

**IN THE HIGH COURT OF TANZANIA
DODOMA SUB- REGISTRY
AT DODOMA
ORIGINAL JURISDICTION
CRIMINAL SESSIONS CASE NO. 16 OF 2022**

THE REPUBLIC

VERSUS

HARUNA ALLY KIMAKI

JUDGMENT

14th November, 2023

HASSAN, J.

The accused person Haruna Ally Kimaki, adult, stands charged with the offence of Murder contrary to section 196 and 197 of the penal code [Cap. 16 R.E 2019]. The particulars of the offence brought against the accused person was to the effect that, on the 22nd day of July, 2020 there at Kelema village, within Chemba District in Dodoma Region, the accused person Haruna Ally Kimaki murdered one Asia Said Ally.

The Facts leading to the charge as revealed in the prosecution evidence is as such, the whole saga started with a dispute between the

accused person and Iddi Hassan Masare @ Iddi Bira (Pw3) who were fighting for cow grazing plot. It was on the 22nd day of July, 2020 at about 11:00 hours when the accused and Pw3 came into contact with their conflict at Kelema East. It appeared that, while Pw3 approached his cows feeding place, he found the accused feeding his cows in the same place. Seeing that the two started to exchange words with abusive language. Heat of anger raised to both sides, but fortunately one Issa Kidwe appeared and separated them from exchanging annoyance words.

Later on, at about 20:30 hours on the same date, that is 22nd day of July, 2020, Pw3 and his family members, including his step daughter Zuwena and his nephew Rahim and his wife (the deceased) were outside his house enjoying dinner together. As they were there having dinner, in a short while Haruna Ally (the accused) appeared with an errow and spear in his hands. Seeing that, Pw3 shouted to his family members to run away to avoid attack. However, in no time, the accused was able to shoot the arrow and hit the deceased. Pw3 claimed to have identified the accused because they are living together in the same village and the area they sat was fixed with strong light. After the incident, Pw3 shouted for help and a man by the name of Bakari offered help by taking the deceased to Kelema West Health Centre


where the deceased received First Aid treatment and later, she was transferred to Kondo Urban District Hospital where after examination she was confirmed dead. And right from there, investigation commenced.

Thus, following her death, autopsy was conducted and the Report for Post Mortem Examination revealed that, the deceased Asia Said Ally died of acute chest injury which led to *pneumo* and *hemothorax*, which are the direct cause of death as per the testimony of Pw7, a post mortem examiner.

Upon being called for trial, Ms. Nancy Rugaihuza assisted by Ms. Faudhia Mashina both learned State Attorneys appeared for the Republic. Whereas, on the other side, the accused person Haruna Ally Kimaki had the service of Ms. Joanitha Paul, learned advocate. I command my gratitude to all counsels for their commitment and dedication as officers of the court.

The matter was heard without the aid of assessors vide the provision of section 265 (1) of the CPA as repealed and replaced by section 30 of the Written Laws (Miscellaneous Amendments) Act, No. 1 of 2022.

When hearing commenced, prosecution called upon a total of seven (7) witnesses to testify against the accused person, namely: Issa Rashidi Kiboko (Pw1), G. 3460 D/CPL Godfrey (Pw2), Iddi Hassan Masare (Pw3),



Zuwena Buruhani Bakari (Pw4), Joel Samuel Mwita (Pw5), G. 7127 D/CPL Issa (Pw6) And Ally Hussein Ogola (Pw7). Additionally, to strengthen their evidence, prosecution tendered three exhibits including the sketch map of the crime scene (P1), Report for Post Mortem Examination (P2) and an arrow. While on his side, the accused person had only himself to testify with no exhibit to tender.


Essentially, the prosecution case was founded by the evidence of Issa Rashidi Kiboko (Pw1) who testified that he lives at Kelema West and Mr. Iddi Hassan lives at Kelema East. He went on to testify that, he remembered it was on 20th July, 2020 at about 11:00 to 12:00 hours when he witnessed a conflict between Haruna Kimati and Iddi Bira (Pw3) about cows feeding at Pw3's land which he uses for grazing his own cows at Kelema East.

Pw1 testified further that he went there to have some coffee and while he was there, he saw the accused person grazing his cows at Iddi Bira's place. Seeing that, Pw3 who was there stopped the accused not to feed his cows in his place. The accused responded that cows were not his, and that, he had to wait for the owner who could remove them. Thereafter, Pw3 started to remove the cows. Seeing that, the accused and Pw3 started to exchange words and the Pw3 started to follow the accused like he wanted

to beat him and Haruna stepped back to avoid him. Thereafter Haruna started to abuse Iddi Bira by telling him he is gay, and that he is his mother's vagina. Pw1 identified the accused person to be a person on the dock. He concluded that on that day the accused wore a black trouser and black suit (jacket).

When he was crossed by defence counsel, Pw1 responded that he understood the conflict between the accused and Pw3 that it was about cows feeding place and that, he has never witnessed other conflict involving the two of them. He denied to have witnessed the murder. He added that, after these two rivals had been separated, he saw the accused and the deceased heading to Kelema East and they were only two of them, and it was during evening time after sun set prayer (maghrib). He stated further that, though they were walking together heading to Kelema East but he did not know exactly where they were going.

Another witness was G. 3460 D/C Godfrey (Pw2), in his sworn testimony he testified that he is a police officer who is working in the investigation department at Dodoma urban central police. He has been working there since December, 2020. Although, before that, he was working



at Chemba Police station. His responsibility is to receive criminal complaints, investigate, interrogate and to adduce evidence in the court.

Pw2 further testified that, on 22nd July, 2020, he was working at Chemba Police Station and on that day, he received instruction from his OC-CID Chemba District to attend criminal allegation at Kelema East with his fellow officers where one woman was reported to have been injured by an arrow.

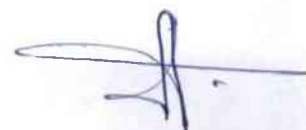
Pw2 continued to state that he interviewed some people at the scene of crime who informed him that, a person who injured the deceased is Haruna Ally Kimaki. After receiving that information, together with his fellow police officers he started to look after the suspect and he was able to arrest the accused person and held him at Chemba Police station.

Furthermore, Pw2 testified that on 23rd July, 2020, he went to the scene of crime for the second time. At the crime scene he met with Iddi Hassan Masare (Pw3) who is the husband of the deceased Asia Saidi Ally. Then, Pw3 informed him that, the deceased was transferred from Kelema Health Centre to Kondoa Urban District Hospital where she passed away on 22nd July, 2020.

At the scene of crime, on 23rd July, 2020, Pw2 drew a sketch map of the scene of crime assisted by Iddi Hassan Masare who then signed the map to attest his participation. He also signed the map with his force number (G. 3460 D/C Godfrey) and prepared a case file and the same was admitted in evidence as exhibit P1.

When crossed by defence counsel, Pw2 explained that he did not mention where the light was in the map but he only showed that there was human residence. He stated further that he drew a map on the second day after the incident. He stressed that, he went to the scene of crime on 22nd July, 2020 and he went again for the second time on 23rd July, 2020, when he drew the sketch map of the scene of crime.

Reflecting on the court observation, Pw2 stated that he drew the sketch map on 23rd July, 2020 and the date of which sketch map is drawn is mentioned on the sketch. However, after looking on the map he confirmed that, there is no date in the sketch map at hand which shows when such particular sketch map was drawn. He also clarified that, a place where light was installed is marked by sign "F" in the sketch map and that it is annexed to the building. Furthermore, he also made it clear that, the distance from



sign "F" where the accused stood to Sign "B" where the deceased was attacked is not shown in the sketch map.


Iddi Hassan Masare (Pw3), in his affirmed evidence he testified that Iddi Bira is his father's name, and he is using that name as his alias name. He stated further that he lives at Kelema East within Chemba District in Dodoma Region with his wife Asia Saidi Ally, the deceased who died after being injured by arrow on 22nd July, 2020 at about 18:30 hours at his house.

Moreover, Pw3 stated that on that date, 22nd July, 2020 about 11:00 hours he had a heated conflict with Haruna Ally Kimaki (the accused). The conflict erupted after Pw3 found the accused person feeding his cows in his land. Seeing that, he asked him as to why he fed his cows in his place. That question prompted the accused anger and the accused started to attack him with abusive words by telling him that he is gay. The two had exchange of heated words and Pw3 went to remove the accused's cows in his place. Thereafter, one Issa Kidwe interrupted the conflict and separated them from exchanging words. After being separated, the accused and the cows' owner left with his cows.

Pw3 testified further that on the same day at 19:30 hours, together with the deceased, he went to buy a bird at the road. And while they were on their way back, they met with the accused and his brother. In the circumstance, he informed the accused's brother to talk with his young brother not to abuse him with his age. At that time the accused was asking the deceased to apologise to her husband in his behalf.

Again, Pw3 stated further that at time when he met the accused in the morning hours, he was wearing a black trouser and faded black jacket and he had the same clothes when they met at night. Additionally, Pw3 also stated that, at 20:30 hours, he was outside of his house having dinner with his step daughter Zuvena and nephew Rahim who are spouses. On that day, they were invited by the deceased to go and eat dinner with them at their house since they failed to secure sources for themselves.

Moreover, Pw3 proceeded that, after a short time, while they were enjoying dinner, the accused arrived with an arrow and stood in front of him. Seeing that, Pw3 got scared because the accused had arrow and spear with him, instantly, he shouted to tell his family members to move away, but promptly the accused attacked the deceased with arrow.



Pw3 added that, he was able to identify the accused because they were living together in the same village. He further stated that he has installed a light with a strong lighting. Detailing on the lights, he stated that they were installed outside of his house, one was fixed on the wall at the backyard and another is on the goats' shelter. He also testified that the distance from where he sat while eating and where the accused stood was about ten meters (10m). And that, during that time, the accused wore a black trouser and black jacket.

He testified more that, the deceased was injured around 20:30 hours, and it took about five (5) seconds since he saw the accused arrive and when he attacked the deceased. After the incident, he shouted for help and one man by the name of Bakari arrived at the scene of crime, and together they took the deceased by "Bodaboda" to Kelema West Health Centre where she received First Aid and later, she was transferred to Kondoa Urban District Hospital. At hospital, the deceased was examined and pronounced died. The deceased was injured on her back. and when Pw3 went back home, he saw police were already there looking for the accused.

Pw3 stated more that, after a while, he was informed that the accused has been arrested and held at Chemba Police station. On the next day, he

went to the police station to record his statement and later on to proceed with funeral. Thereafter, police officer drew a sketch map of the scene of crime based on his information. Pw3 finally identified the accused on the dock.

While cross-examined by the defence counsel, Pw3 responded that it is true that they were living in the same village with the accused person. And that, there is no fence at his house. Pw3 admitted that there was some envy between himself and the accused person because, the accused had love relationship with somebody's wife and Pw3 had forbidden him for that relationship. He added that he never had any fight with any person apart from his existing conflict with the accused. He also stated that when the accused approached them at the scene of crime, he had already set his bow. He added that he saw Haruna attacked the deceased with arrow and at that time his difference with the accused was still in existence. More so, Pw3 stated that in front of the cows' fold there was a crop such as millets.

Zuwena Buruhani Bakari (Pw4), was another prosecution eye witness. In her affirmed testimony she testified that, she lives at Kelema within Chemba District with her husband Rahimu Omary Hinchu and her family. And that, Iddi Hassan Masare and Asia Saidi Ally are her step parents. She

confirmed that her step mother Asia Saidi Ally is now deceased. On 22nd July, 2020 the deceased invited them to her house to have dinner together.

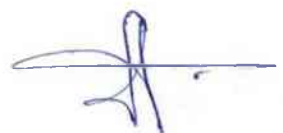
Following the invitation, they went to the deceased's house for dinner, and while they were there, they sat close to each other and she and the deceased were facing the wall of their house. She added that, her stepfather and her husband were facing a cow's fold. Thereafter, they started to enjoy dinner and instantly her step father shouted at them that Haruna (the accused) is there with arrow, and he asked them to run away.

On their effort to escape, the accused shoot the arrow and hit the deceased. Seeing that, Pw3 shouted and Pw4 turned back and saw the accused. She claimed to have identified the accused person at the scene because of solar light which was fixed on the door of their house, and that the accused was living in their village. She described more that; the light was fixed for the purpose of lighting animals' fold. She further stated that the accused stood at about nine (9) meters from where they sat and it took only five to six minutes before the incident took place. Although the incident took six (6) or five (5) minutes, she was able to identify the accused outlook that, he wore a black trouser and black jacket. Thereafter, Pw3 sought for help and motorcycle driver arrived and took the deceased to the Hospital.

She also stated that later on police officers arrived at the crime scene, checked the area and took the arrow. She finally identified the accused in the dock who wore rob and a Swahili hat.

When cross examined by the defence counsel, Pw4 stated that by the time the incident happened, she and the deceased sat where the cows fold was on their backs. She stated further that she saw the accused after he shoot the deceased with arrow, though she did not see while the arrow was released by the accused. Moreover, Pw4 stated that, by the time the accused released an arrow, the cow's fold was on his back. She also stated that the accused had not covered his face when he approached them

There was also a sworn testimony of Joel Samuel Mwita (Pw5), who testified that he is a clinical officer at Kelema Balai Clinical Centre in Chemba. He is a doctor in charge of the centre and his duty is to treat human beings and take care of management issues. He testified further that on 22nd July 2020 he attended a patient who was admitted at the clinic. And that the patient was wet of blood on her back. Thereafter, he examined her and observed that she had an arrow inside her body on the back. Seeing that, he tried to take it out but he failed. He added that the patient was crying that she had been attacked by arrow. After observing it, he realised that an



arrow was still inside her body except small part of it remained outside. Thus, he saw a point of an iron arrow on her body, then he injected her with pain killer as first aid, and then transferred her to Kondoa Urban District Hospital. Pw5 identified the patient's name as Asia Said.

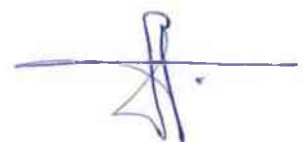
During cross examination, Pw5 stated that, at the centre he saw the patient was sleeping facing the floor. And that, he tried to pull out the arrow from her body by his hand and then scissor but he failed in both attempts. He further described that, to take the arrow out of the body was one of treatment which the deceased needed.

Another prosecution witness was G.7127 D/Cpl Issa (Pw6), who in his affirmed evidence he testified that, he is police officer who works in the department of investigation at Chemba Police station. And that, he started to work at Chemba Police Station since 2005. Pw6 went on to testify that, he learnt police work at CCP – Moshi and he also did a CID course at Kidatu Morogoro in 2013 for NTA level 5. He added further that, he has ten years experience of investigation and his responsibility is to investigate criminal cases after being assigned the duty by OC- CID. He also works on arresting suspects, collecting evidence, gathering intelligence information about crimes, and to interrogate suspects and charge them.

Narrating on what happened during the material date, Pw6 testified that he remembers on 23rd July, 2020 while he was in his office at Chemba police station, he received from OC- CID a police case file No. Chem/IR.190/2020 which was about Murder case in order to proceed with investigation. In that case, the deceased was Asia Saidi Ally and the suspect was Haruna Ally Kimaki.

He further more submitted that, once the file was assigned to him, the suspect was already arrested and kept into the police custody. He stated further that, he took the accused's caution statement and before recording his statement, he informed the accused of his basic rights which he was supposed to understand before giving his statement.

Pw6 explained in his testimony that, he started to record the accused's statement after he informed his rights, and on that, the accused refused to have been involved in the Murder case, but he admitted to have been in conflict with the deceased's husband. Pw6 mentioned the deceased's husband by the name of Iddi s/o Hassan Masare (Pw3). He further testified that, the conflict between the accused and the deceased's husband was about the act of the accused person to feed his cows in the area of the deceased's husband.



More so, Pw6 testified that, after all those steps, he left the police station with his fellow investigator heading to the Hospital at Kondo District Hospital where the deceased body was retained. He testified further that, at the hospital, he attended an autopsy which was conducted by Doctor Ally Ogola. Furthermore, Pw6 testified that in the examination room, the doctor observed an arrow in the deceased's body which was visible from outside. And that, an arrow's wound was on the deceased's back and on the right side. Adding to that, he testified that, the Doctor removed the iron arrow from the deceased's wound and it appeared to be an arrow's head which was then handed over to him. Thus, Pw6 stored the arrow's head in the khaki envelope as an exhibit for this case.

Pw6 testified further that after completing the autopsy, the deceased body was handed over to the deceased's family for funeral and he then returned to his office to proceed with other works. While he was at the police station, he labelled the envelope by marking it "arrow head" and also wrote the case number Chem. IR190/2020, and he further recorded the same in the exhibit register where he gave it a serial number 2/2020.

Finally, Pw6 stored an arrow in the exhibits store till when he took it to the Court. Furthermore, he identified the exhibit by from an envelope

which is written "KICHWA CHA MSHALE". it has a case number which is Chem. IR.190/2020 and the exhibit register no. 2/2020. At the end, he tendered the exhibit which was admitted by the court without objection from the defence and marked as P2. Pw6 continued to testify that, the iron arrow went deep into the deceased body and a small part of it was visible from outside the deceased body. Detailing on how this situation was, Pw6 stated that the arrow head was clearly seen after the doctor had widen the wound in order to remove it from the deceased's body

He also testified that since he was handed over the arrow head on 23rd July, 2020 till when he handed it over to the Court, he stored it in the exhibit room. He explained further that, as an investigator, after completing investigation he observed that the deceased Asia Said Ally was Murdered by being attacked with iron arrow. And that, according to the evidence he had collected, a person who had committed Murder is Haruna Ally Kimaki, the accused person herein.

Pw6 believed that the accused was responsible for murder due to testimony of the witnesses who he had taken their statements and who had attested that they have identified the accused at the scene of crime while he committed the alleged offence. In furtherance to what he had testified, he



mentioned such witnesses to include Iddi Hassan Masare (PW3) and Zuwena Buruhani (PW4), who both testified that, they were outside their house having dinner when the offence was committed. And that, in front of deceased's house there was cow's fold and the accused person came from the cow's fold and threw the arrow which hit the deceased person on her back. Pw6 identified the accused person Haruna Ally Kimaki at the dock.

During cross examination, Pw6 confirmed that he is a police officer who has investigated the case. He also admitted to have visited scene of crime on 23rd July, 2020 for the offence which occurred on 22nd July, 2020. He also acknowledged to have not witnessed anything when the offence was committed. And that, when the accused was arrested, he was not present. He further stated that, he understood where and at what time the accused was arrested but he did not testify about that fact during his examination in chief. Moreover, he admitted that, he did not know how the iron arrow came into contact with the deceased, but he knew how the arrow was cut short, and a piece remained in the deceased's body. He also stated that the arrow was cut short when it was removed from the deceased's body but he does not know who had cut short the iron arrow while trying to remove from the

deceased's body. Similarly, he stated that he does not know the whereabouts of the second piece of the arrow.

Pw6 also testified that, when exhibits are taken by police including investigator, they are usually stored in the exhibit room. He admitted to have not tendered the second piece of the arrow because it was not among the exhibits which he had collected. He acknowledged that, there was no finger print examination conducted which could have shown if the accused person had touched the arrow. He cemented that other evidence which he had collected after completing his investigation, apart from what he knew from other witnesses' statement, is that he visited the scene of crime and witnessed an autopsy.

On the role of exhibits keeper, Pw6 stated that the exhibits keeper is the one who stores the exhibits in the exhibits room. And that, if exhibits need to be taken out of store, a person who takes it out should sign in the exhibits register, though, the exhibits keeper is not obliged to sign in the exhibits register. He stressed that, it is true that exhibits register shows both, in and out movement of an exhibit and also shows who is responsible. Pw6 acknowledged to have not submitted the exhibits register to the Court, however, he asked the court to believe that the iron arrow which he had

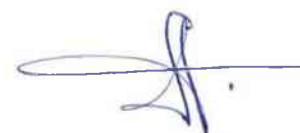


tendered, is one and same to the one he had initially stored in the exhibits room because of its serial number. He cemented that the chain of exhibit was properly maintained.

Lastly, Pw6 re-joined his testimony that he was the one who had received the arrow from the Doctor after it was removed from deceased body. And that, he had only received one exhibit as an investigator which is an iron arrow, and no other exhibits detected. Adding to that, he stated that due to the nature of the iron arrow, it was impossible to conduct scientific examination such as finger print due to the fact that, it was removed inside the deceased's body. At last, Pw6 explained that he has never had conflict with the accused person, and that, he has no reason to plant or fabricate anything.

The last prosecution witness was Ally Hussein Ogola (Pw7), in his sworn testimony he stated that, he is a human doctor who works at Kondoa Township Hospital. He has eight years experiences since 2015 to date. He stated further that, at the time being, he works at Muhimbili Hospital and that, he did his medical doctor degree (MD) in 2013. His area of expertise was about human being treatment including interior medicine patient, child diseases, Maternal care and to conduct Post Mortem Examination.

With respect to the duty of conducting Post Mortem Examination, he stated to have eight years experiences and that, his routine assignment is to treat people, including children, conduct Post Mortem Examination and studying. He went on to explain that, he remembers on 23rd July, 2020 while he was on duty at Kondoa Township Hospital, he was assigned to conduct a Post Mortem examination of the one Asia Said Ally. Following that assignment, he went to the Mortuary and saw the deceased together with the police and deceased's relatives. He then conducted a Post Mortem examination and observed that, the deceased died twelve (12) hours ago and he found a wound on the back of the deceased's body with a piece of arrow at the right side. He also observed blood was flowing out from the wound. Seeing that, he opened up the deceased' body from where it was wounded by arrow. He saw an arrow was inside the deceased's body at about one centimetre. However, Pw7 stated that, the inner penetration of the arrow was not detected because it went much deeper up to the chest. He explained that he could not be able to measure the distance because it went in up to the lung. After that, Pw7 removed the arrow and he realized that, the deceased death was due to acute chest injury which was caused by lung injury as result of attack from outside object.



After completing an autopsy, Pw7 filled the Post Mortem report and also checked the deceased's body and observed blood in her clothes. He also stated to have handed over to the police an arrow which he removed from the deceased's body. Pw7 then identified the Post Mortem report which he filled because of his hand writing, stamp of chief medical officer, his name and the name of the deceased. He at the end handed over the report for Post Mortem Examination which was then admitted by the court without objection and marked as exhibit P3.


Detailing on the cause of death, Pw7 testified that the deceased's death was caused by injury to the deceased's lung. He added that the injury caused acute chest injury which led to *pneumo* and *hemothorax*, and each of these can cause a direct death to human being. He also identified the iron arrow which he removed from deceased body that it was black in colour, 9cm long and of an iron material. At the end, he prayed for both Post Mortem Report and arrow to be used as exhibits.

Cross examined by defence counsel, Pw7 admitted that he is a doctor for human being and he acknowledged to have examined the deceased Asia d/o Sadi Ally. He also admitted to have seen the arrow close to the scapula bone. He added that the said arrow had penetrated to the chest and lung.

He further maintained that an arrow had blood when he took it out of the deceased's body. As to who he handed over the arrow after he removed it from the deceased's body, Pw7 stated that he had forgotten the name of the police officer. However, he stated that he can identify that police officer by his face. At the end of his testimony, Pw7 concluded that he had not seen a plastic arrow and that, he does not know who had attacked the deceased with that arrow, but what he can testify is that, the death occurred within 12 hours prior to the time he conducted the post mortem examination.

Upon closing of prosecution's case, having gone through the prosecution's evidence, the court found the accused person, Haruna s/o Ally Kimaki with case to answer. Rightly so, defence rights were well explained and his answers were recorded. Thus, the accused opted to give his defence under oath and he called upon two witnesses to disprove the allegation against him, however he had no exhibit to tender. His defence evidence was as follows:

The accused person introduced his name as Haruna Ally Kimaki (DW1), 36 years old, resident of Kelema East within Chemba District in Dodoma Region. he affirmed and stated that he lives at Kelema East. And that he stands charged for the offence of Murder which he is suspected to have



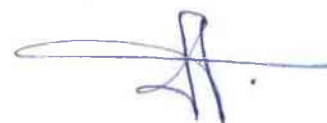
committed on 22nd July, 2020. Thus, he stated that On 22nd July, 2020 at 9:00 hours in the morning, Mr. Kidunda who was the cow owner went to buy three cows at their house. After Mr. Kidunda had successfully bought those cows, he then asked the accused to send them to Kelema East close to the coffee shop. The accused agreed and while he reached there at Kelema East about 10:00 hours, he stopped waiting for the cows' owner to arrive and pick his cows. Dw1 stated further that, when it reached around 11:00 hours, Iddi Hassan Masare (Pw3) arrived at that place where he was waiting for cows' owner and he asked the accused why he was grazing his cows in his area. Thus, Dw1 responded that he was directed to do so by the person who bought the cows to send them there. After that inquiry, Pw3 stepped out of his bullock cart and started to shout to him that he (the accused) is stupid and that is why he has love relationship with other man's wife. Because of that accusation, Dw1 asked Pw3 that they better talk about cows because he does not know any issue about somebody's wife.

Dw1 stated further that even after that response, PW3 continue to abuse him. And seeing that, the accused started to attack him back with abusive words. While these two were throwing abusive words to each other, no sooner the cows' owner arrived at the scene of confrontation

accompanied by the one Issa Kiduye. Seeing that, they both took trouble to separate them from exchanging abusive words. Dw1 went on to testify that he informed Iddi (Pw3) to talk to cows' owner and after that he left the area and continued with his other activities.

Explaining further to what happened, Dw1 stated that on the same date, that is, on 22nd July, 2020 at about 18:00 hours he met with Iddi Masare (PW3) together with his wife (the deceased) as they were buying vegetables in one of the shops. Thereafter, Pw3 called the accused's young brother and the deceased called him and they stepped aside and talked. And that, the deceased and the accused person were discussing about abusive language that Dw1 had exchanged with her husband in the morning hours. On that issue, the deceased asked the accused to avoid conflict with her husband because he is suffering from diabetes (sugar disease).

Following their conversation, the accused asked the deceased to say sorry to her husband for what had happened. And that said, the deceased accepted the request and after that, they both left. Dw1 stated further that, after Pw3 and the deceased left, his brother called him and informed what he was told by Pw3, that he should not repeat what he has done. Having



been informed that, they both went back to the coffee shop and continued to enjoy coffee.

During 19:00 hours of the same day, the accused was called by Shabani Issa Matare and was asked to go to his house to work. Dw1 honoured the call and thus, he went to Shabani Issa Matare's home together with his brother and they reached there around 19:45 hours. Moreover, he stated that, Shaban Issa is living at Kelema West, and on that day Shaban asked them to eat and then to start harvesting honey.

Dw1 further stated that they first had dinner at Shaban Issa' house, and then went to harvest honey from bee Sega. He added that while they were harvesting honey, they heard a voice coming from the next village but they thought it was a drunkard's voice because it usually happens. He stated that, they completed the work at 21:00 hours, and thereafter, they went back to the coffee shop all three of them.

Furthermore, he defended himself that before they reached at the coffee shop, they met a group of people standing on the road. Seeing that they asked them what happened, and they responded that the accused was alleged to have injured Iddi Hassan Masare's wife. That being the case, Dw1

contended that, three of them were coming from Shabani Issa's house. Thereafter, those people warned them not to go where they were heading to because people were looking for accused person and they might hurt him.

In order to avoid what they were cautioned for, then all three went back to Shabani Issa's house. At Shaban Issa's house, Dw1 asked his fellows to go and report the matter to the Village Executive of Kelema East. Thus, the two gentlemen went to report as asked by the accused, and the accused went to hide himself. However, before they left, Dw1 asked his colleague to call him when police arrives in order to tell them his whereabouts so that they can arrest him.

The accused stated further that, when his two colleagues left, he also left that place and he went to stay at Kelema Secondary School board. And that, he stayed there up to 23:00hours. Thereafter, he received a call from a strange number, and the caller introduced himself to be a police officer from Chemba police station. Then that police officer asked him to mention a place where he was hiding, and that also mentioned that he was with village leaders and accused's relatives.



Because of that, the accused informed the police officers where he was hiding himself, and the police officers reached there in three minutes because it was not far from where they were calling from. He added that police went there with vehicle and they took him to the police station. He further stated that, in the police vehicle, he realised that there were Village Executive Officer (VEO) of Kelema East and Shabani Issa Matari and his brother Rashidi Ali Kimaki.

After they reached at Kelema West, at the stand, VEO and his brother Rashidi left the police vehicle and police took the accused and Shabani to the Police Station and kept them in the custody until next day on 23rd July, 2023. In the police station, at around 15:00hours the accused stated that he was taken out of the cell by two Police Officers and was shifted to another small dark room. In that room, he was asked to take off all his clothes and then, the police officers commanded him to sleep on the floor while handcuffed and police placed a long pipe between his legs and the handcuffed arms, and hanged him on between two tables. Thereafter, police started to beat him with another pipe, but with all the tortures, he refused to have injured the deceased with arrow. He also stated that, after that he

remained in the police cell for thirteen (13) days while Shabani Issa was realised after the fourth (4) day.

The accused stated further that, on 04th August, 2020, he was sent to Kondo District Court. He also stated that, when he was arrested by police, on the fateful day, he had worn a red trouser and yellow T-shirt.

During cross examination, the accused stated that in the court room he wore a white sweater and black trouser, but he used to wear a T- shirt and trouser. The accused refused to have love relationship with other people's wives. He further described that, when they were exchanging abusive words with IDDI, he told him that he is gay. He also wanted to resolve his conflict with IDDI because he knew that he mistreated him. More so, he stated that, it is not true that when murder occurred, they were not yet resolved with Iddi Hassan (Pw3).

Adding to that, he stated that the distance from Kelema East to Kelema West is about 1½ kilometre. And that, he used to take half an hour to go from Kelema East to Kelema West with his brother. He also explained about the voice which they heard, that it was like a person was asking for help. He similarly confirmed that, on that day, it was possible to hear a voice coming

from Kelema East to Kelema West because wind was blowing from East to West. He further stated that, he understood the police officers who beat him because they used to go to their village. He denied to have had any conflict with those police officers.

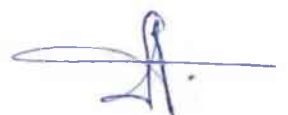
Furthermore, DW1 agreeably stated that, he left Kelema East at 19:30 hours and arrived at Shabani's house at about 20:00 hours. He also confirmed that, it is true that he was arrested together with Shabani. And that he did not make any statement at the police station, though he agreed at police station that he had conflict with Iddi Hassan but he did not see police recording his statement. He admitted further that it is possible that a person who committed an offence at Kelema East could run away to Kelema West. On why he is suspected, Dw1 stated that he was suspected because people were informed by Iddi Masare about their conflict.

Explaining about the voice calling for help (Iwangi) which they have heard, Dw1 stated that the voice calling for the help (Iwangi) came out at about 20:30hours while he was at Shabani's house harvesting bee honey. And that, he was together with Shabani Issa Matari and Rashidi Issa Kemaki. He further stated that the voice reached up to Kelema East and the distance from Kelema East to Kelema West is 1½ Km.

Another defence witness is Rashidi Ally Kimaki (DW2), male, 32 years old, resident of Kelema within Chemba District in Dodoma Region. In his sworn evidence, he briefly stated that he lives at Kelema East, a new District of Chemba. He mentioned Haruna as his sibling, and the last born. In reference to the fateful date, he stated that, he remembers that on 22nd July, 2020 they received a call around 19:30 hours to go to harvest bee honey at Shabani Issa Matare. And that he went there with his brother Haruna Ally Kimaki (the accused). At that time, it was about 19:30hours. He stated further that, at Shabani's house, they first ate dinner and then harvest honey up to 20:30hours.

It was his further testimony that, on the occasion they finished harvesting, they heard a voice calling for help (Iwangi) coming from Kelema East while they were at Kelema West. Thereafter, they decided to go to the shop to look for their needs which was about 10 minutes walking distance. However, before they arrived to the shop, they were estopped on the way by a woman who then informed them that, there is news that Haruna (the accused) had injured Mama Zawia (the deceased) with arrow.

Following the news, they stopped their trip to the shops and went back to Shabani Issa Matari's house (DW3). He further stated that, while they



were there, in a short while, they received a phone call informing them that a person who had been injured by an arrow by the accused person had passed away. It followed after that information that, they decided to hide the suspect (Haruna) and then went to the VEO of Kelema East to inform him about the accident that Haruna has injured a person and also to inform their parents.

After they had informed their parents, then, they received a phone call from VEO that they are at Shabani's house. Seeing that, Dw2 and Dw3 went back to the Shabani's house where they met police officers who later asked them whereabouts of the accused person. They then, informed the police officers that, they have protected him for his safety. Thereafter, they called Haruna (the accused) by phone and followed him at Secondary School's area. And once they reached there, he was arrested by police and taken to the police station together with Shabani Issa who was also arrested for the purpose of investigation.

When cross examined by prosecution's Attorney, Dw2 maintained that Haruna (the accused) is his sibling who is the last born. Speaking about the incident, he stated that, he knew it was 19:30hours when he left Kelema East heading to Kelema West because he looked at his watch. Further to

that, he also maintained that they were called by Shabani from their house at 19:30hours and they reached at Shabani's house at 19:50hours. He added further that, the distance from Kelema East to Kelema West is about 15 minutes walking distance and that they used a bicycle to go to Kelema West from Kelema East.

On the issue of having love relationship with the deceased, Dw2 denied the allegation that accused had love relationship with the deceased. He however acknowledged that he did not mention a person who called them by phone and informed about the injury to the deceased. He also admitted to have been told about deceased injury while they were at Kelema West.

On whether he knew about the conflict between accused and Pw3, on that point Dw2 admitted to have been aware of the conflict between Haruna (the accused) and Iddi Hassan, although he did not mention that in his testimony. He further explained that on the fateful date, he met with Iddi, and Iddi informed him about their conflict with his young brother (the accused), but he acknowledged to have not mentioned that in his testimony.

It was Dw2's further testimony that he was told by Iddi that he was not happy to be abused by his brother Haruna. On the incident, Dw2



supported the fact that, it was not right for his brother to abuse Iddi Hassani, but out of all that, he did not tell Haruna anything about their conflict. He further testified that after they departed with Iddi, they then went to harvest bee honey himself and Haruna (the accused). And that, they reached at Shabani's place at 19:50hours. About the time they arrived at Dw3's house, he cemented that if Shabani will testify that Haruna reached his house at 20:30hours, then that will be Shabani's version not his.

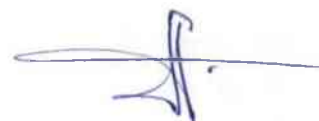
Dw2 admitted that Haruna Ally Kimaki is suspected for Murder case and that Haruna was born at Kelema East and Iddi Hassan knows them very well as members of Ally Kimaki's family. With respect to the conflict between Dw1 and Pw3, he attested that there was no reconciliation between the two. He further stated that the reason why Iddi Hassan suspected Haruna to have Murdered his wife is because of their morning conflict. Dw2 admitted to have hidden Haruna (the accused) in the forest for his safety after the incident. As about the fact given by accused that after the incident, he went to hide himself, the fact which contradict with his version, Dw2 begged the court to believe his version since he testified on what he had witnessed.

When Dw2 was re-examined, he stated that when Haruna and Iddi were exchanging abusive words he was not present at the scene. And that

it was Shabani Issa who received the call about the incident. He also stated that they heard a voice calling for help (Iwangi) while they were at Shabani's house at about 20:30hours. And that, they were three of them, that is Shabani, Haruna and himself.

The final defence witness was Shabani Issa Matare (Dw3), a male, 51 years old, Gogo by tribe, resident of Kelema Balai within Chemba District in Dodoma Region. In his affirmed testimony, Dw3 stated that Kelema Balai is different from Kelema East village. About the incident, he said that he remembers on 22nd July, 2020 he told Haruna around 16:00 hours to follow him at his house to harvest bee honey at about 19:30 hours. Therefore, at about 19:00 hours he called him to remind about appointment and he confirmed that he would honour the appointment.

On the material day, at 20:00 hours, Haruna called Dw3 to check if he was at his home and Dw3 confirmed that he is at his house. Dw3 went on to testify that the accused went to his house together with Rashidi. While they were there, they harvest honey and later they started to eat honey. In the occasion of eating honey, they heard a voice calling for the help (wangi) from the shops.



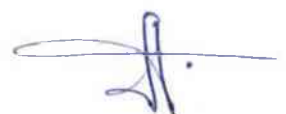
Seeing that, they left heading to the shop. On their way, they met a woman whom they famously called Binde's wife. The woman asked them where they were going, and they responded that they were going to the shop to look for change. Following that answer, the woman advised them not to go because there is rumours that Haruna (the accused) had injured PW3's wife with an arrow. Dw3 stated further that they tried to resist on the advice, but she insisted that they should not go there otherwise they would lose the accused.

Upon consideration of the that advice, they decided to remain there. And soon after, a man passed and they asked him as to what happened' at the shop. The man's response was that Haruna was suspected to have injured PW3's wife by arrow. At that time, they were together with Haruna. Seeing that, Haruna's brother proposed to go to the village executive officer to report the incident. Then, they went to the village chairman of Kelema East to report the matter. They also asked the village chairman for the help to deal with the matter. Thus, he advised them to take a *Boda boda* and go to the police station to report the incident. And that the village chairman also informed them that a person who was injured had passed away. After that,

they went to inform their parents who also proposed to report the matter at police station, and they did so.

Thereafter, Dw3 received a phone call from paramilitary person by the name of Binde who informed him that, there were police officers in his house looking for the accused. He was also informed by that police have broken his house and his wife had fallen down unconsciously, and that they took her to the hospital. After that phone call, Dw3 and Rashidi (Dw2) went back to Dw3's house and left the accused at the chairman's house.

Dw3 stated further that upon arrival to his house, he was informed by his children that, police officers went, broke the door open and their mother fell down unconsciously. After that, the police took her to hospital for treatment and later they brought her back. Dw3 testified further that Police asked him to call the accused by his phone, he did that and the accused responded that he had left where they were at the village chairman's house and he went to Kelema Secondary School's board. Seeing that, he notified the accused that they are with police officers from Chemba and he asked him to wait.



To that effect, they took a police vehicle and headed to where the accused was. The accused was then arrested and taken by police up to Chemba police station together with him. After that he was searched and then they were both kept in custody.

During cross examination, Dw3 stated that he lives at Kelema Balai. Bee's Sega are there at Kelema Balai where he lives. And that, Rashid and Haruna went there to harvest bee honey. He further explained that Rashid and Haruna went to Kelema West from Kelema East. He also clarified that Kelema Balai and Kelema West is the same place. He added more that Haruna and Rashidi went to his house about 20:00hours by their feet. He insisted that they went to his house by feet. About honey harvesting, he stated that usually Haruna do harvesting of his bee honey and that he has done it many times. He finally identified the accused person on the dock.

At the end, that was the evidence adduced from both prosecution and defence side. Desirably, Counsels for both sides opted to drop their legal right to address the court through final submissions.

Now, going through the evidence adduced by the parties, I am certain that, the main issue which need to be proved at this juncture is whether or

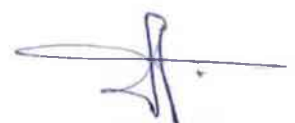
not the accused person murdered the deceased. That said, to stand conviction for the offence of murder, the following sub-issues need to be proved beyond reasonable doubt thus,

- (i) Whether the deceased died
- (ii) Who killed the deceased.
- (iii) Whether the killing was unlawful and accompanied by malice aforethought.

In my endeavour to analyse the evidence by touching each ingredient of the offence, I will start to showcase the position of the law evolving the duty of prosecution into criminal case. For instance in **Simon Edson @ Makundi v. The Republic Criminal Appeal No. 5 Of 2017 CAT (unreported)** it was held that:

"It is trite law that the burden of proof in criminal case lies on the prosecution and it never shifts to the accused."

See also decisions in **George Mwanyingili v. R, Criminal Appeal No. 335 of 2016, Nchangwa Marwa Wambura v. R, Criminal Appeal No.**



44 of 2017 and Mohamed Haji Ally v. Republic, Criminal Appeal No. 225 of 2018 (all unreported), only to mention a few.

That being the case, starting with the first element thus, whether the deceased died. Basically, looking on the evidence of Pw3 (Iddi Hassan Masare) who was the deceased's husband, in his testimony he confirmed that initially on 22/07/2020 at about 11:00hours he had conflict with the accused person which was caused by the act of the accused to graze his cows in the area PW3's. And that, on the same date at 20:30hours PW3 was having dinner out side his house with his family including the deceased, his step daughter Zuwena Buruhani Bakari (PW4), and his uncle Rahim. While enjoying dinner, the accused arrived at Pw3's house coming from the front side of Pw3 with spear and arrow and stood in front of him at about 10 meters. Seeing that, he shouted to alarm his counterparts to run away but the accused hit the deceased with arrow on the back part. Thereafter, the deceased was taken to Kelema health centre for first aid and later she was transferred to Kondoa Urban District hospital where she was examined by the doctor and pronounced dead. They received the deceased body on the next day and funeral was conducted. The evidence of PW3 was corroborated by the evidence of PW4 who was at the the crime scene having dinner

together with the deceased and PW3. In her testimony Pw4 testified that it was on 22/07/2020 at about 20:00 when she, her husband and their child went to join the deceased for dinner. And while they were there having dinner, the accused appeared and injured the deceased with arrow. After that, the deceased was taken to hospital where she died. There is also evidence of Pw7 (Ally Hussein Ogola) a human doctor who conducted an autopsy of the deceased Asia Said Ally at Kondoa Urban Hospital and issued an autopsy report which was admitted in evidence as exhibit P2. In his examination, he found out that the deceased died since the past 12hours. He also observed that the deceased had a piece of an arrow on the right side of her back, and blood was flowing out from the wound. After examination, he concluded that cause of death was due to the attack by an iron arrow which extended to the lung and cause an acute chest injury which resulted to *pneumo* and *hemothorax*. An arrow was admitted in evidence and marked as exhibit P3. Finally, he asserted further that, all these caused direct death to the deceased.

In his defence, the accused person did not dispute prosecution evidence with respect to the occurrence of the deceased's death. But he rather admitted in his defence that on 22/07/2020 at 21:00hours while he

was coming from DW2's house, together with DW2 and DW3 they heard a news that he was suspected to have injured the deceased and was later informed of her untimely death, and because of that he decided to go hide at an unknown place until when he was arrested and arraigned for the offence of murder.

Thus, based on the evidence, in my view, I am certain that prosecution was able to prove the first ingredient of murder that, the deceased person Asia Hussein Ally has actually died. And the evidence of Pw3 and Pw7 together with exhibits P2 and P3, prove that the deceased's death was an unnatural death. That said, I therefore answer the first element in the affirmative that the deceased Asia Hussein Ally has actually died and her death was unnatural. That being the case, I hold without doubt that the prosecution has proved the first ingredient of murder beyond any reasonable doubt.

Moving to the second ingredient thus, who killed the deceased. In my endeavour to point out who has killed the deceased, I will be guided by the decision in **Ami Omari alias Senga v. Republic, criminal appeal no. 233 of 2013, CAT (unreported)** where in this case it was held that:

"It is a trite law that on the charge of murder the onus is always on the prosecution to prove not only the death but also the link between the death and the accused person."

By analysing the evidence collected, it appears out of seven (7) witnesses who testified, only two witnesses that is PW3 and Pw4 who asserted to have witnessed the accused while he was attacking the deceased by spear and arrow. Thus, those are the only eye witnesses who were called to testify on the incident.

In his evidence, Pw3 (Iddi Hassan Masare) testified that it was on 22/07/2020 at 20:30hours which is night time, at his house, he was having dinner with his family members including Pw4 and the deceased who was his wife. The accused person, Haruna whom he identified to be the accused on the dock, and who he had conflict with him during the morning hours about cows grazing, confronted them there with spear and arrow. The accused stands at about 10 meters distance in front of where Pw3 sat, and behind the deceased. By seeing the accused with spear and arrow, Pw3 felt afraid and he shouted to his family members to move away. However, instantly the accused person attacked the deceased with arrow on her back. Pw3 testified to have understood the accused person at the scene because

they live together in village. He also installed a light which has strong lighting at the wall out side his house. And that, one light was at backyard and the second was at the goats shade. He also testified that at that time of attack, the accused wore a black trouser and black jacket. And that, it took only 5 seconds when the accused person arrived at PW3's house and assaulted the deceased. When he was cross examined by the defence counsel about identification of accused at the scene of crime, Pw3 responded that at his house where he keeps his goats and cows there is no fence but there was a fold/hedging made of tree surrounding the area. And that he was able to see his animals properly from where he sat during that fateful night. The distance from where he placed goats' fold to the cow's fold is about 3 meters. He also responded that the incident took about 5 seconds. He added that in front of the cow's fold there were crops such as millets and others and that, when he saw the accused he was already set his bow and arrow. He also stated that the accused was in front of the cow's fold.

Another eye witness was Pw4 (Zuwena Buruhani Bakari), in her evidence she testified that on 22/07/2020 while they were having dinner at Pw3's house at about 20:00hours. They sat close to each other and she and the deceased were facing the wall of their house, while her husband and her

stepfather (Pw3) were facing a cow's fold. And while enjoying dinner, Pw3 shouted to them that Haruna (the accused) is there with arrow and he asked them to run away. She further testified that in her effort to escape, the accused shoot the arrow and hit the deceased. She claimed to have identified the accused person Haruna there at the scene due to the solar light which was fixed on the door of their house. And that, the accused was living in their village. She stated that the solar light was for the purpose of lighting the animal's fold. When he shoot, the accused stand at about 9 meters distance from where they sat. she also testified that it took 5 to 6 minutes since the accused arrived and hit the deceased. She described the accused as he wore a black trouser and black jacket and during trial she was able to identify the accused person on the dock.

When Pw4 was cross examined by defence counsel with respect to how she identified the accused on the scene, she responded that when they were eating, herself and the deceased gave the fold their backs. And that, she saw the accused after he had hit the deceased with arrow. She further responded that she did not see the arrow while it was released by accused. She also stated that when the accused released the arrow, the cow's fold

was behind him, and for the accused, he did not wear a mask by the time he approached them.

On my part, dealing with the point of identification of the accused person, knowing that it was night time when the offence was committed as it was testified by both Pw3 and Pw4, thus, in the circumstance, the crucial question to be determined was, whether factors such as those demonstrated in the celebrated case of **Waziri Amani v. R [1980] TLR. 250** were observed. For clarity and better reference, conditions demonstrated in **Wazir Amani case (supra)** includes: time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night time; whether there is good or poor light at the scene.

That said, going through the evidence by scrutinizing what was transpired by two eye witnesses, it is obvious that the offence occurred during night time. It is from Pw3 testimony that on the material day, that is on 22/07/2020 at 20:30 hours the accused arrived at his house and assaulted the deceased with an arrow. Thus, his evidence was corroborated by Pw4 who testified that she left her house to join the deceased for dinner at 20:00hours and that, her house and the deceased house is about 10 minutes

.walking distance. Therefore, based on the testimonies of both Pw3 and Pw4 the offence was committed during night time.

With regard to the time the witnesses had the accused under observation. Pw3 testified that it took five (5) seconds since when he saw the accused and when his wife (deceased) was injured. However, in her testimony, Pw4 said that the incident took place within 5 to 6 minutes. Here Pw3 and Pw4 seems to differ on the exact time span for each of them to observe the accused.

Now by critically observing the testimonies of these two eye witnesses, in my view, owing to the circumstance, there is a danger that there might be an invented story. For instance, starting with Pw4, she testified in her evidence that when they were having dinner, she sat facing a wall and gave her back to the cow's fold, and that, when the accused arrived, Pw3 shouted to them that the accused has arrow and asked them to run away. Thus, when she wanted to run away, the accused shoot the deceased, and after seeing that, she turned back and saw the accused person. But when she was crossed, Pw4 changed the story and stated that she turned back to look for the accused after Pw3 had shouted that, the accused is coming with arrow. However, she also said that she did not see the arrow released by the

accused and she did not know from where the accused came from. Additionally, Pw4 testified that when the accused hit the deceased, he was standing in front her, and he gave his back to the cow's fold, which means, he was in front of the cow's fold facing them. And that, the action took only 5 to 6 minutes. She also testified that from where they stayed while having dinner to where the accused stood it was about nine (9) meters, but on the evidence of Pw3 he mentioned ten (10) meters which is anyhow a justifiable approximation.

But looking on Pw3 testimony, he testified that after cow's fold, there was some crops plantation such as millet which he did not explain properly of its size, thickness and whether the accused person stood inside the crops or otherwise. In my view clarification of where exactly the accused stood and nature of crops was so important in order to ascertain how far the crops could have affected proper identification of the accused. However, as it stands, it is unknown that the said crops could have covered the accused and shield his identity or not because prosecution have not adduced evidence to clear that ambiguity.

On the other hand, Pw4 did not mention anything about crops. But looking on the distance which both Pw3 and Pw4 mention from where they

sat and where the accused stand, it is not clear whether the accused was inside the crops or not, since Pw3 revealed that crops were in front of the cow's fold and both Pw3 and Pw4 stated that the accused stood in front of the fold when he shot his arrow. In my view, failure to clear up the exact position of the accused left the doubt on the proper identification of the accused, bearing in mind that, based on their evidence (Pw3 and Pw4) the act to hit the deceased was an instantaneous attack which took only 5 seconds as it was testified by Pw3, or 5 to 6 minutes as testified by Pw4.

That being the case, looking on the evidence of Pw3 and Pw4 in totality, and knowing that the offence alleged against the accused is a serious offence which entertain a capital punishment, and that the evidence adduced by these two eyes witnesses is full of inconsistencies and, or is surrounded by unjustifiable doubts. As a result, it renders the evidence of both Pw3 and Pw4 less trustworthy.

Thus, in the circumstances, it is unknown where the truth lies between the evidence of Pw3 and Pw4. Consequently, as it stands, issue of credibility emerged, and in the light of the law, the position was made clear in the case of **Jaribu Abdalla v. R, Criminal Appeal No. 220 of 1994 (unreported)** this Court thus held:

"...in matters of identification it is not enough merely to look at factors favouring accurate identification. Equally important is the credibility of witnesses. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence."

As a result of my observation, taking inspiration from the above decision, I become hesitant to hold with certainty that Pw3 and Pw4 versions manifest the correct state of affairs. More so, considering that both Pw3 and Pw4 are witnesses with interest to serve their evidence deserve to be critically scrutinized and weighted. Therefore, given this position, it is clear that the proper identification of the accused person remains doubtful as whether, owing to the circumstance, the accused person was properly identified by these two eyes witnesses. And thus, the benefit of doubt should lie to the accused.


The final ingredient of murder is whether the killing was unlawful and with malice aforethought. Thus, moving through the evidence, first, it is vital to lay foundation by recalling the provisions of section 200 (a) to (d) of the Penal Code [Cap 19 R. E 2019] which sets various circumstances that constitute malice aforethought. Thus, section 200 (a) provides that:

"Malice aforethought shall be deemed to be established by evidence proving 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."

Coming to the case at hand, there is no dispute that the deceased death was unnatural as it appeared in the autopsy report (exhibit P2). Similarly, the evidence of Pw3, Pw4, Pw6 and Pw7, who all testified that the deceased had initially sustained serious stab wounds on her back caused by arrow and which has resulted into her death.

Thus, it appears from the evidence that the culprit executed his evil act by hitting and severely injured the deceased with arrow in her sensitive part of the body. That means, the circumstances of this case fall squarely under four corners of section 200 (a) of the Penal Code. However, the question will remain as to who had inflicted the injuries.

In the circumstance, I am aware that there was ample of evidence linking the conflict between accused person and Pw3 (deceased's husband) to be motive behind the murder allegation, for instance, from testimonies of Pw1 and Pw3, which was supported by defence evidence of Dw1 and Dw3,



but proof of conflict alone cannot conclusively prove the offence of murder. As the matter of fact, based on the circumstance, one can soundly raise suspicion against the accused, but again, without watertight evidence, suspicion alone cannot form the base of conviction. See **Elia John V. Republic, criminal Appeal No. 306 of 2016 CAT** (unreported) when the court held that:

*"It is trite law that suspicion alone however strong it may be is not sufficient to sustain conviction in a criminal case where the standard of proof is that of beyond all reasonable doubt (see **Evarist Maro @ Mangi and two Others vs. Republic, Criminal Appeal No. 139 of 2006 (unreported)**)."*

Having analysed all elements of murder, and upon considering the evidence at disposal, I find that the prosecution has failed to established all ingredients of the offence of murder against the accused to the required standard of beyond reasonable doubt. As I have demonstrated earlier on, the evidence adduced for proper visual identification of the accused was imperfect. Thus, I accordingly answer the major issue posed previously in

negative and therefore the accused person Haruna Ally Kimaki is found not guilty of the offence of murder of the one Asia Saidi Ally.

To that end, I hereby acquit him for the offence of murder he stands charged contrary to Section 196 and 197 of the Penal Code. In addition to that, I order for his immediate release from the incarceration unless he legally held for another course.

It is so ordered.

DATED at **DODOMA** this 14th day of December, 2



[Handwritten signature]
S. H. Hassan

JUDGE

Right of appeal is explained to the parties.



[Handwritten signature]
S. H. Hassan

JUDGE