IN THE HIGH COURT OF TANZANIA
AT MOROGORO

CRIMINAL SESSION CASE NO.117 OF 2002

REPUBLIC

VERSUS

1. VINCENT FLAVIAN MBAGA
2. ALOYCE MDATSE
3. OMARY SUDI OMARY
4. SALUM RAMADHANI MAUMBA
5. JACKSON ALEX MBECHA
6. EXAVEL PHILIP MHANA
7. RASHID DAVID MUGABE

JUDGEMENT

E.M.E. MUSHI, J:

The seven (7) accused persons, namely: VINCENT (1st Accused), ALOYCE (2nd Accused), OMARI (3rd Accused), SALUM (4th Accused), JACKSON (5th Accused), EXAVEL (6th Accused), and RASHID (7th Accused), stand charged with the offence of Murder, c/s 196 of the Penal Code. The particulars of the offence allege that the seven accused persons, on

08/12/2001, unlawfully murdered one HALID S/O HUSSEIN (Deceased). Each of the accused person has pleaded not guilty to the charge.

The alleged murder took place at LUKOBE Village, within the vicinities of Morogoro Municipality. On the material day, one MAMA SABINA and SAIDA (who operates food kiosk at the village), alleged to have seen the deceased sneaking around their kiosk. They suspected the deceased to be a thief. They reported the deceased to the village's **Sungusungu.** The **Sungusungus,** including one JOSEPH S/O KAMANGA (PW1), searched for the deceased. They managed to track him down. They arrested the deceased. They sent him to the village's authority. At the material time, the 1st Accused, was the acting Chairman for the village.

It is the testimony of both PW1 and the 1st Accused to the effect that they interrogated the deceased. They querried the deceased about his visit to the village (since the deceased was a stranger in the area). The deceased would reply that he had come to pay a visit to his "friend", one PETER ANDREA.

The 1st Accused wanted to cross-check the deceased's response, so he sent for this Peter, who admitted the fact that the deceased was his long time "friend". However, Peter denied to have seen or met the deceased on the material day. According to the testimony of PW1, the said Peter had informed them that the last time he saw the deceased was about seven (7) years since then.

Following the wisdom of the Acting Chairman (1st Accused), he decided to treat the deceased as a "suspect". He saw it better to refer the deceased (suspect) to the Police Station, for further inquiry and investigation. The first Accused tied the deceased's hands with a piece of sisal rope from behind.

The 1st Accused selected a group of eight (8) men from amongst the village's **"Sungusungu"** (including himself), to send over the deceased to the Police Station, at Morogoro town. The eight **"Sungusungus"** selected are the seven Accused persons (except that one of them **(VUMILIA)** is since deceased). The Accuseds set-out to escort the deceased down town.

It is on record that two of the Accuseds were armed with "pangas" (Accused No.2 and the said deceased, **VUMILIA**). The rest of Accuseds, however, had their **Sungusungu** sticks **(fimbo)** with them. It is on record that the Accused persons did not deliver the deceased (suspect) to the Police Station at Morogoro. The following day (09/12/2001), the deceased (suspect) was found dead, along the road leading to Mazimbu, somewhere within the edges of the Lukobe's forest. His hands were still tied. He had two big gaping wounds on his head. According to Doctor's Post Mortem Examination Report (Exh.P1), the wounds were caused by an object with sharp edges.

The deceased's body was found and identified by the same Peter **Andrea,** the deceased's long time friend. Peter had reported the matter to the Police. He also informed the Police that the deceased had been arrested by the Lukobe village's **Sungusungu.**

The Police investigated the matter, which led to the arrest of the accused persons. It is the testimony of D/Sgt. BURHAN (PW4), that he did inquire of the 1st Accused, what had happened to the deceased (suspect). PW4 testified that the 1st Accused claimed that suspect deceased had escaped the

Sungusungu on their way to Morogoro. The 1st Accused and the rest of the accuseds, denied quite vehemently to have killed the deceased (suspect). Of course, PW4 did not believe that story, therefore, the accused persons were arrested and accordingly charged with the offence of Murder, C/S 196 of the Penal Code.

The Accused persons do not deny to have arrested the deceased. The1st Accused claimed that the said Mama Sabina alleged that the deceased had stolen Tshs.500/- from her kiosk. The Accused persons do not refute the fact that they put the deceased (suspect) under their custody. The 1st Accused admitted to have tied the hands of the deceased from the back. The Accused persons accepted the fact that they set-out with the deceased (suspect) from the village, the purpose was to escort him, safely, to the Police Station. However, on their way, the deceased (suspect) escaped them. The Accused persons contended that, as their "caravan" moved along, abruptly the deceased (suspect) broke into a run, and got away.

The accused persons would further maintain that, they attempted to chase the deceased (suspect), however, he surpassed them, and that the deceased (suspect) "disappeared" into the woods (forest). The accused persons

further claimed that, the deceased (suspect) having disappeared into the forest, they did not bother to pursue him (deceased) any further, therefore, they went back to the village.

After the close of the defence case, Counsels made final submissions. The learned State Attorney, MR. MWEYUNGE, argued at length the case for the prosecution. In brief, he submitted that the accused persons were duty bound to deliver the deceased (suspect) to the Police Station, alive. But the accuseds have failed to discharge this duty, therefore, they must be responsible for the eventual death of the deceased (suspect).

Mr. Mweyunge contended that it was not possible that the deceased (suspect) could have ran away, since his hands were tied from behind. It was inconceivable for the learned State Attorney that the deceased (suspect) could run away with the kind of speed that would have surpassed that of the eight (8) accused persons.

Mr. Mweyunge further maintained that, assuming that the deceased got away, as claimed by the accused persons, still they took no real efforts to track down the deceased (suspect) in order to re-arrest him. The learned State Attorney held that

since there is no evidence to the effect that the deceased (suspect) was attacked and eventually killed by people, other than the accuseds, therefore, they must be responsible for the death of the deceased (suspect), since they (accuseds) were the last known persons to be seen with the deceased. The learned State Attorney referred us to the Cases of **JUMA ZUBERI VERSUS REPUBLIC [1984], T.L.R., 249,** and that of **ALLY BAKARI** and **ANOTHER VERSUS REPUBLIC [1992], T.L.R., 10.**

The learned State Attorney also claimed that, even after the accuseds' failure to trail and re-arrest the deceased (suspect), they did not bother to report the matter to the higher authorities of the village (for example, the ward executive officer), or the police for that matter, in order to get further assistance. Mr. Mweyunge further contended that, the accuseds simply returned to their village and kept quiet, as if they did not care that anything bad might befall to the deceased (suspect).

The learned State Attorney maintained that since the deceased (suspect) body was found in a location, very near to the place where the accuseds allege that the deceased (suspect) escaped, and since the deceased's head had two deep cut wounds, and the fact that two of the accused persons

were armed with pangas, therefore, the court must draw an inference that the accuseds killed the deceased (suspect). Mr. Mweyunge concluded his arguments by holding that all the seven accused persons are responsible for the death of the deceased (suspect) under the doctrine of "Common intention", as envisaged under the provisions of Section 23 of the Penal Code.

The seven accused persons were represented by two learned defence counsels. One DR. KAGIRWA represented the 1st, 3rd, 4th, 6th and the 7th Accused persons, while Ms. WAMUNZA represented the 2nd, and 5th Accused persons.

The learned defence Counsels submitted quite vehemently for the defence of the accused persons. The main thrust of their arguments was to demonstrate the weakness of the prosecution's case. Dr. Kagirwa, for instance, asserted that the investigation of the case was inadequate, it should have been stretched a step further.

Dr. Kagirwa submitted that the prosecution has failed to establish the ingredients of the offence of murder against the 1st, 3rd, 4th, 6th and the 7th Accused persons. The learned Counsel maintained that no direct evidence has been adduced

to establish both the mens rea and the actus reus against any of the said accused persons. There was no eye witness to the killing of the deceased (suspect), argued the learned Counsel, therefore, the killers are unknown. He further argued that the prosecution has failed to prove either mens rea or a "common intention" against any of the accused persons.

Dr. Kagirwa would also contend that since the case for the prosecution depends wholly on circumstantial evidence, in order for the prosecution to secure conviction, the circumstantial evidence must lead to an irresistible inference of guilt of the accused persons. Dr. Kagirwa was kind enough to cite for us the cases of **D.P.P. Vs. ELIAS MASHITETE and ANOTHER [1997], T.L.R. 319** and that of **ALLY BAKARI Vs. REPUBLIC [1992], T.L.R.10.**

The learned Counsel concluded his arguments by saying that, the failure of the accused persons to report the escape of the deceased, the fact that some of the accused persons carried with them weapons (pangas and fimbos) when they escorted the deceased (suspect), and the fact that the deceased's hands were tied with a rope when he escaped, these facts, argued Dr. Kagirwa, cannot constitute facts from which an irresistible inference of guilt may be drawn.

On the other hand, Ms. Wamunza maintained that the prosecution's circumstantial evidence must be incapable of more than one interpretation.

I had the occasion of summing up the facts and the evidence to the honourable assessors before requesting for their opinions. I outlined the main factual issues involved in the case. I also explained to them, using the best of my abilities, the legal concepts and arguments and controversies raised by the prosecution and the defence counsels. Afterwards, I requested them to share with me their views of the case, as to whether or not the accused persons committed the alleged offence.

Well, I must admit that the honourable assessors vacillated quite a bit. They were very hesistant in their views. As the honourable assessors were delivering their opinions, I could feel the agony and pain they were going through. Of course, I did sympathize with them.

For instance, the honourable assessors could not conceive how it could be possible for the deceased (suspect) to have escaped the custody of the eight accused persons, and ran away, while the deceased's hands were still tied from behind.

The assessors could not camprehand the accused's failure to re-arrest the deceased (suspect). But at least they agreed upon one thing, that the accused persons were very negligent to let the deceased (suspect) got away and their subsequent failure to take serious efforts to search for the deceased (suspect). The honourable assessors also blamed the accused persons, especially the 1st Accused, for not reporting to the Police about the escape of the deceased (suspect). At the end of the day, nevertheless, the three assessors observed that they were not sure whether all, or any of the accused persons, could be held responsible for the death of the deceased (suspect).

Well, I suppose we should resolve the predicatement which entangled the honourable assessors. The first question that we should resolve is, whether or not the accused persons (Sungusungu) had powers to arrest the deceased (suspect), and whether they were duty bound to deliver him to the police. The answer to that question is, Yes! The Accused persons (Sungusungu) had such powers and responsibility.

The powers and the responsibility of Sungusungu are contained in the Peoples Militia (Misc. Amendments) Act, 1989. According to this Act, Sungusungu enjoy the same powers of arrest for breaches of any provision of written law and search

as those enjoyed by police constables. Once they arrest a suspect their duty is to take him to the police for any action the police may deem proper to take (**Marwa Ngege Vs. Kirimanase & Others [1992] T.L.R. 134**).

In the instant case, therefore, the accused persons were duty bound to hand over the deceased (suspect) to the police. However, the accuseds did not fulfil this obligation. The same law requires of any person entrusted with the custody and safety of suspects, to be accountable for any act that might befall on such a suspect and jeorpadise the suspect's security or life, if there are no sufficient and reasonable reasons given, showing that such a mischief was unforseable and that it was beyond control.

In the instant case, the accused persons claim that the suspect (deceased) did, unexpectedly, escape their custody, he ran away, and got himself lost in the woods. The accused persons contend that they chased the deceased, however, he surpassed them all, therefore, they could not capture the deceased (suspect).

Now, the controversy begins here. The prosecution, and indeed, even the honourable assessors, assert that it was not possible for the deceased (suspect) to have escaped under the conditions he was; that is, with both of his hands tied from behind!

Before we resolve this doubt, it is important we first ask ourselves the following question, whether it is possible for suspects to escape while under custody? The simple answer is, Yes! It happens all the time. We have had several cases whereby suspects, and even convicts, do manage to break free, even from a highly secured custody of the Police or Prison Wardens, as the case may be.

May be the next question to answer is, whether or not the suspect (deceased) could run away, while his hands still tied from behind! Again, the reply to that query is, Yes! It is quite probable for a person (let alone a suspect, or an accused person), to run, while the hands are tied, even from behind. Both the learned Stated Attorney, and the honourable Assessors, seem to be baffled by such a possibility.

It is not an impossibility, as it is asserted by the learned State Attorney, for a person to run away, while ones hands are tied from behind. As a matter of fact, I have seen it myself, live, during games and sports festivals. I have seen young sportsmen and women (including school children), practice and demonstrate that kind of sport. It is quite sensational, if I may say so. No wonder then, that the Accused No.5 (a fairly young man of 36 years), had requested the learned State Attorney (during the cross-examination), permission to demonstrate such a likelihood, that is, how, not only he could run, but also how fast he could.

Having found that the deceased might have escaped the accused persons, the next question to answer is, whether or not the accused persons took reasonable efforts to search for the deceased (suspect) in order to apprehand him. The prosecution maintain that the accused persons did not care at all to re-arrest the deceased (suspect), assuming that the deceased (suspect) infact had ran away. The learned State Attorney contended that the accuseds could easily have captured the deceased if they had taken serious efforts to do so, under the existing conditions. But since they were negligent in this respect, therefore, the accused persons must equally be liable for the death of the deceased (suspect).

Admittedly, there is a considerable amount of evidence to the effect that, once the deceased (suspect) got away, the accused persons were very careless in handling the situation. In the first place, the deceased (suspect) was not given adequate security, in the sense that the accuseds did not contemplate the fact that the deceased (suspect) might attempt to break loose.

There is evidence that during the trip down town, the deceased (suspect) was at the front of the accuseds, who followed from behind. There is evidence that when the deceased (suspect) began running, he was a few steps ahead of the accused persons. There is yet evidence to the effect that the accused persons were taken off-guard by the flight of the deceased (suspect). The accused persons contended that (2nd, 3rd, 4th and 5th), they did not imagine that the deceased (suspect) could contemplate running, for the reasons that all along, since he was arrested at the village, and during the first part of the journey, the deceased (suspect) had remained calm, cooperative, meek and subdued. However, it turned out to be that the deceased's humble conduct had deceived the accuseds.

Again, there is evidence on record that not all of the accused persons were willing to pursue the deceased (suspect). It is the contention of the 2nd Accused that he did not chase the deceased (suspect), because of his advanced age (he was 64 years then), and he was suffering from bad foot and hernia. The 3rd Accused testified that he did not even attempt to go after the deceased (suspect), while the 4th Accused contended that he chased the deceased (suspect), but not for a long distance.

The 5th Accused claimed that he chased the deceased (suspect) for a distance of about forty (40) paces and then stopped, because "... he did not see the reason of running further, since .... the deceased (suspect) was confronted with only a minor offence ...". The 5th Accused even bragged himself saying that if he had decided to real go after the deceased (suspect), he (5th Accused) would have managed to apprehend the deceased (suspect). But the 5th Accused had better things to do, so he maintained, therefore, he simply decided to go back to the village.

Likewise, the 6th and 7th Accused persons claimed that, when the accused persons who had pursued the runaway deceased (suspect) (the 1st Accused and the said Vumilia)

returned, they were told that the deceased (suspect) had "disappeared" into the forest, therefore, they could go back to the village.

And yet again, the evidence reveals that the Accused persons did not even attempt to call for help from the passers-by to assist in searching of the deceased (suspect). Even after the accused persons had returned to the village, they did not consider the idea of getting more **Sungusungus** to mount a search for the runaway suspect (deceased). They could have done that since it was not yet dark (it was just about 5.00pm.).

In their considered opinions, the three honourable Assessors, unanimously blamed the accused persons for being so carelss and negligent as a result thereof they could not re-arrest the deceased. I, personally, do agree with their views. The accuseds' conduct cannot be said to be that of vigilant Sungusungus.

Yes, the deceased (suspect) might have escaped the custody of the accused persons. It is a fact that the accuseds did not take all the reasonable efforts to re-capture the deceased (suspect), as a result thereof, the deceased (suspect) was found dead the following day. The next question to resolve

is, who then killed the deceased (suspect)? Did the accused persons murdered the deceased?

The learned defence Counsels hold that no eye witness testified to the killing of the deceased. The killers are unknown. The prosecution argues that under the circumstances, the accused persons must be taken to have killed the deceased (suspect).

I put that question to the honourable Assessors. They were of unanimous views that it is inconceivable to find as a fact that all the seven accused persons killed the deceased. The Assessors observed that it is possible that those accused persons with the pangas may have killed the deceased, but certainly, not all of the accuseds. After all, the Assessors would further contemplate, the deceased was found with only two wounds on the head.

The learned defence counsels further argued that, it is quite possible that after the escape of the deceased (suspect), he could have fallen into the hands of some of the "angry mob" who had gathered at the house of the Accused No.1, demanding for the deceased (suspect) to be cut loose. Again, the defence would maintain, the deceased (suspect) could have

been attacked by passers-by, when they saw the deceased (suspect) running away, hands tied; these people (passers-by) with strong hatred for thiefs, could have killed him.

But the prosecution would not have it. The contention is that, there is no evidence to prove that some of the "angry villagers" had followed the accused persons' "caravan" escorting the deceased (suspect). Neither is there evidence on the body of the deceased, to the effect he might have been beaten or attacked by more than two persons. The honourable Assessors seemed to go along with reasoning by the prosecution. The defence would insist that, there is such a possibility.

Of course, again, there is such a feasibility. If it is possible that the deceased (suspect) might have escaped the accused persons, and ran away, almost invariably, it is also likely that the deceased (suspect), might have fallen into the hands of some killers, other than the accused persons. It is quite possible that some of the "angry villagers" had followed the accuseds, and when the deceased (suspect) escaped, they might have attacked him.

There is evidence on record to the effect that, the 1st accused and the other accuseds (**Sungusungu**) did their best to restrain the angry villagers who had wanted to assault the deceased (suspect). PW1 testified that before the **sungusungus** began their journey, the 1st accused pleaded with the "angry mob" to go back home, as the deceased (suspect) was then under their lawful custody. The 1st Accused and the others have testified to this fact as well.

The prosecution has not adduced specific evidence to rebut this fact. Such rebuttal evidence should have been produced by the prosecution, and not the defence.

Again, there is evidence to the effect that, as the accused persons were returning to the village, (after the alleged failure to re-arrest the deceased (suspect), some passers-by were jeering at the accused persons. These passers-by mocked and ridiculed the accuseds as to how, the eight of them, could have let the deceased (suspect) get away! The evidence reveals that these passers-by insulted the accuseds for their "careless" act.

It is also probable, therefore, that these passers-by could have captured the deceased (suspect) and attacked him. Indeed, such a possibility is feasible, especially taking into

consideration that events of house breaking and robberies and thefts had become very common at the village, as we have been informed, and that villagers were becoming a bit tired of these incidents. All these possibilities and probabilities lead to the conclusion that, perhaps the deceased (suspect) might have been killed by unknown persons, other than the accused persons.

But even after raising the possibility that the deceased (suspect) might have escaped the accused persons because of their carelessness, and also the probability that the deceased might have been attacked and killed by "unknown people", the prosecution would still assert that the accused persons were yet to blame; because of the fact that had it not been for their "negligence", the deceased would not have managed to escape and fall into the hands of these "unknown killers". Therefore, since the killers are not known, then the accused persons should be taken to be the last known persons to be with the deceased, hence, they should be responsible for the deceased's eventual death. The learned State Attorney referred us the decision of the Court of Appeal, in the case of **JUMA ZUBERI** Vs. **REPUBLIC [1984] TLR 249.**

Admittedly, the prosecution has been quite insistent to making sure that they secured a conviction. I must say we do appreciate the prosecution's relentless zeal and keenness. However, the defence has been equally persistent and eager.

The learned defence Counsel, Ms. Wamunza, emphatically argued that, a man does not become guilty of murder just because he was the last known person seen with the deceased (suspect). The contention is that, still the prosecution is bound to adduce evidence to prove not only the death but also the link between the death of the deceased and the accuseds. Mrs. Wamunza, referred us to the case of **MOHAMED SAID MATULA Vs. REPUBLIC** [1995], TLR 03.

I am inclined to agree with the defence. In the case of Juma Zuberi referred to the learned State Attorney, the appellant in that case was recognized as one of the robbers who had way laid and attacked a party in a vehicle, at night. In the course of the robbery a five (5) year old child was abducted by the Appellant. The child could not be found. A month later, remains of a child were found in the bush, about one (1) mile from the incident. Evidence established that the remains were of the abducted girl.

The Appellant was convicted of murdering the child. He appealed to the Court of Appeal arguing, inter alia, that there was no evidence as to the cause of death of the child. The Court of Appeal held that the Appellant had caused the death of the child in terms of Section 203(e) of the Penal Code, because the child was in his custody and possession and he had abandoned her in the bush, and that the act had, for whatever cause, brought about her death.

However, it must be understood that, the Court of Appeal in the case of Juma Zuberi, was deciding on the issue of the "cause of the death" of the child, since such a cause was not known. The same Court of Appeal has also held, nevertheless, that the fact that a man is proved to be the last known person to have been with the deceased, this fact alone does not automatically prove that such a person killed the deceased.

In the case of Richard Matangule & Another Vs. REPUBLIC [1992] TLR 09, It was established that the Appellants were the last known persons to have been with the deceased. The same Court of Appeal held that: "... this fact, without any doubt, casts a very good suspicion on them. But this in itself is <u>not conclusive proof</u> that the Appellants killed the deceased". (emphasis added). As stated earlier, the prosecution is still

bound to produce independent evidence that would tend to establish beyond doubt that the accused persons must have committed the murder of the deceased (suspect).

Which brings us to the principles underlying the application of circumstantial evidence. It is an established rule of evidence that, where, in a criminal case, the case for the prosecution depends exclusively on circumstantial evidence, in order to sustain conviction, such circumstantial evidence must be that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

Now, it is no doubt that in the particular case, the prosecution's case can only be proved through circumstantial evidence (as it has been demonstrated), in the absence of eye witness to the killing of the deceased (suspect). The learned defence counsels contend that the evidence led by the prosecution has not met this standard.

Ms. Wamunza maintained that, since the prosecution has relied upon circumstantial evidence to establish their case, then the circumstantial evidence produced by the prosecution must be incapable of more than one interpretation. Dr. Kagirwa has

also argued that the facts and the evidence produced by the prosecution, do not constitute facts from which an irresistible inference of guiit of the accused persons may be drawn.

I am inclined to be persuaded by the forceful arguments of the learned defence Counsels. As we have seen in our preceding discussion, the defence has managed to raise considerable doubts as to the guilt of the accused persons. The defence has raised a possibility that the deceased (suspect) might have escaped the accuseds, and he (deceased) could have been attacked by some people, other than the accused persons.

This Court, and indeed, the Court of Appeal, has consistently held that, circumstantial evidence must always lead to an irresistible inference of guilt in order to sustain a conviction. In the case of **ALLY BAKARI AND PILI BAKARI Vs. REPUBLIC [1992] TLR 10**, the Court of Appeal, holding on this aspect, said 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 clearly connected with the facts from which the inference is to be drawn".

I am satisfied that the defence has managed to raise some doubt to rebut the possibility of the accused persons being guilty. The fact that some of accused persons were armed with **"pangas"**, this does not prove that the accused persons (and all of them) caused the wounds on the deceased's (suspect) head. The accused persons maintained that it was normal for the **sungusungu** to be armed with "light weapons" like **"pangas"** and **"fimbos"**. Again, no evidence has been adduced to the effect that the **"pangas"** were found with traces of blood stains on them. From what we have alluded, it is obvious, therefore, several doubts still surround the prosecution's case. These doubts were vividly noticed by the honourable Assessors, and they observed them in their opinion.

More doubts have been observed by both the defence and the honourable Assessors. The complaint is that the prosecution has failed to produce some vital witnesses, who could testify on some vital material facts of the case. It was observed, for example, the said PETER ANDREA, should have been summoned to testify.

There is some merit in that concern. You would re-call that the said Peter Andrea was the long time friend of the deceased (suspect). And we have been informed that the deceased (suspect) had claimed that he had come to the village to visit the said Peter. And we have also been informed that it is this same Peter who had discovered the body of the deceased (suspect). What a coincidence!.

Surely, the defence, even this Court, would have liked to question this Peter on the nature of his "relationship" with the deceased (suspect), even if to dispel the suspicion that this one Peter could have been a "silent-partner" in crime; and for that matter he (Peter) might have killed the deceased (suspect) as well, for fear of being exposed by his "Partner"!

Surely, this Peter lives at the village (Lukobe), and he could have been easily available by the prosecution, if they had wanted to. But it is not the question of "choice", in the real sense. It is the duty of the prosecution to summon those witnesses who, from their connection with the transaction in question, are able to testify on material facts (**Azizi Abdallah Vs. REPUBLIC [1991] TLR 71**). In this particular case, we hold that this Peter was a vital witness for the prosecution. He should have been called to testify and cross-examined by the defence.

Of course, this failure by the prosecution to summon this vital witness does not reflect favourably on their side.

Perhaps, we should consider the conduct of the accused persons to see if some inference of guilt could be drawn from it. There is evidence to the effect that the accused persons apprehended the deceased (suspect), and they sent him before the acting village chairman (1st Accused). There is evidence on record to the effect that the 1st Accused and his **Sungusungus** (the accuseds), effectively restrained the "angry villagers" who had gathered at the house, and had wanted to assault the deceased (suspect). Again, there is evidence that the 1st Accused had pleaded with the "angry mob" not to assault the deceased (suspect), and had required the villagers to disperse. This, in my opinion, does not indicate as if the accused persons had wanted to kill the deceased (suspect) before reaching the Police Station. As a matter of fact, an inference that should be drawn from this conduct is that, the accused persons genuinely wanted to deliver the deceased (suspect) to the police, alive, safe and sound. Of course, this inference is a positive aspect for the defence.

All the foregoing discussion was for the purpose of demonstrating that the evidence produced against the innocence of the accused persons has not yet established the fact that the accused persons killed the deceased (suspect), as it has been alleged by the prosecution. That fact has to be established beyond any reasonable doubt.

Before we conclude this matter, let us consider the question whether the accused persons could be held responsible for any lesser offence. Usually, an alternative verdict may be entered where the evidence adduced for which a person is charged supports a minor offence even if it is not cognate to the offence charged (**J. Shagembe vs. Republic [1982] TLR 147**).

Now, in the instant case, the question is, is it possible to convict the accused persons of the offence of **manslaughter, c/s 195** of the **Penal Code?** I am afraid, it is not possible. The evidence adduced does not establish the offence of manslaughter, since the act (**actus reus**) of killing of the deceased (suspect), has not been connected with the accused persons.

It has been found as a fact that the accused persons were "careless" or "negligent" for their failing to take serious efforts to search for the deceased (suspect) and re-arrest him. Now, the question is, can they be convicted of any of the offences related to "reckless and negligent acts", under the provisions of Section 233 of the Penal Code? Again, it is not possible, since the kind of "negligence" or "carelessness" which the accused persons are blamed with in this case, does not fall within the categories of "criminal negligents acts" embraced within the provisions of Section 233 of the Penal Code. The evidence adduced in this case, does not indicate that the accused persons acted "criminally", when they failed to re-capture the escaped deceased suspect.

It is not possible either, to hold the accused persons liable under the type of offences envisaged in section 234 of the Penal Code (Other negligent acts causing harm). To find the accused persons liable under these types of "negligent acts", it must first be established that the accused persons acted "unlawfully". There is no such evidence in this particular case. The fact that the accused persons (and especially the 1st Accused), did not report immediately the escape of the deceased suspect to the police or any other higher authority,

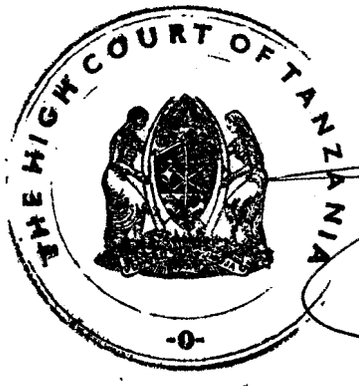
this in itself does not constitute a criminal act, to make the accused persons responsible for any **criminal negligent.** A high degree of negligence is required.

In the case of **Republic Vs. Amin Premji, DSM Criminal Appeal No.218 [unreported],** the Court of Appeal held that:-

> **"... It is trite law that in a Civil Case once negligence is proved, the degree of negligence is irrelevant, but on the contrary in a criminal charge, the degree of negligence is the determining factor. That is, in a criminal charge, simple lack of care which may well be sufficient to constitute Civil liability is not enough; there must be a high degree of negligence and recklessness ...".**

From the foregoing legal position, therefore, I find it that even in this case, the accused persons cannot **criminally be liable** for the escape and eventual death of the deceased suspect, on the account of their failure of taking serious efforts to search for and re-arrest the deceased (suspect).

Now, where do we stand in this case. It is understandable that in criminal cases, it is the duty of the prosecution to prove its case, and the standard of proof is beyond all reasonable doubt. For reasons that have been demonstrated in this rather long judgment, I am satisfied that the prosecution has not proved the case against the accused persons beyond reasonable doubt. Accordingly, they are acquitted. It is so ordered.



E.M.E. MUSHI

JUDGE

15/12/2005