IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SAL AAM DISTRICT REGISTRY)

AT DAR ES SALAAM.

ORIGINAL JURISDICTION

CRIMINAL SESSIONS CASE NO. 206 OF 2022

(PI No. 52 of 2015 in the Resident Magistrate's Court of Kisutu)

THE REPUBLIC ..... COMPLAINANT

VERSUS

DUA SAID LINYAMA.....1ST ACCUSED

ISSA ABDALLAHMANI KOKOKO.....2ND ACCUSED

JUDGMENT

24th Nov. 2023 & 1st Dec.2023

GWAE, J.

In this court, the accused persons, namely; Dua Said Linyama and Issa Abdallahman Kokoko (hereinafter 1st and 2nd accused respectively) stand charged with three distinct offences on three counts one being an alternative count to the 1st count. The **1st count** being in possession of property for commission of terrorist acts contrary to section (4) (1) (3) (d) and 15 (b) of the Prevention of Terrorist Act, No. 21 of 2002 (The Act or POTA). The **2nd**

count, agreeing to participate in commission of terrorist acts contrary to sections 4 (1), (3), (e), (i) and 21 (b) of the Act and **3rd count** in alternative to 1st count the offence being unlawful possession of armaments contrary to section 11 (1) and section 18 of the Armaments Control Act (Cap 246, Revised Edition, 2002).

The particulars of the offence in the 1st count are; that on the 27th August 2015 at Tegeta Mivumoni area within Kinondoni District in Dar es salaam Region, the said accused persons did jointly and together collect one hand grenade, knowing that, it will be used directly or in whole to facilitate the commission of terrorist acts to wit; attacking a section of the public within the United Republic of Tanzania in order to establish an Islamic State within the United Republic of Tanzania. The act, which involves prejudice to the National Security and by its nature and context, may reasonably be regarded as being intended for intimidating a section of the public within the United Republic of Tanzania.

The indictments in the 2nd count are to the effect that; on diverse dates and places between January 2014 and 27th August 2015 at Likawage Village within Kilwa District in Lindi Region and Tegeta Mivumoni area within Kinondoni District in Dar es salaam Region, the 1st and 2nd accused knowingly

did agree to participate in the commission of terrorist acts to wit; collection of explosives intended to be used in attacking a section of the public within United Republic of Tanzania to establish an Islamic State within the United Republic of Tanzania.

The prosecution also alleges in the 3rd count as an alternative to the 1st count that, the 1st and 2nd accused person on 27th August 2015 at Tegeta Mivumoni area within Kinondoni District in Dar es salaam Region were found in possession of armaments to wit; One Hand Grenade without lawfully authority.

Throughout the trial, Mr. Kauli George Makasi, the learned senior state attorney assisted by Mr. Gideon Magesa and Ms. Tully Helela, both the learned state attorneys, represented the Republic. On the other hand, Mr. Gerald Noah assisted by Mr. Joshua Marwa and Mr. Romani Selasini Lamwai abetted by Mr. Fredrick Msaki appeared representing the 1st and 2nd accused person respectively. All the accused persons' representatives are the learned advocates.

Both accused persons when arraigned before the court during plea takings as well as immediately before the commencement of trial, patently

pleaded not guilty in all counts, thereby provoking the prosecution to prove its charge.

The trial of this case was conducted in Camera after the prosecution had sought and obtained the order of the court preserving the protection of witnesses. This was so through Miscellaneous Criminal Application No. 26 of 2021 made under sections 34 (3) (a), (b) and (4) of the Act, and 188 (1),(a) (b)) (c) (d) and 188 (2) of Criminal Procedure Act, (Cap. 20 R. E, 2002). By Virtue of the said Application on 16th Mach 2021, this Court (**Ismail, J as he then was, now JA**) among other things ordered that, the identities of witnesses and their whereabouts be withheld throughout the entire trial. Being guided by the said order of the court, the names of the prosecution witnesses shall herein under be hidden. However, the accused persons were accorded due process in ensuring fair trial.

In her endeavours to substantiate its case, the prosecution called five witnesses namely;- **First,** a police officer who is an expert in explosives and armaments who appeared as PW1 and "P9" during committal proceedings. **Two**, arresting police officer currently working with the police Ant-terrorism Police Department whose name is marked as P8 in the list of the prosecution witnesses. **The 3rd witness**, a retired police officer, PW3 whose name was

enlisted as P6 during committal proceeding**. Fourth witness**, PW4 is a police officers and was the one who was known as "P" for the purpose of hiding his identity and **fifth**, PW5, a civilian who participated in the search at the room allegedly occupied by the 1st accused.

Similarly, in establishing its case, the prosecution was able to tender the following exhibits;- the ballistic report dated 1st September 2015 with reference FB/BALL/LAB/135/2015 and WH/IR/5390/2015 was removed and marked as PE1. Exhibits' receipt form demonstrating that, the Police Force Forensic Bureau received the exhibit namely; one hand grenade with the above investigation and Laboratory numbers (PE2)

The prosecution further produced a letter of 27th August 2015 written by OC-CID Kawe addressed to the Forensic Bureau requesting for forensic examinations of the exhibit suspected to be hand grenade (PE3) and its reply letter dated 2nd September 2015 from the Forensic Bureau to the OC-CID (PE4).

The prosecution further produced, one hand grenade (PE5) whose external features are as per the prosecution witnesses are; name of the 1st accused, Dua Said, safety pin and spoon pin, IR's number, PF168 (tag), I

and black rubber. There was also a seizure note or certificate of seizure of 27th August 2015 produced and admitted as PE6 bearing investigation number that is WH/IR/5390/2015 and name of the 1st accused person as the one whose room was searched by arresting officers. The prosecution side finally tendered the cautioned statement of the 2nd accused person, which was admitted as PE7 after trial within trial had been conducted since it was retracted.

Brief substance of the prosecution evidence is to the effect that, following rampancy of terrorist acts and international crime in 2015 there was an establishment of Ant-terrorist Police Department. Police officers stationed including PW2 and PW4 used to collect information, arrest the offenders of terrorist acts and trans-crimes offenders, investigations of crimes, recording of statements of the accused persons, charging and sending to court the suspects as well as giving evidence and other police related duties.

On 27th August 2015 at morning hours while PW2 and PW4 were in office at the Police Heard Quarter, there was information furnished to them by an informer. The information was to the effect that, there were persons who were suspected to be wrong doers of terrorist acts. The informer led

the police (PW2 and PW4) and other police officers including PW3 who were into two groups to Tegeta Mivumoni area in a workshop manufacturing cookers nearby Nuru Mosque within Kinondoni District in Dar es salaam Region.

Upon arrest of the suspects now, the 1st and 2nd accused person and upon interrogation the 1st accused person confessed before PW4. The 1st accused person further confessed to be in possession of one hand grenade, which he kept on behalf of his leader. The police who received information and who arrested the accused persons called through their cellular phones the local government leaders, including PW5 to assist them conducting search at the 1st accused's residence. Thereafter, the arrival of the local government leaders, the 1st accused took the lead up to his room. While at the 1st accused's residence, the 1st accused gave his room key to the street leader (P1) who opened the room.

However before the search commenced, the police officers (PW4 and PW3) and other persons (independent witnesses-PW5 and street chairperson now deceased) ensured that, they were searched before entering the 1st accused's room. The search was conducted and subsequently one hand grenade was impounded from the 1st accused person's room while the 2nd

accused person was under restraint of police at the Police Motor vehicle. Thereafter, seizure note (PE6) was filled by PW4 and the same was signed by the 1st accused person, PW5, deceased and PW4 whose name and signature have appeared twice in the note.

Having seized the said hand grenade, the police through PW2, and the expert carefully handled it and sent to Field Force Unit at Ukonga where it was safely. However on 28th August 2015, PE5 was sent to Forensic Bureau for examination via the OC- CID's letter (PE3). The Forensic Bureau via PW1 examined the exhibit sent to it and came up with the following observations:- That, the seized article was a defensive hand grenade. That, once it erupts it turns into various fragments and that, it was made in Russian Country as evidenced by mark "RG" bearing its number, 386-129-8, which could not be easily seen by the use of eyes unless by assisting instruments/ magnified glasses.

After the requested examination of the exhibit, PW1 then labeled it as K-1, with serial Number 386-129-8 and WH/IR/5390/2015 and that the same was returned to the OC-CID again through PW2 and PW3. The return of the hand grenade, PE5 was through the PW1's letter dated 2nd September 2015 (PE4) and that after the return PE5 to OC-CID, PW2 and PW3 took the exhibit

to Ukonga Field Force Unit for safe keeping till the date when the trial of the case started.

It is also the prosecution evidence that is incriminatory against the 2nd accused in that, he confessed the offence of participating in the terrorist acts before PW4. The 2nd accused is also alleged to have mentioned some of leaders including one Rajabu Kokoko and others and that his cautioned statement (PE7) was duly recorded.

However when PW1 cross-examined by the defence counsel if he worked on the information contained in PE7, his answer was to the negative that, he is not aware if the information was worked as he was not the case investigator.

After the close of the prosecution evidence, the court ruled out that, the 1st accused person has a case to answer in all three counts as there were pieces of evidence incriminatory to his guilt. These are; the alleged oral confession before PW4, leading to the room where he was living and showing the place (coach cushion) where PE5 was hidden and finally by enabling its seizure.

Nonetheless, the 2nd accused person was found to have a case to answer in respect of the 2nd count unlike in the 1st and 3rd count where he was acquitted. Henceforth, both accused persons were addressed in terms of provisions of section 293 (2) Criminal Procedure Act, Cap 20, Revised Edition, 2002. Each accused person had no any witness save to himself. Both accused persons gave their evidence under affirmation. The 2nd accused commenced his defence followed by the 1st accused. Thus, they respectively appeared and stood in the witness box during their respective defence as DW1 and DW2.

Commonly, each defence witness had strongly testified that, he was apprehended by police officers on the 26th day of August 2015 as opposed to the prosecution version that they were arrested on the 27th day of August 2015. It is also the version of both accused persons that, on the 26th day August 2015, many people were arrested nearby Masjid Nuru Mosque including themselves. Both accused persons also similarly testified that, they were brought to the court of law on the 10th day September 2015 to answer the current charge.

However, each accused exceptionally gave his evidence as follows; the 2nd accused (DW1) testified that, he was not informed of the accusations

when he was arrested until on 10th September 2015 when he was arraigned to the court of law. He further denied to have agreed to participate in the terrorists acts as alleged in the 2nd count. He added that, he has never gone to Lindi Region since he was born. He contended that his residence between 2nd January 2014 and 27th day of August 2015 was at Ununio area-Tegeta as opposed to the prosecution assertion that, he was a resident of Mivumoni area-Tegeta within Kinondoni District.

Maintaining his retraction to the allegedly made confession in PE7, DW1 stated that on 27th August 2015. He added that, he was taken to unknown place to him but the same was being mentioned as "base area" where he was tortured by police officers in order to obtain his illegal confession and in order to show them whereabouts of one person called Rajabu Kokoko (baba mdogo). He further refuted having made the alleged confession to PW4 by stating if correctly as alleged by the prosecution, PW4 could be familiar with him. Therefore, he could not improperly identify the 1st accused person purporting to be him during dock identification when asked to do so by the prosecutor.

When cross-examined by Mr. Kauli Makasi, the learned counsel for the Republic as to the area where he was tortured and if he mentioned his

residence to PW4. DW1 replied that, the ones who arrested him were the ones who tortured him at the area known by them as "base area" and that, police officers had never brought him to Mivumoni area on the 27th day of August 2015 nor does he recollect if PW4 ask him any question in connection with his residence at Mivumoni area.

On his part, the 1st accused person (DW2) uniquely testified that, when he was arrested he was aged 17 years since he was born in the year 1998 and that, he was living at Tegeta Masaiti area during his arrest on 26th August 2015 and not Mivumoni area.

DW2 further affirmed that, he did not confess before PW4 being in possession of hand grenade neither police officer who recorded his cautioned statement while under restraint. He went on testifying that, had it been as alleged by the prosecution that, his statement was recorded the same would have been tendered for evidential value. However, DW2 admittedly testified that, on 27th August 2015 was removed from police lockup and taken to Mivumoni area. He added that, upon their arrival at Mivumoni area, they found police officers who later on took his key from his pocket, which was however placed by the police. According to his testimony, the police opened and entered the room whilst he remained outside.

He also testified that soon thereafter, those police officers who entered into the room came out with an article, which they later on said, to be a bomb. Refuting the signature appearing on the seizure note (PE6), DW2 said that, the signature appearing therein is not his.

He further denied to have attended any military training of any sort neither he went to Lindi Region since he was born. Similarly, DW2 denied knowledge about Islamic State and his alleged participation of any sort in the alleged establishment of Islamic State.

In his own style, the 1st accused person contended that, the signature appearing in the committal proceeding of the 2nd person's is not the same as appearing in the PE7. He finally prayed for being acquitted for the offences flattened against him since the prosecution has failed to prove the charge to the hilt to amount conviction.

DW2 when cross-examined by Mr. George Makasi as whether he was a handwriting expert, whether the seizure note has his name and signature as well as if he tendered any document substantiating his age. His replies were as follows; that he is not an expert of handwritings nor has he produced

any document establishing that, he was born in 1998 and that PE6 contained his signature and his name.

After the closure of the case by both parties, the learned counsel for the parties did not seek and obtain leave to file their closing submissions. Having carefully considered the rival evidence adduced and as summarized hereinabove, the following are the issues for determination by the court;

1. Whether the 1st accused was found in possession of property for commission of terrorist acts
2. Whether, the 1st and 2nd accused agreed to participate in the commission of terrorist acts
3. If the 1st issue is not answered in affirmative whether the 1st accused was found in possession of the armament to wit; one hand grenade without lawful authority
4. Whether the prosecution has proved the accused persons' guilt to the required standard.

Starting with the 1st issue, whether the 1st accused person was found in possession of property for the commission of terrorist acts

As to the 1st accused person now stands charged with the offence under the provisions of the POTA, it is therefore pertinent to have the same provisions, section of the law relied by the prosecution in charging and prosecuting him reproduced herein, section of 4 (1) 3 (d) and 15 (b) of the POTA read;

> *"4-(1) No person in the United Republic and no citizen of Tanzania outside the United Republic shall commit terrorist act and a person who does an act constituting terrorism, commits an offence*
>
> *(3)* ***An act shall also constitute terrorism within the scope of this Act if it is an act or threat of action which-***
>
> *(a) to (c) not applicable*
>
> *(d)* ***creates a serious risk to the health or safety of the public or a section of the public;***
>
> *15 (a) No applicable*
>
> *(b) Possesses property intending that it be used or knowing that it will be used, directly or indirectly, in whole or in part,* ***for the purpose of committing or facilitating the commission of a terrorist act.****" (emphasis supplied)*

The above quoted provisions of the law **First**, entail a prohibition of any person being in the United Republic of Tanzania and any Tanzania citizen who is outside the country from committing any act creating any terrorist offence **Second,** they provide for the essential ingredients of the terrorist offence. The premeditated elements are;

i. An act must be a terrorist act.
ii. There must be serious threats to health or safety of the public or section of the public or group of people
iii. The complained act must be done with terrorist intention
iv. The person found in possession of the property must have an intention to use or cause the same to be used for the commission of the terrorist offence or facilitating the commission of the terrorist acts

The above provisions of the law cited above herein were accordingly interpreted by the court (**Mulyambila, J)** when facing the similar situation in **Republic vs. Mohamed Mohamed Adam @ Mbuko @ Masumbuko**, Economic Case No. 5 of 2022 (unreported). With approval of the court's decision in **Republic vs. Seif Abdallah Chombo @ Baba Fatina and 5**

others, Economic Case No. 4 of 2020 (unreported). The learned judge emphasized the circumstances portraying the commission of a terrorist offence. These are; the motivation, object and design or rationale behind the complained act in proving the offence under provisions of section 4 and 15 of POTA.

According to the evidence so far adduced by the prosecution side in support of the 1st count, it is amply established that, the 1st accused person who upon his arrest orally confessed to the offence of being in possession of the bomb. More so, the one who led to the impounding and seizure of one hand grenade (PE5) by Police officers (PW4, PW3, PW2 and others who did not appear for testimonial purposes). It was therefore the duty of prosecution to prove that, the act of the 1st accused being found in possession of the hand grenade constituted the terrorist act (s). In addition to that, other pieces of evidence were necessary to connect him with the offence. Evidence such as his complained act was serious threatening to the life of the public or an institution or a certain targeted group of society and that he had an intention to use such article in the commission of the terrorist acts or facilitating the commission of terrorist acts.

The offence in the 1st count has no exception to the general rule which requires the prosecution to prove the case beyond reasonable doubt as used to be in every criminal case, which does not follow to an exception to the general principle. Hence, the burden of proof all necessary elements creating the offence in the first count, was unavoidably in the shoulders of the prosecution.

It is a trite principle that, conviction may only be arrived at basing on the strength of the prosecution case and not the weakness of the defence side. This position of the law has been consistently emphasized in our jurisdiction and foreign jurisdiction for example in **Joseph John Makune vs. Republic** (1986) TLR. 44, it was instructively observed that:

> "*The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case. The duty is not cast on the accused to prove his innocence.*"

See also section 3 (2) of TEA as well as judicial decisions in **Joseph John Makune vs. Republic** [1986] TLR 44, **Jonas Nkize vs Republic** (1992) TLR 213, **Marando Suleiman Marando vs. SMZ** (1998) TLR 375, **Nathaniel Alphonce Mapunda and Benjamini Alphonce Mapunda vs.**

Republic, (2006) TLR 395 and **Luhemeja Buswelu v. Republic**, Criminal Appeal No. 164 of 2012 (unreported).

In my considered view, the elements necessary for the offence in the first count ought to have adequately been established to hold the 1st accused person liable. I am of that view simply because since the prosecution remains with mere assertions that in the year 2014 to 2015, there were terrorist acts that were committed such as killings of police officers, robbing military firearms, stealing of the bank money and so on so forth. In other words there is no other proof whatsoever that the 1st accused's possession of the hand grenade, as shall be demonstrated in third count, constituted the offence created under the provisions of the law. The reasons being;-

First, none of the prosecution witnesses has testified as to the 1st accused's intention of being in possession of one hand grenade.

Second, no evidence that, he intended to use the same or caused it to be used in the commission of the terrorist acts or to cause it to be used in the facilitation of the commission of the terrorist offence (s).

Thirdly, that, there is no evidence whatsoever relating to the 1st accused's intention of attacking a section of the public within the United Republic of Tanzania in order to establish Islamic state and.

Fourthly, that the in the absence of any other corroborative evidence connecting the 1st accused with the offence in the 1st count, his defence that he had neither attended any military training nor did he go to Lindi Region since he was born and that, he knows nothing like Islamic State raise doubts since he deserves credence.

In my decided view, evidence adduced by DW2 while in a witness box deserves credence unless the contrary is established. I subscribe to the case of **Mathias Bundala vs. the Republic**, (Criminal Appeal No. 62 of 2004) [2007] TZCA (16th March 2007) Court of Appeal of Tanzania sitting at Mwanza firmly stated that;

> *"It is trite law that, every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing the witness"*

Examining the evidence adduced by the prosecution pertaining the 1st count, I am not convinced if there is sufficient proof to the required standard

to justify the court enter a conviction against the 1st accused. Therefore, the 1st issue is negatively determined.

Now, to the 2nd issue on whether the 1st and 2nd accused jointly and together agreed to participate in commission of terrorist acts

As earlier explained when determining the 1st issue, the prosecution has satisfactorily established that, there was oral confession by the suspect now 1st accused person when arrested and subsequent leading to the search and seizure of one hand grenade (PE5) in the room allegedly occupied by the 1st accused. On the other hand, both accused persons utterly maintained that, they had not committed the offence in the 2nd count. Therefore, both accused persons disputed their knowledge of the explosives and collection of the same as plainly envisaged under section 4 (3) (e) of POTA with a view of attacking a section of the public within the United Republic of Tanzania. Nonetheless, the prosecution has the duty to prove all the essential elements of the offence in the 2nd count as correctly elucidated in **Mosi Chacha @ Iranga and another vs. The Republic**, (Criminal Appeal No. 508 of 2019) [2021] TZCA 598 (22nd October 2021)

"As this Court state in Andrew Longine vs Republic, Criminal Appeal No. 50 of 2019 (TANZLII), proof beyond reasonable doubt implies in our appeal proving all the essential elements constituting the offences of ....."

The same position of the law was stressed in **Antony Kananila and another vs. The Republic**, Criminal Appeal No. 83 of 2021 (unreported). In Antony's case the Court of Appeal of Tanzania sitting at Kigoma when dealing with the offence of murder held that, it is trite that the prosecution is required to prove all ingredients of an offence in order to win a conviction against an accused.

Considering the elements of the offence in 2nd count, the prosecution, in my view, ought to have proved the essential ingredients of the offence since the words used therein are "knowingly did agree to participate in commission of terrorist acts". The essential ingredients of the offence in the 2nd count are; the accused persons must have known the planned mission that is, commission of the terrorist acts namely; collection of the explosives /hand grenade (PE5), knowledge that, the same was intended to be used in attacking a section of the Country in order to establish an Islamic State in the United Republic of Tanzania.

Carefully scrutinizing the evidence adduced by the prosecution side, the 2nd accused person on one hand is incriminated solely on the cautioned statement (PE7) allegedly made by him before PW4. Correspondingly, the prosecution evidence incriminating the 1st accused person is the alleged oral confession, the possession of the hand grenade (PE5) and being mentioned by the 2nd accused in his cautioned statement (PE7) as one of those who agreed to participate in commission of terrorist acts.

The words allegedly spoken by the 2nd accused through his cautioned statement are to the effect that, he was trained or recruited to participate in the terrorist acts namely; overthrowing the United Republic by establishing an Islamic State. That, in the course of executing the planned unlawful acts together with others including the 1st accused. That, the recruitments were being conducted at Likawage area within Kilwa District in Lindi Region. For the purpose of lucidity, parts of the contents in the cautioned statement (PE7) are reproduced herein under;

> *"SWALI: Nani alikuingiza kwenye harakati za kusimamisha dora ya kiislaam hapa nchini Tanzania?*
>
> *JIBU: Aliyenishawishi anaitwa RAJABU S/O KOKOKO ambaye alinishawishi ili niwe mwislaam wa kweli natakiwa nijiunge pamoja na yeye na waislaam wengine ili kuweza kupigania*

na kutetea dini ya Kiislaam kwa kujiunga na harakati za vikundi vya Harakati ya kusimamisha dora ya KIISLAAM kwa njia ya kupigania vita vya JIHADI dhidi ya serikali hii iliyo madarakani ambayo ni ya JAMHURI YA MUUNGANO WA TANZANIA, serikali ambayo haina dini, serikali ya KIKAFIRI, KISHA KUINDOA MADARAKANI NA KUSIMAMISHA DORA LA kiislaam amabayo itafuata sharia na Hukumu za dini ya kiislaam.....Baada ya wiki mbili RAJABU S/O KOKOKO alikuja kazini kwetu maeneo tunayotengeneza MAJIKO huko TEGETA akatuambia kuwa muda wa safari ile umekamilika. Hiyo siku ilipofika tuliondoka katika majumbani kwetu hadi MBAGALA BUS TERMINAL ambapo nilikutana na wanaharakati wenzangu wa harakati za ugaidi ambao ni DUA/SO/ SAID LINYAMA.....na wengine wawili ambao siwakumbuki.

SWALI: Ni aina gani ya zana y vifaa ambavyo mlikuwa navyo huko kambini kwa ajili ya mafunzo?

JIBU: Tulikuwa na bunduki aina ya AK-47 ikiwa na risasi thelathini kwenye MAGAZINE, risasi zingine zilikuwa zimehifadhiwa kwenye mfuko mdogo ambayo sikujua idadi yake..visu mapanga.. matururubai ya kutandikia..... tunajifunza mafunzo ya kutumia silaha yaani bunduki na kutengeneza mabomu ya kienyeji ya kurusha kwa mkono....."

Examining the substances in the cautioned statement (PE7), I have observed that, there is a clear mentioning of the 1st accused person by the 2nd accused person and indication that both accused persons' involvement in the recruitment aimed at participation in the terrorist acts. Nevertheless, the 2nd accused has seriously retracted his cautioned statement (PE7) on the ground that he neither made it nor did he meet PW4 that is why he failed to

properly identify him (2nd accused) during dock identification in the court. Equally, the 1st accused denied to have undergone any recruitment allegedly planned for the commission of terrorists acts. It is common ground, that retracted or repudiated confession requires corroborative pieces of evidence.

I am alive of the principle that, even where there is no corroborative pieces of evidence yet the 2nd accused person's retracted confession can be relied by the court to convict him provided that, the court is cautious of the danger and if eventually it is fully satisfied that, the same is nothing but the truth. This legal position was stressed in the most famous case of **Tuwamoi vs. Uganda** (1967) 1 EA 84 approved the Court of Appeal of Tanzania in the case of **Hatibu Handhi and Others vs. the Republic** (1996) TLR 12 where it was appropriately held:

> *"The court will only act on the confession statement if corroborated in material particulars by independent evidence....."*
>
> *A conviction on a retracted uncorroborated confession is competent if the court warns itself of the danger of acting upon such a confession and is fully satisfied that such confession cannot but be true".*

Moreover, I am quite sound of the principle that, a confession of an accomplish like that of the 2nd accused person incriminating his co-accused person (1st accused person) may also be relied to form basis of conviction yet precaution has to similarly be taken of the danger of convicting an innocent person on such type of evidence. This legal position was stressed in **Paschal Kitigwa vs. Republic** (1994) TLR 65 where the Court of Appeal of Tanzania held that it is safe to look at other pieces of incriminating evidence such as circumstantial or conducts or words of the accused in order to uphold a conviction founded on uncorroborated evidence of co-accused and it went on stating;

> *"However, as correctly observed by the trial magistrate and the learned judge, even though the law is such that a conviction based on uncorroborated evidence of an accomplice is not illegal still as a matter of practice, the then Court of Appeal for Eastern Africa and this court have persistently held that, it is unsafe to uphold a conviction based on uncorroborated evidence of a co-accused".*

In this instant case, it is hardly believed if the accused persons agreed to participate in the commission of terrorist act (s) due to the apprehended diversity of the evidence adduced by the prosecution side and the wording

of the charge in the 2nd count. If the 1st accused was found in possession of the hand grenade/ explosives as per PE5 yet is doubtful if the same was really collected for commission of terrorist acts. I am of such view for an obvious reason that neither the cautioned statement (PE7) nor prosecution witness whose testimony with effect that the same was collected with a view of using the same in the commission of a terrorist offence (s) save the prosecution evidence that, the 1st accused was found in possession of exhibit P5.

I have further taken into consideration that, the alleged terrorist act in the 2nd count is *collection of explosives* whereas the prosecution evidence is to the effect that, the 1st accused person was found in possession of one hand grenade nothing like a process of collection of explosives by either of the accused persons or both.

Furthermore, evidence contained in PE7 does not indicate any alleged collection of explosives on the part of the accused persons except their alleged acts of undergoing terrorist trainings at Likawage village and making of local hand explosives. Hence, apprehension of the absence of coherence and consistency between the prosecution evidence and the wording in the charge, 2nd count.

Furthermore, if as alleged by the prosecution that, the 2nd accused gave detailed information of the military trainings, he underwent at Likawage Village, some vital evidence would be expected from such confession such as some of articles he mentioned like tents (turubai), photos of the camp, seizure of the said AK-47 and the like. Frankly speaking, it was expectable from the investigation team to have closely made follow ups of such information and eventually to enable the court to assess the truthfulness of the 2nd accused persons' cautioned statement.

Therefore, in the above aspect, it was the expectation of the court to form other incriminating pieces of prosecution evidence, I make reference the decisions of the Court of Appeal in **Mwita Kigumbe Mwita and Another vs. Republic,** Criminal Appeal No. 63 of 2015 and **Ibrahim Yusuph Calist 25 @ Bonge and Three Others vs. Republic,** Criminal Appeal No.204 of 2011 (both unreported) where it was held 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 Mfaiamagoha 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 no tin 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."

Nevertheless, I am not in agreement with the defence that, the dock identification purportedly done by PW4 during trial establishes serious doubt if he really recorded the contentious cautioned statement (PE7). I am holding so for an obvious reason that it has been a quite long time since the accused persons were arrested on either 26th August 2015 or 27th August 2015 to when the trial commenced that is November 2023, a period of more than eight (8) years. Henceforth, PW4 must have lost memory. Similar situation was faced **in Yusuph Sayi and two others vs. the Republic** (Criminal Appeal No. 589 of 2017) [2021] TZCA 285 (8th July 2021) where the Court of Appeal at Mwanza held;

"With respect, we endorse Ms. Zengil's submission that the alleged variations are trial. These variations are likely to have arising due to lapse of memory as the testimonies were given five years after the fateful incidence."

The same position was rightly stressed in **Abudalla Nabulere and 2 Ors vs. Uganda** (Criminal Appeal No. 9 of 1978) [1978] UGSC 5 (5 October 1978). Thus, the wrong dock identification by PW4 to the 1st accused instead of the 2nd accused does not shaken evidence adduced by the prosecution regarding the 2nd accused's cautioned statement as the same was greatly associated with the lapse of time

Having demonstrated as herein above and taking into account of the requirement of corroboration to safely secure a conviction against an accused person on evidence heavily placed on the retracted confession and confession by an accomplice without undue regard to the fact that, the evidence that requires corroboration cannot corroborate. Hence, the court is justified to determine the 2nd issue not in affirmative.

In the determination of the 3rd issue on whether the 1st accused is guilty of the offence in 3rd count in alternative to the 1st count

Unluckily, the word "possession" or "be in possession" or "to have been in possession of property or any article" has not been defined in the Armaments Control Act (Supra) except in the Penal Code Cap 16, Revised Edition, 2002. I would therefore find it appropriate to have interpretation section (section 5 of the Penal Code) as to the term "possession" reproduced herein under before answering this issue;

> *"possession" "be in possession of" or "have in possession" includes-*
>
> *(a) not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to, or occupied by oneself or not) for the use or benefit of oneself or of any other person;*
> *(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;*

Apparently, the prosecution evidence pertaining the 1st count has been determined as being doubtful that is why the 1st accused has been found innocent of that offence. That, being the finding of the court in the 1st count, it is now the overriding duty to determine the 3rd count unlike in a situation

if the 1st count would have been determined in affirmative. This legal stance was emphasized in **Republic vs. 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.*"

Basing on the above decision, since the 1st count was not positively answered, therefore the court has the duty to determine the alternative count, the 3rd count as an alternative to the 1st count.

Now, back to the court's determination of the issue, it has been the evidence by the prosecution that, the 1st accused person when arrested instantly confessed to have been in possession of one hand grenade. In addition to that, it was the 1st accused person who led the police team into impounding of exhibit P5 (Bomb). More importantly, the 1st accused admitted being removed from police lock up on 27th August 2015 and taken to Mivumoni area though he has contended that, the searched room was not his residence. I find this piece of defence is nothing but an afterthought. The prosecution evidence that the 1st accused orally confessed to police officers

(PW4) and that, the hand grenade was impounded in the presence of PW4, PW2, PW3 and street chairperson who passed away before the trial of the case is not doubted. The evidence of police officers (PW2, PW3 and PW4 is well supported by an independent witness who appeared during trial as PW5).

Moreover, the prosecution witnesses especially PW2 and PW3 have clearly testified to the effect that, the hand grenade was properly handled from the scene of crime to where it was kept (Ukonga Field Force Unit) on 27th August 2015. It is also certainly clear that, PE5 was sent to the Forensic Bureau on the 28th day of August 2015 until when it was sent back to FFU on 2nd September 2015. More so, documentary evidence (PE3 and PE4) regarding sending the exhibit to Forensic and returning it to the Field Force Unit is undoubtedly clear and supportive to the oral evidence adduced by PW2 and PW3.

Equally, the oral evidence of PW1, an explosives expert is, in my considered view, sufficiently corroborated by the exhibits namely; forensic report (PE1) and exhibit receipt form (PE2) of exhibit, PE5. Thus, the defence contention purportedly made during cross-examinations to the prosecution witnesses on the failure to tender exhibits' register is baseless since the same

is adequately replaced by oral and documentary evidence aforestated. In the circumstances and reasons herein, I am instructively bound to subscribe to the case of **Director of Public Prosecutions vs. Akida Abdallah Banda,** Criminal Appeal No. 32 of 2020 (unreported) where the Court of Appeal Sitting at Dar es salaam had these to say;

> *"With the above evidence we are of the view that the chain of custody of the exhibit P2 was totally established notwithstanding the absence of paper trail, which fact, as Ms. Mkonongo submitted, rightly in our view that the chain of custody may be established by oral evidence."*

Basing on the evidence adduced by the parties relating to the 3rd count, I am satisfied that, the prosecution side has established the 1st accused's guilt to the required standard in terms of possession of the armaments namely; one hand grenade (PE5) and above all, he had no authorization of such possession.

Having discussed as herein above together with the foregoing reasons, it is worth articulating, that based on the evaluation of the evidence, the prosecution side has failed to prove the offence in the 1st and 2nd count to the required standards. The 1st accused is therefore acquitted to the offences

in 1st and 2nd count. Equally, the 2nd accused person is acquitted for the offence in the 2nd count termed "agreeing to participate in the Commission of the terrorist acts". He is thus acquitted for all offences he was initially charged with.

However, the Court is satisfied that, the 1st accused person's guilty to have been sufficiently proved in the 3rd count as an alternative to the 1st count warranting this court to enter a conviction. The 1st accused person is consequently convicted of the offence of being found in possession of armaments to wit; one hand grenade contrary to section 11 (1) and 18 of the Armaments Control Act, Cap 246, Revised Edition, 2002.

It is so ordered

DATED and **DELIVERED** at **DAR ES SALAAM** this 1st December 2023

MOHAMED R. GWAE

JUDGE

Court: Judgment delivered this 1st December 2023 in the presence of the accused persons herein, **Ms. Blandina Mununa**, the learned state attorney for the Republic and **Mr. Romani Lamwai**, the learned advocate for the 2nd accused also holding brief of **Mr. Gerald Noah** for the 1st accused person

MOHAMED R.GWAE
JUDGE
01/12/2023

SENTENCE

This court is duty bound to assess an appropriate sentence that suits the offender, Dua Said Linyama who has been convicted of the offence of being found in possession of armaments contrary to section 11 (1) and 18 of the Armaments Control Act, Cap 246 Revised Edition, 2002

The parties' counsel have rivalry argued in relation to the imposition of a sentence against the offender. On one side, the Republic has prayed for stiff sentence stating that, the offender was found in possession of the article, one hand grenade that was not only dangerous to the people but also to the properties. On the hand, the learned counsel for the offender, Mr. Gerald focusedly urged this court to leniently sentence the accused on the reasons, that he is the first offender and that the period he has spent while in remand.

The applicable provision of the law after an accused being found guilty of the offence under section 11 (1) of the Armaments Control Act (supra) is section 18, which reads

> *"Any person who contravenes, refuses or fails to comply with any provision of this Act is guilty of an offence and shall, if no penalty is expressly stated by the provision contravened,*

be liable on conviction to imprisonment for a term not exceeding fifteen years not less than seven years or to a fine not exceeding three million shillings or to both such fine and imprisonment."

In view of the wording of the above quoted section, the court has a discretionary power, though limited, to sentence an accused person who is convicted of an offence under the Act to a custodial sentence of not more than 15 years jail and not less than seven years or to a fine not exceeding three million shillings or both imprisonment and fine. Thus, the court cannot impose the custodial sentence less than seven years imprisonment

In our instant criminal matter, I have taken into account that, the offender is proved to be first offender and he has been in custody or remand since 27th August 2015 to date, that means he has spent more than 8 years in remand. The period spent in remand is longer than it was expected in the best practice in the system of criminal administration of justice. Thus, stay in remand for 8 years by the accused person now offender is legally capable of justifying the court to reduce the length of a custodial sentence that would otherwise be imposed. (See **Charles Mashimba vs. Republic** (2005) TLR 90.

I have also considered the aggravating factors as rightly argued by Ms. Tully, the learned state attorney for the Republic that, the nature of the article found in the offender's possession is /was injurious not only to the people but also to the properties.

Consequently, the convict, **Dua Said Linyama** is sentenced to **seven (7)** years imprisonment

It is so ordered.

MOHAMED R. GWAE,
JUDGE
04/12/2023

Court: Right of appeal to the Court of Appeal of Tanzania fully explained to the parties.

M. R. GWAE,
JUDGE
04/12/2023

Mr. Tully: We pray for an order under section 16 of the Armament Control Act

Court: The hand grenade (PE5) is forfeited and placed to Police Force in terms of section 16 of the Armaments Control Act, Cap 246 of the Revised Edition, 2002

It is so ordered

MOHAMED R. GWAE,
JUDGE
04/12/2023

THE HIGH COURT OF TANZANIA