

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE CORRUPTION AND ECONOMIC CRIMES DIVISION

AT SONGEA – SUB REGISTRY

ECONOMIC CASE NO. 04 OF 2022

REPUBLIC

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VERSUS

SEIF ABDALLAH CHOMBO @ BABA FATINA 1ST ACCUSED

ABDALLAH MBWANA CHOMBO 2ND ACCUSED

MOHAMED SADIKI KAMALA 3RD ACCUSED

ATHUMANI ABDALLAH CHOMBO 4TH ACCUSED

OMARI HUSSEIN MBONANI 5TH ACCUSED

RASHIDI BILAHY ALI 6TH ACCUSED

JUDGEMENT

Date of last Order: 03/11/2022

Date of Judgement: 16/12/2022 at 9:00am

MLYAMBINA, J.

Love your neighbour as you love yourself is a golden rule embraced by all religious institution because on these two commandments hang all the law and the prophets.¹ The question who is my neighbour in law has

¹ For Christians: Matthew 22, 35-40; 7:12; Romans 13:8-10, Deuteronomy 6:5; Luke 10:27; Mark 12:31; Galatians 5:14 and Leviticus 19, 17-18, The Holy Bible Revised Standard Version, Stonehill, Westlea, Swindon, The British and Foreign Bible Society, 1967; for Muslims: Qur'an Holy Arabic Text and English Translation, Tillford, Surrey GU10 2AQ UK, Islam International Publications Ltd, 2021; al-Nisaa 4:36, Qur'an 2:256 (Surah of the Cow), Mustadrak al-Wasa'il, v.2 p.78-79 (Go and publicly announce that the curse of God and the Angels is on one who troubles his

attracted a broad and not restricted or pragmatic interpretation. Despite of the rule that penal statutes should be strictly construed, the neighbour principle cannot be limited to negligence cases in law. It extends to both civil and criminal matters because everyone strictly speaking is a neighbour to another. Indeed, though I can neither pretend to be an expert in love matters nor a religious scholar but in my perspective point of view, committing suicide or killing others, cannot be taken as symbol of love but extreme hatred which is contrary to any religious teachings and beliefs and upon proof to the standard required, it is contrary to the law of the land.

From the foregoing, the Court in this case is seized with a very delicate and complex subject to address, namely terrorism which is old as history itself.² It is also an international modern scourge.³ Despite the fact that terrorism has been troubling humanity for many years, it has defied

neighbor), Qur'an 49:10, Qur'an 3:102-103 (Love the Lord and love his Word in accordance with the Qur'an, and may your Love towards God, that is to say your faith benefit you as much as all your fellow Muslims; Prophet, al Tirmidhi (d.278/899 (If you love for those you love what you love yourself, you are a Muslim); for Judaism, the Torah: Leviticus 19:, 17,18, 19-26; Abraham Ibn Ezra (1089-1167; Sifra, Kedoshim 2:4.12); for Hinduism: The Anusana Parva (113:8); Mahabharata 5:15,17; Dadistan-i-Dinik, 94:5; for Buddhism: Buddhist Udana-Varga 5:18; for Baha'I: Baha'ullah, Tablets of Baha'ullah, P.64,p.71.

² Yonah Alexander (Ed.), *International Terrorism: Political and Legal Documents*, Martinus Nijhoff Publishers, The Netherlands, 1992, p. ix.

³ R v. F, All ER [2007] Volume 2 p. 193.

any attempt to define it in very clear terms. Lurid efforts at global, regional and national levels to define this subject has not been successful.⁴ Even courts within one nation have come up with different interpretation of what constitutes terrorism.⁵

This situation has been attributed to the failure to correctly place violent actions by States within the realm of terrorism. As a result, the tendency has been to concentrate on actions of either individuals or groups. The results have been to shield State actors and to push under the carpet the many atrocities they commit.⁶ It is worth noting that

⁴ On the attempts to define terrorism see *inter alia*, Acharya, Upendra D., "War on Terror or Terrors: The Problem in Defining Terrorism", *Denver Journal of International Law and Policy*, vol. 37 (2008-2009) p. 653-679; Chimimba, Trevor P., "Defining Terrorism under the United Nations System," Volume 3 *Zanzibar Yearbook of Law*, 2013, p. 51; Dugard, John, "Towards the definition of international terrorism", *American Society of International Law Proceedings*, vol. 67 (1973), p. 95; and Schmidt, A., "Terrorism: The Definitional Problem", *Case Western Res Journal of International Law*, vol. 36 (2004) 375.

⁵ On different interpretation of the term terrorism by courts of one Nation, see *inter alia* *Ghulam Hussain and 3 Others v. The State and 3 Others*, Criminal Appeals No. 95 and 96 of 2019; Civil Appeal No. 10L of 2017 and Criminal Appeal No. 63 of 2013, Supreme Court of Pakistan available at: https://www.supremecourt.gov.pk/downloads_judgements/crl.a._95_2019.pdf [Lastly accessed on 15th December, 2022 at 2:00pm].

⁶ For instance, the war on terror which was given as a basis of the United States to invade Afghanistan terrorised the whole nation for two decades. Also, the decision by NATO to attack Iraq in search of weapons of mass destruction and many others fall under this category. See Williamson, Myra, *Terrorism, War and International Law: The Legality of the Use of Force Against Afghanistan in 2001*, Paris: The Ashgate International Law Series, 2009; Siracusa, Joseph M. and Aiden Warren, *Weapons of Mass Destruction: The Search for Global Security*, New York: Rowman & Littlefield, 2017; Rashid, Ahmed, *Taliban: Militant Islam, Oil and Fundamentalism*

notwithstanding this state of affairs, the international community has not failed to release one resolution after the other condemning terrorism and its various elements.⁷ The United Nations (UN) has ended defining terrorist activities as criminal acts intended or calculated to provoke a state of terror in the general public or to a certain group of persons whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.⁸

In Central Asia, New Haven: Yale University Press, 2000; Rashid, Ahmed, Taliban: The Story of the Afghan Warlords, London: Pan Books, 2001; and Mamdani, Mahmood, Good Muslim, Bad Muslim: America, the Cold War, and the Roots of Terror, Kampala and Dar es Salaam: Fountain Publishers and E & D Limited, 2004.

⁷ These include UN GA also recognised the legitimacy of the struggle by the peoples under colonial rule to exercise their right to self-determination and independence, GA Res. 2105 (XX) of 20 December 1965; UN GA Res.2621 (XXV) of 12 October 1970 describing the right as "inherent". GA Res. 2649 (XXV) of 30 November 1970 made reference to "by any means at their disposal"; UN GA Res. 2787 (XXVI) of 6 December 1971 to "by all available means consistent with the Charter of the United Nations"; UN GA Res.2936 (XXVII) of 29 November 1972 to "by all appropriate means at their disposal; UN GA Res 3103 (XXVIII) of 12 December 1973 (Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes). These principles affirmed the legitimacy of such struggles and as being "in full accordance with the principles of international law." Any attempt to suppress such struggles was considered incompatible with the Charter of the United Nations, the Friendly Relations Declaration, the Universal Declaration of Human Rights and the Declaration on the Granting of Independence to Colonial Countries and Peoples; UN GA Res 3314 (XXIX) (Definition of Aggression) of 14 December 1974; and UN GA Res 2444 (XXIII) of 17 December 1968 (respect for human rights in armed conflicts).

⁸ The UN GA Resolution 49/60 on Measures to eliminate International Terrorism, 1994.

Equally, the UN Security Council has defined terrorism as any criminal acts against civilians committed with the intent to cause death or seriously bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in particular group of persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act.⁹

At national level, States have come up with their own understanding of what is terrorism. For instance, the Code of Federal Regulations of USA defines Terrorism as the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.¹⁰

In India, terrorism has not been defined. However, the provision of *section 3 (1) of the Prevention of Terrorist Act*,¹¹ defines terrorist acts as follows:

3.-(1) whoever;

(a) with the intend to threat the unity, integrity or sovereign of India or to strike terror in the people or any

⁹ UN Security Council Resolution 1566 of 2004.

¹⁰ Terrorism: FBI, Policy and Guidelines, US Department of Justice, Federal Bureau of Investigations, 2002-2005.

¹¹ Act No. 15 of 2002.

section of the people does any act or thing by using bombs, dynamite or other explosive substance or inflammable substance or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means whatsoever, in such a manner as to cause, or likely to cause, death of, or injury to any person or persons or loss of, or damage to, or destruction of, property or destruction of any property or equipment used or intended to be used for the defence of India or in connection with any other purposes of the Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do abstain from doing any act;

(b) is or continue to be a member of an association declared unlawful under the unlawful Activities (Prevention) Act,¹² or voluntarily does an act aiding or promoting in any manner the object of such association and in either case is in possession of any unlicensed firearms, ammunition, explosive or other instrument or substance capable of causing mass destruction and commits any acts resulting in loss of human life or grievous injury to any person or causes significant damage to any

¹² Act No. 37 of 1967.

property, commits a terrorist act...it includes raising funds intended for the purpose of terrorism.

Equally, difficulties in defining the term terrorism in India was echoed in the case of **Madan Singh v. State of Bihar**,¹³ where my brethren Hon. Judge Arijit Pasayat (as he then was), after referring to *section 3 of the Terrorist and Disruptive Activities (Prevention) Act*,¹⁴ made the following observation:

Terrorism by nature is difficult to define. Acts of terrorism conjure up emotional responses in the victims (those hurt by the violence and those affected by the fear) as well as in the practitioners...the old adage "one man's terrorist is another man's freedom fighter" is still alive and well.

In Tanzania, in order to qualify the criteria of terrorist act, the provisions of *section 4, 5, 6, 7, 8, 9 and 10 of the Prevention of Terrorism Act (hereinafter referred as the Act)*,¹⁵ requires fulfilment of the hereinafter elements: *One*, it must be a terrorist action. *Two*, threat of action. *Three*, the action or threat must be done with terrorist intention. *Four*, such act or omission may seriously damage a country or an

¹³ Criminal Appeal No. 1285 of 2003, Supreme Court of India (Criminal Appellate Jurisdiction).

¹⁴ *Ibid.*

¹⁵ Cap 19 Revised Edition 2022.

international organization. *Five*, the act or threat is intended or can reasonably be regarded as having the following *inter alia* object; seriously intimidate a population; and seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of country or an international organization.

It will remain the position, as it seems to the court, the provision of *section 4 (3) of the Act*¹⁶ intrenches seven conditions for an act or threat to constitute terrorism within the scope of the *Act*.¹⁷ Such act or threat must involve or: *One*, serious bodily harm to a person. *Two*, serious damage to property. *Three*, endangers a person's life. *Four*, creates a serious risk to the health or safety of the public or a section of the public. *Five*, the use of firearms or explosives. *Six*, releasing into the environment or any part of it or distributing or exposing the public or any part of it to- (i) any dangerous, hazardous, radioactive or harmful substance; (ii) any toxic chemical; (iii) any microbial or other biological agent or toxin; (iv) is designed or intended to disrupt any computer system or the provision of services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure; (v) is designed or intended to disrupt the provision of essential emergency

¹⁶ Cap 19 *loc cit.*

¹⁷ *Ibid.*

services such as police, civil defence or medical services; (vi) prejudice to national security or public safety, and is intended, or by its nature and context, may reasonably be regarded as being intended to- (vii) intimidate the public or a section of the public; (viii) compel the Government or an international organization to do, or refrain from doing, any act, and is made for the purpose of advancing or supporting act which constitutes terrorism within the meaning of this Act. *Seven*, an act which- (a) disrupts any services; (b) is committed in pursuance of a protest, demonstration or stop- page of work, shall be deemed not to be a terrorist act within the meaning of this section, so long and so long only as the act is not intended to result in any harm referred to in paragraphs, (a), (b), (c), or (d).

Worldwide, situations inviting characterisation as terrorism has been highly dynamic. Persons vilified as terrorists are suddenly celebrated as heroes in our very life time. A good example is that of freedom fighters fighting for self-determination of their countries in liberation struggles. It began by the international community granting them combatant status through the 1977 Additional Protocols to the Geneva Conventions of

1949.¹⁸ Thus, those fighting for liberation¹⁹ turned the tables and at times they came to occupy the highest political offices in their countries. In this category fall Jomo Kenyatta of Kenya; Robert Mugabe of Zimbabwe; and Nelson Mandela of South Africa to mention a few in Africa who are at times characterised as prison graduates having been jailed for engaging in terrorist activities.

The failure to define terrorism at UN and global level notwithstanding, the efforts continue at different levels to have an agreeable international instrument to curb terrorism.²⁰ This is because of

¹⁸ See International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva: ICRC, 1987 and Bellal, Annyssa and Stuart Casey-Maslen, *The Additional Protocols to the Geneva Conventions in Context*, Oxford: Oxford University Press, 2022.

¹⁹ On the legitimacy of wars of national liberation see Abi-Saab, Georges, "Wars of National Liberation in the Geneva Conventions and Protocols", *Recueil des cours*, vol. 165 (1979-IV), p. 367-368; Dugard, C.J.R., "The Organisation of African Unity and Colonialism: An Inquiry into the Pleas of Self-Defence as a Justification for the Use of Force in the Eradication of Colonialism", *ICLQ*, vol. 16 (1967), p. 157-190; and AALCO Secretariat Study: Legal Criteria for the Distinction between Terrorism and People's Struggle for Liberation, Asian-African Legal Consultative Committee, *Combined Report of the Twenty-sixth, Twenty-seventh, Twenty-eighth, Twenty-ninth and Thirtieth sessions* held in Bangkok (1987), Singapore (1988), Nairobi (1989), Beijing (1990) and Cairo (1991), p. 292.

²⁰ These efforts include African Union Convention on the Prevention and Combating of Terrorism, 1999; European Convention on the Suppression of Terrorism, Strasbourg, 1977; Convention of the Cooperation Council for the Arab States of the Gulf on Combating Terrorism, 2004; and Convention of the Organisation of Islamic Conference on Combating International Terrorism, 1999. See Franck, Thomas M. and Bert B. LOCKWOOD, Jr., "Preliminary Thoughts Towards an International Convention on Terrorism", *American Journal of International Law*, vol. 68 (1974), p. 69; and Hmoud, Mahmoud, "Negotiating the Draft Comprehensive Convention

a history of actions which could be characterised as terrorism being reported from various parts of the world.²¹

That said, a comfort zone for most actors has been to restricting themselves to addressing terrorist activities rather than terrorism. The acts characterised as amounting to terrorism do not differ fundamentally across the world. Basically, it is what States regard as unacceptable because, irrespective of who commits them or their reasons, they involve acts so evil that no State was brave, or unwise, enough to seek to justify them, at least on the international legal stage.²² It is these acts which they categorise as constituting terrorist acts. They include:

on International Terrorism: Major Bones of Contention, *Journal of International Criminal Justice*, vol. 4 (2006), p. 1031-1043.

²¹ Yonah Alexander, *loc cit*, reported incidents which could easily fall into this category of terrorism include martyrdom missions of the Hashashim (assassins) an offspring of the Ismailis targeting the crusaders and Sunni adversaries in Persia, Syria and elsewhere in the middle east from the 11th to the 13th centuries. Attack on Israeli Athletes during Munich Olympics, 1972; Attack of a Discotheque in Berlin, 1986; Bombing of TWA plane over Lockerbie, 1988; Bombing of Dar es Salaam and Nairobi in 1998; Attack on London Transport System, 2005. See: www.fbi.gov; www.ojp.gov; <https://assembly.coe.int>; <https://visionofhumanity.org>; www.npr.org; www.unodock.org; www.govinfo.gov; <https://irp.fas.org>; www.congress.gov; <https://www.consilium.europa.eu>; www.dni.gov; www.pogo.org; <https://www.pbs.org>; www.gov.il [Lastly accessed on 16th December, 2022 at 2am]. Moller, Bjorn, *Religion and Conflict in Africa: With a Special Focus on East Africa*, Copenhagen: Danish Institute for International Studies (DIIS Report 2006: 6, pp. 36-44.

²² Commonwealth Secretariat, *Implementation kits for the International Counter Terrorism Conventions*, Marlborough House, London, United Kingdom, p. 2.

(a) The unlawful use of force or violence against persons or property to intimidate or coerce a government, civilian population, or any segment thereof, in furtherance of political or social objectives. Also any act which is a violation of the criminal laws of a state Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to (i). intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or (ii). disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or (iii). create general insurrection in a state.²³

(b) Any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or

²³ *Terrorism in United the States 1997*, Report by Counter terrorism Threat assessment and warning Unit, National security Division available at http://www.fbi.gov/publications/terreor/terr_99.pdf. [Lastly accessed on 12th December, 2022 at 2:05am].

procurement of any person, with the intent to commit any of the above acts.²⁴

(c) The use of threat is designed to influence the government or to intimidate the public or a section of the public, and the use of threat is made for the purpose of advancing a political, religious or ideological cause; serious violence against a person; serious damage to property; endangering a person's life, other than that of the person committing the action; creates a serious risk to the health or safety of the public or a section of the public, or designed seriously to interfere with or seriously to disrupt electronic system.²⁵

(d) Every act, or threat of violence, whatever the motivations, or objects, which occurs in execution of an individual or collective criminal scheme, aiming at striking terror among, or awe upon the people, by hurting them, or exposing the lives, freedom or security to danger, or causing damage to the environment, public, or private property, public, or private utilities or exposing national strategic resources to danger.²⁶

²⁴ Article 1 of the African Unity Convention on the Prevention and Combating of Terrorism, 2002.

²⁵ UK, the new definition of terrorism is provided in section 1 of the Terrorism Act, 2000.

²⁶ *Section 2 of the Terrorism (Combating) Act, 2000 of Republic of Sudan.*

(e) Seriously damaging a country or an international organization; or seriously intimidating a population; or unduly compelling a government to perform or abstain from performing any act; seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of country or an international organization; or influencing such government, or international organization; or attack's upon a person's life which may cause death; attacks upon the physical integrity of a person; kidnapping of a person causing serious bodily harm to a person; seriously damaging property; endangering a person's life; creating serious risk to the health or safety of the public or a section of the public; involving the use of fire arms or explosives; releasing into the environment or distributing or exposing the public; any dangerous, hazardous, radioactive or harmful substance; toxic chemical; microbial or other biological agent or toxin; disrupting any computer system or the provision of services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure; disrupting the provision of essential emergency services such as police, civil defence or medical services; prejudicing national security or public safety, intimidating the public.²⁷

²⁷ Section 4 of the Act, *loc cit.*

The five examples from the United States of America, the African Union, the United Kingdom, Sudan, and the United Republic of Tanzania and the definition offered by India earlier on stated, throws light on what States by and large as constituting terrorist acts. They are complemented by the various conventions adopted by the United Nations and other institutions.²⁸

Terrorist activities carried out by individuals or groups are the most notoriously known across the globe. This is because they are dramatic,

²⁸ These include Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963; Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971; Convention to prevent and punish the acts of terrorism taking the form of crimes against persons and related extortion that are of international significance, 1971; Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism (Draft Convention to Prevent the Spread of Terrorist Violence), A/C.6/L.850 (Sept. 25, 1972); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, United Nations, 1973; European Convention on the Suppression of Terrorism, Strasbourg, 1977;; European Convention on the Suppression of Terrorism, Strasbourg, 1977; International Convention against the Taking of Hostages, 1979; Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991; African Union Convention on the Prevention and Combating of Terrorism, 1999; Convention of the Organisation of Islamic Conference on Combating International Terrorism, 1999; Convention of the Cooperation Council for the Arab States of the Gulf on Combating Terrorism, 2004; Convention on the Physical Protection of Nuclear Material, 2005; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 2005; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005; Convention on the Suppression of Unlawful Acts relating to International Civil Aviation, 2010; Convention on the Suppression of Unlawful Acts relating to International Civil Aviation, 2010; and Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, 2010.

spectacular, and create havoc caused by: *One*, their planning and execution. *Two*, the motives behind these actions. It is mainly religious and other beliefs; mental instability; large-scale victimisation, marginalisation, and victimisation which have the effects of pushing people to the corner and hence explosion.

An individual, on his own or having deserted a group might cause damage to humanity when they strike effectively. These, which are not many, are called lone wolf terrorists. A good example is that of Timothy James McVeigh, an American citizen. Single-handedly, he bombed a Federal building in Oklahoma City killing 168 people, 19 of whom were children, injuring 60 others and in the process destroying one-third of the building. Up to that time, the literature records that was the deadliest act of terrorism by the United States of America.²⁹ As a motive for this action,

²⁹ Michael Martinez, J., *Terrorist Attacks on American Soil: From the Civil War Era to the Present*, Lanham, Maryland: Rowman & Littlefield, 2012; Jones, Stephen, and Peter Israel, *Others Unknown: Timothy McVeigh and the Oklahoma City Bombing Conspiracy* (2nd ed.), New York: Public Affairs, 2001; Madeira, Jody Lyneé, *Killing McVeigh: The Death Penalty and the Myth of Closure*. New York: NYU Press, 2012; Michel, Lou, and Dan Herbeck, *American Terrorist: Timothy McVeigh and the Oklahoma City Bombing*. New York: Regan Books/HarperCollins, 2001; Stickney, Brandon M., *All-American Monster: The Unauthorized Biography of Timothy McVeigh*, Amherst, New York: Prometheus Books, 1996; and Wright, Stuart A., *Patriots, Politics, and the Oklahoma City Bombing*. New York: Cambridge University Press, 2007.

McVeigh said that the bombing was revenge against the government for the sieges at Waco and Ruby Ridge.³⁰

Group terrorists are the most notorious. They are thousands across the globe with different agendas and motives. To date, the most well-known is Al-Qaeda³¹ whose name translates to "The Base or the Foundation." It is a multinational militant Sunni Islamic network mainly composed of Arabs and also some other peoples. The network was founded by Osama bin Laden and Abdullah Azzam in 1988. It has been associated with attacks on civilian and military targets in several countries. The most serious was on 11th September, 2001 in New York, United States of America.

On 11th September, 2001 four commercial airlines flying from New York were hijacked while in the air. Two were deliberately directed flown into the twin towers of the World Trade Centre. A third was directed toward the Pentagon and the fourth aimed at the United States Capitol or

³⁰ *Ibid.*

³¹ On Al-Qaeda see Burke, Jason, *Al-Qaeda: The True Story of Radical Islam*, London: Penguin Books, 2004; Atwan, Abdel Bari, *The Secret History of al Qaeda*, Berkeley, CA: University of California Press, 2006; Al-Bahri, Nasser, *Guarding bin Laden: My Life in Al-Qaeda*, London: Thin Man Press, 2013; Wright, Lawrence, *The Looming Tower: Al-Qaeda and the Road to 9/11*, New York: Knopf, 2006; and Basile, Mark, "Going to the Source: Why Al Qaeda's Financial Network Is Likely to Withstand the Current War on Terrorist Financing," *Volume 27 No. 3 Studies in Conflict and Terrorism*, May, 2004, p. 169–185.

the White House missed the target and crashed in a field in Pennsylvania. In this attack official figures indicated that 2,996 people – 2,507 civilians, 343 firefighters, 72 law enforcement officers, 55 military personnel as well as 19 hijackers who committed murder-suicide were all killed.³² This was a serious undertaking by the group having been planned for years to effect a *fatwa* issued in 1998 against the United States of America and its allies for massacring Muslims in Palestine, Chechnya, Kashmir and Iraq. It was thus an exercise of the "right to attack in reprisal."

There have been other attacks associated with Al-Qaeda. These include simultaneous attacks on the US embassies in Nairobi, Kenya and Dar es Salaam, Tanzania in 1998; bombing of the tourist destination of Bali, Indonesia in 2002 and others. Thus, the United Nations Security Council has designated Al-Qaeda as a terrorist group.

There are other groups in Africa which are characterised as terrorist. The first is Boko Haram which operates in northern Nigeria.³³ This group is so powerful. Boko Haram roams around abducting people for extortion

³² See, The 9/11 Commission Report, *Final Report of the National Commission on Terrorist Attacks Upon the United States* (Authorised Edition with Index), New York and London: W.W. Norton & Company, 2004.

³³ Smith, Mike, *Boko Haram: Inside Nigeria's Unholy War*, London and New York: L.B. Tauris, 2015.

purposes.³⁴ It is the conviction of this Court that Nigeria with its many Generals in its army is likely to suppress such group in near future.

Nearer home we have Al-Shabaab also known as Harakat al-Shabaab al-Mujahideen.³⁵ This group which was established in 2000s operates from Somalia but it is highly visible in the whole of Eastern Africa coast or the Western Indian Ocean area from Somalia through Kenya and Tanzania to Mozambique. Al-Shabaab, under its current leader the American-born Omar Shafik Hammami, also known as Abu Mansoor Al-Amriki, was one adopted internet and particularly the social media which it uses effectively to distribute its propaganda videos and for various other functions. In its early years, the group used online chat rooms and discussion forums to encourage foreign fighters and even military

³⁴ Their most famous abductees were 276 girls aged between 16 and 18 from a Government Girls Secondary School at the town of Chibok in Borno State, Nigeria. On 14th and 15th April, 2014 Boko Haram attacked the school and took the girls. A few escaped but the rest were married by their captors and have never returned home.

³⁵ On this group see Hansen, Stig Jarle, *Al-Shabaab in Somalia: The History and Ideology of a Militant Islamist Group*, Oxford: Oxford University Press, 2013; Harper, Mary, *Everything You Have Told Me Is True: The Many Faces of Al Shabaab*, Oxford University Press, 2019; Ingiriis, Mohamed Haji, "The Invention of al-Shabaab in Somalia: Emulating the Anti-Colonial Dervishes Movement" *Volume 117 Issue 467 African Affairs*, 2018, pp. 217–237; Petrich, Katharine, "Cows, Charcoal, and Cocaine: Al-Shabaab's Criminal Activities in the Horn of Africa," *Volume 45 Nos. 5–6 Studies in Conflict & Terrorism*, 2022, pp. 479–500; and Solomon, Hussein, "Somalia's al-Shabaab: Clans v. Islamist nationalism," *Volume 21 No. 3 South African Journal of International Affairs*, 2014, 351–366.

commanders to post updates and field public questions about the state of the jihad. Al-Shabaab has links with Al-Qaeda since 2012³⁶ and is suspected to having a working relationship with Boko Haram as well. In the case of **Uganda (Prosecutor) v. Hussein Hassan Agade and 12 Others**,³⁷ though the court did not find AL Shabab to be a terrorist organisation listed under the Prevention of Terrorism Act,³⁸ it made reference that AL Shabab is linked with Al-Qaeda as follows:

Al-Shabaab is a self-declared ally of Al-Qaeda; having sworn allegiance to Al-Qaeda leader Osama Bin Laden in September 2009, and then establishing formal alliance in February 2010.³⁹ "Al Shabaab is more than a product of insecurity. It is the export of Al Qaeda's ideology of Global Jihad in Somalia.⁴⁰

³⁶ On the working relationship between Al-Qaeda and Al-Shabaab see Thomas, Matthew J., "Exposing and Exploiting Weaknesses in the Merger of al-Qaeda and al-Shabaab," *Volume 24 No. 3 Small Wars & Insurgencies*, 2013, pp. 413–435.

³⁷ Criminal Session Case No. 0001 of 2010, High Court of Uganda at Kampala International Crimes Division available at <https://.ulii.org/ug/judgment/hc-international-crimes-division-uganda> [lastly accessed on 12th December, 2022 at 2:10am].

³⁸ Terrorism Act, 2002 of Uganda.

³⁹ James Ciments, '*World Terrorism: An Encyclopaedia of Political Violence from Ancient Times to Post 9/11 Era*' (2nd Edn., Vol. 1– 3; Routledge, at p.444).

⁴⁰ Stig Jarle Hansen, '*Al-Shabaab in Somalia: The History and Ideology of a Militant Islamist Group; 2005 – 2012*; Oxford University Press, p.45'; '*Al-Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for US Policy*' (Report of the Congressional Research Service to Congress; dated Feb. 5th 2010, p.19 – 20).

Recently, this group has managed to recruit followers from the Tanzania, Zanzibar, Gulf, United States and other Western countries.⁴¹ This is mainly due to its youthful leadership. One of Al-Shabaab attacks in East Africa was made on 21st September, 2013 at the Westgate Shopping Mall in Nairobi, Kenya.⁴² The group has also carried out frequent attacks in Somalia.

Currently, Al-Shabaab is very active in north Mozambique and its activities are spilling into Tanzania⁴³ and it is busy recruiting members for training which is done in Somalia.⁴⁴ As a result of this development, the

⁴¹ Andre LeSage: The rising Terrorist Threat in Tanzania: Domestic Islamist Militancy and Regional Threats available at ndupress.ndu.edu; <https://www.usip.org>; <https://www.govinfo.gov/html> [Lastly accessed on 12th December, 2022 at 11:40am].

⁴² Williams, Paul D., "After Westgate: Opportunities and Challenges in the War Against Al-Shabaab," *Volume 90 No. 4 International Affairs*, 2014, pp. 907–923; and Mair, David, "Westgate: A Case Study: How al-Shabaab used Twitter during an Ongoing Attack," *Volume 40 No. 1 Studies in Conflict & Terrorism*, 2017, pp. 24–43. This attack costed Africa one of its finest poets and novelist Professor Kofi Awoonor of Ghana.

⁴³ See Amal El Ouassif and Seleman Yusuph Kitenge, *Terrorist Insurgency in Northern Mozambique: Context, Analysis, and Spill over Effects on Tanzania*, Rabat, Morocco: Policy Centre for the New South, 2021; Also visit africacenter.org [Lastly accessed on 12th December, 2022 at 11:45am].

⁴⁴ One of the reasons for gaining access to Muslim youths is complains against marginalization. See Loimeier, Roman, "Perceptions of Marginalisation Muslims in Contemporary Tanzania," in Soares, Benjamin F. and Rene Otayek, *Islam and Muslim Politics in Africa*, New York: Palgrave Macmillan, 2007, p. 137; and Joinet, Bernard, *Who are the Islamists? Muslim and Christian Reactions to the Challenges of Modern Society*, Dar es Salaam: A Letter to My Superiors, Nos. 20-21, December, 1998.

leaders of Mozambique and Tanzania have signed defence and security agreements aimed at fighting terrorism and crime along their shared border.⁴⁵

The case at hand is related to the Al-Shabaab incursions and teachings into the United Republic of Tanzania from Mozambique side.

It was alleged by the prosecution side that; on divers date between 1st January, 2014 and 13th July, 2020 at various places within Tunduru District in Ruvuma Region and other places within the United Republic of Tanzania, the accused persons jointly conspired to start a religious war known as JIHAD, and convince other youth to join force so that they can overthrow the Government and establish an Islamic State by using violence and force. The objective was to rule through Islamic Laws. As a result, the accused persons were sent to various countries which are under Islamic State for further training on JIHAD, contrary to the laws, rule and procedure of the United Republic of Tanzania. Their action not only endangered other people's life but also their life. They aimed to act irresponsibly.

⁴⁵ See "Mozambique, Tanzania Reach Deal to Fight Terrorism," *Africa News and AFP*, September, 2022.

For the fore-mentioned reasons, the accused persons were jointly arraigned before this court for two counts: *First*, conspiracy to commit terrorist acts contrary to *section 4 (1), (2) (b) (iii) and 27 (c) of the Act*,⁴⁶ *read together with paragraph 24 of the first schedule to, and sections 57 (1) and 60 (2) of the Economic and Organised Crime Control Act (hereinafter referred EOCCA).*⁴⁷ *Second*, participating in terrorist meetings contrary to *section 4 (1), (2) (b) (iii) and 5 (a) of the Act*,⁴⁸ *read together with paragraph 24 of the first schedule to, and sections 57 (1) and 60 (2) of the EOCCA.*⁴⁹

The particulars of the offence are as follows; on divers dates between 1st January, 2014 and 13th July, 2020 at Lukumbule Village and various places within Tunduru District in Ruvuma Region, and other places within the United Republic of Tanzania, the accused persons jointly with other persons not in court did participate in a meeting knowingly that the said meeting concern with an act of terrorism to wit; they conspired to commit a terrorist act, including overthrowing the Government of the United Republic of Tanzania and establish an Islamic State through the

⁴⁶ Act No. 21 of 2002.

⁴⁷ Cap 200 Revised Edition 2019.

⁴⁸ Act No. 21 *loc cit.*

⁴⁹ Cap 200 *loc cit.*

use of force and violence, can reasonably have regarded as having been intended for the purpose of seriously destabilising the fundamental, political, economic and social structure of the United Republic of Tanzania.

At the date scheduled for the hearing, the accused persons maintained their position stated during the preliminary hearing by repudiating the accusations and all prosecution details attributed against them. Their material evidence was a total denial of their involvement in commission of the offence. All of them told this Court how and where they were arrested but they all denied to have committed the offence except for: *One*, their names. *Two*, they are the resident of Lukumbule Village, Tunduru District Ruvuma Region. *Three*, they were arrested and taken to Police Station. *Four*, they know each other and worship in the same Mosque known as Al Malid Mosque. *Five*, they were at Lukumbule Village between 2017 and 2020.

Mr. Hebel Kihaka learned Senior State Attorney, assisted by Mr. Tulimanywa Majigo and Edgar Bantulaki both learned State Attorney appeared for the Republic. All accused person were represented respectively; Ms. Naomi John appeared for the 1st accused person, Mr. Nestory Nyoni for the 2nd accused person, Mr. Raphael Matola for the 3rd accused person, Mr. Alex Nyoni for the 4th accused person , Mr. Lazaro

Simba for the 5th accused person and Mr. Dennis Lazaro for the 6th accused person.

It is worth noting that terrorist acts are among serious cases which attract serious punishment which runs up to 30 years imprisonment.⁵⁰ That means, the life of the accused persons is at stake. To prove their case, the prosecution side paraded four (4) witnesses who testified as P3, P, P1 and P6 and tendered five (5) exhibits.

At the closure of the prosecution case, it was the finding of this court that the prosecution managed to establish a *prima facie* case against the accused persons. The court called upon the accused persons to defend themselves against the allegation laid against them. All accused persons testified under oath and no one had neither exhibit to tender nor a witness apart from themselves. They testified as; DW1 for the 1st accused person, DW2 for the 2nd accused person, DW3 for the 3rd accused person, DW4 for the 4th accused person, DW5 for the 5th accused person and DW6 for the 6th accused person.

It is plain that in terrorism cases just like in other criminal cases, it is obligatory that the prosecution is duty bound to prove their case beyond

⁵⁰ Section 53 which introduced section 11A to the Act No. 21 *loc cit*, via Miscellaneous Amendment Act No 4 of 2016 (Written Laws (Miscellaneous amendments) (No. 2) Act, 2016.

reasonable doubt. The same position has been stated in *inter alia* cases of **Jonas Nkinze v. Republic**⁵¹ and **Magendo Paul and Another v. The Republic**,⁵² where the court held 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.

It is upon the prosecution side to prove the case not only that the crime was committed but also the accused persons are the one who committed the same or participated in one way or another in committing the offence laid against them. The Court of Appeal of Tanzania while sitting at Kigoma in the case of **Antony Kinanila and Another v. The Republic**,⁵³ went further to state that:

In any criminal trial, the prosecution bears the burden to prove beyond reasonable doubt not only that the offence was committed but also it was committed by the Accused person or that he participated in the commission of the offence to the extend or decree as prescribed by the law. [Emphasis mine]

⁵¹ [1992] TZHC 22.

⁵² (1993) TLR 219.

⁵³ Criminal Appeal No. 83 of 2021, Court of Appeal of Tanzania at Kigoma (unreported).

It can be deduced from the decision in the case of **Antoni Kinanila**,⁵⁴ that the prosecution burden of proof is divided into two parts: *First*, it has to prove that the offence has been committed. *Second*, the offence was committed by non-other than the accused person(s) who is arraigned before the court. These two parts are inseparable like the two side of a coin. That means, failure to prove one part the prosecution case will be weakened.

Further, there is a plethora of authorities which insist on the duty of the prosecution side to prove the case beyond reasonable doubt. To mention the few, the cases of **Ndege Maragwa v. Republic**,⁵⁵ **Mohamed Said Matula v. Republic**,⁵⁶ **Nathaniel Alphonse Mapunda & Benjamini Alphonse Mapunda v. Republic**,⁵⁷ **Joseph John Makune v. The Republic**,⁵⁸ **George Manyigili v. The Republic**,⁵⁹ **Issa Reji Mafita v. The Republic**,⁶⁰ **Director of Public**

⁵⁴ *Ibid.*

⁵⁵ EACA Criminal Appeal No. 156 of 1964 (unreported).

⁵⁶ [1995] TLR 3.

⁵⁷ [2006] TLR 395.

⁵⁸ [1986] TLR 44.

⁵⁹ Criminal Appeal No. 335 of 2016, Court of Appeal of Tanzania at Mbeya (unreported).

⁶⁰ Criminal Appeal No. 337 'B' of 2020 Court of Appeal of Tanzania at Dodoma

Prosecutions v. Shishir Shyamsingh.⁶¹ In the latter case, the court has this to say:

It is elementary that the burden of proof in criminal cases rests squarely on the prosecution ... that proof must be beyond reasonable doubt.

Moreso, the requirement which vested to the prosecution on proving the criminal case is not court invention but a requirement of the statutory law under the provision of *section 3 (2) (b) of the Evidence Act*,⁶² which provides that:

A fact is said to be proved when-

In criminal matter, except where any statute or other law provides otherwise, the court is satisfied by the Prosecution beyond reasonable doubt that the facts exists.

Elsewhere in East Africa, the standard of proof in terrorism cases is beyond reasonable doubt. Such burden has been stated in *inter alia* cases of; **Nyamache v. Republic**,⁶³ **Wesonga v. Republic**,⁶⁴ consolidated

⁶¹ Criminal Appeal No. 141 of 202, Court of Appeal of Tanzania at Kigoma (unreported).

⁶² Cap 6 Revised Edition 2022.

⁶³ High Court of Kenya at Garissa, Criminal Appeal No. 3 of 2020 available at kenyalaw.org [Lastly accessed on 12th December, 2022 at 10:05pm].

⁶⁴ Criminal Appeal No. 27 of 2020, High Court of Kenya at Garissa available at kenyalaw.org [Lastly accessed on 12th December, 2022 at 11:00pm].

with the case of **Joseph Juma Odhiambo and Another v. The Republic;**⁶⁵ **Republic v. Ahmad Abolfathi Mohammed and Another;**⁶⁶ **Uganda (Prosecutor) v. Hussein Hassan Agade and 12 Others;**⁶⁷ **Uganda v. Kamoga Siraje and 13 Others.**⁶⁸ The same position can be noticed in the rest of the World including the United Kingdom,⁶⁹ India⁷⁰ and South Africa.⁷¹

During hearing, Prosecution witness P, told the court that he was a Police officer responsible for detection of various crimes. He was working with Prevention of Terrorist Authority in Tanzania at the office of Director of Criminal Investigation on March, 2020. He was responsible for

⁶⁵ Criminal Appeal No. 26 of 2020 High Court of Kenya at Garissa available at kenyalaw.org [Lastly accessed on 12th December, 2022 at 11:05pm].

⁶⁶ Petition No. 39 of 2018, Supreme Court of Kenya available at kenyalaw.org [Lastly accessed on 15th December, 2022 at 3:00pm].

⁶⁷ Criminal Session Case No. 0001 of 2010, High Court of Uganda at Kampala, *loc cit* [lastly accessed on 12th December, 2022 at 2:10am].

⁶⁸ Criminal Session Case No.HCT-))-ICD-CR-SC-No.004 of 2015[2017] UGHCI CD available at: <https://.ullii.org/ug/judgment/hc-international-crimes-division-uganda/2017/1> [Lastly accessed on 16th December, 2022 at 2:15am].

⁶⁹ House of Lords Session 2008-09 Report [2009] UKHL 13 on appeal from: [2008] EWCA Crim 922 [2008] EWCA Crim 1161 available at <https://publications.parliament.uk> > Idjudgmt > rgrj1 [Lastly accessed on 16th December, 2022 at 8:00am]

⁷⁰ State (N.C.T. of Delhi) v. Navjot Sandhu@ Afsan Guru, Criminal Appeal Case No. 373-375 of 2004 available at indiankanoon.org [Lastly accessed on 15th December, 2022 at 6:00am].

⁷¹ National Director of Public Prosecutions v. Henry Emomotimi Okah, Constitutional Court of South Africa Case CCT 315/16 and CCT 193/17, CCT 315/16 available at www.saflii.org [Lastly accessed on 15th at 11pm.]

collecting confidential information, analysing and arresting all the suspect of the transboundary offences including terrorism, murder cases, burglary and arson at Southern Regions of the United Republic of Tanzania including Lindi, Mtwara and Ruvuma, especially adjacent to Ruvuma River. They were working as a team. The Government deployed a camp at Lukumbule Village, Tunduru District Magazini area and Nanyumbu District, Ntamba Swala border to Mozambique, Tandahimba, Newala and Masasi Districts. Also, Mtwara Rural and detach at various areas of Ruvuma Region. He was among the leaders who were supervising Police officers at those areas (detach).

It was the evidence of witness P that; they discovered the information which revealed the presence of some Tanzanian who planned to overthrow the Government of Tanzania through Islamic Religion rites by initiating JIHAD war and establish Islamic State. Their aim was that all decision must be based on Quran as they were doing in Mozambique. Their leaders are living at Ruvuma, Lindi, Mtwara and Coastal Region. Few of them were arrested but other managed to escape to Mozambique where they joined Mozambican who have strong faith. Their object was to overthrow the Governments of Mozambique and Tanzania. They started invading army bases, taking weapons, killing soldiers and invading

various villages which were not ready to corroborate with them in Mozambique and Tanzania. They brutally killed the citizen and took away their properties such as food and money. They destroyed immovable properties. They also targeted the village leaders and Police officers.

Prosecution witness P went on to testify that; on 12th July, 2020, he was informed that at Lukumbule Village, Tunduru District there were some Ansar Sunna Mosque or Al Malid worshippers involved in terrorist acts. They conspired to collect youth, motivate them to have strong faith, hate the Government of Tanzania and train them to overthrow the Government of Tanzania led by a Kafir. Unfortunately, their leaders were arrested. For that reason, they opted to go to Mozambique to join with Mozambique terrorist group known as Alal Sunna wa Aljamaah or AL Shabab of Mozambique. Prosecution witness P ordered the detach at Lukumbule to arrest the accused persons. They managed to arrest only seven (7) accused persons. During the preliminary interrogation at Tunduru Police Station, the accused mentioned their associate who were arrested on 13th or 14th July, 2020 early in the morning but others escaped.

Furthermore, on 14th July, 2020, witness P interrogated three accused persons and recorded the cautioned statement of the 2nd accused person, Abdallah Mbwana Chombo, 3rd Accused person, Mohamed Sadiki.

Kamala and 5th accused person. He also recorded the caution statement of Omary Hussein Mbonani separately. The recording was done at FFU office Mtwara Region. The caution statement of the fifth accused was recorded at the office of Regional Commander Officer. Before recording their statement, Prosecution witness P introduced himself and informed them about their right and the offence they are facing. After he recorded the statement, he read to them to satisfy themselves if the record reflected the same information, they gave to him. One of them read himself and they all signed. In their statement, the accused persons admitted to be involved with terrorist acts.

It is in record that the said cautions statements were admitted by the court. Prior to the admission, the defence side raised an objection that the caution statements of the accused were recorded out of time. The court overruled the objection because the cautioned statement of the 2nd, 3rd and 5th accused persons were recorded within the time as prescribed by the law. The reason being that the time when the accused was still into investigation or transit has to be deduced.

Prosecution witness P averred further that; other two accused persons statements were written by other Police officers.

Upon cross examination by defence counsel, prosecution witness P mentioned the ingredients of terrorism to be; having intention to join illegal groups which are participating in killing innocent people, strong religious faith which motivate people to segregate other group of people by not giving them any help, motivate people not to send their children to school deemed to be of kafir.

According to Prosecution witness P, though the accused were not found with any weapon, they were seen by other people in Mosque while motivating others to participate in terrorist acts. Those people are the Republic secret informer. Witness P added that; some of the accused returned from Mozambique after being ambushed. He revealed that; legally speaking, an informer cannot be paraded to court except for the witnesses. He added; neither of the accused person told him if they took weapons from Police or invaded the village leaders but they were inspired to remove their children from school.

In re-examination, witness P insisted that; the accused told him that they were motivated by their leaders namely: Jamal Seleman @ Kunyata, Abudhali Maonyo and Mtumbei to join terrorist group so that they can replace the Government of the United Republic of Tanzania with Islamic State.

The evidence of prosecution witness P was corroborated by prosecution witness P3 who was one among the arresting officers of the accused persons. Also, prosecution witnesses P6 and P1 were the ones who interrogated and recorded the rest of the accused persons' cautioned statements. While testifying they revealed to be informed by the accused that they were persuaded and participated in terrorist meeting in which they conspired to conduct a JIHAD and overthrow the lawful Government of the United Republic of Tanzania and replace with Islamic State through violence.

The above evidence was buttressed with the accused persons cautioned statement which were admitted to court as exhibit P1, P2, P3, P4 and P5. In which the accused persons confessed to have participated in the meetings where they conspired to commits the terrorist acts as alleged. On defence side, the accused persons denied to have committed the offence. Also, they claimed not to have recorded their statements and sometimes claimed that their statements were recorded out of time.

On the other hand, DW1 (the 1st Accused person) admitted to be Seif Abdallah Chombo, resident of Lukumbule Village. A Muslim worshipping at El Malid Mosque. He refused to participate in any terror activity, conspiracy and he knew nothing about terrorism. He admitted to

have been arrested on 13th July, 2020 at his home during night hours, taken to mini Field Force Unit Station at Lukumbule Village. He was asked his names, citizenship and the address of his Hamlet leader. Thereafter, he was taken to Tunduru Police station and he was put into lockup. In the evening, they were transported up to Mangaka Central Police Station. After a while on the same date, they were boarded in a vehicle and transported up to Masasi Central Police Station. They were received and taken to lockup for the whole night. At all time, he was not informed anything in relation to his arrest.

DW1 further testified that; they were transported to unknown place during the afternoon of 14th July, 2020. Upon arriving at the building which was written Mtwara Central Police, they were handled at reception and put into rock up until 17th July, 2020. Seven Police officers entered, they called them by their name, asked their citizenship and address of their hamlet leader. They were inspected on the parts of their body. They heard one of the Police officers saying that they are mere citizen not the offenders. They stayed in the lockup until 12th August, 2020 before been removed through a back door. Up to 12th August, 2020 he was not informed of his offence and whenever he asked, they told him to wait. DW1 denied to have been in Mozambique and to have made any exercise

than volleyball. He also denied to know Al-Shabaab group and Rashid Lipululu as his fellow villager.

Upon cross examination by the prosecution counsel, DW1 averred that; he came to know his offence on 4th September, 2020 while at Tunduru District Court. He confessed to have been declared to be an activist but he did not mention: *One*, the kind of activism. *Two*, the dates he was attending worshipping. He also insisted that they slept at Masasi.

DW2, Abdallah Mbwana Chombo, told this court that; he is a peasant, Muslim worshipping at Al Malid Mosque with Mohamed Sadik Kamala. He knows all the accused persons in this case as they live in the same village and worship in the same Mosque. DW2 denied to have participated in any meeting or exercises. He also denied to have been at Mozambique or being a Muslim with strong faith. He could not remember anything in relation to what happened on 13th July, 2020.

During cross examination, DW2 insisted not to remember anything and what happened while at Mtwara.

DW3 one Mohamed Sadiki Kamala alleged that; he was arrested by Police officers on 13th July, 2020 during night hours at his home. They took him to Field Force Unit Min Station at Lukumbule. They asked him his names, religion, tribe and the names of his street chairman. He was

taken to Tunduru Police Station by vehicle. At Police reception, he was asked his particulars once again and put into lock up. On the same date during noon hours, he was taken to unknown place where he discovered later to be Masasi and they re-recorded his particulars. They were taken to another unknown place on the next day during the afternoon. He was very tired; he saw the title "Police Station". He came to discover that it was at Mtwara Central Police Station. He was asked his particulars too. In the evening hours of 14th July, 2020, seven Police officers went to the lockup, called their names from one to another, then inspected each of them.

DW3 submitted further that; they stayed at Mtwara lock up until on 12th August, 2020 when they were taken out through a back door. They saw Police officers, one of them was holding papers which were written by ink and typed. He was ordered to sign and enter into the car. They did not know the contents of the said documents; they were just told to sign and go to their home. DW3 revealed not to give any statement anywhere. Also, he reminded the court that; prosecution witness P3 denied to see them participating in any meeting in relation with terrorist acts.

During cross examination by the prosecution counsel, DW3 admitted to have slept at Masasi on 13th July, 2020 and left the next day, on 14th

July, 2020 noon hours. He also admitted to have said that they were still on the way to unknown place on 14th July, 2020 at 10:00am. The unknown Police Station he mentioned in examination in chief was Mtwara Police Station. He asked their fellow detainee in lock up. He did not see his document signed under intimidation on 12th August, 2020 being tendered to court.

DW4, Athumani Abdallah Chombo is a resident of Lukumbule Village at Tunduru District, Ruvuma Region. He testified before this court that, it was night hours while sleeping at his house, he heard knock at his door. Upon opening the door, he saw people who introduced themselves to be the Police officers. They handcuffed him, put under restrain and taken him to Min Field Force Unit Post at Lukumbule where they asked him his names, religion, age and the names of his Ten Cell leader. In the same night, he was transferred to Tunduru Police Station where he was asked the same questions. He was put in lock up until noon when they were laid down in the car and taken to unknown place. They arrived at Mangaka Police Station on the same date of 13th July, 2020 noon. Then they were taken to Masasi Police Station where they arrived during evening hours and slept. The next day of 14th July, 2020 during afternoon, they were taken to Mtwara Central Police Station, where they arrived in the evening

hours. While there, they were asked their name, residence, and the name of their Ten Cell leader.

DW4 went on to affirm that; they stayed at Mtwara Central Police Station from 14th July, 2020 till 17th July, 2020. One of Police officers went inside the lock up holding a document in his hand and started naming them. He asked their citizenship and birth places. He also inspected them in some of their body parts. One of them commented that they are just civilian and not the culprit. They were taken out of the lock up through a back door where they found other Police officers and one of them was holding many papers. They were ordered to sign by force without knowing its content.

Thereafter, they were transported to Tunduru Police Station. They stayed up to 4th September, 2020. They were then given documents to sign, ordered to enter into the car alleged to be taken back to their home. Instead, they were taken to Court. DW4 denied to give any statement and to conspire to commit terrorist acts.

When he was cross examined by the prosecution counsel, DW4 confessed one Seif Abdallah Chombo to be his brother.

DW5 was Omari Hussein Mbonani a peasant resident of Lukumbule Village at Tunduru District, Ruvuma Region. He remembered that; on 13th

July, 2020 during the night hours at his home, the door of his house was knocked. Upon opening, he saw the armed Police officers at his door. He was put unto restraint and taken to Mini Field Force Unit Post at Lukumbule where he was not informed of his offence. They just asked his names, citizenship, and his hamlet chairman. He was joined with his follow, who are accused persons in this case and they were taken to Tunduru Police Station.

Further, on the same date, they were taken to Mtwara Central Police Station. On their way, they passed at Mangaka, Masasi Police Station then to their destination. They reached at Mtwara Central Police Station on 14th July, 2020 noon. They were registered, their name recorded and taken into lock up. On 12th August, 2020 they were taken out of the lock up and ordered to sign a certain document and enter into the car. They started a journey back to Tunduru where they were kept in lock up till on 4th September, 2020 before been taken out of lockup and given a paper to sign then proceeded to court.

During cross examination, DW5 insisted that, there were no any intimidation by Police officers throughout. But they were forced to sign a document on 12th August, 2020.

DW6 one Rashid Billal Ally @ Lipululu told this court that; it was on the night between 31st July, 2020 to 1st August, 2020 while with his wife in their house, they heard a knock at their door. Upon opening the door, he found Police officers who put him under restrain, took his phone and hand cuffed him. They took him to the Mini Field Force Unit Station at Lukumbule. On 1st August, 2020, they started journey with Police officers to Tunduru Police Station. They asked his names and taken to lockup until 12th August, 2020. For those days in custody, he did not know the offence facing him. He never gave any statement. He never knew the other accused persons in this case before until on 15th August, 2020. He denied to participate in any meeting with the 1st to 5th accused persons, or conspire to commit any terrorist acts. He never heard any prosecution witness mentioned him.

From the foregoing evidences and exhibits, the main issue as regards to the first count is; *whether the accused person committed the offence of conspiracy to commit terrorists acts contrary to section 4(1), (2) (b) (iii) and 27 (c) of the Act⁷² read together with Paragraph 24 of the first schedule to, and section 57 (1) and 60 (2) of the EOCCA.*

⁷² Act No. 21 *loc cit.*

In their final submission, the prosecution side contended to have managed to prove their case beyond reasonable doubt through the oral evidence presented by four prosecution witnesses and five accused persons confession documentary exhibits admitted and marked as prosecution exhibit P1, P2, P3, P4 and P5. The prosecution highlighted the elements of the offence of conspiracy to commit terrorist. They quoted the case of **Mattaka and Others v. Republic**⁷³ where the East African Court of Appeal defined the word conspiracy to:

consist not merely in the intention of two or more, but in the agreement of two or more to do a lawful; act by unlawful; mean. So long as such design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act itself, and at the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means.

Also, the prosecution cited the provision of *section 12 of the Law of Evidence Act*,⁷⁴ and the case of **Michael Charles Kijangwa v. Republic**,⁷⁵ where the court quoted with approval a comment by the

⁷³ [1971] 1 E. A 495 p. 501.

⁷⁴ Cap 6 Revised Edition 2022.

⁷⁵ Criminal Appeal No. 280 of 2017 (unreported).

learned Authors Ratanlal and Dhiralal in their book **The Indian Penal Code**,⁷⁶ as follows:

In order to prove criminal conspiracy which is punishable under *section 120-B*,⁷⁷ there must be direct or circumstantial evidence to show that there was an agreement between two or more person to commits an offence. This clearly envisages that there must be a meeting of minds resulting in an ultimate decision taken by conspirators regarding the commission of an offence. It is true that in most cases it will be difficult to get direct evidence of an agreement to conspire but a conspiracy can be inferred even from circumstances giving rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence.

From the above quoted legal position, the prosecution side believed that it has managed to prove the offence of conspiracy to commit terrorist acts beyond reasonable doubt. The prosecution cited the provision of *section 4 (1) and 2 (b) (ii) of the Act*,⁷⁸ where the phrase terrorist acts was defined.

⁷⁶ 32nd Edition, Reprint 2011 (Lexis Nexis is Butterworths Wadliwa Nagapur, India).

⁷⁷ Indian Penal Code, Act No. 45 of 1860 as amended.

⁷⁸ Act No. 21 of 2002 loc cit.

The prosecution submitted that; they offered a cogent proof that the accused persons did conspire through the meetings held at Lukumbule Village to further their terrorist intention which was shown from the evidence adduced before this court. They referred this court to the act of the 1st accused person of travelling to Mozambique to join Al Shabab which is designated International Terrorist Group under *Part one of the Schedule to the Prevention of Terrorism (General) Regulation*.⁷⁹ The prosecution, called upon the court to make reference to exhibit P1, P2, P3, P4 and P5 (confession of the accused persons) in which they shows their common intention that they agreed to execute their plans. The prosecution contended that the 1st accused acts were preparatory moves to execute the accused persons criminal plot to overthrow the lawful Government of the United Republic of Tanzania and to replace with Islamic State through violence means. To back up the point of common intention, the prosecution refereed this Court to *Section 27 (1) of the Evidence Act*,⁸⁰ and the case of **Ally Mohamed Mkupa v. The Republic**,⁸¹ where the court stated as follows:

⁷⁹ G. N. No. 7 of 2014.

⁸⁰ Cap 6 Revised Edition 2022.

⁸¹ Criminal Appeal No. 2 of 2008, Court of Appeal of Tanzania at Dar es Salaam (unreported) p. 13.

...the very best evidence is of a person who confess freely and voluntary to have committed the offence in any criminal trial that is an accused person who confessed his guilty.

The prosecution insisted that through exhibit P1, P2, P3, P4 and P5, the accused persons confessed that on divers date between 1st January, 2017 and 12th July, 2020 jointly agreed to form criminal syndicate together with other persons not in court for the purpose of waging a JIHAD aiming at overthrowing the lawful Government of the United Republic of Tanzania and replace it with an Islamic State through violence means, prejudiced the public safety and caused intimidation to the public of the United Republic of Tanzania. It was the prosecution averment that the evidence was corroborative in support of the confession of the accused. They buttressed their argument with the case of **Paschal Kitigwa v. Republic**,⁸² where Court of Appeal held that:

...corroborative evidence may be circumstantial and may as well come from words or conduct of the accused, and may as well also corroborated evidence of a co-accused.

The prosecution added that; the 6th accused person told the court lies while under oath during his testimony in court, yet his lies furthered

⁸² [1994] TLR 65.

the story of the prosecution. They supported their arguments with the cases of **Felix Kasinyila v. Republic**,⁸³ and **Mboje Mawe and three Others v. The Republic**.⁸⁴ Not only the 6th accused person but all the accused persons in a different occasion told this court lies when testifying. The prosecution argued further that; the coherent and consistence of the prosecution witness is evident of their credibility in respect of the arrest of the 6th accused person shakes the 6th accused alienation from his arrest. The prosecution cited the case of **Goodluck Kyando v. Republic**.⁸⁵

Also, the prosecution was aware of the danger of entering conviction based on repudiated confession unless the court is satisfied itself that what was contained in the confession are nothing but the truth and it was corroborated. In the case of **Michael Mgowole and Another v. The Republic**,⁸⁶ Court of Appeal of Tanzania quoted with approval the case of **Ibrahim Yusuph Calist @ Bonge and 3 Others v. Republic**,⁸⁷ where the court stated several ways in which a court can determine whether or not what is contained in a statement is true. It was the

⁸³ Criminal Appeal no 129 of 2002, Court of Appeal of Tanzania at Dar es Salaam (unreported).

⁸⁴ Criminal Appeal No. 86 of 2010, Court of Appeal of Tanzania at Tabora (unreported).

⁸⁵ [2006] TLR 363.

⁸⁶ Criminal Appeal No. 205 of 2017, Court of Appeal of Tanzania at Iringa (unreported).

⁸⁷ Criminal Appeal No. 204 of 2011, Court of Appeal of Tanzania (unreported).

prosecution position that the substance in exhibit P1, P2, P3, P4 and P5 is so detailed, elaborated relevant and thoroughly accounted the crime in question. Thus, no other person could have known such details but the 1st, 2nd, 3rd, 4th, and 5th accused persons.

Furthermore, the prosecution added that; confession must be coherent and consistent with the testimony of other prosecution witnesses and evidence generally. The substance of confessions is coherent and consistent with the evidence of prosecution witness P. The prosecution added that; even if there was no other evidence to corroborate, still the court can convict the maker when the court is satisfied itself that what is contained in the cautioned statement was nothing but the truth. To back up the averment, the prosecution cited the case of **Plano Alphonse Masalu @ Singu and 4 Others v. Republic**.⁸⁸

The defence counsel had general final written submission that; the prosecution failed to provide direct evidence which would have revealed on how the accused persons were involved in one way or another in commission of the offence reigned against them. The counsel went further to claim that the failure of the prosecution to bring an independent

⁸⁸ Criminal Appeal No. 366 of 2018, Court of Appeal of Tanzania at Dar es Salaam(unreported).

witness (meaning a witness who is not a soldier and who witnessed when the accused participated in so called terrorist meeting) in which they conspired to commit terrorist acts weakened their case.

Having considered oral and documentary evidence together with the final written submission from both parties, before addressing the main issue on the first count, the fundamental issues here are: One, *whether there exists a terrorist organization known as AL Shabab*. Two, *whether AL Shabab terrorist organization is listed under Part one of the Schedule to the Prevention of Terrorism (General) Regulation.*⁸⁹ Three, *whether the Accused persons belong, or profess to belong, to a terror organization listed under Part one of the Schedule to the Prevention of Terrorism (General) Regulation.*⁹⁰

To begin with the existence of the terrorist organization known as AL Shabab, the prosecution through the evidence of witness P, P1. P3, and P6 established that on divers dates between 1st January, 2014 and 13th July, 2020 at Lukumbule Village and various places within Tunduru District in Ruvuma Region and other places within the United Republic of Tanzania, the accused persons conspired to collect youth, motivate them

⁸⁹ G. N. No. 7 of 2014 *loc cit*.

⁹⁰ *Ibid*.

to have strong faith, hate the Government of Tanzania and train them to overthrow the Government of Tanzania led by a Kafir and establish an Islamic State through the use of force and violence which can reasonably have regarded as having been intended for the purpose of seriously destabilising the fundamental, political economic and social structure of the United Republic of Tanzania. It is through that ill motive, the accused persons opted to go to Mozambique to join with Mozambique terrorist group known as Alal Sunna wa Aljamaah or AL Shabab of Mozambique. The same evidence was corroborated by the accused persons in their confession statements evidenced through exhibit P1, P2, P3, P4, and P5.

The next issue is; *whether AL Shabab terrorist organization is listed under Part one of the Schedule to the Prevention of Terrorism (General) Regulation.*⁹¹ The court had time to go through the Terrorism General Regulations.⁹² It found that AL Shabab and AL Qaeda are the only terrorists organization listed therein. I take cognizance that even in cases of notoriety like the one at hand, the power of the court is limited and that the nature of a trial is to focus the judge's minds on the evidence put before him rather than on matters outside the courtroom.

⁹¹ G. N. No. 7 of 2014 *loc cit.*

⁹² *Ibid.*

While keeping in view of the two listed terrorists organization, the court, however, takes further cognizance that in order to address the multiple dimensions of terrorism crimes committed by groups, it must take notice of common knowledge, authenticated report and selected authoritative published works that recognizes any other terrorist organization including but not limited to Boko Haram. In any case, to answer the herein issue, AL Shabab terrorist organization is listed under *Part one of the Schedule to the Prevention of Terrorism (General) Regulation*.⁹³ Even if not listed, it is the firm view of this court that it should remain the domain of the court to interpret the said Regulation objectively. The reason being that it was never the intention of legislature that a terrorist offender of unlisted organization should go unpunished irrespective of overall security impact on the society or a section of society.

In addition, the technological development has led to changes in all aspects of life on crimes syndicate including terrorist organizations. Apart from the ways or means of conducting their syndicates, they even change the names of their organization depending on *inter alia* their geographical, tradition, political, social and economic status of the locality.

⁹³ *Ibid.*

Therefore, if the Regulation is interpreted strictly, there can be among others four dangers: *One*, letting terrorists offenders go unpunished simply because the name of the terrorist organization was not listed. *Two*, the terrorist organization can manipulate with the law by forming or changing the names of their organization to evade been caught by the law. *Three*, new terrorist organizations are formed after sometimes, as such, the Government will be forced to amend the law quite often to include the newly formed organizations. This can lead to unnecessary costs. *Four*, the act of listing two terrorist organization and the court accord it strict interpretation may stimulate formation of new terrorist organization because terrorist offenders will be aware of such position of the law.

The third issue is; *whether the Accused person belong, or profess to belong, to a terror organization listed under Part one of the Schedule to the Prevention of Terrorism (General) Regulation.*⁹⁴ A definitive response to this issue is not possible or appropriate, until the facts have been analysed. The evidence of witness P, P1, P3, and P6 established that the accused persons were members of AL Shabab group, travelling to Mozambique to join the said group and professing AL Shabab membership

⁹⁴ *Ibid.*

by convening secret meeting at Answar Suna Mosque and they had positive acclamation and knowledge to the said membership. The same evidence was corroborated by the 1st, 2nd, 3rd, 4th and 5th accused persons in their confession statements.

The confession of the 1st, 2nd, and 3rd accused person which is largely similar to the confession of the 4th and 5th accused persons proved beyond reasonable doubt that the accused persons professed AL Shabab terrorist ideology and their acts were contrary to the provisions of *section 4 and 5 (a) and (c) of the Act⁹⁵ read together with Part one of the Schedule to the Prevention of Terrorism (General) Regulation.⁹⁶*

More so, the court considers the confessions of the 1st, 2nd, 3rd, 4th and 5th accused persons highly reliable because no rational person would make admission against his interest unless prompted by his conscience to tell the truth.

Needless, it must be noted that conspiracy to commit a terrorist act or terrorism offence like an attempt to commit an offence is an inchoate offence chargeable under the provision of *section 4 (1) and 2 (b) (ii) of the Act,⁹⁷* although the acts necessarily to complete the

⁹⁵ Act No. 21 *loc cit.*

⁹⁶ G. N. No. 7 of 2014 *loc cit.*

⁹⁷ Act No. 21 of 2002 *loc cit.*

commission of the principal offence have not occurred. For that reason, in conspiracy cases to commit terrorist acts, the court is punishing the conspirators for the completed agreement to commit the crime alleged. For easy reference, *section 4 (1), (2) (b) (iii) and 27 (c) of the Act*,⁹⁸ read:

4.-(1) No person in the United Republic and no citizen of Tanzania outside the United Republic shall commit terrorist act and a person who does an act constituting terrorism, commits an offence.

(2) A person commits terrorist act if, with terrorist intention, does an act or omission which-

(b) is intended or can reasonably be regarded as having been intended to-

(iii) seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of country or an international organization; or

From a bare reading of *section 4 (1), (2) (b) (iii) of the Act*,⁹⁹ it is manifest that the ingredients of terrorist offence are: *One*, the accused person does an act or omission with aim to destabilise or destroy the fundamental political, constitutional, economic or social structures of

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

country or an international organization. *Two*, the acts or omission should be committed with terrorist intention (*mens rea*).

Section 4 (1), (2) (b) (iii) of the Act,¹⁰⁰ has to be read together with section 27 (c) of the Act¹⁰¹ which provides:

Every person who-

(a) conspires to commit;

an offence under this Act, commits an offence and shall on conviction, be liable to the same punishment as is prescribed for the first mentioned offence.

The term conspiracy has not been defined under the Act.¹⁰² Recourse has to be made to the provision of *Section 12 of the Law of Evidence Act*,¹⁰³ which provides on conspiracy as follows:

Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons referring to or in execution or furtherance of their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² Act No. 21 of 2002, *loc cit.*

¹⁰³ Cap 6 [Revised Edition 2022].

the purpose of proving the existence of conspiracy as for the purpose of showing that any person was a party to it.

From the provision of *section 12 of the Evidence Act*¹⁰⁴ and the decision of **Mattaka and Others**,¹⁰⁵ the ingredients of conspiracy are unambiguous, plain and simple: *First*, there are must be two or more persons. *Second*, the persons must have common intention to do unlawful act. The factum of actions and common intention must be evaluated by examining the entire evidence and exhibits.

In the instant case, all the accused persons, through their cautioned statements confessed to have convened secret meeting at Al Sunna Mosque where they conspired to overthrow the democratic Government of Tanzania and replace it with an Islamic State. They professed AL Shabab membership. They even travelled to Mozambique to join the said group. They therefore had a complete agreement with intent of prejudicing the national security or public safety.

It is the findings of the court that the acts of the accused persons who conspired, confederated, and agreed to commit terrorist acts of *inter alia* overthrowing the democratic elected Government of the United

¹⁰⁴ Cap 6 *loc cit.*

¹⁰⁵ [1971] 1 E. A 495 p. 501.

Republic of Tanzania and for any person who solicited, encouraged or endeavoured to persuade, teach or propose to the accused persons, to commit a terrorist act or terrorism were contrary to the provisions of *section 4 (1), (2) (b) (iii) and 27 (c) of the Act,¹⁰⁶ read together with paragraph 24 of the first schedule to, and sections 57 (1) and 60 (2) of the EOCCA.¹⁰⁷*

Further, it is the finding of this court that the accused person's allegation of not been recorded any statement was an afterthought after they failed to cast doubt that their statements were recorded timely. The accused persons went further to claim that the interrogation time stated by the prosecution, they were still on their way to Mtwara. They however did not know at what time they arrived at Mtwara. More so, in their defence during cross examination, denied to have a watch. That means, the accused were not aware at what time they were interrogated. For those reasons, the accused evidence corroborated to the prosecution evidence that their statements were recorded in time in which they confessed to have committed the offence. This was the position in the cited case of **Paschal Kitigwa**,¹⁰⁸ where the court stated that:

¹⁰⁶ Act No. 21 of 2002 *loc cit.*

¹⁰⁷ Cap 200 Revised Edition 2019 *loc cit.*

¹⁰⁸ [1994] TLR 65.

...corroborative evidence may be circumstantial and may as well come from the words or conduct of the accused, and may as well also corroborate evidence of a co-accused...

The accused persons on oath told this court that when they were taken out of Mtwara Central Police through a back door before boarded a car, they were forced to sign documents which were unknown to them. On cross examination, however, they denied to be intimidated to sign the documents. DW3 told the court that the document he signed under intimidation on 12th August, 2020 was not tendered before the court as an exhibit. For that reason, it is evident that the accused persons voluntarily recorded their statements in which they confessed their guilty. This was the decision in the cited case of **Ally Mohamed Mkupa**¹⁰⁹ where the court held that:

The very best evidence is of person who confessed freely and voluntarily to have committed the offence in any criminal trial that is an accused person who confessed his guilty.

Apart from the aforementioned reasons, the relevant position of the law regarding the admission of accused confession is; any statement or confession is presumed to be voluntarily recorded unless the defence side

¹⁰⁹ Criminal Appeal No. 2 of 2008 *loc cit*, p. 13.

object for being made involuntarily or not made at all. This was the position in the case of **Nyerere Nyague v. The Republic**.¹¹⁰

From the record, along with unsubstantiated objection raised by defence counsel, yet the accused persons failed to cast doubt to this court on the point whether the accused persons were not recorded their statement or their statements were taken out of time. Therefore, the prosecution managed to prove beyond reasonable doubt that the accused persons committed the offence of participating in a terrorist meeting in which there was a conspiracy to overthrow the legal Government of the United Republic of Tanzania and replace with Islamic State.

On the second count, the issue is; *whether the accused persons herein are the one who jointly committed or participated in one way or another in terrorist meeting contrary to section 4 (1), (b) (iii) and section 5 (a) of the Act*¹¹¹ *read together with Paragraph 24 of the First Schedule to, and sections 57 (1) and 60 (2) of EOCCA.*¹¹²

The prosecution reminded the court the provision of *section 5 (a) of the Act*.¹¹³ They added that; all the accused persons confessed to have

¹¹⁰ Criminal Appeal No. 67 of 2010, Court of Appeal of Tanzania at Arusha (unreported).

¹¹¹ Act No. 21 *loc cit.*

¹¹² Cap 200 *loc cit.*

¹¹³ Act No. 21 of 2002 *loc cit.*

participated in the meeting concerning the commission of terrorist acts between 1st January, 2017 to 12th July, 2020 at Lukumbule Village within Tunduru District in Ruvuma Region. Their purpose was to overthrow the lawful Government of the United Republic of Tanzania and to replace with Islamic State through violence means, an act which may seriously destabilise the fundamental political, constitutional, economic or social structure of the United of Republic of Tanzania. The prosecution believed the exhibit tendered established the existence of meetings in form of aforementioned definition.

During cross examination, the defence side raised a discrete point of law on disclosure of the informer. The prosecution was of view that; the role of the informer apart from giving the information, is secretive and he cannot be called to testify before the court. They supported their submission with the cases of **Ahmad Abolfathi Mohamed and Another v. Th Republic**,¹¹⁴ and **Bakari Rashidi v. Republic**.¹¹⁵ In the latter case, the court refused to fault the prosecution side for failure to produce Police informer as a witness. The court has this to say:

...Police Officers and crime buster, most of the time use informers to gather information regarding crime. The

¹¹⁴ Criminal Appeal No. 135 of 2016 Court of Appeal of Kenya.

¹¹⁵ [2016] eKLR.

informers are normally secretive as they go about their business and to open up by calling them as witnesses in open court would certainly blow up their cover, compromise them and expose them to danger. That will defeat the very purpose for which they exist. That is why they are never called or are rarely called as witnesses...

It was the prosecution position that they have successfully proved all counts against all accused persons beyond reasonable doubt. In conclusion they prayed that the accused persons be convicted.

On the contrary, the defence side, in their final written submission contended with some justification that; the prosecution failed to prove their case beyond reasonable doubt in relation to all accused persons.

The defence counsel claimed to have noticed the contradiction in the evidence between Prosecution witness P and P3 specifically on the date and time when the accused persons arrived at Mtwara. Prosecution witness P claimed that the accused reached at Mtwara on 13th July, 2020 at 11:30 hours while P3 testified that the accused persons arrived at Mtwara on 14th July, 2020 at 13:00 hours. The defence counsel did acknowledge the decision of the court in regard to the raised preliminary objection and determined by this court during the hearing. The defence counsel, however, insisted that; the impact of the contradiction goes to

the root of the case. Also, it has an effect on the issue of recording the cautioned statements on whether the accused were interrogated within the time prescribed by the law, which is within four (4) hours from the time they were arrested or reached at Mtwara. They supported their arguments with the provision of *section 50 (1) of the Criminal Procedure Act*.¹¹⁶ Also, the case of **Jumanne Mohamed and Two Others v. The Republic**.¹¹⁷

Moreso, the defence counsel warned this court to act upon the repudiated or retracted confession unless the said confession has been corroborated by independent evidence or satisfied itself that the confession is true. They supported their submission with the cases of **Hemed Abdallah v. Republic**,¹¹⁸ **Republic v. Pius Makeja**,¹¹⁹ and the case of **Ali Salehe Msutu v. Republic**.¹²⁰ It was the defence counsel submission that the accused confessions which were admitted to this court as exhibit P1, P2, P3, P4 and P5 were repudiated or retracted during the hearing.

¹¹⁶ Cap 20 [Revised edition 2022].

¹¹⁷ Criminal Appeal No. 534 of 2015 (unreported) at page 17th second paragraph

¹¹⁸ (1995) TLR 172.

¹¹⁹ Criminal Session No. 183 of 2016, High Court of Tanzania at Mwanza (unreported)

¹²⁰ (1980) TLR 1.

The defence counsel further discredited the accused confession on the ground that the accused persons circumstances and where the statements were recorded made the accused persons not free agent. Due to the circumstance, they had no any other option but to confess as the statement were taken at Field Force Unit Office (FFU) and at the Regional Commissioner Office.

The defence counsel added that; it is in the record that; Prosecution witness P3 told this court that they were seven (7) Police officers during arrest but neither of them was brought to court to testify. It was the defence counsel view that the missing story could have been cleared. They supported their argument with the case of **Azizi Abdallah v. Republic**.¹²¹ In that case, the prosecution failed to bring before the court key witness, as a result, a court had to draw inference in favour of the appellant. It was the defence counsel submission that; in the case at hand, prosecution witnesses have a Police base at Lukumbule Village but they did not summon a key witness from the said base who are still reachable to testify. In conclusion, the defence counsel prayed their client be acquitted for want of merit as the prosecution failed to prove their case beyond reasonable doubt.

¹²¹ [1991] TLR 72.

In order to determine whether the accused persons jointly committed or participated in one way or another in terrorist meeting, it would be essential to have a glance over the requirements of *section 5 (a) of the Act*¹²² which provides:

5. A person commits an offence who-
 - (a) arranges, manages or assist in arranging or managing or participates in a meeting or an act knowingly that it is concerned with an act of terrorism.

The plain reading of *section 5 (a) of the Act*¹²³ gives a meaning that a person will be deemed to commit a terrorism offence if: *One*, he is involved in one way or another in a meeting. *Two*, he has a knowledge that the meeting is concerned with terrorism acts.

In order to establish the knowledge of the accused persons on participation of a terrorist meeting, whether a particular act is an act of terrorism or not, the court may analyse *inter alia* on the surrounding circumstances depicting the commission of offence, the motivation,

¹²² The Prevention of Terrorism Act, Act No. 21 of 2002 as amended by Act No. 6 of 2012.

¹²³ *Ibid.*

object, and the design or purpose behind the said act and the premeditated plan to commit such terrorist act.

The basic weakness that can be discerned from *the Act* is the definition of what is a terrorist act.¹²⁴ The same has been defined under *Section 3 of the Act*,¹²⁵ to be an act of omission which is referred under *section 4 of the same Act*.¹²⁶ Therefore, the literal meaning of what constitute a terrorist act is the prohibitions that have been mentioned in *Section 4 of the Act*¹²⁷ and as well in *sections 5, 6, 7, 8, 9 and 10* as per the dictates of *Section 4 (5) of the Act*.¹²⁸

In order to grasp the dilemma of the Act,¹²⁹ I will begin from *section 4 (1)* which prohibit any person regardless of his nationality to commit terrorist act in the United Republic of Tanzania or a citizen of Tanzania to commit terrorist act outside of the United Republic of Tanzania.¹³⁰ The later part of *subsection (1)* criminalise the act that *constitute terrorism*.¹³¹ It is worth noting that that till this juncture the Act is doing away from

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

elaborating what acts or omission when done constitute terrorism.¹³² *Section 4 (2) of the Act*,¹³³ essentially provides that; a person shall be deemed to have committed a terrorist act, if the said acts or omission are done with *terrorist intention* and the resultant causes or have the effects that have been stated in paragraph (a), (b), and (c).¹³⁴ The phrase "constitute terrorism" and "terrorist intention" brings the dilemma into the interpretation of the Act,¹³⁵ the questions, such as the inclusion of the words "with terrorist intention" after the words "commits a terrorist act",¹³⁶ A plain interpretation of how the said provision was couched is that the acts stated in paragraph (a), (b) and (c) if committed without a terrorist intention cannot constitute terrorism.¹³⁷ In short, one has to prove that a person committed the said acts or omission with a terrorist intent. One may wonder what is a terrorist intention referred in *section 4 (2) of the Act*.¹³⁸

Section 4 (3) of the Act, give further acts that constitute terrorism if it is an act or threat of action which have the effect provided in

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

*paragraph (a) to (h) of the said sub section 3 of the Act.*¹³⁹ *Section 4 (3) of the Act* does not categorically state that the acts should be committed with terrorist intention but a careful reading of the subsection it appears that it connotes that its interpretation should be as whole and not in isolation, hence the use of the word within the scope of this Act.¹⁴⁰ Therefore, *subsection 3* should be read together with other section including *section 4 (2)*.¹⁴¹ The dilemma still exists even in sub section 2, hence makes perfect sense that *section 4 (4)* have given a proviso of certain acts, mentioned in *paragraph (a) and (b) of section 4* which shall not constitute terrorism unless the acts results in harm as stated in *paragraph (a) to (d) of sub section 3 of section 4*.¹⁴²

In the light of the above analysis, it is the court brief understating that the omission to define what "constitute terrorism" or what amounts to "a terrorist intention" was highly influenced by *inter alia* the nature of how these offences are committed. It is hard and difficult to assign a concise definition that may capture every act and every intention. Doing so would have resulted in letting offenders free merely that the acts that they committed have not or does not fall within the categorised acts that

¹³⁹ *Ibid*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

constitute terrorism or the intention stated by the law has not been manifested in the acts committed.

Therefore, the style and design of the Act, was clothed in such a manner that the overt act or *actus reus* constituting terrorist act done with a terrorist intention can be inferred from the effect that follows the act or omission, that is why *Section 4 of the Act* has both the *actus reus* and *mens rea* necessary to prove the offence of terrorism.¹⁴³ That said, whether an act or omission constitute terrorism should be inferred by the evidence adduced to prove that a particular act or omission or threat of action done by a person had the effect of causing any of the effect that have been stated in *sub section 2, 3 and 4 of section 4 of the Act*.¹⁴⁴ The list of terrorist acts is endless. A protest, dissent or mass action or stoppage of work or other similar exercises of civil or political rights may be considered terrorism if these actions are intended to cause death, serious physical harm and create serious risk to the health or safety of the public or a section of the public. This is a solemnly purview of the Court to digest the effect of the acts committed by a person and whether would have or have the *inter alia* effect mentioned above.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

In this case, having gone through the evidence of prosecution witness P and P3, and the exhibits, P1, P2, P3, P4 and P5, it is evident that all the accused persons participated in the meeting at Answar Sunna Mosque known as Al Malid while knowing that the meeting concerned with the terrorism acts with the object of overthrowing the democratic elected Government of the United Republic of Tanzania, an act which would overawed the population.

The defence counsel had allegations that the prosecution failed to bring a key witness (independent witness) who witnessed when the accused were participating in the so-called terrorist meeting in which they conspired to overthrow the Government of the United Republic of Tanzania and replace it with Islamic State. Further, the court reasserts that; the prosecution are the ones who have a right to choose the proper witnesses to testify on material facts in order to prove their case on the required standards. This was the decision in the case of **Azizi Abdallah v. The Republic**,¹⁴⁵ where the court had this to say:

The general and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who from their connection with the transaction in question, are able to testify on material facts...

¹⁴⁵ [1991] TLR 71.

From the decision of **Aziz Abdallah's case**,¹⁴⁶ it is clearly expressed that; it is upon the prosecutor to summon his witnesses who will be able to testify on material facts and not otherwise. The law does not specify the number of the witnesses the prosecutor has to bring to court. *Section 143 of the Law of Evidence Act*,¹⁴⁷ provides *inter alia* that:

Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact.

The same position was maintained by the court in the case of **Yohanis Msigwa v. Republic**.¹⁴⁸

The court is of equal findings that; Police officers had a clear duty to conduct search and arrest the accused persons not only for protection of public order but also for the Tanzanian national security since they had received information that the accused persons were involved in terrorists meeting. For that reason, parading Police officers and not informers did not affect the prosecution evidence.

It follows, therefore, that the number of witnesses summoned to testify before the court cannot guarantee proof of the facts alleged to exist but the weight and strength of the evidence in connection with the

¹⁴⁶ *Ibid.*

¹⁴⁷ Cap 6, *loc cit.*

¹⁴⁸ [1990] TLR 148.

alleged material facts. The defence counsel told this court that; it was alleged that there were seven Police officers who participated in arresting the accused persons yet none of them was summoned to testify. On this allegation, the court do agree with the defence counsel that it is the salutary duty of every Police officer (witness) who has the knowledge of the commission of the crime, to assist the Republic in giving evidence.

However, having gone through the record, the court noted that prosecution witness P3 was one among the arresting officers who participated in arresting the accused persons and transporting the accused persons to Mtwara Central Police Station. It is the opinion of this court that bringing all seven Police officers to testify before this court the same witnessed scenarios would have been a wastage of precious time of the court.

The court reasserts at this point that; what is required is not a particular number of witnesses but what was claimed to be seen, heard, perceived and the credibility of the witness. This was the position in the cases of **Yohanis Msigwa v. The Republic**,¹⁴⁹ and **Julius Josephat v. The Republic**.¹⁵⁰ Therefore, the defence counsel allegation is baseless.

¹⁴⁹ [1990] TLR 148.

¹⁵⁰ Criminal Appeal No. 03 of 2017, Court of Appeal of Tanzania at Arusha (unreported).

The defence counsel went further to aver that; the prosecution was duty bound to summon the Police secret informer to testify before this court taking into consideration that the prosecution witnesses testified under Camera pursuant to the order of this court which was delivered on 2nd May, 2022 in the case of **The Director of Public Prosecutions v. Seif Abdallah Combo @ Baba Fatina and 5 Others**.¹⁵¹ This court is of the findings, as rightly as argued by the prosecution, that the role of the Police informer is mysterious in nature, hence they are not required to be summoned to testify. *Section 53 (2) of the Economic and Organised Crime Control Crime Act*,¹⁵² introduced the *Whistle-blower and Witness Protection Act*,¹⁵³ that guarantees protection to informer against disclosure of their identity. The Kenyan case of **Ahamad Abolfathi Mohamed and Another v. The Republic**,¹⁵⁴ cited by the prosecution, though relevant to the scenarios, it is mere persuasive and not binding in our jurisdiction. Above all, on appeal to the Supreme Court, the decision of the Court of Appeal of Kenya was set aside.¹⁵⁵ The Court of Appeal of

¹⁵¹ Miscellaneous Economic Application No. 02 of 2022, High Court of Tanzania at Songea (unreported).

¹⁵² Cap 200 [Revised Edition 2022].

¹⁵³ Cap 446 [Revised Edition 2022].

¹⁵⁴ Criminal Appeal No. 135 of 2016, Court of Appeal of Kenya at page 8 (unreported).

¹⁵⁵ Petition No. 39 of 2018, Supreme Court of Kenya.

Tanzania while sitting at Dar es Salaam faced the same situation in the case of **Khamis Said Bakari v. The Republic**,¹⁵⁶ where it has this to say:

...at any rate, that person being a whistle-blower, deserved a measure of protection against disclosure of his identity by not calling him as a witness.

Next is the defence allegation that the prosecution based their case on the circumstantial evidence. The circumstantial evidence is one among the types of the evidence where the court can rely upon to convict the accused person if the said circumstantial evidence is irresistible to the commission of the offence by somebody else apart from the accused person. This was the decision in the cases of **Matinda Lesaito v. The Republic**¹⁵⁷ and **Justine Julius and Others v. The Republic**.¹⁵⁸

It is the finding of this court that the evidence relied upon by the prosecution witnesses were direct and documentary evidence as per exhibit P1, P2, P3, P4 and P5 respectively, whereby the accused persons confessed directly to have participated in terrorist meeting. Such evidence was contrary to the defence counsel allegation.

¹⁵⁶ Criminal Appeal No. 359 of 2017, Court of Appeal of Tanzania, Dar es Salaam Registry (unreported).

¹⁵⁷ [2014] TLR 457.

¹⁵⁸ Criminal Appeal No. 155 of 2005, Court of Appeal of Tanzania at Mwanza (unreported).

As regards the point of contradiction, as rightly as argued by the defence counsel, the court finds that there is indeed a contradiction among the Prosecution witnesses P and P3 on date and time when the accused persons arrived at Mtwara Central Police Station. However, such incongruity is a human error destined to happen to anyone. This was the decision in the case of **Marmo Slaa Hofu and 3 Others v. The Republic**,¹⁵⁹ where the court has this to say:

In all trials normal discrepancies are bound to occur in the testimonies of the witnesses due to the normal errors of observations such as errors in memory due to the lapse of time or due to mental disposition such as shock and horror at the time of occurrence.

Also, in the case of **Hamis Mbwana v. The Republic**,¹⁶⁰ the court went further acknowledging the existence of the contradictions or discrepancies which might resurface among the evidence of the prosecution witnesses and insisted that not all discrepancies will affect the prosecution case. For easy of reference, the court stated *inter alia* that:

¹⁵⁹ Criminal Appeal No. 246 of 2011, Court of Appeal of Tanzania at Arusha (unreported).

¹⁶⁰ [2017] TLR 160.

It is not every discrepancy in the prosecution witnesses will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled.

It is in the record that the accused persons were arrested more than two years before they were brought to this court. It is humanly for the witnesses to differ in some aspect. Taking into consideration that the witnesses being law enforcer have an obligation to deal with other different or similar task in which it become difficult to remember exactly in unison all the aspect in the case. The important point is for the court to make sure that the right of the accused has not been prejudiced in any way. The discrepancies which are minor and does not go to the root of the case can be ignored. The same position was maintained in the case of **Marmo Slaa Hofu and 3 Others**.¹⁶¹

It is the further findings of this court that the issue as to what time exactly the accused arrived at Mtwara can neither affect the gist nor go to the root of the case. Therefore, the contradictions are not material to weaken the prosecution case.

¹⁶¹ Criminal Appeal No. 246 of 2011, *loc cit*.

Incidentally, the defence counsel raised an issue of the environment where the accused were recorded their cautioned statement. It is in the record that the accused persons' cautioned statements were recorded at Field Force Unit (FFU) office and Regional Commander Officer (RCO)' offices of Mtwara Region. The defence counsel submitted that; the environment where the cautioned statements were recorded was intimidating to wit, the accused persons were forced to confess.

I find it easy to analyse what the defence counsel submission amounts to in practice. The law in our jurisdiction is silent on where the cautioned statement has to be recorded. Instead, the law requires Police officers to record the cautioned statement of a person under restraint.¹⁶² Obvious not at the police officer's house but at the area where it is conducive and practicable. It is the findings of the court that the Field Force Unit and the Regional Commander Offices were a reasonable and safe area not only for the accused persons but also to the officers responsible for recording the accused persons' statements.

Further, the defence counsel for the 6th accused person told this court that; all the accused persons denied to know him before they were arrested. He went on to submit that; it is a peremptory principle of the

¹⁶² Section 50 and 51 of the Criminal Procedure Act [Cap 20 Revised Edition 2022].

law that the confession evidence which has been retracted and repudiated cannot be acted upon to found a conviction unless; *one*, it is corroborated by the independent evidence and; *two*, the second evidence is found by the court to be truthful upon the court warning itself of the danger to rely on uncorroborated evidence. He cited the case of **Ali Salehe Msutu v. Republic**,¹⁶³ in which the court stated that:

A repudiated confession, though as a matter of law may support a conviction, generally requires as a matter of prudence corroboration as is normally the case where a confession is retracted.

I do agree with the defence counsel that the court must warn itself on the danger of acting on the retracted confessions by all the accused persons. Indeed, in **Tuwamoi v. Uganda**,¹⁶⁴ the appellant had made two statements. The first was a confession; but the day after he made a further statement, which was a complete denial of the crime. He was convicted pursuant to his confession. On appeal, the Court explained, at p. 88, the difference between a retracted and repudiated statement as follows:

The basic difference is, of course, that a retracted statement occurs when an accused person admits that he

¹⁶³ (1980) TLR 1.

¹⁶⁴ [1967] E.A. 84.

made the statement recorded but now seeks to recant, to take back what he said, generally on the ground that he had been forced or induced to make the statement, in other words that the statement was not a voluntary one. On the other hand, a repudiated statement is one which the accused person avers he never made.

At p. 89, the Court stated as follows:

The present rule then as applied in East Africa in regard to a retracted confession, is that as a matter of practice or prudence the trial Court should direct itself that it is dangerous to act upon a statement which has been retracted in the absence of corroboration in some material particular; but that the Court might do so if it is fully satisfied in the circumstances of the case that the confession must be true.

With regard to whether a retracted statement should be treated differently from a repudiated one, the Court stated from pp. 90–91 as follows:

On reconsideration of the position, we find it difficult to accept that there is any real distinction in principle between a repudiated and a retracted confession...We would summarise the position thus –a trial Court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstance of the case that the

confession is true...Court will only act on the confession if corroborated in material particulars by independent evidence...But corroboration is not necessary in law and the Court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true.

Also, it is the letter of the common law that the use of retracted confession against co accused stands on a different footing from the use of such confession against the maker. My brethren Vivian Bose, J (as he then was) speaking for three Judge Bench in **Kashmira Singh v. State of Madhya Pradesh**¹⁶⁵ as quoted in the case of **State (N.C.T. of Delhi)**,¹⁶⁶ noted with approval the observations of Sir Lawrence Jenkins that a confession can only be used to "lend assurance to other evidence against a co accused." The legal position was stated as hereunder:

Translating these observations into concrete terms they come to this. The proper way to approach a case of this kind is, first to marshall the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. It is capable of belief independently of the

¹⁶⁵ AIR 1952 SC 159.

¹⁶⁶ Criminal Appeal Case No. 373-375 of 2004 *loc cit*.

confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared set on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.

Applying the common law reassurance principle in retracted confession against co accused persons in this case, I find the evidence of Prosecution witness P and P3 is strong enough to aid this court convict the 1st, 2nd, 3rd, 4th and 5th accused persons. Through informers, Prosecution witness P and P3 under oath narrated to this court that the accused persons participated in terrorist meetings at the Al Malid Mosque at Lukumbule Village with evil intent of overthrowing the democratic elected Government of the United Republic of Tanzania. The 6th accused person while testifying revealed to this court that; he is a resident of Lukumbule where other accused persons reside. The 1st, 2nd, 3rd, 4th and 5th accused persons in their confession mentioned the 6th accused person to be their fellow activist. Also, the 2nd accused person while testifying

before this court acknowledged to know the accused persons including the 6th accused person. Apart from living in the same village, they are also co-worshiper at Al Malid Mosque.

It follows, therefore, that in the light of the provision of *section 22 (1) of the Evidence Act*,¹⁶⁷ even though the 6th accused did not participate directly, as long as he is a member of the group, he will be liable to any crime committed by the group because the conspirators are regarded to have a common intention. In law, *Section 22 (1) of Penal Code*¹⁶⁸ is alive to that effect:

When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing namely-

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence, in which case he may be charged either with committing the offence or with counseling or procuring its commission.

¹⁶⁷ Cap 5, *loc cit.*

¹⁶⁸ Cap 16 [Revised Edition 2022].

The reading of *section 22 (1) of the Penal Code*,¹⁶⁹ dictates that in order to establish common intention for the accused persons to be considered as joint offenders, there must be proof that they had formed a common intention, either before or in the course of events, to prosecute an unlawful purpose in conjunction with one another.¹⁷⁰ In this regard, what is required is evidence tending to show that each of the individual accused person was in fact part of, and active in a group of the six accused people; sharing a common purpose, with the other or others, in the execution or perpetration of the terrorists acts.

It is the position of the law that the mere presence of the accused persons at the scene of crime is not sufficient to invoke the doctrine of common intention and implicate them to the charged offence;¹⁷¹ and that where, in the absence of evidence of common intention, it is not possible on the evidence to say which of the accused persons jointly charged committed the offence, then all the accused persons must be given the benefit of the doubt.¹⁷²

¹⁶⁹ *Ibid.*

¹⁷⁰ Leonard Silvester Kisusi and 3 others vs R, Criminal Appeal No 270 of 2009, Tabora Sub registry (unreported).

¹⁷¹ Jackson S/o Mwakatoka & 2 Others v. Republic 1990 TLR 17 (CA).

¹⁷² Director of Public Prosecutions v. Elias Laurent Mkoba and Another 1990 TLR 115 (CA).

Despite of the position of the law that confession voluntarily made can be used against the maker only, *Section 27 of the Evidence Act*¹⁷³ is silent on admissibility of the confession against the co accused who did not confess before the Police officer. However, it is the observation of this Court that such confession though falls short by a very narrow margin of the standard of proof necessary for a conviction, it can be used to co accused as long as the court believes that the facts stated in the confession discloses the truth. That was the position of the supreme Court of India, in the case of **Sanjay Dutt v. State of Maharashtra**,¹⁷⁴ where the court quoted with approval the case of **Jameel Ahmed v. State of Rajasthan**,¹⁷⁵ in which it was stated:

(iii) In regard to the use of such confession as against a co-accused, it has to be held that as a matter of caution, a general corroboration should be sought for but in cases where the court is satisfied that the probative value of such confession is such that it does not require corroboration then it may base a conviction on the basis of such confession of the co-accused without corroboration. But this is an exception to the general rule of requiring

¹⁷³ Cap 6, *loc cit*.

¹⁷⁴ Criminal Appeal No. 1060 of 2007, Supreme Court of India.

¹⁷⁵ (2003) 9 SCC 673 at paragraph 50.

corroboration when such confession is to be used against a co-accused.

(iv) The nature of corroboration required both in regard to the use of confession against the maker as also in regard to the use of the same against a co-accused is of a general nature, unless the court comes to the conclusion that such corroboration should be on material facts also because of the facts of a particular case. The degree of corroboration so required is that which is necessary for a prudent man to believe in the existence of facts mentioned in the confessional statement.

Though the **Jameel Ahmed case**¹⁷⁶ was referring to the Terrorist *and Disruptive Activities (Prevention) Act, 1987 (TADA) of India*, on admissibility of confession, the same principle on admissibility of repudiated confession can be applied in our jurisdiction if that confession was recorded voluntarily and in terms of the decision in the case of **Ali Salehe Msutu**,¹⁷⁷ the court is satisfied that the confession statements are true. It can be used not only to the maker but also to the co accused.

This Court is therefore convinced that the confession of the 1st, 2nd, 3rd, 4th and 5th accused persons in which the 6th accused person was

¹⁷⁶ *Ibid.*

¹⁷⁷ (1980) TLR 1.

mentioned to be their fellow activists, it is the true statement which was recorded voluntarily as required by the provisions of *section 27 (1) of the Evidence Act*.¹⁷⁸ As such, the 6th accused person, though did not confess in his own, but mentioned by the co-accused, proves beyond reasonable doubt that he participated in the commission of the crimes laid against them.

At this juncture, it is the position of this court that the prosecution has managed to prove both charged counts beyond reasonable doubt, not only that the offences of conspiring to commit terrorist acts and of participating in terrorist meetings were committed but also the accused persons were the one who committed the offences intent to destroy, destabilise the fundamental, political, economic and social structure of the United Republic of Tanzania.

Consequently, the court hereby convict the 1st Accused person one Seif Abdallah Chombo @ Baba Fatina; 2nd Accused person, Abdallah Mbwana Chombo; 3rd Accused person, Mohamed Sadiki Kamala; 4th Accused person, Athumani Abdallah Chombo; 5th Accused Person, Omari Hussein Mbonani and 6th Accused person, Rashidi Bilahi Ally @ Lipululu for both counts. First count, for the offence of conspiring to commit

¹⁷⁸ Cap 5, *loc cit.*

terrorist acts contrary to section 4 (1), (2) (b) (iii) and 27 (c) of the *Prevention of Terrorist Act*,¹⁷⁹ read together with paragraph 24 of the first schedule to, and sections 57 (1) and 60 (2) of the *Economic and Organised Crime Control Act*,¹⁸⁰ and on second count, for the offence of participating in terrorist meetings contrary to section 4 (1), (2) (b) (iii) and 5 (a) of the *prevention of Terrorist Act*,¹⁸¹ read together with paragraph 24 of the first schedule to, and sections 57 (1) and 60 (2) of the *Economic and Organised Crime Control Act*.¹⁸²



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¹⁷⁹ Act No. 21 of 2002 *loc cit.*

¹⁸⁰ Cap 200 Revised Edition 2022 *loc cit.*

¹⁸¹ Act No. 21 *loc cit.*

¹⁸² Cap 200 *loc cit.*

Judgement pronounced and dated 16th day of December, 2022 in open court in the presence of learned Senior State Attorney Kauli George Makasi for the Republic, learned counsel Nestory Nyoni holding brief of Ms. Naomi John for the 1st accused person, Nestory Nyoni for the 2nd accused counsel, Alex Nyoni holding brief of Raphael Matola for the 3rd accused person, Alex Nyoni for the 4th accused person, Dennis Lazaro holding brief of Lazaro Simba, for the 5th accused person and Dennis Lazaro for the 6th accused person.

Right of Appeal explained.



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PREVIOUS RECORDS

KAULI GEORGE MAKASI, SENIOR STATE ATTORNEY:

On the part of the Republic, we have no previous criminal records of all the six accused persons. However, it is our prayer while this court will be deliberating on the sentence, to consider three factors.

First, the nature or gravity of the offence committed. It is a serious offence which is transnational and it have serious harm to the social economic and political aspects to the nation and it has a diplomatic concern. It is obvious that the offences committed caused terror to the Republic and the society and it can cause non-performance of economic activities.

Second, the nature of the offence is organized and transnational. It causes security concerns to the neighbour countries and have economic and political effects to the United Republic of Tanzania.

Third, apart from destroying the peaceful image of Tanzania and diplomatic relation, it affects investment and economic activities in the country.

It follows, therefore, that the offences committed needs be discouraged by all means by rendering effective sentence as per the provision of *section 11(A) (c) of the Act*¹⁸³ which provides for not less than 30 years imprisonment on the second count which follows on *section 5(a) of the Act*.¹⁸⁴

¹⁸³ As amended by the Written Laws Miscellaneous Amendment Act (Act No. 4) of 2016.

¹⁸⁴ *Ibid.*

On the first count, *section 60 (2) of EOCCA*¹⁸⁵ requires the punishment be 15 years imprisonment. It is our prayer that the court to consider those provisions of the law and sentence them in accordance to the law. That is all.



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MITIGATION

NESTORY NYONI ADVOCATE, FOR THE 1ST AND 2ND ACCUSED PERSONS:

As stated by the Republic, there are no previous criminal records of the 2nd accused person. This is his first time to be convicted on the criminal case.

Also, the age of the 2nd accused. He is 73 years now and he has paralysed on his right leg and hand. He has been cooperating with the Republic since his arrest on 13/07/2020. He gave his statement as stated here by the Republic.

¹⁸⁵ Cap 200 *loc cit.*

The 2nd accused has spent almost three years in remand custody ever since he was arrested in 2020. He has a family and issues who depend from him on several aspects including for advice. I therefore seek for lenience sentence based on the afore factors.

On behalf of the 1st accused, as stated by the Republic, the 1st accused is the 1st offender.

As regards the age, the 1st accused by the time he was arrested was 26 years. He is 28 years now. He is potential for production and economy of his family and the nation.

Also, ever since the 1st accused person was arrested o 13/07/2020, he offered good cooperation to the Republic including police and the Court. The 1st accused has stayed in remand custody for three years now. He is remorseful to what he did. I pray for lenience sentence. That is all.

ALEX NYONI, ADVOCATE FOR THE 3RD AND 4TH ACCUSED PERSONS:

The 4th accused is the 1st offender. As stated by the Republic, they have no his previous criminal records. The 4th accused person has stayed in remand custody for not less than two years ever since he was arrested on 13/07/2020.

The 4th accused is now aged 22 years. He is neither married nor blessed with any issue. *Article 8 of the constitution of the United Republic of Tanzania* talks of welfare of citizens.¹⁸⁶ The issue of welfare includes marriage and being blessed with issues. *Article 1-11 of the constitution of the United Republic of Tanzania* provides for policy, boundaries and administrative issues.¹⁸⁷ The 4th accused was and is still depended by his mother on agricultural issues. His father is old.

The 4th accused person is remorseful while in prison. On the basis of the above, I pray for lenience sentence to the 4th accused. Based on the case of **Tabu Fikwa v. Republic**,¹⁸⁸ his lordship Samatta (as he then was) stated; though the Court should not lender sentence on mercy, it should not use the law to hurt the offender.

On the part of the 3rd accused person, as stated by the Republic, it is his first offence. There are no previous criminal records. He has been in remand custody for not less than two years ever since he was arrested on 13/7/2020. He is remorseful to the offence. His act of attending the preaching "mawaidha" was in good faith but led him to the commission

¹⁸⁶ The Constitution of the United Republic of Tanzania, 1977 as amended from time to time.

¹⁸⁷ *Ibid.*

¹⁸⁸ [1988] TLR 48.

of the offence. He is the father of two issues and one wife, all of whom they depend from him. I pray for lenience sentence. That is all.

DENNIS LAZARO, ADVOCATE FOR THE 5TH AND 6TH ACCUSED PERSONS:

The 5th accused is the 1st offender. He has no any criminal record. Also, the 5th accused is 36 years now. He is very potential of the economy and general development of the nation.

The other reason is that the 5th accused have family. On 13/07/2020 upon being arrested, the 5th accused have a wife and blessed with two issues. His first issue was aged 10 years. She is Ummu Omary Hussein. The second was Kuruthum Omary Hussein, who was aged three years and four months. His wife is Mwanahawa Hassan Said. All of the three depends from the 5th accused whom was providing basic needs to them.

The 5th accused person has been in remand custody since July, 2020 till this 16th December, 2022 which is about two and a half years now. I pray the Court to consider the length of time the 5th accused has spent in remand custody when issuing the sentence. We believe the two and a half years is enough time for him to learn and be remorseful.

One of the objects of sentence is to reform the accused and be a good person to the society. This was stated in the case of **Bernadeta Paul v. Republic.**¹⁸⁹

The other reason is the circumstances of the commission of the offence. As per the caution statement of the 5th accused person tendered before this Court, it shows that the 5th accused person was just in the process of been indoctrinated to join the terrorist group.

Lastly, the nature of the offence of which the 5th accused stands charged. The 5th accused was in the preliminary stage of conspiring to commit the offence. They never committed the offence itself in the sense that they never caused security concerns.

On behalf of the 6th accused persons, I pray he be given lenience sentence based on the following reasons:

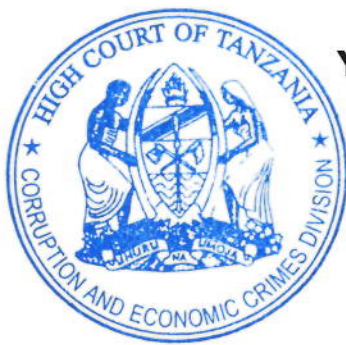
First, the 6th accused is the first offender. He has no any previous criminal records. *Second*, the 6th accused was arrested on 31/07/2020. It is now about two years and six months he has been in remand custody such period is enough for him to be a good person in the society. The object of sentence is to reform the accused as stated in the case of **Bernadetha Paul.**¹⁹⁰

¹⁸⁹ [1992] TLR 97 *loc cit.*

¹⁹⁰ *Ibid.*

The other reason is that the 6th accused have a wife and blessed with two issues whom they all depend from him. The 1st issue is Nasri Rashid Bilah, who was aged 11 years in July, 2020. The 2nd issue is Jamir Rashid Bilahi. He was seven years old by the time the 6th accused was arrested. If the 6th accused will be given a severe sentence all of his dependants will lack basic needs.

Based on the afore reasons, I pray the 6th accused person be given a lenience sentence. That is all.



Y.J. MLYAMBINA

JUDGE

16/12/2022

SENTENCE

Terrorism is both a National and international plague. It is dangerous to national's security, economic, political and well-being of the nation and its diplomatic relations.

Indeed, terrorism is inherently complex, often transnational in character attracting adherence on due process of law in both investigations and trial proceedings.

The overriding purpose is to guarantee human rights to terrorist accused persons, protection of witnesses and ensure that those who commits such atrocities are fairly brought before justice and, if proved on the standard required, be convicted in accordance to the law. "No punishment without law"

Article 13 (6) (c) of the constitution¹⁹¹ and Article 15 (1) of the International covenant on Civil and Political Rights (ICCPR)¹⁹² of which Tanzania is a State Party, requires no heavier penalty to be imposed than the one that was applicable at the time when the criminal offence was committed.

¹⁹¹ Constitution of the United Republic of Tanzania, 1977 as amended from time to time.

¹⁹² Covenant of 1966.

Upon conviction of the 1st, 2nd, 3rd, 4th, 5th and 6th accused person, the Republic speaking through learned Senior State Attorney Kauli George Makasi has *inter alia* informed this court that the Republic do not have any previous criminal records in respect of the 1st, 2nd, 3rd, 4th, 5th, and 6th accused persons. The Republic however beseeched this court to render severe sentence as per provision of *section 11 A (c) of the Act*¹⁹³ which requires not less than 30 years imprisonment on the second count which follows on *section 5 (a) of the Act*.¹⁹⁴

On mitigation, learned counsel Nestory Nyoni for the 2nd accused persons and for the 1st accused person on brief of Ms. Naomi John; Alex Nyoni for the 4th accused person and for the 3rd accused person on brief of Raphael Matola; Dennis Lazaro for the 6th accused person and on brief of Lazaro Simba for the 5th accused person; gave a litany of mitigation with the same conclusive prayer for this Court to issue a lenience sentence to the 1st, 2nd, 3rd, 4th, 5th and 6th, accused persons

In arriving to the sentence, in this case, the court has considered the previous records stated by the Republic and the mitigating factors

¹⁹³ Act No. 21 of 2002 as amended by (The Written Law Miscellaneous Amendment) Act (Act No. 4) of 2016.

¹⁹⁴ *Ibid.*

offered by counsel for each of the accused person. In particular, the Court has relied upon the following reasons.

One, the culpabilities of the accused persons. It is in the evidence that each of the accused person was involved in conspiracy and attended terrorist meeting with the aim of overthrowing the democratic elected Government of the United Republic of Tanzania and replace it with Islamic State. To that end, the accused persons travelled to Mozambique to profess Al Shabab ideology.

Two, the degree of harm. In accomplishing their purposes, the acts of the accused persons were to be achieved through violence means which would seriously destabilize the fundamental political, Constitutional, economic or social structure of the United Republic of Tanzania.

Three, the role of the accused persons. Though they were not the coordinators, having been indoctrinated "kulinganiwa" the accused person played a vital role in executing their evil plan. That is why they travelled to Mozambique to acquire more terrorist skills from Al Shabab group.

Four, the length of the time spent in remand custody. As mitigated, each of the accused persons has been in remand custody since July, 2020 to 16th December, 2022, a period which is not less than two years and five months. To that end, the court agree with the cited decision in the

case of **Bernadetha Paul**¹⁹⁵ in which the Court of Appeal of Tanzania insisted that; the Court in rendering sentence should ensure that the sentence is proportional to the offence committed and the purpose should be reforming the accused person.

Five, Right of marriage and issues (children). It is correct as mitigated by counsel Alex Nyoni that the 4th accused person is aged 28 years now, as per court record. However, the right to welfare of the 4th accused person as it does to the rest of the accused persons as envisaged under *Article 8 of the Constitution of the United Republic of Tanzania*¹⁹⁶ is not enforceable right because it falls on Part A of the Constitution which are non-enforceable rights.¹⁹⁷ Therefore, none of the accused can claim for the right of marriage and issues and enforce it or benefit from it by way of mitigation.

Six, remorsefulness of the accused persons, their age, potentiality to the economy of the nation, being depended by their families; are all good mitigating factors but sentencing of the accused persons must be in accordance to the law. *Section 60 (2) of the EOCCA*¹⁹⁸ requires a person

¹⁹⁵ [1992] TLR 97 *loc cit*.

¹⁹⁶ The Constitution of 1977 as amended from time to time. On non-enforceable rights, see Article 1-11 of the Constitution of the same Constitution).

¹⁹⁷ *Ibid*.

¹⁹⁸ Cap 200 *op cit*.

convicted for the economic offences be triable to imprisonment for a term of not less than twenty years but not exceeding thirty years, or to both such imprisonment and any other penal measures prescribed by this section, provided that where the law imposes penal measures greater than those provided by the Act,¹⁹⁹ the court should impose such sentence.

The Court therefore sentence you the said:

1. Seif Abdallah Chombo @ Baba Fatina
2. Abdallah Mbwana Chombo
3. Mohamed Sadiki Kamala
4. Athumani Abdallah Chombo
5. Omary Hussein Mbonani and
6. Rashid Bilah Ally

For imprisonment of twenty years in jail in respect of the 1st count.

Moreover, *section 11 A (c) of the Act*²⁰⁰ provides a mandatory sentence of not less than 30 years for a person who commits an offence under *section 5 of the Act*.²⁰¹

Therefore, the Court do hereby sentence you the said:

¹⁹⁹ *Ibid.*

²⁰⁰ Act No. 21 as amended by Act No. 4 of 2016, *loc cit.*

²⁰¹ *Ibid.*

1. Seif Abdallah Chombo @ Baba Fatina
2. Abdallah Mbwana Chombo
3. Mohamed Sadiki Kamala
4. Athumani Abdallah Chombo
5. Omary Hussein Mbonani and
6. Rashid Bilah Ally;

for thirty (30) years imprisonment in jail in respect of the second count. The 20 years imprisonment in jail in respect of the first count; and 30 years imprisonment in jail in respect of the 2nd count shall run concurrently from 16th December, 2022.

Right of Appeal fully explained.

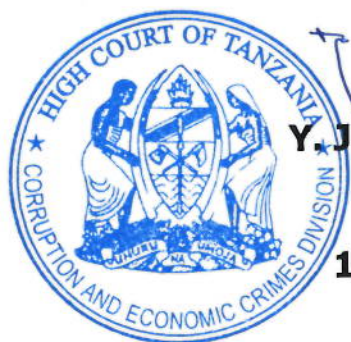


Y. J. MLYAMBINA
JUDGE
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Sentenced pronounced and dated 16th day of December, 2022 in open court in the presence of learned Senior State Attorney Kauli George Makasi for the Republic, learned counsel Nestory Nyoni holding brief of Ms. Naomi John for the 1st accused person, Nestory Nyoni for the 2nd accused counsel, Alex Nyoni holding brief of Raphel Matola for the 3rd

accused person, Alex Nyoni for the 4th accused person, Dennis Lazaro holding brief of Lazaro Simba, for the 5th accused person and Dennis Lazaro for the 6th accused person.

Right of Appeal fully explained.



Y. J. MLYAMBINA

JUDGE

16/12/2022