

TANZANIA / JUDGMENT

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1- IN THE HIGH COURT OF TANZANIA ATGEITA ORIGINAL JURISDICTION CRIMINAL SESSIONS
CASE NO 152 OF 2014 THE REPUBLIC VERSUS ALLY S/O MALINDO

JUDGMENT

28.05.2018 & 08.06.2018 Matupa,J. The accused person here in one Ally s/o Malinda, stands . charged with one count of Murder, contrary to sections 196 and 197 of the Penal Code. The particulars of the charge are as follows. On the 10th day of January, 2014 at about .23:00 hours at Ludeba Village, within Chato District, in Geita region, the accused person murdered one Fatuma d/o Kagiwa. On the 25th June, 2015 the case came up for plea taking. The prosecution laid before the accused person information for murder, and the accused person pleaded as follows "ni kweli nimeua bila kukusudia". The court accordingly entered a plea of not guilty. Mr. Rugaimukamu the learned advocate who was then representing the accused person, raised to inform the court that his client was offering a plea of manslaughter. Ms. Chacha, learned State Attorney, declined the offer, intimating that the prosecution has sufficient evidence on which to secure conviction against the accused person. The case proceeded to Preliminary hearing under section 192 of the Criminal Procedure Act. The prosecution read over the facts of the case to the accused person. The court recorded the following facts as not being in dispute:-

1. That the names of the accused and his particulars of address
2. The deceased was a neighbor to the accused.
3. That the deceased died unnaturally. 2
4. That there was a misunderstanding on the accusation that the deceased was interfering with accused's marriage.
5. That the accused was charged and has admitted to have unlawfully killed the deceased (manslaughter) At the outset, let me record that in a case of murder, of essence is the fact of death. In this case, there was no doctor who was lined up, to substantiate the fact and the cause of death. The prosecution made reliance to the admitted fact that the deceased indeed died, and the death was not natural. When the prosecution read the facts to the accused person, they also put in evidence, a post mortem report in respect of the death of the deceased person. This is what transpired:- "the deceased was examined and it was revealed

that the cause of death was Hypoxia strangulation. We pray to tender the same as an exhibit Rugaimukamu: no objection. Court: Post mortem report is hereby admitted as exhibit P2"

The prosecution did not bother to call the doctor who conducted the post mortem examination. The doctor was not 3 even one among the witnesses, who the prosecution indicated that they would call to give evidence for the prosecution. Worse still, the doctor did not even record his statement after he had conducted his examination. Section 291 (3) of the criminal Procedure Act under which the post mortem report was apparently tendered, provides as follows: " (3). Where the evidence is received by the court the court may, if it thinks fit and shall if so requested by the accused or his advocate summon and examine or make available for cross examination the person who made the report· and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection. " The provisions of this subsection are similar with those of section 240(3) of the Act, which governs the procedure of trial in similar matters before the subordinate courts. This later section has been a subject of judicial interpretation on a number of occasions. In the case of David Gamata and Amos Wigina versus 4 . the R. Criminal Appeal no 216 of 2014 (CAT) Mwanza Registry, the Court of Appeal had this to say on section 240 (3) "The trial court shall inform the, accused person himself or herself, represented or unrepresented. If represente~ the advocate should consult his client and advise him/her to make an informed decisfon. After all, it is the accused who is on trial and not his/her advocate. In order to satisfy the appellate court that this mandatory provision had been complied with, whatever response an accused gives must be recorded in his own words in the record of proceedings. These precautions do not rob the courts of their invaluable time. Even if we believe that speed is good but definitely justice is better. " It was also held in the case of Alfeo Valentino V.R. Criminal Appeal no 92 of 2006 (unreported) that the court should not act upon a report, which is received without complying with the provisions of the section. In the present case, i was expecting the prosecution to remember to call the doctor in terms of the 5 section, notwithstanding that the court provisionally admitted the post mortem report. The post mortem report apart, the prosecution called one witness to establish its case. This was one Simon Duba, a 32 years old young man. According to his testimony, which could suggest the cause of the death of the deceased person. According to the testimony, the witness did not see any bruises on the body of the deceased person. However, the body was positioned on the bed such that, only part of it was on the bed. The rest of it was hanging. This evidence alone is quiet on how the deceased died. Nevertheless, one thing is clear. That is the deceased is dead, and this is beyond dispute. How the deceased died is a mystery. I would ended with the case here had it not been for the offer by the accused person of the plea of manslaughter, intimating that he killed the deceased person. Where an accused person pleads guilty to a charge, and the court records a plea of guilty, that is not the end of the matter. The 6 prosecution must supply facts of the case, which would form the basis of evidence, upon which the court can convict. This is elementary procedure on pleas. In the case of Kusenta and another v. Republic (1975) 1 EA 274 the then Court of Appeal for East Africa stated as follows:- "... a plea of guilty to murder should only be accepted in the clearest of cases. Here the appellant was

claiming to have acted in response to a request. This was a qualification to his statement that he had killed intentional/¹/₂ making his plea equivocal, and a plea of not guilty should have been entered. .. " It is no wonder that my brother was inclined to enter a plea of not guilty when it appeared that the prosecution was not prepared to accept a plea of guilty for the offence of manslaughter, which the accused offered through his counsel. The difficulty in the present case does not end there. The accused person admitted that he killed the deceased person. The prosecution proceeded to prove the case on the understanding of the admission. 7 The second question, which I have to answer, is whether the accused person is the one who caused the death of the deceased person. The prosecution again relies on two lines of a case. The first line of the case is the testimony of the sole witness for the prosecution, that is, they said Simon Duba. According to the testimony of this witness on this fact, he saw the accused person on the fateful night, who complained that some people were mixing him up. The witness advised the accused person to leave the matter at that on that day, until the next morning when he would sort out the matter with the leadership. The accused declined the advice, saying that the witness would advise him the next morning. At this point, the witness claimed that he saw the accused person rushing to the house of the deceased person. The witness also saw the accused trying to force open, the door to house. There was a spell of time thereafter, when the witness went around. First, he went to the ten-cell leader. He told him about 8 the conversation he had with the accused person. The ten-cell leader informed the witness that the accused had been to his place before, complaining about the same thing. Indeed the complaint the ten-cell leader got, was in relation to four women and not only two women. He went to the in-law of the deceased and later he went to the disco. While there at the disco information spread that something unusual had happened at the house of the deceased. People moved to the place. When they reached the house of the of the deceased person, the witness claimed that he saw the accused getting out of the window to the one room house belonging to the deceased person. The window is located about two meters high. The witness demonstrated here in court that the window was barely one square foot. The witness saw him getting out through the window with his legs out first. Eventually, the witness and the in law of the deceased managed to look through the window using a flash light torch, 9 and they saw the body of the deceased lumped up on the bed; part of it hanging from the bed. The witness did not describe any injury on the part of the deceased person. During cross examination, the witness conceded that he did not observe any bruises on the body of the deceased person. So there is no evidence from the witness which suggests violence on the body of the deceased. There was another line of a case, which the prosecution relied upon. This line of the case, in a way, goes along the opinion, which the lady assessor gave. The learned counsel submitted that the_ accused person admitted certain facts at the time of Preliminary hearing. He reminded the court that the facts, which the accused admitted, include that he killed the deceased person. It was his submission that one, in terms of section 192(4) of the Criminal Procedure Act, the fact that the accused person killed the deceased person was presumed that it was proved. As 10 such, it did not need any further proof. The general denial by the accused person here in court, only dubbed him a liar. On this, the learned

counsel invited the court to the decision of the Court of Appeal in the case of Felix Lucas Kisinyila versus the Republic Criminal Appeal no 129 Of 2002. In that case, the court held that, there are times where, lies of an accused person may corroborate the prosecution case. It was the submission of the learned state attorney that the accused person, having admitted the fact of killing the deceased person at the preliminary hearing, which fact he implored the court to hold as proved in terms of section 192(4) of the Criminal Procedure Act, his denial of the fact here in court made him "an unabashed liar." The accused person gave his defence on oath. He denied that he killed the deceased person. He also denied to know the deceased or the sole witness for the prosecution. He also denied that he was a resident of Ludeba Village. 11 Mr. Kasim on the other hand invited the court to take another view. It was his contention that the witness conceded that he was not there when the offence was committed. He only saw a person exiting the window under circumstances, which was demonstrably impossible for the witness to have identified the accused person. He claimed that the witness was discredited on his description of the manner the accused escaped from the tinny window the way he described it. There was no description of the wounds or hematoma by the witness. Much as it was suggested in the post mortem examination. Having discredited the witness on a number of ways it was his submission that the accused person was not the killer. It was his submission that the case for the prosecution is fraught with contradictions. It was his submission that these have to be resolved in favor of the accused person. On this, the learned counsel relied on the case of Wilfred Lukagos v. R (1994) TLR 189. 12 ~ There is the suggestion that the witnesses saw the deceased person and managed to identify him. I asked the gentlemen and lady assessors if they were satisfied that the witness indeed managed to identify the accused person on the circumstances of light and distance he claimed to be. Two of the assessors were contented to believe the witness. Sospeter Mackanza's reasoning was that one, the witness was acquainted to the accused person. Two, they had a close conversation immediately before the incident and that the accused intimated his resolve to cause injury to the deceased and to drag her to a maize field. Three he saw him rushing to the house of the deceased and lastly, he saw him getting out of the window of the house of the deceased. This added together left no doubt on his part, that the accused is responsible for the death of the deceased person. Mabula Lucas on the other hand believed the witness, basically on the same account of Mr. Sospeter Mackanza. The gentleman assessor echoed the fact that the accused person had resolved to deal with the deceased person. This resolve, which also the ten-cell leader was aware, was to the gentleman assessor, nothing but true. He suggested that since it took a considerable length of time between the first conversation and the time the witness saw the accused person coming out of the window, in between, the deceased could do anything. The gentleman assessor concluded that the chronology of the events suggested nothing but only one irresistible conclusion, that the accused was the one who was found creeping out of the window, since he vowed to do kill the woman. The last assessor Hawa Swedi on her part took a different position altogether. On her part, Hawa Swedi was not persuaded by the testimony of the witness on the manner he claimed that the deceased met her death. Nevertheless, it was her position that the accused person had admitted in court that he

killed ~h~ deceased, but pleaded manslaughter, the court should convict him for that offence, which he himself has pleaded guilty. 14 I have considered the matter carefully. The matter is made even more complicated by the offer the accused person made, of the offence of manslaughter, and the subsequent admission of the fact that he killed the deceased person in the cause of preliminary hearing. The prosecution made a submission that the since the fact that the accused has all along not disputed the fact that he killed the deceased person, this fact should be treated under section 192(4) as undisputed fact. What did the accused person offer or plead is the question that has vexed my mind. The prosecution alleged the following facts to the accused person: - "The accused then proceeded to the deceased's house where he entered therein attacked the deceased and eventually strangled to death, the accused then ran away passing through the window and went straight away to the house owned by his father in law at that night While at that house of the father in law those who assembled thereat reached and arrested including Simon Duba and Jane John" Out of these facts the following facts were drawn and were agreed to be . not in dispute: 15 pl "3. The deceased died unnaturally.

4. That there was misunderstanding between the deceased and the accused person on the accusation that the deceased was interfering the accused's marriage.
5. That the accused was arrested and that has admitted to have unlawfully killed the deceased (manslaughter)" The prosecution is contending that, the accused person in denying in court, his involvement with the offence, makes him a liar. Two, the prosecution is also contending that the denial in court should be taken to corroborate the case for the prosecution in accordance with the case of Felix Lucas kisinyila above. One, I do not think the case at hand should be likened with the case of Felix Lucas Kisinyila. This is for the following reasons. In the present case, the accused person admitted facts in the cause of offering a plea of manslaughter. Looking at the admitted facts, one can barely consider the admission as equivocal. Whereas the facts, which the prosecution read over to the accused person, suggested strangulation, he did not admit that fact of strangulation. Instead, in his admission, he introduced the 16 defence that he did not intend to kill. The accused also denied all other facts by the prosecution, including the manner the deceased was allegedly, killed. The rule in Kisinyila is that there must be evidence on the record which is proved which the lies of an accused will corroborate. Lies cannot form the basis for self-corroboration. In the case of Kisinyila, the accused there admitted on three occasions that the deceased had attacked him. The three occasions of the accused explained were diametrically different, in the manner of the so alleged attack. On the first occasion, it was in a cautioned statement, which the court admitted. During this occasion, the accused admitted the fact of killing and that, in the cause, the deceased had cut him with a panga. On the second was in his extra judicial statement. In this occasion, he admitted that the deceased cut him with a panga unprovoked, as he was walking along the way. The last occasion was during his testimony in court, when the accused claimed that he was injured 17 during police torture. This last fact the accused did not disclose to the justice of the peace, when he was recording his statement. In the light of the foregoing, the Court of

Appeal commented as follows:- "The three stands are completely irreconcilable. He claims in Exh. P6 that he was attacked by the deceased. Yet in court he said that he did not know the deceased at all how then did he know that he was attacked by the deceased? Lies of an accused person appellant here may corroborate the prosecution case. That was held so by a Zanzibar case of Kombo Khamis V. The Crown B ZLR 122 and Rubama J. in the case Salum Yusuf Lilundi V.R. Criminal Appeal no 26 of 1984 {Mtwara Registry), Unreported there three persons were accused of theft, two of them confessed while the third, a watchman, denied even being on duty on the material night while in fact he was. His lies were held to corroborate the confessions of the other two. // My understanding of the foregoing statement is that one, the rule applies where there is a positive lie on the part of the accused person. Two, there must be positive evidence for the prosecution suggesting a fact that belies the accused. Three the 18 lie is only relevant to corroborate the belied fact, which the prosecution suggests. Here in this case the prosecution is suggesting that the accused was at the scene of crime. The prosecution also suggests that the accused person was seen creeping out of the window as small as a hole, which is one square foot wide. It would appear from the evidence of the witness that one the witness was not alone as the accused was allegedly escaping. Again, the group of people who happened to be around, were barely ten paces away. Yet, the people around did not manage to arrest the accused, although they were thus barely ten paces away. Going by the geography of the place it is true that there are five huts at the place. There is a house of Simon Sahani, which the sketch indicated that it is eight paces from that of the deceased, and it is separated by a pathway. The claim by the witness, that the houses are only three paces away, is not borne out by the sketch. 19 Another thing, which is not confirmed by the sketch, is the positioning of the window. The sketch shows that the house has two windows on each of the top side of the angle of the front wall. The size of the windows is not indicated. From this drawing, the windows are tiny indeed. The credibility of the evidence for the prosecution that the sole witness saw the accused creeping from the tiny window he described, thus it was besieged. The logic of identification was also not convincing. The court of Appeal has on several occasions, underscored the need for the identification in unfavorable circumstances to be so water tight, as to leave no possibility of mistaken identity. The case of Waziri Amani versus R

(1980) TLR 250 is one case at hand the prosecution called in aid, the decision of Anuary Nangu and another criminal appeal no 109 of 2006 (Dodoma Registry) to distinguish the rule in Waziri Amani. At the outset let me dispose of the analogy simply by saying this, in the case of Anuary Nangu, the Court was satisfied 20 that the identification was cogent. The witnesses not only knew each other, but also adequately described the accused in court. Mr. Mabula has explained that the accused had told the witness his resolve to cause harm to the deceased. He had the time to do so. Definitely, he must have been the one who the witness saw jumping out of the window. This explanation by the gentleman assessor is dangerous. The facts of this case are that, granted, the witness saw the accused who he knows, in the early hours of the fateful night. The witness also heard the accused complaining that the deceased is one of the persons who were mixing him up. Then the

accused rushed to the house of the deceased person. This was about 9 o'clock in the afternoon. When the witness went to the ten-cell leader, he claims that he told him about what the accused said to him. He did not tell the ten-cell leader that in fact, the accused was executing the plan. If his claim that the ten cell leader was barely 150 meters away, and had it been true that the witness had told the truth that the 21 accused was breaking into the house of the deceased person, probably he would have attended the matter with a sense of urgency than waiting for the next day. The witness told the deceased's in law the same story. I am afraid the witness is not truthful on his claim that he saw the accused rushing to the house of the deceased person, which happened to be only eight paces away according to the sketch or three paces away, according to his own testimony in court. The other part of the testimony of the witness is the manner he saw the accused person jumping from a tiny window of the house. The witness was barely ten paces away and he was not alone. It is illogical that the people who attended the place let the accused comfortably get out of the tiny window, jump and get away even without giving a chase. They waited until the accused had escaped before their own eyes, then they decided to call a silent "mwano", on the pretext that they feared not to scare the accused person. This is incredible. 22 Another thing to consider is the manner the witness identified the accused. As said it was only by way of recognition. The witness was closely cross examined on this area of identification. The standard tests for identification are now settled. The Court of Appeal in the cases of Said Chally Scania versus the Republic Criminal Appeal No 69 of 2005 which was extensively quoted in the case of Kijiji Mtatiro versus the Republic Criminal Appeal No 130 of 2011. In those cases, the Court of Appeal stated as follows:- "We think that where a witness is testifying about identifying another person in unfavourable circumstance~ like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all aids to unmistakable identification like proximity to the person being identified, the source of light and its intensity. .." His lordship Othman O (as he then was) observed in the case of Wankuru Mwita versus the Republic Criminal Appeal No 219 of 2012 Mwanza Registry warned that:- "distinction between visual 'recognition cases' and 'identification cases' is of limited utility and such cases cannot be determined on the basis of such categories or labels... the frailties inherent in visual identification or recognition evidence imposes a requirement on courts to proceed with attention, caution and Judiciousness" In the present case the only thing the witness said was that, he saw a person jumping from the window. He did not provide any description of the person in terms of attire he wore or any marks. I am advised that the only person who jumped through the window could be the accused person. It is pleaded in court that the accused entered a plea that he killed the deceased, but he did not intend to do so. The fact that the accused caused the death of the deceased person was common knowledge in the village. I am also urged to find that the general denial by the accused was a lie, which would corroborate the claim that the witness saw the accused at the village on the night. 24 I must confess that the inference is rather compelling. Let me

- dispose of section 192 (4) of the Criminal procedure Act, which provides as follows:- "192.
(1) ...
- (2) ...
- (3) At the conclusion of a preliminary hearing held under this section, the court shall prepare a memorandum of the matters agreed and the memorandum shall be read over and explained to the accused in a language that he understands, signed by the accused and his advocate {if any} and by the public prosecutor, and then filed.
- (4) Any fact or document 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 duly proved; save that if, during the course of the trial, the court is of the opinion that the interests of justice so demand, the court may direct that any fact or document admitted or agreed in a memorandum filed under this section be formally proved. (5)...
- (6) The Minister may, after consultation with the Chief Justice, by order published in the Gazette make rules for the better carrying out of the purposes of this section and without prejudice to the generality of the foregoing/ the rules may provide for-
 - (a) delaying the summoning of witnesses until it is ascertained whether they will be required to give evidence on the trial or not;
 - (b) the giving of notice to witnesses warning them that they may be required to attend court to give evidence at the trial. // Pursuant to this section, the Minister promulgated rules under the foregoing section under GN 192 of 1988 to the following effect:- "3. The person prosecuting shall, in every trial under these Rules prepare/ as clearly as possible/ the facts of the case which shall be read to the accused and explained in a language he understands. " The provisions of this section have been a subject of judicial interpretation. The Court of Appeal in the case of Mt 7479 Benjamin Holela v. Republic (1992) TLR 121 that:- "It is apparent that a statement by counsel or advocate for the accused to the effect that the matters raised are admitted is not sufficient under the law. It is the accused himself who must indicate what matters he or she admits. In cases where the matters comprise documents, the contents of the documents must be read and explained to the accused, in the event of a sketch plan or such like documents, the sketch plan must be explained and shown to the accused to ensure that he or she is in a position to give an informed response. ,✓ As can be shown, the accused person has to admit the facts. Where the justice of the case demands, the court may direct that the admitted facts may be a subject of further proof. In the present case, it was the prosecution, who has moved for the further proof by calling the only witness. I have dealt at length the manner the witness has dismally performed in court so bad so that the prosecution at some stage admitted that he is discredited. I have also demonstrated that among the facts the accused person admitted, did not show that he was the one who the witness saw, probably creeping through the window. The evidence also shows that there may be the probability of there 27 being another person,

who was in the house, locked together with the deceased person. The sketchy account of the witness that he saw the accused forcing the door open in the circumstances of this case, is another probability. In a case of the nature like this one, the suggestion of probabilities is not good enough. I agree that in the present case, there is compelling suspicion against the accused person. I am convinced as all gentlemen and lady assessors are, that the only witness in this case mentioned the accused all over the place that night, and led to his arrest immediately after it was discovered that the deceased person was dead. On top of all this, the accused pleaded guilty to manslaughter. Now the vexing issue is whether, on all the foregoing facts I can shift the burden to the accused to explain how he killed the deceased, in the absence of any evidence to suggest how the deceased was killed? This is, in the background 28 of the case, that the court cannot rely on the postmortem report. Even if I am to rely on it, still the witness was categorical in court that he did not see the protruding eyes or any injury on the deceased. I do not think that can be correct to assume that the deceased was strangled. The Court of Appeal of Tanzania in the case of Mohamed Said Matula versus the Republic (1995) TLR3 at p 7-8 made the following observation:- "It seems obvious to us that the link between the appellant and Adnani's alleged disappearance on 3 February 1986 was most essential but in the absence of any cogent evidence to establish such link the charge against the appellant could not possibly be sustained. The other pieces of circumstantial evidence available tend to implicate the appellant only lightly or remotely. Take for instance the appellant's conviction in the district court for stealing the child Adnani in respect of which a prison term of 3 years was imposed, and the fact that the appellant did not appeal. Relying on s 43A of the Evidence Act; 1967 the learned Trial Judge found it to be conclusively proved that the appellant stole the child Adnani. Then attaching considerable weight to this, the Judge took the view that since the appellant's defence to the present charge consisted of a mere denial then in terms of s 117 of the Evidence Act the child Adnani is properly presumed to be dead and further that the appellant is properly to be held answerable for Adnani's death. With due respect to the learned Judge/ however, this does not necessarily follow. Even if it be conclusively established that the appellant stole the child Adnani that could not properly lead to the conclusion drawn by the learned judge. For, it is one thing to steal a child but quite another to kill it. The appellant after stealing the child may have passed it on to some other person or persons for purposes not connected with killing. The appellant might or might not know what that other person subsequently did with the child, but upon a charge of the murder of that child, the onus is on the prosecution to prove not only the death of the child, but also the connection or link between the appellant and such death. In a criminal case like this one, that burden is always on the prosecution; it never shifts and no duty is cast on the appellant to establish his innocence" Now, the prosecution contends that the accused person has admitted the fact of killing. One of the assessors is advising that the accused has to be convicted of manslaughter, which offence he has admitted. This has again exercised my mind considerably. The question is this can it be said that the admission is equivocal? Under normal circumstances, after the accused had offered the 30 plea of manslaughter, and assuming that the prosecution had accepted the plea, still, the prosecution was required to provide the facts of the case. The

facts would show that indeed the accused killed the deceased in the circumstances suggesting that not only he was responsible for the killing, but also that the manner of killing amounted to manslaughter. The facts, which the prosecution has provided suggests that the deceased's death was due to strangulation. The accused denied the fact of strangulation. There is no evidence, which would suggest that the deceased died of strangulation. There is no evidence to show how the accused caused the death of the deceased person. A plea of murder can only be accepted in clearest cases like was in the case of Kusenta and another versus the Republic (1975) 1 EA 274. And in the case of Thomas Mufumu V. R (1959) 1 E.A 625 the court of Appeal for East Africa stated that:- "It remains only to say that it is very desirable that a trial judge, on being offered a plea which he construes as a plea of guilty in a murder case, should not only satisfy himself that 31 --, the plea is an unequivocal plea, but should satisfy himself also and record that the accused understands the elements which constitute the offence of murder" Furthermore, the accused can with the leave of the court, withdraw his plea of guilty at any time before sentence. This is a rule, which this court stated in the case of Mwakera v. R. (1972) 1 E.A. 366, generally answers the questions I have posed. The accused found himself embarrassed by the incredible evidence of the sole witness for the prosecution, so much so that he decided to deny everything. This he was entitled to do, because after all, he had a right of silence under section 293 (3) of the Criminal procedure Act. This latter cause of action would open him to adverse inference by the court. Before looking at his denial as already demonstrated, the court had to look at the case for the prosecution and see if it stood out. I am afraid it did not. Even going by the facts the accused admitted, as against those which the prosecution read to him, and which the prosecution repeated at the trial, I find it difficult to assume that - 32 the accused was admitting the offence of manslaughter for the death by strangulation, which latter fact he denied. Even if I am to take the admission as a plea, still it was equivocal and the prosecution has failed to lead evidence to substantiate, not only the fact of strangulation, but also the fact that the accused was the one who in fact killed the deceased person by the alleged strangulation. There is every probability that the accused was dealing with different facts of killing all together, which facts are not the subject of the present charge. Let me echo the statement in the case of Mohamed Said Matula versus the Republic (supra) that. " ... In a criminal case like this one, that burden is always on the prosecution; it never shifts and no duty is cast on the appellant to establish his innocence... " The evidence of strangulation was not there yet the prosecution wanted the accused to come up and disprove the claim. I must comment one element of the charge. It would appear that the accused was willing to offer the plea of 33 manslaughter. The prosecution must have seen that they had weak evidence of murder. Yet, they did not wish to yield to plea bargain, and they persisted with their ill-grounded case of murder. I hope the prosecution will take it as a challenge, that sometimes plea bargain is an instrument for justice. On the evidence, I have no option but to enter a finding of not guilty, and accordingly, I do hereby acquit the accused person for the offence of murder under section 196 and 197 where under he stands charged. Dated at Geita this 8th day of June, 2018. 34 [Date: 08.06.2018 Coram: Hon. Matupa, J Mr. Anossisye Erasto State Attorney for Republic assisted by M/s Christina Chacha Mr

Kassim Advocate for accused assisted by Mr Onyango Otieno Advocate Accused Name: Ally Malindo Are present under custody and represented by Mr Kassim Interpreter C. Msingwi English into Kiswahili and vice versa Court Assessors:

1. Sospeter Makanza
2. Mabula Lucas
3. Hawa Swedi Court: The judgment has been delivered in open court in the presence of the accused person. Also present is Mr Kassim and Mr Onyango Otieno Learned Counsel for the accused person and Mr Annosisye and M/s Christina Chacha, learned State attorneys this 8th day of June, 2018. S.B~, Judge 35

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