IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL SESSIONS CASE NO. 65 OF 2022

REPUBLIC

VERSUS

YAHYA TWAHIRU MPEMBA.....1ST ACCUSED

YUSUPH ALLY HUTA @ HUSSEIN.....2ND ACCUSED

ABASHARI HASSAN OMAR.....3RD ACCUSED

KASSIM IDRISSA RAMADHANI.....4TH ACUSED

JAFARI HASHIM LEMA.....5TH ACCUSED

ABDUL MOHAMED HUMUD @ WAGOBA.....6TH ACCUSED

HASSAN ALLY MFINANGA @ AMIR HASSAN.....7TH ACCUSED

ANUWAR NASHER HAYER.....8TH ACCUSED

YUSUPH ALLY ATHUMAN @ SEFU.....9TH ACCUSSED

ABDUL HASSAN JUMA @ ABDUL MASTER.....10TH ACCUSED

SWALEHE HASSAN OMARI @ SWALEHE CHINGA....11TH ACCUSED

RAJABU YAKUBU ABDALAH @ IKAPU.....12TH ACCUSED

JUDGMENT

08/06/2023 & 16 /06/2023

E. L. NGIGWANA, J.

In 2014, the herein above named accused persons, hereinafter referred to as 1st, 2nd , 3rd, 4th, 5th, 6th , 7th, 8th , 9th , 10th , 11th and 12th respectively were arrested allegedly committed these offences;- Participating in

terrorist meeting, commission of terrorist acts, provision of funds to commit terrorist acts, failure to disclose information relating to terrorist acts, and Attempted murder as an alternative offence.

Upon investigation, the charge comprising nine (9) counts was preferred against the accused persons. The 1st, 2nd, 3rd, 8th, and 9th counts are for the 1st, 2nd, 3rd, 4th, 5th, 9th, 10th and 12th accused persons only.

The 4th count is for 6th accused person only. The 5th count is for the 7th accused person only. The 6th count is for the 11th accused person only while the 7th count is for the 8th accused person only.

In the **1st count,** the 1st, 2nd, 3rd, 4th, 5th , 9th , 10th and 12th accused persons stand jointly charged with the offence of Participating in Terrorist meeting contrary to sections 4 (1), (3) (i) (i) and 5(a) of the Prevention of Terrorism Act, No.21 of 2002.

It was alleged that the accused persons on diverse dates between 1st January 2014 and 30th July 2014 at Mianzini area within Arusha District in in Arusha Region, did participate in the meeting knowingly that the said meeting was concerned with an act of terrorism to wit; planning to cause serious bodily harm to Sudi Ally@ Sudi, an act which involves prejudice to the Public safety and by its nature and context, may reasonably be regarded as being intended to be for the purpose of intimidating a section of the public in the United Republic of Tanzania.

In the **2nd and 3rd counts,** the 1st, 2nd , 3rd , 4th ,5th ,9th ,10th and 12th accused persons stand jointly charged with the offence of commission of

Terrorist acts contrary to sections 4 (1), (3) (i) (i) of the Prevention of Terrorism Act, No. 21 of 2002.

The particulars of the 2nd count are that; the accused persons on 3rd day of July 2014 and 30th July 2014 at Majengo-Chini area within Arusha District in Arusha Region, jointly and together with other persons not in court, did commit a terrorist act to wit; detonating a bomb and thereby caused serious bodily harm to **Sudi s/o Ally@Sudi**, an act which involves prejudice to the Public safety and by its nature and context, may reasonably be regarded as being intended to be for the purpose of intimidating a section of the public in the United Republic of Tanzania.

The particulars in the 3rd count are the same as those in the 2nd count save for the victim; **Muhaji s/o Hussein Kifea**.

In the **4th and 5th counts,** the 6th and 7th accused persons stand separately charged with the offence of provision of funds to commit terrorist acts contrary to sections 4 (1), (3) (c) and 13 of the Prevention of Terrorism Act, No.21 of 2002

The particulars of the 4th count are that; the 6th accused person on divers dates between 1st January , 2014 and 30th July at various places with Arusha Region, did provide Tanzanian Shillings Eighty Thousands **(Tshs. 80,000/=)** to the 1st, 2nd , 3rd , 4th, 5th , 9th ,10th and 12th accused persons while having reasonable grounds to believe that, the said funds will be used in full or part, to carry out terrorist acts to wit; causing serious bodily harm to Sudi Ally@ Sudi an act which involves prejudice to the Public safety and by its nature and context, may reasonably be

regarded as being intended to be for the purpose of intimidating a section of the public in the United Republic of Tanzania.

The particulars of the 5th count are the same as those in the 4th count save the amount of money to wit: **Tshs. 57,000/=** alleged to have been provided to the 1st, 2nd , 3rd , 4th, 5th , 9th ,10th and 12th by the 7th accused.

In the **6th and 7th counts**, 8th and the 11th accused persons stand separately charged with the offence of failure to disclose information relating to offences and Terrorist acts contrary to sections 4 (3) (i) (i) and 40 (1) (b) of the Prevention of Terrorism Act, No. 21 of 2002.

In the **6th count,** it was alleged that the 11th accused person on divers dates between January 2014 and 30th July 2014, at various places within Arusha Region, having acquired information from Yusuph Ally Omary@ Sensei (**not among the 12 accused persons in this case)** and Yusuph Ally Huta (**2nd accused**) that they **were planning to commit a terrorist act to wit;** causing serious bodily harm to **Sudi Ally Sudi,** an act which involves prejudice to the Public safety and by its nature and context, may reasonably be regarded as being intended to be for the purpose of intimidating a section of the public in the United Republic of Tanzania, did fail to disclose the said information to a police officer, which could have assisted in securing the arrest of the said **Yusuph Ally Omari@Sensei** and **Yusuph Ally Huta@ Hussein** for the commission of the said Terrorist act.

In the **7th count**, it was alleged that the 8th accused person on divers dates between January 2014 and 30th July 2014, at various places within Arusha Region, having acquired information from Jafari Hashim Lema (5th

accused) that he was collecting funds which will be used to carry out terrorist act to wit; acquiring weapons that will facilitate the execution of their plan to overthrow the lawful Government of the United Republic of Tanzania and establish an Islamic State within the United Republic of Tanzania, an act which involves prejudice to the Public safety and by its nature and context, may reasonably be regarded as being intended to be for the purpose of intimidating a section of the public in the United Republic of Tanzania, did fail to disclose the said information to a police officer, which could have assisted in securing the arrest of the said **Jafari Hashim Lema** for the commission of the said Terrorist act.

In the 8th count (*alternative to the 2nd count*) and **9th count** (*alternative to 3rd count*), the 1st, 2nd, 3rd, 4th, 5th, 9th, 10th and 12th accused persons jointly stand charged with the offence of Attempted Murder contrary to section 211(a) of the Penal Code, [Cap.16 R. E 2019], now R.E 2022.

It was alleged that the accused persons on 3rd day of July, 2014 at Majengo chini area within the District and City of Arusha, did attempt to unlawfully cause the death of One **Sudi s/o Ally@ Sudi.**

The particulars in the 9th count are the same as those in the 8th count save for the victim; **Muhaji s/o Hussein Kifea.**

When the information/charge was read over to the accused persons during plea taking and preliminary hearing, they all pleaded not guilty to all counts. After all the preliminary proceedings have been finalized, I was assigned to preside over this matter. When the information was reminded

to the accused persons, they all maintained the plea of not guilty, and as such, the matter went to a full trial.

The trial of this case has been conducted in accordance with the ruling of this court (Kamuzora J) in Misc. Criminal Application No.22 of 2022 dated 05/05/2022 in which the Director of Public Prosecutions (DPP) moved the court under the provisions of section 34 (3) (a) (b) and (4) of the prevention of Terrorism Act, No. 21 of 2002 as amended by the Written Laws(Miscellaneous Amendments) No. 2 of 2018 read together with section 188 (1) and (2) and 392A (2) of the Criminal Procedure Act, [Cap. 20 R.E 2022] where among other things, the court ordered the non-disclosure of identity and whereabouts of the witnesses and the hearing be conducted in camera for security reasons, and that; the witnesses' testimony be given through video conference as circumstances may allow and in accordance with the law.

At the hearing of this case, the Republic appeared through Mr. Valence Mayenga (SSA), Mr. Yusuph Abood (SA), Ms. Grace Madikenya (SA) and Mr. Clemence Katto (SA). On the defence side, each accused had the legal representation as follows: - Mr. Abdala Issa Ally for the 1st accused person, Ms. Upendo Msuya for the 2nd accused person, Mr. Ramadhani Alliasa for the 3rd accused person, Mr. George Mroso for the 4th accused person, Mr. Fridolin Bwemelo for the 5th accused person, Mr. Said Said for the 6th accused person, Mr. Machwa Hanson for the 7th accused person, Mr. Alpha Ngo'ndya for the 8th accused person, Ms. Magreth Mushi for the 9th accused person, Mr. Kennedy Jeremiah Mapima for the 10th accused person, Mr. Peter Njau for the 11th accused person and Mr. Pendaeli Pedro

Munisi for the 12th accused person. My Law Assistant was Hon. Edwin. M. Kamaleki while the appointed Remote Proceedings Assistant was Mr. Seth Kazimoto.

It is appropriate at the outset to express my sincere appreciation and thanks to the learned counsel both prosecution and defence sides for their commitment, determination, attendance, respective examinations in chief and cross-examinations which in my considered view, went well professionally and harmoniously, and therefore, it goes without saying that both teams have demonstrated great expertise and professionalism. Undoubtedly, the efforts of each side have enabled this case to be disposed of with reasonable expedition.

In a special way, I sincerely thank my Law Assistant and the Remote Control proceedings Assistant for performing their duties accordingly and tirelessly.

In a bid to prove the case, the prosecution side featured fourteen (14) witnesses as follows: - PW1 (P1), PW2 (P6), PW3 (P14), PW4, (P19), PW5 (P20) ,PW6 (P12), PW7 (P13) , PW8 (P17), PW9 (P25) , PW10 (P2) PW11 (P21), PW12 (P7) ,PW13 (P) and PW14 (P22). Eight (8) documentary exhibits were also tendered in favour of the prosecution case to wit; Ballistic report **(Exh.M1),** Photographic book **(Exh.M1A),** cautioned statement of the 11th accused; Swalehe Hassan Omari **(Exh.M2),** cautioned statement of the 12th accused; Rajabu Yakubu Abdalla@Ikapu **(Exh.M.3),** cautioned statement of the 7th accused; Hassan Ally Mfinanga, **(Exh.M.4)** cautioned statement of 1st accused; Yahaya Twahiru Mpemba **(Exh.M5),** Exhibits register book-PF 16 (**Exh. M.6),** and PF3 of the victim

one Muhaji Hussein Kifea **(Exh.M.7).** Physical exhibits were also tendered in favour of the prosecution case to wit; One handle of hand grenade **(Exh.M1B),** One safety pin of hand grenade **(Exh.M1C),** One spring of hand grenade (**Exh.M1D**) and seven (7) fragments of hand grenade (**Exh.M1E collectively**).

Upon the closure of the prosecution case, this court found that all accused persons have a case to answer, and were informed of their rights as provided for under section 293(2) of the Criminal Procedure Act, Cap 20 R.E 2022. In the exercise of the their rights, each accused fended himself under affirmation. None of them lined up witnesses or tendered exhibits.

At the outset, I should state that, prosecution featured fourteen (14) but the following has to be noted; **One** ,none of them testified to have seen the 1st, 2nd, 3rd, 4th, 5th, 9th, 10th, and 12th accused persons jointly or severally participating in any terrorist meeting here in Arusha or elsewhere.

Two, none of them testified to have seen them or any of them throwing a hand grenade at the house of PW2 (P6) and caused severe injuries to PW2 (P6) and PW13 (P).

Three, none of them testified to have seen Abdul Mohamed Humud @ Wagoba (6th accused) and/or Hassan Ally Mfinanga (7th accused) providing any amount of money to the herein above mentioned accused persons or any of them, to support terrorist activities.

Four, none of them testified to have seen Swalehe Hassan Omari (11th accused) in accompany of Yusuph Omari Sensei and Yusuph Ally Huta (2nd accused) and to have heard or seen the 2nd accused and Yusuph Ally

Omari@ Sensei telling the 11th accused or communicating to him their plan to cause serious bodily harm to Sheikh Sudi Ally Sudi, and that having acquired such information, failed to disclose the same to the police and,

Five, none of them testified to have seen Anuwar Nasher Hayer (8th accused) in accompany with Jafari Lema (5th accused) and to have ever heard or seen Jafari Lema telling or communicating to the 8th accused that he will be collecting funds which will be used to buy weapons in order to carry out terrorist acts with the aim of overthrowing the Government of the United Republic of Tanzania and replace for it an Islamic State.

Basically, the prosecution evidence in the case at hand is mainly based on;-

(i) Confessions of the accused persons

(ii) Confessions of co-accused persons

(iii) Oral confessions and

(iv) To some extent, hearsay evidence.

That being the case, it is pertinent to discuss albeit briefly issues of burden of proof in criminal cases, confession, hearsay evidence and the legal principles governing them.

It is a fundamental principle of law that in criminal cases, the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution. It is also a principle of law that in discharging the burden of proof, all the essential ingredients of the crime must be proved beyond reasonable doubt. See section 3 (2) (a) of the Evidence Act, [Cap. 6 R.E 2022]. Emphasizing on this principle, the Court of Appeal of Tanzania in

the case of **Furaha Michael versus The Republic,** Criminal Appeal No. 326 of 2010 (Unreported) had this to say;

"*The cardinal principle in criminal cases places on the shoulders of the prosecution the burden of proving the guilt of the accused beyond all reasonable doubt".*

Cementing on the duty imposed upon the prosecution, this court, through the case of **JONAS NKIZE V.R [1992] TLR 213** had this to say;

"*The general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our law, and forgetting or Ignoring it is unforgivable, and is a peril not worth taking".*

In other words, the evidence must be so convincing that no reasonable person would ever question the accused's guilt. See **Mohamed Said Matula versus Republic** [1995] TLR 3.

It is also settled law that a case can be proved beyond reasonable doubt by direct evidence/direct eye witness account or by Circumstantial evidence, or by free and voluntary confessional statement (Oral or written) of guilty which is direct and positive or by a combination of any of the three modes.

Having seen the standard of proof required, I now turn to discuss confession and the legal principles governing confessional evidence.

A confession is a criminal suspect's acknowledgment (made orally or in writing) of guilty. A free and voluntary confession deserves a highest credit because it is presumed to flow from the strongest sense of guilt and

therefore; it is admitted as proof of the crime to which it refers. See **Leonard Mathias Makani and Another versus Republic,** Criminal Appeal No.579 of 2017 CAT at DSM (Unreported) and **Republic versus Mugisha Katulebe and 5 Others,** Criminal Session No.126 of 2016 HC-Bukoba (Unreported). In the persuasive case of **Ekow Russell versus Republic [2017-2020] SCGLR 469,** the Supreme Court of Ghana defined a confession statement as follows:

"A confession is an acknowledgment in express words, by the accused in a criminal charge, of the truth of the main fact charged or of some essential part of it. By its nature, such statement if voluntarily given by an accused person himself, offers the most reliable piece of evidence upon which to convict the accused. It is for this reason that safeguards have been put in place to ensure that what is given as a confession is voluntary and of the accused person's own free will without any fear, intimidation, coercion, promises or favours."

In our jurisdiction, the law recognizes confessional evidence as one of the modes of proving a criminal charge. Section 57 and 58 of the Criminal Procedure Act, [Cap. 20 R.E 2022] are specific provisions under which caution statements are recorded.

Insisting compliance of the herein above mentioned provisions of the law, Court of Appeal in the case of **Musa Mustapha Kusa and Another versus Republic,** Criminal Appeal No. 51 of 2010 (unreported) quoted in **Bulabo Kabelele and Mashaka Felician versus Republic,** Criminal Appeal No.224 of 2014 had this to say;

"We should quickly point out that these elaborate provisions were not superfluously added to the Act. They had specific purpose. Having been enacted after the inclusion of the basic right of equality before the law, in our Constitution, they were purposely added as procedural guarantees to this right. For this reason, therefore, police officers recording such interviews or recording suspects' cautioned statements under both section 57 and 58 of the Act, have an unavoidable statutory duty to comply fully with these provisions. They cannot at the risk of rendering the statement invalid, pick and choose which requirement to comply with and which ones to disregard. The conditions stipulated in these two sections are cumulative and the duty is mandatory".

However, it is common understanding that the difference between cautioned statements made under section 57 and those made under section 58 depends on the format. The statement made under section 57 is in the form of answers and questions or partly questions and answers and partly narration whereas a statement made under section 58 is wholly a narration by the suspect without being asked questions by the police officer recording the statement. This stance was stressed by the Court of Appeal in the case of **Francis Paul versus Republic,** Criminal Appeal No.251 of 2017 CAT (Unreported).

It is also trite law that an accused who freely and voluntarily confess to a crime is the best witness because no witness can better tell the perpetrator of a crime than the perpetrator himself who decides to confess. This position was pronounced by the Apex Court of this land in **Mohamed Haruna Mtupeni and Another versus Republic,** Criminal Appeal No.

259 of 2007, **Jacob Asegellle Kakune versus The Director of Public Prosecutions,** Criminal Appeal No, 178 of 2017, **Emmanuel Stephano versus Republic,** Criminal Appeal No. 413 of 2018 and **Chande Zuberi Ngayaga and Another versus Republic,** Criminal Appeal No.258 of 2020 (All unreported).

It was stressed in **Leonard Mathias Makani and Another versus Republic, Criminal Appeal No. 579 of 2017 CAT (Unreported)** that voluntariness extends oral confessions. Therefore, an oral confession made by a suspect before or in the presence of reliable witnesses, be they civilian or not may be sufficient by itself to found conviction against the suspect. See **John Shini versus Republic,** Criminal Appeal No. 573 of 2016 CAT (Unreported).

However, as a rule of practice, a retracted and /or repudiated confession calls for great caution before it is accepted and before founding conviction upon it. Usually, the court will act upon a retracted or repudiated confession when it is corroborated in some material particulars by some independent evidence accepted by the court.

The guidance and warning on how the court may invoke the accused person's retracted or/and repudiated confession for conviction was underscored in the landmark case of **Tuwamoi v. Uganda (1967) EA 84.**The court stated that;

"A trial court should accept with caution a confession which has been retracted or repudiated or both retracted and repudiated and must be fully satisfied that in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually, a

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

The danger of relying on the repudiated or retracted confession was further stressed in the case of **Hemed Abdallah versus Republic [1995**] TLR 172 where the Court of Appeal held that;

"*It is dangerous to act upon a repudiated or retracted confession unless it is corroborated in material particulars or unless the court, after full consideration of the circumstances of the case is satisfied that the confession must be true".*

From the herein above legal position, it goes without saying that admission of a confession is one thing while the weight to be attached is quite another. This position was clearly stated in **Steven s/o Jason and 2 others versus Republic,** Criminal Appeal No. 79 of 1999 CAT (unreported) where the Court held that;

"Admission of an exhibit such the cautioned statement in question is one thing and the weight to be given to the evidence contained therein is another thing. This depends on the totality evaluation of the evidence at issue and other pieces of evidence available on record".

As regards the confession of the co-accused, it was settled in **Ezera Kyabanamizi versus R, [1962] E.A 309** that, a statement made by a co-accused person, whether orally or written, implicating his/her co-

accused, can only be used to supplement substantial evidence already in place. Section 33 (1) and (2) of the Evidence Act, [Cap. 6 R.E 2022 governs the applicability of confession by co -accused.

The intention of the confession of the co-accused was stipulated in the case of **Gopa Gidamebanya and others versus R.** [1953] 20 EACA 318 as follows;

"The confession of co-accused is intended to be used to corroborate and even to supplement the evidence in those exceptional cases in which, without its aid, the other evidence falls short by a very narrow margin of that standard which is requisite for a conviction. There must be a basis of substantial evidence to which a confession or statement may be added. If there is substantial evidence against the accused and there remains some lingering doubt, the confession may be taken into account to set that little doubt at rest."

It is also apposite to state the principle of law governing **evidence of co-accused which itself require corroboration whether it can corroborate repudiated or/and retracted confession.** The well settled principle is that; the evidence which itself require corroboration cannot corroborate the retracted or repudiated confession (oral or written) of the co-accused. This stance was stressed in the case of **Muhidini Mohamed Lila@Emolo & 3 others versus Republic,** Criminal Appeal No. 443 of 2015 CAT (Unreported) where the court held that;

"The evidence of the police officers who arrested the appellants (PW4 and PW5) which is to the effect that the appellants made oral confession that they committed the offence cannot, as well be used to corroborate the

retracted confession. ***This is because the appellants denied that they ever made any oral confessions" (Emphasis supplied).***

Similarly, a retracted or repudiated confession cannot corroborate another retracted or repudiated confession. See N**dalahwa Shilanga and another versus Republic,** Criminal Appeal No. 247 of 2008, CAT at Mwanza (Unreported).

As regards **hearsay evidence**, the well-established principle is that, hearsay evidence is of no evidential value, and therefore, must be discredited. This position was pronounced in the case of **Vumi Liapenda Mushi versus Republic,** Criminal Appeal No. 327 of 2016 CAT (Unreported). See also **Jadili Muhumbi versus Republic,** Criminal Appeal No. 229 of 2021 CAT at Kigoma (Unreported).

It is also apposite to remind ourselves the meaning of hearsay evidence. In the persuasive case to wit; **Kinyatiti versus Republic,** Criminal Appeal No. 60 of (1985) KLR 562 the Court of Appeal of Kenya defined hearsay evidence as follows;

"Hearsay evidence or indirect evidence is the assertion of a person other than the witness who is testifying. It is not original evidence and is inadmissible"

Being guided by the above provisions of the law, legal principles and pronouncements, I now turn to the case at hand to summarize, analyze and evaluate the evidence of both prosecution and defence to determine whether the prosecution has proved the case beyond reasonable doubt or otherwise.

Now, for the purpose of clarity, brevity and avoidance of unnecessary confusions, I will start addressing the 4th count followed by 5th, 6th, 7th, 1st, 2nd, 3rd 8th and 9th counts.

In the 4th count, the allegation was that Abdul Mohamed Humud @Wagoba (6th accused) provided **Tshs. 80,000/=** to the 1st, 2nd, 3rd, 4th, 5th, 9th, 10th and 12th to enable them to carry out terrorist acts to wit; causing serious bodily harm to **Sudi Ally@ Sudi.**

The accused entered plea of not guilty to aforementioned count. In all 14 prosecution witnesses, PW2 (p6) and PW14 (P22) testified against the 6th accused. The evidence of PW14 (P22) is to the effect that on 06/06/2014, the 6th accused made an oral confession to him that he contributed **Tshs. 80,000**/= to support the jihadist group mission of attacking PW2 (P6).

It is further the evidence of PW14 (P22) that the 6th accused made an oral confession to him that he handed over the said money to Jafari Lema (5th accused). He testified further that he assigned PW7 (P13) to record the cautioned statement of the 6th accused and he did so.

On his side, PW2 (P6), during cross examination, just said that, he was told by one Mabreka (not among the accused persons) that the accused provided the said amount of money to support the jihadist group.

In his affirmed defence, the 6th accused person who testified as DW6 denied to have ever provided the said amount of money to the DW1, DW2, DW3, DW4, DW5, DW9, DW10 and DW12 accused persons jointly or severally.

On the other hand, DW1, DW2, DW3, DW4, DW5, DW9, DW10 and DW12, each in his affirmed defence denied to have ever received the alleged amount or any other amount of money from the 6th accused.

The 6th accused also denied to have ever made an oral confession to PW14 or to any other police officer.

In his final written submission, the prosecution side through Mr. Mayenga (SSA) argued that, the best evidence in a criminal trial is that of the accused who freely confesses" To support his stance, Mr. Mayenga referred this Court to the case **Mabala Masasi Mongwe versus Republic,** Criminal Appeal No.161 of 2010 (Unreported) which was cited in Andius **George Songoloka versus Republic,** Criminal Appeal No. 373 of 2017 CAT (Unreported).

He further submitted that the 6th accused person made an oral confession to PW14 (P22) during his arrest that he funded terrorist activities.

He also argued that while under affirmation the 6th accused lied in court that he does not know his co-accused contrary to the testimony of Anuwar Nasher Hayer (8th accused) who said the 6th accused person is his colleague and they know each other therefore, the lies told by the 6th accused in this case should corroborate the prosecution case. To support his stance, he cited the case of **Nkanga Daud Nkanga versus Republic,** Criminal Appeal No. 316 of 2013 CAT (Unreported).

Mr. Mayenga ended his submission urging the court to find the case against the 6th accused person proved beyond reasonable doubt.

On the other hand, Mr. Said Said, learned counsel for the 6th accused in his final written submission insisted on the standard of prove in criminal cases to wit; proof beyond reasonable doubt.

He further argued that, in the case at hand, the prosecution failed miserably and drastically to prove that the 6th accused provided Tshs. 80,000/= to 1st, 2nd , 3rd, 4th, 5th, 9th, 10th and 12th accused persons to carry out terrorist acts to wit; causing seriously bodily harm to Sudi Ally Sudi.

He cemented that the evidence of PW2 (P6) is hearsay evidence, which in law has no evidential value. To support his argument, the learned counsel referred this court to the case of **Vumi Liapenda Mushi versus Republic (Supra).**

Mr. Said further argued that, the omission by the prosecution to tender the cautioned statement of the 6th accused is a draw back on the prosecution case in the circumstances of this case. He further argued that, if it was tendered by PW7 (P13) who testified to have written the caution statement of the 6th accused, it would have shown the court the position of the 6th accused. To bolster his argument, the learned counsel referred this court to the case of **Matinda Lesaito versus the Republic,** Criminal Appeal No.150 of 2016 CAT –at Arusha (Unreported).

Mr. Said concluded his final submission asserting that the republic had not proven its case; therefore, the 6th accused person deserves an acquittal.

I have dispassionately considered submissions by both the prosecution and defence side in respect of 4th count preferred against the 6th accused person and keenly scrutinized the evidence adduced by both sides.

Section 13 of the Prevention of Terrorism Act, No.21 of 2002, states clearly that every person who **provides any funds,** intending, knowing or having reasonable grounds to believe that the funds will be used in fall or in part to carry out a terrorist act commits an offence.

In that respect, the major issue as far as the 4th count is concerned is whether it has been proved beyond reasonable doubt that the 6th accused provided **Tshs. 80,000/=** to the 1st, 2nd , 3rd , 4th, 5th , 9th ,10th and 12th accused persons to carry out terrorist acts to wit; causing serious bodily harm to Sudi Ally@ Sudi.

Going through the evidence of all 14 prosecution witnesses, none of them testified to have seen Abdul Mohamed Humud @ Wagoba (6th accused) providing any amount of money to the herein above mentioned accused persons or any of them, to carry out terrorist acts to wit; causing serious bodily harm to Sudi Ally@ Sudi.

The evidence of PW2 (P6) that he was told by one Mabreka who is not among the accused persons that the 6th accused provided the sum of **Tshs.80, 000/=** to the jihadist group is hearsay evidence and as rightly submitted by Mr. Said, and as per position stipulated in **Vumi Liapenda Mushi versus Republic,** (Supra) and **Jadili Muhumbi versus Republic (Supra),** that piece of evidence by PW2 is of no value, hence disregarded.

It is the evidence of PW14 (P22) that the 6th accused made an oral confession to him that he provided the said amount for the said mission, however, in his defence, the accused disputed to have ever made such a confession.

PW14 (P22) added that, he assigned an investigator to record the cautioned statement of the 6th accused, and PW7 (P13) confirmed to have recorded it but the prosecution closed their case without tendering the cautioned statement of the 6th accused person in court as evidence.

I absolutely subscribe to the position referred by Mr. Mayenga (SSA) that as per the law, an oral confession made by a suspect before or in the presence of reliable witnesses, be they civilian or not may be sufficient by itself to found conviction against the suspect. See **John Shini versus Republic** (Supra); and the best evidence in a criminal trial is that of the accused who freely confesses.

However, it should be noted that in the case at hand, DW6 disputed to have ever made an oral confession to PW14 (P22) therefore, as per position stipulated in **Muhidini Mohamed Lila@Emolo & 3 others versus Republic (Supra)**, the evidence of PW14 (P22) needed corroboration.

Considering the fact that during committal proceedings and preliminary hearing, the 6th accused's caution statement was among the prosecution intended exhibits and PW7 (P13) confirmed that he really recorded, therefore, I agree with Mr. Said that, as per guidance given in the case of **Matinda Lesaito versus the Republic** (Supra), the omission by the

prosecution to tender the cautioned statement of the 6th accused is a draw back on the prosecution case in the circumstances of this case.

Indeed, I am alive that, it is not mandatory for the prosecution to tender in evidence all exhibits listed during committal proceedings and or preliminary hearing but, failure to tender material evidence is detrimental to the prosecution case. This stance was pronounced in the case of **Masumbuko Shio and Another versus Republic,** Criminal Appeal No. 213 of 2007 CAT-Arusha (Unreported) where the court held that;

"...If the prosecution fails to tender material evidence in its possession, that will be to its detriment and on the advantage to the defence."

As rightly argued by Mr. Mayenga, the principle of lies of the accused entails that when an accused person tells lies in court, those lies should be used to corroborate the prosecution's case. Nonetheless, it must be noted that, not every discrepancy of evidence of co-accused amounts to lies and as well, weaknesses in the defence side cannot prove the prosecution case.

The issue should always be whether the prosecution case has been proved beyond and not whether the defence evidence is true or not. In my view, the alleged lie is nothing but a mere discrepancy.

Moreover, it is common understanding that the purpose of corroboration is only to confirm or support evidence which is sufficient and credible and not to give validity or credence to evidence which is deficient, suspect or incredible. See **Aziz versus Republic [1991] TLR 7.**

It should not be forgotten that in his defence, the 6th accused disputed to have ever provided a sum of Tshs. 80,000/= to the 1st, 2nd, 3rd, 4th, 5th,

9th, 10th and 12th accused persons jointly or severally, likewise, each of the herein named accused persons in his affirmed defence denied to have ever received the said amount of money or any other amount from the 6th accused person.

In the final analysis and for the reasons stated herein above, it is the finding of this court that the case against the 6th accused person has not been proved beyond reasonable doubt.

As regards the 5th count, the allegation was that 7th accused provided **Tshs. 57,000/=** to the 1st, 2nd , 3rd , 4th, 5th , 9th ,10th and 12th accused persons to enable them to carry out terrorist acts to wit; causing serious bodily harm to **Sudi Ally@ Sudi.** The accused entered a plea of not guilty to the charge.

In all 14 prosecution witnesses, only PW7 (P13) who testified against the 7th accused and his evidence is to the effect that on 18/07/2014, he was assigned to record the cautioned statement of Hassan Ally Mfinanga (7th accused) on the allegations of terrorism and attempted murder, and he did so according to law.

He further testified that the accused person confessed before him to have sent through his mobile phone a total of **Tshs. 57,000/=** to Yahaya Sensei in three installments; **Tshs.20, 000/=, Tshs 22, 000/=** and **Tshs. 15,000/=** by way of Mpesa. PW7 (P13) tendered the statement of the 7th accused person and was admitted as **Exhibit M4** after concluding a trial within a trial as the same was retracted/ repudiated by the accused person.

In his defence, the 7th accused who testified as DW7 denied to have ever provided Tshs. 57,000/= or any other amount to the 1st, 2nd, 3rd, 4th, 5th, 9th, 10th and 12th accused persons jointly or severally. Again, the herein accused persons during their defence, each disputed to have ever received Tshs. 57,000/= or any other amount from DW7.

In final closing submissions, the prosecution side through Mr. Mayenga (SSA) argued that in **Exhibit M4**, the accused elaborated how he funded Jihad activities by sending money to facilitate their operations and he mentioned Kassim Idrissa Ramadhani (4th accused) and Abdul Mohamed Humud @ Wagoba as his associates.

He further argued that though the statement was retracted and/or repudiated, still the court can convict basing on such statement only if the same provides details which come from the accused alone and not known by any other person. To bolster his argument, Mr. Mayenga referred this court to the case of **Flano Alphonce Masalu@Singu & 4 others versus the Republic,** Criminal Appeal No.373 of 2017 CAT (Unreported).

He submitted further that, similarly to the case at hand, **Exhibit M4** contain details of the accused's personal particulars which are known only by the accused person. He finalized his submission inviting the court to convict the 7th accused basing on his confession since the best evidence in criminal in a criminal trial is that of the accused who freely confesses. To support his stance, Mr. Mayenga referred this Court to the case **Mabala Masasi Mongwe versus Republic** (Supra).

On the other hand, Mr. Machwa Hanson, learned counsel for the 7th accused in his final written submission insisted on the standard of prove in criminal cases to wit; proof beyond reasonable doubt.

He further argued that, inconsistencies and contradictions are highly identified in this case because the charge itself has outlined that the 7th accused provided fund to the 1st, 2nd, 3rd, 4th, 5th, 9th, 10th and 12th accused persons while the accused cautioned statement suggest that he provided the fund to only one person known as Yahaya Sensei who is even not in the charge sheet.

He submitted further that, as per the law, the prosecution evidence which is full of contradictions and lack of coherence raises doubt as to whether the accused has committed the offence or not, thus, the doubt should be resolved in favour of the accused. To support his stance, he referred this Court to the case of **Chacha Ng'era versus Republic**, Criminal Appeal No.87 of 2010 (CAT) and **Aloyce Mgovano versus Republic**,Criminal Appeal No.182 of 2011 (CAT) (Both unreported).

He further argued that, prosecution has failed to bring the transaction statement, receipt or even a phone to prove that the accused provided that money, because as per M4, the transaction was made through Mpesa.

Mr. Machwa further argued that, since the 7th accused disputed to have ever been sent to Arusha Central police, the prosecution ought to have tendered the detention register to prove that the 7th accused was really detained at Arusha Central police.

Mr. Machwa concluded his submission asserting that the blanket allegations against the accused person in absence of anything worth demonstrating that the 7th accused committed the offence is a mere suspicion, thus the 7th accused is not guilty of the offence he stood charged.

Having duly considered the evidence in support of the charge (5th count) and submissions by both sides, the issue which needs to be resolved is whether the prosecution has proved beyond reasonable doubt that on divers dates between 1st January, 2014 and 30th July 2014 within Arusha Region, the 7th accused did provide **Tshs. 57,000/=**to the 1st, 2nd , 3rd , 4th, 5th , 9th ,10th and 12th accused persons to carry out terrorist acts to wit; causing serious bodily harm to Sudi Ally@ Sudi.

It is trite that the charge is both a heart and a brain of a criminal justice, and a fair trial which plays the role of informing the accused person on the nature of the accusations, and allows him or her to prepare his or her defence. See **Iliney Molaskus and Another versus the Republic,** Criminal Appeal No.23 of 2022 HC-Morogoro (Unreported). Section 132 of the Criminal Procedure Act Cap.20 R.E 2022 provides that;

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

In the case at hand, the 5th count contained the statement of the offence; *"Provision of funds to commit terrorist acts contrary to sections 4 (1), (3) (c) and 13 of the Prevention of Terrorism Act, No.21 of 2002"*

The charge informed the 7th accused person of the necessary facts that it is alleged that on divers dates between 1st January , 2014 and 30th July at various places with Arusha Region, did provide **Tshs. 57,000/=** to YAHAYA TWAHIRU MPEMBA, YUSUPH ALLY HUTA @ HUSSEIN, ABASHARI HASSAN OMAR, KASSIM IDRISSA RAMADHANI, JAFARI HASHIM LEMA YUSUPH ALLY ATHUMAN @ SEFU, ABDUL HASSAN JUMA @ ABDUL and RAJABU YAKUBU ABDALAH @ IKAPU while having reasonable grounds to believe that, the said funds will be used in full or part, to carry out terrorist acts to wit; causing serious bodily harm to Sudi Ally@ Sudi.

The evidence presented by the prosecution in this court in support the 5th count is to the effect that the 7th accused person provided **Tshs. 57,000/= to Yahaya Sensei**, and that the 7th accused did so after being informed by Yahaya Sensei that he had a problem however, it was not explained what kind of a problem was that. It is further the evidence of PW7 (P13) evidence that Yahaya Sensei, is not among the herein above named persons and not among the accused persons in this case generally and has never been an accused in this case.

I am alive of the submission by the learned counsel for the 7th accused person that no cogent evidence adduced to prove that Yahaya Sensei had received the said money, and that, the 7th accused having disputed that he was not detained at Arusha Police but at Engutoto, the prosecution side ought to have tendered the detention register to show that the 7th accused was actually detained at Arusha Central police.

However, owing to the reason that the evidence adduced in support of the charge against the 7th accused person is at variance with the charge, I see

no compelling reasons to go far because such a variance has rendered the charge unproved as against the 7th accused person.

To appreciate the impact of the prosecution evidence which is at variance with the charge like what happened in the case at hand, See **Abel Masikiti versus Republic,** Criminal Appeal No.24 of 2015 CAT and **Onesmo Yohana@Taile versus Republic,** Criminal Appeal No.196 of 2019 CAT (Both unreported).

In the premises, and for the reasons stated herein above, I am of the firm view that, the prosecution has failed miserably and drastically to prove the charge against the 7th accused person.

In the 6th count, it was alleged that Swalehe Hassan Omari, (11th accused) having acquired information from one Yusuph Ally Omary@ Sensei) and Yusuph Ally Huta (2nd accused) that they were planning to commit a terrorist act to wit; causing serious bodily harm to Sudi Ally Sudi, did fail to disclose the said information to a police officer, which could have assisted in securing the arrest of the said Yusuph Ally Omari @ Sensei and Yusuph Ally Huta @ Hussein for the commission of the said Terrorist act.

The 11th accused entered plea of not guilty to aforementioned count. In all 14 prosecution witnesses, only PW6 (P12) testified against the 11th accused. PW6 (P12) testified that he participated in the arrest of the accused person at Magoza Village within Mkuranga District and that; he was among the police men who brought the accused person to Arusha because, as per the accused, his colleagues namely; Abuu Udhaifa and

Abuu Mosoud were in Arusha however, they were not successfully arrested.

He testified further that on 28/08/2014, he recorded the 11th accused's cautioned statement for the offence of attempted murder and terrorism and he did so after he had warned and informed him his rights as per the law. He added that, in his statement, the accused confessed to have committed the offences.

In his defence, the accused denied to have been arrested at Magazo Village within Mkuranga District; instead, he said that, he was arrested on 24/08/2014 at Arusha Central Police where he followed his sister who was arrested. He further testified that after being arrested, he was taken to Matevez police post famously known as **"Guantanamo"** whereby he was persecuted, beaten and tortured. He added that on 28/08/2014, some unknown papers were brought to him and forced to sign. He showed in court scars and broken nails alleging that they resulted from the torture. He denied to have made his statement and /or mentioned the persons appearing in **Exhibit M2.** The 11th accused concluded his defence urging the court to see that the case against him had not been proved beyond reasonable doubt

In his final written submission, the prosecution side through Mr. Mayenga (SSA) argued that in **Exhibit M2,** the 11th accused elaborated how and where the hand grenade was taken and who was the master mind on the said attack. He further submitted that the accused mentioned YAHAYA HASSAN OMARI@ SENSEI as Mastermind and he further elaborated that

they went to 2nd accused's home to pick a hand grenade which later on used to attack Sudi Ally @ Sudi.

He further argued that, although the statement was retracted and/or repudiated, still the court can convict basing on such statement only if the same provides details which come from the accused alone and not known by any other person. To bolster his argument, Mr. Mayenga (SSA) referred this court to the case of **Flano Alphonce Masalu@Singu & 4 others versus the Republic (Supra).**

He submitted further that, similarly to the case at hand, **Exhibit M2** contains the details of the accused's personal particulars which are known only by the accused person and since the best evidence in a criminal trial is that of the accused who freely confesses. To support his stance, Mr. Mayenga referred this Court to the case **Mabala Masasi Mongwe versus Republic**, Criminal Appeal No. 161 of 2010 (Unreported) which was cited in **Andius George Songoloka versus Republic,** Criminal Appeal No. 373 of 2017 CAT (Unreported).

Mr. Mayenga (SSA) concluded his submission urging the court to find that the case against the 11th accused person had been proved beyond reasonable doubt.

On the other hand, Mr. Peter Njau, learned counsel for the 11th accused in his final written submission insisted on the standard of prove in criminal cases to wit; proof beyond reasonable doubt.

He further argued that, in this case, the prosecution failed to prove the case against the 11th accused due to these reasons; **One;** the exhibit

tendered as M2 has got a lot of anomalies including recording sections whereby both section 57 and 58 of the CPA were used to record the same. **Two,** M2 was highly refuted by the 11th accused person due to the fact that he was forced to sign the same after being heavily tortured**. Three,** that there was a contradiction between the testimony of PW6 (P12) and M2, in the sense that, PW6 (P12) testified that the accused was arrested at Magoza Village but that fact does not feature in M2. He further submitted that PW6 (P12) testified that the accused upon arrest, mentioned his colleagues namely Abuu Udhaifa and Abuu Masoud who were at Arusha but that fact was not mentioned anywhere in M2.

Mr. Njau argued further that the second incident which leaves doubt as to the credibility of the Republic evidence is due to the fact that PW6 (P12) told this Court that during the arrest of the 11th accused there were more than four policemen thus, at least three (3) policemen could have come to corroborate the evidence of PW6 (P12) or any neutral witness but since that was not done, still no evidence as to whether the 11th accused was really arrested at Magoza-Mkuranga considering the 11th accused affirmed defence that he was arrested in Arusha Central Police.

According to Mr. Njau, another doubt arise from the fact that the 11th accused was arrested for the offence of attempted murder and terrorism, and then, he was cautioned of attempted murder before being arraigned to this court for a different offence of failure to disclose information of Terrorism.

He also argued that looking at M2, it is apparent that the person named therein is **Yahaya Hassan Omar @ Sensei** whom it is alleged that he

supplied the said terrorism information to the 11th accused person but the name is quite different from name of **Yusuph Ally Omar @ Sensei** appearing in the 6th count, hence raises major contradictions.

Mr. Njau finalized his submission that based on the above narrated doubts; it is obvious that the prosecution has failed to prove the case beyond reasonable doubt thus, prayed to the court to acquit the 11th accused person.

I have carefully considered submissions by both the prosecution and defence side in respect of 6th count preferred against the 11th accused person and keenly scrutinized the evidence adduced by both sides.

Section 40 (1) (b) of the Prevention of Terrorism 2002 makes it mandatory to every person who has information which may be of assistance in securing the arrest or prosecution of another person for an offence under this act, to disclose that information to a police officer not below the rank Superintendent of police or police in charge of a station.

The only evidence linking the 11th accused person with the offence is his cautioned statement however, during his defence, he said that he never gave a cautioned statement.DW11 added that he was forced to sign papers whose contents were not made aware to him. The said statement was admitted as **Exhibit M2** after concluding trial within trial proceedings whereby the same was found admissible, but the Court stressed that, admissibility of the evidence is one thing and the weight to be attached to it is another thing all together.

Now, the issue is whether confession of the 11th accused person can ground conviction?. I have carefully gone through **Exhibit M2** and discovered these anomalies; **One, Exhibit M2** has no police case file number that would have shown among other things that the crime under investigation was actually reported at the police station and duly registered before commencing the investigation to clear out the doubts alleged by the 11th accused as to whether the cautioned statement was concocted or not.

Two, one of the rights of the accused before making his statement is the right to call his relative or advocate during the confession. In my view, it is the answer of the accused that can show whether the accused was duly informed and understood the right to call his relative or advocate and whether he opted their absence or not. In **Exhibit** M2, the answer of the accused was written "**NDIO NIKO TAYARI KUTOA MAELEZO YANGU**". The proper answer which would have shown that the accused really understood his right would have been as follows **"NDIO NIPO TAYARI KUTOA MAELEZO YANGU KWA HIARI BILA KUWEPO WAKILI, NDUGU AU JAMAA".**

In my view, the answer of 11th accused recorded in Exhibit M2 is evident that the 11th accused was not properly informed of his right. Such a right is not there by accident, it reduces the possibility of torture during confession or the possibility of recording something different from what the accused had narrated or answered. Moreso, it should be noted that such right was not introduced by mistake although the suspect or accused may not wish to exercise it, but the statement must speak for itself.

Three, accused was warned under section 57 (2) but his statement was recorded by PW6 (P12) under section 58 of the CPA on the ground that 11th accused person asked the PW6 (P12) to record. It is unfortunate that **Exhibit** M2 does not speak for itself that there was such a request from the accused. Section 58 (1) of the Criminal Procedure Act, Cap. 20 R.E 2022 provides that;

"*Where a person under restraint informs* ***the police that he wishes*** *to write a statement, the police officer* ***shall-***

(a) cause him to be furnished with any writing materials he requires for writing out the statement; and

(b) ask him, if he has been cautioned as required by paragraph (c) of section 53, set out at the commencement of the statement the terms of the caution given to him, so far as recalls them."

(c) Reading carefully the here in above provisions of the law, it goes without saying that the statement under section 58 must be instigated by the accused person, although the police can just assist in writing. Since the 11th accused in his affirmed defence told the court that there was no point in time he informed PW6 (P12) that he wished to write his statement, and since M2 is silent of such request, it cannot be said the section 58 was duly complied with and as per the case Leonard **Mathias Makani and Another versus Republic (**Supra), such a statement is fatal. In that case the Court of Appeal had this to say;

"We also take note of the provisions of sections 57 and 58 of the Criminal Procedure Act under which caution statements are recorded. They provide

for the procedure to be followed in taking an accused person's statement which should be adhered to for it to be worth it"

I also agree with Mr. Njau that M2 was highly refuted by the 11th accused person alleging that he was forced to sign the same after being heavily tortured, therefore corroboration is necessary.

We should also remind ourselves that it is common and best practice in our jurisdiction that when the accused voluntarily confesses the commission a crime before a police officer, he is taken to the justice of the peace to record his extra-judicial statement because the extra-judicial statement serves as a supplement to the Cautioned Statement recorded by the police officer. See **Republic versus Daniel Ndabuye,** Criminal Sessions Case No.13 of 2017 HC-Bukoba and **Republic versus Simon Busumba and another,** Criminal Sessions Case No.39 of 2021 HC-Mwanza (Both unreported).

In the case at hand, no explanation given by the prosecution as to why the 11th accused was not taken to the justice of peace or whether he was informed of that right. The extra-judicial statement would have supplemented M2.

Furthermore, according to **Exhibit M2,** the person named therein to have supplied the information of terrorism to the 11th accused person is **Yahaya Hassan Omar@ Sensei**, but as per 6th count, the person who is named to have supplied the information of terrorism to the 11th accused person is **Yusuph Ally Omar@ Sensei.**

It is unfortunate that the prosecution side led no evidence to the effect that the names are the names of the same person, and had not sought to amend the charge or allege any typing error, or called **Yusuph Ally Omar@ Sensei** as a witness or included him in the instant charge.

Now, the question is, if at all the cautioned statement of the 11th was in place before the preparation of the charge sheet, where did the prosecution got the name of **Yusuph Ally Omar@Sensei** instead of **Yahaya Hassan Omar@ Sensei?.** As stated by Mr. Njau, this has created doubt to the prosecution case. With no doubt, M2 is at variance with the charge sheet in relation to who supplied the information to the 11th accused.

In essence, I shake hands with Mr. Mayenga that as per the case of **Flano Alphonce Masalu@Singu & 4 others versus the Republic (Supra),** a court can convict the accused basing on retracted and/or repudiated only if the same provides details which come from the accused alone and not known by any other person.

However, reading carefully the case of **Flano Alphonce**, (Supra), it appears that the Court of appeal found that in the trial court, the retracted confession was freely given and that it was nothing but the truth, that is why the Court stated that the learned trial Magistrate did not have to warn himself of the dangers of basing conviction solely on the uncorroborated retracted confession.

In the case at hand, the situation is different because M2 was not admitted because it was nothing but the truth; it was admitted because it was admissible, but the Court doors on what weight it should attach to it

were left open. It is worth noting that each case has to be decided on its own peculiar facts or circumstances.

It should also be noted that, PW8 (P17) admitted to have recorded the cautioned statement of Yahaya Hassan Omar@Sensei who is the young brother of the 11th accused; therefore it is possible for the same details to be known by Yahaya Hassan Omar@ Sensei. It is unfortunate that PW8 (P17) did not go further to state when he recorded the same so as to know between M2 and the alleged statement of Yahaya Sensei, which one was recorded first.

Before I pen off as far as the 6th count is concerned, I acknowledge that Mr. Njau invited the court to determine the issue as to whether the accused was arrested in Magoza or elsewhere but I find the same immaterial as per the case facing the accused, therefore I will not labor myself in that point.

Basing on the anomalies existing in M2 as pointed out herein above, and considering the fact that M2 was repudiated, and that it was not corroborated by any other independent evidence and considering the rules proper administration of justice and fair trial, it is my considered view that it is very unsafe to rely upon the contents of M2 to convict the 11th accused person as suggested by Mr. Mayenga (SSA).

In the 7th count, it was alleged that the 8th accused person Anuwar Nasher acquired information from Jafari Hashim Lema (5th accused) that he was collecting funds which will be used to carry out a terrorist act to wit; acquiring weapons that will facilitate the execution of their plan to overthrow the lawful Government of the United Republic of Tanzania and

replace for it an Islamic; failed to disclose the said information to a police officer, which could have assisted in securing the arrest of the said Jafari Hashim Lema. The accused entered a plea of not guilty to afore mentioned count.

In all 14 prosecution witnesses, only PW8 (P17) and PW14 (P22) testified against the 8th accused. PW8 (P17) testified that he recorded the cautioned statement of the accused person after being assigned to do so by PW14 (P22). PW14 (P22) testified confirming that he assigned PW8 (P17) to record the statement of the 8th accused.

When cross examined, PW8 admitted to have not tendered the cautioned statement of the 8th accused to prove that the accused really made the said confession.

PW14 (P22) went on testifying that on 14/07/2014, while at Arusha Central Police, he ordered the accused to be arrested after he had seen him taking photos of Sheikh Abuu Ismail through smart phone. He further testified that the accused made an oral confession to him that he is a member of Jihad group and that he had information of terrorism which he acquired from his fellow member called Sheikh Jafari Lema.

When cross examined, PW14 (P22) admitted that he had no photos claimed to have been taken by the 8th accused nor did the smart phone he alleged to have been used by the accused.

In his affirmed defence, DW8 denied completely to have committed the offence. He told the court that this case was fabricated against him by the

R.C.O namely Nyanda after he had refused him free fuel for his motor vehicle.

DW8 added that, he knew the 5th accused (DW7) when he was arraigned before the court. In his affirmed defence, DW7 confirmed that fact. DW8 added that he was arrested on 15/07/2014 at the R.C.O office after he had gone at Arusha Central police to see Abdul Mohamed Humud @ Wagoba who was detained there.

In his closing submissions, Mr. Mayenga (SSA), argued that since the 8th accused made oral confession to PW14 (P22) during his arrest, the evidence is sufficient to convict the accused person because the best evidence in a criminal trial is that of the accused person who freely confesses.

On his side, Mr. Ng'ondya submitted that the prosecution failed to prove that the accused was arrested and detained and that his cautioned statement was recorded by PW8 (P17) because; **One,** detention register was not tendered in court as evidence. **Two,** the photos alleged to have been taken by the accused and the phone alleged to have been used by him were not tendered in court. **Three,** the cautioned statement alleged to have been recorded by PW8 was not tendered in court as evidence.

Mr. Ng'ondya concluded his submission asserting that the prosecution has failed to prove the case beyond reasonable doubt and he prayed to this court to resolve the doubt in favour of the accused. To support his stance, Mr. Ng'ondya referred this court to the case of **Zakaria Japhet versus Jumanne & 2 Others versus Republic,** Criminal Appeal No. 37 of 2003 CAT (Unreported)

I have intensively evaluated the evidence on record in support of the 7th count, and the parties counsel final submissions, therefore; the major issue which needs to be resolved is whether it has been proved beyond reasonable doubt that the 8th accused acquired information from Jafari Hashim Lema (5th accused) that he was collecting funds which will be used to carry out terrorist acts and that he (DW8) failed to disclose the said information to a police officer.

It is the evidence of PW14 (P22) that the 8th accused made an oral confession to him that he knew the plan of harming PW2 (P6) and the terrorist meeting held at Mianzini Arusha.

In his affirmed defence, the 8th accused completely denied to have ever made such a confession.

PW14 (P22) added that, he assigned an investigator PW8 (P17) to record the cautioned statement of the 8th accused, and PW8 (P17) confirmed to have recorded the same but the prosecution closed their case without tendering the cautioned statement of the 8th accused person in court as evidence.

I subscribe to the position referred by Mr. Mayenga (SSA) that as per the law, an oral confession made by a suspect before or in the presence of reliable witnesses, be they civilian or not may be sufficient by itself to found conviction against the suspect. See **John Shini versus Republic** (Supra); and the best evidence in criminal in a criminal trial is that of the accused who freely confesses.

However, it is worth noting that in the case at hand, DW8 disputed to have ever made an oral confession to PW14 (P22) therefore, the evidence of PW14 needed corroboration. Furthermore, reading the charge (count) preferred against the 8th accused person and the evidence of PW14 (P22), it goes without saying that the evidence is at variance with the charge.

The evidence which ought have been led by the prosecution is the evidence that proves that the 8th accused acquired information from Jafari Hashim Lema (5th accused) that he was collecting funds which will be used to carry out terrorist acts, and that he (DW8) failed to disclose the said information to a police officer.

Again, omission by the prosecution to tender the cautioned statement of the 8th accused is a draw back on the prosecution case in the circumstances of this case owing to the ground that, during committal proceedings and preliminary hearing, the 8th accused's caution statement was among the prosecution intended exhibits and PW8 (P17) confirmed that he really recorded the said statement.

I am alive that it is not mandatory for the prosecution to tender in evidence all exhibits listed during committal proceedings and or preliminary hearing but failure to tender material evidence is detrimental to the prosecution case as already said.

Also it is trite that every police station must have and keep a detention register aimed to contain the particulars of the arrested person including the alleged offence, date of arrest, full name, and address of the suspect and the physical health status of the suspect.

In the case at hand, I shake hands with Mr. Ng'ondya that such an important document was not tendered in court as evidence to prove when the accused was arrested and whether he was detained at the police station and whether he was removed from the police cell for interview or that he was interviewed first, and then sent in the police cell.

Indeed, the prosecution evidence connecting the 8th accused with the offence of failure to disclose the information of terrorism extremely weak. In the absence of any other evidence connecting the 8th accused with the offence, no conviction can be grounded on such weak evidence because a well-established principle is that; the accused person can only be convicted on the basis of the strength of the prosecution case.

I now turn to the 1st count in which it was alleged that the 1st, 2nd, 3rd, 4th, 5th, 9th, 10th and 12th accused persons on diverse dates between 1st January 2014 and 30th July 2014 at Mianzini area within Arusha District in Arusha Region, did participate in the meeting knowingly that the said meeting was concerned with an act of terrorism to wit; planning to cause serious bodily harm to **Sudi Ally@ Sudi.**

Section 5 (1) of the Act provides that; of the Prevention of Terrorism 2002 is clear that a person who arranges, manages or assist in the arranging or managing or **participates in a meeting** or an act **knowingly** that it is concerned with an act of terrorism commits an offence. Each accused entered a plea of not guilty to this offence.

In the context of this case, it is apposite to remind ourselves the meaning of a meeting. A meeting simply means an assembly of people for the

purpose of discussing and acting upon some matter or matters in which they have common interest.

In all 14 prosecution witnesses, none of them testified to have seen the 1st, 2nd, 3rd, 4th, 5th, 9th, 10th, and 12th accused persons jointly or severally participating in any terrorist meeting at Mianzini - Arusha or elsewhere.

It is only PW14 (P22) who testified that DW6 made an oral confession to him that the Jihad meeting was held at Mianzini area within Arusha Town.

PW14 (P22) testified further that he assigned PW7 (P13) to record the cautioned statement of DW6. PW7 (P13) confirmed to have done so, but the same was not tendered in court as evidence though during committal proceedings and preliminary hearing, it was listed in the list of the intended precaution exhibits.

In his affirmed defence, DW6 denied completely to have made an oral confession to PW14 (P22) to the effect that there was a terrorist meeting held at Mianzini. It is unfortunately that the evidence of PW14 (P22) was not corroborated.

Even if we assume, for the sake of argument that there was such confession of the co-accused, it trite law that confession by co-accused cannot be based solely on a confession by a co-accused.

The evidence in record is very clear that each accused in his affirmed defence denied completely to have participated at a terrorist meeting at Mianzin area within Arusha or elsewhere. In their closing submissions, all learned counsel for the 1st, 1st, 2nd, 3rd, 4th, 5th, 9th, 10th and 12th accused

persons submitted to the effect that the 1st count had not been proved beyond reasonable doubt.

Without further ado, I associate with the learned counsels for the accused person that the evidence led in prove of the first count fall far short of meeting the criteria set up in criminal cases. In that premise, I disagree with the opinion of the prosecution side that suggests that the first count has been proved beyond reasonable doubt.

In the **2nd and 3rd counts,** the 1st, 2nd , 3rd , 4th ,5th ,9th ,10th and 12th accused persons stand jointly charged with the offence of commission of Terrorist acts where it was alleged that the accused persons on 3rd day of July 2014 and 30th July 2014 at Majengo-Chini area within Arusha District in Arusha Region, jointly and together did commit a terrorist act to wit; detonating a bomb and thereby cause serious bodily harm to **Sudi s/o Ally@Sudi**, (the victim in the 2nd count) and **Muhaji s/o Kifea** (victim in the 3rd count)

When the accused persons were arraigned before the court, each of them denied the charge; as a result, a plea of not guilty was entered. As said earlier, none of the 14 prosecution witnesses testified to have seen the accused persons named in the 2nd and 3rd counts attacking or throwing a hand grenade at the house of PW2 (P6) and caused severe injuries to PW2 (P6) and PW13 (p).

PW1 (P1) and PW2 (P6) gave similar evidence that on 3/07/2014, around 21:00hours PW2 picked his guest from a bus terminal and took him to his home place whereby they entered the room occupied by PW1 (P1). They

also gave similar evidence that PW2 (P6) sat on the couch while his guest (PW13) sat on the ground having dinner.

PW2 (P6) went on testifying that he gave his guest PW13 (P) an article bearing the name "**Abdujana"** accusing him (PW2) that he had betrayed Islamic faith and became a Pastor and ant-Jihad thus, his head must be chopped off. PW13 (P) in his evidence confirmed to have been given the said article.

PW2 (P6) added that the article was disseminated by Yahaya Twahiru Mpemba, and hence the article was availed to him by the same by the same Yahaya Twahiru Mpemba.

PW2 also testified that he narrated to PW1 (P1) and PW13 (P) how he escaped a deadly shooting on 2/07/2014. PW1 (P1) and PW13 (P) in their evidence confirmed to have been informed such incident by PW2 (P6).

PW1 (P1), PW2 (p6) and PW13 (P) gave similar evidence that on 03/07/2014 around 23:00hours, the room in which they were in was bombed, as a result, PW2 (P6) and PW13 (P) were severely injured on the legs, but PW1 sustained no injuries because he sat near the door. PW2 (P6) and PW13 (P) added that before the explosion, the window was broken and then a hand grenade was thrown through the broken window.

They further gave similar evidence that the police arrived at the crime scene and picked them (PW2 (P6) and PW13 (P) to Mount Meru Regional Hospital for medical examination and treatment. PW13 (P) added that, he was seriously injured on legs whereas his left leg sustained an open

fracture while his right leg had lost two fingers completely and the third finger was half cut. He tendered PF3 and was admitted as **Exhibit M7.**

PW13 (P) added that he was admitted in the Intensive Care Unit (I.C.U) whereas on 6/07/2014, he was transferred to Muhimbili Hospital for further treatment, and finally, he was sent to India for further treatment.

PW1 (P1), PW2 (P6) and PW13 (P) testified further that, on the material night, they identified no person or persons who broke the window and threw the hand grenade to them.

However, PW2 (P6) told the court that though he identified nobody on the night of explosion, he suspected that the hand grenade was thrown by Yahaya Sensei, Athumani Sefu, Abdala Maginga, Said Temba Mabreka, Abdul Mohamed, Jafari Lema, Hassan Ally Mfinanga who are residents of Arusha Town and Abuu Ismail from Mwanza Region, with the intention of killing him for being against their mission of spreading Jihad ideology in Tanzania.

PW2 (P6) testified further that, few days before the bombing incident, Yahaya Sensei and Athuman Sefu invaded him at the Qiblatain Mosque premises and threatened to kill him if he won't stop opposing Jihad and warning youths not to join the jihadist group.

He further said Abdala Maginga did sent a text of threats to him. PW2 (P6) ended up his evidence without identifying any of the accused persons.

When cross examined, PW1 (P1) admitted to have not seen the hand grenade. He also admitted that when his uncle told him that he escaped a

deadly shooting on 02/07/2014, he did not mention any suspect to him. He also admitted that all 12 accused persons are strangers to him.

He further said, as result of the explosion, the wall and the roof of the house were damaged. He also said that, he did not see the grenade remains. He admitted further that he is not a weapons and explosives expert.

PW10 (P2) testified confirming that he arrived at the home of PW2, (P6) and found the PW2 (P6) and PW13 (P) seriously injured. He added that he joined the police to take the two injured persons to Hospital.

PW10 (P2) added that in 2014, Sheikh Abuu Ismail came from Mwanza to Arusha and gave lectures at Quba Mosque which was under Jafari Lema (5th accused) mobilizing establishment of Islamic State in Tanzania but PW2 was against such mission, that is why he was bombed.

On cross-examination, PW10 (P2) said that he never witnessed the accused persons committing the offences. He admitted to have not attended the lecture conducted at Quba Mosque by Sheikh Abuu Ismail.

He further said to have not reported the plan to overthrow the government of the United Republic of Tanzania to the police and that, he did not see on his own eyes or hear on his own ears Jafari Lema (5th accused) mobilizing youths to establish Islamic State in Tanzania.

He further said that he has identified Jafari Lema, but not as a person who committed the offence, but as a person he knew even before the incidents of 2014. He added that Jafari Lema was never prohibited to attend Qiblatain Mosque for prayers.

On cross examination, PW2 (P6) said that Sheikh Abuu Ismail who was hosted by Jafari Lema mobilized their followers especially youths to purchase weapons to wit; AK47 guns ready for Jihad but he did not tell them where to get the said guns.

PW2 (P6) added that both Jafari Lema and Sheikh Abuu from Mwanza conducted jihad teachings/ lectures at Quba Mosque. He stated further that he heard the lectures and found that they were destructive and dangerous to the community.

He also said, it possible that in Qiblatain Mosque, there were Government officials as well as security officers. He admitted to have no video, compact disc (CD) or Audio voice of Jafari Lema in respect of the Jihad teachings. He also admitted that teaching Jihad as per Quran is not prohibited. He also said that he reported that plan to the police and he did so three (3) times.

He admitted to have been invaded in the presence of members of Qiblatain Mosque though he cannot remember the date in which he was threatened. He also said, he cannot remember the date in which the article was supplied to him but he handed over the same to the police for investigation.

He admitted that the article bears the name of Abdujana but he does not know that person. He added that he was shot on 2/07/2014 but he did not see the bullet cartridges. He also said that since he had two lines to wit; **Vodacom** and **Tigo**, he cannot remember the line used by Abdala Maginga to send the threat text to him. He admitted that Yahaya Sensei and Abdala Maginga are not the accused persons in this case.

When further cross-examined, he admitted that in his statement which was recorded by the police, he did not mention the persons who threatened to kill him or mentioned the article or stated that Jafari Lema instructed youths or his followers to buy guns make AK 47 ready for Jihad or mention that the article was availed to him by Yahaya Twahiru Mpemba. (PW2's statement was admitted and marked D1).

On cross-examination, PW13 (P) said that PW2 (P6) gave him an article which he said he picked from Qiblatain Mosque. He added that the article had no paragraph talking about bombs or paragraph in relation to establishment of Islamic State in Tanzania or paragraph to the effect that the head of Sheikh Sudi Ally Sudi will be chopped off if he will not stop opposing Jihad.

PW13 (P) also said that, he had never seen or heard Jafari Lema giving jihad lectures or mobilizing people to buy guns so as to fight and establish Islamic State in Tanzania.

He also admitted that he is not a medical expert thus cannot explain the contents in exhibit M7. He added that he knew Jafari Lema as a good person, thus he was shocked to hear that Jafari Lema was accused of mobilizing people to establish Islamic State in Tanzania, and since he knew him, he had never seen him committing an offence.

PW14 (P22) who identified himself as major investigator in this case testified that on 3/07/2014 around 23:00hours while patrolling near Arusha Central Police area, he was informed of the bombing incident which took place at the home Sheikh Sudi Ally Sudi that situates at Majengo Chini

within Arusha whereas, he, together with other police men, joined the OC-CID and all headed to the crime scene and controlled the crime scene.

He added that, as a result of the explosion, Sheikh Sudi Ally and one Muhaja Hussein Kifea sustained serious injuries. He added that on the material night, he assigned the police to guard the crime scene so that it cannot be contaminated.

He went on testifying that on 04/07/2014, forensic investigators from the office of the R.C.O Arusha Region and OC-CID's office-Arusha arrived at the crime scene and gathered exhibits to wit; one handle of hand grenade, one lock safety pin of hand grenade, one spring of hand grenade and seven fragments alleged to be parts of the hand grenade. He added that, the forensic officers also collected glasses of the broken window.

He went on testifying that, following intelligence information, on 21/07/2014, Abashari Hassan Omari (3rd accused) was arrested and he confessed to him orally that he involved himself in the bombing incident at the home of Sheikh Sudi Ally Sudi but also confessed to belong to the jihad group. He went on saying that, he assigned PW8 (P17) to record the cautioned statement of the 3rd accused. PW14 (P22) identified 3rd, 6th and 8th accused persons here in court.

On cross - examination, PW14 (P22) admitted that he did not see any of the accused persons committing the offences. He also said that, he assigned one of the investigators to draw the sketch map to shed light to the court on the scene of crime. He also admitted to have not tendered the said sketch map in court as evidence.

He admitted that the cautioned statement of the 3rd accused was necessary to show his involvement in the commission of the offences but, he had not tendered it.

He also admitted that he did not record any additional statement in relation to this case.

PW4 (P19) who is a crime scene investigator testified that on 04/07/2014, she, together with a forensic officer from the OC-CID's office while accompanied by the OC-CID headed to the scene of crime following an explosion occurred at the home of sheikh Sudi Ally Sudi on 03/07/2014, and found the crime scene already under the police guard. She added that the police from the OC-CID office took photos of the crime scene.

She added that, upon entering the bombed room, they managed to get three parts purported to be parts of the hand grenade to wit; one handle, one spring, seven fragments, and outside the house, at a distance of about three paces from the broken window, they picked one lock safety pin.

She added that, she did put the exhibits into four (4) khaki envelopes and marked them as follows; envelope containing one handle "A", envelope containing one lock safety pin "B", envelope containing one spring "C" and an envelope containing seven fragments "D", each referenced AR/IR/7088/2014 and then handed over the same to the exhibits keeper PW9 (P25) as per procedure.

On cross examination, she said that she got police case number from the police case file. She further said that she did not collect the pieces of

glasses of the broken window. She also admitted to have not tendered the photos of the crime scene in court as evidence.

PW9 (P25) testified confirming that, as the exhibits keeper, on 04/07/2014, he received four envelopes "A", "B", "C", and "D" from PW4 (P19) and recorded them into the exhibits register (PF16) and assigned each exhibit the entry number to wit; No.13, reference **No.AR/IR/7088/2014** but also indicated there in the name of the person who brought the exhibits who is PW4 (P19), date to wit; 04/07/2014, time to wit; 10:00hours and the type of an exhibit. He added that he did not open the envelopes.

PW9 (P25) added that, he kept the exhibits into the safe box for safe custody, but on 12/07/2014 he handed over the exhibits to PW5 (P 20) for him to take the same to the Forensic Bureau for examination. PW5 (P20) confirmed that he received the said exhibits to take them to the Bureau for examination.

He added that on 18/07/2014, PW5 (P20) came back and handed over to him four white sealed envelopes. PW9 identified Exhibits **M1B, M1C, M1D and M1E.** He further tendered exhibits register (PF16) which was admitted as **Exhibit M6.**

PW5 (P20) further testified confirming that on 18/07/2014, he collected from PW3 (P14) four white envelopes duly sealed, Ballistic examination report and one photographic book, and upon his arrival in Arusha, he handed over the exhibits to the exhibits keeper who is PW9 (P25)

PW3 (P14), testified confirming that he is a police officer working with Ballistic and explosives unit in Tanzania Forensic Bureau under the legal

powers derived from section 47 of the Evidence Act,[Cap 6 R:2019] and section 205A of the Criminal Procedure Act, [Cap. 20 R.E 2022].

He testified further that on 14/07/2014 around 11:00hours while at work in Dar es Salaam Region, P20, a police officer from the office of the Regional Crimes Officer (R.C.O) Arusha arrived to his office carrying a letter and exhibits.

He added that the letter was a request to the Bureau to examine the exhibits so as to identify whether they were parts of the explosive and to identify the maker of the explosive. He said that the exhibits referred in the letter were; one handle marked "A", one lock safety pin marked "B", One Spring marked "C" and seven fragments marked "D", all alleged to be parts of the hand grenade.

He testified further that having received the exhibits, he duly signed a dispatch book, and then registered them by giving Laboratory number **FB/BALL/LAB/88/2014** so that they can be distinguished from other exhibits, and then registered them in the Laboratory register, and then labeled all four envelopes which carried the exhibits by writing the Laboratory number and IR number in each envelope to wit; **AR/IR/7088/2014**.

PW3 (P14) testified further that after a thorough physical examination of the exhibits, he came to the conclusion and made a finding that exhibits were parts of a hand grenade made in China, the parts being one handle of hand grenade, one lock safety pin of hand grenade, one spring of hand grenade and seven (7) fragments of hand grenade, therefore, he prepared the Ballistic Examination Report.

He added that he knew that the same was made in China because the handle of the hand grenade had serial No.**82-2 (followed by a Chinese word) 22-94650**, which is aimed to differentiate hand grenades made in China and those made in other countries. PW3 (P14) identified and tendered Ballistic examination report which was admitted as **Exhibit M1** and one Photographic book containing the photos of the examined exhibits which was admitted **as Exhibit M1A.**

He also identified and tendered one hand of grenade which admitted as **Exhibit M1B,** One lock safety pin of hand grenade which was admitted as **Exhibit M1C,** One spring of hand grenade which was admitted as **Exhibit M1D** and seven (7) fragments of hand grenade which were collectively admitted as **Exhibit M1E.**

PW3 (P14) went on testifying that the Ballistic examination report, photographic book and the examined hand grenade parts were collected by a police officer from the R.C.O's office - Arusha on 18/07/2014. He added that, he safely kept the exhibits from the date he received them, as well as after examination until when they were collected.

On cross examination, PW9 (P25) said, the law requires the chain of custody to be well maintained to avoid tempering or alterations of the exhibits. He admitted to have not recorded the movement of exhibits in exhibit M6, before he brought them to court. He also admitted to have used the term "Chuma kidogo" "fragment" in PF16 but what was tendered in court as evidence are seven (7) fragments. He also admitted to have not opened the envelopes.

PW3 (P14) testified further that, when grenade blows up the steel body disintegrates into a multiple of tiny pieces with 360' distribution upwards, and may cause death at radius of 5meters and effective casualties at a radius of 15meters but a person who lay on the ground before the explosion, may or may not sustain minor injuries.

On cross examination, PW3 (P14) admitted to have not tendered the handing over register or the dispatch book to show that he received the exhibits for examination, and that after examination, he handed the said exhibits to the police who brought them to the Bureau. He also admitted to have not come with a letter addressed to the Bureau by the R.C.O-Arusha. He also said that hand grenades are always used by Law Enforcement Agencies.

PW7 (P13) testified that on 13/09/2014, he was assigned by the OC-CID Arusha to record the cautioned statement of Rajabu Yakubu Abdala@Ikapu and he did so under section 58 of the CPA after he had introduced himself to him and informed him his rights and the allegations facing him. He added that, he started recording the said statement at 1:40 hours and finished at 2:40 hours. He further testified that having completed that exercise, he returned the accused back to the OC-CID.

PW7 (P13) went on testifying that in the statement, the accused confessed to have gone to the home of PW2 (P6) and attacked him by throwing a grenade into PW2's house.

The statement was retracted or/and repudiated by the 7th accused however, after conducting a trial within a trial, the objection was overruled and the statement was admitted as **Exhibit M4**.

He also admitted to have seen the article "Waraka" that was given to PW2 (P6). He admitted to have recorded cautioned statements of Jafari Lema (5th accused) and Yusuph Ally Huta (2nd accused) though the statements were not tendered as evidence in this case.

He also admitted that he warned the accused persons under section 57 (2) of the CPA but ended recording their statements under section 58 of the CPA. He admitted further that he did not identify the 7th and 11th accused persons herein court.

PW8 (P17), a police officer testified that, on 06/07/2014, he was assigned by the OC-CID Arusha to record the cautioned statement of Yahaya Twahiru Mpemba, and he did so under section 58 of the CPA after he had introduced himself to him and informed him his rights and the allegations facing him to wit; attempted murder and terrorism. He added that, he started recording the said statement at 15:20 hours and finished at 16:10 hours. He added that the accused person signed the statement by hand and thumbprint and he did so after confirming its truth and correctness. He testified further that having completed that exercise, he returned the accused back to the OC-CID.

The statement was retracted or/and repudiated by the 7th accused however, after conducting a trial within a trial, the objection was overruled and the statement was admitted as **Exhibit M5**.

On cross-examination, he admitted that did he not indicate in M5 that the accused opted to make his statement in the absence of the relative of advocate. He also admitted to have warned the accused under section 57(2) of the CPA but ended up recording his cautioned statement under

section 58 of the CPA. He said that the signature of the accused in M5 is similar to the signature appearing in the memorandum of facts as per preliminary hearing conducted on 17/02/2023.

He admitted further that where there is a dispute as to whether the accused was in a police station or not, the dispute can be resolved by tendering a detention Register.

He also admitted to have recorded the cautioned statements of other accused persons who are Abashari Hassan Omari (3rd accused), Kassim Idrissa Ramadhani (4th accused), Abdul Mohamed Humud (6th accused) and Anuwar Nasher Hayer (8th accused).

He also admitted that failure to indicate the police case file in the statement is an anomaly but according to him, it is not fatal. He also admitted to have recorded the cautioned statement of Yahaya Sensei.

He admitted further that the inflammatory article "**waraka wa kichochezi"** was seized from the 1st accused but the same was not tendered in court as evidence, likewise certificate of seizure.

PW11 (P21) testified that on 21/07/2014 within Arusha Town-NMC, he arrested the 4th accused Kassim Iddrisa Ramadhani on 21/0/2014. He added that on the very day, they arrested the 2nd accused Yusuph Ally Huta, and upon search carried out in his room by the OC-CID, the following items were obtained; two (2) hand grenades, six bullets of short gun and black gun powder but were tendered in CC. 18 of 2022 as exhibits.

PW11 (P21) added that, the accused persons confessed orally that they belong to the jihadist group under the leadership of Yahaya Sensei and they have been involved in the commission of terrorist acts in Arusha.

On cross-examination, he agreed to have recorded his statement at police but did not state therein that he is the one who arrested Kassim Idrisa Ramadhani. He also admitted to have not mentioned the items seized from Yusuph Ally Huta.

PW12 (P7), a Street Chairman testified that on 06/07/2014, he was picked by the police to witness search exercise at the room of the 1st accused Yahaya Twahiru Mapemba, whereby an article **"Waraka"** was seized, and after search exercise, he duly signed a certificate of seizure.

On cross examination, he said that the article was an inflammatory "Waraka wa kichochezi" accusing PW2 (p6) for betraying his religion. He testified further that he had been a Street Chairman for 29 year now, and he knew Yahaya Twahiru Mpemba as a good person thus, he cannot confirm whether he had committed the offences or not.

He admitted that without the said article and/or certificate of seizure, the court cannot know whether there was any article found and seized in the house of Yahaya Twahiru Mpemba. This marks the end of the summary of prosecution evidence.

On the defence side, each accused fended himself under affirmation and called no witnesses. The 1st accused testified as DW1, 2nd accused as DW2, 3rd accused as DW3, 4th accused as DW4, 5th accused as DW5, 6th accused

as DW6, 7th accused as DW7, 8th accused as DW8, 9th accused as DW9, 10th accused as DW10, 11th accused as DW11 and 12th accused as DW12.

Each accused denied his involvement in the commission of the offences they jointly stood charged. The accused persons also denied knowing each other before their arrest save for DW8 and DW6.

DW1 added that he never made a statement to the police but he was tortured and persecuted both at Matevez and Engutoto police posts, and while at Engutoto Police post, PW8 (P17) called him and then asked him to mention his name, age and religion and then forced him to thumbprint the statement (Exhibit M5) whose contents were not made known to him. He completely denied to have disseminated any inflammatory article. He also denied his room to have ever been searched. He testified further that he saw DW5 and other accused persons for the 1st time on 1/8/2014 when he was arraigned before the court.

When cross examined by Mr. Mayenga (SSA) DW1 admitted that on 06/07/2014 at 15:20hours -16:10 he was under police custody to wit; Engutoto police post. He also admitted to have not tendered PF3 to show that he was really assaulted. He also admitted to have informed the committal Court that he was assaulted but the Magistrate informed him that the court had no jurisdiction over the matter.

As regards DW2, DW3, DW4, DW5, DW9 and DW10 each denied to have confessed to the police in writing or orally that he committed the offences of terrorism. Each of them said he saw his co-accused accused persons for the first time when he was brought to court.

DW5 added that he had never received Sheikh Abuu Ismail. He also said the he had never mobilized people to contribute money for the purpose of buying weapons in order to overthrow the Government of the United Republic of Tanzania and replace for it Islamic State or for any other purpose. He ended his defence saying the case against him was fabricated.

On cross - examination, DW2 admitted that M5 indicates that he is the one who threw the hand grenade to the house PW2, but that is not true. He added that, even the alleged maker has disputed to have ever made such a statement.

When cross- examined by Mr. Mayenga (SSA), DW2 said that on 3/07/2014 at 23:00hours he was at home to wit; Ngaresero, DW3 said he was at home sleeping, DW4 and DW5 both said that on the material night, they were at home. DW2, DW3, DW4, DW5, DW9 and DW10 admitted to have not informed the court before the closure of the prosecution case that they would rely on the defence of alibi. DW2 also admitted that he has another Criminal case in relation to possession weapons. DW3 denied having blood relationship with Swalehe Hassan Omari (11th accused) but he admitted that he knows Yahaya Hassan Omar@Sensei. He also admitted that he was not at all tortured at police.DW4 said the person named by the name of **"Kassim"** in M3 and M4 is different from him. He denied to have been a motorcycle transporter famously known as "bodaboda"

DW12 in his affirmed defence denied to have made a confession; written or oral to the police. He said that Ikapu is not his name and he raised that concern during preliminary hearing. He stated further that M.3 is not his statement at all. He added that the age written therein as well occupation

do to reveal the truth, and that is a good indication that M3 is not his statement. He admitted that he was arrested at Mapango Village Chemba District. He added that the name of Rajabu Abdala Ikapu appearing in the charge sheet is not his name. He disputed the signature, thumbprint and verification clause appearing in M.3.

On cross-examination he said, the contradiction of the evidence between PW7 and that of OC-CID "**Q**" goes to the root of the matter. He said that as per M3, he is the one who broke the window, but that is not true at all. He added that on 03/07/2014, he was at home.

In his final written submission, the prosecution side through Mr. Mayenga (SSA) argued that the Accused persons gave a detailed account on the plan of causing serious bodily harm to SUDI ALLY @ SUDI and how they executed the mission on 3rd July 2014 as described in Exhibits M2, M3, M4 and M5.

He contended that in the herein above mentioned exhibits, the accused persons gave lengthy and elaborated, detailed account on how they were recruited, they named the persons who recruited them and trained them, intention to operate JIHAD movement and reasons behind on attacking SUDI ALLY@ SUDI and how the said attack was carried out.

He argued further that in Exhibit M3 the accused elaborated how they planned the said attack and how it was carried out, the accused stated that on 28th day of June 2014 at Kilembero Samunge within Arusha Municipal he met Ally Huta (2nd Accused), Hamza Ramadhani and Abashar Hassan (3rd Accused) and planned how and when to attack SUDI ALLY@SUDI and further he elaborated how they carried out the said attack on 3rd July 2014.

He went on submitting that in Exhibit M4, the accused elaborated how he funded the Jihad activities by send money to facilitate their operations and he mentioned one Kassim Idrissa Ramadhan (4th Accused) and Abdul Mohamed Humud @Wagoba (6th Accused) as his associates, and in Exhibit M5, the accused elaborated how they planned to carry out the attack of one SUDI ALLY@SUDI and he mentioned one Jaffar Lema (5th Accused) as the person responsible in collecting money for buying weapons.

He also submitted that he is alive of the prudence practice that demands corroboration on a retracted or repudiated confession for the court to convict an accused; however the court can convict an accused basing on the retracted or repudiated confessions only if the same provides details which comes from the accused only and not known by any other person. To support this position, Mr. Mayenga cited the case **Flano Alphonce Masalu@Singu & 4 Others versus Republic (Supra).**

He went on arguing that since the cautioned statements tendered and admitted as exhibits M1, M2, M3 and M4 contain details of the accused's personal particulars which are known only by the accused themselves therefore, this is enough to suggest that this Court can convict the accused persons basing only on the cautioned statements. He also made reference to the well-known principle of law that the best evidence in criminal trial is that of the accused who freely confesses.

As regards the 2nd accused Yussuf Ally Huta@Hussein, and 3rd accused Abashar Hassan Omar, he argued that it is in the Court record that, they made oral confessions to police during their arrest; they confessed to have

participated in the commission of crime thus, can be convicted upon their oral confessions.

He also submitted that, **Rajabu Abdalah ikapu (DW12)** lied about his name during his defence when he said that the name **"Ikapu"** is not his, while records while records of the court shows that during preliminary hearing, he signed the Memorandum of facts not in dispute by using the name "Ikapu" thus, the principle of Lies of the accused entails that when an accused person tells lies in court, those lies will be used to corroborate the prosecution's case as per the case of **Nkanga Daud Nkanga versus Republic (Supra)**. He urged the court to apply the same principle in the case at hand.

Mr. Mayenga also submitted on the defence of alibi that it was raised by the accused person during defence hearing contrary to the dictates of section 194(4), (5) and (6) of criminal procedure Act [CAP. 20 RE 2022] which require an accused to bring up defence of alibi earlier before the hearing starts or if he intends to bring it up after hearing of prosecution case started, then he should furnish the prosecution with particulars of the alibi. Should the accused bring the alibi belatedly during his defence, then the court will have discretion to accord no weight to the said alibi. To support his submission, Mr. Mayenga referred this Court to the case of Kubezya **John versus Republic,** Criminal Appeal No. 488 of 2015 CAT (Unreported**) and Chamuriho Kirenge @Chamuriho Julius vs Republic,** Criminal Appeal No.597 of 2017. Mr. Mayenga (SSA) urged not accord any weight on the alibi defence brought up lately by the Accused persons.

As regards the question of contradictions Mr. Mayenga submitted that, it emerged in the testimonies of PW7 (P13) and Q2 that while PW7 (P13) said that he returned the accused, Rajab Abdallah Ikapu to Q2 after interrogation, the latter on his side claimed that he was at home when P13 returned the Accused **Rajab Abdallah Ikapu** to the Lock-Up. Also, another contradiction between the two, PW7 (P13**)** and Q2 was on the outfits of the accused during his interrogation. Q2 said the accused (Rajab Abdallah) had a shirt and a moslem hat (kibaghalashia) the other said the accused Rajab Abdallah Ikapu was had no such hat. According to Mr. Mayenga, the contradictions are so minor and do not go to the root of the case.

Mr. Mayenga also submitted that apart from the above contradictions, they acknowledge the typing error in the charge sheet that led the prosecution side to write the name of the 12th accused wrongly in particulars of offence for all counts.

He further argued that on the title of the Charge the name of the 12th accused person is **Rajab Yakub Abdalah@ Ikapu** which actually is his real name, however in the particulars of the offence for all counts, the name appearing for the 12th accused is **Rajab Yusuph Abdalla @Ikapu** therefore, the name **Rajab Yusuph Abdalla @Ikapu** was merely accidental.

Mr. Mayenga (SSA) ended his closing submissions asserting that in their opinion, the prosecution has proved the case beyond reasonable doubt against the accused 1st, 2nd , 3rd. 4th, 5th 9th , 10th and 12th.

In his closing submissions, Mr. Abdallah Issa, learned counsel for the 1st accused argued that the prosecution tendered M2, M3, M4 and M5 alleged to be cautioned statements of the 1st, 7th ,11th and 12th accused persons respectively but the same were all retracted or/and repudiated thus; cannot be acted upon without great care and corroboration. He further argued that, the case against the 1st accused had not been proved since there is no cogent evidence linking him with the commission of the offences.

Ms. Upendo Msuya, learned counsel for the 2nd accused submitted that there is a contradiction in the evidence by the prosecution witnesses PW14 (P22) and PW4 (P19) whereas, PW14 (P22) testified that all remains of the hand grenade were found in the house of PW2 (P) while PW4 (P19) testified that lock safety pin was found outside PW2's house.

Ms. Msuya also argued that **M2, M3, M4 and M5** were all repudiated and or retracted and they were not corroborated by other independent evidence therefore, cannot ground conviction. He made reference to the case of **Kashindye Meli versus Republic** [2002] TLR 374, **Tuwamoi versus Uganda** (Supra) and **Hemedi Abdallah versus Republic** (Supra). She submitted further that the 2nd accused was mentioned by co-accused and as per section 33 (2) of the Evidence Act, [Cap. 6 R.E 2022, conviction of the accused person cannot base on confession of the co accused.

She further submitted that in this case there was variance between the charge sheet and evidence on record since the evidence is to the effect that the offences were committed by one Yahaya Sensei who is not among

the accused persons and was not brought to court as a witness, and the prosecution never prayed to amend the charge as per section 234 (1) of the CPA and the case of **Thabit Bakari versus Republic,** Criminal Appeal No.73 of 2019.

Ms. Msuya further submitted that in this case, the chain of custody was broken beyond repair owing to the reason that Exhibit M6 (PF16) shown only one fragment of hand grenade but in court seven (7) fragments of hand grenade were brought, but also, no evidence verifying the handing over of the said exhibits between PW3 (P14) and PW5 (P20). To support her argument, Ms. Msuya referred this court to the case of Paul **Maduka and 4 others versus Republic,** Criminal Appeal No. 110 of 2007.

In his closing submissions, Mr. Ramadhani Aliasa, learned counsel for the 3rd accused contended that there is no evidence linking the 3rd accused with the offences. He also argued that 3rd accused's cautioned statement was not tendered to prove that the 3rd accused made confession before PW14 (P22).

On his side, Mr. Mroso learned counsel for the 4th accused submitted that failure to tender the alleged inflammatory article "Waraka" reduces value and weight of the testimony of the PW2's evidence. He stated further that the article would have helped to test whether there was common intention to commit a crime or not. He made reference to the case of **Majaliwa Ihemo versus Republic,** Criminal Appeal No. 197 of 2020 CAT (Unreported).

He went on submitting that PW11 (P21) lied before the court while he testified that he arrested DW4, but Exhibit D2, shows that he was not the

one who arrested him hence, his evidence is not free from doubt. He further argued that, failure to tender the cautioned statement of the 4th accused is evident that DW4 had never confessed that he committed the offences. He argued further that M3 and M4 were repudiated, thus without an independent evidence to corroborate the same, they cannot ground conviction.

Closing submissions by Mr. Faridolin Bwemelo, learned counsel for the 5th accused person are similar to submissions by Ms. Msuya; save for the name of the accused person thus no need reproduce them here.

Ms. Magreth Mushi, learned counsel for the 9th accused person argued that no evidence linking the 9th accused with the offences. She also stated that during the hearing of the prosecution case, PW6 (P12) and PW2 (P6) did not identify the 9th accused person or link him with the offences. She also argued that; failure to tender the cautioned statement of the 9th accused proves that the 9th accused had never confessed his involvement in the commission of the offences.

On his side Kennedy Mapima, learned counsel for the 10th accused person submitted that, from the evidence in the record, none of the 14 witnesses testified that he saw the 10th accused person committing the offences. He also submitted that no cautioned statement of the 10th accused person tendered in court as evidence and that proves that the 10th accused had never confessed to have committed the offences he stood charged.

Mr. Pendaeli Munisi, learned counsel for the 12th accused person submitted that in this case, the charge sheet/information is incurably defective for

being contrary to section 132 and 135 of the Criminal l Procedure Act, [Cap.20 R.E 2022].

He contended that in the front page of the information, the name of the 12th accused is Rajabu Yakubu Abdallah@Ikapu but the particulars of the offence introduced a different person Rajabu Yusuph Abdallah@Ikapu. He went arguing that during the preliminary hearing, the name of Ikapu was disputed by the 12th accused person therefore, in absence of any evidence from the prosecution to prove that Rajabu Yakubu Abdalah and Rajab Yusuph Abadala is one, and the same remain defective. He argued further that, failure of the prosecution to cross-examine the 12th accused on that aspect renders the testimonies given against the 12th accused person futile on the ground that the evidence of testimonies adduced and tendered against Rajabu Yakubu Abdalah are diametrically different from the particulars of the offence and that sole effect suffices to acquit the 12th accused person. To bolster his argument, the learned counsel referred this Court to the case of **Credo Swale versus Republic** [2014] TLR 144 , where the Court of Appeal stressed the irregularity in convicting the appellant on a charge which carries particulars diametrically opposed to evidence on record alone is so glaring that it has resulted miscarriage of justice.

He added that applying the same principle in the here above cited authority, it is obvious that all the testimonies and evidence adduced and tendered in this Court referred to **Rajabu Yakubu Abdalah** while the particulars of offences in all five counts refers to **Rajabu Yusuph Abdala**,

it goes without saying that the evidence on record and the particulars of the charge/information are diametrically different.

Submitting on the authenticity of Exhibit M3, Mr. Pendaeli stated that PW7 (P13) testified that he recorded the statement DW12 under section 58 of the CPA while he warned him under section 57(2) of the CPA, but according to section 58 (1) of the CPA, the cautioned statement must be instigated by the accused himself and not otherwise, though the police can assist in writing. He further argued that there was no point in time DW12 informed PW7 (P13) that he wished to write a statement, and for that matter, the law was not complied with.

Pendaeli further submitted that the contradictions between PW7 (P13) and the OC-CID affects the authenticity of M3 because PW7 (P13) testified that he was ordered by the OC-CID "Q2" to record the statement of DW12, and he picked DW12 from the OC-CID's office to the interview room and he started recording the statement on 13/09/2014 1:40 and finished at 02:40 hours, and then returned the accused to OC-CID but OC-CID although he was testifying in a trial within a trial as **"Q2"** said after he had handed over DW12 to PW7, he went home for a sleep, thus the 12th accused was never handed over to him. He further argued according to the OC-CID, the 12th accused on the material night wore a black t-shirt, a worn out coat and a trouser, while PW7 (P13) said the 12th accused wore a short sleeved shirt. Khaki trouser and hat famously known as "Baraghashia".

Mr. Pendaeli went on submitting that the identification contradiction between PW7 (P13) and the OC-CID "Q2" and the lie of PW7 (P13) that he handed over the 12th accused to the OC-CID after he had recorded the

statement adds weight to the DW12 defence that he had never made or recorded any statement. To bolster his stance, Mr. Pendaeli referred this court the case of **Michael Haishi versus Republic** [1992] TLR 92 (CAT) and **Peter William versus Republic,** [2009] TLR 327.

Mr. Pendaeli concluded his submission asserting that the case against the 12th accused person had not been proved beyond reasonable doubt therefore, deserves to be acquitted.

I have consciously considered the evidence and the rival submissions by both the prosecution and defence therefore; the major issue is whether the prosecution has managed to prove beyond reasonable doubt that the accused person on 03/07/2014 did commit a terrorist act by detonating a bomb and thereby causing serious bodily harm to **Sudi s/o Ally@Sudi** and **Muhaji Hussein Kifea,** and I will do so through determination of sub-issues.

Before I move to determine the herein above issue, it is pertinent to recite the provisions of law in which the prosecution relied upon to prosecute the accused persons in the 2nd and 3rd counts. The provisions are sections 4 (1), (3) (i) (i) and 5 (a) of the Prevention of Terrorism Act, No. 21 of 2002 which state as follows;

Section 4-(1)

"*No person in the United Republic and no citizen of Tanzania outside the United Republic shall commit terrorist act and a person who does an act constituting terrorism, commits an offence.*"

Section 4 (3) (i) (i)

(3):- An act shall also constitute terrorism within the scope of this Act if it is an act or threat of action which-

(i) involves prejudice to national security or public safety, and is intended, or by its nature and context, may reasonably be regarded as being intended to-

(i) intimidate the public or a section of the public."

I subscribe to interpretation given my learned brother Hon. Mlyambina J. in the case of **Republic versus Mohamed Mohamed Adam@ Mbuko,** Economic Case No.05 of 2022 HC-at Songea (Unreported), as to what constitutes a terrorist act pursuant to section 4 (1) and (3) of the prevention of Terrorist Act. Hon. Mlyambina had this to say;

"In light of 4 (1) and (3) of the prevention of Terrorist Act, in order to qualify the criteria of terrorist act, it should be: first, an act of threat. Second, such act of threat should involve prejudice to the national security of public safety. Third, the act of threat should be done with intention. Four, the act of threat by its nature .and context, may reasonably be regarded as being intended to intimidate the public or a section of public.

I also subscribe to the definition of terrorism as per the case of Republic **versus Seif Abdallah Chombo @Baba Fatina ,**Economic case No. 4 of 2022 HC-Songea (Unreported) whereby His Lordship this Mlyambina, J defined the term terrorism t by citing the United Nations Security Council Resolution 1566 of 2004 as follows

"Terrorism is any criminal acts against civilians committed with the intent to cause death or seriously bodily injury or taking of hostages, with the

purpose to provoke a state of terror in the general public or in a particular group of persons, intimidate a population or compel a government to do or abstain from doing any act."

The first sub- issue which needs to be resolved is whether a bomb was really detonated and thereby causing serious bodily harm to **Sudi s/o Ally@Sudi** and **Muhaji Hussein Kifea.**

Indeed, there is cogent evidence that on 03/07/2014 around 23:00 hours a hand grenade was thrown into the house of PW2 located a Majengo Chini area within Arusha Municipality. The evidence of PW2 (P6) and PW13 (P) is very strong to the effect that, following such incident, they were both seriously wounded and as a result, they were rushed to Mount meru Regional Hospital for Medical examination and treatment. PW1 (P1) and PW10 (P2) confirmed the occurrence of the incident and the injuries sustained by the PW2 (P6) and PW13 (P). PF3 of PW13 was tendered and marked Exhibit M7. Though PF3 of PW2 (P6) was not tendered as exhibit, still there is strong evidence given by him, and supported by the evidence of PW1 (P1), PW10 (P2), and PW14 (P22) that he was wounded on the legs on that incident and was rushed to Hospital for treatment.

There is also strong evidence that PW14 (P22) arrived at the scene of crime and controlled the same whereas, on 04/07/2014, PW4 (P19) arrived at the crime scene and collected exhibits which were finally sent to Forensic Bureau for examination and PW3 (P14) confirmed that the exhibits taken to the Bureau for examination were really the parts of a hand grenade. PW5 (P20) confirmed to have taken the exhibits to the Bureau and handled them to PW3 (P14) and after examination, he

collected them and hand over the same to PW9 (P25) who is the exhibits keeper Ballistic examination report admitted as **Exhibit M1** and one Photographic book containing the photos of the examined exhibits which was admitted **as Exhibit M1A.** One hand of grenade was admitted as **Exhibit M1B,** One lock safety pin of hand grenade was admitted as **Exhibit M1C,** One spring of hand grenade was admitted as **Exhibit M1D** and seven (7) fragments of hand grenade were collectively admitted as **Exhibit M1E.**

The 2nd sub- issue is whether the chain of custody was duly established as per the law?. According Ms. Msuya, learned counsel for the 2nd accused and Mr. Bwemelo, learned counsel for the 5th accused, the chain of custody was broken beyond repair owing to the reason that Exhibit M6 (PF16) shown only one fragment of hand grenade but in court seven (7) fragments of hand grenade were brought, but also, no evidence verifying the handing over of the said exhibits between PW3 (P14) and PW5 (P20).

In our jurisdiction there is a plethora of Courts decisions related to chain of custody and its impacts in proving a criminal charge against the accused person. In the case of **Paulo Maduka and 4 Others versus Republic (Supra**), the Court of Appeal had this to say with regards to chain of custody.

"By chain of custody' we have in mind chorologicai documentation and or paper trail, showing the seizure, custody; control, transfer, analysis and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody is to establish that the alleged evidence is in fact related to the alleged crime rather than, for instance having planted

fraudulently to make someone appear guilty....The chain of custody require that from the moment the evidence is collected, its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it."

In another case, to wit; **Chacha Jeremia Murimi and 3 Others versus Republic,** Criminal Appeal No. 551 of 2015 (unreported), and the Court of Appeal had this to say;

"In order to have a solid chain of custody it is important to follow carefully the handling of what is seized from the suspect up to the time of laboratory analysis, until finally the exhibit seized is received in court as evidence... The movement of the exhibit from one person to another should be handled with great care to eliminate any possibility that there may have been to tampering of that exhibit."

I am also alive of the case of **Joseph Leonard Manyota versus Republic, Criminal Appeal No. 485 of 2015 (unreported),** where the Court of Appeal went a further milestone and stated that;

"It is not every time that when chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the case say, where the potential evidence is not in the danger of being destroyed, polluted and/or in any way tampered with. Where circumstances may reasonably show the absence of such dangers, the court can safety receives such evidence despite the fact that the chain of custody may have been broken. Of course, this will depend on the prevailing circumstances in every particular case."

Guided by the herein above decision of the court of appeal, it is my considered view that the chain of custody was not broken thus I do not shake hand with Ms. Msuya and Mr. Bwemelo on their argument. PW5 said in his evidence that he did not open the envelopes to count the fragments.

It is worth noting that the chain of custody may also be proved by oral evidence depending on the circumstances of each case. See **Agnetha Sebastian versus Republic,** Criminal Appeal No. 389 of 2020 CAT and **Mychel Andriano Takahindengeng versus Republic,** Criminal Appeal No.76 of 2020 CAT (both Unreported).

In the case at hand, the evidence of PW4 (19) who collected the fragments from the crime scene, and the evidence of PW5 (P20) who took them to the Bureau and PW3 (P14) who examined them, all confirmed that the fragments were seven, therefore, it is the finding of this court that chain of custody was duly had been duly established by documentation and oral evidence.

The 3rd sub- issue is whether, the accused persons were identified on the material night. The evidence of PW1 (P1), PW2 (P6) and PW13 (P) is to the effect that they did not at all identify the persons who detonated a bomb. However, PW2 (P6) testified that he suspected that the hand grenade was thrown by people who were against him because he was resisting jihadist ideology; and he mentioned a list of people including Athumani Sefu, Abdul Mohamed, Jafari Lema, and Hassan Ally Mfinanga.

It is a settled principle of criminal justice that in a criminal charge, suspicion however, strong it may be, is not enough to ground a conviction. See, **Raphael Kanishi versus Republic** [2004] TZCA 60 and **Shabani**

Mpunzu versus Republic, Criminal Appeal No. 12 of 2002 CAT (Unreported). In that respect, suspicion of PW2 (P6) that he was attacked by the accused persons remains a suspicion and no more.

The finding of this court is that, there is no identification evidence linking the accused persons with said bomb attack. Strictly speaking, suspicion is different from identification.

The 4th sub- issue is whether M2, M3, M4 and M5 can ground conviction of the accused persons taking into account that they were all retracted and/or repudiated. **M2** will not detain me because; I have already dealt with it when addressing the 6th count, likewise M4 which I have dealt with in 7th count. It is a principle of law that a retracted/repudiated confession cannot corroborate another retracted /repudiated confession.

I now turn to M3. I have carefully examined **M3,** and noted that; **One,** it has no police case file number which is very important to show among other things that crime under investigation was really reported and duly registered.

Two, one of the rights of the accused person before making his statement is the right to call his relative or advocate during the confession. In my view, it is the answer of the accused person that can show whether the accused was duly informed and understood the right to call his relative or advocate and whether he opted their absence or not. **In M3**, the answer of the accused person to the question asked "**UKO TAYARI KUTOA MAELEZO?** was recorded **"NDIYO"**.

The proper answer which would have shown that the accused really understood his right would have been as follows **"NIPO TAYARI KUTOA MAELEZO YANGU KWA HIARI BILA KUWEPO WAKILI, NDUGU AU JAMAA".** In that respect, it is apparent the 11th accused was not informed of such right.

Three, accused was warned under section 57 (2) but his statement was recorded by PW7 (P13) under section 58 of the CPA on the ground that 12th accused person asked the PW7 (P13) to record. It is unfortunate that M3 does not speak for itself that there was such a request from the accused.

According to the dictates of section 58 must be instigated by the accused person, although the police can just assist in writing. Since the 12th accused person in his affirmed defence told the court that there was no point in time he informed PW7 (P13) that he wished to write his statement, and since M3 is silent of such request, it cannot be said the section 58 was duly complied with and as per the case Leonard Mathias Makani and Another versus Republic (Supra).

Four, PW7 testified that he was ordered by the OC-CID (Q2) to record the statement of DW12, and then, he picked DW12 from the OC-CID's office to the interview room and he started recording the statement on 13/09/2014 1:40 and finished at 02:40 hours, and then returned the accused to OC-CID but OC-CID **(Q2)** said after he had handed over DW12 to PW7, he went home for a sleep, thus the 12th accused was never handed over to him. **Q2** added that on the material night, DW12 did not wore a hat while PW7 said DW12 hat famously known as "**Baraghashia."**

I his submission, Mr. Mayenga (SSA) argued that the contradictions are minor thus; they do not go to the root of the matter, while Mr. Pendaeli submitted to the contrary.

The accused in his affirmed defence denied to have ever made such a statement and that was also his point of objection to admission of the same, it goes without saying that the contradiction between PW7 (P13) and the **Q2** invites doubts as to whether to the DW12 made his statement or not and since it is a principle of law that any reasonable doubt left by the prosecution evidence in criminal proceedings should be resolved in favor of the accused person. In the same spirit, I hereby resolve the doubt in favour of the accused person.

The 5th -sub issue is whether the name "Ikapu" is the name of the 12th accused person or not. The complaint of 12th accused was that "**Ikapu"** is not his name. However, I agree with Mr. Mayenga (SSA) that on 17/02/2023, the preliminary hearing was conducted before A. Z. Bade J. and the 12th accused signed the Memorandum of facts by writing his name to wit; "**Ikapu".** In that respect, the denial of such name is baseless, as it was intended to mislead the court something which is not acceptable. Now, the question is whether the alleged lie can corroborate the prosecution?. It is my considered view that it cannot do so because there must be strong evidence in place first, of which I find that in the case at hand, there is no such strong evidence which can be corroborated that lie.

The 6th sub-issue is whether the charge was defective or not. I would like to state that it is apparent that in the title of the Charge, the name of the 12th accused person is **Rajab Yakubu Abdalah@ Ikapu** but the

particulars of the offence for all five counts, the name appearing for the 12th accused is **Rajab Yusuph Abdalla @Ikapu** is there.

Basically, I agree with Mr. Mayenga (SSA) that what happended is just a typing error, thus was accidental. I do not agree with Mr. Pendaeli that such a minor typing error renders the charge defective or renders the testimonies given against the 12th accused person futile. The only misspelled name is **"Yakubu"** as in the particulars of the offence "it was written "**Yusuph"** but the rest of the names including the 12th accused's famous name to wit; **"IKAPU"**

As regards **M5,** I have noted that**; One** no answer from the accused indicating he was duly informed and understood the right to call his relative or advocate and whether he opted their absence or not. In M5, the answer of the accused to the question asked "**UKO TAYARI KUTOA MAELEZO?** was written "**NDIO NIKO TAYARI KUTOA MAELEZO YANGU"**.

The proper answer which would have shown that the accused really understood his right would have been as follows **"NIPO TAYARI KUTOA MAELEZO YANGU KWA HIARI BILA KUWEPO WAKILI, NDUGU AU JAMAA"**. In that respect, it is apparent the 1st accused was not informed of such right.

Two, accused was warned under section 57 (2) but his statement was recorded by PW8 under section 58 of the CPA on the ground that 1st accused person asked PW8 to record. It is unfortunate that **M5** does not speak for itself that there was such a request from the accused thus, cannot be said section 58 was duly complied with. The police must warn and caution an accused person before recording a statement from him or

her. He must also be informed of his rights. It is a warning/caution that makes a statement a cautioned statement; therefore, that part should never be taken lightly. In other words, investigators should always consider that any incriminating statement obtained without caution runs the risk of being ruled inadmissible or at the very least having the weight of the evidence gained significantly diminished.

Three, during cross-examination PW8 stated that apart from M5, he also recorded the statement of DW6, DW3, DW4 and DW8. He also admitted to have recorded the cautioned statement of one Yahaya Sensei.

An inevitable question here is that, how can a single police officer record the cautioned statements of five people who are accused of the same allegations?. In my view, this practice is not healthy in the proper administration of justice. The criminal investigation department is never a man-show department.

As stated earlier, in our jurisdiction, there is a good practice that a person who voluntarily confess on the commission of the offence is taken to the justice of peace to record his extra-judicial statement. In this case, such a practice was not at all exercised; and no witness testified that the accused persons were informed of that right.

It is a known principle that each case has to be decided on its own peculiar circumstances. In the case at hand, the accused persons disputed their hand signature and verification clauses appearing in **M2, M3, M4 and M5.**

It is trite law that, proof of a handwriting or signature has to be either by direct evidence or by other additional types of evidence or modes of proof.

As far as direct evidence is concerned, the proof of handwriting or signature had to either come through admission by the accused as the writer or from the evidence of a witness in whose presence the document was written or signed.

Besides, the proof could be obtained in other three types of evidence or modes of proof. **One,** through opinions of a handwriting expert as provided for by Section 47 of the Evidence Act. **Two,** by the evidence of a person familiar with the writing of a person who is said to have written a particular writing as per Section 49 of the Evidence Act and **Three,** through comparison by the court with a writing made in the presence of the court or proved to be the writing or signature of the person.

I have carefully compared the writing and signatures of the accused persons; DW1, DW7, DW11 and DW12 with the signatures and writing made in court as they appear papers marked "**A", "B", "C" and "D"** and those appearing in **M2, M3, M4 and M5** and found that the same raise doubt as to whether the signatures and the handwriting are of the same persons.

Considering what I have demonstrated herein above and the principles governing retracted and/or repudiated confessions which stood uncorroborated, it is my considered view that it is not safe to convict the accused persons basing on **M2, M3, M4 and M5.**

During the committal proceedings and preliminary hearing, the prosecution listed among others twelve cautioned statements, but for reasons better known the prosecution, they ended tendering four cautioned statements only. In other words, the caution statements of the 2nd, 3rd, 4th, 5th, 6th 8th,

8th, 9th and 10th accused persons were not tendered in court as evidence. I remind the investigators that confession may not always be a short cut to solution in criminal cases. Every case must be entirely investigated depending on its own circumstances.

The Supreme Court of India in the case **Dagdu v. State of Maharasttra,** A.I.R 1977 S.C1579 while addressing the questions of confession, warned the investigators on the archaic attempt to secure confessions by hook or by crook instead of doing so legally and professionally. The Court had this to say:

"The police should remember that confession may not always be a short – cut to solution. Instead of trying to start from a confession, they should strive to arrive at it. Else when, they are busy on their short –route to success, good evidence may disappear due to in attention to real clues..."

The prosecution evidence by PW14 (P22) is that the 3rd accused Abashari Hassan Omar (DW3) made an oral confession to him that he was involved in the act detonating a bomb in the house of PW2 (P6) while PW11 (P21) also testified that the 2nd accused Yusuph Ally Huta confessed before him that he belongs to jihadist group led by Yahaya Sensei but also confessed his involvement in the bombing incident at the home of PW2.

Since DW2 and DW3 have completely denied to have ever made such a confession, and since, it is the prosecution evidence that the cautioned statements of the accused persons were recorded, it is the finding of this court that in absence of the cautioned statements of DW2 and DW3, the doubt is more serious on whether the accused person really made an oral confession as alleged by the prosecution or otherwise.

As regards the 9th and 10th accused persons, no evidence adduced that they have ever made an oral confession. Again their cautioned statements were not tendered in court as evidence. I agree with Ms. Magreth Mushi and Mr. Mapima that the case against the 9th and 10th accused had not been proved at all.

The 7th sub-issue which needs to be looked at is whether the defence of alibi raised by the accused persons during defence can be accorded any weight. Indeed, I shake hands with Mr. Mayenga (SSA) that, it emerged that during cross-examination and /or examination in chief, 1st, 2nd , 3rd, 4th, 5th ,9th, 10th and 12th accused persons@ stated that on 03/07/2014 at 23:00hours, he was at his own home, and the constitutes the defence of alibi.

I also shake hands with Mr. Mayenga that section 194(4), (5) and (6) of criminal procedure Act [CAP 20 RE 2022] require an accused who intends to rely on the defence of alibi to bring up such defence earlier before the hearing starts or if he intends to bring it up after hearing of prosecution case started, then he should furnish the prosecution with particulars of the alibi. Should the accused bring the alibi belatedly during his defence, then the court will have discretion to accord no weight to the said alibi.

However, it should be noted that, where an accused person raises the defense of alibi, he has no duty to prove it. The duty lies on the prosecution to disprove a defense of alibi and place the accused at the scene of crime as the perpetrator of the offence. In my view, the prosecution can effectively do so where the notice is given before the commencement of the prosecution case or before the closure of the

prosecution case, otherwise, they will remain with a narrow door of cross-examination.

In the case at hand, considering that the accused persons were not identified at the scene of crime on the material night, and no person testified to have seen them on 03/07/2014 between 19:00hours and 23:00hours near the scene of crime or any place in Arusha Town, it is my considered view that the defence of alibi though raised during defence, raises doubt on the prosecution side.

The 8th sub-issue which needs the attention of this court is whether it was proved beyond reasonable doubt that there was common intention between the accused persons. I shake hands with Mr. Mayenga (SSA) that as per the law, where two or more accused persons are jointly charged with an offence, common intention must be proved to exist. See section 22 and 23 of the Penal Code, Cap.16 R. E 2022].

It is trite that in order to make the doctrine of common intention applicable, it must be shown that the accused persons shared with another a common intention to pursue a specific unlawful purpose, and in the prosecution of that unlawful purpose an offence was committed. **In Abdi Alli versus R. [1956] E.A.C.A, 573 the Court** held that:

"The existence of common intention being the sole test of joint responsibility, it must be proved what the common intention was and that the common act for which the accused were to be made responsible was acted upon in furtherance of that common intention. The presumption of common intention must not be too readily applied or pushed too far."

Considering the fact that all oral confessions and cautioned statements were found problematic as demonstrated in the foregoing pages, the same cannot form the base of proving beyond reasonable doubt that there was common intention between the accused persons to commit a terrorist act by detonating a bomb and thereby cause serious bodily harm to **Sudi s/o Ally@Sudi** and **Muhaji Hussein Kifea.**

To that extent, it is the finding of this court that, the 2nd and 3rd counts have not been proved beyond reasonable doubt, thus I proceed to give the accused persons the benefit of doubt.

In the 8th count (*alternative to the 2nd count*) and **9th count** (*alternative to 3rd count*), the 1st, 2nd, 3rd, 4th, 5th, 9th, 10th and 12th accused persons jointly stand charged with the offence of Attempted Murder contrary to section 211(a) of the Penal Code, [Cap.16 R. E 2019], now R.E 2022.

When the accused persons were arraigned before the court, each of them denied the charge; as a result, a plea of not guilty was entered. As I said earlier, none of the 14 prosecution witnesses testified to have seen the accused persons attempting to cause death of PW2 (P6) or/and PW13 (P)

For the offence of Attempt Murder to be proved, the prosecution has to give evidence which establish all the following ingredients of the offence:-

(a) *Proof of intention to commit the main offence of murder.*

(b) *Evidence of prove how the accused began to employ the means to execute his intention.*

(c) *Evidence that proves overt acts which manifested the accused's intention (over act means an act directed towards another person that indicate intent to kill).*

(d) *Evidence proving an intervening event, which interrupted the accused from fulfilling his main offence to such extent if there was no such interruption, the main offence of murder would surely have been committed."*

See. **Samwel Jackson Saabai@Mngawi and 2 Others versus Republic**, Criminal Appeal No. 138 of 2020 and the case of **Boniface Fidelis @Abel versus Republic,** Criminal Appeal No. 301 of 2014 (Both unreported).

The 8th and 9th counts should not detain me because confessions, both oral and written as discussed earlier, were problematic thus, cannot ground conviction of the accused persons in respect of the 8th and 9th counts. In absence of any other independent evidence, there is no way to say the alternative counts have been proved beyond reasonable doubt.

Before I pen off, I find myself indebted to state few things I have observed on the prosecution case:-

(i) The sketch map of the crime scene was drawn and listed in the list of prosecution exhibits but it was not tendered in court as evidence so as to shed light to the court on the extent of the damage but also location in which the exhibits were before collection.

(ii) *There was an inflammatory article" Waraka wa kichochezi" which PW2 (p6) alleged to have handed it over to the police for investigation and the police admitted to have received the same but, the same was never tendered in court as evidence despite the fact that during the preliminary hearing inflammatory articles" Nyaraka za uchochezi were listed in the list of prosecution intended exhibits.*

(iii) *It was alleged further that the house of 1st accused was searched in which an inflammatory article threatening PW2 (p6) article was seized but the article and certificate of seizure were not tendered in court as evidence.*

(iv) *There was a complaint from the accused persons that they were detained at Matevez police post, Engutoto police post and Ungalimited police post, denying to have ever been detained at Arusha Central police, but no single detention register tendered by the prosecution in court as evidence to clear the doubt.*

(v) *PW8 recorded more than five cautioned statements of the accused persons allegedly committed the offence while there are other investigators who can perform such a task.*

(vi) *Mix-up of sections 57 and 58 of the Criminal Procedure Act, Cap 20 R.E 2022 in a single cautioned statement.*

(vii) *It was alleged that Jihad ideology was inspired by the teachings (DW5) and that he had several times mobilized people to join jihad so that they establish Islamic State in Tanzania, but no video (VCD), Audial CD or any lecture material, hard of soft, prepared or possessed by DW5 tendered in court as evidence.*

(viii) Failure to insert police case file number on the front page of the cautioned statement to show that the crime under investigation was duly reported at the police station and duly registered for investigation.

(ix) Failure to tender the cautioned statements of eight (8) accused persons out of twelve (12) who are alleged to have confessed.

The rationale behind investigation is to search for the truth. In that premise, the whole criminal justice system is based on the investigation system where if there is no proper investigation in a case, then the probability of acquittal and conviction of innocent will increase, which in result, would not be good for the society. Where the prosecution case has been poorly investigated, no conviction can be drawn thereof. Equally, where the evidence is properly collected, documented and protected, but not presented in court, the prosecution case must fail.

In the case of **Republic versus Majaliwa William,** Criminal Sessions Case No.57 of 2022 HC-Bukoba (Unreported) the court had this to say.'

"It is common understanding that when the offence is alleged to have been committed, the police has the mandate to carry out investigations with the aim of obtaining the necessary evidence that will be used in court to warrant conviction so as to punish criminals according to law. It should be noted that poor investigation leads to acquittal of guilty individuals on one hand and conviction of innocent parties on the other. Therefore, it goes without saying that a proper investigation into an offence helps the prosecution in proving the guilt of the accused beyond reasonable doubt and ensures that chances of convicting an innocent person are avoided.

Indeed, when an offence is well-investigated, the trial process becomes easier and expeditious."

It is a well-established principle that the accused can only be convicted of an offence on the basis of the strength of the prosecution case, and not on the basis of the weakness of the defense .**See Christian Kale and Another v. Republic** [1992] TLR 302 (CAT).

As far as the case at hand is concerned, however sympathetic this court may be to the circumstances under which such traumatic, horrendous, and shocking incident occurred and resulted severe injuries to PW2 (p6) and PW13 (p), in absence of cogent evidence linking the accused persons with the offences, this court has no other option but to acquit them accordingly.

Having so said and for the reasons so stated, I accordingly find YAHAYA TWAHIRU MPEMBA, YUSUPH ALLY HUTA @ HUSSEIN, ABASHARI HASSAN OMAR, KASSIM IDRISSA RAMADHANI, JAFARI HASHIM LEMA, ADUL MOHAMED HUMUD@WAGOBA, HASSAN ALLY MFINANGA@AMIRI HASSAN, ANUWAR HASHER HAYER, YUSUPH ALLY ATHUMAN @ SEFU, ABDUL HASSAN JUMA @ ABDUL, SWALEHE HASSAN@OMARI@SWALEHE CHINGA and RAJABU YAKUBU ABDALAH @ IKAPU not guilty of the offence they stood jointly and severally charged. Subsequently, they are hereby acquitted and should be released from custody forthwith unless lawfully held.

It is so ordered

Dated at Arusha this 16th day of June 2023.

E. L. NGIGWANA

JUDGE

16/06/2023

Court: Judgment delivered this 16th day of June, 2023 in the presence Ms.Grace Madikenya (SA) and Ms. Amanda Evance (SA) for the Republic, all twelve (12) accused persons and the learned counsels, Hon. E. M. Kamaleki, Judges Law Assistant and Ms. Felister Bisangwa C/C.

E. L. NGIGWANA

JUDGE

16/06/2023

Court: Right of Appeal fully explained.

E. L. NGIGWANA

JUDGE

16/06/2023