IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL SESSIONS CASE NO.26 OF 2006

REPUBLIC

VERSUS

ACP. ABDALLAH ZOMBE AND 12 OTHERS

JUDGMENT

MASSATI, JK: (rtd)

(1) EPHRAIM SABINUS CHIGUMBI, (2) SABINUS CHIGUMBI @ JONGO, (3) JUMA NDUGU and (4) MATHIAS LUNKOMBE, (herein after referred to as "the victims") were brutally killed on the 14/1/2006 in Dar es Salaam. Their killings aroused a wave of public outcry, which fell into the attentive ears of the President of the United Republic of Tanzania. He exercised his powers under the Commission of Inquiries Act (Cap 32-RE 2002) and formed a Commission of Inquiry to probe into these killings. The trial in this case follows a recommendation of that Commission.

Initially 13 police officers, namely (1) ACP ABDALLAH ZOMBE, (2) SP CHRISTOPHER BAGENI, (3) ASP AHMED MAKELLE, (4) F 5923 PC NOEL LEONARD,(5) WP 4593 PC JANE ANDREW, (6) D 6440 CPL

NYANGELERA MORIS (7) D 1406 CPL EMMANUEL MABULA, (8) F.6712, CPL FELIX SANDY'S CEDRICK, (9)D 8289 PC MICHAEL SHONZA, (10) D 23000 D/CPL ABENETH SARO, (11)D 9321 DC RASHID MOHAMED LEMA, (12) D 4656 D/CPL RAJABU HAMIS BAKARI and (13) D1367 D/CPL FESTUS PHILIPO GWABISABI, were jointly charged with 4 counts of murder of the above mentioned persons, contrary to section 196 of the Penal Code.

It was alleged in the different counts of murder for each of the four victims, that the accuseds jointly and together, on14/1/06, at Pande Forest, Kinondoni District, Dar es Salaam Region, unlawfully killed the victims with malice aforethought. All the accuseds pleaded not guilty to the charges, but at the preliminary hearing, it was not disputed that all the victims met unnatural deaths.

At the close of the prosecution case, the court found that three of the accuseds, namely the 4th accused, PC NOEL LEONARD, the 6th accused CPL NYANGELERA MORIS, and the 8th accused CPL FELIX SANDY'S CEDRIC, had no case to answer and were accordingly acquitted. In the course of hearing the defence, however, the 11th accused, DC RASHID MOHAMED LEMA expired. His case was marked abated. So, only nine

accused persons remained up to the end of the trial. In this judgment I will continue to refer to the accuseds by their number labels.

The trial commenced on 26th May, 2008 with the aid of three assessors. Unfortunately one of the assessors fell sick and could not proceed with the trial. It had to continue with the remaining two assessors. The trial, amidst several adjournments, was completed on 26/6/2009, when the assessors gave their opinions.

Let me first review the predominant legal principles that will guide me in this judgment and to which I have also directed the Lady and Gentlemen Assessors' attention. These cover aspects in criminal law and the law of evidence.

In criminal law I had to address my mind to two principles which I think are of relevance to the case. The first one is on criminal participation or to use the language of the statute, "principal offenders". The second principle is on common intention.

On the first principle, section 22 of the Penal Code (Cap 16 – RE 2002) governs the situation. The section provides:-

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 or makes the omission which constitutes the offence.

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

(c) every person who **aids** and **abets** another person in committing an 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 counselling or procuring its commission (underlining supplied)

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

(3) A person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind and is liable to the same punishment as if he had himself done the act or the omission."

In the old context, the offenders in paragraph (a) were called principal offenders in the first decree. "Offenders falling under paragraphs (b) (c) and (d), are called" "principals in the second degree" or "accessories before the fact". But as observed in **SITA d/o ZATTO AND OTHERS v. R.** (1957) EA. 308 such category is no more recognised as all such accessories are now indictable under section 22 as principal offenders.

The section has received consideration in many decisions in East Africa. Applying the statements in the English case of **R v CONEY AND OTHERS** (1882) 8 QBD534, the scope and application of that provision has been considered in the often quoted cases of **ZUBERI RASHID V R** 1957) EA 455 **R v. MUNDULI s/o CHUI AND OTHERS** ("the lion man case") (1948) EACA . 47 **SITA d/o ZATTO AND TWO OTHERS v R** (1957) EA

308, and recently by the Court of Appeal of Tanzania in **DAMIANO PETRO AND JOACHIM ABDALLAH v R.** (1980) TLR. 260, and **MAKOKOI CHANDEMA v HASSAN MTETE** (Criminal Appeal No.143 of 1999 (Mbeya) unreported). From these decisions, the following principles emerge.

(a) To constitute an aider and abettor some active steps must be taken by word or action with the intent to instigate the principal offender or principal offenders to commit an offence

(b) Encouragement does not necessarily amount to aiding and abetting, it may be intentional or unintentional

(c) Mere presence at the scene of crime does not make a person a principal in the second degree merely because he does not prevent the commission of the offence or apprehend the offender.

(d) The question whether or not an accused's conduct amounts to countenancing is a question of fact and would depend on the circumstances of each case.

(e) In cases or circumstances in which the law recognises the duty to actively dissociate oneself from what is about to be done by the intending principal(s), passivity could amount to abetment if it is made to lead the actual committers believe that the motive for non interference was a desire to effect encouragement.

(f) If a person is voluntarily and purposely present and witnesses the commission of a crime, and has the duty and the power to prevent its commission, but offers no opposition, or does not prevent it, it could be inferred that he wilfully encouraged or aided or abetted.

(g) An accused may be convicted of counselling and procuring the commission of a crime even if he is not present at the scene of the crime.

While still an accessories, there is another class of accessories, although that is classified under different provisions. Section 387 of the Penal Code, defines who is an accessory after the fact as:-

> "387(1) a person who receives or assists another who is to his knowledge, guilty of an offence, in order to enable him escape punishment".

This provision applies to all offences

Section 213 provides:

> "213 Any person who becomes an accessory after the fact to murder is guilty of an offence and liable to imprisonment for seven years."

This latter provision specifically applies to the offence of murder.

This provision has also been considered in judicial circles, including **R v YONASANI EGALU AND OTHERS** (942) 9 EACA 65. **PASKAZIA D/O KABAIKYE v. REGINAM** (1954) 21 EACA 359, **R v JAMBI S/O ANASI AND ANOTHER** (1938) 5 EACA , 125, **R v. SUMBUSO s/o RUHONDA AND OTHERS v R** (1948) 15 EACA 99 **VELEZI KASHISHIZHA s/o MADAGARE V. R** (1954), 21 EACA 389, **R v NURU s/o WAMAI AND OTHERS** (1955) 22 EACA 417 and **DAMIANO PETRO AND JACKSON ABRAHAM v R** (1980) TLR 260, From those decisions the following principles can be formulated:

(a) To constitute a person an accessory after the fact, the felony must be complete at the time the assistance is given.

(b) The offence of an accessory after the fact to murder is minor but not cognate with murder, and so cannot be substituted with it.

The next question with regard to accessories is whether an accessory may be convicted without first establishing the principal's guilt. Going through the sea of judicial authorities, it has not been an easy sail. In an old English case of **R v HUGHES** (1860) Bell cc 242, the accused was charged along with one Hall of being an accessory before the fact to the offence of larceny which was actually committed by Hall, who was acquitted but testified against Hughes for the offence. Erle, CJ held that since the offence of being accessory had been made a substantive offence, it was not necessary to have a principal convicted as a condition precedent for the conviction of an accessory. In **SURUJPAUL called DICK v REGINA** (1958) 3 All ER 285, the Privy Council considered and disapproved that decision, and another one of **R v ROWLEY** (1948) 1 All E. 570. The Privy Council advised that:-

> "The conviction of the appellant of being an accessory before the fact to murder must be quashed because it was inconsistent with the acquittals of all accused of murder "

Lord Tucker, made the following pertinent observation in the opinion:-

> "... it was essential to the conviction of any one of the accused as accessory before the fact, for the Crown to prove that he had counselled procured or **commanded one or more of the other accused persons to murder Claude Allen, and that such person or persons have in fact murdered the said Allen**" (emphasis supplied)

But perhaps the position of the law, is put more succinctly in **RUSSEL ON CRIME** 11th ed. Vol. I at pp.134 and 135,

> "A simple but important point is sometimes over looked, namely that when the law relating to principals and accessories as such is under consideration, there is only one crime, although there may be more than one person criminally liable in respect of it. If there are more than one person, then the question arises as

> to the category in which each one is to be placed, that is, whether he is accessory before the fact or principal in the first degree or an accessory after the fact. There is one crime, and that it has been committed, must be established before there can be any question of criminal guilt or participation in it. It is true that one who procures, advises, solicits or instigates in any way another person to commit a crime is himself guilty of common law misdemeanour of incitement whether or not the offence solicited is carried out, but incitement is a different offence from the one which is solicited, if and when the latter offence is committed, then and not until then the inciter becomes a party to it and if it be a felony, he is classed as accessory before the fact, the fact being the crime which the incited person, has, in the character of a principal, in the first degree carried out."

This passage was cited by the Privy Council in **SURUJPAUL's** case, as an accurate statement of the law.

Although I am not bound by English decisions or those of the Privy Council, that principle has been adopted in Tanzania, and is now part of

our law. In **RAMADHANI NASSORO CHAKA v R** Criminal Appeal No. 83 of 1999 (unreported) the Court of Appeal of Tanzania quashed the conviction of a messenger for corrupt transactions. He was charged along with a primary court magistrate for soliciting and receiving bribes, but the latter was acquitted.

The Court of Appeal said:-

> "... the appellant was at most an accessory. Had the PCM been found guilty of soliciting and accepting a bribe, the appellant would have been aptly convicted as charged. However as the PCM was acquitted, then the appellant could not have been an accessory to any offence".

In my considered opinion therefore, 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. It must be shown that A has actually omitted an offence with the aid or abetment of B etc. As **SMITH & HOGAN – CRIMINAL LAW** – 6th ed. at p.152 have put it:

> "A man cannot be guilty of having abetted a crime or counselled it unless the crime has actually been committed by the principal offender."

The second major principle for consideration in criminal law also relevant to the present case is "**common intention**". The doctrine is formulated in section 23 of the Penal Code as follows:-

> "(23) When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence".

This section has also been the subject of numerous judicial decisions, including **TABULAYENKA s/o KIRYA AND OTHERS v. R** (1943) 10 EACA 51, **R V. MGUNDULWA S/O JALU AND OTHERS** (1945) 22 EACA 169, **R v SELEMANI S/O NGULU AND ANOTHER** (1947) 14 EACA. 94 **WANJIRO D/O WAMELLO AND ANOTHER v R** (1955) 22 EACA 521 **LAMAMBUTU S/O MAKALYA AND ANOTHER v R** (1958) EA 706 **Rv.**

NGERERA S/O MASAGA AND OTHERS (1962) EA 766, **GODFREY JAMES IHUYA v R**(1980) TLR 197 **ALEX KAPINGA AND OTHERS v. R** Criminal Appeal No. 252 of 2005 Mbeya (unreported) and **SHIJA LUYENKO v R** (Criminal Appeal No.43 of 1999 (unreported) (Mwanza)

From these decisions, the following principles can be carved out:-

(i) For section 23 to apply it must be shown that an accused person shared with the actual perpetrator(s) of the crime a specific unlawful purpose which led to the commission of the offence charged.

(ii) The offence committed must be a probable consequence of the prosecution of the unlawful purpose.

(iii) To constitute a common intention it is not necessary that there should have been any concerted agreement between the accused persons prior to the commission of the offence. Common intention may be inferred from their presence, their

actions, and the omission of any of them to dissociate himself from the offence.

(iv) Mere presence at the scene of crime is not enough to infer common intention.

The next set of legal principles I have had to remind myself is on the law of evidence. Learned Counsel have submitted at length on this branch generally, and I find that there is no dispute that:-

(i) The burden of proof in criminal cases generally is always on the prosecution and the standard is beyond reasonable doubt. When the said burden shifts to the accused, the standard is on, a balance of probabilities (See **OKARE v R** (1955) EA 555, **SAID HEMED v R** (1987) TLR 117, **MOHAMED SAID MATULA v R** (1995) TLR. 3.

(ii) A case may be proved by direct or circumstantial evidence, but the latter evidence must be such as to lead to no other inference except the guilt of the accused

(MSWAHILI v R (1997) LRT. 25). A mere aggregation of separate facts all of which are inconclusive in that they are as consistent with innocence as with guilt, has no probative value (**CHHABILDAS D. SUMAIYA v. REGINA**(1953) 20 EACA 14.

(iii) That a conviction should always be based on the weight of the prosecution case and not the weakness of the defence case.

(iv) It is not the quantity but the quality of the evidence which matters in deciding on the guilt or innocence of an accused person.

(v) Suspicion, alone, however strong cannot be the basis of a conviction (**SHABANI MPUNZU @ ELISHA MPUNZU v R** (Criminal Appeal No.12 of 2002 (Mwanza) unreported)

However, there are certain aspects of this law, on which learned counsel are sharply divided in opinion.

There was a sharp difference of opinion on the definition of a "confession" and to what extent, a confession could be taken into consideration against the other accuseds. All the learned defence counsel were of the view that a confession must be one in which the maker admits all the ingredients of the offence with which he is charged. If not, it cannot be taken into consideration against the other accuseds. The prosecution was of the view that any statement in which an accused makes affirmative declarations or by his conduct, taken together with other proven incriminating facts may amount to a confession, and could be taken into account against the other accused persons.

In my opinion, under the present section 3(1) of the Evidence Act, (Cap 6 RE 2003) there are two major types of confessions. The first type is what I would call "express confessions," constituted in paragraphs (c), of s.3(1), in which an accused admits to all the ingredients of an offence with which he is charged.

That provision defines such type of confession as:-

> "(c) a statement containing an admission of all the ingredients of the offence with which its maker is charged".

The second type of confession is what I would call “implied confessions” formulated in paragraphs (a) (b) and (d) in which the maker either admits in terms either an offence or substantially that he has committed an offence, or by his words or conduct, or declarations, taken together with other incriminating facts proved, an inference may be drawn that an offence has been committed. The difference between these types of confessions is that in the first type, the maker confesses to the offence with which he is charged. In the second type, a confession may be to any offence. The term “offence” is not defined in the Evidence Act, but it is defined under section 5 of the Penal Code as:-

> “an act, an, attempt or omission punishable by law”.

So, in this type, the maker does not have to admit to the offence with which he is charged but it may be used to found a conviction on any offence minor and cognate to the one with which the maker is charged.

However, that difference does not end there. It also affects its applicability under s 33 (1) of the Evidence Act. The section reads as follows:-

> “33(1) When two or more persons are being tried jointly for the same offence or for offences arising out of the same

> transaction, and a confession of the offence or **offences charged**, made by one of these 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)"

So, for a confession to be taken into consideration against the other accused(s) persons, it must not only relate to the offence(s) charged; but, also directly affect the maker. In my classification above, s 33(1) of the Evidence Act only applies to express confessions. It does not apply to implied confessions. And that is the essence of the decisions in **ANYANGU v R** (1962) EA . 309, and **SWAI & OTHERS v R** (1974) EA 370, with which I also entirely associate myself.

It is also a truism that whether in the form of a confession, or any other types of evidence of a co accused, to ground a conviction, it must be corroborated as a matter of law (in case of confessions) (s 33(2) of the Evidence Act) or of practice in any other types of evidence of a co accused. (See **PASCAL KITIGWA V. R** (1994) TLR 65 (CA).

There was also some difference of opinion with regard to the legal status of a "confession" of an accused person who dies before giving his testimony but the confession is already on record. According to the

defence, such evidence ceases to be evidence and should be disregarded. But the prosecution are of the view, that such is still valid evidence, having been tested by cross examination of their tenderers.

I think, the position of the law is that stated in **SARKAR ON EVIDENCE,** (15th edition p.602) to which I fully subscribe:

> "Where an accused who was being jointly tried died sometime before judgment and his confession was put on record, it was admissible against his co accused only for corroborating the other evidence on record and not as substantive evidence".

So the death of a maker of a confession, only reduces the probative value of the evidence from being substantive, to merely corroborative evidence. But in a case where, the confession cannot be taken into consideration against the other accused(s) , it is certainly valueless as against the other accused(s).

The last aspect in the law of evidence is on the defence of alibi. There is hardly any dispute that under s 194(4) of the Criminal Procedure Act, an accused who intends to raise the defence of alibi, is required to give a notice of his intention to the court and supply particulars to the

prosecution, before the close of the prosecution case. But it is also provided therein, that if the accused gives no such notice, the court may in its discretion accord no weight to such defence. But by raising such defence, an accused does not thereby assume the burden of proving such alibi. It is sufficient if such alibi introduces some reasonable doubt in the prosecution case (**RASHID ALLY v. R** (1987, TLR 97).

It is with those principles in mind that I will now turn to summarise the evidence for the prosecution and the defence before applying those principles to the facts.

The prosecution case consists of 37 witnesses and 23 exhibits as follows: `

MATHEW ALEX NGONYANI (PW1) testified before the Court that he had known the victims since 1990 when he and three of the victims were employed as labourers by one EBO MAGAYA, now deceased, in Mahenge. Subsequently, the victims (excepting JUMA NDUGU), and himself acquired separate mining sites. However they remained as close friends and business associates. It was his testimony that on or about the 7th January, 2005 the victims left Mahenge in a Toyota prado, belonging to

one of the victims, SABINUS CHIGUMBI @ JONGO accompanied by his, and his younger brother's daughters who were going to school in Arusha. According to this witness he had lent shs.500,000/= to SABINUS CHIGUMBI for fuel; and to his knowledge the victims had with them gemstones, worth between 150-200/- million Tshillings. He had also entrusted SABINUS CHIGUMBI @ JONGO with his own gemstones for him to sell on his behalf.

PW1 finally concluded his testimony by saying that on 14/1/2006 he had phoned and asked SABINUS @ JONGO, to send some money to his wife in Sinza. Later that evening, his wife rang to inform him that she did receive the shs.30,000/= from SABINUS CHIGUMBI, but that soon thereafter the victims were arrested, had their cell phones and brief case seized, and handcuffed, being branded as armed robbers. They were bundled together in another vehicle and taken away by what his wife told him were police officers. It was his evidence that upon making further inquires he came to learn that his friends had been killed. He later saw their bodies and took part in their burials at Mahenge.

In cross examination, PW1 admitted that he had never personally witnessed the arrests and that he could not identify any of the

accuseds in the dock. He said that he knew the victims to be law abiding citizens.

The next witness was **ELIZABETH SHAYO (PW2)** who testified that PW1 was her husband, and that they lived in a rented house in Sinza, Palestine. She told the court that on 14/1/2006 she received the victims as her guests upon prior information from her husband PW1. She said that SABINUS gave her shs.30,0000- and she went to deposit the money inside. When she came out, she found that the car which had brought her guests was surrounded by persons she believed were police officers. It was her testimony that in the first car there were about eight male police officers some of whom were armed. The second car, which was a Mark II, brought in three police officers, who had put on collar T - shirts, and their team included a woman. Although she kept a distance of about six metres, she was able to see the arrests, the search in the victims' car, the seizure of some items from the victims and their being handcuffed and bundled in the first police car. She saw a pistol being seized from the second victim, SABINUS.

In cross examination, PW2 admitted that although the incident took place for about half an hour, she could not mark the persons who

rounded up the victims, and could not therefore identify any of the accuseds in the dock. As to the character of the victims, PW2 said that although she did not live with the victims, she understood them to be law abiding gemstone traders, and her husband's friends and associates.

The testimony of **PW 3 PROTASE LUNKOMBE** was to the effect that he travelled with the 1st and 2nd victims together with their two daughters from Mahenge to Dar es Salaam and later to Arusha. He said that he witnessed the sale of a portion of some gemstones in Arusha. In the first transaction, he witnessed the sale of gemstones worth shs.18,000,000/= of which shs.8,000,000/- was paid in cash, and the balance was deposited in the 2nd victim's bank account. The second transaction was worth shs.1,500,000/= which was also paid in cash.

The witness went on to tell the court that on 12/1/2006 they returned to Dar es Salaam and lodged at BONDENI HOTEL. Early the following morning he left for Morogoro to see a sick sister. While in Morogoro, the 2nd victim rang to inform him that he had struck another deal worth shs. 15,000,000/=. Later that same evening he received a telephone call from PW1, that the victims had been arrested by the police at his Sinza home, and were nowhere to be found. He, PW3, was asked to

go and assist in searching for them; but instead he rang a relative, called EZEKIEL MBOJE to follow up. He also rang VENANCE MCHAMI and his wife JANE KAMALA to search for the truth. The following day he boarded a bus and came to Dar es Salaam where all the relatives had agreed to meet at Bondeni Hotel. As he approached Dar es Salaam, his relative EZEKIEL MBOJE phoned and asked him to go to Muhimbili Hospital where there were some developments. So he went straight to Muhimbili, but on entering the mortuary premises, he was informed that his relatives were dead, and that all his relatives who visited the mortuary had been arrested.

PW3 finished his examination in chief by telling the court that after some of his relatives had identified the bodies, they travelled to Mahenge for burials, and that the 4th victim MATHIAS LUNKOMBE, was his elder brother. He also was led to describe the victims, as he knew them, to be law abiding citizens.

In cross examination, PW3 admitted that although he had an auctioneer licence, he had no mining plot of his own. He also said that although he was no expert, he had enough experience to distinguish genuine from fake gemstones,. It was his opinion that the 2nd victim, had carried with him gemstones worth between Tshs.150 to 200 million. He

said that he had to flee for his own safety after learning of his relatives' deaths. He admitted that, save for seeing the 1st accused on television announcing that there was a shoot out between the police and the miners, he knew none of the accuseds. He also admitted that he was nowhere near the scene of any of the incidents that led to the deaths of the victims. His knowledge was mostly from information.

PW4 VENANCE WILLIAM MCHAMI testified that, he, his wife JANE AWINO KAMALA, and the 4th victim MATHIAS LUNKOMBE were partners in a Mining Licence at Mahenge since 2005; but he had known the victim since 1995 at Tunduru, where he had gone prospecting. It was his evidence that he and his wife, mostly resided in Mahenge, but they had a house between Manzese and Ubungo, Dar es Salaam. In their mining activities, they depended on one Mutahibirwa to provide capital. With the finance they intended to purchase some mining equipment, such as an excavator, which they had located at Tunduru and had sent someone to collect it.

In order to seal the contract with their financier, he and MATHIAS LUNKOMBE left Mahenge for Dar es Salaam on 12/1/2006 but due to a breakdown of their passenger vehicle they had to spend a night at

Morogoro, and arrived in Dar es Salaam the following morning. He dropped at his home and MATHIAS LUNKOMBE proceeded to BONDENI HOTEL, where he was fond of lodging. They agreed to meet the following day.

The following day they, met and went for window shopping for the equipment at the city centre. After that, they parted company and agreed to meet the next day, which was 14th January 2006. However, later that afternoon the victim telephoned to inform him that he had met his relatives who had just come from Arusha, and were out to enjoy themselves, and that he would see him the next morning, and would see their financier on Monday 16th January, 2006. According to PW4, that was the last he heard of him.

PW4 told the court that later that evening, PW1 rang to inform him that their mutual friends and fellow miners, had been arrested by the police from his Sinza home, where they had gone to deliver some pocket money to his wife (PW2). So he asked him to look for them in the police stations. He and his wife embarked on the search. After visiting Urafiki, Mabatini, Oysterbay, Magomeni and the Central Police Stations, without success, they retired for the night. He began the task again the following

day by meeting with the victims' relatives and other miners at BONDENI HOTEL. The owner of the Hotel, going by the name of HASHIM, said that he would go someplace to get more information. Later, HASHIM rang to advise him to proceed to Muhimbili after learning that all was not well. This news was later confirmed by NGONYANI (PW1) who informed him that the victims had been killed.

He and 3 others went to Muhimbili Hospital, and in the mortuary, they found the four bodies. He said he was able to identify the victims because he knew all of them. According to him, all the victims had met ghastly deaths, having been shot in the heads, and their other parties mutilated with multiple wounds, but that, further, he noted, the dismemberment of the 2nd victim's private parts. He helped assemble their bodies properly and even offered shs.5,000/= to the nurse to cover the half naked bodies. But, PW4 went on to tell the court, the anguish did not end there. As they were in the middle of examining the bodies, some persons, whom he later learnt to be police officers, doning masks, appeared, manhandled, and arrested all of them, bundled them in a waiting land rover vehicle and drove them to the Central Police Station,

where they were locked up on the suspicion of their being in the robbery network. Despite protesting their and the victims' innocence, they were not believed. However, they were released on bail after two days. This is the time he came into contact with the 1st and 2nd accuseds who, in one way or another also had a hand in his release on bail. It was also his testimony that on the first day he met the 1st accused, the latter branded him one of the escaped armed robbers and must be killed. He also demanded that he disclosed the whereabouts of PW2.

In cross examination, PW4 admitted that he had no personal knowledge as to the circumstances of the arrest and deaths of the victims. He said that he was positive that the victims were law abiding citizens and three of them, genuine dealers in gemstones. He confirmed that he had known the second and forth victims way back in the middle 1990s when they were in Tunduru, and met again at Mahenge where their mines were in the neighbourhood. He said that apart from the 1st and 2nd accuseds, he could not identify any of the other accused persons.

The testimony of **PW5, JANE AWILO KAMALA**, was not different from that of PW4. In as far as the relevant part of her evidence is concerned, it is that, she was the wife of PW4, and a partner in the

mining pact between PW4, the 4th victim and herself. It was also her testimony that they lived mostly in Mahenge; that she knew the victims, and that she came to learn of their deaths on 15th January, 2006 when PW4 rang her from Muhimbili mortuary. She testified at length on her and PW4's efforts to search for the victims in all the police stations that might likely have had custody of them. The second part of her testimony, was on the efforts she made in search of her husband, who had been arrested, and incarcerated and how she met the 1st and 2nd accuseds, who at first denied any knowledge of her husband's whereabouts, and how eventually, two days later, PW4 was released on bail.

In cross examination, PW5 admitted that she had no personal knowledge on how the victims were arrested and killed. She admitted that although she knew PW1, as they lived together in Mahenge, she was not very familiar with his wife (PW2) or where they lived in Dar es Salaam except, vaguely, that, it was in Sinza. She described how the 1st accused reacted when she approached him for the release of her husband.

The next witness was **MJATA KAYAMBA GEORGE (PW6).** His testimony was that in the evening of the 14/1/2006 he was at home (playing a draft game with his friends) (which happened to be near PW1

and PW2's homes). He witnessed the arrival of a Cressida Toyota Cab, carrying three passengers and driven by JUMA NDUGU. He also identified two of the passengers as the 2nd and 4th victims, who had already been introduced to him by PW2 in the past . On that day, he also came to learn that the other passenger (the 1st victim) was the young brother of the 2nd victim, whom, he referred to by his nickname, "JONGO", throughout his testimony. He witnessed how the three passengers came out of the car to greet PW2, and how, later, PW2 took JONGO aside where he saw JONGO giving her something, after which PW2 got into her house and the passengers boarded their taxi, ready to leave.

However, went on PW6, as the taxi prepared to reverse, preparing to drive off, a blue Toyota Stout pick up vehicle arrived with a contingent of not less than five police officers, not less than two of whom were armed. They blocked the victims' vehicle, commanded the passengers to come out, and started searching their persons. From the 2nd victim, the police fished out a pistol. From the rest, they seized cell phones, handcuffed them in pairs and bundled them in their pick up. One of the arresting officers ordered the taxi's boot opened. From there they seized a bag and polythene bag that was full of money. He said that he

knew it was money because, not only was part of it shown to the now grown spectating crowd, but also that one of the victims loudly declared that the bag had carried five million shillings. PW6 went on to tell the court that a few minutes later, another saloon Toyota Mark II came. From it , three police officers came out. They were all in open collar white T-shirts, and included a lady. They joined the others in the operation. According to this witness, the lady police demanded that she keep the bag containing the money, but the victims demanded that they would rather keep it themselves.

It was his evidence, which he repeated in cross examination that he was able to identify the Toyota Stout pick up as belonging to the police, because the word POLICE was painted on the driver's side. Out of the three police officers who arrived in the Toyota Mark II, he was able to identify two of them, and that they were in the court room.

From the dock, he was able to identify the 3rd accused, because according to the witness, he was a short person who wore a black pair of jeans and white rubber shoes. He was able to identify the 5th accused, because, according to him she took particular interest in the bag of money.

PW6 admitted that there were several discrepancies between his police statement and his testimony in court, but explained that the errors could be attributed to the recorder to whom he had told what he had testified in court. He admitted however, that the statement was read over to him and he acknowledged the same by appending his signature. At the instance of the defence the statement was admitted as Exh. D1.

The witness was also led to identify the 1st accused as the one he had seen in the television announcing the deaths of the "bandits" out of a shootout, but before that, PW2 had informed him of the deaths of her guests.

PW7, was KHADIJA MOHAMED CHAKA and her testimony was that on 14/1/2006 as she sat conversing with PW2 (Mama Stanley) a saloon car came. Out, came three passengers, and the car's driver. One of them approached PW2, who went to greet him and went on to greet the other three who were standing near their car. She never heard or saw what PW2 and her guest discussed or gave to her.

It was her testimony that soon after PW2 and a person whom she came to identify as JONGO, finished talking, the guests got into their

car. As the car reversed to negotiate a turn away, a Toyota Stout pick up appeared and blocked the car at the front. Several police officers came down. They arrested PW2's guests, searched them, handcuffed them in pairs and put them in the pickup. From Jongo, the police seized a pistol. From the others their cell phones were seized. From the boot of their car, a black bag was removed and transferred to the pickup.

It was her evidence that there was neither resistance nor any struggle in the course of the arrests, and that she never knew what happened to the guests until she heard it in the media the following day.

PW 7 explained in cross examination that the bag was not opened and that she could not identify any person who was in the arresting team. She said that although she could not remember every person who was in the crowd, she was sure that PW2 and PW6 were around somewhere. She also admitted that the Toyota Stout was not painted with "**police**" signs, or ever heard of any person demanding to take the bag. She finally admitted that she had no personal knowledge of the circumstances leading to the deaths of the victims.

PW8 RAJABU JUMA SAID's testimony was that, he was a motor vehicle mechanic at Yamungu Mengi garage (Bungoni, Buguruni Malapa Ilala Dar es Salaam) who spent the whole afternoon of 14/1/2006 with the victims, repairing Jongo's Land Cruiser Prado. They were introduced to him by one VASCO, as the latter's relatives. He was emphatic that between about 8 am up to 5.30 pm, when he finished the repairs, the victims were either carousing in "**BONGA BAR"** or taking meals at **"YAMUNGU MENGI HOTEL"**. And that, when the car was ready for testing, he had wanted them to join in the test drive, but they declined on account of the fact that they had been asked to send some money to a friend's wife in Sinza. He finally explained how, during the test drive, VASCO tried in vain to ring the victims. Next morning, VASCO rang to inform him of the deaths.

Although he admitted certain discrepancies between his police statement and his testimony, PW8 said that he could not testify on everything that was in the statement because he was not asked all the questions in court to elicit those answers. He admitted that he had no personal knowledge of whether the victims drove straight to Sinza, or the circumstances that led to their killings, because he was not with them.

On the other hand the essence of the testimonies of **PW9, RASHID ALLY RASHID** and **PW10, ALLY JAFFERI MZULE** is that they own business premises near the Posts Corporation fence in Sinza C ("hereinafter referred to as the "**postal fence**"). Whereas PW9 said he was engaged in vending clean water up to about 10 pm on 14/1/2006, PW10 informed the court that although he left his office at 6.00 pm, after handing over to his night watchman on 14/1/2006, neither PW9 nor PW10 had heard of any shoot out near the fence, nor was PW10 informed by his watchman about any unusual event on the night of 14-15/1/2006.

Both witnesses also testified to the effect that the next morning they found a horde of people near the postal fence, looking at some holes. There was a heated argument among the crowd as to whether there were bullet holes or not. The water man concluded by telling the court that he gave those accounts to the Presidential Commission of Inquiry and the police headquarters.

In cross examination, both witnesses said that they saw no empty bullet shells near the fence, and that the holes were circled by chalk.

PW11 JAFFER AMIR JAFFER is a jeweller at Mkunguni Street, Kariakoo Dar es Salaam. On 14/1/2006 at about 11 am his shop was invaded by armed robbers who robbed him of several jewels. There was a shoot out outside the shop, and his own watchman was injured. He had to rush him to Muhimbili. The bandits also made away with his pistol. On 15/1/2006 he was asked to go to Muhimbili, to identify the bodies of the victims. He failed to identify any of the victims as among those who robbed him.

In cross examination PW11 admitted that there were plenty of other robbers in his shop premises, but he was only asked to go and identify those who entered his shop, which he failed. Personally he knew nothing about the circumstances leading to the arrests and deaths of the victims.

PW12 ZAINABU HASHIM MASONGOLO is the hotel receptionist at Bondeni Hotel which is owned by her father, HASHIM. She narrated how she received the 1st, 2nd victims and one PROTACE (PW3) when they arrived from Arusha on 12/1/2006. She also testified to the court, that she last saw the victims in the morning of 14/1/2006, as she left them taking their breakfast. She had never seen them again alive. Later,

she heard that the victims were arrested and were dead. She went to pay last respects to them at Muhimbili on 18/1/2006 where she witnessed the 1st accused who came with a contingent of masked police (Ninja style) and ransacked the mosque where last respects for NDUGU were being held.

In cross examination PW12, admitted that there are certain facts which she did not state to the police, but she remembered. She had no objection, and her statement to the police was admitted as Exh. D2. In this statement there was no mention of Zombe. She happened to know that 3 of the victims were mineral dealers from Mahenge. She narrated their movements from 8/1/2006 to 14/1/2006, the last day she saw them.

The essence of the testimony of **PW13, D.8790, CPL JOHN** was that on 14/1/2006, he was on duty at the Central Police Station Dar es Salaam 999 section. He was charged with controlling, all incoming and outgoing radio calls. In the same room, Sgt Revocatus was in charge, while Cpl Maseku was charged with handling telephone messages and calls. At about 6.15 pm of that evening he heard Cpl Maseku receiving a report about a robbery along SAM NUJOMA Road, from one MASHAKA MASHILI. As a matter of routine all the in charges of Oysterbay, Urafiki the Regional Crimes Officer, as well as the patrol police were informed of the same.

Later he received information from the OC CID Urafiki that four persons had been arrested in connection with the robbery, and were found with shs. 5 million cash and a pistol. The report was recorded in the register.

In cross examination and re examination PW13 said that there was indeed a robbery at Sam Nujoma road involving a BIDCO sales truck and that some people had been arrested, and were found in possession with shs.5/= million cash and a pistol. And that was the entire incident he heard on that day. He said that he did not know whether there was any recording machine in the control room that could record what was received and aired from that room. He further informed the court that the OC CID Urafiki, did not inform them where they had taken the BIDCO robbers.

PW14 B 6829 S/SGT CONSTANTINE said that at the material time he was stationed at Chuo Kikuu police station and was assistant to the OCS. He was also in charge of the armoury. For the movements of the firearms and ammunitions, there was a register, which he tendered as Exh. P1.

It was his testimony that according to Exh. P1 on 14/1/2006, the register shows that a pistol with 8 rounds of ammunition were issued

to D1367 D/CPL FESTUS (the 13th accused) 2 SMG guns with 30 rounds of ammunition each were issued to E 6440 Cpl Nyengelera (6th accused) and to D 8289 PC Michael (9th accused). It was also his evidence that the one who actually issued the firearms and ammunitions was A 6712 Cpl FELIX (8th accused). These officers went on patrol the previous night, in a patrol car, Make Toyota Stout pick up, blue in colour.

He said that next morning when he reported for duty, he found that all the firearms and ammunitions were returned unused and it was so recorded in the register. He also met the officers who went on patrol in the OCS' office, as they were being congratulated for quelling an armed robbery and killing the bandits, and that they were to go to Oysterbay to be congratulated but he never saw any of them injured.

In cross examination, PW14 admitted that the pickup 'Toyota Stout they used was offered to them by the University of Dar es Salaam, with an SU ante, but it had no "police" label. He denied to have been in the court room previously.

PW15 was **C 7521 CPL EXAVERY KAJELA**. He testified that at the material time he was stationed at Oysterbay police as in charge of

the Armoury, of which he had been, since 1997. His companion was Cpl. Bupe, and they, in turn, worked in 48 hour shifts. He said that all the outgoings and in goings in and from the armoury are or have to be entered in a register. He tendered the said register as Exh. P2.

It was his evidence that according to this register, (Exh. P2) to and his own knowledge, on 14/1/2006, he was on duty, and so were D 4656, D/Cpl, RAJABU HAMIS BAKARI,(12th accuseds) (11th accused) 9321 D/Constable RASHID D 5682 D/CPL SAAD, F3807, DC JACKSON, F 1044 PC JOSEPH. He could identify from the dock D/CPL RAJABU (12th accused) Constable RASHID (11th accused) and that firearms were issued to D4656 D/CPL RAJABU – a Pistol (Chinese) with 8 bullets, to D9321 D/C RASHID, on SMG gun with 30 bullets. (The gun issued to D/C Rashid was number 13059192) and to D5682 D/CPL SAAD an SMG gun No. 3N 099P with 30 bullets.

On 15/1/2006 PW15 was still on duty. According to him, on that day D/CPL RAJABU returned the pistol with 8 bullets intact. D/CPL SAAD however returned the gun with 21 bullets (i.e less 9 bullets). D 9321 D/C RASHID returned the gun with 30 bullets, but the register shows an entry in red ink to show that there were three bullets less. He said he was

the one who altered the writing. He explained that he did so after three days when he was ordered by the OC CID, 2nd accused, to reissue the guns and 30 bullets so that it could be fired in order to cover up a serious crime. So, after reissuing the gun to D/C RASHID , three bullets were fired and he was ordered to alter the figure entered on 15/1/2006 to read "less by three). But in fact Cpl Saad had a shortage of nine bullets and constable Rashid had no shortage on that day.

In cross examination and re examination, PW15 said that there was no separate register for pistols apart from (Exh. P2). He did not remember the number of the pistol. He testified that although he did not write, the 2nd accused ordered him verbally to change the figure in red ink in Exh. P2. To him, the order from the second accused was lawful and he had to obey it. He further admitted that certain statements he made in court did not feature in his police statement. He was forced to admit that statement including an additional statement as Exh. D3. It is to be noted that in the main statement PW15 said that he issued SMG No.13059192 to DC Rashid, with 30 bullets and on 15/1/2006, 27 bullets were returned and 3 used, whereas SMG 3N 099P with 30 bullets were issued to Cpl Saad. Next day only 21 bullets were returned, 9 were used. No F 1044 PC

Joseph was not in the patrol car. He said that he got these explanations from the accounts of Cpl Saad and DC Rashid as to how they used the bullets. In his additional statement he attributed the entries and alterations in the armoury register as accidental. He had made the entries before counting and discovering the shortage. He does not mention how the 2nd accused was involved in the alterations, contrary to what he said in his testimony in court. To explain the discrepancies, PW15 said that his statement was taken in the form of question and answer, from the police who recorded it and he was not asked such questions, and he was positive that he told the whole truth in court.

PW16, RAMADHANI MFAUME CHUMA said that he was related to one of the deceaseds, namely NDUGU JUMA, and that he did identify his body at Muhimbili mortuary.,

He said that as they were trying to go for prayers for the deceased in the mosque, a contingent of police arrived in a car. Some of them wore NINJA style (i.e. in masks covering their faces) and that from the group, he noticed the one who was in plain clothes as their commander. He could remember him and identified him from the dock, as the first accused. The contingent was carrying guns. The person who

appeared to be their leader, i.e. the 1st accused declared that the persons who were killed were bandits. But what he did to the chagrin of the prayers, was to enter the mosque with his shoes on.

In cross examination, PW16 said that although there were some discrepancies between his testimony and his police statement, he was sure he was telling the truth to the court. He was forced to admit his police statement as Exh. D4. In this statement (Exh D4) the witness said, that he was the one who identified the body of NDUGU JUMA at Muhimbili Mortuary on 18/1/2006. Contrary to his testimony in court, he did not mention or even hint having seen the 1st accused at Muhimbili. He also admitted that he knew next to nothing as to how NDUGU JUMA met his death. He said of the accuseds, he could only identify the 1st accused, from the press reports.

The next prosecution, witness was **EMMANUEL EKONGA PW17**. He narrated to the court that apart from being a retired army officer he was also a driver. Since 2005, he had been driving a Toyota Prado belonging to SABINUS CHIGUMBI (the 2nd victim) who together with EPHRAIM CHIGUMBI (the first victim) were his nephews as they were his sister's sons.

He explained how, he, the first and second victims and PROTACE (PW3) and two girls, left Mahenge for Arusha via Dar es Salaam. He said the aim of the journey was to send the girls to school in Arusha, and also to sell some gemstones. His testimony was that on 7/1/06 they spent a night at Dar es salaam, (he at his home, the others, at BONDENI HOTEL). Next day, they travelled to Arusha, took the girls to a school in Usa River, and lodged at MANU HOTEL. The following morning, he drove them to a building, and he waited in the car. They came back and returned to their hotel, where he saw a brief case with a lot of money. On 12/1/2006 they drove back to Dar es Salaam.

PW17 further told the court that on 13/1/2006 he took the vehicle for repairs at a certain garage in Ilala Bungoni. He was taken there by one VASCO. The repairs were not finished for the day. They had to leave the vehicle in the garage.

This witness further told the court that, next morning, 14/1/2006, he went back to the garage and met VASCO. Later SABINUS and the others joined them at the garage at around 11 am by a taxi. He did not know who was driving the taxi. The repairs were completed at 5 pm and they decided to go for road testing after consulting the victims.

They drove with VASCO and the mechanic to Gongolamboto Road. They came back to the garage at 7 pm, but did not find the victims. He went back home.

PW 17 said that next morning, he took back the vehicle to the garage for respraying. He met VASCO who informed him that the victims had not yet returned to the hotel. They went to their hotel by taxi, only to find a lot of people waiting in sombre mood. Then VENANCE (PW4) informed him that he had received a telephone from Ngonyani, (PW1) who was in Mahenge that the victims had been arrested at his home in Sinza the previous evening.

On receiving that information they decided to go to Muhimbili to check if they had met with an accident. He was in the company of VENANCE, VASCO, and one CANISIUS.

At Muhimbili mortuary, they saw the bodies of SABINUS, EPHRAIM, and MATHIAS, which he identified. He did not identify theother victim. Soon after, they were arrested and taken to the Central Police Station in a police land rover. They were led to see Zombe, the (1st accused) (who the witness identified from the dock), and his lieutenants.

As he started to explain why he was in Muhimbili, the witness said that Zombe told him that he (the witness) was the retired soldier who was terrorising Mahenge as a bandit. He was shocked. Then they were all locked up in separate rooms, but to his surprise, Zombe came and ordered that they were innocent and should be and were released on bail, on Monday 16, January 2006.

Upon their release on bail he went to Muhimbili to identify the deceaseds for post mortem examinations. He noticed head injuries on each of the deceaseds.

After that they drove to Mahenge for burials.

In cross examination and re examination PW17 said that he didn't know why he was arrested. He was referred to certain discrepancies between his testimony in court and his police statement, but explained that depended on the recorder of the statement. Nevertheless, his police statement was admitted as Exh. D5.

In essence the evidence of **PW18 E 5448 D/SGT NASIBU** is that, as a gazetted photographic officer under the Identification Bureau at the Police Headquarters, he was instructed to take some photographs at

several scenes of the crime. Under the command of SACP Mkumbi, and in the company of other police officers, they went to Sinza C where he took photographs of the places where Mrs. Ngonyani (PW2) stood with her guest, the house opposite where she had sat, and the alleged bullet holes on the postal fence. Although he was not the one who photographed, he developed the negative of a photo of a car that was found at Urafiki police station alleged to have carried the victims, and together with those he personally took, he compiled the photos into an album.

In response to several questions put to him by the defence counsel and the assessors, PW18 admitted that in his statement to the police he had omitted to mention certain facts which he mentioned in court. These included the fact that he had developed a negative of a photograph of a car that was found at Urafiki police station. However, he explained that he did so following instructions of his superiors. He admitted that he did not know the places that he had visited to take photographs from and that he gave only one statement, although they were in two separate sheets each with a different date. He explained that there was no time frame for photos to be taken at a scene of crime.

The next witness was **DR MARTIN PHILIP MBONDE** (PW19). A pathologist by profession, and a Senior Lecturer in Pathology at the Muhimbili University of Health and Allied Sciences, he conducted medical/legal post mortem examinations of EPHRAIM CHIGUMBI (1st victim) SABINUS CHIGUMBI (2nd victim) NDUGU JUMA (3rd victim) and MATHIAS LUNKOMBE (4thvictim). He tendered their respective post mortem examination reports as Exh. P3A P3B, P3C and P3D in that order.

The witness told the court that he was satisfied that the victims, who were identified to him by relatives in the presence of C.5411 D/CPL PASTOLLA, had all died of gunshot wounds. He also noticed several bruises on each of the victims' bodies ,hands, and faces and pale organs. It was also his opinion that their deaths must have occurred four days before he carried out the post mortem examinations, which was on 18/1/2006.

Answering a litany of questions in cross examination, PW19 stood to his ground that as he had detected no other cause of death, the victims must have died only from gun shots. He said that guns shots were

characterised by the sizes of their holes. The holes were smaller at entry point and wider at the exit point. It was also his view that from the pattern of the penetration points of the bullets on the victims' necks they must have been shot from a close range . He denied to have seen any of the victim with severed private parts or nearly decapitated neck. All that there was in respect of the 3rd deceased, was a lacerated neck, that showed as if it had been cut by a sharp object but in fact it was just the after math of the bullets. He said that the first victim had one, the second and third victims had two and the last one had three bullet holes. He further admitted that he had prior information about how the victims were killed before going into the examination room, but said that this did not detract him from establishing the causes of deaths independently. He admitted to have never used the laboratory to determine how much blood the victims had lost, but it was obvious to him because all the organs were pale.

PW 20, KISA MOHAMED SALUM's testimony is that he was a watchman at ALLY MZULE's (PW 10) garage along Shekilango Road, and near the postal fence. He told the court that he never heard any gun shots on any night he was on duty for the whole of January, 2006. And that his

routine was that once he had locked himself in, he would never come out of the fence of his employer's garage. That notwithstanding, he was positive that he never heard any gun shots unless the guns were fixed with silencers.

In answer to questions put to him by the learned counsel for the defence and the assessors, PW20 maintained a straight face and said his last salary was shs.100,000/= and that he left the job on his own accord.

The testimony of **PW21 C 6390 SGT HASSAN**, was briefly that in 2006 he was the only armoury keeper at Urafiki police station. The movements of all issues and returns of the firearms and ammunitions were registered in the Armoury Register, which he tendered as Exh. P4 – According to Exh. P4, on 14/1/2006 he issued one pistol (make Chinese) No. 21215 with 8 bullets to D 2300 CPL ABENETH whom he identified from the dock as the 10th accused. Next morning he returned the pistol and the bullets intact. The record also shows that D8348 PC Emmanuel, had, sometime in the past issued a pistol No. 16012916 to ASP Makelle with 8 rounds of ammunition. He returned it on 25/1/2006. Everything was in order. He identified him from the dock as the 3rd accused.

Responding to questions put to him, PW21 said that since the 3rd accused was an officer, he could keep the pistol as long as he wished and he only returned it on 25/1/2006, because he was proceeding for some studies in Egypt. He further said that on 14/1/2006 a total of four guns were issued (one pistol and three sub machine guns) but they were all returned intact. Every three or six months, a return is filed to the district police headquarters, for onward transmission to the regional, and finally, the police headquarters.

Although **SP JUMA BWIRE, (PW22)** testified at length, his evidence in brief was that he works in the identification bureau forensic department, ballistics section. He boasted of 17 years experience that he collected through in house training and short courses in the USA, South Africa, Gaborone, and the former USSR and that he was the in charge of the section.

While in office on 25/1/2006, he received some exhibits from the OC-CID Kinondoni signed by SP BAGENI (2nd accused). He was asked to identify which of the 9 used cartridges were fired from which of the two guns sent as exhibits. He tendered his report as Exh. P5.

On 9/3/2006 he received another parcel of two used cartridges from police headquarters, also requiring him to identify which of the two guns submitted to him by the OC-CID, Kinondoni, could have fired the two shells. According to Exh P5, after some test firing with six bullets from his laboratory, PW22 said that he had formed an opinion that five of the nine cartridges originally sent to him were fired from SMG No.3N – 0199P which he tendered as Exh. P6. The remaining four cartridges were fired from SMG No. 1305992, which he tendered as Exh. P7- 13059/92 He said that both guns were of 7.62 mm. calibre. He tendered the first batch of five cartridges as Exh. P8 and the four cartridges as Exh. P9.

PW 22 was also of the opinion that two empty cartridges received from police headquarters, which he admitted as exhibit P11 were fired from SMG gun No.1305992 (Exh. P7).

The separate sets of the six test cartridges in groups of three each were tendered as Exh. P12 – (These are three empty cartridges testifired from Exh.P6) and P13 – (These are three empty cartridges testifired from Exh. P7.)

Answering questions from the learned defence counsel, PW22 admitted his ignorance on the law or regulations governing ballistic tests, but he was positive, the Police General Orders (PGO) must provide for this. He also admitted that he had no knowledge or means to discover the date of firing. He said that although the guns looked similar in make and some parts could be exchanged, each had peculiar characteristics that distinguished it from the other, when it has been used; the determinant factors being pin impressions, ejector marks, and breach face characteristics. He said that such information would not be obtained in Manufacturer's Manuals. He stood his ground that those characteristics would be found regardless of the age of the particular gun. They could only be seen by aid of a microscope, and not easy to describe them in writing. Finally the witness said that although the examination was first ordered from CID Kinondoni, he sent the results to police headquarters, who had not only taken over the investigation in the matter, but by chain of command, he was duty bound to obey the headquarters first. It was his evidence that he had not been specifically informed that the examination he was carrying had something to do with any deaths.

PW 23 SP JUMA K. NDAKI was the Urafiki Police Station Officer Commanding Station in January 2006. At that time the criminal investigation section was headed by ASP Makelle. On 14/1/2006 at about 6 pm there was a radio call announcement of a robbery in the Mwenge Sinza area. ASP Makelle (3rd accused), WP PC Jane (5th accused), and Cpl Abeneth (10th accused), drove to the scene of crime in a Toyota Corolla registration No. T.262. AAP. Later ASP Makelle (3rd accused) radioed to inform him (his call sign was 156) that the suspects had been arrested, and shs.5/= million cash and a pistol had been seized from them.

PW23 went on the testify that later in the evening a man and a fat woman came to inquire about any recent arrestees who could be there. He said there were none, but referred them to Kijitonyama police station. They came back later and told him that they could not trace their relatives there either. A few minutes later, a Toyota Chaser (Silver in colour) registration No. T.617 AAS driven by a police officer from the University of Dar es Salaam police post was parked at the station. Two police officers came out. Soon after a Toyota stout pickup (blue) came and parked. It was a University of Dar es Salaam Police car and driven by another police officer. They all sat waiting for Asp Makelle (3rd accused).

Asp Makelle arrived at 8 pm, by the same Toyota Corolla. PW23 however, did not see the other two (5th and 10th accuseds). At that time the Kinondoni OCD SSP Mantage was also there. ASP Makelle first went to his office, and then came to his (PW23) office, where SSP Mantage was waiting. Half an hour later, SP Bageni (2nd accused) arrived). The 2nd accused asked Mantage to witness the exhibits seized from the scene of crime. ASP Makelle was ordered to bring the bag which had some money. As ASP Bageni sought an explanation from ASP Makelle on the short landed money and before he could offer any, ACP Zombe (1st accused), entered. On receiving information about the shortfall, the 1st accused was very disappointed. He ordered for the retrieval of all the exhibits money. The second accused, however left with the half empty bag.

Responding to several questions put to him by the defence and the assessors, PW23 said that the 1st accused was not pleased with what he found and wanted everything put in order. The witness said that he did not inquire as to which incident the Toyota Chaser was involved. He said that those who were looking for their suspect friends told him that they (their friends) were in a Toyota Prado. It was further his evidence that as a matter of procedure, the “Chaser”, brought as an exhibit ought to have

been recorded in an exhibits register, and that he later checked and found that it was so registered but he did not know that that car was involved in the reported robbery. He said it was right for the 2nd accused to have left with the exhibit. PW23 told the court that although ASP Makelle had informed him that the suspects had been arrested, he did not tell him how many they were or where they were taken to.

SSP SEBASTIAN MASINDE (PW24) testified that in January 2006 he was the OCS at the University of Dar es Salaam police post where he had been since 1999. He was assisted by Safia and Sgt Constantine (PW14).

On 14/1/2006 he came to the station at about 7.30. He met Cpl Omary at the charge room (CRO). The latter informed him that he received information on the radio call from the Control Room (999) that there had been a robbery of shs.5/- million, which had been seized and the robbers arrested. From the Occurrence Book he learned that Cpl Festus, Cpl. Nyangelera, Emmanuel Mabula, and S/SGT James had gone on patrol. They were driven to the scene in a blue pickup car offered by the University of Dar es Salaam by PC Noel and DC David. He could identify the 4th accused (Pc Noel) the six accused (Nyangelera) the 7th accused

(Mabula) the 8th accused (Cpl. Cedrick) and the 9th accused (Michael). He said that the pickup vehicle was, before the accident in 2005, labelled "POLICE" on both sides of the cabin doors, but after the accident it was panel beaten and resprayed, and thus obliterating the initial labels. Its registration number was SU 29363.

The witness further testified that the next morning before he left for college, where he was pursuing a course in diplomacy, the 1st accused called and instructed him to send the patrol officers, so that he could congratulate them for a job well done. He ordered PC Noel to take them to the 1st accused's office. He was also the Dar es Salaam Acting Regional Police Commander. All the patrol men, except Sgt James, who has since disappeared, went. At the 1st accused's office, the 1st accused praised the patrol police on how they handled the situation. He showed the money and the pistol seized from the bandits, and ordered that we put commendations in the officers' files for consideration for promotions. Before he left with the patrol officers for the 1st accused's office, he had ordered PW14 to check on how many bullets had been spent. When he came back he was informed that none of the 68 bullets issued for patrol had been spent.

In response to questions put to him by the defence and the assessors, it was PW24's testimony that there was nothing wrong in what the 1st accused did in ordering commendations for the juniors to be given promotions. He said that PW14 came in as they prepared to leave for the 1st accused's office. He said that he was informed by Cpl Omary that SP Bageni (2nd accused) and ASP Makelle (3rd accused) were already at the scene of the crime. He said that PC Noel and PC Cedrick did not take any firearms because they were mere escorts. He remembered that Oysterbay and Urafiki police stations beside his, had sent in their men and that at that meeting in the 1st accused's office, beside himself, SP Bageni, SSP Mantage, OCS Ndaki and ASP Makelle were also there.

It was also his testimony that at the meeting, the 1st accused showed them the money, the pistol, but he did not report on the whereabouts of the arrested suspects. Finally it was his evidence that according to the records, Nyangelera, Michael and Festus were issued with SMGs and 30 bullets each and one pistol and 8 bullets respectively but all were returned unspent.

The next witnesses, **SHABANI SAIDI MANYANYA RUNJE (PW 25)** and **RAMADHANI SAIDI MPUTA** (PW 26) gave evidence of a similar

nature. They said that they were the brains and actual perpetrators of the robbery from the BIDCO truck with the connivance of MASHAKA, the truck's driver. They had blocked the sales truck at the junction of SAM NUJOMA and University roads near the Ubungo bridge and made away with shs.6,000,000/= which they divided among the seven of them. They used a taxi, make Mark II registration No. T946 AAT. They were both surprised to hear from the media, the 1st accused announcing that the robbers had been killed in an ensuing shoot out. In fact, said PW26, there was no shoot out, the only weapons used were oral threats.

In cross examination, the two witnesses admitted, with straight faces that they were thieves and that they had to come to the fore, in grief of the innocent departed victims' souls. They both admitted that they know that what they did was wrong, but were driven out to lay bare the truth, that they were the ones who committed the robbery in question, and they that knew there was no other robbery, from the BIDCO truck, along that road on that day. They also revealed that a contingent of police officers from Oysterbay police station came to know about it but let them alone on receiving bribes the offered. The testimony of **ACP MAXIMILUS UBISIMBALI** (PW27) was to the effect that, he, SACP

Mgawe and ACP Mugassa were assigned to make preliminary investigations into the killings of the robbery suspects at Sinza on 14/1/2006. They started with a visit to the Regional Police Commander's office at the Central Police Station where the 1st accused, ACP Zombe was not only the RCO (the Regional Crimes Officer) but also the Acting Regional Police Commander. They met all the district crimes officers.

He was the one who first inquired of the first accused whether he had visited the scene of crime. It drew a negative answer. So they all decided to visit the scene first. That, they did on 20/1/2006. They first passed through Oysterbay where they collected SP Bageni (2nd accused) and they, together with the 1st accused went to Sinza, where SP Bageni (2nd accused) showed them the scenes of crime.

The second accused first showed them where the BIDCO truck robbery took place, then took them to a place along Sinza towards Mugabe primary school, and showed them where the bandits' two vehicles had parked; and where the bandits had tried to escape by climbing a fence. He also showed them some holes, which he (the second accused) had told them, were holes made from bullets fired towards the escaping bandits. It was the testimony of this witness that SP Bageni, had ordered the police to

return fire when the bandits opened fire at them. His platoon consisted of police from Oysterbay and the University of Dar es Salaam.

On a personal level, however, PW27 informed the court that he was not convinced that there was any shootout because he could not trace any blood either on the wall or down the scene of the shootout, although SP Bageni had explained it away by the fact that there was rain the previous day. PW 27 further said that according to SP Bageni, ASP Makelle and his team came to the scene, and having overpowered the bandits, the injured were taken in the University of Dar es Salaam pick up, the bandits' vehicle was searched, and a bag of money (5/= million) and a pistol were seized. SP Bageni then ordered the defender landrover on patrol to take the bandits to hospital.

It was his evidence that on returning to the office, the team began to take other investigative measurers such as taking down witnesses' statements. However, again on a personal effort, PW27 informed the court that before leaving the scene he had made some inquiries with the neighbours, who included a garage owner, water vendor and a fruit vendor, who all denied having heard any shoot out on the alleged day. PW27 concluded his testimony by saying that they suspended

further investigations when the Presidential Commission of Inquiry was formed. At that stage they prepared a report of their preliminary investigation, which he co authored. During cross examination he was forced to admit the report, and upon objection from the prosecution but without objection from any other defence counsel the court ruled that the same be admitted as Exh. D6.

In cross examination by the defence counsel, PW27 admitted that by its preliminary report the team exonerated the police for the killings given that there was a wave of robberies in Dar es Salaam and other places in the country. The team formed an opinion that the force used by the police was not excessive. He was led to admit that according to the evidence they had collected, BIDCO was robbed of shs.5,755,000/= and that pistols were used in the robbery. He admitted that he had no personal knowledge of the circumstances leading to the killing of the victims, but quickly pointed out that in the circumstances, he did not believe everything that SP Bageni had told them although there was evidence from independent witnesses of the robbery from the BIDCO truck. He was also led to testify that although the bandits were allegedly shot at from SMGs, the spent cartridges collected at the scene of the crime were those from pistol(s)

whose calibre was different from the standard pistols (Chinese) issued to the police. It was his view that even the holes on the fence showed that if they were bullet holes at all, they must have been fired from the right angle side, and not directly. He admitted however, that if the bandits truly resisted and were so armed, the police were entitled to return fire. PW27 was also extensively asked about his expertise in blood and its decomposition. He confessed that he was not an expert, but said he had sufficient field experience to tell how long blood could remain clotted at a scene. Finally, PW27 said that although he did not express such doubts in their report (Exh. D6) the report was not final as investigation was still going on.

In answer to questions put to him by the assessors, PW27 said that the 1st accused did not brief them anything before they visited the scene.

PW28 ELIEZER MBUKI FELESHI who, at the date of trial was the Director of Public Prosecutions told the court that in January 2006 when he was the State Attorney In charge Mwanza, he was appointed secretary to the Commission of Inquiry appointed by the President, to inquire into the circumstances leading to the deaths of the victims, the subject matter of this case.

It was his evidence that the Commission was formed under the Commissions of Inquiry Act (Cap 32 RE 2002) and Mr Justice Mussa was appointed Chairman. Other Commissioners, included Ms. Mwatumu Malale, Prof. Ibrahim Juma, and Mr. Arthur Mwaitenda. He himself headed a Secretariat of six people. He said that the Commission's terms of reference were:-

(i) to investigate the cause and circumstances leading to the deaths of the four persons at Sinza,

(ii) to investigate whether the four persons were involved in the alleged robbery,

(iii) to investigate and identify the names residences and occupation of the victims,

(iv) to investigate the reasonableness of the force used by the Police and lastly,

(v) to advise the President on the whole incident.

PW28 testified that they were to complete the task within 21 days. They visited the various scenes and interviewed several witnesses, both from the police involved, and civilians. They travelled to and interviewed witnesses in Mahenge. All the evidence was recorded in hard copies and by tape recorders. They also collected several exhibits. In all, a total of 90 witnesses were interviewed, including two from Arusha. Many other civilians witnesses were ready to testify but were turned away, either because their evidence was a mere repetition or irrelevant to the issue at hand. The Commission handed over its report to the President on 17/2/3006. The report comprised of a 66 page summary (report) three volumes of the proceedings, statements, and exhibits and 36 tapes.

It was PW28's evidence, that the Commission found out that the victims were truly mining dealers in Mahenge; they were identified by their parents and friends as such, that the second victim lawfully acquired the pistol he was found with, that he had secured the biggest gemstone from his pit, that they left Mahenge on 7/1/2006, proceeded to Arusha and sold part of the gemstones; that the victims were arrested at Sinza C without any scene; had their pistol seized, and handcuffed, before being driven away. The Commission also found that the police officers who arrested the

victims at Sinza must have had something to do with those deaths. It was the Commissioners' view, after visiting the scene of the alleged shoot out and interviewing witnesses in the neighbourhood; that the alleged shoot out did not take place, and that if it did, the force used by the police was excessive because the victims were handcuffed and unarmed.

PW28 wound up his testimony by telling the court that the Commission recommended to the President that the law should take its course for those responsible for the victims' deaths.

In cross examination, PW28 admitted that the Commission had indeed recommended disciplinary measures against the 1st accused. He stood his ground and said that the Commission doubted the explanation of the 2nd accused on the alleged shootout, because there was no such evidence from the neighbours. PW28 admitted that the Commission did receive the preliminary investigation report from the police, but did not agree with its conclusions because the police team did not interview other witnesses. He said that he was also aware of the BIDCO truck robbery, but did not interview either the director of the company or the witnesses thereto, such as MASHAKA MASINI or the cashier. PW28 informed the court that the 2nd accused showed them the robbery scene. He further

admitted that the 1st accused was called twice before the Commission, the first time for him to give his account of the incident, the second time after receiving the 2nd accused's account on the shootout, since the two accounts differed from the account contained in the press release issued by the 1st accused. PW28 also admitted that the commission commenced its work when it already had the list of 15 police officers involved in the saga supplied by the police headquarters. He told the court that when SP Bageni was explaining the shootout none of the police officers present discounted it. As to the existence of blood stains, PW28 told the court that he had interviewed a neighbour thereto, one Katabazi who said he had slaughtered a duck a few days ago, and the blood stains were still there, but was quick to admit that he did not know where he had done so. PW28 also informed the court that although the former Director of Criminal Investigations had ruled out the prosecution of the 1st accused, the final authority whether or not to prosecute lay with the Director of Public Prosecutions.

In answer to questions put to him by the assessors, PW28 said that there was a total of 15 police officers when they went to inspect the scene (three from Urafiki, five from Oysterbay and seven from University of Dar

es Salaam police stations) and that it was the 2nd accused, SP Bageni, who ordered the police to shoot, on instructions from above. The Commission was also told that after the shootout, the injured suspects were driven to the BIDCO robbery scene after which they were driven to Muhimbili, where they were pronounced dead. The Commission did not know the place at which the victims met their deaths.

As to the contradictions between the police press releases and the account of the shoot out offered by SP Bageni, PW28 said that the 1st accused in his press release had said that the shootout took place from the vehicle as the bandits tried to get away, which was contrary to the account offered by SP Bageni on the visit to the scene that the bandits were hit from the wall which they tried to climb in order to escape.

PW 29, JULIUS JOSEPH HAULE identified himself as the owner of a taxi cab, make Toyota Chaser registration number T617 AAS. He said that he had bought the vehicle in 2003 and had hired NDUGU JUMA (the 3rd victim) to drive it. He told the court that according to their agreement the driver was to remit shs.60,000/= every Sunday of the week. He had hired NDUGU JUMA on 20/12/2005.

On Sunday 15/1/2006 he waited for NDUGU JUMA to come and remit the weekly collections, to no avail. He made several inquiries from his co drivers at Sinza Kijiweni, on the following two days. On 17/1/2006, drivers from "**Kijiweni**" informed him that his car had been seen parked at Urafiki police station. He went there and found it parked in front of the police station. The police officers on guard informed him that his car was involved in a robbery and its driver was dead and lying at the mortuary in Muhimbili.

As he saw it, his car was intact. It was finally released to him on 3/3/2006 on the instructions from CID headquarters. He had since been in its custody, complying with the conditions given by the police. He tendered it as Exh. P14

Asked by Mr. Myovella learned defence counsel for the 8th, and 13th accuseds, PW29 said that there was no "contract" as such but just a local arrangement with the driver NDUGU JUMA. He also admitted that NDUGU JUMA used to keep the car, and did not know where he parked it. Certainly he would not be sure of who drove the vehicle on the night of 14/1 – 15/1/2006.

Answering questions from the assessors, PW29 said that he was informed by the police on guard at Urafiki police station that the driver of his vehicle was lying dead in the mortuary at Muhimbili, but he did not go to Muhimbili to see his body. However he said that the victim had never breached any term of their agreement.

The testimony of **PW30 ACP EMSON MMARI** was that he was one of the members of the team formed by the Director of Criminal Investigations to investigate the killings of the victims. Led by SACP Mkumbi, he said that the other member was SSP Mgassa, but they also co-opted Insp. (now ASP Kabeleka) Insp. Omary (now ASP) S/Sgt Frimini and S.Sgt David. During their visits to the various scenes of crime they were accompanied by D/SGT Elly, and D/SGT Moja who took video and still pictures of the various scenes of the crimes.

Although PW30 took three days to complete his testimony, his evidence was, briefly, to the effect that after receiving the report of the Kipenka Commission on the killings of the four victims, he and his team were detailed to investigate the murders. By then 15 suspects had been arrested and were in police custody at the Selander Police Station and the Central Police Station. He was instructed to go to Selander Bridge Station.

There he was able to take a cautioned statement of the second accused, SP Bageni. Later, he and the team had occasion to interview the 11th accused D/C RASHID LEMA. Since the accused said he had come to tell the truth he was instructed to take him to a Justice of Peace to give his extra judicial statement. However, from the preliminary interview, the 11th accused was able to explain to them the whole story and to send them to several places.

It was his evidence that, according to the 11th accused from the SAM NUJOMA scene, the victims were taken in a defender Land rover from Oysterbay police station, (which was on patrol,) to Pande Forest. There each of the victims were taken down from the vehicle, one by one, forced to lie prostrate at a small clearing off the dirt road, and systematically executed. The executor was D/Cpl Saad, who was ordered by the second accused, SP Bageni. The other accuseds present at the execution, apart from himself and SP Bageni, were the 3rd, 5th, 7th, 8th 9th, 10th, 11th, 12th and 13th accuseds. After the execution, the Land rover defender took the victims to Muhimbili and was driven by D/Sgt. James; who together with D/Cpl Saad were still at large.

As a result of the preliminary investigation from the previous team, PW 30 said that their team was led to the various scenes, first by D/SGT Nickobay, who took them to Sinza C, Sam Nujoma road and the postal fence. As a result of the information obtained from the 11th accused, and later by the 12th accuseds, the team was led to the execution spot at Pande Forest, where they recovered two empty cartridges, and blood samples mixed with soil.

The said cartridges were later taken to the Ballistics section, and the blood samples taken to the Government Chemist for analysis. The 11th accused also took the investigation team to Bunju Sand Quarry, where he and D/Cpl Saad were sent by the second accused, SP Bageni, to fire a total of nine bullets and return the empty cartridges to him. According to PW30, the 11th accused and D/Cpl Saad were accompanied by D/Cpl Rajabu. PW30 then took the court to visit the scenes, at Sinza C, where the victims were arrested live; at SAM NUJOMA Road, where the BIDCO robbery is alleged to have taken place; at the postal fence where the second accused told PW30 that there was an exchange of fire between the bandits and the police leading to the victims' injuries. At this wall, PW30 showed to the court the four holes that were shown to him to have been

caused by gun shots emanating from the fire exchange. He then took the court to Pande Forest, and showed the place alleged to be the execution ground. After that, he led the court to Bunju Sand Quarry and showed the place where the nine bullets were fired.

In an intensive cross examination by the defence counsel, PW30 admitted that the 1st accused was not in the list of 15 officers that the Kipenka Commission had recommended for further investigation and prosecution. He admitted further, that after being shown several correspondences and newspapers cuttings, that, for his role in the saga, the official recommended action against the 1st accused, was disciplinary action, and indeed such steps had begun to be taken. Led by the Police General Orders, PW30 was led to admit that certain provisions of the Police Orders were not complied with during their investigation, and that the 1st accused had not given any statement before them. He also admitted that apart from the statements of the 11th and 12th accuseds they had not collected any other independent evidence to show that the 2nd and the 1st accuseds were communicating by radio or cell phone about the incident. As for the 2nd accused, PW30 explained that although his statement was shown to have been taken by himself, it was ASP Kabaleke who recorded it

in the presence of the accused and his advocate. With reference to Exh. P2 (the Oysterbay Police Station, Armoury Register), PW30 was led to show that in some cases bullets could be taken and returned without filling in the respective columns, but said that in such cases, there were signatures of the responsible officers. He said that after collecting the two empty cartridges from Pande Forest, they were reserved in SACP Mkumbi's office, before being taken to the Ballistics section but he did not know who took them there. As to the rules of recording an interview of a suspect, the law is silent as to whether, apart from the suspect, his lawyer, relative or friend, any other police officer could be present. As to his own statement, PW30 admitted that he did not mention by names (if told by the 11th accused), of those who were present at Pande Forest, during the execution. He admitted that this was an important detail, but he explained that they thought that the 11th accused would give his full statement before a justice of peace. He further admitted that the BIDCO robbery did indeed happen and that a total of shs.5,755,000/= was stolen, but said that he was not aware if the victims were also found with shs.5,000,000/=. He admitted that some officials, from BIDCO , including MASHAKA, the driver and the salesman gave their statements. He said that he never took

the 5th accused's statement, so he did not know how she was involved in the incident. He said that in their investigation, they never interviewed any resident of Mbezi on the way to Pande Forest nor did they interview the accuseds again after visiting Pande Forest. He said it was the 11th, and 12th accuseds' statements which implicated the other accuseds.

PW30 further said that although there was no road sign restricting the use of the Pande Forest road, he knew that the forest was a Forest Reserve and one could only go in, with the permission of the Natural Resources officers. He further opined that the road was not used frequently, although they had gone there after about one month and six days. Although they took blood samples from Pande Forest and although the victims had already been buried, they did not seek permission to exhume the bodies to get samples for DNA comparison with the blood samples. All that the Government Chemist established was that it was human blood. Although PW30 saw many similar holes at the postal fence he had only been shown four holes. He said that after interviewing the neighbours they told him they did not hear any gun shots.

PW30 further explained that although March was a rainy season for Dar es Salaam, there was no rain on the day they went to Pande Forest,

and the road was passable. He said that the two cartridges they picked from the forest could have been fired from either an SMG or an SAR gun but that it was for the ballistics expert to establish so. He admitted that the 11th accused was not involved in delivering the cartridges to the ballistics section. He said that the 11th accused was brought to them by Ramiah and that according to him, it was D/Cpl Saad, who fired the fatal bullets, while D/Sgt James took the victims to Muhimbili.

In re examination PW30 explained that although the Kipenka Commission had recommended disciplinary action against the 1st accused, (ACP Zombe) at that time the 11th accused had not spilled the beans, and in any case, it was the DPP who, in law had the final say, as to whether or not a person should be charged. As to whether or not the accuseds should have been involved in the collection and processing of exhibits, the witness said it was not necessary to do so. He said that in his opinion there was circumstantial evidence to link the accuseds with the commission of the offences, because the victims were taken from Sinza C alive and had ever since been in the custody of the police officers until they met their deaths. So the accuseds should know what happened to them. PW30

further said that the 11th accused's statement was credible because he led them to a place where they recovered empty cartridges and blood samples.

He said that the 11th accused had told them that it was the 1st and 2nd accuseds who prepared a format of what to state before the Commission.

Asked by the Lady and Gentleman assessors, PW30 said that they did not prepare any report after their investigation. All that they were required to do, and did, was to compile the evidence and send it to the DPP. He was appointed to interview the 2nd accused, and did so in the presence of ASP Kabaleka who recorded the statement. He said that according to their investigation there was no exchange of fire between the police and the victims as SP Bageni had alleged. He said that he was not sure whether the driver of the STOUT vehicle also went to Pande Forest. At Pande Forest, the victims were killed by D/Cpl Saad, on the orders of the 2nd accused. It was the vehicles' lights which lit the area during the execution. It was his further evidence that his team did not promise or induce the 11th accused to say what he did. And that according to the 11th accused, the cars that went to Pande Forest were the Pajero, the Defender and a saloon car, and that all accuseds except the 1st, 4th and 6th were present at Pande

Forest. The 4th accused was the driver of the Stout Car, but had run out of fuel and the 6th accused was ordered to drive the victims' car to Urafiki police station.

The testimony of **PW31, ASP OMARY AMIR, OMARY** was to the effect that he was one of the officers coopted in the team of investigators led by SACP Mkumbi. He said that the team was divided into two groups, one led by ACP Mmari (PW30) and the other led by SSP Mgassa. He was under SSP Mgassa. It was his evidence that after his appointment the whole team met at SACP Mkumbi's office and studied the Kipenka Commission report. That was on 18/2/2006. He was assigned to record the statements of some suspects who were already in custody at the Central Police Station.

In the course, he recorded the statements of D/Cpl Emmanuel Mabula (7th accused) who denied any part in the killings. He also took the statement of Cpl. Felix Cedrick (8th accused) who although admitted having been at Sinza, denied that he had anything to do with the killings. He said both the 7th and 8th accuseds denied carrying any guns on the material day. Thereafter accuseds and others were charged in court on 19/2/06. Then on 6/3/2006 he was present when D/C Rashid (the 11th accused) was

sent to SACP Mkumbi's office. He said that the 11th accused told them that after telling lies to the Kipenka Commission, he now realised his mistake and was now ready to tell the truth. ACP Mmari and himself were assigned to take him to a Justice of Peace. That they did. They took him before a primary court magistrate at Kinondoni Primary Court. He and ACP Mmari were asked to leave the room. After a while they were called in. The Justice of Peace handed over an envelope containing the 11th accused's extra judicial statement to ACP Mmari (PW30).

PW31 told the court that on 7/3/2006 the 11th accused took the team to Pande Forest, where the victims were executed. There, they picked two empty cartridges and collected clotted blood mixed with soil. Then the accused also took them to Bunju Sand Quarry, where he said he and D/Cpl Saad were ordered to go and fire their guns and bring the cartridges to SP Bageni (2nd accused). They were in the company of 12th accused (D/Cpl Rajabu). PW31 said that the team came back to the office. He was detailed to send the blood sample to the Government Chemist and also take a cautioned statement from the 11th accused. That he did. He produced that statement as Exh. P15.

On 3/4/2006, PW 31 went on, he was again summoned to SACP Mkumbi's office where he met the 12th accused, D/Cpl Rajabu, who also explained his willingness to divulge the truth about the killings. He was again asked to take his cautioned statement. After cautioning him and advising him of his rights, PW31 took the 12th accused's cautioned statement. He tendered it as Exh. P16.

According to the 12th accused, a few days after the executions,, the 2nd accused instructed him to take Cpl Saad and DC Rashid to fire 6 and 3 bullets respectively at Bunju.

PW31 said that in his statement the 12th accused explained what happened at Pande Forest and Bunju, but said he himself did not participate in the killings.

In cross examination, PW31 admitted that the 1st accused ACP Zombe was not in the original list of 15 suspects identified in the Kipenka Commission Report. He admitted further that even in Exh. P15 the 1st accused is not mentioned. He said that as a team, there were certain things they did jointly, while others were done by each group separately.

He was shown photographs of several police officers published in the police news letter that were wanted for some offences. He admitted that he could identify them being those of Frank Mbutu, James Masetta, D/Cpl Rajabu, and D/Cpl Saad. He said that although all carried the same RB number, Frank, and Mbutu were wanted for absconding from the force while the others were wanted for murder.

He said that it was standard procedure for empty cartridges to be sent to the ballistics expert for examination and not to lie at the police station, but if they could be there, they would normally be in the armoury. It was his response that according to the 11th accused, it was SP Bageni (the 2nd accused) who ordered him and D/Cpl Saad to go and fire the bullets at Bunju so that his gun might be seen to have been used too. He said that the 11th accused told him that all the cartridges were handed over to D/Cpl Rajabu who handed them over to SP Bageni (2nd accused). He admitted that, he never read the 11th accused's extra judicial statement, but admitted to have recorded the original statement of Cpl XAVERY (PW 15), the Oysterbay's Armoury Keeper (Exh. D3). He also admitted that according to the 12th accused, there was also a robbery at Kijitonyama, but could not tell whether SP Bageni followed it up or not. He admitted further

that the Government Chemist did not link the blood sample taken to him with that of the victims.

PW31 further said that although he had used the plural in his statement about the Kipenka report, what he meant was that the report was being read over to them by SACP Mkumbi. He admitted that although PW25 and PW26 had confessed to their participation in the robbery from the BIDCO truck robbery, and although these two had implicated some Oysterbay police with corrupt practices, to his knowledge, no action had been taken yet against PW25 and PW26 and the implicated police officers. But he was aware that the BIDCO robbery was the subject of a separate investigation. It was also his evidence that he could remember only two of the deceaseds, namely SABINUS SABINUS CHIGUMBI and JUMA NDUGU but he did not caution the 11th and 12th accuseds, as to who they had murdered, neither did the 11th accused mention them in his statement, (Exh. P15). He said that he had never read the post-mortem reports on the victims, so he did not know the cause of their deaths.

He also admitted in cross examination that in Exh P.15 and P16, which he recorded, the 11th and 12th accuseds did not admit to have committed the offences with which they were charged or being a party

thereto, but that they were present at the scene of crime at Pande Forest,. He believed them to have told the truth. He also admitted that the 11th and 12th accuseds' statements do not describe the list of persons who were present at Pande Forest on the material day. He said that although they had found and collected blood samples from the scene which was mixed with soil, he did not know the technical part of the evidence as to blood grouping or DNA comparison.

However, on further cross examination, the witness said that although the 11th and 12th accuseds did not admit having killed the victims, their team doubted them and that is why they were charged. He remembers that from the scene at Pande Forest, they collected two empty cartridges and blood samples. They kept those for sometime in their offices, before he personally took the blood samples to the Government Chemist. He could only remember that the cartridges were taken to the ballistics expert. He said that although the 12th accused's statement mentioned having collected one uniformed police officer from Mbezi Police Post he did not pursue that matter. It was left to ACP Mmari (PW30). Neither did he concern himself with who drove the victims to Muhimbili, or

to know who among the accuseds was on patrol in the defender land rover.

In re-examination PW31 said that what he knew was that their team was formed by the IGP to investigate the killings after which those responsible were to be prosecuted, and that it was the DPP who had the final say as to who to prosecute. As to PW25 and PW26, PW31 said that this was a separate incident, and was to be investigated separately. The team's task was to investigate the killings of the victims, and that is why he interviewed the 11th and 12th accuseds . He did not take a statement from ASP Makelle. He said that he was not aware whether Pande Forest was being guarded. He clarified that when he said they found blood on the soil, he meant it was mixed with soil. He said when their team was formed, the victims had already been buried.

Examined by the Lady and Gentleman Assessors, PW31 said that they referred to the Kipenka Commission Report, to see their findings. He said according to the 7th and 8th accuseds they told him that they were present at the postal fence but did not partake in the shootout in which the bandits used pistols. He said that according to the 7th and 8th accuseds there were three groups of police officers, from Oysterbay, Chuo Kikuu and

Urafiki, but they did not tell him which group led the shoot out. It was his evidence that according to the 11th accused, it was SP Bageni, who led the squad, and that D/Cpl Saad was the one who opened fire and killed the victims, and that he (11th accused remained in the car as the victims were executed.

It was his further evidence that according to the 11th accused, the 1st accused had asked them to go to his office on 15/1/2006 to get a format of the statement. He said that the 12th accused was not taken to a justice of peace. He did not know from the 11th accused why the victims were ordered killed, but someone must have issued an order. He reiterated that the (11th accused) appeared composed and willing to give his statement, and so was the 12th accused.

The next witness was **S/SGT MOJA TALUWAYE KABENA** (PW32). His evidence was simply that he was a gazetted police photographer whose duty was to take still pictures of the scenes of crime, with 18 years experience on the job.

It was his testimony that on 7/3/2006 he accompanied a police officers' investigation team led by SACP Mkumbi to Pande Forest and

Bunju Sand Quarry. There, he took photographs of the scenes of execution at Pande Forest and at Bunju, places at which they were shown where bullets were test fired in the sand pits. Although, he was not an expert in drawing sketch plans he was also ordered by his superiors to draw sketch maps, which he later passed over to one NICKOBAY for perfection as he was the expert. However, he handed in his rough sketch plan, for the Pande Forest scene as Exh. P17.

In cross examination, PW32 admitted that predominantly he took still pictures, while his boss S/SGT Elly, took video pictures of the scenes of crime, although sometimes he would assist her in taking video pictures, and she too, would take still pictures. However, he admitted in his police statement of 9/3/2006 that sometimes he used both equipment, the still, and video cameras. He admitted that he was not part of the investigation teams, and that he was not an expert in sketch plan drawing. He also denied having taken photographs contained in Exh. D6.

It was further his evidence that he was gazetted in GN 86 of 2006 but would not remember the date of publication of the notice. He admitted that although use of guns was part of police training, he had never practiced it after leaving college and had lost knowledge on how to use

guns now. He said that although he was present when the team visited Pande Forest, he never heard the 11th accused say when they went there,. He also admitted that he did not ask which car Cpl Rashid had gone there with and where they parked the car and that on the day of the visit he did not see any tyre marks. He said that although the 12th accused showed where the victims lay as they were shot, he did not show the spots in the sketch plan, because he was not an expert, but Exh. P18 showed the rough sketches. He admitted that on the date he took pictures at Bunju the quarry was still active as fresh tyre marks could be seen but on that particular day he did not see any activity or any people or livestock grazing.

He said that although they met many people on the way, they did not see any person from the border of Pande Forest. He said apart from the 11th accused, none of the accuseds accompanied their team to the two scenes of crime, nor invite any civilian to witness the search. He did not remember to have seen NICKOBAY when they left office for the visit to the scenes. He said it was S/SGT Elly who ordered him to draw the sketches although he confessed his ignorance of that skill to her.

He however, did not tell SACP Mkumbi or Insp. Omar, or ACP Mmari about his ignorance and would not know if SGT Elly ever informed them of that. At both Pande Forest and Bunju, he took photos of the 11th accused pointing at some points with sticks, but he never heard anything of what he was saying. He witnessed two empty cartridges being picked from Pande Forest, but would not tell who saw them first. At Bunju although he was standing only two metres from where Rashid (11th accused) was standing, he did not hear him say how many bullets were fired, although he pointed at a sand pit into which they were fired.

PW32 also disclosed that at Pande Forest he was shown four spots with black sand. He also admitted that he did not carry any tape measure with him.

In re examination PW32 admitted that he knew and could use both video and still pictures equipment and used both at different times at Pande and Bunju. He said that he was not the one who took photos at Sinza. He repeated that he was only ordered to draw the sketch plans by S/SGT Elly, his superior. He said that he noticed that the sample of sand picked from Pande Forest was unusually dark, but would not say what it

contained. His duty was to take pictures at the scene and not to listen to what people were saying.

Asked by the lady and gentleman assessors, PW32 said that it was Sgt Elly who showed him points C1-4 in his rough sketch plan (Exh. P17). He did not measure the distance between points D1 and D2 in Exh. D17 but they were very close, although he did not know who saw them first. He said that although the 11th accused had shown them the scene at Pande Forest, he had only come to learn of the deaths from the media. He could not tell what type of soil was at Pande Forest, but it was clear to him that the soil from the four spots C1-C4 was not natural to the surroundings. He admitted that all the points marked in Exh. P18 were made without scale but only estimates, although he could guess at Pande Forest, the victims were laid to be shot only about one foot from the path.

D/S/SGT NICKOBAY MWAKAJINGA testified as PW33. He said that he was a scene of crimes officer and his main duties were to draw sketch plans of scenes of serious crimes. In that regard on 23/1/2006 he accompanied first, SP Bageni to draw sketch plans of Sinza C at Sam Nujoma Road, from where the Bidco truck was robbed, and then moved to the postal fence, at the scene of the shootout. He said that at the postal

fence he was shown four holes allegedly made from bullet impact. He was also shown where the victims fell. He discovered four spots with blood stains. He dug the soil, preserved it in plastic bags and came back with it to the office. He said that he made inquiries from the neighbouring garage and water vendors who said that they did not hear the shoot out. From Exh. D6, he was able to identify the sketch plan he drew of the scene on 23/1/06. Then on 22/2/06 he was called by SACP Mkumbi and asked to accompany another team of investigators to Sinza C, the Bidco robbery scene, the postal fence scene, the Pande Forest scene and the Bunju Valley scene. He tendered Exh. P19, Exh.P20, and Exh.P21 for the Sinza C, Bunju and Pande Forest scenes, respectively.

In cross examination, PW33, admitted that in his statements he did not mention the presence of the first accused. He was thus forced to tender his statement as defence exhibit D7. The witness categorically denied having ever gone to Pande Forest or Bunju, but only drew sketch plans from the rough sketches submitted to him by Sgt. Moja (PW32). He also admitted that apart from police basic training, he had no special training on draughtsmanship except his own talent. He was also led to admit that apart from SP Bageni who accompanied him on the first trip to

Sinza on 23/1/06 none of the accuseds were present during the initial or subsequent visits to the scenes of crime. He also admitted that all that he based on drawing the sketch plans for Pande Forest and Bunju was what he was told by PW32 and the rough sketches the latter had made. Lastly, PW33 admitted that he handed over the blood samples he collected from the Sinza postal fence on 23/1/2006 to his officer, and that he was aware that the sample was last submitted to the Government Chemist for analysis. He said that as far as he knew, the report from the Government Chemist showed that the blood sample was a mixture of human and animal blood but did not see the report himself.

In re examination, PW33 identified the signature of the 2nd accused in a sketch plain in Exh. D6. He said that when he drew the sketch plan for the Bidco robbery, the vehicle was not there. He said that although he had no specialized training in draughtsmanship, drawing sketch plans was part of the basic training at the police college. He did not come with the certificates, however. He said although he did not go to Pande Forest and Bunju, PW32 explained to him the salient features and estimates from which he perfected the rough sketches. Finally it was his evidence that in his experience, it was neither practical nor necessary to have the presence

of the suspects/accuseds at the time of drawing sketch plans of scenes of crimes.

Examined by the lady and gentlemen assessors, PW33 emphasised that, he indeed, found four spots with blood stains down the postal fence where the alleged shootout took place and where it is said the bandits were killed. It was also his testimony that SP Bageni informed him that it was the Oysterbay police who exchanged fire with the bandits at the scene of the shootout. He noticed that the blood stains were scattered some 30 cms apart from each other on the same line. As far as he knew, only once was some blood sample sent to the Government Chemist.

In her evidence, **PW 34 WP 1516 S/SGT ELLY NKYA** testified that she was a gazetted police photographer by virtue of GN 467 of 1999

It was her testimony that on 22/2/06 and 7/3/06 she was one of the photographers who accompanied an investigation team led by SACP Mkumbi to visit various scenes of crime in this case. She said she visited Sinza (Palestine), the postal fence, the Bidco robbery scene, the Pande Forest, and Bunju Valley and took moving pictures of all the scenes, except the Sam Nujoma, Bidco robbery. She testified that it was the 11th accused,

who showed to the team, the Pande Forest and the Bunju Valley scenes. In her evidence, at Pande Forest, she was able to see four spots with blood stains, and also witnessed the picking of two empty cartridges of which she took moving pictures, while Sgt Moja (PW31) took still pictures. Finally she said that her final act was to develop these pictures into a CD (Compact Disc) and labelled it "Zombe AM."

In cross examination PW34 said that she had her own reasons for labelling the CD in the manner she did, but not because she predicted that Zombe (the 1st accused) would be charged with the present case. She said that she gave her statements on 28/2/2006 and 9/5/06 for what she did on visiting the scenes on 22/2/06 and 7/3/06. In those visits, she said, the team leader was SACP Mkumbi, but later came to learn that they were being led by the 11th accused Rashid Lema as both SACP Mkumbi and others, including herself did not know the directions to Pande Forest or Bunju Valley. Examined further, she said that she could not see who picked the blood soiled sand at Pande Forest nor heard Rashid closely as he pointed to those spots because she threw her attention to taking her moving pictures. Although she saw samples of blood she could not identify whether it was human.

She said that she also took pictures of the two cartridges picked from Pande Forest, and the four holes on the postal fence at Sinza.

It was her further testimony that although she was trained in the use of firearms, she could not tell from which gun the cartridges picked from Pande Forest could have been fired. She admitted that she ordered Sgt Moja to take sketch plans at Pande and Bunju scenes because he was also knowledgeable on this aspect. She said that they left for Pande Forest in several vehicles although she couldn't remember in which vehicle, Rashid Lema, the (11th accused) drove, and who led the way to those scenes. It was her evidence that at Pande Forest, the 11th accused showed the places where the victims were laid and executed from which clotted blood was found. She admitted that at the east side of the scene of crime at Bunju there were houses. She said that it was she who ordered Sgt Moja to draw sketch plans. At Sinza C, it was one Mjata (PW6) who showed the different points, of which she took pictures, but none of the accused persons were present, at Sinza while at Pande and Bunju, only the 11th accused was present.

She admitted that apart from taking pictures, she knew nothing else about the case. She admitted that she did not shoot pictures all the way to

Pande Forest, but only the scene of crime. PW34 said that even her driver Eric did not know the way to Pande, and that at no time did she engage the 11th accused in any conversation.

In re-examination, PW34 said that there was no limitation of time in which to make a statement. She did not take any measurement of the width of the road to Pande Forest. She further said that by referring to Sgt Moja also an expert in draughtsmanship, she meant that he ought to know of it because, it was part of the basic training of any police officer. However, PW33 as a Scenes of Crimes specialist had better/polished experience in drawing, while PW32 specialised in photography.

The next witness for the prosecution was **OMAR MOHAMED ABDALLAH** (PW35). This was a justice of peace who took the extra judicial statement of the 11th accused RASHID LEMA and tendered it or Exh. P22. He read the extra judicial statement back to the court. He also said that he was not aware of a procedure whereby a suspect could write down his own statement. He admitted he had witnessed cases in which suspects had been brought to him, with bruises sustained while in police custody, but in this case the 11th accused had no bruises, except a self inflicted tattoo on the left shoulder. He also said that although the 11trh

accused mentioned a prepared format of what to say to the Commission he did not ask him to produce it before him. He said that in his statement although the 11th accused said that there were a total of 15 police officers, including himself who were present at the scene, the only officers he mentioned were Zombe, Frank, Bageni, Rajabu and Saad, and that, of these, Saad was the actual perpetrator, Frank was their driver, while Rajabu was his fellow Oysterbay police officer. He said that although Exh. P22 was not a direct admission of guilt he believed it was a confession. He admitted having written an extrajudicial a statement as recent as May, 2008 but did not remember the police officer who received it. He said that in his own statement, the word "**ungamo**" (confession) does not appear.

In re-examination, PW35 told the court that according to the 11th accused, he had to lie to the Presidential Commission because he was threatened by the police administration into doing so or else took the risk of facing the responsibility for the killings. PW35 said that Exh. P22 was a confession, because, in it, the accused admitted being present and witnessed the killings and even receiving the bodies back into the vehicle.

The testimony of **PW 36, SACP SYDNEY MKUMBI** was that she was in charge of the Y section of the Directory of Criminal Investigation at

the CID headquarters. Y section deals with offences against the person including homicides.

On 18/2/2006, she was summoned by his boss CP Adadi Rajabu who entrusted her with the task of investigating the case of the killing of four business persons on 14/1/2006 as recommended by the Presidential Commission/Kipenka Commission) She said that she was to be assisted by SSP/now ACP) Mmari (PW30) and SSP Mgassa (retired). She said that she summoned the two officers for briefing . They were to complete the investigation within 21 days. She enlisted the assistance of other police officers, including ASP (now SP) Kabeleka, ASP Omari (PW31) S/SGT Firimin, Sgt David and officers of the Forensic Bureau.

PW36 said that they started their investigation by interrogating 8 of the 15 officers recommended for prosecution by the Kipenka Commission . Of the eight who were already in custody, seven were at the Central Police station and one at the Selander Bridge police station.

PW30 appointed detectives to take statements from the 7 suspects at the Central police station, while she and PW30 went to Selander Bridge,

where the 2nd accused, SP Bageni was being held. At that time not all the 15 officers had been arrested.

At Selander Bridge, SP Bageni informed them that he was bereaved and grieving for his sister and was not ready to give his statement without his counsel. So they left him. All the other suspects gave their statements and she personally witnessed the taking of the statement of the only woman suspect, the 5th accused. It was also her evidence that the DCI had instructed her to get in touch with the Secretary of the Kipenka Commission, Mr. Feleshi (PW3), who could give her insight on the case. That she did. It was her evidence that as a result of the contacts she was directed to Sinza (Palestine) where her team met MJATA (PW6) and BERNADETA LYIMO (PW2). They were shown various points relevant in their investigation. From there they were led by SGT NICKOBAY (PW33) to Sam Nujoma Road, (at the BIDCO robbery scene), and the postal fence wall where it was said there was an exchange of fire between the police and the alleged bandits. The witness informed the court that after interviewing the neighbours they told her that they never heard of any shoot out on 14/1/06, she was satisfied that nothing of the sort happened.

PW 36 went on to inform the court that on 3/3/06 Special Zone Commander Tibaigana rang to inform him that one of the suspects had come forward and was prepared to surrender. It was ASP Makelle, the 3rd accused. His statement was taken and was later joined in the charge of murder. Then on 6/3/06, she again received a call from CP Tibaigana who informed her that there was yet another suspect who was ready to surrender. It was DC Rashid Lema (11th accused). After some preliminary inquiries on where he had been hiding, PW36 decided that the suspect be taken to a justice of peace to give his extra judicial statement. According to the witness, the statement of the accused was very revealing. From the 11th accused, she learned that after the arrests of the victims at Sinza Palestine alive, they were driven to Sam Nujoma road at the BIDCO robbery scene. He made inquiries and learnt that they were innocent, and that even SP Bageni was satisfied that they were innocent but after conversing with some senior officials ("Afande") SP Bageni came back to tell them that the senior official had ordered the execution of the victims. After which the journey to Mbezi Luis began. It was her further evidence that according to the 11th accused, at Mbezi Luis, they looked for assistance of a police officer from the police post there, who directed them

the way to Pande Forest. She said from the evidence of the 11th accused, the victims were executed by Cpl. Saad after which the bodies were boarded into a vehicle (he being one of the persons who assisted in loading the bodies) and taken to Muhimbili. So, PW36 concluded that there was no exchange of fire at Sinza.

PW36 went on to tell the court that the following day, the 11th accused took them to Pande Forest, where they collected four samples of blood sand soil and two cartridges. And from there, he took them to Bunju where he and Cpl Saad fired a total of nine bullets in the sand pit. She said that the blood stained soil was sent to the government Chemist, and the empty cartridges to the ballistics examiner.

PW36 said further that later in July 2006, Cpl. Rajabu (the 12th accused) also surrendered himself and was joined in the charge.

She said that after interviewing him, she found that his account was similar to that of the 11th accused. His cautioned statement was taken by ASP. Omari (PW31).

With regard to the 1st accused, PW36 said that after completing their investigation and submitting the case file to the DPP, the latter

instructed that the 1st accused also give a statement. This was in May 2006 when she called him to inform him of the DPP's directive. The 1st accused was not willing to give one, saying that he had already given one to the Inspector General of Police in answer to disciplinary charges. However, PW36, took up the matter with the Director of Criminal Investigations who ordered him to write a statement, which he did. After that the file was sent back to the DPP, who was the one who decided to charge him with the offences of murder with the rest of the accused persons. She said that of the 15 persons recommended for prosecution, by the Kipenka Commission, 3, Frank, James, and Saad, were still at large.

PW 36 further testified that in their investigation of the whole sequence of this case, the robbery from the BIDCO truck was set up by RAMADHANI MANYANYA and his group. This also added to strengthening their findings that the victims were innocent, and that they were killed at Pande Forest. Furthermore they also relied on the evidence of the 11th and 12th accuseds, and the results of the chemical analysis of the 4 samples taken from Pande Forest, that, it was human blood. In addition, there was evidence from Sinza Palestine, that the victims were arrested live and had their pistol seized, so, the question of there being an exchange of fire, did

not arise. Furthermore it was PW36's evidence that the armoury registers of Chuo Kikuu and Urafiki showed that no bullets were used from those stations, but the one from Oysterbay, showed that nine bullets were unaccounted for out of the 30 issued to Cpl. Saad.

In cross examination, PW36 admitted that although she had testified at length in court, she wrote only a brief statement on the case on 26/5/2008 after being directed by the DPP. She admitted that most of what she testified on in court was not in the statement. She was forced to tender her statement as Exh. D8. When shown the first accused's statement, she said that she had not seen the statement before. Upon being asked to read it, she said it was written as a witness statement. She went on to tell the court that when she asked the first accused to give his statement, he refused, and she did not feel like taking any action against him other than by reporting to the DCI. After all, he had the right not to give a statement. She admitted that the 1st accused was not in the list of 15, recommended to be prosecuted by the Kipenka Commission, and that the Commission had recommended that disciplinary action be taken against him. She said that the BIDCO robbery had an investigation file opened and she herself had interviewed the driver MASHAKA MASINI and the

Salesman RAMADHANI SHOMARI. Otherwise, the robbery was investigated by another section, but according to RAMADHANI (PW26) the shs.5/- million which they robbed from BIDCO, was distributed among the perpetrators of the crime. She admitted that although the 1st accused was entitled to give a press release, his role in the present case is depicted by the statements of the 11th and 12th accuseds. She said that she was not aware that Zombe (1st accused) had undergone disciplinary measures or that he was demoted. In fact, getting back to headquarters from the position of RPC Sumbawanga, was a promotion to him. She admitted however, that the 11th accused's statement (Exh. P.15) did not mention the 1st accused but that he was mentioned in the extra judicial statement. (Exh. P22).

PW36 admitted that the victims were arrested in connection with the BIDCO robbery. She said that although the Director of Criminal Investigation referred to the recommendations of the Kipenka Commission, she did not see the report herself. Even when she met Feleshi (PW28) she had no access to the report. The DCI did not tell her why only 15 officers were cited for prosecution. She said that the road to Pande Forest was too narrow to enable two cars simultaneously drive in opposite directions. As

to Exh. P2, P36 admitted that there were discrepancies in the records which showed that the same guns and 30 bullets were issued to other officers on subsequent dates, but there was no indication as to whether the bullets were accounted for. She admitted the possibility of the two cartridges picked from Pande Forest being fired subsequent to 14/1/06. She also said that according to the 11th accused, Sgt. James was the one who took the victims to Muhimbili, and that he, Frank and Saad were still at large. She was not aware of who else partook in the crime and not charged.

PW36 told the court, that the 1st accused was neither at Sinza, during the arrest of the victims, nor at the postal fence where it is alleged, there was an exchange of fire, nor at Pande Forest. She said that after the 11th accused's statement, she tried to check with the cell phone service providers, VODACOM and CELTEL to trace the conversation between the 1st and 2nd accuseds on the material dates, but she was told that the records had been deleted on the expiry of six months. It was her testimony that although police officers were obliged to obey orders, they could only do so if the said orders were lawful.

PW36 confessed that according to the 11th accused, at least three cars went to Pande Forest on 14/1/06 and that he himself boarded the 2nd accused's car, without resistance. She said that the 11th accused said that all the accuseds, except the 4th and 6th accuseds were present at Pande Forest. It was her testimony that none of the witnesses at Sinza could identify the officers who arrested the victims, but apart from the statement of the 11th accused the respective OCSs of the stations disclosed the identity of the police officers on patrol duty. She said that they did not get the officer from Mbezi Luis police post, who directed the squad to Pande Forests. It was her testimony also that apart from the said accuseds, SP Bageni also went to Pande on the material day. She said that although she had learnt that the police officers also grabbed money from the victims, she did not investigate the matter further as it was not within her jurisdiction, but after interviewing SHABANI LUNJE (PW25), she was certain whatever money the police boasted of seizing, was not from the BIDCO robbery. She admitted that according to the statement of VASCO which was taken down by SSP Mgassa, at some point in time, at the garage, the 2nd victim handed over his brief case to VASCO for safe keeping, but she did not inquire whether VASCO returned it.

She admitted that on the information from SP Bageni, the 1st accused issued a press statement on the seizure of shs.5,755,000/= from BIDCO robbery with which the vitims were found in possession. However, the statement was released before the Sinza witnesses were interviewed, and SP Bageni was already in court. She did not recall SP Bageni, for another interview. She said that she believed Cpl. Rashid on his statement that Cpl. Saad executed the victims. Apart from the recommendations of the Kipenka Commission and the statement of the 11th accused, the other accuseds also gave additional statements acknowledging their presence at the crime scene. It was her further testimony that the 11th accused showed her a prepared statement, which they were required to follow when they appeared before the Commission but he was not prepared to release it to her.

On the blood samples collected by SGT NICHOBAY (PW33) at Sinza postal fence, PW36 said that she did not remember whether they were sent to the Government Chemist, or had their results known. When they started investigation, the victims had been buried. She confirmed that in her statement, the 5th accused did not confess to the commission of the offence and that the 3rd accused was out of the country on official trip

when the other accuseds were arrested. She said that the accuseds were not charged because they were on patrol but for other circumstances as well. She said that for instance, the Chuo Kikuu police led by Sgt. James were the first to arrest the victims from Sinza.

In further elaboration, PW36 admitted that among the accuseds the 4th, 6th and 13th accuseds were not present at Pande Forest, and that Cpl. Saad actually executed the victims. She admitted that, it was not an offence to arrest a suspect, neither was going to Pande Forest per se. But when they reached Pande Forest and the executions began none of the accuseds said a word of protest. She said that NICKOBAY (pw 33)had shown them where he had picked four pools of blood samples from the postal fence, but she and her team had not yet started investigation, and so she was not aware whether they were sent to the Government Chemist. But, confirmed PW36, after visiting the Sinza postal fence scene and interviewing witnesses in the neighbourhood she did not believe that there was any exchange of fire there.

PW 36 said that she did not remember whether XAVERY wrote an additional statement to explain the discrepancy in Exh. P2. She said she did not remember who sent the guns used by Rashid and Saad to the

ballistics experts, except the two cartridges picked from Pande Forest, which were sent by SSP Mgassa. She said that as the victims were executed by Saad, according to the 11th accused, the rest were just spectators, and included those who were in the land rover defender. However, those who were in the defender are not among the 15 officers recommended to be prosecuted by the Kipenka Commission. She said that the decision who should or should not be charged rested with the DPP. It was her evidence that a police officer on duty patrol could not disobey the orders of his superiors and if he did he would be charged disciplinarily. She said that the OCS was in charge of all stocks of firearms in his armoury.

In re examination, PW36 said that it was not necessary to record everything in a statement, and that omission to record anything would not affect one's testimony in court. She said that ACP Zombe (the first accused) had an option whether or not to write a statement. She could not force him.

She clarified that when the Kipenka Commission was proceeding,D/C. Rashid (11 accused) had not surrendered and given his statement. And so was Cpl. Rajabu. It was also her testimony that the first police probe team

report led by SACP Mgawe, was not complete because they did not complete the task. She said that apart from the administrative command chart PGO 3 there was also a criminal investigation command chart PGO n.8. In the latter command chart the OC-CID reports to the RCO. At the material time the 2nd accused was the OC CID Kinondoni and answerable to the RCO (1st accused).

PW36 said that she was only assigned to investigate the offence of murder not the BIDCO robbery. It was her evidence that although the RCO could give a press release it was prudent that he be first satisfied with the accuracy of the report. In this case it was the DPP's office which decided to charge the accuseds. Of the 15 officers shown in the Kipenka Commission Report, only 12 were in the present case. The other three were still at large. She said that according to their investigation the two guns used for the killing were issued on 14.1.2006 and that was when the two cartridges picked from Pande Forest were fired. It was her further evidence that she was not present when XAVERY was testifying in court. She said that her investigation further revealed that the pistol seized from the victims was lawfully owned by one of them, namely SABINUS CHIGUMBI since October 2003. PW36 said that her team was not satisfied

that there was an exchange of fire at the Sinza postal fence, because the victims were arrested at Sinza handcuffed, had their pistol seized and taken to Sam Nujoma. Apart from the 11th accused's statement, SP Bageni had also written to demand an audience with the DCI. It was after the 2nd accused had given his additional statement sometime in June or July 2006 that they visited VODACOM who said the six months had expired.

PW 36 told the court that in their investigation after the incident, each of the accuseds initially gave a different version of the event. But none of them said that they took any action to prevent the commission of the offences.

Although she did not record the statements of all the witnesses, it was clear after reading VASCO's statement again that the 2nd victim's black brief case with money was finally returned to the owner and placed in the boot of their car. She said that after the arrests the police were supposed to take the victims to a police station.

Examined by the lady and gentleman assessors, PW36 said that although she saw four holes on the postal fence, she was not sure whether they were bullet holes. She said according to the 11th accused, at Sinza,

the 2nd accused informed the contingent that he was ordered to execute the victims and at Pande Forest and , he was the one who issued orders, as he was the most senior. The report from the ballistics expert on the two cartridges was that they were fired from an SMG gun. D/CRashid's role at Pande Forest was to load the bodies of the victims onto the vehicle that took them to Muhimbili. It was also her testimony that although the 4th and 6th accuseds were not present at Pande Forest, they were involved in arresting the victims at Sinza and drove them to Sam Nujoma. They were therefore part of the conspiracy to murder the victims. She said that when the 11th accused went to see her on 6/3/2006, he was in a normal condition and was not induced to give his statement. She did not know how much money the victims had.

Asked by the court, PW 36, said that the police officers present should have reported the commission of the offence to the next nearest police officer as to what led them to obey the unlawful orders.

The last witness for the prosecution was **PW 37 DAVID ELIAS.** His evidence was short. He was a Principal Chemist employed by the Government Chemist Laboratory Agency. He is equipped with a Master of Chemistry Degree from Lumumba University, Moscow. He also has a post

graduate diploma in forensic sciences from Stasclive Glasgow, the UK. He has 13 years experience working in the Government Chemist Laboratory

On 9/3/2006, he received exhibits from Insp. Omari (pw31) . They consisted of four samples of soil alleged to have contained blood. His task was to determine, first whether, it was blood, second, whether it was human blood, and thirdly the blood grouping. He said that after doing the analysis he was able to determine that it was human blood, but due to decay their blood groups could not be determined. He offered his report as Exh. P.23.

In cross examination, PW37 said that he did not receive any other samples for testing. He said that decay could be caused by several factors, including moisture, rain or heat. For it, not to decompose, blood had to be stored in a cool place – such as a refrigerator.

He said that as far as he could recollect, the samples were sent in by the OC-CID Oysterbay and that it was the cells which could identify it. He was not sure whether there was any other blood samples received from police headquarters. He admitted that the chemical (anti serum) could fail if it was not properly kept, but its accuracy rate was 99,9%, and that in

this case was that much accurate. PW37 said that he could not tell whether the four blood samples brought to him were part of the same sample. And that he was not asked and did not do any soil analysis.

In re examination, PW37 said that he was not asked to show the procedure of analysis nor soil analysis, in the request form.

Examined by the assessors, PW37 said for blood not to decay, it must be stored in a cool place. It was chemicals which could identify blood groups. He said that if any blood groups were discovered and it happened to belong to the same blood group, it was not possible to tell which one belonged to whom. Finally he insisted that the blood samples were brought in from the OC-CID Oysterbay and not from the police headquarters.

Before the close of the prosecution case, and at the request of the defence counsel, PW22 was recalled for further cross-examination. He was led to admit that on 27/1/2006 he received four samples of soil/sand from Sgt. Nickobay (PW33) with instructions from SACP Mgawe that he should forward the same to the Government Chemist. He did as instructed and tendered the letter as Exh. D9. According to PW22 the subject matter of

the request was armed robbery, and the scene of crime from which the samples were collected was Sinza. And further the witness said, he did not get back the results, nor saw the report from the Government Chemist which he was asked to read aloud in court. In re examination, the witness said he had testified on the case of a murder, but the subject matter of Exh. D9was armed robbery.

I have carefully listened and watched the prosecution witnesses testify. I am of the view that with the exception of a few, all the prosecution witnesses gave credible testimony; and stood their grounds in cross examination. Although PW6 MJATA GEORGE contradicted PW14's evidence when he described the Chuo Kikuu police pickup, this did not affect the substance of his evidence which is that he witnessed the arrest of the victims. PW15 contradicted his oral evidence by his own statements (Exh. D2) (additional statement) as regards to the alterations in the Armoury register. While in his testimony he said the alterations were ordered by the 2nd accused in Exh. D2, he said he did it accidentally without mentioning the 2nd accused. In the circumstances I will give the 2nd accused the benefit of the doubt. I therefore find that the allegation that it was the 2nd accused who ordered PW15 to change the entries

against D/C Rashid's return column not proved. That, however, does not make the rest of his testimony suspect, because the exhibit Exh. P2 supports the entries, in question, and there is no dispute that D/C Rashid, and D/Cpl Saad, were issued with firearms and ammunitions on 14/1/2006 and returned them the next morning with the shortages shown. There is also no dispute that a few days later the 11th accused and D/Cpl Saad were also issued with firearms and fired nine bullets from them. This is supported by the 2nd accused himself sending nine cartridges for ballistic examination on 25/1/2006.

The evidence of PW25 and PW26 is that, of self confessed robbers. Such evidence has to be treated with a suspicious eye, since these witness have no moral scruple. With such caution in mind, I found that their evidence could corroborate the victims ' alibi, as exposed by PW8 and PW17. These two pieces of evidence together, show that the victims could not have taken part in the robbery from the BIDCO sales truck along SAM NUJOMA, at the time alleged to have taken place.

PW6, PW12, PW15, PW16, PW17, PW33 and PW36, were forced to tender their police statements as Exh. D1 D2 D3, D4, D5, D7 and

D8 respectively, I suppose this was done under the auspicies of section 164(1) of the Evidence Act (Cap 6 – RE 2002) which reads:

> "164(1) The credit of a witness may be impeached in the following ways by the adverse party, or with the consent of the court by the party who calls him...
>
> (a) ..... (not applicable)
>
> (b) ..... (not applicable)
>
> (c) by proof of former testimonies inconsistent with any part of his evidence which is liable to be contradicted".

I have carefully compared the testimonies of those witnesses and their previous police statements.

As shown above it is true that PW6 said something different from PW14 and PW24 about the description of the Chuo Kikuu police car. Although his statement was not true in certain aspects it was consistent with the substance of what he said in court. I find that although PW6 displayed so much zeal in his testimony, in substance this witness's credibility had not been impeached because, in other aspects, his description of the vehicle did not materially differ from those of PW14 and

PW24 who admitted that at one time, the car had "POLICE" labels on both doors of the cabin, but was removed when it was resprayed after an accident in 2005. In their statements, Exh. D2 and D4, PW12 and PW16 had omitted to mention the 1st accused's presence at Muhimbili on 18/1/2006 contrary to their testimonial evidence in court. They both attributed the omission to the manner of recording the statements. It is my view that these contradictions raise reasonable doubts as to the presence of the 1st accused at Muhimbili on 18/1/2006 when the witnesses went to Muhimbili mortuary to pay last respects to the victims. Therefore I will give the benefit of the doubt to the first accused and also find that allegation too not proved.

I have already commented on the evidential value of Exh. D3 and the testimony of PW15. If the omission in his statement is severed from his testimony to the benefit of the 2nd accused, I think the bulk of his evidence remains unshaken. Similarly, in Exh. D5, PW17 is alleged to have omitted to mention that the 1st accused had labelled him a bandit terrorising Mahenge. He attributed the omission to the recorder who did not record what he told him. All in all, the substance of his evidence is that he was the one who drove two of the victims to Arusha, saw the proceeds of sale

of gemstones, spent the whole of 14/1/2006 up to 5 pm with the victims at a garage, and on 15/1/2006 went to identify the bodies of the victims at Muhimbili where he was arrested. It is my opinion and finding that whatever contradictions or omissions in his statement, they did not detract from the substance of his evidence.

PW 27 was also forced to exhibit, not his statement, but the Mgawe task Force Report, of which he was the co author, as Exh. D6. I will comment on this exhibit in the course of evaluating the defence evidence as his tendering Exh. D6 does not fall within the confines of s.164 of the Evidence Act.

PW33 was also forced to exhibit his statement as Exh. D7 because in this statement, he did not mention the first time he went to the scene on 23/1/2006 where he alleges, the 1st accused was present along with SACP Mgawe. I find this omission, material in so far as it creates doubts, whether the 1st accused participated in inspecting the scene of crime on that day. However, the intention of this witness was to draw scenes of crime, which he did. This omission does not affect the substance of his evidence although I will disregard it as far as the 1st accused is alleged to have visited the scene on that day.

Exh. D8 is the statement of PW36 which she was forced to admit because it was less detailed than what she had testified on in court. She explained that it was not very necessary to cover every detail in a statement. For my part I do not see how Exh. D8, could be said to be inconsistent with her testimonial evidence in court, because such details are not in the statement. What is not contained in a previous statement cannot contradict, or be inconsistent with the one's testimony in court.

On the whole, therefore, I find that the inconsistencies in Exh. D1, D2, D3, D4, D5, D7 and D8, are not so material as to impact on the credibilities of PW6, PW12, PW15, PW16, PW17, PW33 and PW36. Thus, with the exception of PW25, PW26 whose evidence I regard as suspect, which however I find it corroborated in the evidence of PW8 and PW17, I find the rest of the prosecution witnesses credible, and their evidence solid.

Let me now evaluate the probative value of the prosecution exhibits. Exh. P1 is the Chuo Kikuu Police Armoury register. According to PW14 and PW24 this exhibit shows that although on 14/1/2006 the 6th, the 7th, and 13th accused persons were issued with firearms and ammunitions these were returned the next morning unused. Exhibit P2 is the Armoury Register of Oysterbay police station.

As indicated above, Exh. P2 shows that on 14/1/2006 the 2nd accused was in possession of a pistol with 8 rounds of ammunition. D/Cpl Rajabu (12th accused) was issued with a pistol with 8 rounds of ammunition, but it was returned unused on 14/1/2006 D/Cpl Saad was issued with an SMG gun with 30 rounds of ammunition. Next morning he returned the firearm and 9 rounds of ammunition less. On the other hand, D/C, Rashid, was issued with an SMG gun and 30 rounds of ammunition. Next morning, the entry, was initially "GOOD", but according to PW15, this was later altered to read 3 bullets less. I have found this piece of evidence of doubtful value.

Exh. P3, A,B,C,D collectively, are the victims' post mortem reports. They show that they died of gun shots fired at close range from the hind necks. Between the four victims, seven bullets were fired. Exh. P4 is the Armoury Register of Urafiki. According to this exhibit on 14/1/2006 the 3rd accused had in his possession a pistol with 8 rounds of ammunition. So was the 10th accused. Next morning, the 10th accused returned the pistol and rounds of ammunition unused. The 3rd accused returned his on 25/1/2006 before he left for Egypt. It was unused. It means that none of them fired their guns the previous evening.

Exh. P5, is a ballistic examination report together with the photographic impressions of the testifired bullets, following a request from Kinondoni District Crimes Officer dated 25.1.2006 for examination of 9 cartridges, and which of the two firearms, fired them. In his opinion 5 of the cartridges were fired from an SMG No. 3N-0199P; and 4 were fired from SMG M 13059192. Exh. P6 is the SMG No. 3N – 0199P. Exh. P7 is SMG No.13059/92. Exh. P8 are 5 empty cartridges Exh. P9 are 4 empty cartridges. Exh. P10 is a report on ballistic examination of two empty cartridges, requested by Police headquarters on 9/3/2006. In his opinion, PW22 said that the two empty cartridges were not fired from SMG No. 3N – 0199P, but from SMG No. 130 59192. Exh. P11 are the two empty cartridges. Exh. P12 are 3 cartridges testifired from Exh. P6, Exh. P13 are 3 cartridges testifired from Exh. P7. There is therefore credible evidence that the two cartridges picked from Pande Forest were fired from SMG No. 13059192.

Exh. P14 is the motor vehicle driven by the 3rd victim as a taxi, which carried around the city the other victims until they were arrested at Sinza on 14/1/06. Exh. P15 is a cautioned statements of the 11th deceased accused. Exh. P16 is the cautioned statement of the 12th accused. Exh.

P22 is the extra judicial statement of the deceased 11th accused. As observed above when setting out the principles of law, I have formed the opinion that, the statements Exh. P15, 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 the other accuseds. I must also note that unlike Exh. P22 which taken together with other incriminating facts such as the accused's 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 Ex. P16 is only a confession to the other minor offences and not to murder.

Exh. P17 and P18 are rough sketch plans drawn by PW32. Exh. P19 P20 and P21 are sketch plans drawn by PW33, of various scenes of crime at Sinza C, the Sam Nujoma road robbery scene, the postal fence, Pande Forest and Bunju. There is no dispute about the sketch plans. I have noted however, that there is a strange coincidence in the way in which the

sketch plan at the postal fence also contained in Exh. D6 shows how the victims fell from the wall to the same place, and as closely as it is shown how they were forced to lie down to be shot at Pande Forest Exh. P21. This, in my opinion, reflects the brain of a person who was present at both points and saw how the victims lay after being shot. But I am also unable to accept that the victims, who were shot as they were trying to climb different parts of the wall shown in Exh. 19 could, by coincidence, have also fallen on the same spot, as this was against the physical laws of nature.

Exh. P23 is the report of the Government Chemist on the results of blood samples sent to him for analysis. It was his opinion that the soil contained human blood, but could not detect any blood group. PW37 testified that he received it on 9/3/2006, and received no other sample. It will be recalled that PW33 is recorded to have testified that he also collected blood from the postal fence on 23/1/2006 and there is also evidence that PW22 sent it to the Government Chemist for analysis. Whereas PW33 confirmed in court that the samples he had collected were sent to the Government Chemist, he was not sure whether the blood was human as he had not seen the report, PW22 on being recalled, said that he

had not received back the results of the samples he had sent. PW37's insistence that he had received the request from Kinondoni can be explained by the reference number of the police case file OB/1112/670/2006 but the forwarding letter which is also quoted in Exh. P2 of CID/HQ/SCR/Y/1/2006/5 of 9/3/2006 clearly indicates that it was sent from CID headquarter by Inspector Omary (PW31) who also testified to the same effect. In the circumstance, there is no reasonable doubt I think that Exh. P23 reflects the results of the blood samples taken from Pande Forest and there is no result before the court, for the samples taken from the postal fence. Besides, even if such results were there I would have treated it with suspicion because when PW27 and his team visited the scene earlier on 20/1/2006 no blood was seen, so it is strange that it was seen three days later on 23/1/2006. It is even more strange that the blood was collected from four different spots sisymetically arranged as the sketch plan (Exh. P20) from Pande Forest. I would therefore reject any suggestion that the blood collected from there could have been attributed to the blood shed there from the victims, or that this piece of evidence introduced any reasonable doubt in the prosecution that Exh. P23 is a report on the blood collected from Pande Forest.

However, having held that the blood from Pande Forest was human blood it is not conclusive evidence, in the absence of blood group analysis or DNA test, that it necessarily belonged to the victims. On this comment I have the support of the Court of Appeal of Tanzania, in **MPUNZU's** case (supra) where the court said:

> "In the absence of evidence showing the deceased's blood group which could be related to that blood found on the rubber shoes could not be linked with the deceased. It cannot with any element of certainty be said that the appellant caused the death of the deceased".

But as the Court of Appeal also observed in **HAMIDU MUSSA TIMETHEO AND MAJID MUSSA TIMETHEO v R** (1993) TLR 125 (CA) blood grouping in the laboratory was not the only way of linking a sample of blood to the subject in issue. Other deductive methods can be used. In that case the Court of Appeal found that there was sufficient circumstantial evidence to link the blood found with the Appellants' articles to that of the deceased even if the deceased's blood group was not established.

Although I had made my remarks on Exh. P23, I will for the moment defer to make any further findings on the conclusiveness of the owners of the blood analysed in Exh. P23, until, I will have considered the defence evidence.

But so far from the totality of the prosecution evidence on record, I am satisfied that 3 of the victims namely the 1st, 2nd and 4th victims were artisan mineral dealers from Mahenge, whereas the 3rd victim was a taxi driver, in Dar es Salaam. I am also satisfied that on 14/1/2006 they spent the whole day repairing their car at YAMUNGU MENGI GARAGE in Buguruni before they went to PW2's house. That, they were arrested from PW2's house, had their pistol seized, handcuffed and taken away, is now also beyond dispute.

I am also satisfied that the 3rd, 4th, 5th, 6th, 8th, 10th, and 13th accuseds were present and took part in the arrest of the victims, and that from Sinza the victims were taken to Sam Nujoma where the BIDCO sales truck was robbed. I have no doubt that the BIDCO robbery was real, but as said above, the victims did not take part in the heist. I am also satisfied that the victims are dead and the cause of their deaths is gun shots. From the nature of the wounds, I am satisfied that whoever did it he did so with

malice aforethought. I am also satisfied that two empty cartridges were picked from Pande Forest, and the cartridges were fired from an SMG gun No.13059192 (Exh. P7). I also find as a fact that the 2nd, 3rd, 9th, 10th, 12th accuseds did not fire their guns on 14/1/2006 and that only Exh. P6 and Exh. P7 were fired/used. I will for now, however leave open the question as to who among the accused persons (apart from the 1st accused) were present at Pande Forest, until a later stage.

However, I cannot wait to remark that first, there is no direct evidence from any of the 37 prosecution witnesses to prove that any of them saw the victims killed and by the accused persons. Secondly so far there is no link between the medical evidence on the cause of deaths of the victims, and the ballistics evidence that would show which gun fired the 7 fatal bullets. There is a hint that D/Cpl Saad is the one who fired at the victims. But D/Cpl Saad is not on trial before me. He has not defended himself. The two cartridges picked at Pande Forest suggest that they were fired from the 11th accused (deceased's gun) which is not consistent with his SG gun exculpatory statements (Exh. P15 and P22). But since he is dead and has not defended himself, the court cannot at this stage make any conclusive findings on the two cartridges especially when Exh. P2

suggests that the same guns and ammunitions were, subsequent to 14/1/2006, issued to other police officers, and PW36 admitted that there was a possibility that those two empty cartridges could have been fired on a date later than 14/1/2006.

Let me now turn to the defence case.

All the accuseds elected to give their evidence on oath. The 1st accused **ACP ABDALLAH ZOMBE** was the first to testify as DW1.

In his defence, as led by his counsel, the 1st accused outlined the salient features of his case. First, he said that had it not been for the letters from his fellow accuseds, (secretly spirited away from the prison) the DPP implicating him 6 months after the incident, he would not have been charged. Secondly he emphasised that the law was not followed in charging him. He cited several provisions of the Criminal Procedure Act, 1985, which were violated, but principally that he did not and was not given a chance to make a cautioned statement as a suspect, but only as a witness as demanded by s 131 of the Criminal Procedure Act. He tendered his witness statement as Exh. D10 –

Thirdly, the 1st accused said he had acted on the report of the crime as submitted by the OCD – Kinondoni on the BIDCO robbery. The report, was hand written by the 2nd accused. The report is what led him to give a press conference, where he showed the money and the pistol seized from the "robbers". In doing so, DW1 cited several provisions of the Police General Orders, which allowed such cause of action. He tendered a series of the report on the incident as Exh. D11 collectively.

Fourthly, the 1st accused embarked on elaborating the various single incidents that put him in the crime map. He said that his visit at Urafiki police station was prompted by a call from the then Magomeni OCD, who wanted some guidance on what to do with the missing money, seized from the BIDCO robbery incident, as revealed by the 2nd and 3rd accuseds. All that he did was to order that the exhibit should be found. He also said that had it not been for his sick wife whom he picked from TMJ hospital – city centre, he would not have been there. As to him calling the police officers to congratulate them, he said that, this was allowed under the PGO, but on 15/1/06 he only saw police officers from Chuo Kikuu, although all the OCDs were around, for a normal daily briefing. DW1 also said that he had not been to Muhimbili to see the deceaseds nor did he

order the arrest of PW4 and PW17. He also denied demanding from PW4 the production of PW2. Fifth, the 1st accused analysed and criticised the prosecution evidence Exh. P15, P16 and that of PW4, PW5, PW17, PW16 and PW12, saying that it was contradictory, shaky and unreliable. Lastly the 1st accused said that he did not know the victims personally before at or after their deaths, and that in that week he was busy leading a pilot car for the presidential entourage of familiarisation to various ministries, and that he had delegated most of the administrative work as Ag. RPC and as RCO to his assistants, who he admitted would communicate with him, if necessary.

In cross examination DW1 admitted that of the accuseds, he had known the 2nd, 3rd accuseds as they were officers, and had once worked with him and the 6th accused, Moris Nyangelera who has been acquitted. In response to his first complaint, the 1st accused said that it was the conspiracy between the then DPP and his fellow accuseds, which landed him in court for the offence of which he was innocent. He said some cell phones were seized by the prison offices from some of the accuseds which showed how they had been communicating with the then DPP, Geoffrey Shaidi, now judge of the High Court. He said this must have been

prompted by the newspapers against whom he had filed six suits in the High Court for defamation. In one of them a list of documents, mentioned those letters as the ones that they intended to rely on, in their defence. Confronted with the original letters, the 1st accused admitted that with the exception of the undated letter from Nyangelera, the other letters differed with the copies he had, in terms of dates of writing and receipt, but the contents were the same and that none of them had passed through the officer in charge of the remand prison. He insisted that all his actions were based on the crime report received from the OCD Kinondoni, whom he had no reason to doubt. He reported that he had never seen or known the victims nor been to Pande Forest before the date the court visited the scene. He also said that the 11th accused was facing defaulter charges (disciplinary charges) which he had ordered, for breaking and stealing from the Oysterbay Staff canteen. So he could have had grudges against him, hence the contents of Exh. P15 and P22. He said that he did not make any inquiries as to the legality of the possession of the pistol seized from the victims because that was the concern of another department – the forensic unit. He said that there were three classes of police stations, Class A, Class B, and Class C each handled by OCS, and in the case of Class A, by an OCD

and OC CID. In administration of crime, each class would report to the next class, and onwards up to the IGP through the RPC. He said that in this case, the 2nd accused was in charge of crime administration at Oysterbay, and was at Urafiki to collect the exhibits. He admitted that he had been asked to go to Urafiki police by the OCD, SSP Mantage and that when he arrived there he also met his deputy and head of anti robbery unit SP Mkumbo. He said that by visiting Urafiki he committed no wrong. He went on to inform the court that on receiving the BIDCO robbery report no one else came forward to complain about the ownership of the money. He himself did not know who was at Sinza, and did not know any of the other accuseds except the 6th accused Nyangelera.

The 1st accused went on to inform the court that once a crime report is filed by a Senior officer among police officers who went in an operation, and there is nothing wrong, the other police officers need not file another report. He also went on to caution that under S 27(1) and (3) of the Police Force and Auxiliary Services Act, and a police officer's oath requires any police officer to obey only such orders as are lawful. In case a police officer finds that a crime report filed is faulty, his duty is to report the incident to any superior officer, nearest him, or even the RPC and IGP. In

this case the 1st accused said, that after receiving complaints against the crime report, he could not do anything because, immediately thereafter the IGP formed a task force followed by the formation of presidential commission of inquiry. He said that in this case the Magomeni OCD and the Kinondoni OCD had at first informed him of the killing of the victims and later a crime report was filed through the 999 section and copied to him. He denied the contents of Exh. P15 and P22, saying that he had never ordered any killings.

In re examination, DW1said that he first came to learn of the BIDCO robbery through the radio call pronounced by PW13 and instructed SP Mkumbo to follow it up, but it was not true that, thereafter he switched off the radio. He said, there was nothing wrong with him going to Urafiki police station on that particular day. He had in the past, made similar visits, not only to Urafiki, but also other stations such as Msimbazi, Buguruni, Kijitonyama and Oysterbay, and he had never been accused of breaching the disciplinary code. As to his treatment of PW4 and PW17, he said that, he was the one who released them, on seeing that they were innocent.

Asked by the assessors, the 1st accused said that between 14/1/06 and 15/1/06, he never communicated with the 2nd accused. He was briefed at the morning call, where all the OCDs were present. He said that to his knowledge the arresting of the robbers was broadcast through the radio by 999, and that it was the 2nd accused who commanded the operation. He said that although he was notified that the victims died on the spot, it was only the doctor, who could confirm their deaths. He said, only the Chuo Kikuu police officers were brought to his office, at the instance of their OCS, so that they could be congratulated. The 1st accused further said that for the whole of January 2006 he was leading the presidential entourage on all days except weekends. During those days SSP Mafie and SP Mkumbo deputised– as Ag. RPC and RCO respectively . The 2nd and 3rd accuseds were answerable to their respective OCDs. He said, that from the explanation he received, he could not tell whether the force used against the victims was reasonable or excessive. However he was positive that according to the PGO, everything being equal, on arrest, a suspect is to be taken to the nearest police station. He also said, that from his experience in the use of guns it is possible for many persons to be shot at the same spot, depending on the angle of elevation.

The second accused, **SP CHRISTOPHER BAGENI** testified next, as DW2. His evidence was to the following effect. First, that on 14/1/2006, he had gone to his building site at Pugu and came back to his station at around 7.00 pm. On his return the stand by officer on duty briefed him on the BIDCO robbery along SAM NUJOMA. He also informed him that the victims of the robbery were at the station. He summoned to interview them. It was MASHAKA MASINI the driver and RAMADHANI SHOMARI the salesman, who told him that they were robbed of shs.5,000,000/- at gun point by four men who fired one shot in the air. No sooner had he finished with them, than his OC D SSP Edward Maro summoned him. As he tried to brief him on the robbery, the OCD appeared familiar with the incident, and so just ordered him to go to Urafiki police station to collect the recovered shs.5,000,000/=and a pistol as exhibits. He went there and found SSP Mantage, and SP Mkumbo. ASP Makelle was ordered to go fetch the exhibits. On finding that the money was short landed, he refused to take it. That is when the OCD, SSP Mantage decided to radio the 1st accused, who on arrival ordered that the money be made good. It was then that he left with the exhibit and handed them over to his OCD Maro. Then other crime incidents followed where his personal attention was needed. These

entailed visiting scenes like TIRDO Msasani and Kijitonyama. When he came back to the station at around 11 pm, he was summoned by the OCD, SSP Maro, who informed him that the bandits of BIDCO robbery who were engaged in a shoot out with the police were dead. He advised the OCD that in that case, a murder case file should be opened. His inquiries led him to find that some of his own anti robbery unit personnel, and several officers from Chuo Kikuu, were at the scene, and were the ones present at the shootout. Next morning, he summoned them so as to brief him on what happened.

It was the CID in charge of Chuo Kikuu Dar es Salaam, Staff Sergeant James, who took him to the battle ground and showed him six bullet holes at the postal fence in Sinza. It was from him that he learnt that his anti robbery unit boys and his pajero car were also present at the scene. He later learnt that from his unit, those present were Cpl Saad, Pc Frank, the 11th and12th accuseds. And from Chuo Kuu police officers present included S/Sgt James the CID in charge, D/Cpl Nyangelera and D/C Mabula.

The second aspect of DW2's testimony was that although he agreed that he took the Mgawe team to the postal fence scene in the statement

said to be his in Exh. D6 (which he denied it was his) because it appeared to have been written by himself, but in fact, his, was taken by ACP Ngassa, He also denied to have made any statement at all whether to PW30 or to PW31,

The third aspect of DW2's evidence was that although the report to the OC 999 dated 14/1/2006 that forms part of Exh. D11 was written by him, in fact he did so, not on that date but on 14/2/2006 at the instance of the 1st accused who was going to face the Kipenka commission for the second time. He said that the 1st accused had told him that Judge Mussa was his classmate at Songea Boys secondary school and was willing to assist the police officers who were to face the charge of murders., He thought it was more godly to assist others. However, he admitted that the contents were the same.

Lastly, DW2, denied everything that the 11th ,12th, accuseds and P W15 said against him because he had recommended that the 11th accused be charged for breaking the canteen and stealing. As for PW 15 he said that since he had free access to empty cartridges he had no reason to order PW 15 to alter the armoury register. He denied having ever communicated with any senior officer on that day on the phone or radio.

DW2 tendered the handing over notes of his office as Ag. OCD and OC-CID of Oysterbay, Exh. D.12.

Asked by the prosecution, the 2nd accused said that while at Pugu he had switched off his radio call because there was no network there. So he could not have heard anything on the radio. He said he switched it on while in the city centre at around 7 pm. He said he was informed by his OCD; SSP Maro, that the BIDCO robbery bandits were arrested and in custody at Magomeni. To his surprise the OCD later told him that the robbers were shot dead at the battle ground. He admitted that he did not go to Magomeni to see the arrested bandits although they were arrested in his area of jurisdiction because more urgent matters had cropped up. At first denying having prepared any report to the OC 999 he later identified it in Exh. D11 and admitted it was his and was dated 14/1/06.

Later, however, he shifted his position and said that he did not write it on 14/1/06 but on 16/2/06 as instructed by the 1st accused, in order to assist the police officers involved in the murder. He said that he told the Kipenka Commission and the Mgawe Team the same things as he told the court, and that he did not mislead them. He further informed the court that at the Sinza postal fence, where S/Sgt James had taken him, he only

saw six bullet holes on the wall but did not see any blood. To him the holes were not straight suggesting that the bullets were shot from an angle. He said he did not look for neighbours around there to ask if they heard anything because it was a Sunday and there were very few people around. Before the Mgawe team, his statement was taken down by ACP Ngassa and the one in Exh. D11 was not his. When he was shown other statements of other senior officers who appeared to have written their own statements, DW2 said that he could not speak for them. When asked to read the statement, he said, with the exception of the BIDCO robbery, the name of MASHAKA MASINI, and that the BIDCO's truck was a Mercedes Benz, the rest of the contents of the statement were not his. He said that Exh. D12 had no official stamps because he was out of office by then. He admitted to have made a statement to ASP Kabeleka, but not PW30, and that he didn't know who Advocate Taisamo was. He was not his counsel. His, had always been Mr. Ishengoma. He agreed that the report in Exh. D11 is in his handwriting and bears his signature. He denied telling PW27 that he had ordered the police to open fire at the victims. At the end, DW2 said he had not grudges against PW27, DW1, ACP Mgawe or ACP Ngassa, nor against PW36, or PW32, but PW30 had grudges against

him because, while in Moshi,PW30 had visited there and asked for a vehicle, to take him to his village. He failed to supply him with a vehicle as there was none.

DW2 repeatedly admitted that the crime report to the OC 999 dated 14/1/06 with reference to OB/IR/670/2006 was in his own handwriting and bore his signature. He was referring to the report contained in Exh. D11. He recognised the next detailed report dated 18/1/06 signed by the OCD – Maro to the RCO/RPC on the incident. The next thing he remembers was that on 16/2/06 the 1st accused asked him to prepare a report that would be sent to the Kipenka Commission, but that that letter is not in Exh. D11, neither did he have a copy.

DW2 further informed the court that apart from the 3rd accused, he did not know the 5th, 7th accuseds, but saw the 9th and 10th accused for the first time on 15/1/06 at the 1st accused's office. So he could not have sat with them to plan the commission of the offence. He said that he did not know how the BIDCO exhibits reached Urafiki police station, nor did the 3rd accused say anything about them there.

The 2nd accused told the court that according to Sgt. James, some of the police from Chuo Kikuu had been sent and left at Makongo Juu, before the rest went on to arrest the BIDCO robbers.

DW2 admitted that there were certain contradictions between his testimony and the reports in Exh. D11 on the Kijitonyama and TIRDO incidents in respect of who visited and reported the incidents. He said that it was between May – June 2005, when the 11th accused broke into the Canteen building, broke the slotting machine and stole coin tokens worth 60,000/= Tshs. Although he was intent on charging him, he never removed him from the anti robbery unit, or instructed that he should never collect weapons. This was because his file was still lying with the OCD. He further informed the court that he was taken to the postal fence scene, first by Sgt James, on 15/1/2006 and next by 11th and 12th accused persons, the next day, and that later they informed him that they did fire 9 bullets. He ordered them to bring the cartridges but it was the 12th accused who brought the cartridges on 17/1/06. And since then Cpl Saad, Frank and Sgt James had disappeared.

Asked by the court, DW2 said his first visit to the postal fence showed that although it had not rained, there was no sign of blood on the

wall and on the ground. He also said from his experience, trained police could shoot from an angle and hit a person at a different angle but in this case if the robbers were climbing the wall exposing their backs, and the police were shooting from an angle, the culprits would most likely have been shot at the shoulders.

The 3rd accused **AHMED ABDULRAHAMAN MAKELE** testified as DW3. Briefly, his testimony was to the effect that he received information from the control room, that a robbery had been committed along SAM NUJOMA Road and that as the bandits were in a car, they were to institute suveillance in his area of jurisdiction. Accompanied by the 5th and 10th accuseds, he drove to Sinza via Shekilango Road, turned left near Mugabe Primary School, drove a few streets away and found a large crowd of people. Then the 6th accused, Cpl Nyangelera who was in uniform and armed with a machine gun came forward to inform him what was happening. He was informed that four persons had been arrested with a pistol, and about shs.5,000,000/= seized . He ordered that since that place was not safe for interviewing the suspects they should take them to their station, which he discovered was Chuo Kikuu. He dissuaded them from giving him the exhibits. Then he informed the Control Room about the

arrests and he drove off to drop the 5th and 10th accused persons at Ubungo Bus Terminal and he proceeded with other routine duties.

DW3 further informed the court that later that evening he saw the OCD Magomeni (SSP Mantage) the Deputy RCO, ASP Mkumbo, and the 2nd accused at Urafiki police station. The second accused had come to collect the money seized at the robbery scene as an exhibit, but at first refused to accept it because it was short landed. It took the 1st accused, who later appeared at the station, to order that the shortfall should be made good that the 2nd accused accepted the money and left.

The 3rd accused told the court that the first time he ever heard of the deaths of the victims, was through the press where the 1st accused alleged that the deaths were due to an exchange of fire between the police and the bandits. He said that after that he prepared for his trip and left for Egypt on an official study tour. When he came back, he was joined in the charge now facing him. He said he knew nothing about the deaths or the alleged shoot out at the postal fence as he never went there. He did not know Pande Forest either.

Cross examined, DW3 denied making any statement to the Mgawe Task Force, and so recanted what is alleged to be his statement in Exh. D 6. He said this was the machination of the 1st accused to fix him. He denied every statement shown to him, saying that none of them was his. He admitted however, that he witnessed the arrests at Sinza, where the court had paid a visit, that they were alive when the victims drove off with the Chuo Kikuu police in their blue pickup. He denied that he was in the centre of this incident because the arrests were not made in his area of jurisdiction, and that Chuo Kikuu police station was also not in his jurisdiction.

DW4 WP JANE ANDREW (5th accused) told the court almost the same story as DW3. It was her case that they found the suspected robbers at Sinza where the court had visited and that they drove off when they were alive. After that, they too, drove away and she was dropped at Ubungo Bus Terminal, where she was on patrol duty up to the following morning. She knew nothing about the killings and that she never made any statement before the Mgawe Team, thus dissociating herself with Exh. D6.

In cross examination DW4, said although some of the particulars in her alleged statement in Exh. D6 could be true, some of them were not. She was convinced that whoever wrote that statement must have obtained them from her personal file at the police headquarters.

The next witness for the defence was the 7th accused, **CPL EMMANUEL MABULA**. Testifying as DW5, the accused said that he was a police officer at Chuo Kikuu assigned to general duties. On 14/1/06 he and the 9th accused, were taken and left at Makongo Juu, for patrol duties. They came back the next morning and at about 7.30 am he was summoned to the OCS's office. When he arrived, he found other officers already in the car. He was ordered to jump into the car. As they were driving, off he asked the 8th accused, where they were being taken to. He was informed that the previous night they had arrested bandits, and the Ag. RPC was calling them for a handshake. But, DW5 said, even after the 1st accused had shaken his hand he was still in the dark as to the purpose of the handshake. He said he did not know anything about the arrest or the killings of the victims. He had neither been to Sinza, the postal fence, or Pande Forest.

In cross examination, DW5 admitted that he appeared and made statements before Insp. Omari, (PW31) the Mgawe Team, and the Kipenka Commission, and said he made the same statement as he was now testifying on. However, when shown some of the statements, he denied the one in Exh. D6 saying it was not recorded by Insp. Robert Majala as shown there in, but by the same Insp. Omari and that PW31 himself also said so in this court.

He also accepted the introductory part of the statement dated 18/2/06 also taken by Insp. Omari, but recanted the rest of the statement. He mentioned that on 14/1/06, DS/Sgt. James, the CID in charge was leading the team when they left the station. He also informed the court that also present at the Ag. RPC's office were all the Dares Salaam OCDs and that the last time he saw, Sgt. James, was during the interviews in this case, and although he was surprised as to why he was receiving a handshake, he could not ask his superiors about this as this would amount to indiscipline.

The 9th accused, **MICHAEL SHONZA** testified next as DW6. His testimony is not different from that of DW5. The essence is that on 14/1/06, he and DW5 had been posted at Makongo Juu, for patrol duties.

He was armed. Next morning he surrendered the weapon together with the bullets, unused. Soon after they were ordered to board the car and taken to the RPC's office. There the 1st accused shook hands with them congratulating them for work well done. He further informed the court that he first came to learn of the killings when he was summoned to the CID headquarters on 16/1/06 to give a statement before Sgt. Niko where he narrated his side of the story. He also gave a similar account at the Central Police station on 19/1/06. It was a cautioned statement. He gave a similar account before the Kipenka Commission. He denied involvement in the killings or having ever been to Pande Forest before the court visited it. He said that when he went for a handshake in the RPC's office the 1st accused and the 2nd accused were there. He did not know Cpl Saad and had never met with any person to conspire to commit this offence, because he knew nothing about it.

In cross examination, DW6 said that although some particulars in the statements shown to him were his, some of them were not correct, and particularly the contents of the said statement. He said that on 15/1/06 he and other police officers from Chuo Kikuu went to the RPC's office for a handshake but he did not really know what it was for. He said

he first made a statement before Sgt Niko. He insisted that he was innocent of the crime allegedly committed by him.

The 10th accused **ABENETH-SARO** testified as DW7 taking the same path of the defences of the 3rd and 5th accuseds. DW7 concluded by denying he ever committed the offence although he was issued with and had in possession on 14/1/2006, a Chinese pistol with 8 rounds of ammunition. His role at the arresting scene was to remain in the car and take care of the radio. He never went close to where the suspects were, but heard the 3rd accused inform the Control Room on what happened and what orders he had given to the Chuo Kikuu police who arrested the suspects. He denied to have ever appeared or made a statement before the Mgawe task Force, and that he told the Kipenka Commission, and to the Central police station, the same story as he gave to the court

In cross examination, DW7 continued to deny having ever made statements to the Mgawe Task Force. However, he admitted that he had no grudges against SACP Mgawe or PW27 who appeared and testified in this court. He denied having known the Pande Forest before the day the court visited it. In re examination DW7 said any person could obtain his personal particulars from his personal file at the police headquarters. He

insisted that he only came to hear of the killings from the press and that he was innocent.

As indicated in the introductory part of this judgment the 11th accused, DC RASHID MOHAMED LEMA did not live to witness the end of the trial. He fell sick soon after the defence case had opened. The case however proceeded in his absence on the authority of section 197 (b) of the Criminal Procedure Act. It had to be adjourned when it came to his turn to give him time to recover and be fit for the trial again. Unfortunately he did not recover. He died before the trial resumed and so he could not give his much awaited defence.

DW 8 CPL RAJABU HAMIS BAKARI gave a lengthy and graphically detailed testimony. But in short his evidence was to the effect that on 14/1/06 at 6.00pm, he, Cpl Saad and the late D/C Rashid Lema were ordered to get into their pajero patrol car, to go to Sam Nujoma Road where a robbery had been reported. They were led by the 2nd accused, SP Bageni. True, on reaching SAM NUJOMA Road, they found a truck parked on the middle of the road, near the disused KONOIKE works site. They found four victims of the said robbery, who were interviewed by the 2nd accused. Soon thereafter a pickup car pulled in. It was that of Chuo Kiuu

police. In it were several police officers from that station, and four persons seated on the floor of the pickup. A few minutes later another white saloon car also arrived. From that car emerged the 3rd accused, one ASP Makelle. He, together with one D/Sgt James, who appeared to be in charge of the Chuo Kikuu contingent, explained to the 2nd accused, how the four persons seated in the pickup, were arrested at Sinza, searched and found in possession of shs.5,000,000/=.

The second accused then took the victims of the robbery to the pick up and asked if they could identify the suspects. It was only the driver who pointed to one of the suspects as resembling the one who had pointed a gun at him.

What followed thereafter was a scene of cell phone conversations by the second accused, to people, he, DW8, did not know. To wind up their Sam Nujoma event, DW8 told the court that a landrover defender pick up arrived at the scene. The four suspects were transferred to the defender, and it was ordered to leave. The Chuo Kikuu pick up, and the dark blue saloon car that had arrived together, were ordered to go to Urafiki public station to park. Later they also left in the pajero, towards Ubungo. On reaching Ubungo traffic lights, the second accused ordered the driver to

turn right towards Kimara. They drove up to Mbezi Luis Police post, where they picked a uniformed policeman. DW8 asked this uniformed policeman where they were going; the policeman is said to have told them they were proceeding to Makabe, but he did not know what they were going to do there.

Dw8 went on to inform the court that, soon thereafter they were on their way to the forest. He described it as the one that the court had visited in this trial.

There, there were a total of three vehicles. The pajero, the defender, and a saloon car whose identity he could not clearly mark as it was already dark. He remained in the car, while the second accused, Cpl Saad and the late D/C Rashid Lema got out. He paid his attention to his radio call, where he was able to hear of the Kijitonyama robbery. While in the car he heard, sounds of gun shots. He did not hear how many they were. He came out of the car. From a distance he could see Cpl Saad, firing at a man. He went closer, and found that three men had already been shot at and that was the last one. Although he could not remember the persons who transferred the bodies to the defender, what he was certain about, was that the bodies were finally taken to Muhimbili Hospital.

Back in the car, DW8 said he asked Cpl Saad, why were those persons killed. He said it was on the orders of SP Bageni. DW8 said that from the forest their car passed through Urafiki police station where SP Bageni picked a black bag before proceeding to Oysterbay. DW8 said that a week or so later, SP Bageni (2nd accused) asked him to accompany Cpl Saad and D/C Rashid to Bunju where they were to fire a total of nine bullets, because he needed the empty cartridges. He obeyed and eventually, handed over the cartridges to SP BAGENI, which Cpl Saad and DC Rashid had left with him after missing SP Bageni.

DW8 wound up his testimony by telling the court that there was no such thing as the Sinza postal fence shootout and that on the first day he and others were to testify before the Kipenka Commission, the 1st accused had distributed prepared specimen statements to all of them as to what they should state before the commission. According to DW8 that was what they stated before the Commission but it was all lies. He said they were taught to say that the victims were killed in a gun battle at the postal fence which he maintained, was not true.

In cross examination DW8 admitted that the order issued by the 1st accused was not lawful and he was not supposed to obey it, but

that he did so because he had no option as he feared the wrath of the police force expressed through the first accused. He further admitted that there were several discrepancies between his statements (Exh. P16) and that of D/C Rashidi (Exh. P22), but implored the court to believe him. He also said that in his statement (Exh. P16) not all details were there. Some, were missing, which he had narrated in court. He also revealed that PW31 ASP Omary and SSP Mgassa had visited him in remand prison with a typed statement which they asked him to sign. They promised to have the case against him withdrawn and instead, he and D/C Lema would be turned into witnesses. He said, he was sure a letter to that effect was lying in the DPP's case file. He admitted that he had never heard any orders from the 1st accused to kill the suspects.

DW8 further denied/recanted the statement contained in folio 9 in Exh. D6 saying it was not his. He admitted however that his counsel did not put questions to PW27 (Ubisimbali) to challenge the authenticity of that statement.

The witness admitted that despite all the wrongs committed in his presence, he could not dare describe or inform any superior officers

until 3/4/06 when he surrendered himself and made his first statement (Exh. P16), for fear of reprisals from the 1st and 2nd accused persons.

With respect to the 3rd accused, DW8 admitted that he was not sure if he saw him or was there in the forest when the killings took place. He also admitted that what he said about the 2nd accused passing through Urafiki police station and collecting a black bag, before they proceeded to Oysterbay, was different from what D/C Lema had said in Exh. P22, and is not part of his own statement Exh. P16. He explained that there were some details were missing in his statement.

In answer to questions put by the assessors, DW8 assured the court that the four victims had no injuries when he met them at Sam Nujoma Road. He said that it was easier to remember an event that had happened recently than, what has happened in the past. He said that he did not know why the victims were killed, and that he did not even hear any conversation ordering the killing of the suspects.

DW8 said in re examination that some details were missing from his statement because he had only been answering questions which were being asked of him. He also said that he could not report the

incident because he expected them to be taken care of by his superior, the second accused. He also told the court that in the circumstances, it was impossible for him or anybody who could have been in his position to do anything to prevent the killings.

The 13th accused, **D/CPL FESTUS PHILIP GWEBISARI** testified as DW9. His testimony was to the effect that he and six other police officers from Chuo Kikuu were to go on patrol on the evening of 14/1/06. He was armed with a Chinese Pistol with eight bullets. They boarded the Chuo Kikuu pickup. They passed through Changanyikeni, and dropped the 7th and 9th accuseds, at Makongo Juu. As they were getting back to report at the Survey area post, the radio called and informed them of the armed robbery along SAM NUJOMA Road. Their boss, D/SSGT James, ordered the driver of the car to head towards SAM NUJOMA. They took the red Gate No.1 out of the University.

At Sam Nujoma, they found a truck parked in the middle of the road. They also found four persons sitting around it. They asked them and they identified themselves and hinted at where the robbers had headed to.

They followed the hint to Super Star and emerged at Sinza Palestine. The witness said that they found a dark blue saloon, and another had just swerved and taken off. They suspected the two cars, and surrounded the dark blue car. From there, four persons came out. From one of them he seized a pistol, while from the boot the police seized a black bag, which the owners said, it had shs.5,000,000/=. At that time the 3rd accused also appeared at the scene. They were then ordered to take the suspects and the exhibits to a police station for further action. He was ordered to take the SMG gun from Cpl Nyangelera to drive in the suspect's car to Urafiki police station. He drove along with him in the same car. The victims were carried in the Chuo Kikuu Car.

At Sam Nujoma, the Chuo Kikuu car, driven by PC Noel together with the police officers, including Sgt James, stopped. He was able to see, a pajero car parked near KONOIKE camp site and could also identify SP Bageni. After a while they drove off to Urafiki where they handed over the car to the Charge Room Office. They also met PW23. They then boarded mini buses to go back to Survey area, where they resumed their patrol duties. Later, PC Noel joined them. He drove, the Chuo Kikuu car.

Next morning he and the others were summoned to the RCO's office, where the 1st accused congratulated them for a job well done. He attributed the congratulations to the arrests of the robbers, the previous evening.

On 16/1/06, he was surprised to hear from the media that the suspects had been killed at a shootout in Sinza. He emphasised that there was no such thing, neither had he been to the postal fence. They were then summoned to appear before the Kipenka Commission. Before they could testify, the 1st accused called all the officers to his office and distributed to them specimen statement sheets, which he instructed all to follow when they appeared to testify before the Commission. But he refused to obey, what he labelled as an unlawful order.

In cross examination, DW9 said that although he was arrested on 24/7/06 and made a statement, the statement shown to him was not his.

He denied to have absconded after the event, but that he had gone home to attend a funeral and his sick mother. He repeated that from Sinza Palestine, the victims were arrested alive and their pistol seized. Two

of them were handcuffed, while the other two had their shirts tied together.

He agreed that he made a similar statement to the Mgawe Task Force but the one contained in Folio C 12 in Exh. D6 was not his. He said that although he was present when PW27 was testifying, he did not hear him mention him as among those who were engaged in a shootout at the postal fence.

He insisted that although the 1st accused had distributed the specimen statement, he did not feel obliged to follow his instructions because they were unlawful. He said he had the statement, which he handed over to his lawyer. He said what the 1st accused did to congratulate him and others was normal, he himself having received such congratulations three times before. He admitted that the 1st accused was not seen at any of the scenes. In all probability he may have acted on information from his subordinates.

DW9 said that since there was a long traffic queue, it took them about 40 minutes to drive to Urafiki from Ubungo. He said that they received information about the robbery at around 6.00 pm, arrived at Sinza

Palestine around 6.15 pm, and were at Urafiki parking the car around 7.30 pm.

He said that he was immediate in command after Sgt James. He said that the 3rd accused was around when the victims were searched. He insisted that it was him who accompanied Nyangelera to Urafiki, and not because the latter has been acquitted from the present case. According to him, the prepared specimen statement had numbered paragraphs.

DW9 emphasised that the 7th and 9th accuseds had already been dropped at Makongo Juu, when they went to the robbery scene. He did not know where the other vehicles went after leaving Sam Nujoma with Nyangelera. He was positive that the 3rd accused is the one who ordered the victims and the exhibits be taken to a police station for further action, but personally he did not know anything about the killings nor been to Pande Forest before the day that the court made the visit.

In re-examination DW9, said he was not at the RCO's office for a promotion but merely to be congratulated. He dissociated himself from the statements shown to him in court. He said that where a senior officer is present at a scene, he is the one who is required to report the event. In

other words he did not have to report because his senior, Sgt. James was with him.

Examined by the assessors, DW9 informed the court that after the arrests, he expected the victims to be taken to Urafiki police station as they were arrested within its jurisdiction. The suspects were still in the Chuo Kikuu police car, when Cpl Nyangelera and he, left Sam Nujoma for Urafiki police station. Asked by the court, DW9 said that the black bag of money was transferred to the Chuo Kikuu vehicle together with the victims and remained there, before Nyangelera and himself left Sam Nujoma for Urafiki.

The next defence witness was **ACP SAMWUEL ROBERT NYAKITIRI** who testified as DW10. He was called by the 1st accused. Briefly DW10 was a prison officer in charge of Ukonga prison, but before that he was at Keko. He reported at Ukonga on 3/6/06. He said, at present, only the 2nd and 3rd accuseds are at Ukonga but he knew the other accuseds from his KEKO days, except the 5th accused.

He testified that every inmate is expected to know and obey prison rules. They all get oriented on admission.

One of the rules is that all inmates' correspondence written from the prison must be endorsed by his official seal and signature, before they go out of the prison walls. He identified one of the letters written by the 1st accused to the Judge in Charge as an illustration of what is to be done. He also testified that on 15/1/06, four cell phones and cash shs.153,000/= were seized from some prisoners and remandees, but he was not the one who did so, and so was not sure if they were seized from any of the present accuseds. With the visitors book, which he had brought along with him, DW10 said it was true that on 9/7/2006 several senior officers, namely all Dar es Salaam RPCs visited Ukonga prison, to verify the remandees.

In cross examination, DW10 said that if a remandee wrote a letter when he was out attending court, it could be sent to the addressee even though it would not have his official seal or signature, but no government office would act on such a letter, but did not however, know the legal effect of such action.

DW11 **CPL JUMANNE** testified for the 2nd accused. Essentially, his evidence was to the effect that, he, as a standby police, driver at Oysterbay police, had, from around 7.00 pm to 1 am on 14/1/06

driven the 2nd accused around to Urafiki police, and the Kijitonyama and TIRDO Msasani robbery scenes. He was positive that at Urafiki, the 2nd accused went into the OCS' office and after half an hour he came out with a black bag, whose contents he did not know.

In cross examination DW11 said that while at Urafiki police station he did not see any other police motor vehicle that he knew, of or see the 1st accused arrive or SP Mkumbo. When examined by the court, this witness positively asserted that SP Bageni, the 2nd accused, was in office throughout that day.

The next defence witness was **CPL NYANGELERA MORIS**. He testified **as DW12** in defence of the 13th accused. In examination in chief, his point was that on 14/1/2006, he, together with other police from Chuo Kikuu, were involved in the arrest of the victims from Sinza Palestine near PW2's residence. His orders were that he was to hand over his SMG patrol gun to the 13th accused, to enable him drive the victims' car to park at Urafiki police station and the 13th accused accompanied him to Urafiki. From Urafiki they boarded mini buses to Survey area, where, they were stationed for patrol duty. They were later joined by PC Noel and Felix.

In cross examination, DW12, said that he told the truth to the Commission of Inquiry and the Mgawe Police Task Force but the statement from the task Force Report shown to him as his, was not. He said that he did not recognise any of the uniformed or plain clothed policemen that he saw at the scene of the BIDCO robbery at Sam Nujoma road. He also said that he was not offered any prepared statement by the 1st accused to guide him through the questioning at the Commission of Inquiry.

He also said that in the police force it was normal for junior officers to be congratulated for jobs well done, so there was nothing out of the ordinary for the 1st accused to have done so. He was sure that he and others deserved a pat on the back for arresting the robbers the previous day. He went on to tell the court that he did not believe and is yet not sure if those killed, were the ones they had arrested on 14/1/06. He only came to hear of the deaths in the media. But, said DW12, the media is known for distortion of news. He was also asked and extensively responded to questions on how the police force worked and relied on reports on events from their lower officers, illustrating his answers from Exh. D11.

DW12 was emphatic that the four persons were arrested peacefully without any scene, had their pistol seized and handcuffed, and forced to lie prostate at the back of the Chuo Kikuu police pickup.

According to this witness, they were ordered by the 3rd accused, who was at the scene, to take the suspects and the exhibits to Chuo Kikuu police station for interrogation but he did not follow up to see if they were taken there.

In answer to a question by the court, DW12 described the pickup used by Chuo Kikuu police as a single cabin pickup with only the front seat. And with that, DW12 came to the end of his testimony and the close of the defence case.

I have seen the accuseds and their witnesses testify. It is now time to evaluate their evidence. In my assessment, generally DW1, the first accused was mostly defensive in his testimony. He appeared familiar with the Criminal Procedure Act and relied on the Police General Orders for his defence. But it is the Police General orders which command that once there is a serious crime such as murder or robbery, the RCO, must personally visit the scene of crime, unless exempted. It is also provided in

the PGO that once arrested, a suspect must be conveyed to the nearest police station as soon as possible. One wonders why the 1st accused did not visit the scenes personally, or why did he not inquire where the victims were being taken to after their arrest. DW1 also offered no explanation as to why PW4, who did not even know PW2 would say that DW1 had inquired of her whereabouts when he himself was arrested and brought before him.

DW2 SP CHRISTOPHER BAGENI, was the most incredible witnesses of all. He was very economic with truths and very liberal with lies. He kept on shifting from one story to another in his defence. For instance when asked if he knew where the victims were arrested, he said that the OCD had informed him that it was Magomeni . Next, he said Magomeni was where they were sent after their arrest. This is the person who did not care to follow up where the victims were on the pretext that he had “other important assignments” at TIRDO, but there is evidence that the TIRDO scene was visited by the OCD, SSP Maro. Although he had denied any association with Exh. D6, his signature, appears in the sketch plan, which he admitted. He is the sort of person who can admit

something this minute, deny the same thing the next minute as he did in his first crime report in Exh. D11. In short he is not a credible witness.

DW3 at first appeared to be truthful, until he denied ever being present at the BIDCO robbery scene. It is incredible that for a senior officer like him, having ordered the Chuo Kikuu police to take the victims to a police station, finds the car stop, and the BIDCO vehicle parked in the middle of the road, the very vehicle, of which he had been sent on surveillance, and already reported about it, not to stop there. I believe DW9 who said that he saw the 3rd accused there.

DW4 is generally a witness of truth, and a victim of circumstances. Similarly DW7. DW8, who is at the centre of this case, gave a graphic detail of what happened. Despite his incredible denials, I believe that what he had told the court was the truth. However, I do not believe that he went to Pande involuntarily. If that was so, one would have expected him to report the incident immediately and not 3 months later.

DW9 must have told the truth and I found him a credible witness despite denying his statement in Exh. D6, on which I will comment later. DW10 also told the truth. A typical civil servant, he would not risk

speculation and conjecture. DW11, who was called to complement DW2's alibi, was a poor liar. He was not prepared to answer questions on what he saw at Urafiki police station, if he ever went there. It is incredible that he could not have seen the Chuo Kikuu pickup, or the 1st accused arrive and leave at Urafiki, where he said the 2nd accused had gone to collect a black bag. This witness avoided eye contact most of the time when he was being cross examined. He is the sort of person one would assess as a rehearsed witness but, who was not given all the key scenes, to memorise. I would assess him as an incredible witness. DW12, was mostly truthful but an overzealous witness. He was all out to save his former co accuseds whenever he had opportunity. He avoided any question that would put any of the accuseds in trouble. His evidence must therefore be treated guardedly.

As for the defence exhibits, I have already commented on the probative value of Exh. D1, D2, D3, D4, D5, D7 and D8, above. I will now look at Exh. D6, D9, D10, D11 and D12.

It will be recalled that Exh. D6 was tendered amidst protests from the prosecution, by PW27. There was no objection from the rest of the accuseds when the 1st accused pressed to have the report tendered.

Learned defence counsel also had opportunity to cross examine PW27 on Exh. D6, but none of them had suggested to PW27 that their clients' statements found in the exhibit did not belong to them. The existence or non existence of the accuseds' statements was a crucial matter that should have been cross examined on. By failing to object to the admissibility of Exh. D6, the 2nd and other accuseds, apart from the 1st accused, are now estopped from denying their statements at this stage (See **RAJESH RAJPUT vs. MRS SUNANDA RAJPUT** (1988) TLR 96. It was the obligation of the defence counsel in duty to his client and to the court, to indicate in cross examination the theme of his client's defence so as to give the prosecution an opportunity to deal with the matter. (See **MOHAMED KATINDI AND ANOTHER v R**(1986) TLR. 134) and as **PHIPSON ON EVIDENCE** 13th Ed. at p.804 – 805 would put:

> "The object of cross examination is twofold – to weaken, qualify or destroy the case of the opponent; and to establish the party's own case by means of his opponent's witness"
>
> … As a rule a party should put to each of his opponent's witnesses in turn so much of his case as concerns that particular witness of which he had a share" …

If he asks no question he will .... generally be taken to accept the witness' account...."

However, the position in Tanzania is that even if a point is not cross examined on, the court is not precluded from disbelieving a witness on that particular point. **(MOHAMED KATINDI AND ANOTHER V. R** (supra)

On the premises, I would hold that since the second and other accuseds did not feel like objecting to the admissibility of Exh. D6, and since they have not raised in cross examination, a suggestion that their statements therein were not theirs, they must be taken to accept that the statements in Exh. D6 are theirs.

However, that does not mean that all the statements contained the truths about what is alleged to have happened at the Sinza postal fence. In this exhibit, the accuseds there have given a similar account of what was supposed to have happened at the postal fence, which they have now all denied in their defence in court. But apart from a statement, the 2nd accused had his signature appended in the sketch plan annexed to the report. The second accused does not deny that it is his signature. The footnote by the scenes of crimes officer SGT NICKOBAY (PW33) describes

the second accused as the one who showed him all the essential marks in the sketch plan annexed in Exh. D6. In other words, that places the second accused at the centre of the postal fence shoot out story. He is the brain behind it, so to speak. And that leads me to the conclusion that although the accuseds, (excepting the 1st accused) have given their statements to the Mgawe Task Force, the story was a fabrication and the brain behind it was the second accused. For what it is worth, Exh. D6 as it appears in its present form is only evidence of a conspiracy to detract the truth about the killings of the victims in this case. However, this is subject to the caveat sounded by PW27, PW28 and PW36 and the preface to the report itself, that the report was incomplete as it omitted essential parts of its terms of reference, (including failure to interview witnesses from the neighbourhood of the fence) and so makes it inconclusive.

Exh. D9 is a letter dated 27/1/2006 from the Forensic Bureau, tendered by PW22 on being recalled. It forwards to the Government Chemist a sample of blood mixed with sand for analysis whether it was human. In my view this is just an extension of the conspiracy exhibited in Exh. D6. However, PW37 has testified that apart from the one he received in March 2006, he had not received any other sample for analysis, and so

there is no other report to back up Exh. D9. This means that Exh. D9 alone has no probative value capable of raising doubts on Exh. P23.

Exh. D10 is the statement of the 1st accused which he wrote on 29/5/2006. In this statement, the accused admits to have heard over the radio call about the BIDCO robbery, but he remained in office, although he had asked all the OCDs to follow it up. He also admits to have received a report from the 3rd accused that, the robbers had been arrested and injured and their pistol seized, together with shs.5,000,000/= cash. But he also admits that despite the seriousness of the situation, he personally never visited the scenes of crime nor got to know the victims. This, in my view, is strange for a senior officer like him, who according to PGO 224 (3), is required to attend **personally** at the scenes of crime of all murders, armed robberies, and other scenes of a very serious nature, unless specifically exempted there from by his commanding officer. In this case the 1st accused who was the RCO and Ag. RPC, did not tell us who exempted him from attending to the scenes of crime in the present case especially after hearing that the alleged robbers had been injured and rushed to Muhimbili. Why was he so indifferent to see the scene, and ascertain whether there was any shoot out?

In my assessment, for a senior officer like him, that was unbecoming, and I do not believe, it was a mere coincidence. There must have been something else he knew, especially taken together with his inquiries after PW2 from PW4 (whom I find to be a witness of truth and so) which I believe he made, and reject his denial. Besides, the first accused also threatened to kill PW17 who said in Exh. D5:

> "Kamanda Zombe alitamka sisi ni majambazi tuliokimbia Jana ni lazima tuuwawe".

This statement was tendered at the 1st accused's instance, and he did not call in evidence to refute that he issued such a threat. To me this was an indication that the victims had been killed because they were suspected robbers and not because they tried to escape, and he knew it, just as he threatened to deal with the PW17 because he was another suspect.

Exh. D11 is also a set of documents tendered by the 1st accused, to show that he had given a press release based on the report from the 2nd accused, who was the OC CID Kinondoni and the disciplinary charges framed against him. It is significant that in this exhibit, "Kielelezo "C", is the handwritten note from the 2nd accused dated 14.01.2006 reporting on

the incident to OC 999. The 2nd accused acknowledges his signature at the end of the report, Kielelezo "G" is the detailed report of the same incident sent by the Kinondoni OCD, dated 18.1.2006. Despite the seriousness of the incident and even in his report to the Inspector General, the 1st accused does not even indicate whether he had decided to open an inquiry and interview the actual shooters himself to ascertain how and whether it was necessary to open fire, in the light of the provisions of the PGO (274). If he was sincere and visited the scene of the alleged shoot out, I do not think he would come out with the conflicting press releases.

So, although Exh. D11 seems to cover him, reading the whole of it between lines, coupled with other evidence and conduct, I think it is more than meets the eye. It creates a heavy cloud of suspicion around the 1st accused.

Exh. D12 is the handing over report of Oysterbay police OC CID's and OCD's offices by the second accused on 19/1/2006. I have looked at the handing over note of the OC CID's office and compared the accused's signatures. It appears to me to have been signed by the same person. This document is therefore of doubtful character. But above all, I think, the handing over notes are of little relevance here, because the second

accused is not charged of theft or loosing any government property, but with murder.

The predominant defence of the accused persons is therefore that of alibi. It is not insignificant also that although my finding is that the accuseds wrote statements in Exh. D6, not all of what they said was true. In view of the accuseds' denouncement and other evidence on record, I have to find and conclude that the postal fence shoot out was not there. That means, the victims were and could not have been killed there.

That they were killed at Pande Forest is introduced by the 12th accused (DW8) and the 11th accused's statements, Exh. P15, P16, and P22. I am still mindful here that Exh.P15 P16 and P22 cannot be taken into consideration against the other accuseds but it cannot be disputed that the victims were killed somewhere. The killings at Pande Forest are supported by the blood samples, which proved to be human. In view of the evidence of DW8 and Exh. P15, P16, and P22 and the two empty cartridges picked from Pande Forest, together with Exh. P2 and P23 collectively I now have to conclude that the blood described in Exh. P23 is that of the victims. I therefore find it proved beyond reasonable doubt that the victims were killed at Pande Forest as alleged by the prosecution. However, as

expressed before what is missing is the link between the medical and the ballistic evidence. Although the 12th accused admitted being present and witnessed the killings he did not testify on who among the other accused persons killed the victims. Upon hearing the other accused persons, the following questions have to be resolved. Who among the accused persons went to Pande Forest, and who fired the fatal shots? What is the role of each of the accused persons in the killings?

I will now apply the principles of law set out above to the facts of the case as they touch an each of the accused persons. I will start with the 13th accused.

The prosecution evidence against the 13th accused person is that he was present at the scene of the victims' arrest at Sinza Palestine. The defence does not dispute this. But it has not been suggested that the arrests were unlawful. The accused in his defence said that he did not go to Pande Forest where the victims were allegedly taken and killed. Instead he was ordered by S/Sgt James to accompany the hence acquitted 6th accused, Cpl Nyangelera to drive the victims' car to Urafiki police station. This is supported by Cpl Nyangelera who testified as DW12. Even the

prosecution in their submission, admits that the 13th accused did not go to Pande Forest.

However, Mr. Mtaki learned state prosecutor, submitted that on the strength of Exh. D6, the 13th accused (whose statement appears in this bundle) admitted to have participated in the shoot out at Sinza Postal fence. He was among the last persons to have been seen with the victims alive. In the alternative, he went on, the 13th accused should be held responsible as an accessory after the fact contrary to ss .213 and 387 of the Penal Code.

Mr. Myovella, learned counsel, submitted that the accused has sufficiently discharged his burden of proof of alibi. Besides, there was no evidence that the gun issued to him was used on that day. He urged that he be acquitted.

Both the lady and gentlemen assessors were of the unanimous view that the 13th accused did not go to Pande Forest. If the 6th accused Cpl Nyangelera, was found to have had no case to answer and acquitted, he too should be acquitted because he did not go to Pande Forest.

I agree with the assessors that on the basis of the evidence on record, the 13th accused did not go to Pande Forest where the killings took place, but was with Cpl Nyangelera, at all the material time. Apart from his witness, (DW12), that he was with him to Urafiki and back to Survey area, none, of Exhibits P15, P16, PW22 and DW8 (the 12th accused) or any person came forth to prove his presence or participation in the killings of the victims, apart from their initial arrests. His alibi, is corroborated by PW23 and even PW36. On the basis of these pieces of evidence I cannot see how the 13th accused can be held culpable for those homicides. As held in **GODSON HEMED v. R** (1993, TLR 241) where the accused's alibi is supported by both the prosecution and defence witnesses, it would not be proper to reject it.

Mr. Mtaki, learned prosecution counsel, has offered an alternative argument that he be convicted of being an accessory after the fact, and has cited the case of **NANA v. EMPEROR.** (supra)

I think that case and the holding quoted by the learned counsel, only carries a definition of the offence, but we have it in our Penal Code. According to s.387(1)

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

Now, in this case there is no evidence on record, as to who the 13th accused has received and assisted, in order to enable him or them to escape punishment. But even if there was such evidence, the position of the law as we shall demonstrate later, is that, although being an accessory after the fact is a 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.

I will therefore reject Mr. Mtaki's invitation to convict the 13th accused of being an accessory after the fact, even if there was any evidence to prove so, which I have found none. I find that the prosecution has failed to prove its case against the 13th accused beyond reasonable doubts.

Next I will go to consider the evidence available against the 5th and the 10th accuseds since their defence is the same, and so is the evidence against them.

The prosecution evidence against the 5th and 10th accuseds is that they were present and took part in the arrest of the victims. They also relied on the evidence of the 12th accused (DW8) and Exh. P.15, P16, and P22 to show that they also went to Pande Forest where the victims were executed but also on exh D6 to show that they were present at the postal fence "shoot out". On the basis of this evidence they cried for their convictions.

In his final submission, Mr. Mtaki learned counsel for the prosecution told the court that Exh.P15, P16 and P22 show that those accuseds accompanied the 3rd accused to go to the arrest scene and later to Pande Forest, and since their alibi has failed to raise any reasonable doubt against the prosecution case, they should be held responsible since they were the last persons to be with the victims alive. He said that the evidence of the deceased/accused (11th accused) was still valid as long as it was still on record.

On the other hand, Mr. Magafu learned counsel, submitted on their behalf that generally the case was poorly investigated, and produced unreliable evidence, such as Exh. P15, P16 and P22, while the evidence of PW30, PW31, and P36 was not only hearsay, but contradictory among themselves. Besides, submitted the learned counsel, in view of the evidence on record from PW36, that more than 15 police officers, were involved not all of whom were charged, a lot of reasonable doubts prevails as to who killed the victims.

Turning to the 5th and 10th accuseds specifically, Mr. Magafu submitted that although it was not disputed that they were present when the victims were arrested at Sinza, the only evidence that they went to Pande, was Exh. P15 and P22. Relying on **SARKAR ON EVIDENCE** , 15th ed. at p.1169, the learned counsel argued that this piece of evidence having come from the deceased/accused and having not been tested by cross examination, is valueless and the court should not use it. As to the evidence of the 12th accused (DW8) and Exh. P16, he submitted that DW8 denied having seen the 3rd accused at Pande Forest. The only remaining evidence was that of PW30 which was nothing but hearsay, whereas the evidence of PW23 was only to the effect that the accuseds went to attend

the BIDCO robbery, which was not disputed by the accuseds. But, argued, Mr. Magafu, even if Exh. P16 amounted to a confession to which he did not subscribe, it could not be taken into consideration against the other accuseds because it was self exculpatory. For that proposition he cited **ANYANGU v. R.** (1968) EA.239. Even if the court rejects this argument it is now established that such evidence must be corroborated, which was not available against the 5th and 10th accuseds.

The Lady and Gentlemen Assessors were of the view that since the accuseds participated in the arrests of the deceaseds and there is evidence from the 12th accused (DW8) that they had gone and were present when the victims were killed and their alibi having failed to give particulars and witnesses as to where they were at the material time they should be convicted of murder.

I think there is no dispute that the 5th and 10th accuseds went to Sinza with the 3rd accused, and witnessed the arrest of the victims. I have also no doubt in my mind that there was no shoot out at the Sinza postal fence and that the prosecution allege and I have found as a fact that the killings took place at Pande Forest. The prosecution cannot deny the

existence of the shoot out at the postal fence and at the same time rely on Exh. D6 to prove that the accuseds were present at the postal fence.

In their defence the 5th and 10th accuseds deny having gone to Pande Forest and that instead they were at their Ubungo Bus Terminal patrol station. The only burning issue therefore is whether these accuseds did go to Pande and if so, what role did they play in the killings?

There are only two pieces of evidence on record that the 5th and 10th accuseds had also gone to Pande. PW 30 and PW36, both investigating police officers, mentioned the fact that according to the information obtained from the 11th and 12th accuseds these accuseds had also gone to Pande Forest. I agree with Mr. Magafu that this is nothing but hearsay. I will discard it. The second piece of evidence is that of the deceased accused (11th accused)'s statements Exh. P15 and Exh. P22; and Exh. P16 and DW8. Now there is no doubt that this is evidence from co accuseds. In law as observed elsewhere above, under s 33(1) of the Evidence Act, Exh. P15, P16 and P22 cannot be taken into consideration against co accuseds because the statements are exculpatory. The position of the law is, as correctly pointed out by learned counsel, that as set in **ANYANGU's** case (supra)

While testifying in court, the 12th accused (DW 8) was not positive whether he saw the 3rd accused at Pande Forest or the car he saw was his. Besides even if there was such evidence it is evidence of a co accused which in practice requires corroboration. Even if the statements of the deceased accused (Exh. P15 and P22) were to be taken into account against the 5th and 10th accuseds, they cannot corroborate because, they themselves require corroboration. Evidence which requires corroboration cannot corroborate. (See **R. RAMAZANI BIN MAWINGU** (1936) EACA 104. **MKUBWA SAID OMARI v. SMZ** (1992) TLR 365 (CA). Furthermore PW23 testified that he saw the 3rd accused drive back to Urafiki police but did not see the 5th and 10th accuseds which would have strongly suggested that they were with him throughout.

With the sort of evidence that we have on record it is my finding that the presence of the 5th and 10th accused persons at Pande Forest, has not been proved beyond reasonable doubt. In my view, since the accuseds did not assume any burden of proof to prove their alibi, and since their alibi is supported by both PW23 and DW8 it would not be proper to reject it (see **GODSON HEMED v. R** (supra).

But even if there was evidence that they were present at Pande Forest one would have expected evidence to be led to show their participation in the killings. As seen above it is now established law that mere presence of an accused as the scene of crime is not enough to base a conviction for murder. Authorities on this point are not a scarce commodity. (see **ZUBERI s/o RASHID v. R** (1957) EA. 455.)

In the circumstances I do not think that, the prosecution have proved beyond reasonable doubt that the 5th and 10th accuseds were not only present at Pande Forest, but also took part in the killings

With respect therefore, I would not agree with the Lady and Gentlemen Assessors, who opined that the prosecution had proved their case against the 5th and 10th accuseds beyond reasonable doubts.

I will next consider the evidence against the 7th and 9th accused persons. The prosecution case against these accuseds is that on 14/1/2006 they went out on patrol, participated in the arrest of the victims, went to Pande Forest and so killed the victims. In their defence, the accuseds said that their station for patrol was Makongo Juu, and that was where they were dropped on the evening of 14/1/2006. They never went

to Sinza, where the victims were arrested, or at Pande, and so did not kill the victims or know anything about the killings.

Mr. Magafu, learned counsel for the accuseds who adopted his general submissions in respect of all his clients, but specifically on these accuseds, submitted that although PW14 testified that they had gone on patrol duty, there was no prosecution evidence to controvert the accuseds' alibi that they were dropped at Makongo Juu, and did not go to Sinza, where the victims were arrested nor the BIDCO robbery scene. As to the fact of attending a meeting at the RPC's office, these said they did not know what the congratulations were for, and besides, all police officers from Chuo Kikuu including the 4th, 6th and 8th accuseds who had since been acquitted, also attended the meeting. So he prayed that the 7th and 9th accuseds be acquitted.

Mr. Mtaki's view was that the 7th and 9th accuseds had participated in the arrest of the victims at Sinza and later gone to Pande Forest for the killings. He further submitted that their alibis that they were at Makongo Juu was an afterthought because no such evidence was suggested during cross examination. Besides, the accuseds were among those who were taken to be congratulated by the RPC for a job well done. He wondered

why the accuseds accepted the compliments if they did not know what they had done. His view was that the accuseds did not raise any reasonable doubt against the prosecution case and should therefore be convicted.

The Lady and Gentleman Assessors agreed with the submission of the prosecution that the accuseds' defences of alibi, did not raise any reasonable doubt in the prosecution case, and so should be convicted.

I have carefully considered the evidence on record, the views of the prosecution and defence counsel, and the assessors. The issue is whether the 7th and 9th accuseds ever went to Pande Forest, and if so, whether they participated in the killings.

The prosecution relies on the fact that the accuseds were among those who went on patrol on the evening of 14/1/2006. This is clear from the testimony of PW14. The prosecution also relies on the evidence of PW30 and PW36, as well as exhibits P15, P16, and P22 and other circumstantial evidence, such as being congratulated by the RPC.

With respect, however there is no dispute that the 7th and 9th accuseds went on patrol on the material evening but it does not follow that

they must also be deemed to have gone to Pande Forest. In the first place, when they left for patrol they were in the company of the 4th, 6th, 8th accuseds (who have been acquitted) and the 13th accused. Of these, the 6th accused 12th and 13th accuseds gave evidence as DW12 and DW8 and DW9 respectively. They confirmed that the 7th and 9th accuseds were dropped at Makongo Juu and did not go to Sinza to arrest the victims. None of PW2 PW6 and PW7 identified the 7th and 9th accuseds as having been seen at Sinza. And the prosecution now admits that the 4th, 6th, 8th and 13th apart from the 1st accused, did not go to Pande Forest. The evidence of DW8, DW9 and DW12 was not seriously challenged by the prosecution. Secondly, I also find lacking, evidence stronger than that of PW30 and PW36, (which is hearsay), and Exh. P15 P16 and PW22, which is, as seen above, problematic and cannot be taken into consideration against the other co accuseds. Thirdly, the fact of being called to be congratulated by the RPC is as consistent with innocence as it is with guilt. In the circumstances of this case it weighs heavily in favour of the accuseds' innocence. This is because all police officers from Chuo Kikuu who went on patrol on the material evening were sent to be congratulated, including those who did not go to Pande Forest and which

the prosecution acknowledges. Those are the 4th, 6th, and 8th accuseds, who have since been acquitted. Fourthly, even if the 7th and 9th accuseds were present at the arrest scene there was nothing unlawful about it, that is why the 4th, 6th and 8th accuseds were acquitted, although they were also present at the scene of the arrest. But last, and not least, even if these accuseds were present at Pande Forest, there was no evidence on record to show how they participated in the killings, given that the firearms and ammunitions issued to them were returned intact, and the principle that mere presence at the scene of crime was not enough.

For all the above reasons, once again, I respectfully disagree with the Lady and Gentlemen Assessors. After considering all the evidence on record particularly that of DW8 and DW12 and on the authority of **GODSON HEMED v. R** (supra) I am satisfied that the accuseds have, by their alibi, managed to raise reasonable doubts in the prosecution case which I hereby find not proved beyond reasonable doubts against them.

I will now go to the 12th accused. The primary evidence against him is his own statement in writing (Exh. P16) and his sworn testimony that he was present at the scene of the execution. This evidence was not retracted. So, it does not require corroboration.

Mr. Denis Msafiri, learned counsel for the accused, submitted that although the accused had participated in the arrest of the victims, the arrests were lawful. He submitted further that the accused was ordered by his boss to jump into the car and finally found himself at Pande Forest where his only role was to witness the killings. In his view, the accused did not know that he was driving to Pande Forest, and driving there to kill. Relying on the case of **R v. CONEY AND OTHERS** (1882) 8 QB 534 at 557 the learned counsel submitted that for one to be convicted for his presence, at the scene of crime, it must be proved that he was there voluntarily. This he said, was not proved in the present case.

He further submitted that he had no power, and was not expected to prevent the commission of the offences. Mr. Msafiri also submitted that there was no common intention between him and the actual killers. He cited **WANJIRO WANELLO & ANOTHER v. R** (1955) 22 EACA 521 as authority for the prosecution that in order to bring section 23 of the Penal Code into play, it must be shown that the accused shared with the actual perpetrators of the crime, a common intention to execute an unlawful purpose. He argued that in this case, there is no evidence that any of his co accuseds shot the victims. For this proposition, he cited

ZUBERI RASHID v. R (1951) EA 455 which was followed in **R v. CHEYA AND ANOTHER** (1973) EA 500.

The learned counsel went on to submit that all the prosecution evidence is to the effect that the 12th accused was charged for his presence, but "***eyes don't kill"*** he said.

He said that it was idle for PW36 to argue that the 12th accused should have reported the commission of the offence to higher authorities, because she did not say, how this could have prevented its commission. As far as reporting was concerned, the learned counsel submitted that as evidenced by Exh. D11, this matter was reported to higher authorities, whether correctly or not. He said that if the police investigators followed him in prison to get more information, there was nothing wrong in it; if anything; it only confirmed that even they, were in doubt or to his guilt. With regard to the status of the accused's "***confession***". Mr. Msafiri submitted that since no incriminating facts had been adduced, as to his role in the commission of the offences, and in particular since those who took the deceaseds' bodies to Muhimbili were not called to testify, his statement (Exh. P16) did not amount to a confession. Besides, the absence of such witnesses adds doubts to the prosecution case. He said

that such doubts should be resolved in favour of the accused. He therefore prayed to the court to find that the prosecution has failed to prove its case beyond reasonable doubt.

On the other hand, Mr. Mtaki submitted that the accused admitted that he was present at BIDCO robbery scene and later at Pande Forest. This is corroborated by Exh. P15, P16 and P22. He asked the court to disbelieve his defence that he was only forced to go to Pande Forest. If that was so, argued the learned counsel, he would immediately have reported to the authorities at the earliest opportunity. He also asked the Court to discard the accused's explanation that he left it to the 2nd accused to report as incredible in view of the magnitude of the crimes. Furthermore, the accused had access and opportunity but, he never revealed this information to the Mgawe Task Force or the Kipenka Commission. The learned counsel concluded his address by submitting that the accused's subsequent conduct showed that he was hand in glove with the actual killers. He therefore prayed for his conviction as charged.

On their part, the Lady and Gentlemen Assessors were of the unanimous opinion that since the accused admitted his presence at the scene of the killings, and being a police officer, but failed to report such

heinous crimes to the authorities he was part and parcel in the commission of the offences. In their view the 12th accused was guilty and should be convicted as charge.

It is true that the only direct evidence that connects the accused to the present offence is his own statement (Exh. P16) and his own testimony in court. In his statement (Exh. P16) the accused admits that he was present at Pande Forest, and witnessed the killings done by one Cpl Saad. He repeated that declaration in court and asserted that when he asked Cpl Saad, why he did so, the latter told him, that it was on the orders of the 2nd accused.

I have already discussed above why I still maintain that Exh. P16 is a confession against the 12th accused himself.

After hearing all the evidence, I am satisfied that in the circumstances, the 12th accused, has exposed himself liable to be prosecuted for various offences but above all he has brought himself within the walls of ss 213 and 387 of the Penal Code in that he could be charged for being an accessory after the fact to the murder for delaying to

report the truth of the matter to higher authorities, and thus let the actual killers off the hook. For that reason, Exh. P16 is a confession.

I agree with the principles stated in numerous authorities cited by the learned counsel and others that mere presence at the scene of crime did not constitute one a party to the offence, or that he had common intention with the actual offenders. I also agree that from the evidence on record the 12th accused did not have a gun and so he could not have been the one that killed the victims. Prima facie therefore, he could not be a principal offender. He could only be taken in as an aider or abettor counsellor or procurer, either by an act or by omission (encouragement) if there was evidence to that effect. Was there? A word or two on the two principles hinted above would now be appropriate.

As shown above the position of the law, can, I think, be sufficiently, summarised as follows. Mere presence at the scene of crime does not make one a party to an offence. To constitute an aider or abettor, or countanancer, there must be evidence of action or omission from which the court could infer that the person who did so, intended to aid, abet, or encourage the commission of that offence by the principal offender.

Evidence could be direct or by conduct, and it is a question of fact in each case whether such evidence exists.

In this case the 12th accused testified that when he boarded the car with the 2nd accused, he did not know where he was going and on reaching Pande Forest, he did not get out of the car, and that he only got out to witness the last person being shot. He was not armed and so could not prevent the offence. But as held above, I do not agree that the accused went to Pande Forest involuntarily.

I think, with due respect to the Lady and Gentlemen Assessors, and the prosecution, and although I had admitted Ex. P16 as a "confession" the prosecution had failed to prove any other incriminating facts in respect of the offences of murder, with which the accused is charged; other that his presence at the scene of the commission of the crimes. On the contrary there is a suggestion that the killings were done by Cpl Saad, who is not one of the accuseds in this case. Exh. P16 may be a confession to other minor but cognate offences to but not murder. As to his failure to report I don't see how this did contribute or could prevent the commission of the offences. In the circumstances I do not think it is open to the court to conclude that the 12th accused's passivity or presence or failure to report or

giving false information was intended to effect encouragement to the actual killers at the commission of offences with which he is charged because the said killers are not among his fellow accused persons. What is on record is only a strong suspicion that he may have aided or abetted the actual offender(s) and nothing more whatever offences Exh. P16 may have revealed may be min and they are not cognate to murder, and so cannot be substituted for the offence of murder. Therefore I find the case against the 12th accused not proved beyond reasonable doubt. With regard to the 3rd accused, the prosecution case rests on three pieces of evidence. First his participation in the arrest of the victims at Sinza. Second his visit and presence at Sam Nujoma road and Pande Forest where the killings took place. Thirdly, his association with the victims' black bag that contained the money and the pistol. In his defence the 3rd accused did not deny that he participated in the arrest of the victims at Sinza. He said, however that he ordered the Chuo Kikuu police to take the victims to their police station for further interrogation. He denied having stopped at Sam Nujoma Road, at the BIDCO robbery scene, or going to Pande Forest. He categorically denied taking part in killing the victims. As to the victims' black bag, the accused's defence was that he was simply

ordered to fetch the bag from the charge room. He did not know how the bag came there. It was his view that this case was framed against him by the 1st accused.

Mr. Magafu, learned counsel for the accused, submitted that although the 3rd accused was seen at Sinza during the arrest of the victims he went on to order Sgt. James to take the victims to Chuo Kikuu police station for interrogation. The only evidence that the 3rd accused ever went to Pande forest was Exh. P15 and P22. He submitted that the evidence being from a deceased co accused, was valueless and the court should not act on it. As for Exh. P16 the author of the statement, DW8 denied to have seen the 3rd accused at Pande Forest. He was not shaken in cross examination. What remains is the evidence PW 30 and PW36 which was hearsay. He went on to submit that the evidence of PW23 should not be considered in reaching the conclusion that the 3rd accused had gone to Pande Forest, because he was not at the scene of crime; except that the accused had gone in response to the BIRDO robbery. Even if this court finds that Exh. P16 amounted to a confession, it may only be used against the co accuseds on being corroborated for it to ground a conviction. Finally the learned counsel, submitted that all that the prosecution managed to build was a

suspicion. Relying on **SHABANI MUHUNZU @ ELISHA MCHUNZU v. R** (CAT Criminal Appeal No. 12/2002 (Mwanza (unreported), Mr. Magafu submitted that suspicion alone, however strong is not enough to ground a conviction.

On his part, Mr. Mtaki submitted that there was no dispute that the arrested victims were not taken to any police station. It was strange that when the 1st, 2nd and 3rd accuseds met at Urafiki police station, nobody asked or wanted to know the victims' whereabouts. It was even more so, as the three were senior police officers; and even more so when their bodies were found at Muhimbili, the next morning. In his view, there was strong circumstantial evidence to prove that all the accuseds killed the victims. He relied on **MSWAHILI v R** (1977) LRT 25 for the statement that circumstantial evidence corroborating each other could ground a conviction if it irresistibly points to the guilt of the accused. Coming to the 3rd accused in particular, Mr. Mtaki submitted that he was not only seen at Sinza, where the victims were arrested, but he later so informed PW23. He argued that Exh. P15, P16 and P22 proved that he went to Pande Forest and was the one who brought back the victims' black bag, that was eventually handed over to the 2nd accused at Urafiki police station. He

asked the court to ignore his defence of alibi, and find that the prosecution has proved its case beyond reasonable doubt. Exh. D6 he argued, showed that he participated in the shootout at Sinza postal fence.

The Lady and Gentlemen Assessors who sat with me, opined that the accused was guilty because there was ample evidence on record that he was the one who brought back the victims' black bag to Urafiki police station, and after going in his office, went out to hand over the bag to SSP Mantage, SP Mkumbo, ASP Ndaki, and the 2nd accused. They argued that on the premises, he must have had something to do with the deaths. So they advised that he be found guilty as charged.

As I remarked, at the beginning, there are three pieces of evidence lined up against the 3rd accused. As to the fact of his being present at the scene of arrest of the victims there is no dispute because the accused himself also admits it . It is important here to note that, he had not only seen, but he/or the 5th accused also attempted to take the black bag from the victims after learning that it contained about Tshs.5,000,000/= in cash. Fortunately, the victims sensed danger and demanded their bag back. And the bag was returned to them as they were packed in the Chuo Kikuu car. The next important fact is that it is in evidence that from Sinza, the 3rd

accused drove behind the Chuo Kikuu vehicle carrying the victims which stopped at Sam Nujoma, BIDCO robbery scene but he said he never stopped there. As remarked above I cannot accept that a senior police officer, sent to take preliminary measures, in respect of a reported BIDCO sales truck robbery, could not or did not stop at that scene especially on seeing that the Chuo Kikuu vehicle had also stopped. On the available evidence I have all reasons to infer that the 3rd accused also stopped at SAM NUJOMA, where the BIDCO truck was robbed.

The next piece of evidence, is Exh. P15, P16 and P22, which shows that the 3rd accused, not only stopped at SAM NUJOMA, but also, from there led the way to Mbezi Luis. I am aware and have already held above that by their very nature not only would , these exhibits not be taken into consideration against co accuseds, but would also if they did, require corroboration, and that they cannot corroborate each other especially with the shaky testimony on this aspect from DW8, the 12th accused, who in court appeared unsure whether he had seen the 3rd accused at Pande Forest. Virtually there is no evidence of value left in this bag.

The third piece of evidence against the 3rd accused is the victims' black bag, which was later found at Urafiki police station. The Lady and

Gentlemen assessors heavily relied on this piece of evidence. They opined that PW23 saw the accused drive back and go into his office with the black bag, before proceeding to hand it over to SSP Mantage and others. Although I cannot see such evidence from PW23 but only from DW8 (12th accused's statement (Exh. P16) I am unable to accept the accused's explanation that he was sent to collect the bag from the charge room, because it is in evidence that the charge room could only accept exhibits after registering them in the exhibits register. A senior police officer, like the 3rd accused should know that under PGO 229, exhibits like cash are supposed to be kept in a safe or cash box not just at the open charge room office. So if it is true that the black bag was in the charge room, the burden shifted to him to prove so, because none of the prosecution witnesses was cross examined on this aspect. I take it as a fact, that the 3rd accused had driven back with the bag and kept it in his office, before handing it over, with some cash missing. The bag could not just have mysteriously have found its way to Urafiki. Someone must have brought it and I find that it was the 3rd accused who brought it there.

The doctrine of recent possession is not a presumption of law, but only of fact. All that it means is that if a person is found in possession

of property recently stolen or unlawfully obtained the court may draw an inference that the person found in its possession is the one who stole or unlawfully obtained it. It is a rebuttable presumption, and may be applied to any offence, however penal including murder.

In **DIRECTOR OF PUBLIC PROSECUTIONS vs. JOACHIM KOMBA** (1984, TLR 213 (HC) this court held:-

> "an inference under the doctrine of recent possession may be drawn to uphold any offence however penal it may be including the offence of murder."

Indeed, in **MANOZO MANDUNDU AND ANOTHER vs. REPUBLIC** (1990) TLR 93 the Court of Appeal of Tanzania confirmed a conviction for murder based on the inference drawn from recent possession.

In the present case, the 3rd accused produced a black bag, which he had seen at Sinza as the one seized from the victims. The bag had remained with the victims all the way from Sinza until they were separated from it. A few hours later, the owners of the bag are found dead, and the bag is found in possession of the 3rd accused.

I think the inference that the 3rd accused had something to do with the deaths or was present at the place and time of their killings is too temtping in the absence of a more credible explanation as to how he came by it. I also find that he may have been one of the last persons to have been seen with the victims alive; and that on the basis of the authority of **MAKUNGILE MTANI v R** (1983) tlr. 179, a conviction is possible. However in **MAKUNGILE's** case there was an additional evidence that the appellant's clothes bore blood stains of the same blood group as that of the deceased different from his own. This is not the case in the present case. Apart from the victims' bag, there was no other connection with the victims. To me, the bag only suggests that the accused was present and witnessed the killings.

Although mere presence at the scene of crime does not make a person a principal in the second degree merely because he does not prevent the commission of the offence or apprehend the offender, it is also true that if a person is voluntarily and purposely present and witnesses the commission of the crime and has the duty and the power to prevent its commission, but offers no opposition, it could be inferred that he wilfully encouraged or aided or abetted or intended to encourage the principal

offenders. But, as shown above on the principles set out in SURAJ PAUL's case, it is the law that for a conviction of any one of the accused persons as a principal in the second degree, the prosecution must prove that he has counselled procured, aided, abetted, or commanded one or more of the other accused persons to murder, and that such person or persons have in fact committed the murder.

In the present case although I am satisfied that by circumstantial evidence, it has been established that the 3rd accused was present at the scene of crime there is no evidence that he counselled, procured or commanded any of the other accused persons to commit the murders, because as adequately demonstrated, none of the other accused persons did actually fire the lethal bullets that caused the deaths of the victims.

I therefore find that the prosecution has also failed to prove its case against the 3rd accused person beyond reasonable doubt.

The next one that comes for consideration is the 2nd accused. The prosecution evidence against him is of two types. First there is what may be called direct evidence comprised in Exh. P15, P16 and P22 and the testimony of the 12th accused (DW8). The effect of this class of evidence

is that the second accused is the one who led and ordered the execution of the victims at Pande Forest. The second class of evidence is circumstantial evidence.

Arguing for his client, Mr. Ishengoma, learned counsel, submitted as follows. First, the evidence against the 2nd accused was merely circumstantial but the circumstantial evidence that there is, does not irresistibly point to the guilt of the accused, because:-

(i) The 2nd accused did not leave with the victims nor take part in their arrests;

(ii) The evidence of PW30, PW31, PW33, PW36, PW27, PW23, and PW13 is that of police officers, who did different tasks in the course of investigation.

Their evidence is not independent and as a matter of prudence such evidence requires corroboration for which he cited: **MOHAMED KAKINDE AND ANOTHER v. R** (1986) TLR 134

(iii) The evidence of pw15 should be taken with caution (**MOHAMED HEMED KAKARA & R.** (1967, hcd.341

(iv) The evidence of PW27 is of little value because he admitted in cross examination that the 2nd accused only took them to the postal fence in his capacity as OC-CID.

(v) The evidence of PW28 (now DPP) was most likely hedged on the facts he read in the case file placed before him as DPP. He was thus both a witness and a prosecutor.

(vi) The only other evidence is that of the 11th and 12th accuseds' statements (Exh. P15, P16 and P22) and the 12th accused's testimony in court as DW8.

The statements of the 11th accused had no value, as the maker died before being crossed examined on them. The evidence of DW8 was not credible. In any case the evidence of both those accuseds require corroboration which is lacking in the present case. In any case the learned counsel further submitted, Exh. P16 was not credible and the 12th accused's credibility should be scrutinised closely. For that he cited **MUSA SALUM OTHMAN v. R** (1969) HCD. 91. It was further submitted that, since, Exh. P16 did not

incriminate the 12th accused himself, it could not be taken into consideration against the other co accuseds. He relied and cited **KYABANAIZI v. R** (1962) EA 309 and **SWAI & OTHERS V. R** (1974) EA 370

(vii) There was no independent evidence and the burden of proof never shifted to the accused for which he cited **JONAS NKIZE v R** (1992) TLR.213.

(viii) It was not enough for the prosecution to prove that the 2nd accused knew of the circumstances of the deaths. That would not be a sufficient ground of conviction. For that he cited **JOSEPH KAMHANGO & 5 OTHERS vs. R.** (1953) TLR. 185.

It was for these reasons that Mr. Ishengoma prayed for the acquittal of the said accused.

On his part, Mr. Mtaki, learned counsel for the prosecution submitted that the second accused participated in the commission of the offences for the following reasons:-

(i) Exh. P15, P16 and P22 and the testimony of the 12th accused (DW 8) establishes the accused's role

(ii) The evidence of PW15 corroborates the above evidence.

(iii) PW27 told the court that the accused told him he led the shoot out at the postal fence which was not challenged.

(iv) In Exh. D6 and D11 the 2nd accused admits being present at the postal fence during the shootout.

(v) PW9, PW10, PW20, and PW8 established that there was no shoot out there.

(vi) Exh. P15 and P16 fully implicate their makers and so **JOHN NKIZE v. R** (supra) and **JOSEPH KEMILYANGO v R** (supra) do not apply; and so the statements may be used against other accuseds.

(vii) PW28 testified as Secretary to the Commission and not as DPP and his evidence did not go beyond the Commission's work. He was an uninterested party.

(viii) 2nd accused admitted to have taken PW27, PW28, and PW30 to the postal fence.

(ix) The 2nd accused and DW11 contradicted each other on the accused's alibi. The court should therefore ignore that defence.

He therefore asked the court to find that the second accused has failed to raise any reasonable doubt against the prosecution case, and to convict him as charged.

The Lady and Gentlemen assessors were of the unanimous opinion that on the basis of the evidence of the 12th accused and, the accused's efforts to mislead the probe teams as to where the killings took place demonstrated by his attempt to attribute the missing blood stains to the previous rains at the postal fence, the 2nd accused be also found guilty as charged.

Let me first deal with the available "direct" evidence in the form of Exh.P15, P16, P22 and the evidence of the 12th accused (DW8). As to whether Exh. P15, P16 and P22 amounted to a confession in law, I have already answered that question elsewhere, above. As far as I am

concerned they are confessions against the makers in terms of s.3(1) (d), of the Evidence Act, although they do not directly incriminate themselves. Since they do not directly incriminate the makers, they cannot be taken into consideration against their co accuseds under s.33(1) of the Evidence Act. I need not repeat the evidential value of Exh. P15 and P22 whose author is dead.

So really, Exh. P15, P16 and P22 are worthless against the second accused and even others.

But even if the testimony of the 12th accused is not a confession, it is nevertheless evidence of a co accused, which, like that of an accomplice, has to be corroborated as a matter of practice. (See **PASCHAL KITIGWA v R** (1994) TLR 65. The defence submits that there was no corroboration, but the prosecution thinks there is some strong circumstantial evidence to corroborate. What is that circumstantial evidence?

The first link is the evidence of **PW15, SGT XAVIER KAJELA**, regarding the alteration in the Armoury Register. He admitted in cross examination (through Exh. D3) that he made the alterations on his own volition. It also showed that he made the additional statement when the

2nd accused was already in remand, so he could not have prevailed over him to make such a statement. Admittedly as Mr. Ishengoma has submitted, such evidence must be treated with a lot of caution. After due consideration and evaluation of this witness and his evidence I found it not proved that the second accused had ordered the alterations . However in other aspects, I found PW15 credible. I found that Exh. P8 and P9, (the empty cartridges) which were sent to the ballistic expert by his letter of 25/1/2006), matches with the number of bullets issued by PW15 to Cpl Saad and DC Rashid for another firing. According to the ballistic report the 9 cartridges were fired from the SMG guns issued to Cpl Saad and DC Rashid respectively (Exh. P6 and P7) tendered by PW22. According to the letter sent by the 2nd accused of 25/1/2006 the cartridges were sent in connection with the investigation over the murder of the four robbers of BIDCO.

The second chain is the two empty cartridges that were picked from Pande Forest where the killings took place which were picked by a team of investigators led by PW36 (Exh. P11). According to PW22 these two empty cartridges were fired from an SMG gun issued to the late DC Rashid (Exh. P7 and Exh. P10). Which goes to show that indeed D/C Rashid was

present at Pande Forest and his gun was used on 14/1/2006. This together with Exh. P8 and P9 shows that the 2nd accused knew that the said gun together with that of one Cpl Saad were used, and had to find a way of explaining their use, hence the reissue of the 9 bullets

The third chain in the circumstantial evidence against the 2nd accused is the explanation he offered to the Mgawe Task Force and the Kipenka Commission of Inquiry that the deaths were a result of a shootout at the postal fence to which he had taken also PW27, PW28, PW30, PW 31, PW34 and PW36, and showed them what appeared to be bullet holes .

This was the theme of Exh. D6 whose evidential value as I have held above, is that it was intended to mislead the authorities, and hiding the truth about the deaths. The postal fence story was invented by the 2nd accused to explain how the nine bullets were used by the 11th accused and Cpl Saad. But by his own admission in court, there was no such shootout there, and that he only got the story from Sgt James who is not before the court. I am aware that no conviction should be based on the weaknesses of the defence, but as the Court of Appeal said in **ALLY MPALILO KAILU v. R** (1980) TLR 170

> "Where the prosecution has made up an affirmative case against an accused person and the accused in the course of his defence gives evidence which carries the prosecution case further, the court will be entitled to take into account such evidence of the accused in deciding the question of his guilt."

The next link in the chain of circumstantial evidence is his own first crime report to the Control Room (999) and to the Regional Crimes Officer. This is to be found in Exh. D11. In that report like in Exh. D6 he claimed that the deaths followed a shootout at the postal fence. He admitted that the report was in his own handwriting, but also admitted that it was all cooked up in order to save the actual perpetrators. He also admitted to have given false evidence before the Kipenka Commission. This is evidence of his subsequent conduct. In my opinion it all goes to lend credence to the evidence of DW8. But the chain ends there.

The circumstantial and direct evidence, of course, do not link the 2nd accused with actually killing the victims. What it clearly establishes, was that he was present at Pande Forest and might have been privy to the killings and knew who did so. But as seen above it was not enough to

prove that the 2nd accused was present. As demonstrated above in **R v CONEY AND OTHERS** (op cit) at 537 case:-

> *"to constitute an aider or abettor, some active steps must be taken by word, or action, with the intent to instigate the principal or principals."*

And as seen above, the position of the law is that a man cannot be guilty of having abetted or counselled or commanded the commission of a crime unless the crime has been committed by the principal offender; and that the alleged abettor or aider did so to one or more of the other accused persons, and the other persons have in fact committed the murder.

In this case, I have found that the 2nd accused 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 the killings were carried out by Cpl Saad at the instance of the 2nd accused. This is certainly hearsay and has no value. The fact would remain that Cpl Saad is not among the accused persons.

The question of aiding, abetting, procuring or counselling cannot be considered in the absence of the alleged killers.

As in the case of the 3rd accused, I find that the prosecution has also failed to prove their case against the 2nd accused beyond reasonable doubts.

As against the 1st accused, the evidence is wholly circumstantial, consisting of his press releases, his conduct towards some prosecution witnesses such as PW4, PW5, PW17, PW12, his visit to Urafiki police station his failure to ask for the victims' whereabouts, and his congratulations to the arresting team. In his defence he said that the evidence against him was weak, that he was not offered opportunity to make a cautioned statement, but only a witness statement which he tendered as Exh. D10 He also said that as far as the press releases were concerned, he was led into issuing them by reports from his subordinates, including the 2nd accused. For that he relied on Exh. D.6 and D11. He also testified that it was normal police procedure to issue press reports and if need be to congratulate junior officers if they did a good job. It was not therefore out of the ordinary for him to congratulate the Chuo Kikuu police

for the arrests they made. The accused said he did not know the victims before.

On the basis of the evidence, Mr. Msemwa, learned counsel submitted that the 1st accused had offered reasonable explanations for his behaviour and movements on 14/1/2006, and that:-

(i) He was not the one who arrested PW4 or PW17 nor was he hostile to them. He was the one who ordered their release from lock ups.

(ii) His visit to Urafiki police station was at the instance of SSP Mantage who wanted him to go there and solve the problem on the missing money exhibits as witnessed by PW23.

(iii) PW13 the Control Room officer, has never heard him ordering the execution over the radio call. Even if he gave such an order no one was bound to obey it (He relied on the case of **MAGAI v. UGANDA** (1965) EA 667.

(iv) On press releases he received his information from his subordinates and other reports (Exh. D6 and D 11)

(v) Although he congratulated the Chuo Kikuu police it was not true that he had summoned them for the purpose. It was ASP Masinde (PW 24) who asked him to do so. In any case it was a normal police procedure.

(vi) Although he was accused of preparing specimen statements to be used before the Kipenka Commission by his co accuseds, none has produced such statement and DW12 even denied it.

(vii) The case against him was not thoroughly investigated. It was only hastily commenced against him following correspondence between his co accuseds and the DPP. Even PW36 admitted so. Apart from the co accuseds, some newspapers were also behind this, because he had filed defamation cases against them.

With these, Mr. Msemwa, prayed for the acquittal of his client.

Mr. Mtaki for the prosecution, submitted that there was plenty of circumstantial evidence to show that the 1st accused knew what was going on, and that:-

(i) He only released PW4 and PW17 on the pressure of PW4's father, and that of SACP Mwamunyange.

(ii) PW4 and PW17 were not registered at any police station after their arrests

(iii) The first accused has prepared and distributed specimen statements to his co accuseds. This was confirmed by the 12th accused (DW8) and is corroborated by Exh. P15, P16, and P22.

(iv) DW10 did not support the 1st accused's complaints against his co accuseds.

(v) At Muhimbili Hospital, the accused behaved rudely towards PW12 and PW16

(vi) First 'accused's STATEMENT (Exh. D10 said that it was the 3rd accused who had told him that he was the one who arrested the victims, which is denied by the 3rd accused.

(vii) In terms of Exh. ~D11 and the evidence of DW1 and DW2 shows there was a common

intention between those two accuseds, to kill the victims.

On the premises, he submitted that he too should be convicted as charged, or alternatively for being an accessory after the fact, as in the case of the 13th accused.

The Lady and Gentlemen Assessors advised the court to find the accused not guilty because, the prosecution has failed to prove its case beyond reasonable doubt, and he has offered reasonable explanation for his visit at Urafiki, his press release and his behaviour towards PW4, PW5 and PW17 and also for congratulating the Chuo Kikuu police officers.

It is not disputed that the first accused did not go and was therefore not present at the scene of crime at Pande Forest. But in law, in certain circumstances, an accused may be convicted of counselling or procuring the commission of the crime even if he is not present at the scene of crime (See **R v KOMEN ARAP CHELAI & OTHERS** (1938) 5 EACA 150.

In the present case it is indeed alleged by the prosecution through Exh. P16, P22, PW30, and PW36, that the accused ordered the 2nd accused to see that the victims were executed. It was also submitted that by his

subsequent conduct, the accused must be taken to have known what had happened to the victims so that it amounted to corroboration.

I have already discussed the evidential value of the evidence in Exh.P1, P16 and P22 which cannot be taken into consideration against co-accuseds. DW 8 testified that he never heard anything like the 1st accused ordering the executions. PW13 also said he never heard such orders over the radio from the first accused. PW36 could not trace any telephone records of conversations between the 1st accused and the 2nd accused. In my view the allegation that the 1st accused ordered the execution of the victims has not been proved, let alone corroborated.

I have carefully considered the submissions of the prosecution and the defence counsel, and I am satisfied that the accused has offered reasonable explanations for his visit at Urafiki, and his congratulating the arresting team of officers, as well as the contradictory press releases. I would only comment that the PGO requires that in his capacity the accused should have visited the scenes of such serious crimes personally. Had he made the visits he would have been in a better position to know the actual situation on the ground before issuing the press releases. But that only makes him negligent, but not necessarily a party to the crime. There was

also a suggestion, that the accused had attempted to distribute a specimen statement for the other accused persons to follow in answering questions before the Kipenka Commission. This is what the deceased 11th accused, the 12th accused (DW8) and the 13th accused (DW9) said in their statements and evidence in court. Apart from the fact that this is evidence from co accuseds, the specimen statement itself was not produced in court. Even if it was produced, it would have required corroboration. When all is said and done, I find that this allegation too not proved.

It may perhaps be worthwhile to comment on one or two things about the accused's conduct/behaviour toward PW4 and PW17. To PW4 he is alleged to have inquired after PW2. I have already held PW4 a credible witness but it is strange for someone to inquire after PW2 from whose home the victims were arrested. It is equally strange that through Exh. D5, the accused is said to have threatened to kill PW17, as part of the robbery network. This suggests strongly that he might have known the circumstances in which the victims met their deaths.

Mr. Msemwa, cited the case of **JOSEPH KAMILIHANGO AND 5 OTHERS V. R** 1983) TLR, 185, to the effect that:-

"The mere knowledge about the background and circumstances of the death of the deceased, coupled with the discovery of the dead body of the deceased does not constitute sufficient circumstantial evidence to support a conviction of murder".

With respect I don't think that the case was laying down any general principle of law. It was decided on the peculiar facts of that case. In that case one of the appellants, was convicted of murder, because he knew of the existence of a long standing misunderstanding and the efforts taken by their family to eliminate the deceased by witchcraft. The deceased's body was eventually discovered lying in a banana plantation, near the appellants' house. At the trial these facts were brought forth and used to convict the appellants with the murder, but the Court of Appeal quashed the conviction of the 3rd appellant on that ground. The facts in the present case are different. In this case the 1st accused was a Regional Crimes Officer and Ag. Regional Police Commander. He got news over the radio on the arrest of the robbers (victims). Despite the provisions of the Police General Orders, he did not care to visit the scene of crime or know whether the victims were taken to the nearest police station, or to know

their whereabouts even when he was called upon to intervene in the missing exhibit. Despite public outcry and protests that the victims were not robbers and were disarmed at the time of their arrests, he kept on sticking to the story, without satisfying himself as to where the truth lay. This irresponsible behaviour could only be explained by the fact that he knew what he was doing and intended to achieve. For my part I find that this conduct gives rise but to a very strong suspicion that his intention was to protect and prevent the arrest of the cold blooded killers. Had the killers been any of the other accused persons he could easily have been an accessory after the fact to murder.

Mr. Mtaki, learned counsel, has indeed suggested that the 1st and 13th accuseds be convicted of being accessories after the fact to the murder. I have already decided not to do so, against the 13th accused. Apart from the fact that evidence of his presence at the scene is wanting, and the actual killers not charged and convicted of the offences, the law does not permit of such a course of action. **In R v. YONASSANI EGALU AND OTHERS** (1942) 9 EACA. 65, it was held:

> *"That if it is sufficiently established that a murder has been convicted by someone, even though that person has not been*

> *convicted or even found, then another person can be convicted as accessory after the fact to that murder, provided the evidence supports' such conviction."*

On the face of it the holding in that case seems to support the prosecution's prayer. But the case is only authority, if in fact the accused was charged with the said offence. In the present case the accuseds are not charged with the alternative offence of being accessories after the fact, but Mr. Mtaki has asked the court to substitute and convict the 1st and 13th accuseds in the alternative if they are acquitted of murder, apparently under the provisions of section 300(1) and (2) of the Criminal Procedure Act (Cap 20 – RE 2002).

Section 300 (1) of the Criminal Procedure Act provides:-

> "300(1) When a person is charged with an offence consisting of several particulars, a combination of some any 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.

(3) (Not applicable)

Mr. Mtaki's proposition finds support in an old decision in an appeal originating from Tanganyika, of **R v. SUMBUSO s/o RUHONDA AND OTHERS** (1948) 15 EACA 99, where the defunct East African Court of Appeal said:

> *"On a charge of murder an accused may be convicted of being an accessory after the fact to murder"*

But that decision was overruled in a subsequent decision in an appeal originating from Uganda, in **VELEZI KASHIZHA s/o MADAGALE v. R** (1954) 21 EACA. 389 where the court held:

> *"The offence of being an accessory after the fact to murder is minor to but not cognate to murder."*

A year later, the same court affirmed **VALEZI**'s decision in **R v. MURIU S/O WAMAI AND OTHERS** (1955) 22 EACA 417 and held:

> "*A person who has been charged and acquitted of murder, cannot be convicted of becoming an accessory after the fact to such murder, when he has not been charged with the latter offence, it being not minor to and cognate with the former offence."*

In the **VALEZI KASHIZHA** case, the Court of Appeal for Eastern Africa considered the provisions of s.181(2) of the Tanganyika Criminal Procedure Code, s.179(2) of the Kenyan Criminal Procedure Code and s.180(2) of the Uganda Code, and observed that they were all identical. Section 181(2) of the repealed Tanganyika Criminal Procedure Code is identical to the current section 300 (2) of the Criminal Procedure Act that I have quoted above.

The two cases of **MURIU s/o WAMAI AND OTHERS** and **VELEZI KASHIZHA** were affirmed and followed by the Court of Appeal of Tanzania, in **DAMIAN PETRO AND JACKSON ABRAHAM v R** (1980) TLR 260.

So even if the actual killer(s) were also charged along with the 1st accused the current position of the law is that a person charged with

murder cannot be convicted of the lesser offence of being an accessory after the fact to such murder, if he was not charged with the same offence, it being a minor but not cognate to murder. And as for the offences of murder, I agree with the Lady and Gentlemen Assessors that the prosecution has failed to prove its case beyond reasonable doubt against the 1st accused.

At the beginning of this judgment I started by declaring that the victims were brutally killed. This has remained so todate. 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.

As Mr. Magafu learned counsel, has rightly observed throughout the trial and it cannot be gainsaid that this case was hastily investigated and taken to court. Although the Commission of Inquiry had recommended the prosecution of 15 suspects (excluding the 1st accused) only 12 of them thus listed were charged, leaving out some crucial parties. In so doing, the prosecution, according to PW30 and PW36 depended heavily on the statements of the 11th and 12th accuseds. But as BARTH C.J. of Kenya said in **R V KAMAU (1924)** 10 KLR. 8

> *"Shortcuts are usually inexpedient, and every effort should be made to prove the case alleged against an accused without a reliance on a confession which can as easily be retracted as made. The police should not be satisfied that a confession having been obtained, a case is completed".*

Applying that observation in **MANUBHAI HIRA v. THE CROWN** (1945) 7 ZLR,4 the Eastern African Court of Appeal remarked:

> "The learned Chief Justice in **R v KAMAU** was in that case dealing with a confession, but what he then said applies with equal force to other statements made to the police by accused persons in custody. Such statements are as easily denied or retracted as made and the police should not be satisfied that their investigation is complete unless and until they have, apart from anything the accused person may have said, obtained the best and fullest evidence to support the charge."

This was clearly demonstrated in the present case, as we have observed on the evidence on record. Apart from the 11th and 12th accuseds' statements, the only other independent medical and ballistic and circumstantial evidence was inconclusive and could not prove the case against the accused persons beyond reasonable.

With these few concluding remarks, I now proceed to declare that the prosecution has failed to prove their case against the accused persons beyond reasonable doubts. I therefore find all the accuseds not guilty and acquit them of all the counts.

I order that they be released immediately from prison, unless otherwise lawfuly held. I also order the police force to intensity their efforts in tracking down the actual perpetrators of these offences and bring them to book.

It is so ordered.

S.A.Massati

JAJI KIONGOZI. (rtd)

17.8.2006

Right of Appeal explained.

S.A.Massati

JAJI KIONGOZI.(rtd)

17.8.2006

Assessors thanked and discharged.

S.A.Massati

JAJI KIONGOZI. (rtd)

17.8.2006