

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

CRIMINAL SESSIONS CASE NO. 54 OF 2022

THE REPUBLIC

VERSUS

- 1. FUNDI HAMISI KAMAKA@FUNDI HAMIS@
MOHAMED S/O FUNDI**
- 2. ELIASA KALINDA KAZANA@ELIASI RAMADHAN**
- 3. ISSA MUSSA MUSTAPHA**
- 4. ATHUMAN HAMISI ABEID**
- 5. JUMA RAJAB MBONDE**

JUDGMENT

24th November & 1st December 2023

A.Y. Mwenda, J.

Sometimes in February 2015, all accused persons were arrested by security forces for committing offences under the Prevention of Terrorism Act, No.21 of 2002. The said offences go as follows; first count for all, is conspiracy to commit terrorist acts contrary to Sections 4(1),(2)(b)(iii) and 27(c) of the Prevention of Terrorism Act, No. 21 of 2002, Second count for

all, is soliciting support for the commission of terrorist act contrary to Sections 4(1),(2)(b)(iii) and 18(b) of the Prevention of Terrorism Acts, No. 21 of 2002; 3rd count for 2nd accused only, is provision of funds to commit terrorist acts contrary to Sections 4(1),(2)(b)(iii) and 13 of the Prevention of Terrorism Act, No. 21 of 2002; 4th count for 1st accused only, is collection of funds to commit terrorist acts contrary to Sections 4(1),(2)(b)(iii) and 13 of the Prevention of Terrorism Act, No. 21 of 2002; 5th count for 4th accused only is provision of funds to commit terrorist acts contrary to Sections 4(1),(2)(b)(iii) and 13 of the Prevention of Terrorism Act, No. 21 of 2002 and 6th count for 1st accused only is collection of funds to commit terrorist act contrary to Sections 4(1),(2)(b)(iii) and 13 of the Prevention of Terrorism Act, No. 21 of 2002.

The particulars of the said offences are as follows. Regarding the 1st count on conspiracy to commit terrorist acts, it was alleged that on divers dates between 1st November 2013 and 21st February 2015 at various places in Kiwalani Markaz, within Dar es salaam Region, Mtendeni mosque within Tabora Region and Markaz mosque within Kigoma Region all accused persons, jointly and together, with other persons not in Court, conspired to commit terrorist act, to wit, overthrowing the lawful government of the

United Republic of Tanzania and establish an Islamic State within the United Republic of Tanzania, an act which can reasonably be regarded as having been intended to be for the purpose of seriously destabilizing the fundamental political, constitutional, economic and social structures of the United Republic of Tanzania.

On the second count which is soliciting support for the commission of terrorist acts, the prosecution alleged that on divers dates between 1st November 2013 and 21st February 2015 at various places in Kiwalani Markaz at Dar es salaam Region, Mtendeni Mosque within Tabora Region and Markaz Mosque within Kigoma Region, all accused persons did solicit support for commission of terrorist acts, namely the use of violence against a section of a public within the united Republic of Tanzania, an act which can reasonably be regarded as having been intended to be for the purpose of seriously destabilizing the fundamental political, constitutional, economic and social structures of the United Republic of Tanzania.

As for the third count on Provision of funds to commit terrorist act, it was alleged that on diverse dates between 1st and 30th January ,2015, at Markaz Mosque within Kigoma Region, the second accused one ELIASA KALINDA KAZANA@ELIASI RAMADHAN, directly provided Tanzanian Shillings Eighty

Thousands (TZS 80,000/=) only, to FUNDI HAMISI KAMAKA @ FUNDI HAMIS@MOHAMED S/O FUNDI, while having reasonable grounds to believe that the said funds would be used in full or part to carry out terrorist acts, to wit, overthrowing the lawful Government of the United Republic of Tanzania and establish an Islamic State within the united Republic of Tanzania, an act which can reasonably be regarded as having been intended to be for the purpose of seriously destabilizing the fundamental political, constitutional, economic and social structures of the United Republic of Tanzania.

Regarding the 4th count on collection of funds to commit terrorist act, it was alleged that on divers dates between 1st, January 2015 and 30th January, 2015, at Markaz Mosque within Kigoma Region, FUNDI HAMISI KAMAKA @ FUNDI HAMISI @ MOHAMED S/O FUNDI, directly collected Tanzanian Shillings Eighty thousand (TZS 80,000/=) only, from ELIASA KALINDA KAZANA@ELIASI RAMADHAN, while having reasonable grounds to believe that the said funds would be directly used in full or part to carry out terrorist acts, to wit, overthrowing the lawful Government of the United Republic of Tanzania and establish an Islamic State within the United Republic of Tanzania , an act which can reasonably be regarded as having

been intended to be for the purpose of seriously destabilizing the fundamental political, constitutional, economic and social structures of the United Republic of Tanzania.

As for 5th count on Provision of funds to commit terrorist acts, it was alleged that on divers dates between 1st November, 2013 and 21st February, 2015, at Mtendeni Mosque within Tabora Region, the 4th Accused person one ATHUMAN HAMIS ABEID, directly provided Tanzanian Shillings Forty thousand (TZS 40,000/=) only to FUNDI HAMIS KAMAKA@FUNDI HAMIS @MOHAMED S/O FUNDI, while having reasonable grounds to believe that the said funds would be used in full or part to carry out terrorist acts, to wit, overthrowing the lawful Government of the United Republic of Tanzania and establish an Islamic State within the United Republic of Tanzania, an act which can reasonably be regarded as having been intended to be for the purpose of seriously destabilizing the fundamental political, constitutional, economic and social structures of the United Republic of Tanzania.

On the last (6th) count regarding collection of funds to commit terrorist act, it was alleged that on divers' dates between 1st, November 2013, and 21st November, 2015, at Mtendeni Mosque within Tabora Region, FUNDI HAMIS

KAMAKA @FUNDI HAMIS @MOHAMED FUNDI, directly collected Tanzanian Shillings Forty thousand (TZS 40,000/=) only, from ATHUMAN HAMIS ABED, while having reasonable grounds to believe that the said funds would be directly used in part or in full to carry out terrorist acts, to wit, overthrowing the lawful Government of the United Republic of Tanzania and establish an Islamic State within the united Republic of Tanzania , an act which can reasonably be regarded as having been intended to be for the purpose of seriously destabilizing the fundamental political, constitutional, economic and social structures of the United Republic of Tanzania.

At the commencement of trial, accused persons declined any involvement in the commission of the alleged crimes. That position was similar with the one they had at the preliminary hearing stage. By then, save for the 4th accused who kept mum, the rest acknowledged their names only.

Both parties were fully represented by learned counsels as follows. Mr. WAZIRI MAGUMBO Senior State Attorney assisted by MS. ELIZABETH MKUNDE, Senior State Attorney, and Mr. JUMA MAHONA and CLEMENCE KATO, both learned State Attorneys appeared for the Republic. Accused persons were present in person and had the legal services by the learned

advocates as appearing hereunder. Mr. AUGUSTINO RUTAKOLEZIBWA and Ms. NEEMA SARUNI, appeared for the 1st accused person, Mr. MUHIMBI SADIKI JUMA & Mr. LUSAJO MWAKASEGE appeared for the second accused person; Mr. LAWRENCE JACKSON MWASANGA, appeared for the 3rd accused, Ms. NERIA MARTIN & Ms. DORIS KAFUKU appeared for the 4th accused person and Ms. RITHA NTAGAZWA appeared for the 5th accused person.

As accused persons pleaded not guilty to the charge read against them, the trial commenced by the prosecution calling six (6) Witnesses. On top of that the prosecution tendered four documentary exhibits which are the cautioned statements for the 1st, 2nd, and 4th & 5th accused persons. This was meant to discharge its burden of proof. This is so because the law has it that the onus of proof in criminal cases lies on the prosecution's side and the standard of which is beyond reasonable doubt. This principle is stated under Section 3(2) of the Law of Evidence Act, [CAP 6 R. E 2022]. This section reads as follows that.

"S. 3(2)(a) A fact is said to be proved when in criminal matters, except where any statute or other law provides

otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists.”

Apart from that, the above position has been stated in a plethora of authorities. In the case of DIRECTOR OF PUBLIC PROSECUTIONS V. SHISHIR SHYAM SINGH, CRIMINAL APPEAL No. 141 of 2021 [2022-06-16] it was held as follows:

“It is elementary that the burden of proof rests squarely on the prosecution. The proof must be beyond reasonable doubt.”

A proof beyond reasonable doubt was propounded in the case of MAGENDO PAUL and ANOTHER V. THE REPUBLIC [1993] TLR 219, where the court held inter alia that;

“For a 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 favor which can easily be dismissed.”

Apart from imposing the duty on the prosecution to prove the commission of an offence, the law also imposes a duty on the prosecution to prove the accused person’s involvement in the commission of crime. In the case of

ANTHONY KINANILA AND ANOTHER V. THE REPUBLIC, CRIMINAL APPEAL
NO. 83 OF 2021, CAT(Unreported) held inter alia that:

“In any criminal trial, the prosecutions bear the burden to prove beyond reasonable doubt not only that the offence was committed but also it was committed by the accused person or that he participated in the commission of the offence to the extent or degree as prescribed by the law.”

In this case, in a bid to discharge its burden of proof, the prosecution paraded witnesses in the following flow.

The first prosecution's witness to enter the witness box was P4. This witness stood as PW1. In his testimony he testified that on 19.02.2015 while at Buguruni Police Station an informer and a worshiper at Kiwalani Markaz Islamic center tipped him that there was a group of Seven persons who were persuading other worshipers to come together and establish an Islamic State in Tanzania. According to him, having received such information, he notified his Seniors officers who in turn, instructed him to investigate the matter. With such instructions he said that he tasked a spy to go at Kiwalani Markaz Mosque to verify the informer's intelligence information. According to him, he was briefed later by said spy confirming that the said group was engaging

itself in persuading worshippers to establish an Islamic state in Tanzania. With the said feedback, PW1 said that he mobilized manpower of about ten police officers and, on 21.02.2013 they proceeded to Kiwalani Markaz Mosque to arrest the suspects. He said that upon arrival, they entered the mosque where a group of seven people was seen seated near the pulpit (mimbar). On what followed thereafter, PW1 said that he approached them and introduced himself including telling them that they were under arrest for engaging themselves in terrorist activities. According to this witness, they managed to arrest five suspects while the other two escaped. He went on to testify that the said suspects introduced themselves to as FUNDI HAMIS, ELIASA KALINDA, ISSA MUSSA, ATHUMAN HAMISI and JUMA RAJAB MBONDE respectively. PW1 testified further in that they inquired from the suspects regarding the names of the two fugitives and possible location where they might have run to, and the response was that they are ABDALLAH S/O? and BASHIR S/O? who might be at KIGILAGILA or BOMBOM streets. Having received the said response, PW1 said that the suspects led them (PW1 and other policer officers) to KIGILAGILA and BOMBOM, but they could not find the fugitive. With such failure PW1 said that they conveyed the suspects to BUGURUNI Police station for further inquiry over other

possible location where the fugitives might have run to only to be told that they might be at MKURANGA and KISIJU. With the said tips, PW1 said that they proceeded to KISIJU and MKURANGA. According to him they left Dar es Salaam at around 20:00hrs hours and arrived at Mkuranga at around 00:00 hour, but still the fugitives were not found. He said they further proceeded to Kisiju and arrived at around 03:00 hours of the following day (i.e.,22.02.2015), but again, they could not find the fugitives. PW1 stated that they tried to go to other places such as Kisiju but again, they could not find the fugitives. He said they then decided to return to Dar-es-Salaam Police Headquarters, investigation department where they arrived at around 08:00 hours and handled over the suspects to the Senior Officers of Anti-terrorism department for further investigative actions. This witness recognized the suspects in the courtroom. He even mentioned their names to as FUNDI HAMIS, ELIASA KALINDA, ISSA MUSSA, ATHUMAN HAMIS and JUMA RAJAB MBONDE.

In cross examination, PW1 said that on 19.02.2015 between 13:00 hours and 14:00 hours he was informed by an informer and the intelligence officer that the suspects were persuading other worshippers to establish an Islamic State (DOLA YA KIISLAMU) in Tanzania, but he did not get the actual number

of those who were persuaded or convinced. He also said that at Kiwalani Markaz Mosque, they found the suspects seated but he did not witness or hear them persuading worshippers to establish an Islamic State. According to him, it is not an offence to sit or convene in a mosque.

After the discharge of PW1, the prosecution paraded another witness one P10. This witness stood as PW2. In his testimony he testified that in January 2015, he was Worshipping at Markazi Mosque at Kigoma Urban. He mentioned the name of the Mosque to as Masjed Salama which is under Markazi Association. According to him that association is involved in DAAWA (preaching) and TABLIGHI. While explaining the meaning of TABLIGHI, PW2 said that it is a program where worshipers travel across the country in groups preaching the word of God including doing good deeds. Further to that he said that TABLIGHI is aimed at convincing worshipers to pray in mosques and not at their respective homes. This witness testified further that in January 2015, eight (8) visitors arrived at their mosque i.e., Masjed Salama Markazi at Kigoma Urban from Dar es Salaam. He mentioned the name of their leader as one MOHAMED FUNDI. He said that those visitors were preaching after every prayer's session but in the long run, they started preaching about politics and leadership contrary to TABLIGH rules. According

to him the said visitors alleged that the Government of Tanzania was led by "KAFIRS" (Non-Moslems) and as such, they motivated others to come together and establish an Islamic State in Tanzania although, he said, they did not say how would they do so. Further to that, PW2 testified that due to visitor's strange agenda, the mosque clerics convened and warned them to stop preaching contrary to TABLIGH's rules, but they refused. He said that their refusal prompted the clerics to drive them away. According to this witness, it was MOHAMED FUNDI who was preaching. This witness recognized MOHAMED FUNDI in the courtroom.

In cross examination, PW2 said that the visitors were about seven (7) or eight (8) in number and were preaching contrary to the rules of TABLIGH. He further said that they did not report them before the relevant authorities (police) as they had no idea if accused persons were terrorists. He also said that the current government came into power through democratic means (votes), and he said that he doesn't know if accused persons wanted to also establish Islamic State through democratic means i.e., (votes).

When PW.2 was discharged, the prosecution called PW3, one Mr. P. This witness testified that he is a Muslim worshiper at Kiwalani Markaz in Dar es Salaam. He said that in February 2015 a group of about six (6) or seven (7)

Muslims worshippers arrived from Kigoma. He said that in their presence, he overheard some of Worshipers complaining that the said visitors were advocating about establishing Islamic State in Tanzania. According to him he asked the visitors about the said allegations only be told that it was true. This witness mentioned their leader by the single name of FUNDI S/O? whom he alleged to be familiar to him as he previously visited the same Mosque to preach the word of God. He said that the worshipers reacted and ordered the visitors to leave but the visitors refused hence, police officers were notified. He said that accused persons preached about politics and establishment of Islamic State against the TABLIGH rules. This witness failed to identify accused persons in the courtroom due to allegedly poor sight. In cross examination, PW3 said that he doesn't know the meaning of Islamic State "DOLA YA KIISLAM" although he confirmed knowing some of the Islamic States such Saudi Arabia. Further to that he said that he never heard if accused persons wanted to overthrow the government. Moreso, he said that at the mosque, he did not hear the visitors preach, but accused persons only talked about cleaning the mosque although he did not know the type of cleaning they were taking about. In further cross examination he said that

he never heard them explaining on how Islamic State would be established. He contended that establishing Islamic state may also be spiritually.

PW4, one P12 was also paraded by the prosecutions. He commenced by telling the court that in 2015 he was working at Police investigation's Headquarter in Dar es Salaam where he specialized in investigation of terrorist Offences. He testified that on 22.02.2015 while at his office, he was instructed to interrogate the suspects of terrorist acts. He said that after he had prepared a room (office) where the suspects would be kept and interrogation room, he took one of the suspects for interrogation. According to him the interrogation room had a table, chairs, and windows. He added in that the said room was lit and well ventilated. Regarding compliance to the legal procedures, PW4 testified that he introduced himself to him and demanded him to also introduce himself. He mentioned the name of the suspect as ATHUMANI HAMIS ABEID (the 4th accused). He said that at that time, the said suspect was in good health condition. According to him he cautioned him and gave him his legal rights and then recorded his statement in which, he confessed committing terrorist acts. This witness prayed to tender the cautioned statement of the 4th accused in question, but it was objected by the defense counsels for the 4th accused, one Ms. NERIAH

MARTIN on the following reasons, **one**, that the said statement was recorded out of the prescribed time i.e. beyond 4 hours as the 4th accused person was arrested on 21.02.2015 but the said cautioned statement was recorded on 22.02.2015 at 08:00hrs and no extension of time was sought. In support to that, she cited the case of ANOLD LUISHIE. V. R, CRIMINAL APPEAL NO. 249 OF 2017, CAT (Unreported). **Two**, that the confession in question was procured under torture contrary to Article 12 (1) of Constitution of United Republic of Tanzania and Section 55 (1) (a) of Criminal Procedure Act [CAP 20 R.E 2022].

Following the said points of objections, the court conducted a trial within a trial to test the admissibility of the 4th accused person's cautioned statement and at the end, the said points of objection were overruled and the said (4th accused person's) cautioned statement was admitted as Exhibit P1.

In his further testimony, PW1 said that he also took another suspect one FUNDI HAMIS KAMAKA for interrogation. He said that after he cautioned him, he informed him regarding his legal rights and then recorded his cautioned statement which he prayed to tender in court as exhibit. His prayer was objected by Mr. AUGUSTINE RUTAKOLEZIBWA and Ms. NEEMA SARUNI learned counsels for the 1st accused person on the following grounds. **One**,

that the 1st accused person's cautioned statement was recorded beyond four (4) hours contrary to section 50 (1) (a) of the Criminal Procedure Act, [CAP 20 R.E 2022]. According to them, the 1st Accused was arrested on 21.02.2015 and his statement was recorded on 22.02.2015. Further to that, they pointed out that while the investigator alleged that when they went to pursue the fugitives in Mkuranga and Kisiju they returned on 22.02.2015 at 08:00 hours still, the said statement was recorded from 11:00 to 13:00 hours far beyond 4 hours from when they arrived in Dar es salaam without seeking extension of time under Section 51 (1) (b), of Criminal Procedure Act. They supported that argument by citing the case of RASHID OMAR V. REPUBLIC, Criminal Appeal No. 106 of 2020, CAT (UNREPORTED) at page 18 & 19. **Two**, that the cautioned statement has no commencement time and the finishing time contrary to Section 57 (1) (2) (d) of the Criminal Procedure Act.

Three, that the said statement was procured under torture in that the 1st accused was forced to sign it contrary to section 55 (2) of Criminal Procedure Act [Cap 20 RE 2022] and **four**, that the 1st accused person was not informed that he was under restraint and the offence he was alleged to have committed was not disclosed to him contrary to Section 53 (b) of the Criminal

Procedure Act. Moreso, they said that in his cautioned statement he was cautioned for contravening Sections 4 and 5 of the Prevention of Terrorism Act No. 21 of 2002 while some of the offences under the said provisions are not reflected in the chargesheet.

Following the said objections, the court conducted a trial within a trial and having considered the evidence from both sides, the said points of objections were overruled and the cautioned statement of the 1st accused person was admitted as exhibit P2.

PW4 further testified that after he had finished recording the statement of Fundi Hamis Kamaka (the 1st Accused), he took another suspect for interrogation. In the said process he said that he introduced himself, informed him the offences he was facing and told him his rights such as the right to call a lawyer, a relative or a friend to witness the exercise in question. According to PW4, the said suspect introduced himself as ELIASA KALINDA KAZANA. He said that he recorded the cautioned statement of the said suspect from 14:00 hours and finished at around 16:47 hours. Summarily PW4. Said that the said suspect confessed to be involved in terrorist acts with the aim of establishing Islamic state in Tanzania. This witness prayed to tender the cautioned statement of ELIASA KALINDA KAZANA. However,

the said prayer was challenged by Mr. MUHIMBI SADIKI JUMA and Mr. LUSAJO MWAKASEGE learned counsels for second accused person on the following grounds. **One** that the cautioned statement of the 2nd accused person was recorded out of time contrary to Section 50 (1) (a) of Criminal Procedure Act. Submitting on this point, the learned counsels said that the suspects (accused persons) were arrested on 21.02.2015 but the statement in question was recorded on 22.02.2015. The learned counsels stressed that even if there was an ongoing task of pursuing fugitives, the same is not on record and according to them, such allegation would be an afterthought and a mere speculation. In further arguments, the learned counsels submitted that the safeguards stated under Section 51(1) of Criminal Procedure Act and Oxygen principle cannot apply under the said scenario. To support this point, they cited case of PETRO SULE V. REPUBLIC, CRIMINAL APPEAL No. 175 of 2020.

TWO, that the 2nd accused's cautioned statement was recorded contrary to Section 58 of the Criminal Procedure Act. They submitted that the record does not show if the recording officer asked the suspect (2nd accused person) if he knows how to read and write and let him record his statement by himself.

Three, that the 2nd accused person's cautioned statement was procured under torture as he was beaten contrary to Section 55 of Criminal Procedure Act and then forced to sign the already prepared statement/documents.

Lastly that, in the said cautioned statement the commencing and finishing time when the suspect was cautioned is not recorded. In support to this point they cited the case of REPUBLIC VS. ADAM RASHID, CRIMINAL SESSION No. 29 of 2016.

Based on their arguments, they prayed the said cautioned statement to be rejected.

Since the admissibility of the 2nd accused's cautioned statement was challenged, the court conducted a trial within a trial and at the end, the court was satisfied that the said statement passed the tests of admissibility. All the points of objections were overruled and the said statement was tendered in court as exhibit P3 and its contents were read in court. After that PW.3 identified the 2nd accused person in the courtroom.

In cross examination PW4 said that he interrogated three suspects. According to him the first suspect to be interrogated was ATHUMAN HAMIS, the second one is FUNDI HAMIS and the 3rd one as being ELIASA KALINDA. He said that during interrogation accused persons confessed being involved

in terrorist acts. He also said that they were all involved in terrorist acts by persuading other worshippers to join them to establish Islamic state. According to him, FUNDI HAMIS confessed to partake Karate exercises to make themselves fit and that in his cautioned statement he did not say if he received TZS 1,000,000/=, TZS 80,000/=and TZS 40,000/=. Further to that he said that to his understanding, "HARAKATI ZA KUPIGANIA UISLAMU" is not necessarily a terrorist movement but it may be as such if it is aimed at establishing an Islamic State "KUSIMIKA DOLA YA KIISLAM". He also said that Al-Shabaab is a terrorist organization but FUNDI HAMIS had a group which was not mentioned. Moreso, he said that the 2nd accused said that Sheikh Sinde was their sponsor who preached regarding establishing an Islamic state. He otherwise said he doesn't know as to why he was not arrested.

In further cross examination PW4 said that in the said statements (Exhibits P1, P2 & P3) there is no mention of there being a manifesto to guide them in their movement to establish an Islamic State. He also said that accused persons were charged based on their (investigators') own interpretation on what accused persons said and not based on their actions. He also said that what accused persons preached caused panic to worshippers. However, in

re-examination, he said that accused persons were charged based on the interpretation of law.

When PW4 was discharged, the prosecution called P15, a police officer who stood as PW5,

In his testimony he said that in 2015 he was stationed in Dar es salaam in the department dealing with terrorism offences. According to him, on 22.02.2015 at around 07:45hrs he was instructed to interrogate and record the cautioned statements of the suspects who were involved in terrorist acts. According to him, he took one suspect from the waiting room for interrogation. He said that after introducing himself to the suspect, he cautioned him and gave him his rights to call a lawyer, a friend or a relative to witness the recording exercise. According to him, he started to record the said statement at around 10:00hrs and concluded at 11:00hrs. He mentioned the name of the suspect in question as JUMA RAJAB MBONDE, the 5th accused person. This witness identified the 5th accused in the courtroom and tendered his cautioned statement as exhibit P4 without any objection from the defense side.

In cross examination, PW5 said that JUMA RAJAB MBONDE was involved in terrorist acts. According to him (PW5), the signs of terrorist acts is

engagement in illegal gatherings or secret meetings. Regarding the contents of Exhibit P4 this witness said that it does not contain issues regarding illegal meetings and secret meetings. Further to that he said that overthrowing the government is a treason offence. He also said that in Exhibit P4, the 5th accused said that there was no military or karate trainings which were being conducted, but he (PW5) believed that the suspect would overthrow the government by engaging other groups although he was unaware of any military groups affiliated to them.

The last witness to be paraded by the prosecution was P7 who stood as PW6. He testified that he is a Muslim and a worshipper at Kiwalani Markaz mosque. He said that on 17.02.2015 at 05:00 hours he went at Kiwalani Markaz Mosque for Morning prayers and found seven (7) visitors who informed other worshippers that they had a message to deliver to them after prayers. According to him, their leader introduced himself as Fundi S/O while others introduced themselves as Juma S/O? Abdallah S/O? and Athuman S/O?

In his further testimony PW6 said that the said visitors persuaded the worshippers to come together and establish an Islamic State in Tanzania and rule the Nation under Islamic Law although they did not describe how they would establish the said state. According to this witness following the said

message, the clerics of the Markaz were informed who in turn ordered the visitors to stop preaching or leave the mosque. He said that since the said visitors refused to obey the said order, that issue was reported at Buguruni Police station on 19.02.2015 and on 21.02.2015 at around 16:00 hours police officers came and arrested them.

According to PW6, five suspects were arrested while the other two escaped. He mentioned the suspects who were arrested as Fundi S/O? and Mzee Juma S/O?. This witness identified Fundi S/O? (the 1st accused) and Mzee Juma (the 5th accused) in the courtroom. He said that Abdallah escaped with another suspects. He otherwise could not identify the remaining accused persons.

In cross examination PW6 said that the visitors did not describe on how they would establish Islamic State. In further cross examination he said that he heard the visitors saying that the government on power is led by "*Kafir*" and according to him, a "*Kafir*" is someone who don't follow Islamic laws. Further to that he said that when the suspects were arrested, he was summoned at Buguruni Police Station to identify them in an identification parade.

In further cross examination PW6 said that accused persons had no weapons or papers and that he never witnessed any kind of exercises or training.

When PW6 concluded his testimony, the prosecution side closed its case. After that the court had the duty to ascertain if a prima facie case was established to warrant accused persons defend their case. In so doing, the court considered the evidence by PW1, PW2, PW3, PW4, PW5 and PW6 as well exhibits P1, P2, P3 and P4 (the cautioned statements of 4th, 1st, 2nd, and 5th accused respectively) and found that the same have established a prima facie case against all accused persons. As such the court addressed them regarding their right to defend themselves or call witnesses to testify for them. At first, all of them informed the court that they would give evidence as witnesses on their own behalf and call other witnesses to testify for them. However, at a later stage, they all waived their right to call other witnesses to testify for them.

On their defense, each accused person tendered his evidence, summarily they all denied their involvement in the commission of the crimes they stand charged. In common they all, except DW3, denied making any confession before the police officers and alleged that they were not at Kiwalani Markaz Mosque on 21.02.2015, the alleged date of their arrest. Each one alleged being tortured by security officers to procure their confessions. In short, each one prayed the charge against him to be dismissed.

As the prosecution and defense closed their case, the court ordered the learned counsels for both parties to file their respective written final submissions and each party complied. The same shall be referred to in the cause of responding to issues raised by the court. With the evidence on record as well as submissions by the learned counsels for both parties, this court is now able to determine the outcome of this matter.

In this matter, the prosecution case relied on two types of evidence. These are oral and the documentary evidence. In oral evidence, the prosecutions paraded P4, P10, P, P12, P15 and P7. Among them, P10, P and P7 are the worshipers at Kigoma and Kiwalani Markaz. As for documentary evidence, the prosecution tendered the cautioned statements of the 1st, 2nd, 4th and 5th accused persons as exhibits P2, P3, P1 and P4 respectively.

As the prosecution case largely depend on the said two types of evidence, it is apposite to raise the following issues for determination.

- i) Whether accused persons were arrested at the Kiwalani Markaz Mosque.
- ii) Whether accused persons save for 3rd accused person, made any cautioned statements before the police officers.

- iii) Whether the prosecution's evidence demonstrate offences under the Prevention of Terrorism Act No. 21 of 2002.

Regarding the 1st issue which is whether accused persons were arrested at Kiwalani Markaz Mosque, there is evidence from P4 a police officer who stood as PW1 and two civilians and worshipers at Kiwalani Markaz mosque, to wit P (who stood as PW3) and P7 (who stood as PW6) in that respect. In their defense, accused persons denied the prosecution's allegations that they visited Kiwalani Markaz Mosque and preached about Muslims coming together in order to establish an Islamic state. They also denied being arrested at the said Mosque on 21.02.2015. Some of them alleged that they were arrested at different places and dates. For example, DW1 alleged that he was arrested on 17.02.2015 at Kinyerezi area in Dar es salaam; DW2 alleged to be arrested on 28.01.2015 at Kariakoo area over allegation of stealing money his employer's money; DW3 said he was arrested on 31.01.2015 at Chanika Magenge in Dar es Salaam; DW4 alleged that he was arrested on 01.03.2015 at Hungumalwa village in Kwimba District in Mwanza Region and DW5 said alleged he was arrested on 27.02.2015 at Mbagala Kongowe in Dar es salaam. In essence the above is nothing but defence of alibi. Beginning with accused persons' defense of alibi alleging on the date

of their arrest they were in other places, the law is clear that before relying on such defense, one has to issue to the court and the prosecution a notice of intention to rely on the same. This is by virtue of section 194 (4) of the Criminal Procedure Act [CAP 20 R.E 2022]. This section read as follows:

“S.194 (4) Where an accused person intends to rely upon an alibi in his defense, he shall give to the court and the prosecution notice of his intention to rely on such defense before the hearing of the case.”

In this matter it is evident that notice of intention to rely on alibi was not issued. In law, failure to issue notice is not free from legal consequences as courts are at liberty, upon considering the same, to accord no weight. This is by virtue of subsection 6 of Section 194 of the Criminal Procedure Act. This subsection goes as follows, that:

“S.194 (6) Where the accused person raises a defense of alibi without having first furnished the prosecution pursuant to this section, the court may, in its discretion, accord no weight of any kind to the defense.”

The take from the above is that failure to furnish notice of alibi does not automatically mandate rejection of the same. This position was discussed in

the case of MARWA WANGITI MWITA AND ANOTHER VS REPUBLIC [2002]

TLR 39, where the Court held inter alia that;

“The absence of notice required by section 194 of the CPA, 1985, does not mandate or authorize the outright rejection of an alibi, though it may affect the weight to be placed on it”.

Also, in MAGANGA UDUGALI VS REPUBLIC, CRIMINAL APPEAL NO. 144 OF 2017, Where the court of appeal held:

“Still on the defense of alibi, section 194(6) of the CPA requires that the court should consider the defense even where it is not properly raised, but that it is in the discretion of the court to accord no weight or disregard the defense.”

Guided by the above authority this court is going to consider the said defense in line with the prosecution’s evidence.

As pointed above, accused persons’ defense is that they were not arrested at the Kiwalani Markaz Mosque, rather at different places. However, this court assessed the evidence of the arresting Police officer P4 (PW1) and P7 (PW6) who is a worshiper at the Mosque of Kiwalani Markaz and observed

the following. One, it was evidenced by P7 (PW6) that on 17.02.2015 seven worshipers arrived at Kiwalani Markaz mosque and preached about establishing an Islamic State in Tanzania. This witness mentioned some of them by their single names to as Fundi S/O? Juma S/O? and Athumani S/O?. It was his further testimony that having reported them at Buguruni Police Station, the said visitors were arrested on 21.02.2015 at around 16:00 hours before his naked eyes. This witness identified the 1st and the 5th accused persons in the courtroom. On his part, P4(PW1) testified that on 21.02.2015, he and his team of about ten (10) other police officers went at Kiwalani Markaz mosque to arrest preachers who were motivating Muslims to come together and establish Islamic State. This witness mentioned the names of the suspects as FUNDI HAMIS, ELIASA KALINDA, ISSA MUSSA, ATHUMAN HAMIS and RAJAB MBONDE (the 1st, 2nd, 3rd, 4th, and 5th accused person respectively). This witness further identified them in the courtroom. With the evidence of P4(PW1) and P7(PW6) it is not in dispute that accused persons visited and were all arrested at Kiwalani Markaz mosque. This is so because even if they were strangers to the witnesses, the incident in question took place on a broad daylight. On top of that, from the date when they arrived i.e., 17.02.2015 to 21.02.2015 (the date of their arrest), the chain of event

was not broken. That is to say, upon their arrival at the mosque, they did not leave until the date of their arrest and detention. Further to that, when P4(PW1) was giving his testimony in court he was not cross examined regarding the places where accused persons are alleged to be arrested. It is trite law that failure to cross examine the adverse party is considered as admission of the fact which was not cross examined. This position has been stated in several decisions of the Court of Appeal. For example, in the Case of SHOMARI MOHAMED MKWAMA V.THE REPUBLIC, CRIMINAL APPEAL NO. 606 OF 2021, the Court held inter alia that:

“...It is now a settled position of the law that failure to cross examine the adverse party’s witness on a particular aspect, the party who ought to cross examine the witness, is deemed to have taken as true, the substance of the evidence that was not cross examined, See **Issa Hassan Uki v. R**, Criminal Appeal No. 129 of 2017 and **Martin Misara V. R**, Criminal Appeal No. 428 of 2016 (both unreported).”

Also, in SEBASTIAN MICHAEL & 1 ANOTHER V. THE DIRECTOR OF PUBLIC PROSECUTIONS, CRIMINAL APPEAL NO.145 OF 2018, CAT, (Unreported) it was held in that:

“It is trite law that failure to cross examine a witness on material evidence amounts to acceptance of it...”

[emphasis added]

From the foregoing reasoning this court is of the view that accused persons were arrested at Kiwalani Markaz Mosque. Their defense that on 21.02.2015 they were arrested at different places is dismissed as being an afterthought. Regarding the second issue which is whether accused persons, save for the 3rd accused made their cautioned statements before police officers, the record reveals the admission of four cautioned statements which were tendered by P4(PW1) and P15(PW5). Save for the 5th accused's cautioned statement which was tendered by P15(PW5) without any objection, the rest, i.e., the 1st accused's, 2nd accused's and 4th accused's cautioned statement were challenged to their admissibility. Several reasons were raised such as, one, that the same were procured under torture, two, that they were recorded far beyond four (4) hours contrary to Sections 50(1)(a) of Criminal Procedure Act, three, that the time under which some of them were

cautioned is not recorded and lastly that the 2nd accused person was not afforded his right to record his own statement. Based on the foregoing objections the court was compelled to conduct a trial within trial. Regarding torture, none of them tendered any evidence to substantiate his claim. Regarding allegation of noncompliance to the provisions of section 50(1)(a) of Criminal Procedure Act, it was put on evidence during trial within a trial that after the arrest of the accused persons, search for two fugitives started from 21.02.2015 at 16:00hours which involved travelling to Mkuranga and Kisiju until the 22.02.2015 at around 08:00 when they returned to Dar es salaam. It was the prosecution evidence that even after their arrival at Dar es Salaam, it took sometimes to have them all covered/recorded as it was not possible to record them at ago as the number of recording officers was limited to only two. Based on the said reasoning, this court was satisfied that the said circumstances fall within the safeguards of Section 50(2) (b) (iv) of Criminal Procedure Act. This is so because what delayed the exercise was the ongoing investigation. For ease of reference this section reads as follows:

“S. 50 (2)(b)(iv) In calculating a period available for interviewing a person who is under restraint in respect of an offence, there shall not be reckoned as part of that

period any time while the police officer investigating the offence refrains from interviewing the person or causing the person to do any act connected with the investigation of the offence. For arranging or attempting to arrange for the attendance of a person who under the provision of this Act, is required to be present during an interview with the person under restraint or whole the person under restrain is doing an act in connection with investigation."

On allegations that there was a failure to record the time spent to caution the 2nd accused person, this court went through the cautioned statement of the 2nd accused only to find the commencing and finishing time recorded. After all, even if the said irregularity existed, the same would not affect the admissibility of the said document based on safeguards covered under S. 169 of the Criminal Procedure Act [Cap 20 R.E 2022] and what was stated by the Court of Appeal in the case of YUSTAS KATOMA V. THE REPUBLIC, CRIMINAL APPEAL NO. 242 of 2006. On top of that, it is important to point out that admission of confession is one thing while weight to be accorded is another thing. This position was propounded in the case of STEVEN S/O

JASEN and 2 OTHERS VERSUS REPUBLIC, CRIMINAL APPEAL NO. 79 OF 1999, CAT where the Court held that.

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

Based on the above reasoning the said confessions were admitted as exhibits P1(for the 4th accused), P2(for the 1st accused) P3(for 2nd accused) and P4(for 5th accused person). As hinted earlier, save for the 3rd accused person who had no statement tendered against him, the rest, i.e. The 1st, 2nd, 4th, and 5th Accused person made their cautioned statements before police officers.

The 3rd issue is whether the evidence by the prosecution demonstrates offences under the Prevention of Terrorism Act, No. 21 of 2002.

At the outset, it is important to point out that in this matter, this issue is crucial as its answers will determine whether to analyze the counts in the charge sheet or not. In other words, the counts in the charge sheet can only

be analyzed if the evidence collected have demonstrated terrorist acts/offences.

As hinted earlier, accused person are charged under the Prevention of Terrorism Act, No.21 of 2002 for committing terrorist acts. On that basis, the prosecution was bound to firstly prove that what accused persons are alleged to do was acts of terrorism.

Before going further, it is crucial to firstly, consider what a terrorist act means.

Terrorist acts is not a new terminology in our jurisdiction. It is covered under the Prevention of Terrorism Act, No. 21 of 2002. On recent years, due to prevalence of terrorist incidences; several suspects have come into conflict with the law. As such, there have been several decisions of the court on the matter. In the case of REPUBLIC V. SEIF ABDALLAH CHOMBO @BABA FATINA and 5 OTHERS, ECONOMIC CASE NO. 04 of 2022, HC (MLYAMBINA, J) it was held as follows, that.

“In Tanzania, in order to qualify the criteria of terrorist act, the provision of section 4,5,6,7,8,9 and 10 of the Prevention of Terrorism Act, [Cap 19 R.E 2022], requires fulfillment of the hereinafter elements: one, it must be a

terrorist action. Two, threat of action. Three, the action or threat must be done with terrorist intention. Four, such act or omission may seriously damage a country or an international organization. Five, the act or threat is intended or can reasonably be regarded as having the following inter alia object; seriously intimidate the population; and seriously destabilize or destroy the fundamental political, constitutional, economic, or social structures of country or an international organization.”

In the present case, the record reveals a set of evidence which was tendered by the prosecution. This includes the cautioned statement of the 1st, 2nd, 4th, and 5th accused person on one hand and the oral evidence from P (PW3) and P7(PW6), (the worshipers from Kiwalani Markaz Mosque) as well as P10 (PW2), a worshipper from Kigoma Markaz Mosque on another hand. With the said set of evidence this court is now able to assess it in line with the Prevention of Terrorism Act, No 21 of 2002 to see if they have established terrorist acts offences.

Regarding accused persons’ cautioned statements, the court is bound to assess if they are true confessions in the eyes of the law. To do so it is

apposite to see what does the law in respect of cautioned statement. In the case of ABDALLAH ATHUMAN LABIA@BROTHER MOHAMED & 8 OTHERS, CRIMINAL SESSIONS NO. 63 OF 2022, this court (RWIZIRE, J), while citing the case of SAMWEL NYALANDA V. REPUBLIC, CRIMINAL APPEAL NO. 121 OF 2013, held inter alia that:

“Cautioned statement must be voluntary, disclosing all the ingredients of offence(s) charged in terms of type, material time and date” [emphasis added]

Further to that, the court looked at the definition of confession under section 3 of the Evidence Act [CAP 6 R.E 2022] as:

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

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

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

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

[Emphasis added]

The take from the above is that a true confession is the one in which all the ingredients of an offence are covered.

In this matter, save for the cautioned statement of the 5th accused which was tendered unopposed, the rest were tendered after conducting trials within a trial. Despite objections the same were admitted.

As for the 1st accused person's cautioned statement, his statement was admitted as exhibit P2. Reading between lines, its contents does not reflect features of a true confession on the following reasons. One, it contains contradicting stories in that while at the first part the 1st accused alleged to take part in the training organized in Nairobi which centered in advocating participants to do good deeds such as dawah, general Islamic knowledge, heed to prayers, good behavior, allegiance to leadership which were meant to be practiced when they come back, on the other hand it depicts a contradicting story in that while preaching in Tanzania they focused in establishing an Islamic state and motivation to join Al-Shabaab. With the said self-contradiction, one may ask if what they learnt in Nairobi (which focused on good deeds only) was meant to also be practiced in Tanzania, then what triggered a sudden change of agenda. That defies logic and common sense. There is a likelihood that one of the two versions is true and the other one is not. On that basis, it is unsafe to conclude that Exhibit P2 depict the truth. This reminded the court on the first accused's defense which I tend to believe that when he was being interrogated, questions were asked over his understanding on Islam as a Religion and when he gave good answers he used to be beaten. According to him, it seems the recording

officers wanted to hear bad answers only. From his defense, this court is made to believe that exhibit P2 contains untrue account on what transpired. Further to that, while the prosecutions witnesses testified that accused persons were preaching to the worshippers after every prayer's session, exhibit P2 shows that they were preaching at night hours after the worshippers' departure. This too cast doubt on the authenticity of the said cautioned statement because, if they are alleged to persuade worshippers to establish an Islamic State, how would they opt do so after the worshippers' departure.

Lastly, even if the said anomalies didn't exist, which is not the case, Exhibit P2 reveals the persons who were motivating worshipper to join hands and establish Islamic state as well as joining al-Shabaab as Sheikh Ahmed Sinda and Moyo Salim who were not arrested.

From the foregoing, this court is of the view that the cautioned statement of the 2nd accused is not a true confession in the eyes of the law and no weight is accorded on it.

As for the 2nd accused person's cautioned statement (Exhibit P3), it is on record that he converted into Islam on 24.12.2014 and joined Jamat Tablighi in Tabora whose agenda was to teach how to pray, to read Quran, "dua",

self-discipline, dressing code and "Sunna". He further stated that he was a judo trainer and he added in that they travelled to Kigoma to preach in the manner they were preaching in Tabora. In that statement, he said that Sheikh Sinda preached on how to establish Islamic state. He added in that in order to facilitate the movement each member was required to contribute TZS 80,000/= and he donated the said amount to "Amir" whose name was not disclosed. What is gathered from this statement is that the 2nd accused did not confess to commit any offence. This is so because what they intended to preach in Kigoma was in the manner used at Markaz TABLIGH in Tabora which on the face of it focused on normal Islamic knowledge/teachings. The take from it is that their visit to Kigoma had no evil intention as alleged by the prosecution. Even the amount donated i.e. TZS 80,000/= was meant to cater for the same purpose. In that statement, what was done by Sheikh Sinda i.e., motivating others to establish Islamic state was not a common agenda for all. As for Judo and karate training, that by itself is not a terrorist act in the eyes of the law as it is not forbidden by any law. From the foregoing, Exhibit P3 is not a confession in the eyes of the law and as such, no weight is accorded on it.

As for the 4th accused's cautioned statement, exhibit P1, its contents reveal that in November 2014 the 4th accused received a phone call from HAMIS FUNDI requesting him to join the movement aimed at establishing an Islamic state (DOLA YA KIISLAM) which he agreed. I have considered the words "KUANZISHA DOLA YA KIISLAM" used and noted that, by itself, do not make the said statement a confession to commit terrorist acts. This is because he did not describe how the said state would be established. It is important to point out that, what was referred to as Islamic state in this matter was the government governed by Islamic law as opposed to Islamic state as a terrorist group. Again, as there was no description on how the said State would be established, it is thus unsafe to conclude that the said move was a terrorist act. On the record, it is alleged in the charge sheet that accused persons conspired to establish an Islamic state by overthrowing the government. However, such evidence is lacking in the record. On that basis, Exhibit P1 is not a confession in the eyes of the law because the acts in question are not terrorist acts.

As for 5th accused's cautioned statement, exhibit P4, the 5th accused said that he was arrested on allegation of establishing Islamic state. When he was asked by the recording officer on the meaning of Islamic State, he said

that he thinks, it involves overthrowing the government in power. The said question and answers go as follows:

"SWALI: Je, ulikamatwa kwa tuhuma gani? JIBU: nilikamatwa na wenzangu watano ambao ni FUNDI HAMIS, ISSA S/O? ELIASA S/O? ATHUMAN S/O? na Mimi mwenyewe na tulikamtwa tuhuma za kuanzisha DOLA ya Kiislam. SWALI: Hiyo DOLA ya Kiislam ilikuwa inamaanisha nini hasa unaposema DOLA ya Kiislam? JIBU: Hii mimi nilivyoelewa ni kuipindua serikali iliyoko madarakani kwa Muislam kutekeleza maamrisho ya Mwenyezi Mungu Mfano Swala, Kufunga, Kutoa zaka, Kwenda Hija, Mwizi akatwe Mkono, mzinifu apigwe mawe, kafiri alinganiwe."

I have assessed the quote above and in it, there is nowhere the 5th accused confessed to engage himself in any move to establish an Islamic state. What is clear in that statement is that he mentioned Islamic state when he was responding to the question which asked him on what allegations were they arrested for. The issue on overthrowing the Government came in his response to a question which asked him the meaning of Islamic state.

Further to that, exhibit P4 reveals that the 5th accused said that on 21.11.2014 he joined the DAWA TABLIGH and visited Kigoma and Tabora where they preached to Muslims who don't pray to do so. His utterance that at Kigoma FUNDI HAMIS preached about establishing Islamic state shows that the said agenda was not in his knowledge, no wonder he concluded his statement by saying, and I quote:

"Mimi nilipoingia kwenye kundi sikujua kama ndani yake
kuna maswala ya kusimamisha DOLA nilidhani ni TABLIGH
ya kawaida tu."

On that basis, I also find, the 5th accused's cautioned statement is not a confession in the eyes of the law and as such, no weight is accorded on it. In the final written submission by the Republic, the learned state Attorney tried to impress that the contents of Exhibits P1, P2, P3 and P.4 are detailed, elaborate, similar and give a relevant and thorough account of the crime in question with the aim of establishing Islamic state and remove the government of the United Republic of Tanzania. With due respect to the learned State Attorney that is not the case. This is so because he reached to that conclusion without assessing the content of each statement.

Had he assessed the said statements he would have come up with a different conclusion.

In upshot, this court is of the view that the cautioned statements of the 1st, 2nd, 4th, and the 5th accused persons are not confession in the eyes of the law as they don't fit in the ambit of the decision of the Court of appeal in SAMWEL NYALANDA V. REPUBLIC, CRIMINAL APPEAL NO. 121 OF 2013.

Having discarded the cautioned statements tendered by the prosecution, it is also important to analyze the oral testimony by P10 (PW2), P (PW3), and P7 (PW6), to see if they demonstrated any offence under the Prevention of Terrorism Act, No. 21 of 2002.

Beginning with P10 (PW2), his testimony is to the effect that in January 2015, about six worshippers arrived at Masjed Salam in Kigoma. According to him the said visitors were preaching, among other things, politics and government leadership which is contrary to TABLIGH rules. On that issue he testified that the preachers told them that the Government is led by non-Muslims(kafirs) and that they inspired Muslims to establish Islamic state although they did not describe on how they would do so.

On his part, P, who stood as PW3 testified that in February 2015, a group of about six or seven worshippers visited the Kiwalani Markaz Mosque. This

witness said that although he did not hear them preaching about politics, he overheard other worshippers complaining over their motivation to Muslims to come together and establish Islamic state in Tanzania.

On his part, P7 who stood as PW.6 testified that on 17.02.2015 a group of worshippers arrived at the Kiwalani Markaz Mosque and while preaching, they inspired Muslims to come together and establish Islamic State. He also testified that the said visitors alleged they were capable of going to the state House and rule under Islamic law although, he said, they did not specify on how they would do so.

I have assessed the evidence from this witness and it suffice to say that mere utterance by accused persons that they would establish Islamic State without describing how they would do so, by itself cannot be said to be a terrorist act. Further to that from the prosecution's evidence there is no indication that accused persons were members of any terrorist group/organization or had radical ideology. Further to that, there is no evidence that they were involved in suspicious trainings such as military trainings. The issue of judo and karate training which surfaced in the prosecution's evidence by itself, is not a terrorist act as it is a normal Sports.


While submitting in respect of the evidence by PW2, PW3 and PW6, the learned State Attorney, in his final submission tried to impress that in this matter there is direct evidence from PW2, PW3 and PW 6 (who were among the believers of Markaz Mosques in Kigoma and Dar es Salaam) that all accused participated in the planning to commit the terrorist acts from teaching, planning how to get weapons and that their aim was to remove the government in power and establish Islamic state in the United Republic of Tanzania. I have assessed this argument and it suffice to say that what is alleged by the learned State Attorney is not supported by evidence. As hinted earlier, the prosecution's evidence covers only the establishment of Islamic state which by itself is not a terrorist act due failure to describe on how the said State would be established. Other issues such as teachings and how to get weapons are not supported by evidence as the learned state attorney invited extraneous matters with intent to mislead the court. The learned counsels, (State attorneys and Defense counsels), being officers of the court are obliged to assist the court to do justice and not to mislead.

Again, in the final written submissions, the learned state Attorney opined that the acts in the 1st, 2nd, 3rd, 4th, 5th, and 6th counts fall in the domain of terrorism offence. His stance is based on the evidence by PW1, PW2, PW3

and PW6 and Exhibits P1, P2, P3, and P4. With due respect, without proof of existence of terrorist acts, there is no way counts No. 1,2,3,4,5 and 6 would be proved. As I have analyzed above, the whole prosecution's evidence has failed to provide answers as to whether what accused persons did constitute terrorist acts. From the foregoing reasoning, I found no reasons to assess each count in the charge sheet.

In upshot, it suffices to conclude that the prosecution has failed to prove the case beyond reasonable doubt. All accused persons, that is FUNDI HAMIS KAMAKA@FUNDI HAMIS@MOHAMED FUNDI, ELIASA KALINDA KAZANA@ELIAS RAMADHAN, ISSA MUSSA MUSTAPHA, ATHUMAN HAMIS ABEID and JUMA RAJAB MBONDE are acquitted from all counts in terms of section 235 of Criminal Procedure Act [CAP 20 R.E 2022].

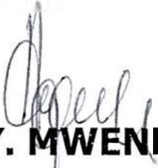
Right of appeal fully explained.


A.Y. MWENDA
JUDGE

01.12.2023

Judgment delivered in open court under the seal of this court in the presence of Ms. Elizabeth Mkunde (SSA) for the republic and in the presence of Mr. Augustine Rutakolezibwa and Ms Neema Saruni, (Defence counsels for 1st Accused Person),

Mr. Lusajo Mwakasege, (defence counsel for 2nd accused person), Mr. Lawrence Jackson Mwasanga (defence counsel for 3rd accused person), Ms. Doris Kafuku (defence counsel for 4th accused person) and Ms. Rita Ntagazwa (defence counsel for 5th accused person).


 **A.Y. MWENDA**
JUDGE
01.12.2023