

**THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)
AT LINDI
[ORIGINAL JURISDICTION]**

CRIMINAL SESSION CASE NO 43 OF 2020

**THE REPUBLIC.....PROSECUTOR
*VERSUS***

SAIDI JUMA AFIA @SHAROBARO.....1ST ACCUSED

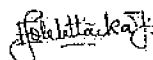
**HUSSEIN s/o ATHUMANI JUMA @ISHIRINI NA
SITA.....2nd ACCUSED**

JUDGEMENT

28/11/2022 & 30/11/2022

LALTAIKA, J.

SAIDI JUMA AFIA @SHAROBARO and **HUSSEIN s/o ATHUMANI JUMA @ISHIRINI NA SITA** (hereinafter referred to, interchangeably, as accused persons and the first and second accused respectively) are charged with murder contrary to sections 196 of the Penal Code [Cap 16] R.E 2002 (Now RE 2022). The particulars of the offence are that on the **19th day of**



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July 2018 at Mbwemkulu Kiegei Village within Nachingwea District, Lindi Region they murdered one **Mohamed Athumani** (the deceased).

The accused persons took plea on 15/3/2022. They denied committing the offence hence this trial. At the hearing, the Republic appeared through Mr. **Yahaya Gumbo**, learned State Attorney. This being a capital offence, the state fulfilled its obligation of providing legal assistance to the accused person through **Ms. Happyness Sabatho**, learned Advocate. I take this opportunity to register my sincere appreciation to the learned counsels for their dedication, commitment, and above all legal expertise that have contributed greatly to giving this judgement its current form and content.

Before unpacking the art and craft exhibited by these able counsels on behalf of their respective parties, I find it imperative to expound, in a simple and straightforward manner, the real story behind the matter at hand. The facts narrated bellow are as can be gleaned from the court file. Special care has been employed to maintain originality despite unavoidable pitfalls common in translation from Kiswahili to English.

On the 19th day of July 2018, the accused persons allegedly arrived at Pachayamindu area, Nakapanya Village Tunduru District in the Region of Ruvuma, Southern Tanzania from Namiungo village also in Tunduru District where they had been sojourning therein since the 14th of July 2018. Upon arrival at Pachayamindu, a growing business center owing to its proximity to the Mbwemkulu Gold Mines, the accused persons allegedly inquired for a motorcycle to take them to the Mining Area. Mbwemkulu (Mwera word



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translated "Great River" is one of the famous geographical features in Southern Tanzania.

The deceased, who was one of the bodaboda riders in that village, accepted the offer of 40,000/= to carry both accused persons as his pillion passengers in a style that has come to be known in many parts of Tanzania as "mshikaki" (carrying two or more pillion passengers in one motorcycle). Since it was already late in the evening around 18:00 hours, the accused persons and the deceased went to a nearby local hotel "mgahawa" where they had supper, allegedly paid by the accused persons. No doubt, this would, sadly, become the "last supper" to borrow a Biblical term where Jesus had his "last supper" before he was betrayed and later killed.

The deceased and his passengers took the familiar road from Pachayamindu *enroot* Mbwenkulu Mining Area. No sooner had they arrived at Kiegei Village in the Mbwenkulu Area than the accused persons allegedly attacked the deceased fatally. It was the prosecution story that the deceased was stabbed with a sharp object on his back and on his right eye, his right ear was completely removed, and his knees gravely injured. The accused persons allegedly disappeared with the deceased person's motorcycle with registration number **MC CXB make SANLG**. The accused persons allegedly left the deceased languishing in pain, bleeding profusely and without any hope for help.

On the 21st day of July 2018, during evening hours, the body of the deceased was found lying near Mbwenkulu River close to the Mining Site. The incident was reported to various police stations in Tanzania.



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On the 23rd day of July 2018, Police Officers at Mangaka Police Station located in Nanyumbu District, Mtwara Region were tipped that suspicious young people were chanced selling motorcycle parts. This led to the arrest of the accused persons and one other person Chaso Mohamed who allegedly hosted the accused persons in his place in Mangaka. The three were found with among other things an engine and chassis of a motorcycle whose number tallied with those of the motorcycle used by the deceased. Since the incident took place in Nachingwea District, the police at Mangaka handed over the case file to their counterpart in Nachingwea kickstarting further investigations.

This trial is the culmination of such investigation. It goes without saying that the onus is on the prosecution to prove to this court, beyond reasonable doubt, the allegation levelled upon the accused persons. The next paragraphs are centered on such an attempt.

PW1 in this case was Leonard Zablon Kachaba @Askofu, a 58-year-old Peasant and Artisanal Miner from Mbwemkulu Juu, Kiegeye Ward, Nachingwea District. PW1 testified that he was elected by his fellow miners, about two hundred of them, to be their secretary from 2014 to 2020. His role as the Secretary, PW1 stated, were to ensure security of the people and maintain peace and order in the mining site.

It was PW1's testimony further that on 21/7/2018 around 5:00 PM while at his workstation in Mbwemkulu Juu, he received information from two young people George and Hassan Kalowale that they had seen a body of the person believed to have been killed. PW1 shared the information with


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some of his members and the community at large some of whom walked with him to the scene of crime. Upon arrival, PW1 recalled, he saw a helmet of a motorbike, a Taqiyah, (barakashia) and a knife.

PW1 testified further that moving further following blood dropping that had left marks on the ground along the *Korongo la Mbwewe* they found the body of the deceased. It was a body of a male person, recalled PW1 adding that the body was badly damaged as the right eye was pierced, the right ear was cut off and the legs were cut by a sharp object.

It was PW1's testimony that he advised his people to take precautions by lighting a bonfire to keep the animals out. He then left the scene of crime to **Matandani** (this means a camp for artisanal miners) where he wrote a letter to the Leadership of the neighbouring camp to inform them of the incident. Thereafter, recalled PW1, he went to Kilimarondo Police Station to report the incident arriving at 10:00 PM he managed to meet the Officer in Command (OC-CID) with whom he shared the information.

It was PW1's testimony further that upon arrival of the police and relatives of the deceased in the scene of crime on 22/7/2018, the deceased was identified as Mr. **Mohamed Athumani Mpeile**. It became clear, recalled PW1, that the **deceased was a bodaboda rider at Pachayamindu area.**

On cross examination, PW1 testified that the place where the body of the deceased was found was a wilderness full of wildlife such as leopards, hyenas, *ngolombwes* (antelopes) and *mbalapis* whom he described as a gentle animal that feeds on grass. On further cross examination, PW1 denied



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ever seeing predator birds or birds that eat carcasses in the area which was about 6 hours ride from Pachayamindu by a motorcycle. On re-examination, PW1 sternly maintained that he tried to ensure that dangerous wildlife do not come to destroy the body of the deceased; and that he was afraid mostly of hyenas and leopards.

PW2 was Yassini Iddi Kamtande, a 25-year-old peasant and resident of Mtonya Village, Tunduru District Ruvuma. PW2 testified that he was a paternal uncle "Baba Mdogo" to the deceased and that on 22/7/2018 upon receiving information (that a body of a person had been found in Mbwenkulu) from Rashidi Chinyanganya he rushed back home where they sat as a family to discuss about the information. The family was sad because, PW1 asserted, their **son Mohamed Athumani Iddi Kamtande** was missing for two days since he left with pillion passengers to Mbwenkulu.

It was PW2's testimony further that the family meeting resolved that goes to the scene of crime accompanied by Abdu Hassan, another relative using a motorbike belonging to Amnadi Manoti yet another relative of the deceased (a maternal uncle "mjomba").

Upon arrival at the scene of crime, PW2 further testified, they met the leaders of the area who told them that they could not do anything to the body until the police and the doctor came to inspect the body. In that area, recalled PW2, they found the body of the deceased with wounds in different parts of the body and the same was not covered. PW2 testified that the deceased had the same clothes he had on when he left namely black trousers and a white jacket. PW2 recalled that when the police arrived, they took


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some measurements and allowed the relatives to take back the body of the deceased for burial arrangements.

On cross examination, PW2 looked rather perplexed when his age was questioned. He admitted that he was not sure of his age because his parents were illiterate. He also denied to having ever made a statement to the police. On re-examination, PW2 testified that although the scene of crime was a forest, they met people guarding the body of the deceased.

PW3 was Dr. Mathayo Laurence Mnelamwana, a medical doctor with Nachingwea District Hospital and who has been in the medical profession since 1988. It was Dr. Mnelamwana's testimony that on 22/7/2018 he was assigned by the Medical Officer in charge to accompany police officers Komba and Boaz to the scene of crime to conduct autopsy.

It was Dr. Mnelamwana's testimony that, on conducting physical examination, the body of the deceased was that of a male person. The right ear was cut off, the right eye was pierced stated Dr. Mnelamwana. Describing the wound with more details, PW3 testified that the stabbing on the right side the back of the chest was 8cm deep the cut wound on the right knee was 5cm wide and 3cm deep. It was PW3's testimony that the **cause of death was severe bleeding** adding that after the examination, he wrote a report and handed it over to the investigating officer.

On cross examination, PW3 testified that it was a legal requirement that he produced a report every time he conducted a postmortem examination even though he did not have a copy of the report with him in court. PW3 insisted that he was not trying to hide the report to tell lies. In



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re-examination, PW3 emphasized that in the instant case, the severe bleeding was caused by the sharp cuttings.

PW4 was F9012 DC Deusdedith Bartolomeo Ngobese a Police Officer at Mangaka Police Station in Nanyumbu District Mtwara Region. It was PW4's testimony that on 24/7/2018 around 9:00 in the morning hours, he received a phone call from a **concerned citizen** "raia mwema" named **Mohamed Jafari Issa** that three young men were seen carrying some items including a motorcycle chassis, exhaust, and some other parts of the motorcycle including a tank and a seat and that he (Mr. Issa) got suspicious because in three days before, one of the young men, who was a local of Mangaka, **Chaso Mohamed @Jibaba** was seen in a company of the two other young people who were new in Mangaka.

PW4 testified further that according to his informer, the three young men were previously seen riding a motorcycle make SUN LG without registration number. As an investigator, PW4 recalled, he shared the tip with **the OC-CID ASP Msonda** by then and the latter instructed PW4 and his fellow police officer G 3409 DC Mfungo to proceed with the assignment.

With the aid of one E2227 Corporal Matiku, PW4 testified, he managed to arrest three suspects in a public place surrounded with an angry mob. These were 1. Chaso Mohamed @Jibaba 2. Saidi Juma @Sharobaro and 3. Hussein Athumani @Ishirini na Sita. PW4 testified that the items he apprehended the suspects with included a chassis, exhaust, motorcycle tank red in color, two shock abs, footrest mudguard and a sprocket with its chain to mention but a few.


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PW4 prayed to tender a certificate of seizure purported to have been signed by the accused persons but the learned counsel for the accused Ms. Sabatho strongly objected. After a protracted legal exchange, the objection was sustained as the accused persons were arrested in a public place and were not searched as such. PW4, however, successfully identified all the impounded parts of the motorcycle and upon his prayer for admission, they **were collectively admitted and marked as Exhibit P1**

It was PW4's testimony further that upon arrival at Mangaka Police Station, he opened a police case file for three suspects namely Chaso Mohamed @Jibaba, Saidi Juma Afia @Sharobaro and Hussein Athumani Juma @Ishirini na Sita. Whereas @Jibaba was a local of Mangaka, PW4 explained, the other two were strangers hosted by Chaso. It was PW4's submission further that since they (the police at Mangaka) knew Chaso, they simply asked him about the motorcycle, and he explained that it belonged to the other two and he was set free. Having successfully identified the accused persons he had arrested in 2018, PW4 went on to testify that he then interrogated the accused person's on how they came about the motorcycle.

The first accused person @Sharobaro, testified PW4, claimed that he was given the motorcycle by his grandfather who lives in Namiungo, Tunduru. Asked on the whereabouts of other parts of the motorcycle, PW4 narrated, the first accused said he had sold one tyre, but the rest of the parts were with CHASO. The second accused person on the other hand, PW4 narrated, decided to tell him the truth. He said he believed PW4 was their


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brother, so he opened. He declared that they took the motorcycle from a person they killed. On hearing that, PW4 stated, he thought it was a much serious crime than he had anticipated.

The second accused went on to explain to PW4 that they killed a bodaboda man "kuna bodaboda tumemuua". They hired him from Pachayamindu area to take them to Mbwenkulu in the mines and the bodaboda man took them both onboard "*alitubeba mshikaki*". Arriving at a place in Nachingwea district where there was a mountain and a valley full of sand, the second accused allegedly told PW4, the bodaboda man requested them to help him push the bodaboda. The first accused quickly requested to go for a short call but ended up signaling to the second accused to grab the bodaboda rider. The second accused agreed. He held together the hands of the deceased while the first accused took the helmet and started hitting the accused with the helmet on the head. He (first accused) also took a knife, allegedly narrated the second accused, with which he started attacking the deceased until he became weak and fall.

Recalling events and figures as accurately as if they happened a day before, PW4 went on to testify that no sooner had he finalized exchanges with the accused persons than news came out that there was a bodaboda rider's body that had been found in the Mbwenkulu River area. A murder case file was opened in Nachingwea Police with **IR/885/2018**.

On the next day 25/7/2018, PW4 narrated, a relative of the deceased called **RASHIDI AHMAD CHINYANGANYA** went to Mangaka police station accompanied by some bodaboda riders from Nakapanya. They found



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him in the police station and after exchanging greetings, Mr. Rashidi Ahmad Chinyanganya produced the registration card of the motorcycle. Upon comparing the number of the chassis and the engine recorded on the card with those impounded from the accused persons, PW4 stated, they matched. Upon scrutinizing the card, PW4 went on narrating, it still carried the name and address of the company that sold the motorcycle suggesting that the accused person was in the process of completing registration formalities, said PW4 looking deeply speculative.

Nevertheless, the Certificate of Registration No T657CXB was admitted as part of the evidence of these proceedings **and marked as Exhibit P2.** **PW4** emphatically testified that on 26/7/2018 around 14:00 HRS, the OC-CID of Nachingwea and his team arrived in Mangaka Police Station in Nanyumbu District whereupon he handed over **all the exhibits as well as three suspects to DC Boaz E8581 of Nachingwea District.** He emphasized further that the handover was in writing through an official letter.

On cross examination, the learned counsel for the accused persons seemed like she was having a feast day on PW4's testimony during examination in chief a day before. PW4 admitted that he had impounded parts of the motorcycle, not a motorcycle and that some of the parts were common for all other motorcycles out there.


Asked whether the name of the deceased appeared on the registration card, PW4 claimed he had told the court that the deceased did not transfer ownership of the card. It was not immediately clear what he meant but upon


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further cross examination PW4 stated that the registration card bore the name of the company and **WU ZHOU Investment Company Ltd of Post Address 77128 Dar es Salaam**. PW4 pointed out that as a police officer, he had the authority to produce the card as an exhibit in court because he is the one who arrested the accused persons, impounded the motorcycle parts, and received the registration card from relatives of the deceased person. Cross examined on the purported confession by the first accused person, PW4 quickly pointed out that he had no documentary proof as he interrogated them orally (*niliwahoji kwa mdomo*).

PW5 was E284 Seargent Peter Magwaza, retired Police Officer currently living in Wassa Village, Msia Ward, Mbozi District in Mbeya. It was PW5's evidence that on 24/7/2018 he was ordered his supervisor who had been tipped of a crime happenstance to look for another officer to go with to Mchangani Street in Mangaka Village to impound suspected parts of a stolen motorcycle. PW5 went on to testify that he took about five police officers with him along with the three suspects hitherto arrested and one "raia" a civilian.

Upon arrival, PW5 stated, he tried to get a member of the local leadership to witness the search, but he could not. As an alternative he asked a neighbour by the name **Mwajuma Douglas** to take the position of the local leader. The concerned citizen called **Mohamed Jafari Issa** who had come with the police joined the list of independent witness along with one of the suspects **Chaso Mohamed who had** claimed that he was the



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caretaker of the house. PW5 emphasized that by the time the search was conducted, the premise was considered the house of Chaso Mohamed.

It was PW5's testimony further that following the search, they found two bags hidden in one of the rooms. They listed down all the items impounded in a research warrant including 1. engine with number SL157FMI14911866, 1 rim complete with the tire, big lamp and its dashboard, air cleaner, 2 indicators. The two independent witnesses Mwajuma Douglas and Mohamed Jafari Issa and the special owner of the house Chaso Mohamed signed the search order, and he too signed it, recalled PW5.

PW5 prayed to tender the purported "order" which doubled as a certificate of seizure and a search warrant but the same was objected by counsel for the accused because it was made under **the Police Force Ordinance Cap 55 of 1952** as amended by section 307(c) Of the CPA No 9 of 1985. This court sustained the objection because the law cited rung no bell on any part of the statutes of this country. A repealed law was as good as a nonexistent law. Nevertheless, the witness managed to identify the parts of the motorcycle itemized and the same admitted **and collectively marked as exhibit P3.**

On Cross-examination, PW5 stated that the items he had tendered such as battery, indicators etc. could be found on sale by ordinary shops selling spare parts. He also conceded that Chaso was an important witness in this case as the items were impounded in his house. On re-examination, PW5 emphasized that the items he impounded were taken to Chaso's place


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by his two friends. He added that after impounding them he handed them over officially, using a special police document called OB.

PW6 was E8581 Sergeant Boaz Peter Minyenye, Police Officer from Nachingwea. It was PW's testimony that on 22/7/2018 he was ordered the OC-CID to join the team heading towards the scene of crime for a murder incident that occurred at Mbwemkulu. He was specifically tasked with preparing an investigation kit he described as a box with investigation tools such as envelopes for keeping exhibits, tape measures and gloves. Based on that information, PW4 recalled, they started off, but they had to pick up a medical doctor from Nachingwea District Hospital whose name was Dr. Mnelamwana. It was PW6's evidence that upon arrival at the scene of crime, he was tasked to draw a sketch map of the scene of crime which he did.

Skillfully describing the sketch map, PW6 testified that he indicated marks (legend) representing the location of the river, deceased body, and the helmet. The Sketch map of the scene of crime dated 21/07/2018 was admitted and **marked as Exhibit P4.**

PW7 was Mohamed Jafari Issa, a-46-year-old peasant and resident of Mchangani Street, Mangaka Township, Nanyumbu District. He testified that on 23/7/2016 at around 23:00 hours his wife started groaning in a dream. She screamed. PW7 waked her up and asked what the matter was. She responded that she had seen an animal in a dream. They went back to sleep but PW7 also sensed something in his sleep. Upon waking up, PW7 recalled, he realized that a thief had broken into their room and was trying to steal a mobile phone. The thief run away with one phone and


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dropped another that belonged to his wife. As their neighbours went to assist them, recalled PW7, they could not show them the thief. The neighbours, allegedly asked PW7's wife if she knew the to which she replied that she did not but there were new guys around whom they suspected.

PW7 went on to testify that he too thought the guys looked suspicious because they would mostly stay indoors and only occasionally seen around. PW7 therefore, reported to the local leader who advised him to report the matter to the Police Station. PW7 emphasized that he told the police that someone had stolen his phone and that there were people he suspected due to their suspicious environment. He informed the police further that there was a motorcycle that they took inside but since then they did not bring it out. The police told him that they had heard the complaint and tasked him to go back and ascertain their presence and call back.

On that day 24/7/2018, PW7 recalled, he observed the suspicious men more earnestly because he had reported them to the police and knew that if he did not gather enough information, he would be at fault for sharing false information with the police. Therefore, he became a temporary detective.

In his temporary, **self-appointed police detective portfolio**, PW7 recalled, he went to the accuse person's place, greeted them and he saw that they had packed up something in the bags and knew it was a *farasi* (another name for motorbike.)

It was PW7's testimony that he met three people, all men and knew one by name. The other two were new in Mangaka but he could tell their




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faces. PW7 then went back to his home place and called the police officer who had given him a mobile phone number. PW7 informed him that the motorbike he had reported about earlier had been disassembled and parts put in a bag. The policeman tasked him to make more follow-up and inform them on any new developments. PW7 testified further that he saw the three young men taking the road to MASWERA a nearby village. He informed the police officer who trekked towards them and successfully arrested them. PW7 identified the accused and the parts of the motorcycle they were arrested with. On cross examination, PW7 could not explain why he was specifically suspicious of the two "new young men" while Mangaka was a place that received many visitors.

PW8 was Mwajuma Doglas, a 45-year old woman from Mchangani Street, Mangaka. PW8's testimony was that on 24/7/2018 at around noon, she was at her home place peeling off peas. A police van arrived. The police officers asked her to accompany them to a neighbouring house to witness searching on behalf of the Mtaa leaders. PW8 mentioned that her neighbour whose house she went to witness the search was Bahati Mpungula (Mama Ernest) and that the distance from her house to her neighbour's was about 10 meters.

Upon arrival, PW8 recalled, they met three young people, and the police asked her if she knew any of them to which she responded that she only new one (she pronounced the name slightly differently CHAUSO) emphasizing that she did not know the other two. The police asked her to get inside the house and witness what they would come up with and she



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saw them impounding motorcycle parts in a room inside a *kiroba*. PW8 successfully identified the exhibit and the accused persons.

PW9 Rashidi Ahamad Chinyanganya a 30-year-old artisanal miner, resident of Pachayamindu area in Mtonya Village, Tunduru District in Ruvuma. PW9 deposed that in the immediate past he was a bodaboda rider who owned two motorcycles but left that job after this happenstance.

PW9 testified that on 19/7/2018 around 5PM he was in his *kijiwe* (an informal name for a bodaboda stop) at Pachayamindu waiting for passengers when he saw a bodaboda coming from Namihungu carrying 2 passengers. The two passengers came directly to where he was seated and told him they needed transport to Mbwemkulu Mining cite. PW9 offered them the ride of one of his motorcycles for 40,000/-. He called the bodaboda young man working for him whose name was Hassan Ligambo. However, PW9 recalled, the would-be passengers he was negotiating with were tipped that the rider he wanted to assign the job to was not good enough. They declined the offer and went to another bodaboda rider called Hassan Magoha who told them that his motorcycle was out of order.


PW9 testified further that the two prospective passengers went back to him and inquired for a nearby place they could get food *mgahawa* for their supper. One bodaboda guy, the deceased, PW9 recalled, was on his way to play football. The two guys saw him and called out. They agreed on the price. The deceased came to him and inquired from if the price was proper. PW9 advised the deceased to accept the offer as he would have remained with a profit of 25,000 after deducting fuel for 15,000/-. However,


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PW9 recalled thoughtfully, he advised him not to return to Pachayamindu that day because it was late. The deceased left to his place to get ready. In the meantime, one of the passengers Saidi Juma Afia (first accused) went to tip PW9 with TZS 2,000 and apologized that he had made a deal with him (PW9) but ended up taking another bodaboda. PW9 allegedly took the money explaining that it was normal in *vijiweni* for someone to be given a thankyou tip for initiating a deal.

It was PW9's testimony that he knew the first accused before not only because he saw him a few times in the mines but also because they once lived together at Namiungo Village in Tunduru, Nakapanya. PW9 testified confidently that Mzee Afia who is first accused's grandfather lives in Matekwe Village. He recalled that after supper, the accused persons gave the money to the deceased and he used a part of it to buy 6 liters of fuel and the trip to the mining area started on a Thursday quarter to six. PW9 testified further that he did not know the second accused person. Although it was the first time to see him, PW9 recalled that he was tall and wore a white *barakashea*.

Looking even more reflective but confident and consistent, PW9 testified that bodaboda riders would usually wait in the mining area for another passenger even if it meant staying overnight. However, on the next day 20/7/2018 the deceased was not back to Kijiweni. On Sunday 22/7/2018, PW9 recalled, they received a report that a body of a person was found at Mbwemkulu River, and it was believed to be that of a bodaboda rider. PW9 suspected that it could be his colleague who had not been seen for three

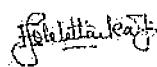

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days. He accompanied one **YASINI MPERIA** uncle to the deceased along with Yusufu Abdallah, Ally Ismail and Hassan Magoha to the scene of crime.

Upon arrival, PW9 recalled, they met the chairman of the miners famously known as Askofu. They asked Askofu to show them the body of the deceased. The askofu took them there as it was just by the road. Askofu explained that no one was allowed to touch the body as they had to wait for the police and a medical doctor. PW9 testified further that he identified the deceased as he personally could tell his face "*sura*" and the clothes he was on he confirmed that the deceased was Mohamed Athumani Mperia and the doctor told them that the death was caused by severe loss of blood.

It was PW9's testimony that upon arrival at the scene of crime, he found the *barakashea* that was won by one of the accused persons and a knife. Looking confident and paying attention to the finest details, PW9 testified that the last time he saw that *barakashia* was 19/7/2018 won by one of the two pillion passengers and he took it. PW9 suspected that the people who had hired the deceased are the ones who killed him hence he decided not to leave the cap behind.

PW9 explained that the deceased had left Pachayamindu riding a motorcycle make **SUNLG, red with registration T657CXD**. He testified further that the deceased was wearing Yanga jersey which was yellow and green and had a jacket on, but it was not found with the body in the scene of crime. They also did not find the motorcycle, PW9 stated adding that shortly thereafter they were allowed to take the body of the deceased with them for burial arrangements. He successfully identified the accused



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persons. The first accused whom he knew closely before and the second accused whom he saw last on Thursday, 19/7/2018 at 5PM leaving for Mbwemkulu Goldmines.

PW9 went on to testify that on 24/7/2018 they got the news that a motorcycle was impounded in Mangaka and were supposed to go and identify it. On the same day in the evening, PW9 recalled he went to the father of the deceased for the registration card and the father gave him the motorcycle registration card. On the next day 25/7/2018 PW9 accompanied by relatives of the deceased and other bodaboda riders, arrived at Mangaka Police Station. Upon examining the card, PW9 recalled, the police were convinced that the numbers matched with those of the impounded parts of the motorcycle, so he left the card with the police at Mangaka and went back to his home village. PW9 successfully identified the card by its number T657CXD. On cross examination, PW9 conceded that the deceased was called Mohamed Athumani Mpeiya, but the motorcycle registration card did not bear that name.

On the 18/11/2022 this court delivered a ruling in which it stated categorically that the accused persons had a case to answer, placing the accused persons on the doc to defend themselves with the aid of their counsel. The defense case constituted of two witnesses and no exhibit was produced as expounded in the next paragraphs.


DW1 was Saidi Juma Afia @Sharobaro, a twenty-two-year-old, resident of Mbagala, Temeke in the city of Dar es Salaam. DW1 deposed that he completed STD 7 at Mpakani Primary School in Dar es Salaam in 2015.


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After that, since he was not selected for secondary school education, he went ahead into entrepreneurship selling used clothes "mitumba". He started the mitumba business in 2016. It was DW1's testimony further that he used to travel to different places such as Dar, Morogoro, Mangaka, etc. to sell the mitumba as a Machinga (moving around carrying items for sale).

On 24/7/2018, DW1 recalled, when he was in Mangaka for his Mitumba Business, he was arrested by the police who suspected that he had stolen a mobile phone. He was taken to Mangaka Police Station, DW1 narrated, where he was locked up. A few hours later he was taken to the reception of the police where he met one woman who claimed that her phone had been stolen. The woman was asked if she knew DW1 to which she responded in the negative. DW1 was then taken back to the lockup till the 26th of July 2018 when he was joined with other people he did not know where they drove on a Police van to Nachingwea Police Station. Upon arrival at Nachingwea, DW1 recalled, he was locked up once again from 26/7/2018 to 1/8/2018 when he was taken to court and charged with the offence of murder. DW1 insisted that he did not know anything about the instant case of murder and never knew the person called Rashid Chinyanganya.

On cross examination, DW1 agreed that he had not told the court when exactly he arrived in Mangaka, and who he was staying with in Mangaka, or which guest house hosted him. On Re-examination, DW1 confirmed that he was arrested in Mangaka but insisted it was during his business of selling used clothes.


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DW2 was Hussein Athumani Juma, a 22-year-old, resident of Mabibo Area Ubungo, Dar es Salaam. DW2 deposed that he studied at Mianzini Primary School, Dar es Salaam from 2007 to 2014 thereafter he went into entrepreneurship meaning small businesses of selling used clothes and shoes "mitumba" a business he conducted from 2015 to 2018.

On 18/7/2018, DW2 stated, he was in Dar es Salaam, Kariakoo Market Area collecting clothes and shoes for his mitumba business and getting ready to travel to the south to sell them. By South, "Kusini" DW2 explained, he meant Mangaka in Nanyumbu District. He went on to testify that he left Dar on the same day 18/7/2018 arriving in Mangaka on the next day 19/7/2018. He proceeded with his business "kumwaga biashara" in a flea market from 19/07/2018 till the 23/7/2018. DW2 explained that he would take his commodities out of the flea market in the evening entrust them to the watchmen in the market for storage and in the morning he would decant "kumwaga" them back in the flea market.

On 24/7/2018 while leaving the guest house to his place of business, DW2 recalled, a police officer came and told him that he was needed in the police station. Asking the police officer what the matter was, he was told that everything would come to light in the police station. In the police station, DW2 testified, he was told that he was suspected of stealing a mobile phone whereupon a person came and was asked whether he knew DW2 to which that person replied to the negative but still he was locked up.


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DW2 went on to testify that on 26/7/2018 he was joined with other suspects and taken to Nachingwea Police Station till 29/7/2018 when he was arraigned in court charged with murder.

On cross examination, DW2 confirmed that he was lodged at Meshack Guest House from 19 to 24th July but had not mentioned, during examination in chief, the exact location of the Guest House nor the number of the room he was staying. On further cross examination, DW1 confirmed that he had heard Rashidi (PW9) say the last time he saw him he (DW2) was wearing a *barakashea* and he had neither denied nor accepted the same. On re-examination, DW2 explained that he came to know Chaso at Nachingwea District Court insisting that he never knew him before.

Closure of the defense case was immediately followed by final submissions by learned counsels. Mr. Gumbo, on his part reiterated that the prosecution had discharged its duty of proving the offence beyond reasonable doubt even though the evidence adduced was by and large circumstantial. Ms. Sabatho, on the other hand took the opportunity to remind the court that in criminal trials, any doubt, however slight, should be resolved in favour of the accused.

Having dispassionately considered rival submissions and carefully examined the court records including exhibits tendered, I will divide my analysis into five parts namely the Offence, Witnesses, Evidence, law, and Opinion (verdict)

For a court of law to be satisfied that the offence of murder has been committed it must answer yes to all four (in that order) namely, 1. Whether



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death of a human being has occurred. 2. Whether the death was unnatural
3. Whether the death was caused by the accused 4. Whether the accused acted with malice aforethought.

In the matter, there is no question that a human being called Mohamed Athumani lost his life at Kiengei Village, Mbwenkulu on 18/7/2022. The evidence of PW1, PW2, PW3 and P9 to mention but a few, are crystal clear that the deceased was a natural person, a father, a son, and a friend to many.

The accused person met his death while working for his family. PW3 opined that the deceased died due to severe loss of blood. There was nobody who intended to kill the deceased. In other words, there is nothing to indicate that the accused persons targeted the deceased. When they arrived at Pachayamindu they just wanted any motorcycle. In fact, they went through two different choices before the deceased arrived on his way to play football. The main target of the accused persons, as will be explained, was to steal a motorcycle. This led to the death of the deceased.

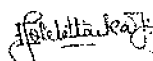
This brings me to the second part of my analysis namely witnesses. It cannot be overemphasized that witnesses are a very important part of any criminal trial. The number of witnesses usually does not matter much. What matters is the quality of their evidence. In the matter at hand, the 9 witnesses paraded by the prosecution can be divided into 3 parts. (a) Witnesses involved in the arresting, impounding and investigation (b) Witnesses involved in the identification of both the accused persons and the deceased (c) Witness responsible for explanation of the scientific cause of


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death of the deceased. It is my observation that all PWs were credible. There were occasional inconsistencies due to varying intelligence and power of memory. This is understandable due to the fact that the incident had taken place five years before. It is also clear from the proceedings that none of the prosecution witnesses was an eyewitness. The deceased's body was found in the wilderness several days after the alleged killing.

There were two defence witnesses DW1 and DW2. It was obvious from observing their demeanors that they were young, naïve and repentant. Apparently, the duo benefited from unquestionable expertise of the learned defence counsel paid by the state for them. Nevertheless, bullet like questions fired by learned State Attorney Mr. Gumbo during cross-examination made the work of the learned counsel for defence quite cumbersome.

This brings me to an important part of my analysis namely evidence. I intend to spend quite some time here since, as it is often said, evidence is the language of courts. It is obvious from the records that this case falls short of the evidentiary standards required of a typical murder case. Many, if not most of the evidence tendered point (unquestionably I would say) without leaving any iota of doubt of the involvement of the accused persons in the stealing, dismantling and selling of spare parts of the motorcycle that allegedly belonged to the deceased. I cannot help but commend the prosecution team for their paratroopers' approach to assist this court in (as will be clearer later) connecting the dots.

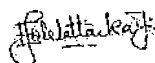


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Still on evidence, I observed the demeanor of PW3 (Dr. Mathayo Laurence Mnelamwana) a highly knowledgeable, eloquent, and confidently professional medic who had conducted the autopsy. PW3 could describe the cut wounds as if the incident happened only a day before. Unfortunately to him, however, he had nothing tangible to show. The prosecution czar, Mr. Gumbo, for reasons he chose not to disclose, chose to advise his witness not to produce the postmortem report. A soul touching evidence came from the oral testimony of PW9 Rashidi Ahamad Chinyanganya, the 30-year-old artisanal miner, resident of Pachayamindu area in Mtonya who had allegedly negotiated the deal with the accused persons which explanation deal botched. He told the court that had the deal worked in his favour, he would have been dead. He decided to sell his two motorcycles soon after the incident.

Oral evidence of DW1 and DW2 was to the effect that they were arrested while conducting their "machinga" business. The only they gave for being in the Southern part of Tanzania on the material time was their attempt to look for lucrative markets for items of their shops on the shoulders.

It can be concluded preliminarily that, in spite of the impressive prosecution evidence linking the accused with the motorcycle, I see absolutely no evidence sufficient to ground conviction for murder. My next question then is, are the accused person guilty of the lesser offence of manslaughter or are they entitled to outright acquittal. This is the crux of my analysis in the next paragraphs.



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It is noteworthy at the outset that the prosecution evidence in this case is largely circumstantial. The principle governing circumstantial evidence is that it should directly point to the accused as the only person who has committed the offence.

It is my finding that the prosecution has proved beyond reasonable doubt that the accused persons were pillion passengers with the deceased motorcycle enroute to Mbwenkulu Goldmines on the material day. They were properly identified and even tried to strike a deal with PW9 which deal botched in the last minute. This means they were the last persons to be seen with the accused alive. The evidence of PW 4, PW5, PW6, PW7, PW8 and PW9 irresistibly connect the accused persons with parts of the motorcycle allegedly used by the deceased before he died. Admittedly, these are all "indirect" or as commonly referred to "circumstantial" evidence. In the next paragraphs I am going to critically find out whether, having ruled out any possibility for murder, the same can sustain conviction for manslaughter. A legitimate question before accepting that advice would probably be what is the difference between the two types of evidence? Dean John Henry Wigmore in **EVIDENCE IN TRIALS AT COMMON LAW** (1983) § 25, at 954 provides the following distinction.

*"When we speak of a fact as established by direct or positive evidence, we mean that it has been testified to by witnesses as having come under the cognizance of their senses, and of the truth of which there seems to be no reasonable doubt or question; and when we speak of a fact as established by **fairly and reasonably to be inferred from other facts proved in the case.**" (Emphasis added)*



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Dealing in circumstantial evidence is sometimes unavoidable. It is an exercise in critical thinking that judges and magistrates fairly and reasonably separate the wheat from the chaff. As far back as 1981, the Supreme Court stated: "Perfect proof is seldom to be acquired in this imperfect world and absolute certainty is a fallacy." (**Rama Nand & Others vs State of Himachal Pradesh** 1981 AIR 738, 1981 SCR (2) 444.) I am mindful of the geography of the area described by the prosecution.

It is illogical to expect eyewitnesses in the Mbwemkulu jungle towards Kiegei Goldmines. Circumstantial evidence is the way to go here. One cannot but admire the wisdom of the Court of Appeal on Tanzania in **Mathias Bundala v. Republic Crim App 64 of 2004 at page 15** as quoted by Mr. Gumbo in his final submission thus "... if everything has to be eye witnessed then many homicides would remain unsolved...they can hardly be witnessed by an eyewitness."

Encouragingly, however, studies show that ***Ceteris Paribus*** convictions based on circumstantial evidence are more accurate. Binyamin Blum "Evidence Law: Convictions Based on Circumstantial Evidence" " The Judges' Book: Vol. 3, Article 11.

Available at: <https://repository.uchastings.edu/judgesbook/vol3/iss1/11> provides as follows:

"Indeed, there is no a priori reason to classify circumstantial evidence as probatively inferior, or to suspect that it leads to less accurate outcomes than direct evidence. On the contrary, some studies have demonstrated that certain kinds of circumstantial evidence are more accurate—and therefore lead to



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fewer wrongful convictions—than direct evidence. For instance, one study found that 68% of known wrongful convictions stemmed from direct evidence, whereas only 9% relied on circumstantial evidence.”

In our jurisdiction, the Court of Appeal of Tanzania has set parameters upon which circumstantial evidence may be applied. In the case of **Seif Seleman v. Republic**, Criminal Appeal No. 130 of 2005 (unreported) the Apex Court stated:

"Where evidence against an accused person is wholly circumstantial, the facts from which an inference adverse to the accused is sought to be drawn must be clearly connected with the facts from which the inference is to be inferred. In other words, the inference must irresistibly lead to the guilt of an accused person."

I have subjected the entire evidence to strict scrutiny. As circumstantial as it is, it irresistibly points to the accused persons as responsible for the series of events leading to the death of the deceased. As alluded to above, the prosecution chose not to produce the Postmortem Examination Report. That notwithstanding, the oral evidence of PW3 provides hints on the condition of the deceased. It does not take much power of imagination to picture that the deceased suffered painfully in the hands his tormentors.

We can safely assume that the death of the deceased would not have occurred had he not taken the accused persons to the Mbwemkulu Goldmines on 18/7/2018. That is what the circumstances point to. Nevertheless, I am alive to the Court of Appeal of Tanzania's wisdom-laden



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decision in **Zakaria Jackson Magayo v. The Republic** Criminal Appeal No 411 of 2018 that circumstantial evidence should not be interpreted to work only for the prosecution. In the exact words of the Apex Court:

"The learned trial judge did not address his mind to the two versions of the evidence and make an objective evaluation of them before coming to the conclusion...With respect, the trial court did not apply the same standards in accepting the evidence of PW1 as against DW2 on the same principle..."

Applying the principle governing circumstantial evidence to the defence side removes any doubt that the killing of the accused person was not premeditated. It is doubtful, in the first place, whether the accused person wanted to kill anyone in particular as that would have operated in favour of the prosecution through the doctrine of transferred malice. The accused persons wanted, and it is obvious that they intended to, steal a motorcycle from anyone. This court (Laltaika, J.) in **MICHAEL LANDELIN JOHN v. R.** Criminal Appeal No 274 Of 2020 HCT, Dar es Salaam (unreported) had the following to say on covetousness of some young people in the country to own motorcycles and consequential criminality.

"Many young people dream of owning a Bodaboda...When this desire conceives it gives birth to criminality when criminality is proven it leads to jail terms...Indeed, as the desire intensifies, a much smaller percentage of young people, I should suppose, use illegal, uncouth and outright inhuman methods to achieve their dream of owning a bodaboda. In line with the saying of the wise that "crime does not pay" these methods, including armed



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*robbery, bring such young people in conflict with the law. **Some of them end up spending a large part of their youthful years in jail.**" (Emphasis added)*

I have addressed my mind to both versions of the story in line with application of circumstantial evidence in our country. Since no one else has been found with the parts of the motorcycle, no one else was seen taking a ride at Pachayamindu and above all no one else was last seen with the deceased alive except the accused persons, I am fortified that the evidence is sufficient to warrant conviction.

It is worth emphasizing that even in the absence of direct evidence on the actual killing (actus reus) and completely absent evidence on intention (mens rea) whether by direct or indirect evidence, the prosecution has, through skillful application of circumstantial evidence, managed to connect the dots between the offence committed and the accused persons leaving no doubt whatsoever. It would be absurd for this court to invent any other technicalities that would defeat the ends of justice.

In the upshot, since except for malice aforethought, all other elements of the offence of murder have been successfully inferred, the position of the law as per section 300(1) and (2) of the Penal Code [Cap 16 RE 2022] is conviction on a minor offence. In the matter at hand, the minor offence to murder is Manslaughter.

Consequently, I hereby convict the accused persons **SAIDI JUMA AFIA @SHAROBARO** and **HUSSEIN s/o ATHUMANI JUMA @ISHIRINI NA**



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SITA of **MANSLAUGHTER** contrary to section 195 and 198 of the Penal Code.

It is so ordered.





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30/11/2022



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**THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)**

**AT LINDI
[ORIGINAL JURISDICTION]**

CRIMINAL SESSION CASE NO 43 OF 2020

**THE REPUBLIC.....PROSECUTOR
*VERSUS***

SAIDI JUMA AFIA @SHAROBARO.....1ST ACCUSED

**HUSSEIN s/o ATHUMANI JUMA @ISHIRINI NA
SITA.....2nd ACCUSED**

RULING ON SENTENCE

30/11/2022

LALTAIKA, J.

The accused persons herein **SAIDI JUMA AFIA @SHAROBARO (1st accused)** and **HUSSEIN s/o ATHUMANI JUMA @ISHIRINI NA SITA (2nd accused)** hitherto charged with the offence of Murder contrary to section 96 and 97 of the Penal Code Cap 16 RE 2002 (now RE 2022) has on this 27th day of February 2023 been found guilty and convicted for the lesser offence of Manslaughter.



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This court has, pursuant to section 300(1) and (2) of the Criminal Procedure Act Cap 20 R.E. 2019, made a finding that the prosecution failed to prove one element of the offence of murder namely malice aforethought. The court henceforth proceeded to convict the accused of the lesser offence of manslaughter contrary to Section 195 and 198 of the Penal Code hence this ruling on sentence.

No sooner had the court entered conviction than Mr. Godfrey Mramba, learned State Attorney and Ms. Happyness Sabatho, learned defence submitted on aggravating and mitigating factors respectively. The importance of such an exercise for sentencing purposes cannot be overemphasized. In **Bernard Kapojosye v. R.** Criminal Appeal No. 411 of 2013 (unreported) the Court of Appeal of Tanzania had this to say:

In sentencing, the court has to balance between aggravating factors, which tend towards increasing the sentence awardable, and mitigating factors, which tend towards exercising leniency. The sentencing court should also balance the particular circumstances of the accused person before it and the society in which the law operates."

It is noteworthy however that the convicts had not pleaded guilty guaranteeing the "discount" as per sentencing tradition in commonwealth jurisdictions. They pleaded not guilty during preliminary hearing held at Ruangwa on 15/3/2022 necessitating this full trial. However, in a very unusual way, upon being asked if they had anything to add to the mitigation submitted by their counsel, the duo opened up. They explained in detail what had happened and prayed earnestly for this court to show them mercy. What


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is the difference between mitigation based on plea of guilty before trial and mitigation based on conviction after a full trial? Professor Andrew Ashworth **Sentencing and Criminal Justice** (Cambridge University Press: 2005) p. 152 offers some hints in relation to an ongoing debate among scholars in England.

"There has been some debate in England about the implication of sentencing "discount" for pleading guilty: clearly, a person who pleads not guilty and is convicted cannot receive this discount, and so the sentence will be higher than for someone who pleaded guilty to a similar offence. But does that mean the pleading not guilty and putting the prosecution to proof is an aggravating factor? Pleading not guilty certainly has a potential cost that pleading guilty does not have; but in principle the person who is convicted after a not guilty plea should receive the normal sentence, not aggravated sentence."

I have taken into consideration both aggravating and mitigating factors by the learned State Attorney and the learned defense counsel respectively. While the mandatory sentence for murder is death, the maximum sentence for manslaughter is life imprisonment. The court may, however, reduce the sentence depending on peculiar circumstances of a given case. Guided by the Court of Appeal practice of substituting a death sentence with an average of fifteen (15) years imprisonment term See **Moses Mungasian Laizer @Chichi** [1994] T.L.R. 223 and **Richard Venance Tarimo v. Republic** [1993] T.L.R.142 among other authorities, I take the liberty to reduce the


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four years already spent by the convicts in custody as prayed for by their counsel.

All said and done, **SAIDI JUMA AFIA @SHAROBARO and HUSSEIN s/o ATHUMANI JUMA @ISHIRINI NA SITA** are hereby sentenced to serve a term of Ten (10) years imprisonment each.

It is so ordered.



A handwritten signature in blue ink, appearing to read "E.I. Laltaika".

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30/11/2022

Court:

Judgement delivered by my own hands in the open court in the presence of Mr. Godfrey Mramba, State Attorney, Ms. Happy Sabatho, Advocate, counsel for the convicts and the convicts.



A handwritten signature in blue ink, appearing to read "E.I. Laltaika".

E.I. LALTAIKA
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Court

The right to appeal to the Court of Appeal of Tanzania fully explained.



A handwritten signature in blue ink, appearing to read "E.I. Laltaika".

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30/11/2022

A handwritten signature in blue ink, appearing to read "E.I. Laltaika".

E.I. LALTAIKA
JUDGE