

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE SUB-REGISTRY OF MTWARA  
AT MTWARA  
CRIMINAL SESSION CASE NO. 55 OF 2022**

**THE REPUBLIC**

**VERSUS**

- 1. SAID MSHAM KALIAS**
- 2. JUMA SAIDI MSHAM**
- 3. ALABI SAIDI KALIAS**
- 4. SELEMANI DADI ATHUMAN**
- 5. MOHAMED SELEMAN DADI**
- 6. RAZACK SELEMAN DADI**

**JUDGEMENT**

*29<sup>th</sup> February & 15<sup>th</sup> April, 2024*

**MPAZE, J.:**

The accused persons named above stand charged with the offence of Murder contrary to sections 196 and 197 of the Penal Code [CAP. 16 R.E. 2022] hereinafter 'the Penal Code'. The Prosecution alleged that on the 9<sup>th</sup> May, 2022 at Mibobo Village in Mtwara District and Mtwara Region, the accused persons murdered one Salumu Mussa Nayopa. Each of them denied any involvement in the death of the deceased.

Following the accused persons' pleas of not guilty to the charge levelled against them, the prosecution called a total of four witnesses namely; Rukia Lumani (PW1), Asha Manyilima (PW2), Vicent Sebastian Kway (PW3), and H 298 CPL Marwa (PW4).

Additionally, the prosecution tendered two documentary evidence in support of their case; a postmortem report concerning the body of the deceased Salumu Mussa Nayopa dated 10/05/2022 - marked as Exhibit P1, and a sketch map drawn on 09/05/2022 - marked as Exhibit P2.

Throughout the trial, the prosecution, the Republic, was led by Ms. Christine Joas, who served as the leading counsel and was assisted by Ms. Yasinta Peter, both Senior State Attorneys. On the defence side, all accused persons were represented by Ms. Thabita Ndumbaro, Learned Counsel.

During the hearing of the case, PW1 the deceased wife, aided by interpreter WP 7103 PC Furaha, testified that, before the deceased, she was married to Said Mshamu, the 1<sup>st</sup> accused, she said during their marriage, they were blessed with two children, Juma Said Mshamu and Alabi Said Mshamu, the 2<sup>nd</sup> and 3<sup>rd</sup> accused, respectively.

PW1 added that on 9<sup>th</sup> May, 2022 she accompanied the deceased to his parents, Musa Nayopa, and Asha Manyilima (PW2), to seek assistance in procuring food. Unfortunately, they were unsuccessful in securing any food, prompting them to leave.

According to PW1 while on the way home, they encountered the accused persons namely Said Mshamu, Alabi Said Mshamu, Juma Said Mshamu, Selemani Dadi, Mohamed Seleman Dadi, and Razaki Selemani Dadi.

PW1 continued that the accused persons assaulted the deceased using '*vigongo*,' hitting him on the head and limbs. PW1 said despite the time being 19:00hrs, there was still some bit of light; it wasn't completely dark. She described the illumination as a mixture of dim light and partial darkness. At the time of the incident, she estimated herself to be a few steps away, approximately five paces, and that the attack did not take long.

PW1 testified further that, she went and reported the incident to the deceased's parents. Subsequently, she returned with the deceased's mother, PW2, to the scene of the crime, where they discovered the deceased in critical condition. They took him to his uncle, Mzee Mshamu, who then

proceeded to report the incident to the police. Later, they tragically learned that Salumu Mussa Nayopa had died.

Besides identifying the 1<sup>st</sup> accused as her ex-husband and the 2<sup>nd</sup> and 3<sup>rd</sup> accused as her children, PW1 also pointed out the 4<sup>th</sup> accused, Selemani Dadi Athumani, the 5<sup>th</sup> accused, Mohamed Selemani Dadi, and the 6<sup>th</sup> accused, Razaki Selemani Dadi, as her neighbours. She explained that they had been living together in the same village for more than five years.

During cross-examination, she elaborated that she separated from the 1<sup>st</sup> accused due to safety reasons. She disclosed that she had experienced heart-related illnesses, locally referred to as '*ugonjwa wa kichaa*,' but had received treatment and recovered. She mentioned that the 1<sup>st</sup> accused left her upon her recovery. However, she refuted any allegations of mistreating her 2<sup>nd</sup> child, the 3<sup>rd</sup> accused, during his youth.

Under further cross-examination, she asserted that each accused possessed '*kigongo*,' and all six of them utilized these weapons to assault the deceased. She clarified that she was present during the incident, which occurred near a water source and a road frequented by people fetching water. She described the houses as being spaced somewhat apart. She acknowledged that it was a residential area and stated that she initially

attempted to report the incident to nearby households, but they advised her to report it to the deceased's parents. She explained that she refrained from shouting as there were only two of them present. She also denied any involvement in the assault. She said when returned to the scene of the crime with PW2 they found the accused persons had already fled.

PW2, with the assistance of interpreter WP 7103 PC Furaha, testified that on the 9<sup>th</sup> May, 2022, while on the veranda of their house with her husband, Musa Nayopa, PW1 approached and informed them that they should go and check on their son as she was uncertain about his well-being. Upon receiving this information, she accompanied PW1, where she found her son lying helpless on the ground while covered with blood.

Seeing that she instructed PW1 to report to the deceased's uncle, and upon his arrival, they took her son to his uncle's house who was in critical condition, nearing death. Subsequently, she returned home and informed her husband to go check on their son.

PW2 testified further that PW1 did not disclose who had attacked her son. Accordingly, she asserted that she did not know the identity of the

assailant, as she had not witnessed the incident and was not present at the scene of the crime.

During cross-examination, she provided further testimony, stating that she did not have a watch, but she estimated the incident to have occurred around 19:30hrs, not at 20:00hrs. She reiterated that PW1 informed her that the assailants had assaulted the deceased with '*ligongo*!', she stressed that PW1 did not specify any particular person who was involved in the incident.

PW3 a Medical Doctor, testified that on 10<sup>th</sup> May, 2022 he examined the body of Salumu Musa Nayopa. During the examination, he discovered two cut wounds caused by blunt objects, measuring 8cm and 7cm, at the back of the head, as well as another on the chest, from which blood was seeping out. Based on his findings, he concluded that the cause of death was excessive bleeding in the head, known as intracranial haemorrhage. PW3 tendered a postmortem report, which was admitted and marked as Exhibit P1.

PW4 a Police Officer, testified that on 10<sup>th</sup> May, 2022, accompanied by ASP Kauzeni, the OCS of Nanyamba police station and James, also a Police Officer, they proceeded to the scene of the crime. Upon arrival, they engaged

with the residents, particularly Mr. Mussa Nayopa Athumani, the deceased father, who guided them to the scene of the crime.

PW4 recounted that after PW3 examined the deceased's body, he was tasked with sketching a map of the crime scene by the OCS. He drew the map under the guidance of the deceased's father. The sketch map was admitted and marked as Exhibit P2.

In the process of gathering evidence, PW4 questioned PW1 regarding those involved in her husband's death. He said initially PW1 was hesitant to name the suspects. However, after persistent questioning while moving her away to the people surrounding her, she eventually named six people; Said Mshamu Kalias, Juma Said Mshamu, Alabi Said Mshamu, Seleman Dadi, Mohamed Seleman Dadi, and Razaki Seleman Dadi, which resulted to their arrest.

During cross-examination, PW4 stated that people were sitting with PW1 who were advising her not to reveal the assailant. So, they removed her from those people. After some persuasion, she eventually disclosed the names of the suspects.

With the prosecution having closed their case, all accused persons were found with a *prima facie* case. They all opted to defend themselves under oath without calling witnesses or tendering any exhibits.

In their defence, all accused persons denied any involvement in the attack and subsequently, the death of the deceased. Each of the accused provided his alibi, recounting his whereabouts on the date of the incident.

DW1, Said Mshamu Kalias, testified that on 10<sup>th</sup> May, 2022 in the morning, he woke up around 06:00hrs. While heading to the toilet, he heard an announcement by Mr. Mussa Nayopa, who was informing the villagers about the death of his son, Musa Nayopa, which had occurred earlier that morning. The burial was scheduled for the evening, in which he decided to join the mourners to bury the deceased.

Furthermore, DW1 stated that he had never encountered the deceased and had never assaulted him. He claimed to be unaware of any conflicts the deceased may have had with various people.

DW1 acknowledged that PW1 was his wife, and they were married in 2001. Their first child, Juma, was born in 2001, and their second child was born on 28<sup>th</sup> November, 2006. Additionally, he alleged that PW1 has been suffering from mental illness this being the cause of their separation.



DW2, Juma Said Mshamu, testified that on 9<sup>th</sup> May, 2022 at 19:00 hrs, he was at his grandfather's house, Mr. Mshamu. On 10<sup>th</sup> May, 2022, he learned about the death of Salumu Mussa Nayopa. He adamantly stated that he had never assaulted the deceased.

DW2 acknowledged that PW1 is his Mother and stated that he is aware of her mental health issues.

When cross-examined, DW2 responded that he was informed by his Father about his mother's mental disorder.

DW3, Alabi Said Kalias, testified that on 9<sup>th</sup> May, 2022, at 19:00 hrs, he was at home with his grandfather and brother. He stated that he is aware of his Mother's mental instability. He said that she would often undress herself, and as his children, they would attempt to restrain her. Even after they separated from her, this behaviour persisted.

DW4, Selemani Dadi Athumani, testified that on 9<sup>th</sup> May, 2022, at 19:00 hrs, he was asleep at his home with his wife. He contended that he had never assaulted the deceased nor had any quarrels with him.

Furthermore, DW4 testified that on 13<sup>th</sup> May, 2022, around 19:00, he was instructed by the Village Executive Officer, named Hassan Kadili, to go to the Nanyamba police station to provide a statement. Being a law-abiding

citizen, he complied with the request. Upon his arrival at the police station, he was questioned about whether he had committed murder, which he denied. He stated that he was coerced into admitting the offence, but he maintained his innocence. On 14<sup>th</sup> May, 2022 he was taken to the Mtwara police station, and on 16<sup>th</sup> May, 2022, he was interviewed regarding a crime that he did not commit.

DW5, Mohamedi Selemani Dadi, testified that on 9<sup>th</sup> May, 2022 at 19:00 hrs, he was at his business premises called '**Kibanda Umiza**,' of which he is the owner. '**Kibanda Umiza**' is well-known as a place where people gather to watch football. Afterwards, he returned home, where he resides with his friend Azizi Mohamedi Namwidamba. However, his friend was not present that day as he was away on a journey.

DW5 further testified that he had never assaulted the deceased nor had any quarrel with him. On that particular day, he did not see the deceased at all.

Additionally, DW5 stated that he is aware of PW1's mental health issues. He alleged that he knew PW1 had a mental illness because she exhibited behaviour such as undressing and being naked in front of people, which is not normal for a sane person.

DW6, Razaki Selemani Dadi, testified that on 9<sup>th</sup> May, 2022, at 19:00 hrs, he was at a house left to him by his brother Jafari Chitenda, who had traveled to Kitere for entertainment. He was alone at the time. He asserted that he is aware of PW1's mental instability because she exhibits behaviours such as public undressing and consuming food from dustbins.

Furthermore, DW6 testified that he had never assaulted the deceased, nor did he have any relationship with him. He mentioned that the deceased had conflicts with various people in the village and had assaulted several people, such as Mr. Mpoyo and Mr. Mkambale, incidents he claimed to have witnessed.

Following the conclusion of the defence case, both parties agreed to file their final submissions. Each side complied with the court's order. While I won't delve into the specifics of the arguments presented in the final submissions, I will consider them when addressing the pertinent issues in this case.

Based on the evidence presented by both sides, there is no dispute that Salumu Mussa Nayopa has passed away. Even the 1<sup>st</sup> accused in his defence acknowledged his participation in the deceased's funeral.

Through the testimony of PW3, there is no dispute that Salumu Mussa Nayopa's death was caused by excessive bleeding in the head, known as intracranial haemorrhage. The two cut wounds, caused by a blunt object measuring 8cm and 7cm, at the back of the head and another on the chest with blood seeping out, as stated by PW3, confirm that the deceased's death was unnatural.

For the charge of Murder to be proven, the prosecution must establish three elements: **One**, the presence of death, **Two**, that the said death was unnatural, **Three**, that no one other than the accused who caused death with malice aforethought.

From the undisputed facts, it is plain that the prosecution has successfully established two of these elements; that death has occurred and that it was unnatural. The remaining question now is whether the accused persons were responsible for the act of killing the deceased with malice aforethought.

It should be borne in mind that the burden of proof lies on the shoulders of the prosecution and the standard of proof is beyond a reasonable doubt. See section 3 (2) (a) of the Evidence Act [CAP 6 of R.E.

2022]. The Court of Appeal in the case of **Magendo Paul & Another v. Republic**, (1993) T.L.R. 219, insisted that;

*'For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed'.*

Again, in the case of **Mohamed Matula v. Republic**, [1995] T.L.R.

3, the Court held that;

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

Relying on the principle stated in the cited case, the burden lies upon the prosecution to prove that the accused persons are the ones responsible for the killing of the deceased and that they committed the act with malice aforethought, as outlined in section 196 of the Penal Code, which states as follows;

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

Section 200 of the Penal Code provides four circumstances that, when established, serve to prove malice aforethought:

*a) An intention to cause death of or to do grievous harm to any person, whether that person is the person actually killed or not;*

*b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous harm is caused or not, by a wish that it may not be caused;*

*c) An intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;*

*d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence.'*

Any of these circumstances outlined in section 200 of the Penal Code may lead to the establishment of malice aforethought, indicating the intention to kill or mens rea. Therefore, the offence of murder may be established based on these circumstances.

Having in mind the important legal principles and the provision of the law, I will now turn and analyze the evidence adduced by both the prosecution and defence before this court.

Looking at the evidence of the prosecution, there is evidence of eye witness. PW1 testified that she was at the scene of the crime and witnessed the incident. According to her testimony, she managed to identify the accused persons as the assailants.

PW1 stated that, while on their way back home with the deceased, they were encountered by the accused persons who attacked the deceased, using '*vigongo*' and hitting him on the head and limbs. PW1 said the incident occurred at 19:00hrs, but there was still some light; it wasn't completely dark. In her words, there was a bit of dim light and partial darkness.

PW1 also said when the deceased was attacked, she was a few steps away, approximately five paces and the attack didn't take long.

All accused persons denied committing the offence or even being at the scene of the crime.

It is settled law that when evidence of visual identification is presented, courts must exercise caution and refrain from relying on such evidence unless all possibilities of mistaken identity have been thoroughly eliminated.

The court must be fully convinced that the evidence before it is watertight.

This stance was reinforced in the case of **Kennedy Owino Onyachi &**

**Others v. Republic**, [2009] T.L.R. 229 wherein it was held that;

*'Where the evidence of visual identification is relied upon, such evidence must be subjected to scrutiny due regard being paid to all the prevailing conditions to see If, in all the circumstances there was readily sure opportunity and convincing ability to identify the person correctly and that every reasonable possibility of error has been dispelled.'*

Again, in the case of **Isaya Loserian v. Republic** Criminal Appeal No. 426 of 2020 (unreported) when faced with the issue of evidence of visual identification had this to say;

*'Trite legal stance is that such evidence is of the weakest nature and should not be relied on unless the court is satisfied that all possibilities of proper and unmistakable identification are eliminated, that is to say, the evidence must be watertight. Generally, night times are associated with darkness and the conditions are taken to be difficult and hence unfavourable for a proper and unmistakable identification'.*

There are established guidelines that must be adhered to to ascertain the reliability of identification evidence, as outlined in the case of



**Waziri Amani v. Republic** [1980] T.L.R. 250 as follows;

*'...before a court can found conviction based on visual identification, such evidence must be watertight to remove the possibility of honesty but mistaken identity. In such cases the court is required to consider, among others, the following matters; **one**, the time the witness had the accused under observation; **two**, the distance at which he observed him, **three**, the conditions in which such observation occurred, for instance, whether it was day time or night time, whether there was good or poor lighting at the scene; **four**, whether the witness knew or had seen the accused before or not; and **five**, all factors on identification considered, it should also be plain that was any material impediment or discrepancies affecting the correct identification of the accused person by the witness.'*

These guidelines have been applied consistently by the Court of Appeal in many of its subsequent decisions on the issue. For instance, in the case of **Said Chaly Scania v. Republic** [2007] T.L.R. 100, the Court drew inspiration from the case of **Waziri Amani** (supra) and had this to say;

*'We think that where a witness is testifying about another in unfavourable circumstances like during the night, he must give dear evidence which leaves no doubt that the identification is correct and reliable. To*

*do so, he will need to mention all aids to unmistakable identification like proximity to the person being identified, the source of light, its intensity, the length of time the person being identified was within view and also whether the person is familiar or a stranger.*

Now, the testimony of PW1 will be evaluated against a set of criteria to determine if it meets the requisite standards. It is uncontested that DW1 was PW1's ex-husband, and DW2 and DW3 are PW1's children, indicating that PW1 is familiar with them. Also, DW4, DW5, and DW6 are fellow villagers and neighbours whom she has known for more than five years, further establishing her familiarity with them.

Therefore, her evidence was that of recognition. Such evidence is considered to be more reliable than the identification of a stranger, however, the Court of Appeal has occasionally warned of the possibilities that mistakes in recognition of even close relatives and friends may sometimes be made as it was held in the case of **Shamir John v. The Republic**, Criminal Appeal No. 166 of 2004 (unreported) as follows;

*'...recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the Court*

*should always be aware that mistakes in recognition of close relatives and friends are sometimes made.'*

See also the case of **Abdul Ally Chande v. Republic**, Criminal Appeal No. 529 of 2019, and **John Stephano and 5 Others v. Republic**, Criminal Appeal 251 of 2021 (unreported).

The important thing to consider is whether the evidence of PW1 on recognition of the accused persons is credible, plausible, cogent, and convincing as to leave no room for reasonable doubt.

PW1 stated the incident occurred at 19:00hrs. The distance the accused persons stood was approximately five paces. She observed the accused from when the attack started until it ended and it did not take long. Regarding the light at the scene, she stated there was some light it wasn't completely dark, in her words there was a bit of dim light and partial darkness. I find PW1 evidence has disturbing features for the reasons I will explain hereunder.

Regarding the light and its intensity at the scene of the crime, PW1 only stated there was a bit of light at the scene of the crime, she did not disclose and give particulars of the source of light and its intensity at the scene of the crime which enabled her to see and recognized the accused persons.

In the case of **Juma Hamad vs. The Republic**, Criminal Appeal No. 141 of 2014 (unreported) the Court of Appeal held that;

*'When it comes to the issue of light, clear evidence must be given by the prosecution to establish beyond reasonable doubt that the light relied on by the witnesses was reasonably bright to enable identifying witness to see and positively identify the accused persons. Bare assertions that "there was light" would not suffice.*

Since PW1's testimony is not clear as to the source of the dim light she said was there and how far it was enabling her to see, the possibility of mistaken identity cannot be said to have been eliminated.

Furthermore, PW1 testified that she went to report the incident to the deceased's parents, accompanied by the deceased's mother, PW2, to the scene of the crime. However, she did not disclose to PW2 the identity of the assailants or name the accused persons as responsible for the attack of the deceased.

PW4 testified that he interviewed PW1 regarding those involved in her husband's death. He said initially, PW1 was hesitant to name the suspects. However, after persistent questioning, while moving her away to the people

surrounding her, she eventually named six people who are the accused persons in the dock.

This raises unanswered questions for the court regarding why PW1 if she truly recognized the accused persons during the incident, did not mention them to PW2 immediately. Furthermore, why did she only mention their names to PW4 after being persuaded extensively, as PW4 himself testified

In **Marwa Wangiti Mwita and Another v. Republic**, [2002] T.L.R. 39, the Court of Appeal had this to say;

*'The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as an unexplained delay or 14 complete failures to do so should put a prudent court to inquiry.'*

Therefore, the failure of PW1 to name the accused persons at the earliest opportunity renders her evidence of identification to be questionable.

The Court of Appeal stated in the Case of **Anael Sambo vs Republic**, Criminal Appeal No. 274 of 2007 (unreported) as follows;

*'The fact that a witness knew the suspect before that date is not enough. The witness must go further and state exactly how he identified the appellant at the time*

*of the incident, said his distinctive clothing, height, voice and the like.'*

As indicated in the cited case above merely knowing the suspects before the day of the incident is not sufficient. The witness must provide detailed information on how she was able to recognize them on the day of the incident, whether it be through clothing, physical appearance, or voice.

In her testimony, PW1 did not provide details on how she identified the accused persons. She did not describe their clothing or mention if there were any exchanges during the attack that would have enabled her to recognize the assailants, even by their voices.

Furthermore, during the preliminary hearing on 5<sup>th</sup> May 2023, the accused persons contested the assertion that while they were assaulting the deceased, they claimed it was because the deceased had insulted them repeatedly, and they were fed up with it.

Since PW1 was present at the scene of the crime, it was expected that she would provide evidence showing what transpired before the attack, which could have lent credibility to her identification of them. However, in her testimony, PW1 did not mention whether the accused persons uttered anything during the assault on the deceased. This omission has raised doubts regarding the reliability of her identification testimony.

As I have explained earlier, the only eyewitness in this case is PW1, while PW2 and PW3 do not have any knowledge of who committed the crime. PW4's testimony regarding the perpetrator was based on information provided by PW1, making it hearsay evidence. Therefore, the testimonies of PW2, PW3, and PW4 do not provide any evidence regarding who committed the murder. The only evidence relied upon to prove that it was not others but the accused persons who murdered Salumu Mussa Nayopa was of PW1.

It is a well-established legal principle that there is no specific requirement for the number of witnesses needed to prove any fact. This implies that a conviction of the accused can be based solely on the testimony of a single witness if the court believes that the witness is telling the truth. This principle is enshrined in section 143 of the Evidence Act, [CAP. 6. R.E 2022].

See also the case of **Yohanis Msiqwa v. Republic** [1990] TLR 148 and **Kennedy Owino Onyachi & Others v. Republic** (supra).

Generally, every witness is entitled to credibility, and their testimony should be accepted unless there are compelling reasons not to believe them, as established in the case of **Goodluck Kyando v. Republic**, Criminal Appeal No. 118 of 2003 (unreported).

The credibility of a witness can be evaluated by examining the coherence of their evidence and how it aligns with the testimony of other witnesses, as highlighted in the case of **Mathias Bundala v. Republic**, Criminal Appeal No. 62 of 2004.

In the case of **Rashid Shabani v. Republic**, Criminal Appeal No 310 of 2015 (unreported), The Court of Appeal emphasized that;

*'In evaluating the testimony of a witness, the Court may take into consideration all the circumstances of the case, such as whether the testimony is reasonable and consistent with other evidence, the witness's appearance, conduct, memory and knowledge of the facts, the witness's interest in the trial and the witness's emotional and mental state'.*

In her final submission, the learned defence counsel argued that considering PW1's demeanour during her testimony, where she laughed without apparent reason, she was not competent to be called as a witness. The defence counsel further contended that PW1's testimony cannot be relied upon to convict the accused persons because she is allegedly suffering from mental illness.

On their part, the state attorneys argued that PW1 is a competent witness, as she provided relevant, material, and competent evidence in



response to all questions posed to her. They stressed that she is a material witness who possesses the correct information and knowledge of what occurred at the scene of the crime on the date of the incident. Her testimony serves as direct evidence of the subject matter of this case, which is significant enough to influence the trial's outcome.

Regarding the issue of PW1's alleged "*ugonjwa wa moyo*" or insanity, as referred to in Mtwaru cultures, the state attorney countered that there is no medical evidence to support this claim.

It is commonly known that the issue of insanity demands medical evidence. While it is true that PW1 showed laughter during her testimony and asserted she suffered from mental illness, verbal statements alone do not suffice to establish her mental stability. Therefore, I am hesitant to conclude that PW1 is mentally unstable, particularly in the absence of medical proof confirming her condition at the time of the incident and during her appearance before this court.

Given these considerations, I am unable to use the issue of insanity as grounds to discredit PW1's testimony.

However, I find PW1's testimony fraught with numerous uncertainties, particularly concerning the identification of the accused persons at the scene

of the crime and the sequence of events leading to the incident. Therefore, I do not consider it credible and reliable for this court to base its determination of the fate of the accused persons solely on PW1's testimony regarding the information of Murder levelled against them.

PW1 allegedly went to report the incident to the deceased's parents, but according to PW2, she did not explicitly inform them that their son had been attacked; rather, she simply urged them to go and check on him, expressing uncertainty about his well-being. Under normal circumstances, one would expect PW1 to directly inform the deceased's parents about the attack on their son and who was attacking him.

More so, PW1 claimed to have witnessed the incident from start to end, indicating that she was present and observed the deceased being attacked. It begs the question of why she did not immediately run and report the incident, one may wonder about PW1's courage in waiting to witness the extent of the deceased's assault and not anticipating that the assailants might turn on her once they were done attacking the deceased.

In their defence, all the accused persons refuted being present at the scene of the crime and consequently denied any involvement in the Murder

of the deceased. Their testimonies primarily focused on their whereabouts on the day of the incident.

As pointed out earlier, the prosecution bears the burden of proving the guilt of the accused beyond a reasonable doubt. This burden never shifts to the accused persons, and they cannot be convicted solely based on the weakness of their defence.

In the case of **Hussein Malulu @Elias Hussein & 2 others v. Republic**, Criminal Appeal No 263 of 2021, The Court of Appeal held that;

*'The satisfaction that a case has been proved beyond reasonable doubt cannot be held to exist where doubts linger in the head of a trial Magistrate or a Judge on the blameworthiness of an accused person he is set out to convict. If there is persistence of doubts or unsureness about the guilt of the accused person, the obvious conclusion is that the case has not been proved at the required standard and the accused person should benefit from the doubts.'*

All said and done, after noting the flaws in the testimony of PW1, whose evidence was crucial in proving the charge, it is apparent that the prosecution has failed to establish its case beyond reasonable doubt.

Furthermore, no other evidence was offered by the prosecution linking or implicating the accused persons in the killing of Salumu Mussa Nayopa. Consequently, I find that the prosecution has not proven its case beyond a reasonable doubt against all the accused persons. Therefore, I acquit all the accused persons of the information of Murder against them. I hereby order their immediate release from prison unless they are lawfully detained for other reasons.

It is so ordered.

**Dated at Mtwara** this 15<sup>th</sup> April 2024



**M.B. Mpaze**  
**Judge**  
**15/4/2024**

**COURT:** The right of appeal is fully explained.



**M.B. Mpaze**  
**Judge**  
**15/4/2024**

**COURT:** Judgment is delivered in the presence of Mr. Jilala Jagadi State Attorney for Republic and Mr. Emmanuel Ngongi for all Accused persons who were also present in Court this 15<sup>th</sup> day of April 2024.



**M.B. Mpaze**

**Judge**

**15/4/2024**