

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT DODOMA SUB REGISTRY

ECONOMIC CASE NO. 1 OF 2022

THE REPUBLIC

VERSUS

- 1. ASIA D/O IBRAHIM@ZUBERI**
- 2. SOPHIA D/O ISMAIL@MUHOMI**
- 3. SELEMANI S/O RAJABU NTUNGU**
- 4. SAID S/O RAJABU NTUNGU**
- 5. MUSSA S/O RAJABU NTUNGU**

JUDGMENT

Last order: 22nd December, 2023

Judgement: 06th February, 2024

ISAYA, J.:

The accused persons, Asia Ibrahim @Zuberi, Sophia Ismail @Muhomi, Selemani Rajabu Ntungu, Said Rajabu Ntungu and Mussa Rajabu Ntungu being the first, second, third, fourth and fifth accused persons respectively, stand charged with offences in five counts as follows; the two counts are for all accused persons that is; **first count:** conspiracy to commit terrorist acts contrary to section 4 (1), (2) (b) iii), 11A(1) c) and 27 (c) of Prevention of

Terrorism Act No. 21 of 2002 read together with paragraph 24 of the First Schedule to and sections 57(1) and 60 (2) of the Organized Crime Control Act [Cap 200 RE 2002] as amended; **second count:** participating in terrorist meeting contrary to section 4 (1), (3) (i) (ii), 5 (a) and 11A(1) (c) of Prevention of Terrorism Act No. 21 of 2002 read together with paragraph 24 of the First Schedule to and sections 57(1) and 60 (2) of the Organized Crime Control Act [Cap 200 RE 2002] as amended; **third count:** (for 1st and 2nd accused persons) Rendering support to Terrorism contrary to sections 4 (1), (3) (i) (i), 7 (1) (a) (2) (b) and 11A(1) (c) of Prevention of Terrorism Act No. 21 of 2002 read together with paragraph 24 of the First Schedule to and sections 57(1) and 60 (2) of the Organized Crime Control Act [Cap 200 RE 2002] as amended; **fourth count:** (for the second accused person) Use of property for commission of terrorism acts contrary to section 4 (1), (3) (i) (i), and 15(a) of Prevention of Terrorism Act No. 21 of 2002 read together with paragraph 24 of the First Schedule to and section 57(1) and 60 (2) of the Organized Crime Control Act [Cap 200 RE 2002] as amended; **fifth count:** (for the 2nd accused person) Failure to disclose information relating to terrorist acts contrary to section 4 (1), (3) (i) (i), and 40(1) (a) of Prevention of Terrorism Act No. 21 of 2002 read together with paragraph 24

of the First Schedule to and section 57(1) and 60 (2) of the Organized Crime Control Act [Cap 200 RE 2002] as amended

In the 1st **count** it is alleged by the prosecution that, on divers dates between 22nd July 2017 and 2nd August 2017 at Mgori forest area, within Singida District in Singida Region, the accused persons jointly and together with other persons not in court did conspire to commit 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 through the use of force and violence, an act which can reasonably be regarded as having been intended for purpose of seriously destroying the fundamental political, constitutional, economic and social structures of the United Republic of Tanzania.

In the 2nd **count**, it is alleged by the prosecution that, on divers dates between 22nd July 2017 and 2nd August 2017 at Mgori forest area, within Singida District in Singida Region and other places within the United Republic of Tanzania, the accused persons did participate in meetings knowing that the said meetings are concerned with an act of terrorism to wit, planning and preparing military training and exercises to overthrow the lawful Government of the United Republic of Tanzania and replace it with an Islamic State within the United Republic of Tanzania through the use of force and

violence, an act which involves prejudice to the National security and its nature and context may reasonably be regarded as being intended for the purpose of intimidating a section of the public within the United Republic of Tanzania.

In the 3rd **count**, it is alleged by the prosecution that, on divers dates between 22nd July 2017 and 2nd August 2017 at Mgori forest area, within Singida District in Singida Region, the first and the second accused persons rendered material assistance about an act of terrorism by providing food service and information relating to movements of armed police officers at various police stations within Singida region to Yusuph Said, and to the third, Fourth and fifth accused persons who were engaged in acts of terrorism namely plan to overthrow the lawful Government of the United Republic of Tanzania and replace it with an Islamic State within the United Republic of Tanzania through the use of force and violence, an act which involved prejudice to National Security and by its nature and context may reasonably be regarded as being intended for the purpose to intimidating a section of public within the United Republic of Tanzania.

In the 4th **count** it is alleged by the prosecution that, on divers dates between 22nd July 2017 and 2nd August 2017 in the Ilongero area, within Singida District in Singida Region, the second accused person directly used

part of her house located at Ilongero village in Singida Region, for purpose of facilitation commission of a terrorist act to wit, conducting a meeting concerned with the act of terrorism to wit preparations for the purpose of overthrowing the lawful Government of the United Republic of Tanzania and replace it with an Islamic State within the United Republic of Tanzania through the use of force and violence, an act which involved prejudice to National Security and by its nature and context may reasonably be regarded as being intended for the purpose of intimidating a section of the public within the United Republic of Tanzania.

In the 5th **count**, it is alleged by the prosecution that, on divers dates between 22nd July 2017 and 2nd August 2017 at the Ilongero area, within Singida District in Singida Region, the second accused person had information that Yusuph Said and Asia Ibrahim Zuberi were conducting meetings concerned with acts of terrorism to wit planning to overthrow the lawful Government of the United Republic of Tanzania and replace it with an Islamic State within the United Republic of Tanzania through the use of force and violence, an act which involved prejudice to National Security and by its nature and context may reasonably be regarded as having as being intended to intimidate a section of the public within the United Republic of Tanzania.

At the trial, Mr. Winlucky Mangowi, Ms. Kezilahabi, and Mr. Nehemia Kilimuhana, Learned State Attorneys, represented the Republic. In contrast, Mr. Samwel Mcharo, Ms. Josephine Mnzava, Mr. Majaliwa Wiga, Mr. Fred Kalonga, and Mr. Robert Owino, Learned Advocates, represented the first to fifth accused persons respectively. I wish to extend my appreciation to the team of members of the bar for their commitment, hard work, and attentive cooperation.

In her bid to prove the case against the accused persons beyond a reasonable doubt, the prosecution paraded ten (10) witnesses to testify, besides they produced eleven exhibits which were admitted into evidence. On the other hand, the accused persons testified themselves under oath as defence witnesses as DW1 to DW5 respectively, they did not tender any exhibit.

The summary in the body of evidence of the prosecution side presents an engrossing and raising eyebrows story. It all started when the game scout (PW4) of the Mgori forest reserve, upon learning of the presence of a man armed with a gun and accompanied by his wife (the 1st accused) who offered military training to some people in the Mgori forest, informed PW3 who was in a joint team of Police officers and other security officers from Singida district comprised an operation team that had encamped in the

Kuhama area, Pohama ward, in Singida district in the morning of the 2nd August 2017 as they prepared to launch the operation to get rid of the invaders of Mgori forest out of the reserve, that the two were residing near the place. The team had a special task of removing the intruders within the Mgori Forest Reserve located at Mkulu village. Following such information, a team of police officers was deployed to investigate the allegations. Upon being notified that the 1st accused and Yusuf Said (deceased) were at their home, they led their way to the Mkulu village office and later headed to their home. The team which included the village leader took precautions before they reached the house. They parked their vehicle a bit far from the house and started to walk silently and strategically toward the house. The first accused person (DW1) and her husband(deceased) happened to see them coming toward them. The deceased who was allegedly a jihadist militant had a sharp instinct to sense danger upon seeing the police coming, he quickly made an acceptable move of a trained mind to run into the house. The police wished to make an ambush and arrest them. DW1 could not make up her mind quickly. Seeing that, the police officers moved swiftly and managed to arrest the 1st accused person outside the house. Yusuf Said (the deceased) managed to avoid the ambush and prepared for the chaotic moment in the house. As the police pleaded for him to get out of the house in surrender,

he too warned them for anyone who dared to follow him into the house. He had decided to confront them in a fight. Sadly, he died in the exchange of gunfire with the police officers as he resisted the arrest. The 1st accused upon being searched was found in possession of a locally made firearm namely a pistol without number, four shotguns live ammunition, twenty-three SMG/SAR live round ammunition, and one cartridge from a fired bullet. The 1st accused was interviewed, confessed, and named the 2nd, 3rd, 4th, and 5th accused persons to be members of the syndicate that committed the offences charged to overthrow the lawful Government of the United Republic of Tanzania and replace it with an Islamic state. The 2nd, 3rd, 4th, and 5th accused persons were traced and arrested at different intervals on 21st August 2017 for the 2nd accused and 25th August 2017 for the 3rd, 4th, and 5th accused persons respectively. Upon interrogation, all accused persons confessed to having conspired to commit terrorist acts with the intent to overthrow the lawful government of Tanzania and establish an Islamic state.

It has been stated by the prosecution that on Diverse dates between 22nd July 2017 and 2nd August 2017, the accused persons formed a criminal syndicate with other persons not in court to commit a crime. In the process, they participated in military training and skills including how to fight against

state security military, and conducted several meetings to that effect in various places within the United Republic of Tanzania.

At the closure of the prosecution case, the court found that the accused persons had a case to answer in respect of the offence charged with. The accused persons (DW1, DW2, DW3, DW4, and DW5) firmly denied being involved in the commission of the offences alleged and charged with. The first accused person's evidence was to the effect that on the 2nd August 2017 she was arrested in the Migori area while she was with her husband, the late Yusuph Said. She stated that policemen went to their house and ordered her to lie down. After being put under arrest one policeman asked DW1 to call her husband to come out and when the deceased came from inside the house the policeman fired on him and caused his death. Thereafter DW1 was taken to the police station where she was interrogated and told that her husband (deceased) was a terrorist. In her testimony, DW2 stated that she was arrested on 20/08/2017 while at her home, in Msange village. She was taken to the police station where she spent 30 days until 30th September when she was taken to court. She maintained that she had never conspired to commit the offence, never attended meetings, never cooked food for the accused persons, never given them information nor knew them before and her house was not used for meetings. The evidence of DW3, DW4, and DW5

was to the effect that they were arrested at their home on 25th August 2017 in Jerman village, Ikungi Singida without knowing the offence. Later, they were taken to Singida Police Station where they were tortured by policemen. They all denied to know DW1 and DW2 previously. They further said that they did not know the deceased as well as had never been to Mgori forest.

That was the evidence of the prosecution and defence sides. Counsels for prosecution and the first accused persons filed their final submissions as it was ordered by this court. In his submission, the Learned Counsel for the first accused person submitted that the case against the first accused person was not proved beyond reasonable doubt since there is no common intention of the accused persons to commit the offence shown by the prosecution evidence. He added that there is no *mens rea* for the commission of the offenses charged with, no direct evidence adduced by the prosecution against the accused, and it uncorroborated. To reinforce his point, he cited the cases of **Nathanel Mapunda and Benjamin Mapunda vs Republic (2006) TLR 395, Protas John Kitogole and Another vs Republic, (1992), TLR 51, Christina Mbuna vs Republic, 1983 TLR 340, Christian Kale and Rwekaza Bernard vs. Republic (1992), 302, 307, Mathias Mnyemi and Another vs Republic [1980], TLR 290 and Michael Haishi vs Republic 1992 TLR 92.**

On the other hand, the prosecution Counsel submitted that their evidence manages to prove the case against the accused persons in a required standard thus he referred this court in a number of cases to include; **Magendo Paul and Another vs Republic**, [1993] TLR 2019, **Mataka & Others vs Republic** [1971] 1 E. 1, **Akili Chaniva vs The Republic**, Criminal Appeal No. 156 of 2017, **Paul Maduka & 4 Others vs Republic**, Criminal Appeal No. 110 of 2007, **Nyerere Nyague vs the Republic**, Criminal Appeal No. 67 of 2010, **Dickson Elia Nsamba Shapwata & Another vs Republic**, Criminal Appeal No. 92 of 2007, **Nzwelele Lugaila vs the Republic**, Criminal Appeal 140 of 2020, **Chacha Jeremiah Murimi & 3 Others vs Republic**, Criminal Appeal 551 of 2015 (Both Unreported), **Paschal Kitigwa vs The Republic**, [1994] TLR 65, **Paschal Kitigwa vs the Republic**, [1994] TLR 65, **Felix Kisinyila vs Republic**, Criminal Appeal No 129 of 2022, (Unreported), **Mohamed Katindi & Another vs Republic**, [1986] TLR 134, **Safari Anthony @ Mtelemko vs Republic**, Criminal Appeal No. 404 of 2021, **Khamis Said Bakari vs Republic**, Criminal Appeal 359 of 2017, **Goodluck Kyando vs Republic**, [2006] TLR 363, **Chrizant John vs Republic**, Criminal Appeal 313 of 2015 (Unreported), **Mohamed Said Matula vs The Republic** [1995], TLR 3,

Hamisi Mbwana vs Republic, [2017] TLR 160 and **Isaya Msofe vs Republic**, Criminal Appeal No. 31 of 2020 (Unreported).

Having considered the evidence on record and submission from the learned counsel of both sides the main issues are; **firstly**, whether Exhibit P2 (locally made pistol), Exhibit P3 (cartridge), Exhibit P4 (four bullets), twenty-three SMG/SR bullets (Exhibit P6) were retrieved from the first accused person; **secondly**, whether the case against all the accused persons was proved beyond reasonable doubt.

I will determine the first issue based on the evidence of PW3, PW4, PW5, PW6, and PW8, it is the evidence of PW3 that while he was in the Kuhama area encamped and ready to go for the operation at Mkulu, one game scout (PW4) informed him of the presence of a man (deceased) and his wife (first accused person) at Mgori forest who have a weapon (gun) and were training people military skills including using a weapon. They were residing in the abandoned house of Manyerere. PW3 selected five police officers including PW6. PW5 joined later in the team as the leader of the area. It was the evidence of PW4, PW5, PW6, and PW8 that at the place of the first accused and the deceased, there was a confrontation between the

deceased and policemen, an incident which caused the death of Said Yusuf (deceased) and injury to the one policeman (PW6).

After being informed of the tragedy that occurred, PW3 went there with other policemen where he found the deceased still alive but injured by a bullet, and the locally made pistol which he used to fight against policemen beside him on the ground and one cartridge of shotgun bullet. He inspected the said pistol and found one bullet inside, he took them. Thereafter, together with DW1 and others, he entered the sitting room where he saw one sulphate bag containing maize. They emptied the bag to find four red bullets used in a shotgun.

After that, they entered the bedroom where they saw the bed. Beneath the mattress, they saw a sock that had a white and black color containing twenty-three SMG bullets. They also found nine books of Islamic teaching in the bedroom. PW3 seized all items via the certificate of seizure (**Exhibit P5**) which was signed by PW3, PW5 (a village leader), and the first accused (DW1) herself.

The law governing search and seizure is the provision of section 38 (1) (2) and (3) of the Criminal Procedure Act, Cap 20 "the CPA" as well as the

Police General Order paragraph 226. The provision of section 38 of the CPA provides as follows;

: "(1) Where a police officer in charge of a police station is satisfied that there is reasonable ground for suspecting that there is in any building, vessel, carriage, box, receptacle or place-

(a) anything with respect to which an offense has been committed;

(b) anything in respect of which there are reasonable grounds to believe that it will afford evidence as to the commission of an offense;

(c) anything in respect of which there are reasonable grounds to believe that it is intended to be used for the purpose of committing an offense, and the officer is satisfied that any delay would result in the removal or destruction of that thing or would endanger life or property, he may search or issue a written authority to any police officer under him to search the building, vessel, carriage, box, receptacle or place as the case may be.

(2) Where an authority referred to in subsection (1) is issued, the police officer concerned shall, as soon as practicable, report the issue of the authority, the grounds on which it was issued, and the result of any search made under it to a magistrate.

(3) Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any".

In the case at hand, PW3 was a police officer in charge of the district (OCD). The law gives him powers to search and seize without a warrant or order. There is no dispute that the said search was conducted in the presence of PW5 (the leader in the village), and the first accused who was the occupier of the premises. There is again strong and unchallenged evidence that shows that PW3 and his team were in operation to evict the intruders at the Mgori forest, consequently, the search and seizure at the first accused's premises was not in the plan. See also the cases of **Shabani Said Kindamba v. Republic**, Criminal Appeal No. 390 of 2019; **Ayubu Mfaume Kiboko & Another v. Republic**, Criminal Appeal No. 694 of 2020 and **Moses Mwakasindile v. Republic**, Criminal Appeal No. 15 of 2017(both unreported).

To that end, the court deliberates that the search was legally conducted to the first accused person and items to wit Exhibits P2, P3, P4, and P6 were retrieved therefrom. The first accused person signed the certificate of seizure (Exhibit P5) which was used by PW3 to seize the above-listed items, also signed by PW3 and PW5. It is a trite law that the accused person having signed the certificate of seizure which is in the view of the court is valid, it means that the accused acknowledged that the items were found in his possession. See the case of **Song Lei v. Republic**, Criminal

Appeal No. 16A of 2016 and No.16 of 2017; and **Waziri Shabani Mizogi v. Republic**, Criminal Appeal No. 476 of 2019 (both Unreported). Therefore, evidence of DW1 that the seized exhibits above were not seized from her is an afterthought because the said exhibits were not challenged after being admitted to the court as exhibits. In other words, DW1 made no effort to disown the signature in Exhibit P5 or she never challenged it. Subsequently, it is my considered view that Exhibit P2 (locally made pistol), Exhibit P3 (cartridge), Exhibit P4 (four bullets), and twenty-three SMG/SR bullets (Exhibit P6) were all retrieved from DW1.

The second issue examines whether the case against all the accused persons was proved beyond a reasonable doubt.

Admittedly, in the case at hand, I should observe and find that there is no direct evidence showing that the accused persons herein did commit the offenses charged rather there is only circumstantial evidence with which the prosecution side has relied upon to prove their case. The prosecution side relied on the cautioned statement of the accused persons too.

I should therefore start by borrowing a leaf from circumstantial evidence in the case of **Sadiki Ally Mkindi v. The D. P. P.**, Criminal Appeal

No. 207 of 2009 (unreported), the Court of Appeal underscored the principle laid in Sarkar on Evidence, 15th Edition., where the Court stated that;

"We would therefore set out the general rules regarding circumstantial evidence in criminal cases as elucidated in SARKAR ON EVIDENCE, Fifteenth Edition, Reprint 2004 at pages 66 to 68. These are:

- 1. That in a case that depends wholly upon circumstantial evidence, the circumstances must be of such a nature as to be capable of supporting the exclusive hypothesis that the accused is guilty of the crime of which he is charged. The circumstances relied upon as establishing the involvement of the accused in the crime must clinch the issue of guilt.*
- 2. That all the incriminating facts and circumstances must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other hypothesis than that of his guilt, otherwise the accused must be given the benefit of the doubt.*
- 3. That the circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected with the fact sought to be inferred therefore.*
- 4. Where circumstances are susceptible of two equally possible inferences the inference favoring the accused rather than the prosecution should be accepted.*
- 5. There must be a chain of evidence so far complete as not to leave reasonable ground for a conclusion therefrom consistent with the*

innocence of the accused, and the chain must be such human probability the act must have been done by the accused.

- 6. Where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated.*
- 7. Circumstances of strong suspicion without more conclusive evidence are not sufficient to justify a conviction, even though the party does not explain them.*
- 8. If the combined effect of all the proved facts taken together is conclusive in establishing the guilt of the accused, a conviction would be justified even though any one or more of those facts by itself is not decisive".*

See also: **Jimmy Runangaza v. Republic**, Criminal Appeal No. 159B of 2017, **the Gody Katende @Godfrey Katende vs the Republic**, Criminal Appeal No. 399 of 2018 (Unreported), and **Simon Musoke vs Republic**, [1958] 1 E.A. 715

Let me start to examine the circumstances revolving around the 2nd, 3rd, 4th, and 5th accused persons in this case. It is apparent from the evidence particularly the evidence of PW7 that, the 2nd, 3rd, 4th, and 5th accused persons above were arrested and charged upon being mentioned or named by the first accused person. When she was interrogated by the PW7 the first accused person stated that they were new trainees who joined.

Apart from this piece of evidence, the other evidence implicating these accused persons to the offense charged is their only cautioned statements.

It is a trite law that, we agree in principle that evidence of an accomplice needs corroboration for it to be acted upon against an accused. However, a conviction is not necessarily illegal for being based on uncorroborated evidence of an accomplice. See the case of **Godfrey James Ihunya and Another v. Republic**, [1980] T.L.R 197.

In **Bushiri Amiri vs Republic** [1992] TLR 65 the High Court, Mroso, J (as he then was) cited and underscored two previous decisions of the High Court, that is **Omari J. Kibanike & Others vs Republic**, Criminal Appeal No. 224 of 1975 (DSM Registry), the High Court through Biron, J. said: -

"Where at a trial an accused opts to give evidence on oath and in such evidence, he incriminates a fellow accused, such evidence is admissible against the other, though it cannot be treated otherwise than as evidence of an accomplice and therefore requiring corroboration in practice though not in law vide S. 142 of the Evidence Act, 1967. "

Also, in the case of **Ibrahim Daniel Shayo vs Republic**, Criminal Appeal No. 10 of 1990 (DSM registry) Mapigano, J observed: -

"Where an accused person gives evidence on oath in a joint trial implicating another accused (even if not a confession) whether or not he

implicates himself, it may be used against that other accused, because that evidence is on the same footing as that of any other witness, though as a matter of prudence, it must be approached with caution."

In this case, the first accused person in her testimony under oath did not implicate other accused persons into the offenses they are charged with rather in a confession she made to the PW7 it is where the first accused person stated to train and impart army skills to the rest of the accused in this case. For this reason, this court takes the said evidence with caution to warrant the guilt of the 2nd, 3rd, 4th, and 5th accused persons, thus needing it to be corroborated. In the case of **Hussein Malulu @ Elias Malulu and 2 Others vs Republic**, Criminal Appeal No. 263 (Unreported), the Court held that;

"That what we gather from the quoted provision is that the testimony of a co-accused, arising out of his confession to committing an offense must be given force through corroboration. This means that conviction of a co-accused without there being corroborating evidence fails the test of a properly grounded conviction."

The other evidence that implicates the said accused persons in the offense charged is their respective cautioned statements which they alleged to be recorded at police stations. Those are Exhibit P7 (cautioned statement of 2nd accused), Exhibit P8 (cautioned statement of 4th accused), Exhibit P9

(cautioned statement of 3rd accused) and Exhibit P10 (cautioned statement of 5th accused). In the above Exhibit, all accused persons confessed to having committed the offenses charged with. In the case of **Mohamed Haruna Mtupeni and Another v. Republic**, Criminal Appeal No. 259 of 2007 (unreported), the Court observed that:

"The very best witness in any criminal trial is an accused person who freely confesses his guilt."

I agree with the principle above, however, the confession that has been retracted or repudiated needs to be corroborated with other independent evidence. In the case of **Joseph Mkumbwa and Samson Mwakagenda vs Republic**, Criminal Appeal No. 97 of 2007 (Unreported), the Court held that;

*".... the evidence of visual identification **could not be corroborated by the cautioned statement** (Exh P27) because as the first appellate court correctly observed, **having been repudiated, it, requires, corroboration** and it is now settled law that **evidence which, requires corroboration cannot corroborate another**, (see *ALLY MSUTU v R. (1980) TLR 1*)."[Emphasis in mine].*

In this case, all cautioned statements were bitterly challenged. They were either repudiated or retracted. Under the circumstances, I find it safe

to subscribe to the guiding principle above that the alleged confessions in the accused persons cautioned statements cannot corroborate any other evidence in the case at hand because the said exhibit has been repudiated or retracted by the accused persons.

Again, it is very unfortunate that in the case at hand, apart from their respective cautioned statement, the prosecution did not adduce direct or circumstantial evidence or evidence showing words of conduct of the 2nd, 3rd, 4th, and 5th accused persons corroborating oral confession of the 1st accused person or their cautioned statement to connect them with any of the offenses charged with. See the case of **Hussein Malulu @Elias Malulu** (Supra). Indeed, I find no strong and cogent evidence to prove the offences meted on the 2nd, 3rd, 4th and the 5th accused persons.

Coming now on the case revolving around the 1st accused, it is the evidence of PW4, PW5, and PW6 that at the Mgori forest where the first accused was living with Yusuph Said (the deceased), she inspired or encouraged the deceased to confront the policemen outside their house. She stirred him to fight for Allah, to get arms to reinforce their group. According to the prosecution evidence, it was because of the encouragement and influence of the first accused person that the deceased confronted the

policemen with his locally-made pistol. The confrontation led to his death. This evidence from the prosecution witnesses went unchallenged by the defence counsels when they testified in court.

In **Emmanuel Saguda @ Sulukuka and Another v. R**, Criminal Appeal No. 422 "B" of 2013 (unreported), the Court cited with approval an old English case of **Browne v. Dunn** [1893] 6 R. 67 which held that: -

"A decision not to cross-examine a witness at all or on a particular point is tantamount to an acceptance of the unchallenged evidence as accurate unless the testimony of the witness is incredible or there has been a dear prior notice of intention to impeach the relevant testimony".

Guided by the above principle it is clear that failure to cross-examine the prosecution witnesses on material part of evidence adverse to the other party is tantamount to its acceptance. In the case, at hand, the defense did not challenge these facts which are material and relevant to the case at hand to connect the first accused person with the offenses charged and the said witnesses are credible.

It is clear from the prosecution evidence that there is no single witness who demonstrated the direct evidence showing that DW1 committed the offenses charged with. However, it is the evidence of PW7 that the accused

person and her husband Yusuf Said had escaped from Kibiti due to the operation which was going on there, where they were fighting jihad war to overthrow the existing government so that they could put a government which is led by "Sharia law". According to the prosecution case, they came to that forest so that they could re-establish themselves again by training and offering teachings. Her late husband was training them in military exercises, techniques, indoctrination, and skills. She further informed PW7 that the new trainees who joined were Ahmed, Sophia Muhomi (wife of Ahmed) from Jangwa Village, Ilongelo Singida District, Selemani Rajabu Tungu, Said Rajabu Ntungu and Musa Rajabu Tungu, all these came from Ihombwe village, Ikungi District.

Correspondingly is the evidence of PW4, PW5, PW6, and PW8 that they arrested the first accused person at the Mgori forest at her home where she was living with the deceased before her arrest and the death of one Yusuf Said, she influenced the deceased to come out of the house to fight for Allah, to fight against "kafir" to get weapons and reinforce their group. The deceased responded by saying Takbir! Takbir! Takbir! thereafter he got out of the house armed with a locally made pistol and fired a bullet at the policeman. He met his fate after being shot by one of the policemen

On the other hand, it is the evidence of DW1 that on material date almost 20 police invaded them. They were in uniform. They fired a bullet into the air and ordered them to be under arrest. According to the DW1, she was handcuffed and ordered to lie down. She said that the deceased was inside the house to put on clothes. One policeman with a gun guarded DW1. She further stated that other policemen commanded her husband "Shekhe toka huko" When the deceased husband was getting out, the police who were guarding DW1 fired a bullet. She heard also other bullets being fired at the deceased. The deceased said "*Lah illah Illah lah*" while lying on the ground.

Thereafter, she admitted that the policemen took her inside the house, about seven or six of them for a search. In the sitting room, there was one sack full of maize grain which they had emptied down as they searched. She was forced to show the deceased weapons. Later on, she was taken to Police Station Singida.

The evidence of PW3, PW4, PW5, PW6, and PW8 together with the evidence of the first accused herself indicate how she was arrested at home and how the deceased met his fate. The said evidence of DW1 corroborates the circumstances and conduct of the deceased and the 1st accused person

toward the offenses charged to her. DW1 did not confess that the deceased was fighting against policemen or she was the one who inspired the deceased to fight against the policemen. She however did not challenge that the locally made pistol was allegedly used by the deceased to fight against the police, and together with other things which were seized from her through Exh.P5.

In the instant case, it is born from the prosecution that, the first accused person was found in possession of various weapons in Exhibits P2, P3, P4, and P6 at her home. It is again, the first accused who lived with the deceased in Mgori forest where the accused person was arrested. She and the deceased saw the police coming toward their house in their cautious and militarily calculated move. The deceased's instinct was quick to sense danger. He made an acceptable move of a trained soldier to quickly decide and ran into the house. It could no longer be an ambush to him because he having closed and locked the door the jihadist militia got time to prepare for the confrontation. As expected, he resisted the repeated call to surrender in the hands of the entrusted body of the police force with the maintenance of public peace and order by the government. The act of the first accused to inspire and keep insisting the deceased fight against policemen for Allah, by restating the words as hereunder quoted;

"Mume wangu toka upigane na hawa makafiri" "toka upigane kwa ajili ya Allah" "toka upigane na hawa makafiri tuchukue hizi bunduki tatu tuimarishe kikosi chetu", "toka upigane na hawa makafiri tuwanyang'anye silaha ili tuimarishe kikosi chetu".

As stated above, the deceased refused the call to surrender at the hands of the police. According to the evidence in the record and considering the circumstances of the death of one Yusuph Said it is true that he was inspired and influenced to fight against the policemen by his wife. He came out armed for nothing but to fight as inspired by DW1.

Again, even though the first accused person in her evidence denied having signed the certificate of seizure and that she did not own the exhibits above, it is unfortunate that the same was not challenged at the time the prosecution witness testified to that effect thus implying she agreed with the said piece of evidence.

The injury suffered by PW6 supports the evidence that there was a fight at a place where the first accused person was arrested. Besides the evidence of DW1 itself tends to corroborate the prosecution evidence that her husband got shot when he came out of the house in a combat situation. Even thou

her evidence of DW1 tried to hide some facts about what happened at the scene of the crime her evidence and that of PW3 are of the same line.

Again, in the case of **Shabani Mpunzu @ Elisha Mpunzu v. Republic**, Criminal Appeal No. 12 of 2002 (unreported). the Court observed as follows:

"It is a settled trite principle of law that in a criminal case in which the evidence is based purely on circumstantial evidence, for the court to found a conviction on such evidence, it must be satisfied that the evidence irresistibly points to the guilt of the accused... to the exclusion of any other person." [Emphasis is Mine]

- See also the cases of **Hamidu Mussa Timotheo and Majid Mussa Timotheo v. Republic** [1993] T.L.R 125 and **Shabani Abdallah v. Republic**, Criminal Appeal No. 127 of 2003 (unreported).

The circumstances involved in this case as demonstrated by the court above are sufficient to connect the first accused person with the offences charged with.

Again, there is unchallenged evidence of PW7 to the effect that the first accused person freely confessed to him that, she and her deceased husband Yusuf Said had escaped from Kibiti due to the operation that was going on there, where there was a group that was fighting Jihad war to

overthrow the existing Government so that they could put a government which is led by "Sharia law". They came to that forest so that they could re-establish themselves again by training and offering teachings. Her husband was training them in military exercises, to be physically fit, to keep secrets, and other military techniques and skills. In her defense, DW1 stated that he was taken to Singida Police Station, and later was taken to Dar es Salaam. According to her, though she was interrogated and tortured she did not state what she was interrogated about or what she stated to the police.

In the case of **Patrick Sanga v. Republic**, Criminal No. 213 of 2008, (unreported), the court held that,

*"Under section 3 (1) (a), (b), (c) and (d) of the Evidence Act, Cap. 6 a confession to a crime **may be oral**, written, by **conduct**, and/or a combination of all of these or some of these. In short, a confession need not be in writing and can be made to anybody provided it is voluntarily made".*

In another case of **Posolo Wilson @ Mwalyego v. Republic**, Criminal Appeal No. 613 of 2015, the court stated that;

"... it is settled that an oral confession made by a suspect, before or in the presence of reliable witnesses, be they civilian or not, may be sufficient by itself to found a conviction against the suspect"

In this case, PW7 is a credible and reliable witness, the court finds no congest reason for not believing her. See the case of **Goodluck Kyando** (Supra). Thus, this confession corroborates the evidence of prosecution witnesses; PW2, PW4, PW5, PW6, and PW8 to establish the offenses she was charged with.

In the upshot, all that I have endeavoured to expound herein above, I find that the prosecution side has managed to prove the case against the first accused persons to the hilt on the second and third counts. The prosecution has failed to prove the case against all the 1st 2nd, 3rd, 4th, and 5th accused persons in the 1st Count, and 2nd Count to 2nd, 3rd, 4th, and 5th accused persons, and 3rd, 4th, and 5th counts to the 5th accused person. Therefore, I acquit Sophia Ismail Muhomi, Seleman Rajabu Ntungu, Said Rajabu Ntungu, and Mussa Rajabu Ntungu, being the second, third, fourth and fifth accused persons respectively in all counts charged with and also, I acquit the first accused Asia Ibrahim Zuberi for the 1st Count she is charged with.

I find Asia Ibrahim Zuberi being the first accused guilty of the second and third counts and I hereby convict the first accused person for the offenses in the 2nd and 3rd counts which are; Participating in terrorist meetings contrary to sections 4 (1), (3) (i) (ii), 5 (a) and 11A(1) (c) of Prevention of Terrorism Act No. 21 of 2002 read together with paragraph 24

of the First Schedule to and section 57(1) and 60 (2) of the Organized Crime Control Act [Cap 200 RE 2002], and Rendering support to Terrorism contrary to sections 4 (1), (3) (i) (i), 7 (1) (a) (2) (b) and 11A(1) (c) of Prevention of Terrorism Act No. 21 of 2002 read together with paragraph 24 of the First Schedule to and sections 57(1) and 60 (2) of the Organized Crime Control Act [Cap 200 RE 2002]. Order accordingly.



G. N. Isaya

Judge

06/02/2024

SENTENCE

Whereas the first accused person is convicted of the offenses of Participating in terrorist meetings contrary to sections 4 (1), (3) (i) (ii), 5 (a), and 11A(1) (c) of the Prevention of Terrorism Act No. 21 of 2002 read together with paragraph 24 of the First Schedule to and section 57(1) and 60 (2) of the Organized Crime Control Act [Cap 200 RE 2002], and Rendering support to Terrorism contrary to section 4 (1), (3) (i) (i), 7 (1) (a) (2) (b) and 11A(1) (c) of Prevention of Terrorism Act No. 21 of 2002 read together

with paragraph 24 of the First Schedule to and section 57(1) and 60 (2) of the Organized Crime Control Act [Cap 200 RE 2002].

In sentencing the first accused person, I have considered the submission by the Learned State Attorney, the offenses have adverse effects on all people in the country because the acts cause terror and unrest in the society. They affect economic growth and spoil good relationships with other countries. I have considered too the mitigation of the accused person through the learned defence Counsel.

I have considered the mitigation factors advanced and I am guided by the relevant legislation that is sections 11A (1) (c) of the **Prevention of Terrorism Act No. 21 of 2002**, and paragraph 24 of the First Schedule to and section 57(1) and 60 (2) of the **Organized Crime Control Act [Cap 200 RE 2002]**. Having regard to all circumstances, I hereby sentence the convict Asia Ibrahim Zuberi as follows;

2nd Count: Thirty (30) years imprisonment

3rd Count: Thirty (30) years imprisonment

-Sentences to run concurrently.

It is so ordered.




G. N. Isaya
Judge
06/02/2024

Right of Appeal explained.




G. N. Isaya
Judge
06/02/2024

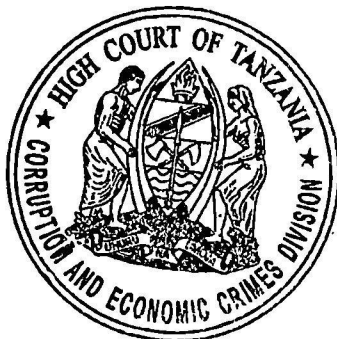
Order:

The local pistol (Exhibits P2), live ammunition, and cartridge be destroyed by fire.




G. N. Isaya
Judge
06/02/2024

**DATED and DELIVERED at DAR ES SALAAM by Video
conferencing this 06th day of FEBRUARY, 2024.**




G. N. Isaya
Judge
06/02/2024