

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**[ ARUSHA SUB- REGISTRY]**  
**AT ARUSHA**  
**CRIMINAL SESSIONS CASE NO. 109 OF 2022**

**REPUBLIC**  
**VERSUS**  
**1. SHAFII S/O ATHUMAN SALEHE @ MBONEA**  
**2. HASSAN AMAN**

**JUDGMENT**

7/11/2023 & 24/11/2023

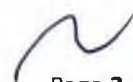
**BADE, J.**

The accused persons are charged with murder contrary to section 196 of the Penal Code. The charge alleges that on the 13<sup>th</sup> day of April, 2021 at Nambala Area within Arumeru District in the Arusha Region the accused persons murdered one Mashaka Mussa Majid. The charge was read and explained to the accused persons, who pleaded not guilty, hence a full trial.

The learned State Attorneys Upendo Shemkole, Witness Mhosole, Carolyne Kasubi and Lilian Kowero appeared for the republic while the accused persons were represented by learned counsels Median Mwale, Fridolin Bwemelo and Happy Mlacha.

In proving the charge against the accused persons, the republic summoned a total of ten (10) witnesses. Out of those 10 witnesses two of them namely, Dr Manumbu Justin (PW4) and James Wawenje (PW8) were disqualified by the Court after objection against them was sustained. The republic also tendered three exhibits, a crime scene map (exhibit P1), a Post-mortem report (exhibit P2), and a Cautioned statement of 2<sup>nd</sup> accused (exhibit P3).

Rishael Sangito Nassari (F6633), a police detective who testified as **PW1** was the first witness for the Republic that was put on the dock. He testified that on 14/04/2021 around 10:00, he was instructed by OC CID for Arusha to go to the Nambala area, Nelson Mandela Road where a dead body was found on a river. Reaching there with his colleague they found a lot of people around the bridge. Down the river, they found a dead body of a male person. He further testified that the body had bruises on the forehead and back of the head. He made a crime scene map which was admitted in evidence as **Exh P1**. He also took the dead body to Leganga Hospital, and then to Mount Meru Mortuary for post-mortem. **PW1** further testified that at the scene of the crime, no one could identify the dead body.



On her part, Shukuru Emmanuel Lukumay, the wife of the deceased testified as **PW2**. She explained that 13/04/2021 was the last time she was at home with her deceased husband when he told her that he was going to meet his friend, known as Shafii so they could both meet somebody who had a business proposal. **PW2** further testified that one Baraka, the deceased's boss had given him a motor vehicle so that he could take some visitors to the national parks. The deceased left around 6:00 pm, and by 8:00 pm she had called to check on him, where he told her that those people had yet to come and he was still waiting for them. She called again at 9:00 pm but he did not pick up the call. At 10:00 pm he picked up and told her that he would call when he was done and that he was at Sombetini.

It was **PW2's** testimony that around 11:00 pm his phone was not picked up anymore as she called again. The next day he reported her husband to the police station as a missing person. On 15/04/2021 she received a call from her husband's cell phone. She asked the person who called her to hand over the phone to the owner but they asked her to go to Moshi to take it if she wanted it. They threatened to throw the phone into the water and insisted that they should go get it from Moshi, after which the phone was put off. On 30/04/2021 he received the news that

her husband was found dead and on 01/05/2021 she went to Mount Meru Mortuary to identify the body where she had identified him through his body marks, particularly the legs. Also, he was a bald head. **PW2** goes on to testify that in his body there were bruises on the back of the head, at the forehead, and in the neck area. It was also her testimony that she never met Shafii, she was only told about him by her husband, referring to one name only.

Another witness testifying as **PW3** was Baraka Rabson Ukoko. His testimony to the effect that the deceased was a driver, driving tour motor vehicles in his company known as Katambuga Company, ferrying tourists to the national parks as their driver. He was employed for service in January 2021. On 12/04/2021 he called to inform him that they will have some visitors on 13/04/2021 intending to visit Tarangire and Ngorongoro, so he should be ready. **PW3** further testified that normally the deceased would take the car and ready it by servicing and repairing it if needed, just normal inspections and checks to ensure it is on top order. That on the fateful day the deceased took a beige-colored Toyota Land Cruiser with Registration No. T215CHM but then on 13/04/2021 those visitors cancelled the trip, so he called him again to ask him to return the car to the office. **PW3** further testified that later

on the day around noon, he was called by one Nuruel, another driver, informing him that the mechanic they normally use had his own visitors and wanted to inspect the car for hire, so as to be sure that it will be good for the said visitors. The said mechanic was called Shafii Athuman. He asked him to look for the deceased so that whoever needed to inspect could do so through him, but he never got any feedback from any of them. He further testified that on 14/04/2021 he received a phone call from another employee one Jaffari who explained that the wife of the deceased had called looking for her husband, as they could neither trace him nor the motor vehicle anywhere. In response, he had asked Jafari to visit the deceased's wife and confirmed that he was missing, after which they reported the missing person and the missing car to the police station. Six days later 20/04/2021 he received the information that the missing car had been found in the estate farm of Dekka at Bomang'ombe in Moshi. He thus went and identified the car which had several items missing including lights, the front dashboard, the fridge, the radio call, and two spare tires which were on the back of the car. He observed that on the boot at the back of the motor vehicle, they found some blood stains.

On the other hand G499, Det Corporal Miraji Omary Mkaguru (PW5) a police officer stationed at Bomang'ombe testified that on 19/04/2021 around 7:30, he received a phone call instructing him to report to the station for an assignment, and upon arriving, together with fellow officers he found at the station, they were briefed that there was a motor vehicle that has been left unattended with no details of the owner so they were to inspect the area and the motor vehicle. The motor vehicle was left near the road leading to the Dekka farms near Bomang'ombe.

They obtained the forensic tools and got a team to the incident, where they found the motor vehicle which was an earth-coloured tour vehicle. The motor vehicle was locked, so they opened the rear side mirror and got inside to open the front door. While inspecting the motor vehicle they found the dashboard had been taken off, the wires were open, the back seat on the driver's side had some blood that was dried as well as the floor at the back seat. The refrigerator was taken off the car, no battery and many other items on the bonnet were missing. That all the front lights were missing as well as the plate number. PW5 went on testifying that he swabbed the blood as well as picked the thumbprint profiles on the door handles as well as on the seats.



PW6, Inspector Idrissa Jabir Msoffe, on the other hand, testified that on 07/05/2021 he was instructed by the OC CID that there was a motor vehicle that is at Bomang'ombe and that he should bring it to Central Police Station in Arusha. It was also explained that the motor vehicle was related to a murder incident they were investigating, so they were handed the motor vehicle which was a beige-colored land cruiser with missing items like the dashboard, the front lights, and the plate number. They brought it to Arusha and handed it over to the exhibit keeper, one Corporal Evance. **PW6** further testified that on 19/05/2021 he was again instructed by the OC CID to travel and arrest a suspect who had supposedly been found in Dodoma so he could be brought back to Arusha. This suspect is Amani Hassan Amani, and they found him in Maseka Village in building works, where he was painting a house, and arrested him to bring him back to Arusha.

Abraham Hatibu Ndeshao, (**PW7**), a member of the hamlet for Nambara Security Committee testified that on 14/04/2021 early morning at 06:45, he received information from a passerby that there was a dead body of a male person near the Nambara bridge. So he went to the scene where he found a crowd of people and indeed found a male person's body which seemed to have been thrown under the bridge. He called the OCS

and OCD for Usa River and a police patrol car came, they investigated the area, and then took the body to Leganga Hospital, and later to Mount Meru Mortuary.

F162 Detec Seargent France Lean Mlay testified as **PW9**. His testimony was to the effect that on 16/04/2021 around 10:00 am he was instructed to investigate a case based on the information received on 13/04/2021 that one Mashaka Majid Musa had disappeared with a motor vehicle with registration no. T 215CHM Land Cruiser to an unknown place. Upon receiving that information, they met with the relatives of the missing person, as well as the owner of the motor vehicle one Baraka Ukoko for interrogation. **PW9** further testified that they had received information from the police in Bomang'ombe that there was a motor vehicle that was left unattended, and that its descriptions matched the motor vehicle was missing. On 20/04/2021 they got information that the missing vehicle was found. He further testified that the owner of the vehicle was able to identify it by comparing the details of the vehicle the car chassis number and the registration number. The motor vehicle was found to have been missing the front show, all the lights, the dashboard, the refrigerator, the radio, and two spare tires. They also found on the back of the car some blood stains trailing. So they shifted



the vehicle from Bomang'ombe to Arusha. On 22/04/2021 around 4:00 am, the suspect Shafii Athuman was apprehended from his house in Muriet. **PW9** further testified that after interrogating and making a statement, they were looking for the second suspect one Hassan Amani as well as the deceased's body. They recovered the body having collaborated with Arumeru and Hai police station. The body was recovered in Arumeru, Nambara Village near Nelson Mandela.

On 27/04/2021 they went to Mount Meru Hospital with the relative of the deceased and his former boss **PW3**, and they identified the body as that of Mashaka Mussa Majid. A medical investigation was done on the deceased's body and a post-mortem report was prepared. The reason for death was pinned to severe traumatic brain injury. Then he testified that they proceeded to investigate with cyber crimes personnel and on 19/05/2021 the second accused was apprehended in Kondoa Dodoma and was brought back to Arusha.

PW10, H2611 Sergeant Zambi finalized the prosecution case by testifying that on 19/05/2021 he was instructed by OC CID to take the statement of the second accused person. He interrogated him and he admitted having taken part in the incident. He recorded the said statement and gave it back for him to read, where he read and signed the statement.

On the defence side, before accused persons could give their defence their advocates brought this court to note under section 294 (1) (2) of the Criminal Procedure Act, Cap 20 R.E 2022 (the "CPA") that the copy of the information which was filed on 21/04/2022 on murder charges of one Mashaka, the area of concern where the deceased body was found was Nelson Mandela bridge but none of the prosecution witnesses has spoken of the body that was found at the Nelson Mandela bridge. And that even **PW9** who was the investigator on the case could not respond about the location where the dead body was found. On that basis, they would like to outright discredit the testimony of prosecution evidence.

The first accused person testified as **DW1**; his testimony was to the effect that on 12/04/2021 he met his boss, **PW3**, for whom he does most of his motor vehicle repairs since he needed his motor vehicle replaced with parts. These were two cars, a Toyota Camry and a Toyota Alphard. He testified that **PW3** gave him some money, a total of TZS 20M on the evening of 12/04/2021, and the next day on 13/04/ 2021 in the morning hours 06:30<sup>h</sup> he boarded a bus headed to Dar es Salaam to procure those spare parts.

When he arrived in Dar he went to a night club for a night out where he met a lady who later told him to go to another venue - club Afrika Sana

and yet again, later on, proceeded to "Kitambaa Cheupe" nightclub, going into a drinking spree. While at it, he lost the money that he was entrusted. He called **PW3** to inform him about the loss, but PW3 did not want to hear of it, and gave him an ultimatum to either bring the money back or the spare parts. He testified that on 15/4/2021 he had tried to find the money from his relatives without any fruition. He proposed to him that he give him time so that he could repay the money or in kind or to assign him duties over which he could repay the money but **PW3** insisted that he should come to Arusha. On 21/04/2021 he informed him that he had already come back, and **PW3** came with some police officers including **PW9** Afande Francis, they arrested him and took him to Engutoto Police Station in Njiro. When they were Engutoto **PW3** told him that he would show him how his money could not be lost. The police officers beat him and made him sign papers that were not explained to him and he refused to sign them. On 19/05/2021 he was arraigned to court and to his surprise a murder charge was read to him that he killed one Mashaka Majid.

On the other hand, the second accused testified as DW2. His testimony was to the effect that on 14/05/2021 he had some work that was given to him by one Haji at Masenge in Dodoma whose value was 1.5M. He

did the work as agreed. On 15/05/2021 while at work, some people who introduced themselves as police officers accompanied Haji asking why his work is not completed, taking longer to finish, while he was already paid the full amount; so he had to promise that he will find some money and buy the materials to finish the work. **DW2** added that Haji would not agree with him on his proposal and so he was arrested. They brought him to Arusha, adding that on the way to Arusha, he had been asked questions like how he had spent the money that was given to him for the materials and his personal details.

I have considered the charge sheet, the evidence from both sides, and the law, and I am of the considered opinion that the major issue for determination here is whether the accused persons are guilty of the murder of the deceased Mashaka Mussa Majid.

In law, for the Court to convict an accused person of murder, the following key ingredients must be proved:

- i. That, the victim of the crime mentioned in the charge information died,
- ii. That, it was the accused persons who in fact, caused the death of the deceased,

iii. That, the taking of the deceased's life was with malice aforethought,

iv. That, the killing was performed by committing an unlawful act or omission.

It is also the law that, the prosecution bears the burden of proving the case. The law further states that the standard of proof is beyond reasonable doubt 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. It is also a legal requirement that any reasonable doubt left by the prosecution's evidence should be resolved in favour of the accused person. In the case of **Pascal Yoya @ Maganga vs Republic**, Criminal Appeal No. 248 of 2017 (unreported), it was held that:

*"It is a cardinal principle of criminal law in our jurisdiction that, in cases such as the one at hand, it is prosecution that has a burden of proving its case beyond a reasonable doubt. The burden never shifts to the accused. An accused only needs to raise some reasonable doubts on the prosecution case and he need not prove his innocence".*

Obviously, this case is based entirely on circumstantial evidence. In cases of this nature, the court must satisfy itself that the point of guilt of the accused is irresistible. Circumstantial evidence can be the sole basis for a conviction if circumstances establish the chain of events leading to the guilt of the accused and the commission of the crime without other possibilities. The Court should be satisfied that the said circumstances were clearly established complete the chain of events and prove the guilt of the accused beyond reasonable doubt. Moreover, all the circumstances should indicate the guilt of the accused and should be inconsistent with their innocence, the onus in proving that the chain is complete is always on the prosecution, and the infirmity of lacuna in prosecution cannot be cured by the defence. The chain of events or circumstances should be complete without gaps to the extent that no other conclusion or inference apart from the guilt of the accused can be drawn. It necessarily means the evidence should really be pointing to no one other than the accused persons.

In the case of **Said Bakari vs Republic**, Criminal Appeal No. 422 of 2013 (unreported) which was quoted with approval in the case of



**Sikujua Idd vs Republic**, Criminal Appeal No. 484 of 2019 (2021)

TZCA 427 the Court took the view that:

*"It is established law that a charge of murder can be fully proved by circumstantial evidence. In determining a case centered on circumstantial evidence, the proper approach by the trial court and appellate court is to critically consider and weigh all circumstances established by the evidence in their totality and not consider piecemeal or cubicles of evidence or circumstances".*

In the matter at hand, I find it upon myself to test one ingredient of the offence after another in its circumstantial totality in order to establish if indeed the accused persons are the ones who murdered Mashaka Mussa Majid.

The first ingredient of the offence of murder on whether the victim of the crime mentioned in the charge actually died; the death of Mashaka Mussa Majid is proved by **PW1** and **PW7** who went to the scene of the crime and saw the body of the deceased. This fact is corroborated by the evidence of **PW2** and **PW3** who went to the Mount Meru Mortuary and identified the body of the deceased as one of Mashaka Mussa Majid. The first ingredient is thus, answered

affirmatively that there is a victim of the murder mentioned in the charge sheet who actually died. So, this first ingredient of murder has, therefore, been proved beyond reasonable doubt.

Regarding the second ingredient, whether it was the accused persons who in fact, caused the death of the deceased. Going through the prosecution witnesses, none of the witnesses said he/she saw the accused persons committing the murder. It is not clear on prosecution evidence what led them to arrest the accused persons. **PW6** only stated that on 19/05/2021 he was instructed by OC CID to travel and arrest a suspect by the name of Amani Hassan Amani who was found in Dodoma. **PW9** also stated that the first accused, one Shafii Athuman was apprehended from his house in Muriet on 22/04/2021 around 4 am. The prosecution's evidence is dead silent on what made them arrest those two suspects or how those suspects are connected with the murder of the deceased Mashaka Mussa Majid.

In the whole of the prosecution's evidence, it's only exhibit **P3**, a cautioned statement by the 2<sup>nd</sup> accused which implicated the 1<sup>st</sup> accused to the commission of the crime. In that cautioned statement, the 2<sup>nd</sup> accused person stated that he witnessed when the 1<sup>st</sup> accused person hit the deceased on the head using a spanner, popularly

known as a pump ranger three times. After the deceased fell, they took him to the boot of the car, drove to one "korongo", dumped the body there, and then they took the car to Moshi and handed it to one white man. This statement alone is not enough to convict the accused persons without corroboration, bearing in mind that some of what is in the statement contradicts what some of the prosecution witnesses had said, especially in the area where the body was found.

The prosecution witness testified that the body was found on the river in the Nambala area near Nelson Mandela Road, while 2<sup>nd</sup> the accused in his statement stated that, they threw the deceased in a "korongo".

This Court has cautioned itself that a confession of a co-accused is not a substantive piece of evidence in its own right. The principle of law is that in dealing with a case against an accused person, the court cannot start with the confession of a co-accused person; it must begin with the other evidence adduced by the prosecution. The confession of the co-accused is ideally utilized by the court only to assure itself about its conclusion as to the guilt of the accused that it has drawn from the other evidence.

Prudently, I directed myself to first investigate the other evidence tendered by the prosecution and establish if the remaining evidence of the prosecution was acceptable. Only then I could turn towards **Exhibit P3**. This necessarily means that since the evidence led by the prosecution is itself unsatisfactory, the confession of the co-accused is of little help and cannot be taken into account to hold the accused guilty.

In the case of **Abubakari Issa @ Mnyambo vs Republic**, Criminal Appeal No. 34 of 2010, the Court of Appeal sitting in Mwanza held on the weight to be accorded to a confession of a co-accused:

*"Suffice it to say, a confession by a co-accused would support a conviction if it is corroborated by other independent evidence".*

Another doubt that appeared in the prosecution case is that according to the testimony of **PW5**, they went to Bomang'ombe where the motor vehicle that the deceased person was driving was found. The testimony is that they inspected the motor vehicle and found some items missing from it. They also found some blood stains on the floor in the back seat as well as the boot of the car.

**PW3** stated that he swabbed the blood as well as picked the profiles on the door handles, as well as on the seats of the car, but surprisingly they did not subject that blood sample to any DNA analysis to establish if the blood was that of the victim or any trace of the suspects now accused persons has been in that motor vehicle. In my mind, I expected that to be a logical conclusion to the swabbed samples from the said motor vehicle; that they would be taken to be analyzed in order to complete the circumstances of the evidence. But that was not to be. The prosecution is silent on what happened to these swabbed samples.

Worse enough the motor vehicle was not brought in court as an exhibit and the reasons for not doing so were not disclosed. I could not help but make a negative inference in conclusion that the prosecution evidence has failed to link the accused persons to the commission of the crime, bearing in mind the fact that where a party fails to introduce in evidence either a witness or an exhibit to their credibility a testimony that is available and able to elucidate and bring clarity to the facts, then I should think, there should be an inference drawn that the party fails to bring in such testimony because they feared that such evidence would expose peculiar facts to the case which are unfavorable to them.

I see no useful need to discuss the remaining ingredients of the offence of murder as it shall serve no useful purpose at this point.

Having said so, it is my conclusion that the prosecution was unable to prove the case against the accused persons beyond the reasonable doubt.

Consequently, I acquit the accused persons of the murder charge and order that they both be released forthwith unless held for other lawful causes.

It is so ordered.

**DATED at ARUSHA this 29th day of November 2023**




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**A. Z. Bade**  
**Judge**  
**29/11/2023**

Judgment delivered in the presence of the accused persons and or their representatives and the State Attorneys in open Court on the **29th** day of **November 2023**

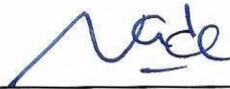




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**A. Z. BADE  
JUDGE  
29/11/2023**

Right of Appeal is explained



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**A. Z. Bade  
Judge  
29/11/2023**