

**IN THE HIGH COURT OF TANZANIA  
DAR ES SALAAM DISTRICT REGISTRY  
AT DAR ES SALAAM**

**CRIMINAL SESSIONS CASE NO. 13 OF 2021**

**REPUBLIC**

*Versus*

- 1. KHALID ALMAS MWINYI @ BANYATA**
- 2. RAHMA ALMAS MWINYI @ BABY @ RAHMA ALMAS  
IDDI**
- 3. NDUIMANA OGISTE @ JONAS ZEBEDAYO @  
MCHUNGAJI @ NDAYISHEMEZE ZEBEDE @  
NDAISHIME ZEBEDAYO @ OMARI HASSAN**
- 4. GODFREY PETER SALAMBA**
- 5. CHAMBIE JUMA ALLY**
- 6. ALLAN ELIKANA MAFUE**
- 7. ISMAIL ISSAH MOHAMED @ MACHIPS**
- 8. LEONARD PHILIPO MAKOI**
- 9. AYOUB SELEMAN KIHOLI**
- 10. JOSEPH ALEXANDER LUKOA**
- 11. GAUDENCE JAMES MATEMU**
- 12. ABUU OMARY MKINGIE**
- 13. HABONIMANA AUGUSTIN NYANDWI @ OGISTEE**
- 14. MICHAEL DAUD KWAVAVA**

**15. EMMANUEL THOMAS SONDE**

**16. KELVIN ATHANAS SOKO**

**17. SAMIA SALEH HUJAT**

**18. ALMAS SWEDI @ MALCOM**

***RULING ON A PRIMA FACIE CASE***

***Date of last Order: 19/08/2022***

***Date of Ruling: 20/09/2022***

**MGONYA, J.**

The accused persons herein namely **KHALID ALMAS MWINYI @ BANYATA, RAHMA ALMAS MWINYI @ BABY @RAHMA ALMAS IDDI, NDUIMANA OGISTE @JONAS ZEBEDAYO @ MCHUNGAJI @ NDAYISHEMIZE ZEBEDE @ NDAISHIME ZEBEDAYO @ OMARI HASSAN, GODFREY PETER SALAMBA, CHAMBIE JUMA ALLY, ALLAN ELIKANA MAFUE, ISMAIL ISSAH MOHAMED @ MACHIPS, LEONARD PHILIPO MAKOI, AYOUB SELEMAN KIHOLI, JOSEPH ALEXANDER LUKOA, GAUDENCE JAMES MATEMU, ABUU OMARY MKINGIE, HABONIMANA AUGUSTIN NYANDWI @ OGISTEE, MICHAEL DAUD KWAVAVA, EMMANUEL THOMAS SONDE, KELVIN ATHANAS SOKO, SAMIA SALEHE HUJAT and ALMAS SWED @ MALCOM** are before the court charged with three offences:

1<sup>st</sup> **CONSPIRACY TO MURDER** contrary to Section 215 of the Penal Code, Cap. 16 [R. E. 2002] **for all accused persons;**

2<sup>nd</sup> **MURDER** contrary to Sections 196 and 197 of the Penal Code Cap. 16 [R. E. 2002] **for all accused persons** and,

3<sup>rd</sup>, **ACCESSORY AFTER THE FACT TO MURDER** contrary to Section 213 of the Penal Code, Cap. 16 [R. E. 2002] for the **15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup> accused persons.**

It is alleged that on divers dates between 1<sup>st</sup> July, 2017 and 16<sup>th</sup> August, 2017 while at various places within the United Republic of Tanzania particularly in the City and Region of Dar es Salaam and within the City and Region of Arusha, jointly and together the above accused persons conspired to commit Murder. Their intention was to eliminate **WAYNE DEREK LOTTER** a South African National who had NGO in Tanzania known as **PAMS FOUNDATION** dealing with the Protection of Wildlife and assisting the Government of Tanzania in the fight against poaching and poachers.

After all the preliminary proceedings have been finalized, this special session commenced on 11<sup>th</sup> March 2022. I as preceding Judge, I sat with two Gentlemen Assessors **Mr. Selemani Sijaona** and **Mr. Salehe Chautundu**; together with a Lady Assessor, **Ms. Sophia Isike** respectively as required by law. However, unfortunately in the midst of the prosecution case, one of the

Assessors, Mr. Selemani Sijaona had to drop from the proceedings due to illness. So up to the closure of the Prosecution case I remained with only two Assessors.

The Prosecution team was led by Mr. Yamico Mlekano PSA assisted by Mr. Hemedi Halidi SSA, Mr. Fadhili Mwandoloma SSA, Ms. Lilian Rwetabura SSA, Mr. Haruna Shomari SA, Ms. Imelda Mushi SA, Ms. Ellen Masululi SA, Mr. Philbert Mashurano SA, and Mr. Joseph Mwakasege SA. While Defence was led by Advocate Majura Magafu for 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, and 14<sup>th</sup> accused persons. Others are Advocate Mluge Karoli Fabian, for 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, and 18<sup>th</sup> accused persons, Advocate Roman Selasini Lamwai for 3<sup>rd</sup> and 13<sup>th</sup> accused persons, Advocate Abdulai Abdulaziz for 4<sup>th</sup> accused, Advocate Augustino Shio for 6<sup>th</sup> accused, Advocate Herman Gervas for 7<sup>th</sup> accused, and Advocate Modesta Medard for the 8<sup>th</sup> and 9<sup>th</sup> accused persons.

At this juncture, I wish to express my sincere appreciation and gratitude to all the Assessors who were involved in this matter for their generous attention, devotion and respective attendance throughout the proceedings. The same applies to Mr. Ally Ndakeye the Interpreter whom we have involved him in these proceedings from the very beginning of the trial to this end. His professional services have assisted the court to see that the 3<sup>rd</sup> and 13<sup>th</sup> accused

persons have their right to follow this court's proceedings accordingly, hence adhering to the fair trial rules.

In a special way, I sincerely thank the learned counsel from both Prosecution and Defense sides for their respective attendance and prompt participation up to this stage for their respective examinations in chief by the Prosecution and the respective cross examinations from the Defense of which to my considered view went well, harmoniously and professionally. They have demonstrated great expertise in pursuing this matter and I value their professionalism. This also applies to the Gentleman and Lady Assessors for their valuable questions to the witnesses for the purpose of getting elaborative information from their respective testimonies.

However, before I go into determination of whether the accused persons herein have a case to answer or otherwise, I am of the considered view that, it is important to briefly discuss the concept of no case to answer and its principles. This will enable those who are now listening and who will have a chance to read this Ruling to have a better understanding of the concept of no case to answer or having a case to answer and link to the decision herein.

The concept of "**no case to answer**" of which is also known as a "***Prima facie case***" is well entrenched practice in Common

Law Jurisprudence through Case Law. In some jurisdictions the concept has attracted legal provisions especially in Criminal Procedure statutes. The concept is also known as "**halftime submission**".

In this regard, I wish to start with a decision of the East African Court of Appeal to demonstrate the position in Criminal proceedings. In the landmark case of ***BHATT V. R. (1957) E. A. 332***, Court of Appeal for East Africa laid down two principles and defined a ***prima facie*** case in the following terms:

- (a) That the onus is on the prosecution to prove its case beyond reasonable doubt and that a prima facie case is not made out if, at the close of the prosecution, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction; and***
- (b) That the question whether there is a case to answer cannot depend only on whether there is some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence. The court further observed that a mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence.***

In Tanzania, in criminal proceedings a submission of no case to answer has enjoyed a wide range of application and attracted a lot of decisions both from the High Court of Tanzania and the Court of Appeal. Indeed, the essence of the application of the submission of no case to answer is through entrenchment under section **293 (1) of the Criminal Procedure Act, Cap. 20 [R. E. 2019]**. For the sake of brevity of this ruling, I do not wish to reproduce the said section.

In the case of ***DIRECTOR OF PUBLIC PROSECUTION VS PHILIPO JOSEPH NTONDA, Criminal Session No. 217 of 2020, Court of Appeal at Zanzibar*** it was stated that:

*"In any criminal trial, at the closure of the prosecution case, be it at the subordinate courts or the High Court, the trial court is required to consider the evidence and make a finding as to whether the prosecution had sufficiently made out a case against the accused person to require him to mount his defence. If a prima facie case is not made out, the trial court is enjoined to find that the accused is not guilty".*

Moreover, in the case of ***REPUBLIC V. ALHAJI SHABAN MINTANGA KONDO, Criminal Sessions Case No. 85 of 2009 (HCT at Dar es Salaam) (Twaib, J.)*** it was held that:

- "1. The relevant law applicable to the High Court at this stage is S. 293(1) of the CPA. It enjoins the Court to acquit the accused where, at the end of the prosecution case, the court is satisfied that no Prima facie case has been established.*
- 2. Many years ago, in his Practice Notes, England's Lord Chief Justice Parker stated that a submission on no case to answer may properly be made and upheld where:*
- (a) There has been no evidence to prove an essential element in the alleged offence; or*
  - (b) When the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it;*
  - (c) Where such a tribunal might convict on the evidence so far laid before it, there is a case to answer."*

*A prima facie case was also complimented in the case of **DIRECTOR OF PUBLIC PROSECUTION VS ERNEST WARYOBA @ MUHINDI and MUHINDI S/O ERNEST, Criminal Appeal No. 126 of 2021 High Court Musoma, August 2022, [www.tanzlii.org](http://www.tanzlii.org)** where it was stated that:*

*"It is a trite law that prima facie case means a standard of proof whose evidence suffices to ground conviction if the accused*



*does not offer explanation. See **PATEL VS REPUBLIC [1968] 1 EA 97**. Further, it is a clear position of law that in assessing evidence at the prima facie stage, the court is not required to apply a fully-fledged analysis. This is what makes prima facie distinct from proof beyond reasonable doubt. See **THE REPUBLIC VS KILEO BAKARI KILEO AND 6 OTHERS, Criminal Sessions Case No. 19B of 2011, HC at Tanga** and **THE REPUBLIC VS JONAS JAMES @ KOMBE, Criminal Sessions Case No. 18 of 2002, HC at Arusha**".*

Nevertheless, from the above exposition of the law and decided cases, it is imperative to state that in appraising the no case to answer submission in a Criminal Case after the conclusion of the Prosecution case, the court must be mindful that at that stage of the proceedings, the Prosecution only needed to have adduced sufficient evidence to provide a *prima facie* case against the accused. Thus, at the conclusion of its case, the Prosecution is, in my view, at that stage, not under any obligation to have proved the case beyond reasonable doubt. It only needs **to have evidence pointing to or attaching to all the ingredients of the offence(s) alleged against the accused person.**

Thus in making a decision over the no case to answer submission, the question the court ought to ask itself is whether

**there are circumstances based on the Prosecution's evidence which can convict the accused.**

Prosecution in proving their case against the accused persons herein, brought before the Court **thirty two (32) witnesses** and also tendered **forty three exhibits** to prove the charges against the accused persons herein. Further, at this stage, I have to point out that, as this case concerns the Murder of one **WAYNE DEREK LOTTER**, then this court at this juncture is indeed satisfied that the latter is a deceased as supported by **Exh. P1** which is the Report on Post Mortem Examination of **Wayne Derek Lotter** dated 19<sup>th</sup> August 2017.

I want to assure all of you that I have carefully perused the evidence presented by the Prosecution witnesses and the exhibits tendered; and I have no doubt that taken together with what I have discussed above on the application of the concept of no case to answer, I am now in a position to table my findings at this necessary stage of the case to each and every accused as herein below in a serially manner as they appear in this case.

The first accused in this case is **KHALID ALMAS MWINYI @ BANYATA**. Despite the fact that he is the first in the list, the only evidence which was tendered before the court and touched him direct was tendered by the last witness in the Prosecution witnesses list, **PW32 - BF**. This witness testified before the court that he is

the one who went to the 1<sup>st</sup> Accused's residence at Mikocheni B after he was informed by an informer that the vehicle which was used by the people who were involved in the murder of the victim herein, Wayne Derek Lotter was owned by the 1<sup>st</sup> accused and also by that time the same was under his custody at his residence at Mikocheni B. Further, upon arrival at that place, he met the 1<sup>st</sup> accused and indeed the said car which was specified as Toyota IST white in color with the black roof with registration number T 372 CMY was within his premises. After he confessed to be the owner of the same, the 1<sup>st</sup> accused is said also to admit that he sometimes used the car for his normal activities, but regularly the same was used by his brother one **Fahami Haji Karama**, a Temeke Resident.

It is after that information, **PW32 - BF** testified to have conducted search of the entire house before the Local Government Leader (Mjumbe) of that locality. Further, upon completion of the said exercise, the said car and other items from the house were confiscated and brought to Police Station together with the 1<sup>st</sup> accused for further investigation. To support his assertion, the witness tendered Search and Confiscation Form in respect of **Case File No. OB/IR/6586/2017** both dated 2<sup>nd</sup> September 2017; which were admitted for evidence as **Exh. P42**.

Further, at the Police station, according to **PW32 - BF** the cautioned statement of the 1<sup>st</sup> accused was procured while the 1<sup>st</sup> accused remained in custody from that day, to date, facing the charges as mentioned earlier. Further the said car was kept under Police custody and the same was admitted for evidence in respect of this case as **Exh. P28** respectively. However, up to the closure of the prosecution case, the 1<sup>st</sup> accused's cautioned statement was not tendered before the court. The fact which prevented the court to get the benefit of knowing the contents of the same to further link the accused with the offences charged.

The 1<sup>st</sup> accused's admission and confession of the fact that he is the owner of the car in issue (Toyota IST) Exh. P28 and also that the same is regularly used by Fahami Karama is well corroborated with the contents of 2<sup>nd</sup> accused's cautioned statement, when interrogated about the ownership and the use of the said car. The 2<sup>nd</sup> accused said, and I quote:

***"Hiyo gari ni mali ya mdogo wangu Khalid Almas anayefanya kazi benki ambaye tunaishi naye hapa nyumbani na pia amepanga nyumba nyingine huko Mikocheni B. Gari hiyo ameitoa kwa ajili ya matumizi ya familia kumsaidia Mama yetu na yeye Fahami Karama kwani ni mlemavu wa mguu, ana mguu wa bandia."***

According to my knowledge is that the 2<sup>nd</sup> accused herein, the 1<sup>st</sup> accused and the person who has been mentioned by the name of Fahami Karama who is not in court, are siblings who are all issues of the 17<sup>th</sup> accused person herein. I have no any reason to disbelieve the 2<sup>nd</sup> accused's information on the car in issue as all that she volunteered to state about this property concerns her family members, being her two Brothers and their Mother.

It is my profound concern that the 1<sup>st</sup> accused's case is exceptional. There is evidence before the court that indeed he owns the said car through **Exh. P29**, the registration card in respect of **Toyota IST T 372 CMY** which was admitted before the court. To be charged and convicted of conspiracy to Murder and Murder, the 1<sup>st</sup> accused must do unlawful act. Being only the owner of the car, is not unlawfully act since the 1<sup>st</sup> accused such as any other person has the right to own property such as this car. The evidence before the court shows that both **PW 32 BF** and **2<sup>nd</sup> accused** herein had the knowledge that the 1<sup>st</sup> accused released his car to assist his mother and his disabled brother. From this fact, it has been established that the said car was used by the 1<sup>st</sup> accused's brother Fahami in some other mischievous activities also in the knowledge of the second accused as they were living together. This does not make the owner of this car an offender.

I find it pertinent to say that despite that fact that the 1<sup>st</sup> and 2<sup>nd</sup> accused herein together with their brother one Fahami Karama are siblings, this does not make them one personality. Meaning that everything that they do is in the knowledge of each other. These are different personalities from the moment they were born by their Mother. It is quite possible that between them there are some issues that they cannot share. So there is a danger of offending someone by the acts of another independent person though they are related.

The fact that the car in issue was regularly used by Karama and also known to be his car, was cemented by the 4<sup>th</sup> accused, Godfrey Peter Salamba in his admitted cautioned statement when he said, and I quote:

***"Tuliondoka nyumbani kwa Fahami Karama huko Temeke majira ya kama saa mbili kasorobo usiku. Tulikuwa watu watatu katika gari Toyota IST mali ya Fahami Karama."***

Further, the fact that the said car was regularly used by Fahami Karama despite the fact that was owned by the 1<sup>st</sup> accused, was a well-known fact as the same was also observed by the 9<sup>th</sup> accused person herein Ayoub Selemani Kiholi when he revealed in his cautioned statement (Exh. P41) when asked about the details of the car in issue; he had this to say:

***"Swali: Je ulikuwa unafhamu gari hiyo Toyota IST yenye rangi nyeupe na roof nyeusi ni gari ya nani? Jibu: Gari hilo Toyota IST yenye rangi nyeupe na roof nyeusi aliyokuwa akitumia Fahami Karama ni mali ya Khalid Almas."***

The vital question to consider is who was with the car in issue at the scene of crime. Before the court there is already enough evidence that on 16<sup>th</sup> August 2017 during night hours, the **Toyota IST** with registration number **T 372 CMY** was in possession of Fahami Karama and his accomplices. To hold the 1<sup>st</sup> accused responsible and further liable for the serious offences of **Conspiracy to Murder** and **Murder** is **unjustifiable**.

From the above analysis and the fact that the court lacks any further information to link the 1<sup>st</sup> accused to the offence charged apart of being the owner of the car that was used in crime, taking into account that he is not mentioned to be anywhere be it in the meetings to organize the crime, be at the scene of crime neither mentioned by any other person that he had the knowledge of the crime, my instinct destined me to the decision that under the given circumstances it is difficult to link the 1<sup>st</sup> accused with neither **Conspiracy to Murder** nor **Murder** of Wayne Derek Lotter that took place at Chole Road at Masaki within the City of Dar es Salaam on 16<sup>th</sup> August 2017.

Consequently, let the 1<sup>st</sup> accused be granted with the benefit of doubt that he is not connected at all with the offences charged, hence **the court finds the 1<sup>st</sup> accused Khalid Almas Mwinyi @ Banyata has no case to answer.**

The second on the list is the 2<sup>nd</sup> accused person one **RAHMA ALMAS MWINYI @ BABY @ RAHMA ALMAS IDDY.** For this accused, the prosecution successfully managed to tender the cautioned statement in her favour (**Exh. P19**) of which revealed many information about the plan and the killing of the deceased herein whom she has been referring to as **"Mzungu"** including the crucial duty she had of being custodian of the weapons used to accomplish the killing of the deceased WAYNE DEREK LOTTER.

It is in her own cautioned statement the 2<sup>nd</sup> accused narrated a series of events, and the meetings towards the killing which were in fact held in her residence she shared with his brother Fahami Karama. She also mentioned his brother's friends / associates to the plan who were their frequent visitors at their home that she was involved in hosting them even cooked meals for them. To mention the few are the 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> accused persons to be the members who were assembling at their home for meetings.

The 2<sup>nd</sup> accused also admitted to be the custodian of the weapons which were used to execute the deceased in this case. She



even volunteered to show the police where she kept the said weapons at Ngazija graveyard. Her testimony was well corroborated with Exhibits **P2, P3, P4, P5, P6, P7, P8, P9, P10, P11, P12, P13, P14, P15, P16** and **P17** respectively.

All the above pieces of evidence which were successfully tendered by prosecution before the court, implicates the 2<sup>nd</sup> accused person to the offences charged. It is from that situation, I am satisfied that there is credible evidence against the 2<sup>nd</sup> accused. In the event therefore the court would like to grant her with an opportunity to defend herself against the prosecution evidence so far produced. **Subsequently, the 2<sup>nd</sup> accused herein Rahma Almas Mwinyi @ Baby @ Rahma Almas Iddi, has a case to answer.**

Coming to the 3<sup>rd</sup> accused, one **NDUIMANA OGIESTE @ JONAS ZEBEDAYO @ MCHUNGAJI @ NDAYISHEMIZE ZEBEDE @ NDAISHIME ZEBEDAYO @ OMARI HASSAN**, the Prosecution's evidence before the court purports that he is the person who pulled the trigger which took the life of Wayne Derek Lotter. The main evidence being two eye witnesses who are alleged to be at the scene of crime, being **PW10 - AJ** who managed to identify the 3<sup>rd</sup> accused to be at the scene of crime and who pulled the trigger, but also managed to identify the same during the

conducted identification parade and before this honourable court during her examination in chief.

The second eye witness who successfully identified the 3<sup>rd</sup> accused person to be at the scene of crime is the 14<sup>th</sup> accused herein **Michael Daud Kwavava** through his cautioned statement which was admitted for evidence as **Exh. P 35**. Further the 3<sup>rd</sup> accused was mentioned and pointed at by the 14<sup>th</sup> accused during his cross examination in the trial within trial before admission of his cautioned statement, when Mr. Lamwai Advocate for the 3<sup>rd</sup> and 13<sup>th</sup> accused persons asked him if at the identification parade conducted at the Oysterbay Police Station, he was able to identify any one before this court. Respectfully and sincerely responding to the said question, Mr. Kwavava who was testifying as DW1 responded by saying; I prefer to quote as herein below:

***"At the parade which was conducted, I managed to see / identify someone who is before this court and he is the one who killed my boss. He is that one, (pointing to the third accused)".***

Apart from the above evidence, the 3<sup>rd</sup> accused was also incriminated in the following evidences / Exhibits: **Exh. P19 - 27, Exh. P34, P36, P37, P38, P40, P41** and **P43** respectively.

As it is a clear position of law that in assessing evidence at the *prima facie* stage, the court is not required to apply a fully-fledged

analysis, but only to demonstrate that there is sufficient evidence so far adduced by the prosecution which will demand the accused to defend himself. Then, from the above brief analysis, this court finds it justifiable to invite the 3<sup>rd</sup> accused to mount his defense. The court would therefore like to hear what the accused has to say in rebutting the prosecution's evidence and charges laid against him. **Accordingly, the 3<sup>rd</sup> accused person herein Nduimana Ogiste @ Jonas Zebedayo @ Mchungaji has a case to answer.**

With regard to the 4<sup>th</sup> accused, **GODFREY PETER SALAMBA**, just as the 3<sup>rd</sup> accused person, the prosecution managed to forward before the court pieces of evidence to prove their case against the 4<sup>th</sup> accused. One being his cautioned statement which was admitted as **Exh. P36** and accordingly corroborated with **Exh. P37** the video clip when the 4<sup>th</sup> accused was recorded while being interrogated. Prosecution evidence before the court also reveals that the 4<sup>th</sup> accused was at the scene of crime and that he was part and effective member of the meetings which took place both in Dar es Salaam and Arusha in planning the killing of Mr. Lotter. Further, he was an instrumental person in making it possible that the mission in Dar es Salaam is accomplished having a crucial duty of driving the alleged killer at the scene of crime.

Other evidences which implicates the 4<sup>th</sup> accused are: **Exhs. P19, P27, P36, P37, P38** and **P40** respectively.

From the above circumstances, I agree with the prosecution that in the light of the evidence above, a case has been made out against the 4<sup>th</sup> accused. Therefore, this court would like to hear from him what is his defense from the prosecution's allegations against him. Thus the 4<sup>th</sup> accused herein **Godfrey Peter Salamba has a case to answer.**

The 5<sup>th</sup> accused person herein **CHAMBIE JUMA ALLY** admitted that he was a taxi driver stationed at Kilimanjaro International Airport (KIA). He also admits to have known the deceased, Mr. Lotter and his co-director Ms. Christine Clark as his clients since 2014. As of now like other accused persons before the court is facing the alleged offences.

The major evidence against him is his cautioned statement which was admitted as **Exh. P39**. The contents therein reveals how he was involved in the plan to commit an offence which led to his knowledge of the outcome of the plan. He also played a major role of informing the accomplices of the offence in Dar es Salaam that indeed the deceased and his co-director were on their way to Dar es Salaam knowingly that it was Mr. Lotter's last journey. Indeed,

a *prima facie* case against him has been established by the prosecution.

It suffices to say by this single piece of evidence, the court is of the firm view that the 5<sup>th</sup> accused herein be invited to come forward and defend himself for the alleged evidence against his commission of the offences before the court. Therefore, fairly and reasonably, **this court is satisfied that the 5<sup>th</sup> accused herein Chambie Juma Ally has a case to answer.**

**ALLAN ELIKANA MAFUE** the 6<sup>th</sup> accused herein, the court has detected that he has no upfront evidence against him which has been tabled by the prosecution up to the time of the prosecution's case closure, such as his cautioned statement. However, he has been mentioned by those who have been caught by tangible evidence against them in this matter such as the 5<sup>th</sup> accused Chambie Juma Ally, Rahma Almas Mwinyi the 2<sup>nd</sup> accused herein, Habonimana Augustin Nyandwi the 13<sup>th</sup> accused, Michael Daud Kwavava the 14<sup>th</sup> accused, and the 3<sup>rd</sup> accused Nduimana Ogiste @ Jonas Zebedayo @ Mchungaji.

For clarity, the 5<sup>th</sup> accused whose work station is at KIA confessed that the 6<sup>th</sup> accused is one of his regular customers and that prior to the killing of Mr. Lotter, the 6<sup>th</sup> accused Mr. Mafue

tasked him to enquire and inform him the deceased's movements particularly from Arusha to Dar es Salaam.

Further the evidence before the court through **Exh. P35**, being the 14<sup>th</sup> accused person's cautioned statement, it was revealed that, few hours before the Murder of Mr. Lotter, the 14<sup>th</sup> accused Mr. Michael Daud Kwavava before heading to Julius Nyerere International Airport (JNIA) to receive the deceased and his co-director, he passed at the 6<sup>th</sup> accused's supermarket as planned earlier to finalize the plan on how to accomplish the execution.

This fact was corroborated by the 13<sup>rd</sup> accused Habonimana in his cautioned statement (**Exh. P34**) when he said that, on a certain occasion at Karama's residence he was introduced to the 6<sup>th</sup> accused Allen Mafue saying that he is the rich man who is coordinating the work that is before them and he is the one who is going to pay them upon completion of the task.

Again, the 6<sup>th</sup> accused's involvement in the crime was cemented by the 4<sup>th</sup> accused person Godfrey Peter Salamba in his cautioned statement when he confessed that a day after the killing, him in the company of Fahami Karama and Zebedayo the 3<sup>rd</sup> accused went to Allan Mafue's bureau de change at the Airport where they met him and that as he was one of the coordinators to

the plan, he paid Zebedayo the 3<sup>rd</sup> accused the sum of **Tshs. 20 Million** as promised.

The fact that the 6<sup>th</sup> accused was the coordinator of the plan, in the 2<sup>nd</sup> accused's cautioned statement which is evidence before the court, it is stated that Mr. Mafue was among the individuals who were conducting their meetings in respect of the plan at Karama's house which is also the 2<sup>nd</sup> accused's residence.

As I have stated earlier that in respect of Mr. Mafue, there is no straight confession from himself in anyway, be it by cautioned statement or any identification, but the above pieces of evidence leave a lot to be desired that has brought this court to the decision to rule out that there is a need to hear the 6<sup>th</sup> accused person's defence. For that reason, the 6<sup>th</sup> accused **Allan Elikana Mafue has a case to answer.**

As for the 7<sup>th</sup> accused person herein **ISMAIL ISSAH MOHAMED @ MACHIPS** like the 6<sup>th</sup> accused, the prosecution case did not have straight evidence against him as his cautioned statement if any not tendered before the court. However, one can tress the areas that he has been incriminated to be in 4<sup>th</sup> and 8<sup>th</sup> accused persons' cautioned statements.

Referring to **Exh. P38**, Leonard Philipo Makoi's cautioned statement herein, reveals that he was contacted by the 7<sup>th</sup> accused

person at Arusha for the purpose of seeking a person to be engaged in the murder. Where the 8<sup>th</sup> accused was told by the 7<sup>th</sup> accused that: ***"Kuna Mzungu anayehusika na meno ya tembo anatakiwa auwawe"***. From there, the 8<sup>th</sup> Accused is said to have proposed Fahami Karama to be a fit person for the job.

The second scenario where he is connected is in the 4<sup>th</sup> accused person's cautioned statement (**Exh. P36**) one Godfrey Peter Salamba, when this accused was asked as to who in Arusha had knowledge of Mr. Lotter's planned murder, he had this in response:

***"Kwa upande wa Arusha ni Makoi, kuna dereva taxi wa Arusha anayefahamiana na Makoi na wengine ni Machips na Mchina ambaye ni tajiri mwezeshaji ambaye alikuwa anaongea na mkalimani wetu ambaye ni Mchina Mswahili."***

After being mentioned by the 4<sup>th</sup> and 8<sup>th</sup> accused persons on two different important scenarios / positions, and that although not much can be said at this stage, **Exh. P36** and **Exh. P38** would seem to give a logical explanation as to what might have transpired. I believe an invitation of the 7<sup>th</sup> accused by this court to defend himself is inevitable. In view of that, the 7<sup>th</sup> accused person herein **Ismail Issah Mohamed @ Machips has a case to answer.**



In this case prosecution too managed to tender some pieces of evidence to incriminate the 8<sup>th</sup> accused person one **LEONARD PHILIPO MAKOI**. The same are **Exhs. P19, P27, P36, and P39** all these being co-accuseds' cautioned statements. From the said statements together with his own cautioned statement (**Exh. P38**), indicates that the 8<sup>th</sup> accused was the coordinator of the plan particularly in Arusha and also he was an active member of the entire plan joining hands with Dar es Salaam team in accomplishing the strategy.

From the above, this court is satisfied that the *prima facie* case has been established against the 8<sup>th</sup> accused and in my firm observation, he deserves to be granted an opportunity to be heard in respect of defending himself. In the event therefore, the 8<sup>th</sup> accused **Leonard Philipo Makoi has a case to answer.**

At this juncture, I will determine the **9<sup>th</sup>** and **12<sup>th</sup>** accused persons **AYOUB SELEMAN KIHOLI** and **ABUU OMARY MKINGIE** cases jointly. This is because their participation in committing the crime as per the prosecution evidence seem to be one, the same and unique. And this is the duty of making sure that the ride of the deceased's car and that of the people who assassinated him was intact and safe and incase of any emergency, then they can easily communicate. It can appear to some people

that this duty is minor, but in commission of the crime is distinctive as I have named it unique at the beginning.

Further to that, from the availed evidence, it appears that they had knowledge of what was going on as they have been detected by the 2<sup>nd</sup> accused in her cautioned statement that they were also involved and participated in the plan meetings that took place at her residence. If that is the case then, it suffices to say that, this court would like to hear from them as to what extent they were involved in the offence. It is from the above explanation, the **9<sup>th</sup>** and **12<sup>th</sup> accused persons Ayoub Selemani Kiholi and Abuu Omary Mkingie separately both have case to answer.**

Next are **JOSEPH ALEXANDER LUKOA** the **10<sup>th</sup> accused** and **GAUDENCE JAMES MATEMU** the **11<sup>th</sup> accused** in this court. This court has detected and satisfied itself that as from the beginning of the prosecution case up to the stage where their case was closed, neither any prosecution witness nor prosecution documentary evidence have incriminated or rather connected these two accused to the offences charged in any manner.

From the above observation, it is this court's firm opinion that this is the fit and proper episode under the law to declare that the two accused persons **Joseph Alexander Lukoa the 10<sup>th</sup> accused** and **Gaudence James Matemu the 11<sup>th</sup> accused** before this honourable court **have no case to answer.**

**HABONIMANA AUGUSTIN NYANDWI @ OGISTEE** the 13<sup>th</sup> accused in this case is one of the persons whom are said to have also committed this organized crime. To prove this assertion, prosecution laid down two pieces of evidence to connect him to the offences charged. **Exhibit P19** being the cautioned statement in favour of the 2<sup>nd</sup> accused person herein have shown that this accused was in knowledge of the offence to be committed. As he has been mentioned to be involved in meetings that took place at the 2<sup>nd</sup> accused's residence duly shared with his brother Fahami Karama. This is enough evidence to claim that he knew the entire plan.

Further are the contents of his own cautioned statement **Exh. P34** which also convinced the court that the *prima facie* case has been successfully established by the prosecution; the fact which would require him to come forward and defend himself from the evidence laid before the court. Consequently, it suffices to declare that **the 13<sup>th</sup> accused Habonimana Augustin Nyandwi @ Ogistee has been found with a case to answer.**

Next is the 14<sup>th</sup> accused person **MICHAEL DAUD KWAVAVA**. It is not a disputed fact even from the accused himself that he is the one who received the late Lotter and his co-director at the Julius Nyerere International Airport aiming to bring them at their final destination at Baobab Village at Masaki within the Dar es Salaam

City. However, on the way, the tragedy that took life of the late Wayne Derek Lotter took place. It is also not disputed that at first, this accused was considered and treated as probable prosecution witness. However, in the midst of this case investigation, on 12<sup>th</sup> of May 2020 he was arrested and his status changed forthwith from that of the witness to accused who today stands before this honourable court facing the 1<sup>st</sup> and 2<sup>nd</sup> counts as other accused persons.

According to prosecution evidence tabled before this court, I am satisfied that the contents of his own detailed cautioned statement (**Exh. P35**) provides his cogent connection to the offences charged as it seems he had prior knowledge of the ruthless and immoral incident which took place on 16<sup>th</sup> August 2017 which actually deprived the life of the late Wayne Derek Lotter.

This fact is cemented by the cautioned statement of the 3<sup>rd</sup> accused particularly on what happened few hours before the incident where he said they stopped at Temeke before proceeding to the Airport. In his words, the 3<sup>rd</sup> accused stated:

***"Walikaa kama dakika thelathini au zaidi, baadaye walitoka na yule mzee aliondoka. Karama aliniambia, tuingie ndani ya gari. Tulipoingia alisema kazi ipo. Na yule mzee aliyekuwa naye ndiye dereva atakayemchukua Mzungu airport. Wameshaongea***

***naye walipoingia ndani kwa Allan, tuliondoka kwenda airport.”***

I am persuaded by the 14<sup>th</sup> accused detailed cautioned statement and the 3<sup>rd</sup> accused person piece of information from his cautioned statement as seen above. At this stage, this court avails the 14<sup>th</sup> accused with an opportunity to refute prosecution evidence if possible and defend himself accordingly. In consequence, the 14<sup>th</sup> accused one **Michael Daud Kwavava has a case to answer.**

From the charge, facts and evidence adduced before this honourable court by the prosecution so far, I have seen it wise to determine the last four accused persons herein jointly, being **15<sup>th</sup> accused EMMANUEL THOMAS SONDE, 16<sup>th</sup> accused KELVIN ATHANAS SOKO, 17<sup>th</sup> accused SAMIA SALEHE HUJAT** and **18<sup>th</sup> accused ALMAS SWEDI @ MALCOM** for the following reason:

That according to the evidence so far adduced which connects these four witnesses jointly, is that they have only been mentioned by the 2<sup>nd</sup> accused person herein Rahma Almas Mwinyi @ Baby in her cautioned statement. There is nowhere in the entire prosecution's case be it through other witnesses or through any documentary evidence that connects these witnesses to the offences charged.

Further, from the charge of this matter, these four accused persons have been charged with three offences unlike all other accused who have been charged with only two offences of **Conspiracy to Murder** and **Murder**; while their additional or rather peculiar offence is **Accessory after the fact to Murder**. From the above sentiments, then it is my firm observation as said above that their case be determine jointly.

However, before I proceed with determination of their case, I have made a brief analysis and observation in respect of their case; particularly to the third count which is charged in their favour. For ease of reference let me quote the said count:

### **“3<sup>RD</sup> COUNT**

IN ALTERNATIVE TO 2<sup>ND</sup> COUNT

FOR 15<sup>TH</sup>, 16<sup>TH</sup>, 17<sup>TH</sup> & 18<sup>TH</sup> ACCUSED PERSONS

#### **STATEMENT OF THE OFFENCE**

**ACCESSORY AFTER THE FACT TO MURDER:** Contrary to section 213 of the Penal Code, Cap. 16 [R. E. 2002].

#### **PARTICULARS OF THE OFFENCE**

**EMMANUEL THOMAS SONDE, KELVIN ATHANAS SOKO, SAMIA SALEHE HUKAT and ALMAS SWED @ MALCOM,** on

diverse dates, between 2<sup>nd</sup> September, 2017 and 16<sup>th</sup> September, 2017, within the City and Region of Dar Es Salaam, **knowing** that **RAHMA ALMAS MWINYI @ BABY @ RAHMA ALMAS IDDI** has committed the offence of murder, jointly and together assisted the said **RAHMA ALMAS MWINYI @ BABY @ RAHMA ALMAS IDDI** to escape from punishment."

Furthermore, I would like to quote the section that defines the offence of **Accessory after the fact**. The said definition is found in **Section 387 of the Penal Code, Cap. 16 [R. E. 2019]**. It provides:

*"387.- (1) A person who receives or assists another **who is, to his knowledge, guilty of an offence**, in order to enable him to escape punishment, an accessory after the fact of the offence."*

From the wording of Section 387 of Cap. 16 above, of which defines the offence of **Accessory after the fact**, to my considered view, the key word which makes an offence is the **"knowledge"**. It is my further observation that in order for the person to be charged with an offence of **Accessory after the fact**, he must have knowledge that the person he is aiding has committed an offence and that he is assisting the said person from escaping the punishment. If this is the case then, I don't have any disagreement

with the wording of the 3<sup>rd</sup> count in favour of the above four accused persons. However, as I have said earlier, the key word in both the definition of the offence and the wording of the count is “**knowledge**” of the accused persons to the offence committed. If that is the case then, this court expected the prosecution to bring the evidence which will indicate that these accused persons had knowledge that those weapons which were carried by them were engaged in the offence, here being the Murder of Wayne Derek Lotter, and that they were assisting the 2<sup>nd</sup> accused in escaping punishment by hiding the same.

I don't want to take the prosecutors' position, but as far as we have reached at this important stage of examining whether there is a *prima facie* case to each of the accused, it is important to weigh the evidence against every accused to determine whether he has the case to answer or not.

Taking into consideration of what I have highlighted above, it is my firm concern and observation that the above four accused persons who have been charged with an offence of **Accessory After the Fact to Murder and other offences of Murder and Conspiracy to Murder**, the evidence before the court does not connect them to all the three counts alleged against them. Therefore, from the above, I find the **15<sup>th</sup> accused Emmanuel Thomas Sonde, 16<sup>th</sup> Accused Kelvin Athanas Soko, 17<sup>th</sup>**



**Accused Samia Salehe Hujat and 18<sup>th</sup> accused Almas Swedi @ Malcom with no case to answer.**

In conclusion, I would say that the only accused persons who have been found with no case to answer are the **1<sup>st</sup> accused KHALID ALMAS MWINYI @ BANYATA, 10<sup>th</sup> accused JOSEPH ALEXANDER LUKOA, 11<sup>th</sup> accused GAUDENCE JAMES MATEMU, 15<sup>th</sup> accused EMMANUEL THOMAS SONDE, 16<sup>th</sup> accused KELVIN ATHANAS SOKO, 17<sup>th</sup> accused SAMIA SALEHE HUJAT and 18<sup>th</sup> accused ALMAS SWEDI @ MALCOM.**

Respectively, I proceed to record **a finding of not guilty** in their favour under **Section 293 (1) of the Criminal Procedure Act, Cap. 20 [R. E. 2019]**. Consequently, I hereby order that **they be acquitted and released with immediate effect, unless they are otherwise lawfully held with some other charges.**

Ordered accordingly.



**L. E. MGONYA**

**JUDGE**

**20/09/2022**