

TANZANIA / JUDGMENT

# the republic v omary hussein

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IN THE HIGH COURT OF TANZANIA DODOMA SUB- REGISTRY AT DODOMA ORIGINAL JURISDICTION CRIMINAL SESSIONS CASE NO. 15 OF 2022 THE REPUBLIC VERSUS OMARY HUSSEIN BAHATI SHABANI@ BAHATI

### JUDGMENT

1&h December, 2023. Hassan, J.: The accused person, one Omary Hussein Bahati Shabani@ Bahati, 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 that on 13th day of April, 2021 there at Salanka village, within Kondoa District in Dodoma Region, did murder one Adam Athumani Majala. i Upon being called for the trial, Mr. Matibu learned State Attorney appeared for the Republic. Whereas, on the other side, the accused person Omary Adamu Athumani enjoyed the service of Mr. Ezekiel Amon, 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 The matter was heard without the aid of assessors vide the provision of section 265 (1) of the CPA as repealed and replaced by section 30 of the Written Laws (Miscellaneous Amendments) Act, No. 1 of 2022.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 three (3) witnesses to testify against the accused namely: Omary Adamu Athumani (Pw1), Amina Adamu Athumani (Pw2) and F. 3263 D/SGT Joseph (Pw3). Additionally, prosecution tendered two exhibits including the sketch map of the crime scene (P1) and Report for Post Mortem Examination (P2). Whereas the accused person defended himself (Dwl) and had one witness, Maulid Juma Gwandi (Dw2), with no exhibit to tender. Prosecution testimony started with Omary Adamu Athuman (PW1), Adult, 18 years old, Mrangi by tribe, resident of Salanka village within Kondoa District in Dodoma Region, Christian and on his sworn testimony he stated 2 that he lives at Salanka with his mother. He is a Boda boda (motorcycle) driver. And that, he came to the Court to testify about Murder case of which, his father Adam s/o Athumani was murdered on 13th April, 2021 at about 16: 30 to 17:00 hours. Explaining on how the incident occurred, Pw1 stated that the offence was committed at Salanka along the road. He said on that date, he was coming from school, and when he reached at their home, he heard a voice (call of help) from the road. Because of that, he went there and once he reached there, he saw Omary and Salmin with machete were slaughtering his father. Seeing that, then Salmin told him that, they will do to him like what they were doing to his

father. After that, they started to chase him off but he did not run away. Soon after, it passed a motorcycle, and the motorcyclist shouted for help to the people and the culprit ran away. And people started to arrive at the crime scene and, among the people who arrived there is his sister, Amina d/o Adamu Athumani. Then, Pw1 went on to testify that, Omary who killed his father was the accused on the dock. 3 Moreover, Pw1 testified that seeing the situation was not favourable, Salmini ran away. He added that, Omary (the accused) and Salmini were living in his village, and that is why, he knows them very well. He also stated that, Omary (the accused) and Salmini are good friends, and they were both peasants. He also testified that when the deceased was slaughtered, he was at the distance of five (5) paces. And that, his father died on the same day which he was attacked by the accused. He also testified to have known the conflict about shamba between his father and the accused. During cross examination, Pw1 maintained that, after the incident he did not report the matter to the Police. Moreover, he revealed that, his father saw those who injured him. He further detailed that Amina was not at the scene of crime but she came later with other people while the accused had already run away. Furthermore, Pw1 stated that when the motorcycle (bodaboda) arrived to the crime scene, the accused had already started to ran away. He also confirmed that, the villagers participated in the funeral of the deceased, although, he did not know the number of people who were there to the funeral. Additionally, he revealed that, he did not go to the Hospital where his father was admitted. 4 More so, Pw1 testified that he only saw the accused with machete and together with his friend Salmini. He stressed that, he was the one who was at the crime scene while they were slaughtering his father. He also mentioned that, he knew that his father was in conflict with Salmini about shamba, of which, belongs to his father. He finally concluded that they have never had conflict about shamba with Omary family or Omary himself. And that, his father died on the same day he was sent to Babati Hospital for treatment. Another prosecution witness is PW2 Amina Adamu Athumani, female, 32 years old, Mrangi of Salanka village within Kondoa District in Dodoma Region. In her Affirmed testimony she stated that, her name is Amina Adamu, peasant, she came to testify about the Murder of Her father. She therefore stated that, it was on 11th April, 2021 when she received a call from Juma, a young man from her village, asking her where she was. And seeing that, she responded that she was sleeping. After she gave that answer, Juma asked her again whereabouts of her father? She responded that she does not know whereabouts of his father. Then, after that, Juma asked Pw2 to go to the road to see her father because Omary was asking 5 for him. With that call, Pw2 woke up and went to the Banda where she met the Village Executive (VEO) but her father was not there. Seeing that, VEO asked her what she was there for, and she responded that she went to look for her father because he has been told that Omary and Salmini want to kill him. Pw2 testified further that her father was aware of the plan because VEO called him and informed him that he should not go out because Omary and Salmini were looking for him in order to kill him. Pw2 stressed, that was on 11th April, 2023. Pw2 continued to testify that, her father was murdered on 13th April,

2023. And that she was in her house and she heard a voice saying that CHARGE has been killed and Charge is her father's alias name. Thereafter, she went to the place where other people were rushing. While she was on the way, she met with Omary coming from the crime

scene heading to his house. She further described that from her house to the scene of crime is about 25 minutes walking distance. At that time when she met Omary, he was wearing a shirt with green and white strips which was blood stained. Seeing that, she did not do anything with Omary but she proceeded to rush to the scene. At the scene of crime, she saw her father was injured with 6 machete and she also met her brother Omary there who informed her that their father was injured by Omary and Salmini. After that, they took their father to Hospital. While they were taking him from the scene of crime, the deceased's condition was very bad in such a way that he could not speak. She further stated that, initially they sent him to Bereko Hospital but he was later transferred to Manyara District Hospital (Babati). At the Hospital, he started to receive treatment but he died in a short while. She proceeded to testify that, when she was heading to the scene of crime and met Omary, she was able to identify him because, she knew him since they were living in the same village and they grew up together. Pw2 identified the accused person Omary on the dock. Pw2 went on to testify that, in their village Omary is famously known as Omary Bahati but at school, he was called Omary Hussein Shaabani. She further testified that, the deceased had a Land conflict with Salmini and he had reported that dispute to the Ward Tribunal. And that, this dispute was reported at the tribunal since 2019 and her father was given his Land. Coming 2021, Omary (the accused) and Salmini started to trespass her father's land once again. And that, the matter was reported to the Ward 7 Tribunal again, and on 14th April, 2023 they were expected to appear before the Tribunal. However, coming on 13th April, 2021 her father was attacked and seriously injured by Omary and Salmin. And that, the deceased was injured in the legs, hands and head. After the incident, they rushed the deceased to the Hospital and when they returned, Omary and Salmini had already ran away to Manyara where Omary was later arrested. Pw2 testified further that, coming to 12th April, 2023 after her father was informed about the threat posed to him by Omary and Salmin, they reported the same to VEO. She further stated that report about her father's injury was received by police themselves because they were close to the scene of crime. During cross examination, Pw2 stated that, on 11th April, 2021 Juma called her by phone only to tell her that Omary and Salmini want to kill her father. She further stated that at the Banda she did not see Omary and Salmini and she did not wait there because it was a night time. Adding to that, she confirmed that, the distance from her house to the scene of crime is about 25 minutes for slow walking and 10 minutes for speed walking. She 8 added that her father was injured close to his shamba along the road. She also admitted that she did not testify that she went slowly or quickly to the scene, and also, she did not mention the distance between where she was and where Omary was when they met at the road while she was heading to the scene of crime. More so, Pw2 admitted that she did not see Omary (the accused) at the scene of crime. Adding to that, she stated that she knew that the accused was coming from the scene of crime because his shirt was blood stained. As she was asked by defence counsel, she admitted that, there are number of living organisms who have blood. And she also admitted that, it is not a crime for person to have blood in his body. Asked if the accused has ever had conflict with the deceased, Pw2 responded that, the deceased had no Land conflict with Omary Hussein Shaban (the

accused). And she further stated that, she did not see the accused slaughtering the deceased but she was only informed about his involvement. Adding to that, she also stated that at the court, she did not see a shirt which she mentioned in her evidence in chief or any other exhibits. She also admitted to have not gone to the Hospital and she further stated that only her brother Jamal who went to the Hospital with the deceased. 9 On the issue whether Police went to the scene of crime, she stated that she met investigator for the first time when the accused person was brought at Kondoa on 24th April, 2021 but she does not remember the first date she gave her statement at police station after incident. She further stated that, at the scene of crime, she met Omary Adamu (Pw1), Hamis Ramadhan and others. The third prosecution's witness was F.3262 D/SGT Joseph (Pw3), male, 46 years old, Muha, resident of Kondoa within Kondoa District in Dodoma Region. In his sworn evidence he testified that he is a police officer from the department of criminal investigation. And that, he has eighteen

- (18) years' experience in the department of Criminal Investigation. He stated that his work in the department is to investigate cases by information gathering and trace the exhibits which are connected to the case. He also interrogates accused and prepare an investigation file. With respect to the case at hand, Pw3 stated he was testifying for a murder case No. Bereko IR.47/2021 which involved the deceased Adamu Athuman Majala and the accused Omary Hussein Hassan @ Bahati (DW1), of which, he was an investigator. Pw3 also testified to clarify on the name of the accused person, that is, the actual name of the accused person is Omary io Hussein Hassan which he used at school and thus, the name Bahati is his alias name. He went on testifying that, on 20th April, 2021 he was given a case file by his OC-CID of Kondoa to investigate this case. However, since there was no accused who has been arrested yet in connection with the alleged offence, then, he started to investigate and on that, he took witness statements, and for that, he was able to secure one eye witness Omary Adam Athuman (Pw1). Pw3 stated further that, the eye witness has informed him that, he saw the accused person attacking the deceased and that, Pw1 was the only witness who had witnessed the offence while it was committed. And that, the witness is the deceased's son. Moving forward, Pw3 stated further that, he continued to search for the suspects which means, the accused person on the dock and other suspect by the name of Salmini Saidi Grey who is still being searched. He further stated that, after the incident, all suspects ran away from the village. He went on to testify that, later on, they were informed that the accused herein is in Manyara Region, Babati District and Magugu village. 11 Thus, following that information, on 24th May, 2021 the OCD- Emafoya (SSP) was informed by informer on whereabouts of the accused and thus, he commissioned PC Mwita from Bereko Police Post to go and arrest the accused person. It follows that, on the same date, on 24th May, 2021 around 1:00 hours PC Mwita was able to arrest the accused person at 3:00 hours. The said accused was identified by Pw3 to be the accused on the dock. After that, the accused was then transferred from Bereko Police Post to Kondoa Police station. Pw3 further stated that the accused was then interrogated through cautioned statement and denied to be responsible of Murder. He also stated that, the accused person claimed to have been a close

friend of the deceased, and that, he used to work on a farm together with the deceased. On investigating the matter, Pw3 testified to have interrogated the accused through cautioned statement. On that, he also realized that, the deceased was injured by machete in his hands, legs and head. He added that, cause of crime was a Land dispute between the suspect and deceased who were neighbours. He further stated that, from Bereko to Kondoa Urban is about 78 Kilometre. During cross examination, Pw3 stated that, he came to understand whereabouts of the accused after accused switched on his phone. Though, 12 he admitted that to switch off somebody phone, is not a crime when there is a suspicion of crime. And that, he was given an investigation file on 20th April, 2021 by his OC- CID. On 13th April, 2021 he went at the crime scene around 19:00 hours. As to when he wrote witnesses' statements, Pw3 testified that, it is true that eye witness's statement was recorded after one month and a week. And it is also true that only one witness had witnessed the incident but the rest are not eye witnesses. He further stated that Land dispute was between Ssalmini's father and the deceased and there was no conflict between the accused person and the deceased. On defence, the accused person Omary Hussein Shabani (Dwl), 33 years old, resident of Bereko within Kondoa in Dodoma Region, in his affirmed testimony, he stated that before he was arrested, he was working as peasant at Said Grey's farm. He was working as a labourer; and that he was arrested on 23/05/2021 at Magugu Village within Babati District in Manyara Region. He was arrested while he was working in the rice farm. Dwl denied to have been involved in the Murder case of the one Adamu Athuman, and he was not at the scene of crime when deceased was murdered. He further testified that on that fateful day, he was at Said Grey's farm from morning hours to the evening at around 17:00 hours. He also 13 stated that he understood Salmin Said Grey who was his neighbour. He insisted that, he was not responsible for the attack of the deceased and on the material day he was not with Salmini. He further stated that, on the fateful day, he was at coffee shop area, while he was there, some people appeared and they told them that, there was people who was injured, and before he left, he heard that Adamu Athuman Majala has been attacked and there were people who witnessed. After getting that information, they went to the crime scene and saw a lot of people, but the deceased was not there. He also stated that, what Amina Athumani (Pw2) has testified was untruth. He further testified that, he is not living at the same area with Amina, that Amina is living on the south part while he, the accused lives on the north of the crime scene. And, on the material day he did not meet Amina Athuman. Therefore, he stated that it was not true that he met Amina Athumani while he was leaving the crime scene. He further testified that after incident, on the next morning, he participated to dig the grave and then he attended the funeral. 14 Moreover, Dwl stated that on the seventh day after the incident, he travelled to Magugu village. It was on 23/05/2021 when he was arrested and interrogated on 25/05/2021 at Kondoa. He further testified that during interrogation, he denied to be responsible of Murder. He testified that Omary Adam Athuman gave information after he was arrested on 27/05/2021. Dwl also testified that he did not abscond from the place which he was living and that he left from his village after the deceased had been buried. Talking of Magugu, Dwl testified that he was also working there. And that he did not switch off his phone as prosecution witness has testified. He further testified that,

witness should have provided Dwl's number and proof to show that his phone was switched off. Adding to that he testified that he only wants to inform the court that, this case was planted due to the reason that the victim (deceased) has not indicated his name while he was interviewed by police at the Hospital. He stressed, that though he was not there at hospital while the deceased recorded his statement, he has committal which shows that he did not mention his name. 15 When he was cross examined by prosecution, Dwl stated that if an offence of this magnitude occurs, a person is expected to report at police station. He testified further that he was a neighbour of the deceased Adamu and that he was informed that the deceased was murdered by Salmin Said Grey. He also stated that he was working together with Salmini's father in his farm. And that, Salmin Said did not attended the funeral. He also testified that; he was informed that Salmin has been involved in the murder that is why he ran away. He also acknowledged Salmin as his friend. Adding to that Dwl testified that he did not inform Salmini about the incident because after that, he did not have communication with him. Moreover, he testified that there is only one road leading from Amina's house to the scene of crime, and that at the crime scene, he met a number of people including Amina. He also admitted to meet Amina at the crime scene after offence was already committed and not on the road. Dwl denied to have switched off his phone. Dwl testified further, during that time of incident, he was communicating with a number of people including his relatives, and that he did not bring to the court evidence to show that his phone of alive because he was arrested and he could not take his phone with him. He further stated 16 that he knows that there was a Land dispute between Salmini and Adamu Athuman Majala. He denied to have participated in the Murder and he added that during funeral of Adamu Athuman, there were a lot of people including the deceased's brother Jamal who led the funeral. Another defence witness was Dw2, Maulid Juma Gwandi, 50 years old, Mrangi, resident of Salanka, within Kondoa District in Dodoma Region, he affirmed and testify that he is a peasant and builder. And that on 13/04/2021 he was in the farm cultivating with his uncle Omary Hussein. He was with Omary Hussein from morning hours up to 17:00 hours in the evening. And that, on that day Adamu Athumani was murdered. He further testified that after they completed their work, they went to the coffee shop "Kijiweni" together with Omary Hussein. Moreover, he testified that they went to the crime scene and that they arrived there while the deceased was already taken to hospital. Later on, they were informed that the victim has died at Babati and the next day funeral was conducted and Omary Hussein attended the funeral with him. And that, Omary Hussein participated in the funeral until the seventh day where dua was conducted. Omary Hussein Bahati also attended that Dua and after that everyone proceeded with his activities. 17 When cross examined, Dw2 stated that the incident occurred on 13/04/2021. And that deceased died on the night of that date. He added that Omary Hussein was present after the incident and he left to Manyara after seven days. He also stated that at the crime scene, he went with Omary and Amina was at the scene of crime after incident happened. Omary and Salmin was two friends. At the end, that was the evidence adduced from both prosecutions and defence side. Desirably, Counsel for both sides used their legal right to address the court through final submissions. In brief prosecution's submission filed by learned State Attorney Matibu

Matibu instructs as follow: That, in this matter where the accused stands charged with the offence of murder. On that, prosecution was able to prove the charge against the accused person by calling the testimonies of three witnesses including eye witness Omary Adamu Athumani (Pw1) and Amina Adamu Athumani (Pw2) the deceased's daughter. He further submitted that, according to the testimony of Pw1 and other evidence gathered they were able to prove that the accused had malice aforethought to commit the said offence because of the following reasons: 18 the deceased was assaulted at the sensitive and vulnerable parts of his body; weapon used; amount of force used; and conduct of the accused after committing an offence. To rainforce his argument, he brought into attention the case of Enock Kipera . Republic, Criminal Appeal No. 150 of 1994. Applying the said factors, learned State Attorney averred that in this case the deceased was cut by a machete on the sensitive part and the injury he sustained prove existance of malice. Also, the conduct of the accused where after the incident the accused discerned from his arrest to Magugu village. He adds that, the deceased and the accused were living in the same village, however immediately after the incident, the accused escaped untill 24th may, 2021. He further cited the case of Awadhi Gaitan @ Mboma v. Republic, Criminal Appeal No. 288 of 2020 CAT (Unreported). In addition, he pointed out that during his testimony, Pw3 who is a police officer gave his evidence with slip of the tongue where he mispronounced the accused name as "Omary Hussen Hassan@ Bahati instead of Omary Hussein Shabani @ Bahati. On that case, learned state Attorney holds that the anomaly is minor since the charge and the evidence tendered by the prosecution was sufficient to prove the charge beyond 19 reasonable doubt. Adding that the accused was identified by both witnesses including the eye witness. Furthermore, Mr. Matibu submitted that, although the accused denied being involved in the murder, he did not dispute being a friend of Salmini Said Grey of whom they were suspected together. He also did not dispute that on the material day he was in the village and he admitted to meet with Pw2 and also he failed to prove why he escaped after the crime was committed. More so, he averred that the accused did not raise any doubt in the prosecution's evidence. In this point he cited a case of Magendo Paul and Another v. Republic, [1993] TLR. 220 to strengthen his point. Finally, together with a number of antcedents which I will reserve them at this juncture, he prayed the court to convict and sentence the accused person as per the law. On the other hand, the defence counsel Mr. Ezekiel Amon submits in contetion to the charge against the accused herein. On that, although he admitted from the outset that, there is no dispute that the deceased Adamu Athumani has actual died from unnatural cause on 14th april, 2021. However, in his contentious submission he raised the issue as to whether the accused 20 person was identified by the prosecution's witnesses as assailant on the fateful day. Thus, in his endeavours, he protested that, in his testimony, Pw1 (the only eye witness) claimed in his testimony that it was the accused and his companion, Salmini Said Grey who attacked the deceased. However, during cross examination, Pw1 testified that he did not mention the accused to anyone. On this point, learned counsel pointed out the laid down principle of "naming the suspect at the earliest opportunity" . Thus, he protested that when cross examined, Pw1 testified that he mentioned the accused to the village leader but there was no village leader who was paraded to prove the assertion. Therefore, to his view

the assertion has no leg to stand. Adding to that, Mr Amon submitted that Pw2 is not a credible witness as she testified that the walking distance from her home to the crime scene was 25 minutes. And that, Pw2 further testified that she heard a call for help from her residence. Thus, to him her testimony is untrustworthy since Pw1 has stated the incident lasted not more than ten minutes, yet, Pw2 rushed from a distance of 25 minutes to reach the accused. 21 Submitting about Pw3 testimony, he averred that Pw3 testified that the deceased before he passed away he mentioned Salmini Said Grey as his lone assailant. And on his part, he wrote pwl's statement after the accused has been arrested. Therefore, based on Pw3's testimony, it is clear that the accused was not the assailant of the deceased, it was Salmini Said Grey who had attacked the deceased according to the deceased's dying declaration. Moreover, Mr. Amon submitted that it was established from the defence evidence that the accused was present all the time in the village and he even participated in the burial of the deceased, the testimony which went unchallenged by prosecution. Thus, it is clear that failure to cross examine a witness on key issues is tantamount to the admission of the facts. In furtherance to the earlier submission, learned counsel for the accused submitted further that, Pw1 testified that he observed the incident at about 5 paces from the assailants. To that note, Mr. Amon drew the attention of the court that this assertion should be taken with caution as there was a chance of mistaken identity due to the distressful nature of the event. He submitted that on the circumstance Pw1 could have mistaken the identity of the accused with someone else as the witness was under 22 traumatic situation. To back his point, he preferred the case of *Wamalwa and Another v. Republic* [1999] 2 AE 358. At the end, he pressed that the issue about identification of the accused as assailant was disproved by prosecution's witness and therefore, they prayed the court to acquit the accused from the offence he stand charged. Having considered the evidence from both parties, and after giving the well-thought attention to the submissions fronted by the learned Counsels, I am certain at this stage that, the main issue which needs a thoughtful deliberation of the court is, whether or not the accused person murdered the deceased. That said, it is obvious that to stand conviction for the offence of murder, the following sub-issues have to be proved beyond reasonable doubt thus, (i) Whether the deceased died (ii) Who killed the deceased, (iii) Whether the killing was unlawful and convoked by malice aforethought. In the first place, to analyse the evidence by touching each ingredient of the offence of murder, I will start to showcase the position of the law evolving the duty of prosecution onto criminal case. For instance in *Simon 23 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 Mwaningili 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 but a few. That being the case, starting with the first element thus, whether the deceased died. Essentially, looking on the evidence of Pw1 (Omary Adamu Athumani) and Pw2 (Amina Adamu Athumani) both have testified that the deceased Adamu Athumani has passed away after being attacked and slaughtered by the accused. That fact that the deceased has actually died is supported by the accused who

admitted in his defence evidence that, I quote: "...after incident happened, the next morning I participated to dig the grave and then we attended the 24 funeral. On the seventh day after the funeral, I travelled to Magugu village." Additionally, death of the deceased was also proved by the report for postmortem examination (exhibit P2) which was admitted during preliminary hearing. The report for postmortem examination confirms that, death of the deceased Adamu Athumani Majala was unnatural, it was caused by Hypovolemic shock secondary to multiple penetrating wounds. That being the case, I hold with certainty that the first sub-issue that the deceased Adamu Athumani Majala has actually died is proved beyond any doubt. Coming to the second sub-issue which asks who killed the deceased. Looking on the prosecution's evidence, it is clear from the testimony of Pw1, the only eye witness who testified to have witnessed the accused attacking the deceased with his colleague on the fateful day. In his sworn evidence, Pw1 testified as I hereunder reproduce his version for better reference that: "...I am a boda boda driver, I came to the court to testify about murder case of my father Adam s/o Athumani. The murder occurred on 13th April, 2021 at about 16:30 to 17:00 hours. The incident occurred at Salanka along the road. I remember on that date; I was coming from school. When I reached at their home, I heard a voice from the road. I went there and I saw Omary and Salmini with machete slaughtering my father. Salmini told me they will do to me like what they were doing to my father. After that they started to chase me off but I did not run away. Soon it passed a boda boda slaughtering his father. Seeing that, then Salmini told him that, they will do to him like what they were doing to his father. After that, they started to chase him off but he did not run away. Soon after, it passed a boda boda and the boda boda driver shouted to the people for help and the culprits ran away and people started to come to the crime scene including my sister Amina Adamu Athumani." Additionally, Pw1 has identified the accused on the dock. He also testified that he knows the accused very well because they live in the same village. And at the crime scene he was at the distance of five (5) paces from where the accused was attacking the deceased. He further testified that his father died on the same day which he was attacked. Moreover, he testified that he knew that his father had conflict with the accused about shamba. And Omary (the accused) and Salmini are good friends and they are both peasants. However, when Pw1 was cross examined about the conflict between his father and the accused, he turned the story and stated that his father had conflict with Salmini about shamba and that they have never had conflict about shamba with Omary's family or Omary himself. This evidence of Pw1, to somewhat extent seems to have been corroborated by the evidence of Pw2, Amina Adamu Athumani who is a deceased's daughter. In her affirmed testimony, linking the accused with the alleged offence, her version of evidence was as I will reproduce hereunder: "...Murder of my father occurred on 13/04/2021. I was at my house and I heard a voice saying that Charge has been killed. Charge is my father, Adamu Athumani. Thereafter I went to the place where people were rushing. On the way, I met Omary coming from the crime scene, he was heading to his home..... Omary had worn a shirt with green and white strips which was blood stained. I did not do anything with Omary but I only rushed to the scene." 27 Another prosecution evidence to this effect was that of Pw3 which in my view adds nothing of weight at this juncture. Pw3 was only involved in the arrest and

recording of witnesses' statements. On the part of the accused, Pw3 asserted from the outset that the accused denied being responsible for murder when he recorded his cautioned statement. In his sworn defence, the accused denied to have been responsible for murder of the deceased Adamu Athumani and he was not at area where the deceased was murdered. And that he was at Said Grey farm from morning to evening at 17:00 hours. He also testified that he was not with Salmini on the day the deceased was attacked. Furthermore, he testified that he only heard about the attack while he was at coffee shop and after that he went to the crime scene where he met a lot of people. He also denied to have met with Amina when he was leaving the crime scene as she had testified. Now, before I start to analyse the evidence, I find it apt to point out at this early stage that, I am alive to the position of the law with respect to the identification of the accused. It is a trite law that to secure conviction for the offence of murder, prosecution has to prove beyond reasonable doubt that the assailant has murdered the deceased, among other issues. See for instance in *Ami Omari alias Senga v. Republic*, criminal appeal no. 233 of 2013, CAT (unreported) where the court of appeal once 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." Thus, taking inspiration from the authority above, it is clear in my mind that the element of identification of accused linking him to the murder is of utmost importance. However, caution has always been raised on the effect of visual identification. To say the least, it has been marked as one on unreliable piece of identification, and thus, to be given a weight, all possible mistaken identity must be eliminated. To achieve that, factors have always been earmarked for instance, in the celebrated case of *Waziri Amani v. R*

[1980] TLR. 250 the following factors were demonstrated to guarantee proper visual identification thus; 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. 29 Therefore, looking on the instant case, Pw1 who was the sole eye witness, testified that an attack which led to the deceased's death occurred at about 16:30 to 17:00 hours which is a day time. Also, he testified that he was at the distance of about five (5) paces from where accused was attacking the deceased and that he was chased off by the accused but he refused to leave. This shows that Pw1 had an ample of time to observe the accused. More so, he also testified to have known the accused well because they are living in the same village and this fact is also corroborated by Pw2 in her testimony. Thus, by securitizing evidence of Pw1 in all-purpose, he seems to have clearly identified the accused person Omary Adamu Athumani from the crime scene that he was responsible for murder of the deceased. In my view, apart from being straight, his evidence was not shackled by defence. Dwl only denied generally that he was not responsible for murder of the deceased, but he admitted to have been at the crime scene, though, it was later after incident. That said, Pw1 stands firm with his version on the point of identification of the accused. All said, I am also settled in my mind that a mere assertion for identification of the accused person should not be credited without satisfying 30. That all other possible ruinous aspects were

checked and cleared. See in *Jaribu Abdalla v. Republic*, 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." Taking inspiration from the above decision, I will start to critically analyse each of prosecution witness in connection to the issue of reliability of their evidence. To start with the corroborative evidence of Pw2, in view of my consideration, the evidence of Pw2 was not reliable with respect to the link between the accused and the offence committed. This is due to the reason that: one, the story that Pw2 received on 11/04/2021 that the accused (Omary) and his counterpart Salmini were looking for her father as they want to kill him was a hearsay. Two, that fact that on the material day, while she was heading to the crime scene, Pw2 met with the accused wearing a shirt 31 \* • which was wet with blood stains. In my view, ablood seen from the accused shirt should not be merely taken as human blood without first being established in evidence to be so through forensic examination. Thus, out of those two scenarios, there is no other piece of evidential link adduced by Pw2 connecting the accused to the murder charge. With regard to Pw1, in his testimony he testified that, he did not report the matter to anyone. And he added that the deceased himself saw those who attacked him. However, looking on Pw3 evidence when he was cross examined by the defence counsel, he revealed that he saw a victim statement in the investigation file. And that the deceased was interrogated by SGT Amani from Bereko. Pw3 testified further that he saw deceased statement (dying declaration) in the investigation file, and in his statement, the deceased mentioned to have been attacked and injured by one Salmini Saidi Grey. Again, looking of the testimony of Pw2, she stated that, I quote: "...the deceased at the crime scene was in very bad condition in such a way that he could not speak. We sent him to Bereko hospital and transferred to Manyara District Hospital. At the hospital he started to be treated but he died in a short time." 32 In view of the above testimonies of Pw1 (deceased's son) Pw2 (deceased daughter) and Pw3 (investigator), there is contradiction in their versions. For instance, if the accused had made his statement (dying declaration) why was the same not tendered in evidence. From the evidence of Pw3 the accused herein has not been mentioned by the deceased as part of the assailant. And as he mentions in his evidence, if Pw1 did not report to anyone about the murder, then how and when the accused was reported to have been involved as one of the murderers. It is a trite law as in *Festo Mawata v. Republic*, Criminal Appeal No. 229 of 2007 (Unreported), the court of appeal held that: "Delay in naming a suspect without a reasonable explanation by a witness or witnesses has never been taken lightly by the court. Such witnesses have always had their credibility doubted to the extent of having their evidence discounted." Yet, again, Pw2 testified that when they took the deceased to hospital, he was in very serious condition in such a way that he could not speak, and that, he died in a short time when he was undergoing treatment. Then, the question to be asked here is how and when police was able to take his

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- statement with such condition. And why police who took the deceased's statement was not called to testify and also the dying declaration itself was unveiled in evidence. In my view a police officer SGT Amani who has been mentioned by Pw3 was an important witness to be summoned, and failure to call him as evidence leads the court to make adverse inference. Thus, with adverse inference against the prosecution case. See Hemedi Saidi v. Mohamedi Mbilu [1984] TLR. 113; Azizi Abdalah v. Republic, [1971] TLR. 71; And Boniface Kandakira Tarimo v. Republic, Criminal Appeal no. 350 of 2008 (unreported) where the court held that: "It is thus, now a settled that where a witness who is in a better position to explain some missing links in the parties' case, is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only permissible one." Unfortunately, after conducting a thorough perusal of prosecution evidence, there is no sufficient reason shown why such an important witness was not called in evidence, thus, an adverse inference is drawn against prosecution evidence as to who was the assailant is unsubstantiated. In any 34 case, since Pw3, an investigator affirms that he saw the deceased's statement (dying declaration) in the investigation which pointed out one Salmini Said to be a person who had attacked him, then, such evidence was vital to the matter at hand in order to prove who was the real assailant. Bearing in mind that, apart from the deceased himself, nobody else is shown in the records to have reported the incident at police station. Another issue which requires critical scrutiny of the court is the fact that Pw1, who was the only eye witness himself is a witness with interest to serve. As I have mentioned earlier, Pw1 is the son of the deceased, hence as the position of the law demands, his evidence must be considered with great care in order to receive its evidential weight. Thus, in P. taray v. Republic, criminal appeal no. 216 of 1994 the court of appeal has observed that: " We wish to say at the outset that it is of course, not the law that whenever relatives testify to any event they should not be believed unless there is also evidence of non-relative corroborating their story. While the possibility that relative may choose to team up and untruthfully promote a certain version of events 35 must be borne in mind, the evidence of each of them must be considered on merit, as should also the totality of the story told by them. The veracity of their story must be considered and gauged judiciously just like the evidence of non-relative. It may be necessary, in given circumstances, for a trial judge or magistrate to indicate his awareness of the possibility of relative having a common interest to promote and serve, but that is not to say a conviction based on such evidence cannot hold unless there is supporting evidence by a non-relative." Thus, in the light of the authority above, I become hesitant to hold with certainty that Pw1's version manifests the correct state of affair, considering that there was a veracity of facts in his evidence. For instance, in his testimony first, in examination in chief he stated that the accused had conflict with the deceased, but in cross examination he changed the story and averred that neither accused no his family has ever had conflict with the deceased. Again, the version that he never reported the incident any where and the fact that the accused has been made a party to the case speaks the volume, provided that apart from Pw3 who testified that, initially he saw the 36 dying declaration in the investigation file of which the deceased mentioned Salmini Saidi Grey to be the person who had attacked him. Then, the

issue is who had reported the accused to the police. For that note, it is clear to me that there are hidden facts on the party of the Pw1, and that has devalued his truthfulness. The final ingredient of murder is whether the killing was unlawful and with malice aforethought. Thus, it goes without saying that, before I make analysis of the evidence adduced, first, I find it vivacious to lay down foundation by evoking the provisions of section 200 (a) to (d) of the Penal Code, which sets the circumstances at which malice aforethought is constituted. 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), as well as the evidence of Pw1, and Pw2 who testified that the deceased had 37 initially sustained serious cut wounds on his body as a result of attack inflicted by the assailants and resulted into his death. Thus, it appears from the evidence that the culprit executed his evil act by cutting the deceased with machete in his hands, legs and head. That means, the circumstances of this case fall evenly under four corners of section 200 (a) of the Penal Code. However, at this juncture the basic question will remain as to who had perpetrated the injuries. In the circumstance, based on the evidence adduced, this question will remain a hard nut to crack. I am aware that there was ample of evidence linking the conflict between accused person and the deceased which seems to be the motive behind the commission of this murder allegation. For instance, from testimonies of Pw2, the accused herein has started to trespass the deceased's land, and the two sides appeared to have personal grudges, but proof of conflict alone, though it may raise serious suspicion cannot conclusively attest 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 *Richard Matengula v. Republic*, Criminal Appeal No. 38 73 of 1991 (unreported) where the court of appeal authoritatively laid down that: "The fact that the appellant were the last known persons to have been with the deceased casts very grave suspicions on them, but it is in itself not conclusive proof that they killed the deceased." 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. Thus, I accordingly answer the major issue posed previously in negative and therefore the accused person Omary Hussein Shabani is found not guilty of the offence of murder as charged. Consequently, I hereby acquit him under section 312 (3) of the CPC for the offence of murder he stands charged contrary to Section 196 and 197 of the Penal Code, Cap. 16 R.E. 2019. Additionally, I order for his immediate release from incarceration unless he is legally held for another course. It is so ordered. 39 DATED at DODOMA this 18th day of December, 2023. Right of appeal is explained to the parties. 40

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