

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**[ORIGINAL JURISDICTION]**

**CRIMINAL SESSION CASE NO 32 OF 2022**

*(Originating from P. I. Case No 4/2020 in the District Court of Kilwa  
at Masoko)*

**THE REPUBLIC..... PROSECUTION**

***VERSUS***

**RASHID S/O JUMA OMARY @RAHIM..... ACCUSED**

**JUDGEMENT**

*30/3/2023 & 28/04/2023*

**LALTAIKA, J.:**

The accused person herein **RASHID S/O JUMA OMARY @RAHIM** is charged with the offence of murder C/S 196 and 197 of the Penal Code [Cap 16] R.E 2019 (now R.E. 2022). The particulars of the offence are that on the 22<sup>nd</sup> day of October 2020 at Nanjilinjji Village within the District of Kilwa in Lindi Region he did murder one **SHABAN S/O RAMADHAN**

**MOHAMED @KIJORO.** The accused person took plea on **07/03/2023** where he denied the allegations hence this trial.

This being a capital offence, the state fulfilled its obligation of providing free legal representation to the accused through **Mr. Ali Kassian Mkali**, learned Advocate. Prosecutorial functions of the Republic were rendered through **Ms. Kijja Elias Luzungana**, learned State Attorney. I take this earliest opportunity to register my sincere appreciation to both learned counsel for their commitment and insights that have contributed greatly to shaping this judgement.

The importance of clarity of facts for logical flow and coherence of this judgement cannot be over emphasized. To this end, an appreciation of the story behind the matter at hand is considered imperative. In brief, an unusual incident took place at Nanjilinji a remote village in Kilwa District Lindi Region of Southern Tanzania. A businessman by the name of **SHABAN S/O RAMADHAN MOHAMED @KIJORO** (henceforth the deceased) was attacked in his house in the night hours of 22 October 2019.

Apparently, a neighbour overheard unusual sound and reported the same to the father of the deceased that someone was groaning in the house of the deceased. The father one **Ramadhani Mohamed Kiagabwike** (PW2) (along with other neighbours) went to his late son's place. Upon arrival they found his body lying near the gate to his house with indications that it was dragged out of the house. He was unconscious and bleeding profusely. Attempts were made to rush him to the nearby dispensary but he was pronounced dead on arrival.

As usual the incident was reported to the police. Without wasting time, a police convoy led by the then OC-CID of Kilwa M.S. Madali, ASP rushed to the scene of crime. The OC-CID *Afande* Madali was accompanied by, among other detectives, G3627 D/CPL Datus. The police inspected the scene of crime, ordered an autopsy on the body of the deceased and returned back to Kilwa. No sooner had the entourage returned to Kilwa than G3627 D/CPL Datus was assigned the task of conducting investigation on the matter. The detective was supposed to start from a clean slate because neither the villagers at Nanjilinji nor the police who rushed there as alluded to above, knew who the culprit of the killing was.

In the course of conducting the investigation, the Detective Datus discovered that a person called **Rashid S/O Juma Omary @Rahim** (the accused herein) had been arrested on the same day for selling airtime vouchers suspected of having been stolen. As he allegedly, learnt that the detainee was also from Nanjilinji the detective connected the dots. He requested a fellow detective to record a statement of the deceased where he allegedly confessed to have committed the offence. Further investigations were conducted leading to arraignment of the deceased hence this trial.

In the highly spirited attempt to prove the allegations levelled against the accused at the required standard, the prosecution fronted **seven (7) witnesses** (herein after referred to as prosecution witnesses or PWs for short) and tendered in five (5) exhibits. The prosecution case is summarized in the next paragraphs.

**PW1 was Inspector Peter Zakayo Jambi**, a police officer at Kilwa Masoko in Lindi. He testified on the 23rd of March 2020 at 11:00 AM while he was in the Masoko Area, he received a tip from Abdallah Kirumbaki, a voucher seller in the bus stand, that he had doubts about a young man selling vouchers below the market price. He then proceeded to the kiosk of the informer in the Masoko Area where he saw the suspect seated next to Kirumbaki holding a big red bag. Inspector Jambi confirmed with Kirumbaki that the suspect was the one he had just seen. He introduced himself to the suspect showed him his ID and proceeded to arrest and handcuff him. He seized the bag containing the vouchers and asked the suspect whose vouchers they were. The suspect replied that they belonged to him.

PW1 testified further that he found the vouchers suspicious due to their large quantity. He impounded them and filled out a seizure certificate. The informer, the suspect, and Inspector Jambi signed the seizure certificate. The airtime vouchers were for ZANTEL, VODACOM, and HALOTEL. PW1 impounded the vouchers from the accused person, whom he identified as Rashidi Omary @Rahim, and took him to the police station in Kilwa Masoko. He handed over the vouchers to the exhibit keeper and shared the information about the arrest.

During cross-examination, PW1 avowed that anyone in the rank of inspector can sign the documents that bear the official stamp of the OC-CID or OCS. The detective also mentioned that as he was arresting the accused, people left because they knew him, and he took the accused to Kilwa Masoko Police Station, which was about 1.5 to 2 kilometers away, using a Bajaj that he requested from the owner.

**PW2 was Ramadhani Mohamed Kiagabwike**, a 64-year-old resident of Nanjilinjji. He took oath and stated he had a family and six children, one of whom was his son Shabani Ramadhani Kihagambwike, also known as Shabani Kijoro, who was since then dead (the deceased). PW2 testified further that the deceased was a shopkeeper for his (PW2's) shop that sold various items, including airtime vouchers.

Narrating the incident connected to the matter at hand, PW2 stated that on 22/10/2020, the deceased left the shop around 8:00 pm to join the family for dinner before he could proceed to his house located close by. The deceased was carrying a bag, which his father did not know the contents of. After having dinner, he left to his place, which was about 100 meters away.

Later that night, PW2 was called out loud by Asia Issa Ngongono, who informed him that someone was groaning ("kuna mtu ana koroma) at Shabani's place. PW2 immediately went to his son's place with a torch and found blood on the ground. Following the blood droppings, he found Shabani lying unconscious, having been beaten up and bleeding. He also saw a piece of wood nearby. He then called the Village Executive Officer (VEO) and informed him of the incident. The VEO allowed them to take the body to Nanjilinjji Health Center, where they were told that Shabani had passed away.

The police were informed and came to the scene of the crime. They found that Shabani's room had been invaded and some things had been taken, including his phone and the bag he had come home with. The bag was a red "Magufuli-style bag" with black letters on it. The deceased was living alone, and his father could identify the bag if he saw it. The

deceased had a cut wound that looked like he was beaten up with a piece of wood with some sharpness. PW2 mentioned that his son was a gentleman who loved people and would even give his customers items on credit.

During cross-examination by Mr. Mkali, Adv., the witness stated that although the shop was his, he had handed over the items for sale to Shabani and allowed him the freedom to buy more items and sell them, as he was not directly involved in buying items for the shop. On further cross-examination, PW2 confirmed that his late son was once married, but he divorced his wife. The deceased allegedly just told the witness that he was not on good terms with his wife, and PW2 told him it was okay to leave her.

**PW3 was Abdallah Saidi Kirumbaki**, a 35-year-old resident of Kilwa Masoko. PW3 affirmed and stated that on the 23/10/2023, he was in his shop in Masoko, which he usually opened at 8 AM. At around 10:50 AM, a customer came to his shop holding a bag. The customer did not want to buy anything but had a bag containing airtime vouchers and wanted to sell them to him. He asked the customer if the vouchers belonged to him, and the customer replied yes. The customer was selling them for 450 TZS per piece, which was cheaper than the normal price of 480 TZS when buying from the super dealer, making him suspicious.

Trusting his guts PW3 decided it was wise he involved his close friend, Peter who was also a police officer, and called him using a mobile phone. Upon arrival Ins. Peter Zakayo Jambi (PW1), arrested the suspect, took some notes, and went ahead to count the vouchers. He remembered the number of vouchers counted, which were 1900 pieces of Vodacom

vouchers, 750 pieces of Zantel vouchers, and 469 pieces of Halotel vouchers, all priced at 500 TZS per piece.

During cross-examination, PW3 stated *Afande* Jambi did not show him the form (certificate of seizure) before signing. Nevertheless, he was firm that the form was not filled out prior to his signing it. The witness further stated that the accused did not tell him when the vouchers would expire, but vouchers generally have no expiry date but would be "closed" (*zinafungiwa*) by their respective issuers.

**PW4 was Ahmad Zuberi Hassani**, 32 years old, businessman and resident of Chamanzi Temeke, Dar es Salaam. PW4 testified that on the 19<sup>th</sup> of October 2020, he received a call from his friend, Shabani Ramadhani Kijoro, (deceased) who asked him to buy vouchers for him. His friend was a dealer in vouchers and lived in Nanjilinji, Lindi. Shabani sent him the money, and he bought 1,000 pieces of Zantel vouchers for 500 TZS each and 1,000 pieces of Halotel vouchers. He took them to the bus stand at Rangitatu and gave them to a bus conductor called Afsa, who was to deliver them to Mr. Kijoro.

PW4 further mentioned that Shabani confirmed the receipt of the vouchers the following day and that he used to ask him to buy vouchers for him whenever he was busy. Shabani sold vouchers of different service providers such as Vodacom, Tigo, Halotel, and Zantel. He then stated that he received a call from Shabani's father on the night of 22/10/2020, informing him that Shabani **had been attacked by unknown people and had died**. He went to Nanjilinji for the burial the next day. He could identify the vouchers he bought for Shabani and the red bag he put them in. He recognized the Zantel vouchers by their green color and the Halotel

vouchers by their orange color. He also mentioned that he had put the vouchers in a red bag with black letters before giving them to the bus conductor.

During cross-examination, PW4 stated that Shabani Ramadhani Kijoro had paid for the costs of sending the vouchers and that they usually communicated directly with the bus conductor. He also mentioned that he had received a total of **TZS 1060,000/= by phone (TIGO PESA)** and bought a total of 2000 pieces of vouchers. He further stated that he and Shabani Ramadhani Kijoro had communicated, and that he had some need for money, and his friend had helped him out. He used the rest of the money to buy the 2,000 pieces of vouchers.

**PW5 was G3627 D/CPL Datus**, a police investigator based at Kilwa Masoko. He testified that on 22/10/2020, he was at his workplace when he was ordered by the OC-CID of Kilwa MS Madali, ASP, to accompany him to the scene of the crime. Upon their arrival at Nanjilinji, they were received by the father of the deceased, who introduced himself as Ramadhani Hamad Kiagambwige. He showed them the place where the body of his son was lying. Although they did not find the body, they found a lot of blood. The father of the deceased had told them that he had taken the body to the Nanjilinji health center. His son was Shabani Hamadi [Ramadhani] Kiagambwige. The father of the deceased had told them that around 8:00 PM, his son passed by his house to eat food. He added that his son had a red bag in his hand and left with it after supper.

PW5 also stated that the father of the deceased did not know what was in the bag, but he suspected that it was a voucher or money. He informed them that his son was a shopkeeper selling different items, and



he had gone for about 30 minutes before his sister-in-law called Asia came to report that someone was groaning outside his son's place. PW5 further stated that the father of the deceased and his sister-in-law left for his son's place and found the main gate open. Upon arrival, they found the body lying, but there were no more groanings. He had taken the initiative of carrying the body to the Nanjilinji health center. He had then gone back to his home and reported the matter to the VEO before calling them.

According to PW5, he was ordered to draw a sketch map of the scene of the crime, and he did so while being guarded by the father of the deceased. He signed it, and the father of the deceased also signed it. The father of the deceased had told them that he inspected the house before their arrival and saw blood drops. They had also seen the drops. He had gone into the house and found that there was nothing in the place where his son used to keep the money.

PW5 testified that they passed through the hospital to inspect the body. The OC-CID ordered the body to be examined, and thereafter they left for Kilwa Masoko. The order for the postmortem was given on 23/10/2020, and the report was given dated the same day. He filled the forms and gave them to them. The father of the deceased had told them that his son had died on 22/10/2020. They had gone back to the police station on 23/10/2020 and arrived.

As he went back to his workstation, PW5 found an RB that had been opened shortly before, which was about a person found with stolen property. As he read the heading, he was drawn to read the content. He discovered that it was a person arrested with vouchers of different companies. The witness had asked the in-charge of the CRO to show him

the person arrested for that offense. It turned out to be Rashidi Juma Omary @Rahim (the accused herein). When he came out of the lockup, the witness asked him where he was from to which he responded that he was from Njinjo. The witness connected the dots and thought that the person could be the culprit of the killings.

PW5 looked for the police officer who had arrested his suspect and he found that it *Afande* Insp. Peter Zakayo Jambi. He was shown the exhibit and copied the batch numbers of the airtime vouchers. Thereafter he requested for help from D/CPL Maneno to interrogate the accused. This was because he was still going on with the investigation on the vouchers. He called the father of the deceased to know when the last time the deceased bought vouchers to which the father responded that it was on 19/10/2020 when his son had ordered vouchers from Dar es Salaam through his friend called Hemedi.

PW5 called the friend of the deceased who confirmed he had bought the vouchers for his friend. He had gone to a shop and bought vouchers for Zantel and Halotel gave them to the conductor for the MTEGAMA BUS who safely took them to the deceased. On 20/10/2020, he had called the deceased to ascertain if the vouchers had been received and the response was affirmative.

The witness checked his notebook and confirmed that the batch numbers the friend of the deceased told him matched with what was in his records. The batches matched. Thereafter PW5 went back to the police station, read the cautioned statement of Afande Maneno, and discovered that the accused had confessed that he was a resident of Nanjilinji and had

got the vouchers after killing the owner. He had grabbed the bag and left with it.

PW5 testified further that the accused had mentioned two other people, Ally Mnyira and Samwel, as being involved in the crime. The accused claimed that Samwel had sponsored the killing of the deceased, who he alleged was having an affair with Samwel's wife. He also mentioned that he lived in Nanjilinji with his fiancée, Suzana. As a detective, he decided to search for these people and the fiancée in order to prove the accused's residence.

Samuel and Ally Mnyira were subsequently arrested and taken to Masoko Police Station, but they denied the allegations. When the accused was called to identify the people he had mentioned, he denied having worked with them and claimed to have committed the crime alone. As a result, the OC-CID ordered Samuel and Ali to be released on bail. Suzana Akarya, the fiancée, was located in Nanjilinji and interrogated. She confirmed that she knew the accused and that they had been living together. She also stated that the accused had left home on the afternoon of October 22<sup>nd</sup> 2020, and returned around 10:00 p.m. Later that night, he bid her farewell, claiming that he was going to Ruangwa to look for money for *ufuta* (sesame) farming with an unnamed bank. After gathering sufficient evidence, PW5 avowed, he forwarded the case file to the OC-CID, who in turn forwarded it to the RCO for further action.

During the cross-examination by Mr. Mkali, PW5 clarified that it was after returning to Kilwa Masoko Police Station from Nanjilinji where he found an RB which had details of a person suspected of having received stolen property. The details were based on information received from

Afande Peter, who had arrested the suspect. Upon seeing the RB, he asked the CRO in charge for permission to talk to the person mentioned in the RB. He then left for Dar es Salaam on 24th to look for a witness who had been asked to buy vouchers by the deceased. This information is recorded in the investigation diary.

**PW6 was G4070 D/CPL Maneno**, Police Investigator at Kilwa Masoko. He testified that on 23/10/2020, he was at Kilwa Masoko Police Station when his fellow detective Datus asked him to take a cautioned statement of a suspect of murder who was already in the police cell. He then proceeded to the interrogation room, where he prepared the cautioned statement form. The accused Rashidi Juma Omary @Rahim was handed over to him by the counter. He introduced himself and explained to him the reason for his presence, which was for interrogation.

As the interrogation commenced, PW6 explained, he asked the accused where he got the vouchers from and he explained that he got them after committing murder in the company of Ally Mmila and another person whose name he had forgotten. PW6 asked the accused why they committed the murder, and the accused stated that they were hired by a businessman named Samuel to kill Shabani because he was having an affair with his wife. He could not remember the other name of the businessman, who ordered the accused, Ally Mmila, and another person whose name he had forgotten.

The accused further informed PW6 that on the day of the murder, they went to the deceased's place and waited for him to return from his business. When the deceased came from the backyard, Ali Mmila took a piece of wood and hit the deceased on the head. The accused stated that

the deceased was holding a bag, and they did not know what it was inside. They then dragged the body to the side of the house, and Ali Mmila continued to hit the deceased. The accused went to the gate to keep watch that no one came to see what they were doing. Afterward, the accused took the bag and left. They met the three of them and agreed to go to the boss who had promised them 3 million shillings for killing the deceased.

The accused, however, decided to go to his home place and discovered that the bag he had grabbed from the deceased contained vouchers. He decided to go to Ruangwa to sell them but delayed in catching the morning bus, so he decided to take the bus to Kilwa Masoko instead. PW6 testified further that during the interrogation, he asked the accused why he decided to tell him the truth to which he replied that he did so because there were so many questions about how he got the vouchers.

During cross-examination PW6 clarified that the cautioned statement was for murder, but he did not know the case number as detectives were not responsible for numbering cases. It was possible for the offense to change. He also stated that he never saw the vouchers, and that there were only two people in the room during the interrogation.

**The last prosecution witness, PW7, was Mashaka Ramadhani Kayago**, 38 years old, Resident of Nanjilinji, Lindi. PW7 affirmed and testified that on 22/10/2020, while he was in his workstation at Nanjilinji, at 10:45 PM, he admitted a patient called **Shabani Ramadhani** who was brought in by his relatives, including his father. The patient was unconscious after being attacked. As a doctor he did vital signs so he could continue with treatment. However, he realized that all vital

signs were absent, which are the indicators for one's condition whether alive or dead. He inspected the body further and realized that the deceased had injuries on the occipital part of his head and back of the right ear, which were not cut wounds. He filled the information in the patient book and informed the father that his son was not alive, and that the death was caused by severe loss of blood.

PW7 impressively and professionally explained that he then followed the "last office" procedures, which are procedures for handling the body of a deceased person. It involves covering the open parts of the body, tying hands and legs, and covering the whole body. He was told that the body would not be removed from the hospital because of the situation leading to the death, and he was supposed to wait for the police officers. On 23/10/2020 around 10:30 AM, the police arrived, and they had to reexamine the body and fill the postmortem report that they came with. PW7 allowed the relatives to take the body for burial. He identified the postmortem examination report and the same was admitted as exhibit P5.

On closure of the prosecution case, this court made a finding that the accused person had a case to answer. The next part of this judgement is devoted to the defence case and the evidence adduced therefrom. The defence case had one witness (the accused) and tendered no exhibit.

**DW1 was Rashid s/o Juma Omary @ Rahim** 32 years old, Resident of Nanjilinji. He took oath and stated that he had been a peasant and trader, cultivating *ufuta* and wheat, and selling vouchers on the side. During cultivation, he would temporarily stop selling vouchers to focus on

farming. He used to sell vouchers in Nanjilinji and neighbouring villages, especially on open market days known as "minada", which were fixed and commonly known. The mnanda for Nanjilinji was on Monday, Kilwa on Tuesday, and Nabilanje on Wednesday.

He recalled traveling from Nanjilinji to Kilwa Masoko to sell vouchers on 23/10/2020. He arrived at Kilwa Masoko around 10:30 on 23/10/2020 and found a person selling vouchers in a kibanda. He told the person that he was also selling vouchers and asked if he could buy them all at a discounted price of TZS 475 per piece of TZS 500. The person agreed, and they opened the vouchers, which were in a small bag known as Mifuko ya Maghufuli. Before they could count the vouchers, a police officer arrived, introduced himself, and asked if he had the *Mjasiriamali* ID. DW1 replied that he did not have it and did not have a permanent place of business. The police officer handcuffed and took him to the police station without explaining the offense.

The police officer took the vouchers and their receipts and ordered the other person to find transportation for Rashid to be taken to the Kilwa Masoko Police Station. When they arrived, the police officer handed DW1 over to the reception and took the bag with the receipts and vouchers. The witness did not see the bag again until he came to court for this trial.

The witness mentioned that the OC-CID asked for his full name and in response, he told the OC-CID that his name was **Rahim Khuzaima Ramadhani**. He also told the OC-CID that he was not a native of Nanjilinji, and instead, he came from Singida. When asked how he came to

Nanjilinji, he explained that he followed his father's friend, Kashinje, who had moved to Nanjilinji to farm *ufuta*. Kashinje advised he joins him in farming *ufuta*, which was cheaper and more profitable. Therefore, in 2019, the witness followed Kashinje to Nanjilinji.

DW1 emphasized that he had already farmed and harvested *ufuta*, sold it, and **got TZS 2,371,000**. He then started selling vouchers while waiting for another farming season. In October 2020, his wife got sick, and he decided to sell the vouchers he had already bought at a discounted price to take his wife to the hospital. Since he couldn't find anyone in Nanjilinji to buy them, he went to Kilwa Masoko. The witness testified that he was arrested without being told what his offense was, and he denied ever putting his thumbprint on the certificate of seizure.

The police impounded the vouchers from him and demanded that he pay TZS 500,000 for the costs incurred by the police in investigating the legality of ownership of the voucher. He refused and insisted that he was innocent. The OC-CID ordered his subordinates to take him to a place called Garage, where they tortured him for one hour. He was taken back to the cell and tortured again the following day. He was continuously beaten up for five days until he could no longer walk alone (without support). The police took out his nail from the toe of his right foot as a form of torture. On the following day, they took him back to the garage room and told him they wanted to uproot his tooth. However, the witness, allegedly, could no longer bear the pain and accepted the OC-CID's proposal.



During cross-examination, DW1 confirmed that he was found at Kilwa Masoko selling vouchers, and the vouchers tendered in court for Vodacom, Zantel, and Halotel were his. However, he denied selling TIGO vouchers. He mentioned that he was present when his cautioned statement was tendered but did not object and alleged that it was because he was not given the chance to do so. He also stated that he did not remember what happened during the certificate of seizure tendering. Upon closure of the defence case, learned counsels chose not to make final submissions instead each party pleaded the court to take a careful consideration of the evidence tendered and issues raised.

Having dispassionately considered submissions by both counsel and keenly scrutinized the evidence adduced throughout the trial, there are four issues calling for my determination:

- (i) *Whether there was death of a person*
- (ii) *Whether the death was unnatural*
- (iii) *Whether the said death was caused by the accused*
- (iv) *Whether the accused caused the death with malice aforethought*

The first issue should not be taken for granted. Many are times where a court enters conviction for murder only for the public to be astounded later that the purported deceased is in fact alive. It is therefore vital that a Court of law is satisfied that life of a human being has been terminated before proceeding to analyzing other aspects. In the case of **Mohamed Said Matula v. Republic [1995]** TLR 3 the Court of Appeal of Tanzania held that proof of stealing a child was insufficient to conclude that the said child is dead.

In the instant matter, it is undisputed that one **SHABAN S/O RAMADHAN MOHAMED @KIJORO**, died on the 22<sup>nd</sup> day of October 2020 at Nanjilinji Village within the District of Kiliwa in Lindi. All prosecution witnesses were consistent on this. The most relevant evidence being that of PW7 who conducted postmortem examination and that of PW2 who deponed that he was the father of the deceased albeit with some variation in names. This takes me to the second issue.

The second issue for my determination is whether the death was unnatural. There is no dispute on this either. Throughout the trial, it became obvious that the death of **SHABAN S/O RAMADHAN MOHAMED @KIJORO** was not natural. **PW7, medical personnel avowed** that the death was caused by severe loss of blood having sustained injuries on the occipital part of his head and back of the right ear. PW2 father of the deceased narrated what a loss it was for his family to lose the deceased untimely. It is safe to assume that had there not been such an unfortunate turn of events, the deceased would not still be at Nanjilinji village today building the nation. Like the learned defence counsel and his client, I choose not to be derailed here instead I move on to the third issue.

The third issue is whether the said death was caused by the accused. I intend to spend a substantial amount of time here. I choose to use the OWEP (Offence, Witnesses, Evidence and Principle) as an analytical tool. On the offence: it is a truism that the offence of murder is well known in our jurisdiction. The Court of Appeal of Tanzania has had many opportune moments to discuss the same in various dimensions including its essential

ingredients (See among other authorities **Francis Alex v. R.** Cr. App. No. 185 of 2017 (unreported), **Lusagula Machia & another v. R.** Cr. Appeal No 426 of 2013 (unreported) and its relation to other offences such as robbery (See **Juma Zuberi v. R.** [1984] TLR 249).

When it comes to murder, the burden of proof is always on the side of the prosecution. In the case of **Mohamed Matula v. Republic [1995] TLR 3** the Court of Appeal of Tanzania stated categorically that:

*"Upon a charge of murder being preferred, the onus is always on the side of the prosecution to prove not only the death but also the link between the said death and the accused; the onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence"*

It does not take much thought to realize that at the matter at hand, the prosecution had cast a very heavy burden on the accused to prove his innocence. As narrated in the facts, he was already in the police cell arrested for allegedly being found with airtime voucher suspected to have been stolen. The police detective charged with conducting investigation decided to go for the "low hanging fruits." Instead of casting his net wide enough to catch more "fish" he chose to try to get water out of a solid rock like Moses albeit without the authoritative rod. I am convinced that the burden was unbearably heavy on the side of the accused. So much pressure was exerted, unfairly I would say, on the accused persons to fill in the factual and evidentiary gaps left unfilled by the prosecution. Such a practice should be avoided to ensure that justice is not only done but manifestly seen to be done.

On witnesses these are the heart of any trial. In our jurisdiction every witness "is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness." (See **Goodluck Kyando v. Republic** [2006] TLR 363.) It is also trite law that no particular number of witnesses is required for the proof of any fact (See **Yohanis Msigwa v. Republic** [1990] TLR 148). Nevertheless, and probably more importantly for this discussion, this court is entitled to forming an opinion not to believe a particular witness. The Court of Appeal of Tanzania in **Mathias Bundala v. Republic**, Criminal Appeal No. 62 of 2004, (unreported) spelled out (non-exhaustive) reasons for not believing a witness.

There were seven prosecution witnesses in this case. Many if not most of them exhibited half-heartedness leading to outright inconsistency. PW2 did not sound like a father seeking justice for death of a son. He spent several minutes trying to justify variation of his name and that of his late son particularly the nickname @Kijoro. He claimed that his late son was working for him while the prosecution story was to the effect that "a businessman" had been killed by unknown people in Nanjilinji. His demeanor while describing the disposable bag that his son was holding when he visited him for lunch left a lot to be desired. Valuable items such as airtime voucher and bank notes are held a bit more respectably than the disposable bag story could convey.

It is also important to mention here that some inconsistencies could also be noted in the testimonies of PW1 Ins. Peter Zakayo Jambi, PW5 G3627 D/CPL Datus and PW 6 G4070 D/CPL Maneno on how a suspect of

possessing goods suspected to have been stolen transitioned or rather metamorphosized into a suspect for murder. D/CPL Maneno, on his part, deponed that he was only asked to record the cautioned statement. The rest of the narrative remained beyond his mandate. I commend him for an unshakable but truthful position. Failure to summon one **Asia Issa Ngongono** the closest neighbour who had heard the groanings also weakens the prosecution case to the knees.

**On Evidence,** there is no doubt that the evidence for this case is wholly circumstantial. In our jurisdiction, the Court of Appeal of Tanzania has set parameters upon which circumstantial evidence may be applied. In the case of **Seif Selemani 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 laboured to put the entire prosecution case to a careful scrutiny to find out the link between airtime voucher and the death of the deceased @Kijoro. I could find absolutely no connection. Selling airtime voucher is a business open to anyone in Tanzania with or without a shop. More importantly, I have revisited the statements of prosecution witnesses and found that the issue of airtime vouchers is referred to superficially as if it is incapable of being tested with the same rigour as, say ownership of a vehicle. Direct inference would be for example, being found with a weapon

that had been used in the killing. The airtime story is too farfetched. It cannot ground conviction.

The principle of law that I can derive from this OWEF inspired discussion is standard of proof in criminal cases. **Section 3(2)(a) of the Evidence Act Cap 6 RE 2002** provides as follows:

*(2) A fact is said to be proved when  
(a) in criminal matters, except where any statute or other laws provide otherwise, the court is satisfied by the prosecution beyond reasonable doubt.*

See also **Hemed v. Republic [1987] TLR 117** in which the Court of Appeal of Tanzania expounded on the above standard of proof adding that “[w]here the onus shifts to the accused it is on a balance of probabilities.”


I am fortified to make a finding that the prosecution has failed to prove the allegations levelled against the accused at the required standard. As per tenets of fair trial, any slight doubt is resolved in favour of the accused. The doubts here are not slight, they are massive. At both factual and evidentiary levels, there is not any slight connection between the death of the deceased and the accused person. I see no need to discuss the fourth issue namely whether the accused caused the death with malice aforethought. It crumbles naturally.

Premised on the above, I hereby order that **RASHID S/O JUMA OMARY @RAHIM** be released from prison forthwith unless he is being held for any other lawful cause.

I also order that the **Exhibit P1** (Airtime Vouchers) be destroyed under direction and supervision of the Deputy Registrar, Mtwara District Registry of the High Court of Tanzania to protect consumers and market integrity.

It is so ordered.




  
**E.I. LALTAIKA**  
**JUDGE**  
**28/04/2023**

Court:

Judgement delivered by my own hands in the open court in the presence of Mr. Melchior Hurubano, State Attorney, Mr. Ali Kassian Mkali learned defence counsel and the accused.




  
**E.I. LALTAIKA**  
**JUDGE**  
**28/04/2023**

Court

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



  
**E.I. LALTAIKA**  
**JUDGE**  
**28/04/2023**