IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM:LUANDA, J.A., JUMA, J.A. And MUGASHA, J.A.)

CONSOLIDATED CRIMINAL APPEALS NO.82 OF 2013 & 330 OF 2015

1. KILEO BAKARI KILEO
2. YAHAYA s/o ZUMO MAKAME
3. MOHAMMUDAL s/o GHOLUMGADER POURDAD ..... **APPELLANT S**
4. SALUM s/o MOHAMEDI MPARAKASI
5. SAID s/o IBRAHIM

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from a Judgment of the High Court of Tanzania at Tanga.)

(Mussa, J.)

dated the 10th day of August, 2012
in
Criminal Case No. 19B of 2011

.....

JUDGMENT OF THE COURT

10th August, 2015 &

LUANDA, J.A.:

In the High Court of Tanzania (Tanga Registry) KILEO s/o BAKARI KILEO, YAHAYA s/o ZUMO MAKAME, MOHAMMADAL s/o GHOLAMGHADER POURDAD, SALUM s/o MOHAMED MPARAKASI and SALD s/o IBRAHIM HAMSI (henceforth the 1st, 2nd, 3rd, 4th and 5thappellants respectively) and

two others who were acquitted, were charged with two counts. The first count was conspiracy to commit an offence c/s 384 of the Penal Code read together with sections 22(a) and 25 of the Drugs and Prevention of Illicit Traffic in Drugs Act Cap. 95 RE 2002 (the Act).In the second count, the appellants and those two who were acquitted were also jointly charged with Trafficking Narcotic Drugs c/s 16(1)(b)(i) of the Act.

All the appellants were cleared with the first count. But they were convicted with the second count and each was sentenced to pay a fine of Tsh. 1,438,364,400/=. However, nothing was said in case the appellants failed to pay the fine. Ordinarily, a custodial sentence ought to have been imposed inlieuof the fine. Be that as it may, in addition to that sentence of a fine, each was sentenced to a custodial term of 25 years imprisonment.

Aggrieved, they have come to this Court on appeal. Indeed, it is not out of place at this juncture to mention that the 1st appellant had to file a fresh appeal vide Criminal Appeal No. 330 of 2015 after the one he had filed earlier on was struck out because the notice of appeal was incurably

defective. As for the rest, their appeal namely Criminal Appeal No. 82 of 2013 was sound in law. Since, the two appeals arose from the same case, in terms of Rule 69(1) of the Court of Appeal Rules, 2009the two appeals were consolidated and proceeded as one appeal.

In his memorandum of appeal, the 1st appellant has raised ten grounds as reproduced hereunder:-

1. ***THAT***, *the learned trial judge grossly misdirected himself in fact and in law in finding that the appellant was known to the co-accused whereas there was no evidence to prove that allegation.*
2. ***THAT***, *the learned trial Judge grossly misdirected himself in fact and in law in failure to analyse the evidence adduced by the prosecution before concluding that the appellant when arrested at KABUKU was on the same mission with other co-accused.*
3. ***THAT,*** *having regard to the circumstance of the case and contradictions in the evidence adduced by the prosecution on the arrest and search of the appellants, the learned trial Judge grossly misdirected himself in finding that the appellant were found in possession of prosecution exhibit P6 and exhıbit P4.*

4. ***THAT,*** *the learned Trial Judge grossly misdirected himself in fact and in law in admitting and relying on photocopies of documents whose authenticity had not been established.*
5. ***THAT,*** *the learned Trial Judge grossly misdirected himself in failing to consider the defence of Alibi which was not challenged by the respondent.*
6. ***THAT,*** *the learned Trial Judge gross misdirected himself in holding that Prosecution Exhibit No. P1,P2 and P3 did establish that exhibit P4 was among Narcotic drugs defined under the law.*
7. ***THAT,*** *having regard to the contradictions in the evidence of PW 9 and Prosecution exhibit No. P17, the Learned trial Judge misdirected himself in fact and in law in finding that the appellants did stay at Nyinda Classic Hotel and were in possession of exhibit P6.*
8. ***THAT,*** *the Learned trial judge grossly misdirected himself in law and in fact in failing to properly analyse the evidence given by the appellant and their witnesses.*
9. ***THAT,*** *the learned trial Judge grossly misdirected himself in fact and in law in failing to consider chain of handling the exhibits and holding that the substance which was seized at Kabuku was the same substance which was produced in court as Exhibit P.4.*

10. ***THAT,*** *in the alternative the sentence and fine imposed on the appellant was excessive.*

The 2nd and 3rd appellants jointly filed a memorandum of appeal consisting nine grounds, namely:-

1. ***THAT****, the Learned Trial Judge grossly misdirected himself in fact and in law in failing to consider the defence of alibi given by the 1st and 2nd appellants and for which a prior notice had been given before the prosecution closed its case and not challenged by the Prosecution.*
2. ***THAT****, having regard to the evidence on record and the circumstances of the case, the Learned trial Judge grossly misdirected himself in fact and in law in holding that both appellants were in the company of KILEO S/O BAKARI KILEO and were known to him.*
3. ***THAT****, the learned trial Judge grossly misdirected himself in fact and in law in finding that the appellants had stayed at NYINDA CLASSIC HOTEL at all by depending on dock identification of PW9 Zablon Deus Iswaga.*
4. ***THAT****, the Learned to trial Judge grossly misdirected himself in fact and in law on relying on documents whose authenticity had not been established to prove that appellants visa arrangement had been made by Kileo S/O BakariKileo the 1st accused and in failing to analyse*

critically the contradicting evidence of PW16 AGNES EDWARD MBWANA.

5. ***THAT**, the Learned trial Judge grossly misdirected himself in fact and in law in finding the appellants were found in possession of prosecution Exhibit No. 4 was narcotic drugs within the law.*
6. ***THAT**, having regard to the contradictory evidence produced by the persecution, the Learned trial Judge grossly misdirected himself in factand in law in finding that prosecution Exhibit No. 4 was narcotic drugs within the law.*
7. ***THAT**, the Learned trial Judge grossly misdirected himself in fact and in law in convicting the appellants against the weight of evidence.*

On the other hand the 4th and 5th appellants have jointly filed a memorandum of appeal consisting five grounds as follows:-

1. *That the learned trial Judge erred in law by not considering the Appellants' defences of alibi despite notices been duly given.*
2. *That the learned trial Judge erred in law and in fact by finding that the Appellants were found in possession of the prosecution exhibit P4.*

3. *That the learned trial judge erred in law and in fact by holding that prosecution Exhibit P4 was narcotic drugs within the law.*
4. *That the learned trial judge erred in law and in fact by finding that the Appellants stayed at Nyinda Classic Hotel and that PW9 – ZABRON DEUS ISWAGA was a truthful witness.*

In this appeal the 1st, 2nd and 3rd appellants enjoyed the services of Mr. EgidMkoba and Mr. Edward Chuwa learned advocates. The 4th and 5th appellants were represented by Mr. Alfred Akaro learned counsel. The respondent/Republic was represented by Mr. BiswaloMganga learned Director of Public Prosecutions assisted by Mr. SarajiIboru learned Senior State Attorney.

When the appeal was called on for hearing, Mr. Chuwa informed the Court that they were dropping the 7th and 9th grounds of appeal of the 2nd and 3rd appellant. So, they remained with seven grounds. Mr. Akarofollowed suit, he also dropped ground no. 5. So, he remained with four grounds.

The particulars of the charge, the appellants were convicted with were that on the 8th day of March, 2010 at Kabuku area within Handeni District in Tanga Region, the appellants and two others who were acquitted were jointly and together did traffic in narcotic Drugs to wit; 92.2 kilograms of HEROIN HYDROCHLORIDE valued at Two Billion, THREE Hundred Ninety Seven Million Two Hundred and Seventy Four Thousand Tanzanian shillings [Tsh. 2,397,274,400/=] in the United Republic of Tanzania.

The prosecution case was built on the two incidents which occurred at Kabuku area within Handeni District, a small town on the High way heading to Dar Es Salaam from Tanga. The other one was that which took place at Nyinda Classic Hotel within Tanga City. Indeed,ongoing through the prosecution case, itis quite clear that the prosecution side depend solely on the credibility of witnesses. We shall start with the Kabuku incident.

Following a tip off from an informer to the effect that a group of six people were planning to transport narcotic drugs from Tanga to Dar Es Salaam in two cars with registration numbers T. 650 BAT make Suzuki silver colour and T 457 BCQ make Rav 4 green colour, SP Salum Rashid Hamdum (PW6) and ACP Nzowa from the Anti-Drugs Unit (here-in after referred to as ADU), on 5/3/2010 they travelled from Dar-Es-Salaam to Tanga to make a follow up. On arrival they chartered out strategies as to how to apprehend the group. While in Tanga they were further informed that the said group of six were to travel from Tanga to Dar Es Salaam on 8/3/2010. So, on that date between 6.00 AM and 7.00 AMPW6, ACP Nzowa and other police officers arrived at Kabuku ready to intercept and effect their arrest.

Around 2.00PM or so the aforementioned cars arrived at Kabuku.Rav 4 was in front followed closely with Suzuki. The first car namely Rav 4 was intercepted and forced to stop by traffic police officer in uniform one PC Elimuzi (PW1). The two motor vehicles were driven by police officers to Kabuku police station. Rav 4 had four occupants namely the 2nd Appellant who was the driver, 3rd, 4th and 5th appellants. On the other hand Suzuki

had three occupants namely the 1st appellant who was the driver, BakariKileo @ Mambo the father of the 1st appellant who was among the two charged and acquitted and an infant boy aged between 3 to 4 years. The two motor vehicles were searched in the presence of civilians including Mariam Kiondo (PW8). But before PW6 commenced the search, the 1st appellant was reported to have told PW6 that it was true they were carrying a small amount of narcotic drugs and the 1st appellant requested PW6 not to search the cars and that the matter should not be pursued further. PW6 did not buy the 1st appellant's story. He proceeded to search.He opened the rear door of Suzuki; he saw a suit case and two bags. On opening, he saw in total 95 packets wrapped in a blackish nylon strings and 8 ½ packets in a plastic bag which turned out to be cassava flour. The same were seized. Other items seized were two gas lighters, two cell phones, wallet etc. From Rav 4 in the bag of the 3rd appellant, PW6 retrieved 8 gas lighters similar to those two found in Suzuki. Also seized were various documents inter alia those in connection with the application for visa for the 3rd appellant requested by 1st and 2nd appellantsand photographs of the 2nd appellant. The same were tendered in Court as exhibits.

It was in the prosecution case that PW6 had a test kit to check there and then whether the seized packets were heroin or otherwise. He took one packet out of those 95 packets. The result was that it was heroin, whereas 8 ½ packets were also tested. They were not heroin. The packets were sent to Tanga FFU Headquarters and eventually dispatched to the Chief Government Chemist via the Headquarters of ADU. Bertha Mamuya (PW3) Principal Government Chemist confirmed after she had tested that the 95 packets which were 92.2 kg whose value was as per the charge sheet which was done by Christopher Shekiondo (PW5) the Commissioner ofthe Drugs Control Commission, were heroin.

The prosecution side also went further to show that the two cars and the occupants therein were acting under a common design in transporting the drugs. The prosecution relied upon so much on the incident of Nyinda Classic Hotel in Tanga city. It is the evidence of ZablonIswaga (PW9) a receptionist of the said Hotel that on 2/3/2010 around noon hours the 4th appellant arrived at the hotel and booked three rooms on behalf of several

others. He filled in his name in the visitors' register Exh P17. Around 10 or 11.00 PM on the same day, the 4th appellant arrived along with five adults and a male infant aged about 4 years with luggages including bags and suit case in two cars Rav 4 green colour and Suzuki with silver colour.

PW9 assisted them in carrying their luggages to the rooms. He then served them with meals in room No. 2 one of the rooms they had booked. He was able to identify the 3rd appellant, the 4th appellant the one who booked the rooms, the driver of Rav 4 – the 2nd appellant, the 1st appellant the driver of Suzuki and the 5th appellant during the trial. The appellants stayed in the Hotel from 2/3/2010 till 6/3/2010 when the 4th appellant had cleared the bills and released the two rooms they had occupied namely Numbers 5 and 8. But room no. 2 was retained for the 3rd and 4th appellants up to 8/3/2010 morning hours when they left. When he was asked by the 1st assessor as to where the others had spent the nights on 6/3/2010 and 7/3/2010, he said he did not know.

In their defence all the appellants denied to have been found trafficking in narcotic drugs though agreed to have been arrested at Kabuku. They categorically denied to have been at Nyinda Classic Hotel; they were at some other places.

Before he presented his oral submission, Mr. Chuwa combined the memoranda of appeal of his clients. Having carefully read the combined grounds of appeal, the same can be condensed to the following grounds. One, the defence of his clients as a whole andin particular that of the alibi which was raised was not considered by the learned trial Judge. Two, the stuff alleged to have been found with the appellants namely heroin hydrochloride does not fall under the Act. Three, the procedure of handling of exhibits popularly known as chain of custody was flawed. Four, the evidence of Immigration officers who testified to the effect that the 1st and 2nd appellants applied for visa for the 3rd appellant were not credible. Five, the trial court erred in admitting and relying on photocopies of documents whose authenticity had not been established. Those are the complaints raised for the 1 – 3rd appellants in this appeal.

For the 4th and 5th appellants, Mr. Akaro basically has raised the following grounds. One, the defence of alibi raised was not considered at all. Two, the alleged stuff retrieved from Suzuki car was not narcotic drugs. Three, the evidence of PW9, a receptionist of Nyinda Classic Hotel who testified to have seen the appellants, including the 4th and 5th appellant was not credible.

Submitting on alibi, both Mr. Chuwa (for the 1st – 3rd appellants) and Mr. Akaro (for the 4th and 5th appellants) said their clients gave written notice that they would rely on the defence of alibi that at the time they were said they were at Nyinda Hotel, they were at all the time at Kirigini village. Both learned counsel said that the defence was not considered by the trial count. That the learned Judge neither analysed nor evaluated the defence case. Mr. Akaro went further and said the alibi of the 4th appellant was supported by his two witnesses,SamitShafiiKinelo (DW7) and Amir Barua (DWIO).

Responding to this ground of alibi, Mr. Mganga said in the first place the 1st appellant had said nothing. As to the other appellants, he said their alibi does not shake their case. There is possibility the appellants to have gone to the village and returned to Tanga.

As regards the stuff retrieved from the Suzuki car not being heroin, both learnedcounsel for the appellants submitted that heroin hydrochloride is not one of the items listed in the schedule as per the Act. Reacting to this ground, Mr. Mganga said the evidence of PW3 Bertha Mamuya Principal Government Chemist is clear; it is heroin.

As regards to the handling of the stuff which was not done properly, Mr. Chuwa said PW6 did not say in evidence whom he had handed over. That creates doubts whether really the stuff retrieved from Suzuki is the same stuff which found its way to the Chief Government Chemist.

Replying to this ground, Mr. Mganga said PW6 explained in detail how the stuff was retrieved, stored and finally sent and handed over to PW3 for analysis. The chain of custody was properly observed.

Submitting on the credibility of witnesses PW9, PW14 and PW16 raised by Mr. Chuwa (in respect of PW14 and PW16) and Mr. Akaro (in respect of PW9), the learned advocates said those witnesses were not credible. As to PW9 Mr. Akaro said he is not credible. Further, he said it is not enough to identify an accused person by way of dock identification. There was a need on the part of the prosecution to conduct an identification parade as the witness might be honest but mistaken.

Referring to PW16, Mr. Chuwa said she was not credible at all as she gave two versions. He did not elaborate. As regards PW14, Mr. Chuwaalso said he was not credible. Responding to this ground Mr. Mganga said PW6, PW9, PW14 and PW16 were credible witnesses in any case the question of credibility is the domain of the trial Court which saw the witnesses when testifying. Those witnesses, he said, linked the

appellants with the offence they were charged with. He went on to say, in case the defence of the appellants was not considered at all, then this Court being the first appellate Court can do so and make a finding.

In rejoinder the learned advocates for the appellants reiterated their respective positions. As we have said earlier on, the prosecution case depend solely on the question of credibility of witnesses. However, having read the judgment of the trial Court, we were unable to see the defence case to have been considered. The trial Judge ought to have considered the defence and this should be reflected in the record.But as correctly pointed out by Mr.Mganga, this Court being a first appellate Court can step into the shoes of the trial Court and consider that amiss. So, our approach in this appeal is that we shall discuss the prosecution case as a whole in tandem with the defence of alibi raised by the appellants which was not considered.

It is the evidence of PW6 that upon receipt of information from an informer about trafficking narcotic drugs from Tanga to Dar Es Salaam, a

group of police officers positioned themselves at Kabuku to intercept and arrest the suspects. Indeed two cars Suzuki and Rav 4 were intercepted. Before search was conducted, the 1st appellant who was driving Suzuki was reported to have told PW6 that they were carrying a small amount of narcotic drugs and that he pleaded to PW6 not to pursue the matter further. PW6 did not agree with the 1st appellant. The motor vehicle driven by the 1st appellant was searched. It was found to carry 95 packets wrapped in black nylon and 8½ kilo of packets and other items. It was those 95 packets which after the laboratory test done by PW3 it was confirmed that the 95 packets seized at Kabuku were heroin hydrochloride while 8½ kilo 5 were starch. The trial Court was satisfied that the stuff seized were narcotic drugs.

This finding was attacked by the appellants through their advocates in two ways. First, the stuff seized were not narcotic drugs. Mr. Chuwareferred us to S.2 of the Act that is the stuff seized is not one falling under the schedule. The learned trial Judge relied on the expertise evidence of PW3 that the stuff was heroin.

S.2 of the Act defines what is a narcotic drug. It says:-

> *"narcotic drug" means any substance specified in the Schedule or anything that contains any substance specified in that Schedule."*

According to the Schedule to the Act, the substance specified therein as narcotic drug is "heroin diacetylmorphine." But when PW3 was Cross examined by Mr. Chuwa she said, we quote:-

> *"There are several types of heroin. The substance at hand is part of the listed poisons. I indicated in my report that the substance was heroin hydrochloride.* ***Heroin hydrochloride is a synonym of heroin diacetylmorphine and the two expressions relate the same substance****."[Emphasis Ours]*

That piece of evidence was not countered in any way, save submission by advocates. In absence of any evidence to counter that piece of evidence,given on oath,we are not prepared to go along with the submissions of advocates. That piece of evidence remained unchallenged. Further, it should be borne in mind that the 1st appellant also voluntarily confessed to PW6 which conversation was heard by PW8 that they were carrying a small portion of narcotic drugs. This further strengthened the prosecution case that the stuff retrieved from Suzuki car was heroin. Having carefully read that piece of evidence, like the trial Court we are satisfied that the substance the 1st appellant was carrying was heroin. Second, the appellants' complaint that after the seizure of the stuff, there is no evidence to show that the 95 packets retrieved at Kabuku are the very one which PW3 had analysed to be heroin. In other words the appellants are questioning the exhibit to have notbeen properly handled. And this in turn took us to the chain of custody.

In **Paulo Maduka and Four others VR**, Criminal Appeal No. 110 of 2007 (Unreported) this Court had the occasion to explain what the chain of custody is about. The Court Said:-

" By 'Chain of custody' we have in mind the Chronological documentation and/or paper trail showing the seizure, custody, control, transfer analysis and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody is to establish that the alleged evidence is in fact related to the alleged crime rather than, for instance, having been planted fraudulently to make someone appear guilty. The chain of custody requires that from the moment the evidence is collected, its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it." (See also ***IluminatusMkoka VR*** *[2003] TLR 245;* ***Malik H. Suleiman Vs. S.M.Z.*** *[2005] TLR 236)*

We wish to point out in this case that the issue of chain of custody is of less significant. This is because the 1st Appellant who was found with the stuff had orally confessed to PW6 that they were carrying a small amount of narcotic drugs; while his colleagues distanced themselves to be found with the stuff. It is clear then that the question as to whether or not what was seized at Kabuku was heroin is not an issue as in other cases of

this nature. However, if further evidence is required to establish the stuff seized was heroin is the evidence of PW3 and PW6.

PW6 explained how the two cars were intercepted, arrest was effected and searched. The Suzuki was found to have carried heroin. He went further to explain that he was in full control of the contraband stuff from the time of seizure till when it was handed over to PW3 for laboratory test and its return. Indeed PW3 in her report (Exh P1) after she had completed the test, stated inter alia, from whom she had received the stuff for laboratory test. The report read in part thus:-

> *"Mnamotarehe 11/03/2010 tulipokeakutokakwa**InspSalum R. Hamduni,** Insp. Peter Mayalana Insp. Neemabahashailiyofungwakwalakini ...'* [Emphasis ours]

And it is also in evidence that when the stuff were packed and sealed before they were sent to the Chief Government Chemist, PW6 was present. With that evidence on record, like the trial Court, we are satisfied that the

stuff retrieved from Suzuki car was the same stuff which PW3 had analysed to be narcotic drugs and tendered in court as exhb P4. There was no mishandling of the exhb P4 as contended by the defence.

Next is whether all the appellants were in a convey trafficking the drugs. To put it differently whether the appellants wereacting under a common design. We are alive to the principle of common design that when two or more persons form an intention to prosecute an unlawful purpose conjointly and in the prosecution of which an offence is committed of such a nature that its commission was a probable consequences, each of them is deemed to have committed the offence. The formation of a common intention doesn't require prior agreement. Common intention may be inferred from the presence of the offender, their actions and omissions of any of them todissociate himself from the prosecution of the lawful purpose. (See **RV Tabula YenkaKirya and others** (1943) 10 EACA 52**; Damiano Petro & Another VR** (1980) TLR 260)

The prosecution side relied on the incidences that occurred at Kabuku and Nyinda Hotel to connect the appellants with the contraband stuff narcotic drugs which the trial Court found credible. It is the prosecution case that before the two motor vehicles Suzuki and Rav 4 were intercepted and stopped, the said cars were very close. On being searched the Suzuki Car carried one gray suit and two bagsone brown and the other blue (Exht. P6). Apart from the 1st appellant who confessed orally and without any inducement or threat that they had carried a small amount of drugs, PW6 opened those bags, PW6 saw the drugs. Also seized in the Suzuki Car were, inter alia, two gas lighters (Exh P9). In Rav 4 PW6 saw bags, one of such bags was black in colourwhich belonged to the 3rd appellant. The same was opened and PW6 retrieved 8 gas lighters (Exht P10) similar to those found in Suzuki car (Exht P9), passport of the 3rd appellant and various documents including 4 letters of application of Visa made by the 1st and 2nd appellants on behalf of the 3rd appellant which was granted by PW14 and PW16 and photographs of the 2nd appellant.

As regards to Nyinda Hotel occurrence, it was the evidence of PW9 that he first saw the 4th appellant who booked three rooms for unspecified

period of stay. Then on the someday the remaining appellants along with a fairly old man and a male kid, who happened to be the father and son of the 1st appellant arrived in two motor vehicles Suzuki and Rav 4 driven by the 1st and 2nd appellants respectively. PW9 even served them with meals in one of the rooms they had booked through the 4th appellant.

The appellants on the other hand denied to have been found trafficking in drugs. However, all admitted to have been arrested at Kabuku. They also denied to have been at Nyinda Hotel.

The 1st appellant said on 5/03/2010 he was informed by his sister through phone that his father was seriously sick. On 6/3/2010 in accompany with his son went to Tanga to take him with a view to sending him to Muhimbili Hospital. On 8/3/2010 he left Tanga for Dar Es Salaam with his father and his son. He was arrested at Kabuku. The 1st appellant did not formally raised the defence of alibi and called no witness. However on careful reading 1st appellant's defence he is saying from 2/3/2010 till 6/3/2010 around morning hours he was not in Tanga City in

particularNyinda Hotel. The 1st appellant no doubt was raising a defence of alibi at least in respect of Nyinda Hotel incident. The advocates for the 2 to 5th appellants said they had formally raised the defence of alibi by lodging notices as per the dictates of the Criminal Procedure Act, Cap. 20 RE. 2002. The notices of alibi which found their way in the record raised a number of questions. First, it is doubtful whether really the same were properly lodged though it showed the said notices to have been received by a Registry officer that they were lodged on 3/4/2012 for the 4th and 5th appellants; on 4/4/2012 for the 2nd appellant and on 11/4/2012 for the 2nd appellant. Our doubts are based on the fact that the notices do not bear any court stamp as the practice demand to indicate the date and time they were filed. Second, the learned trial judge did not say a word about the written notice of alibi which we found strange. We do not think the learned judge would have skipped even to mention the appellants to have filed the notices. When the Court asked the Counsel for the appellants whether they drew the attention of the trial Judge about the said notices, they said they did not! Under the aforesaid circumstances it is more likely than not that the notices were not properly lodged.

Be that as it may, since in their defence the 2nd – 5th appellants like the 1st appellant had raised the defence of alibi in respect on Nyinda Hotel incident which was not considered at all by the trial High Court, this Court can not close its eyes to that fact that the appellants raised the defence of *alibi*. This being the first appellate Court it should in the first place take cognisance of the defence of alibi to have been raised, which we hereby do step into the shoes of the trial Court and exercise our discretion whether to accord weight to such defence. With the foregoing observation we now proceed to consider the defenceof alibi raised by 2nd – 5th appellants. The 2nd and 3rd appellants called two witnesses Amir Barua (DW10) and Samir Kinelo (DW7); whereas the 4th appellant called DW10. The 5th appellant called ZainabuSaidi (DW8). The evidence of the 2nd and 3rd appellant can be summarized together as follows.

The 3rd appellant is an Iranian Citizen. He frequently visited Tanzania for business. On 1/3/2010 he arrived to Tanzania by plane whereby he was received by the 2nd appellant – a taxi driver who took him in all trips when he came to Tanzania.

On 28/2/2010 the 2nd appellant got sad news of the death of his uncle's wife. That information was communicated to the 3rd appellant and that the 2nd appellant would travel to Kigirini Village, Tanga to convey his condolences to his relatives. The 3rd appellant volunteered to escort the 2nd appellant to travel to the said village. So, on 6/3/2010 the 2nd and 3rd appellants left Dar for Kigirini village Tanga in a borrowed car make Rav4. The two stayed at the said village from 6/3/2010 to 8/3/2010 when they left for Dar-Es- Salaam.

It is also the evidence of the 4th appellant that he saw the two when they arrived at the village on 6/3/2010 and that he requested a lift through DW10 so as to travel in Rav 4. On 8/3/2010 the 2nd, 3rd and 4th appellant when they were heading to Dar Es Salaam, hence their arrest at Kabuku. That evidence of the 4th appellant to have attended the burial of DW2 relativewas confirmed by DW7,a sheikh who conducted burial prayers, who said that the 4th appellant was in attendance on the date of the burial i.e.

1/3/2010. The 2nd and 3rd appellants had arrived at the village on 6/3/2010. DW7 did not say their where abouts from 2/3/2010 to 6/3/2010

As regards the 5th appellant he said in his evidence the following

> *"I reside at a house inherited from our ancestors. Iam not married. I share the house with any mother, aunt and grandmother. On 8/3/2010 I was at Tanga. I know the 2nd accused who is also Tanga based. I knew him well ahead of this occurrence.* ***I bought chocolates two weeks ahead of 8/3/2010. I was then throughout in Tanga****."* [Emphasis supplied]

In his further evidence in chief he denied to have been atNyinda Hotel. But he did not state the dates involved. Be that as it may, his evidence that he was conducting chocolate business was supported by his mother DW8 and the date he left for Dar Es Salaam on 8/5/2010. But nothing was said about the dates he was said was seen atNyinda Hotel.

Before we go further, we wish to point out that for the defence of alibi to stick the accused person has to establish that his alibi is reasonably true. So, what the accused person is required to do is to create doubt as to the strength of the case for the prosecution. (See **Kennedy OwinoOnyachi& 2 others VR**, Criminal Appeal No. 48 of 2006 CAT (Unreported).

The question now is whether the defence of alibi creates any doubt in the prosecution. PW9 gave a detailed account as how the 4th appellant booked thethree rooms on 2/3/2010; it was during broad day light; the incident did not take place at a flush. Now this evidence coupled with the 4th appellant version that he had no grudge with PW9, we are unable to see the reason as to why PW9 to have fabricated a story against the 4th appellant. Further, it is evidence of PW9that on the same day the 4thappellant along with other appellants arrived in two cars Suzuki and Rav 4. PW9 even helped to carry their luggages which he identified them when shown (Exht. P.6) to their rooms and served them meals. He also mentioned a malekid of the 1st appellant which story found support with

the evidence of PW6 who not only saw the child but also the cars Suzuki and Rav 4 whose description tallied with the evidence of PW9. To crown it all PW14 and PW16 were the ones who processed the visa of the 3rd appellant following applications made by 1st and 2nd appellants where their evidence was not seriously challenged.

The advocates for the appellants strongly argued that the evidence of dock identification of PW9 was not enough. The prosecution ought to have conducted an identification parade proper. Generally it is accepted that evidence of such nature is valueless (See **Musa Elias and Two others VR,** Criminal Appeal No.172 of 1993 and **Julius s/o Justine and Four OthersVR**, Criminal Appeal no. 155 OF 2005 (unreported). But in this Case the conviction of the appellants was not solely based on the evidence of identification. There are other pieces of evidence which the trial court took into consideration to convict. In any case we do not think the circumstance of this case called for an identification parade. This is because the appellants were familiar to PW9. As we have said earlier on at Nyinda Hotel the appellants stayedfor more than two days and taking the fact that the appellants were the only customers in the hotel an

opportunity for PW9 to get acquainted with the appellant, then the question of mistaken identity does not arise. Like the trial Court we are satisfied that PW9 was a credible witness.

As regards their defence of *alibi* all appellants including their witnesses did not specifically mentioned as to their whereabouts from 2/3/2010 till 6/3/2010. The defence of alibi as correctly pointed out by Mr. Mganga does not create any doubt in the prosecution case.

Taking the totality of the prosecution case, we are satisfied like the trial Court that the appellants were acting under a common design in trafficking narcotic drugs from Tanga to Dar Es Salaam.

Mr. Chuwa did not argue his ground touching on documents. We take it that he had abandoned it.

In sum the appeal is devoid of merits. The sentence imposed is not excessive. The same is dismissed in its entirety.

DATED at **DAR ES SALAAM** this 8th day of September, 2015.

B.M. LUANDA
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

S. E. MUGASHA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

Z.A. MARUMA
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