

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB- REGISTRY OF ARUSHA**

**AT ARUSHA**

**CRIMINAL SESSION CASE NO. 112 OF 2022**

**REPUBLIC**

**VS**

**MWAKA AMOSI LWENDO @ MAMBA \_\_\_\_\_ 1<sup>ST</sup> ACCUSED PERSON**

**HILLARY ANTONY \_\_\_\_\_ 2<sup>ND</sup> ACCUSED PERSON**

**EMMANUEL ALOYCE KAVISHE \_\_\_\_\_ 3<sup>RD</sup> ACCUSED PERSON**

**JOHNSON TILLYA ADOFU \_\_\_\_\_ 4<sup>TH</sup> ACCUSED PERSON**

*01/08/2023 & 18/08/2023*

**JUDGMENT**

**BADE, J.**

The accused persons were charged with the offence of murder contrary to section 196 and 197 of the Penal Code (Cap 16 R.E 2022). The prosecution alleged that, on 2<sup>nd</sup> day of September 2021 at Ngaramtoni Area within Arumeru District in Arusha Region, jointly and together the accused persons murdered one Almasi s/o Mohamed, the deceased. When the information of the murder was read over and properly explained to the accused persons, they all pleaded not guilty.

To prove the charge, the prosecution called a total of 4 witnesses, including two persons who are said to have been the victims of the incident which culminated in the death of the deceased person, the doctor



who received the body of the deceased, and did a postmortem on it, and a police officer who had attended to the crime scene and later apprehended the accused. Out of those four witnesses and one exhibit, the prosecution managed to establish a case of murder against 3 out of the 4 accused persons, as the 2nd accused person was found with no case to answer. The court invited the 3 accused persons to make their defense, electing to testify under oath, without calling any witnesses to testify in their favor, nor tendering any exhibits. The 1st, 3rd, and 4th accused persons testified as **DW1, DW2, DW3** respectively defending their innocence and denying having committed the murder.

At the hearing of this case, the Republic was represented by Ms. Riziki Mahanyu, Ms. Eunice Makalla and Ms. Neema Mwijage, learned State Attorneys; while the accused persons enjoyed the legal services of Fridolin Bwemelo for the 1st Accused, Jennifer Jon assisted by George Mnzava for 3rd Accused, and Mitego Methusella for the 4th Accused, learned advocates.

From the prosecution case, Ally Kimweri Rajab testified as **PW1**. His testimony was to the effect that on 2<sup>nd</sup> September 2021 he was at his home, in the morning hours between 8 and 9am, where two security guards from Suma JKT whom he knew as Mamba and Emma came knocking at his door. It was his testimony that the accused started beating him up immediately after he opened his door, particularly Mamba, the 1st accused. Mamba is said to have dragged him to the nearby road where he saw the Kilimo ASA Motor vehicle, inside the vehicle he saw the 4<sup>th</sup> accused, the manager of the farm, who instructed that he should be thrown into the car. Inside the car he found the deceased, lying on his stomach with his arms and legs swollen. He testified further they were

taken to agriculture office, reaching there they were made to alight and told that it is their destination. **PW1** further testified that 4<sup>th</sup> accused made a phone call to bring another person **PW4**, who was also brought along which made them three persons who were under arrest.

It was his further testimony that the 1<sup>st</sup> accused called once another person, Emma, the 3<sup>rd</sup> accused. Moreover, he testified that they were drenched in water and be made to roll over the ground on the dirt. That the persons who did this to them were the 1<sup>st</sup> and 2<sup>nd</sup> accused. That 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused started attacking them with clubs. That deceased was badly beaten where he started to vomit, some of which came through his nostrils.

He testified further that soon enough, the small, white vehicle office car belonging to Kilimo Farm came through and they were all loaded onto it and sent to police station first, given PF3 and then to the Oltrumeit hospital. On being cross-examined, he denied knowing Almasi Mohamed the deceased, nor knowing for certain his passing away or attending his funeral, while then admitted to Almasi being his neighbor. While he first stated his observance that the deceased arms and legs were swollen, he later denied this observance as the deceased was wearing a trouser, so he could only observe that the soles of his feet were swollen, while his hands, not the whole arm were swollen, and denied to have seen him being beaten on the arms or legs.

Further on the prosecution side, Dr. Emmanuel Masanje Manyonyi testified as **PW2**. He was the medical doctor who did the postmortem on the body of the deceased. His testimony was to the effect that on 5<sup>th</sup> September 2021 he was assigned to investigate a dead body,

accompanied by the police officers and relatives of the deceased who identified the body as that of Almasi Mohamed, and recorded his findings in the PF 99 which was admitted as **Exh P1**. He further testified that it was his opinion that the reason of death was asphyxiation and that upon investigating the body, he found the body had normal bruises on the face and arms, his right arm was swollen as well as the leg on the front.

His testimony was that as he dissected the body, he found that there was some vomits on the trachea. He further testified that it was related to him as a history that the victim was earlier beaten, had been vomiting and had been bleeding from the ears. It was his further testimony that He found the deceased stomach had retained water which was yellow in color, and that the liver of the deceased person was observed to be smaller than normal, and had also yellowed. His observance further revealed that everything else in the internal organs was found and observed to be normal.

He further testified that the nails of the deceased body were blue, which is an indication of suffocation as the body lacked oxygen. In his view since there was a history of the deceased having been beaten and had some blood on his ears, the cause of death could be that he suffocated by reason of the vomits on his trachea. On being cross-examined by the defence attorneys, he testified that he did not establish when exactly the deceased vomited, nor was he able to establish that the vomits was the direct result of the beating, or that the vomits getting into the trachea would cause death; and that he found all the other internal organs were intact, except for the liver which was smaller than normal, which he confirmed to be the reason that he had water in his stomach that was yellow. Further on cross-examination, he confirmed he could not establish

the exact time of death or when the deceased passed away, as he admitted to not being the doctor who received the patient, and that the patient passed away while in hospital.

Another prosecution witness was Assistant Inspector Mafwimbo Medikela Msirikali who testified as **PW3**. He intimated that on 2<sup>nd</sup> September 2021 while at his workstation, three people approached him and introduced themselves as lawyers from Legal and Human Rights Center. They told him that they were informed that there were 3 persons being attacked at ASA Kilimo offices at Ngaramtoni, those people were Almasi Mohamed who is now deceased, Emmanuel Evarist and Ally Kimweri. He further testified that after receiving the information as in charge of CRO he accompanied them to the scene of the crime and found three victims, one of them was Almasi Mohamed, and the other two were on the side who were Emmanuel Evarist and Ally Kimweri. That Almasi Mohamed had lost consciousness, the other two also looked beaten and were not in good shape, he thus obtain transport, and took them to the police station, so that they can be given a PF3. Afterwhich, he took them to Otrumeit hospital for treatment.

His further testimony was to the effect that on 3<sup>rd</sup> September 2021 he went back to the hospital to check on the patients and Almasi Mohamed was able to talk but his condition was still terrible, he called one medical officer to become a free agent and started taking a statement from Almasi Mohamed. This free agent was not called as a witness in court. According to **PW3**, the deceased stated that he can recognize the persons who had attacked him in names and faces, including Emmanuel Aloyce Kavishe, Mwaka Amos Mamba and Hilary Anthony. Since the accused were mentioned by names, he took the initiative to put them under arrest. He



testified further that the statement of the deceased stated that the mentioned persons were helped by other militiamen one Mohamed and Antony. Later, he received the information that Almasi Mohamed has passed away. On being cross-examined, he confirmed to not have enough information on the particulars of the death of the deceased, neither could he establish when did the deceased passed away. He confirmed that the deceased was attacked by fists and clubs as it was related to him by the Almasi Mohamed, and that he was drenched in water, but admitted to not have brought in court any weapon of the alleged attack in evidence as he was not the person who investigated this case.

The last witness for the prosecution was Emmanuel Evarist Kamili who testified as **PW4**. His testimony was to the effect that on 2<sup>nd</sup> September 2021 while he was at Kilimo Farm digging a trench for the rain water, he received a phone call from the 4<sup>th</sup> accused, a farm manager who asked him to meet at the office, and on what seem as a second thought, he told him that he would come where he was working but he did not show up, instead he saw two women guards, one civilian dressed and another one in uniform, both of them were SUMA JKT guards. That they asked who is J4, and he identified himself as the one, afterwhich he was told to sit on the ground, and then he was asked to follow them. **PW4** further testified that after several steps he was ordered to take dirt from the ground and applied on his face. That upon arriving at the Kilimo gate, she ordered him to kneel and walk on his knees on gravels, and then he was ordered to sit down near the water tap and they started drenching his whole body with water while he was fully dressed, after which he was ordered to roll his body on the ground dirt. That he found the deceased with his hands tied on his back, while Ally was tied with his hand forward, he was ordered

to be on the ground and move towards those two. **PW4** further testified that the deceased was told to identify him but he kept saying he doesn't know anything, and they kept beating the deceased, after which they also started beating him by using a club. That since the hands of deceased were tied, he was brutally beaten and he could not defend himself. He further testified that the persons who were beating them at the office is Mwamba the 1<sup>st</sup> accused and Emmanuel the 3<sup>rd</sup> accused. That he could not tell who had beaten the two other victims previously as he found them already beaten. He insisted that the person who was beating them and him when he arrived at the office is Mwamba.

His further testimony was that some people came at the Kilimo gate wanting to come in but they were not allowed so they left and came back with the police officers at which point they were allowed to come in. He stated that the deceased started to vomit while he was on the floor and that they were then taken to Ngaramtoni police station and then to Oltruimet hospital, Ally and him were treated and let go, but the deceased was admitted.

On cross examination, he confirmed to have found the other persons who were the victim there at the Kilimo Offices, and had already been beaten, so he did not witness any beating of the victims, nor was he tied down, or made to lie and roll on the ground or beaten at the ASA Offices. It was his further testimony that he only saw the other victims there but he did not recognize any of them. He was also controverted and admitted to have issued a statement at the police, where he did not mention Mamba, the 1<sup>st</sup> Accused in it, and he is only mentioning him as he is testifying now, explaining that he had found the other beaten, and that he was beaten before he was brought in at the office.

Having been found with a case to answer, the 1<sup>st</sup> accused, Mwaka Amosi Lwendo @ Mamba testified as **DW1**. His testimony was to the effect that in 2021 he was assigned to ASA Kilimo station where agricultural seeds are farmed and produced for commercial purposes by the government. On 30/08/2021 their farm manager, the 4<sup>th</sup> accused called them all and told them that they had found some people had unlawfully harvested a maize crop at the farm and that they should patrol the farm and be on watch out so that they could establish and apprehend those people who had harvested the said maize crop at the farm. He further testified that on 2<sup>nd</sup> September 2021, he and the 2<sup>nd</sup> accused were the guards on duty relieving the 3<sup>rd</sup> accused and another person one Ibra. They were assigned a duty to supervise the sorting of bean seeds. Having been assigned such duties they kept a close watch on the people working on the seed sorting as there was a tendency for some of them to try and sneak out some seeds. He further contended that by 11 a.m. he observed 3 people being brought to the office by their fellow SUMA JKT guards Crispian Badwini and Sylvanus Mhagama on the allegation that they had been caught at the farm. After a while, a police car pulled over with one officer named Mafwimbo took those three people, and left with 4<sup>th</sup> accused while he continued supervising the sorting of seeds at the godown. He did not hear anything about the deceased being beaten and he did not see anybody being beaten, neither did he identify which one amongst them was the person who is now said to be the deceased. The allegation that he must have beaten the deceased is untrue as he was supervising the sorting of the seeds. That he had nothing to do with apprehending those people.



The 3<sup>rd</sup> accused, Emmanuel Aloyce Kavishe testified as **DW2**. His testimony was to the effect that on 30/08/2021 he was informed about the illegal harvest of maize crops that was discovered at the farm. They were instructed to patrol the farm so they could apprehend whoever was responsible for the unlawful harvest. On 2/09/2021 he had been relieved of duty by the guards who were coming in for the morning shift having stayed the night. He was relieved by Hillary and Mwamba, so he went back home to rest. That, around noon he was informed by the ASA manager that the people who had harvested the maize had been apprehended and were now brought to the ASA offices, and asked him to come to the office so that he could guard over the suspects who were apprehended at the farm cornhusking their unlawful yield. Upon reaching the ASA offices, he found a police car coming out at the gate just as he was getting in. That he did not see inside the car, but he recognized Inspector Mafwimbo who was in police uniform.

He further testified that he proceeded to the office and met the 4<sup>th</sup> accused the farm manager, who informed him that the three suspects had been taken by the police and he allowed him to go back home. Around 3 pm he had gone to Ngaramtoni to get some groceries where he saw Inspector Mafwimbo who asked him if he was a SUMA JKT guard, upon his positive response, he was asked to go with him to the police station where he was locked up.

The 4<sup>th</sup> accused, Johnson Adolf Tillya, testified as **DW3** his testimony was to the effect that on 30/08/2021 as a Manager of ASA farm he was informed that there was unauthorized harvest of the seed crop at the middle section of the farm by unknown persons. The harvested yield was all collected at the farm, so he took it upon himself as the person

responsible for this farm, to call all the six guards at ASA and ask them to prioritize the area of patrol, particularly to increase patrol in the middle section of the farm so they can know who is responsible for this unlawful harvest which is theft of government property, for which he was responsible for. He further testified that on 02/09/2021 the SUMA JKT Guard Commander called explaining that the patrol had yielded fruit and that the two SUMA JKT guards had apprehended three persons who came to cornhusk so they could remove the same from the farm area. That, they brought those people to the office. Two guards, Crispin Baldwin and Mhagama brought the suspects in. He asked for assistance from the Ngaramtoni Police for the officers to come and apprehend and take them away for their further investigation. On 02/09/2021 the 3<sup>rd</sup> accused was off shift but he called him because he wanted him to add to the manpower to guard the apprehended persons. He further testified that as he neared the center, the police from Ngaramtoni had already arrived. They came and took the 3 apprehended persons. All the 3 apprehended persons were well and fine, no one had beaten them and were taken by the police while in good condition.

Upon hearing the whole of the prosecution case and that of the defense, the general issue before the court that must be determined is whether the prosecution managed to prove the case against the accused persons beyond a reasonable doubt.

The accused persons have been charged with the offence of murder which is defined under section 196 of the Penal Code (Cap 16 RE 2022), thus:

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



Based on the above provision, it is pertinent that for the prosecution to sustain a conviction in a murder case, it is duty-bound to prove beyond reasonable doubt the two elements of the offense of murder which are malice aforethought and the act itself. Furthermore, the linking of the said act of the unlawful taking of the life of another person by the persons accused of the crime, and since there is more than one accused person, their common intention. The prosecution evidence must be cogent enough leaving no doubt to the criminal culpability of the accused persons linking them with the murder of the deceased. The prosecution, therefore, must produce credible and reliable witnesses whose evidence irresistibly points to none save only to the accused person/persons. Section 3 (2) (a) of the Evidence Act Cap 6 RE 2002 provides:

"a fact is said to have been proved in criminal matters, except where any statute or other law provides otherwise, when the court is satisfied by the prosecution beyond reasonable doubt that the fact exists"

The standard of proof in criminal cases was insisted in the case of **Jonas Nkize vs R** [1992] TLR 213 where this Court through Katiti, J. (as he then was) stated:

"The general rule in a criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution is part of our law, and forgetting or ignoring it is unforgivable, and is a peril not worth taking."

Similarly, the Court of Appeal of Tanzania in **Furaha Michael vs Republic**, Criminal Appeal No. 326 of 2010 (Unreported) held:

"The cardinal principle in criminal cases places on the shoulders of the prosecution the burden of proving the guilt of the accused beyond all reasonable doubt"

Consistently, the Court has guided in the case of **George Mwanyingili vs Republic**, Criminal Appeal No. 335 of 2016 (Unreported) that:

"We wish to re-state the obvious that the burden of proof in criminal cases always lies squarely on the shoulders of the prosecution unless any particular statute directs otherwise. Even then, however, that burden is on the balance of probability and shifts back to the prosecution."

Understandably, the offence of murder is one of the most serious offences whereas, when proven to the required standard, would only attract one capital punishment which is death by hanging as per section 197 of the Penal Code Cap 16 RE 2019. Its evidence and proof must be unshakably clear, with no compromises and leaving only remote possibilities or negligible errors that might be neglected by a person confronted to decide on the same. See the holding in **Republic vs Mtei**, [1971] HCD 451; and **Republic vs Anzigar Hermsin Deonis and Another**, Criminal Session Case No 02 of 2019 (Unreported).

The onus never shifts away from the prosecution and no duty is cast on the accused persons to establish their innocence. See **Said Hemed vs Republic** [1986] TLR 117.

The pertinent questions in proving a murder case such as the one before me now are several. Has the death of the deceased person proven as being unnatural, was death caused by an unlawful act or omission of the accused, and Lastly, was the killing actuated by malice aforethought? All



of these considered, one would be able to establish the proof beyond reasonable doubt. Furthermore, where the charge/information involves more than one accused person, this court will have to satisfy itself that there was a common intention for the accused persons to perpetrate the offence. For that reason, I have guided myself to look through the issues as 1) Whether the alleged deceased Almasi Mohamed is proven to have unnaturally died; 2) if in the affirmative, whether his death was caused by the unlawful act or omission of the accused persons; 3) Whether there was established a common intention amongst the accused persons to execute this offence; and 4) whether the said killing was actuated by malice aforethought.

Starting with the first issue, whether the passing of and the unnatural death of the deceased Almasi Mohamed was established, the prosecution relied on **PW2** and **PW3** to establish this fact. Even with these witnesses, it is incontestable that none of them adduced evidence to the effect that he witnessed of his own eyes the passing of the alleged Almasi Mohamed while he was being beaten by any of the accused persons, or any of them had any first-hand knowledge of his passing while at the hospital. The doctor **PW2's** testimony was in fact shaken for want of proof that who was the coroner that requested the inquiry over the death of the deceased on the PF99. Granted that death may be proved by the production of the postmortem Report, but the said report which was admitted as **exhibit P1** was incomplete with a few pages missing and or information missing. Meanwhile, **PW3** who is said to be the person who took the deceased to the hospital where he was admitted for treatment, was only informed of the death, he was not present during the post-mortem, and he could not establish the exact time of death. Upon being cross-examined, he averted

the responsibility of knowing for a fact since he was not the investigator of the case. So the only positive identification of the deceased was through the evidence of the doctor's report who received the body of the deceased and investigated the cause of his death. Naturally, he only testified of being intimated of there being a history of the deceased being beaten. None amongst the four witnesses had witnessed anything further than that or been part of the funeral of the deceased, all of whom stated they heard he passed and was buried away in his home village.

Looking further at the evidence by the prosecution, while trying to lay down a foundation to prove there was an unnatural death of Almasi Mohamed, they had pinned the cause of death to be asphyxiation caused by the vomits that were found on the trachea. But the Doctor could not satisfy the quest that the vomit was a result of the alleged beating, and eliminate other causes that could have caused the deceased person to vomit and/or meet his death, neither could he say for certain that the said vomit could actually cause death. Further testimony reveals that the deceased could have had some underlying issues with his liver that could have also aggravated his situation, or presented the swollen limbs, and was confirmed by the appearance of the yellowed water on the deceased stomach when dissected.

It is my considered view therefore that the first issue is answered partly affirmatively, and partly negatively, that while the deceased is Mohamed Almasi, the cause of his death is not necessarily unnatural, since vomit on the trachea can not be on its own, the reason for asphyxiation, if as it was found, not a lot, and rather, infection as a secondary cause would the reason for such death as it causes blockage.

Under the circumstances, I cautiously accord evidential value to **Exh P1** Post Mortem report especially on the cause of death, knowing very well that expert opinion does not bind the court. I sought guidance in the case of **Yusuph Molo vs the Republic**, Criminal Appeal No 343 of 2017 (Unreported) where the Court of Appeal held:

"Expert opinion is not binding to the court in arriving to its decision but it is rather persuasive "

Meanwhile, I am aware that there are other ways in which death may be proven such as:

- (a) Evidence of witnesses who state that they knew the deceased and attended the burial or,
- (b) Evidence of the persons who saw the dead body or
- (c) Circumstantial evidence as testified by witnesses.

This is per the case of **Seif Selemani vs Republic**, Criminal Appeal No. 130 of 2005; and **Mwale Mwansanu vs DPP**, Criminal Appeal No. 105 of 2018 (Both unreported).

Since the above issue is partly in the affirmative, I would now turn to look at the second and third issues, whether the death was caused by the acts or omissions of the accused persons, and with common intention.

Aptly, the law presumes any murder to be unlawful unless it is accidental, excusable or authorized by law. It is also the position of the law that in a joint trial involving more than one accused, the evidence against each accused must be considered separately, and the court must address the issue as to whether there was a common intention.

Therefore, the case against each accused person must be such as to prove

the guilt of that accused person beyond a reasonable doubt. See **Munyole vs Republic**, Criminal Appeal No 97 of 1985, Court of Appeal of Kenya at Kisumu whose persuasive stance I subscribe to.

In the instant case, as stated earlier, there were initially four accused persons, and by the time the prosecution case was made, only three needed to defend themselves, as the 2<sup>nd</sup> accused person was found with no case to answer.

In **DW1** and **DW2's** testimony, they denied having caused the death of the accused person or the beating of any of the victims. Despite this, they were pointed to have been the ones beating all three victims, with their names coming consistently in the testimony of **PW1**, as the persons who went to take him from his home, and upon getting into the car, he also saw **DW3**. **PW3's** testimony was to the effect that he apprehended the accused persons upon their names being mentioned by the deceased on the of 3rd September when he visited the deceased at the hospital, and **PW4** denied having been beaten by any of the accused persons, that he found them at the offices when he was brought there together with the other two victims, and that he was called by the 4<sup>th</sup> Accused/DW3 while he was digging the trench to establish his whereabouts before he was taken by the two women guards, under whom he was made to roll over the dirt and be drenched with water. **DW1** testified that he was not involved with them, but he saw the victims who were held as suspects being brought to the offices of the ASA, where he was stationed to supervise the sorting of seeds. Meanwhile, **DW2** stated that he had been off duty when the suspects were brought into the offices, whose evidence was corroborated by **DW3**, as the one who called him to come in to increase the watch over the suspects before they were handed over to



the police. From the evidence of **DW1, DW2, and DW3** it is undoubted that they have all admitted to having been at the crime scene either because they were working there or because they were called by **DW3**. So how does this translate into common intention if any?

Legally speaking, a common intention is the meeting of the mind of the accused persons which is necessary to be present in joint charges, and it may be inferred from the presence of the accused persons, their actions, and or the omission of any of them to disassociate himself from the assault/act. Conversely, the mere presence of the accused person at the scene of the crime is not conclusive proof of the common intention of committing an unlawful purpose, or that an offence was in fact committed. In any case, the doctrine of common intention would apply irrespective of whether the offence was murder or a lesser offence, and it is not necessary to make a finding as to who caused the death. See Uganda Court of Appeal decision in **Ismail Kisegerwa and Anor vs Uganda**, Criminal Appeal No 6 of 1978. Similarly, in **Bombo Tomola vs Republic** [1980] TLR 254 the court while addressing the issue of common intention observed:

*"The question which arises is who was the author of the fatal blow or blows which broke the spinal cord? Obviously, if the appellant was the author of the fatal blow or blows, she could be found to have caused the death of the deceased, but if, on the other hand, the fatal blow or blows were administered by the second accused, the appellant would not be found legally responsible for the death of the deceased unless the situation falls either under the provisions of section 22 or section 23 of the Penal Code, which deal with parties*

*to a criminal offence and offence committed by joint offenders in the prosecution of a common purpose"*

In **Abdi Alli vs R.** [1956] E.A.C.A, 573 the Court of Appeal held in guidance that:

*"...the existence of common intention being the sole test of joint responsibility, it must be proved what the common intention was and that the common act for which the accused were to be made responsible was acted upon in furtherance of that common intention. The presumption of the common intention must not be too readily applied or pushed too far"*

The section 22 (1) of the Penal Code Cap 16 RE 2019 that the Court is referring to provides:

*"When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing namely;*

*(a) every person who does the act or makes the omission which constitutes the offence;*

*(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;*

*(c) every person who aids or abets another person in committing the offence;*

*(d) any person who counsels or procures any other person to commit the offence, in which case he may be charged either*

*with committing the offence or with counseling or procuring its commission.*

*(2) A conviction of counseling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.*

*(3) A person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind and is liable to the same punishment as if he had himself done the act or the omission.*

Section 23 of the Act is further specific:

*"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."*

The evidence by **DW1** and **DW2** while admitting to have been at the crime scene, they each had a different objective in their presence at the crime scene. While **DW3** testimony could have been said to infer that he had procured the cooperation of the other accused persons into the commissioning of the common intention to procure the offense, it was not controverted by the prosecution that the calling or presence of the **DW1** and **DW2** was not for the purpose that **DW3** explained to have intended, as would logically make sense as the person in charge of the farm, and whom the 1st and the 2nd accused worked under his supervision.

Having revisited the law regarding the applicability of common intention vis a vis the gathered evidence of both sides, it is my finding that the prosecution has not been able to prove common intention in this case. My considered view is that the law regarding the doctrine of common intention has not been satisfied to apply in this case, and thus the two issues are found to be unproven.

Lastly, is the issue of whether malice aforethought was established to constitute murder as charged against the accused. In the case of the **People vs Njovu (1968) ZR 132** it was persuasively observed in regard to malice aforethought:

*"To establish malice aforethought, the prosecution must prove either that the accused had an actual intention to kill or to cause grievous harm to the deceased, or that the accused knew that his actions would be likely to cause death or grievous harm to someone".*

Undoubtedly, murder is said to be committed when an accused person kills another with malice aforethought. Section 200 (1) of the Penal Code Cap 16 RE 2019 is prescriptive of the above fact that:

*Malice aforethought shall be deemed to be established by evidence proving anyone 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.*

Further the law is clear that malice aforethought can be inferred from the nature of the weapon if used or/and the morphological location on which the attack was made, as well as the conduct of the accused. In the case of **Enock Kipela vs Republic**, Criminal Appeal No 150 of 1994 (Unreported) the Court of Appeal observed:

*"Usually, an attacker will not declare to cause death or grievous bodily harm, whether or not he had that intention must be ascertained from various factors, including the type and size of the weapon if any that was used in the attack, the amount of force applied in the assault, the part or parts of the body the blows were directed at or inflicted on, the number of blows, although one may, depend upon the facts of the particular case, be sufficient for this purpose, the kind of injuries inflicted, the attacker's utterances, if any, made before, during or after the killing, and the conduct of the attacker before and after the killing."*

Looking at the evidence, since it is not found anywhere in the adduced facts that the accused or any of them at any particular time made the

declaration to have wanted or intended to kill the accused person or cause grievous harm, the court will have to look in the inferences as guided by the law. But even then, it is falling short. The prosecution had not brought in evidence any weapon that is alleged to have been used in attacking the victims or the deceased. Neither were the blows and bruises found on the deceased person as described by **PW2** fatal. In his testimony, he established the bruises found on the deceased person of the normal kind, and upon being cross-examined, he clarified them to be superficial, not hurting any internal organs. The only cogent piece of testimony, as to the cause of death being asphyxiation by the vomits found on the trachea, is logically opposed to being a direct result of the beating as testified by **PW2**.

There was evidence of the deceased being tied from the back of his body, being beaten, or seen to have vomited and not helped, the fact that this evidence is uncorroborated notwithstanding in my view, does not establish malice aforethought to kill the deceased, particularly in the absence of anyone having seen or establishing any connection between what has been narrated to have happened to the deceased and the accused persons as no one witnessed any of the beatings. In that case, it is my view that the prosecution has failed to prove the case beyond a reasonable doubt. Thus the issue is answered negatively.

At most, in my considered view, the prosecution has made a circumstantial case against the accused persons; that the deceased was killed by the accused as a result of the beatings that he received upon being apprehended on suspicion of being responsible for the illegal harvesting of the maize crop at the ASA Farm. From these stated facts and the inferences of guilt of the accused persons that could be drawn

from the evidence adduced, one cannot say to have found a connection with the principal fact that they had murdered the deceased with malice aforethought.

The Court of Appeal has guided on this proposition as per the case of **Halima Mohamed and Another vs Republic**, Criminal Appeal No. 30 of 2001 (unreported) when it held:

*"In a criminal case in which the evidence is based purely on circumstantial evidence, in order to found a conviction on such evidence, it must be established that the evidence irresistibly points to the guilt of the accused to the exclusion of any other person"*

This was also the position in **Ally Bakari & Pilly Bakari vs Republic**, [1992] TLR 10, stating:

*"The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from the circumstances".*

So I do not see how the prosecution has satisfied this requirement of the law given the circumstances of the case and the evidence so far evaluated. I am not convinced a circumstantial case has been proven against the accused.

On an issue that I would not feel comfortable resting the pen before commenting upon, is the concern raised by the Defence counsels in their final summation that there is variance between the charge and the prosecution's evidence. The records testify to this variance as the charge

sheet states that the accused persons killed the deceased on 02/09/2021, while the evidence adduced reveals that the deceased died on 04/09/2021. Granted, the actions alleged to have perpetrated the said death happened on the 02nd Sept, while the actual passing away happened on the 4th of September. But the prosecution had the duty either to amend the charges to reflect the actual date that the alleged death happened or adduce evidence that would have made this variance probable. The fact is that the said variance was a result of cross-examination, which only proved that no one is certain when exactly the death of the deceased happened. The Court of Appeal of Tanzania in the case of **Credo Swalehe vs Republic** [2014] TLR 144 held in guidance on this matter that:

*"The irregularity in convicting the Appellant on a charge which carries particulars diametrically opposed to the evidence on record alone is so glaring that it has resulted in miscarriage of justice."*

In that sense, I must agree with the defence side that this is an irregularity to which the prosecution should have had the opportunity, which they amply had, to amend the same.



In the final analysis, the prosecution has failed to prove the case against the accused persons on the charge of murder. I find all the accused persons not guilty of the charge of murder. Consequently, this court acquits the accused persons of all criminal liability and sets them to liberty, unless held for other lawful causes.

It is so ordered.

**DATED at ARUSHA this 18th day of August 2023**



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**A. Z. Bade**  
**Judge**  
**18/08/2023**

Judgment was delivered in the presence of the Accused persons and their counsel and the State Attorneys in an open court on the **18th** day of **August 2023**



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**A. Z. BADE**  
**JUDGE**  
**18/08/2023**

The right to appeal is hereby explained.



A handwritten signature in blue ink, appearing to read "A. Z. Bade", is positioned above a horizontal line.

**A. Z. BADE**  
**JUDGE**  
**18/08/2023**