IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT DODOMA

SITTING AT DODOMA

CRIMINAL SESSION CASE NO 138 OF 2016

REPUBLIC

VERSUS

SELEMANI S/O MWALIMU ..... 1ST ACCUSED

MATESO S/O ISAYA ..... 2ND ACCUSED

JUDGMENT

2nd March 2020 & 12th March, 2020

M.M. SIYANI, J

When the Director of Prosecution filed information for murder on 15th December 2016 in respect of this case, Selemani S/O Mwalimu and Mateso S/O Isaya were charged for unlawful killing of one Kalasa Bundala contrary to section 196 and 197 of the Penal Code Cap 16 RE 2002. It was alleged that on 16th March 2016, while at Chifutuka village in Bahi District, Dodoma, the accused persons unlawfully killed the said Kalasa Bundala by hitting him with stones and cutting various places of his body.

The story on how the accused persons were arrested and later indicted in this case is simple and straight forward. According to Gasper Ernest Mahembano (PW1), the killing of Kalasa Bundala was preceded by another tragedy where one John Pembo was attacked by robbers and severely injured. The Chifutuka villagers decided to find the culprits and bring them to justice. They organised themselves to trace those responsible for John Pembo's attack. PW1 being a ward executive officer at Chifutuka, was among those who participated in the said tracing, a movement which took him to Sanza village in Manyoni where they were informed of the arrest of two suspects who upon interrogation confessed to have attacked John Pembo at Chifutuka and revealed that they were hired by Kalasa Bundala. PW1 then informed police officers at Bahi Police Station about the arrest of the two suspects in connection to the attack of John Pembo at Chifutuka and the fact that they were hired by Kalasa Bundala.

As such Kalasa Bundala was arrested at a public auction in Chifutuka and taken to village offices. Upon his return to Chifutuka from Sanza, PW1 witnessed a group of angry people at the village offices where Kalasa Bundala was kept following his arrest. Those people threw stones to the building and later set it on fire. Kalasa Bundala managed to

escape and ran to his house. The angry mob followed him there and PW1 took the same cause in an attempt to calm his people, but being a leader, he wouldn't be accepted and as soon as he was seen, he was threatened and chased away from witnessing what would appear to be the second tragedy in his village. So PW1 returned to his house where he waited there until when the police from Bahi Police Station arrived. Together they went to Kalasa's house but it was too late to save him. There, they found his body, lying dead outside his house. It was PW1 testimonies that Kalasa's body had wounds and his private parts (penis and testicles) were missing.

Maria Maguna and her son Emanuel Samwel testified as PW2 and PW4 respectively. These were the only eye witnesses from the prosecution's side. According to their testimonies, they were both at the public auction place at Chifutuka on 16th March 2016 when Kalasa Bundala was arrested and sent to village offices. While PW2 heard "Iwangi" an alarm from Kalasa's house and decided to go and see what was happening, PW4 joined a group of people who followed Kalasa at the village office after his arrest. However, when PW4 got there, he found Kalasa had already escaped and with others they went to his house where they found a lot of people and the said house was in fire. Both stated that

they saw the accused persons in this case attacking Kalasa and killed him. It was their testimony while standing approximately ten (10) paces from scene, they saw Mateso Isaya (2nd accused) throwing a huge stone in a water drum where Kalasa had hidden to serve his life; then followed by Selemani Mwalimu (1st accused) who took a stone and hit the same in Kalasa's head before the 2nd accused took a hand saw and cut Kalasa's neck. Having been satisfied that Kalasa is no more, the accused persons pulled him out of his house where the 1st accused person chopped off the deceased's private parts. Although this incident happened at night, PW2 and PW4 claimed to have recognized the accused persons who are familiar to them by the assistance of the light from the blazes of the burning house.

Dr. Christopher Herman (PW3) was a medical doctor who examined the deceased body on 16th March 2016. According to him, the body of Kalasa Bundala was covered by blood in the head and there were also some cut wounds in the neck, thigh and both the penis and testicles were removed. In his opinion, the wounds in Kalasa's body suggested that he was hit by a heavy object and cut by a sharp object. His Post Mortem Examination which was tendered and admitted in court as

exhibit P2, revealed that loss of blood due to the said cut wounds, was the cause of death of the late Kalaja Bundala.

SP Oswald Mtelenya (PW5) was among the police officers who visited the scene of crime around 22hrs on 16th March 2016 where he saw smoke still coming from the burnt house whose surroundings contained a lot of stones that appeared to have been thrown there. He saw Kalasa's body which had several wounds and as testified by witnesses, had its private parts removed completely. At the scene, PW5 was informed that Kalasa was killed by a group of angry people which included Selemani Mwalimu and Mateso Isaya. As a result of that information, the 1st accused person was arrested in the same night and interrogation where at first, he denied to have been involved in the killing of Kalasa Bundala before changing his mind on 24th March 2016 when he confessed the killing.

According to PW5, the 2nd accused person was arrested on 23rd March 2016 and when interrogated he confessed to have participated in the killing of the late Kalasa Bundala. PW5 therefore recorded the cautioned statements of both accused persons on 24th March 2016 and ordered them be taken to a justice of peace to repeat their confession. The two

cautioned statements from the 1st and 2nd accused persons, were tendered in court and admitted as exhibit P3 and P4 respectively.

Although PW5 claimed to have referred both the 1st and 2nd accused person to repeat their confessions before a justice of peace, it was the 2nd accused persons who appeared before one Jamila Mkabala (PW6), a primary court magistrate, station at Bahi Primary Court. Through his testimonies, PW6 told us that he recorded the extra judicial statements of Mateso Isaya on 30th March 2016 having been brought to her office by PW7 one WP Ukende. These statements were however not admitted as evidence and so the same are not party of the record.

The seventh and the last prosecution witness was an investigator of this case one WP No. 3841 DC Ukende. She traveled to Chifutuka on 16th March 2016 after receiving the news of the killing of Kalasa. As such, when at the scene, PW7 was with PW1, PW3 and PW5. She witnessed the deceased body when examined by PW3 and she interviewed those found at the scene. Being an investigator, her testimonies to a greater extent therefore, resembles what was testified by the rest of the prosecution witnesses.

Through their defense the accused persons denied to have killed Kalasa Bundala. They both faulted the prosecution for failure to tender important evidence such as the stone and the hand saw allegedly used to kill Kalasa Bundala despite the same being recovered at the scene. In view of the two accused persons, the prosecution case was therefore weak against them. As far as the 1st accused person indicates that is concerned his defense testimonies shows, he was at his house at Chufutuka on 16th March 2016 when he saw fire burning from the east side of the village approximately four (4) acres from his location. Curiosity made him to go there but as he approached the scene, he heard people associating the incident at Kalasa's house, with thieves. As just the previous night his neighbor one John Pembo was attacked by bandits, the 1st accused person decided to return to his house where he slept till around 24hrs when he was arrested by police offices in connection to the killing of the late Kalasa. It was his defense testimonies that upon his arrest he was taken to Bahi Police Station where he was beaten and forced to sign some documents before being taken to Bahi Primary Court. At Bahi Primary Court, the 1st accused person met with PW6 who required him to make his extra judicial statements but since until that time he was not informed of the charges against him, the 1st accused person couldn't make any statements.

On his part, the 2nd accused person's defense testimonies shows he was at Chifutuka public auction on 16th March 2016 until around 21:15hrs when he heard that Kalasa's house has been burnt. The 2nd accused person decided to visit the scene and found a lot of people. According to him, it was while he was there that he came to learn that Kalasa has been killed though he couldn't see the body at that moment until around 22hrs when the Police offers arrived at the scene. In the next morning, the 2nd accused person, participated in the burial of Kalasa and thereafter he continued with his normal life routines until a week later when he was arrested by Police officers around 23hrs on 23rd March 2016 and taken to Bahi Police station where he was given some papers to sign and he did without knowing its contents as the same was not read over to him.

With the above testimonies, the defense case was closed. Both the prosecution and the defense counsels made their final submissions. Ms Mwakyusa, the learned State Attorney, believed that being familiar to with the accused person for years, PW2 and PW4 properly identified the accused persons at the scene using the lights from the fire flames. Ms Mwakyusa argued that being familiar to the accused persons, their claim

of recognition should be considered as more reliable than identification by a stranger. She contended that the prosecution side proved intention (malice) through PW2 and PW4 who witnessed the accused person attacking the deceased by hitting him with a huge stone and cut his neck with a hand saw before chopping his private parts. In view of the learned State Attorney, the weapons used were dangerous and the accused person manifested their intention to kill by attacking the deceased in sensitive areas. It was argued that killing can be murder even in cases of mob justice where malice is established. As to the accused's defence, the learned State Attorney submitted that they didn't prove that they were tortured when making their cautioned statements neither did they properly relied on the defence of alibi. Ms Mwakyusa argued the court to consider PW2 and PW4 as credible witnesses despite being related, because no law discredit evidence of relatives.

On his side counsel Lubyama for the 1st accused person, argued on what he believed to be contradictory and so doubtful identification evidence from PW2 and PW4. The learned counsel submitted that evidence of these two witnesses contradicted each other on the distance they were to enable correct identification. According to Mr. Lubyama while PW2 said she was behind some people at the scene, PW4 failed to explain his

exactly location at the scene. According to the learned counsel, despite some of the prosecution witnesses indicating that Kalasa's premises had a fence, there was no consensus on that as other witnesses refuted its existence. It was contended that even the sketch map (exhibit P1) indicated no such fence. Believing that PW2 and PW4's evidence of identification contained some mistakes, the learned counsel referred the case of **Chacha Jeremiah Murimi and three others Vs Republic.** Criminal Appeal No. 551 of 2015 and argued that, their claim of recognition cannot be conclusive in such circumstances.

With regard to the caution statements, counsel Lubyama submitted that the statements were taken out of the prescribed time but more so, the 1st accused person did not repeat his confession before a justice of peace. He argued the court to consider such absence of an extra judicial statement by the 1st accused to be a sign that the cautioned statement was not voluntarily taken. Similar to exhibits, counsel Lubyama submitted that failure by the prosecution to tender weapons allegedly used by the accused persons in killing the deceased despite being recovered meant, the claim in respect of those weapons was a mere illusion and invited the court to subscribe to the decision of the Court of Appeal of Tanzania in **Miraji Malumbo Malumbo Vs Republic,**

(2011) ELR, 280 where handling of exhibits was said to be the duty of Police officers.

On behalf of the 2nd accused person, counsel Fred Kalonga took the same approach as Mr Lubyama. He submitted that evidence tendered by the prosecution, left serious doubts against the 2nd accused by failing to call in court key witnesses such as Maulid Kajualwake who was mentioned by PW1 and PW5 as the arresting officer and the one who witnessed the incident leading to the killing of Kalasa. Likewise on failure to summon D/C Mtiliga who drew the sketch map of the scene, the learned counsel believed he was important to clear the contradiction as to whether the deceased premises, had a fence or not, whether there was a gate or not or whether the compound contained three houses. Citing the case of **Aziz Abdallah Vs Republic** (1991) TLR 71, it was argued that the prosecution had a duty to call witnesses who are able to testify and therefore the learned counsel invited the court to draw an adverse inference against the prosecution for failure to call these key witnesses while there were contradictions from PW2 and PW4 as to appearance of the scene.

The question of failure to tender the weapons used to kill Kalasa was also raised by Mr. Kalonga as it was for voluntariness of the cautioned statements and identification of the accused persons. It was contended in line with the decision in **DPP Vs Mirzai Pirbakhshi @ Hadji and Three Others,** Criminal Appeal 493 of 2016 that since PW7 had knowledge of the weapons used to commit the offense in this case, she ought to have tendered the same and her failure to do so deserves an adverse inference by the court. As to the cautioned statements, counsel Kalonga reiterated that the same was taken out of time and should therefore despite being admitted, the court should consider its weight as was the case in **Tuwamoi Vs Uganda** (1967) EA and **Pambano Mfilinge Vs Republic** Criminal Appeal No. 283 of 2009.

On the claim of identification of the 2nd accused person by PW2 and PW4, failure to name him at the earliest possible opportunity after the incident and the conduct of the said accused after the incident, it was submitted that the same brings doubts as to whether the said accused person was properly identified and argued the court to subscribe to the decision of Court of Appeal of Tanzania in **Jaribu Abdallah Vs Republic** Criminal Appeal No. 220 of 1994, by not rely on the testimonies of these witnesses. He contended that the 2nd accused

person was at the same village for a week after the killing, he even attended Kalasa's burial ceremony. Had he been named immediately, Mr. Kalonga believed, he would have been promptly arrested. He contended that such failure to name the 2nd accused person in view of counsel Kalonga created doubt as to whether he was identified by PW2 and PW4. In view of counsel Kalonga, the 2nd accused's conducts after the incident, shows he had no malice and invited the court to follow the decision in **Keneth Jonas @ Kasase Vs Republic,** Criminal Appeal no. 156 of 2014.

In summing up to assessors, I directed them on matters of facts and law. On facts, I informed them that there is no dispute that Kalasa Bundala died unnatural death. His death was a result of severe loss of blood due to deep cut wounds following an assault to him. I further told them that the only disputed fact is whether it is the accused persons who perpetrated the murder with malice aforethought. To answer this issue in the affirmative, I directed them on the law governing identification particularly visual identification and confession statements. I told them that visual identification is the weakest form of identification which can only be acted upon where all possibilities of a mistaken identification has been eliminated. That a correct identification considers

the incident time (whether it was night or day time), the form and intensity of light that could guarantee a proper identification, the time the parties spent together, their familiarity before the incident and the credibility of the identifying witnesses. I further informed the gentlemen and lady assessors that the material evidence in this case as far as identification is concerned, is that of PW2 and PW4 who alleged to be familiar with the accused persons and that the incident of the killing of Kalasa Bundala occurred during the night time and in the presence of lights from the burning house.

On the alleged confessions by the accused persons, I told the assessors that such evidence can be acted upon when voluntary made and contains true account of what happened. On voluntariness, I told the assessors that practice requires a voluntarily confessesion on commission of an offense before a police officers to be followed by a confession before a justice of peace where it is believed that the said suspect will be more free to confess or deny the same. On how to determine whether or not what is contained in a statement is true, I directed the lady and gentlemen assessors to consider two things. **First,** if the confession leads to the discovery of some other incriminating evidence. **Second**, if the confession contains a detailed,

elaborates relevant and thorough account of the crime in question, that no other person would have known such details but the maker.

Upon inviting the assessor's opinion, they unanimously entered a not guilty verdict for the following reasons: Firstly, that weapons used to kill Kalasa Bundala were not tendered as exhibit in court despite being recovered from the scene and secondly, that evidence of identification from PW2 and PW4 was doubtful as the offense was committed by mob justice.

The offence of murder with which the accused persons stand charged, requires the prosecution side to prove mainly three ingredients. These are one that there is a human being who has died an unnatural death, second that the said death must be a result of an unlawful act by the accused person and third that death or at least serious bodily harm was intended by the accused persons when doing that unlawful act. I will start with the first issue on whether a human being called Kalasa Bundala has died a death which is unnatural one. The key evidence in this issue came from exhibit P2, a Post Mortem report which was tendered by PW3 and admitted without objection from the defense side. Since there was no contention on the Post Mortem report, then the fact

that Kalasa Bundala has died an unnatural death, was proved beyond reasonable doubt and I accordingly hold so.

The first question being answered as such, the remaining issues for my determination are whether Kalasa Bundala was unlawful killed by the accused persons and that in doing so, they intended death to occur. Apparently, evidence tendered and summarized above, shows the prosecution's case has been built on two premises. One; is that the accused persons were identified or recognized by PW2 and PW4 and two; is that upon their arrest they voluntarily confessed to have participated in the killing of Kalasa Bundala.

As I begin, let me make it clear at the outset that I will accord little weight to the evidence on the confessions of the accused persons (exhibit P3 and P4) for one major reason, its voluntariness is doubtable. It is so because the 1st accused person did not repeat the alleged confession before a justice of peace and nothing has been explained by the prosecution as to the failure to tender his extra judicial statements despite PW5 instructions to have him taken to a justice of peace. Such failure, can only be construed to mean he was either not taken to a justice of peace or having been taken there, he declined to repeat the

confession. In **Samson Kadeya Kazeze Vs Republic,** Criminal Appeal No. 137 of 1993, the court of Appeal of Tanzania observed the following in relation to declining of suspects to repeat their confessions before a justice of peace:

> *If the appellant had voluntarily made the confession contained in the cautioned statement, why did he decline to do so before the Justice of the Peace? The trial Judge gave a very curious reason for the appellant's refusal to make an extra judicial statement before the justice of the peace because an accused is freer before the Justice of the Peace than before the police. In our view this is exactly the point. If the appellant felt he was not free to refuse to make the cautioned statement, then it was not freely made. [Underlined emphasis supplied]*

In **Ndorosi Kudekei Vs Republic,** Criminal Appeal No. 318 of 2016, the Court of Appeal facing with a case where only a cautioned statement and not an extra judicial statement was tendered, observed the following:

> *..... what was placed before the court in evidence, was the cautioned statement only (exhibit P1), whereas the whereabouts of the extra judicial statement which was made to the justice of peace was nowhere to be seen. With the absence of the extra judicial statement, the trial judge was not placed in*

a better position of assessing as to whether the appellant really confessed to have killed the deceased or not.

In the same vein, although the 2nd accused person was taken to a justice of peace, his alleged confession, falls under the same trap because his extra judicial statements was not admitted upon conducting trial within trial for similar reason that the same was not voluntarily made.

The above said, the prosecution side remains with basically evidence on identification or recognition of the accused persons. This is therefore a case that hinges on evidence of visual recognition. An established principle of law is that such kind of evidence must be careful examined before being relied so as to remove all possibilities of mistaken identity. Emphasizing the duty of the courts to have identification evidence seriously examine such evidence before relying on the same, the Court of Appeal of Tanzania stated the following in **Philipo Rukaiza @ Kitchwechembogo Vs Republic,** Criminal Appeal No. 215 of 1994 CAT (unreported) the Court of Appeal of Tanzania observed the following in relation to identification evidence:

The evidence in every case where visual identification is what is relied on must be subjected to careful scrutiny, due regard being paid to all the prevailing conditions to see if, in all the circumstances, there was really sure opportunity and convincing ability to identify the person correctly and every reasonable possibility of error has been dispelled. There could be a mistake in the identification notwithstanding the honest belief of an otherwise truthful identifying witness.

In the case of **Anthony Kigodi Vs Republic** Criminal Appeal No. 94 of 2005, the Court of Appeal of Tanzania reemphasized the same when the following was observed:

*We are aware of the cardinal principle laid downby the erstwhile Court of Appeal of East Africa in **Abdala bin Wendo and Another Vs Rex** (1953) EACA 116 and followed by this Court in the celebrated case of **Waziri Amani Vs Republic** [1980] T.L.R. 250 regarding evidence of visual identification. The principle laid down in these cases is that in a case involving evidence of visual identification, no court should act on such evidence unless all the possibilities of mistaken identity are eliminated and that the Court is satisfied that the evidence before it is absolutely watertight.*

Similarly in **Shamir John Vs Republic,** Criminal Appeal No. 166 of 2004 the Court of Appeal of Tanzania observed that:

Whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defense alleges to be mistaken, the Courts should warn themselves of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications.

Borrowing a leaf from the above authorities, I would say the need to have all possibilities of mistaken identity cleared before evidence on identification or recognition is acted upon, arises from the common experience that mistakes on identification are normally made even by witnesses who claims to be familiar with the suspects. In **Issa s/o Mgava @ Shuka Vs. Republic**, Criminal Appeal No. 37 of 2005 the Court of Appeal of Tanzania observed the following in similar terms:

..... as occasionally held, even when the witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made.

In order to eliminate the possibility of mistaken identity, courts of law have developed a list of factors or guidelines to be considered when examining such evidence. The list is however, not conclusive, depending

on the circumstances of each case. In **Mathew Stephen @ Lawrence Vs. Republic,** Criminal Appeal No. 16 of 2007, the Court of Appeal of Tanzania listed the following factors for consideration in identification cases:

> *To exclude all possibilities of mistaken identity, the Court has therefore to consider the following. First, the period under which the accused was under observation by the witness. Second, the distance separating the two during the said observation. Third, if it is at night, whether there was sufficient light. Fourth, whether the witness has seen the accused before and if so, when and how often. Fifth, in the course of examining the accused, did the witness face any obstruction which might interrupt his concentration. Sixth, the whole evidence before the Court considered, were there any material impediments or discrepancies affecting the correct identification of the accused by the witness.*

I have given a length consideration on the testimonies of both PW2 and PW4 as prior summarised. Despite admitting that there were a lot of people at the scene, these two witnesses, claimed to have recognised the accused persons because of their familiarity with them. They also claimed to have been assisted to see by the light that illuminated the area from the burning house. Nothing however was said through their evidence, as to the appearance of the accused persons that night;

neither did they disclose that they named the accused immediately thereafter. Settled is the law that in cases which depends on identification or recognition evidence like the instant one, ability of the witness to describe the culprits is very important. Indeed, it is not enough to merely state that the accused persons were identified. Specific and not general descriptions must be given. In **Raymond Francis Vs. Republic [1994] T.L.R 100** the Court of Appeal of Tanzania cited with approval the decision of the defunct Court of Appeal for Eastern Africa in **Mohamed Alhui Vs Rex** (1942) 9 EACA 72, which observed the following:

> *In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description given are matters of the highest importance of which evidence ought always to be given; first of all, of course, by the persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given.*

The above decision shows one important aspect of identification evidence be it from the witnesses who are familiar with the suspects or stranger to them. Evidence on descriptions of the suspects must first be given by the identifying witnesses and then by the person to who the descriptions were given. Evidence on identification or recognition,

cannot therefore be safely relied by the court, if given by the identifying witnesses alone.

In this case, none of the prosecution witnesses supported PW2 and PW4's version of evidence on identification. It is therefore unknown if these witnesses disclosed to anyone about the involvement of the accused persons in the killing of the late Kalasa Bundala. Evidence tendered also does not show if the arrest of the accused persons was preceded by information given to the police officers by PW2 and PW4. When arresting the accused persons for example PW5 stated the following:

> *We then started investigation by drawing the sketch map and find those responsible. Our investigation revealed that Kalasa was killed by a group of angry people. We got the names of those who were at the scene to be Selemani Mwalimu, Mateso Isaya and others who were seen attacking Kalasa. We started to arrest them and the first to be arrested was Selemani Mwalimu around 23hrs in the same night. On 23rd March 2016, Mateso Isaya was also arrested and he was brought to Bahi.*

I have also gone through PW7's testimonies. Indeed, the fact that PW2 and PW4 revealed to her the involvement of the accused persons in the

killing of Kalasa Bundala, is silent. For reference purposes. PW7 stated the following in relation to how the accused persons were arrested and connected to this case:

> *... I was in a group of those who interviewed witnesses. The people interviewed told me that they saw the deceased running from the village offices to his house and a group of people chasing him and killed...After that we continued with investigation to find the culprits. Around 23hrs the 1st accused person one Selemani Mwalimu was arrested.*

As it can be seen from the above extracts, nothing from either PW5 or PW7 testimonies indicated that PW2 and PW4 named the accused persons as the culprits. With the above observation, I take the fact that the prosecution side did not lead evidence to show that PW2 and PW4 revealed to anyone including the police officers on the involvement of the accused persons in the incident of this case, to be one; failure by these witnesses to name the accused persons at the earliest possible opportunity and two; ipsa jure, a loophole in the prosecution's case that leaves serious doubts on the claim of identification of the accused. This is notwithstanding the fact that the 1st accused person was arrested within the same night when Kalasa was killed because as said above, nothing suggests that his arrest was due to information given by PW2

and PW4. In **Marwa Wangiti Mwita and Another vs. The Republic**, Criminal Appeal No. 6 of 1995, the Court of Appeal of Tanzania observed the following in relation to need to have an identified suspect named by the identifying witness at the earliest possible moment.

> *The ability of the witness to name a suspect at the earliest possible opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry*

In the fine, since PW2 and PW4 did not gave the descriptions of the accused persons to anyone and if they did, no such evidence was tendered in court as observed in **Mohamed Alhui Vs Rex** (supra), it remains a fact that their claims of identification was first given for the first time in this court. Such evidence is unsafe and for all purposes and intent, cannot be relied by a prudent court because in absence of evidence showing that these witnesses named the accused persons, their credibility cannot be guaranteed. In case of **Jaribu Abdallah Vs Republic**, Criminal Appeal No. 220 of 1994, the Court of Appeal of Tanzania had the following to say:

> *..... in matters of identification, it is not enough merely look at factors favouring accurate identification. Equally important is credibility of witnesses. The conditions for identification might*

appeal ideal but that is no guarantee against untruthful evidence.

All that being said it is my finding that, PW2 and PW4's testimonies, fails the test and so cannot be relied. The question whether the accused persons were properly identified by two witnesses, is therefore negatively answered. With that question answered as such it is obvious that the main question whether the accused persons are responsible for unlawful killing of Kalasa Bundala lacks supportive evidence. In my opinion, having accorded no weight to the cautioned statements as indicated earlier and having found evidence on identification unsafe to rely, nothing remains that touches the accused persons in this case. There is therefore no evidence to incriminate them.

As I conclude, I wish to refer, though by way of passing, the words the late Lugakingira, J. (as he then was) in **Mohamed Katindi and Another Vs Republic** (1986) TLR 134 where he stated:

The onus is, unless otherwise stated, on the prosecution to prove the guilt of the accused beyond reasonable doubt. An accused person may not be convicted on the weakness of the defence which would include the omission to cross-examine on

a crucial matter, but can only be convicted on the strength of the prosecution case.

In the circumstances and for the reasons stated, the prosecution side has failed to prove this case to the required standards. I therefore share the opinions of ladies and gentlemen assessors in this case and find the two accused persons one **Selemani Mwalimu** and **Mateso Isaya**, not guilty of murder, the offence with which they have been charged in this Court. I according acquit them forthwith from that count and order their immediate release from remand prison unless otherwise held for any other lawfully cause. It is so ordered.

DATED at **DODOMA** this 12th Day of March, 2020

M.M. SIYANI

JUDGE