was at mortuary of Muhimbili National Hospital, was an on-duty doctor by then, the body of a lady approximately aged 13 was brought for examination. That body was introduced to him by two relatives and a police officer. He mentioned the relatives as Shaffii Mohamed Yasini and Abdallah Abdulrahman Kipingo in presence of D/CPL Evodius. He examined the body and wrote a report which was handed to the investigator by the mortuary department.

According to this witness, he observed three things which were; deceased died of asphyxia, her body showed she was raped but also, she was sodomized. It was his testimony that, the circumstances leading to the death of the deceased are interrelated to act of rape and sodomizing. That there is high possibility that at the time of committing the incident, the deceased's mouth and nose were shut. Medically, it is called smothering. She was raped first then failure to breathe came next.

Cross-examined, PW4 testified that he was not there when the deceased was raped but was his conclusion due to the body symptoms of the deceased. Had bruises in the vagina caused by friction by something which

can penetrate the vagina, penis inclusive. The other thing he found in the deceased's body is her nail were already turned grey. As to sperms, when a person dies, undergoes autolysis (self-destruction). As long as the body has no life, it underwent autolysis making impossible to see the sperms. That, the deceased's body showed all the sign of being raped and according to PW3, the child was only 13 years incapable of giving consent to sex. PW4 further articulated that he didn't perform DNA rather took vagina swab and rectal swab and personally, had not seen the result from the Chief Government Chemists.

The other witness for prosecution was **Adna Omary (PW5)**, 10 years old girl whom upon promising to tell the truth, told the Court that she studies at Nguvu moja primary school. That deceased was her sister. For the last time, they ate with their aunt one Mwajuma (PW2) then were taken to sleep in a room where their aunt had prepared matrices and a net. According to PW5, the accused went in that room where they slept. He then held the deceased on her neck. PW5 insisted that he saw him. That he undressed his boxer to let his penis out. He then asked PW5 to turn and look onto the wall of which she complied. In the morning, her aunt came to wake up them up but she met her sister already dead. According to her, there was blood on the matrices to which they slept on.

When cross examined, PW5 said she didn't see the accused inserting his penis in the vagina of her deceased sister

The other witness was **Bernard Nyambalya (PW7)** who testified thus. He is a police officer working as a head of criminal investigation at Kariakoo police district in Dar es Salaam. On 19/4/2020 was working at Mbagala police district as a head of criminal investigation in that police district which is within Temeke district. On the date around 8:00 am (morning time) while PW7 was in the office, Mbagala police station, the accused went to report the incident which happened at his home. He reported that, a lady who was residing with him at his home has died and it seems that she was raped and he was unaware of what happened because at the time of the incidence, he was sleeping with his wife in their room. According to PW7, he organized an investigation team and went to visit the scene of crime. He also asked a doctor to accompany them whom he mentioned his name was Dr. Godwin. Since the scene was the accused's home, they were led by him to it. E7700 D/SGT EVODIUS (PW 8) also accompanied them. PW7 testified that, at the accused's home they met his wife one Mwajuma Ally (PW2). Assessed the scene by looking the house in which they lived, it had a fence and a gate. That, it was a house in which two family could live but only Hamis was the one living in. on top of it had a store in which no one was living in. Thereafter, they went into the house where the accused lived in and from outside it had

a grilled door and had no wooden door. The house had a room which was used by him and his wife, the guest's room, a store and another small room in which the deceased was sleeping and a kitchen. Upon entering the house, they saw no sign of anything suggesting if anyone from outside entered the house. Everything inside showed nothing have been taken. The time they went there the body of the victim was still lying on the bed. The Doctor was the first person to examine the body by uncovering her and was satisfied the deceased was already dead. That he turned her and observed that her private part had been penetrated and blood was on her private parts and on the bed to which she was sleeping.

As to PW7, he then started oral interrogations with the accused and his wife, Mwajuma ally (PW2) on what happened. Their response was that they don't know what happened. That, upon completion of the oral interview, didn't conclude as to who committed the offence. On 19/4/2020 they set as a team of investigation to discuss the matter, and concluded that should have a detailed interrogation with those who lived in that house. PW7 instructed his team to summon the accused and his wife for further interrogations on 20/4/2020. Also, he instructed the investigator to carry out interrogation to Adna (PW5) to find out if there is anything she knows about the incident as she was the one who slept with the deceased on that date. The statement of Adna was taken at mbagala police station. The accused and his wife denied

to have committed the offence. The interrogation by Hawa to Adna showed that the accused is the one who committed the offence as he saw him committing the same.

From the statement given by Adna; found that the wife should be released and continue with the accused person as a person named by Adna to be the culprit. After that, Evodius is the person who continued to investigate the matter and within that investigation time he got a work transfer to Kinondoni criminal investigation department. The instructions were given on 19/4/2020 to Evodius to draw the sketch map of the crime scene. Also, PW7 instructed him to go with the deceased' body to Muhimbili National Hospital. PW7 insisted that the investigation which was carried out was done keenly up to the level of bringing the accused before the court and should the same be considered in the court's determination of this case in dispensing justice.

The last witness was **E7700 D/SGT EVODIUS (PW8)** whom testified to the effect that he is a police officer at Mbagala police station in criminal investigation department. On 19/4/2020 he was working at Mbagala police station and to date is still working there in the same department. PW7 testified that on that date around 8:00 in the morning was called by the head of investigation ASP Bernard Nyambalya (PW7). He informed him that about the incident of murder case occurred at Moringe street in Mbagala Kiburugwa

area in Temeke District in Dar es Salaam region. That, it is the accused who reported the incident and, in their company, led them to the scene of crime. Together with Dr. Godwin. He managed to see the house which was in the fence and the accused is the one who showed the house. Upon arrival, they entered the house in which the incident occurred. It had a grilled door without a wooden door to it. They inspected the room in which the victim body was lying. That room had no door save the curtain and it had a bed with 5'x6' mattress. The doctor uncovered the victim's body and found it to have froth (mapovu) with blood particles coming out the mouth. The Doctor also examined the private parts of the victim both the anus and the vagina and found that all were torn and blood was coming out and confirmed to them that the victim was dead and ASP Bernard assigned PW8 to take sketch map of the scene of crime. He looked how many room the house had, if the house had electricity, if it had an area where one can intrude in from outside. He also went outside to look the fence if there was any part of the fence which had been piercing but found none. According to him, they observed that the house had three bedrooms, a store, a kitchen and a seating room. He observed that the house had electricity and the room in which the victim slept had a bulb which was lighting. Also, in that room there was a bucket which was put by the accused's wife so that during night it will be used for urination by the two children. Also, they were satisfied that Mwajuma Ally was the last

person to close the main for entrance and took the key into the room in which the deceased slept. He also switched on the bulb to test if it was functioning it worked. He also observed that the house had only one entrance room and also had a ceiling bord which does not allow one to penetrate through in order to enter into the house.

According to PW8, he was satisfied himself that the the grilled door could not allow one to pass through. After all that, PW8 said that they then took the body to Muhimbili National Hospital for medical examination. It was on 19.4.2020. Thereafter, investigation team sat, and it was concluded that the accused, his wife and Adna be interrogated.

According to PW8, on 21/4/2020 he was accompanied with the deceased's relative one Abdallah Abdrahaman Kipingo and Shaffii Mohamed Yasini to go to Muhimbili National Hospital to identify the body of their beloved one, Saada Juma. Abdallah was a step father to the victim and the other was only a neighbour to them. They met Prof Mwakigonja (PW4) who examined the body of the victim. He called the victim's relatives and asked how are they related. He was the one who told the PW4 when the incident occurred, where and at what time. He identified the body and left the Doctor to continue with his examination. The Doctor took the sample from the body of the deceased so that He could sent them to the Chief Government chemist for forensic investigation regarding the rape and canal knowledge committed to



the deceased person. He sent the sample to the Chief government chemist and was given Lab No. 1426/2020. After that, since it was the sample from the deceased, He took the accused person so that he can be taken his sample for comparison with that of the deceased. That was on 24/4/2020. He was received by on Hadija Saidi who took swab from the right and left side of the accused's mouth and also took two pieces of the accused's shirt he was wearing. By the end of April,2020 he made up follow ups to the forensic investigation, he saw Hadija and gave her the Lab No.1426/2020 and upon looking, the results were that the DNA test was incomplete. Therefore, it was hard to get comparison between the two samples.

They then proceeded with an investigation in the street where the accused lived and observed that at the accused's home there are different persons who had stayed there, Asha Saidi and another person he had forgotten. He looked for them and interrogated. What he observed from them was that they once slept in the room the victim slept on the incident date and they experienced the accused's attempt to rape them. These were adult of over twenty years. He then concluded in my investigation is that the accused raped, sodomized and strangled Saada Juma.

Upon reviewed the prosecution evidences, this court found the accused had a case to answer. The court explained to the accused person all his rights as provided for under section 293 of Criminal Procedure Act, [Cap. 20

R.E.2022]. In turn, the defence case was blessed by one witness, who is the accused person. He fended after taking oath.

As alluded to above, the accused Said Hamisi Bakari@ Muddy (DW1), denied the charge. In his testimony testified that, on the 18/4/2020 he went at his work at Temeke returned home around 5 PM evening. His wife asked him for money to enable her to go to pick the children at Mbagala bus terminal. These children to be taken were deceased and Ramia Abdallah Kipingo who were coming from Nachingwea in Lindi region. According to him, these children came to visit their aunt, his wife Mwajuma Ally. That she picked them from the bus stand. That deceased child had visited their home for almost three times. They arrived at their home around 6:00 PM evening time. Their aunt prepared them food and they ate. When they finished, he phoned their step father one Abdrahman Kipingo. That was around 7:00 Pm evening time informed him that the children had arrived safely. Thereafter he proceeded with his normal business and his wife continued preparing evening food. He then picked the children into the room to watch TV. The kids he picked are Adina Omary, Saada Juma (deceased) and Ramia Abdallah. When they were watching TV, he was outside and his wife proceeded cooking food. His brother-in-law one Omary Ally the brother of his wife came to see his nephews. The food was then ready, this was around 8:00PM, they together ate and upon finishing his brother-in-law left. The children went again to

watch TV and himself and his wife joined them in watching the TV up to 11 PM. He then asked his wife to prepare them a place to sleep in a guest room. The three children were taken to sleep together in that room but Ramia, because she was crying, his wife picked her so that she could sleep in their room. DW1 insisted that he didn't help his wife in preparing the room for sleeping of the children.

According to him, the house he resides had five rooms and a living room. There is a room for the landlord's child, his room followed by a store, the room for guests and the kitchen then sitting room.

The children went to sleep at 11 PM and they also went to sleep at that time. According to DW1 In the house he lives in, his room has a door, that of the landlord's child room have a door and the rest have no doors. The house entrance door had no wooden door except the iron grill. That they slept and woke up on 19/4/2020 around 7:00AM morning time. He told his wife that he wanted to go to work. He took bath and finished and his wife went in for a short call. He came out from his room with a water bucket to take water in the living room for use in the toilet. On the way he met with his wife coming into the living room and asked him if he had opened the entrance door. The entrance door is the iron grilled door. They used to lock it with a padlock model solex. It had two keys. According to him, before they owned all the keys but when they travelled to Nachingwea Lindi they left one key to

his brother in -law one Omary Ally. He replied to her that he didn't open the door and asked her to first ask the children. His wife went into the children's room and suddenly heard her calling him shouting that there is a problem. He went there. He asked her what was the problem she told him to look the deceased saying she had tried to awake her but the deceased was not responding. DW1 said he saw the flue on her nose mixed with blood. When his wife removed the bedsheet from her body, they saw blood on the matrice. Also he said they saw the right leg folded and her under pant was on that right leg. Having so observed he went outside to call a ten cell leader one Siwa Said. Also, their neighbour called Eliud went. He took the ten cell leader into the room. In the room there were his wife, Eliud and other neighbours started coming. The ten-cell leader told them not to touch the child.

DW1 said in that room there is no bed so the children slept on two matrices which were merged. That room had light and the house had electricity power. The light in that room is deem light because it is for sleeping and cannot have strong light like those of outside. The bulb had pale light. If there is power cut and one enters into our house there is no way you can identify him.

He then reported the matter at Maturubai police station in Mbagala. The police took the police landcruiser and went up to Zakiem Healthy center and picked the doctor and together they went home where the incident

occurred. At home he showed them the room in which the body was and the doctor examined the body and later confirmed to the police that the child was already dead and it seems she was raped. After that the police inspected the house surroundings. It was seen there was a leg palm which stamped down and climbed the wall fence. They then wrote down, but he doesn't know what they were writing.

Thereafter they returned the doctor to Zakem healthy center and then they took the body of the child to Muhimbili National Hospital. When they came back from Muhimbili, a police, not Bernard, asked him about the incident and he narrated to him and he was writing. After that he was released to go back home.

DW1 informed his father-in-law, one Shaffi Mohamed Yasin over the phone call on the incident. The next date 20/4/2020 which he was told to report to the police station did go there with Shaffi Mohamed Yasin, Abdalrahman Kipingo and Salum Mandanje. His father-in-law entered the OC CID Bernard office and then phoned his daughter (accused wife) Mwajuma Ally also went into the OC CID room and from there it was resolved that him and his wife be arrested and were arrested and taken into the lock up. By then he was not aware which offence he was facing.

DW1 further testified that, on 21/4/2020 was taken out of the police lock up to the investigation room. The police came with a box which looked

like of keeping cold things and told him that they wanted to take a sample for DNA. He asked them how long will it take, replied will take 14 days to 21. When he was in the lock up, which was almost one month and a half, came police officer by the name of Evadius (PW8) and told him that the sample failed to match, the DNA test. He then concluded that he is not concerned with this murder and he has never been charged with any offence apart from this.

When cross examined DW1 said, he fixed bulb in the room the children slept so that they can see. Before 19/4/2020 he had never switched on that room bulb. The bulb was of a coil mode chine made. He also told the police about the key that he left when we travelled but the police didn't bother.

At the close of the evidence tendered by both sides, upon being given opportunity, both the learned State Attorneys and the defence counsel were willing to make a final submission. I have considered them. To make it more brevity, I won't reproduce the same here but I will be referring them in the course of determination of this matter where I find it necessary.

I have considered the evidence from both sides, the information of murder laid against the accused person and the law applicable. From both side's evidence as adduced, the following facts are not in dispute. That, the deceased died unnatural death, the incident which occurred on the night of

19<sup>th</sup> April, 2020. Lastly, the accused Said Hamisi Bakari@ Muddy is a person arrested in connection to that death thus facing the instant murder case.

In this case, as already stated earlier, the accused is charged with murder contrary to section 196 and 197 of the Penal Code [Cap.16 R. E. 2002] now [R. E. 2019]. The law provides that:

*"S.196: - Any person who with malice aforethought causes the death of another person by unlawful act or omission is guilty of murder".*

Thus, in order to establish guiltiness of the accused person, the prosecution is duty bound to prove the following issues touching the vital ingredients of the offence:

- 1. That, Whether the accused actually caused the death of the deceased or killed her,*
- 2. If the answer to the first issue will be affirmative, then whether the killing amounted to murder.*

It is unfolded truth that, from the prosecution testimonial version, there is both direct evidence which points the accused person to be the culprit of the incident. These ranges from the testimony by PW5 who witnessed the conducts of the accused at the scene which led to the death of the deceased

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and circumstantial evidence giving circumstances suggesting that the accused person is responsible for the death of the deceased.

It is very important to note the following; **one**, the evidence by PW5 is in respect to visual identification of the accused on the material date of the incident. **Two**, Principally, when a case is centred on evidence of visual identification such evidence must be watertight before arriving at a conviction. It is borne out of the fact that visual identification is of the weakest kind and hence the necessity of ruling out any possibilities of mistaken identity first before acting on such evidence. In the celebrated case of **Waziri Amani v. R. (1980) T.L.R 250** the Court of Appeal stated that visual identification is of the weakest kind of evidence and the most unreliable, and that a court should not act on it unless all possibilities of mistaken identity are eliminated. This entails, in case whose determination depends on identification, it is very important to scrutinize the evidence on conditions favouring a correct identification. In **Raymond Francis v. R, (1994) T.L.R 100** the Court of Appeal clearly stated: -

*"...It is elementary that in a criminal case whose determination depends entirely on identification, evidence on conditions favouring a correct identification is of utmost importance. "*



In **Chacha Jeremiah Murimi and 3 Others vs. Republic**, Criminal Appeal No. 551 of 2015 CAT at Mwanza (Unreported); the Court of Appeal of Tanzania had this to say: -

*"Admittedly, evidence of visual identification is of the weakest kind, and no court should base a conviction on such evidence unless it is absolutely watertight; and that every possibility of a mistaken identity has been eliminated. To guard against that possibility the Court has subscribed several factors to be considered in deciding whether a witness has identified the suspect in question. 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 night? Was the observation impeded in either way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? ...**" [Emphasis is added]*

Again, it is an established principle that where conditions of identification are unsatisfactory, evidence must be watertight. In the case of **MOHAMED BAKARI & 7 OTHERS V. R [1989] TLR 134** it was held that:

*"Where the conditions for identification are unfavourable, corroboration is necessary."*

**Three**, Besides, to pin liability on the accused based on 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 doctrine. In other words, the evidence should not be ambiguous for it to be relied upon. Meaning, before the court can ground a conviction entirely on circumstantial evidence, it must find that the exculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilty [see: **John Magulandogo V. The Republic**, Criminal Appeal No. 18 OF 2004 CAT, **Mark Kasimiri v. Republic**, Criminal Appeal No.39 of 2017 CAT at Arusha (both unreported), **Ilanda Kisongo v. R** (1960) EA 780 at page 782, **Magendo Paul & Another v. R** (1993) T.L.R 219, **Hassan Fadhili v. R.** (1994) T.L.R 89 and **Nathaniel Alphonse Mapunda & Another v. Republic** [2006] T.L. R 395]

It was the prosecution witnesses especially, **PW5** who has testified to the effect that she saw the accused at night on the material date of incident, entering in the room where she was sleeping with the deceased, he took out his penis from the pant he wore and started holding the neck of the deceased tight. This piece of evidence is collaborated with the evidence of *one*, **PW4**, the medical expert who testified to the effect that the deceased was raped

and sodomised the same which was backed with the Postmortem report (Exhibit P1). Two, **PW2** the wife of the deceased who testified to the effect that, she had observed the safety of the house before they slept on that night, she locked the main entrance with padlock, she put a bucket in the room where the deceased and PW5 slept and instructed them to use it and not the toilet which was outside, the bucket which was later on found by PW7 and PW8 during investigation, she also testified that the house was installed with electricity the same was testified by PW8, much on to say PW2 explicated that the room (scene) was installed with the hanged bulb on the roof which was working properly and on the fateful date she was the one who switched on the light which was bright and it was never made off by the victim and PW5 as she instructed them not to do so.

Looking at PW5's testimony and considering how the scene of crime house rooms are arranged as testified by DW1 himself and PW2, PW7, PW8 and the sketch map, it is very obvious ***that at the matrices where the deceased and PW5 slept, anyone entering in the room was closer to them.*** But again, the light within the room as testified by PW2 was bright enough which made PW5 manage to identify the accused at the material night before the commission of the incident as together had been watching television before going to sleep. But again, per the evidence adduced by PW7 and PW8, the circumstances surrounding the incident itself, nothing

suggested the breaking into that house. Also, the accused was the only male person present in that house on the fateful date considering the main entrance was locked with padlock.

The accused has fended for himself that, the entrance door had two keys and when they travelled to Nachingwea Lindi before the incident, they left one key to his brother in - law one Omary Ally. He also contended that, he had told the police officers, however, I am hesitating to believe the accused as the same is not reflected in his statement recorded at the police station. I have all reasons to believe that, this statement is an afterthought to suggest to implicate the other person in such commission.

In this case, despite the accused denial of killing the deceased but with the testimony of the eye witness PW5 collaborated with the evidence of PW2, PW4, PW7 and PW8, I am satisfied that the accused is responsible for what happened to the deceased that he raped, sodomised and killed her. To that end, I find the first issue is disposed positively that the accused was the one who committed an act of killing the deceased.

On the second issue as to whether the killing amounted to murder, the crucial test is whether the accused had malice aforethought. Principally, malice aforethought is governed by *section 200 of the Penal Code* which sets out the law as follows:

167.

"S.200: - **Malice aforethought shall be deemed to be established** by evidence proving any one or more of the following circumstances

**(a) an intention to cause the death of or to do grievous harm to any person whether that person is actually killed or not"**

(b) N/A

(c) N/A

(d) N/A

The position of the law was well elaborated in the case of **ENOCK KIPELA vs. R** Criminal Appeal No. 150 of 1994 CAT at Mbeya (Unreported) in the following words: -

*"... 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, (2) **the amount of force applied**, (3) **the part or parts of the body the blow or blows were directed at or inflicted on**, (4) the number of blows, although one blow may be sufficient for this purpose, (5) **the kind of injuries inflicted**, (6) the attacker's utterances, if any, made before, during or after killing and (7) the conduct of the attacker before and after the killing"*[Emphasis is added]

Guided by the above principles of the law, the intention of the accused

can be proved by considering the amount of force applied, the part of the body inflicted and the kind of injuries sustained. In my dutiful opinion, the answer to this issue lies in the evidence gathered from PW5 and PW4 the medical expert who examined the body of the deceased as to how the accused held the neck of the deceased tight on the material night strangling her to death and PW4 explications together with the Postmortem examination report (Exhibit P-1) which reveals that the deceased's death was due to ASPHYNXIA DUE TO SMOTHERING DUE TO RAPE-SODOMY. The force applied and the parts of the body inflicted clearly indicates that the accused had intention of committing the offence. Henceforth, the second issue is addressed positively.

Based on the foregoing, I am satisfied that the prosecution managed to prove their case beyond reasonable doubt and therefore I hold that the accused committed the offence of murdering one SADA JUMA STAMBULI contrary to section 197 of the Penal Code, [Cap.16 Revised Edition 2022]. Consequently, I hereby find him guilty of the offence and convict him.

It is so ordered

DATED at **MBEYA** this 29<sup>th</sup> day of MAY 2024.

169.

**MUSA K. POMO**

**JUDGE**

**29/05/2024**

**ANTECEDENT**

**MR. MASUA, S/A:** My Lord, accused be punished in accordance to the law.

That is all

*M.K.P.*

**MUSA K. POMO  
JUDGE  
29/05/2024**

**MR. MOHAMED, ADVOCATE:** - My Lord, we leave it to the discretion of the court on the kind of punishment to be imposed

*M.K.P.*

**MUSA K. POMO  
JUDGE  
29/05/2024**

**SENTENCE**

After conviction comes sentencing. For the offence of murder, there is only one sentence under the law, death sentence by hanging as provided under section 197 of the Penal Code, [Cap. 16 Revised Edition, 2022]. Being the stance of the law, I hereby sentence the accused person, SAID HAMIS BAKARI to suffer death by hanging for murdering, SADA JUMA STAMBULI, on 19<sup>th</sup> day of April, 2020 at Moringe Mbagala area within Temeke district in Dar es Salaam region.

It is so ordered



*M.K.P.*

**MUSA K. POMO  
JUDGE  
29/05/2024**

**COURT:** Judgment and sentence pronounced at Mbeya sub-registry of the High Court via video conference in presence of Mr. Clement Masua, learned state attorney for the republic, the accused person represented by Mr. Mohamed Muya, learned defence counsel holding brief for Ms. Mainda Omary Sengeda, learned counsel and also B/C Eva, all appearing before Dar es Salaam sub - registry of the High Court of Tanzania. Right of appeal fully explained



**MUSA K. POMO**  
**JUDGE**  
**29/05/2024**