

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT KILOMBERO/IFAKARA

ORIGINAL JURISDICTION

CRIMINAL SESSIONS CASE NO. 111 OF 2022

REPUBLIC

VERSUS

KAPONDA MAKUTU 1ST ACCUSED

ELIA JOHN MAZENGO 2ND ACCUSED

JUDGEMENT

Hearing date on: 16/02/2023

Judgement date on: 28/02/2023

NGWEMBE, J.

The accused persons stand charged for the offence of murder contrary to sections 196 and 197 of the **Penal Code [Chapter 16 Revised Edition 2019]**. According to the particulars of the charge sheet, the two accused persons are alleged to have murdered one JOHN NYERERE on the 24th day of July 2021 at Mbuyuni Suburb in Tindiga village within Kilosa District in Morogoro region.

The information for the above charge was read over to both accused in Swahili, the language they well understand and they entered plea of not guilty. In turn the Republic lead by Karistus Kapinga and Emmanuel Kahigi, learned State Attorneys lined up three (3) prosecution witnesses namely; Dasu Doto Busalike, Chris Doto Busalike and Erick Kimbe with one exhibit that is, Post mortem report. When the accused

were invited for defence, as were rightly defended by the learned defence counsel Frank Malebeto chose to adduce their evidences as defence witnesses, with no exhibits.

Before going in details of the witnesses' testimonies, I feel owed to introduce a brief overview of the incident that made the present case. The accused persons Kaponda Makutu and Elia John are from the Maasai pastoralist community resident in Kilosa district. In the same district but different villages there was another pastoralist community of Sukuma tribe to which the deceased, PW1 and PW2 belong. It seems that there happened an incident of cattle theft also associated to scramble for pastures allegedly committed by some Maasai men to the Sukuma herdsman. It is said that the deceased along with other Sukuma men went to the scene and successfully rescued some calves stolen by Maasai men back to their camp.


A short moment thereafter, emerged a group of Maasai men confronting the Sukuma Camp. After exchange of words, a fight erupted. Both sides engaged in a serious combat, the deceased, PW1 and PW2 were amongst. Out of that commotion and fighting, the deceased John Nyerere lost his life. Other persons from both sides were wounded, some badly. It is unknown how police investigation was conducted, but eventually the prosecution brought the two accused persons to this house of justice facing charge of murder of the deceased.

Having that brief in mind, now is a brief summary of the evidence adduced by both parties in this court. Mr. Dasu Doto Busalike, testified as PW1, that on 24/07/2021 around 17:00 hours, when he was at the camp with Chris Doto Kusalike (PW2), were informed by one Maina that

their calves have been stolen by a group of Maasai young men. They went with Chris along with the deceased John Nyerere to the scene and saw the said Maasai with those calves, but upon those Maasai seeing them coming, they ran away leaving behind the stolen flock. They took it back to the camp. Immediately thereafter he saw a group of 20 or more Maasai men approaching their camp some of whom he identified as the two accused persons, Siringo, Payo and others. When he asked them what was the matter, they responded by a blow to his left eye. He fell down and lost memory. Chris responded and one of the Maasai threw a spear, but it strayed. PW1 stood up and ran away leaving Chris and the deceased in the fight. From where he was hiding, about 10 paces he witnessed the accused persons beating the deceased for about 5 minutes. The scene was a bare land for him to see clearly at around 17:00 hours. He recognised the two accused persons for he knew them for almost a year as fellow pastoralists and used to meet in grazing areas, he identified them both in the dock.

After sometime he came back to the camp and heard that John Nyerere was murdered by those Maasai. Along with others they reported the incident to the village leaders.

In cross examination he pointed out that Kaponda was responsible in killing the deceased John Nyerere. That he witnessed the killing when he was with Chris and one Sandu Dotto. Added that he also knew one Shaban Simanga who is not among the accused, to have been among the Maasai on the eventful date. Proceeded to answer the questions put forward to him that, he was confused and lost memory for about 4 minutes after being beaten on his left eye.



In re-examination, he stated briefly that, it is after he stood up when he saw those Maasai beating the deceased and he saw Kaponda throwing a club which hit the deceased making him fall down.

Chris Doto (PW2) in his testimony said, he was with PW1 when Maina came to inform them of the calves' stealing, together with the deceased and PW1 rescued those animals. Thereafter, he saw a group of Maasai coming to their camp after rescuing those calves. He affirms that PW1 was attacked by those Maasai and fell down, but he went for help. Immediately, Kaponda attacked John Nyerere (now deceased) on the back of his head using a club. He mentioned those Maasai who attacked them as Elia, Payo and Kaponda and others who continued beating the deceased on various parts of his body. When John fell down, he sought to save him but failed. So he ran away and hid in the reed for about 20 minutes. The whole incident took about an hour from 17:00 to 18:00 hrs. The scene was a plain land and clear for him to see.

Added that Kaponda is known to him as they stay in one area. When he came out from hiding, he found John Nyerere is already dead. He reported the incidence to the elder brothers and then to the village leaders who notified police. That he was able to identify the accused persons for he was about 10 paces from the scene of crime and he identified them in the court room.

In cross examination, he stated *inter alia* that, the deceased John Nyerere was murdered by Maasai about 20 of them, all of whom did beat the deceased. He admitted that at the Police station he stated that the one who beat the deceased to death was Shaban Simanga, that such statement he recorded to police was wrong, the truth is that Kaponda is the one who killed the deceased and not Shaban. Although

Elia participated in beating the deceased but the one who killed him was Kaponda. Proceeded and admitted that he fully participated in the fight, where he managed to assist Dasu and many others. Also, that when in the hiding place he did not see what was happening to the deceased. It is after the event he heard many Maasai were arrested. In re-examination he explained that when the deceased turned back in order to run, he was beaten on the back of his head by a club. That he saw the Maasai in attacking the deceased because he was facing them.

Erick Kimbe (PW3) is a Human Medical Doctor from Kilosa District Hospital, testified that he is the one who conducted an autopsy of the deceased body on 25/07/2021 around afternoon. He stated that the body had a fresh wound on the head, chest and back. It was bleeding in the nose. He opined that; the cause of death was due to beating with a blunt object on the back of the deceased's head. He tendered the post mortem examination report, same was admitted as exhibit P1.

Having so testified, the prosecution case was closed, hence this court made a ruling on case to answer where the two accused persons were found to have a case to answer. Thus, invited the accused persons to defend against those accusations. The accused were the only defence witnesses and they had no exhibit to tender in court.


In their brief evidences, Kaponda Makutu (DW1) under oath stated that, he neither knew the deceased person nor did he participate in the crime scene. But on Monday 26/07/2021 while at home he received a phone call from Mataya Simanga who is a chief of Maasai Tribe, saying that while at Kilosa Police Station he was given 21 names of the persons required at the police station, so a public meeting was convened. At the rally, the chief read the names, including the first accused that, they

were required to report to Kilosa Police Station. They actually went there in the chief's vehicle. While at the Police station, their chief introduced the first accused to the OCCID. When he was asked on the event of murder at Tindiga, he responded that he had no knowledge of the incident and that he is living at Kiduhi, about 50 kilometers from Tindiga. However, he was arrested at that Police Station. Other Maasai were also arrested about 20 or 30 of them. Identification parade was conducted at the Police in noon hours, one Nine and Siringo were identified among the arrested, but DW1 was not identified. He stated that he does not know why the prosecution is disturbing him in court.

Further testified that, he knew Shabani as they live in the same village, in his opinion, it seems Shabani is the one who did beat the deceased. Prayed this court to find him innocent.

In cross examination, he stated that he is also a businessman buying goats and other cattle, the witnesses who identified him may have known him in the said business, but he did not know them prior to his arrest. Added that though he did not file notice of alibi, on the eventful date, but is true that he was at home with his fellows including Luka Mpaye and Rikalei Misay who were not in court.

DW2, Elia Jonas Mazengo said on 26/07/2021 he was at his home place at Kiduhi village, around 17:00 hrs while clearing his farm, he was called by Ngoyaki saying he should go and assist the police at Kilosa, where he went. Upon arrival he was asked about his domicile, which he stated and then was asked about the incident of murder of the deceased. He denied for he did not know anything. The police mentioned the names of Siringo, Chadi and others all of whom were stranger to him and his name was not in the list that police mentioned,



but he was kept in police custody for two months and a half. He saw Kaponda at the police and others who were also stranger to him. He insisted that, he is a stranger to the case because he did not know the deceased, even those who were mentioned as responsible for the killing. He knows nothing at all, prayed this court to acquit him.

In cross examination he maintained that he was at Kiduhi in his farm on 24/07/2021. While at police he was beaten yet he denied to know anything in respect of the death of the deceased. That done, advocate Frank prayed to close the defence case.

As the above, the prosecution attempts to convince this house of justice to find the accused persons guilty of the offence charged, while the defence case is firm to exonerate them from any liabilities for murder. Therefore, what stands before this court for decision is *whether the accused persons are guilty of the offence of murder.*

The offence for which the accused persons stand charged is created under section 196 of **the Penal Code**. Same provides: -

"Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder."

From the above provision, two major elements are important to constitute murder; *first:* causing death of another person in an unlawful act or omission, best known in Latin words *actua reus*, *second:* having malice aforethought also known as *mens rea*. As to what constitutes malice aforethought is sufficiently provided for under section 200 of the **Penal Code**, which provides thus: -

"Section 200. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;

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

Before the court of law, in establishing the ingredients above, the prosecutor must prove that the deceased in question is actually dead and suffered an unnatural death.

According to the surveyed evidence of both sides, it is clear that the late John Nyerere died an unnatural death. PW1 and PW2 testified to have seen the deceased before and after death there is no doubt that John Nyerere is dead. PW3 who examined the deceased body testified that the said John Nyerere's body was bleeding from the nose, with various bruises and wounds of different width, length and depth on

various parts of the body, but the worst was a deep wound of about 50 x 4 cm on the head leading to severe brain injury which resulted to death as per exhibit P1. It is also not disputed that the deceased died as a result of being hit several parts of his body in a fight which involved many people of the two communities, Maasai and Sukuma.

Therefore, in deciding guilt of the accused, two interdependent issues arise; *One* - whether the accused persons are the ones who killed the deceased. *Two* - if the first issue is answered in affirmative, the subsequent issue is whether the accused persons had malice aforethought in killing the deceased.

In resolving these issues, this court follows the trite law on burden and standard of proof in criminal trials, that the prosecutor bears the burden to prove guilt of the accused beyond reasonable doubt as provided for under section 3 (2)(a) of **The Evidence Act** along with **Makolobela Kulwa Makolobela and Eric Juma alias Tanganyika [2002] T.L.R 296** and **Akwino Malata Vs. R, Criminal Appeal No. 438 of 2019.**

Proof beyond reasonable doubt means to establish watertight evidence linking the accused with the offence he committed. It has been so held in many cases, including that of **Samson Matiga Vs. R, Criminal Appeal No. 205 of 2007** followed by the case of **Daimu Daimu Rashid @ Double D Vs. R, Criminal Appeal No.5 of 2018** where it was held: -

"A prosecution case, as the law provides, must be proved beyond reasonable doubt. What this means, to put it simply, is that the prosecution evidence must be so strong as to leave no doubt to the criminal liability of an accused person. Such



evidence must irresistibly point to the accused person, and not any other, as the one who committed the offence"

This being a murder case, the most serious offence which attracts the most severe punishment which under section 197 of **The Penal Code** is death. The mode of death is prescribed in section 26 of **The Penal Code**, that is death by hanging. Since such punishment is the most serious in our country, then proof of it must leave no reasonable doubt meaning the proof must be beyond reasonable doubt as our laws so require.

Central to the question of whether the accused persons are the ones who killed the deceased, is the issue of identification. This is because both accused persons not only deny to have taken part in the fight that culminated to the death of the deceased, but they claim on the fateful date they were in their village called Kiduhi about 50 Kilometers from the eventful village of Tindiga.

The rule as to proper identification is well established that, the court should not rely on the identification evidence unless it is satisfied not only that environments were friendly to the identifying witness, but also taking into account all other prevailing circumstances, that the possibilities of mistaken identity was eliminated. A comprehensive consideration of this principle was made in the case of **Anthony Kigodi Vs. R, Criminal Appeal No. 94 of 2005**, in which the Court of Appeal held *inter alia* that: -

"We are aware of the cardinal principle laid down by the erstwhile Court of Appeal of East Africa in Abdallah bin Wendo and Another vs. Rex (1953) EACA 116 and followed by this Court in the celebrated case of Waziri Amani vs. Republic



*(1980) T.L.R 250 regarding evidence of visual identification. The principle laid down in these cases is that **in a case involving evidence of visual identification, no Court should act on such evidence unless all the possibilities of mistaken identity are eliminated and that the Court is satisfied that the evidence before it is absolutely watertight ...***"

The above has also been followed in a good number of cases that came later, including the case of **Mafuru Manyama & Others Vs. R, (Criminal Appeal 256 of 2007) [2011] TZCA 129** and in another case of **Jaribu Abdallah Vs. R, Criminal Appeal No. 220 of 1994 CA (unreported)** which I find relevant to our case as was held: -

"In matters of identification, it is not enough merely to look at factors favouring accurate identification, equally important is the credibility of the witness. The conditions for identification might appear ideal but that is no guarantee against untruthful evidence. The ability of the witness to name the offender at the earliest possible moment is in our view reassuring..."

The rationale of having strict proper identification of the accused and the reliabilities of the witness testifying it, is to avoid possibilities of an innocent person being implicated and punished mistakenly, while leaving the true perpetrators at large.

In our case as the facts stand, death of the deceased happened in a commotion and fight among two groups of young persons involving more than 20 of them in one group and good number of persons in another group. The two prosecution witnesses were also partisan in the fight siding with the deceased. Witnesses also testified that such fight

involved throwing clubs. It seems the fight was so serious that some from both sides were wounded, in the course of fight one died at the scene, while the witnesses ran away to rescue their lives. In the case of **Republic Vs. Isaya Wendeline Amandus @ Milanzi and 2 others, Criminal Session Case No. 49 of 2016**, this Court sitting at Mtwara Registry, faced similar issue of proper identification in murder allegedly committed in the commotion and movement of the angry mob, the court addressed as follows: -

"In this case, the prosecution did not disclose any reason as to why they did not call, eye witnesses to testify in this court. More so, PW1 did not disclose how she singled out the three accused persons out of angry young men beating the deceased? What was so special to the three accused persons out of many angry people beating the deceased?"

I have made further reference to precedents in which identification under the like circumstance was discussed. The principles referred herein will stand as guidance in handling the issue of identification in the case at hand. In the case of **DPP Vs. Nyangeta Somba and 12 others [1993] T.L.R 69 (CA)**, where one village passed away, it seems the bereaved had some questions surrounding the death, so they sought answers from a fortune-teller who in his profession told them that their relative was not actually dead, but was bewitched and turned to a zombie @ *msukule* by some two witches he named. The community resolved that the said two witches must be put to death. One of the *witches* got the wind, ran to the police. When the police came to the village the first 'witch' was already crucified and burned beyond recognition. The issue of identification of the murderers was in place, the Court of Appeal upheld the trial court's decision by holding: -

"Given the huge crowd, the commotion of the moment and the charged atmosphere, reliability of the identity evidence of the three witnesses was doubtful."

In another case of **Mereji Logori Vs. R, Criminal Appeal No. 272 of 2011 (Criminal Appeal 273 of 2011) [2013] TZCA 408**, robbery was committed in a busy street of Metropole area of Arusha city, statement of a single identification witness did not eliminate the possibility of mistaken identity. The Court therefore held: -

"Applying the principles, we laid down in Waziri Amani v Republic (supra) to the present appeal, we do not think all possibilities of mistaken identity were eliminated with respect to the appellant. Possibility that someone else other than the appellant was responsible for the offence that took place in a busy street cannot be ruled out. Such doubts should operate in favour of the appellant."

Yet in another case of **Andrea Zabron & Another Vs. R, (Criminal Appeal 488 of 2016) [2019] TZCA 274**, where a group of more than 30 people assaulted and killed the deceased alleging him to be a thief. Material witnesses testified that they fled the scene having failed to rescue the deceased from his hard times and the incident occurred around night hours, the Court of Appeal ruled *inter alia* that: -

"Therefore, in our considered view, in the crowd of 30 people or more, the commotion of the moment and the charged atmosphere, reliability of the identity evidence of the PW1, PW4 and PW5 was highly questionable and doubtful."



All those precedents converge into one principle of proper identification in an ecstatic movement and commotion of angry young pastoralists with their traditional weapons including sticks, clubs, knives, machete and so on, seriously engaged into fight, I think proper identification to single out one or two of them require strict proof. In this trial, the prosecution managed to call in this court only two witnesses including a medical doctor who is not a witness of evidence but a professional doctor who opined on the source of death according to his professional examination of the deceased corpus.

Accordingly, I find no doubt, witnesses of fact are only two, PW1 and PW2. As per their own statements, a group of 20 or more people from Maasai community invaded their camp, which had many people as well. A fight happened to which the deceased, PW1, PW2 and others fully engaged. Above all, it seems PW1 and PW2 yielded, ran away and hid in different places leaving the deceased in a fight. They both came out of their respective hiding places when the fight ended and got to know that the deceased had died. They strongly suggested that the first accused is the one who inflicted a deadly blow by throwing a club from the back on the deceased's head, which sent the deceased down. Yet it is unknown whether that blow is the one that killed the deceased because they say even after the deceased fell down all the 20 or more Maasai men continued beating the deceased.

On the other side, the accused persons brings forward a kind of alibi defence which, despite not complying with section 194 of **the Criminal Procedure Act**, also their defence bring sense in some points; nothing plausible was presented to exhibit the suspicion, while there being more than 20 Maasai at the scene and claiming that all were attacking the deceased, the prosecution brought only these two

witnesses without watertight evidence, that they were present at the scene leave alone being involved in the fight. Considering that they were not caught at the scene nor in any conduct which would fall under the doctrine of *res gestae*, the evidence was needed to establish why they were picked out of many Maasai, otherwise even their alibi defence is convincing.

Apart from that I have observed some omission in the prosecution evidence and contradictions altogether. First is in respect to the investigator of the event as to how he figured out two accused out of more than 20 perpetrators and it is unknown, the 21 names given to the Maasai chief were devised on which investigation, while the said chief was not called before this court to testify on where and when he obtained those 21 names.

Moreover, it seems the whole of this case was not investigated at all by a professional and qualified police investigator. It is clear, failure to have a Maasai chief inviting the accused persons to Kilosa Police Station, no one could be arraigned in court. Surprisingly, the prosecution failed to call even that police who conducted the alleged identification parade.

Considering the testimonies of the two witnesses, yet I find several contradictions in their testimonies. **First;** while PW1 stated that the incident took about 5 minutes, PW2 estimated that it took about an hour. Also, PW1 insisted that the first accused is the one who murdered the deceased, while PW2 maintained that all the Maasai who were more than 20 murdered the deceased. This is also adopted by PW1 partly in his statement. **Second;** PW1 was the first to be attacked fell down and lost memory for about 4 minutes after being beaten, when he regained

his senses, he ran away. At the same time, he persistently testified that he saw the accused persons beating the deceased. PW2 stated in chief that after he ran to the reed where he hid himself, he was able to see the Maasai men beating the deceased. In cross examination he changed again saying that from his hiding place, he was not able to see what was happening to the deceased. Further admitted that in giving his statement at police station, he mentioned one Shabani who hit the deceased with a club, yet he repealed it and mentioned the first accused Kaponda Makutu when was testifying in this court as the one who hit the deceased.

Change in mentioning the perpetrator, under the circumstance watered down PW2's credibility. There is no material explanation as to why he mentioned Shabani, the one he knows in the earliest stage and at this stage of trial changed to another person. In the case of **Jaribu Abdallah Vs. R** it was reiterated that credibility is on the witness who mentions the perpetrator on the earliest stage. In our case the witness despite having mentioned the perpetrator when giving his statement before the police, he mentioned one person different from the person he mentions before this court. Because PW2's previous statement differs from his testimony before this court, obvious the two statements cannot be relied upon, the most probable position is both two statements are false, this is more where the court cannot properly find the true statement between the two. In the case of **Bahati Makeja Vs. R, [2010] T.L.R. 49** the Court of Appeal had this to hold in case two statements given by the same person contradicting each other: -

"In order to do substantive justice in a case, the court attempts to separate the grain from the chaff, truth from falsehood." Where this is not feasible because the grain and the chaff are

inextricably mixed up, the only available cause is to reject or discard the evidence in its totality"

In similar vein, the case of **Ronjino Ramadhani Ronji and 2 others Vs. R, Criminal Appeal No. 75 of 2019, CAT at Dsm**, the Court of Appeal following the above and its other previous decisions held: -

*"In the case of **Mohamed Said v. Republic**, Criminal Appeal No. 145 of 2017 (unreported) we restated the principle that a witness who tells a lie on an important point should hardly be believed on other important points."*

In **Mohamed Said's** case, actually it was held that a witness who tell a lie on a material point should hardly be believed in respect of other points. This court finds that paying any reliance to PW2's statement as to who murdered the deceased among other aspects can pose a serious peril to justice in this case.

The above is one aspect, also when cross examined he admitted that when he ran and hid himself in the reed, he could not see what was happening to the deceased. Generally, both witnesses left the late John Nyerere alive in the fight. They both came to know that he was dead after they resurfaced from their respective hiding places.

Under the above circumstance, this court cannot have any ground upon which to rely on these two prosecution witnesses, their credibility in respect of proper identification is weak and tainted. Therefore, there is only one conclusion that, the prosecution failed to bring strong evidence in this court on proper identification of both accused persons at the crime scene.

Generally, there are serious doubts breeding from the prosecution evidence. It is unknown what methodology was applied in filtering out the two accused persons who again are said to have been just called by their chief for what they say was to assist the police. In absence of a serious evidence linking the accused persons to the said murder, the serious doubts pointed above run in support of the defence and the alleged *alibi*.

The first issue is thus resolved in negative, that although it is established that the deceased died an unnatural death and that such death was occasioned as the result of fighting, it is unknown who killed the deceased on the fateful date. Although with a bunch of authorities from **Zuberi Abdallah Vs. R, Criminal Appeal No. 144 of 1991** (unreported) and **Israel Misezero @ Miriani Vs. R, Criminal Appeal No.117 of 2006** to **Bahati Ndunguru @ Moses Vs. R, Criminal Appeal No. 361 OF 2018** out of many, all converge into one conclusion that a killing occasioned from a fight does not contain malice aforethought. I will not go into the second issue for obvious reason that, the second issue of whether the accused persons killed with malice aforethought was dependent upon the first issue of whether the accused persons are the ones who killed the deceased in the first place. Such issue having been resolved in negative, then the issue of malice aforethought cannot arise.

In the circumstances of this trial, curiously I am troubled, troubled indeed to find which evidence if any, energized the prosecution to detain the two accused persons in custody all that time, and indeed prosecute them in this house of justice? Is it true that the prosecution and investigators performed their noble duties to unearth the true culprit of killing the deceased? The only viable conclusion in this aspect is that the

investigators (if any) and the prosecution abdicated their noble duty to conduct thorough investigation on the death of the deceased and the prosecution, likewise, had no reliable witnesses to establish and prove their case.

The situation of this case has reminded me, the warning issued by an eminent legal author **A. D. Singh's on Judgements and How to Write them, 4th edition**, defined judgement to mean an expression of the opinion of a judge arrived at after due consideration of the evidence and of the arguments advanced before him. It is a final verdict of the trial of an accused or appellant. Proceeded to say **it is a cardinal principle which must not be forgotten that a court judgement should be based strictly on the evidence on record, and not on outside evidence, however acquired.**

Similar position was captured by the Court of Appeal in the case of **Hamis Rajabu Dibagula Vs. R, [2004] T.L.R. 196** where they described the contents of a court judgement to comprise among others, evidence adduced in court, all material portion of evidence adduced during trial; analysis of factual issues; legal issues and reference to precedents where applicable before arriving into conclusion.

In this trial, one may ask which material evidences are viable to lead the court to convict the accused persons? I find none, hence I may safely conclude that the prosecution failed to prove the accusations against the two accused persons beyond reasonable doubt. Above all the allegations of murder was not investigated at all, thus led the prosecution difficult to build a prima facie case against the accused persons. Moreover, the prosecution failed to call material witnesses like the Maasai chief as discussed above.

Unfortunate may be to the prosecution, this court find the prosecution failed to establish and prove an offence of murder against the two accused persons. Consequently, **Kaponda Makutu and Elia John** are not guilty of the offence charged; I therefore, proceed to acquit them forthwith and order them be released immediately from prison custody unless otherwise lawfully held.

Order accordingly.

DATED at Morogoro in Ifakara in open court this 28th day of February, 2023.



P. J. NGWEMBE

JUDGE

28/02/2023

Court: Judgment delivered at Morogoro in Ifakara in open court on this 28th day of February, 2023 in the presence of accused and Mr. Frank Malebeto defence counsel and Karistus Kapinga State Attorney for the Republic.

Right to appeal to the Court of Appeal explained.



P. J. NGWEMBE

JUDGE

28/02/2023