IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM:LUANDA, J.A., MJASIRI, J.A. And KAIJAGE, J.A.)

CRIMINAL APPEAL NO.358 OF 2013

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

1.ACP ABDALLAH ZOMBE
2. SP CHRISTOPHER BAGENI
3. ASP AHMED MAKELE
4. WP 4593 PC JANE ANDREW
5. D. 1406 CPL EMMANUELMABULA
6. D. 8289 PC MICHAEL SHONZA
7. D. 2300 D/CPL ABINETH SARO
8. D 4656 D/CPL RAJABU HAMISI BAKARI
9. D 1367 D/CPL FESTUS PHILIP GWABISABI

..... RESPONDENTS

(Appeal from the judgment of the High Court of Tanzania at Dar es Salaam.)

(Massati, J.K)

dated the 17th day of August, 2009
in
Criminal Sessions case no. 26 of 2006

.....

JUDGMENT OF THE COURT

29th April,& 16th September, 2016

LUANDA, J.A.:

Initially ACP Abdallah Zombe, SP Chiristopher Bageni, ASP Ahmed Makele, PC Noel Leonard, WP 4593 Jane Andrew, CPL Nyangelera Moris, CPL Emmanuel Mabula, CPL Felix Sandy Cedrick, PC Michael Shonza, CPL Abeneth Saro, DC Rashid Lema,CPL Rajabu Bakari and CPL Festus

Gwabisabi were jointly and together charged with four counts of murder. It was alleged in the charge sheet that on 14/1/2006 at Pande forest, Kinondoni District, Dar Es Salaam Region the above named unlawfully killed Ephraim Sabinus Chigumbi, Sabinus Chigumbi, Juma Ndugu and Mathias Lunkombe. The accused persons pleaded not guilty to the charge and the case went for trial after the conduct of a preliminary hearing.

However, at the close of the prosecution case, the prosecution had summoned 37 witnesses, the High Court found out that the three accused persons namely PC Noel Leonard, CPL Nyangelera Moris and CPL Felix Sandy Cedrick had no case to answer. They were accordingly acquitted. Unfortunately, DC Rashid Lema expired before he could give his defence case. His case was marked as having abated. The nine accused persons remained till at the end of the trial. And at the end of the trial, all nine were acquitted. Aggrieved by the finding of the trial High Court, the Director of Public Prosecutions (the DPP) has come to this Court on appeal.

The DPP has raised four grounds in the memorandum of appeal which read as follows:

1. That, the learned trial judge misconceived the application of the principle of parties to the offence, hence he failed to apply it against the 1st, 2nd, 3rd and 8th respondents.
2. That, the learned trial judge erred in law and fact in not finding that Exh. P16 and Exh. P22 are confessions with probative value against their makers as well as the co-accused namely the 1st, 2nd, 3rd and 8th respondents.
3. That the learned trial judge erred in law and fact in finding that since the actual shooter of the deceased was not charged with the respondents, they (respondents) could not be found guilty of accessory after the fact to murder.
4. That, the learned trial judge erred in law and fact in finding that the offence of accessory after the fact to murder being a minor but not cognate with murder, cannot be substituted for murder as an alternative verdict against the respondents.

In this appeal Mr. Timon Vitalis and Ms. Lucy Diganyeck learned Principal State Attorney and State Attorney respectively appeared for the appellant/DPP; Whereas Mr. Richard Rweyongeza advocated for the 1st respondent (ACP Abdallah Zombe); Mr. Majura Magafu Learned Counsel

represented the 2nd respondent (SP Christopher Bageni), 3rd respondent (ASP Ahmed Makele), 4th respondent (WP4593 PC Jane Andrew) 5th respondent (CPL Emmanuel Mabula) 6th respondent (PC Michael Shonza) and 7th respondent (CPL Abineth Saro). Mr. Denis Msafiri learned advocate appeared for the 8th respondent (D/CPL Hamis Bakari) and 9th respondent (D/CPL Festus Gwabisabi).

When the appeal was called on for hearing on 29/4/2016, Mr. Vitalis prayed to withdraw the appeal against the 4th, 5th, 6th, 7th and 9th respondents, under Rule 4 (2) (a) of the Court of Appeal Rules 2009 which we granted. So, we remained with the 1st, 2nd, 3rd and 8th respondents. We shall retain their positions save the 8th whom we shall refer him from now on wards as the 4th respondent.

The material prosecution evidence as we have gathered from the record can be summarized as follows. The three deceased persons out of four namely; Ephraim Sabinus Chigumbi, Sabinus Chigumbi and Mathias Lunkombe were genuine gemstones dealers. They were doing their activities in Mahenge, Morogoro Region. They were not alone in that activity, they had some friends or relatives in that business. Among the

relatives or friends were Protace Lunkombe (PW3) Mathias Ngunyami (PW1) and Venance William Mchami (PW 4).

On 7/1/2006 the two deceased person namely Ephraim Chigumbi and Sabinus Chigumbi, along with Protace Lunkombe (PW3) travelled from Mahenge to Arusha via Dar Es Salaam in a motor vehicle the property of Sabinus Chigumbi driven by Emmanuel Ekonga (PW17). Mathias Lunkombe was all along in Dar es Salaam. He had joined the team in Dar es Salaam. The purpose of the safari was to sell gemstones and send their daughters to school. In Arusha they had managed to sell some gemstones and were paid money in cash of which some amount was deposited in the Bank. They also dropped their daughters to their respective school. They stayed in Arusha till on 12/1/2006 when they decided to return to Dar es Salaam to find other buyers of the gemstones. In Dar Es Salaam they also managed to sell their gemstones.

On 13/1/2006 PW17 took the motor vehicle to a garage at Ilala Bungoni for repairs. The repairs could not finish on that day. The three deceased persons hired a taxi cab driven by Juma Ndugu (the fourth

deceased) whose taxi was frequently used while in Dar es salaam so as to enable them move easily from place to place.

On 14/1/2006 Ngonyani (PW1) while in Mahenge communicated with Sabinus as to the date when they would return to Mahenge. The late Sabinus told him that they had decided to return the following day. It was the evidence of PW1 that on hearing that, he requested Sabinus to visit his family at Sinza, Kinondoni District before they left for Mahenge and asked him to give money to his wife one Elizabeth Shayo (PW2). Sabinus obliged. Indeed Sabinus in the company of Ephraim, Chigumbi and Mathias Lunkombe went to Sinza. They used the taxi cab driven by Juma Ndugu. The four including the driver arrived at the residence of PW1 and met his wife one Elizabeth Shayo (PW2). Sabinus gave PW2 money Tsh, 30,000/= But when they prepared to leave the place, a vehicle make Toyota Stout arrived with five police officers. Two of them were armed. Sabinus and his colleagues were arrested, their bag which contained money was seized and a pistol of Sabinus which was lawfully acquiredand possessed was also taken. The two eye witnesses who testified namely PW2 and Mjata Kayamba (PW6) told the trial High Court that they did not know where the four deceased persons were taken. It is however not

irrelevant at this juncture to mention that around that time a robbery had been committed along Sam Nujoma Road (henceforth Sam Nujoma Robbery). Police were making a follow up to effect the arrest of the culprits. The four deceased persons appeared to have been the suspect of that robbery. We shall revert to this incident at a later stage in this judgment. Suffice to say that the four deceased persons were arrested in connection with the Sam Nujoma robbery. The news of their arrest circulated to their relatives and friends. Efforts were made to trace their whereabouts but in vain. Eventually the four deceased persons were found at Muhimbili hospital already dead. It was the evidence of Mihami (PW4) that he saw bullets wound on each of the four deceased persons on the back of their necks and bruises on their bodies. Dr. Martin Mbonde (PW19) who conducted postmortem confirmed that version that the four deceased persons each had a bullet wound on their back side of their necks. According to PW19 the cause of death was gunshot injuries. The trial High Courtwas satisfied that the four deceased persons were brutally killed by gun shots and that whoever had done it, he did so with malice aforethought.

As to where the shooting took place, the trial court found out that it was at Pande Forest within Kinondoni District. The trial court also found out that the one who actually shot the four deceased persons was CPL Saad who is at large to date. The trial Court absolved the 2nd, 3rd and 4th respondents from criminal responsibility, though they were present at the place and time of shooting because in the absence of CPL Saad, the perpetrator, it is difficult to establish common intention, the trial court found out.

As to the 1st respondent, the trial court also absolved him from criminal responsibility because of lack of evidence though there is a strong suspicion against him in that the 1st respondent might have been aware of the circumstance in which the deceased persons met their deaths.

In his defence, the 1st respondent, who was at the material time a Regional Crimes Officer (RCO) cum Ag Regional Police Commander (Ag RPC) of Dar Es Salaam denied to have caused the death of the four deceased persons. He said he did not know them prior and after their demise. He, however, did not deny to have visited Urafiki Police Station on 14/1/2006 to give direction as to what should be done to a portion of

money which went missing after recovery from the bandits who allegedly committed the robbery along Sam Nujoma road. He ordered the OCD (Officer Commanding District) one SSP Mentage to make good the loss. The directive was complied with. The money was returned the following day. He also said while at Urafiki Police Station he was briefed about the Sam Nujoma robbery incident and was told that the bandits were shot dead following an exchange of gun fire between them and the police personnel. Later the IGP (Inspector General of Police) formed a task force to probe into the surrounding circumstances in which the four deceased persons met their deaths. And then the Presidential Inquiry Commission led by Hon. Mussa, J (as he then was) was also formed. He denied to have ordered any person to kill the four deceased persons.

The 2nd respondent who was the OCCID Kinondoni District also denied to have ever had a hand in the deaths of the four deceased persons. He said on the 4/1/2006 when he came back from his building site at Pugu, he was briefed about the Sam Nujuma robbery. As the victims were around, he interviewed them. The victims namely the driver and salesman narrated to him the story. They told him they were robbed Tsh. 5,000,000/= at gun point. When they had finished he was summoned

by the OCD and ordered to go to Urafiki Police Station to collect the exhibit – money Tsh. 5,000,000/= and a pistol. However, the money was short landed, he refused to collect. It was at that juncture where the OCD alerted the 1st respondent, who arrived immediately. The 1st respondent ordered the missing amount to be made good. Then the 2nd respondent attended other incidents. It was after his return around 11.00pm he was informed by the OCD that the bandits who had engaged in a shootout with the police at the Postal fence Sinza Palestina were dead.

As to who showed him the place where the exchange of gun shots took place, he said it was the CID in charge of Chuo Kikuu Dar Es Salaam D/CPL Nyangelera and Sgt. James.

The 2nd respondent agreed to have taken the task force formed by the IGP (Mgawe Team) to the sceneof crime. He denied everything said by the late D/C Lema (11th accused person) D/CPL Bakari (the 4th respondent) and Sgt. Kajela (PW15). The evidence of the late D/C Lema implicating the 2nd respondent is contained in Exh. P22 – the Extra Judicial Statement taken by Omary Mohamed (PW35) a Justice of Peace; whereas the 4th respondent gave oral evidence as well as his cautioned Statement Exh. P16

in which he implicated the 2nd respondent. In short the 2nd respondent deniedto have been neither at Sam Nujoma robbery incident nor at Pande forest.

The 3rd respondent also denied to have killed the four deceased persons. He however informed the trial court that on the material day around evening hours he received news about the Sam Nujoma robbery through a radio call and was ordered to make a follow up. As they suspected the robbers might have had taken paths towards Mwenge or Sinza, he took a car with two uniformed police officers. When proceeding he happened to see CID officers namely CPL Abeneth Saro (10th accused person) and D/C WP Jane (5th accused person). He took these two and dropped those uniformed police officers. When proceeding they came across a group of people. One uniformed police officer stopped them and informed them about the arrest of the culprits who had money Tsh. 5million and a pistol. He ordered the suspects to be taken to Chuo Kikuu police station for further interview. He returned back to his working station at Urafiki.

Later, however, he was ordered to retrieve a bag from a charge room whose contents he did not know. When opened, the bag had money and a pistol. But the 2nd respondent, refused to take the exhibits saying that he was not sent to collect that less amount. He said nothing about the Pande forest incident.

On the other hand the 4th respondent gave a detailed explanation of the incident but exculpated himself. His story runs as follows:- On the material day around morning hours he reported for duty to patrol in Kinondoni, Mwananyamala and Mikocheni. He was with CPL Saad, D/C Lema (deceased) D/C Frank and another one whom he could not remember.

When in the evening he wanted to report about the patrol to the 2nd respondent, he was ordered to follow him and visit the scene of crime of Sam Nujoma robbery. The 4threspondent said he had no news of that incident before. On arrival they found a lorry parked in the middle of the road with four people. The 2nd respondent queried them as to what had befallen them. The four explained how they were robbed by four people who were in a saloon car. The bandits used a pistol and an amount of

Tsh5,000,000/= was stolen from the victim of Sam Nujoma robbery. The 2nd respondent then talked on a cell phone. He could not hear to whom he was talking and what they were talking. As the 2nd respondent was talking, Chuo Kikuu Police patrol car appeared. It had police officers with four persons. Later two saloon motor vehicles dark blue and white arrived. The four persons did not disembark from the pickup. The 3rd respondent explained to the 2nd respondent that four persons were arrested with a pistol and Tsh. 5,000,000/= at Sinza. The 2nd respondent went aside and talked on his cell phone.

A few minutes later, a defender pick up arrived with four police officers. The 2nd respondent then ordered the four suspects to disembark from a pickup and boarded on to the defender. The order was complied with. The 4th respondent did not remember the number of police who boarded the defender. The Chuo Kikuu driver was ordered to drive his car to Urafiki Police Station. The dark blue saloon car was also ordered to follow suit, it would appear, said the 4th respondent. Then the defender was followed by a white saloon car left. The 4th respondent said they waited for the 2nd respondent who was busy talking on his cell phone. After some few minutes, the 2nd respondent boarded a station wagon

pajero in which the 4th respondent had boarded and left. The 4th respondent said he could not hear further instructions issued to their driver but their car took Morogoro Road. On the way they refueled.

They then went to Mbezi Luis Police post. The 2nd respondent disembarked. Shortly he came back with a uniformed policeman who also boarded their car. At some stage when the 2nd respondent went out of the car and talked on his phone, the 4th respondent asked the policeman they had picked as to where they were going to. He was told Makabe, the place he did not know. And what they were going to do, the policeman said he did not know. Later the journey resumed. They drove to a bush area. Then the 2nd respondent ordered the driver to stop. The driver stopped. The 2nd respondent, CPL Saad and D/C Rashd Lema disembarked. The 2nd respondent handed over a radio call to him. The 4th respondent, Frank and Mbezi Luis policeman did not disembark. As he was listening to radio messages he heard gun shots. Then he came out of the car. On coming out he went closer and he saw CPL Saad shooting one of the person from the defender. The others had already been shot dead and were lying on the ground. The four dead bodies were ordered to be sent to Muhimbili hospital. The order was made by the 2nd respondent.

Two days after that incident the 2nd respondent ordered the 4th respondent to accompany CPL Saad and D/C Rashid Lema to go and fire some bullets because he needed the empty cartridges. Hls two colleagues were armed with SMG (Sub machine Gun) each and went to Bunju. CPL Saad fired those six bullets whereas D/C Rashid Lema fired three bullets. Since on return CPL Saad and D/C Rashid Lema could not get the 2nd respondent, the two handed over the nine spent cartridges for onward transmission to the 2nd respondent. The 4th respondent said he handed over the spent cartridges to the 2nd respondent. He however did not know why the 2nd respondent needed the spent cartridges.

Be that as it may, that was the defence case. Mr. Vitalis filed a written submission in support of the grounds of appeal raised. He highlighted what is contained in the written submission which is to this effect.

GROUND NO. 1

In ground number 1, the Appellant is complaining that the trial judge misconceived the principle of aiding, abetting and common intention; as a result he

incorrectly applied them against the 1st, 2nd, 3rd and 8th respondents.

Honourable Justices of Appeal.

The 2nd, 3rd, and 8th respondents aided and abetted the killings of the deceased in two ways; (a) by taking part in taking the deceased to Pande Forest where the victims were mercilessly executed. The act of taking the deceased to Pande Forest aided or enabled the killings of the deceased without fear of being detected. The respondents had power and duty to take the deceased to the nearest police station but they did not do so.

Doing an act or omission to do an act for the purpose of enabling or aiding the commission of an offence makes one a party to the offence (see Section 22 (1) (b) of the Penal Code).

(b) By failing to prevent the execution of the deceased while they had the statutory duty and power to protect the lives of the victims. Passivity or omission to prevent the commission of an offence makes one party to the offence if; (i) the omission or failure to prevent the offence was intended to enable or aid its commission (see Section 22(1) (b) of the Penal Code; (ii) the accused was present at the scene when the offence was committed and his presence was voluntary; (iii) the law

or circumstances of the crime imposed a duty on the accused to intervene or at least to express his dissent or dissociate himself from what was being done or was about to be done; (iv) the accused had the power to prevent the commission of the offence and (v) the passivity or acquiescence was such that it could reasonably be interpreted by the perpetrator as an approval or encouragement to commit an offence.

The three respondents being police officers had the duty and power to prevent the killings of the four deceased. According to Exh. P2 and P4, the three respondents were armed with guns on the date of incident. They had power to protect the deceased. Seven bullets were fired to kill the deceased (see Exh. P3). Therefore the respondents had the opportunity of hearing the gun shots and could intervene to save some of the victims. In the circumstances of this case the perpetrator (s) could only interpret the respondents' acquiescence as approval to kill the deceased.

There was enough circumstantial evidence from which an inference of aiding and abetting could be inferred that the three respondents were parties to the murders of the deceased in terms of section 22(1) (b) and (c) of the Penal Code, Cap 16.

(ii) Common Intention

Honourable Justice of Appeal,

Since the trial judge was satisfied with the evidence that the 2nd, 3rd and 8th respondents took part in arresting the deceased, taking the deceased to Pande Forest, and were present during the execution and witnessed the killings, the conviction against them ought to have been automatic.

Common intention is usually inferred from circumstantial evidence. Common intention may give rise to criminal liability in two distinct situations (i) where the parties have common unlawful purpose to commit a particular crime which purpose is carried into effect or; (ii) where one of the parties in carrying out their common purpose commits another crime and that other crime was a probable consequence of the prosecution of the unlawful purpose.

Instead of conveying the deceased to a nearest police station, the respondents took them to Pande Forest. At no time they dissociated themselves from the perpetrators. They kept silent after the execution. They had power to save the victims but none of them attempted to do so. They took back the dead bodies to the City. This was enough evidence from which the

inference of common intention could have been drawn against the 2nd, 3rd and 8th respondents, that they shared the same unlawful purpose to kill the deceased. The common unlawful purpose to kill the deceased might have been developed after arresting the victims who were suspected to be robbers. It is not necessary that there was a pre plan to kill them before the arrest. Common intention to kill the suspects (deceased) could have been developed after arresting the deceased. This was a good case of common intention.

(2) The effect of the absence of the actual offender (s).

Honourable Justices of Appeal

Sections 22(1) (b) (c) and (d) 23 puts perpetrators of the crime and those who aid, abet, counsel or procure perpetrators to commit the offence or share the common unlawful purpose to commit an offence on the same legal footing. For the purpose of determining criminal liability all are equally liable. There is no distinction between their degree or level of participation.

Liability for the offence under Sections 22(1), (b), (c) and (d) and 23 of the Penal Code is not dependent on the conviction of the actual perpetrator (s). Anybody covered under those provisions is a principal offender irrespective of this role or level of participation.

Therefore a conviction of one principal offender cannot be subject to the conviction of another. This is because it is the evidence (facts) that determine the liability and not the conviction of the actual perpetrator. What has to be proved is that an offence was committed and the accused aided or abetted or procured or counseled the commission of that offence or that he shared the same unlawful mission with the perpetrator though he did not actually commit the offence. Once that is proved the accused may be convicted without necessarily convicting the actual offender.

In this case conviction of the three respondents could not have been vitiated by the absence of the actual perpetrator(s) in court. If the Parliament intended to subject the liability of the offenders covered by Sections 22(1) (b), (c) and (d) and 23 to the conviction of the actual perpetrator (s), it would have said so by using terms like "Subject to section 22(1) (a)". Sections 22 and 23 are plain and require no any scope of interpretation.

GROUND NO. 2

Honourable Justice of Appeal

In his judgment, the Trial Judge found the Exh. P15, P16 and P22 are confessions but he refrained himself from

using them against other respondents other than their makers for two reasons: (i) that they are exculpatory; (ii) that Exh. P15 and P22 are worthless because their maker, D/C Lema died before he gave evidence so his death reduced the probative value of the said confessions from substantive to merely corroborative evidence; (iii) Exh. P15, 16 and P22 are implied confessions which are types of confession which cannot be used against a co-accused; (iv) Exh. P15. P16 and P22 are confessions of a co-accused which require corroboration (see page 1296, 1297, 1400, 1461 – 1462, 1365 – 13663, 1472, 1486 – 1487).

We agree with the trial judge that Section 3(1) (a), (b), (c) and (d) of the Evidence Act creates two types of confessions namely direct (express) confession and indirect (implied) confession (see page 1294-1295 of the record of appeal).

For a statement or a conduct to constitute a confession, the maker must inculpate himself. If a statement cannot justify a conviction against its maker, it is not a confession. There is no exculpatory confession in law. A statement cannot be a confession but exculpatory. Since Exh. P16 and P22 inculpates their makers, they are confessions and can be used against the co-accused

mentioned therein namely 1st, 2nd and 3rd respondents. In the said exhibits, the makers made statements that make them parties to the offence in terms of sections 22(1) (b) and (c) and 23 of the Penal Code, Cap 16. A statement that makes one a party to the offence by virtue of sections 22(1) (b) (c) and or (d) and 23 of the Penal Code is an implied confession.

There is no law that excludes the application of implied or indirect confession against a co-accused. Once the accused directly or indirectly implicates himself, his statement becomes a confession against himself and it can be used against a co-accused.

It is true that Exh. P16 and P22 are confessions of the co-accused that require corroboration for them to be used to convict other accused. But they can corroborate circumstantial or other pieces of evidence like lies of 2nd respondent; recent possession, by the third respondent, of the deceased bag which contained money; being the last person to be with the deceased and failure to give a reasonable explanation as to how the 2nd and 3rd respondents parted with the deceased after the arrest and the evidence of the 8th respondent who testified as DW8.

In Tanzania confession of a co-accused is mere corroborative evidence whether the maker dies or survives until the case is concluded (see S. 33(2) of the Evidence Act. There is enough circumstantial evidence from which the trial judge drew a conclusion that the 2nd and 3rd respondents went to Pande Forest and were present when the victims were killed and witnessed the execution. Such circumstantial evidence is corroborated by Exh. P16 and P22 against the 2nd and 3rd respondents.

The trial judge found the 2nd respondent to be a liar (see page 1443-1444 of the record of appeal). It is now settled that lies of the accused may corroborate. Conduct of the accused may also offer corroboration Court found that the 2nd respondent cheated Mgawe Task Force and Kipenka Commission (see page 1448 of the record). This conduct was a corroborative evidence.

GROUND NO. 3 & 4

Honourable Justice of Appeal

At page 1456, 1500 – 1504 of the record, the trial judge was of the view that the 1st respondent who was charged with murder could not be convicted of accessory after the fact to murder contrary to sections 213 and 287 of the Penal Code for two reasons: (i) the actual perpetrators were not charged and convicted of

murder. (ii) accessory after the fact to murder is minor but not cognate to murder therefore it cannot be substituted for murder unless the 1st respondent was charged with it.

(i) The Actual Perpetrator not charged or convicted.

Accessory after the fact to murder is an independent offence. It is not a degree or level of participation in committing murder. The conviction of accessory after the fact to murder cannot be dependent on the conviction or presence of the murderer in court. The guilt or innocence of the accused is determined by the evidence; not by the absence, presence or conviction of the perpetrator. The classification of accessories was abolished to avoid unjustified acquittal on the ground that the principal or perpetrator is not convicted. The offence of accessory after the fact to murder was retained in the Penal Code as an independent offence; not as a degree of participation in committing murder.

(ii) Accessory after the fact to murder is minor but not cognate to murder.

Honourable Justices of Appeal,

A person may be convicted of minor offence under the authority of section 300 (2) of the Criminal Procedure

Act even if it is not cognate to the offence charged. It is subsection (1) of section 300 which requires the substitute offence to be both minor and cognate; not subsection (2).

The Parliament could not enact two subsections which deal with the same thing. The two subsections are different. One deals with cognate and minor offence whereas the other deals with minor but not cognate offence. This Court has several times substituted convictions of minor offences which are not cognate to the offences charged.

Charge of murder cannot contain a count of accessory after the fact to murder. Therefore the Republic could not charge the 1st respondent with the offence of accessory after the fact to murder contrary to section to sections 213 and 387 of the Penal Code as an alternative count or substantive count.

Exh. P16 and P22 the evidence of DW8, DW9 plus his conduct summarized by the trial judge at page 222 to 223 of the record is enough to find the 1st respondent guilty of accessory after the fact to murder.

Responding, Mr. Rweyongeza for the 1st respondent in the first place submitted thatthe appeal is devoid of merit in respect of the 1st respondent. As to whether the 1st respondent could have been convicted with accessory after the fact to murder, Mr. Rweyongeza said the ingredients of the offence as provided under S. 387(1) of the Penal Code, Cap 16 RE.2002 were far from being met. He went to say to this effect that in order for an offence of accessory after the fact to murder to stick, it must be established one; the accused intended to assist or receive a person who to his knowledge is guilty of an offence. Two, he did so in order to enable him escape. In our case, he said, no such evidence was tendered. In absence of such evidence the 1st respondent cannot be convicted with accessory after the fact to murder.

As to his presence at Urafiki Police Station, Mr. Rweyongeza said, the 1st respondent responded to the call made by the OCD- Urafiki Police Station. He gave a satisfactory explanation. So, he went on, no inference of guilt could be drawn from therein. He however admitted that the 1st respondent was negligent in not going to the scene of crime of armed robbery at Sam Nujoma Road. That alone is not enough to ground

conviction either to the offence of murder or accessory after the fact to murder.

On the other hand Mr. Magafu also started by saying the appeal against the 2nd and 3rd respondents has no merit. He started with the 3rd respondent. To him the evidence tending to implicate the 3rd respondent is that of him having abetted or aided. But according to the evidence available, the 3rd respondent did not go to Pande Forest. This is in accordance with the oral evidence of DW8 (the 4th respondent) along with Exh. P16 and Exh. it P22. Mr. Magafu picked an issue in regard to the tendering of Exh. P22 which he said was admitted in absence of the maker, the late Lema. We wish to pose here and point out that the said Exh. P22 was admitted on 23.9.2008 when the late Lema was alive and was present in court. The late Lema according to the record of appeal, expired on 13.4.2009 (See Pg 908). So it is clear that what has been said by Mr. Magafu is not correct.

Back to our case, Mr. Magafu submitted that the learned trial judge was wrong when he found that the 3rd respondent was at Pande Forest. He admitted the 3rd respondent to have been at Sinza. In any case he said there is no evidence to corroborate Exh. P16.

Turning to the 2nd respondent, Mr. Magafu did not deny the 2nd respondent to have been at the Pande Forest. He however said mere presence does not amount to abetting or aiding. He went on to say without the actual perpetrator who had a gun, it cannot be said the 2nd respondent abetted or aided. The acquittal of the 2nd respondent was proper, he concluded.

Mr. Msafiri for the 4th respondent also started by saying that the appeal against his client is without merit. He submitted that the appeal is based on the confusion on the applicability of SS.22 and 23 of the Penal Code. He went on to say that as no offence had been previously planned it was not possible to enter conviction basing on common intention as provided under S. 23 of the Penal Code. As to aiding and abetting, he said it is true the 4th respondent was present at Pande Forest. But that by itself is not enough for the Court to ground a conviction. This is because the 4th respondent was not the driver; he did not know where they were going; he was not in the car which carried the deceased persons. There is no evidence of aiding or abetting, he concluded.

In a brief rejoinder Mr. Vitalis reiterated his position.

Before we go into the merits or otherwise of the appeal, we wish to point out at this juncture that this being a first appeal, this Court is entitled to re-evaluate and re-appraise the evidence, to determine whether or not the trial High Court had erred in its approach to evaluating the evidence or had acted on a wrong principle and to come to its own conclusion (**See Jaffari Mfaume Kawawa VR** (1981) TLR 149; **Salum Mhando V R** [1993] TLR 170). Further, the burden of proof in criminal cases, to prove the case beyond doubt, always remains with the prosecution.

In this case it is not in dispute, as correctly found out by the High Court that Ephraim Sabinus Chigumbi, Sabinus Chigumbi, Mathias Lunkombe and Juma Ndugu are dead. Further, the deceased persons were killed by gun shots. According to Dr. Mbonde (PW19) who conducted postmortem examination and prepared reports he said all had bullets wound on the back of their necks. He made the following observation:-

(i). Ephraim Chigumbi (Exh P3A) – 3 bruises on the face and on the right hand caused by a blunt object.

- There was a bullet entry wound from the back neck to the font a **fortirior.**

- The bullet came out through the mouth causing a wound of about 8 cms.

(ii). Sabinus Chigumbi (ExhP3 B)

- He had 2 bullet wounds and bruises

- The gun bullet wounds one penetrated the neck at the back and came out at the lower mandible (jaw) leaving a cavity of 6 cm & 4 cm

- Another bullet wound was, on the left hand entering from behind and emerged in front heaving a cavity of 6 cm x 6cm. The bullet also fractured the skull and nerves.

(iii). Juma Ndungu (Exh. P3C)

- He had 1 injury

- It was a bullet injury penetrating from the back of the neck 1cm wide and come out in

front of the face leaving a cavity of 6cm & 6 cm.

- It fractured the lower part of the skull and the vertebra and the spiral cord.

(iV). Mathias Lunkombe (Exh. P3D)

- The body had 3 bullet injuries one penetrated from the right side of the lower jaw (mandible).
- The other two bullets were shot at the back of the neck.
- Both mandibles (Jaws) were broken and the brains affected.
- His nerves were also damaged.

In view of the nature of wounds inflicted, like the trial High Court we are satisfied that the four deceased persons were brutally killed. Furthermore, we also agree with the finding of the trial High Court that whoever had done it, he did it with intention to cause their deaths.

But the trial High Court as earlier said absolved all the respondents from criminal responsibility, hence this appeal. So the question is whether

or not the finding of the trial court was correct. We prefer to start with the second ground. Exh. P16 is a Cautioned Statement of D/Cpl Rajabu (the 4th respondent; whereas Exh. P15 cautioned statement and Exh. P22 Extra Judicial Statement are of D/C Lema (the 11th accused person who died before the trial was concluded).

As regards to these statements the learned trial judge said.

> *"... I have formed the opinion that the statements Exh. P 15, P16, P22, taken together with other proved facts, are confessions within S.3(1) (a) (b) and (d) of the Evidence Act* ***but so long as they are exculpatory,*** *they cannot be taken into consideration against the other accuseds under S. 33(1) of the Evidence Act. Besides Exh. P15 and P22, is now worthless, because after his (11th accused) death, the statements' value were reduced from substantive to corroborative evidence only and since they are exculpatory in nature, they cannot be considered against other accuseds. I must also note that unlike ExhP22 which taken together with other incriminating facts such as the accuseds role in helping in the loading of the corpses, and the two empty cartridges picked from the scene of crime is a*

confession to murder Exh. P16 is only confession to the other minor offences and not to murder"

It would appear from above that the learned trial judge contradicted himself as to what constitutes a confession. What is a confession? According to **The Oxford Advanced Learner's Dictionary,** 4th Edition the word has been defined thus:-

"say or admit, often formally that one has done wrong, committed a crime".

The **Black Law Dictionary,** Eight Edition defines confession thus:-

"Is acknowledgment in express words by the accused in a criminal case of the truth of the main fact charged or of some essential part of it".

So, in this context a confession is a voluntary admission of guilt to an offence. In **Anyangu and Others V R** (1968) EA. 239 the then Court of Appeal for East Africa Observed:-

"A statement is not a confession unless it is sufficient by itself to justify the conviction of the person making it of the offence with which he is tried".

In our case, the makers of the statements did not at all admit to have committed the offences. Rather, they had exculpated themselves from the offences they were charged with. It is no wonder that even Omary Abdallah (PW35) a Justice of Peace who took the Extra Judicial Statement of D/C Lema when he was cross-examined by Mr. Magafu whether D/C Lema had confessed, he said:-

> *"Nowhere is there an admission to the offence of which he was charged. I expected him to admit that much".*

We are not prepared to go along with the learned trial judge who opined that the statements are confessions falling under S. 3(1) (d) of the Evidence Act in that they contained affirmative declaration in which incriminating facts are admitted. The statements do not show the makers to have incriminated themselves. We are of the settled view that the statement fall short of confession, as such S. 33 (1) of the Evidence Act cannot come into play. The section reads:-

> *"33(1) When two or more persons are being tried jointly for the same offence or for different offences arising out of the same transaction, and a confession of the offence*

or offences charged made by one of those persons ***affecting himself*** *and some other of those persons is proved, the court* ***may take that confession*** *into consideration against that other person". [Emphasis supplied]*

The statement of D/C Lema and the 4th respondent should not have been acted upon in incriminating the other accused persons. With due respect to Mr. Vitalis the mere fact that the 4th respondent along with D/C Lema made statements, that alone does not necessarily make them parties to the offence committed in the absence of any incriminating evidence. We wish to reiterate the position once again that in order to establish whether the statement is a confession or otherwise, the test always is that it must in the first place indicate to have incriminated the maker with the offence charged as well. In the absence of an incriminating factor, it falls short of a confession; it is something else.

Next we are going to discuss grounds 3 and 4 together. However, before we go to these grounds, we wish to point out that apart from the evidence of the statements discussed supra, the prosecution also relied on

another set of evidence, namely, oral evidence of the 4th respondent and some tit bits of circumstantial evidence. The 4th respondent gave his defence on oath. He explained in details the circumstances under which the four deceased persons were executed. And he mentioned Cpl Saad who is still at large as the one who shot the deceased to death in the presence of some of his colleagues police officers. We shall give details of the surrounding circumstances of the death of the four deceased persons when we will discuss ground number one. Suffice to say that the 4th respondent mentioned his colleagues police officers to be involved in the saga. The learned trial judge was satisfied that the 4th respondent was telling nothing but the truth and that his evidence is that of an accomplice. We too, having carefully read the record, are at one with the finding of the trial judge that the 4th respondent on the whole was telling the truth. But we wish to clarify as to whether the evidence of a co-accused tendered in a defence can be acted upon to convict another accused person. We pose that question because the evidence of a person who is alleged to have been associated with an accused person in the commission of any offence, otherwise known as accomplice, and who is not charged, normally is tendered in the prosecution side. This is because it is the prosecution

which has the burden to prove its case beyond any doubt. The question now is what is the status of evidence of a co-accused tendered in defence implicating other accused person. In **Bushiri Amiri VR** [1992] TLR 65 the High Court of Tanzania was faced with a similar problem.

In that case Mroso, J (as he then was) cited two previous decisions of the High Court. In **Omari J. Kibanike & Others VR,** Criminal Appeal No. 224 (1975 DSM Registry), the High Court through Biron, J. said:-

> *"Where at a trial an accused opts to give evidence on oath and in such evidence he incriminates a fellow accused, such evidence is admissible against the other, though it cannot be treated otherwise than as evidence of an accomplice and therefore requiring corroboration in practice though not in law vide S. 142 of the Evidence Act, 1967."*

In **Ibrahim Daniel Shayo V R** Criminal Appeal No. 10 of 1990 (DSM registry) Mapigano, J observed:-

> *"Where an accused person gives evidence on oath in a joint trial implicating another accused (even if not a*

confession) whether or not he implicates himself, it may be used against that other accused, because that evidence is on the same footing as that of any other witness, though as a matter of prudence it must be approached with caution ."

We fully subscribed and find as correct the observation made by the High Court that the evidence of a co-accused given on oath and on the defence implicating other accused should be treated as evidence of an accomplice.Such evidence, owing to its inherent danger, requires corroboration as a matter of a well established practice but not in law as provided under S. 142 of the Evidence Act, Cap. 6 RE 2002 which reads.

142. An accomplice shall be a competent witness against an accused person; and conviction isnot illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

In this case, the learned trial High Court judge was satisfied that the 4th respondent gave a true account as to what had taken place at Pande forest which resulted to the death of the four deceased persons. As said

earlier on the learned trial Judge did not find any evidence to connect the accused persons with either murder or accessory after the fact to murder. The prosecution side invited the trial judge to find them guilty of accessory after the fact to murder maintaining that the offence of accessory after the fact to murder is minor to murder. The learned judge said, we reproduce:-

> *"...although being an accessory after the fact is minor, it is not cognate to the offence of murder and so cannot be substituted as an alternative verdict unless he was charged with that offence."*

In any case, the trial judge did not find any evidence on record, and correctly so. This is because for an offence of accessory after the fact to any offence to stick under S. 387 (1) of the Penal Code (the Code) as rightly pointed out by Mr. Rweyongeza, it must be shown that the accused person to have assisted or received a person who is to his knowledge guilty of an offence with a view to enabling him escapepunishment. The section reads:-

> *387(1) A person who receives or assists another who is to his knowledge guilty of an offence in order enable him escape punishment, an accessory after the fact of the offence.*

In this case there is no evidence to that effect. Mr. Vitalis was maintaining that the finding of the trial judge was wrong. He submitted that it is subsection (1) of section 300 of the CPAwhich requires the substituted offence to be both minor and cognate; not subsection (2). With due respect to Mr. Vitalis, we are unable to agree with him. In actual fact he mixed up the two subsections.

S. 300 of the CPA provides as follows:

> *300 – (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.*
>
> *(2)When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.*

We start with the subsection (2) reproduced supra. This subsection has similar wording with the S. 181(2) of the then Criminal Procedure Code, Cap. 20 (the CPC).

In **Miswahili Mulugala V R,** (1977) LRT No. 25 the appellant was dissatisfied with the finding and sentence of the trial District Court which convicted him with robbery. He appealed to the High Court of Tanzania challenging the same. The Judge set aside the conviction of robbery because the evidence was wanting but substituted thereof with common assault basing on subsection 2 of S. 181 of the CPC. In his judgments the learned judge said, we quote:-

> *" Although the subsection is seemingly general I think it has to be strictly construed. The test in my view should be whether the minor offence is accommodated in or cognate to the major offence before conviction can be entered for such minor offence. The word "cognate" is defined in the 1966 Impression of Chambers' Twentieth Century Dictionary to mean "of the same family, kind or ature: related or allied." And according to P.G. Osborn's Concise Law Dictionary, 1962 Impression, in Roman law the word "cognate" meant "persons connected with each other*

by blood." On this understanding, then, if a person is charged with but acquitted of attempted murder and evidence reveals that he used an unlicensed firearm, he cannot be convicted of unlawful possession of a firearm under the Arms and Ammunition Ordinance. The two offences are not cognate as they are products of different ancestors."

We fully subscribe to that finding that in order for the two offences to be cognate in terms of S. 300 (2) of the CPA, the minor offence must come from the same root with the major offence.

In our case, we have seen the two i.e. murder and accessory after the fact to murder are different; they are not cognate. As such S.300 (2) of the CPA cannot be engaged.

As regards S.300(1) of the CPA, the wording is quite different from that of S. 300 (2) of the CPA. It cannot therefore be construed to mean one and the same thing as contended by Mr. Rweyongeza. We entirely agree with Mr. Vitalis that the two subsections cover two different situations. However, despite the wording of subsection 1 of section 300 of the CPA which allows substitution of a minor offence which is not cognate

offence to the original charge, that should not be done at the detriment of the accused person. The accused person must always be afforded a fair trial in enabling him understand the nature of the intended substituted charge and must be shown to have defended himself on that "new Charge".

In more or similar situation the High Court of Tanganyika in **Elmi bin Yusufu V Rex, T.L.R**(R) 269 had the occasion to interpret S. 181(1) of the CPC which has identical wording with S. 300 (1) of the CPA. It said:-

> " *Though a magistrate [or Judge] has power under this section to convict the accused of a different offence from what he was originally accused of, still this must be done only in cases where the accused is not in any way prejudiced by the conviction on the new charge. The accused person is entitled to know with certainty and accuracy the exact nature of the charge brought against him, and unless he has this knowledge, he must be seriously prejudiced in his defence."*

We entirely agree and subscribe to that interpretation. We have already shown that even if that course is correct there is no evidence on

record to ground a conviction to the alternative count of accessory after the fact to murder as suggested by Mr. Vitalis. We hold that the two grounds namely number 3 and 4 have no merits.

We now move to the 1st ground. When acquitting the 2nd, 3rd and 4th respondents, the learned trial judge said, we reproduce;

> *"At the beginning of this judgment I started by declaring that the victims were brutally killed. This has remained so to date. The only question was, whether it was these accuseds who actually did so? After going through the evidence on record, I have come to the conclusion that it is not so. There is no direct or circumstantial evidence to show that any of them killed the victims. The nearest evidence was that some of them i.e. the 2nd, 3rd and the 12th accused were present at the scene of the killings and witnessed them, but they did not kill in person. The closest offences the 2nd and 3rd and 12th accuseds could have been convicted of, is for their role as aiders and abettors; but in the absence in court, of the actual perpetrators the case against them is not made up but remains that of strong suspicion, which is not sufficient to found a conviction. In the absence*

of the actual perpetrators it is difficult to establish common intention among the accused persons."

Mr. Vitalis attacked the finding of the learned trial Judge to be wrong.

Having carefully read the record of appeal, the learned trial judge appeared to have misinterpreted ss.22 and 23 of the Code as correctly pointed out by Mr. Msafiri. S.22 enumerates persons who are principal offenders to an offence.The section does not say that the charge against an abettor or aider will not hold unless and until the actual perpetrator should first be charged. This is because those listed in S. 22 are principal offenders it matters not whether they are abettors or aiders or actual perpetrators.They will not be charged specifically as aidersor abettors. Their role in the commission of crime will come at the time of tendering evidence. This is what section 22 is all about. The section reads:-

"22(1) 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.

(2)A conviction of counseling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

So, the trial judge was not correct when he said a person cannot be charged and convicted for his participation in a crime in any of the classes

in paragraphs (b) (c) and (d) of section 22(1), without establishing that a principal offender in a class (a) has committed that offence. All persons enumerated in that section are principal offenders as such they can be jointly or separatelycharged and convicted.

On the other hand S. 23 of the code creates another scenario altogether vis – a – vis S. 22 of the code in that the parties to the crime must have first intended to commit an offence. But in the execution of that plan they committed another offence which was in the ordinary cause of events was a probable result, then in such situation the parties are taken to have a common intention. For example, A and B had decided to steal by force using a gun. In the process of stealing, A who had a gun killed C. Interms of S. 23 of the Code, B is deemed to have common intention of killing C. The two sections therefore are quite distinct. We agree with Mr. Vitalis that the learned trial judge did not apply the principles of the parties to the offence properly. The question now is whether there is evidence to connect the respondents with the charge.

The learned trial Judge was satisfied, as indicated earlier on, that the four deceased persons were killed by gun shots at Pande Forest. Were the

respondents, present at Pande forest? The learned trial Judge said, save for the 1st respondent, the 2nd, 3rd and 4th respondent were at Pande forest. The learned trial Judge found the 4th respondent credible and reliable. But we have carefully gone through the evidence on record, the 4th respondent did not state to have seen the 3rd respondent at Pande Forest, though initially he was around at Sam Nujoma. This is because the motor vehicle which carried the 2nd and 4th respondent (pajero) was the last to leave from Sam Nujoma after the other motor vehicles had already left towards undisclosed destination. The 4threspondent did not know where they had gone. He even did not know where they were going. He being ajunior police officer to the 2nd respondent he was obeying the orders. And on the way they fueled and passed through Mbezi Loius Police Post where they picked one uniformed policeman.By then darkness had begun to set in. Further at Mbezi Loius Police Post, the 4th respondent did not see other cars. When he was cross examined by Mr. Mwaipopo, learned Senior State Attorney as to whom he had seen at Pande Forest, the 4th respondent said:-

" Apart from SP Bageni, myself, Rashid and Saad, I ***never saw ASP Makelle*** *in the forest." [Emphasis ours]*

In his defence the 3rd respondent did not say anything about his presence at Pande forest. In those circumstances, we think the benefit of doubt should have been resolved in favour of the 3rdrespondent that he was not one of the police officers who went to Pande forest.

Next is the 2nd respondent. We agree with the finding of the trial learned judge that he was at the scene of crime at Pande Forest. But the trial learned Judge cleared him from criminal responsibility. He said, we reproduce:-

"In this case, I have found that the 2nd accused (the 2nd respondent) was in fact present at the scene of crime, and could but did not prevent the commission of the crime, but there is no evidence that he procured, commanded, aided or abetted, any of the other accused persons into committing the murders. According to the 12th accused (4th respondent) the killings were carried out by Cpl. Saad at the instance of the 2nd accused (2nd respondent). This is certainly hearsay and has no value. The fact remain that Cpl

Saad is not among the accused persons. The question of aiding, abetting, procuring or counseling cannot be considered in the absence of the alleged killers"

But the big question is:- On whose order the four deceased were sent to Pande Forest? And what was the purpose of sending them there, a place where there were no houses around? It is the evidence of the 4th respondent that at Sam Nujoma it was the 2nd respondent who ordered the four deceased to be taken in another motor vehicle make defender. It was that motor vehicle which carried the four deceased to Pande forest. According to the 4th respondent at Pande forest the 2nd respondent, Cpl Saad and D/C Rashid disembarked from the motor vehicle make Pajero in which they were travelling and which parked about 15-20 meters behind the defender whereas the 4th respondent, the driver one Frank remained in the motor vehicle. The 2nd respondent gave the 4th respondent a radio call. So, he was listening to it. While listening he heard gun shots. He did not know from which guns they were fired. He decided to come down and went closer. He saw Cpl Saad shooting one of the last four deceased persons while the other had already been shot dead. The dead bodies were then loaded in a motor vehicle.

The 2nd respondent ordered Sgt James that the dead bodies be sent to Muhimbili Hospital. The 2nd respondent is a Senior Police officer in the Police force. He was a superintendent of Police and officer commanding of Criminal Investigation in Kinondoni District. He was the most senior police officer who went to Pande Forest. In actual fact going by the totality of evidence on record he was the one who issued orders to the junior police officers. We are satisfied therefore that he was the one who ordered the four deceased persons to be taken to Pande forest. And indeed the four deceased persons were sent to Pande Forest, a place where there were no houses around. The sending of the deceased there is not without significance; it was to execute the ill planned mission without any hindrance. We are satisfied that the four deceased persons were killed in the presence and sanction of the 2nd respondent at Pande Forest. But that evidence came from the 4th respondent. If the evidence of the 4th respondent requires corroboration, then the conduct of the 2nd respondent in concealing the truth of the incident affords such corroboration. Corroborative evidence may be circumstantial and may well come from the words or conduct of the accused person (See **Paschal Kitigwa V R** (1994) TLR 65). First, the 2nd respondent lied to his Senior Police officers

including SACP Mkumbi (PW36) and ACP Ubisimbali (PW.27) inter alia; that the four deceased were killed in the exchange of gunshots at the Post Corporation wall Sinza. Indeed those who were close to the said wall, inter alia, Kisa Mohamed (PW.20) a watchman of a garage and Rashid Ally (PW 9) denied to have ever heard the exchange of gun shots nor heard any unusual incident to have occurred. He did not end there, he showed the place where the alleged exchange of gun fire took place. Basing on that information, a sketch plan was drawn by S/Sgt Mwakajinga (Pw33). Last but not least the 2nd respondent purported to show the nine spent cartridges were fired at Post corporation wall Sinza while according to the 4th respondent they were fired at Bunju by Cpl Saad and D/C Rashid and handed over to the 2nd respondent at his direction.

In view of the above, it is clear that the 2nd respondent was the architect so to speak of the whole incident by sending the four deceased persons to Pande Forest with a view to killing them and in actual fact they were eliminated. In terms of S. 22 (1) (b) of the Code aperson who enabled another person to kill another person and that other person is actually killed the person who facilitated the killing is guilty of unlawfully causing death of that person notwithstanding the absence of the actual

perpetrator. We do not buy the story of denial of the 2nd respondent which is intended to save his skin.

As regards the 4th respondent, the only evidence remaining in the record, is that of the 4th respondent himself. The 4th respondent all along did not dispute to have been at Pande Forest. But he protested his innocence that he did not take part in killing the four deceased persons.He said upon arrival at Pande Forest he was given a radio call by the 2nd respondent. He did not disembark from a motor vehicle pajero. But after hearing gun shots he disembarked from the motor vehicle to see what the fuss was all about. He saw one of those four people in the defender being shot by Cpl Saad. The others had already been shot dead and were lying on the ground. He went on to say he could not do anything there and even after the shooting because the 2nd respondent who was his senior was around.He was a mere Detective corporal. According to him it is the responsibility of the 2nd respondent to take action eg. reporting etc. The question is whether the 4th respondent was a party in causing death of the four deceased persons.

We have carefully considered the surrounding circumstances as explained above. We are far from being persuaded that the 4th respondent was a party to the killing. First, the evidence of the 4th respondent was not challenged at all. Second, he did not know the place they were going and the purpose of going there. It is no wonder he happened to have asked the policeman they picked at Mbezi Luis as to the place they were going. This is what he said:-

> *" I asked the Mbezi Luis policeman, as to where we were going. He said we were going to Makabe. I did not know where it was. I asked him whether there were any arrests to be made. He said, he did not know".*

In the circumstances, his mere presence at the scene, without more, is not enough to make him a party to the killings.

In a more or less similar situation in **Jackson Mwakatoka & two others VR (1990) TLR 17** this Court quoted with approval a statement from a decision of the defunct Eastern African Court of Appeal in **RV Komen** that:-

" Mere presence of the accused at a killing, he not having any objection thereto, is not enough to justify his conviction for murder."

(See also **Zuberi Rashid VR** (1957) EA. 455; **Damiano Petro** & **Another V R,** (1980) TLR 260)

The answer to the question posed is in the negative.

Finally the 1st respondent. There is no evidence, direct or circumstantial, on record to connect him with the charge of murder though there is a strong suspicion hovering over his head. The investigation did not timely follow up the mobile phones conversation between the 1st and 2nd respondents. According to SACP Mkumbi (PW 36) when they made a follow up after Rashid Lema (the deceased accused) had revealed the information, a period of six months which VODACOM and CELTEL retained the information, had already elapsed and so the information had been erased. The evidence on the phone conversation was crucial in connecting the 1st respondent with the charge. There is none.

In sum the appeal against 1st, the 3rd and 4th respondents, has no merits. The same is dismissed. We allow the appeal against the 2nd respondent. We set aside the acquittal and substitute thereof with a conviction in respect of all four counts. We sentence him to suffer death by hanging in respect of the 1st count.

Order accordingly.

DATED at **DAR ES SALAAM** this13th day of September, 2016.

B.M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

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

J. R. KAHYOZA
REGISTRAR
COURT OF APPEAL