

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF SHINYANGA)
SITTING AT BARIADI**

CRIMINAL SESSION NO. 23 OF 2022

**REPUBLIC
VERSUS
PETRO LUSANA @MANDAGO**

JUDGMENT

26th October & 20th November 2023

MASSAM, J.:

The accused person Petro Lusana @ Mandago is charged with the offence of Murder contrary to Section 196 and 197 of the **Penal Code** Cap. 16 R:E 2019 and Attempted to Murder Contrary to Section 211(a) of the Penal Code Cap 16 R.E 2019.

The information was read over and explained to the accused person who were required to plea thereto, on his particular plea, he pleaded not guilty to the information.

It was alleged that, on 9/01/2020 at 09:00 hours at Sola street within Maswa District, in Simiyu Region, the accused person did Murdered one Richard s/o Peter Lusana, Pili D/o Peter Clement, Pili D/o Mathias Doto and

attempt to murder one Mathias S/o of Madaha, Irine D/o of Fabian and Salome D/o Clement.

The brief facts of the case are such that, on 8/1/2020 at Sola street at Maswa District in Simiyu region night hours one Grace daughter of peter received a call from accused telling him to go to his house to tell his wife one Sabina Machungwa to throw out things that were hidden under the bed. She did as instructed and the thing which was hidden was petrol which was kept in the water bottle. After throwing that petrol the wife of the accused one Sabina Machungwa told one Grace to do not inform anyone.

That on 9/1/2020 one Salome clement while asleep with her mother in law (deceased) Milton, Irine Fabian, Prisca Peter and Richard Peter they were awaked by their mother as there was fire burning in their entire house. So they raised an alarm and their father who was in different room opened the door which was closed on the outside and succeeded to get out. But all of them were badly burnt and taken to Maswa hospital then to Bugando Referral hospital. The source of the accused person to set fire was that accused person had separated with his wife Bankolwa Clement and he was trying to make peace with her but it failed. Search was

conducted in the house of accused and the said bottle of petrol was found outside the house near the toilet on the grass and the said search was witnessed by Sabina Machungwa, Regina Ngeleja and WEO namely Pascal Mathias and one No. G 2049 D/C Philipo and Petro Lusana. Sketch map was drawn and postmortem report was filed which revealed that the cause of death was caused by wounds and failure in the respiratory organs caused by that fire. Accused was arrested and taken to the police station where he confessed to commit the said offence. He then charged before the court with the six offenses.

When the matter was called for plea taking and preliminary hearing, the information of murder and attempt murder was read out and explained to him, he pleaded not guilty to both offences.

The matter was called for hearing, the Prosecution side was represented by Ms. Rehema Sakafu and Patrick Challe learned state Attorneys, while the accused person was represented by Mr. Vitus Dudu the learned Advocate.

In proving their case, prosecution called (8) eight witnesses and tendered 7 (seven) exhibits, while the defense had only one witness the accused himself.

The prosecution evidence according to its witnesses was basically as follows, **PW1**, one Clement Malunde, 59 years, farmer, Sukuma, Christian testified that, he is living at Solwa street, Maswa District, with his child namely Bahati Clement, He added that in January 2020 he was living with his wife, his daughter and his grand sons and daughters. In his compound he had two houses, that day he was sleping in different house with his wife who slept in the other house with their children and grand daughters and sons. In that house he was sleeping with his brother. That on 9/1/2020 at 1:00pm, night hours, when they were sleeping they heard an alarm from someone crying for help.

They decided to follow where the alarm was coming from and find out it was coming from his another house, he went there and found they were locked outside. He unlocked them and started to get them out of the house as the house was surrounded by fire and all of the people who were in that house were burnt by that fire. They cried for help and people came to their rescue and help to take them to the Maswa Hospital upon their arrival to the hospital two children passed away and one patient was transferred to Bugando referral hospital who later on passed away too. Policemen when came to the scene they interrogated them and told them they suspected one Petro Lusana his in law he threaten him that he will do

something bad to his family because they separated him with his wife who is his daughter. He reported that threat to VEO who advised him to be careful. In that scenario he suspected the accused person but he did not inform the police that the accused person threatened him, and VEO was the one who required to inform this court as he had no dispute with the accused.

The PW2, Salome clement, testified that on 23/2/2020, is living at Sola village with his son namely Milton Madaha. On January 2020 he was living at Sola with her parents, Clement Malunde and Pill Mathias with her other relatives. That on 9/1/2020 night hours when she was asleep with other relatives, she saw fire burning their house they started to cry for help and her father came to rescue them by breaking the door. She continued to say that some of the relatives got some wounds and some of them passed away. Policemen after been reported they came to the scene and took the victims to Maswa hospital. She suspected accused person to be the one who set that fire as he had dispute with her young sister who was his wife, accused person started to threaten their family to kill them. She said that they reported that threat to VEO and it was like one month from the time of threat to the commission of that offence. Accused person was alleging her together with her mother to be the reason of that separation

when she was asked if accused person had a motorcycle she said that he had it. When she was asked the number of her children she said that she had two children but one of them died.

PW3 told this court that his name is D/SGT Maulid ,46 yrs, Manyema. He said that he is working at Busega police station but on 2020 he was working at Maswa police station. He has experience of 7 years. That on 9/1/2020 at 2.00pm night hours he was on duty and he received a phone from his boss to go and attend the victims who their house was set on fire. He went to the scene and found the victims and some villagers who were helping them. All the victims were taken to Maswa hospital, on arrival two children passed away and one woman got transfer to Bugando hospital. The said victims had some burnt wounds and some of them their condition were so bad. At the scene he tried to ask the mother of that family and he mentioned this accused person to be the one as he used to come to her house all the time. That on 10/1/2020 he went to the house of accused person to search after he heard that petrol was used to set fire to the victims house. In his house he found two Jambo bottles filled with petrol.

He filled the certificate of seizure and if he saw it he will identify it as it has his name, signature police number and names of the witnesses who

were in the scene, the said certificate of seizure and two bottles of Jambo bottles were tendered and admitted as exhibit P1 and P2. Later on it was read over to the court. He continued to say that the said post was not the source of that offence and in the house of accused person he did not see any motorcycle no vehicle. Also he said that search was conducted in the presence of accused's wife.

PW4 Pascal Mathew told this court that he is WEO of Senani on 10/1/2020 he was told to go and witness search which was conducted in the house of accused person. In that search they found two Jambo bottles with petrol outside his house nearby outside toilet in the grass. The wife of accused was the one who directed them there, as she told them that one woman told her that his husband called her and directed her to remove that petrol which was inside the house. In that search the accused person was around. He told this court that accused person is his friend and he never had any dispute with him. Again he said that Clement Malunde told him that accused was disturbing them by going to his house and he told him that if that acts repeat he will write him a letter. When he was asked if accused person used to drive the motor cycle he said he do.

PW5 No. F 3905 D/Sgt Julius, policeman, Mbugwe, 46yrs, Christian told this court that he works at Bariadi police station since 2021 before that he was at Maswa police station that 12/2/2021 he was told to go Maswa prison to take accused person who had a murder case, he was told to take handwriting samples in order to take it to the handwriting expert. He said that he gave him three papers and told him to write the words he was reading to him and write as written in the said posts which was found in the scene which was suspected to be written by him. After that he handled over the said papers and the said posts to the office of handwriting expert Mwanza. He said that if he saw that exhibits he will identify it as he wrote it himself and it has his name and signature, he prayed to tender the same as exhibit and it was admitted as exhibit P3 and P4. The said exhibit was with one CPL Timothy who is now the deceased. He said that he don't know what was used to write in that post but in his side he told him to use a piece of wood to write the said posts. The said posts which was found at the scene and the one which was written before him was written in different dates the aim of that investigation was to know if the said statement was written by same person.

PW6 Joshua Henry Paulo 44yrs, sukuma, welder, Christian, he told this court that he is a welder living at sola njia panda Maswa, that on

8/1/2020 he was in office. One mandago went to his office and ask for a small red oxide quantity of grill paint to paint his table, he gave him. He said that he know him as he was his the hamlet chairman. On 9/1/2020 at 2.00pm he heard a cry for help (mwano) from the house of clement which was burnt with fire, he went to the scene and found mandago who showed them a post which was hanged on electric pole and it was written by using with the red oxide paint. The next day the said mandago was arrested and on his interrogation he admitted to commit the said offence of set fire. He is assured that the said paint is red oxide as he uses it every day as welder. He continued to say that the red oxide paint cannot stay for a long after been opened but if it is closed can stay but the said colour which he gave to accused could not stay for long time.

PW7 Stephano Mnubi, 53, Kerewe, Assistant medical officer, Christian testified that he was a doctor working at Maswa hospital ,that on 9/1/2020 he was on duty and he received some patients who were burnt by fire they were six, among them there were two children who were in critical condition, who passed away the short period after their arrival and one patient who was an old woman her condition also was not good so he decided to transfer her to Bugando referral hospital.

The remaining patients remained with them. The two children who passed away he took their body to the mortuary Dr. Nelson was the one conducted postmortem and find out that their death was caused by deep burn as the fire went too deep to their body. He said if he see postmortem he will identify Dr Nelson's hand writing as he used to work with him so he pray the same to be tendered as exhibit and the same was admitted as exhibit P5 and P6.

PW8 PF 20536 inspector Idd Yusuph Msemakweli, 42 yrs, Ndegereko, policeman, Muslim testified that he is policemen, he is working at Mbeya but before he was at Mwanza his duty is to investigate, examine, register the questioning documents and to appear to the court to give evidence. That on 17/2/2021 he was at work, one policeman No. 3905 D/CPL Julius from the office of OC-CID Maswa came with two envelopes which had some samples to investigate the questioning handwriting.

The said envelopes were marked A1 and A2 and another sample of handwriting from Petro Lusana was marked as exhibit B1 and B2, after that he marked it as MW/FB/Doc/lab/10/2021. He started his investigation by comparing that exhibits from exhibit A1 and A2 to exhibit B1 to B2, his findings were if the handwriting from exhibit A1 and A2 are the same with

the handwriting from exhibit B1 to B2 that if they were written by the same person as all characteristics of the size are same. After his findings he wrote a report and handover to the said policeman. He said that if he see the said exhibits he will identify by its marks and his name, signature and his office seal. He prayed the same to be tendered as exhibits and it was admitted as exhibit P7.

He added by stating that the questioning documents required to be the same with the sample documents, which meant that if the questioning documents are written by pen the sample document must be written by pen too when he was asked if he understand the object which accused used to write the said posts he said that he don't know he dealt with handwriting only. This he proved that it was written by the same person.

Having heard the evidence from prosecution closed and the prima facie case had been established the accused person was called to defend his case by informed this rights under Section 293 (2) of Criminal Procedure Act, Cap 20, R:E 2022. He chose to give a sworn defence without calling any witnesses

In his sworn defence, **DW1** testified that, on 9/1/2020 at night hours he heard a cry of help (mwano) from the house of one clement Malunde

his house was on fire. He went to the scene and started to rescue the victims especially his son one Richard Petro. After a short time police men came and helped them to take the victims to the hospital when they arrived to hospital he was called by one policeman who told him that one Salome clement was suspecting him to be connected in the incidence the next day he was taken to investigation room and OC-CID directed his house to be searched. They searched his room and found petrol under the table. They called VEO to come and witness the search after six days he was taken to court. He continued to state that he did not commit the said offence it was cooked one as he had dispute with clement Malunde after the death of his grand child who they were fighting to bury him while his father's side want to bury him too, so has a leader he decided to order the deceased to be buried at his father's family so clement Malunde was not happy as the deceased was his grandson too.

He also said that he never threaten to kill him and he never went to Clement Malunde home to look for his wife as he was with her at his house. He added that the said petrol which was found at his house belonged to him as uses it for his motorcycle as he had a plan to go to the market place at Malampaka concerning to the posts at the scene are not the same tendered at the court because those tendered posts are the one

he wrote at Maswa police station after being given the colour and a piece of wood to write. He said that he was at the scene and he saw a pen and the post which was hanged.

He said his wife saw nothing that's why he did not call her. Concerning the issue of using motorcycle, Salome and WEO testified to the court and supported his testimony

This was the end of the evidence for both parties with no final submissions the issue for determination if this case has merit is **whether the accused person, is guilty of murder of the deceased one Richard Peter Lusana, Pili Peter Clement and Pili Mathias Dotto and attempt murder of Mathias s/o Madaha, Irine D/O Fabian and Salome d/o Clement**

It is clear in criminal matters that, the case should be proved beyond reasonable doubt, and it is principle that the burden of proof in criminal proceedings lies with prosecution. The said burden never shifts to the accused person it will be contrary with provision of law under Section 3(2) (a) of **The Law of Evidence Act Cap 6 R:E 2022**, which provides that, in criminal cases the burden of proof lies on the prosecution and that, the case must be proved beyond reasonable doubt, The section provide that,

3 (2) A fact is said to be proved when-

(a) In criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists;

The above provision was emphasized by the Court of Appeal in the case of **Nathaniel Alphonse Mapunda and Another v. Republic (2006) TLR 395**, that,

"The standard of proof is beyond reasonable doubts and the accused person bears no duty of proving his innocence. His duty is only to raise reasonable doubts in the mind of the court"

According to the said principle, provision of the law and the said decision the prosecution is required to prove all ingredients of the alleged offence as elaborated to the case of **Woolmington vs DPP (1993)AC 462** and **Okale vs Republic (1965) E.A 55**. For the court to convict an accused person (s) of murder, the following ingredients must be properly proved.

(i).That, the victims of the crime mentioned in the charge are actually died,

(ii). Whether the death was not natural,

(iii). Whether it was the accused person who caused the death of the deceased,

(iv). Whether the killing of the deceased was with malice aforethought,

With regard to the first question as to, ***Whether the victims of the crime mentioned in the charge is actually died***, is that, this fact is not disputed by both parties that the victims are actually died, the same was also supported by Exhibit P. 6 (postmortem report) which read that,

"The body of the deceased lying in supine position on the examination table, with minimal redigity with extensive burn wound on the abdomen, chest, on the face and lower limbs....the body was cold with no purification noted....."

Another postmortem of Richard Peter Lusana read that

"Upon examination of the deceased .there was extensive emaciation of the skin on the abdomen, upper limb lower limb and face. These

emaciation of the skin was superficial but was extensive. The body of the deceased already slightly with rigidity but other all the external organ were intact."

Also the evidence from PW1 testified that, upon his arrival to the house where the victims were sleeping he found fire he cried for help and the victims were on bad condition due to fire, with the help of other people they managed to take them out and took them to the hospital but two of the children passed away when they were attended at Maswa hospital and one of the victim was referred to Bugando hospital who later passed away. PW2 also testified that she was among the victims who were sleeping in the house which was set by fire, she said that they were taken to the hospital but two children passed away at Maswa hospital and her mother who was transferred to the Bugando hospital passed away, later due to wounds caused by the said fire.

Also, the evidence of PW3, (policeman) testified that, after he received the information about the incidence, he went to the scene and found the victim were badly destroyed with the fire by help of villagers they took them to Maswa hospital later but one victim her condition was

bad she was taken to Bugando hospital but died later and two children who were at Maswa hospital.

From the above evidence, it is clear that, the victims of the murder mentioned in the charge sheet, actually died, this court is therefore find out that the 1st ingredient has been proved beyond reasonable doubts.

Regarding the second ingredient, ***if the death was not natural***, since the first issue is answered in affirmative, this means, the death of the diseaseds were unnatural death, as it was caused by burnt of fire which caused wounds in the different parts of the victim body but for the ones who passed away, they had wounds all of their body. The same was also testified by PW7 supported by postmortem report. (Exhibit P6).

In answering the third issue as to Whether it was the accused person who caused the death of the deceased, is that, from the evidence testified by prosecution it is clear that, no any prosecution witness said that he saw the accused person committing the offence, because the prosecution's evidence is entirely based on circumstantial evidence, by looking at the evidence of PW1 told this court that he had two houses and on the said date he was sleeping in different house with his wife who were in the other house with the victims at 1.00pm he heard a

cry of help from the other house he wake his brother, on his arrival to that house he found the said house was locked outside, so he broke the door with the help of the villagers and neighbors they took out the victims and later to the hospital.

He added that at Maswa hospital her two grand children passed away and his wife who was transferred to Bugando also passed away Police came and started to ask him if he suspected anyone to be connected with the commitment of the offence the mentioned accused person (his in law) married to his daughter but they had misunderstanding, Again he said that accused used to threaten him to kill his family and he reported that threat to WEO. Also PW2 said the same that she suspected accused person as he was her brother in law, she agreed the same to have misunderstanding and used to blame them to be the source of the said misunderstanding. She said that it is true that accused used to threaten them and her father PW1 reported the same to the VEO.

In regard to circumstantial evidence, there is no dispute that, PW1, and PW2's testimony was due to the threat which was given by the accused person concerning his marriage but no one saw him setting fire to that house. Another evidence was about the petrol which was found in the house of the accused person and a post which was written and hanged to

the house of the victim, PW3 No. F 5153 D/SGT Maulid testified that on 9/1/2020 he was on night duty and received information that there is a house which was set fire so the victims needed help. He went to the scene and took the victims to the Maswa hospital, where two children passed away and another one died at Bugando hospital after been refereed there. While at the scene he tried to ask some people there if they are suspect anyone and PW1 told him he suspected the accused person as he used to threaten their family.

Also concerning the post which was hanged near to the victim's house suspected to have been written by the accused person alerting the victim his plan to finish up his family. PW3 testifed that he was the one who went to the house of the accused person to search his house after he has been suspected to be the one who set fire to the said house, on his search he found out some petrol in his house which were in the two bottles of Jambo water, and he filled a certificate of seizure which was tendered and admitted as exhibit P "1" and P "2" collectively.

PW4 WEO of Senani told this court that he was at the scene when search was conducted and found two bottles of Jambo water with petrol inside which were outside the house on the grasses. Concerning the issue of threat to kill their family which was raised by PW2 and PW1 in their

testimony, PW4 said that PW1 complained to him that the accused person used to disturb him by going to his premises to ask for his wife and Pw4 told PW1 if that act proceed, he will give him a letter to go to the police stations.

Again he said that, the accused's wife told them that her neighbour was the one who informed her that the accused send her to inform her to take out that petrol. PW4 informed the court that accused person was his friend who used to drive motorcycle so there was no any problem of him being found with the said petrol. PW5 was a policeman who took the sample of the accused's handwriting to the office of handwriting expert to confirm if the said posts written to the house of PW1 was written by the accused person.

After that, he took it to Mwanza until on 8/7/2021 when told the results were out he handed it to the investigator of this case. He said that the said exhibits if he saw it he will identify the same as it had his number and his names. He said when he was taking the said samples he was compering with the posts which was found to the house of which the victim suspected to be written by the accused person, he therefore prayed the same to be admitted by court which admitted as exhibit P3 and P4. When cross examined by Mr. Dudu advocate if he was aware which object was

used to write that posts, he said he don't know but the accused wrote the same by using a piece of wood. Again PW6 who was the welder testified that, the accused person went to his working place to ask for small amount of painting colour to paint his table. He gave him and the next day he heard a cry for help coming from the house of PW1, he went there and found people gathered he saw the posts which was written by using the painting colour similarly to the one which he gave it to the accused person.

He said that if he sees the said posts he will identify it. Lastly he said that he has never heard any dispute between the accused person and PW1 as he was their leader and advisor. He added that, the said red oxide can be used for long time if closed but if not closed cannot, but for the period of one year as it was testified, it cannot be used. When he went to the scene he found the said post hanged and it was written by the said red oxide person left and after a short time the deceased was attacked.

Again, PW7 the doctor testified that on 9/1/2020 he received patients who were burnt by fire who were six in number among them there were two children who passed away when he was giving them treatment .and one woman was transferred to Bugando hospital who later on passed away too. He said that the cause of death was deep burn he said that postmortem was conducted by his fellow Dr. Nelson and he was the one

who filled the PF3. He said that if he see the PF3 he will identify it together with postmortem report which was filled by Dr. Nelson as he knows his handwriting and the same was admitted as exhibit P "5" and P "6".

PW8 one inspector Iddi Yusuph Msemakeli testified that he is working to the office of questioning document examination laboratory. On 17/2/2021 he was at his office at Mwanza and he received a policeman who had samples of document which was questioning the handwriting, the said samples were marked with exhibits A1 and A2 and another one was marked as B1 and B2, his duty was to compare the handwriting from exhibit A1 and A2 with exhibit B1 and B2. After his investigation he found out that all samples were written by one person. From the above piece of evidence, it is clear that, no one witnessed when the house of the victim was set on fire this means that there was no eye witness to that circumstance. The whole evidence based on circumstantial evidence; hence this court is doubting as to whether the offence was committed by the accused person.

It is clear from the case of **Simon Musoke v. Republic [1958] 1 EA 715, the Court of Appeal for East Africa**, that,

"In a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction,

find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt".

The same principle was imported from the case **Lezjor Teper v. Reginam [1952] A.C 480** in which it was stated at pg. 489 that,

"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

Consequently, and from the above findings, it is my view that, there is no eye witness who testified to have seen the accused person committing the offence .

From the evidence of PW1 and PW2, they testified that, they suspected the accused person to be the one who set fire to that house as he used to threaten them to finish their family, and PW1 said that he reported the matter to WEO but WEO who testified as Pw4 admitted that PW1 did report to him that, the accused is disturbing him by going to his house to look for his wife, there is he nowhere he said that Pw1 reported to him that the accused person threatened to kill his family.

Again when PW1 was cross examined by Mr. Dudu said that he suspected accused person to be the one who committed that offence but he never tell the policeman about it. When PW2 was testifying to the court she said that the accused person used to drive motorcycle, the same was supported by the evidence of PW4 who said that the accused person used to drive motorcycle and on the said day when the search was conducted he was there and the said petrol was found outside the accused person's house and the one who lead them was the wife of the accused person.

Also PW4 when asked by Mr. Dudu advocate if it was wrong for the accused to possess the said petrol, he said that there was no problem as the accused person used to drive the motorcycles. This court finds out that between the accused person and his wife who was required to be suspects as she was the one who lead them to find the petrol which was suspected to be used in the commission of the offence, and bad enough the neighbour called Regina who was mentioned to be the one who was phoned by the accused person to go to the accused's house to tell his wife to remove the said petrol was not called, this court finds out that the said witness was important to make clarification on the place where the said petrol was and who took the same outside the house with direction of whom. So failure to call the same the court may draw an inference adverse

to the prosecution. This court is aware that as per Section **143 of The Evidence Act Cap 6 R:E 2022**, provides that

"Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact".

From the above provision, it is clear that, no number of witnesses is required to be brought before the court to testify, what matters the most is weight of the evidence which brought to proof the case as all knows that, in criminal cases the prosecution is bound to prove the case beyond reasonable doubt that the accused person committed the offence.

In this case, as narrated above PW4 and PW3 said that the wife of accused person's wife told them that the accused person phoned his neighbour Regina to go to his house and tell her to remove that petrol but the said Regina was not brought to the court to testify, also the wife was not called to tell the court if Regina went to her and informed her to remove the said petrol. This court is doubting if the evidence testified by PW3 and PW4 was in fact from Regina and the wife of the accused person.

This above position was clearly discussed in several cases including the case of **Aziz Abdalah V. Republic [1991] T.L.R 71**, that,

"The general and well known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify to material facts. If such witnesses are within reach but are not called without sufficient reason being shown; the court may draw an inference adverse to the prosecution"

The above principle was also debated in the case of **Pascal Sele vrs Republic** Criminal Appeal No. 57 of 2017(unreported), **Mashimba Dotto @ Lukubanija vs. Republic, Criminal Appeal No, 317 of 2013** and **CRDB Bank PLC v. Africhick Hatchers Ltd & Another, High Court Commercial Case No.97 of 2017**. Whereby in these two cases it was held that,

"Where a party fails to call a material witness without any justification, the court should draw an adverse inference against the party who failed to do so".

Again, the case **Ester Aman V. R, Criminal Appeal No 69/2019 (2020) TZAC (12, DEC, 2020** at Pg 14 it was held that,

"Saidi Amri Ramadhani was not called as a witness irrespective of being listed as one of the witnesses at the committal stage in order to clear the doubts on what had precipitated the enquiry in question in relation to the killing incident. To say the least, Said Amri Ramadhani was a material witness and the prosecution was under a prima facie duty to call him as he would have testified on material facts relating to the fateful incident. Since nothing was said if he was not within reach or could not be found, the Court is entitled to draw an inference adverse to the prosecution."

From the above analysis there is another doubt in my minds that, investigation was not properly conducted regarding the issue of the colour used in writing the said posts, Pw6 who is the welder told this court that, the accused person went to his office and asking for a small amount of paint colour for painting his table of which he gave him, and when at the scene he found the said post was written by that paint colour and he identify to be the same as he uses it everyday in his work. He said that

the said colour cannot be used after staying for a long time, but PW5 in his testimony said that he took the accused person's sample after one year and he used the said colour left by the accused person at the scene. This court is doubting as to which colour did PW5 used in taking the said samples as PW6 testified that red oxide cannot be if stayed for a long time, this court is of the view that may be the red oxide alleged to be used by the accused to the said posts is not the one which was used by accused as in document laboratory department sample the said piece of evidence is contradictory which support the defence submission that the said posts and sample are different

Again PW6, when cross examined, testified that, for the period of one year the said alleged post was with investigator CPL Timoth who is now a deceased. So this court is doubting on the issue of chain of custody the said exhibit CPL Timoth took it from who and after his demise the said exhibit was handed to who until the date which came to the possession of PW5. Again PW5 said that the colour which used in the said posts are the same with the one which was used by the accused person before him, no where from their evidence showing who was keeping the said red oxide colour for that one year until when it came to the possession of PW5. From what I stated above this court finds out that, prosecution failed to

link between the petrol which was found outside the house of the accused person if it was the same which was used to set fire to the house of the victim as petrol was not the only source which can be used to set fire to the house. Again the issue of the red oxide colour which PW6 gave it to the accused person was the one which used to write in that posts and to the said samples as the samples which were taken after one year elapse while PW6 said that the said red oxide cannot be in use after staying for long time especially one year.

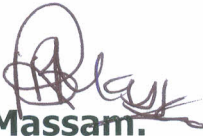
Having said so, I may now conclude the 3rd ingredient of this offence by saying that, from the evidence testified by the prosecution, I am not convinced that the accused person was the one who murdered the mentioned deceased because, the link between the death and the accused persons has not been proved to the required standard.

Coming to 4th element **Whether the killing of the deceased was with malice aforethought, thus** I see that, there is no need of discussing the same as the third element as the prosecution failed to proof that the accused person was the one who set fire to the house of the victim and cause death to the said deceased and attempt murder to the said victims.

As the prosecution has not discharged their duty, this court is hereby acquitting one Petro Lusana @ Mandago the accused person forthwith unless he is otherwise lawfully held for another offence.

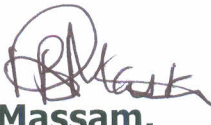
It is so ordered.

DATED at **SHINYANGA**, this 20th day of November, 2023.


R.B. Massam.
JUDGE
20/11/2023

Right of appeal explained to the parties.




R.B. Massam.
JUDGE
20/11/2023