

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA DISTRICT REGISTRY
AT ARUSHA

CRIMINAL SESSION CASE NO. 28 OF 2021

(Originating from PI No. 21/2021 District Court at Arusha at Arusha)

THE REPUBLIC

VERSUS

RICHARD PETRO KIMWERI 1ST ACCUSED

MBWANA HUSSEIN MAKAMBA 2ND ACCUSED

JUDGMENT

10 & 30th March, 2023

TIGANGA, J.

It was 20th June, 2016 during evening hours when sorrowful cries and wailings were heard from Esso Street near Banian Grave Yard area within Arusha City in Arusha Region as body of the innocent girl Samira, a daughter of Mr. Said Omary and his wife Ms. Rahma Adam was found brutally murdered and appearing to be thrown like trash at the side of the road. It seems, as the evidence will show hereinunder, it was unbearable scene and nightmare which no parent wishes to go through. It was a normal evening for them, they were preparing iftar, during the Muslim holy month of Ramadhan when their lives were changed into dark cloud of sorrow and sadness as they received such bad news in respect of death of their daughter Samira who was only four years by then.

Her tiny neck was broken and there was blood oozing from private parts which at first, they thought she was raped to death. However, evidence from the prosecution will show otherwise, that, it was greedy for wealth and worldly riches that made Samira's life cut short.

Following the matter being reported to the police who arrived to the crime scene and took the deceased body to the hospital, an investigation was made and it led to the arrest of Richard Petro Kimweri (the 1st accused person) and Mbwana Hussein Makamba (the 2nd accused person) as the suspected murderers of Samira. They were charged with the offence of murder contrary to section 196 of the **Penal Code**, Cap 16, [R.E. 2002 (now R.E. 2019)]. They both denied involvement of any kind to the death of the deceased.

Following the accused persons' pleas of not guilty to the charge levelled against them, the prosecution was obliged to prove its charge and in doing so, the Republic summoned a total of twelve (12) witnesses namely; **PW1** F. 2162 D/Sgt Francis, **PW2** Rahma Adam, **PW3** Said Omary, **PW4** F. 6655 Sgt Amour, **PW5** WP 7006 D/Cpl Tausi, **PW6** Filemon Joshua Dahabe, **PW7** Hans Ufoo Mushi, **PW8** D 7222 D/Sgt Ally, **PW9** Insp Suleiman Mbagga, **PW10** Fidelis Charles Bugoye, **PW11** Meshack Stephen and **PW12** Elirehema Twarila Mbwambo.

Equally, the prosecution side tendered a number of documents and exhibits in support of their charge notably; Sketch Map drawn on 21/06/2016 - **Exhibit P1**; Post Mortem report in respect of the body of the deceased Samira Saidi dated 21/06/2016 - **Exhibit P2**; Police search order PF 91 - **Exhibit P3**; The cautioned statement of Mbwana Hussein Makamba - **exhibit P4**; A pair of socks, a pair of sandals and a head covered cloth (ushungi) - **Exhibits P5**; One pair of trousers allegedly seized from the home of the 1st accused - **Exhibit P6**; A gown, one sweater and one skin tight allegedly undressed from the deceased - **Exhibit P7**; Cautioned statement of 1st accused Richard Petro Kimweri @ Selemani Onesmo - **Exhibit P8** and Forensic DNA profiling test report dated 18/04/2018 with reference No. F. B/DNA/LAB/46/2016 - **Exhibit P9**.

The Republic, throughout the trial, was being represented by Ms. Janeth Sekule, assisted by Mr. Charles Kagilwa and Ms. Grace Madikenya learned State Attorneys whereas, Mr. Mitego Methusela and Mr. Victor Benard, both learned Advocates represented the 1st & 2nd accused persons respectively.

Starting with **PW1** F. 2162 D/Cpl Sgt Francis, it was the prosecution evidence, that on 20th June, 2016, at about 21:45 hours, PW1 being a police officer and investigator of this case, received information on the

death of the deceased and immediately went to the crime scene in companion of the OC-CID Damas Massawe. Upon arrival, they found a body of the deceased lying along the road covered in Kitenge. He asked for her name and her father who was at the vicinity told him, she was called Samira Said. PW1 tried to call her out but she did not respond hence, they took the body to Mt. Meru hospital accompanied with James Lyatuu, a Ward Councilor, Hans Mushi, street Chairman and father of the deceased child. At the hospital the deceased was confirmed dead thus, the body was taken to the mortuary and PW1 proceeded to the police station to take statement of those who accompanied them.

It was PW1's further narration that, on the following day, together with DC Hamis he was assigned case file with AR/IR/6146/2016 to investigate the death of Samira which they started immediately. They went to the crime scene, drew a sketch map which was admitted into evidence as **exhibit P1**. Around 12:30 hours in the afternoon of the same day, joined by D/C Tausi, the Forensic expert, they escorted the parents of the deceased to Mt. Meru Hospital for post mortem examination of the deceased body. At Mt. Meru Hospital, they were received by Dr. Philemon, a medical doctor who ordered the deceased body of Samira to be taken from the Mortuary to the Pathology room where he examined her. He told them that, Samira died from neck fracture as it was completely broken

and excessive bleeding from her vagina. Dr. Philemon took the sample of blood which was oozing from the deceased vagina and handed the sample to DC Tausi for DNA test. He also handed the body of the deceased's parents for burial. He thereafter prepared a report which was admitted as **exhibit P2.**

PW1 went on telling the court that, while still conducting investigation, they received a tip concerning murder suspect. The tip was from one of the children who was playing with deceased on the day of her demise. They went to see her around Esso and she told them that, four days back, there was a man who approached her and asked to have sex with her for Tshs. 2000/= which she could buy sweets. She denied the offer. She however told them, she knew the said man and where she stays thus, she showed them from a far, the house in which that man was living. PW1 and other officers started to put it under surveillance. It was the house of the 1st accused person.

PW1 also told the court that, on 22nd June, 2016 while still investigating the matter, he was notified by the OC-CID that, the 1st accused person was arrested as a suspect of Samira's death and apparently, he had given his statement confessing to have committed the offence. He was assigned to conduct a search at his home and together with forensic expert DC Tausi, Insp. Goodluck and D/C Hamis they went

to the house of the 1st accused at Esso, Makaburi ya Baniani. They started the search in the presence of the street Chairman and one Elirehema Mbwambo, the land lord, who told them that the suspect was his tenant working with Worrier Security. During the search, they found a dust bin behind the door which had child black sandals, a pair of socks with blue and yellow colors and a niqab (ushungi) which had black and white colors.

Also, they found a pair of male trouser which had some patches of blood. They were all collected for examination. Insp. Goodluck prepared the search order/seizure certificate to that effect which they all signed. The same was admitted as **exhibit P3**. According to PW1's testimony, another suspect, the 2nd accused was arrested and on 24th June, 2016, OC-CID instructed him to interrogate the said suspect who also admitted to have committed the offence. His cautioned statement was admitted as **exhibit P4**. A pair of sandals socks and niqab (ushungi) were collectively admitted as **exhibits P5**. A pair of trousers seized from the home of the 1st accused was admitted as **exhibit P6** whereas a gown one sweater and one skin tight undressed from the deceased body were collectively admitted as **exhibit P7**. PW1 finished his testimony by positively identifying both accused persons at the dock.

The testimonies of **PW2** Rahma Adam, deceased person's mother and that of **PW3** Said Omary, deceased person's father does not vary much. They all told the court that, they reside at Esso, Makaburi ya Baniani and Samira was their fifth born aged four years at the time of her death. That, on that unfortunate day, she was outside playing with other neighboring children as PW2 was preparing iftar. After time went by, PW3 inquired about her and when PW2 went outside, Samira was nowhere to be found. When PW2 inquired of her whereabouts from the neighbors, Meshack, PW11, who was among the children Samira was playing with told them that, Samira was taken by one man who said he was going to buy her sweets.

PW2 reported the matter to the Mosque whereby the Sheikh promised to advertise thus, she left the description of Samira including what she was wearing. She went back home and around 21:00 hours they heard an advert that, there was a body of child lying along the road. They ran toward the call only to find that, it was their daughter. Thereafter, all procedures as narrated by PW1 followed.

Another prosecution evidence was that of **PW5**, WP 7006 D/Cpl Tausi who was working as an investigator under OC-CID office, Arusha in Forensic department. She told the court how she collected exhibits from 1st accused person's home during search and seizure, and from the

deceased body for DNA analysis. She also narrated how she packaged them with labels and that, before handing them over. She also told the Court that on 14th July, 2016, a government chemist who went to collect samples, took the blood and nail samples from both accused persons. After that, PW5 sealed all the samples, prepared a letter and handed them to **PW9** Insp. Suleiman Mbagga of the RCO office who opened them to confirm before he resealed them ready to be taken to Dares Salaam.

The samples were then handed to **PW4**, F. 6655 SGT Amour, who corroborated the fact that, on 15th July, 2016, he took all the samples in respect of exhibit P5, P6, and P7 to the chief Government Chemists in Dar es Salaam for DNA analysis. After he handed them over on 16th July, 2016, he returned to Arusha. All these three witnesses managed to positively identify exhibits P5, P6 and P7 during trial.

Another incriminating prosecution evidence was that of **PW 6** Filemon Joshua Dahabe, a medical Doctor who conducted postmortem examination on Samira's body. He told the court that, when examining the body, he observed that, the vagina was ruptured and teared to the anus and was still bleeding. Also, her neck was broken as it was easily rotating. He collected the blood sample from the vagina and handed it to PW1 who put the same in the forensic containers and handed over to

PW5. Thereafter, he prepared a postmortem examination report which he also stamped and handed over to PW1. He positively identified exhibit P2, the postmortem report and concluded that Samira's death was caused by the fracture of the neck and severe bleeding.

PW7 Hans Ufoo Mushi was a street chairman of Ezzo Street when the incident occurred in 2016. He told the court that, he heard the announcement from Mosque that, there was a child who was missing. After a while he received a call informing him that, there was a body of a child covered by Kitenge left alongside the road within his street. When he arrived and realized that the child was dead, hence he informed the Ward Executive Officer, the nearby street chairman and also, called the Police who arrived at the crime scene immediately. They inspected by the body and took it to hospital and later he went to the police station where his statement was recorded.

Another investigation officer in this case was **PW8**, D 7222 D/Sgt Ally, he told the court that, on 22nd June, 2016 at 14:00 hours he was at Police Station Arusha when ASP Damas Masawe the then OC – CID assigned him to record the statement of the 1st accused person. According to him, he prepared the room to be used in recording the statement and when the 1st accused person was brought in the room he informed him of

his right including right to have a relative, friends or his Advocate present. According to him, the 1st accused waived such rights and opted his statement be taken while alone, which **PW8** did. PW8 said that, the 1st accused admitted to have participated in the causing the death of Samira together with the 2nd accused as they agreed to find a virgin girl to take her uterus so that they can prepare the medicine which would make them rich. The said cautioned statement was admitted **exhibit P8** and he positively identified the 1st accused person from the dock.

A senior Chemist from the office of Chief Government Chemists in Dar es Salaam, Mr. Fidelis Charles Bugoye, testified as **PW10**. He told the court that, on 21st July, 2016, he received one Mahamoud Mbelwa from Forensic Bureau in Dar es Salaam who had samples in a parcel. The parcel was accompanied with a letter from Forensic Bureau and that of RCO, Arusha, requesting profiling of the samples sealed in the parcel. He told the court that, the process of profiling is in five or six stages. **One**, sample collection; **two**, screening test, (the initial investigation); **three**, DNA extraction of the sample you have received; **four**, DNA quantification process which is called RT Polymer chain reaction; **five**, DNA amplification/ polymer chain reaction in amplification and **lastly**, capillary electro forensic or DNA Profiling which is done by using the machine. Thereafter a report is written.

According to **PW10**, the samples he received were sample "A" which was the blood swab from the deceased body; sample "B" the blood from 2nd accused person; sample "C" the blood from the 1st accused person; sample "D" were nails from the 2nd accused person whereas sample "E" were the nails of the 1st accused person. There were also deceased person's clothes and sandals, sample "F", 1st accused clothes, sample "G" and other deceased's clothes i.e. sweater, blouse/gown and a trouser, sample "H".

PW10 told the court that, he started preliminary examination on the blood and nail samples in which he first ruled out they were all blood and nails of human beings. After doing other procedures in respect of DNA extraction, quantification, amplification and analysis, he arrived to the conclusion that, sample "A" the blood of the deceased had relationship with more than one person others being male. Sample "B", "D" and "C" "E" had DNA of the 2nd and 1st accused person respectively.

She further told the court that, Samira's blood sample had DNA of both accused persons. He prepared a report and on 28th December, 2019 it was collected by PW5 together with the samples. The Forensic DNA Profiling Test Report dated 18th April, 2018 with reference No. F. B/DNA/LAB/46/2016 was admitted and marked as **exhibit P9**.

Another incriminating evidence is that of **PW11** Meshack Stephen who was playing with the deceased and other children on the day when the deceased died. According to him, while playing the 1st accused person approached them, offered Samira sweets and asked her to follow him to the shop so that he could buy her more sweets. It is **PW11**'s evidence that, although they urged Samira not to go, she went and never came back until when they heard that she was reported missing and later her body found dead. He told the court that, he knew the 1st accused person as black, tall, thin and was living on the other side of a canal (mfereji) from where he was living about 50-70 meters away. He positively identified him at the dock. Further to that, **PW11** said, he was the one who described the 1st accused person to the mother of the deceased, although at first he did not open up to mention the first accused by description fearing that the 1st accused person would take him too.

The last prosecution witness was **PW12** Elirehema Twarila Mbwambo, who was landlord of the 1st accused person. He testified to have witnessed the search and seizure conducted in the presence of the 1st accused in his rented room.

After the prosecution case was closed, the court found both accused persons with a case to answer and availed them with right to defend

themselves. The defence had three witnesses **DW1** Richard Petro Kimweri, **DW2** Mbwana Hussein Makamba and **DW3** Fatuma Athuman Mohamed.

As briefly elucidated above, both accused persons denied to have committed the offence. **DW1** Richard Petro Kimweri, testified that, he was arrested in the morning 22nd June, 2016 when he arrived at home from his duty station. He was taken to the Police Station without being told what wrong did he commit. There, he was put in lockup until 13:00 hours or 14:00 hours when PW1 with other two Police Officers took him to the room which had no table or chair but it had clubs. He was ordered to remove all clothes he was wearing, they handcuffed him from back, hanged him head down legs up and started beating him on his toes and on his knees while asking him about the Samira's death.

He denied to have participated in anything but they continued beating him up forcing him to confess. Realizing that he was not talking and becoming weak, they decided to leave him there until the next day when they untied him and left him lying on the floor. He recalls that, he did not record any statement, whether cautioned or otherwise hence the signatures on the cautioned statement are not his. He told the court that, he remained there until 23rd March, 2016 when he was brought a

document and forced to sign. The same had the name of his landlord and PW1, thus, he signed it after being forced to do so. He denied to have known the 2nd accused person before they were charged together. He also told the court that, he asked to be taken to the hospital in respect of the pains on his knees due to beatings. At Kisongo Prison, a medical Doctor called Riziki checked him and told him that his knee was dislocated. He was written a transfer to KCMC Moshi where his knee was operated. He showed the court his knee scar from the alleged operation and that, after eight months he was returned to Arusha at Kisongo prison where the case was withdrawn and later on, they were arrested again.

He further denied to have known the deceased family or rather took Samira anywhere and that, there were neither blood sample nor nail samples which were taken from him. He prayed that, this court acquits him.

DW2 Mbwana Hussein Makamba told the court that, the whole day of 20th June, 2016, he was at home with his wife and children as they were fasting. In the evening, his wife prepared iftar, they ate and he never left his home. To his surprise, on 24th June, 2016, he was at home when he heard people knocking his door ordering him to open. As it was around 02:00 hours at night, he did not open, thinking those people were bandits, thus the door and window were broken, they entered inside beat him up

using gun butts. He was taken into the police car and taken to the Police Station. While at the police station, it was when he realized that, his abductors were police officers. He was interrogated in respect of death of Samira which he denied being part of in anyway. Later, PW1 gave him a piece of paper to sign, he did not sign it until when he was taken to court and later committed for trial. During preliminary hearing he denied to have known the 1st accused person until 4th July, 2016 when they were charged together. He further denied his blood sample being taken or any search done to his home to prove that he was a local medicine man. He also denied either knowing the deceased or doing anything to her. He prayed the court to find him innocent and acquits him.

DW3, Fatuma Athuman Mohamed, corroborated the manner in which her husband, DW2, was arrested. She insisted that, DW2 never left their home on 20th June, 2016 at the time when the alleged murder is said to have been committed. She said the 2nd accused was at home with his family the whole day. That was the end of defence case.

After completion of testimonies from prosecution and defence, both parties agreed not to file their final submissions. Now basing on the provision of section 196 of the Penal Code (supra) which create the offence of murder, provides that a person commits murder if, with malice

aforethought, causes death of another person by unlawful act or omission. The term malice aforethought, has been defined by section 200 of the Penal Code (supra) to mean, any 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 the person actually killed or not;*
- (b) knowledge that, the act or omission causing death will probably cause death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*
- (c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;*
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence.*

This provision has been given effect by the Court of Appeal of Tanzania in the case of **Bomboo Amma and Petro Juma @ Lanta vs The Republic**, Criminal Appeal No. 320 of 2016 - Arusha (Unreported).

Gathering from the summary of the proceeding in this case the relevant parts are paragraphs (a) and (b) of section 200 cited

hereinabove. In that regard, the prosecution needs to prove the following ingredients of the offence.

- (i) Whether the deceased Samira Said Omary was murdered;
- (ii) If the first issue is answered in affirmative, then whether it was the accused persons who murdered her;
- (iii) That, the accused person actually intended to cause such death, or had knowledge that the act or omission causing death will probably cause the death.
- (iv) Whether the case against the accused persons were proved to the required standard.

Starting with the first issue, according to the postmortem report, exhibit P2 and the testimony of the doctor, PW 6 Filemon Joshua Dahabe who examined the body of the deceased, the cause of deceased's death was neck fracture and excessive bleeding from her vagina. Considering the fact that, PW1, PW2, PW3, PW5 and PW12 also witnessed the lifeless body of Samira before and after it was taken to the hospital, it is without doubt the, little Samira met her untimely, shocking and traumatizing unnatural death on 20th June, 2016. This issue is therefore answered affirmatively.

Coming to the second issue, in order to prove that it was the accused persons who murdered the deceased, looking at the evidence of the prosecution, there is no direct evidence proving that any of prosecution witnesses witnessed the accused person murdering the deceased. Therefore, the prosecution have capitalized and based their evidence on circumstantial evidence. In law, for circumstantial evidence to ground the conviction, it must irresistibly point to the guilt of the accused persons and no other person. This principle has been expressed in various decisions of the Court of Appeal of Tanzania one of which being the one in the recent case of **Shilanga Buzali vs The Republic**, Criminal Appeal No 600 of 2020 CAT at Bukoba (unreported) where the Court held *inter alia* that;

*"... We are aware about the settled position of the law that, **one**, the circumstantial evidence under consideration must be that of surrounding circumstances which, by undesigned coincidence is capable of proving a proposition with the accuracy of mathematics. See: **Lucia Anthony @ Bishengwe vs The Republic**, Criminal Appeal No. 96 of 2016 (unreported); **two**, that each link in the chain must be carefully tested and, if in the end, it does not lead to irresistible conclusion of the accused's guilt, the whole chain must be rejected. See; **Samson Daniel vs Republic**, (1934) EAC.A. 154]; **three**, that the*

*evidence must irresistibly point to the guilt of the accused to the exclusion of any other person. See: **Shaban Mpunzu @ Elisha Mpunzu vs Republic**, Criminal Appeal No 12 of 2002(unreported); **four**, that the facts from which an inference adverse to accused is sought must be proved beyond reasonable doubt and must be connected with the facts which inference is to be inferred. See **Ally Bakari vs Republic** (1992) TLR, 10 and **Aneth Kapazya vs Republic**, Criminal Appeal No. 69 of 2012 (both unreported); and **five**, the circumstances must be such as to provide moral certainty to the exclusion of every reasonable doubt- see **Simon Msoke vs Republic** (1958) EA 715.”*

Applying the above principles to the current situation, the following are the circumstances under which the prosecution based their evidence in court in proving that, it was the accused persons and nobody else who would have killed the deceased. First; both accused persons admitted to have killed the deceased on evil belief of getting riches. Although they denied to have given voluntary cautioned statements on the ground that they were beaten but, the evidence shows otherwise. Starting with the 1st accused person, he told the court that, he was stripped naked, hanged upside down with his hands tied back and beaten from 13:00 or 14:00 hours to the late hours. He was then left hanging until the following day when he was put down. From the defence of both accused persons

repudiated the cautioned statements as they dispute to have ever made them. In law, the confession made before the police officer as contained in the exhibit P4 and P8 is regulated by section 27 of the Evidence Act [Cap 6 R.E 2022]. For purposes of easy reference, the same is hereby quoted in extensor as follows;

"27 (1) A confession voluntarily made to a police officer by a person accused of an offence may be proved as against that person.

(2) the onus of proving that any confession made by the accused person was voluntarily made by him shall lie on the prosecution.

(3) A confession shall be held to be involuntary if the court believes that, it was induced by any threat, promise or other prejudice held out by the police officer to whom it was made or by any member of the police force or by any other person in authority."

That being the position of the law regarding the confession and how the same should be proved against the maker and in what circumstance the same should not be proved against him. The law that is section 29 of the same law provides the circumstances in which the confession which otherwise would not have proved can be proved against the person who made it. for easy reference the same is quoted in extenso.

29. No confession which is tendered in evidence shall be rejected on the ground that a promise or a threat has been held out to the person confessing unless the court is of the opinion that the inducement was made in such circumstances and was of such a nature as was likely to cause an untrue admission of guilt to be made."

Reading between lines the provision cited hereinabove, four pertinent issues are seen;

- (i) *A confession made before a police officer may be proved against the accused only where it has been voluntarily made by the accused.*
- (ii) *A confession which was induced by any threat, promise or other prejudice held out by the police officer to whom it was made or by any member of the police force or by any other person in authority shall be held to be involuntary if the court believes that, it was so obtained.*
- (iii) *The onus proving that any confession made by the accused person was voluntarily made by him shall lie on the prosecution.*
- (iv) *A confession which is tendered in evidence shall not be rejected on the ground that, a promise or a threat has been held out to the person confessing unless the court is of the opinion that the inducement was of such a nature as was likely to cause an untrue admission of guilt to be made."*

Looking at the defence of the 1st accused he actually repudiated the cautioned statement and said on 23rd June, 2016 after he was tortured and one police officer went to him and gave him a paper which was written and forced him to sign the only thing he could remember on that paper was the signature of his land lord. In fact, that is the only document which he was forced to sign. The 2nd accused said with regard to the confession as contained in the exhibit P4 that, after his arrest, he was taken to police station, asked his names and other personal particulars as which he gave. He was interrogated about the murder of the deceased, he disputed not only to have committed the murder, but also to know the deceased. He was thereafter given the paper to sign and out of fear which was inflicted to him in the previous night, he said, he signed the papers. He denied the signature on the exhibit P4 is not his and asked the court to look at the differences of the signature on exhibit P4 and the one he signed during Preliminary hearing.

However, when cross examined by Ms. Grace Medikanya, learned State Attorney, he admitted that, PW1 never beat him prior or after taking his cautioned statement. In the case of **Geoffrey Kitundu @ Nalogwa and Michael Joseph vs The Republic**, Criminal Appeal No. 96 of 2018, at Page 16 the Court of Appeal acknowledged two positions depicted from

its previous decisions, one of them is **Abubakari Hamis and Another vs The Republic**, Criminal Appeal No. 253 of 2012 in which the court insisted on the need of corroborating the retracted or repudiated statement before relying on the same to found a conviction. The second position was in the case of **Festo Mwanyagila vs The Republic**, Criminal Appeal No. 255 of 2012 which cited with approval the case of **Tuwamoi vs Uganda**, (1967) EA 84 at Pg 88 where it was emphasized that the court can convict based on repudiated or retracted statement even if it is not corroborated if the court is satisfied that, the confession must be true. Further to that, in **Nehemia Rwechungura vs The Republic**, Criminal Appeal No. 71 of 2020, CAT, Bukoba, relied on the authority in the case of **Ali Salehe Msutu vs. Republic** [1980] TLR 1, the Court of Appeal stated that:

"...a repudiated confession, though as a matter of law may support a conviction, generally requires as a matter of prudence corroboration as is normally the case where a confession is retracted."

In the case at hand, there is actually enough corroborating evidence from other prosecution witnesses. The evidence of PW1, PW5 and PW11 corroborated both cautioned statements i.e exhibits P4 and P8.

Further to that, the evidence of the accused themselves during defence, though did not admit to have committed the offence, but did not raise doubt in the evidence of the police officers before whom the cautioned statements were recorded. For example, the 1st accused person told the court that, he was beaten in his knees that led to knee surgery.

Considering the fact that the surgery was done while in prison, he would have brought any documentations to prove such fact. A mere showing a scar to the court is not enough to raise doubt and more so, he said the documents he was forced to sign are that one which had the signature of his land lord. Now looking at the cautioned statement, I find no signature of any other person, other than the accused himself and the recording officer. The only document which has the signature of the land lord of the 1st accused is exhibit P3, the search order. Therefore, in being forced to sign the document which had the signature of the land lord, from the evidence, it was not the cautioned statement but the search and seizure certificate. Further more, the fact that, the 2nd accused person when cross examined by Ms. Grace Medikanya, learned State Attorney, admitted that, PW1 never beat him prior or after taking his cautioned statement. This concludes the fact that, all accused persons gave their statements voluntarily hence admissible before the court.

According to the cautioned statements which were tendered and admitted without objections as exhibit P4 and P8 show that; both accused persons planned to find a girl who was a virgin so that they can make charms and local medicines that would make them rich by using her uterus. The plan was initially executed by DW1 who lured little Samira to an abandoned house where they drugged her, laid her down as the DW2 inserted his hand in her vagina to extract the said uterus. Also, according to their statements, Samira did not cry as they gave her a sweet which contained drugs that made her unconscious, however, in the course of inserting the 2nd accused's hand in her vagina, she was fighting back and it was when the 1st accused strangled her leading to a complete broken neck.

In their statements, they incriminated each other in their involvement of killing Samira. I am alive of the provisions of the law regarding confession of co-accused, particularly section 33 (1) and (2) of the Evidence Act (supra) that;

"33.-(1) When two or more persons are being tried jointly for the same offence or for different offences arising out of the same transaction, and a confession of the offence or offences charged made by one of those persons affecting himself and some other of those persons is proved, the

court may take that confession into consideration against that other person.

(2) Notwithstanding subsection (1), a conviction of an accused person shall not be based solely on a confession by a co-accused”.

However, in light of the provision above, it is not their statements alone which proves their involvement in the offence charged. There is also the evidence of PW11 a child who was playing with the deceased who identified the 1st accused as a person living on the other side of the road from where he was living.

According to PW11 the 1st accused was not a new person to him as they live in the same street and it was not the 1st time that the accused offered them sweets. He had that tendency whenever he found them playing. This corroborated admission in the cautioned statement that, it was the children who were able to give his description. PW11 said he identified the 1st accused person as the person who lured the deceased with some sweets and left with her before she was found dead. PW11 told the court that it is the description he gave to police officers which assisted the arrest of the 1st accused person and the 1st accused person in his statement mentioned the 2nd accused.

The other evidence, is the DNA profiling done to the samples taken from both accused persons as well as the deceased. Although both accused person deny to be taken blood samples, they never cross examined PW5 after she testified regarding the same. According to exhibit P9, the DNA profiling report, it shows that, blood sample obtained from the deceased genitalia had DNA of both the 1st and 2nd accused.

In the case of **Christopher Kandidius vs The Republic**, Criminal Appeal No. 394 of 2015, CAT at Dsm (unreported), the Court of Appeal had this to say regarding DNA;

"With regard to the DNA evidence, it has been observed that:

"DNA is one of the most powerful tools we have to solve and prevent crime. By analyzing the samples collected in a rape kit, forensic scientists can develop a DNA profile that is unique to the perpetrator. That DNA profile can then be compared to a data base with thousands of other DNA profiles from known offenders and from unsolved crime scenes. This process can both identify an unknown perpetrator and link a suspect to other crimes." — **DNA and Rape Kit Evidence**, endthebacklog.org

Unfortunately, despite the enactment of the Human DNA Regulation Act, 2009 [ACT No. 8 of 2009] criminal

investigation and prosecution in Tanzania still shies away from comprehensive use of the DNA"

This case being one of the few cases in which the investigation and prosecution have responded to the call of the Court of Appeal in the above cited case, looking at the testimony of PW10, the government chemist, after tendering PE9, he told the court that, the possibility of the accused persons not having relationship with the deceased's blood is one out of a billion (1/1,000,000,000). This is almost 16 times of the whole population of Tanzania, thus the possibility that the owner of DNA is not either of the accused is close to none. This without doubt concluded their involvement in killing the deceased in a manner they did by inserting the hand to extract the uterus hence leaving the DNA inside her genitals.

The other set of evidence is that, some of the clothes that the deceased was last seen wearing were found in the 1st accused person's home. That is, a niqab, pair of socks and sandals. Although he denies his house to be searched, the testimonies of PW1, the investigator, PW5 forensic expert, PW7, street chairman by then and PW12, the landlord, shows that, his house was searched and the above items were seized from therein. With the above explanation, the 2nd issue is also answered in affirmative. All the circumstantial evidence points to none other than the

accused persons who were involved in the murder of Samira Saidi, the deceased.

As to the third and fourth issues, as to whether, the accused persons intended to kill the deceased and whether the prosecution has proved the case at the standard beyond reasonable doubt. This is a requirement under sections 110 and 112 read together with section 3(2) (a) of the Evidence Act (supra) which provides for the burden and standard of proof in criminal cases. All these sections impose that the burden of proof is on the shoulder of the prosecution and the standard of proof is beyond reasonable doubt. These provisions have been interpreted by a number of case authorities, few of which are to be mentioned here i.e **Woodimington vs DPP** (1935) AC 462 as well as **Mwita & Others vs Republic**, [1977] L.R.T. 54.

Now, with these two principles of burden and standard of proof, I find important to add another principle found in the case of **Maliki George Ngendakumana vs Republic**, Criminal Appeal No. 353 of 2014 (CAT) Bukoba (unreported) which *inter alia* held that: -

*"...it is the principle of law that in criminal cases, the duty of the prosecution is two folds, **one**, to prove that the offence was committed and **two**, that it is the accused person who committed it"*

In **Salehe Ally V R, Criminal Appeal No. 20 of 2009, CAT-Tanga (unreported)**. The Court had this to say:

"In an ideal case, an accused person is convicted on the strength of the prosecution case against him/her and not otherwise."

The term beyond reasonable doubt is not statutorily defined, but have been defined by case laws. In the case of **Magendo Paul & Another vs Republic** [1993] T.L.R 219 (CAT), it was held *inter alia* that,

"...for a case to be taken to have been proved beyond reasonable doubt, its evidence must be strong against the accused person as to leave only a remote possibility in his favour which can easily be dismissed"

This was held in the line with the philosophy in the case of **Chandrakat Jushubhai Patel Vs Republic** Crim. App No 13 of 1998 (CAT DSM) in which it was held that;

"..remote possibility in favour of the accused person cannot be allowed to benefit him. Fanciful possibilities are limitless and it would be disastrous for the administration of criminal justice if they were permitted to displace solid evidence or dislodge irresistible inferences"

I am of the firm view that the case against the accused persons have been proved at the required standard. I say so because, the

prosecution have managed to prove every essential ingredient of the offence, against the accused persons.

As earlier on pointed out, in a case built on circumstantial evidence as this one, for such evidence to sustain conviction as briefly hinted above, the condition is, such evidence has to be in the nature of a series of circumstances leading to the inference or conclusion of guilt to none other than the accused persons. All the elements of the offence have been proved at the required standard because series of events as established by the prosecution have managed to prove that, it was the accused persons and no one else who committed the crime. In my evaluation of such evidence, I have not managed to locate any possibility in their favour, and if there is any of such possibilities which has escaped my attention, then the same is so remote, and is incapable to displace solid evidence as presented by the prosecution or dislodging irresistible inference against them.

That said, I find the accused persons **Richard Petro Kimweri** and **Mbwana Hussein Makamba** guilty of the offence of Murder contrary to section 196 and 197 of the Penal Code [Cap 16 R.E 2022], I hereby convict them forthwith.

It is accordingly ordered

DATED and delivered in **ARUSHA** this 30th day of March, 2023.



J. C. TIGANGA

JUDGE

SENTENCE

The accused persons have been convicted for the offence of Murder under Section 196 of the Penal Code, (supra). Their sentence is essentially provided under Section 197 of the same law. Looking at the wording of the provision of section 197 of the Penal Code, the prescribed sentence is only one, and the court has no discretion to impose any sentence other than what has been provided by that law. In the same vein, I find myself with no other sentence to impose than the one provided by the law, which is none other than "death by hanging".

Having said all these, I hereby sentence the two accused persons **Richard Petro Kimweri** and **Mbwana Hussein Makamba** to death by hanging as provided under Section 197 of the **Penal Code** [Cap 16. R.E. 2022].

It is accordingly ordered.



J.C. TIGANGA

JUDGE

30/03/2023

Right of Appeal explained and guaranteed.



J.C. TIGANGA

JUDGE

30/03/2023

