

TANZANIA / JUDGMENT

JUDGMENT FINAL REPUBLIC VS TALK ABDULKARIM KIPUPWE

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TANZLIIDECIDED
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA DAR ES SALAAM SUB-REGISTRY AT DAR ES SALAAM CRIMINAL SESSIONS CASE NO. 36121 OF 2024 (Arising from PI. No.17928/2024 in the District Court of Mkuranga District at Mkuranga) REPUBLIC VERSUS TALKI ABDULKARIMU KIPUPWE@DOGOMBA

JUDGMENT

Date of last order: 28/03/2025 Date of judgment: 04/04/2025 A.A. MBAGWA J. In this case, the accused Talki Abdulkarim Kipupwe @ Dogomba is indicted of murder contrary to Sections 196 and 197 of the Penal Code. In the particulars of the offence, it was alleged that TALKI ABDULKARIMU KIPUPWE DOGOMBA on the 18th day of June 2024 at Kisemvule area within Mkuranga District in Pwani Region murdered Abdulrahman Salum Mawani @ Man Santos. 1 Upon arraignment, the accused denied the charges leveled against him hence a preliminary hearing was conducted in terms of Section 192 of the Criminal Procedure Act and thereafter a full trial ensued. During the prosecution of the case, the Republic enjoyed the representation of Ms. Rachael Dann Mwaipyana and Mr. Joseph Kisaka, learned State Attorneys whilst the accused had the services of Mr. Justine Kisha, learned advocate. To establish the guilt of the accused, the prosecution marshalled eight (8) witnesses namely, PW1 Sadam Ally Nassoro, PW2 Salum Said Mawani, PW3 DENIS Gilbert Basyagile, PW4 Doctor Josephat Tembe Muhoja, PW5 Happy Emilio Mwidunda, PW6 J2058 P/C Denis, PW7 F3241 D/SGT Joseph, and PW8 G7715 D/CPL Albinus. Besides, the Republic tendered three (3) documentary exhibits to wit, the postmortem examination report of Abdulrahman Salum Mawani dated 20/06/2024 (exhibit P1), the PF3 of Sadam Ally Nassoro dated 18/06/2024 (exhibit P2) and the sketch map of the crime drawn by F3241 D/SGT Joseph on 19/06/2024. 2 In defence, the accused stood as a solo witness. He neither called other witnesses nor produced any exhibit to support his defence. In summary, the prosecution story was as follows: On the 18th day of June 2024 around 23:00hrs, Sadam Ally Nassoro (PW1) was called by his friend Abdulrahman Salum Mawani @ Man Santos, the deceased to join him at Kshkash Bar to celebrate Eid-il-Adhia festival. PW1 went to Kashkash Bar and found the deceased with other youngsters. In the course around 02:00hrs, the deceased went outside to follow his girlfriend. However, after a short while, Sadam Ally Nassoro (PW1) heard some noises from outside. He thus got outside to see what was happening. Thereat, he found the deceased,

Abdulrahman Salum Mawani @ Man Santos fighting with the accused. Before he could render any assistance, the accused took out a knife and stabbed the deceased in his right arm between an elbow and shoulder. PW1 tried to apprehend the accused but ended up being stabbed too. As such, the accused managed to escape from the crime scene. The deceased who was excessively bleeding due to stab injuries, was rushed by Samaritans to Vikindu Police Station to obtain a PF3 as it was a conditional 3 requirement to get medical treatment. At Vikindu Police Station, they found PW6 J2058 P/C Denis and PW7 F3241 D/SGT Joseph. Having examined and observed the severe injuries the deceased had sustained, PW6 J2058 P/C Denis under the superintendence of PW7 F3241 D/SGT Joseph issued a PF3 and handed the same to Hashim Mahmoud Maongezi, one of the Samaritans who were eagerly struggling to save the deceased's life. Thereafter the deceased was hurriedly ferried to Kisemvule Dispensary. Nevertheless, the deceased was pronounced dead upon arrival. Dr. Happy Emilio Mwidunda (PW5), the medical officer in charge of Kisemvule Dispensary told the Court that it was around 03:30hrs on 18/06/2024 when she was awakened by the watchman to attend to the patient (deceased) but after a preliminary test, she confirmed that the deceased was no more. She thus notified the police of the deceased's death. PW7 F3241 D/SGT Joseph went to Kisemvule Dispensary, took the deceased body, and submitted it to Kilwa Road Police Hospital for postmortem examination. Thus, on 19th June 2024, Dr. Denis Gilbert Basyagile (PW3), in the presence of the deceased's father one Salum Said Mawani (PW2), and 4 the investigator of case one F3241 D/SGT Joseph (PW7), conducted an autopsy. PW3 recorded his findings regarding the cause of death in the postmortem examination report (exhibit P1). According to the testimony of PW3 and exhibit P1, the cause of the deceased's death was hemorrhagic shock caused by stab injuries in the right arm. The above series of event was done along with the efforts to locate the accused. It was the evidence of F3241 D/SGT Joseph (PW7) that, through his detective means, he learned that the accused had fled to Magawa Village. He thus communicated with G7715 D/CPL Albinus (PW8) who was on patrol in the area to help him trace the accused. G7715 D/CPL Albinus (PW8), in collaboration with the Village Chairman one Maulid Mbwana Mtulya successfully tracked and ultimately apprehended the accused at Magawa Village on 19th June 2024. He was subsequently conveyed to Vikindu Police Station where he stayed for two days before he was transferred to Mkuranga Police Station and later on arraigned before the District Court of Mkuranga. Moreso, on the very fateful morning i.e. 18th June 2024, Sadam Ally Nassoro (PW1) also went to Vikindu Police Station to get a PF3. He then went to 5 Ngunguti Health Centre where he was attended by Dr. Josephat Tembe Muhoja (PW4). PW4 observed three stab injuries in PW1's body. Two injuries were on the neck while one injury was on the right hand. PW4 told the Court that the injuries were caused by a sharp object. Lastly, PW4 tendered the PF3 (exhibit P2) to support his testimony. Based on the evidence from eight witnesses and three documentary exhibits, the prosecution believed that the guilt of the accused was proved to the hilt. Conversely, the accused maintained his denial in his defence. In essence, he raised the defence of alibi as he completely disputed to have ever been at Kashkash Bar (the crime scene) on the material time. He further stated that he was arrested along with his friend one Imran Mmakonde while watching TV at his home in Kisemvule area. Submitting in support of the charge, Mr. Joseph Kisaka, learned State Attorney was of the strong view that the prosecution proved the case beyond to the hilt. He lamented that the accused, in his defence,

raised a defence of alibi contrary to the dictates of Section 194(4) and (5) in that he did not issue a notice to rely on alibi. Mr. Kisaka added that the accused denied 6 being at the crime scene but did not bother to call any witness to support his assertion. It was thus Mr. Kisaka's conclusion that the accused lied to the Court and for that reason, he urged the Court to consider the accused's lies as corroboration to the prosecution case. On this, the learned State Attorney relied on the decision of this Court in the case of Republic vs. Muharami Mohamed Abdallah @Chonji And 4 Others, Criminal Session Case No. 58 of 2023, HC at Dar es Salaam Tanzlii, where it held thus: 'It is the law where the accused lies to the court, such lies may be taken to corroborate the prosecution case.' Furthermore, while referring to the case of Enock Kipela vs the Republic, Criminal Appeal 150 of 1994, CAT at Mbeya, Mr. Kisaka forcefully submitted that the prosecution proved malice aforethought. He clarified that the type of weapon used (a knife), a number of blows inflicted and part of the deceased's body attacked demonstrate that the accused had malice aforethought. At the end, the learned State Attorney beseeched the Court to find the accused guilty and consequently convict him of murder. Conversely, Mr. Justin Kisha was diametrically opposed to the prosecution's 7 contention. He had it that the prosecution failed to prove the case against his client to the required standard. He pinpointed PW1 did not describe the intensity of light that aided him to properly identify the accused at the crime scene. In addition, Mr. Kisha assailed the prosecution saying that it failed to tender the alleged caution statement of the accused whilst it had earlier on indicated to do that. Mr. Kisha therefore implored the Court to find that the case was not proved. Further, Mr. Justin complained that PW2 Salum Said Mawani and PW4 Doctor Josephat Tembe Muhoja were not listed as intended witnesses and yet, they were allowed to testify contrary to Section 289 (1) of the Criminal Procedure Act. He thus wished to have the Court expunge their evidence. Briefly, the above is what both parties narrated to the Court. Now, it is apt to determine whether the prosecution proved the charge beyond reasonable doubt. Three issues are relevant for the determination of this case namely:

- (i) Whether the deceased Abdulrahman Salum Mawani @ Man Santos died an unnatural death.
- 8 (ii) Whether it is the accused Talki Abdulkarimu Kipupwe@Dogomba who caused the death of the deceased.
- (iii) Whether the accused Talki Abdulkarimu Kipupwe@Dogomba caused the deceased's death with malice aforethought. To commence with the 1st issue, on this, there is evidence of Sadam Ally Nassoro (PW1) who eye-witnessed the accused stabbing the deceased with a knife thereby causing the deceased to bleed excessively. PW1's evidence was supported by the medical findings (PW3 and exhibit P1) which were to the effect that the deceased died of hemorrhagic shock caused by excessive bleeding. Further, the injuries in the deceased's body were testified to by PW2 Salum Said Mawani, PW6 J2058 P/C Denis, and PW7 F3241 D/SGT Joseph. There was no evidence to the contrary. As such, I conclude that the deceased died an unnatural death. Coming to the 2nd issue namely, whether it is the accused Talki Abdulkarimu Kipupwe@Dogomba who caused the death of the deceased, there is an eye witness namely, Sadam Ally Nassoro (PW1) who saw the accused stabbing the deceased on his right arm. PW1 attempted to arrest the accused but the 9 accused also stabbed PW1 to avoid apprehension. Thereafter, the accused fled to Magawa Village. During his defence, the accused denied being arrested at Magawa Village. However, he forgot that

during the preliminary hearing, he admitted this fact. For clarity, I reproduce a memorandum of agreed facts. Memorandum of Agreed Facts The accused's name is Talki Abdulkarimu Kipupwe @Dogomba. The investigation was carried on which ultimately led to the apprehension of the accused on 19th day of June 2024 at Magawa village. Court: The memorandum of agreed facts had been read to the accused and found correct. A.A. Mbagwa JUDGE 05/02/2025

1. Accused: Signed
2. Defence Counsel: Signed
3. State Attorney: Signed 10 There is a plethora of authorities to the effect that a fact which is admitted during the preliminary hearing is taken to have been proved. See the case of Efraim Lutambi vs the Republic, Criminal Appeal No. 20 of 1996, CAT at Mbeya. Considering the evidence of G7715 D/CPL Albinus (PW8) and the accused's admission during the preliminary hearing, I am settled that the accused was arrested at Magawa Village. Thus, the question to ponder is, if the accused had not committed a wrong why did he flee to hide himself in Magawa Village? In my considered findings, the accused's conducts after the incident coupled with the evidence of PW1 leaves no doubt that it is none but the accused who stabbed the deceased and consequently caused his death. I therefore answer the 2nd issue in the affirmative. The last but most relevant issue is whether the accused Talki Abdulkarimu Kipupwe@Dogomba, with malice aforethought, caused the deceased's death. As hinted above, the only eye-witness in this case is Sadam Ally Nassoro (PW1). PW1 testified that he found the accused and the deceased fighting. The reason for the fight was not disclosed. A part of PW1's testimony goes as follows: 11 '...I remember 18/06/2024 it was Eid Adhia. My friend Abdulrahman called me around 23:00hrs. I therefore followed him at KashKash Bar at 01:00hrs. On arrival, I met my friend Abdulrahman. Abdulrahman left me inside the bar and went outside. I waited for him about four minutes and later I heard some noise. I therefore decided to follow him outside. Outside, I found Abdulrahman fighting with Gomba (the accused). Gomba took out a knife and stabbed Abdulrahman two times in the deceased's hand. The accused took the knife from his body. I tried to arrest the accused but he also stabbed me with a knife on my right hand.' PW1's evidence tells it all that the accused took out a knife and stabbed the deceased in the course of fighting. Now, Based on the prosecution's own evidence that the stabbing of the deceased resulted from the fight, can we safely say that the accused had malice aforethought without even knowing what transpired before? In my considered opinion, having assessed the evidence as a whole, the prosecution evidence is wanting to prove malice 12 aforethought beyond a reasonable doubt. Although the accused did not raise this defence, it is my view that the failure by the defence to raise it, does not relieve this Court from considering it given that the same was introduced in evidence by the prosecution witness (PW1). It is a settled position of law that where death occurs in the course of fight, the accused is liable to the offence of manslaughter and not murder. See the cases of Sospeter Karoli vs the Republic, Criminal Appeal No.122 of 2007, CAT at Mwanza. As I wind up, I find it apposite to address though in passing the complaint

by the defence counsel that PW2 Salum Said Mawani and PW4 Doctor Josephat Tembe Muhoja were not listed as intended witnesses and yet, they were allowed to testify contrary to Section 289 (1) of the Criminal Procedure Act. Without further ado, the counsel's complaint is without merits. The committal record is clear that their statements were read during committal proceedings. Part of the committal court record reads: 'COURT: Statements of the following witnesses have been read to the accused person;- 13

1. STATEMENT OF HASHIM MAHAMUDU MAONGEZI OF MIDIZINI, KIGAMBONI DISTRICT
2. STATEMENT OF SADAM ALLY NASSORO OF VIKINDU, MKURANGA DISTRICT
3. STATEMENT OF EMMANUEL AMOSI NYAMBARO OF VIKINDU, MKURANGA DISTRICT
4. STATEMENT OF J.2058 PC DENIS OF VIKINDU, MKURANGA DISTRICT
5. STATEMENT OF DR. HAPPY EMILIO MWIDUNDA OF VIKINDU, MKURANGA DISTRICT
6. STATEMENT OF SALUM SAIDI MAWANI OF VIKINDU, MKURANGA
7. STATEMENT OF DR. JOSEPH TEMBE MUHOJA OF VIKINDU, MKURANGA DISTRICT
8. STATEMENT OF DR. DENIS GILBEERT BASYAGILE OF KURASINI, DAR ES SALAAM
9. STATEMENT OF MAULID MBWANA MTULIA OF MAGAWA, MKURANGA DISTRICT
10. STATEMENT OF G. 7715 D/CPL. ALBINUS OF MKURANGA
11. STATEMENT OF F. 3241 D/SGT. JOSEPH OF MKURANGA VERIFICATION I hereby certify that the listed prosecution witnesses' statements have been read over and explained to the accused person as to the effect of S. 246 (2) of CPA Cap 20 RE 2022. K.P.MROSSO, SRM 02/01/2025' All the above said, I am opined that the accused person is not guilty of murder for want of malice aforethought. In the stead, I find the accused guilty of a minor offence of manslaughter in terms of Section 300(1) and (2) 14 of the Criminal Procedure Act. Consequently, I hereby convict Talki Abdulkarimu Kipupwe@Dogomba of manslaughter contrary to Sections 195 and 198 of the Penal Code. It is so ordered. The right of appeal is explained. A.A. Mbagwa JUDGE 04/04/2025 SENTENCE I have keenly heard and considered both mitigation and aggravation factors. I have also taken into account the manner in which the offence was committed and the weapon used. It is obvious that the offence falls under the high level manslaughter as per the Tanzania Sentencing Guidelines,
2023. According to the Guidelines, the punishment for high-level manslaughter is between life imprisonment and ten-year imprisonment. All 15 the above considered, I hereby sentence the convict Talki Abdulkarim Kipupwe to imprisonment of twelve (12) years. It is so ordered. The right to appeal is explained. A.A. Mbagwa JUDGE 04/04/2025 16

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