IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CRIMINAL APPEAL NO 49 OF 2015

(CORAM: OTHMAN, C.J., JUMA, J. A. And, MWARIJA, J. A.)

1. **MASHAKA PASTORY PAULO MAHENGI @ UHURU**
2. **WYCLIF IMBOVA ANGARUKI@WIKII**
3. **JOHN APPELES MNDASHA** ..... **APPELLANTS**
4. **MARTIN HARISON MNDASHA@ KIJAZI**
5. **HAJI HAMISI KWERU**
6. **RASHIDI ABDI ABDIKADIR@RAHA@MSOMALI**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Hon. Rugazia, J.)

dated the 19th day of December, 2014
in
HC. Criminal Session Case No. 109 of 2007

JUDGMENT OF THE COURT

31st August & 12th October, 2016

OTHMAN, C.J.

On 20/04/2006 just before 12.30 hrs., daytime, a convoy of two Toyota Land Cruisers with Reg. Nos. SU 36177 and SU 34397 in which four armed policemen were escort and carrying, in two wooden and two metal boxes Tz. Shs. 1 billion 'cash in transit' from the National Micro Finance

Bank (N.M.B.), Bank House, Dar es Salaam to N.M.B., Wami Branch was waylaid and ambushed at the Ubungo traffic lights inter-section ("Ubungo Mataa") by heavily armed assailants. One of the vehicles (SU 36177) hit a concrete pole and the other (SU 34397) rammed into a Mercedes-Benz vehicle (Exhibit P.3).

Armed assailants in a Nissan Pickup with Reg. No. T884 ALQ, which twenty minutes earlier had parked at a nearby petrol station and which PW 10 (S/St. Solomon) had visibly noticed before the incident, but mistook to be a police anti-robbery squad, moved in and opened fire. The assailants sprayed a hail of bullets on the convoy, its occupants, as well as policemen on duty. PW5 (AI Wallace Mmuni) was hit with four bullets and PW10 who took cover under a truck and was in the assailants' line of fire, miraculously escaped death. However, as a result of the armed robbery Evarist Manyoni whom the money had been handed over to by N.M.B. staff (PW1, Abdu Marik Kinumbo; PW3, Colam Kiwia and PW4 Stration Chiongola) at the N.M.B., Bank House and D6361 PC Abdallah Marwa, who were in the motor vehicle carrying the 'cash in transit', both died a violent death caused by severe haemorrhagic shock and head injury due to bullet wounds.

The armed assailants managed to flee at full speed towards Mandela Road in a Toyota Corolla, Reg. No. T 986 ALB (Exhibit P.8), a gateway

motor vehicle, which had come from the opposite direction of Mwenge. They grabbed and took with them a wooden box containing cash.

Following 10-20 minutes chase involving an exchange of gunfire with a police patrol led by PW 7 (Stg. Robert) that was in a Hyundai M/v. with Reg. No. STH 9947, the assailants abandoned their vehicle at Tabata Relini and at gunpoint carjacked, a Toyota Surf m/v. with Reg. No. T 848 AHF driven by PW 9 (Doto Ali). Arriving immediately thereafter, the police found in the gateway car (Exh. P.8), a "Webley" pistol Serial No. 76599 (Exh. P.4), two bullets (Exh. P.5), 6 cartridges (i.e. pellets) (Exh. P.6), a red collared blood stained T-shirt ("South Pole") purportedly with a bullet hole at the back (Exh. P.7) and a grey T-shirt (PW8, SP. Abdallah Dunia). The rear seat of the vehicle had blood stains (PW 8).

On the same day, i.e. 20/04/06, police also found another abandoned Toyota Corolla with Reg. No. T. 761 AHG near Twalipo Army Camp. In it, they recovered three submachine guns (SMGs), Serial Nos. 56-128128513, 56-1-55046 and M70AB2-793947, a pistol with Serial No. L. 90644, 75 live ammunition and a blood stained khaki shirt with a hole at the back (Exh. P.10). The seat and floor of the car had blood stains.

No one positively identified any of the armed assailants at the scene of the crime. None of the assailants were arrested at the occurrence or

immediately after the midday heist. The 'cash in transit' in the wooden box they had snatched was never recovered.

It is out of this incident that the six appellants, together with other ten accused who were acquitted by the High Court were arraigned on two charges of murder c/s. 196 of the Penal Code, Cap. 16, R.E. 2002. The High Court (Rugazia, J.) on 19/12/2014 convicted and mandatorily sentenced the appellants to suffer death by hanging.

Aggrieved, they have now preferred this appeal.

The arsenal of evidence primarily employed by the prosecution at the trial to nail down the accused for the two murders, included direct and circumstantial evidence, identification parade registers, confessional cautioned statements, and forensic evidence by way of fingerprints, ballistic, and DNA (Deoxyribonucleic acid). For each of the accused, it principally displayed a combination of the above pieces of evidence according to what it considered incriminating. Whether those pieces of evidence proved their worth is at the core of this appeal.

The appellants resolutely denied any involvement. The 1st and 2nd appellants claimed they did not know each other or any of the other appellants before the incident. The 3rd appellant claimed that he did not know the 4th appellant. The 1st, 4th and 5th appellants repudiated their

cautioned statements, respectively, Exhs. P.17, P.18 and P.24. Each of the 1st, 2nd, 3rd and 6th appellants also displayed an *alibi* defence that they were not at the occurrence, but elsewhere at the time of incident. At the end of the trial, the Assessor's entered a guilty verdict in respect of the 2nd, 3rd, 4th, 6th appellants and a not guilty verdict as concerns the 1st and 5th appellants. On his part, the learned Judge acquitted ten of the accused, including the 11th accused, a police officer who was the first suspect to have been arrested on 23/04/2006, three days after the heist and the 5th accused who was arrested on 26/05/2006. He has also led the police to the arrest of the 3rd and 4th appellants. The High Court finally found the appellants guilty and entered convictions for the murder of the two deceased

At the hearing of the appeal, on 29/08/2016 and 31/08/2016, the 1st appellant was represented by Mr. Richard Rweyongeza, the 2nd and 6th appellants by Mr. Majura Magafu, the 3rd appellant by Mr. Barnaba Luguwa, the 4th appellant by Mr. Samson Mbamba and the 5th appellant by Mr. Gabinus Galikano, learned Advocates.

The respondent Republic, which forcefully resisted the appeal was represented by Mr. Tumaini Kweka, learned Principal State Attorney

assisted by Mr. Mohamed Salum, Mr. Joseph Mauggo, Ms. Neema Haule and Mr. Dereck Mkatibuzi, learned Senior State Attorneys.

At the outset, we think it is convenient if we restate the well settled principle of law that on this first appeal, the Court is entitled to re-evaluate the whole evidence and determine whether or not the findings and conclusions of the trial court should stand or fall (See, **Peter v Sunday Post** ([1958] E.A. 424; **Hassan Mzee Mfaume v.R.** [1981] T.L.R. 167).

Two issues also need to be prefaced.

At the trial and on this appeal controversy arose whether or not the 1st appellant's *alias* was "Uhuru", a name he disowned at the preliminary hearing and in his sworn testimony. The point Mr. Rweyongeza attempted to drive home was that the 1st appellant was not involved because there was no link between his arrest and the incident. Mr. Salim's brief reply was that a name need not be proved beyond reasonable doubt and the 1st appellant did not dispute that he was not called "Uhuru" when he was arrested by the police.

In our respectful view, so long as the 1st appellant's self-introduction to the police in Dar and Moshi (PW1, ACP Hezron Kigono and PW2 D/Sgt. Firmine Masue in the trial-within-a-trial, PW 13) was also by the use of his name and *alias* (i.e. Mashaka Pastory Muhengi @ Uhuru @ Mkenya) and

this case does not appear at all to be one of mistaken identity or that of a wrongful arrested and prosecuted accused before the court, not much can be capitalized on this debate. The only detectable error in the impugned judgment was its reliance on the 1st appellant's passport, which both Mr. Rweyongeza and Mr. Salum agree, was not tendered in evidence, to arrive at a finding that it bore that name.

The second issue concerns police witnesses for the prosecution. Mr. Magafu relying on **Peter Kazembe v.R.** (1967) H.C.D. 338 and **Mohamed Katindi and Another v.R.** (1986) T.L.R. 134 forcefully contended that much as there is no legal requirement for the evidence of policemen to be independently corroborated, some of them like PW 6 and PW16 had acted as a decoy, case law required the evidence of the policemen in this case to be corroborated as a matter of caution and prudence. He criticized the High Court for not taking a position on that issue raised at the trial.

The learned Judge's limited remark was that the Statute books did not yet contain the interesting law advanced by Mr. Magafu.

In this case, twenty three (23) of the twenty nine (29) witnesses for the prosecution were police officers. Of these, 18 were police officers, 5 were police experts and only 6 were civilian or ordinary witnesses. Neither

the Evidence Act, Cap. 6, R.E. 2002 nor the Police Forces and Auxiliary Forces Act, Cap. 322 require the evidence of a police officer to be independently corroborated in order for it to be credible and reliable. By section 127 of the Evidence Act, every person is competent to testify except those who fall under the exceptions therein (e.g. extreme old age, etc). Given their statutory role in investigating offences under the Penal Code and other laws and the responsibilities duly spelt out in the Criminal Procedure Act, Cap. 20 (herein after referred to as the CPA), it is appreciable that criminal prosecutions are founded on the evidence of policemen and other ordinary witnesses. The mere fact that the prosecution case was overpopulated by the evidence of policemen does not by the fact alone agitate a requirement for independent corroboration, legal or otherwise of that testimony. More is needed. Each case must be decided on its own facts and circumstances.

No doubt, in this case, police witnesses by far numerically outnumbered civilian witness. It is trite law that what counts is not the number but the quality of the testimony of examined witnesses. Moreover, the police officers who testified had various ranks, were at different chair of command levels and had assorted responsibilities. They possessed diverse specializations and even came from various police stations (Central,

Ilala, Magomeni, Oysterbay, Stakishari) and from offices in Dar-es-Salaam, Morogoro, Moshi and Arusha. They had been assigned various tasks in the investigation of the case, which also required expert opinion. Many gave evidence simply because they happened to be at the place they were and at the time of the specific occurrences. Others because they interacted with the accused. Yet others, because they were performing their official investigation or expert duties or were acting under orders. During the trial, the police witnesses were subjected to incisive cross-examination by learned Advocates.

Having re-examined the record, it does not appear to us that the evidence of the policemen was concocted or tailor-made. No partisanship, enmity or self-interest was detectable. None of the police witnesses enticed or deceived any of the accused into committing any criminal or reprehensible act. In these circumstances, the fairness of the trial went unaffected and the appreciation of the evidence of each police officer by the trial court deserved appreciation, acceptance, rejection or doubt as that of any other witness. In our respectful view, the High Court was alive to its primary duty of assessing the credibly and reliably of all the testimonies. No fault arose.

We now address each of the appellants' decisive grounds of appeal contained in their memorandums of appeal. For convenience, we will combine the appellants' grounds of appeal where they challenge the same piece of evidence employed by the trial court for their convictions.

Concerning the 1st appellant, grounds 1 and 2 of his appeal faults the learned Judge for relying on his repudiated cautioned statement (Exh. P.17) to base the conviction.

Mr. Rweyongeza criticized the learned Judge for admitting and acting on the 1st appellant's repudiated cautioned statement (Exh. P.17). He pointed out that it was recorded beyond the period prescribed by law for interviewing a suspect, as the 1st appellant was arrested on 2/06/2006 and the statement was recorded by PW14 (D/ Sgt. Firmine Masue) on 7/06/06, four days later. That section 50(2)(a) of the CPA was offended. It does not appeal to common sense for the 1st appellant's interview with PW14 to have been interrupted on 3/06/2006 in Dar es Salaam so that he leads the police to Arusha where weapons were allegedly hidden. Worst still, the person who hid those weapons, and in fact took the police to where they were hidden, i.e. the 2nd accused had already been in their custody. He was acquitted.

On the contrary, Mr. Salum submitted that the cautioned statement (Exh. P.17) was correctly recorded under section 50(2) (a), as the trial Judge had properly excluded the relevant period under the law. That is, the period from 2/06/2006 to 6/06/06 when the appellant was being conveyed by the police from Moshi to Dar-es-Salaam to Arusha and back to Dar-es-Salaam. That it could not have been recorded on 6/06/06 as the 1st appellant had travelled 600 k.m. by road from Arusha to Dar-es-Salaam and was tired. The learned Judge was entitled to rely on it for his conviction.

We have given the record close scrutiny. Following his arrest in Moshi on 02/06/2006 at 14:00 hrs, the 1st appellant's repudiated cautioned statement (Exh. P. 17), was recorded by PW 14 at the Regional Crime Officer's (R.C.O.) Office, Ilala, Dar-es-Salaam on 7/06/2006 from 07.40 hrs to 10.30 hrs. The interval was over 4 days. The prosecution's case was that the interview was conducted under sections 53 and 57 of the CPA. The pertinent question arising is whether or not in calculating the period available to the police for the 1st appellant's interview the learned Judge was entitled to exclude that period under section 50(2)(a) of the CPA.

Section 27(1) of the Evidence Act provides that a confession to an offence voluntarily made to a police officer by an accused may be proved

as against that person. The position of the law on the admissibility of a confession succinctly laid down in **Tuwamoi v. Uganda** [1967] EA 84, at 91 and repeatedly endorsed by the Court is also that:

> *"First the onus of proof in any criminal case is on the prosecution to establish the guilt of an accused person.* ***A conviction can be found on confession of guilt by an accused person. The prosecution must first prove that this confession has been properly and legally made. The main essential validity of a confession is that it is voluntary, but the other legal requirements.....must also be established".*** *(Emphasis added).*

Section 50 of the Criminal Procedure Act provides:

> ***50(1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is-***
>
> ***(a) Subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the***

time when he was taken under restraint in respect of the offence;

(b) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended.

(2) In calculating a period available for interviewing a person who is under restraint in respect of an offence, there shall not be recorded as part of the 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-

(a) While the person is, after being taken under restraint, being conveyed to a police station or other place for any purpose connected with the investigation; (Emphasis added).

In **Emmanuel Malahya v.R**, Criminal Appeal No. 212 of 2004, (COA, unreported) we stressed:

*"**The violation of section 50 is fatal** and we are of the opinion that ss.53 and 58 are of the same plane. **These provisions safeguard the human rights of suspects and they should, therefore, not be taken lightly or as mere technicalities".** (See, also, **Janta Joseph Komba and 3 Others v.R,** Criminal Appeal No. 95 of 2006, (COA, unreported). (Emphasis added).*

A close re-assessment of the evidence, in particular that of the trial-within-a-trial discloses that following his arrest on 2/06/2006, in Moshi the 1st appellant was escorted by SACP Hezron Kigono, then Regional Crime Officer (RCO), Kilimanjaro by air to Dar-es-Salaam on 3/06/2006, the next day. They arrived at Dar-es-Salaam International Airport at 10:00 hrs. The 1st appellant was brought before ASP Charles Mkumbo (PW 3 in the trial-within-a-trial) at the R.C.O's Office at Ilala at 12:00 hrs and then escorted to Central police station, where he arrived at 13:00 hrs.

PW 14 saw the 1st appellant for the first time at 14:30 hrs. He administered a caution and accorded him the right to communicate with a lawyer, relative or friend. Soon thereafter, the 1st appellant suggested to PW14 that the police had better go to Arusha to retrieve firearms which

were with the 2nd accused (acquitted). He volunteered for the trip. PW 14 stopped the interview. A helicopter was made available, and PW 13 (SP. Duwan Nyanda) and the 1st appellant immediately departed for Arusha.

We find it fully established, as the learned Judge correctly did that the 1st appellant was escorted back to Dar-es-Salaam from Arusha on 3/06/2006 by road and not by airplane as he unconvincingly claimed. He was escorted by PW4 (F. 6065 D/Cpl. Hatibu in the trial-within-a-trial), handcuffed. The learned Judge found PW 4 trustworthy and credible. We have no reason to disagree. They left Arusha at between 05:30 hrs – 05:55 hrs, arrived at Kibaha at 17:00 hrs. and finally at Central police station at 18:00 hrs. The next day, 7/06/06 at 07:40 hrs., PW14 took the 1st appellant cautioned statement afresh (Exh. P.17).

Having re-examined the whole material, we are of the respectfully view that the recording of the 1st appellant's repudiated cautioned statement (Exh. P.17) violated section 50(2)(a) of the CPA. Under section 50(1)(a), the basic period available to the police for interviewing a person under restraint in respect of an offence is the period of four hours commencing at the time he was taken under restraint in respect of that offence, unless that period is either extended under section 51 or in calculating the period available there is a period of time therein which is

not to be reckoned as part of that period during the acts or omissions and for the purposes spelt out in section 50(2)(a) to (d). The bitter contest between the parties is over section 50(2)(a), which the High Court relied upon to enter the conviction.

First, the period from his arrest in Moshi on 2/06/2006 at 14:00 hrs. to the morning of 3/06/2006 when he was flown by airplane to Dar-es-Salaam has not been fully accounted for by the prosecution. The High Court also did not put it into the equation in calculating the basic period available. The 1st appellant was under police restraint and the R.C.O. was involved in his arrest. The police had a presence in Moshi and according to him, Majengo police station, Moshi had even commenced action on the institution of charges.

Second, in our considered view as long as the 1st appellant's interview had been formally engaged according to the law on 3/06//2006, with a caution duly administered and his legal rights explained to him by PW 14, the interview should have been reduced to writing under section 57(1). All the more reason as the 1st appellant according to PW14 freely gave information on firearms in possession of the 2nd accused (acquitted) and even offered to go to Arusha to assist the police. Moreover, its

recording would have documented an important aspect of the 1st appellant's alleged voluntariness to confess to the crime.

Third, even if we were mindful to accept that the period from 02/04/2006 to 3/04/2006 was validly excluded by the learned Judge and to generously condone the non-reduction to writing of the 1st appellant's initial interview by PW 14, we find it insufficiently explained why the interview was not conducted and recorded between 4/06/2006 and 5/06/2006, i.e. two days, once he was *conveyed* to and had arrived at Arusha on 3/06/2006.

One of the key words in section 50(2) (a) is ***conveyed***. The Concise Oxford Dictionary (5th Ed.) defines the word *convey* as:

> *"transport, carry."*

The Oxford Advanced Learners Dictionary (7th Ed.) gives it as meaning:

> *"to take, to carry, or transport sb/sth (i.e. somebody/something) from one place to another".*

The 2nd accused (acquitted) who the 1st appellant at Dar-es-Salaam had pointed a finger of accusation at during the interview with PW 14 had already been arrested in Arusha by 3/06/2006. He showed the police that very day the load of weapons, including two AK 47 SMGs and six pistols

(Exhp. P 11, P 12) concealed in a car stationed at a church park yard. There was neither suggestion from the prosecution that the arrest, search and seizure operation in Arusha prompted by the 1st appellant's tip, took two days (i.e. 4/06/2006 – 5/06/2006). If anything, he knew who had the weapons, the person concerned, i.e. the 2nd accused (acquitted) was by 3/06/2006 already in police custody and the weapons were seized on that very day. Again, it went unexplained why these two days period, i.e. 4/06/2006 -5/06/2006 were not available to the police for the 1st appellant's interview to be properly conducted within the period available for the 1st appellant's interview under section 50(1) (a) and 50(2)(a) once he had been *conveyed* to Arusha on 3/6/2006. On the available evidence, for all intents and purposes the objective for the operation had been successfully completed by that day. Accordingly, having been illegally obtained, we expunge the repudiated cautioned statement (Exh. P.17) from the record. We did the same in **Abas Selemani Mbinga v.R.**, Criminal Appeal No. 25 of 2008 and **Christopher Chengule v.R.**, Criminal Appeal No. 215 of 2010. We find merit in these grounds of appeal.

Concerning ground 6 of the appeal, the High Court had also held that the 1st appellant had rented PW16's (Chrysant Tibaijuka) house at Ukonga where the proceeds of the crime were allegedly distributed. Mr.

Rweyongeza submitted that the rent receipt (Exhibit P.19) was recovered by the police (PW14) on 25/10/2006 in Moshi when they went to the 1st appellant's home a second time and in his absence. There was no independent witness to authenticate that it was found there. Moreover, the Landlord (PW 16) was unable to identify the 1st appellant in court. The evidence relied upon by the learned Judge was insufficient to warrant his conviction.

Mr. Salum conceded that the search and seizure of the rent receipt (Exh. P.19) was not proper and it had no evidential weight.

The evidence reveals that the receipt dated 31/8/2005 for the payment of eight months rent at Tz. Shs. 760,000/= for the house at Ukonga paid by one Mr. Uhuru Joseph was tendered in court by PW 16. That receipt was seized on 25/10/2006 by PW 13 (SSP Duwan Nyanda) when the police in the absence of the 1st appellant searched his house in Moshi, a second time. PW 16 was unable to identify the 1st appellant in the dock. However, he positively identified the 4th appellant who had paid the balance of the rent.

We fully agree with both Mr. Rweyongeza and Mr. Salum that the seizure of the rent receipt (Exh. P.19) was irregular. There was no independence witness to the search conducted in the 1st appellant absence.

Moreover, it did not make it any better for the prosecution that PW.16, the owner of the house was unable to identify in the dock his alleged tenant, the 1st appellant. It is not insignificant that at the time of the occurrence, on 20/4/2006 the house had been rented by one Mr. Uhuru Joseph for over seven months. On the whole evidence, it could not have been proved that the 1st appellant rented that house. The allegation that the proceeds of the heist were distributed there was PW 13's mere guess. As a matter of proof, it was not at all established. Accordingly, we find substance in this ground of appeal.

On Ground 3 of the appeal, Mr. Rweyongeza also forcefully criticized the trial court for relying on the 1st appellant's fingerprints (Exh. P.23) on which PW 18 (SSP Amani Mkanyaga) had given as an expert opinion that they had the same ridge characteristics as those found at the scene of the crime. The prosecution brought no evidence to show how the fingerprints had been lifted from the crime scene and by whom. Moreover, the motor vehicle with Reg. No. T 734 ALY, purportedly from where the 1st appellant's fingerprints had been taken from was not even tendered in court as an exhibit.

Adverting to Ground 3 of the 2nd and 6th appellants' appeal who were also convicted on the basis of fingerprint identification, Mr. Magafu

vehemently submitted that the chain of custody doctrine was not adhered to in relation to the lifting of the fingerprints from the gateway motor vehicle (Exh. P.8) at Tabata Relini to Urafiki police station and finally to the fingerprint expert (PW.18). Particularly in relation to the 6th appellant, Mr. Magafu submitted that if the only evidence linking him to the incident is the fingerprint expert opinion (Exh. 23), it was insufficient to warrant his conviction.

For the 3rd appellant, who in grounds 1 and 2 of his appeal also challenged the fingerprint expert opinion (PW18, Exh. 23) used as independent corroboration evidence against him by the trial court, Mr. Luguwa joining forces with the 1st, 2nd and 6th appellants submitted that D/Sgt. – Elly, the photographer who took the photograph of the 3rd appellant's fingerprint was not called by the prosecution to testify. The fingerprint expert report (Exh. 23) did not indicate at what place the photograph was taken. This left a lot of unanswered questions.

For the 4th appellant, Mr. Mbamba submitted that he had denied that any fingerprints were taken from him. The fingerprint expert report (Exh. P.23) was also weak as it did not mention any scientific criteria used to arrive at its findings. He relied on **D.P.P v. Shida Manyama**, Criminal Appeal No. 285 of 2012 (COA, unreported).

In reply, Mr. Salum was candid enough also to concede the deficiency of the fingerprint expert opinion (Exh. 23). He acknowledged that in the whole case, the prosecution brought no witness to show from what places the fingerprints of the 1st, 2nd, 3rd, 4th and 6th appellants were lifted. The course where the fingerprints were extracted is unknown. Exh. P.23 used by the High Court as a piece of corroboration evidence was weak. He submitted that much as the credibility of PW18, the fingerprint expert had not been shaken, the absence of the prospective witnesses who took the concerned appellants' fingerprints at the crime scene created a gap in the prosecution case. Mr. Salum left it to the Court to decide the 3rd and 6th appellants' ultimate fate in this appeal should their fingerprint identification be discounted.

There is no quarrel among the parties on the competency and expertise of PW18, the fingerprint expert. We, as the High Court correctly did, also find him to be so. The parties also concur that the primary material he used for fingerprint comparison, namely, the fingerprints of the 1st, 2nd, 3rd, 4th and 6th appellants purportedly lifted from the crime scene or other sources connected with the incident, such as the motor vehicles or weapons which were seized by the police were unreliable and unsafe. We fully agree.

Section 47 of the Evidence Act, Cap 6, R.E. 2002 governs the reception of fingerprint expert opinion.

Fingerprint identification, it is authoritatively said:

> ***"is valuable because fingerprints are unique. No two fingerprints are alike***. *[Even identical twins, with identical DNA, have different fingerprints, p.11]. Fingerprints are unique [do not change throughout ones life time or as one ages; p.11], Thus, fingerprint examiners can trace a fingerprint back to its source. Fingerprint comparison is the process of comparing two friction ridge impressions to determine if they come from the same source (i.e. did the same person make both impressions). Fingerprint examiners compare unknown fingerprints from crime scene or other items of evidence to known fingerprints and make a determination as to the source of the prints" (**Hillary Moses, Fundamentals of Fingerprint Analysis,** CRP Press, 2015); See also, **Robert John Buckley v. Regina**, [1999] EWCA Crim 1191; **Smith, R v (Rev. 1)**, [2011] EWCA, 1296 para. 8).*

The learned author, **R.N. Choudry** in **Expert Evidence**, 3rd Ed., 2014, p.61 also states:

> "***The identity of finger-marks is the strongest evidence of the identity of the person*** *and such evidence is relevant (See, Mohanlal v. Ajit Singh, 1978 SC 1183; Jaspal Singh v State of Punjab, AIR 1970 SC 1708).*

In **Rv. Beare; Rv Higgins** [1988] 2 SCR 387, the Supreme Court of Canada also observed:

> "***Fingerprinting is an invaluable tool of criminal investigation because of the ease and rapidity of the process and because it is infallible,*** *no two person's fingerprints being alike.*
>
> .....
>
> *"In brief, they have been an integral part of the Criminal justice system at every stage.* ***I should add that they provide advantages to an innocent accused. They may establish that another has committed the crime and they may also ensure that the innocent will not be wrongly identified with someone else's***

criminal history." *(See also, R. v Nikolousky, [1996]3 SCR 1197, para. 14). (Emphasis added).*

Police General Order 229 underscores that exhibits are vital evidence, and it specifically provides:

"Classification of Exhibits

1. ***Exhibits for the purpose of this order include:***

   (a) Stolen property and any ***property the possession of which may be the subject of a criminal prosecution;***

   (b) ***Objects which may connect a person with offence or incident, such as articles bearing fingerprints****, foot prints, particles of dust,* ***blood stained clothing****, hairs and* ***fibers****;*

   (c) ***Instruments with which an offence is committed, such as guns****, knives,* ***cartridges****;.....*

2. *(a)* ***The police are responsible for each exhibit from the time it comes into the possession of the police, until such time as it is admitted by the Court in evidence****, or returned to its owner, or otherwise disposed of according to instructions;*

   (b) The proper identification and safe custody of an exhibit is

initially the responsibility of the officer-in-charge of the investigation. ***The chain of evidence as to its discovery and subsequent custody will be reduced to as few persons as possible and the police officer who first obtained possession of the exhibit will produce it in Court"; ....***

3. ***Exhibits on which there may be fingerprints shall be handled with the greatest care.*** *(Emphasis added).*

In our considered view, **first**, we fully agree with the parties that it is completely not known from where the 1st, 2nd, 3rd, 4th and 6th appellant's fingerprints were precisely lifted from. **Second**, the two photographers, D/Sgt. Moja (in relation to the 1st, 2nd, 4th appellants) and D/Ssgt. Elly (in relation to the 3rd appellant) who on 20/04/2006 had apparently lifted and photographed the appellants' latent fingerprints (i.e. unintentionally leftover fingerprints smudges) did not testify in order to provide reassurance of the source of the fingerprint images used for ridge comparison by PW 18. **Third,** the fingerprint expert report (Exh. P. 23) is silent on whether the 1st, 2nd, 3rd appellants' latent fingerprints were taken from the crime scene or the various motor vehicles whose photographs

were annexed to that Report (i.e. M/Vs. with Reg. Nos: T 734 ALY; T 986 ALB and T 884 ALQ). Also no prosecution witness explained the connection between the photographs of the those motor vehicles, inexplicably and mysteriously attached to the fingerprint expert report, (Exh. P. 23) and the concerned appellants' fingerprints.

Fourth, the evidence shows that the photographic enlargements of the appellants' alleged fingerprints were a most vital source for PW 18's expert opinion, which was based on an analysis and comparison of sixteen (16) friction ridge characteristics contained therein and the sets of fingerprints on plain paper (i.e. known fingerprints) said to have been taken from the appellants that he had received from Central police station. However, considering all the above, the authenticity and uncertainty of the very source of the fingerprints, the reliability of the photographic enlargements, as well as the break in their chain of collection, transmission and preservation, the fingerprint expert opinion (Exh. P.23) was virtually a weightless piece of evidence. With respect, we are of the settled view that the High Court seriously misdirected itself in relying on PW 18's fingerprint expert opinion for the 1st, 2nd, 3rd, 4th and 6th appellants' conviction. We find merit in the appellants' grounds of appeal on this complaint.

Given that fingerprint identification was a chapter in the trial, we pause to observe this. Much as PW8 (S.P. Abdallah Dunia), then OC-CID, Magomeni knew the importance of securing the crime scene to protect the evidence, the retrieval and chain of custody of the items recovered in the gateway motor vehicle (Exh. P.8) was broken, fragmented and only partly documented.

A mob had to be dispersed at the site where the gateway car (Exh. P.8) was abandoned. The motor vehicle was driven by the police from Tabata Relini to Urafiki Police Station. With the exception of the "Webley" pistol (Exh. P 4), which PW 6 (C. Jamada) gave to the Regional Police Commander, all the other items (Exhs. P.5, 6, 7, and 8) were handed over to PW 8. PW 6 admitted that his statement is silent on the two live bullets (Exh. P.5) recovered in that vehicle. Equally, he never wrote therein the words "South Pole" borne out in the blood stained T shirt (Exp. P. 7). PW 6 also stated in his statement that the police found 5 SMGs. Testifying in court, he reduced the number to an SMG (i.e. one). Surprisingly, what was tendered in court as weapon was only the "Webley" pistol (Exh. P.4). PW 8's own statement did not make any reference to the handing over of the exhibits to him by PW6. Neither does it speak of the six cartridges (pellets) (Exh. P. 6). To make matters grave, the "Webley" pistol (Exh. P.4) was

picked up by the police (PW 6.) in the gateway car (Exh. P. 8) with their "bare hands" (i.e. no gloves). Cross-examined by Mr. Malamsha, learned Advocate for the 2nd accused (acquitted), PW 8 knew the dire implications. He frankly admitted:

> *"The pistol and cartridges [i.e. Exh. P.6] had already been touched so not good for evidence".*

As directed by P.G.O. 229, para. 3, "greatest care" was required in the handling of the fingerprints, "vital evidence". All the above facts and circumstances compromised their integrity and chain of custody. It seriously exposed them to the risk of contamination or alteration of the evidence sneaking in, in respect of forensic evidence-fingerprints, ballistics and D.N.A.

Ground 3 of the 2nd appellant's appeal also censures the High Court in relying on a gunshot wound allegedly sustained by him at the crime scene. Mr. Magafu submitted that there was no evidence to link the T shirt ("South Pole") with a hole at its back (Exh. P.7) found in the gateway motor vehicle (Exh. P.8) with the scar on the 2nd appellant's back. No one had seen him wear that T shirt before.

Vigorously resisting, Mr. Salum submitted that when the 2nd appellant was arrested on 23/06/2006, he admitted to PW13 that he had a gunshot

wound on his back. The trial court also found him with a scar on his back. That connected him with the incident. The gunshot injury constituted independent corroboration evidence. This was also supported by Exh. P.7, the T shirt ("South Pole") with a bullet hole found in the gateway car (Exh. P.8).

The learned Judge reasoned that it would not be sheer speculation to link the wound displayed by the 2nd appellant before the trial court with that he had suffered at the crime scene. He found it to be a piece of independent corroboration evidence against him.

With respect, we agree with Mr. Magafu that there was no evidence worthy of that name to establish that the scar on the 2nd appellant's back was a gunshot wound sustained during the incident. The prosecution did not tender any medical evidence to establish that the injury or scar was in fact a bullet wound. The 2nd appellant was not medically examined to establish that fact when he was arrested. In any event, the court also lacked any expertise or specialization in medical or forensic sciences or wound ballistics to make any interpretation, let alone an informed one on the basis of its visual observation of the scar on the 2nd appellant's back when he was in the dock on 30/06/2010 that it was derived from a gunshot wound sustained at the incident on 20/04/2006. With a four years

interval any credible finding of fact needed expertise. Equally, there was no ballistic evidence to prove that the hole in the T shirt ("South Pole") (Exh. P.7) was a result of a gunshot. In fact, when PW 6 (C. Jamada) was cross-examined by Mr. Urasa, learned Advocate for the 11th accused (acquitted) he responded:

> "*The T shirt has a bullet hole at the back.* ***I said the T shirt had holes and not bullet holes***". (Emphasis added)

Without any expertise and experience in forensic ballistics, he could barely have been an authority on the origin of the hole or holes. With respect, we fully agree with Mr. Magafu that the trial court misdirected itself in finding the above evidence to be a piece of corroboration against the 2nd appellant.

Ground 10 of the 1st appellant's appeal impugn the High Court for failing to rely on his *alibi*, notice of which was produced under section 194(4) of the CPA.

Mr. Rweyongeza submitted that the learned Judge had ignored the 1st appellant's (DW 1) timely notified *alibi* and evidence that from 19/04/2006 to 21/04/2006 he was in Moshi. DW 16 (Raphael Mahenge) had supported it. The learned Judge had a duty to discredit or refuse it.

In reply, Mr. Salim strenuously contended that the 1st appellant's *alibi* way self-defeating. He claimed that he was in Kenya at the time of the occurrence. That when he was cross-examined by the prosecution at the trial, he readily admitted that had never gone there and that the notice of *alibi* that he was there was not true. Much as any prudent Judge had to address the *alibi*, the error did not go to the root of the matter. The *alibi* was an irrelevant fact.

In a brief rejoinder, Mr. Rweyongeza correctly submitted that the *alibi* was not that he was in Kenya. He was at home in Moshi, building a fence. Moreover, so long as the *alibi* notice was duly served on the prosecution under section 194(4), the learned Judge had no option but to determine it.

Our re-examination of the record plainly reveals that on 2/12/2008 the 1st appellant properly served the prosecution, under section 194(4) of the CPA a notice of his intention to rely on the defence of *alibi*, before the commencement of the hearing of the prosecution case on 15/04/2009. Section 194(4) was fully complied with. (See, **D.P.P. v. Nyageta Somba and 12 others** [1993] T.L.R. 69). The 1st appellant's compliance with section 194(4) required the trial court to properly direct itself on and determine the *alibi*. The 1st appellant had no duty to prove the truth of his *alibi*. The prosecution had the burden to disprove it (See, **Lusanya Siaten**

v.R. [1988] T.L.R. 275); **Chacha Pesa Mwikwabe v.R**, Criminal Appeal No. 254 of 2010 (COA, unreported).

The 1st appellant gave sworn evidence that from 19/4/2006 to 21/04/2006, he was in Moshi digging trenches for his deceased brother's fence. This was supported by DW 16, his elder brother. We fully agree with Mr. Rweyongeza that once the prosecution was duly notified of the *alibi* under section 194(4) of the CPA, as a matter of law, the learned Judge was duty bound to consider and determine it. He completely omitted it in his judgment. With respect, this constituted a serious non-direction.

On our part, having closely considered the totality of the record, we cannot resist the finding that the 1st appellant's *alibi* raised a reasonable doubt (See, **Saidi s/o Mwakawanga** [1963] EA 6; **Ali Salehe Msutu v.R** [1980] T.L.R.1). In terms of the burden of proof, it was incumbent on the prosecution to affirmatively place the 1st appellant at the scene of the crime or squarely connected him with the event by credible and reliable evidence. There was hardly any. We equally find merit in this ground of appeal.

Adverting next to the 2nd appellant's 5th ground of appeal, Mr. Magafu faulted the learned Judge for basing his conviction on a Tz. Shs. 5000/= Celtel airtime voucher No. 112050546143 (Exh. P.9). He submitted that the

voucher was only found by PW8 at Urafiki police station after the assailants' gateway car (Exh. P.8) was towed there by the police on 20/4/2006. There was neither evidence from Celtel Company to establish that the voucher was used to recharge the 2nd appellant's alleged mobile phone, nor that the mobile phone number the airtime voucher charged belonged to him.

Without hesitation, Mr. Salum agreed that this piece of evidence was more speculative than one of any expertise.

The trial court held that the Tz. shs. 5000/= Celtel recharge voucher No. 112050546143 found on the gateway motor vehicle (Exh. P.8) had recharged the 2nd appellant's cell phone No. 0787 771381. With great respect, it erred. We agree with Mr. Magafu that there was simply no evidence to establish that it had recharged that mobile telephone number and that the mobile phone it purportedly did, belonged to the 2nd appellant. In fact, when cross-examined by Mr. Magafu, PW 8 responded that the printout from the Celtel Company existed. It was not tendered in evidence. No mobile phone was found on the 2nd appellant and it was not established at all that cellphone No. 0787 771381 was his. This piece of evidence could not have been of any service to the prosecution. It was, as forthrightly conceded by Mr. Salum, speculative.

Next, and for the reasons that will shortly be self-evident on this appeal, we cannot escape addressing the 2nd, 3rd and 6th appellants' *alibi* defences, much as their memorandums of appeal did not ground a complaint against them. The record plainly bears out that the 2nd and 6th appellants had served the prosecution notices of their intention to rely on the defence of *alibi* on 15/04/2009 and 4/12/2013 after the commencement of the hearing of the case, but before the close of the prosecution case on 5/12/2013. The 3rd appellant's notice too was served on 15/04/2009. The 2nd, 3rd and 6th appellants did not furnish the prosecution with the particulars of their *alibi* as required under section 194(5) of the CPA. They had served him only with notices. The requirement of the law at the time they served the prosecution was to serve it with particulars of their *alibi*. The notices the 2nd, 3th and 6th appellants served went far short of that condition. Their non-compliance with sections 194(4) and (5) of the CPA required the trial court only to take cognizance of their *alibi* defences and in its discretion to accord no weight of any kind to them (**Charles Samson v.R** (1990) TLR 39; **Ludovick Sebastian v.R**, Criminal Appeal No. 318 of 2007 (COA, unreported). That discretion must be exercised judicially and no doubt involves an

examination of all the surrounding circumstances and facts (See, **Rajabu s/o Issa Ngure v.R**, Criminal Appeal No. 164 of 2013 (COA, unreported).

That apart, while only the *alibi* defences of the 1st and 4th appellants were briefly noted by the learned Judge in his summing up to the Assessors, there was no attempt by the trial court to explain to them the import of the defence of *alibi* and the consequences of the failure by the 2nd, 3rd, and 6th appellants to comply with section 194(4), (5) and (6). The judgment is also completely silent on all the concerned appellants' *alibi*. With respect, all this constituted a fundamental non-direction that prejudiced the 1st, 2nd, 3rd and 6th appellants.

In his defence, the 2nd appellant (DW 6) claimed that on 24/04/2006 he was at his used clothes shop in Nairobi. It was the 3rd appellant's (DW 3) evidence that on that day he was at his used tires shop at Bukoba Street, Ilala, Dar es Salaam. The 6th appellant testified that he was in Nairobi on 20/4/2006. On the whole evidence, the unfolding of the facts and circumstances of the event and the evidence as recounted by the prosecution, in our considered view no weight of any kind is to be accorded to any of the above *alibi* defences. They were the product of an afterthought.

Submitting on the principal ground of appeal in relation to the 4th appellant who was convicted on the basis of his own repudiated cautioned statement (Exh. P.18), Mr. Mbamba faulted its admission as it was recorded beyond the period allowed by law. He submitted that there was no dispute that the 4th appellant was arrested on 31/05/2006. His statement was recorded on 4/06/2006, four days later. Moreover, it had shortcomings. If at all the 4th appellant had cooperated with the police throughout the 4 days to execute the arrest of the other accused that information was not in the statement. No police lock-up register or log book was tendered to prove the existence of the alleged arrest trips by the 4th appellant and the police. That PW1 (ASP Salum Isaya in the trial-within-a-trial) also admitted that he did not record any statement on the alleged trips. In addition, he did not even remember the telephone numbers of any of the suspects whom the 4th appellant called during those rounds in order to lay a trap for their arrest.

In ground 8 of his appeal, 1st appellant too equally faulted the High Court for relying on the 4th appellant's cautioned statement (Exh. 18). Mr. Rweyongeza's essential submission was that as the statement was repudiated by the 4th appellant, who also testified that he did not know the 1st appellant, a co-accused it could not be employed to corroborate his

repudiated cautioned statement (Exh. P.17). Both statements repudiated, they could not corroborate each other. No use could be made of it for his conviction.

Opposed, Mr. Salum found no misdirection or non-direction in the High Court's admission of the 4th appellant's repudiated cautioned statement (Exh. P. 18) and its subsequent reliance for his conviction, and those of the 1st, 2nd and 3rd appellants, the accomplices it implicated. He contended that the period from the 4th appellant's arrest on 31/05/2006 to 4/06/2006 when it was recorded was properly excluded by the learned Judge under section 50(2)(a) of the CPA. During that period, he had assisted the police in the arrest of the other accused as well as the discovery of a weapon and ammunition. Moreover, the details contained in the statement including on his connection with the house at Ukonga and the activities that took place there, corroborates it. It contained nothing but the truth. The trial court was entitled to use it against the 4th appellant, and to employ it as a piece of independent corroboration against the other appellants it implicated.

On the 4th appellant's cautioned statement (Exh. P.18), the learned Judge in his ruling in the trial-with in-a-trial reasoned and found out:

*"**The explanation for this delay is that the investigating team was still doing investigation** and they were ready to have statement recorded on 3/6/06, there was a crucial interruption when the accused revealed about the firearm hidden in a motor vehicle so the team had to proceed to Buguruni Police Station.*

*As for the period between 30/5/06-3/6/06 PW1 testified how the accused took them to so many places in the hope that he could assist them to net other suspects still at large. Going by PW's story, **the hunting mission** it appears was cumbersome and grueling".....*

"I am satisfied that the period between 30/5/06 -4/6/06 has a viable explanation failing squarely within the ambit of section 50(2) (a) of the Criminal Procedure Act, Cap. 20 R.E. 2002, that said, I proceed to hold that the statement sought to be tendered is legally permissible and it be tendered". (Emphasis added).

The 4th appellant was arrested on 31/05/2006. His repudiated cautioned statement was recorded by PW15 (D/sgt. David Mhanaya) at the District C.I.D. Office, Ilala on 4/06/06 from 11:30 hrs. to 14.30 hrs., four days after. In our view, the most critical question for determination is whether or not the repudiated cautioned statement was correctly recorded during the period available for interviewing him, account taken of section 50(2)(a) of the CPA.

Going by the record, the 4th appellant started cooperating with the police immediately after his arrest. From the morning of 31/05/2006 to 18:30 hrs. he assisted them in trapping the arrest of the other accused. They returned to Central police station between 20:30 hrs. – 21:20 hrs. A similar mission took place on 1/06/06 from 10:00 hrs. to 21:00 hrs. The third operation was conducted on 2/06/06 from 07:00 hrs. to 22:00 hrs. A fourth, on 3/06/06 also took place with the team returning to the police station at 16:00 hrs.

On 3/06/06, around 16:30 hrs. some 5-10 minutes into the interview, the 4th appellant volunteered information to the police that there was a firearm in the vehicle parked at Buguruni police station. He and the police arrived there at 19:00 hrs. and they left at 20:30 hrs. During the commencement of the interview by PW 15, a caution had been

administered and he had been informed of his right to communicate with an advocate or relative friend under sections 53(c) (ii) or 57(2) (d) of the CPA. The interview could not continue on their return to the police from Buguruni police station because the 4th appellant was hungry and tired (PW2). He was interviewed the next day, 4/06/06 from 11:30 hrs. All the police involved (PW15, and PW1 (ACP Salum Isaya, PW2 A/I David Mhanaya, PW3 SSP Robert Mayala in the trial-within-a-trial)) were well aware of the legal requirements for the interview of a suspect under restrain.

After a close re-assessment of the whole evidence, in our respective view, section 50(2) (a) could not validly come into play. The 4th appellant's repudiated cautioned statement (Exh. 18) was recorded outside the period legally available for his interview. **First,** with the vivid cooperation offered by the 4th appellant in the "hunting mission" for the arrest of the other suspects, nothing prevented the recording of the statement on his return to the police station during any of the nights from 31/05/2006 to 2/06/2006. When PW15 was cross-examined by Mr. Rweyongeza, he responded:

> PW 15: "Statement *can be recorded at night depending on accused.*"

Crystal clear proof of that is that the cautioned statement of the 5th appellant (Exh. P.24) was recorded on 6/06/2006 from 23:08 to 00:15 hrs, after midnight.

Second, another interview window that was available to the police and which was not properly seized was the morning of 4/06/2006 up to 11:30 hrs. No explanation was offered by the prosecution why the interview could not have taken place during this period. The police had not only sufficient investigators, but ones experienced and knowledgeable on the legal requirements for interviewing a suspect under restraint. **Third,** in the circumstances of this case so long as the formal interview of the 4th appellant had already begun on 3/06/2006 by around 16:30 hrs. with a caution having been duly administered and his legal rights afforded to him by PW 15, that should have been reduced to writing under section 57(1). After all, he had started volunteering vital and had initiated cooperation. There was also no evidence that it was impracticable to do so. Furthermore, the movements of the 4th appellant in and out of police custody in the "hunting mission" should also have been recorded in the cautioned statement and in the statements of the police officers involved given that under Police General Order No. 353, para 6:

"It is a serious offence to remove a prisoner from cells without recording the removal in the detention register".

All considered, in our respectful view the statement was recorded by PW 15 outside the period available for the interview of the 4th appellant, and hence was not legally obtained. It was not saved by section 50(2) (a) of the CPA. No extension of time for its belated recording was either sought or obtained under section 51(1) (a) and (b) thereof. With respect, had the learned Judge pointedly analyzed the whole material as we have, no doubt he would have arrived at the same conclusion as ourselves that the repudiated cautioned statement (Exh. P.18) was not freely and voluntarily offered, and thus inadmissible. Accordingly, as it was illegally obtained we have no option but to expunge it from the record. It could not have been used against the 4th appellant's conviction or that of the other appellants.

Grounds 4,5,6 and 7 of the 4th appellant's appeal is a challenge on the trial court's finding that he led the police to the discovery on 3/06/2006 of a "Hell" pistol (Exh. P.22) found in the m/v. with Reg. No. T 848 AJL that was parked at Buguruni police station and further that the ballistic tests found that it had been used in the incident.

Mr. Mbamba submitted that the motor vehicle was not tendered in evidence. Its ignition key was given to a policeman who did not testify. Elizabeth s/o Boniface Shilangila, the independent witness who witnessed the search and seizure of the pistol on 3/06/2006 and who signed on the certificate of seizure (Exh. P.20) also did not give evidence. There was even contradiction as to who supervised it. While the certificate of seizure (Exh. P.20) and SSP Mayala's (PW 3 in the trial-within-a-trial) statement (Exh. D.7) is that it was SP. Mkumbo who supervised it; in court PW3 gave evidence that SP Mkumbo had left. Mr. Mbamba citing **Miraji Malumbo v.R.,** Criminal Appeal No. 229 of 2008, (COA, unreported) submitted that this case represented a mishandling of exhibits.

In turn, Mr. Salum responded that the 4th appellant showed the police the motor vehicle in which a "Beretta" pistol (Exh. P. 37) was seized. The test fired cartridges (Exh. P. 38) matched that weapon.

We need not be unnecessarily detained by this ground of appeal. PW 29 (SP. Godfrey Luhamba) said that his Ballistic Report, No. 41E of 7/11/2006 (Exh. P. 37) was in respect of a "Beretta" pistol, which he had test fired. Not the "Hell" pistol (Exh. P.20) allegedly retrieved at Buguruni police station. Exhibit P.38 by the prosecution is a purported Note of an unsigned result of a finding that two spent cartridges of .9mm "Beretta"

pistol alleged to have been found at the occurrence. No one knows who lifted and properly secured it for ballistic or any other forensic examination. The confusion over the vital potential exhibits was not of much assistance to the prosecution. Moreover, agreeing with Mr. Mbamba on the shortcomings on the search and seizure of the motor vehicle parked at Buguruni police station and the "Hell" pistol (Exh. P.20), not much confidence can be placed on that evidence. In our considered view, there is substance in these grounds of appeal.

In ground 9 of the 4th appellant's appeal, which faults the learned Judge for failing to properly evaluate the 4th appellant's testimony, Mr. Mbamba submitted that PW16's evidence established that on 20/4/2006, the 4th appellant was at the house in Ukonga. PW16 had seen him there that day when he took TANESCO employees to fix the LUKU.

On his part, Mr. Salum submitted that it was proved that the 4th appellant physically lived at that house. He contended that the details on the 4th appellant's presence and his activities at the house that were recounted by PW16 and referred to in the 4th appellant's repudiated cautioned statement (Exh P.18) corroborated it.

Going by the record, in his defence, the 4th appellant (DW4) gave evidence that he was at the house in Ukonga, on 20/4/06, where he was a

watchman. Precisely, that he was at the house from 11.00hrs to 12.20 hrs. when PW16 brought the TANESCO staff to fix LUKU meter. This was partly supported by PW16, who saw the 4th appellant at the house when he took them there. Furthermore, when PW16 was cross-examined by Mr. Mbamba he replied that the electricity meter was fixed on 20/04/2006 and on further cross-examination by Mr. Magafu explained that it took one and a half hour to fix, which work was finished by 11.00 hrs or so.

In our respectful view, these facts by themselves are neither incriminating nor impeaching. They also cannot constitute independent corroboration to the 4th appellant's repudiated cautioned statement (Exh. 18) as vainly argued by Mr. Salum. It is trite law that:

> "***Corroboration evidence is independent testimony which confirms in some material particular not only that a crime has been committed but also that the defendant had committed it***". *(R V Back (1982) 1 ALL E.R. 807; Mdiu Mande alias Mnyambwa Mande v.R. [1965] E.A.L.R. 193).*

With this as evidence, including that from the Landlord (PW16), the prosecution's own source, incriminating material was required to

affirmatively link the 4th appellant's connection with the occurrence, given his established presence at the house in Ukonga at 11.00 hrs. or so (PW 16), immediately prior to the incident, which took place sometime before 12.30 hrs. The burden of proof was on the prosecution to bring reliable evidence to fully establish that it was possible for the 4th appellant to be at the house in Ukonga at 11.00 hrs. and at the occurrence, which took place before 12.30 hrs., at one and the same time, given the distance involved between the two locations, the mode of transportation used and the traffic conditions that prevailed. Furthermore, it should be recalled that the learned Judge had rejected the purported DNA evidence that attempted to connect what was irregularly seized in that house with some of the appellants and the acquitted accused in the commission of the offence. We find merit too in this ground of appeal.

For the 5th appellant, who was solely convicted as a result of his own cautioned statement (Exh. P. 24), Mr. Galikano submitted that it fell short of a confession. There was no reference in it to any of the other fifteen accused. The persons mentioned in it, namely, one Hamza and Moleli were not charged or even considered as suspects. His defence on affirmation was that he only came to know the other accused in court. Moreover, there was no corroboration evidence other than his own statement. Mr. Luguwa

also added that there was a contradiction in the evidence relied upon by the prosecution as to who was at the N.M.B., Bank House. While the 4th appellant's cautioned statement mentions that the 3rd appellant was at the Bank with the 5th appellant, the later's cautioned statement (Exh. P.24) makes no reference at all to the 3rd appellant. The statement was unreliable.

On grounds 4 and 5 of the 5th appellant's appeal, Mr. Galikano went on to submit that he was arrested on 6/6/2006 and the incident had taken place on 20/4/2006, a considerable time thereafter. Throughout this period, the 5th appellant was on duty at the N.M.B., Bank House. If he was involved, he should have been arrested much earlier. The prosecution evidence against him was scantly and weak for his guilt to have been proved beyond reasonable doubt.

In a short reply, Mr. Kweka submitted that the learned Judge was correct in convicting the 5th appellant on the basis of his own confessional cautioned statement (Exh. P.24). Its contents were true to the hilt and linked him with the incident as a principal offender under sections 22 and 23 of the Penal Code. The mere fact that he did not get any money or one of the boxes of money from the incident as promised by the assailants does not erase the fact that he was an accomplice to the whole plan as

disclosed in his own confessional statement. That there was corroboration in the 4th appellant's statement (Exh. P.18) that while at N.M.B., Bank House, the 5th appellant was with the 3rd appellant so that they confirm to the others who were then at Ubungo, the transport of the money from the N.M.B., Bank House to N.M.B., Wami Branch.

In our respectful view, the most important question that arises on these decisive grounds of appeal is whether or not the learned Judge was entitled to hold that the 5th appellant's repudiated cautioned statement (Exh. P.24) was free and voluntary, and admissible. Furthermore, whether he rightly held that it had contained nothing but the truth.

The record bears out that the 5th appellant, a security guard at the N.M.B, Bank House was arrested after 16:00 hrs. on 6/06/2006 at the Bank. He arrived at Central police station between 18:00-18:30 hrs. In the trial- within-a-trial, the recording police officer, (PW2 AI Mathias Nduguye) testified that he was at Stakishari police station when he was summoned to interview the 5th appellant and arrived at Central police station at 22:45 hrs. He promptly recorded the 5th appellant's statement from 23:08 hrs. to 00:15 hrs.

Having closely re-examined the record, we are of the respectful view that learned Judge was entitled to find that the cautioned statement was

freely and voluntarily offered, hence admissible. The police had recorded it with dispatch. However, what is next most crucial is whether it had contained nothing but the truth as held by the learned Judge. In our settled view, in terms of truth, it was not above board.

It is on the cautioned statement (Exh. P. 24) that the 5th appellant was in communication with one Hamza and Moleli on the event. The two were never charged. According to the statement, none of the accused went to N.M.B., Bank House on 20/04/2006. On the contrary, the 4th appellant's repudiated cautioned statement (Exh. P.18) unsuccessfully relied upon by the prosecution was that the 3rd appellant went to meet the 5th appellant at the Bank on 20/04/2006, a contradiction of sorts. With the 4th appellant actively cooperating with the police in the arrest of the other suspects from the morning of 31/05/2006, it beats reason why the 5th appellant was only arrested on 6/06/2006, some six days later. The arrest "hunting mission" had taken the 4th appellant and the police as far as Kimara, Mbezi Luis, Tegeta, Ubungo and Ukonga. Yet, between those periods, the 5th appellant was on guard duty at N.M.B., Bank House. It is common knowledge that it is a stone throw away from Central police station.

The fact that it was not established that he had fled after the incident and was in fact on duty as a guard at the Bank from 20/04/2006 to

6/06/06, 45 days after the incident, increasingly raises serious doubt on the truthfulness, head, stock and barrel, of his repudiated cautioned statement. In our respectful view, it could not validly be held that it contained nothing but the truth.

Unreliable, the repudiated statement also could not corroborate any other evidence. We agree with Mr. Galikano that on the whole evidence there was no other evidence against him other than his own uncorroborated repudiated cautioned statement, whose full truth by far cannot be assured. The law is well established that it would be dangerous, if not hazardous to act on such a piece of untruthful and unreliable evidence without independent corroboration (See, **Hatibu Gandhi and Others v.R**, (1996) TLR 13; **Hemed Abdallah v.R**, (1995) TLR 172; **Joyi s/o Kalihose v.R**, [1960] EA 760; **Nayinga s/o Batungwa v.R** [1959] E.A. 693).

Furthermore, it is a principle of law that:

> "***the purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm*** *and support that which is* ***sufficient and satisfactory and credible; and corroborative evidence with only fill***

its role if it itself is completely credible *" (D.P.P. v. Kilbourne (1973), 1 All E.R. 440, 452; Azizi Abdallah v.R., (1991 T.L.R.) 71, Mbushuu alias Domic Mayoroje and Anr. v.R. (1995) T.L.R. 97).*

In the result, we also agree with Mr. Galikano that the evidence against the 5th appellant was too feeble. He could not have been confidently and safely convicted on his own untrustworthy repudiated cautioned statement as the sole evidence against himself. We find merit in grounds 3, 4, and 5 of his appeal.

Before we conclude, in scrutinizing the whole record, our attention was drawn to a serious irregularity at the tip end of the proceedings concerning the Assessors' full participation in the trial which the appellants did not challenge and the respondent Republic did not detect. The learned Judge invited the Assessors to give him their "verdicts". The three assessors, pronounced one combined verdict, guilty or not guilty in regard to each of the accused. They termed it "a unanimous opinion". None of the Assessors gave any individual opinion on the case, generally or otherwise. The judgment too is completely silent on any opinion or even the Assessors' so called "unanimous opinion".

By law, all trials before the High Court shall be with the aid of assessors (section 265 of CPA). Furthermore, section 298(1) provides:

> *"298. (1)* ***When the case on both sides is closed, the judge*** *may sum up the evidence for the prosecution and the defence and* ***shall then require each of the assessors to state his opinion orally as to the case generally and as to any specific question of fact addressed to him by the Judge, and record the opinion.***
>
> *(2)* ***The Judge shall then give judgment, but in doing so, shall not be bound to confirm to the opinions of the assessors".***
>
> *(Emphasis added).*

Having given the matter due consideration, in our respectful view, it was not proper for the trial court to allow the three assessors to give one combined verdict. In any event, the verdict could not have amounted to an opinion under section 298(1) of the CPA. Furthermore, it did not make it any better that none of them gave any individual opinion on the case, generally or otherwise as required by section 298(1). The opinions had also

to be recorded in writing, and since they did not offer any, none was recorded by the High Court as it was commanded to do so under section 298(1).

The trial court also completely omitted in its judgment any reference to the Assessors' opinion. By a plain and ordinary reading of sections 265 and 298(1), (2) of the CPA the judge can only give judgment after each of the assessors has given his or her opinion orally and the same has been recorded in writing. He is to be informed of the opinion. Much as under section 298(2) the assessors' opinions are not binding to the judge, it is a requirement that the judgment should have reference to the opinions of the Assessors as they aid and are a part and parcel of trials before High Court. The learned Judge therefore did not fully have the aid of the assessors as they had not given him their individual opinion on the case before he gave judgment. This must have prejudiced the appellants. The net effect this may have is to vitiate it and the proceedings from the end of the summing up to the Assessors, of the evidence of the prosecution and the defence by the learned Judge on 4/11/2014, to the date the judgment and sentences were delivered.

Having combed the record and determined all the crucial grounds of appeal, we cannot resist the temptation of this inevitable final remark. This

case had the full potential of reliable forensic evidence fingerprints, ballistic and DNA.

> "***Such real evidence has the inestimable value of cogency and objectivity. It is in large measure not affected by the subjective defects of other testimony***", *(Regina v. Chief Constable of South Yorkshire Police (Respondent) ex parte Marper (FC) (Appellant), 2004 UKHL 39. (Emphasis added).*

A number of motor vehicles were directly utilized or were suspected to have been used by the armed assailants in the occurrence. Exh. P 8, the assailants' gateway car; the motor vehicle with Reg. No. T 848 AJL that was parked at Buguruni police station; that with Reg. No. T 761 AHG that was found abandoned at Twalipo Army Camp and the Nissan Pickup with Reg. No. T 884 ALQ the assailants used at Ubungo Traffic lights. "Webley" (Exh. 4), "Hell" (Exh. P. 20) and "Beretta (Exh. P. 37) pistols, as well as a handful of SMG's (Exh. P. 10, P. 11, P. 12) were seized. In one instance, on 3/6/06 nine firearms (i.e. two AK 47 (SMG), 6 pistols, 1 shotgun and 100 live ammunition (Exh. P. 11) were recovered and seized in m/v with Reg. No. T 615 AKS in Arusha in possession of the 2nd accused (acquitted). According to SACP Hezron Kigono the 1st appellant was arrested with a

"Star" pistol and 10 SGM ammunition. Moreover, the occurrence itself involved an exchange of gunfire. Cartridges were recovered. Pellets were found in the bodies of the two deceased. Blood stains were discovered in the rear seat of the gateway car (Exh. P.8). Inside PW 16's house at Ukonga, police (PW 13) also found a piece of POP (plaster of Paris) with blood stains and tooth brushes. Clothing was also collected.

What the trial revealed is that the seizure, chain of custody, including the collection, handling, transmission and processing of these potential exhibits was compromised to render any fingerprints, ballistic and DNA identification admissible and reliable. No doubt, untainted and reliable forensic evidence would have provided a vital clue to the audacious and gruesome crime. On this, we add no more.

In the result, having determined all the decisive grounds of appeal, it would be convenient if we now summarize the outcome.

We find merit in the 1st appellant's appeal, which challenged his repudiated cautioned statement (Exh. P.17); the fingerprints identification (Exh. P.23); the house rent receipt (Exh. P.19) and the 4th appellant's repudiated cautioned statement (Exh. P.18).

The 2nd appellant's grounds of appeal attacking the 1st and 4th appellant's repudiated cautioned statements (Exhs. P.17 and P.18), the

fingerprint identification (Exh. P.23), the cellphone voucher (Exh. P.9) and the alleged bullet wound or scar on his back, all had merit.

Having expunged the 1st and 4th appellants' repudiated cautioned statements, (Exhs. P.17 and P.18) what remained as evidence against the 3rd and 6th appellants was only the highly unreliable fingerprint identification evidence (Exh. P. 23) which could not have grounded any conviction. We equally find merit in their respective appeals.

For the 4th appellant, apart from the expunged repudiated cautioned statements (Exhs. P. 17 and P. 18), the remaining evidence, namely fingerprint identification (Exh. P. 23) and the recovery of the "Hell" pistol and cartridges (Exhs. P.21 and P. 20) were also highly unreliable and insufficient to prove his guilt beyond reasonable doubt. We too find merit in his appeal.

The 5th appellant's appeal was a successful challenge on his untruthful cautioned statement (Exh. P.24), the sole basis of his conviction. He could not have been safely convicted on it.

On the totality of the evidence, much as the appellants justifiably attracted suspicion, in law, suspicion however strong cannot anchor a conviction.

For all the above reasons, we find merit in the appellants' appeal, which we allow. The appellants' convictions are hereby quashed and the sentences imposed are set aside. We order their immediate release from prison, unless they are otherwise lawfully held.

DATED at **DAR ES SALAAM** this 6th day of October, 2016.

M. C. OTHMAN
CHIEF JUSTICE

I. H. JUMA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

I certify that this is a true copy of the original

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL