IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

CRIMINAL SESSION NO. 63 OF 2022

REPUBLIC

VERSUS

1. **ABDALLAH ATHUMAN LABIA@BROTHER MOHAMED**
2. **ALLY HAMISI KIDAANYA**
3. **ABDALLAH MAGINGA WAMBURA**
4. **RAJABU PIRI AHMED**
5. **HASSAN ZUBERI SAID**
6. **ALLY HAMISI JUMANNE**
7. **YASSIN HASHIM SANGA**
8. **SHABANI ABDALLAH WAWA**
9. **IBRAHIM LEONARD HERMAN@ABUU ISMAIL**

JUDGEMENT

6th & 19th June 2023.

Rwizile, J

Perhaps it is no longer the case today, but nearly a decade ago, one could not completely enjoy the beauty of Arusha, without visiting Arusha Night Park Bar, known for its famous name "*Matako Bar*" according to the charge sheet. The place was not only good for *Nyama Choma*, and English Premier League, but also famous for its "heavyweight" waitresses.

This package, therefore, did not excuse the bar from attracting terrorist attacks. When Liverpool fans were enjoying three goals win over Manchester City and the Blues preparing for its encounter with Swansea, at about 7:00pm, on 13th April 2014, the ill-fated event happened.

A big explosion occurred at the bar followed by heavy smoke. The whole city was taken at bay. The attack was severe and of its own kind, which left several people injured and caused the death of Sudi Ally Ramadhani days thereafter.

It was factually stated that out of the normal cause of doing things, two male adult persons appeared as normal customers. One of them held a small black bag. It was placed under one chair at a table that was vacant. This was on the front side of the bar, in the corridor with tents, close to the main entrance. The table had only one chair. When one of the female attendants was watching the conduct of the two customers who didn't sit, planning to get them another chair, they left towards the main building leaving their small black bag behind.

No sooner had they left, than the waiters started smelling unusual smoke. To their surprise, soon thereafter, a big explosion occurred. The place was thrown into pandemonium. Some attendants and customers were severely

injured on the legs, feet, and thighs. In an emergency, they were helped to the two hospitals namely Arusha Lutheran Medical Center@ Selian and the Regional Government Hospital@ Mount Meru. They were attended to and treated. Unfortunately, on 13th May 2014, one Sudi Ally Ramadhani died due to severe bleeding from wounds sustained on the right leg around the knee joint.

In this situation, the state intelligence, forensic, and investigative machinery hurried onto the crime scene. P was a senior police officer dealing with high-profile cases in Arusha District. In the company of his team, arrived at the crime scene a few minutes thereafter. Apart from dealing with victims, he directed forensic police officers to surround the crime scene with yellow tape. The crime scene had blood, bent nails of 5 to 6 inches, chairs turned upside down and damaged, broken bottles and small electric wires.

Exhibits were collected, PF-3s were taken to the hospitals for victims, and statements of witnesses were taken down making the commencement of the investigation. It was discovered that the bombing was from a homemade bomb.

At different places and times, the accused persons were arrested in connection and arraigned on 14 counts of terrorism under section 4(1)(3)

(I) (i) and section 5(a) of the Prevention of Terrorism Act, No. 21 of 2002 (to be referred herein as the Act). Allegedly, they were participating in a terrorist meeting held at the Magugu area of Babati District in the Manyara Region on 7th April 2014. According to the charge sheet, this forms the first count.

The second count also faces all accused persons which is under section 4(1)(3) (I) (i) and section 15(a) of the Act, which is the use of the property for the commission of a terrorist act. The accused persons are alleged to have used a homemade bomb to blast Arusha Night Park Bar @ Matako bar on 13th April 2014.

Further, in the 3rd to the 14th count, all accused persons are charged with committing a terrorist Act, contrary to section 4(1)(3) (I) (i) of the Act, where by using a homemade bomb, blew up, Arusha Night Park Bar@ Matako Bar on 13th April 2014, as the result Sudi Ally Ramadhan died, Joyce William Patrice, Loyce John, Suzan Jackob, Anterus Vicent, Nathan Charles, Stephen Cosmas, Peter James Bukerebe, Oberd Mbasha, Zakaria Mmassy, Everast Richard and Mariam Juvenary Hans, respectively, sustained serious bodily injuries.

It should however be noted that the 15th count of murder contrary to sections 196 and 197 of the Penal Code is charged in alternative to the 3rd count. It faces the 1st to 8th accused persons, who are alleged to have jointly and together on 13th April 2014 at Arusha Night Park@Matako bar at Mianzini of Arusha District and Region murdered one Sudi Ally Ramadhani.

The succeeding 11 counts, (16th to 26th) are of attempted murder contrary to section 211(a) of the Penal Code also charged against the 1st to 8th accused persons. They are charged in the alternative as follows; 16th count is in the alternative to the 4th count, where following the bombing of Arusha Night Park Bar @Matako bar on 13th April 2014, the 1st to 8th accused persons jointly and together unlawfully attempted to cause the death of Joyce William Patrice.

On the 17th count, it was alleged that, on the same date, time and place, the accused persons attempted to cause the death of Loyce John, it is an alternative to the 5th count. The 18th count is an alternative count to the 6th count where the accused persons 1st to 8th attempted to cause the death of Suzan Jackob.

The 19th count is an alternative to the 7th count which was an attempt to kill Anterus Vicent. The 20th count is an alternative to the 8th count where the

accused persons attempted to kill Nathan Charles. The 21st count is an alternative to the 9th count which was an attempt to kill Stephen Cosmas. The 22nd count is an alternative to the 10th count, which is an attempt to kill Peter James Bukerebe. The 23rd count was an attempt to murder one Oberd Mbasha charged in alternative to the 11th count. Further, on the 24th count, being an alternative count to the 12th count, an attempt to kill Christian Zacharia Mmassy was made. Likewise, the 25th count is charged as an alternative to the 13th count, where an attempt to cause the death of Evarest Richard was made, and the 26th count is an alternative to the 14th count, where 1st to 8th accused persons jointly and together attempted to cause death of Mariam Juvenary Hans.

Before the committal proceedings, an exparte application was made and granted under sections 34(3)(a), (b) and (4) of the Act, and 188(1), (2) of Criminal Procedure Act, that the witnesses' identities both at the committal proceedings and the trial of this case, as well as the statements and documents containing their evidence likely to disclose their identities, should not be disclosed for security purposes. Throughout this trial, therefore, the names of the witnesses have not been disclosed.

The prosecution, cast with the duty to prove its case, called 23 witnesses, who were assigned names and so testified in the following order; P25, P7, P33, P28, P3, P29, P34, P1, P11, P38, P4, P13, P22, P10, P17, P30, P39, P23, P, P16, P20, P8 and P21 and will be so referred in this judgment.

The prosecution team of Attorneys was led by Ms. Ajuaye Bilishanga a Principal State Attorney, assisted by Mr. Nassoro Katuga, Mr. Kauli Makasi Senior State Attorneys, Ms. Alice Mtenga, Ms. Ashura Mnzava and Mr. Tony Kilomo learned State Attorneys. The defence team was led by Mr. Peter Madeleka, for the 1st accused person, who was assisted by Mr. Sylvester Kahunduka. For the second accused was assisted by Lectony Ngeseyan, for the 4th accused was assisted by Matuba Nyirembe, while for the 7th accused was assisted by Mr. Richard Manyota learned advocate. The 3rd accused is represented by Mr. Yoshua Mambo, 5th accused by Ms. Fatma Amir. The 6th accused was represented by Mr. Vincent Stewart, the 8th accused by Mr. Kennedy Chando, and the 9th accused was represented by Mr. Victor Jonas, learned advocate. Upon closing the defence case, Attorneys were allowed closing submissions which were filed, as scheduled.

It was the opinion of the prosecution, that cast with the duty to prove the case as under section 3(2)(a) and 110 of the Evidence Act [Cap. 6 R.E 2022],

(The Evidence Act), and that in the strength of the case of, **Anthony Kinanila and Another v R**, Criminal Appeal No. 83 of 2021, (CAT) the Prosecution has to prove all ingredients of terrorism in order to win a conviction. Accordingly, it was submitted that there was a meeting attended by the accused persons and discussed how to commit terrorist acts. The acts, it was argued were committed prejudicial to the National security that intimidated the population falling in the purview of the provisions of section 4(1) and (3) read together with sections 5, 6, 7, 8, 9 and 10 of the Prevention of Terrorism Act, No. 21 of 2002.

In a complete package of witnesses, in view of the prosecution, which is composed of Victims of the explosion at Arusha Night Park @ Matako Bar, Doctors who attended the said victims at different hospitals here in Arusha, arresting officers who recorded confession statements, an expert witness a Government Chemist Analyst, investigators and independent witnesses, it was argued that the case was proved. In the endeavour to demonstrate so, the prosecution held the view that based on the confession statement of the 6th Accused person, Ally Hamisi Jumanne which was tendered and admitted as exhibit PE-14 without objection, proved that the meeting held at Magugu on the 7th April 2014 was called by the 2nd Accused person, Ally Hamisi

Kidaanya at Mbugani Mosque which planned to establish Islamic State, start a *Jihad* war by fighting against *kafir*, blowing-up churches, Government offices and other public gatherings in Arusha Region. According to the prosecution, the 8th accused person, Shabani Abdallah Wawa, and Hassan Zuberi Said, the 5th accused confessed so in exhibits PE-12 and PE-15 respectively. The meeting, it was argued, was the result of the bombing of Arusha Night Park bar @ Matako Bar on 13th April 2014. To cement the argument, they referred this court to the case of **Ally Mohamed Mkupa v R**, Criminal Appeal No. 2 of 2008 (Unreported), on page 13 where the court stated as follows;

> *"...the very best evidence is of a person who confesses freely and voluntarily to have committed the offence in any criminal trial that is an accused person who confesses his guilty".*

Fortifying the argument, the prosecution submitted that the evidence of the 4th accused Rajab Piri Ahmed, in his confession statement, exhibit PE-10, 1st accused person Abdallah Athumani Labia in his confession statement, exhibit PE-9 coupled with the 3rd accused Abdallah Maginga Wambura's confession statement exhibit PE-6, the accused persons admitted to having travelled from Magugu to Arusha, made two bombs that exploded Arusha Night Park

Bar @ Matako Bar and attempted to do the same at Washington Bar. Further, the prosecution held the view that despite the 1st, 2nd,3rd, and 4th accused persons retracting their confessions, as long as they were admitted in evidence, this court should not hesitate to find conviction based on them. The prosecution fetched support in the cases of **Michael Luhiye vs R** [1994] TLR 181 where the Court of Appeal held that;

> *"It is always desirable to look for corroboration in support of retracted confession before acting on it but a court may convict on a retracted confession even without corroboration."*

And in the case of **Tuwamoi vs Uganda** (1967) E.A 84, The Court of Appeal for East Africa stated;

> *"But corroboration is not necessary in law and the court may act on confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true."*

The above notwithstanding, the prosecution was of the firm view that evidence of P10 and P8 respectively, corroborated the confession statements. That there was indeed a meeting on the 7th of April, 2014 at Magugu, and that a homemade bomb was found at Washington Bar on the

13th of April 2014. As well, it was argued that accused persons 2nd, 4th, 6th, and 8th, according to the prosecution evidence were arrested there, which shows the coherence and consistency of the prosecution evidence leading to credibility. Support was sought in the case of **Goodluck Kyando v R** (2006) TLR 363.

The prosecution further submitted that evidence of P was clear that he visited the crime scene immediately after the bombing and found the remains of the bent nails, a safety delay fuse, small wires, and broken bottles. The remains, it was added were materially similar to the bomb found at the Washington Bar. These facts, the prosecution went on submitting were not disputed by the defence or even cross-examine on the same. The facts, it was stated must be held as admitted by the defence.

The prosecution was of further submission that the 3rd and 4th accused persons were identified at the parade and in the dock as they were at the scene of the crime. P1 and P8, it was argued properly made such identification. Equally, the prosecution made it clear that all accused persons even though they were not at the crime scene as 3rd and 4th, still, there is evidence of a common intention to commit the offences charged under section 12 of the Evidence Act which provides that;

"Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons referring to or in execution or furtherance of their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any person was a party to it"

The prosecution, in support of the point, cited the case of **Ismael Kisegerwa & another vs Uganda,** Criminal Appeal No. 6 of 1978, which had this to say in respect of common intention;

"...in order for the doctrine of common intention to be applicable, it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence"

Addressing the court on material contradictions in the names of the 2nd and 4th accused, as well as failure by P30 to dock identify the 1st accused, prevalent in the cautioned statements and evidence of P30, the prosecution

sought a cure in the case of **Evarist Kachembeho & Others v R** (1978) LRT 70, where the court held that;

> *"Human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story"*

Further, the court was referred to the famous decision in this aspect by the Court of Appeal, in the case of **Dickson Elia Nsamba Shapwata v R,** Criminal Appeal No. 92 of 2007 (unreported), where it was observed that;

> *"...invariably in all trials, normal contradictions and discrepancies occur in the testimonies of the witnesses due to normal errors of observation, or errors in memory due to the lapse of time or due to mental disposition such as shock and horror at the time of the occurrence of the incident...a material inconsistency or contradiction is that which is not normal and not expected of a normal person, and that courts have to determine the category to which a discrepancy, contradiction or inconsistency could be characterized"*

The court was further asked to hold that mistakes in dock identification or failure of a witness to identify the accused person in the dock, does not discredit the evidence of such a witness and that it becomes meaningful if the identification parade was conducted as it was the position in the case of

Hepa John Ibrahim v R, Criminal Appeal No. 105 of 2020 at page 21 citing with approval the case of **Musa Elias and 2 others v R,** Criminal Appeal No. 172 of 1993, which held;

> *"It is a well-established rule that dock identification of an accused person by a witness who is a stranger to the accused has value only where there has been an identification parade at which the witness successfully identified the accused before the witness was called to give evidence at the trial"*

The prosecution case, it was argued, is on several counts of terrorism and the capital offences of Murder and Attempted murder. Submitting on the cautioned statements and the bare allegation that they were warned on murder cases only, it was the view of the State that, murder cases and attempted murder were committed in the course of doing terrorist acts which is why the same are charged as alternative counts.

Commenting on the defence case, it was argued by the prosecution that the accused persons decided to tell lies. When cross-examined, it was stressed that they opted to only make short answers pretending they have forgotten or do not know anything. For the prosecution, when the accused persons tell lies may be rendering support and corroboration to the prosecution case, as

it was held in the case of **Felix Lucas Kisinyila v R,** Criminal Appeal No. 129 of 2002 at page 7. It was however added that in the case of **Mboje Mawe and 3 Others v R**, Criminal Appeal No. 86 of 2010, Court of Appeal of Tanzania, at Tabora (unreported) at Pages 22 & 24, the Court stated that;

> *"...although lies and evasions on the part of an accused do not in themselves prove the facts alleged against him, they may, if on material issues, be taken into account along with other matters and the evidence as a whole when considering his guilt..."*

It was vehemently argued that lies and inconsistency were in several aspects of the defence case and at the inquiry into the voluntariness of the cautioned statements. Taken as an instance, some of the accused persons did not object to the admission of their confession statements but turned against them when making their defence. This sort of U-turn was considered by the prosecution contrary to the doctrine of estoppel. The accused persons have no right to deny the said confessions at the stage of cross-examination or during the defence. This court was asked to seek assistance in the case of **Ndalahwa Shilanga and Another v R**, Criminal Appeal No. 247 of 2008 (Unreported) Court of Appeal, on Page 11, had this to say on denying confession during the defence stage;

"It is true that exhibit P6 was received in evidence without objection from the defence. We agree that the proper time to take objection to the admissibility of an alleged confession is when it is about to be received in evidence and not in cross-examination or during defence"

The prosecution submission further attacked the defence of *alibi* made by the 4th accused person during his defence that on 13th April 2014, was not at the crime scene as alleged, but was in Tabora, where he went to fetch honey in the direction of his father. It was the prosecution's submission that the defence should not be accorded any weight in terms of section 194(6) of CPA and the case of **Kubezya John v R, Criminal Appeal No. 488 of 2015**, Court of Appeal at page 25 had this to say on the defence of *alibi*, that;

"...a genuine alibi is of course expected to be revealed to the police investigating the case or to the prosecution before trial, only when it is so done can the police or the prosecution have the opportunity to verify the alibi. An alibi brought up at trial for the first time is more likely to be an afterthought..."

On failure to tender the remains of the bomb that exploded on 13th April 2014 at the Arusha Night Park bar, the prosecution was of the considered

opinion that since the same were rejected for technical reasons, still the evidence of P and P17, as well as the report by P17 which is exhibit PE-8, clearly proved the case and that the defence did not show how the prosecution case was prejudiced.

It was added, that the defence did not cross-examine the prosecution witnesses on this material issue. They are therefore estopped from doing so at some other stage. Failure to cross-examine a witness on certain matters, in the view of the prosecution, connotes the acceptance of the veracity of the testimony. It was submitted that in the landmark case of **Issa Hassan Uki v R, Criminal Appeal No. 129 of 2017**, the Court of Appeal of Tanzania sitting at Mwanza, had this to say;

> *"The appellant did not challenge the testimony of the witness. This connotes that he was comfortable with the contents of the testimony of the witness. Had he any query or doubt as to the veracity of PW1's testimony he would not have failed to cross-examine on the same. It is settled in this jurisdiction that failure to cross-examine a witness on a relevant matter ordinarily connotes acceptance of the veracity of the testimony"*

It was finally argued, that the prosecution has proved all ingredients of the offence of terrorism in that the acts should be done with the purpose of provoking a state of terror in the general public or a particular group of people.

The prosecution cited the case of **R v Seif Abdallah Chombo @ Baba Fatina,** Economic Case No. 4 of 2022, on page 5, where this court had this to say on the offence of terrorism;

> *"Terrorism is any criminal acts, against civilians committed with the intent to cause death or serious 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"*

Therefore, it was submitted, the motive and acts done by the accused persons fall within the 1st, 2nd and 3rd counts. According to the prosecution, the nature and context of acts done may reasonably be regarded as being intended to intimidate a section of the Public and hence cause fear to the general community. The prosecution sought support in the case of **Ghulam Hussain & 4 Others v The State**, Criminal Appeal No. 95 and 96 of 2019,

the Supreme Court of Pakistan at page 56 had this to say with regard to terrorism offences;

> *"It is no longer the fear or insecurity actually created or intended to be created or likely to be created which would determine whether the action qualifies to be termed as terrorism or not but it is now the intent and motivation behind the action which would be determinative of the issue irrespective of the fact whether any fear and insecurity was actually created or not..."*

The court was therefore asked to convict the accused persons as charged.

On the other hand, the joint defence submission raised the already determined objection that this court has no jurisdiction to try this case. The defence submitted that the offences of terrorism are scheduled offences under Paragraph 24 of the Economic and Organized Crimes Control Act, [Cap. 200 R.E 2022], therefore the accused persons ought to be charged before the Corruption and Economic Crimes Division of the High Court.

According to the defence, the amended information filed before this court is enclosed with the Consent of the Director of Public Prosecutions dated 19th April 2022 which contained the first 14 counts preferred under the Prevention of Terrorism Act, No. 21 of 2002, which are economic offences,

while the succeeding counts namely Murder and Attempted Murder are charged under the Penal Code [Cap 16 R.E 2022].

The second point raised by the defence hinges on the defects of the charge. It is the view of the defence that the 1st and the 2nd counts are duplex. To show how the two counts are bad for duplicity, it was submitted that in the 1st count, the accused persons are charged with participating in a terrorist meeting contrary to sections 4(1), (3)(i)(i) and 5(a) of the Prevention of Terrorism Act. It was the view of the defence counsel that two distinct counts are created, such acts aim to intimidate the public or a section of the public.

While on the 2nd count, which is the use of the property for the commission of a terrorist act charged under sections 4(1), and 15(a) of the Act, it was stated that the two provisions of the law create two distinct offences. This court, therefore, was asked to refer to the case of **DPP v Pirbaksh Ashraf and 10 others,** Criminal Appeal No. 345 of 2017, where the Court of Appeal had this to say on page 9;

> *"Having considered the submissions made by the respective learned counsel for both parties, we unhesitatingly agree with them that the charge sheet undoubtedly suffers from serious defects. For instance, the defect found in the 1st count was*

to combine section 47(a)(b) (i) (ii)(a) of the Wildlife Conservation Act while it is clearly seen that the offences under subsection (a) and (b) are two distinct offences. While subsection (a) and is referring to a person not being a holder of a license, on the other hand, subsection (b) makes reference to a person being the holder of the license. A charge is said to be duplex if for instance, two distinct offences are contained in the same count, or an actual offence is charged along with an attempt to commit the same offence"

The court was asked to dismiss the charge for being a duplex one. Further, dealing with the merits of the case, the defence, held the view that the case against the accused persons has not been proved beyond reasonable doubt as per section 3(2)(a) of the Evidence Act. To be clear, it was asserted that the prosecution allegation on the first count that there was a meeting attended by the accused persons at Magugu on 7th April 2014, the prosecution ought to procure evidence to prove so.

Accordingly, it stated that section 26 of the Act, defines a meeting to mean, a meeting of three or more persons, whether or not the public is intimidated.

I was also asked to refer to the case of **Wilfred Lwakatare and Another v R,** Misc. Criminal Application No. 14 of 2013, High Court of Tanzania, (Unreported). To prove the meeting was held, it was added, the prosecution ought to tender the minutes of the meeting and the agenda as well as a list of those who attended the meeting. It was further argued that even P10, who allegedly attended the meeting, told the court, he went late and found the meeting done but was asked to attend another meeting on some future date, which he did not attend.

According to the defence, there is no evidence to prove that any of the accused persons appeared at the crime scene. It was stated that since the bombing happened on 13th April 2014 at Arusha Night Park, at 7:30 pm, there ought to be evidence of identification of the culprits. The defence held the view that in the absence of direct and proper evidence on visual identification, it cannot be said that the accused persons were identified at the scene of the crime. It was added, the evidence in the circumstance was not watertight as respectively held in the cases of **Joseph Melkior Shirima @ Temba v R,** Criminal Appeal No. 261 of 2014, (CAT), citing with approval the case of **Waziri Amani v R** [1980] TLR 250 and in **Andrea Augustino @ Msigara and another v R,** Criminal Appeal No. 365 of 2018 CAT at Tanga (Unreported) at page 16 and 17, where it is settled that;

"Evidence of visual identification is of the weakest kind and most unreliable. As such, no court should act on such kind of evidence unless all possibility of mistaken identity are eliminated and the court is fully satisfied that is absolutely watertight."

In the premises, the defence went on submitting that the two prosecution witnesses who worked at the Arusha Night Park Bar, under cross-examination admitted did not see the 3rd and 4th accused persons detonate a bomb or that the bomb was from the bag that they were allegedly seen holding. The defence further stated that taking the amount of time that lapsed from the fateful date to the date they gave evidence, as well as taking into consideration that the intensity of light at the crime scene was not described, the attire of the same persons and the changes in their physical appearances that have taken place, especially with the 3rd accused who is lame due to amputation of the leg, it was not likely for the witnesses to have clearly identified them. The benefit of the doubt, it was argued should be given to the accused persons.

The court was called upon to be guided by the decision in the case of **Maulid Dotto @ Mau Mchina and 2 others v R,** Criminal Appeal No. 493 of 2019,

(CAT), Dar es Salaam (Unreported) at page 7 where the Court of Appeal had this to say;

> *"The time under which the two witnesses had the culprits under observation and the attire of the culprits were not fully elaborated by the two identifying witnesses. In that state of commission, it is doubtful if he could identify the culprit from the above. We say so because the culprits were complete strangers to both identifying witnesses and the extent of lighting in the room was not explained with certainty. It is from this premise that we find merit in this complaint and allow it.*

Submitting further on the weakness of the prosecution case, it was stated that the prosecution failed to call the owner or Manager or whoever is in charge of the said Arusha Night Park Bar @ Matako bar who would have proved that the same place was bombed. The arresting officers were not called who would have told this court the place the accused persons were arrested, they could as well tender detention register to know when they were placed under police custody.

According to the defence, there is as well no forensic evidence from the person who allegedly took pictures and samples or exhibits from the scene of the crime. No sketch map of the scene of the crime. The defence, therefore, held the view that the prosecution case did not prove the bombing at the Arusha Night Park bar. Further, it was said, there is no evidence as well to prove the charge of murder of Sudi Ally Ramadhani. The defence submission is that according to the information, allegedly, he died on 13th April 2014 which is contrary to exhibit PE-7, a report on a postmortem examination done on 15th May alleging the same died on 13th May 2014. The defence was of the view that the death of Sudi Ally Ramadhani was not proven.

Commenting on the cautioned statements of the accused persons, it was stated by the defence that they were all cautioned on the murder of a person not named or known, there was no date of death or statement of death stated therein, and that they were cautioned on the murder of a person who died a month after they were cautioned. The defence cited the 4th and 7th accused cautioned statements exhibits PE-10 and PE-13.

To support this proposition, the cases of **Mwita Kigumbe Mwita and Another v R,** Criminal Appeal No. 63 of 2015 and **Ibrahim Yusuph Calist**

@ Bonge and Three Others v R, Criminal Appeal No.204 of 2011, were referred, where it was held by the Court of Appeal that;

> *"There are several ways in which a court can determine whether or not what is contained in a statement is true. First, if the confession leads to the discovery of some other incriminating evidence. (See Peter Mfalamagoha v Republic, second; if the confession contains a detailed, elaborate relevant and thorough account of the crime in question, no other person would have known such details but the maker (See William Mwakatobe v Republic, Third, since it is part of the prosecution case, it must be coherent and consistent with the testimony of other prosecution witnesses, and evidence generally. (Shaban Daudi v Republic, - especially with regard to the central story (and not in every detail) and the chronology of events. And lastly, the facts narrated in the confession; must be plausible.* "

The learned defence counsel argued that the cautioned statements did not in all, show there was a common intention for the accused persons to commit the offences charged.

This assertion was supported by the case of **Ibrahim Yusuph Calist @ Bonge and Three Others v R** (supra) and that there is doubt in the

prosecution case which should be resolved in the favour of the accused persons as held in the case of **Michael Mgowole and Another v R,** Criminal Appeal No. 205 of 2017, and **Mereji Logori v R,** Criminal Appeal No. 273 of 2011.

Submitting further on the weakness of the prosecution case, the defence attacked the evidence of the Government Chemist Analyst and exhibit PE-8 which is a report. It was stated that the report was not original and no loss report to prove the original was lost, second that the same did not show how the analysed samples were taken from the crime scene to him, and that the remains stated in the report were not tendered in evidence. The defence took a view that the evidence did not corroborate what is alleged in the cautioned statements of the 4th accused, exhibit PE-10 and 2nd Accused PE-11. It was therefore stated that the chain of custody on the exhibits was broken which is contrary to the decision in the case of **Michael Gabriel v R** Criminal Appeal No. 240 of 2017, (CAT), Arusha (Unreported) on pages 10, 11, and 13.

Moreso, the defence submission was that there was poor work done in the identification parade and that it was in conflict with PGO 232, such as failure to sign it and stamp which calls for its authenticity, that it did not show how

the suspects were identified, that it is not known as to where exactly suspects stood in the said identification parade line, and it did not show when the said two suspects were arrested and how was their health conditions. It was added that it was important to establish that the 3rd accused was not beaten on his foot leading to having his leg amputated. Here, reference was sought in the Court of Appeal case of **Andrea Augustino @ Msigara and another v R** (supra). Another cited weakness in the prosecution case points out the evidence of the failure of P and P30 to identify the 1st accused. It was stated that failure to do proper dock identification is contrary to the decision in the cases of **Mwita Kigumbe Mwita and another v R** (supra) and **Zakaria Jackson Magayo v R** Criminal Appeal No. 411 of 2018, (CAT), Dar es Salaam, (Unreported) at page 17

Lastly, the defence submitted that there was no proof of a joint meeting by the accused persons at Magugu on 7th April 2014. As well, the prosecution case did not show, the accused persons were not tortured in order to obtain cautioned statements.

To cite as an example is the exhibit D2 by the 2nd accused person which shows how he was tortured. It stated further that all other accused persons went through a similar fate except that they did not have the PF-3s from the

police. Apart from asking this court to acquit all accused persons, it was argued that there was no single evidence against the 1st, 5th, 6th, 7th and 9th accused persons who were shamelessly charged.

Having gone through the rival submissions of the parties, the defence raised an issue about the jurisdiction of this court. When it was raised for the first time, before the hearing of this case started, it was dismissed.

Given the fact that it has resurfaced, I have to say, in terms of the case of **Jumanne Leonard Nagana vs R,** Criminal Appeal No.515 of 2019, the jurisdiction of any court is something basic to be decided before plunging into any other matter, at page 13 of the judgement it was held;

> *"...the question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial. It would be risky to proceed to hear the case on the assumption that this court has jurisdiction..."*

The objection is pegged in the terms of section 57 of the Economic and Organised Crimes Control Act [Cap 200, R.E 2019] (EOCCA), which states that offences under the first schedule to the Act are Economic offences with effect from the 25th day of September 1984 and that the first 14 counts

under section 4(1)(3) (I) (i), section 5(a) and 15(a) of the Prevention of Terrorism Act, are terrorism offences and therefore scheduled offences. It is from this point that the same ought to be prosecuted in the Corruption and Economic Crimes Division of the High Court.

As the law currently stands, terrorism offences like the ones under trial are indeed economic offences and therefore not triable by this court. But facts of this case have it that the offences alleged were committed on 7th April 2014. Admittedly, there was no offence of terrorism in our laws until enacted into the law by Act No. 21 of 2002, which came into force on 14th December 2002. This means the original text of the EOCCA did not have such a crime. Section 34(1) of the Act provided that the offences under it were triable by the High Court upon the consent of the Director of Public Prosecutions. Further, it is certainly clear that until 8th July 2016, terrorism offences were not scheduled offences under the EOCCA and so were not economic offences.

It was by Miscellaneous Amendment Act No. 3 of 2016 under section 16 of the Act which invited the same into economic offences. It goes without saying, the accused persons were charged in court on 29th May 2014, long before terrorism offences were listed as scheduled offences in the EOCCA.

It can be argued with certainty that, the law did not in 1984 envisage terrorist acts, to be economic offences as the defence invites this court to believe. The doctrine of retrospective operation of the law, demands that when the law affects substantive justice, it cannot operate retrospectively. In the case of **Simon Nchagwa vs Majaliwa Bande**, Civil Appeal No. 126 of 2008 at page 8, the Court of Appeal held;

> *"... the question of whether legislation operates retrospectively or not was discussed in the case of **Patel v Ben Bros Motors Tanganyika Ltd** Civil Appeal No. 5 of 1968. In the said case Sir Charles Newbold P, had an occasion to discuss the issue of retrospective law. He cited with approval the case of **Municipal of Mombasa v Nyali Limited** 1963 E.A. 371 at page 373 where he said:- "Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation the courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights, it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is good reason to the contrary. But in the last resort, it is*

the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must have in order to ascertain that intention..."

Therefore, terrorism offences were not economic before the amendment in 2016. Based on the rules of construction, I see nothing in Miscellaneous Amendment Act No. 3 of 2016 in particular section 16, which suggests that the legislature intended, it should operate retrospectively. As I did before, I hold that the objection by the defence is baseless and deserves a dismissal.

Next is the duplicity of the charge as raised by the defence on the 1st and 2nd counts. The two counts of terrorism are charged under section 4(1)(3)(I)(i), 5(a) and section 15(a) of the Act. According to the defence, different offences are created in the same sections. It follows therefore that a charge is bad for duplicity if, two offences are preferred in the same count. The law, therefore, sets out that, every charge must be identified separately. Conversely, its particulars must be clearly provided. It is basic therefore that each count should charge one offence unless otherwise permitted by law. Where a count charges two or more offences simultaneously, it is regarded as a duplex one.

The principle was well stated in an English case of **Director of Public Prosecutions v Merriman** (1972) 56 Cr App R 766; [1973] AC 584 where it was stated that;

> *"...make it clear that the rule against duplicity, that only one offence should be charged in any one count, information or summons, has always been applied in a practical rather than a strictly analytical way for the purpose of determining what constituted one offence. The question of whether someone has committed one offence or more than one offence is best answered by applying common sense in deciding what is fair in the circumstances. It will often be legitimate to bring a single charge in respect of what may be called one activity, even though it may involve more than one act..."*

It is therefore settled that when one count is constituted by more than one offence, or, where an actual offence is charged along with an attempt to commit the main offence, the charge is bad for duplicity as held by the Court of Appeal in the case **Director of Public Prosecutions v Morgan Mariki and Another**, Criminal Appeal No.133 of 2013). In the circumstances, the practice has always been, if a charge is duplex and therefore defective, in the opinion of the court, it may be dealt with in one of the following ways:

one, the prosecution is expected to apply to amend the charge if it so happens before the close of the case for the prosecution, under section 276(2) of the CPA which for ease of reference, it provides that;

> *Where before a trial upon information or at any stage of the trial, it appears to the court that the information is defective, the court shall make an order for the amendment of the information as it thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendment cannot be made without injustice, and all such amendments shall be made upon such terms as the court shall seem just*

Second, if it is at some later stage or the court feels an amendment cannot be done without occasioning failure of justice on the part of the accused persons, as such, the charge may be dismissed.

True to this position, is the decision of the Court of Appeal in the case of **DPP v Pirbaksh Ashraf and 10 others,** where the charge in respect of count 1 was bad for duplicity after combining section 47(a)(b)(i)(ii)(a) of the Wildlife Conservation Act when it was clearly seen that the offences under subsection (a) and (b) are two distinct offences, while sub-section (a) is

referring to a person not being a holder of a license, on the other hand, sub-section (b) made reference to a person being a holder of a license.

In the instant case, for a better understanding of what constitutes the 1st count under section 4(1)(3) (I) (i), 5(a) of the Act, it clearly states as hereunder;

> *4-(1) No person in the United Republic and no citizen of Tanzania outside the United Republic shall commit a terrorist act and a person who does an act constituting terrorism, commits an offence.*
>
> *2. NA*
>
> *(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.*

Breaking it down into simple terms, the section has the following; **first,** whoever commits an act that constitutes terrorism whether done in Tanzania or elsewhere commits an offence of terrorism, **second,** it constitutes

terrorism if it is an act or a threat, **third**, the act is prejudicial to national security or public safety, and **four,** the act is intended to intimidate a public or as section of the public. It is clear that the section does not, in my view, create distinct offences but it defines acts which if committed in unison or separately constitute the offence of terrorism. That is why, section 5 adds that acts of terrorism include those listed under sections 5-10, among them participating in a meeting concerning terrorism.

Therefore section 5(a) clearly states that one commits an offence of Terrorism, if he arranges, manages or assists in arranging or managing or participates in a meeting or an act knowing that it is concerned with an act of terrorism. The section simply refers to acts that constitute terrorism. It has nothing to do with creating offences.

After all, the defence counsel did not name which distinct offences are created. It may be added, in the marginal note, which aids interpretation of the provisions of the law, provides section 4 as a definitional section, while sections 5 to 10 provide for other acts which constitute terrorism and offences created therefrom.

As to the 2nd count, it can be discerned from the foregoing that it is also charged under section 4(1)(3) (I) (i), which defines what acts that constitute

terrorism, while section 15(a) creates an offence of use of the property to commit acts of terrorism mentioned in section 4 and as well provides for the penalty if one is found guilty of the offence under use of the property.

One last thing to comment on here is that the law provides that a charge which is bad for duplicity may be incurably defective. The test is if, the accused may not be in the position to put up a focused defence because of having two counts in the same charge.

The defence has failed to show which distinct offences were lumped together in the same charge in both the 1st and 2nd counts. Therefore, the objection to the duplicity of the charge is baseless and therefore dismissed.

Having dismissed two preliminary points, it is opportune to venture into the merits of the case by albeit briefly looking at the evidence. According to the prosecution, it all started on 13th April 2014 at about 7.30 pm. P1 and P3 were waiters at the Arusha Night Park Bar @Matako Bar. When attending customers, two people appeared as normal customers for service. One of them was holding a small bag. The two men went all the way to a table that had only one chair. The black bag was placed on a chair.

This was outside in a corridor where many people were busy watching football matches. They then left through the rear exit which is in the main

building. According to their evidence, this incident took a few minutes before the explosion. The two were seriously injured as the result of the explosion and were taken to hospital for treatment. According to P29, a medical doctor, P1 sustained injuries on the right leg and thighs, she was treated at Mount Meru Regional Hospital in terms of exhibit PE-3 which is a PF3. P3 was attended by P33 at Arusha Lutheran Medical Center @Serian.

The patient, according to him and exhibit PE-1 which is a PF3, sustained injuries on the right side of the leg. According to their evidence, they were treated and discharged after at least one week. It is the evidence of P1 and P3 that on 20th May 2014, were called at the police station. They attended the identification parade. It was conducted by P13, a police officer, and attended among others P11. It is exhibit, PE-5 where witnesses P1 and P3 identified the two suspects, 3rd and 4th accused persons among 14 attendants of the parade.

In the conduct of the identification parade, P13 a police officer was in charge. He said the parade was conducted on 20th May 2014 at the police central station at about 10.00 am. According to his evidence, the suspects were two who were identified by two female identifiers.

He said the two suspects are namely Abdallah Maginga and Rajab Piri Ahmed. (3rd and 4th accused persons). They were paraded in between 6th and 7th persons in a line of 12 people making the number of the persons attending the parade 14. The two, according to his evidence, were identified by being touched on their shoulders. Upon, finishing, it was the evidence of P13 that he filled and filed PF-186 which was admitted as PE- 5.

As to how the 3rd and 4th accused persons were arrested, it is gathered from the evidence of P and P10. Witness P10 was a resident of Himiti village of the Manyara Region. He said, he knew and was in contact with Shaban Abdallah Wawa- the 8th accused person who wanted a gun. He could not get one for him but asked for the price of the same. He further told the court that, the same person called him at the meeting at Magugu on 7th April 2014, it is unfortunate to him that he arrived late and found the meeting postponed to 1st May 2014. He said, the meeting, he was told was for *Jihad*. On 18th May 2014, he was asked by Shaban Wawa to seek permission for them to sleep in the Mosque at Himiti, which he successfully did. They slept at the Mosque that night. The following day early in the dawn, on 19th May 2014, he was asked to locate them by the police officers who came to his home with Ally Hamis Kidaanya.

He led them to the Mosque and they were arrested. They were Rajabu Piri- 4th accused, Shaban Abdallah Wawa- the 8th accused and Ally Hamis Jumanne -the 6th accused. They were brought to Arusha at the central police.

Perhaps, the most crucial evidence for the prosecution was from P. Witness P, the police officer who was in charge of the investigation of high-profile cases in Arusha at that time.

He arrived at the crime scene immediately after the bombing. He found the crime scene in a state of mayhem. There were many people injured, blood spread all over. He found bent nails of about 5 to 6 inches and wires.

After witnessing that situation, he assigned duties to the investigators who were at the crime scene. Forensic police were told to surround the crime scene with yellow tape. They were also asked to collect all exhibits. He further, directed police officers to record the statements of the people who witnessed the incident. Others were directed to go to collect PF-3s and take them to the hospital where the victims were taken to. The information at the crime scene, according to him, was that, over 10 people were injured and taken to different hospitals in Arusha. He said they opened up for the people who had information and were willing to supply the same.

On the next morning, he got informed about a locally made bomb at Washington Bar close to the *Daladala* bus stand. He went to the place and found; it was indeed a homemade bomb in a bottle of Jack Daniel. P henceforth called experts from the JWTZ at Monduli who were left to manage the same. This event was as well testified by P8, who witnessed the same thing the previous night with Washington bar attendants before he informed the police about it.

P, testified further that on 17th May 2014 at about 6:30 am at Magugu in Babati District, one person was arrested called Ally Hamis Kidaanya, 2nd accused, who was involved in both incidents, in Arusha Night Park Bar and Washington Bar. After his arrest, he added, he admitted to having been doing such crimes and mentioned his fellows. These included Rajab Piri Ahmed-4th accused, Shaban Abdallah Wawa- 8th accused, and Ally Hamis Jumanne- 6th accused, as well as the corporal of the prisons who was at Mang'ola, and who was training them on how to make explosives. He said a follow-up was made.

On 19th May at about 1.00 am, they arrived at Himiti and met the person called Ally Hamis whom he was in contact, he led them to the Mosque and managed to arrest Rajab Piri Ahemed, Shaban Abdallah Wawa, and Ally

Hamisi Jumanne. (4th, 8th and 6th accused persons receptively). He brought them to Arusha and handed them to the RCO. He said he was in the company of other police officers including P16.

The evidence of P16 in material terms supports that of P because, they were together when the 4th, 6th and 8th accused persons were arrested and brought to Arusha. Moreso, he recorded the cautioned statement of Shaban Abdallah Wawa, who admitted to having been involved in the bombing that killed one person and left several others injured. The cautioned statement was admitted without objection and marked PE-12.

P16 also recorded the caution statement of Yassin Hashim Sanga- the 7th accused. He said he recorded it on 13th May 2014, when he was brought from Kahama where he was arrested on 12th May 2014. In the said caution statement, he told the court that, he admitted involvement in the Arusha night Park bombing. He added that the statement was freely recorded. It was tendered in evidence and admitted as PE-13.

P23 is another police officer who recorded the caution statement of Rajab Piri Ahmed-4th accused on 19th May 2014 from 11.30 am to 2.30 pm. According to him, the accused admitted the commission of the offence and

it was tendered and admitted as PE-10. According to him, the statement was recorded at the central police and then filed.

P20 is also an investigator who worked at the central police in Arusha in 2014. He testified that; he recorded the cautioned statement of Ally Hamis Jumanne-the 6th accused. He said it was done on 19th May 2014 at the central police in Arusha.

According to his evidence, it was recorded from 10:30 to 11:30 am. Without objection, the same was tendered and admitted as PE-14.

P21 was the other witness for the prosecution. He too, is a police officer and worked with the police at Arusha during the Arusha Night Park bombing. He as well recorded the statement of Hassan Zuberi the 5th accused. He testified; it was recorded on 13th May 2014 at about 9:00 to 10:45 am. It was admitted without objection as well and marked PE-15.

The cautioned statement of Abdallah Maginga Wambura-the 3rd accused was recorded by P22 on 15th May 2014 at the central police station according to P22. After an inquiry into its voluntariness, it was admitted as PE-6. The evidence of P22 was to the effect that the 3rd accused freely admitted commission of the offences he was warned of committing.

As to P30, a police officer, is the one who arrested Abdallah Athuman Labia- the 1st accused. He alleged to have arrested him at Karatu on 25th April 2014 and brought him to Arusha. According to his evidence, he was in possession of different sim cards for Airtel, Vodacom and Safaricom.

It is the 3rd accused whose cautioned statement was recorded by P39 on the day he was arrested. P39 testified that in his evidence.

The statement on caution was recorded on 25th April 2014 at the central police station. There was no objection to the caution statement when tendered. It was therefore admitted as PE-9. P39 also recorded the caution statement of Ally Hamis Kidaanya, the 2nd accused, whose statement was admitted as PE-11 following the inquiry into its voluntariness. It was his evidence that he recorded the statement on 17th May 2017. He said the accused admitted the offence he was warned of.

P17 is a government Chemist Analyst from the office of the Chief Government Chemist Laboratory Authority. It was his evidence that he got exhibits from the Forensic Commission and they were from the RCO's office- Arusha. According to him, they were nails, a detonator, safety delay fuse and remains of the black bag each exhibit was in an envelope. Upon examining the same, he found nails and remains of the bag had traces of

nitrates which is a chemical used to make explosives. He tendered a report as exhibit PE-8.

Apart from P1 and P3, other victims of the bombing at Arusha Night Park are P4, P7, P25 and P34. They also testified and described the nature of their injuries. They were also attended at Mount Meru Regional Hospital. Their PF-3s were tendered in court.

P4 was attended by P28 who tendered PE-2, and P25 was attended by P29 who tendered the PF3 as PE-3. Whereas P7 was attended by P38 and the PF3 tendered in that respect is PE-4. Despite testifying, P34 had no medical proof of her injuries that was tendered.

In terms of the defence case, which more details will be regressed to later, surfaces to say at this juncture, that the accused persons testified and did not call witnesses. In all, they denied the commission of the offences charged. The basic and common defence in all was to deny generally and in particular that the whole prosecution case was fake and actuated by torture to obtain the confessions.

The point made by the defence is that there were no confessions made and those that were made did not have any grain of truth as they were a result of torture done at Kisongo police station also referred to as Guantanamo. In

all the accused persons asked this court to dismiss the charges and acquit them.

After a brief narrative of what constitutes evidence presented in this case, I think I have to clearly state that at law, cases may be proved by direct evidence or circumstantial evidence, or both.

Direct evidence and application of which is clearly stated under sections 61 and 62 of the Evidence Act, which states as hereunder;

61. All facts, except the contents of documents, may be proved by oral evidence. Oral evidence must be direct

62.-(1) Oral evidence must, in all cases whatever, be direct;

that is to say-

(a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

(b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

(c) if it refers to a fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

(d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion or, as the case may be, who holds it on those grounds.

Direct evidence, therefore, is as it was held in the case of **Commonwealth VS Webster** 1850 Vol. 50 MAS 255 where Shaw CJ stated:

"The advantage of positive evidence is that it is direct testimony of a witness of a fact to be proved who if speaks the truth so it done. The only question is whether he is entitled to belief."

As far as I know, there is no statutory definition of circumstantial evidence in the Evidence Act. But circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for a reasonable inference of the occurrence of the fact in issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved as in this case that it was the accused persons who committed the offence or offences charged. In the case of **John Magula Ndongo v R**, Criminal Appeal No. 18 of 2004, the Court of Appeal held on page 6 that;

"In a case depending entirely on circumstantial evidence before an accused person can be convicted the court must find that the

inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt. And it is necessary before drawing the inference of guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. Indeed, this principle is well enunciated in the case of ***Ilanda Kisongo v. R*** *(1960) EA 780 at page 782."*

It follows therefore that for circumstantial evidence to hold, it must conform to three tests namely;

(i) *The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established.*

(ii) *those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and*

(iii) *the circumstances taken cumulatively, should form a chain so, complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and no one else*

The three tests above were developed by the Court of Appeal in the case of **Ndalahwa Shilanga and Another vs R,** (supra) on page 8. In this case,

there is no direct evidence. It is so because the accused persons are charged with 26 counts. It is the 9th accused only charged on the first 14 counts. The prosecution evidence is largely based on cautioned statements. This is because the 1st to the 8th accused persons are alleged to have confessed before police officers to have committed the offences charged. It is therefore true as submitted by the prosecution that the best evidence comes from the victim as in the case **Ally Mohamed Mkupa v R (supra)** where it was held that;

> *"...in any criminal trial, the very best of witnesses is an accused person who confesses freely and voluntarily to have committed the offence..."*

It was submitted by the prosecution that from the evidence of 23 paraded witnesses, P1, P3, P10 and P8 are independent witnesses and have corroborated the caution statements of the accused persons. It was submitted that whereas P1 and P3 allegedly identified the 3rd and 4th accused persons at the scene of the crime and therefore responsible for the Arusha Night Park bombing. P10 said allegedly witnessed, 2nd, 4th, 6th and 8th accused persons at Magugu where a meeting planning terrorism act was held on 7th April 2014. P8 on his part, said he saw a bomb at Washington

Bar on 13th April 2013, which in view of the evidence of P, it was a similar bomb, detonated at the Arusha Night Park bar.

The evidence of the above witnesses, in the view of the prosecution, is said to corroborate the caution statements, since they are from independent witnesses.

The prosecution evidence has it that all statements were recorded under section 57 of the Evidence Act and therefore in line with the decision in the case of **Yustas Katoma v R,** Criminal Appeal, No. 242 of 2006, Court of Appeal, where it was held that;

> *"...it is elementary that section 57 of the CPA as a whole, sets out the procedure to be followed by police officers when recording an interview with a person for the purpose of ascertaining whether the person committed the offence..."*

For the above reasons and since the prosecution efforted to prove the case based largely on the caution statements, this court finds it important in evaluating the evidence, to determine the following questions. **First,** whether the accused persons made caution statements to the police. **Second,** whether in recording the caution statements the police officers complied with provisions of the Criminal Procedure Act.

Third, whether the cautioned statements amounted to confessions within the meaning of the law. **Fourth,** whether the confessions were corroborated.

First: *whether the accused persons made caution statements to the police.* It is in the record that three cautioned statements were admitted after trial within trial namely PE-6 of the 3rd accused, Abdallah Maginga Wambura, PE-10 of the 4th accused, Rajab Piri Ahmed and PE-11, 2nd accused Ali Hamis Kidaanya, whereas, that of the 1st, 5th,6th 7th and 8th exhibits PE-9, PE-15, PE-14, PE-13 and PE-12 respectively were not objected to admission, but strongly impeached by the lawyers during cross-examination and during the defence testimony by the accused persons. In the view of the prosecution, it was of essence that since there was no objections to the admissions of five caution statements - PE-9, PE-15, PE-14, PE-13 and PE-12, in the strength of the decision of the Court of Appeal in the case of **Ndalahwa Shilanga and Another vs R, (**supra). The defence is thwarted from dealing with the same at some other stage. Actually, the court held:

> *"We agree that the proper time to take objection to the admissibility of an alleged confession is when it is about to be received in evidence and not in cross-examination or during the defence"*

From the decision, I agree with the prosecution that, by not retracting or repudiating when confessional statements exhibit PE-9, PE-15, PE-14, PE-13 and PE-12 were tendered, the accused persons were admitting that the same were indeed made. But even when PE-6, PE-10 and PE-11, were tendered, the accused persons said, the same were made and obtained at Kisongo police station through torture.

But with respect to the prosecution, I do not agree with the proposition that when a caution statement is admitted without retraction or repudiation, the Court of Appeal in the case of **Ndalahwa Shilianga** (supra) held that such statement should be taken as true. The Court was categorical that objections must be taken when it is to be tendered in evidence.

I think, the reason for so emphasizing is that there are processes to be followed in order to test its admissibility depending on the nature of the objection such as conduct a trial within a trial or if there are legal issues to be determined, before it is admitted. I think, I have to add, whether objected or not, if a caution statement is admitted, it is the duty of the court to examine its scrupulousness and asses its value. This is now settled; the court is not deprived of the right to review the evidence and make its own findings on it. Treatment of the statement in such circumstances is governed

by rules of practice, which include whether or not there is corroborative evidence. Faced with a similar situation, the Court of Appeal in **Amiri Ramadhani v R**, Criminal Appeal No. 228 of 2005, had this to comment;

> *"In this case, the appellant's caution statement was admitted in evidence without objection. However, the appellant having retracted it when giving his evidence the trial court still had the duty to satisfy itself from the circumstances in which the confession was made that it was voluntary. We think that the statement was voluntary because there was nothing in all the evidence to suggest that it was obtained through undue influence. But having been retracted, the procedure is to look for corroboration."*

Looking in totality of the evidence of P, P13, P16, P20, P21, P22, P23, and P30 on the one hand, and on the defence of all accused persons except the 9th accused, on the other hand, I am left with no doubt that the accused persons made the cautioned statements. It is enough therefore to answer the first question that it is true, the accused persons made confessions to the police officers.

Second, *whether in recording the caution statements the police officers complied with provisions of the Criminal Procedure Act.* The caution statements may be recorded under section 57 as in this case or 58 of the CPA. There is a slight difference between the two provisions. Under section 58 the same is recorded in the form of a question and answer, which I think is not common, while under section 57 it may be in response to questions asked, the accused must be left to narrate the story. It is vivid in the case of **Ramadhan Salum v R,** Criminal Appeal No. 5 of 2004.

> *"Caution statements, therefore, are not made exclusively under section 58 and Exhibit P5 in this case is not any less a caution statement merely because it was taken under section 57 and not section 58. The circumstances in which the two kinds of caution statements are taken are different. The one taken under section 57 may be as a result either of answers to questions asked by the police investigating officer or partly as answers to questions asked and partly volunteered statements. The statement under section 58 is a result of a wholly volunteered and unsolicited statement by the suspect"*

The caution statements in this case, were all made under section 57 as the prosecution witnesses testified. This means the accused persons did not

volunteer to make them. If they were unsolicited, they could have been made under section 58. There is no evidence tending to suggest that provisions of the same were not followed. I have examined the caution statements and I have found some errors for instance PE-6 for the 3rd accused, Abdallah Maginga Wambura is not numbered on the 1st page and because it is made in a prescribed form there are blank spaces left unfilled. PE-9 is for 1st accused, Abdallah Athumani Labia @Brother Mohamed. This seems to have no reference file number and has left some blank spaces. Others like that of Ally Kidaaya PE-11 have misspelt names and PE-10 for Rajab Piri Ahmed, seems to have been signed on different dates. In all, the same may be taken to have contravened section 57(2)(a) of the CPA. But such irregularities may not be taken to invalidate the same. In **Yustas Katoma v R,** (supra) it was found that;

> *"We do not think that failure by the recording police officer to comply with any of the requirement (a) to (f) under section 57 (1) of the CPA necessarily rendered the statement invalid simply because the word "shall" is used under the provision of section 57 (1) (e) of the CPA as urged"*

What has been observed in the caution statements leads me to one conclusion that they were not recorded invariably in contravention of the recording procedures under the CPA or Police General orders (PGO) No. 236, to have rendered them inadmissible in evidence.

Third, *whether the cautioned statements amounted to confessions within the meaning of the law.* This court in the case of **Samwel Nyalada v R,** Cr. Appeal **No. 121 of 2013, at Tabora,** stated that;

> *"... cautioned statement must be voluntary, disclosing all the ingredients of the offence(s) charged in terms of type, material time and date"*

Case law notwithstanding, the Law of Evidence Act has provided a definition of what constitutes a confession. Section 3 of the Act, defines a confession as –

> *(a) words or conduct, or a combination of both words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person who said the words or did the act or acts constituting the conduct has committed an offence;*

(b) a statement which admits in terms of either an offence or substantially that the person making the statement has committed an offence;

(c) a statement containing an admission of all the ingredients of the offence with which its maker is charged; or

(d) a statement containing affirmative declarations in which incriminating facts are admitted from which, when taken alone or in conjunction with the other facts proved, an inference may reasonably be drawn that the person making the statement has committed an offence;

It is perceptive from the definition that, whether it is by words or conduct or both, in order to be taken meaningfully, a confession must be proved against the maker.

To start with, although Yassin Hashim Sanga, the accused is alleged to have made a confession, in PE-13, it does not show he admitted any of the charged offences. In his caution statement, he was warned of Murder contrary to section 196 of the Penal Code which occurred on 13th May 2014 at 8.00 am. In the statement, he did not admit to having been involved in a meeting that was allegedly held on 7th April

2014 at Magugu. Neither did he admit to having known the existence of the meeting. There is no mention as well about the bombing incidence of Arusha Night Park Bar on 13th April 2014. Testing, with the provisions of the law in relation to confessions as shown above, I doubt whether PE-13 has traces of a confession statement within the meaning of the law. It can be safely held, PE-13 (for Yassin Hashim Sanga) is not a caution statement within the meaning of the law.

Other cautioned statements were recorded in the same way. All accused persons were warned as the law requires on the offence of murder but none of them admitted to have committed any event in relation to a murder case or even its attempt as charged in alternative counts 15 to 26. But other offences charged are participating in the terrorism meeting which has been largely confessed in the rest of the statements, using property for commission of a terrorist act, and commission of terrorist Act have not been referred into their confessional statements. One may hold without any fear of contradiction that the statements of 1st, 2nd 3rd, 4th 5th 6th and 8th which are PE-9, 11, 6, 10,15,14, and 12 respectively amounted to confessional statements.

Last: *whether there is corroboration*. But why corroboration? The need for corroboration in a retracted confession need not be overemphasized. In **Ramadhan Salum v R**, (supra) it was clearly stated that a caution statement having been retracted, the procedure is to look for corroboration. All statements in this case as I intimated before, have been retracted or repudiated in some material particulars. It was, however, restated in the case of **Ali Salehe Msutu vs R**, [1980] TLR 1, that;

> *"A repudiated confession, though as a matter of law may support a conviction, generally requires as a matter of prudence corroboration as is normally the case where the confession is retracted"*

Based on the above authorities, corroboration must be from the evidence present in the record in totality. It may be circumstantial from the words or conduct of the accused person. The nature of corroborative evidence must come from independent witnesses, whose evidence has to be measured in comparison to all other evidence and in the circumstances of the case. This was the position

in the case of **Tuwamoi vs Uganda** [1967] E.A 84. where it was stated as follows;

> *"...the court will only act on the confession statement if corroborated in material particulars by independent evidence..."*

Further, the court held that;

> *"But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all material points and surrounding circumstances that the confession cannot but be true..."*

From this decision, it is plain that for corroboration to be meaningful so that it be acted upon, **one**, it must come from independent evidence and definitely independent evidence may come from an independent witness. **Second**, if no need for such corroboration, there must be an assurance to the court that based on the circumstances of the case the confession tells nothing but the truth. Perhaps most importantly, the court must be fully satisfied with such evidence.

Let me start with the first count. Section 4(1)(3) (I) (i) and section 5(a) of the Act, create an offence of participating in a meeting that is

concerned with terrorism, where it clearly states that one commits an offence of terrorist if he arranges, manages or assists in arranging or managing or participates in a meeting or an act knowing that it is concerned with an act of terrorism. The prosecution has testified by P10, a resident of Himiti that on 7th April 2014, he was invited to attend a meeting by the accused persons. Upon arriving, he was told that the meeting was postponed to 1st May 2014. According to him, the same was attended by the 2nd, 4th 6th and 8th persons. He was told to attend the next meeting. He was told it is about *Jihad*. It is therefore apparent that there is no direct evidence. It is P10 who according to the record is the independent witness who allegedly witnessed. But it is clear from his evidence that he found the meeting finished.

He could not know exactly what was the issues but was simply told it was about the *Jihad*. In the absence of his evidence, what remains are the caution statements by the accused persons which I think are not independent of each other. I, therefore, find no corroboration in the evidence constituting the first count.

On the second count, the accused persons are alleged to have used the property for the commission of a terrorist act contrary to section 4(1)(3) (I)

(i) and section 15(a) of the Act. According to section 15(a) of the Act, a person who uses the property, directly or indirectly, in whole or in part, for the purpose of committing or facilitating the commission of a terrorist act, commits an offence. But section 3 of the Act defines property to include any property and any asset of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and deeds and instruments evidencing title to, interest in, such property or asset and includes bank account.

It was factually stated that the accused persons are alleged to have used a homemade bomb to blast Arusha Night Park Bar on 13th April 2014. In this case, therefore, the property allegedly used to commit terrorism is a homemade bomb.

The prosecution, I think, misconceived the term property as defined by the law. I think the prosecution ought to procure some evidence on the properties that the accused persons were jointly or severally owning in furtherance of the terrorist acts. For instance, money, bank accounts used to transfer money used to create a bomb that exploded at Arusha Night Park Bar on 13th April 2014. Above all, there is no confession among them which admitted use of such property to commit the offence charged. This does

not even need corroboration, it should be simply held there is no evidence at all, in respect of the 2nd count.

Next is the 3rd to the 14th count, where all accused persons are charged with committing a terrorist act, contrary to section 4(1)(3) (I) (i) of the Act, where by using a homemade bomb, blew up, Matako bar on 13th April 2014, as the result Sudi Ally Ramadhan died and several other sustained serious bodily injuries. The injured persons included Joyce William Patrice, Loyce John, Suzan Jackob, Anterus Vicent, Nathan Charles, Stephen Cosmas, Peter James Bukerebe, Oberd Mbasha, Zakaria Mmassy, Everast Richard and Mariam Juvenary Hans.

The prosecution case straightly calls 3rd and 4th accused persons to have not only participated in the terrorist meeting but also to have detonated a bomb on 13th April 2014 at about 7:30 pm. Apart from their cautioned statements exhibits PE-6 and PE10 respectively, where there is a narrative on what happened. The evidence to corroborate their statements is from P1 and P3, who were no doubt at the scene of the crime on that fateful night.

The two bar attendants told the court that in the normal cause of doing things, when customers were watching football matches two adult men came as normal customers. They put the black bag that they had on the chair.

They then moved leaving their bag behind. It was their evidence that this event lasted for a few minutes before the blast occurred followed by a heavy smoke. They further told this court that they recorded their statements on the same day. When cross-examined, P3 said, was not able to say who between the two was holding a bag. It was stated that the time spent from when they got to the premises and left was in less than one minute. According to P3, the statement was recorded on 14th April 2014, and on 20th May 2014. The description of how the two looked in P3's evidence was given after the parade. It was not stated before on the day of the incident when the statement was first recorded. After giving the evidence in court, P3 did not do dock identification. P1 on this point, when cross-examined said the two people were seen entering but did not see them leave the premises. Joining hands with P3, the time spent was just a few seconds, less than one minute and the blast occurred.

First, from their evidence, it can be collected that the 3rd and 4th accused persons were strangers to them. **Second**, they were seen at the crime scene for not more than one minute. **Third,** they did not describe how they looked on the day they were first interviewed by the police on 14th April 2014. Authorities in this part are not in short supply. In the case of **Issa Ngara**

@Shuka v R, Criminal Appeal No. 37 of 2005, the Court of Appeal, insisted on the need to have a clear identification of offenders at the crime scene. It was held;

> *"... as we occasionally held, even when the witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made..."*

Mistaken identity, it may be argued, is likely to occur, and I am not saying, it happens in every situation. The court, therefore, has the duty to scrutinize the evidence and rule out the possibility of making mistakes in the identification of a suspect. As strange as they were, and the time taken from the time, the two got into the premises and then left leaves much doubt proper identification. Further, in the case of **Maulid Dotto @ Mau Mchina and 2 others (**supra)

> *"The time under which the two witnesses had the culprits under observation ... were not fully elaborated by the two identifying witnesses. In that state of commission, it is doubtful if he could identify the culprit from the above. We say so because the culprits were complete strangers to both identifying witnesses... It is*

from this premise that we find merit in this complaint and allow it."

Apart from the time spent observing the strange people to be less than a minute, they did not also describe their physical appearances to the police officers a day after the incident, when the wounds and memories of the incidents were still fresh in their minds? On 14th April they recorded statements at the police station, but did not describe how the suspects looked like. They did not do so, even before the parade. On 20th May, 2014, it is when the identification parade was conducted according to the witnesses, P1, P2, P11 and P13. How did the police manage to single out the two accused persons among many others who were arrested for identification at the parade in the absence of the description from the two witnesses who had alleged saw them at the crime scene? This lands me to the decision in the case of **Joseph Melkior Shirima @ Temba v R (supra)** on page 9, where the Court insisted on the need to name the suspect at the earliest time possible as an assurance of veracity.

"...While we appreciate, as was underscored by this Court in, among others, the cases of Kulwa Makwajape & 2 others v. Republic ... that

the fact that a witness names a suspect at the earliest opportunity is an assurance of his veracity..."

I have no doubt, based on the above findings, that the evidence of P1 and P3 is not free from doubt.

Yet another piece of evidence is the identification parade. It was conducted by P13 and attended by, among others P11. P1 and P3 were the identifying witnesses according to their evidence and evidence of P11 and P13. P13 tendered exhibit PE-5 which is a police form No. 186. How to conduct the identification parade is a question of law. The leading authority in conducting a proper identification parade in East Africa is the case of **R vs Mwango s/o Manaa** [1936] 3 EA CA 29. In brief, it stated things which must be observed.

I. *An accused should always be informed he may have his advocate or friend when a parade takes place.*

II. *The investigating officer may be present but he or she is not permitted to carry out the identification parade.*

III. *None of the witnesses are allowed to see the accused before the parade.*

IV. *There must be at least eight persons as far as possible of similar age, height, general appearance and class of life.*

V. *The accused may stand at any position.*

VI. *Exclude every person who has no business there.*

VII. *Careful notes be recorded after each witness leaves and if identification had been made or not.*

VIII. *Witnesses may ask the accused to walk, speak, or see him with a hat or not, if so, then all parade members have to act likewise.*

IX. *The witnesses must touch the person identified.*

X. *Accused to be asked if he is satisfied with the parade at its termination.*

XI. *There should be no influence. Witnesses should be told instead you will see "a group of people who may or may not contain the suspected person". NOTE "Can you see the suspect in the parade".*

XII. *The process must be fair.*

The same principles were also stated in the case of **Simon Musoke v R** [1958] EA 715. As well, in Tanzania, there is the guidance of the Court of Appeal in conducting the parade which were restated in the following words;

"While still on identification, we must say something about identification parades. An identification parade is by itself not substantive evidence. It is usually only admitted for collateral purposes, mostly, to corroborate dock identification of an accused by a witness... But if it is to be of any value, such identification parades must be conducted in compliance with the applicable procedure as set out in ***REX vs MWANGO s/o MANAA*** *(1936) 3 EACA 29 (or GPO 231). Otherwise, it will be of little probative value against an accused person."*

This was also the position in **Said Lubinza & 4 Others v R**, Criminal Appeal Nos. 24, 25, 26, 27 and 28 of 2012. In its decision, the Court of Appeal clearly spoke about the role of identification parades in the following remarks;

"It is trite law that identification parades derive their corroborative value from s. 166 of the Evidence Act, Cap. 6. In other words, identification parades are in themselves not substantive evidence. If properly conducted, their value is to corroborate the evidence of identifying witnesses, and the purpose of corroboration is only to confirm or support evidence which is already sufficient, satisfactory

and credible and not to give validity or credence to evidence which is itself deficient, suspect or incredible."

Intrusively, P13 did not tell the court whether if among other rights, he told the accused persons to comment after the parade was done. It is not even recorded in PE-5. There is also a doubt as to the number of people that attended the same. When cross-examined he said, the number of people were 16, including the accused persons. Throughout the evidence, the number is 14. Moreso, failure to accord the suspects the right to express whether they were satisfied with the conduct of the parades, was considered in the case of **Raymond Francis v R** [1994] TLR 100 to be a defect enough to render the parade of little value. My reading on the Police General Orders (PGO) No. 232, which P13 employed to conduct the parade obliges the officer conducting the parade to explain the purpose and to take objections from suspects. The suspects have to stand where it pleases them in the line. In this case, the suspects both stood together and did not change their position after the first witness made the identification. I think, this is wrong and forms a wrong procedure. It defeats the purpose for which the PGO aims when doing the parade. The whole purpose of the parade is to ascertain whether a person detained in police custody can be recognized by witnesses.

Therefore, the police must ensure that the proceedings are so conducted that unfairness to the person concerned cannot afterwards be alleged, otherwise the value of the identification as evidence depreciates considerably.

To sum up my findings in identification, inspiration can be taken from the case of **Abudalla Nabulere and 2 Ors v Uganda** (Criminal Appeal No. 9 of 1978) [1978] UGSC 5 (5 October 1978). The Court of Appeal observed that:

> *"Where the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correct identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances the identification came to be made, particularly the length of time, the distance, the light, and the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the*

quality is good the danger of mistaken identity is reduced, but the poorer the quality the greater the danger"

I tend therefore to accept the defence proposition that the parade does not support the evidence of the prosecution since I have shown how doubtful the evidence of P1 and P3 on identification is wanting.

Moving further, there is evidence of P17 a Government Chemist Analyst. He tendered a report exhibit PE-8, which explains and based on his evidence that nails, and remains of the bag upon laboratory chemical examination, were found with remains of nitrates used to make explosives. But the delay safety fuse and a detonator had no such remains. According to his evidence, the exhibits were from Arusha in the RCO's office with the letter ARR/CIDB.1/7GEN/VOL.XXVI/298 dated 16th April 2014.

Unfortunately, such remains are not part of the record, they were not admitted in evidence. But still, there is no proof that the same are the remains of the bomb that exploded on 13th April 2014. In actual fact, the court is unsure, if what exploded was the bomb. Even the other bomb that was allegedly made by the accused persons and was found at Washington bar as per evidence of P and P8, was not tendered in evidence or even taken for laboratory analysis.

It is not clear from the prosecution case that what exploded at Arusha Night Park bar @ Matako bar was a bomb that is allegedly made and detonated by the 3rd and 4th accused persons. Despite the evidence of P who told the court, he appeared at the crime scene a few minutes after the explosion, and that the premises were surrounded by yellow tape to protect the exhibits and the integrity of the crime scene, there is no evidence that anything was collected from that place.

If it was done as he intimated, then, no one is sure the same was properly collected, kept, transferred to P17, analysed and then brought to court as it was testified. In my considered view, the chain of custody which was splendidly stated in the case of **Paulo Maduka and 4 Others v R**, Criminal appeal No. 110 of 2007, by the Court Appeal on the need and importance of observing the chain of custody after exhibits are found was not observed. It was the view of Court that;

> *"By "chain of custody" we have in mind the chronological documentation and/or paper trail, showing the seizure, custody, control, transfer, analysis, and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody, it is*

stressed, is to establish that the alleged evidence is in fact related to the alleged crime."

The defence gravamen, points out the inefficiency of the prosecution evidence to prove that it is the accused who made and detonated the bomb leading to the death of Sudi Ally Ramadhan, leaving several others injured. The absence of such evidence leads me to one conclusion that there is no corroboration of the accused caution statements. The last question is therefore answered that there is no corroboration.

From the foregoing, there remains in the prosecution case, as part of the evidence, the cautioned statements which as I said are uncorroborated. I have carefully read all the statements; the accused are mentioning one another to have committed the offence.

Another question to be asked is, can the piece of evidence that in itself needs corroboration, corroborate another? In other instances, one may call that evidence "blind evidence". Can a blind man lead another blind man? Will they, not both fall into the pit? The answer is not only legal but also Biblical. (See Luke 6: 39). Sufficiently, it was stated in **Ndalahwa Shilanga** (supra) that the requirement for corroboration is either a matter of law or of practice. Where it is a matter of law, no conviction can be sustained without

corroboration, if it is based on evidence that requires corroboration. Precisely on page 10, the Court further held;

> *"It has also been long established that a witness (who himself) or evidence which itself requires corroboration cannot corroborate."*

The decision of the court is in line with section 33(2) of the Evidence Act, which puts its that a conviction of an accused person shall not be based solely on a confession by a co-accused.

As the day follows the night and darkness is the absence of the light, I am firm that the only evidence, cautioned statements are not sufficient proof of the offences charged.

Before going to the defence, it was submitted by the prosecution that the case has been proved to the required standard because the accused persons have admitted the offences charged. It is apparent as I have endeavoured to demonstrate, clearly, there is no doubt that the cautioned statement even if not corroborated may be used to convict, but that goes with only one assumption that the evidence stated in it, must be nothing but the truth and that the court should believe so. Among ways to believe that the confession is true, it is when for instance the confession leads to the discovery of some

incriminating evidence as per section 31 of the Evidence Act, which points out that;

> *"When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, is relevant."*

In other premises, where it such coherent and consistent with the testimony of other prosecution witnesses, and evidence generally present in the record. As I have shown, none of the above is true of the case against the accused persons. Upon arrest, the 3rd accused said was taken to his home for search and inspection, the prosecution admits to having done so. The same story happened to the rest of the accused persons. Nothing that was discovered in their possession to prove in the absence of other evidence, the accused persons committed the offence.

The accused persons defended themselves and called no witnesses. In their defence, Dw1, Yasin Hashimu Sanga, the 7th accused alleged was arrested on 8th April 2014 at Kahama, and then transferred to Arusha. On 13th May 2014 was taken to Kisongo police station, tortured and forced to sign. He

was ultimately charged on 29th May 2014 after being joined by fellow accused persons.

Dw2 is Abdallah Athman Labia, 1st accused in his evidence, he said was arrested on 24th May 2014 at Mang'ola, and brought to Arusha via Karatu on 25th April 2014. It was his evidence that on arrival at Arusha Central police station at 10:30 am, he was taken to Kisongo police station and tortured.

He said he was forced to sign papers on 27th April 2014, like Dw1, he was brought to court on 29th May 2014 to answer these charges.

Ibrahim Leornard Herman @ Abuu Ismail, 9th accused testified as Dw3. His evidence was that his arrest was on 12th July 2014 at Mwanza, and then transferred to Arusha to Kisongo Police Station where on 17th July was taken to Engutoto police post. He was later charged with different cases. He tendered the chargesheets of PI 65 and 59 of 2014 as exhibit D1 collectively. He never alleged was tortured or mistreated in any way. He is the only accused who did not have the cautioned statement recorded. He was joined with the rest of the accused persons on 28th February 2022.

Dw4 is the 2nd accused, Ally Hamis Kidaanya. His evidence is that he was arrested on 17th May 2014, at Kilombero Market at 8:00 am. He was taken, to Kisongo police station, and tortured in order to admit involvement in the

Arusha night park bar bombing on 13th April 2014, which he signed. To prove he was tortured he tendered a PF-3 as exhibit D2 and alleged his charges with fellow co-accused persons were on 29th May 2014.

It was the defence of Dw5, Hassan Zuberi Said the 5th accused person that he was arrested on 19th April 2014 at Shinyanga and then brought to Arusha. On 13th May 2014 was taken to Kijenge police Station and then Kisongo police station on 20th May 2014. At Kisongo was forced to sign papers after being tortured. He was allegedly charged on 29th May 2014.

Dw6, Abdallah Maginga Wambura 3rd accused, his evidence on defence was that he was arrested on 19th May 2014 at Kilombero Market at 8:00am. He was taken to Kisongo police station. He was tortured to admit events that occurred at Arusha Night Park bar on 13th April 2014. He signed papers on 26th May 2014 because he was seriously injured and was to be taken to the hospital. He was taken to Mount Meru hospital and admitted on that day because following the beating he had received; his leg had sustained serious injury. On 1st June 2014, he said, his left leg was amputated due to the injuries caused by torture. On 29th May 2014, according to him, charges were read to him at Mount Meru Hospital, when others were in court.

Dw7, Ally Hamis Jumanne, 6th accused said was arrested on 15th May 2014 at Mgori village and then brought to Arusha. He was taken to Njiro Police Station. On 19th May 2014, according to his evidence was taken to Kisongo police station where due to torture, he collapsed. As he regained his consciousness, he was forced to sign papers which he did and henceforth charged on 29th May 2014

Dw8 Shaban Abdallah Wawa, 8th accused, was arrested on 25th April 2014 at 7:00am at Karatu bus stand. In his evidence, he told the court, he was brought to Arusha. He did not know what to do but was promised to be released, provided he signs papers by affixing his thumbprint which he did. Instead of being released as promised, he was joined with others and charged on 29th May 2014.

Dw9, Rajab Piri Ahmed, 4th accused testified that he was arrested at Bereko on 13th May 2014. Upon, his arrest, he was brought to Arusha at Kisongo police station where he was tortured and forced to sign on 14th May 2014 and on 19th May 2014. He was brought to court on 29th May 2014 with others. He further raised a defence of *alibi* that, he went Tabora on 06th April 2014 and came back to Kwachuli village on 14th April, 2014. To prove his statement, he tendered bus tickets which were admitted as exhibit D3 and

D4. In doing so he was denying presence at a meeting at Magugu on 7th April, 2014 and at Arusha on 13th April 2014 and so could not be involved in the bombing as it was alleged.

All accused persons claimed, Kisongo police station is called Guantanamo because of torture that they went through when arrested. None of them admitted to have recorded a statement at the central police station.

Having carefully considered the defence case, and the serious allegation of torture and the nature of the cautioned statements, I think I have no reason to be believe that their defence of torture is totally unfounded. I believe so because of the following propositions ***first***, out of 9 accused persons, it is only one person who said, was no tortured. It is the 9th accused who did is not recorded to have confessed before the police officer. In actual fact, he praised the police for having treated him well. **Second**, the 3rd accused person alleged was admitted in hospital following the beating that caused severe injury on his legs. He is now lame without his left leg which was cut off; he walks with two walking sticks. He alleged he was arrested on 19th May 2014. He was tortured. According to P1, P3, P11 and P13, when the parade was conducted on 20th May, 2014, he was identified without any disability. His evidence that his leg was amputated on 1st June 2014 was not

controverted by the prosecution. **Third,** there is undisputed evidence that the charges on 29th May 2014 were read to him while admitted in the hospital. The prosecution did not bring evidence to show that his presence in the hospital was not due to the beating he alleged but to some other natural causes. **Fourth** on part of the 4th accused, he tendered the PF-3 exhibit D2 which shows, he had injuries, even though there is no proof that the same were connected with torture, but since he was in custody from time of arrest until then, it was the duty of prosecution to show that the same is not a genuine document and therefore was illegally obtained or that it was due to some other reasons. **Fifth** and perhaps the last one, the accused persons alleged were tortured at Kisongo police station. The prosecution disputed and was of the evidence that there was no torture and that the cautioned statements were recorded at the central police station and at the office of the RCO of Arusha.

In my considered view, the prosecution ought to tender the dentation register (PF.20), which should be maintained at every police station in terms of PGO 353(2). It was clearly stated that the detention register, records all the movement of the suspects from the time he got to the remand police station, until when he moves out in accordance with PGO 353 (6), (7) and

(8). It was the prosecution case that PF-20, could not be tendered because it was destroyed due to time lapse. I do not think that was proper, if the same was destroyed in the normal cause of doing things the prosecution ought to prove so. According to PGO 35, which I think deals with destruction of books and registers, which states that:

> *"...all completed Police books and registers, except only:-*
>
> *(a) Treasury and Stores records, which must be preserved in accordance with Regulation 140 of Public Finances Regulations; and*
>
> *(b) Official books which must be preserved for a special period under specific Police General Orders, shall be destroyed two years after the date of the last entry on the last page. Destruction shall, in every case, be authorised by a Gazetted Officer. Books and registers, which are due for destruction, shall be produced at formal inspections and Gazetted Officers shall ensure that old and useless records are not preserved."*

From the above, it is apparently clear to me that only old and useless records need be destroyed. I hesitate to hold that the records in respect of the accused persons were old and useless. But even assuming the same were destroyed as alleged, it was the duty of the prosecution to show when and

how the same were destroyed and of course, the officer who destroyed them or authorised destruction. In the absence of such evidence, it remains unclear as to why the same were not tendered. May be, it had information against the prosecution case, because according to the evidence, the health status of the suspect is recorded in that book before he is put under custody in the cell or lock-up.

Based on the stated doubts on my part and due to evidence, it cannot be safely held that the accused persons were not tortured. In the case of **Brasius Maona and Gaitan Mgao v R,** Criminal Appeal No. 215 of 1992.

> *"It was held that once torture has been established, courts should be very cautious in admitting such statements in evidence even under the provisions of section 29 of the Evidence Act, 1967 which in our considered opinion was not meant to be invoked in situations where the inducement involved is torture."*

Then, Rajab Piri Ahmed (Dw9), the 4th accused, raised a defence *alibi.* He tendered tickets showing he travelled to Tabora on 6th April only to return to his home village on 14th April 2014. The tickets were admitted as D3 and D4. He meant, was not present at the crime scene, because he had gone to Tabora. In law, as submitted by the prosecution, the defence of *alibi* is

governed by section 194(4) and (5) of the CPA, which enjoins the accused person who supposedly wants to rely on it, to give notice to the prosecution on his intention of relying on an *alibi* before the hearing commences and furnish to the prosecution particulars on the said *alibi.* The accused did not comply with the requirement of the law.

In the case of **Kubezya John v R,** Criminal Appeal No. 488 of 2015, Court of Appeal of Tanzania, held in respect of the defence of *alibi* that;

> *"...a genuine alibi is of course expected to be revealed to the police investigating the case or to the prosecution before trial, only when it is so done can the police or the prosecution have the opportunity to verify the alibi. An alibi brought up at trial for the first time is more likely to be an afterthought..."*

But the law further says, if the accused person does not comply with the provisions of subsections 4 and 5 of giving sufficient notice to the prosecution, under subsection 6 of the section, the court has the discretion to accord it no weight of any kind. In the circumstances of this case, I am bound to hold that the accused did not comply with the requirements of the law and I have no reason to accord weight to his defence. It is just an afterthought and therefore dismissed.

That said and done, I have no doubt that the caution statements of the accused persons were not corroborated and that they are for the reasons stated above not in themselves reliable. They cannot be used as the basis of conviction.

It is therefore time to consider if the 3rd to the 14th counts have been proved. I have shown before what constitutes a terrorist act. Such acts are spelt out under subsection 3 of section 4. For clarity, they include but are not limited to acts that involve serious bodily harm to a person, serious damage to property, endangers a person's life, creates a serious risk to the health or safety of the public or a section of the public, involves the use of firearms or explosives etc. But how can the court differentiate a terrorist act and an act of violence not within the meaning of the law. A clear distinction was made by the Supreme Court of Pakistan in the case of **Ghulam Hussain & 4 Others v The State**, Criminal Appeal No. 95 and 96 of 2019, where it stated that the court has to look at the intent and motivation behind the action which would be determinative of the issue irrespective of the fact whether any fear and insecurity was actually created or not. Therefore, it can be recapitulated therefore that the real test to determine whether a particular

act constitutes terrorism or not is the motivation, object, design or purpose behind the act and not the consequential effect created by such an act.

There is no dispute that on 13th April 2014, an explosion occurred at the Arusha Night Park Bar. There is no dispute either that one person died as a result of the explosion.

The acts were witnessed by P1, P3, P4, P7, P25 and P34, who are victims of the crime, as well P appeared at the crime scene and witnessed the casualties that resulted from it. According to P, apart from injuries caused still the property was destroyed. The rest of the prosecution witnesses indeed participated in one or the other to either investigate or treat the injured. The planning and execution of the same incident did not for all intents and purposes target one Ally Sudi Ramadhan who died or the other victims. It was intended to create a serious risk to the health or safety of the public or a section of the public. It was therefore a terrorist act. In the case of **JONAS NKIZE VRS REPUBLIC (1992) TLR 213**, it was held that,

> *"The general rule in a 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."*

Having evaluated the evidence for both the prosecution and defence, I am convinced that the prosecution did not discharge its duty to the required standard. Therefore, it is safe to hold that not only the 1st ,2nd and 3rd counts have not been proved, but also the 4th to the 14th counts.

Nevertheless, there remains the 15th count of Murder, which is charged under sections 196 and 197 of the Penal Code, being followed by the 16th count to the 26th count, which is attempted murder contrary to section 211(a) of the Penal Code. As shown before, these counts are charged in the alternative. This is permissible in law under the pretext that charges may be so framed when the prosecutor is uncertain as to whether the facts point to one or another offence. The main effect behind this principle is that the accused can only be convicted on the main charge or its alternative. But if an accused is acquitted on the main charge, then the court delves into assessing whether the alternative charge has been proved. In the case of **R.v John Katua** [1981] TLR 257, it was held that:

> *"It is now settled law that where there are alternative counts and a conviction is entered on one count then no finding should be made on the other...that is to say, once he was convicted on the first count then he should not have made a finding on the second alternative count."*

From my finding on the first 14 counts, that the prosecution has not proved the charges, it is opportune to venture into whether the succeeding 11 counts were proved. To start with the 15th count, of murder, it is settled law that in order to prove the offence of murder, there must be evidence that a person was not only killed but also it was done with malice aforethought. Section 196 of the Penal Code stated that;

> *"Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder."*

What constitutes evidence of malice aforethought, is stated under section 200 of the Penal Code, thus;

> *"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-*
>
> *(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*
>
> *(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*

(c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence."

As well, the counts of attempted murder as shown before were preferred under section 211(a) of the Penal Code, which states thus;

"Any person who- (a) attempts unlawfully to cause the death of another..."

But subsection (b) of section 211 infers that there must be an intent to cause death by doing acts or omissions likely to endanger human life. It is stated in the following terms;

(b) with intent unlawfully to cause the death of another does any act or omits to do any act which it is his duty to do, the act or omission being of such a nature as to be likely to endanger human life, is guilty of an offence.

Having restated the law, the prosecution case has it that, as the result of the bombing of Arusha Night Park bar on 13th April 2014 one Sudi Ally Ramadhan

died and Joyce William Patrice, Loyce John, Suzan Jackob, Anterus Vicent, Nathan Charles, Stephen Cosmas, Peter James Bukerebe, Oberd Mbasha, Zakaria Mmassy, Everast Richard and Mariam Juvenary Hans were injured. In general, facts were stated that on 7th April 2014 at Magugu area, Babati District within Manyara Region, accused persons did participate in a meeting knowing that the said meeting was planning for establishing Islamic State and attacks by blowing up bars, churches and other gatherings in Arusha Region an act which is prejudice to the public safety and intimidation to a section of the public in the United Republic of Tanzania. In implementing the agenda of the said meeting, on 13th April 2014, at Arusha Night Park bar @ Matako Bar, Mianzini area within Arusha District in Arusha Region, the accused persons did detonate a homemade bomb at the said Bar, thereby causing the death of one person and serious bodily injuries to 11 persons (victims), who were at the said Bar.

Apparently, the accused persons are alleged to have admitted the offences. In the cautioned statements, they were all warned of murder, even though there is no evidence that any of them admitted to having killed anybody. The statements as well did not name the person killed or any person whom a killing attempt was made. For instance, the 5th accused was warned of

murder even before the news of the death of Sudi Ally Ramadhan was known on 13th May 2014.

But as well, the 8th accused was warned in the murder case on 25th April 2014, while the death occurred on 13th May 2014 according to PE-7. Without repeating evaluation of evidence, since the prosecution case depended wholly and entirely on caution statements which I have said, they are not corroborated and cannot be believed. These other counts are bound to fail.

Finally, after examining the evidence on record both for the prosecution and defence, I am convinced that it is not sufficient to prove all counts charged.

Before I pen off, I wish to comment though briefly that terrorist acts have long been experienced in the world and they are here to stay. The supreme court of Pakistan in **Ghulam Hussain & 4 Others v The State** (supra) at pages 6 to 7 was in agreement with the publication of David C. Rapoport, Professor Emeritus of Political Science at the University of California, Los Angeles, in the year 2004, *(published in his journal Terrorism and Political Violence).* According to the court, his article propounded the theory known as the 'waves of terrorism' theory. According to Prof. David, modern terrorism can be divided into four waves which are divided into the epoch as thus;

i. 1880s-1920s,

ii. 1920s-1960s

iii. 1960s-1990s

iv. 1990 to date.

He maintains that each wave came and died out and that these waves have also at times overlapped. In his view, the common factor in all those waves is that all the relevant acts of violence were and are universally recognized as terrorism. He went on to say that they are so recognized because the unlawful use of violence was and is meant to achieve political, ideological or religious goals. It was his understanding that by now the international community understands quite well that terrorism is a species quite distinct from all other usual and private crimes howsoever heinous or gruesomely executed.

The court further referred to the book called, *21 Lessons for the 21st Century* (Published by Random House LLC, New York in 2018) where the author Yuval Noah Harari came up with a very interesting, and quite apt analysis of how terrorists operate and succeed in their objectives. The most relevant part of the text is how states should deal with terrorism. The author proposed the following solutions which may be a successful counter-terrorism struggle.

According to him, the fight against terrorism, should be conducted on three fronts: ***First***, governments should focus on clandestine actions against the terrorist networks. ***Second***, the media should keep things in perspective and avoid hysteria. The theatre of terror cannot succeed without publicity. The ***third,*** front is the imagination of each and every one of us. The success or failure of terrorism, therefore, depends on us. He added, if we allow our imagination to be captured by the terrorists and then we overreact to our own fears, terrorism will succeed. He went further, if we free our imagination from the terrorists and then we react in a balanced and cool way, terrorism will fail.

I concur with the findings of the author and think in order to achieve that in such situations, things must be done very fast. Referring to this case, it has taken 9 good years to come to the finality. The accused persons have all that time been in custody in heinous offences that are not bailable. Since 29th May 2014, when they were brought to court under pretext of Committal proceedings, the decision to prosecute them in a competent court was made on 19th April 2022, when the Director of Public Prosecutions consented prosecution on the current charges be staged. There is also evidence that

the even some police officers who took part in the investigation recorded their statements to that effect in 2020.

I do not hesitate to say, things were well. I have had a chance to see all 23 witnesses testify. It was indeed sad to see how they were struggling to recall events that occurred 9 years ago.

Taking 9 years waiting for a trial in my view is shockingly and abysmally, as good as punishing the accused unheard. Indeed, if I may be pardoned for saying this, it is against the principle of fair trial enshrined under article 13(6) of the Constitution of the United Republic of Tanzania, 1977 as amended.

To sum up, I have to invite the wise words of the Court Appeal of the United Kingdom in the case **R v. Chaaban,** [2003] EWCA Crim 1012, in respect of fair and speedy trial of cases as it held;

> *"...Time is not unlimited. No one should assume that trials can continue to take as long or use up as much time as either or both sides may wish, or think, or assert, they need. The entitlement to a fair trial is not inconsistent with proper judicial control over the use of time.*
>
> *At the risk of stating the obvious, every trial which takes longer than it reasonably should is wasteful of limited resources. It also results in delays to justice in cases still waiting to be tried, adding to the tension*

and distress of victims, defendants, particularly those in custody awaiting trial, and witnesses. Most important of all it does nothing to assist the jury to reach a true verdict on the evidence..."

Having said all I have said, it is worth pronouncing, that based on the evaluation of evidence. The prosecution has failed to prove the case beyond a reasonable doubt. All the accused persons, namely ABDALLAH ATHUMANI LABIA@BROTHER MOHAMED, ALLY HAMISI KIDAANYA, ABDALLAH MAGINGA WAMBURA, RAJABU PIRI AHMED, HASSAN ZUBERI SAID, ALLY HAMISI JUMANNE, YASSIN HASHIM SANGA, SHABANI ABDALLAH WAWA and IBRAHIM LEONARD HERMAN@ABUU ISMAIL are in terms of section 235(1) of the CPA acquitted of all 26 counts as charged.

A. K. RWIZILE

JUDGE

19.06.2023

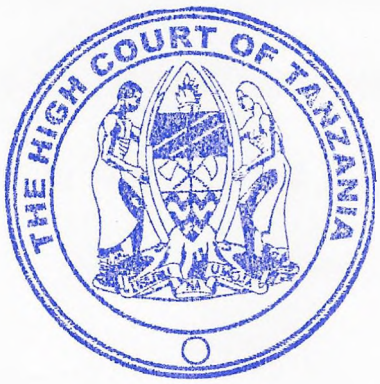
Court: Judgment delivered this 19th day of June, 2023 in the presence of Mr. Tonny Kilomo (SA) and Ms. Alice Mtenga (SA) for the Republic, all nine (9) accused persons are represented by their advocates who are all present.

A. K. RWIZILE

JUDGE

19.06.2023

Court: Right of Appeal fully explained



A. K. RWIZILE

JUDGE

19.06.2023