IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA SUB-REGISTRY)

AT ARUSHA

CRIMINAL SESSION CASE NO. 62 OF 2022

REPUBLIC

VERSUS

YUSUF ALLY HUTA @ HUSEIN .....1ST ACCUSED

JAFARI HASHIM LEMA .....2ND ACCUSED

RAMADHANI HAMAD WAZIRI .....3RD ACCUSED

ABDUL MOHAMED HUMUD @ WAGOBA .....4TH ACCUSED

ABASHARA HASSAN OMARY .....5TH ACCUSED

ABDULRAHAMAN JUMANNE HASSAN .....6TH ACCUSED

JUDGEMENT

Dated: 8th and 20th September, 2023

KARAYEMAHA, J.

The accused persons, namely, Yusuf Ally Huta @ Husein, Jafari Hashim Lema, Ramadhani Hamad Waziri, Abdul Mohamed Humud @ Wagoba, Abashara Hassan Omary and Abdulrahaman Jumanne Hassan stand charged on 23 counts. The 1st count is conspiracy to commit terrorist acts 4(1)(i)(i) and 27(c) of the Prevention of Terrorism Act No. 21 of 2002 (hereinafter the "POTA"). The indictment is to the that effect

on diverse dates between 10/6/2013 and 15/6/2013 at various places within the Region of Arusha, the accused persons jointly and together with other persons not in court, did conspire to commit terrorist act, to wit, detonating a hand grenade in a public gathering at Chama Cha Demokrasia na Maendeleo (hereinafter "CHADEMA") campaign rally at Soweto AICC grounds in Arusha Region, an act which involves prejudice to the public safety and by its nature and context may reasonably be regarded as being intended for the purpose of intimidating a section of the public in the United Republic of Tanzania.

In the 2nd to 11th counts all accused persons are charged with the offence of committing terrorist acts c/s 4(1), (3)(i)(i) of POTA. The allegations are that on 15/6/2013 at Soweto AICC grounds Kaloleni area within Arusha District in Arusha Region, the accused persons jointly and together with other persons not in court, did commit terrorist act, to wit, detonating a hand grenade in a public gathering at CHADEMA campaign rally at Soweto AICC grounds in Arusha Region, thereby causing the death of Judith William Mushi, Amir Ally Dafa, Ramadhani Juma Ramadhani, Fahad Jamal, and causing serious bodily harm to Emmanuel Lukas, Abraham Samwel Shange, Hazla Omary, Clement Kasimu Olomy, Shukuru Alex Masawe and Jacob Barnaba Mbunda, an act which involves prejudice to the public safety and by its nature and context may

reasonably be regarded as being intended for the purpose of intimidating a section of the public in the United Republic of Tanzania.

The 4th and 6th accused persons are facing offences charged under counts 12th and 13th that is provision of funds to commit terrorist acts c/s 4(1)(2)(b)(iii) and 13 of POTA. It is alleged that on diverse dates between 1/1/2010 and 15/6/2013 at various places within Arusha District in Arusha Region the 4th and 6th accused persons directly provided money to Yahaya Sensei Tshs. 235,000/= and Tshs. 300,000/= respectively while having reasonable grounds to believe that the said money would be used in full or in part to buy weapons to be used in overthrowing the lawful Government of the United Republic of Tanzania through the use of violence and establish the Islamic State within the United Republic of Tanzania, an act reasonably regarded as being intended for the purpose of seriously destabilizing the fundamental political, constitutional, economic and social structures of the public in the United Republic of Tanzania.

The 14th, 15th, 16th and 17th counts on murder c/s 196 and 197 of the Penal Code [Cap. 16 RE 2002] (now R.E 2022] (hereinafter the "Penal Code") are charged in the alternative of 2nd, 3rd, 4th and 5th counts respectively. They are against all accused persons who are

claimed to have jointly and together murdered Judith William Mushi, Amir Ally Dafa, Ramadhani Juma Ramadhani and Fahad Jamal on 15/6/2013 at Soweto AICC grounds within Kaloleni Ward in the District and Region of Arusha.

The subsequent 7 counts, i.e., 18th to 23rd are of attempt to murder c/s 211(a) of the Penal Code. They are against all accused persons and charged in alternative of the 7th to 11th counts. It is alleged that following the bombing of the gathering of CHADEMA campaign rally on 15/6/2013 at Soweto AICC grounds, the accused persons jointly and together unlawfully attempted to cause death of Emmanuel Lukasi, Abraham Samwel Shange, Hazla Omary, Clement Kasimu Olomy, Shukuru Alex Masawe and Jacob Barnaba Mbunda.

When the charge was read over to them, all accused persons denied to have been involved in those offences. This event triggered a full trial.

The nature of this case coupled with its complexity, saw both parties represented by competent and experienced learned counsel. The prosecution was represented by a team of six learned State Attorneys led by Ms. Ajuaye Bilishanga, learned Principal State Attorney assisted by Mr. Nassoro Katuga, Ms. Verdiana Mlenza and Ms. Elizabeth Mkunde,

learned Senior State Attorneys and Mr. Nestory Mwenda, Ms. Alice Mtenga and Mr. Godfrey Nugu, learned State Attorneys whereas the 1st, 2nd, 4th and 5th accused persons were represented by Mr. Fridolin Bwemelo, learned advocate assisted by Mr. Nerius Rugakingira, learned advocate; the 3rd accused person enjoyed the legal services of Mr. Kennedy Mapima, learned advocate and the 6th accused person was represented by Mr. Joshua Mambo, learned advocate. Mr. Alpha Ngo'ndya, learned advocate appeared for all accused persons.

In a bid to prove its case, the prosecution called twenty-six(26) witnesses. Of these witnesses one was a ballistic expert and another was a forensic science expert. A number of fifteen (15) exhibits, both documentary and real objects were also tendered in evidence.

This court being aware of how special the proceedings were, endeavoured to accord its judicial care of the whole proceedings from the beginning to the end. The intention behind this was to make sure that, judicious caution is taken, impartiality is preserved, and at the same time the accused persons are afforded fair trial with timely justice. To cherish good practices, this case was tried on a scheduled session. A non-stop hearing of witnesses was a song of a day. Apparently, prior the committal proceedings, an *ex -parte* application was made and granted under sections 34(3)(a), (b) and (4) of the POTA, and 188(1),

(2) of Criminal Procedure Act, [Cap. 20 RE 2022] (hereinafter the "CPA") that the witnesses' identities and details both at the committal proceedings and at the trial of this case, as well as the statements and documents containing their evidence likely to disclose their identities, be kept anonymous for security reasons. Throughout this trial, therefore, witnesses' names were anonymized and were protected from being seen throughout the trial of this case. Therefore, the 26 witnesses were baptized new names as P12, P3, P54, P48, P8, P32, P31, P61, P19, P20, P23, P37, P46, P42, P38, PI, P44, P35, P39, P41, P47, P40, P58, P53, P47 and P59 the codenames by which they testified at the trial and will be so referred in this judgment.

The background of terrorist events in Arusha as deciphered from the facts of this case can be traced back more than a decade ago. The prosecution witnesses particularly P1 and P37 testified in court that, on diverse dates between 2012 and 2014 the crime incidents whose *modus operandi* was usage of bombs, both homemade and military hand grenade, with intent to disturb public peace and security in various places within United Republic of Tanzania. Some of incidents precisely executed in Arusha City include the Olasiti Bombing in the Holy Family Church when the Parish inauguration mass was going on, Arusha Night

Park @ *Matako Bar* bombing where a homemade bomb was plucked and Soweto AICC grounds bombing which is the subject of this case.

Driving back home to the case on board, the prosecution case can be conveniently summarized as follows. In 2013 Tanzania was set to hold a by-election of counsellors in 4 wards in Arusha by June 2013. This event fueled political parties including CHADEMA and Civic United Front (hereinafter "CUF") to vie for them and each was determined to win all the 4 wards. But a common knowledge may tell that the competition was so heavy. It was the prosecution case that CHADEMA was very strong than CUF. Possessed by lust, CUF supporters dreamed one day to weaken CHADEMA and make the former stronger.

The 15/6/2013 was a final day of campaigns to give room to the Election Commission to plan how the by election would be run. The rules triggered CHADEMA to convene the last campaign rally at Soweto AICC grounds and CUF at Sheikh Amri Abeid Stadium in the afternoon hours on the same date. To add flavour on the event and give it a deserving weight, prominent leaders including Freeman Mbowe, Godbless Lema, Wilbrod Slaa and many others, were invited and they indeed attended. It was the evidence of P12, P3, P8 and P32 that speeches were delivered by those leaders at the stage which was prepared and designed on the

announcement's car. According to P1 it was with registration number T588AAJ make FUSSO.

Apparently, on 15/6/2013 in the afternoon hours many supporters gathered at Soweto grounds to have a final word from their leaders and vindicate their commitment. As it stands, the party was not that much strong financially. Therefore, leaders mobilized members and other supporters to contribute money to sponsor some of the parties' undertakings. At the pinnacle of the campaign CHADEMA leaders descended from the stage carrying boxes in order to collect the donations. No sooner had they started collecting money from people than a big explosion occurred near the stage. From that moment the story changed. Everything came to a halt. A state of confusion, disquiet and fear ensued in and the place was thrown into shambles. People started running aimlessly. Some managed to run as their legs could carry them but those who were severely injured on their legs, limbs, abdomen, liver and toes others failed to run or completely failed to rise up from the ground though they aspired to run from the damn scene. Sadly, one died instantly at the scene of crime and two on the following day and one after almost a week. The post mortem reports (exhibits PE8, PE9, PE10 and PE11) revealed that they lost a lot of blood due to penetrated wounds on their abdomen, arms, thighs, damaged livers,

damaged skulls and damaged ventricles. According to P47, metal fragments were found and removed in the deceased's bodies.

It was the prosecution case that being an emergency, the injured persons were helped and rushed to Hospitals, to wit, Mt. Meru Government Regional Hospital, St Elizabeth hospital and Arusha Lutheran Medical Centre @ Selian hospital. The deceased's bodies were kept in the mortuary at Mt. Meru Government Regional Hospital.

The big explosion perturbed not only the AICC Soweto dwellers but also the neighborhood and the police officers some of whom were reinforcing security at the CHADEMA campaign rally. P1 the former OC-CID of Arusha was informed through the radio call from the control room to make follow up of the incident. P1's evidence was that when he got at the scene of crime from CUF campaign rally, he witnessed a hoity toity situation, cries, grief and confusion. He also witnessed CHADEMA supporters stoning the police officers. To stabilize the situation, he ordered the police officers to retreat because they were defending themselves by firing tear bombs to the crowed. After retreating and assembling at Arusha central police station, P1, the team of investigators including P58 and Godbless Lema the former Member of Parliament of Arusha Urban constituent, returned to the scene of crime. After CHADEMA members and supporters had been cooled down by Godbless

Lema, P1 directed forensic police officers including P53, who has specialized in crime scene photographing, to surround the scene of crime with cordoning tape because dark had covered the sky and vision impaired.

On the next day (16/6/2013) the team of investigators from both the police headquarters and regional level and forensic police officers, went to the scene of crime for a thorough inspection. The scene had ponds of blood, shoes, metal fragments, safety lever, spring strike, sheet steel fragments, one piece sheet still fragments, one fuse ring and a crater. At the same time, PF-3s were taken to the hospitals for victims to allow commencement of treatment. In the due course statements of witnesses were recorded making the commencement of the investigation.

P12, P3, P8 and P32 all being the victims, testified that they were seriously injured by that explosion. P12 testified that she sustained injuries on her leg (ankle's upper bone was broken), three toes of the right leg were broken and one maimed because metal fragments penetrated into those body parts. She was admitted for almost a week. She showed this court the scars. P3 sustained injuries on his foot, leg up to the knee and waist. He was treated at Selian Hospital. After x-ray and several surgeries metal fragments were removed from his body. On his

side P8, sustained injury on his calf and was treated at Mt. Meru Government hospital. P32 testified that he sustained injuries on his right leg, left hand and abdomen and was treated at St. Elizabeth hospital. He testified further that he was discharged after three weeks. Apart from admitting that he was fine, he said that of current his left hand which was broken cannot carry heavy things.

Furthermore, the prosecution case was that on the fateful date the deceased's bodies were taken to the hospital and kept in the mortuary. On 18/6/2013, the autopsy was conducted by P47 a specialist pathologist, after relatives of the deceased had identified the bodies. He was in the company of a team of six doctors and the investigator, P53. Deceased's bodies were found with small multiple penetrating wounds on different parts. They removed metal fragments from those bodies. According to him the cause of death was acute loss of blood. P47 tendered the post mortem examination reports which were admitted and marked exhibits PE8, PE9, PE10 and PE11.

Exhibits were collected by a team of investigators and P53 was taking pictures. After a keen and thorough inspection of the scene of crimes, exhibits were collected and marked A, B, C, D and E by P53. In the same line the 8GB memory card comprising pictures taken at the scene was created . Thereafter, he took them to P47 for safe custody in

the exhibit room at Arusha central police Station. On 24/6/2013 P58 took them from P47 to P58 a ballistic expert. P58 testified that he received safety lever with number 82-2 5490-650, spring strike, sheet steel fragments, one piece sheet still fragments, one fuse ring and 9 fragments which were found in the deceased's bodies from P53. After a physical examination and reconstructing both exhibits found at the scene of crime and in the deceased's bodies by P58, it was discovered that all exhibits were parts of the bomb. He tendered them and were received as exhibits PE13 collectively. It was, therefore, the conclusion of P58 that the bombing was from a military hand grenade made in China. A report, exhibit PE12, was made to bolster that conclusion. The 8GB memory card was taken to P59 by P53 who testified that he examined the pictures in the memory card and found them original. Thereafter, printed some in their original form and magnified others to enable the scene of crime and the collected exhibits be seen very clearly.

The prosecution case divulges further that through a keen investigation, intelligence information and other information gathered from informers, led to the arrest of the accused persons almost a year later. They were arrested at different places, times and styles. While under police restraint, it was stated, the 3rd and 4th accused persons confessed orally to P37 and P1 by revealing their roles and participation.

Finally, they facilitated the arrest of the 1st, 2nd, 5th and 6th accused persons. P1 testified that the 1st accused was arrested on 21/7/2014 and upon being searched he was found with 7 bombs and 6 bullets of shotgun. He then divided the group of police officer after being tipped that the 5th accused was returning to Arusha from Kigoma with two hand grenades. After setting a trap, the 5th accused was arrested at about 21:00hrs with one hand grenade. P37, on the other hand, testified that he arrested the 5th accused at his home Sombetini on 21/7/2014 at about 20:00hrs. He did not say if he had a hand grenade.

According to the prosecution, the accused persons were properly arrested and their cautioned statements duly recorded. P46, P38 and P44 police officers recorded the cautioned statements of the 1, 3rd and 4th accused persons respectively who among other things prepared the facilities for recording the accused persons' cautioned statements. Those witnesses who recorded the cautioned statements of the accused persons, testified in different languages that the accused persons were availed with all basic rights as required by the law. Their testimonies are mainly the same on the fact that each witness prepared conducive environment for recording the particular accused person's cautioned statement. Also, that during recording of the statement, only the accused with the officer were in the room. In total the above witnesses

told this court that the cautioned statements were recorded by following all procedures, while availing the accused persons all their rights and the accused themselves made their choices. Similarly, P48 Justice of Piece recorded the 1st accused's extra judicial statement by complying with the Chief Justice's guide and adhered to all procedures. In common they testified that the accused persons confessed to commit the offences they are charged with.

The prosecution having closed its case, this court at that level was satisfied that the case against all accused persons was built and all had a case to answer. Having complied with **section 293 (1)(2) of the CPA**, this court called upon the learned advocates for defence to come up with their defence case plan. The defence counsels disclosed that, they had six witnesses and had no exhibits at all. In the similar venture, the learned counsels expressly abandoned the notice *alibi* as was recorded during committal and trial by 6th accused person. On 7/9/2023 the defence case was opened by calling defence witnesses who were the accused persons. All defended themselves under on affirmation.

It is learnt from the defence evidence that all denied participating in the commission of terrorists acts on 15/6/2013 at Soweto AICC grounds within Arusha or at all. They have denied participating or conspiring to detonate a hand grenade in a public gathering of

CHADEMA campaign rally to terminate the deceased's lives or attempt to terminate other people's lives. It is further gathered from their testimonies that no prosecution witnesses testified in court that he saw them planning to commit terrorist acts, detonating the bomb murdering people or attempting to murder them. They further denied knowing each other prior 1/8/2014.

Singularly, each defence witness had a peculiar defence as hereunder. DW1 (4th accused) in addition testified that he was arrested on 8/7/2014 after he was called by OC-CID, namely, Faustine Mafwele and told that he was needed by RCO at about 14:00hrs. Apart from admitting his historical background he denied knowing a person who bombed Sheikh Sud. Apart from admitting that these particulars are his and were part to the cautioned statement, he denied to have made a confession to P44 or signed on exhibit PE7. He again denied being arrested on 6/7/2014. He stressed that he was arrested on 8/7/2014 and was registered in the detention book. He denied to have ever known his fellow accused persons prior 1/8/2014 when he met them in court. Responding to cross questions by Mr. Katuga, DW1 admitted that he did not deny the thumb print signature appended on exhibit PE7.

DW2 (6th accused), also testified in addition that he never provided Tshs. 300,000/= to fund the commission of terrorist acts. He denied to

have attempted to murder anybody or murdered anybody because his faith does not allow such immoral acts and killing one person is tantamount to killing all people.

DW3 (3rd accused) similarly told this court that he was arrested on 21/7/2014 at Mosque located at Endasaki Village within Hananga District in Manyara region. He denied being arrested at Orjoro and taken to central police instead he was taken to Kisongo @ Guantanamo police station. Apart from admitting his historical background, he denied the rest of the statement and said that he was tortured on 24/7/2014 and 25/7/2014 to rescue his life he signed on papers he did not know. In addition, he denied to have confessed to commit terrorist acts and murder on 21/7/2014 before P38.

In addition, DW4 (5th accused) testified he was arrested on 19/7/2014 at Sanawari. He denied being arrested at Ngusero, to have confessed to police officer and being in possession of a bomb transporting it from Kigoma. In so doing he denied to commit any of the offences he is charged with and cemented that no prosecution witness said he saw him committing those offences.

DW5 (2nd accused) testified adding with respect to this case that he was arrested on 11/7/2014 at 16:30hrs by Richard the police officer, who was given orders by RCO. He denied being arrested on 28/7/2014

by P41 because by then he was in prison remand. He denied further to have confessed before any police officer including P41.

It was his further defence that he was taken to court on 23/7/2014 joined to other 5 accused persons in Criminal Case 1554 of 2014 before Hon. Rose Ngoka, RM, namely, Abdul Mohamed Humud @ Wagoba, Mohamed Nuru @ Muhaka, Athuman Hussein Mmasa, Shabani Musa Mmasa @ Jamal Mmasa and Said Maiko Temba (RIP). The charge laid against them was conspiracy to commit terrorist acts and commission of terrorist act. On 31/7/2014 while in prison, he was called together with Abdul Mohamed Humud @ Wagoba and Said Michael Temba to sign on the summons to appear in court on 1/8/2014. That was the date he met his fellow accused persons in the instant case charged with murder and attempt to murder. He denied all the charges.

DW6 (1st accused) testified that he was arrested at Usa Ngarasero within Arumeru District in Arusha Region in his shop and taken at Kisongo @ Guantanamo police station. While there, he was tortured to confess that Jafari Hashim Lema gave him the bomb to blast the gathering at CHADEMA campaign. The torture he went through made him to confess as the police officers wanted. Apart from admitting that he was taken to P48 by Michael Njau the police officer, in a bad

condition and asked his name and religion, he denied to have made a confession to him. He also denied to have confessed before P46 and had his cautioned statement recorded. He also denied all signatures appended to exhibits PE2 and PE5, the extra judicial statement and cautioned statement respectively. The foregoing is the material evidence from both parties.

Upon closure of the defence case, and on consensual basis parties were allowed to file their closing submissions. With appreciation, the learned counsel rightly observed the court's schedule by filing the same on 15/9/2023. This court has paid a serious consideration to their submissions, all rules, principles and precedents that parties have referred are taken into account, although they may not appear in full.

The prosecution's final submission was preambled by a brief summary of the charges facing the accused persons. Then pointed out that the prosecution case rests wholly on confessional statements which were tendered and admitted in court as exhibits PE2 and PE5 (Extra judicial Statements and cautioned statement of the 1st Accused person), PE6 (caution Statement of 3rd Accused person), and PE7 (caution Statement of 4th Accused) and intimated that they were repudiated and retracted by the respective accused persons. Added that they were

admitted after their testing their voluntariness through the trial within trial conducted as per **section 27 (2) of the Evidence Act, Cap. 6 R.E 2022** (hereinafter the "Evidence Act").

The prosecution went on submitting on the 1st count of conspiracy. Then pointed out some authorities in respect of the offences of Conspiracy to commit an offence, ranging from **Mattaka and others v. R** [1971] 1EA 495 and **section 12 of the Evidence Act** and the case of **Michael Charles Kijangwa v. R**, Criminal Appeal No. 280 of 2017 (unreported). They went on to refer to section 4 (2)(3) and (4) of POTA, which provides for ***mens rea*** and ***actus reus*** of the offence. The State Attorneys have put reliance on the confessional statements which were retracted and repudiated but on the necessity of corroborative evidences to convict the accused based solely on the confessional statement or co-accused confessional statements the state attorneys submitted the accused persons are facing serious offences attracting public interest at large, and that since the terrorist related offences involve a hidden and secret evil agenda, no one else rather than the accused themselves or their accomplices may be in good position to know and explain on how and when their evil intention is executed. In that state of affairs, they urged this court convict the accused basing on

confessional statements. Those cautioned statements, gave out the hidden agenda of the accused persons participating in judo, Kungfu and karate at different places and different Mosque in Arusha to execute their plan of overthrowing the government in lieu therein to establish an Islamic State and eliminating the kafir. They further referred to **section 27 of the Evidence Act** and in the case of **Ally Mohamed Mkupa v. R**, Criminal Appeal No. 02 of 2008 on reliability of the cautioned statements.

The learned State Attorneys held the view that exhibits PE2, PE5, PE6, and PE7 of the 1st, 3rd and 4th accused persons are corroborated by oral confession of 4th, 3rd and 2nd accused who confessed orally and voluntarily before P1, P37, and P41 both confessions proved that all 6 accused persons conspired to form a criminal syndicate with other persons not in court for the purpose of committing terrorist acts with intention of seriously destroying the fundamental political, constitutional, economic and social structure of the United Republic of Tanzania.

The prosecution then addressed some other aspects like the accused persons telling lies to the court under affirmation in their testimonies and their failure to cross-examine on crucial aspects and object on the place and time of arrest as was testified by the

prosecution witnesses and exhibits tendered in that respect. Underscoring their argument, they referred this court to the case of **Damian Ruhele v. R,** Criminal Appeal No. 501 of 2007, **Felix Kasinyila v R,** Criminal Appeal No. 120 of 2002, **Issa Hassan Uki v R,** Criminal Appeal No. 129 of 2017 CAT, **Michael Mgowole and another v. R,** Criminal Appeal No. 205 of 2017, Court of Appeal of Tanzania (Unreported) at page 30 the Court quoted with approval her decision in the case of **Ibrahim Yusuph Calist @ Bonge and 3 others v R,** Criminal Appeal No. 204 of 2011 (Unreported) along with other precedents on the test of confessions, that a confession is said to be true if: -

i) leads to the discovery of some other incriminating evidence,

ii) contains a detailed, elaborate relevant and thorough account of the crime in question that no other person would have known such details but the maker,

iii) coherent and consistent with the testimony of other prosecution witnesses and evidence generally especially with regard to the central story and the chronology of events.

iv) the facts narrated in the confession; must be plausible.

It was argued, in that context that despite the accused persons retracting their confessions, the law allows conviction without corroborative evidence as long as the court is satisfied that the

confessions are nothing but true by following the precedent in the case of **Flano Alphonce Masalu @ Singu and 4 others v. R,** Criminal Appeal No. 366 of 2018, CAT.

They held the view that the proven facts constituted terrorist acts by all the accused persons. They reiterated further that the substance of the confessions in Exhibit PE2, PE5, PE6, and PE7 are so detailed, elaborate relevant and thorough account of the crime in question, that no other person could have known such details but the accused persons. Also, that P37 and P1, proved that the aforementioned acts aimed at causing serious destabilization of the fundamental political, constitutional, economic and social structures of the United Republic of Tanzania.

Submitting in respect of the 2nd up to 11th counts for commission of a terrorist Act, and 14th up to 23rd counts charged in alternative to 2nd up to 11th counts for murder and attempted murder respectively, the learned State Attorneys contended that the contents of Exhibit PE2, PE5, PE6, and PE7 whereby 1st, 3rd and 4th accused persons, proved participation of all the accused persons with their fellows not in Court who planned and executed their plan by throwing a hand grenade to public gathering, an act which caused deaths and serious bodily harm

and may seriously destabilize the fundamental political, constitutional, economic or social structures of the United Republic of Tanzania.

They added that the above tendered exhibits establish the existence of commission of terrorist act in terms of the aforementioned definition. The bombing incident at Soweto grounds which caused the death to **Judith William Mushi, Amir Ally Dafa, Ramadhani Juma Ramadhani** and **Fahad Jamal,** and caused serious bodily harm to one **Emmanuel Lukas, Abraham Samwel Shange, Hazla Omary, Clement Kasimu Olomy, Shukuru Alex Masawe** and **Jacob Barnaba Mbunda** as well as testimonies of P37 and P1, that the acts if not prevented by arresting the accused persons herein would have the effect of causing serious destabilization of the fundamental political, constitutional, economic and social structures of gthe United Republic of Tanzania.

With respect to the 13th and 14th to 23rd counts, which are alternatives to 2nd to 11th counts for offences of murder and attempted murder respectively, the learned state Attorneys submitted that they were proved through the contents of Exhibit PE2, PE5, PE6, and PE7 proves the 14th to 23rd counts in respect of all accused persons by virtue of section 22 of the Penal Code provides that, any person who actual

does an act, enable or aid, aids or abet, counsels or procures other person to commit offence is deemed to have committed the said offence hence they are principal offender even if it is stated that the one who detonated the bomb was the 1st accused person in a company of the 2nd accused person. They referred to **Samweli Jackson Saabai @ Mng'awi & 2 Others v R,** Criminal Appeal No. 138 OF 2020, CAT-Musoma (Unreported) at page 18 – 19 on the four (4) elements of the offence of attempt to Murder. Applying the said elements in the case at hand, they stated that; the act of throwing an explosive material in public gathering was clearly intended to cause death to people gathered with malice aforethought which could be inferred from the weapons used. The injuries sustained by *Emmanuel Lukas, Abraham Samwel Shange, Hazla Omary, Clement Kasimu Olomy, Shukuru Alex Masawe* and *Jacob Barnaba Mbunda* are proved by P12, P3, P8 and P32 were confirmed by P35, P54 and P61, the medical officers who attended them on 15/6/2015 at Serian Hospital and St. Elizabeth Hospital and tendered PF3s and post Mortem Examination Reports and admitted in evidence as exhibits PE1, PE3, PE4, PE8, PE9, PE10 and PE11 respectively established the three elements. The condition of the victims after the explosion and the immediate medical attention to the victims received constituted the last element.

In the end they prayed this court to find that all the offences against all the accused persons were proved. They went further to analyse the defence case and covered the legal issues raised in tendering of prosecution exhibits, cross-examination and the actual defence.

Considering Exhibit PE2, PE5, PE6 and PE7 the confessional statements of the 1st, 3rd and 4th accused persons respectively, which were admitted after they were subjected to some objections, they wondered why the defence attacked them during the defence hearing contending that they were either recorded out of time, or obtained through torture or threat or were not recorded at all respectively.

Relying on the case of **Nyerere Nyague v R,** Criminal Appeal No. 67 OF 2010, CAT-Arusha (unreported) at page 7, they argued that objections of this nature were to be raised before they were admitted, and not during cross-examination or during defence. They were therefore of the firm view that those objections are nothing but an afterthought. Punching further holes, the learned State Attorneys argued citing the case of **Nzwelele Lugaila v R,** Criminal Appeal No 140/2020 CAT MWANZA at page 16-17 that the conduct of the 1st accused person retracting exhibit PE2 but repudiating it during his defence, intimates

that he was not certain on why he wanted to object his extra judicial statement.

Equally, the learned State Attorneys tumbled accused persons' defence of *alibi* defense for not giving prior notice as per section 194 (4) and (5) of the CPA. Basing on **Kubezya John v R,** Criminal Appeal No. 488 of 2015, CAT, at page 24 where it was held *inter alia* observed that, an *alibi* set up for the first time at the trial of the accused is more likely to be an afterthought than honest one, considering also the fact that defence side gave oral notice of intent to rely on *alibi* defence in preliminary hearing, but later was withdrawn. They prayed that *alibi* raised by all the accused persons be disregarded as even other persons accused claimed to be with them, were not called to testify on their favour.

Submitting with regard to chain of custody raised by the defence on exhibits collected at the scene of crime and those related to case at hand particularly exhibit PE12, PE13, PE14 and PE15 alleging it was broken for lack of documentary proof, maintained that, the chain of custody was not broken. They built on oral testimony of P58, P53, P47 and P59 whose evidence explained how they received, stored and transmitted those exhibits from one point to another. Those witnesses

were credible, their evidence was not shaken by cross-examination and defence. Same proved maintenance of chain of custody even in absence of documentary evidence, relied on the case of **Abas Kondo Gede v R**, Criminal Appeal No. 472 of 2017, CAT-DSM where documentary evidence was held not to be necessary to supplement oral evidence, but oral evidence in circumstance sufficed.

Supplementary, they exposed that, there might be minor inconsistencies and contradictions on the part of some prosecution witnesses, but the trite law is that not every discrepancy is fatal to the case. They warned that only fundamental discrepancies should count, exemplifying **EX. G. 2434 George Vs. R**, Criminal Appeal No.8 of 2018 CAT at Moshi where minor contradictions were held to be a healthy indication that the witness did not have a prepared script of what to testify in court. They suggested that, as the incident dates 8 years back, witnesses won't be positioned to exactness, as was held in **Chukwudi Denis Okechukwu and 3 others v R,** Criminal Appeal No. 507 of 2015, (CAT-DSM) and others.

The learned State Attorneys submitted that the defence by the accused persons that were not arrested on dates mentioned by the prosecution witnesses was a general denial and blatant lies which should

be used to collaborate prosecution case. They cited the case of **George Lazaro Ogur v R,** Criminal Appeal No. 69 of 2020, CAT at Arusha (unreported) to cement their view. They built on the evidence of P37, P46, P38, P1, P44, P39, and P41 and vehemently submitted that they were consistent in their testimony about the date and time of arresting the accused persons, transportation and arraignment of the accused persons at Arusha Central Police Station and nothing was adduced to fault their testimonies nor were they cross-examined. They sought support from **Issa Hassan Uki** (supra).

On their part, the learned defence counsel in their joint brief final submissions, attacked the charge sheet alleging that it is defective as it contained the offence of conspiracy to commit terrorist acts and commission of terrorist acts at the same time. Relying on cases of **Emmanuel Magembe and others v R,** Criminal Appeal no. 35/2018 at page 8 (unreported) while referring to the holding in the case of **Magobo Njige & another v R,** Criminal Appeal No. 442 of 2017 they argued that the exercise was wrong and urged this court not to rely on it.

That notwithstanding, the learned defence counsels for the accused persons, rightly pointed out in the very beginning on the

cardinal principles surrounding the burden of proof in criminal cases. To that end they cited section 3(2)(a) of the Evidence Act. They also revealed a cardinal principle of law that in criminal charge doubts are resolved in favour of the accused however slight they may be; They cited the case of **Zakaria Japhet @ Jumanne & 2 others v R,** Criminal Appeal No. 37 of 2003, CAT-Arusha at page 18 (unreported).

Bringing home the point, they argued rightly well that, it was the duty of the prosecution to prove that, the accused persons committed the offences charged. They referred this court to the case of the High Court, Bukoba Registry at Biharamulo in the Criminal session No. 13 of 2017, **Republic v Daniel Ndababonye** at page 10 which referred to the holding in the case of **Hemed v Republic (1987) TLR 117**. The learned advocates argued that, since no any prosecution witness saw the accused persons committing the alleged offences, the allegations were not proved.

They challenged the prosecution evidence being contradictory in respect of the place the 5th accused person was arrested. Whereas P1 he was arrested at Kisongo area with one bomb riding a motorcycle, P37 testified that he was arrested at his home Ngusero and was not found with anything suspicious. That whereas P1 testified that the 3rd accused

person was arrested on 21/07/2014 at 12:45 hours and read his caution statement at 15:30, P38 testified to have written the said caution statement from 16:30 to 17:40. Further, that the arresting officer said he arrested him between 15:30 and 16:00 hours. They held the view that it was unclear on when the 3rd accused was arrested and cautioned. They further pointed out that the contradictions manifest on the number of exhibits collected at the scene of the crime and those removed from the deceased bodies. Whether they were 9 or 23. Further contradictions were pointed on the time of occurrence of the crime whether it was 17:30 to 17:45 hours or 17:00 as per P1.

Addressing the issue of confessional statements solely relied upon by the prosecution, the learned defence counsel argued that since they were retracted and repudiated, it is dangerous to act up on them because they were not corroborated by independent witness. They relied on the warning residing in the case of **Tuwamoi v. Uganda** (1967) EA 84 and **Hemed Abdallah v. Republic** (1995) TLR 172. They added that stories in the confessional statements are not related. They however, admitted that the court may still act upon them if satisfied that the confession could not but be true. They fortified their position by citing the case of **Kashindye Meli v. Republic** (2002) TLR 374. That exhibit PE7 was certified under section 57(4) CPA at the end of the

exhibit which was wrong hence no certification as per the case of **Juma Omary v R,** Criminal Appeal No. 568 of 2020 CAT at Dodoma, page 13-16 (unreported). Apart from that there was a failure to insert the case file number on the front page of exhibit PE5 which was not recorded under specific sections of 57 and 58 of the CPA. They stressed that even if this court admitted the confessional statements, they should not be given weight because they revealed shortcomings. They propped their views by citing the case of **Yahya Twahiru Mpemba and 11 others v R** Criminal sessions No. 65 of 2022 HC in the district registry of Arusha at Arusha at page 76-81 and 86 (unreported).

With respect to co-accused evidence, the learned defence counsel contended that the prosecution did not have any other evidence apart from the repudiated confession not corroborated. They cited **section 33(2) of the Evidence Act,** and the case of **Asia Iddi v R, (1989) TLR 174,** cited in the case of **Ganja Mahele Nyama v R,** Criminal Appeal No. 93 of 2019 at page 5 (unreported) to highlight the principle that conviction of the accused persons should not be based on confessional statements by a co-accused.

They further revealed that dock identification was done by witness while no identification parade of which the witness successfully identified

the accused persons was conducted. They said that dock identification has value only where there has been an identification parade of which the witness successfully identified the accused person before the witness was called to give evidence at the trial. To exemplify that they cited the case of **Bakari Jumanne @ Chigalawe and 3 others v R,** Criminal appeal No. 197 of 2018 at page 16 (unreported) which echoed what was stated in the case of **Mussa Elias and 3 others v. R,** Criminal Appeal No. 172 of 1993 (unreported).

The learned defence counsel contended further that the charge sheet varies with the evidence on record. They based on the particulars of the offences under the information in which the accused persons are charged with except the offence under the 13th and 14th counts, reveal that the accused persons jointly and together did conspire to commit terrorist act on the 1st count, committed the terrorist acts in (2nd - 11th counts), murder in (14th -17th counts) and attempted to murder (18th - 23rd counts). They were firm that the adduced evidence that is the cautioned statements of 1st, 3rd and 4th accused persons, mentioned Yusuf Ally Huta and Yahya Sensei who bombed at Soweto but Yahya Sensei was not made part of the case or brought as a witness. They discredited the prosecution. They submitted that the prosecution had to use section **234(1) of the CPA** to seek amendment of the charge as

was reiterated in the case of **Killian Pater v R,** Criminal Appeal No. 508 of 2016 at page 14 (unreported) since this was not done the charge remained unproved and the accused persons are entitled to acquittal. They relied on the case of **Thabiti Bakari v R,** Criminal Appeal No. 73 of 2019 at page 12 (unreported) to underscore their view.

Another defect noticed by them was the failure to call the material witnesses such as the informer, Godbless Lema and Freeman Mbowe who were the leaders of CHADEMA. Relying on the case of **Pascal Mwinuka v R,** Criminal Appeal No. 258 of 2019 at page 23-24 (unreported) they submitted that this court should draw adverse inference against the prosecution case.

On chain of custody, it was the argument of the defence counsel that the same was broken beyond repair because there was no chronological documentation of how exhibits changed hands as was emphasized in the case of **Paul Maduka and 4 others v R,** Criminal Appeal No. 110 of 2007 at page 18-19 (unreported). Their view based on exhibit PE13 which shown only nine fragments of hand grenade which were removed in deceased's bodies while P53 stated that 23 fragments of hand grenade were removed from the same. Further, there is no any evidence verifying the handing over of the said exhibits

between P57 (the custodian) and P58 and P59 (the expert) and P53, but also P58 tendered fuse ring admitted in Exhibit P13 collectively which was not collected at the scene of crime as no picture of the fuse ring were admitted before this honourable court in consideration to the contention that P53 took all pictures of fragments found at the scene of crime.

Finally, the defence challenged the prosecution for failure to tender important exhibits such as the video mentioned by P1 and P35, that shown the 1st accused demonstrating how he threw the bomb, PF 16 which was listed in the list of prosecution exhibits but it was not tendered in court and would shed light to the court on whether exhibit P13 was collected at the scene of crime and was handed it over to the Exhibit keeper (P57) who also handle over to PW24 and the detention register which would prove that the accused persons were arrested on the alleged dates and were taken to Arusha central police station.

Having submitted as such they stressed that the prosecution case was not proved beyond reasonable doubt.

The submission by the defence has raised the issue of defective charge. They have contended that the charge contains the offence of conspiracy to commit terrorist act and the actual offence of committing

terrorism acts. Before plunging into any other matter, I propose to deal with this issue.

Coming to the merits of the complaint, according to the defence the offence of conspiracy to commit terrorist acts charged under section 4(1) (3(i)(i) and 27(c) of POTA, is a standalone. It follows, therefore, that the information is defective if it is included in the same information with the actual offence of committing terrorist acts charged under section 4(1) (3(i)(i) of POTA. The later offence denotes that the actual offence was committed and therefore the offence of conspiracy could not have been preferred against the accused person in the same information. That is to say the information is duplex.

The law, therefore, is clear that it not proper to charge the accused persons with the offence of conspiracy to commit terrorist acts. The principle is elucidated in the case of **Magobo Njige & another** (supra) the appellants were charged and convicted with the offence of conspiracy to commit the offence and the offence of armed robbery. On appeal after citing the case of **Steven Salvatory v R,** Criminal Appeal 275 of 2018 (Unreported), the court held;

> *"Thus, in the light of settled law, it was not proper to charge the appellants with the offence of conspiracy to commit armed robbery.*

Therefore, as the offence of conspiracy could not be sustained the appellants were wrongly convicted of that offence."

In the case of **Emmanuel Magembe & Others** (supra) the appellants were charged and convicted of the offence of conspiracy to commit armed robbery together stealing and armed robbery. The court restated that it was wrong in law to charge and convict the appellants of conspiracy and armed robbery in the same charge as conspiracy is an offence capable of standing on its own. Further the court found not only the appellants were charged with conspiracy to commit an offence but also, they stood charged with armed robbery and stealing in the same charge. It, consequently, nullified the proceedings and judgment basically after finding that retrial was not practical.

The *ratio decidendi* from the two cases of **Emmanuel Magembe & Others** (supra) and **Magobo Njige & another** (supra) relied upon by the defence is that when conspiracy to commit offence is charged together with the actual offence, the charge or information does not become defective rather the court has to discharge or desist from convicting the accused on the offence of conspiracy. I, therefore, decline to heed to the defence request that I should not act on the information. The test is whether the accused persons have been prejudiced. In

Musinga v Republic [1951] 18 EACA 211 cited in **Kinyanjui v Republic** [1986–1989] 1 EA 288, it was remarked:

> *"Counsel for the appellants have referred us to expressions of opinion by this court and by courts in England, deprecating joinder of a charge of conspiracy with charges of specific offences based on the same evidence. It is admitted that there is no illegality in such a joinder, but we agree that it ought not be done in cases where it is likely to prejudice the conduct of the defence. No objection was raised to the order of this charge at the trial and we do not think that it was improper in the circumstances of this case. Indeed, it would seem to have been the only course open to the Crown to bring home the guilt of some persons concerned in this series of illegal transaction."*

The akin situation was discussed in a very recent case of **Boniface Thomas Mwimbwa and another v R**, Criminal Appeal No. 325 of 2019 [2023] TZCA 192 (TANZLII; 19 April 2023). In this case the appellants were charged with conspiracy to commit an offence contrary to section 384 of the Penal Code and money laundering contrary to sections 12 (e) and 13 (a) of the Anti-Money Laundering Act. The court discharged the appellants of the count of conspiracy upon being satisfied that it was irregular to charge them with conspiracy to commit an offence along with the actual offence. The issue cropped up in the Court of Appeal which had this to say;

"In any case, for completeness's sake only, it was not suggested that in the circumstances of the case in which the appellants were ably represented by counsel they were prejudiced in any way by facing a trial on the two counts. As submitted by Mr. Ndaskoi, if there was any prejudice, same was too insignificant to vitiate the trial. We respectfully agree that, such an error was curable under section 388 (1) of the CPA consistent with the cases cited to us by the learned Principal State Attorney."

In the same vein, although it was improper to join the count of conspiracy to commit terrorism acts and offence of committing terrorism acts, there is no proof that the accused have been prejudiced anyhow because they were represented throughout the trial and revealed their ableness when they marshalled their defence very carefully and powerfully. In the end I find that the anomaly is curable under section 388(1) of the CPA, the accused persons are all discharged on the first count of conspiracy to commit terrorism acts contrary to section 4(1)(3)(i)(i) and 27(c) of the POTA.

Having discharged all accused persons of the 1st count of conspiracy to commit terrorist acts and having summarized parties' submissions, the chief duty of this court is to determine the case as per the charge sheet in line with the evidences adduced during trial, applicable laws and relevant precedents. The fundamental question to be answered is whether the prosecution established and proved the

offences against the accused persons beyond reasonable doubts. In so doing and in answering this question, I wish to commence by highlighting matters which, in my considered view, were proved beyond reasonable doubt and test some issues of chain of custody if have grievous impact on them.

As I tackle this issue, it should not escape anybody's mind that, in criminal cases, the burden of proof is casted upon the prosecution. This imperative requirement has been underscored in a collection of decisions of this Court and the Court of Appeal. In **Joseph John Makune v. Republic** [1986] TLR 44, it was observed:

> *"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case. The duty is not cast on the accused to prove his innocence. There are few well known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities ...."*

Accentuating this position was the Court of Appeal, yet again, in **George Mwanyingili v. R**, CAT-Criminal Appeal No. 335 of 2016 (Mbeya-unreported), in which it was held as follows:

> *"We wish to re-state the obvious that the burden of proof in criminal cases always lies squarely on the shoulders of the prosecution, unless any particular statute directs otherwise. Even then however, that burden is on the balance of probability and shift back to prosecution."*

Therefore, the burden is on the prosecution to prove beyond reasonable doubt that the all accused persons committed terrorist acts as charged in the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 11th counts; that the 4th and 6th accused persons provided funds to commit terrorist acts as charged in the 12th and 13th counts; that all accused persons murdered *Judith William Mushi, Amir Ally Dafa, Ramadhani Juma Ramadhani* and *Fahad Jamal* as charged in the 14th, 15th, 16th and 17th counts; and that all accused persons attempted to murder *Emmanuel Lukas, Abraham Samwel Shange, Hazla Omary, Clement Kasimu Olomy, Shukuru Alex Masawe* and *Jacob Barnaba Mbunda* as charged in the 18th, 19th, 20th, 21st, 22nd, and 23rd counts. It is not upon the accused persons to prove their innocence or even that it was someone else who committed these offences. It is the law of our land that in cases of this nature the accused persons can only be convicted of the offences on the basis of the strength of the prosecution case and not on the basis of the weakness of the defence case. Even suspicions, however ingenious or strong can never be a basis of a criminal conviction or a substitute for proof beyond reasonable doubt. This is equally true even where an accused persons is proved to have told lies either in Court or prior to that in connection with the facts in issue. See the case of **Republic v.**

Kerstin Cameron [2003] TLR 84 at page 106.This is a legendary and universally accepted principle of law which will guide my voyage in determining this case.

In this case, therefore, the prosecution has to prove to the required standard not only that the explosion occurred at Soweto AICC grounds on 15/6/2013 and some people died and others sustained serious injuries, but also that explosion, the deaths and injuries were caused by the accused persons. That notwithstanding, it must be established that the killing was done with malice aforethought.

It is not disputed in this case that a big explosion occurred at the Soweto AICC grounds Kaloleni area within Arusha District after the military hand grenade was detonated in a public gathering of CHADEMA campaign rally and that act involved prejudicing the public safety and by its nature and context reasonably intended to intimidate a section of the public within the United Republic of Tanzania.

The fact on the occurrence of the explosion is certified by P12, P3. While P12 attended as a news reporter and testified that she saw something black in colour rolling few steps from where she stood in front of the stage and suddenly heard a big blast, P3 attended as CHADEMA party member and saw something like stone being thrown in the air. No sooner had it landed than it exploded causing disquiet and

many people were left injured. P8 and P32 were at the meeting too and witnessed a big blast. P37 went to the scene of crime after the explosion had taken place and witnesses the scene to have been blasted. P1, a chief investigator of this case, and P40 also went to the scene of crime after the explosion had occurred and witnessed the confrontations between the police officers and CHADEMA members and people running aimlessly. He ordered the retreatment of police offices to Arusha central police station. On resuming to the scene with Godbless Lema and having the turbulence settled, he ordered the cording of the scene of crime which was done by P53. On 16/6/2013 P1, P53 and other police officers went to the scene took some photos and collected exhibits. The occurrence of the explosion is also strengthened by exhibit PE15 tendered by P53 containing pictures of the scene of crime which were developed and magnified by P59. Pictures show some exhibits and blood that chilled at the scene of crime. With this evidence at my disposal, I unhesitatingly hold that the prosecution has managed to prove beyond reasonable doubt that explosion occurred at Soweto AICC grounds on 15/6/2013.

As to what caused the explosion, there is strong and undisputed evidence from P58 the ballistic expert. This witness has informed this court that after receiving exhibits marked A, B, C, D, E, F1, F2, and G

and carried out a scientific physical examination and finally made a reconstruction, he concluded that it was a bomb made in China which caused an explosion. He testified further that it was a military hand grenade. Therefore, the cause of explosion is a hand grenade which was detonated in the public gathering of CHADEMA at Soweto AICC grounds.

Similarly, it is undisputed in this case that the death of *Judith William Mushi, Amir Ally Dafa, Ramadhani Juma Ramadhani* and *Fahad Jamal* was not a natural one. It was a violent one. The cause of death is not disputed. It was due to the bomb explosion whose small metal fragments caused penetrated wounds on different parts of the bodies including but not limited to damaging of skull, heart, liver, hands, legs, etc, which led to acute loss of blood and intracerebral haemorrhage. The deaths and their sources are confirmed by the deceased's post mortem examination report, exhibits PE8, PE9, PE10 and PE11 which were tendered by P47. We have on record the evidence of P31, P19, P20 and P23 who lost their relatives and later witnessed the autopsy.

As far as attempted to murder is concerned, it is undisputed that after the explosion *Emmanuel Lukas, Abraham Samwel Shange, Hazla Omary, Clement Kasimu Olomy, Shukuru Alex Masawe* and *Jacob Barnaba Mbunda* were seriously injured. In proving this fact, the prosecution produced P54 who tendered the PF3s, exhibit PE1

collectively and P61 wo tendered exhibits PE3 and PE4 of the harmed people. We also have the evidence of P37 a police officer who helped the injured people by cooperating with other people, rushed them to hospital and gave them PF3s and the evidence of P12, P3 and P8 and P32 who are actually the victims.

On this basis and on the totality of the evidence, I cannot but hold that deaths and injuries were a result of the detonated bomb whose fragments hit people. Given the evidence of the ballistic expert (P58) that a detonated bomb's fragments can hit a target from 5 meters to 230 meters and cause death or injuries, it is my considered opinion that whoever detonated the hand grenade in the gathering at Soweto AICC grounds had a malice aforethought as correctly submitted by the learned State Attorneys.

The facts of this case justify my conclusion that even if the chain of custody was broken, some exhibits picked from the scene but not taken to P58 or not taken to the photographic expert (59) and some added or P53 omitted to take them to the experts, still no strong evidence from the defence weakening the strong prosecution evidence that a hand grenade was detonated in the gathering of CHADEMA campaign rally thereby causing death and injuries.

Connected to that is the discrepancy with regard to a number of metals fragments removed from the deceased's bodies. The evidence clearly shows that P47 said they were 9 and P53 said they were 23. This is a contradiction yes! But the truth is that those fragments were the ones which formed the hand grenade thrown in the gathering at Soweto AICC ground and were the source penetrating wounds that led to acute bleeding and finally led to the death of four people and left many others seriously injured. I buy the prosecution argument that this is a minor contradiction which is unescapable after the laps of 10 years from the time of incidents to testifying in court. Minor discrepancies on details due to lapse of memory on account of passages of time should always be discarded. It is only fundamental discrepancies going to discredit the witness which count as contradiction. This area is saddled with a litany of authorities. These include the decision in **EX. G. 2434 GEORGE** (supra) where the court the court held that;

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

The same spirit was expressed in the case of **Marando Slaa Hofu and 3 others v R,** Criminal Appeal No.246 of 2011, CAT where it was held: -

"Contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case. However, in considering the nature, number and impact of contradictions, it must always be remembered that witnesses do not always make a blow-by-blow mental recording of an incidence. As such contradictions should not be evaluated without placing them in their proper context in an endeavour to determine their gravity, meaning whether or not they go to the root of the matter or rather corrode the credibility of a party's case."

Considering the nature of the offences charged in this case, it is impossible to eliminate all variations. The paramount test as per the case of **EX. G. 2434 GEORGE** (supra) should be whether the inconsistencies are material going to the root of the case, the test which this court rules in the negative. Gathering from all these, I am inclined to conclude, that the prosecution has succeeded to prove beyond reasonable doubt that an explosion occurred at Soweto AICC grounds, some people died and some sustained serious injuries.

The issue is who detonated the bomb? The evidence on record does not give me many options. It points unerringly to only six individuals, that is, all accused persons and others who are not part to these proceedings. The prosecution's duty is producing evidence proving beyond reasonable doubt that it was the accused persons who jointly

and together detonated the hand grenade in the gathering at Soweto AICC grounds.

Indisputably, in this case, none of the 26 prosecution witnesses adduced direct evidence to have seen the accused persons committing any of the charged offences. A careful review of the testimony of the prosecution reveals that there is no testimony that brings even closer to the category of circumstantial evidence. I have cautiously read all 26 prosecution witnesses' testimonies. P12, P3, P8 and P32 all testified how they sustained injuries after the explosion. They also spoke about their treatment but were candid that they did not see a person who detonated the hand grenade. P54 and P61 treated the injured people and filled in the PF3s which they tendered as exhibits. Similarly, P47 conducted the autopsy to the deceased's bodies and prepared the post mortem examination reports which he tendered as exhibits. Their evidence has nothing substantial connecting the accused persons with the commission of the offences. P48, a Justice of Peace, recorded the 1st accused's confession and tendered the extra judicial statement as an exhibit. On the same line, the evidence of P31, P19, P20 and P23 is in respect of their deceased's relatives and how they were called to identify their relatives' bodies before the autopsy was conducted. The testimonies of P46, P42, P38 and P44 explains how they extracted the

cautioned statements from the 1st, 3rd and 4th accused persons. They testified further that these accused persons confessed to commit offences they are charged with. P37 testified how he arrested the 3rd accused person at Oljoro on 21/7/2014 and informed this court that he orally confessed to him and that he was the one who arrested the 1st accused and the 5th accused person on the same date. P1's evidence shows that he arrested the 4th accused person on 6/7/2014. P39 and P41 arrested the 6th and 2nd accused persons respectively. It is gathered from the evidence of P53 that he inspected the scene of crime, rounded it with cordoning tape, photographed exhibits picked at the scene of crime and tendered exhibits PE14 (*taarifa ya uchunguzi wa picha*) and PE15 (*kitabu cha picha*). The evidence of P58 is limited to scientific examination of exhibit PE13 he received from P53 and the report he prepared, i.e., exhibit PE12. Again, the evidence of P59 is all limited to the expert evidence particularly of examining, developing and magnifying pictures he received from P53. P47 introduced himself as exhibit keeper. His evidence explains how he was receiving, keeping, handling and handing over exhibits for use.

From the totality of the reviewed evidence, I tap nothing coming close to providing incriminating facts and circumstances which would be said to be incompatible with the innocence of the accused persons. I,

therefore, agree with both parties who unanimously opined that the prosecution case is solely nailed on confessional statements both oral and written.

As to how these cautioned statements and extrajudicial statement came into being, the prosecution has presented a very friendly procedure which they claim to have followed. They stated that, each of the accused volunteered information. These were tendered as exhibits PE2, PE5, PE6 and PE7. All these were either retracted or repudiated by the 1st, 3rd and 4th accused persons. The 1st accused, for example, narrated and alleged torture before exhibit PE2 was recorded by P48. He as well said that P48 simply asked him his name and religion on 25/7/2014 not details about the offence. He complained that exhibit PE2 was recorded prior he was arrested, that is, on 15/7/2014. P48 did not give reason in his evidence in chief why he recorded that the 1st accused was taken to him on 15/7/2014. The 3rd accused claimed to have been subjected to a serious torture, and ultimately papers were brought to him to simply sign without even knowing their contents. The 4th accused retracted his statement on allegation that he never confessed to any police officer. But on cross-examination he changed his story admitting history background but denied other details.

The baseline is that the 1st, 3rd and 4th accused persons denied to have made the respective cautioned statements, which are now before this court for use. As to how exhibit PE6 was gotten, the 3rd accused person has claimed that it was designed and prepared by the police themselves, then after torture and threat he was forced to sign. The 1st accused repudiated exhibit PE5 and disowned the signatures. On cross-examination he admitted to have not said anything on the thumb print signature in his evidence. The 4th accused as well admitted his history but denied the rest of the contents and scribbled signature and left out the thumb print signature. But in themselves they never confessed any offence and what is contained in the statements were the inventions of the police themselves.

I have deeply considered those cautioned statements and the total denial from the alleged authors. The question is whether the cautioned statements were properly extracted and whether on their own prove the charges pressed against the accused persons. Therefore, applying the law in respect of retracted and repudiated confessions, I as well studied the statement of each of the accused person among other exhibits.

The guiding principles regarding confessional statements were referred by the learned counsel on behalf of their parties. Before testing the cautioned statements, I will briefly refer to the relevant rules.

A well-known general overview was offered in the famous case referred to by the defence of **Tuwamoi v Uganda** (supra) where the East African Court of Appeal developed voluntariness and truthfulness of the confession clarified thus:

> *"We would summarize the position thus - a trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true."*

The general rule is that, if any confessional statement is retracted or repudiated, the court should be cautious as to whether to accord any weight as it was followed in the cases of **Richard Lubilo and Mohammed Seleman v Republic** [2003] TLR. 149, **Hemed Abdallah v Republic,** [1995] TLR 172 and where actual torture is

proved, the statement will be inadmissible as per the judgement of **Thadei Mlomo and others v Republic,** [1995] TLR 187. In the similar vein, the rule of thumb is that in order to avoid such danger, there should be corroborating evidence by independent witness. However, where such a confession contains true story about the offence, the court may convict the accused person basing on it no matter that it was repudiated or retracted. Here the major test is whether the court is able to believe the story contained in the caution statement. See the case of **Republic v Daniel Ndababonye** (supra) and **Kashindye Meli** (supra).

Guided by these authorities, I have to underscored that an imperative principle is that admission of a confession is one thing and attaching weight to it is another thing. I am not alone on this. The CAT underscored this position in the case of **Steven Jason and 2 others v R**, Criminal Appeal No. 79 of 1999 (unreported).

With regard to principles guiding on confession by co-accused, the CAT said it all in the case of **Paschal Kitigwa v R**, [1994] quoted in the case of **Steven Jason and 2 others** (supra) that:

> *"Evidence from co-accused as in this case is accomplice evidence and a court may convict on accomplice's evidence without corroboration if it is convinced that the evidence is true, and*

provided it warns itself of the dangers of convicting on uncorroborated accomplice's evidence."

Similarly, section 33(1) and (2) of the Evidence Act guides that:

"33. (1) When two or more persons are being tried jointly for the same offence or for different offences arising out of the same transaction, and a confession of the offence or offences charged made by one of those persons affecting himself and some other of those persons is proved, the court may take that confession into consideration against that other person.

(2) Notwithstanding subsection (1), a conviction of an accused person shall not be based solely on a confession by a co accused."

Now, what is the explanation of the rule? In other words, the Court may convict on an uncorroborated retracted or repudiated confession of a maker or a co-accused as the law allows in Tanzania, if the following conditions are satisfied. ***First,*** that the court warns itself of the danger of convicting on such evidence and ***second,*** that the court is satisfied that the statement is true, free and voluntary.

As a matter of law voluntariness encompasses oral confessions. In view thereof, 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 conviction against the suspect. **See D.P.P v Nuru Mohammed Gulamrusul** [1998] TLR 82, **John Shin v R**, Criminal

Appeal No 573 of 2016 and **Peter Didia Rumala v R,** Criminal Appeal No. 421 of 2019 CAT-Shinyanga.

Let me now go deep in the cautioned statements and examine them having at the back of my mind the guiding principles and law. In exhausting this issue, I have read with a fair eye the 1st accused's extra judicial statement (exhibit PE2) and the cautioned statement (PE5). I have first and foremost discovered that they differ on the personal history and the coverage of the incident. As already introduced hereinabove, the same differ on the date on which the 1st accused was taken to P48 and later signed on confessional statement recorded by P46. While exhibit PE2 shows that the 1st accused was taken before P48 on 15/7/2014 and appended his signature on 25/7/2014, exhibit PE5 shows that he was arrested on 21/7/2014 and made his statement 22/7/2014. This indicates that he was taken to P48 on 15/7/2014 and later went to sign on 25/7/2014. Meanwhile it is the prosecution evidence that he was arrested on 21/7/2013. On his part, the 1st accused person insisted in his evidence that he was arrested on 13/7/2014. In the absence of plausible explanation on why this variance is manifesting, I am afraid, this court has to warningly and sparingly act upon these two documents. Under these premises, I accede to the defence suggestion that in order to put things right the detention

register was important. Basically, it would clear the varying statements as to when the accused persons, including the 1st accused, were arrested. It would corroborate the contention by the prosecution that they were taken to Arusha central police station not to Kisongo police station.

In my considered view, the prosecution ought to tender the detantion register (PF.20), which should be maintained at every police station in terms of PGO 353(2) in which all the movements of the suspects from the time they got to the remand police station, until when he moves out are recorded in accordance with PGO 353 (6), (7) and (8). This is also the testimony of P1 and P38. Through these witnesses, it was the prosecution case that PF-20, could not be tendered because it was destroyed due to time lapse. Was that proper? I do not think so. It was very important to be maintained given the fact this case, of high profile of course, was still pending in court. My strong conviction is that, if the same was destroyed in the normal cause of cleaning the police station to let new books replace the old ones, the prosecution ought to prove that fact in terms of section 112 of the Evidence Act provides that:

> *"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person."*

In this case since the prosecution wished the court to believe that PF-20, could not be tendered because it was destroyed due to time lapse had to prove that fact. According to PGO 35, which in *ipso facto,* deals with destruction of books and registers states that:

> *"...all completed Police books and registers, except only:*
> *(a) Treasury and Stores records, which must be preserved in accordance with Regulation 140 of Public Finances Regulations; and*
>
> *(b) Official books which must be preserved for a special period under specific Police General Orders, shall be destroyed two years after the date of the last entry on the last page. Destruction shall, in every case, be authorised by a Gazetted Officer. Books and registers, which are due for destruction, shall be produced at formal inspections and Gazetted Officers shall ensure that old and useless records are not preserved."*

On this particular point, I am persuaded by the observation of my brother Rwizile, J. in **Republic v. Abdallah Athuman Labia @ Brother Mohamed & 8 others,** Criminal Session No. 63 of 2021 HC-Arusha Sub-Registry where he had this to say guided by the PGO:

> *"From the above, it is apparently clear to me that only old and useless records need be destroyed. I hesitate to hold that the records in respect of the accused persons were old and useless. But even assuming the same were destroyed as alleged, it was the duty of the prosecution to show when and how the same were destroyed and of course, the officer who destroyed them or authorised destruction. In the absence of such evidence, it remains unclear as to why the same were not tendered. May be, it had*

information against the prosecution case, because according to the evidence, the health status of the suspect is recorded in that book before he is put under custody in the cell or lock-up."

Basing on the fact that the prosecution evidence contradicts itself on when the 1st accused was taken to P48 to confess and when exhibit PE2 was recorded and exhibit PE5 which shows that the 1st accused was arrested on 21/7/2014 and the claim that he was taken to Kisongo police station, tortured to confess that he was given a bomb by the 2nd accused, I hesitate to declare that there was no inducement in making the confessional statement or some dubious means to extract it.

The 3rd accused person denied to have ever confessed before P38 and alleged torture. However, in exhibit PE6, the 3rd accused person narrated well how he was called by Yahaya Sensei at his home and found him with a bomb. In the course of being instructed how to detonate the same, he refused due to incompetency. That is when the 1st accused was called to meet them at Kaloleni Mosque.

The problem begins here. Exhibit PE6 shows that after the meeting which was attended by the 1st, 2nd, 3rd accused persons and Yahaya Sensei at Kaloleni Mosque, the 3rd accused went to Soweto AICC ground with the 1st and 2nd accused but was later ejected on the reason that he refused to throw the bomb to the gathering at Soweto AICC

grounds. That is when he went to CUF campaign rally. Exhibit PE5 shows that after the meeting at Kaloleni Mosque, the 1st accused went to Soweto AICC grounds with the 2nd accused person. The 3rd accused and Yahaya Sensei went to the main Mosque. Again, exhibit PE6 indicates that the 3rd accused saw the 2nd accused buying two caps of CHADEMA and giving the 1st accused a bomb from his pocket. The question is, if the 3rd accused was not with the 1st and 2nd accused persons, how did he see the 2nd accused buying two caps of CHADEMA and the handing over of the bomb. How come that the 1st and 3rd accused persons were doing everything together but have two different stories. If the bomb was handed over to the 1st accused by the 2nd accused while the 3rd accused was still at Soweto AICC ground, there needed evidence to show how long did the 1st accused stay with it prior throwing it in the gathering. I say so because the explosion occurred after the 3rd accused had already got at Sheikh Amri Abeid Stadium where CUF was holding campaign. The two places are not close to each other. Conversely what I gather from exhibit PE5 is that immediately after the 2nd accused had handed the hand grenade to the 1st accused, he took no time before throwing it in the gathering.

Through exhibit PE7 the prosecution convinces this court that Yahaya Sensei was at Soweto AICC ground and cooperated in

detonating the bomb. Part of exhibit PE7, the 4th accused's confessional statement, states on the last page that:

> *"Nakumbuka mnamo tarehe 15/6/2013 majira ya saa 19:30hrs nikiwa maeneo ya mskiti mkuu nikiwa nimeenda kusali nilikutana na Yahaya Sensei, aliniambia nimesikia kazi hiyo. Nikamuuliza kazi gani. Akaniambia tukio la Soweto, akaendelea kunieleza kuwa ni wao wamerusha hilo bomu na walivaa nguo za CHADEMA."*

The maker of exhibit PE7 was confessing that Yahaya Sensei reported to have exploded the gathering of CHADEMA campaign rally and dressed CHADEMA uniforms.

This also being the prosecution evidence, it contradicts the contents of exhibit PE5 and PE6 on the aspects of who went to Soweto to detonate the hand grenade. Was it the 1st and 2nd accused persons? Was it the 1st, 2nd and 3rd accused persons? Was it the 1st, 2nd, 3rd and Yahaya Sensei? The other questions are whether it was the 1st accused person who threw the bomb in the group of people or Yahaya Sensei.

On what they dressed, PE6 reveals that the 3rd accused saw the 2nd accused buying two caps of CHADEMA but exhibit PE7 indicates that Yahaya Sensei and his group probably the 1st and 2nd accused persons dressed in CHADEMA uniforms.

Similarly, the prosecution is banking on exhibit PE5 to prove its case. This exhibit shows that the 1st accused was the custodian of all bombs. Some were taken to him from Yahaya Sensei's followers. It indicates further that:

> *"...mimi ndiye muhifadhi mkuu wa vitu hivi na wakitaka kufanya tukio wanakuja kwangu kuchukua."*

In the Court's language, the above means the 1st accused was the keeper of the bombs. He reveals that in order to attack they were to get them from him. This statement has not excluded Yahaya Sensei. To the contrary, the same exhibit shows that the bomb which was used at Soweto was not collected from the 1st accused. Following closely the statement of the 1st and 3rd accused persons, the bomb which was used was in Yahaya Sensei's custody. I agree with the prosecution that in these cases it is difficult to know who was keeping the bombs. But I think that exhibit PE5 contradicts itself on who was keeping the bombs. It is also silent on who gave the bomb to Yahaya Sensei. To speak the less this is the prosecution evidence.

Let us examine exhibits PE5, PE6 and PE7 in relation to the trainings headed by Yahaya Sensei. Exhibit PE5 explains at page 4 that:

> *"... kabla ya kufanya tukio hilo tulikuwa tumepatiwa mafunzo ya ugaidi kutoka kwa Yahaya Sensei mwalimu wa judo na Kungfu na mafunzo huwa anayatolea msikiti mkuu na misikiti mingine ambapo*

kuna vipindi vya asubuhi na jioni, na mazoezi haya yameanza siku nyingi lengo likiwa ni jihadi maana yake ni mapambano baina ya makundi mawili yasiyofanana. Pia kupambana na makafiri maana yake watu wasiofuata dini ya kiislaam kama vile Wakiristo na Wapagani. Wafuasi wakubwa wanaongozwa na kufundishwa mazoezi na Yahaya Sensei ni Rama, Abdul wa Kijenge, Mazengo, Yusuph, Amani, Kassim, Manganyu, Abubashir na wengine wengi haswa vijana wa kabila la Warangi na Wasambaa."

In this court's language the author confesses that prior the incident of Soweto, they were undergoing trainings of judo and Kungfu from Yahaya Sensei at the main Mosque and other Mosques into two sessions of morning and evening. He reveals that trainings started long time and the topmost intentions were to prepare them for jihad meaning a battle between two different groups of kafir meaning Christians and pagans. He states further that Yahaya Sense's main trainees were Rama, Abdul of Kijenge, Mazengo, Yusuph, Amani, Kassim, Manganyu, Abubashir and many other youths from Rangi and Sambaa tribes. The 3rd accused is not mentioned herein.

In exhibit PE6, a confessional statement of the 3rd accused person discloses that he was teaching madrassa at kwamrombo in Istiqama Mosque. On trainings, he states at page 2 through 3 that:

"kabla ya kwenda kufundisha watoto madrassa huwa ninakwenda msikiti mkuu wa Ijumaa kuanzia majira ya 14:00hrs – 16:00hrs kufanya mazoezi ya judo na baada ya muda huo ndo huwa naenda

kufundisha watoto na mwalimu wetu wa mazoezi anaitwa Yahaya Sensei na watu ambao tulikuwa tukifanya mazoezi ilikuwa ikifika zaidi ya watu arobain na lengo hasa la mazoezi hayo ilikuwa ni kwa ajili ya kuweka mwili vizuri.... Yusuph huyu ni kijana ambaye naye huwa tuna fanya naye mazoezi ya judo msikiti mkuu."

The 3rd accused is confessing that he was Yahaya Sensei's trainee of judo with other more than 40 youths at the main Mosque. The intention of the judo training was to perfect their bodies. He reveals that Yusuph was among the trainee.

Confessing on the reasons for being trained by Yahaya Sensei, the 4th accused persons had this to say:

"Mimi nilijiunga na uwanaharakati wa dini ya kiislamu tangu mwaka 2010 na ndipo nilipofahamiana na Jaffrari Hashim Lema, Yusuph, Ramadhani na Yahaya Sensei. Jukumu kubwa lilikuwa ni kuhubiri jihad msikitini. Jihadi maana yake ni vita dhidi ya makafiri. Makafiri maana yake ni watu wanaopinga uislamu... Miongoni mwa mikakati tuliyopanga ni pamoja na kununua silaha. Jambo lingine ni kufanya mazoezi ya judo, karate ambapo mwalimu wake aliokuwa anafundisha, Yahaya Sensei..."

The 4th accused was confessing that he is a jihad activist who aspires to wage a war against kafir. He states that the plans they had were to purchase weapons. He opens that Yahaya Sensei was training them on judo and karate.

This brings me to the 12th and 13th counts. These are basically facing the 4th and 6th accused persons alone. The prosecution is alleging that they directly provided to Yahaya Sensei Tshs. 235,000/= and Tshs. 300,000/= respectively to purchase weapons. According to the information, those weapons were to be used in overthrowing the lawful Government of the United Republic of Tanzania through the use of violence and establish the Islamic State within the United Republic of Tanzania, an act reasonably regarded as being intended for the purpose of seriously desterilizing the fundamental political, constitutional, economic and social structures of the public in the United Republic of Tanzania.

To prove these allegations, the prosecution relied on exhibit PE7, the 4th accused's cautioned statement, the evidence of P1 and P44 who recorded exhibit PE7. P1 and P44 both testified that the 4th accused confessed to them that he contributed money for buying weapons. Exhibit PE7 enlightens further that:

> *"Mimi nilijiunga na uwanaharakati wa dini ya kiislamu tangu mwaka 2010 na ndipo nilipofahamiana na Jaffrari Hashim Lema, Yusuph, Ramadhani na Yahaya Sensei. Jukumu kubwa lilikuwa ni kuhubiri jihad msikitini. Jihadi maana yake ni vita dhidi ya makafiri. Makafiri maana yake ni watu wanaopinga uislamu... Miongoni mwa mikakati tuliyopanga ni pamoja na kununua silaha ...Yahaya Sensei aliniambia tuchangishe fedha kwa ajili ya kununulia silaha kama*

bunduki na mabomu kwa ajili ya kupambana na makafiri. Mimi niliwahi kumpa fedha ambazo si chini ya Tshs 300,000/= kama mchango wangu wa kununulia silaha. Watu wengine waliochangia ni Pamoja na Said Temba, Yusuph, Ramadhani, Ibrahimu Mohamed na Shabani."

From the quoted passage, two things are obvious. ***One,*** the 6th accused is not mentioned. ***Two,*** the 4th accused confessed to provide funds to purchase weapons to wage a war against kafir.

I have stretched my mind as I could to digest whether it is stated in exhibit PE7 that the intention of contributing money to buy weapons was to overthrow the lawful Government of the United Republic of Tanzania through the use of violence and establish the Islamic State within the United Republic of Tanzania but I have sniffed that idea. What exhibit PE7 proves is that money was contributed to buy weapons to wage a war against kafir. Unless there is another evidence to that effect, I don't agree that the allegations of overthrowing the lawful Government of the United Republic of Tanzania through the use of violence and establish the Islamic State within the United Republic of Tanzania have been proved.

In view thereof the allegations in counts 12 and 13 have not been proved beyond reasonable doubt.

Scanning from the three confessional statements it is obvious that they differ on the intention of the training.

In total, my unfleeting review of all the confessional statements bring one unanimous message of the accused's involvement in the commission of the offences, and that these offences were pre-meditated by none other than the accused person's themselves and other accomplices who are not impleaded as accused in these proceedings. It gives a blow by blow account of the build up to the event and the manner in which execution of the plan was carried out to the perfection.

On the other hand, the quoted portions of the confessional statements tell three different stories on the number of those who attended the CHADEMA campaign rally, it differs on who detonated the hand grenade, who was keeping the bombs, the intention of the training coached by Yahaya Sensei, clothes the perpetrators dressed at the time of the incident, where the accused persons and other assailants met after the incident and on the next day (16/6/2013).

Taking the cautioned statements, other prosecution evidence together, material points and surrounding circumstances, this court accepts the defence's suggestion that the confessions do not carry with them the truth even testing them against the parameters in the

decisions in **Felix Kasinyila and Issa Hassan Uki's** case, among others cited by the learned State Attorneys and the defence counsel.

In a fair weighing of the evidence from both sides, in respect of this point, having in mind of the legal principles which came to my guide, some of which have been presented herein and some were pointed out by the learned counsel of both parties in their submission, I am warranted to conclude that, I doubt if the cautioned statements are by themselves telling the truth. Many loose ends were left untied. Many questions were left unanswered. Being the prosecution lone evidence, it is my considered view that, as a matter of law, confessional statements needed corroboration from independent witnesses in order to ground conviction on them. More-so, it is similarly dangerous to use them to convict co-accused persons. Furthermore, considering the whole evidence on record and the weaknesses in the prosecution case I doubt if the statements are true, free and voluntary. My view is guided by the case of **Hassan Said Nondo v R,** Criminal Appeal No. 128 of 2002 (unreported), **Paschal Kitigwa** (supra) and **Steven Jason** (supra) and section 33(1) and (2) of the Evidence Act. Given the above position, I am guided by a well settled principle that evidence of co-accused which by itself needed corroboration cannot corroborate repudiated or

retracted confession (oral or written). This stance is gleaned from the case **Muhidini Mohamed Lila @ Emolo & 3 others v R**, Criminal Appeal No. 443 of 2015 CAT (unreported). The Court held that:

> *"The evidence of police officers who arrested the appellants (PW4 and PW5) which is to the effect that the appellants made oral confessions that they committed the offence cannot, as well be used to corroborate retracted confessions. This is because the appellants denied that they ever made any oral confessions."*

Exhibits PE2, PE5, PE6 and PE7 have been examined and analysed deeply and widely. What comes from my scrupulous review of these confessional statements is a less than convincing and consistent account of events. They are caught in the web of contradictions. Capitalizing on this, the learned defence counsel implored this court relying on the case of **Zakaria Japhet @ Jumanne & 2 others** (supra) to resolve the discrepancies in favour of the accused persons. The law is trite that discrepancies and inconsistencies in the witnesses' statement or testimony can only be considered adversely if they are fundamental, meaning that, if the same are of trifling effect, they ought to be ignored. In **Luziro Sichone v. R**, Criminal Appeal No. 231 of 2010 (unreported), the Court of Appeal held:

> *"We shall remain alive to the fact that not every discrepancy or inconsistency in witness's evidence is fatal to the case, minor*

discrepancies on detail or due to lapses of memory on account of passages of time should always be disregarded. ***It is only fundamental discrepancies going to discredit the witness which count.*** "[Emphasis added]

The decision in the just cited case followed in the footsteps of another grand decision of the Court of Appeal of Tanzania in **Disckson Elia Nsamba Shapurata & Another v. R**, Criminal Appeal No. 92 of 2007 (unreported), in which the learned Justices quoted the passage in ***Sarkar's Code of Civil Procedure Code.*** It was held as follows:

"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to material disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. ***Material discrepancies are those which are normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties' case material discrepancies do.*** "[Emphasis supplied]

In **Mukami Wankyo v. Republic** [1990] TLR, the Court of Appeal took the view that contradictions which do not affect the central story, especially in confessions, are considered to be immaterial. See also: **Bikolimana Odasi @ Bimelifasi v R**, CAT- Criminal No. 269 of 2012 (unreported).

From the quoted passage, what is the status of the prosecution's evidence in this matter? As stated earlier on, the confessional statements (exhibits PE2, PE5, PE6 and PE7), which are the only inculpatory evidence against the accused persons in this case, are conflicting with one another. The prosecution evidence is overflowing with pregnant variances of no trifling proportions, as cited above. They also touch on who went to the scene of crime and who detonated the hand grenade. The contradictions highlighted in these confessional statements are irreconcilable, suicidal and going to the root of credibility of the prosecution's case. The contradictions are so glued on the central story of the accused persons' confessions and charges they face, such that they (the contradictions) cannot be severed from it and leave the central story unhurt.

The learned State Attorneys stood on a properly rooted stem and argued the contradictions were of less magnitude to corrode the central story staged. With due respect I disagree with them. They went on urging this court to consider the circumstances under which offences of this nature are waged on, meaning that they are plotted in secret, warnings and as it stands, they stem from religious and ideological motivation. Having considered the circumstances in which these offences

are committed, the learned State Attorneys revealed that, the intentions resided in the offenders themselves who can better explain their evil intention and the way they are carried int executions. In as far as this case is concerned, these evil intentions are digested in exhibits PE2, PE5, PE6 and PE7 whose evidential value is highly questionable.

I have humbly considered this submission which is greasily connected with intentions to eradicating terrorist acts in the territorial jurisdiction (domestic terrorism) and outside the territory (international terrorism) designed to induce terror or psychic fear through religious terrorism, state terrorism, nationalist terrorism etc. I have also considered the canons of law, the interest of the public and rights of parties and the guiding principles.

In the end of all this, I find that the contradictions create serious implausibility that makes the confessions too unsafe to rely on as the basis for the finding of guilt. When they happen, as is the case in this matter, courts are enjoined to treat them with a serious caution and, inevitably, follow the path taken in **Sahoba Benjuda v. R,** CAT-Criminal Appeal No 96 1989 (Unreported), in which the Court of Appeal held as follows:

> *"Contradiction in the evidence of a witness affects the credibility of the witness and unless the contradictions can be ignored as being*

only minor and immaterial ***the court will normally not act on the evidence of such witness touching on the particular point unless it is supported by some other evidence."***
[Emphasis supplied]

See also: **Nyambuya Kamoga v. R**, Criminal Appeal No. 90 of 2003 (unreported).

In the present case, the confessional statements are supported by the oral testimonies of P1 and P37 who testified that the 3rd and 4th accused persons confessed orally to them and P38, P44 and P46, the police officers who recorded the said statements and P48 a Justice of Piece who recorded the extra judicial statement. Testimonies on oral confessions were seriously disputed hence a need for corroboration.

Still taking on board the prosecution's concern over offences of this nature, indisputably, the circumstances under which these offences are committed cause disquiet, instil fear and un-comfortability. They are in actual fact traumatic, horrendous and shocking incidents which claim lives of innocent people and maim others. However, as worrying these acts are, the prosecution is still duty bound to prove the case beyond reasonable doubt. In my considered view, in cases of high profile like this, investigation must be thorough. The investigation machinery must not leave any stone unturned in searching the truth because it is an

unescapable truth that criminal justice system is wholly dependent on investigation.

Since the totality of the contradictions and pregnant conflicts in the testimony corrode the credibility of the central story, thereby weakening the prosecution's case, I find nothing convincing me to hold that the accused persons committed terrorist acts, that they were the ones who murdered the deceased and injured some other people by detonating the hand grenade in the public gathering of CHADEMA at Soweto AICC grounds on 15/6/2013 and that the 4th and 6th accused persons funded terrorist acts.

All said and done, I am constrained to hold that though an explosion occurred at Soweto AICC grounds leading to deaths and injuries, the prosecution has failed to prove beyond reasonable doubt through confessional statements that it was the accused persons who are responsible. Consequently, I find all the accused persons, namely, **Yusuf Ally Huta @ Husein, Jafari Hashim Lema, Ramadhani Hamad Waziri, Abdul Mohamed Humud @ Wagoba, Abashara Hassan Omary** and **Abdulrahaman Jumanne Hassan** not guilty of the offences they stood jointly and together charged. Subsequently, I declare that they are all acquitted.

J. M. Karayemaha
Judge
20/9/2023

Court: 1. Judgment delivered this 20th day of September, 2023 in the presence of Ms. Alice Mtenga, learned State Attorney, for the Republic, all 6 accused persons represented by their advocates namely who are all present.

2. Right of Appeal explained.

J. M. Karayemaha
Judge
20/9/2023