

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[ARUSHA DISTRICT REGISTRY]**

AT ATUSHA

(ORIGINAL JURISDICTION)

CRIMINAL SESSIONS CASE No. 70 OF 2022

(PI No. 65 of 2015 from Arusha Resident Magistrates Court)

THE REPUBLIC

VERSUS

ISMAIL SWALEHE SANG'WA

JUDGMENT

28th February & 13th March 2023

TIGANGA, J

In this case, Ismail Swalehe Sang'wa, hereinafter referred to as the "the accused", stands charged with the offence of murder contrary to section 196 and 197 of the Penal Code [Cap 16 R.E 2019] (Now R.E 2022). He is accused to have committed the said offence on 18th December 2015 by murdering one Emilly Stephen Kisamo hereinafter the deceased. The offence was committed at Corridor street, Uzunguni area within the City and District of Arusha, in Arusha Region at the home of the deceased.



On arraignment, the accused pleaded not guilty to the charge, and during preliminary hearing he admitted to his names and other personal particulars as they appear in the charge and the facts, he also admitted to the fact that, the deceased went missing and later his body was found in his car with registration number T.435 CSY make Mazda. He also admitted to be arrested in connection with the murder of the deceased and that he was interrogated in that connection. He also admitted to have confessed to have seen the police officers conducting search at the home of the deceased, he also admitted to be taken to the justice of the peace where he confessed to have murdered the deceased. He also admitted to be identified at the identification parade and that, he was thereafter arraigned to Court.

In law, after the accused had pleaded not guilty, then under section 110 and 112 read together with section 3(2) (a) of the Evidence Act [Cap 6 R.E 2022] the prosecution is burdened to prove the case at the standard of beyond reasonable doubt. These provisions have been interpreted by a number of case authorities, some of them are **Woodimington vs DPP** (1935) AC 462 and **Mwita & Others vs Republic**, [1977] L.R.T. 54. Further to that, on these two principles of burden and standard of proof, I find it important to add another principle found in the case of **Maliki George**

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Ngendakumana vs The Republic, Criminal Appeal No. 353 of 2014 (CAT)

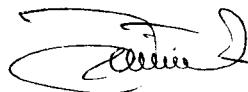
Bukoba (unreported) which *inter alia* held that: -

*"...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"*

It is equally important at this juncture to point out that, under section 192(4) of the Criminal Procedure Act [Cap. 20 R.E 2022], "the CPA", any fact or documents admitted or agreed whether such fact or document is mentioned in the summary of evidence or not, in a memorandum filed under this section, shall be deemed to have been dully proved; unless the court is of the opinion that, in the interest of justice the said fact or document be formally proved. In this case, during preliminary hearing, the accused admitted to be present when the police officers were conducting search at the home of the deceased. He also admitted to be taken to the justice of the peace where he confessed to have murdered the deceased, and lastly he admitted to be identified at the identification parade which was conducted by PW8 ASP Goodluck Revocatus Mugambi. These facts are in terms of section 192(4) of the CPA, deemed to have been proved against the accused person.

Now, having made myself clear on these important guiding legal principles which will guide me in this judgment, I now turn to the merit of the case. Now, following that plea and the response to the facts made by the accused, the prosecution had to call witnesses to prove their case. In the bid to prove it, they called ten witnesses namely Caroline John Lukumay, E. 7139 SGT Evalist Pantaleo Shayo, Namsifu Simon Ayo, F. 7335 Cpl Evance, Denis Dismas Shayo, F.3668 WP Leonia, John Faustine Lyimo, ASP Goodluck Revocatus Mugambi, Mark Colman Ngalo and Abdallah Hussein Semvua. These witnesses had their evidence recorded as PW1, PW2, PW3, PW4, PW5, PW6, PW7, PW8, PW9, and PW10 respectively.

They also tendered twenty-four exhibits namely; a motor vehicle register book titled "Kitabu cha magari mbalimbali No. 04 of 2015 hadi 2016" particularly entry No. 95 of 2015, as exhibit P1, the Court exhibit register particularly item No. 10/2015, as exhibit P2, one panga, as exhibit P3, two bed sheets as exhibit P4 collectively, four big towel as exhibit P5 collectively, three small towels as exhibit P6 collectively, one table cloth as exhibit P7, One Masai sheet of red colour as P8 two perfumes as exhibit P9 collectively, 14 piece of rechargeable airtime vouchers as exhibit P10 collectively, one phone make Sumsung Galaxy, as exhibit P11, one phone make Sumsung

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Duos, as exhibit P12, one phone make Sumsung Camera, as exhibit P13, One Small phone make TECNO, as exhibit P14, Cash money Tsh. 4,294,000/=as exhibit P15, extra Judicial statement of the accused as exhibit P16, Identification parade register as exhibit P17, a certificate of seizure which seized the four big towels, three small towels two bed sheet, one table cloth as exhibit P18, a certificate of seizure cash money Tsh. 4,294,000/, two perfumes and rechargeable air time voucher as well as the three phone as exhibit P19 and certificate of seizure which seized the panga as exhibit P20. The other exhibits tendered were the Postmortem examination report as exhibit P21, Forensic DNA Profiling report admitted as exhibit P22, 16pictures bearing images of some of the acts in an investigation process as exhibit P23 and the certification of the pictures as exhibit 24.

The facts of the case as can be revealed by the evidence as contained in the testimony of the 10 prosecution witnesses and twenty-four exhibits are very sad to tell; they can briefly be told by starting with the discovery of the death of the deceased. In short, Emily Stephen Kisamo herein after, the deceased, died a tragedy death. His death was discovered in the morning of 19th December 2015, but there is enough evidence proving that, the deceased died on 18th December, 2015. His body was found in a motor

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vehicle make Mazda with registration number T435 CSY allegedly owned by himself. That motor vehicle was found deserted at Njiro Kikwakwaru "B" in Arusha city and Region on 18th December, 2015 at about 21.00hrs with its all doors closed. The evidence by PW3 one Namsifu Simon Ayo, is that, although the police were informed in the evening of the suspicious parking of the said car, the same was parked by a young man in the morning of 18th December, 2015 at 09.00hrs. That after parking it that young man, who after parking it, came out of the car, locked the same and walked away leaving it locked. It was because a person who parked the motor vehicle did not return, and her husband became suspicious.

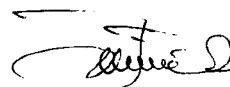
Following that suspicion, they informed the police officers of that suspicious parking car. The police officers who were patrolling at Njiro at that particular moment, while led by PW2, the patrol in charge, went there, inspected the car from outside and found its doors locked. They regarded it as a found property and started to find the breakdown to carry the said motor vehicle. At about 21.00hrs PW2 managed to carry the said motor vehicle to the Central Police Station using the breakdown facility. At Central police station PW2 handed it to the OC CID, by then, one Faustine Mafwere.

Before the motor vehicle was recovered, PW1 Caroline John Lukumay, a wife of the deceased, who was by then a student at Arusha University College, had been unsuccessfully searching for her husband. She started contacting him through the text message via his mobile phone at 15.48 hrs in the afternoon, but she received no reply. After some hours of silence, she decided to call the deceased via his phone which was also had not response.

While in that dilemma, she had to wait till when she finished her class at 18.30 hrs before she went back home at Corridor street, Uzunguni area in the City of Arusha. At home she found the accused who was the house boy employed by the deceased. After being asked the whereabouts of the deceased, he said the deceased left in the morning with the Motor vehicle with registration Number T435 CSY make Mazda and told him that he was going to his work. PW1 went to various places including Shri Hindu hospital where she thought, the deceased might have gone for treatment because a day before he had told her not to be feeling okay. However, she did not find him. She decided to report the missing of the deceased to the police station, where she was advised to wait till 24 hours lapse before such report is received by the police therefore she was advised her to wait till the next day.

Having been so advised, PW1 decided to go back home. When she was approaching to the gate of the Central Police Station, she met the breakdown carrying the motor vehicle which she was told by the accused that, the deceased left with it. Shockingly, PW1 returned to PW8, ASP Goodluck Revocatus Mugambi who was by then of the rank of Inspector of Police, to whom he had just reported the missing of the deceased. She told him that the car which had been driven by the person whom she went to report his missing was brought at the police station while carried by the breakdown. PW8 went and inspected the motor vehicle, he found its all doors locked. He advised PW1 to go back home, but to let her phone on, in case they find any information they would call her. That motor vehicle was handed over by PW2 to PW4, a Police Officer, F.7335 Cpl Evance, the exhibit keeper who received the exhibit via entry No. 95/2015 in exhibit P1, a motor vehicle register book titled "Kitabu cha magari mbalimbali No. 04 of 2015 hadi 2016".

On arrival to her home, which is also the home of the deceased, PW1 she entered inside and found the bedroom was disarranged as things in the room were not in their normal order. He found the accused together with the night watchman. When it reached at about 05.00 hrs she was called via her mobile phone and informed that, the car of her husband was found at



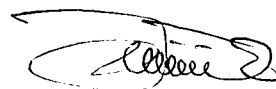
Njiro Kikwakwaru "B" so the police would pass over her to go to the place where the car was found. It was at 07.30hrs when she was picked by the police officers, they went together at Njiro Kikwakwaru where they found one youth who showed them the place where the car was found parked. While there, they tried to search around but nothing was found.

On their return PW1 was asked to get the spare keys of the car. She took the same to police station and handed over the keys to the OC-CID. Having received the said keys, the OC CID called the exhibit keeper, PW4 together with the experts from forensic department, and the wife of the deceased, PW1 the investigator used the said keys and opened the motor vehicle and rear seats were bent to prevent the views in the boot from the outside on inspection of the car boot, they found the body of the deceased. It was found with a cut wound on his neck which almost had dismembered the head with the rest part of his body. According to exhibit P.21, out of 40cm circumference of the whole neck, 36cm were cut leaving a skin tag which was supporting the head from the neck. The deep cut wound was extending from the back to front. That means the 3rd vertebrae bone, the spinal code, major blood vessels and the throat organ were all cut and dismembered from the head. When that body was found in the car, PW6,

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D/Sgt Leonia, a forensic expert from the office of the RCO Arusha, took photos of the body while in the boot of the car and out of the boot before the same body was taken to Mount Meru hospital mortuary.

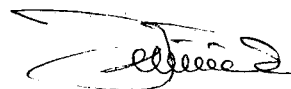
Soon after the body was taken to the mortuary, a team of investigators led by PW10, Abdallah Hussein Semvua, who was by then a Police Officer of the rank of SSgt, were assigned to investigate the case. Others investigators who joined him were Sgt Ally, Cpl Francis and D/C Rehema. Upon being so assigned, they decided to go to the home of the deceased at Uzunguni Corridor Street where they found a young man who introduced himself as Ismail Swalehe Sang'wa. That youth introduced himself as the house boy in that house. They informed him that, the deceased, his boss, was found dead. He said the deceased left on 18/12/2015 in the morning with the motor vehicle with registration No. T.435 CSY going to work but, he did not return. Since the information they had was that, the car in which the body of the deceased was found parked at Njiro Kikwakwaru "B", they decided to go to that place. On arrival, they asked the people who were living in the neighborhood of the place where the motor vehicle was found parked one of them being PW3 who told them that, she saw the car parking, and after being parked, she saw a young man, going out, locking the car and walking away

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leaving the car there. PW3 told them that, she could identify the person who parked the car, she said he was a young man, moderately tall and brown in colour. From that description, PW10 and his fellows suspected the accused because the description resembled him.

That, led to arrest to the of the accused person just for interrogation, upon interrogation, on 23rd December 2015, he admitted to be the one who killed the deceased. According to PW10, the accused told them that, he was the one who killed the deceased and after killing him, he stole cash money Tsh. 4,292,000/= and there after carried the body of the deceased and put it in the boot of the motor vehicle with registration number T.435 CSY and drove the car to Njiro Kikwakwaru "B" where he parked it before he locked all the doors and came back home where he cleaned the house and hide some of the items used in hiding the offence outside the house but within the compound.

Following that confession, they decided to go back to the home of the deceased together with the accused. They went with the forensic expert who would take photo at the scene and collect other exhibits. They went there with the OC-CID and the RCO and his team of investigators. When they reached there, they found relatives of the deceased who were mourning his

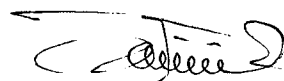
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death. They took with them some of the relatives inside the house. While inside, the accused showed them where the deceased was sitting when killed him. They inspected the area using the special torch and saw the sign of wetness at the joint of the tiles which they suspected to be the remains of blood. They decided to break the tiles, and found underneath the tiles some blood remains and collected blood sample. They were thereafter shown a place where the accused parked the motor vehicle when he was carrying the body of the deceased to the boot of the car and P10 with his fellows saw the tyres marks.

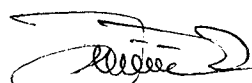
Further to that, PW10 said that, thereafter, the accused took them out of the house but within the compound to the nearby banana plant and he unearthed therefrom two bed sheet, four big towels, three small towels, one table cloth, one Masai sheet, one thermos and other items which the deceased was using in drinking porridge. The accused thereafter took them to the chicken's coop which was also within the compound, where showed them where he had dug the hole and earthed the black plastic bag with some items stolen during the commission of the offence. He dug and took it out. In it, there was a sadolin plastic container which had four mobile phones, three of which were sumsung, while one was TECNO. There were also two

perfumes and cash money which when they were counted they were Tsh. 4, 294, 000/=. In that container, there was also 14 rechargeable airtime vouchers of Tsh. 5000 each of Vodacom, these are exhibits P4, P5, P6, P7, P8, P9, P10, P11, P12, P13, P14, P15. There after the accused took them to the store where he actually said hide the bush knife which he used to kill the deceased. That bush knife (Panga) was admitted and marked exhibit P3.

Thereafter, Inspector Happy who supervised the search, prepared three seizure certificates, i.e exhibits P18, P19, and PW20 which were signed by PW10 the officer conduction search and John Faustine Lyimo, PW7 as an independent witness as well as the accused person. Thereafter they returned to the Central Police station where they handed over some of the exhibits to the exhibits keeper PW4, while the exhibits which are in the form of fluid were handed over and kept in the special fridge in the office of forensic. At 12.00, PW10 together two other police officers and two relatives of the deceased, one of theme being PW9, went to Mount Meru Hospital where the relatives identified the body of the deceased, and PW10 witnessed the conduct of postmortem examination and preparation of the postmortem examination report, exhibit 21 in which it was found that the cause of death of the deceased was the acute blood loss caused by a cut wound which

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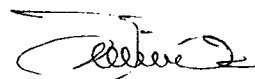
separated the head and the rest part of the body for 90% thereby leaving small skin joining the head and the rest parts of the body. At 14.00hrs of that day, in his volition, the accused was taken to the justice of peace, i.e PW5 who recorded his confession, exhibit P16 in which he confessed to have committed the offence. This fact was also admitted by the accused during preliminary hearing that, he actually admitted to have confessed to the justice of the peace. The investigation did not end there, on 27th December 2015, PW8 conducted identification parade in which the accused was identified by PW3, a person who saw him parking the car at Njiro Kikwakwaru "B", locking it, and walking away as reflected in exhibit P17, the identification parade register. Thereafter, the accused was taken to court. The investigation went on, as on 30th December, 2015, DC Justine was sent to take the samples of clothes and blood sample collected from the scene of crime, and from various clothes found at the scene of crime, and blood sample collected from the deceased as well as oral swarb taken from the mouth of the accused. Upon examination of the samples, the results were communicated in the DNA Profiling Test Report which was tendered as exhibit P22 in which generally, the sample of blood stains on the clothes and panga P3-P8 resembles the DNA of the deceased. Also that, the swarb



collected from the mouth of the accused and the handle of the panga resembles the DNA of the accused person.

However, I find it important at this juncture to make it clear, that although the DNA profiling report was tendered in court as exhibit P22 but upon examination of the same, I find that, there is no evidential back up of how some of the sample which were examined in the report were collected from their original sources. One of the samples is the sweater of the accused, the other one is the sample of blood collected from the door of the deceased, the third is a blood sample collected from the table on which the deceased was killed, and fourth the sample taken from the chair where the deceased was sitting when he was killed. These are few samples which the prosecution have not martialed the evidence on how the same were collected that being the position, I will thus not rely on this exhibit in my judgment because it lacks credibility.

The other exhibit which were taken to forensic for examination was the pictures i.e exhibit 23, these were sent on 14th March 2016 to the picture analyst by DC Justine and upon examination, picture analyst certified the pictures in the report which were tendered, exhibit P24 to be used as evidence.



In defence as earlier on pointed out, the accused called two witnesses, namely, himself who testified as DW1 and B1667 SSgt Godifrey Hindeji Muhande, a prison officer and an assistant Medical Officers stationed at Arusha Central Prison at Kisongo. The summary of their testimonies are as follows. According to the accused, on 20th December 2015, he was on safari from Dodoma to Arusha. He was from the burial of his late Uncle one Ibrahim Hamisi. He said he went to Dodoma on 14/12/2015, using the car which was carrying the body of his deceased uncle. According to him, from Dodoma to Arusha he boarded the passengers bus called Capricon which travel to Arusha, and that he arrived to Arusha on that date.

According to him he was arrested on his arrival to Arusha by Police officers who introduced themselves to him as Abdallah, Mahita and Ally. He said he was arrested on his way going to his brother at Sanawari. On his arrest, they accused him of theft. He was thereafter taken to central police station where he was remanded up to the evening when he was taken to Mateves police station at Kisongo.

While there, they ordered him to remove all clothes, and started to beat him up and it was when they told him that, he was accused of killing a person called Emily Kisamo. He said he initially disputed to have killed the

deceased. However, after the intense tortured he decided to agree. Thereafter, they brought him papers which was already written and forced him to sign. After signing the said papers at Mateves Police station, they took him back to central police station where he remained for a while before they took him to a place he does not know, took him photo and later on returned him to Central Police station, he said.

Having done all these to him, on 29th December 2015 they brought him to court. He said before the court here complained to the Magistrate but the Magistrate told him that, he would not be able to help him. Thereafter he was taken to remand prison where he complained of pain and sickness, they took him to the dispensary where he was treated.

He tendered the bus ticket to prove that, on the date he was accused to have committed the offence, he was on safari travelling from Dodoma to Arusha. That bus ticket of Capricon Royal Class with Serial No. 2334 dated 20/12/2015, was admitted without objection from the prosecution and was marked as exhibit D1.

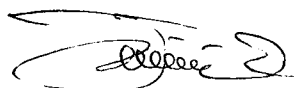
He generally disputed to have worked with the deceased or PW1 and to have the knowledge of driving the car. He also disputed to record any confession statement and he had never seen PW6. He said he remember

when he was tortured, they ordered him to open his mouth from where they took his saliva but he did not record any cautioned statement or extra judicial statement.

He also disputed to have participated in the identification parade. Regarding the picture, he also disputed them. However, he said, on 28th December 2015, he was ordered to hold the plastic container and open up the said container. He said all the evidence given against him is false. He said the allegation that he had money was false.

On the evidence that he had money, he said the evidence by the prosecution is self contradictory particularly in figures. He disputed the allegation the he was found with a panga which had blood. He said the prosecution failed to call the right watchman he asked the court to treat the failure to call him to attract adverse inference against the prosecution.

On cross examination by the State Attorney he said although PW1 testified that, he was living and working for them, but he did not through his Advocate cross examine her on that area to indicate his line of defence and contradict her. He also said he does not know PW6, PW8 and P10, despite the fact that, they came to court and said they went with him to the home of the deceased, where he showed them the exhibits, but I have never gone



with them. He said he was tortured at Mateves and felt pain. He said the evidence by PW5 that, he inspected him is not true. He said he has never confessed before the Magistrate; therefore, the extrajudicial statement was not his. He further said, In the memorandum of facts, the fact that he was taken to the justice of peace is not true despite the fact, that during preliminary hearing he did not dispute to be taken to the justice of the peace, the fact was that he was taken there.

Also that although PW3 said she identified him, but that is not true. He disputed to have parked the car at Njiro Kikwakwaru and that he was identified in the identification parade as there was no such a parade conducted. He said, it was on 31st December 2015 when he was treated by the prison officer, fact he proved with exhibit D2. He said had not enmity with the Police officers who arrested him.

On re examination, he said he did not write the ticket, as the same was written by the bus conductor. He said PW1 did not tender employment agreement between the accused and the deceased or PW1.

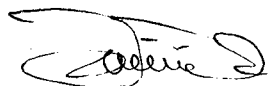
As earlier on intimated, the defence called DW2 a medical Doctor who treats patient at Arusha Central Prison. He introduced himself as a scholar of a Diploma in clinical medicine at Mvumi Clinical Officer College in Dodoma,

and Advanced Diploma in clinical medicine KCMC where he was awarded Assistant Medical Officer

He said in his testimony that, he knows Ismail Salehe Sang'wa as the remandee of Arusha Central Prison. He remembers to have received and treated him on 29/12/2015, when he was brought to prison by the Police. According to him, he was not around when the accused was brought, since the receptionists saw the accused to be very sick, they called him to see the accused, he said the accused was complaining pains on various parts of this body particularly the chest pain.

On interrogating him, the accused told him that he was beaten by the police officers. Following that conditions, he admitted him to hospital for treatment. When passed on round on 31st December 2015 the accused was still in bad condition, as he was still coughing the coughs which was mixed with some blood, he therefore increased his dose.

He further said on 05th January 2016 he went to the ward and discharged him. To prove what he said, he tendered the out-patient record card of Ismail Swalehe Sang'wa dated 29/12/2015 which was admitted without objection and marked as exhibit D2.

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On cross examination, by the State Attorney he said he has 13 years' experience as a medical personnel, but 20 years' experience as a prison officer. He said, through that experience, he knows that, under the law and regulation governing prison service the remandee or prisoner with injuries must have PF3 before he gets treated. If he has no PF3 he is normally returned to police but sometime they receive and treat them on humanity grounds. But according to the regulation he must be returned to the police.

He said he attended Ismail Swalehe Sang'wa on 29/12/2015, without the PF3 because he was complaining of pain and he was injured his ankle on the right side leg. In further cross examination he said the accused was supposed to have PF3 before he was treated, but he treated him without the PF3 though it was against the prison regulations. He said it was on humanity and medical grounds because he could not have left him to die. On his examination, he found that the accused was injured by a blunt object which caused his leg to swell

He said the exhibit P2 does not show the remand number of the accused, that was because by then he had not been admitted to prison by the admission officers. He said he received and treated him without PF3 and without being admitted. On further cross examination, he said even the

exhibit D2 was issued without following the procedure. He insisted that, was against the procedure but he wouldn't have left him to die.

On re examination, he said they normally receive patients and treat them whenever they find the Police who brought them had left. He said the accused was received by the people who were at the gate, in the absence of the admission officers who were by then not present. He said the accused could not even walk. He said it was him who was supposed to tell the Police to return with the accused but he was not present when the police brought the accused and the admission officer was not there.

Examined by the court for clarification, he said the documents of this nature remain in the custody of the dispensary. But I gave it to the patient when he asked for it. He said the accused requested orally and he recorded that he gave it to him from the patient file.

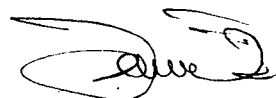
Both parties opted not to file or make final submissions, they asked the court to base on the evidence they have adduced to decide, hence this judgment.

That being a comprehensive summary of the proceedings, it is important to once again restate that, the accused person is charged with the murder of Emmily Stephen Kisamo contrary to section 196 and 197 of the

Penal Code (supra). In law, for murder cases to be established, it must be proved that the killing was with malice aforethought. The term malice aforethought is defined in the provision of section 200 of the same law thus making it important to read section 196 and 197 of the Penal Code together with section 200 of the same law.

While section 196 provides that a person commits murder if, with malice aforethought, causes death of another person by an 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;*

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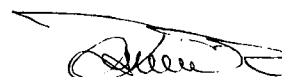
(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence.

This has been interpreted in the case of **Bomboo Amma and Petro Juma @ Lanta vs The Republic**, Criminal Appeal No. 320 of 2016 CAT Arusha (Unreported).

Gathering from the summary of the proceedings 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) That, the said Emmily Stephen Kisamo "the deceased" died and his death was not natural.
- (ii) That, the death of the deceased was caused by the accused person charged in this case.
- (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.

In this case, the evidence of PW1, the wife of the deceased, who witnessed when the car boot was opened, and found the body of the



deceased with its neck cut and by general observation she was of the view that, the deceased was no longer alive. The evidence of PW4 the exhibit keeper, was also to the effect that, he received the car from PW2, at night of 18th December 2015, and was present when the car was opened in the morning of 19th December 2015, when they found the body of the deceased in the car boot, and he said apparently it had no life.

The other witness whose evidence is proving the death of the deceased is PW6, she was present when the car boot was opened, she was the first person to touch the body of the deceased being a forensic expert, she also took pictures of the body while in the car boot and after it had been taken out, in her view, when she carried the body it apparently had no life. As part of her evidence, she took five photos pictures showing five different body postures in the car boot and out of it, these pictures are part of exhibits P23.

The other witness who gave evidence to prove the death of the deceased is PW9 a nephew of the deceased who was present and identified the body to the Doctor who conducted the postmortem examination on the body of the deceased. The last evidence to prove that the deceased really died and his death was not natural is the exhibit P.21 which is the postmortem examination report, prove without doubt that the deceased

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Emmily Stephen Kisamo died and his death was not natural. This is based on the content of exhibit P21, the same shows that the cause of death was acute blood loss caused by a cut wound which separated the head and the rest part of the body for 90% thereby leaving small skin joining the head and the rest parts of the body. Extracting the details from the exhibit P21 the deceased was found with a cut wound on his neck which almost had dismembered the head with the rest part of his body.

According to exhibit P.21, out of 40cm circumference of the whole neck of the deceased, 36cm were cut leaving a skin tag which was supporting the head from the neck. The deep cut wound was extending from the back to front. That means the 3rd vertebrae bone, the spinal code, major vessels and the throat organ were all cut and dismembered with the head. That proves both that the deceased died, and his death was not only unnatural but also a very tragedy and a painful one.

From the above exposition as can be gathered from the evidence I have analyzed hereinabove, there it vividly evident that the person who caused such death had reasons to believe that his act would actually cause death, therefore he had malice aforethought in terms of section 200 of the Penal Code (Supra). Further to that, the fact that the cut wound was from

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the back means that, the person who caused death ambushed the deceased him from the back therefore he was not prepared for any resistance from the deceased and I am sure he got no one, therefore, malice aforethought has been established.

The next question is who caused the death of the deceased. The Republic capitalizes their case on four types of evidence; **one**, the confession or extra-judicial statement of the accused which was person which was recorded before the justice of the peace, **two**, the evidence of discovery of the exhibits allegedly used in the commission of the offence or in hiding the offence to be discovered after its commission, **three**, the circumstantial evidence, which includes, the identification parade, **four and last**, the oral testimony evidence of the prosecution witnesses in particular their credibility.

On the other hand, the defence mainly relied on three types of evidence **first**, that the accused was beaten up by the police, **second**, the defence of alibi, that he was not in Arusha on the date when the offence was committed, **third** and last, the defence denial to have committed the offence, to have known the deceased or to have been employed by him and to have not confessed before any justice of peace.

From the base upon which the prosecution case has been built, I find no direct evidence by the prosecution of a person who witnessed either the accused or any other person killing the deceased. The available evidence is as indicated herein above.

Now as earlier on pointed out, while the prosecution alleges through the evidence of PW3 that the car in which the body of the deceased was found was driven and parked at Njiro Kikwa "B", being parked by a person whom she described to PW10. The description which she gave lead to the arrest of the accused person. PW3 later identified the accused at the identification parade which was conducted by PW8 and recorded in exhibit P17, the identification parade register.

PW3 identified the accused person as the person she saw parking the motor vehicle in which the body of the deceased was found. It is the same car which was collected by PW2 as the found property and handed over to PW4, the exhibit keeper as proved by exhibit P1, the exhibit register. The evidence of PW10, the investigator who arrested the accused after the description given by PW3 when himself and his fellow investigator visited the place (Njiro Kikwakwaru B) where the car in which the body of the deceased was found. It was after PW10 and his fellows had heard the description from

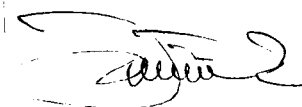
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PW3 they realized that, the person described resembled the person they saw at the home of the deceased, who turned to be the accused person.

That description was followed by the arrest and interrogation of the accused person who according to PW10 confessed and volunteered to show them the exhibits, the exercise which resulted into seizing of the panga, allegedly used in the killing of the deceased, it also resulted into the seizure of the bed sheets, the towels, the table cloth and the Masai sheet which were allegedly used to clean the place where the blood from the deceased was shed. Other items are phones, the perfumes, the recharging vouchers and cash money Tsh. 4,294,000/= allegedly taken from the room of the deceased. All these are exhibits P3 to P14, as well as the seizure certificates exhibits P18, P19, and P20 through which the said items were seized.

In law, the confession made before the immediate presence of the Magistrate or justice of the peace is regulated by sections 28 and 29 of the Evidence Act [Cap 6 R.E 2022]. For purposes of easy reference, the same are hereunder reproduced;

*"28. A confession which is **freely** and **voluntarily** made by a person accused of an offence in the immediate presence of a Magistrate as defined in the Magistrates' Courts Act, or a justice*



of the peace under that Act, may be proved as against that person.

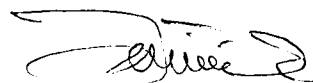
29. No confession which is tendered in evidence shall be rejected on the ground that a promise or a threat has been held out to the person confessing unless the court is of the opinion that the inducement was made in such circumstances and was of such a nature as was likely to cause an untrue admission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

Reading between lines the provision cited herein above, I find two pertinent principles to guide me;

- (i) *A confession made before a Magistrate or justices of the peace may be proved against the accused only where it has been freely and voluntarily made by the accused.*
- (ii) *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."*

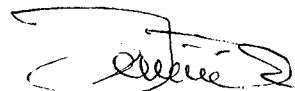
Looking at the defence of the accused, he actually repudiated the cautioned statement on the ground that, he did not record any statement before the magistrate or justice of the peace. Now, how to deal with the

repudiated confession is not a virgin land, this concept has been a subject of discussion and decisions of the Court of Appeal of Tanzania in a legion of cases. In the case of **Geoffrey Kitundu @ Nalogwa and Michael Joseph vs The Republic**, Criminal Appeal No. 96 of 2018, at Page 16 of the decision the Court of Appeal acknowledged the existence of two positions depicted from its previous decisions. One of them is in the case of **Abubakari Hamis and Another vs The Republic**, Criminal Appeal No. 253 of 2012 in which the court insisted on the need to corroborate the retracted or repudiated statement before relying on the same to found a conviction. The second position was 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 basing 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 the case of **Nehemia Rwechungura vs The Republic**, Criminal Appeal No. 71 of 2020, CAT, Bukoba, relied on the authority in the case of **Ali Salehe Msutu v. Republic** [1980] TLR 1, the Court of Appeal stated that:



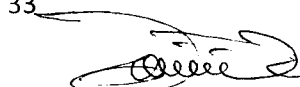
"a repudiated confession, though as a matter of law may support a conviction, generally requires as a matter of prudence corroboration as is normally the case where a confession is retracted."

In the case at hand, what is contained in the exhibit P.16 has been well and sufficiently corroborated by a lot of evidence in this case. The fact that search was conducted and a lot of the items connected with the offence were mentioned in the confession statement were obtained and seized corroborates the confession. Further to that, the fact that the body of the deceased was found in the boot of the car which was found at Njiro Kikwakwaru "B" corroborates the confession. That said, I find that, in terms of the case authorities mentioned herein above, the confession statement has been sufficiently corroborated by other evidence. Even if we assume for the sake of argument, which is not the case here, that it was not corroborated, yet the accused has not complained of a promise made to him, or any threat when he was recording the said statement, neither has he complained of any prejudice held out against him. To the contrary, he totally denied to have appeared before the justice of the peace and threatened or promised. Even the exhibit D2 which he tendered proving that he was actually injured when he was taken to prison for the first time, is accepted,

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there is no evidence to evidence connecting the said injury with either being forced to record the statement. He only complained to be given a paper to sign while at Mateves Police Station which he did not say whether ther were confession statement or seizure certificate. That being the case, it is thus instructive to find that, the confession as contained in exhibit P16 is legally proved against the accused person as it was freely and voluntarily made by him before PW5 whom I have no reason to disbelieve.

It should also be noted that, the exhibits P3 to P14 were found and seized on account of accused's oral confession made before the police officer, i.e PW10. It is obvious that without such a confession leading to the discovery, the said exhibits would not have been found and seized. I am aware that under section 31 of the Evidence Act (supra) any information given by the accused person under the police custody whether the same amounts to a confession or not, as long as it leads to the discovery then, that information is relevant. In the case of **Chamuriho Kirenge@ Chamriho Julias vs The Republic**, Criminal Appeal No. 597 of 2017, CAT-Mwanza where the court of appeal relied on its previous decisions of **John Peter Shayo & 2 Others vs The Republic**, [1998] TLR 198 which was

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also quoted in **Tumaini Daudi Ikera vs The Republic**, Criminal Appeal No. 158 of 2009 where the Court observed that;

- (i) *Confession that are otherwise inadmissible are allowed to be given in evidence under section 31 of the Evidence Act, 1967 if and only if they lead to the discovery of the material objects connected with the crime, the rationale being that such discovery supplies a guarantee of the truth of that portion on the confession which led to it.*
- (ii) *As a general rule, oral confession of guilty are inadmissible though they are to be received with great caution and section 27(1) and 31 of the Evidence Act contemplates such confessions."*

Now, as the oral confession before the police lead to discovery then the same is also relevant.

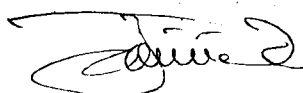
The other evidence which the prosecution has relied on is the evidence of identification of the accused when he was parking the car in which the body of the deceased was found as given by PW3. She said on the fateful day she was at her home at Njiro Kikwakwaru "B" she saw the car parking. On her observation, she saw a youth coming out of the car, locking the doors and walking away. She said she managed to mark his appearance and when



she reported about the parking car on suspicion she later described the attributes of the person who parked to PW10 and his fellow investigators.

As a result, PW10 who had passed to the deceased's house and found the accused and asked him some questions which the accused answered without being suspected by PW10. PW10 and his fellows were led by the description given by PW3 to suspect the accused as the person described by PW3 resembled him.

PW3 said the incident was in the morning at 09.00hrs therefore there was enough light. She also said the distance from which she observed the accused was at a distance of 10 (ten) meters. As if not enough, she went and identified the accused the identification parade conducted at the police station by PW8. This evidence was given before me as a trial presiding Judge, I observed the demeanor and assessed credibility of the said witness. She did not know the accused before and so to the deceased, therefore she couldn't frame the evidence against the accused. In my strong belief, what PW3 said is nothing but the truth as the identification has met all the requirement established in the case of **Waziri Amani vs Republic**, [1980] T.L.R 250 and **Goibert Henerico Vs Republic**, Crim. Appeal No. 114 of 2015 requires the witness to give the following description.



- (i) The time the witness had the accused under observation*
- (ii) The distance at which he observed him,*
- (iii) The condition in which such observation occurred, for instances whether it was day or night (whether it was dark, if so was there moon light or hurricane lamp etc) (the source and intensity of light),*
- (iv) Whether the witness knew or had seen the Accused person before or not.*

In my view, the evidence given by PW3 met all these factors.

As earlier on pointed out, the accused denies to have driven the motor vehicle to Njiro Kikwakwaru "B" as alleged, and that neither was he arrested at the home of the deceased, because he was in safari travelling from Dodoma to Arusha he tendered the exhibit D1 a bus ticket to prove that alibi. Before relying on the same, he through his Advocate, gave the notice to rely on such a defence in terms of section 194 (4) of Criminal Procedure Act [Cap 20 R.E 2019]. That means the procedure of raising the defence of alibi were complied with.

In this case, the evidence of PW1, is to the effect that, the accused was employed by the deceased as the house boy, the evidence of the PW3 prove irresistibly to have identified the accused to have parked the motor



vehicle in which the body of the deceased was found, PW5 and PW9 who were the relative of the deceased said they knew the accused as the person who was working for the deceased as a house boy.

Having raised the defence of alibi which has been negated by the evidence of the prosecution, it is expected of the accused person to call a person who was with him at the place where he alleges to be when the offence was committed. Failure to do so, leaves a defence weak and unbelieveable as held in the case of **Chrisant John vs The Republic**, Criminal Appeal No 313/2015 CAT - Bukoba (unreported) and **Masound Amlima vs The Republic**, (1989) TLR 25. It should be noted that calling the witness to support the alibi does not mean shifting the burden to the defence to prove the accused's innocence, it should be the one intending to raise doubt.

In fact, the accused was insisting for the court to believe him and disregard the prosecution witnesses, while the prosecution is asking the same against the accused. Now looking at the evidence of both sides, it is clear that, on this issue this matter is bound to fail or succeed on the bases of the credibility of the witnesses. It means unless one believes what was said by the prosecution witnesses, can found the conviction basing on their evidence.

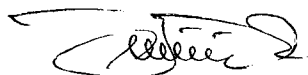
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It is a principle in law that, only a credible and reliable witness can have their evidence believed and found a conviction in criminal cases. See; **Shija Juma vs The Republic**, Criminal Appeal No. 383 of 2015. CAT (Bukoba) (Unreported).

That being the case, the issue is, what affect the credibility and reliability of the witness in law? In my considered view, a number of factors may affect the credibility and reliability of witnesses, few of them being the following;

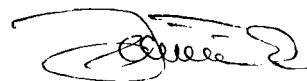
- (i) Contradictions, discrepancies and the conflicting statement in the witness's evidence,
- (ii) Failure of the witness to mention the suspect at the earliest opportunity possible,
- (iii) To give evidence basing on suspicion,
- (iv) Evidence based on hearsay,
- (v) Witness testifying as accomplice and
- (vi) A witness with interest to serve.

Without any of the short comings caused by these factors and others certainly not mentioned here as this list is not exhaustive, a witness deserves to be believed, if he is competent to testify.



It is also a principle that, a trial judge is better placed to assess the credibility of the witness as he is in the position to grasp the inconsistencies, to assess the demeanors and the flow of the evidence from that witness. See **Goodluck Kyando vs The Republic**, Criminal Appeal No.118 of 2003 CAT- Mbeya (Unreported)

In this case, just like many cases, only one notable contradiction has been pinpointed, that is on the amount of money allegedly found in the possession of the accused. While the cautioned statement states that the money which the accused stole was Tsh. 4,069,000/= the money which was tendered in court is Tsh. 4,294, 000/=, the other contradiction noted is in the evidence of PW7 still on the same aspect of money, when he said the amount found was Tsh. 4,292,000/= instead of Tshs. 4,294,000/= which was tendered in court as exhibit. Also the investigator, PW10 his evidence was contradictory in figure instead of mentioning Tsh. 4,294,000/= he mentioned Tsh. 4,292,000/. These are the only contradiction which I have noted. On how the contradictions of this sort must be treated, the guidance can be found in the case of **Chrisant John vs The Republic**, (supra) court held *inter alia*, that;

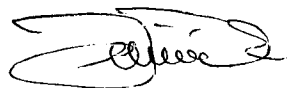


"We wish to state the general view that, contradiction by any particular witness or among witnesses cannot be escaped or avoided in any particular case. However, in considering the nature, number and impact of contradictions it must always be remembered that witnesses do not make a blow by blow mental recording of the incidents. As such, contradictions should not be evaluated without placing them in their proper context in an endeavour to determine their gravity, meaning, whether or not they go to the root of the matter or rather corrode the credibility of a party's case."

Citing the case of **Dickson Elias Nsamba Shapwata & another v. Republic**, Criminal Appeal No.92 of 2007, the Court of Appeal further held that;

"In evaluating discrepancies, contradictions and omissions, it is undesirable for court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter."

Putting the contradiction in this case in the proper context of the case I should state that, this is a case of murder, it is not a case of theft, therefore, the central issue to be proved is who killed the deceased, this means, the

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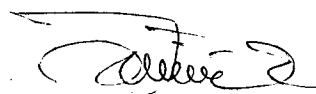
contradiction regarding the amount which the accused was found with is minor and it does not go to the root of the matter. The same does not affect the credit of the evidence of the prosecution and the credibility of the witness who gave such evidence regarding the main issue of murder. The contradictions are thus ignored.

Regarding the second issue as to whether the witnesses mentioned the accused persons at the earliest opportunity possible. This is built on the principle enunciated in the case of **Jaribu Abdallah vs The Republic**, Criminal Appeal No. 220 of 1994 (unreported) in which it was held *inter alia* that;

"..delay in naming a suspect at the earliest opportunity dents a witness's credibility especially where the identification of the suspect is in issue."

Further to that, in the case of **Marwa Wangiti Mwita & another vs. Republic**, [2002] TLR 39 in which it was held *inter alia* that;

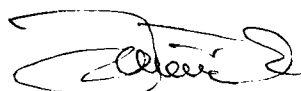
"The ability of a witness to name a suspect at the earliest opportunity possible is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry"(emphasis supplied)



In this case, PW3 is the identifying witness, she described the accused to PW10 the description which led to the arrest of the accused person. That, description is, in my opinion, tantamount to mentioning the accused person at the earliest opportunity. Further to that, regarding to the remaining elements and looking at the evidence of the prosecution it is neither based on suspicion nor hearsay. PW3, identified the accused, other witnesses evidence was about what they did in relation to the investigation of the case. These witnesses therefore are worthy of credit, their evidence should be believed and relied upon, as their evidence is direct in as far as the particular aspect is concerned.

Last but not least, I said the prosecution based their case on the circumstantial evidence, the same must comply with the requirement established in the case of **Ndalahwa Shilaga, Buswelu Busahi Vs Republic** Criminal Appeal No. 247 of 2008 CAT- Mwanza, which established three tests to be met before circumstantial evidence has been relied on to found the conviction, these principles are as follow;

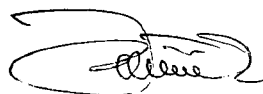
- (a) *The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established.*



- (b) *Those circumstances should be of definite tendency unerringly pointing towards the guilt of the accused person, and*
- (c) *The circumstances taken cumulatively, should form a chain so, complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused person and no one else.*

I have carefully looked into the evidence as adduced by the prosecution side, with exception to some few aspects, I find the evidence to be more of direct type than circumstantial. I find so basing on the fact that, each witness has talked about what he did, or perceived. Even in those few aspect which can be termed to be circumstantial, particularly on who killed the deceased, the fact that the accused was seen and identified parking the motor vehicle in which the body of the deceased was found, the fact that he showed the police the panga that he used in cutting the deceased and various clothes which were found to have blood and which the accused personally confessed that he used them to clean the place where the blood of the deceased was shed after the accused had cut him.

All these evidence and the circumstances from which the inference of guilt is sought to be drawn are cogently and firmly established pointing towards the guilt of the accused person. These circumstances when taken

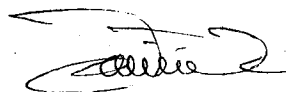
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cumulatively, they form a chain so complete leading to the conclusion that within all human probability the crime was committed by the accused person and no one else.

The other claw back that may affect the credibility of the witnesses and the evidence is where the witness so testifying has interest to serve. In this case, looking at looking at the nature of the evidence who testified in this case, I am of the firm view that the witnesses had no interest to serve except that of justice. That said, I find the evidence presented by the prosecution credible.

I have said more than once that the prosecution is duty bound to prove the case to a standard of beyond reasonable doubt. The term beyond reasonable doubt is not statutorily defined, but it has 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"

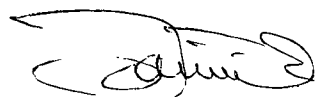
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This was held in the line with the philosophy in the case of **Chandrakant Jushubhai Patel Vs Republic** Crim. App No 13 of 1998 (CAT DSM) in which it was held *inter alia* that;

"...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"

From my findings on every issue raised, and looking at the evidence in total, it goes without saying that the prosecution have managed to prove the case beyond reasonable doubt. The evidence presented against the accused persons is very strong in proving his guilty.

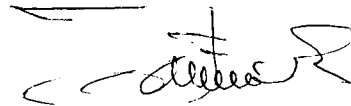
In my evaluation of such evidence, I have not managed to locate any possibility in his favour, and if there is any of such possibility which has escaped my attention, then the same is so remote, and is incapable to displace solid evidence as presented by the prosecution or dislodging irresistible inference against him, in other words, from the evidence, there is no any other conclusion other than that, it is the accused person who killed the deceased.

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That said, I consequently find the accused person namely Ismail Swalehe Sang'wa guilty of murder contrary to section 196 and 197 of the Penal Code and accordingly convict him as charged.

It is accordingly ordered

DATED and delivered at **ARUSHA** this 13th day of March, 2023.



J. C. TIGANGA

JUDGE

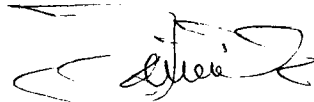
Judgment has been delivered in open court in the presence of the accused person and his Advocate Mr. Victor Bernard as well as the learned State Attorney Mr. Charles Kagilwa fro the Republic.

SENTENCE

After considering the mitigation and the aggravating factors as presented by the learned defence counsel and the State Attorney, I find worthy to state that, Murder cases have only one sentence provided by law. I have no any other option other than sentencing the accused in accordance with the law. The sentence id provided under section 197 of the Penal Code

Cap .16 R.E 2022 and that is non other than death sentence. That said, I hereby sentence the accused to suffer death by hanging in terms of section 197 of the Penal Code. Right of Appeal explained and fully guaranteed.

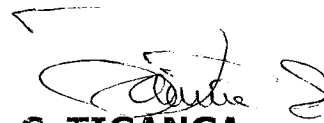
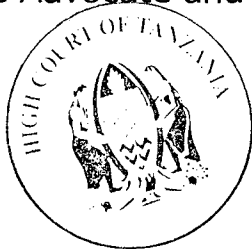
It is accordingly ordered.



J. C. TIGANGA

JUDGE

Sentence pronounced in open Court in the presence of the Accused and the Advocate and State Attorney as indicated herein above.



J. C. TIGANGA

JUDGE