IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 76 OF 2020

(Original Criminal Case No. 112 of 2018 of the Resident Magistrates Court of Dar es Salaam at Kisutu before Hon. T.K. Simba - PRM)

FREEMAN AIKAEL MBOWE ..... 1ST APPELLANT

PETER SIMON MSIGWA ..... 2ND APPELLANT

SALUM MWALIMU ..... 3RD APPELLANT

JOHN JOHN MNYIKA ..... 4TH APPELLANT

ESTHER NICHOLAS MATIKO ..... 5TH APPELLANT

HALIMA JAMES MDEE ..... 6TH APPELLANT

JOHN WEGESA HECHE ..... 7TH APPELLANT

ESTER AMOS BULAYA ..... 8TH APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

J U D G M E N T

19th May, 2020 & 25th June, 2021

I.C. MUGETA, J.

On 17/2/2018, a by-election of a member of Parliament for Kinondoni Constituent was held. For the purposes of this judgment the reasons for a midterm election are irrelevant. Prior to this day, the usual campaigns were held by all participating parties which according to Victoria Charles

Wihenge (PW7), the Assistant Returning Officer, were AFP, CCK, DEMODRASIA Makini, TLP, UMD, DP, CHADEMA, CUF and CCM. Events on the last campaign date, the 16th day of February, 2018, are the concern of this case. Besides the big number of contesting parties, the evidence by the prosecution covers events at CHADEMA campaign rally. Pursuant to the election campaign timetable, CHADEMA held their campaign at Buibui grounds, Mwananyamala area.

As a matter of duty, the Tanzania Police Force had to ensure peace and security at all the campaign rallies. To meet this legal mandate, according to SSP Gerald Ngiichi (PW1), CHADEMA meeting was supervised by SP Dotto. SSP Ngiichi (PW1) himself was the operations Manager charged with the general security during the campaign period.

No doubt it was a lawful campaign period and security was guaranteed. What the heck turned a lawful activity into the alleged criminal acts? It is the prosecution's case that after the rally the appellants who are top CHADEMA leaders and their supporters walked towards the Kinondoni Municipal Council Office without a lawful cause resulting into breach of the peace. On the way, the police team under SSP Ngiichi blocked and finally dispersed them by force. Subsequently, on different places and dates, the

appellants were arrested and charged with thirteen counts. These are first count, conspiracy to commit an offence. Second count, unlawful assembly. Third count, riot. Fourth count, riot after proclamation. Fifth count, promoting feelings of ill-will for unlawful purpose. Sixth count, raising discontent. Seventh count, promoting feelings of ill-will for unlawful purpose. Eighth count, raising discontent. Nineth count, sedition. Tenth count, sedition. Eleventh count, inciting the commission of offence. Twelfth count, inciting the commission of offence and thirteenth count, inciting commission of offence. All appellants pleaded not guilty, were tried and finally convicted of all counts in the charge sheet except the first count for which they were acquitted. Aggrieved by both conviction and sentence, except Vincent Biyegiza Mashinji who was the 6th accused person, they have preferred this appeal to protest their innocence.

The petition of appeal carries fourteen grounds of appeal which for brevity I paraphrase them thus: -

i. *The case against the Appellants was not proved beyond reasonable doubts;*

ii. *The trial court did not properly analyse the evidence on record;*

iii. *The trial court did not analyse the individual elements of each offence against the evidence on record in order to justify its verdict;*

iv. *The trial court did not consider the defence evidence;*

v. *Exhibit P4 and exhibit P5 relating to admission of Electronic Evidence were illegally admitted;*

vi. *Count No. 3 and count No. 4 were duplex therefore prejudiced the appellant's defence;*

vii. *Count No. 5 and count No. 7 were defective for failure to sufficiently disclose the nature of the discontent that was likely to be raised by the alleged utterances;*

viii. *Count No. 6 and count No. 8 were defective for failure to sufficiently disclose the identity of the communities who were likely to be subject of the promotion of the alleged ill-will;*

ix. *The trial court erred in law in failing to find and hold that count No. 11, 12, and 13 in the charge sheet were vague, embarrassing and prejudicial to the appellant's ability to defend themselves;*

x. *The trial court unreasonably did not consider the alibi of the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th appellants vis a vis the 2nd, 3rd and 4th counts in the charge sheet;*

xi. *Any alleged words in the 5th, 6th, 7th, 8th, 9th and 10th counts did not amount to criminal offences;*

xii. *The words allegedly spoken by the 1st 7th and 8th appellants in counts No. 11th, 12nd and 13th respectively did not amount to inciting commission of an offence;*

xiii. *There was no preliminary hearing conducted per the law;*

xiv. *The trial court erred in law in sentencing the appellants to pay fines which were reckoned to operate consecutively while the alternative custodial sentence was held to run concurrently.*

The appeal was heard by oral submissions where Peter Kibatala and Hekima Mwasiku, learned advocates represented the appellants. The Respondent was represented by Faraja Nchimbi, Principal State Attorney, Wankyo Simon, Senior State Attorney and Salimu Msemo, State Attorney.

In my view, the above grounds of appeal are intertwined. Mr. Kibatala tried to argued them separately. In so doing, he could not avoid repeating himself, therefore, he had to adopt submissions on one ground to cover the other. In that regard, he adopted his submissions on the second ground to cover the fourth ground, ground seven to cover ground eight,

grounds eleven and twelve were combined and ground thirteen was dropped. In the same vein, I have earnestly considered those grounds and have come to a conclusion that save for the fourteenth ground of appeal which is on the sentencing mode, the rest boils to two major complaints. Firstly, that the charge was not proved beyond reasonable doubts. Secondly, that the judgment of the trial court falls short of being a judgment for want of a proper analysis of evidence. I shall start with the second complaint which challenges the legality of the trial court's judgment.

Mr. Kibatala complained that the trial court's judgment does not provide a proper analysis of the evidence on record against each count and reasons for reaching the decision it made. In short, he submitted that it is not a judgment for being omnibus. That considering the number of the counts, if the evidence was properly analysis the reasoning would not have covered only pages 90-98 of the judgment. To the contrary Mr. Msemo submitted that the trial magistrate did a proper analysis and accounted for the conclusions he made. In his view, the reason for the decision is brief because the counts are interwoven.

In order to decide on the rival arguments, it is imperative to understand the constitution of a valid judgment in criminal cases. A quality judgment in criminal cases ought to be in accordance with the provisions of section 312 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2019] (the CPA) which provides: -

> *"Every judgment under the provisions of section 311 shall, except as otherwise provided by this Act, be written by or reduced in writing... and shall contain the point or points for determination, the decision thereon and the reason for the decision ...".*

The issue for my determination, therefore, is whether the trial court's judgment complies with the conditions in the above section of the CPA in terms of structure and contents.

The learned trial magistrate framed three issues for determination. These are: -

i. *Whether the accused persons have committed the offences which they stand charged;*

ii. *Whether the prosecution side have proved its case against the accused persons beyond reasonable doubt and;*

iii. Whether the defence side have raised any reasonable doubt to disturb the standard of proof by the prosecution.

It is my view that in light of the second issue, the first and the third issues were unnecessary and redundant. Once it is decided in the second issue that the case has been proved, it means the accused persons committed the offences charged and their defence has not raised a reasonable doubt in the prosecution's case. If it is ruled that the case has not been proved, it means they did not commit the offences and there are reasonable doubts in the prosecution evidence either by its nature or the doubts have been raised by the defence.

I understand the trial of this case was not an easy work. The proceedings count up to 752 pages most of which covering unnecessary applications and objections. The hearing of the appeal lasted for two days. Hereunder, is the structure and contents of the impugned judgment.

The impugned judgment has 98 pages of which 89 pages is a reproduction of the proceedings. At pages 90 and 91, is a discussion about the criminal law principle that it is upon the prosecution to prove the case beyond reasonable doubts. The above stated issues for determination are covered

in those pages too. Then the analysis of evidence follows from page 91 through to 98 and lastly is the conclusion at page 98. Therefore, in terms of structure, the judgment complied with the commonly used form of Facts, Law, Analysis and Conclusion (FLAC). The question that follows is whether that judgment contains findings based on analysis of evidence and reasons for the findings on each issue or count. This is where Mr. Kibatala's complaint lies.

According to the trial court's judgment, the first count namely; conspiracy to commit an offence is discussed from page 92 through to page 94. In reaching his findings, the learned Principal Resident Magistrate referred to the definition of Conspiracy in the Black's Law Dictionary and stated: -

> *"I have heard the testimonies all the (sic) prosecution witnesses in this area. The prosecution witnesses are tending (sic) to prove the offence of conspiracy as per the first count in which all nlne accused persons stand charged. I have also gone through the submissions filed by the prosecution and the defence side. I shall give the findings later on the process (sic) of this judgment".*

Neither specific witnesses' evidence relating to this count nor the analysis of that evidence appears in the judgment. Even the findings promised to be made later are untraceable therein. It is just at the last sentence but one of the judgment where the learned trial magistrate further states: -

> *"The Prosecution had (sic) totally failed to prove their case in respect of the first count".*

This conclusion contradicts his early suggestion that the prosecution witnesses "*are tending to prove the offence of conspiracy*". It is, therefore, unexplained why the appellants were acquitted in the first count.

At page 94 – 95 the second count of unlawful assembly is delt with. The learned trial magistrate raised an issue that; whether the accused persons on 16/2/2018 at Buibui had assembled and whether the assembly was unlawful. Then he observed: -

> *"On that day CHADEMA political party was scheduled to conduct their meeting at Buibui grounds and the said meeting was to end at around 6.00pm. I do not agree with the submission that the meeting became unlawful from the time when the leaders started to utter words found in the charge*

sheet. The assembly was lawful during the whole period of the campaign".

Thereafter, and without making any reference to the specific defence and prosecution's evidence, he found that the evidence of PW2, PW3, PW4 and PW6 proved that all the appellants left Buibui grounds and marched along Mwananyamala and Kawawa roads. He concluded that the marching constituted unlawful assembly rejecting generally the evidence of the defence as being weak in these words: -

"All accused persons denied to have so marched. The defence case on this area was weak and has not shaken the strong evidence adduced by the prosecution side".

It follows, therefore, that the learned Magistrate, was satisfied that while there was no unlawful assembly at Buibui, there was one at Mwananyamala and Kawawa Roads. However, the weak evidence referred to above is not disclosed to justify his conclusion. No reasons are given for referring to it as weak evidence. The conclusion that the appellants walked along Mwananyamala and Kawawa roads is in total disregard of the

defence and the prosecution witnesses credibility. I disagree with Mr. Msemo on his submission that it is based on being satisfied that PW2, PW3, PW4 and PW6 are credible witnesses. Reasons why a court finds a particular witness credible ought to be reflected in the judgment.

On the third and fourth counts the learned magistrates had this to say: -

> *"If this court will hold that there was Riot and Riot after proclamation then it has to decide if there was any permit to authorize the accused persons to move from one place to another".*

Nothing more is said in the judgment about evidence regarding these counts prior to finding the appellants guilty. They were convicted of those counts on the mere above statements.

The impugned judgment is also silent on evaluation of evidence in relation to the 5th, 6th and 7th counts. From perfunctorily dealing with the 2nd 3rd and 4th counts, the learned magistrate jumped to the 9th and 10th counts which are about sedition offences against Freeman Mbowe. He was satisfied that offences in those counts had been proved to the hilt. After

convicting the Freeman Mbowe of the 9th and 10th counts the learned magistrate held: -

> *"I am also satisfied as I did to the 09th and 10th count (sic) that the words found in the 8th count had raised discontent to the inhabitants of the United Republic of Tanzania".*

The eighth count is about raising discontent contrary to section 63B (1) of the Penal Code. With respect, the learned trial magistrate misdirected himself. The 8th count is unrelated to the 9th and 10th counts which are about sedition against Freeman Mbowe. Evidence proving sedition cannot equally prove the 8th count against John Wegesa Heche which is about raising discontent.

Further, without any analysis or reference to any evidence, the learned magistrate, regarding the 11th, 12th and 13th counts, held: -

> *"The offences of inciting the commission of offences as found in the 11th, 12th and 13th counts have also been proved".*

No reasoning towards this conclusion is reflected in the judgment. As simple like that the learned Principal Resident Magistrate concluded: -

> *"In the final event, I am satisfied that 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th and 13th counts have been proved beyond reasonable doubts in respect of all the accused persons".*

Therefore, not only the judgment lacks specific and clear reasons for the decision on the framed issues and each count charged but also no decision at all was made in respect of the 5th, 6th and 7th counts. To say the least, the impugned judgment is an omnibus judgment ever! However, I do not agree with Mr. Kibatala that it is not a judgment. From what I have tried to demonstrate above, it is a judgment but which is unsatisfactory or deficient in terms of analysis and finding of facts per the evidence in relation to each count charged.

What is the remedy? While Mr. Kibatala urged the court to acquit the appellants, Mr. Nchimbi had this to say: -

"... the analysis made by the trial court was sufficient and covered all offences. In case the court finds it to be deficient, I pray it to do its analysis and make its own findings...".

To support his proposition that this court is entitled to step into the shoes of the trial court and treat the evidence as a whole and weigh it against the finding of the trial court he cited the case of **Kileo B. Kileo & 4 Others v. R**, Consolidated Criminal Appeal No. 82 of 2013 & 330 of 2015, Court of Appeal – Tanga (Unreported). I agree with the learned Principal State Attorney. There is a plethora of case law authories to the effect that a first appellate court can step into the shoes of the trial court to do that which is amiss in its judgment. It was so decided in **Dinkarai Ramkrishna Pandya v. R** [1957] E.A 336 and **Damson Ndaweka v. Ally Said Mtepa**, Civil Appeal No. 5/1999, Court of Appeal – Arusha (unreported). This, I will do. In so doing I shall address the first complaint on whether the charge was proved beyond reasonable doubts in all the thirteen counts or any one of them.

As I embark on this course, it is pertinent to point out that I am not going to deal with all the case laws cited to me by the counsel for the appellants and the learned State Attorneys when they argued for and against the appeal. This is not with any disrespect to their efforts in presenting each side's case but simply because firstly, the cases cited refer to common principles of law which does not necessarily need an authority to prop them up. Secondly, a total of thirty-two case authorities were cited by both sides. In my considered opinion, referring to each case and the principle involved would make this judgment a tome. I shall, therefore, discuss the cases cited and the submissions made by each party where necessary only. Hereunder, I shall refer to the appellants as accused persons or appellants interchangeably.

The first count for all accused persons is conspiracy to commit an offence c/s 384 of the Penal. The appellants were acquitted of this count. Even if the Republic did not appeal, I shall discuss it because I am re-evaluating the evidence and, as I intimated, no reasons were assigned for the acquittal.

The particulars of the offence are that Freeman Aikael Mbowe, Peter Simon Msigwa, Salum Mwalimu, John John Mnyika, Ester Nicholas Matiko, Vicent Biyegiza Mashinji, Halima Mdee, John Wegesa Heche and Ester Amos Bulaya, on diverse dates between 1st February, 2018 and 16th February, 2018, within the Region of Dar es Salaam, jointly and together conspired with other persons not in court to commit offences, namely, unlawful assembly, riot and riot after proclamation.

I shall dispose of this count very quickly. From the particulars of the offence, the offence of conspiracy was charged as a cognate offence to three other offences, namely, unlawful assembly, riot and riot after proclamation. In the case of **John Paul @ Shida & Another v. R,** Criminal Appeal No. 335/2009, Court of Appeal – Arusha (unreported) the practice of charging conspiracy as a cognate offence to other offences was discouraged. The Court of Appeal held that conspiracy is an offence in its own right. The rationale is not far-fetched. In this jurisdiction, this offence is deemed completely committed when people willfully and intentionally agree to commit an offence regardless of whether they act on that agreement. This notwithstanding, I am satisfied that the error did not occasion failure of justice. Therefore, I shall determine it on merits.

The offence of conspiracy has three major ingredients. These are firstly, an agreement of more than one person to do an unlawful, or a lawful act by unlawful means as was held in **Mattaka & others v R** [1971] E.A 495. Secondly, a willful agreement and thirdly, the intent to have a particular offence committed. To prove conspiracy, all these elements ought to be proved. In this case no witness from the prosecution side gave evidence that the appellants, after holding meeting(s) or by other forms of communication, agreed to commit any offence. The offence in the first count was, therefore, as the trial court found, indeed, not proved.

The second count for all accused persons is unlawful assembly contrary to sections 74 (1) and 75 of the Penal Code. The particulars of the offence are that on 16th February, 2018, at diverse places at Buibui grounds and along Mwananyamala and Kawawa roads area within Kinondoni District in Dar es salaam region, the accused persons jointly and together, being assembled with intent to carry out a common unlawful purpose, did conduct themselves in such a manner as to cause persons in the neighborhood reasonably to fear that they will commit breach of the peace. What is unlawful assembly? The meaning is provided under section 74 (1) of the Penal Code. All the following constitutes unlawful assembly: -

(i) *A gathering of three or more persons with intent to commit an offence.*

(ii) *Persons who having lawfully assembled to carry out a common purpose, conduct themselves in such a manner as to cause persons in the neighbourhood reasonably to fear that the persons so assembled will commit a breach of the peace.*

(iii) *Persons who having lawfully assembled conduct themselves in such a manner as to cause persons in the neighborhood reasonably to fear that the persons so assembled will, by that assembly needlessly and without any reasonable occasion, provoke other persons to commit a breach of the peace.*

Considering the particulars of the offence, the third ingredient is irrelevant. I shall, therefore, test the first and second ingredients against the evidence on record to see if those elements were proved.

The particulars of the offence are that there was unlawful assembly involving the appellants both at Buibui grounds and along Mwananyamala and Kawawa roads. These are three distinct incident places. I shall consider them separately starting with the Buibui assembly. SSP Ngiichi (PW1) and Victoria Charles Wihenge (PW7) testified that CHADEMA party

had to hold by-election campaign rally at Buibui grounds on 16/2/2018. All appellants admitted to have attended the rally at Buibui. It is, therefore, undisputed fact that the appellants assembled at Buibui grounds to lawfully conduct election campaign rally. They never, I hold, met for a common unlawful purpose as alleged in the particulars of the offence. The first ingredient has not been proved.

What about the second ingredient?

In order to prove this element, the prosecution ought to establish that those assembled instilled into nearby observers fear that the assembly would breach the peace. Since it is impossible to prove what is in the mind of the persons assembled, the probability of the breach of the peace can only be inferred from their conduct. The criteria would be firstly, the nature of the assembly, secondly, the weapon used, if any and thirdly, the behaviour of the assembly at or before the scene of the crime.

SSP Ngiichi testified that the in-charge of security at Buibui grounds was SSP Dotto. Unfortunately, for undisclosed reasons, Dotto did not testify in court. On this account, Mr. Kibatala urged the court to draw adverse inference against the prosecution for failure to bring a material witness. In rebuttal, Mr. Msemo submitted that his evidence was unnecessary as the

evidence of SSP Ngiichi sufficed. I do not buy the suggestion by Kibatala because other prosecution witnesses present at Buibui grounds testified on what transpired. These are D.6976 Cpl. Rahim (PW3) and F.5362 D/Cpl. Chale (PW6).

On the situation at Buibui grounds, D.6976 Cpl. Rahim testified: -

> *"... The said Freeman Mbowe was talking on a stage. He then returned the microphone and left the stage. The situation at Buibui was not good as people who gathered were furious as a result of the statement of Mbowe. People were speaking words showing breach of the peace. I head people saying, "hatuogopi, hatutishwi tutaandamana hadi kieleweke".*

From this testimony, the evidence suggesting a likelihood of those assembled to breach the peace is "people becoming furious" and uttering words "*hatuogopi, hatutishwi tutaandamana hadi kieleweke".*

On his part, D/Cpl. Chale had this to say: -

> *"... People gathered and started to move on the way to Kinondoni to the office of the DED. I decided to keep myself in the police vehicle people*

started to throw stones. Police started to prevent them from throwing stones".

Therefore, by this evidence of the prosecution the nature of the assembly constituted citizen attending election campaign rally. The weapon used was stones and their behaviour involved singing songs and throwing of stones. The relevant evidence as to those peoples' peace threatening conduct is that of D/Cpl. Chale (PW6). He said that he saw people throwing stones. If I have to accept this evidence, I must reconcile its clear discrepancy with the testimony of Cpl. Rahim who did not see people throwing stones. The evidence of Cpl. Rahim, above stated, does not point out any peace threatening conducts. His reference to "people becoming furious", in my view, does not define any specific conduct. Further, singing "*hatuogopi, hatutishwi tutaandamana hadi kieleweke"* by itself does not necessarily constitute a likelihood of breach of the peace on part of the singers in the eyes of an independent observer. At a charged political rally, it is common for the participants to sing songs and chant slogans. I understand witnesses are not expected to testify in similar words. However, the discrepancy is acceptable in terms of describing the incident not the occurrence. The occurrence in issue here is the throwing of stores. I am of

a settled view that in a chaotic situation described by D/CPl. Chale (PW6), his colleague Cpl. Rahim (PW3) would not have likened throwing stones to becoming furious and singing songs. It follows, therefore, that evidence of one of them must be untruthful, hence, the need to assess their credibility in relation to the incident they described. In so doing, I shall take into account the role assigned to each of them at the rally.

According to D/Cpl. Chale, he went there with a sole purpose to film the incident which is recorded in exhibit P5. On his part, D.6976 Cpl. Rahim testified that he went to Buibui grounds "*to add force in guarding the area".* It is my view, considering the nature of their assignments, Cpl. Rahim (PW3) was better positioned to observe peace threatening incidents like the throwing of stones than D/Cpl. Chale. He was charged with security issues. On his part, despite being part of his assignment and seeing the throwing of stones, D/Cpl. Chale did not film that incident.

Exhibit P5 is a recorded film of the incident at Buibui and Mkwajuni by D/Cpl. Chale. I have watched it more than ten times, I did not see a single stone throwing incident at Buibui grounds. In the circumstances, I hold that Cpl. Rahim is credible on the state of affairs at Buibui. There was no stone throwing acts at Buibui grounds. I further hold that the discrepancies

in the evidence of Cpl. Rahim and D/Cpl. Chale goes to the root of the matter relevant to the fact in issue which warrants me to entertain a reasonable doubt on whether people at Buibui grounds conducted themselves in a manner that caused fear of breach of the peace. The evidence that there was unlawful assembly at Buibui grounds is short of proving that offence.

What about the situation along Mwananyamala road? Again, the relevant evidence is that of Cpl. Rahim (PW3) and D/Cpl. Chale (PW6). From Buibui Cpl. Rahim was instructed to follow up the people who had walked towards Kinondoni along Mwananyamala road. He testified that since the road (Mwananyamala road) had been closed he took another route. There is no evidence as to why and who closed it. At Mkwajuni area, he met the people he believed were from Buibui grounds moving towards the office of the Municipal Director. Cpl. Rahim did not, rightly so, testified on the conduct of people along Mwananyamala road. On his part, PW6 also testified on the closure of the Mwananyamala road and that from Buibui grounds he drove to the office of the RCO. He gave no evidence as to people's conduct along Mwananyamala road. Therefore, there is no evidence of unlawful assembly along Mwananyamala road as alleged in the

particulars of the offence. I move to considering the situation along Kawawa road at Mkwajuni area.

As I have already stated, Cpl. Rahim's (PW3) next stop over from Buibui grounds was at Mkwajuni along Kawawa road. This is the place where him and H.7856 PC Fikiri Magecha (PW4), allegedly, finally got injured. Juma Alufani (PW5) tender the PF3's for their treatment as exhibits P1 and P2 respectively. They testified that the people they met at Mkwajuni were singing "*hatuogopi mtatuua*". They had in their hands stones, sticks and water bottles. Another person who was there is Shaban Hassan Abdallah (PW2). He is a welder who works at Seba Steel Furniture at Mkwajuni along Kawawa road. He testified that he saw people who were demonstrating holding stones and sticks. They were Singing "*hatupoi mpaka mmoja afe mtatuua".* The evidence of SSP Ngiichi (PW1) and Bernard Nyembele (PW8) who were also there is to the same effect.

In their defence the appellants denied to have walked to Mkwajuni. Freeman Mbowe (DW1) testified that after the rally he left for the party headquarters. Peter Simon Msigwa (DW2) said he left for his residence at Baobab. Salum Mwalimu (DW3) said he left for Kigogo. John Mnyika (DW4) said he left the rally before 16:00 hours. Ester Matiko (DW5) said she was

at the Kinondoni Municipal Council following up on identification letters of polling agents. Dr. Vincent Mashinji (DW6) (who did not appeal) said he left for the office and John Wegesa Heche (DW8) said he left the rally for his residence at Baobab together with Peter Msigwa. On their part, Halima Mdee (DW7) and Ester Bulaya (DW9) said they left before the rally ended and travelled to South Africa where Halima had to undergo medical treatments. Therefore, all the accused persons raised a defence of alibi. Mr. Kibatala admitted the alibi was raised without notice as required by section 194(6) of the CPA. However, he cited **Marwa Wangiti & Another v. R** [2002] T.L.R 39 to support his argument that courts are enjoined to consider the alibi even if raised without notice. Mr. Msemo replied that where no notice is issued the court has a discretion to consider or to disregard the alibi. In his view, the alibi was not proved, therefore, it does not raise any reasonable doubts in the prosecution's case.

Before I decide whether to consider the alibi, I shall assess if the prosecution proved formation of unlawful assembly along Kawawa road and if evidence tendered implicates the appellants as participants in the assembly. Existence of such evidence is what makes the alibi relevant. I

start with the issue of identification as none of them was arrested at the scene of crime.

The prosecution evidence relating to identification of the appellants is that of SSP Ngiichi who identified Freeman Mbowe, Halima Mdee, Peter Msigwa and John Mnyika. Shaban Hassan Abdallah (PW2) identified Freeman Mbowe, Ester Matiko, John Mnyika and Halima Mdee. CPL Rahim (PW3) identified Freeman Mbowe and Halima Mdee. H.7856 PC Fikirini (PW4) identified Freeman Mbowe, Peter Msigwa, Salum Mwalimu, John Mnyika, Ester Matiko, Halima Mdee and John Heche and Bernard Nyambele (PW8) identified Freeman Mbowe, Dr. Vincent Mashinji, Halima Mdee, John Mnyika and John Heche. The witnesses made dock identification and they claimed familiarity with the persons identified. However, there is no evidence that they named the suspects to anybody or authority immediately after the incident as an assurance for their reliability. In fact there is no evidence as to what prompted the arrest of each accused person since they were not arrested at the scene of crime.

The principle on weight to be attached to visual identification evidence was defined in **Aman Waziri v. R,** [1980] TLR 250. Visual identification evidence was described as the weakest form of evidence which can found

a conviction only when the possibilities of a mistaken identity have been eliminated. The conditions that favour a correct identification pronounced in the said case includes familiarity of the parties, duration of the incident, time of the incident (whether a day or night time), the nature of light and its source and the distance at which the witness observed the incident. These criteria were again articulated in **Chacha Jeremiah Mrimi & 3 others v. R,** Cr. App. No. 551/2005, Court of Appeal, Mwanza (unreported). In that case, familiarity was further qualify by demanding evidence on how often the witness has met the suspect and the interval of time lapse between the original observation and the subsequent identification.

In this case, the incident took place at day time. Therefore, day light favoured accurate identification. All witnesses (PW1, PW2, PW3, PW4 and PW8) claimed to be familiar with the accused persons as CHADEMA leaders whom they regularly see on Television. As was held in **Goodluck Kyando v. R** [2006] T.L.R 300 they are entitled to credence unless there is a good reason to not believe them. Further, their evidence is positive evidence. They saw the accused persons. The advantages and disadvantages of positive evidence was alluded to by the Court of Appeal in the case of

Daniel Nguru & 4 Others v. R, Criminal Appeal No. 179/2004, Court of Appeal – Mwanza (unreported) where it quoted Shaw, C.J in **Commonwealth v. Webster** [1850] Mass. 255 saying thus: -

> *"The advantage of positive evidence is that it is the direct testimony of the witness to the fact to be proved, who, if he speaks the truth, saw it done, and the only question is whether he is entitled to belief. The disadvantage is that the witness may be false and corrupt, and the case may not afford the means of detecting his falsehood".*

I entertain no doubt that the appellants, as politicians, are popular. It is, therefore, easy for a false and corrupt witness to claim familiarity with them when it comes to issues of identification. This challenge makes the question of determining credibility of witnesses of paramount importance. My curiosity is supported by the settled principle of law that in matters of identification it is not enough merely to look at factors favoring accurate identification. Equally important is the credibility of the witnesses. (see **Jaribu Abdallah v. R,** [2003] TLR 271).

Fortunately, case law has established safeguards against untruthful testimonies in case of identification evidence. Where the witness is unfamiliar with the suspect, the safeguard is a lawful identification parade.

Where the witness claims familiarity with the suspect, the safeguard is how soon did he/she mention the person identified. In **Marwa Wangiti Mwita and Another v. R** [2002] TLR 39, it was held: -

> *"The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or failure to do so should put a prudent court to inquiry".*

As I have indicated herein above, the prosecution side did not lead evidence to show when their witnesses named the appellants as having seen them in the demonstration at Mkwajuni. The alleged incident took place on 16/2/2018. Appellants were charged in groups. The first batch appeared in court for the first time on 27/3/2018. Evidence on how early the witnesses named them as the culprits would have assured the reliability of the witnesses on their identification. Their evidence on identification, therefore, is unreliable.

The foregoing notwithstanding, the evidence of Shaban Hassan Abdallah (PW2) and Bernard Nyembele (PW8) in particular is suspect because of contradictions on whether they met at the scene of crime immediately after the incident. Shaban Hassan Abdallah testified: -

> *"Police officers blasted tear gases. ...We decided to run away from there. At around 7.00pm we decided to come back to the place of work. ...* ***On the next day*** *police officers came to our place to investigate on what happened. ...I told police officers on what happened". (emphasis supplied)*

On his part, Bernard Nyambele when referring to what he did immediately after the rioters were dispersed testified: -

> *"I identified police officers who could be witnesses as well as independent witnesses who were there during the riot. Among the people who were identified as witnesses were one Shaban Hassan Abdallah".*

It is logical that PW2 could not have been identified immediately after the incident because he ran away. The above pieces of evidence of Shaban Hassan Abdallah and Bernard Nyambele on when Shaban Hassan Abdallah met the police and was identified as a potential witness is not only contracting but also irreconcilable. While PW2 says it was on the next day, PW8 says it was immediately after the incident. The exact date and time when they met is a relevant fact as far as their credibility in identifying the appellants is concerned. Their telling different stories on this important issue coupled with lack of evidence on when they mentioned the persons

they identified create doubts on their identification of the suspects and also lowers their credibility. I, therefore, hold that it has not been proved that the appellants were part of the people who assembled along Kawawa road.

I move to the question of the unlawful assembly. The prosecution witnesses said the demonstrators had sticks, stones and bottles of water and sang "hatuogopi mtatuua" and "hatuogopi mpaka mmoja afe mtatuua". I have doubted the evidence of Shabani H. Abdallah (PW2) and Bernard Nyembele (PW8) on their meeting at the scene of crime. I do not think they are worth believing on what the assembly held in their hands. This leaves on record the evidence of Cpl. Rahim (PW3) and Cpl. Fikiri (PW4) as the only evidence which can, if believed, prove unlawful assembly. They testified that due to the fracas at Mkwajuni they were injured. Are these witnesses credible? I believed Cpl. Rahim on his evidence regarding the state of affair at Buibui. Is there a reason for not believing him and PW4 on their narration on the state of affair at Mkwajuni and that they were injured thereat? On the injury, I have no doubt that the two Policemen were injured. However, the belief is not due to their PF3 tendered by Juma Rashid Alufani (PW5) but because of their oral testimony in court and that of PW5 that he treated them at the Police Kilwa Road

Hospital. The PF3s after being tendered were not read in court for the accused persons to understand their contents which render them of no probative value. They deserve to be expunged from the record as I hereby do.

The foregoing notwithstanding, I am not convinced by their testimony that they were injured due to the unlawful assembly. While I am satisfied that there was an assembly along Kawawa road, I am of the view that those who assembled did not conduct themselves in a peace threatening manner. I hold that view because the evidence of PW3 and PW4 on the weapons carried by those assembled contradicts the record in exhibit P5. In that video record, those people are seen marching empty handed and most of them raising up their hands which is a sign of "I surrender". If I am asked which evidence I believe between a video record and oral evidence contradicting a video recorded image, I would go for the video record provided I am satisfied it is authentic record. I find exhibit P5 to be authentic. I disregard Mr. Kibatala's objection that it was admitted in violation of section 18(2) of the Electronic Transactions Act, 2016 as no affidavit was tendered to prove its authenticity. In my view, there is nothing in that section which requires that before an electronic record is

admitted an affidavit testifying as to its authenticity ought to be filed. In **EAC Logistics Solution Ltd v. Falcony Marines Transportation Ltd**, Civil Appeal No. 1/2021, High Court – Kigoma (unreported) a similar issue was raised and I held: -

> *"This section outlines criteria upon which admissibility and probative value of such evidence can be determined. For purpose of admissibility, I hold, those criteria can be established by an affidavit or other from of evidence like oral evidence depending on the kind of document to be admitted. In case of oral evidence, it suffices the witness to testify on how the electronic data message was generated, stored, communicated, maintaining and the original identified prior to tendering the electronically generated documents. Filing of affidavits or certificates is necessary when the person seeking to tender the evidence is not the person in-charge of the computer from which the data message was generated or a party to the chain of custody of the electronic document or device".*

I still hold the same view. There are other ways to prove authenticity of an electronic document or device which include oral testimony of a witness prior to praying for admission of the record. That is what happened in this

case. PW6 testified on how he recorded, stored, retrieved and finally tendered exhibit P5 in court.

Then what happened at Mkwajuni leading to the injury of PW3 and PW4? According to PW3 and PW4, they were hit with stones after the police fired tears gas to the assembly. Therefore, peace escaped on the attempt to disperse the assembly. The assembly was peaceful until when tears gas was fired with view to prevent it from getting into the offices of the Returning Officer. This evidence agrees with the testimony of Aidan Ulomi (DW12) and Lumela Stephen Kahumbi (PW13) who testified for the defence. Their evidence is that the situation along Kawawa road was safe until when the police blasted tear gas gears. That is when peace disappeared resulting into their injury. DW12 tendered his hospital treatment card as exhibit D4. These witnesses are civilians who saw the incident along Kawawa road. They saw it while on their private business. In this regard, those assembled did not commit any offence under section 74 (1) of the Penal Code. They did not conduct themselves in a peace threatening manner before the police fired tear gas bombs to them.

Another argument by the prosecution is that the demonstrators had no lawful cause to march along Kawawa road as they had no business to do

with the office of the Returning Officer where they headed to under the instruction of Mr. Mbowe. If this is true, the assembly was unlawful and the appellants can be held liable under the doctrine of common intention under section 23 of the Penal Code. This section provides: -

> *"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"*

According to CPL Rahim and D/Cpl. Chale, Mr. Mbowe directed his followers to go to the office of the Returning officer to demand for polling agents' introduction letters. Exhibit P5 shows Mr. Mbowe, indeed, instructing his party members to go to the office of the Returning Officer to demand for polling agents' introduction letters as the same had not been issued to all CHADEMA polling agents. He admitted this fact in his defence too. Since there is no evidence that he consulted other appellants before he gave the order, I shall consider this issue against Mr. Mbowe alone. He gave the instructions and urged for a peaceful walk in these words: -

"Sasa ni saa 12. Sikiliza Kinondoni. Hatutaki fujo.

Asiumwe mtu, Asiumizwe mtu, asiumizwe nzi".

On this note, the assembly started the marching. It is important, therefore, to examine if the introductory letters had, indeed, not been issued and if they were necessary document for their identification at the polling stations. If the answer is in the negative then the marching was for an unlawful purpose hence unlawful assembly and Mr. Mbowe can be held liable under the doctrine of common intention.

Victoria Wihenge (PW7) was an Assistant Returning Officer of the election. She testified that after polling agents are sworn in, they are not issued with any certificate or introduction letter for identification. This evidence is intended to establish that the CHADEMA's polling agents' journey to her office was without a lawful cause. During the 2018 elections, procedures for appointment of polls agents on parliamentary elections were governed by the National Elections (Presidential and Parliamentary Elections) Rules, 2015 [GN. No. 307 of 2015. Rule 48 of these rule provides that polling agents are appointed by their political parties and before they are allowed in polling stations, they must be sworn in first. Sub rule 3 of rule 48 provides: -

"The Returning Officer shall after receiving the information under Sub-regulation (2), inform the Presiding Officers or polling assistants the polling agents authorized to be at each polling station".

The section does not provide for the procedure on how the polling agents can identify themselves to the Presiding Officers. However, in the letter to CHADEMA dated 15/2/2018 with Ref. Na. EA.75/162/08A/51 which is exhibit D1 in evidence, the National Election Commission clarified that polling agents ought to be issued with introduction letters. Paragraph one page 3 of exhibit D1 reads: -

"Kanuni 48(3) ya Kanuni tajwa, Wakala wa Upigaji kura atapaswa kupewa barua na Msimamizi wa Uchaguzi ya kumtambulisha kwa msimamizi wa Kituo cha kupigia kura".

The complaint by CHADEMA was that some of their polling agents were denied those letters despite follow ups by Suzan Lyimo and Ester Matiko (DW5) who spent the whole of 16/2/2018 at the office of the Returning Officer demanding for the same together with those agents who had not received the letters. One of them is Shaban Othman (DW14). He testified that he did not get the letter. Shaban Kimbau (DW15) gave evidence as one of those few who got them. He tendered it as exhibit D5 despite,

allegedly, being torn by the police. The Assistant Returning officer worked on behalf of the National Election Commission. The evidence on record does not provide the means to detect why she was not aware that the Commission wants polling agents to be issued with introduction letters. In view of exhibit D1, I find that the polling agents were entitled to the introduction letters and some of them were denied the same. Therefore, the direction by Mr. Mbowe to his followers to go and demand the letters from the office of the Returning Officer was lawful even if it was not a wise idea that all of them had to go. Therefore, the assembly was not executing an unlawful cause and their conduct at Kawawa road was not a threat to the public peace. The second count was not proved.

In the 3rd and 4th counts, all appellants are charged with riot and riot after proclamation respectively. The third count is charged under section 74 (3), 76 and 35 of the Penal Code. The particulars of the offence in the third court are that the accused persons having unlawfully assembled at Baibui grounds, along Mwananyamala and Kawawa Road they conducted unlawful procession with an intention to invading the office of the Director of Kinondoni Municipal Council, thereby causing breach of the peace and terror to the public. Riot is committed when the unlawful assembly starts to

execute the purpose for which it assembled. Since I have held that there is on record neither evidence of unlawful assembly at Buibui grounds and along Mwananyamala and Kawawa Roads nor that the appellants were among the assembly which was dispersed by the police at Mkwajuni, I hold that the offence of riot in the third count was not proved. This applies to the offence of riot after proclamation. The 4th count is charged under section 79 of the Penal Code. The particulars of the offence in the fourth court are that having riotously assembled, the accused persons disobeyed the order to disperse made by SSP Ngiichi, breached the peace and terrified the public resulting into the death of Akwilina Akwiline Baftaa.

While I agree with PW1, PW2, PW3, and PW4 on their evidence that people who assembled along Kawawa disobeyed the proclamation to disperse made by SSP Ngiichi, it has not been sufficient proved that the appellants were part of that group. The 3rd and 4th counts were not proved. On the same account, I also find no reason to deal with the complaint by Mr. Kibatala that the 3rd and 4th counts are duplex. I move to the fifth count.

The fifth to the eighth counts are interrelated. Each count is against a different individual. The fifth and sixth counts are against Freeman Mbowe.

The seventh count is against Halima Mdee and the eighth count is against John Wegesa Heche. The counts are about raising discontent and promoting feelings of ill-will for unlawful purpose. All of them are charged under section 63B of the Penal Code as amended by section 43 of the Written Laws (Miscellaneous Amendments) (No. 3) Act, No. 10 of 2013. This section reads: -

> *"Any person who, to any assembly, makes any statement likely to raise discontent amongst any of the inhabitants of the United Republic or to promote feelings of ill-will between different classes or communities of persons of the United Republic, is guilty of an offence and is liable to a fine of not less than five hundred thousand shillings or to imprisonment for a term not less than one year.*
> *Provided that no person shall be guilty of an offence under the provisions of this section if the statement was made solely for any one or more of the following purposes, the proof whereof shall lie upon him, that is to say –*
> *(a) To show that the Government has been misled or mistaken in any of its measures;*
> *(b) To point out errors or defects in the Government or its policies or the Constitution of*

the United Republic as by law established, or in any legislation or in the administration of justice with a view to the remedying of those errors or defects;

(c) To persuade any inhabitants of the United Republic to attempt to procure by lawful means the alteration of any matter in the United Republic; or

(d) To point out, with a view to their removal, any matters which are producing or have a tendency to produce discontent amongst any of the inhabitants of the United Republic or feelings of ill-will and enmity between different classes or communities of persons of the United Republic".

It is my settled view that beside the proviso, the above offence section has two parts which must be carefully observed when charging an accused person. These are: -

i. Statement likely to raise discontent amongst any of the inhabitants of the United Republic; and

ii. Statement likely to promote feelings of ill-will between different classes or communities of persons of the United Republic.

The two parts are disjunctive, separated by the word "or". While the first part is general as to who can be discontented namely; the inhabitants of the United Republic, the second part is specific as to whose feelings of ill-will can be promoted namely; classes or community of persons in the United Republic. The fifth and seventh counts are charged under the second part. Mr. Kibatala submitted that the charge in these counts was defective for failure to disclose in the particulars of the offence the nature of the discontent in the alleged utterances. Mr. Msemo replied that the charge was proper for including the words "unlawful purpose". It is my view that both Mr. Kibatala and Mr. Msemo erred. Mr. Kibatala's error is due to misplacement of his argument. The argument is relevant to the charge in the 6th and 8th counts which concerns raising discontent not the 5th and 7th counts which are about promoting feelings of ill-will among communities. The issue for determination is neither about disclosure of the intended discontent by the utterances nor the legality of the same but the propriety of the charge for failure to disclose the communities whose feelings of ill-will would be promoted as charged. I shall clarify.

The relevant part of the law reads: -

> *"Any person who, to any assembly, makes any statement likely ... to promote feelings of ill-will between different classes or communities of persons of the United Republic, is guilty of an offence..."*

Simply put, the word promote means to further the progress of something. It is, therefore, upon the prosecution to prove firstly, that there exists feelings of ill-will among certain classes or communities and then that the utterances by the accused person promoted such feelings. Consequently, in order to avoid prejudicing the accused in their defence, a charge under the second part, as is the case here, must, firstly, disclose the classes or communities of persons concerned or the same must be proved in evidence. Secondly, the charge ought to state or the evidence must prove the existing ill-will that was promoted by the utterances. I have reached this conclusion considering the fact that the word ***"between"*** used in the offence section always carries the comparator significance. Further, the definition of the offence under this part specifies factual circumstances namely, the classes or communities of person without which the offence cannot be committed.

Now, therefore, the fifth count against Freeman Mbowe and the seventh count against Halima Mdee are about uttering statements likely to promote feelings of ill-will between different communities of persons. It is alleged in the fifth count that while addressing the public at Buibui grounds, Freeman Mbowe made statements which was likely to promote feelings of ill-will between communities of persons of the United Republic of Tanzania. The particulars of the offence have it that he uttered these words: -

> *"... ninapozungumza hapa Kiongozi wetu wa kata ya Hananasif yupo mochwari ... amekamatwa na makada wa CCM kwa msaada wa vyombo vya ulinzi na usalama ... wamemnyonga wamemuua. Halafu sisi tunaona ni jambo la kawaida ... Tumechoka na polisi, tumechoka na CCM..."*

In the seventh count it is alleged that Halima Mdee uttered these words: -

> *"... Msihitaji kuwasimulia madhala yanayomkumba kila mmoja wetu kutokana na utawala wa awamu ya tano ... tunaomba kesho tukamchinje Magufuli na vibaraka wake wote ... kama mbwai na iwe mbwa".*

The charge sheet in the particulars of the two offences, after recounting the above spoken words in each count, simply stated: -

> *"... statement which was likely to promote feelings of ill-will between communities of persons in the United Republic of Tanzania".*

A community is a group of people living in the same place or having a particular characteristic in common. For that purpose, the United Republic of Tanzania has a lot of communities. The charge sheet ought to have disclosed the communities concerned. In evidence, no prosecution witness named the communities that was likely to be affected by the utterances. According to section 132 of the CPA a charge sheet must give such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. Failure to name the intended communities of persons in the charge sheet and lack of proof in the evidence not only deprives the court the yardstick upon which the likelihood of the statements to promote feeling of ill-will between of communities of persons can be tested but also prejudiced the appellants in their defence.

Therefore, I agree with Mr. Kibatala, for a different reason though, that the charge sheet in the fifth and seventh count was fatally defective.

I move to the sixth count against Freeman Mbowe and the eight count against John Wegesa Heche which are charged under the same section too. Both are about raising discontent c/s 63B (1) of the Penal. However, unlike the 5th and 7th counts, I shall consider them separately because there are no defects in the charge.

In the sixth count it is alleged that Freeman Mbowe uttered these words: -

> *"...tumejipa kibali cha kutangulia mbele ya haki... Haiwezekani wanaume wazima na akili zetu na wake zetu tukafanywa ndondocha. Hii ni nchi ya ajabu. Mimi leo nipo hapa kuliandaa taifa. Kule Afrika ya Kusini, juzi, jana aliyekuwa Rais wa Afrika Kusini Jacob Zuma amelazimishwa kujiuzulu... Robert Mugabe wa Zimbabwe kang'olewa, kang'olewa Waziri Mkuu wa Ethiopia ... juzi ameondolewa kwa people's power, Magufuli ni mwepesi kama Karatasi".*

Was this statement likely to raise discontent amongst any inhabitants of the United Republic of Tanzania? This is what Mr. Mbowe testified in his defence: -

> *"The phrase people's power used in the 6 count is a phrase inviting majority to join us on what we were meaning (sic). The slogan is used by CHADEMA. The slogan recognizes the wish of the majority. The words that in South Africa Jacob Zuma was forced to retire are meant to inform the public that he was forced to retire by popular demand of people from his party. The same thing in count 6 it was pronounced that Mugabe was overthrown the meaning was the same that people from his party were not happy with him. It was meant to invite voters to vote for us. As for the prime minister of Ethiopia, we meant majority were in need to remove him and they actually did so. The words Magufuli was light like a paper meant to mention the head of CCM and the President of the country through his ruling party CCM. The words were meant that CCM was lighter and was simple for us to win the election".*

No one can hope for a simpler and clearer explanation. Even without the explanation above by Mr. Mbowe, it is difficult to fathom that such statements at an election campaign rally could raise discontent amongst inhabitants of the United Republic of Tanzania. Tanzania is a great Nation and a matured democracy. Upon watching the speech by Freeman Mbowe in exhibit P5, I am satisfied that in the context of election campaign by the phrase *...tumejipa kibali kutangulia mbele za haki ..."* he was complaining about opposition parties' mistreatment by the police. In that regard he urged them to be fair and to do justice on the election day. He meant anything short of justice, CHADEMA members were prepared to die for democracy. By any standard, a call for justice in the election process, one day before the election, as such cannot raise any discontent among the inhabitant of the United Republic of Tanzania, if at all. It is my view that the utterances, under the circumstances of this case are protected under the proviso of section 63B (1) paragraph (c) of the Penal Code above cited. It was a call for regime change through the ballot box which is all that democracy is about. The sixth count, I hold, was not proved.

In the eighth count it is alleged that John Wegesa Heche uttered these words *"... Kesho patachimbika, upumbavu ambao unafanywa kwenye nchi hii ... wizi unaofanywa na serikali ya awamu ya tano lazima ukome..."*

In his defence, the 7th appellant testified: -

> *"... The word "upumbavu unaofanywa nchi hii" was not directed to any person. Many people had earlier said that there is theft being done in this country. The controller and Auditor General (CAG) had once pointed out several thefts from several institutions".*

I have considered these words in the context of their use; I see nothing in them which expressly or by implication can raise discontent. The statement that the fifth phase government is involved in stealing is an allegation which cannot be countered by preferring criminal charges against the maker particularly when made during election campaigns. This amounts to pushing political affairs too far. It does not matter whether the statement is untrue. No reasonable person can be discontented with such statement at an election campaign rally. A democratic government must tolerate

criticism in political activities even in its harshest manifestation. The eighth count was not proved to the hilt.

The nineth and tenth counts are against Freeman Mbowe alone. They relate to sedition c/s 52 (1) and 53 (1) (b) of the Media Services Act No. 12/2016. Due to their nature, I shall consider them jointly. It is alleged that while addressing the said election campaign rally he uttered these words: -

(a) *"... nitaongoza mapambano nchi hii kwa sababu tumechoka kuuawa... matokeo ya watanzania mia watakokufa wataleta haki katika Taifa hili. Wangapi wapo tayari kuchukua bei hiyo?"*

(b) *"... hii nchi inadharaulika ... imejengwa misingi ya woga, kwa lugha nyingine wanaume ni kama mademu, si unawaona hao wamevaa suruali, waoga, bure kabisa... juzi ametekwa kijana wetu wanasema yupo Mochwari, haki ya Mungu ingekuwa nchi nyingine Kinondoni ingekuwa majivu... Lisu amepigwa risasi Machine gun na vyombo vya dola... Watanzania wanarudi nyuma... kuna mwandishi wa habari ... leo ana siku ya 86 amebebwa na vyombo vya dola ... suluhu ya nchi hii haipo bungeni, suluhu ya nchi hii ipo kwa wananchi ... lakini ili*

tupate suluhu hiyo... ni lazima tukubali kubeba majeneza ... inawezekana leo mnaogopa kufa ... ni bora tuwabebe wachache hata wakiwa 200 waliokufa katika ukombozi ili nchi hii ikasimame kama nchi ya wanaume wengine katika dunia hii".

The words in (a) above, allegedly, were intended to bring hatred and contempt to the citizens of the United Republic of Tanzania against the Lawful Authority of the Government. They are subject of the charge in the 9th count while the words in (b) above, allegedly, were intended to excite disaffection against the Lawful Authority of the Government and they are subject of the charge in the 10th count.

According to exhibit P5, Mr. Mbowe, indeed, uttered those words. He also so admitted in his defence. The Media Services Act, 2016 does not define sedition. However, section 52 (1) tries to define seditious intentions, among others, to include bringing both hatred or contempt and to excite disaffection against the Lawful Authority of the Government of the United Republic of Tanzania. This definition is under section 52(1)(a) under which the two counts have been charged. Unfortunately, no law defines the "Lawful Authority". For that matter any government body is included which

makes the nature of the offence too wide to cover everything. Mr. Kibatala argued that the offence of sedition is vague and it strives to put down hostile critics of the Government, therefore, it is a threat to the liberty of the State's subjects. I refuse to be drawn into discussing such arguments because before me is not a petition to challenge the constitutionality of that offence. I am fully aware, however, that to avoid the void-for-vagueness problem, statutes must give fair notice or warning to those subject to them, must guard against arbitrary and discriminatory enforcement and must not unreasonably deny people their constitutional right to free speech. Nevertheless, even if these issues are not subject of the discussion in this case, I know with my heart that there are always ways to tame widely cast penal sunctions under the overbreadth doctrine. They include to interpret them restrictively.

It is my view that despite the generality of the offence section, the Lawful Authority of the government intended to be brought into hatred, contempt and disaffection in the circumstance of a particular case must be disclosed in the particulars of the offence or proved by evidence. This is necessary to avoid prejudicing the accused's defence. I hold this view because according to the definition of the offence in this section, "Lawful Authority" is a

factual circumstance without which the offence cannot be committed, therefore, it ought to be disclosed. In **Isdory Patrice v. The Republic**, Criminal Appeal No. 224/2007, Court of Appeal – Arusha (unreported) it was held that where the offence charged specifies factual circumstances without which the offence cannot be committed, they must be included in the particulars of the offence. Hereunder is case law and practice which vindicates my finding.

In his judgment, the learned Principal Resident Magistrate cited the case of **Hussein Kasanga v. Republic** [1978] LRT 16. In that case, the accused Hussein Kassanga was charged for uttering these words which the court found to be seditious: -

> *"I am sorry Mr. Chairman, when Nyerere was fighting for independence all he wanted was to rule us, Nyerere wept at Tabora. In actual fact what he wanted was to rule us and fry us like groundnuts in a pot. If you were like me we would have rejected Ujamaa in Tabora up to Kigoma... I as Hussein Kassanga, I am cursing Nyerere. We had a chief, chief Nassoro Fundikira. He was a dictator like Nyerere. We coursed him. The result was that he*

committed suicide. This Nyerere too will do the same and everything will be over".

Hussein Kassanga was charged under section 56 (1) (b) of the Penal Code which is in *pari materia* with section 53 (1) (a) of the Media Services Act, 2016. Unlike in this case, in Kassanga's case the Lawful Authority was well defined. The following is the clarity with which the charge in the Kassanga's case was drafted in the particulars of the offence: -

"Hussein Kasanga, on or about the 9th November, 1973, in Tabora District, Tabora Region, in the hearing of members of Public uttered words with a seditious intention, the purport of the said words being: -

That when the leaders (meaning both government and TANU leaders) tell the people to go and live together they are deceiving the people as their real aim is to make the people live in Ujamaa Village. That when Nyerere (Meaning Mwalimu Julius Nyerere) was fighting for independence what he was actually fighting for was the power to rule people. That "when Nyerere (meaning Mwalimu

Julius Nyerere) wept at one of the Public meetings in Tabora during the era of struggle for independence he did so that he could rule the people". That "when Nyerere (meaning President Mwalimu Nyerere) is ruling the people like stupid fellows and that the people are being fried liked groundnuts in a piece of a pot" (meaning that the people in the United Republic of Tanzania were being mistreated by President Mwalimu Nyerere by ruling them as he pleases). That President Mwalimu Nyerere's fate "was going to be similar to that of Chief Nassor Fundikira of Unyanyembe who rule of dictatorship was similar to that of President Mwalimu Nyerere and who ended up by committing suicide".

In our case, the particulars of the offence read: -

In the ninth count.

"FREEMAN AIKAEL MBOWE on 16th day of February, 2018 at Buibui grounds within Kinondoni District, Dar es Salaam Region while addressing the resident of Kinondoni District in a Public Meeting held at Buibui grounds, with intent to bring hatred and

contempt to the citizens of the United Republic of Tanzania against the Lawful Authority of the Government of the United Republic of Tanzania, uttered seditious words to wit. "... nitaongoza mapambano nchini kwa sababu tumechoka kuuawa... matokeo ya Watanzania mia watakaokufa wataleta haki katika Taifa hili. Wangapi wapo tayari kuchukua bei hiyo...".

The tenth counts particulars of the offence read: -

"Freeman Aikael Mbowe on 16th day of February, 2018 at Buibui grounds within Kinondoni District Dar es Salaam Region, while addressing residents of Kinondoni District in a Public Meeting held at Buibui grounds, with intent to excite disaffection against the Lawful Authority of the Government of the United Republic of Tanzania, uttered words to wit "... Hii nchi inadharaulika ... imejengwa misingi ya woga, kwa lugha nyingine wanaume ni kama mademu si unawaona hao wanavaa suruali, waoga, bure kabisa... juzi ametekwa kijana wetu, wanasema yupo mochwari, haki ya Mungu ingekuwa nchi nyingine Kinondoni ingekuwa

majivu... Lisu amepigwa risasi machine gun na vyombo vya dola... watanzania wanarudi nyuma... kuna mwandishi wa habari ... leo ana siku ya 86 amebebwa na vyombo vya dola ... suluhu ya nchi hii haipo Bungeni, suluhu ya nchi hii ipo kwa wananchi wenyewe lakini ili tupate suluhu hiyo... ni lazima tukubali kubeba majeneza ... inawezekana leo mnaogopa kufa... ni bora tuwabebe wachache hata wakiwa 200 waliokufa katika ukombozi ili nchi hii ikasimame kama nchi ya wanaume wengine katika dunia hii ..."

It is now clear that while the Lawful Authority in Kassanga's Case was particularized, in the case before hand the contrary is true. I hold that failure to name the Lawful Authority targeted by the utterances prejudiced the 1st accused in his defence and denies the court an objective criterion upon which it can evaluate if words in question were calculated to achieve act or conduct said to be seditions. In view of the foregoing, the charge in the nineth and tenth counts was defective.

Assuming I am wrong and the charge was properly drawn, was it proved? Sedition can be for two major purposes. Firstly, it can be aimed at stirring up treason. Secondly, it can target defaming the government. In our case

the utterances can be categorized as intended to defame the government. Whether that intention was achieved as held in Kassanga's case, depends on the nature of the words in the circumstances of each case. I would add that the court reaches its conclusion after considering the context of their use, public policy and socio-political context of the period concerned. Kassanga's case was decided in the era of single party democracy and party supremacy policy. Our Constitution had not yet the bill of rights guaranteeing freedom of speech. We are now a mult-party democracy where, subject to other laws, the freedom of speech and the right to information are guaranteed under article 18 of the Country's Constitution. The alleged seditious words in this case, therefore, shall be considered in the current political landscape.

In the nineth count it is alleged that the words were intended to bring hatred and contempt to the Citizens of the United Republic of Tanzania against the Lawful Authority of the Government of the United Republic of Tanzania. In the tenth count the intended act or conduct is said to be to excite disaffection against the lawful authority of the Government of the United Republic of Tanzania. As a matter of fact, the maker of these statements was expressing his grievances at election campaign rally so that

voters can vote for his party. Voting is a lawful process and if he managed to attract voters by advancing those grievances, that cannot amount to sedition. The words are saved by the proviso to section 63B (1) paragraph (c) of the Penal Code which reads: -

> *"Provided that no person shall be guilty of an offence under this section if the statement was made solely for anyone of the following purposes the proof whereof shall lie up on him that is to say: -*
>
> *(a) ... (not relevant)*
> *(b) ... (not relevant)*
> *(c) to persuade any inhabitants of the United Republic to attempt to procure by lawful means the alteration of any matter in the United Republic".*

Therefore, the charge in the 9th and 10th count was not proved beyond reasonable doubts.

The eleventhS, twelfth and thirteenth counts are about inciting to commit a crime c/s 390 and 35 of the Penal Code. They are against Freeman Mbowe, Peter Msigwa and John Wegesa Heche respectively. In the eleventh count it is alleged that Freeman Mbowe incited the residents of Kinondoni District

to commit an offence of unlawful assembly. Peter Msigwa is alleged to have incited them to go armed in Public. John Wegesa Heche, allegedly, incited them to commit the offence of riot. However, in all these counts the inciting words have not been mentioned in the particulars of the offence. Section 390 of the Penal Code reads: -

> *"Any person who solicits or incites another to commit an offence is guilty of an offence notwithstanding that the solicitation or incitement has no effect".*

Incitement falls into the category of inchoate offences. These are offence which have begun but not completed. The Oxford Advanced Learner's Dictionary, 7th edition, define "incite" as to encourage somebody to do something violent, illegal or unpleasant, especially by making them angry or excited. Therefore, the requisite *mens rea* can be gleaned from the words uttered or written if they expressly or impliedly intended to cause people to act illegally. Disclosure of those words in the particulars of the offence is, therefore, necessary.

I have gone through the defence of Freeman Mbowe, Peter Msigwa and John Wegesa Heche I am satisfied that they sounded to be unaware of the words they, allegedly, uttered to incite the commission of the alleged offences. This is because, unlike in other counts they face where they entered their respective defence, they entered no defence in respect of those counts. This is an indicator that non-disclosure of the words in the particulars of the offence prejudiced them in their defence. The charge in the 11th, 12th and 13th counts was, therefore, defective.

Was the defect cured by the evidence particularly exhibit P5 where speeches of the 1st, 2nd and 8th accused persons are recorded? I think the answer is in the negative. It is upon the prosecution to prove which part of the speech each of them made is inciteful. I am not prepared to engage in speculations.

Consequently, I find that the charge in all counts was not proved. I hereby acquit all the appellants of the charge of conspiracy contrary to section 384 of the Penal Code, the offence of Unlawful assembly contrary to section 74 (1) and 75 of the Penal Code, the offence of riot contrary to section 74 (3), 76 and 35 of the Penal Code and the offence of riot after proclamation contrary to section 79 of the Penal Code. The first accused is also acquitted

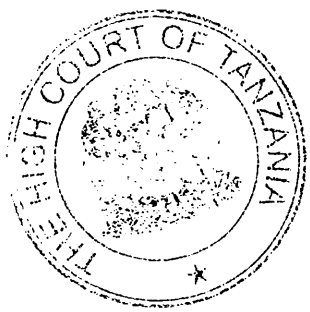
of the offence of Promoting feeling of ill-will for unlawful purpose contrary to section 63B (1) of the Penal Code, raising discontent contrary to section 63B (1) of the Penal Code, sedition contrary to section 52 (1) and 53 (1) (b) of the Media Service Act, 2016 in the 9th and 10th counts and inciting the commission of the offence contrary to section 390 and 35 of the Penal Code in the 11th count. The 7th accused person is acquitted of the offence of promoting feelings of ill-will contrary to section 63B (1) of the Penal Code in the 7th count, the 2nd accused person is acquitted of the offence of inciting commission of the offence contrary to section 390 and 35 of the Penal Code in the 12th count and the 9th accused is acquitted of the offence of inciting commission of the offence contrary to section 390 and 35 of the Penal Code. For the 6th accused person (Vincent Biyegiza Mashinji) who did no appeal, I invoke the revisional powers of this court under section 372 and 373 (1) of the Criminal Procedure Act, [Cap. 20 R.E. 2019] to find him not guilty of the charge in the 1st, 2nd, 3rd and 4th counts. He is acquitted too.

In the event, I find merits in the appeal. I accordingly quash the appellant's conviction and their respective sentence is set aside. The lower court record shows that they paid fine in lieu of imprisonment. I order

such monies to be paid back to them. The fourteenth ground of appeal which is about the mode by which the fine sentence was imposed is rendered nugatory by the acquittal orders. Further, the trial court made orders for disposal of exhibit P4 (the Video Camera) and exhibit P5 (the two mindiv) to be returned to the police. I uphold that order. Since he made no disposal orders regarding other exhibits, I order that all exhibits should be returned to their owners. Appeal allowed.

I.C. Mugeta
Judge
25/6/2021

COURT – Judgment delivered in open court in the absence of all the appellant and in the presence of their advocate Peter Kibatala and Fadhiri Masinde and Salimu Msemo, State Attorneys for the Respondent.



Sgd: I.C. Mugeta
Judge
25/6/2021