IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CRIMINAL JURISDICTION

CRIMINAL SESSION NO. 45 OF 2022

REPUBLIC

VERSUS

AYOUB S/O SAID @ MAULID

04/08/2023 & 4/09/2023

JUDGEMENT

MWENEMPAZI, J.

The accused person AYOUB S/O SAID is arraigned in this Court and charged with one count of an offence of attempt to commit a terrorist act contrary to section 4(1), 25(1) (a) and 27(b) of the Prevention of Terrorism Act, No. 21 of 2002. It is alleged by the prosecution that the accused AYOUB MAULID SAID on divers dates between 1st March, 2015 and 30th March, 2015 at various places in Rukwa Region within the United Republic of Tanzania and the Republic of Kenya, attempted to commit a terrorist act, to wit, becoming

a member of a terrorist group namely; Al – Shabaab Al Islaamiya based in Somalia.

After the arrest of the accused person and investigation had been completed the Director of Public Prosecutions issued a consent in terms of section 34(2) of the Prevention of Terrorism Act, No. 21 of 2002 to prosecute the accused, AYOUB S/O MAULID SAID who is charged for contravening the provisions of sections 4(1), 25(1) (a) and 27(b) of the Prevention of Terrorism Act, No. 21 of 2002. The particulars are set out in the information and have been reproduced herein above.

On the 5th August, 2022 an information was read over and explained to the accused person. In his plea, he denied to have contravened the provisions of law as alleged by the prosecution. That stance was also maintained even after the facts prepared under section 192 were read over and explained to the accused person.

As a matter of procedure, the prosecution was thus compelled to call witnesses and fulfill their duty to prove the allegations leveled against the accused person. In total, five (5) witnesses were called and two exhibits

were tendered/produced. The accused defended himself, in that, he did not call any witness. All witnesses for prosecution and defence testified on oath.

The prosecution case was handled by Mr. Nestory Mwenda assisted by Ms. Godliva Shiyo, learned State Attorney and the accused was defended by Mr. Samwel Kipesha, learned advocate.

Hearing of the case was done in Camera and names of the prosecution witnesses were not disclosed pursuant to an order of the Court in Miscellaneous Criminal Application No. 16 of 2022 dated 14th April, 2022 where it was ordered that:

1. *Witnesses' testimonies shall be given through video conference in accordance with the provisions of the evidence Act, [Cap 6 R.E 2019].*
2. *I order for none disclosure of identity and where about S of the witnesses for security reasons during committal and trial proceedings.*
3. *I order for none disclosure of statements and documents likely to lead to the identification of witnesses for their security reasons during committal and trial proceedings.*
4. *Trial proceedings in respect of committal case No. 2 of 2022 shall be conducted in camera.*

5. *I order for other protection measures as which I consider appropriate for the security of the prosecution witnesses in respect of Criminal Case No. 2 of 2022, including: -*

(a) *Prohibition on dissemination and publication of documentary evidence and any other testimony bearing identity of prosecution witnesses without prior leave of the Court.*

(b) *Prohibition on dissemination and publication of information that is likely to disclose location, residence and whereabouts of the prosecution's witnesses or any of their close relatives.*

it is ordered.

Dated at Sumbawanga this 14th day of April, 2022.

J.F. NKWABI

JUDGE

However, subject to the order above, hearing was conducted with a view to protect witnesses, whereby the witness dock had to be extended further high to the height reaching eight feet and a tinted glass placed on a small window so that only voice could be heard without the face of the witness being seen

and or recognizable. Also, a special arrangement was made such that the witness could not be seen when entering and leaving the witness dock.

That having been said, let us now embark on the summary of the tendered evidence. Witnesses who were called to testify were dubbed as P (who testified as PW1), P5 (who testified as PW2), P1 (who testified as PW3), P4 9who testified as PW4) and P8 (who testified as PW5).

PW1 testified that he is employed with the Tanzania Police Force department and for the time being he is far more based in the section or unit for combating and Prevention of Terrorism in the Country. The unit works in collaboration with other similar units in neighboring countries.

On the 18th April, 2015 he reported at his office. His superior assigned him a duty to head a team of investigators who, together with the witness, went to Arusha to receive a suspect who had been arrested at Kenya by the Kenyan authorities. He left Dar es Salaam on the same date and arrived at Arusha on the same date in the night hours.

The following morning on 19/04/2015 he went to Namanga, at the Tanzania-Kenyan border, where he met with the colleague from Kenya. The latter handed over the suspect to him; and according to Tanzania, laws he re –

arrested the suspect. The suspect introduced himself to him as AYOUB MAULID SAID. The witness introduced himself and informed the suspect his duties. After following necessary procedures, they left Namanga for Dar es Salaam.

At Dar es Salaam they arrived on the 20/04/2015, it was early morning. Upon arrival at Dar es Salaam at their offices, he placed the suspect in a remand and reported to his superior; the latter told him to hand over the suspect to P5. He thus over the suspect to P5 who had been assigned to record a cautioned statement of the suspect. The witness went home to rest.

At the time, the country had been hit by a wave of terrorist acts. They thus continued with investigation to find out if the suspect was connected to any of the events which had at the time occurred at various places within the country. In their investigation they discovered that the suspect now accused was not connected to those events. They decided to take the suspect to Sumbawanga. They left Dar es Salaam on the 17/05/2015 and arrived a Sumbawanga on 18/05/2015. Upon arrival the suspect was handed over to the RCO – Rukwa and they briefed him of the allegations facing the suspect, that he was on safari to Somalia with intent to join Al – shabaab. Had it been

that he succeeded, he wouldn't be with them there at the time. The RCO was also handed over a comprehensive report on the suspect. That he (RCO) should continue with investigation and other procedure here at Rukwa.

PW2 was known by the letter P2. He is also a police officer who was assigned to record a cautioned statement of the accused person on the 20th April, 2015. He testified that he was assigned that duty on 19th April, 2015. He stayed up to the next day at around 1:00 hours, when he was told that the suspect had already been brought and that he should record his cautioned statement. The suspect's name was AYOUB MAULID SAID. He was in a room specially made for lockup as there was no specific lockup at the CID Headquarters.

He prepared himself and took the suspect, after following necessary procedure he recorded the cautioned statement. He testified that that the suspect was healthy and he recorded the statement voluntarily after the necessary legal pre-requisites had been complied with by the recording officer. The cautioned statement was received and admitted in Court as exhibit P1.

In the document, the accused gave narratives of how it came to be, at the time he was recording the cautioned statement. that he is alleged to attempt to commit terrorist acts. In short, he admitted that he had the intention to join the terrorist group and narrated how he carried and executed his intention until he was arrested by the Kenyan police. The account was detailed.

It is worth noting at this juncture that although the cautioned statement was admitted still there was objection by the accused person that the statement was recorded in his absence. He only signed on blank pages and that he did fearing to endanger his life. However, this court after a trial within trial, found that the statement was recorded while the suspect was a free to exercise his volition.

P1 is also an investigator in the Tanzania Police Force. His station of work at the time, 18th May 2015, was Sumbawanga. He received Officers from Dar es Salaam CID Headquarters who had brought AYOUB MAULID SAID. He testified that on 17/05/2015 he was informed by the CID headquarters that there will be a suspect brought from Dar es Salaam who is alleged to have been involved in an act of attempt to join Al Shabab al Islaamiya

(terrorist group). He was told that the suspect was arrested in Kenya. When he received him, he ordered the suspect be placed in remand. At the time of receiving the suspect, he was in good health. It is a procedure that the condition of the suspect must be recorded.

After receiving him they continued with investigation. A new file was opened with reference number SUM/IR/1977/2015. They also received his cautioned statement. On 26/05/2015 the suspect prayed to see RCO. He was taken to the RCO. He was again in good condition. He wanted to be taken to the justice of the peace. In this case they took him to P8. He was taken by P4 under the instruction of P1. Later he was brought back with an envelope containing an extra judicial statement. He was again in good condition. According to what he was told, the accused was arrested at Mandera in Kenya on 13/04/2015.

P4 testified as PW4. His job is an investigator. He took the suspect to the justice of peace. It was on 26/05/2015. He did so at the instruction of P1. He took the suspect to P8, Justice of Peace. There, he introduced himself and the suspect, informed P8 that he was escorting the suspect, then he left. The suspect subject of his testimony is AYOUB MAULID SAID.

In the testimony, P8 stated that before he recorded an extra judicial statement of the accused person, he informed the accused person his rights and interviewed him to check if the accused had decided on his own volition to record an extra judicial statement. He also inspected the accused on his body to see if he had any injuries. That would help determine whether the accused has been influenced or coerced to opt for recording an extra judicial statement. In conclusion the accused expressed that he has decided on his own and has not been forced to record an extra judicial statement. P8 was therefore satisfied that the accused was ready to record an extra judicial statement. Thus, before commencing recording the statement both the accused person and P8 signed as a sign of volition by the accused.

At the end after recording the extra judicial statement, the justice of peace, read over to the accused person the just recorded extra judicial statement and the accused person confirmed that it is correct. Both the accused and justice of peace signed. The document was handed over in an envelope to the police, P4 and also the accused person who was returned to the lock up. The extra judicial statement by the accused was admitted as exhibit P2 and was read over by the witness P8 in Court.

Upon closure of the prosecution case, this Court had an opinion that the prosecution had successfully made a *prima facie* case against the accused person. He was thus required to defend himself and he was addressed in terms of section 293(1) and (2) of the Criminal Procedure Act, [Cap 20 R.E 2019].

In his defence, the accused did not call witnesses. He defended himself. He testified on oath and basically, he distanced himself from the offence he is charged with. In the defence he testified that he was arrested on the 4/5/2015 at Arusha bus stand while with his wife and child. The child had a swelling in the stomach and together they went to Arusha, pursuing treatment to a local and or traditional healer as they could not afford modern hospital costs.

After arriving at Arusha and disembarking from a bus, as they were in the course of looking for a place to sleep, fifteen paces from the bus stand two persons approached them and stopped them. They were in dilemma as to the identity of the persons arrested. After a brief discussion, they made up their mind to arrest the accused and his wife. Both were taken to the police station and placed in lockup, different rooms. He stayed in the lockup until

at midnight. He was then removed by the same persons who arrested them. They inquired if he is MASOUD. He denied and after a brief discussion they decided to record him to save their affairs. He testified *"wakasema tumwandike huyu huyu tusije tukaharibikiwa".*

The accused testified that after they had recorded his real names and then brought many papers, some were in a format of a special form. They asked him to sign. He refused and demanded to know why he had been arrested. They told him to sign. After he had refused, they beat him, pierced his foot soles with nails and to save his life he signed. He was taken back to the lock up. He stayed for three days and transferred to Dar es Salaam. It was on 09/05/2015. There, he stayed for eleven (11) days up to 20/05/2015. On 21/05/2015 they transferred him to Sumbawanga. They arrived on 22/05/2015. The witness referred to statements of P and P1 which statements were not tendered in Court. Thus, he firmly testified that he was taken to Sumbawanga and arrived on 22/05/2015.

The defendant/accused denies that on 20/04/2015 he was at Dar es Salaam. According to his testimony, he alleges that he was still at Sumbawanga. He had not yet left for Arusha.

He denied to have recorded a cautioned statement. The one which has been tendered by the prosecution, shows it was recorded at Dar es Salaam; but also, he testified that when he was at Arusha, he was made to sign a copy on blank pages.

In the tendered statement a signature by Right Thumb Print is in blank ink. He testified that it is a copy. The contents of the statement are false and doubtful. The accused also showed the variation of the statement and the charge. The charge shows he attempted to join Al – Shabaab Al Islamiyah. However, the statement refers to Al- Shabaab. The word Al – Shabaab is company or football team. The proper translation of the word is young man (kijana) or young men (vijana). The word is an Arabic one. The defendant/accused also testified that the statement that he graduated standard VII in 2007 and Form IV in 2010 is practically impossible. That shows falsehood.

The witness also testified that another area to be careful is the story how he came to Sumbawanga. First the motive was to look for good life and then there is another line that he was pursuing higher levels of training in religious studies. The two lines of story show there is a lie.

The witness called this Court to refer back to the allegations he made that at Arusha he was made to sign blank pages of certain forms. He testified that those papers may have been to prepare a caution statement by P5 as he never wrote anything on it. He has also raised a complaint that an extra judicial statement contains a finger print which is not his finger print. The witness has alleged that this case has been fabricated against him.

The witness also testified that he was supplied with statement during committal proceedings. P8 recorded his statement on 8/11/2019. He was also told by the RCO Mtatiro that the investigation file from CID Headquarters has been brought for rectification. He believes, the statement by P8 was made to make sure he is pinned in the offence he is charged with, as P8 could not record his statement in 2019 while it is alleged that an extra judicial statement was recorded in 2015.Also, the witness complained that there are civilian witnesses who have not been called, who might have cleared him.

During cross examination by the prosecution, the witness testified that he remembers that earlier on he had said that he does not remember the date he was arrested. In the testimony he said he was transferred from Dar es Salaam to Sumbawanga on 21/05/2015 and arrived on 22/05/2015.

On the 06/05/2015 he was forced to signed blank pages and he believes the signatures are those appearing in the cautioned statement. He admits to have recorded an extra judicial statement before a justice of the peace, and P8 said that he did on his own volition. But he insists that when you are under police everything is an order. He denies to have asked to go for recording an extra judicial statement before the justice of the peace.

The defendants insist that the cautioned statement was objected to in its entirety. He has never met P5 so the testimony by P5 is a lie.

The defendant says he travelled from Sumbawanga to Arusha on 04/05/2015. The charge sheet shown that the offence was committed between 01/03/2015 and 30/04/2015. They days mentioned in the charged sheet he was at Sumbawanga. On the allegation of torture, he could not produce a PF3 because it was difficult for the police to issue one to him.

At the end of trial, counsels for both sides prayed to file written final submission which they did. Mr. Samwel Kipesha, learned advocate for the defendant submitted at the forefront of the document that the prosecution has failed to prove the charge against the accused person. He submitted that the duty of the prosecution to prove the case beyond reasonable doubt

is universal. In order to emphasize the point, he cited the case of **Jafari Juma Vs. the Republic, Criminal Appeal No. 252 of 2019, Court of Appeal of Tanzania at Mwanza** where it was held that:

> *"It is instructive that, the duty of the prosecution to prove the case beyond reasonable doubt is universal. In* ***Woomington Vs. DPP [1935] AC 462****, it was held inter alia that, it is a duty of the prosecution to prove the case and the standard of proof is beyond reasonable doubt. This is a universal standard in Criminal trials and the duty never shifts to the accused".*

In the case referred to herein above, the Court went on to explain the words reasonable doubt by referring to the case of **Magendo Paul & Another Vs. the Republic [1993] TLR 2019,** the Court held that:

> *"For the case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed".*

In the submission the counsel for defence has submitted on the various names of the group the accused is alleged to have attempted to join. In the information it is said the accused attempted to join Al Shabaab Al – Islamiya based in Somalia. However, none of the prosecution witnesses P1, P1, P5, P4 and P8 alleged that the accused tried to join Al – Shabaab and none of them bothered to explain if at all Al Shabaab means Al – Shabaab Al Islamiya or if the duo means the same group or same thing. The counsel has the view that given the gap, the submission cannot mend as the same is not evidence. He has cited cases, **The Registered Trustees of the Archiocese of Dar es Salaam Vs. The Chairman, Bunju Village Government and 11 Others, Civil Appeal No. 147 of 2006, Court of Appeal of Tanzania at Dar es Salaam**; **Tanzania Union of Industrial and Commercial Workers (TUICO) and Mbeya Cement Ltd Vs. Mbeya Cement Company Ltd and National Insurance Corporation Tanzania Ltd and Florian Steven Kitiwili Vs. Mariam Benedict Makombe, Civil Appeal No. 136 of 2019, High Court of Tanzania at Dar es Salaam** at page 7 and the case of **Joao Oliveira and Soul of Tanzania Limited Vs. It Started in Africa Limited and Baraja Bernard**

Kangoma, Civil Appeal No. 186 of 2020, Court of Appeal of Tanzania at Arusha at page 20 where it was observed that:

> *"Whether point which was canvassed by counsel it was made in their submission and not on evidence and therefore, one cannot evaluate submission but rather evaluation has to be done on the evidence on record. It is now settled that as a matter of general principle submission by counsels are not evidence".*

The counsel has submitted that the group mentioned in the information must tally to the one recognized by law to be a terrorist group. The group declared to be a terrorist group in the **Prevention of Terrorism (General) Regulations 2022, GN. 379/2022** is Al – Shabaab Al Islamiya. Nowhere it is defined to mean or have a crony in and in our case the evidence states the group he attempted to join is "Al Shabaab or Al Shababi.

The counsel has submitted that the particulars of the charge show the offence was committed in Kenya but no witness has been called to prove the allegations. P2 is the person who knew how the offence was committed in

Kenya and also the date he was re-arrested at Namanga. But without any explanation to the Court, the prosecution dropped this witness.

Also, P6 and P7 are residents of Rukwa Region whose statements show are the witnesses who knew the accused and how he started learning on how to join Al Shabaab. They were not called. The counsel called upon this Court to draw adverse inference to the prosecution's case.

Even the accused's wife who could have corroborated to the dates of arrest and dates of recording cautioned statement of the accused of the accused person.

The counsel for defence cited the case of **Charles Ambrosi Vs. the Republic,** Criminal Appeal No. 338 of 2019, Court of Appeal of Tanzania at Moshi where it was held that:

> *"A court may be invited to draw permissible adverse inference against prosecution case where a crucial or material witness who could have testified against a crucial or decisive aspect of its case is with held without sufficient reason".*

The counsel submitted further that the whole case rests on a repudiated caution statement which in law required corroboration in order for it to be the basis of conviction. The extra-judicial statement varies with the caution statement hence it cannot be used to corroborate the cautioned statement. In law a repudiated confession cannot be acted upon unless it was corroborated by independent evidence as it was held in the case of **Sharifu Mohamed @ Athuman & 4 Others Vs. the Republic,** Criminal Appeal No. 251 of 2018, Court of Appeal of Tanzania at Arusha that:

> *"As stated above, the confession was repudiated and as correctly argued by the learned counsel for the appellants, it could not be acted upon unless it was corroborated by independent evidence".*

It was also a contention by the counsel for defence that the caution statement was not properly certified as per section 57(30 of the Criminal Procedure Act, [Cap 20 R.E 2019]. Thus, it was not authenticated. And that since it was objected to by the accused it is rendered not a good evidence to be relied for conviction.

He submitted that the extra judicial statement was taken contrary to the guidelines of the chief justice, which requires time of arrest to be written and the accused be informed of the consequence of the written statement. That it may be used against him. He cited the case of **Japhet Thadei Mseswa Vs. the Republic,** Criminal Appeal No. 367 of 2008, Court of Appeal of Tanzania at Iringa that time of arrest is required and the same is mandatory and was not followed. The effect is that the statement is taken to have not taken voluntarily.

The defence counsel has submitted in conclusion that in the light of the arguments together with the supporting case laws, this Court should find that the offence has not been proved beyond reasonable doubt and acquit the accused person.

On their part the prosecution has been under the service of Mr. Nestory Mwenda and Ms. Godliva Shiyo, learned state attorneys. They have submitted that this Court should find that the case has been proved to the standard and convict the accused person as charged.

They have brought witnesses who are five in number and two exhibits. The accused is charged with the offence of attempt to commit a terrorist act.

The crucial elements of the offence after visiting the law are that: **one**, intention to commit an offence; **two**, accused starts to take steps to put into execution the intention by means adapted to fulfil it; **three**, that intention is manifested by some overt acts; and **four,** the intention is not fulfilled as to commit the offence. Section 380 of the Penal Code, [Cap 16 R.E 2022] provides that: -

> *"380(1) when a person,* ***intending to commit an offence begins to put his intention into execution by means adapted do its fulfilment, and manifests his intention by some overt acts,*** *but does not fulfil his intention to such extent as to commit the offence he is deemed to attempt to commit the offence.*
>
> *(2) It is immaterial, except so far as regards punishment, whether the offender does not all that is necessary on his part for completing the commission of the offence or whether the complete fulfillment of his intention is* ***prevcuted*** *by circumstances independent of his will or*

whether he desists of his own motion from the further prosecution of his intention".

In the case of **Samweli Jackson Saabai @ Mng'awi & 2 Others Vs. the Republic,** Criminal Appeal No. 138 of 2020, Court of Appeal of Tanzania at Musoma (unreported) at page 18 – 19 Court held that:

*"The Court in **Bonifas Fidelis** (supra) went on to further summarize what they found to be the four ingredients of attempted murder is arising from section 211(1) read together with section 386 of the Penal Code as follows:*

*Firstly, **proof of intention to commit the main offence** of murder; secondly, **evidence to prove how the appellant begun to employ the means to execute his intention.** Thirdly, e**vidence that proves overs acts which manifest, the appellant's intention,** fourthly, **evidence proving an intervening event, which interrupted the appellant from fulfilling his main offence,** to such as extent if there*

was no such interruption, the main offence of murder would surely have been committed".

In order to prove the offence at hand, the prosecution had a duty to provide proof of; **first,** intention to commit the main offence of terrorism to wit, becoming a member of terrorist group namely; Al Shabaabs Al – Islaamiya based in Somalia. **Secondly**, evidence to prove how the accused person begun to employ the means to execute his intention of becoming a member of a terrorist group namely; Al – Shabaab Al – Islaamiya based in Somalia. **Thirdl**, evidence that proves overt act which manifests the accused person's intention; and **Fourthly,** evidence proving an intervening event, which interrupted the accused person from fulfilling his main offence, to such an extent if there was no such interruption, the main offence of becoming a member of a terrorist group namely; Al – Shabaab Al – Islaamiya based in Somalia would surely have been committed.

The burden of proving the case against the accused person beyond reasonable doubt lies to the prosecution according to section 3(2) (a) of the Evidence Act, [Cap 6 R.E 2022] and that burden does not shift. In the case of **John Nkize Vs. the Republic, [1992] TLR 2023** it was held:

"General rule in criminal prosecution is 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 peril not worthy taking".

The counsels for the prosecution have submitted that looking at the crucial elements and evidence tendered they have an opinion that the prosecution has managed to prove the offence of attempt to commit terrorist acts beyond reasonable doubt.

The counsels have submitted that the evidence tendered in this Court is a circumstantial and documentary evidence from which the prosecution used to prove the case beyond reasonable doubt.

Through the oral testimony adduced by the prosecution witnesses, caution statement as well as the extra judicial statement of the accused person which were tendered and admitted in Court provided a detailed information of the accused which made him to travel from Sumbawanga – Tanzania through various places to the Republic of Kenya; that was to execute his plan to become a member of terrorist group; Al – Shabaab Al – Islaamiya based in

Somalia. A group in which the accused person intended to join is a terrorist group as per paragraph 1(a) of the schedule to; of the Prevention of Terrorism (general) Regulations, 2011.

In this Court, the prosecution tendered the caution statement of the accused person (exhibit P1) and an extra judicial statement (exhibit P2). In them the accused admitted and or confesses to have as his mission(intention) joining a terrorist group, Al Shabaab Al Islamiya which is committing terrorist acts, to wit, to join and become a member of the terrorist group namely; Al – Shabaabs Al – Islaamiya based in Somalia.

According to section 27(1) of the Tanzania Evidence Act, [Cap 6 R.E 2022] it provides that:

> *"A confession voluntarily made to a police officer by a person accused of an offence may be proved as against that person".*

It is as well provided under section 28 of the Tanzania Evidence Act, [Cap 6 R.E 2022] on the evidential value of extra judicial statement of the accused that:

"A confession which is freely and voluntarily made by a person accused of an offence in the immediate presence of a magistrate as defined in the Magistrates' Court Act, or a justice of the peace under that Act, may be proved as against that person"

The prosecution counsels submitted that the confession and conduct of the accused corroborate with the testimony of PW1 who testified that upon receipt and analysis of the intelligence information managed to re arrest the accused person for being engaged to commit terrorist act by attempting to become a member of the terrorist group for purposes of overthrowing the lawful government of the United Republic of Tanzania and replace it with Islamic state.

PW2 (P5) and PW5(P8) recorded cautioned statement and extra judicial statement of the accused person respectively. The two documents have been admitted in Court as exhibit P1 and P2. They contain the detailed information related to the offence charged. They were admitted by the Court after the Court was satisfied that the two documents were obtained

voluntarily. The prosecution counsels submitted that the documents contain nothing but the truth.

In the case of **Michael Mgowole and Another Versus the Republic,** Criminal Appeal No. 205 of 2017, Court of Appeal of Tanzania (unreported) at page 30 the Court quoted with approval the decision in the case of **Ibrahim Yusph Calist @ Bonge and three Others Versus the Republic,** Criminal Appeal No. 204 of 2011 (unreported) where the Court stated several ways in which a Court can determine whether or not what is contained in a statement is true:

> *First, it the confession leads to the discovery of some other incriminating evidence. (see* ***Peter Mafala Magoho, Versus the Republic,*** *Criminal Appeal No. 11 of 1979 (unreported).*
>
> *Second, if the confession contains a detailed, elaborate relevant and through account of the crime in question, that no other person would have known such details but the maker (see* ***William Mwakatobe Versus the Republic,*** *Criminal Appeal no 65 of 1995 (unreported).*

*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 (**Shabani Daudi Versus the Republic,** Criminal Appeal No. 28 of 2001 (unreported) especially with regard to the central story (and not in every detail) and the chronology of event.*

And lastly, the facts narrated in the confession, must be plausible (emphasis added).

The prosecution counsels have submitted that details in the exhibits, are coherent and consistent with the content of the information especially when viewed in the context of the main and or central story and chronology of the events proves that the accused did attempt to commit a terrorist act. Further to that the story is so plausible that it leaves no doubt that it is nothing but the truth.

The prosecution counsel also submitted that even if there was no corroborative evidence still the Court can convict the maker on account of confession therein without corroborative evidence as long as the court is

satisfied that the confessions are nothing but true and warn itself on the dangers of convicting the accused person solely on their confessions. They cited the case of **Flano Alphonce Masalu @ Singu and 4 Others versus the Republic,** Criminal Appeal No. 366 of 2018, Court of Appeal of Tanzania (unreported) at page 32 where the Court held as follows:

> *"The law is that where the accused retracts his confession the Court can convict him on uncorroborated confession provided that it warns itself on the dangers of acting solely on such confession and it is fully satisfied that confession cannot be but true".*

They submitted that they pray this Court to find the confessions in exhibit P1 and P2 are true and can be safely relied to convict the accused person.

The counsels also submitted that the accused in defence told lies under oath. In the case of **Felix Kasinyila Versus the Republic, Criminal Appeal No. 120 of 2002, Court of Appeal of Tanzania** (unreported) the Court stated that in certain circumstances lies of the accused person may be taken to further the story of the prosecution. In this case, PW1 testified that the

accused was re-arrested at Namanga on 19/04/2015, transported to Dar es Salaam the offence being connected to terrorist act.

However, during defence, he alienated himself entirely of his re – arrested at Namanga border. He alleged that he was arrested on 6th May, 2015 at Arusha bus terminal. Also, he denied that he was transported to Sumbawanga on 17/5/2015 and that handed over to the police authorities at Sumbawanga on 18/5/2015. Those facts were not objected to or cross examined during the hearing of the prosecution case.

It is a principle of law that failure to cross examine a witness on a relevant matter ordinarily connotes acceptance of the facts testified. That was held in the case of **Issa Hassan Uki Versus Republic, Criminal Appeal No. 129 of 2017, Court of Appeal of Tanzania** (unreported) at page 16 where it was held that while quoting the case of ***Paul Yusuf Nchia v. National Executive Secretary, Chama Cha Mapinduzi & Another, Civil Appeal No. 85 of 2005*** *(Unreported) to observe*

> *"As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have*

accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said."

The other question worthy to be considered is whether the conduct and words, acts of the accused person falls in the domain of terrorism offences? The counsels have answered and opined that the evidence on record answers the raised issue in the affirmative. The counsels have referred the case of **Republic Versus Seif Abdallah Chombo @ Baba Fatina and Five Others,** Economic Case No. 4 of 2022, High Court of Tanzania at Songea sub-Registry, page 7 – 8 and also that in the case of **Ghulam Hassain and Four Others Versus the State,** Criminal Appeal No. 95 and 96 of 2019, Civil No. 10 of 2017 and Criminal Appeal No. 63 of 2013, supreme Court of Pakistan page 56 that:

"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 qualified to be termed as terrorism or not but it is now the intent or 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".

They have also argued that our jurisprudence allows the Courts of laws to borrow experience from other jurisdiction when confronted with matters which demand so as it was pointed out in the case of ***Attorney General Versus Mungesi Antony and 2 Others, Criminal Appeal No. 320 of 2021, Court of Appeal of Tanzania*** (unreported).

They have thus submitted that the evidence reveals the actions which the accused did and thus is alleged to have committed offence which falls in the domain of terrorism offences. This is the evidence of PW1, PW2, PW3 and PW5 to whom the accused person manifested his purpose, intent or motivation. The testimonial evidence of PW1, PW2, PW3 and PW5 is backed by the solid evidence of confession statement of exhibit P1 and P2. In totality the evidence reveals that the acts which the accused is charged with were for the motive and purpose of becoming a member of a terrorist group and thus in our laws he committed terrorist acts.

The learned state attorneys thus submitted that the prosecution has managed to prove its case against the accused person at the required

standard. They did not end there, they proceeded to go through the defence and opined on the question as to whether the defence has managed to raise any reasonable doubt in the prosecution case.

The accused person in his defence has testified denying to have been re-arrested on the 19/4/2015, that he was at Dar es Salaam on the 20/4/2015. Instead, he maintains that he was arrested on the 6/5/2015 and was take to Sumbawanga and arrived here on the 22/5/2015. The learned State Attorneys for the prosecution has submitted that those are lies. Their argument is that the defence to have cross examined the prosecution witnesses on the points before they could testify on the point at defence.

Since the defence rely on the defence of alibi under section 194(4) of Criminal Procedure Act, Cap. 20 R.E. 2019, they have submitted that they should have complied with the requirement to furnish a notice to the prosecution under the cited law.

There was also no need to call P2 because the offence has been alleged to have been committed in Rukwa Region within the United Republic of Tanzania and the Republic of Kenya. Thus, in their argument the evidence produced/adduced by the prosecution suffice to prove the charge against

the accused person without calling a Kenyan Police. **Two**, the key parts of the offence were mainly executed in the United Republic of Tanzania, to wit; planning, preparations and executions by moving out of the United Republic of Tanzania to join the Al – Shabaab Al – Islaamiya based in Somalia. The law allows them to charge the accused person in our Courts for the offence which was committed both within and outside our jurisdictions as highlighted by section 177 of the Criminal Procedure Act, [Cap 20 R.E 2022]. Further, there is no legal requirement of specific number of witnesses to prove a fact in issue.

In the present case, the accused person charged for offence of attempt to commit a terrorist act, that is to say actual acts was not completed by the accused person rather his evil intention to commit an offence. That being the case, P2, a Kenyan Police officer had nothing new to tell the Court rather to testify what P1 (PW1) testified in Court that the accused person was arrested by Anti – terrorism unit force while attempting to cross border to Somalia to join and become a member of a terrorist group namely; Al shabaab Al – Islamiya based in Somalia, the evidence which corroborated by exhibit P1 and P2.

The prosecution has submitted that the testimony of PW1, PW2 and PW3 on the arrest, transportation and how the accused was recorded caution statement was strong enough. The said witnesses were credible, their evidence was not shaken in any way during cross examination and defence is enough to prove that the accused person was arrested on material date for the charged offence.

Moreover, during prosecution case the named witnesses testified in Court on date and time the accused person was arrested, transported and recorded his caution statement. The witnesses were not cross examined on relevant matters related to arrest, transport and cautioned statement. Instead, the accused denied to have recorded his statement at all. In **Issa Hassan Uki Vs. the Republic, Criminal Appeal No. 129 of 2017, Mtwara** (unreported) at page 16 – 17).

> *"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. See* ***Daman Ruhele Vs. Republic, Criminal Appeal No. 501 of 2007".***

In **Nyerere Nyague Vs. Republic** (supra) it was observed:

> *"As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the trial Court to disbelieve what the witness said".*

Likewise, in **Damian Ruhele Vs. Republic** it was underlined that:

> *"We are aware that there is a useful guidance in law that a person should not cross-examine if she/he cannot contradict. But it is also trite law that failure to cross examine a witness on an important matter ordinarily implies the acceptance of the truth of the witnesses' evidence".*

In conclusion, the counsels for the prosecution have argued that minor contradictions in a testimony are healthy as in the case of **EX. G. 2434 George Vs. Republic, Criminal Appeal No. 8 of 2018, Court of Appeal of Tanzania** at Moshi page 18:

"Minor contradictions are healthy indication that the witness did not have a rehearsed script of what to testify in Court".

They have thus submitted that the case was proved beyond reasonable doubt against the accused person. They prayed the accused person be convicted as charged.

In consideration of this case, the questions for determination is whether the prosecution case has proved the case facing the accused person to the standard required by law. The accused in this case is charged with an offence of attempting to commit a terrorist act.

According to the provisions of law cited in the charge sheet, the accused has contravened section 4(1), 25(1) (a) and 27(b) of the Prevention of Terrorism Act No. 21 of 2002, herein after referred to as POTA. Section 4(1) of the Act, [POTA) it is provided that: -

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

Section 25(1) (a) of POTA provides that: -

25(1) every person who

(a) Is a member of;

(b) _____

A terrorist group, is guilty of an offence and shall on conviction, be liable to imprisonment for a term not less than eighteen years.

Section 27(b) of POTA provides that:

27. Every person who

(a) _____

(b) Attempts to commit

(c) _____

(d) _____

An offence under this Act, is guilty of an offence and shall on conviction be liable to the same punishment as is prescribed for the first mentioned offence.

According to the charge sheet the accused attempted to commit a terrorist act, to wit, becoming a member of a terrorist group namely: Al – Shabaab Al Islamiya based in Somalia. The particulars show that the offence was committed on diverse dates between 1st March 2015 and 30th April, 2015 at various places in Rukwa Region within the United Republic of Tanzania and Republic of Kenya. Now whether with the facts adduced, the accused can be said he did really attempt to commit the offence as charged.

When we refer to the law, the main offence is that the law prohibits any person in the United Republic of Tanzania or a Tanzanian outside the United Republic of Tanzania to commit a terrorist Act. The law section 3 of POTA defines a terrorist act to be an act constituting terrorism as per section 4 of POTA.

Also, section 4(3) provides an act shall also constitute terrorism within the scope of this Act if it is an act or threat of action which: -

(a) Involves serious bodily harm to a person.

(b) Involves serious damage to property.

(c) Endangers a person's life.

(d) Creates a serious risk to the health or safety of the Republic or a section of the public.

(e) Involves use a firearms or explosives.

In the present scenario section 4(3) (c) of POTA is more relevant when looked at the context of the charge and the evidence tendered which point at the intention to join a terrorist group. The appellant by attempting to join the terrorist group endangered his own life and also depending on what may have occurred later other optional provisions listed above may be would have applied.

According to Section 25(1) (a) of POTA, being a member of the terrorist group is an offence punishable. It is also a defence under section 25(2) (a) and (b) if at the date a person became a member or professed to be a member of the entity/group it was not a terrorist group.

However, in our case we are told the accused attempted to become a member of the terrorist group on divers' dates between 1/3/2015 – 30/4/2015. ***Prevention of Terrorism (General) Regulations 2014*** lists Al Shabaab Al – Islamiya as a terrorist group in part I of the schedules to the regulations. Thus, the entity to which it is alleged that the accused

The execution of the intention by the accused person was not fulfilled as to render the complete offence committed and therefore, he has been charged with the offence of an attempt to commit a terrorist act.

Section 380 of the Penal Code, [Cap 16 R.E 2022] define what an attempt is; it is *"when a person **intending to commit an offence, begins to put his intention into execution** by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil in intention to such extent as to commit the offence, he is deemed to attempt to commit the offence."*

The prosecution counsels cited the case of **Samwel Jackson Saabu @ Mng'ari and 2 Others Vs. Republic, Criminal Appeal No. 138 of 2020, Court of Appeal of Tanzania at Musoma** (unreported) wherein the case at page 18 – 19 the Court listed the crucial ingredients of an attempt offence. They have been referred to herein the judgment. They are one, Proof of intention to commit the main offence; two, evidence to prove how the offender begins to employ means to execute his intention; three, the evidence that proves overt acts which main fest's the accused's intention;

four, evidence proving an intervening event, which interrupted the accused from fulfilling the main offence.

The evidence tendered, in particular the cautioned statement, shows that the accused under Shekh Shaban Maalim Shaban learned a lot on jihad movement. The movement is for fighting for Muslim to make sure the reigning government is overthrown and install an Islamic state. He made follow up of the advice by Imamu Rajab, by following up on the training in the YouTube. Apart from that he said in the statement that he was being trained in the forests whereby he did well and this made his leader(s) to recommend that he should join Al Shahab Al Islamiyah for higher studies. The accused agreed and that is when he started preparing for a journey to Somalia. As he was advised to accompany his wife, they left together with her and the wife started requesting to return home just after arriving at Iringa. Up to that stage, what is the position in law so far as proof of an offence is concerned?

I have an opinion, basing on the facts that, as to the intent, the prosecution did establish and prove that by observing the facts in the confession the accused had made and which was recorded in exhibit P1 and P2, that the

accused developed interest after recommendations and that made him loose interest in his then current employment at the stationary. He carried that by continuing learning through YouTube.

The second element there must be a proof that the accused began to employ the means to execute his intention of becoming a member of a terrorist group. The accused in the cautioned statement explained how he prepared himself for the journey. He first sold all his house belongings whereby he got Tshs. 700,000/=. He lied to his wife and told her they are leaving for Somalia to search for his sister and return her to Tanzania and that when they come back, they will start a business of clothes – Madera. When the wife agreed on the 3rd April, 2015 the accused withdrew his savings money from the bank, which amount was Tshs. 500,000/= so that they use the money for the journey. He was warned to be confidential.

As to the third element, the accused explained that he left on 4th April, 2015 and they travelled up to Iringa; he had been warned not to take a direct transport to Tanga. On the 5th April, 2015 from Iringa to Tanga whereby they disembarked at Chalinze and took another transport to Tanga. He was received by a certain person Shekh, who took them to the hotel. The host

provided food and hotel. The next day 6th April, 2015 they left Tanga for Mombosa, where they slept at Bondeni Hotel. On the 7th April, 2015 morning he charged his phone and replaced a Tanzania number with that of Kenya and on the 8/4/2015 left Mombosa for Nairobi using the transport Simba Coach. On the 9/4/2015 left Nairobi for Garisa.

On the 10/4/2015 left Garisa heading for WAJIRA and on 11/4/2015 left WAJIRA Kenya to MANDERA where they slept. On 11/4/2015 left WAJIRA Kenya to MANDERA heading for Somalia whereby when they arrived at BURAHAURA all passengers were required to disembark at the police station. The police inquired as to where they were going. The accused replied that he was going to Somalia. He was required to show a passport. After the police had inspected the passport, they advised him to return as it is not safe for them, but the accused insisted. The police arrested them.

The accused testified and or recorded in his cautioned statement that his statement or explanation varied with that of his wife. They stayed for two days then they were taken to Kenya where they were heavily guarded and interrogated for three days. Then after he gave up he decided to spill out the beans as follows: -

"Mwisho baada ya kukata tamaa niliwaeleza kwamba naenda Somalia kujiingiza na kundi la ugaidi la Al – Shabaab kwa ajili ya harakati za ugaidi na JIHADI".

With the account, the details could not easily be known by the police had it not been for the revelation by the accused himself. It is clear, the accused manifested overt acts to fulfil his intent which was interrupted by the Kenyan Police when they arrested him at BARAHAURA.

Although, the police at Kenya were not called, the charge is based on the facts that the accused acted in Tanzania and also in Kenya as was rightly submitted by the prosecution. It is enough for the purpose of the charge to rely on the story on the Tanzania side. Given the seriousness of the offence, it is illogical for the state, to spend all the expenses just for the sake of implicating the accused. If that was the case, they could have joined him in other similar cases whose offence were fully completed and save time to bring him to Sumbawanga only to be charged with an attempt to commit an offence.

During trial there has been a contest by the prosecution and defense that the case has been proved and the defence asserting that there was no any

proof at all. It will be observed that apart from the evidence adduced by the witnesses PW1 – PW5 in respect of the arrest, the details were laid bare by the accused in exhibit P1 and P2. He gave that evidence himself after he had given up and he has revealed the reasons as well. Due to discrepancy between his explanation and that of his wife, it led the police at Kenya to arrest them at BARAHAURA. But also, he gave up and spilled the beans as quoted above.

Although the accused in his defence has recanted all the evidence, I believe he made that repudiation and forgot to make it flow to substantiate the defence position and make it truthful. The flow in the prosecution case deprives the defence a chance to raise doubt especially when we trace back the trail of events starting from the date, he was recorded in the detention register No. 15 of 2015 serial number 1339. If it would be true that he was taken to Sumbawanga on 22nd May, 2015 how comes he was recorded to be incarcerated on the 18th May, 2015. Obviously, that alone brings me to the finding that there is truth in the prosecution evidence tracing back the events to 19th April, 2015 when the appellant was re-arrested as per PW1.

The accused also raised a defence of alibi. He did not however, issue notice and furnish particulars to the investigators nor the prosecution and he did come up with the same during defence after the prosecution case had already been closed which is contrary to section 194(4) and (5) of the Criminal Procedure Act, Cap. 20 R.E.2019. Thus, it is trite in law that where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case. And where the accused fails to comply with the requirement the court at its discretion may accord no weight of any kind to the defence as per section 194(6) of the Criminal Procedure Act, Cap. 20 R.E.2019. In the case of **Matinda Lesaito V. Republic [2014] TLR 457,** the learned trial judge defence of alibi as the defence was raised by the appellant without giving a prior notice and found the Appellant was guilty. In our case, the accused failed as well to furnish the prosecution with the particulars and also most of the denied facts were not cross examined when the prosecution witnesses were testifying.

Under the circumstances, I find the prosecution has managed to prove the case beyond reasonable doubt that the accused AYOUB S/O MAULID SAID did commit an offence, to wit, attempted to commit a terrorist act, to wit,

becoming a member of a terrorist group namely; Al – Shabaab Al Islaamiya based in Somalia contrary to section 4(1), 25(1) (a) and 27(b) of the Prevention of Terrorism Act, No. 21 of 2002. I therefore find the accused AYOUB S/O MAULID SAID guilty and convict him with an offence, to wit, attempted to commit a terrorist act, to wit, becoming a member of a terrorist group namely; Al – Shabaab Al Islaamiya based in Somalia contrary to section 4(1), 25(1) (a) and 27(b) of the Prevention of Terrorism Act, No. 21 of 2002. It is ordered accordingly.

Dated at Sumbawanga this 4th day of September, 2023

T. M. MWENEMPAZI

JUDGE

Date - 04/09/2023

For Republic - Mr. Jerinus Mzanila – SA

For Accused - Mr. Samwel Kipesha – Advocate

Accused - Present

JLA - George Aman

B/C - A.K. Sichilima – PRMA

Mr. Jerinus Mzanila – State Attorney: The case is for judgment and on our part we are ready.

Mr. Samwel Kipesha – Advocate: We are ready to proceed.

Court: Judgment delivered in Court in the presence of the parties.

T. M. MWENEMPAZI
JUDGE
04/09 2023

SENTENCE:

The law is categorical and prescribes a minimum sentence of 18 years incarceration in jail. That is according to section 27(b) read together with section 25(i)(a) of the Prevention of Terrorism Act, No. 21 of 2022. The same provides as follows:

S. 25(1) Every person who-

(a) is a member of;

(b) professes to be a member of a terrorist group, is guilty of an offence and shall, on conviction be liable to imprisonment to a term not less that eighteen years.

S. *27 Every person who-*

(a) aids and abets the commission;

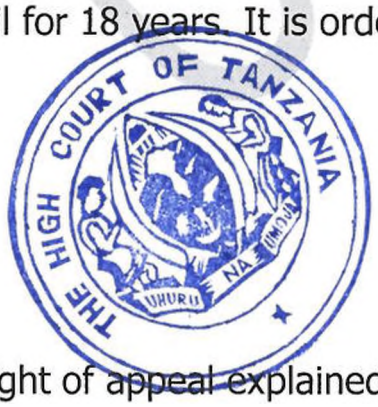
(b) attempts to commit;

(c) conspires to commit

(d) Counsels or procures the commission

of an offence under this Act, is guilty of an offence and shall on conviction be liable to the same punishment as is prescribed for the first mentioned offence.

In accordance to the law therefore, since the accused has been found guilty with an offence of an attempt to commit an offence, to wit, becoming a member of a terrorist group namely; Al Shabab Al Islaamiya based in Somalia contrary to section 4(1), 25(1)(a) and 27(b) of the Prevention of Terrorism Act, No. 21 of 2002 is hereby sentenced to serve a term of imprisonment in jail for 18 years. It is ordered accordingly.



T. M. MWENEMPAZI
JUDGE
04/09 2023

Right of appeal explained.