THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

INTERNATIONAL CRIMES DIVISION

CRIMINAL SESSION CASE No. 0001 OF 2010

(Arising from Nakawa Chief Magistrate's Court Crim. Case No. 574 of 2010)

UGANDA ..... PROSECUTOR

VERSUS

1.	**HUSSEIN HASSAN AGADE**	}{
2.	**IDRIS MAGONDU**	}{
3.	**ISSA AHMED LUYIMA**	}{
4.	**HASSAN HARUNA LUYIMA**	}{
5.	**ABUBAKARI BATEMETYO**	}{
6.	**YAHYA SULEIMAN MBUTHIA**	}{
7.	**HABIB SULEIMAN NJOROGE**	}{ ::: **ACCUSED**
8.	**OMAR AWADH OMAR**	}{
9.	**MOHAMED HAMID SULEIMAN**	}{
10.	**SELEMANI HIJAR NYAMANDONDO**	}{
11.	**MOHAMED ALI MOHAMED**	}{
12.	**DR. ISMAIL KALULE**	}{
13.	**MUZAFAR LUYIMA**	}{

BEFORE:- THE HON MR. JUSTICE ALFONSE CHIGAMOY OWINY – DOLLO

JUDGMENT

The 13 (thirteen persons) named herein above, who are herein after also referred to respectively as **A1** to **A13** following the chronological order of their listing herein above as accused persons, have been

indicted on various counts and with regard to various offences as set out herein below. The first charge, comprising three counts, jointly accused **A1** to **A12** of having committed the offence of terrorism c/s 7 (1) & (2) (a) of the Anti Terrorism Act 2002. The first count was with regard to the discharge of explosives at the Kyadondo Rugby Club, the second count covered the discharge of explosives at the Ethiopian Village Restaurant, and then the third count accused them of the delivery or placement of explosives at the Makindye House.

The second charge, in which **A1** to **A12** have jointly been charged in one Count, is the offence of belonging to a terrorist organization c/s 11 (1) (a) of the Anti Terrorism Act 2002. The particulars of the charge state that between the years 2006 and 2010, **A1** to **A12** belonged to Al-Shabaab, which is stated to be an affiliate of Al-Qaeda listed under the Anti Terrorism Act 2002 as a terrorist organization. Third, **A1** to **A12** have jointly been charged, in 76 Counts, with the offence of murder c/s sections 188 and 189 of the Penal Code Act. The particulars of the offence in each of these counts state that **A1** to **A12** are responsible for causing the death, with malice aforethought, of the respective persons named in each of the counts. Each of the counts name either Kyadondo Rugby Club, or Ethiopian Village Restaurant, as the place each of the murders, for which **A1** to **A12** are charged, took place.

Fourth, **A1** to **A12** have jointly been charged, in 10 Counts, with the offence of attempted murder c/s section 204 of the Penal Code Act. The particulars of the offence state that they attempted the murder of ten persons; and in each of the counts, either Kyadondo Rugby Club, or Ethiopian Village Restaurant, is named as the place each of the attempted murders charged took place. Fifth, **A13** has been charged alone, in two counts, with the offence of being an accessory after the fact c/ss 28(1) and (29) of the Anti Terrorism Act 2002. The

particulars of the charge in the first count is that in the month of July 2010, **A13** received Idris Nsubuga, who to his knowledge had committed an offence of terrorism, and assisted him in order to enable him to escape.

The particulars in the second count of the offence is otherwise the same; save that therein the person **A13** is alleged to have received with the knowledge that he had committed the offence of terrorism, and assisted in order to enable to escape, is named as Hassan Haruna Luyima. Finally, **A12** has been charged alone, in one Count, with the offence of aiding and abetting terrorism c/s 8 of the Anti Terrorism Act 2002. The particulars of the charge are that in various places in Uganda, **A12** aided and or abetted and rendered support to Al-Shabaab group, knowing and or having reason to believe that the support rendered would be applied and used for, or in connection with, the preparation and or commission of acts of terrorism; to wit, the July 2010 Kampala twin bombings.

Court explained to each of the Accused persons the respective offences, with which each of the Accused persons has, either jointly with others, or alone, been charged. Each of the Accused persons expressed to Court that they had understood the charges as explained to them. However, they each made a categoric denial of any involvement whatsoever in each of the offences with which they have been charged; and accordingly, the Court entered a plea of 'Not Guilty' with regard to each of them. This therefore necessitated the conduct of a full-blown trial; which this Court carried out.

BURDEN OF PROOF

In law, it is incumbent on the Prosecution to prove the guilt of the Accused person as charged. This burden of proof perpetually rests on

the Prosecution, and does not shift to the Accused person; except where there is a specific statutory provision to the contrary (see ***Woolmington vs D.P.P. [1935] A.C. 462***, and ***Okethi Okale & Ors. vs Republic [1965] E.A. 555***). However, in none of the several charges brought against the Accused persons herein does the burden shift to them to prove their innocence. Second, the standard or threshold required to prove the case against the Accused person is that the proof must be beyond reasonable doubt. This does not necessarily mean proof with utmost certainty, or 100% proof. Nonetheless, the standard is met only when, upon considering the evidence adduced, there is a high degree of probability that the Accused in fact committed the offence.

There is a host of decisions, which I am citing hereunder, where Courts have pronounced themselves on the issue of the burden and standard of proof required to establish the guilt of an Accused person. I will seize the benefit of these authorities to guide me on the matter of burden and standard of proof; and, thus, enable me reach a just decision in the instant matter before me. In ***Miller vs Minister of Pensions [1947] 2 All E.R. 372*** at page 373 to page 374, Lord Denning stated quite succinctly that:–

> *"The degree of beyond reasonable doubt is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with a sentence: 'of course it is possible but not in the least probable', the case is proved beyond reasonable doubt; but nothing short of that will suffice."*

In ***Andrea Obonyo & Ors. V. R. [1962] E.A. 542***, the Court stated at p. 550 as follows:

> *"As to the standard of proof required in criminal cases* ***DENNING, L.J.*** *(as he then was), had this to say in* ***Bater v. Bater [1950] 2 All E.R.*** *458 at 459:*
>
> > *'It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases, the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear.'*
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> *That passage was approved in* ***Hornal v. Neuberger Products Ltd. [1956] 3 All E.R. 970,*** *and in* ***Henry H. Ilanga v. M. Manyoka [1961] E.A. 705 (C.A.).*** *In* ***Hornal v. Neuberger Products Ltd., HODSON, L.J.****, cited with approval the following passage from* ***KENNY'S OUTLINES OF CRIMINAL LAW*** *(16th Edn.), at p. 416:*
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> > *'A larger minimum of proof is necessary to support an accusation of crime than will suffice when the charge is only of a civil nature. ... in criminal cases the burden rests upon the prosecution to prove that the accused is guilty 'beyond reasonable doubt'. When therefore the case for the prosecution is closed after sufficient evidence has been adduced to necessitate an answer from the defence, the defence need do no more than show that there is reasonable doubt as to the guilt of the accused. See* ***R. v. Stoddart (1909) 2 Cr. App. Rep. 217*** *at p. 242.*
>
> > *... ... ...* [I]*n criminal cases the presumption of innocence is still stronger, and accordingly a still higher minimum of evidence is*

required; and the more heinous the crime the higher will be this minimum of necessary proof.

Where, on the evidence adduced before Court, there exists only a remote possibility of the innocence of an Accused person, it would mean the Prosecution has proved its case beyond reasonable doubt; hence, the Prosecution would have conclusively discharged the burden that lay on it to prove the guilt of the Accused. In ***Obar s/o Nyarongo v. Reginam (1955) 22 E.A.C.A. 422*****,** at p. 424 the Court held that:

"We think it apt here to cite a passage from the recent Privy Council case of ***Chan Kau v. The Queen (1952) W.L.R. 192.*** *... At p. 194* ***Lord Tucker*** *said this:*

'Since the decision of the House of Lords in ***Woolmington v. Director of Public Prosecutions (1935) A.C. 462;*** *and* ***Mancini v. Director of Public Prosecutions 28 C.A.R. 65;*** *it is clear that the rule with regard to the onus of proof in cases of murder and manslaughter is of general application and permits of no exceptions save only in the case of insanity, which is not strictly a defence.'"*

In ***Okethi Okale v. R. [1965] E.A. 555***, the trial judge had misdirected himself on the onus of proof; and made remark on the defence evidence, stating that:

"I have given consideration to this unsworn evidence but I do not think it sufficient to displace the case built up by the prosecution or to produce a 'reasonable doubt'."

On appeal, the Court responded at p. 559 as follows:

"We think with respect that the learned judge's approach to the onus of proof was clearly wrong, and in ***Ndege Maragwa v. Republic***

(1965) E.A.C.A. Criminal Appeal No. 156 of 1964 *(unreported), where the trial judge had used similar expressions this court said:*

> *"... we find it impossible to avoid the conclusion that the learned judge has, in effect, provisionally accepted the prosecution case and then cast on the defence an onus of rebutting or casting doubt on that case. We think that is an essentially wrong approach: apart from certain limited exceptions, the burden of proof in criminal proceedings is throughout on the prosecution. Moreover, we think the learned judge fell into error in looking separately at the case for the prosecution and the case for the defence.*
>
> *In our view, it is the duty of the trial judge ... to look at the evidence as a whole. We think it is fundamentally wrong to evaluate the case for the prosecution in isolation and then consider whether or not the case for the defence rebuts or casts doubt on it. Indeed, we think that no single piece of evidence should be weighed except in relation to all the rest of the evidence. (These remarks do not, of course, apply to the consideration whether or not there is a case to answer, when the attitude of the court is necessarily and essentially different.)" (**emphasis added**).*

In the two combined appeal cases of ***R. v. Sharmpal Singh s/o Pritam Singh; & Sharmal Singh s/o Pritam Singh v. R. [1962] E.A. 13***, the Privy Council had to decide whether the accused strangled his wife under culpable circumstances or in an act of excessive sexual embrace. It stated at p. 15, that the prosecution:

> *"... not only had to dispose of the defence set up but had also to prove that the evidence adduced by the prosecution was consistent*

only with murder. ... It is now well established by a series of authorities, of which ***Mancini v. the Director of Public Prosecutions [1942] A.C. 1****, is the first and still the best known, that it is the duty of the judge to deal with such alternatives if they emerge from the evidence as fit for consideration, notwithstanding that they are not put forward by the defence. This may impose a heavy burden on the judge when, as in the present case, attention is concentrated by the defence on quite different issues."*

In ***Abdu Ngobi vs Uganda, S.C.Cr. Appeal No. 10 of 1991***, the Supreme Court expressed itself as follows; with regard to treatment of evidence:

"Evidence of the prosecution should be examined and weighed against the evidence of the defence so that a final decision is not taken until all the evidence has been considered. The proper approach is to consider the strength and weaknesses of each side, weigh the evidence as a whole, apply the burden of proof as always resting upon the prosecution, and decide whether the defence has raised a reasonable doubt. If the defence has successfully done so, the accused must be acquitted; but if the defence has not raised a doubt that the prosecution case is true and accurate, then the witnesses can be found to have correctly identified the appellant as the person who was at the scene of the incidents as charged."

I should however point out that while it is advisable and useful for the defence to cause a reasonable doubt to hang over the prosecution case, by punching a hole, or laying bare the deficit, in the case, this does not arise in every case. It only does so where the prosecution has presented a fairly strong case that may need an explanation from the Accused. This does not amount to shifting the burden of proof to the Accused; as the burden lies perpetually on the Prosecution to prove the guilt of an Accused person beyond reasonable doubt. In ***Byamungu***

s/o Rusiliba v. Rex (1951) 18 E.A.C.A. 233, the Court considered the defence of alibi put up by the defence, which the trial Court had rejected as untrue, the appellate judges did not question it; but, with regard to the burden of proof, they said this, at p. 237: –

> *"...the essential question is not the truth or untruth of the defence, but whether the case for the prosecution was proved beyond reasonable doubt, and after a very careful consideration of the record, we are not satisfied that it was."*

Proof of guilt may be established through direct, or circumstantial, evidence. Direct evidence ordinarily means evidence of events as witnessed by any of the five senses; namely sight, touch, smell, taste, and hearing. On circumstantial evidence, the law is that it may in fact offer the best evidence; and may prove a case with the certainty or precision of mathematics. However, for circumstantial evidence to prove a case beyond reasonable doubt, it must irresistibly point to the guilt of the Accused person. Hence, inference of guilt, from circumstantial evidence, is only justified when the inculpatory facts are incompatible with the innocence of the Accused; and must be incapable of explanation upon any other reasonable hypothesis than that of guilt. Furthermore, there must be no co–existing circumstance that would weaken or altogether negate the inference of guilt.

For Court to place reliance on circumstantial evidence, it is enjoined to consider the totality of the evidence adduced before it. This requires taking a holistic consideration of the entire evidence adduced; and not a selective approach that considers pieces of evidence in isolation from the other pieces of evidence relevant for the determination of the issue at hand. Further, the direct or circumstantial evidence relied upon, as having proved the prosecution case, must be evidence adduced before Court; and not any material or

fact extraneous to the trial. However relevant or material a piece of evidence may be, if it has not been adduced and canvassed at the trial and subjected to the requisite scrutiny, such evidence remains extraneous matter; and is of no probative or evidential value at all in the determination of the case against the Accused person.

In the ***Okethi Okale v. R.*** case (supra), the trial judge had come up with a theory inconsistent with the actual evidence adduced in support of the prosecution case on how the fatal injury had been caused; and he is quoted at p. 557 to have stated thus: –

> *"This is a case in which reasoning has to play a greater part than actual evidence."*

On appeal, the Court responded tersely as follows: –

> *"With all due respect to the learned trial judge, we think that this is a novel proposition, for in every trial a conviction can only be based on actual evidence adduced and not on any fanciful theories or attractive reasoning. We think it is dangerous and inadvisable for a trial judge to put forward a theory of the mode of death not canvassed during the evidence or in counsel's speeches (see* ***R. vs Isaac [1965] Crim. L.R. 174****)."*

Pursuant to this position of the law on evidence which is applicable and admissible, I had to administer a serious warning to the lady and gentleman assessors, and in the same vein do hereby warn myself, regarding the most heinous and gruesome murder of Ms Joan Kagezi, hitherto the lead Prosecution Counsel in this trial. This wanton and diabolical felony, shook the entire country, and disrupted the trial for quite a while. Abhorrent and tragic as it surely is, it must not in any way have influence on the Court or the assessors in the exercise of their sworn duty to accord each of the thirteen persons standing trial

before this Court a just and fair trial, as is required by law. I must add here that this position would not change even if it were to emerge that investigations had established that anyone, or all, of the Accused persons herein was, or were, behind that most horrendous act.

Any revelation that any of the Accused persons was responsible for that evil deed would instead give rise to a separate trial altogether. The murder having occurred in the course of her prosecuting the thirteen persons standing trial before me, it would gravely offend the principle of fair trial for me, or the assessors in this trial, to take charge of the conduct of the other trial. However just, the present assessors and I might be, in conducting the other trial, if however any conviction results there from, it is self–evident that there would be a most unfortunate indelible and pervasive perception that justice would not have been done. The Court and the assessors in this trial must therefore wholly disabuse themselves of any influence, which this repugnant deed might have had on them; and instead rely strictly on the evidence adduced before this Court during the trial.

OFFENCE OF BELONGING TO A TERRORIST ORGANISATION

I think it makes sense to dispose of the second charge – that of belonging to a terrorist organisation – first. In the course of summing up to the assessors, I directed them not to bother to advise me on that charge; as on a point of law, I had made up my mind to strike the charge from the indictment. I am fully aware that both the prosecution and the defence had canvassed the matter and made submissions thereon. However, because my decision thereon is based strictly on law, I thought it improper to have the assessors advise me on it. Section 2 (The Interpretation Section) of the Anti Terrorism Act provides that '*terrorist organization*' means an organization specified in the 2nd Schedule to the Act. This is a restrictive provision, which

would exclude even the most notorious of the known terrorist organizations, for not being listed in the 2nd Schedule to the Act.

Similarly, section 11 of the Anti Terrorism Act prescribes that a person who belongs, or professes to belong, to a terrorist organization commits an offence. However, section 10 (1) of Anti Terrorism Act provides that the organizations specified in the 2nd schedule to the Act are declared to be terrorist organizations; and adds that: –

> "*any organisation passing under a name mentioned in that Schedule shall be treated as terrorist organisation whatever relationship (if any) it has to any other organisation bearing the same name*".

Section 10 (6) of the Act provides that in the section, *"organisation" includes any association or combination of persons.*"

The key words in section 11 of the Act are: '*belonging*' or '*professing to belong*' to a listed terrorist organization. Therefore, to merely '*profess to belong*' to a listed terrorist organization would suffice to have such a person charged with commission of the offence of belonging to a terrorist organization. The ingredients of the offence are: –

(i) Existence of a terrorist organization.
(ii) The terrorist organization must be listed in the Act.
(iii) The Accused person must belong, or profess to belong, to a terror organization listed in the 2nd Schedule to the Act.

Ingredient (i)
(Existence of a terrorist organisation)

I find it preferable not to refer to the evidence of PW1, **A3**, and **A4**, on the matter; and will accordingly restrict myself to the evidence of PW78 that Al-Shabaab had threatened to attack Uganda; and that it

claimed responsibility for the Kampala bombings. In addition to the link between Al-Shabaab and Al-Qaeda, as was brought out by the prosecution, I should point out that it is well established in the public domain that Al-Shabaab is an organization that uses unconventional means to achieve its cause. This is evident from the multiple acts in the region, attributed to them, which target non-combatants or the soft underbelly of society. I therefore think it proper to take judicial notice of that fact. However, that is only part of the requisite ingredients for bringing Al-Shabaab within the specification of terrorist organization; as is spelt out in the Anti Terrorism Act.

Ingredient (ii)

(Organisation to be listed in the 2nd Schedule to the Act)

In 2010 when the Kampala bombings took place, Al-Shabaab was not among the organizations listed in the 2nd Schedule to the Anti Terrorism Act as terrorist organizations. However, by 2010, Al-Qaeda was listed in the 2nd Schedule to the Anti Terrorism Act, as a terrorist organization. The Prosecution referred me to some selected authoritative published works, for my consideration, to guide me to reach a finding that Al-Shabaab was one of the organizations listed in the 2nd Schedule to the Act by reason of the fact that it had a close association with Al-Qaeda. First, is '***World Terrorism: An Encyclopaedia of Political Violence from Ancient Times to Post 9/11 Era' (2nd Edn., Vol. 1 – 3; Routledge, at p.444)***, where James Cimens states that:-

> *"Al-Shabaab is a self-declared ally of Al-Qaeda; having sworn allegiance to Al-Qaeda leader Osama Bin Laden in September 2009, and then establishing formal alliance in February 2010."*

Second, '***Al-Shabaab in Somalia: The History and Ideology of a Militant Islamist Group; 2005 – 2012; Oxford University Press, p.45***', where Stig Jarle Hansen, after an extensive and well considered analysis of the Al-Shabaab as

an organization, concludes that Al-Shabaab is an ally of Al-Qaeda. He states therein that:-

> *"Al Shabaab is more than a product of insecurity. It is the export of Al Qaeda's ideology of Global Jihad in Somalia."*

Third, is the document intituled ***'Al-Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for US Policy' (Report of the Congressional Research Service to Congress; dated Feb. 5th 2010, p.19 – 20).***

From these literary and official works, the prosecution submitted quite strongly that there in an association between Al-Qaeda and Al Shabaab. It identified such key phrases as *'Al-Shabaab is an export of the Al-Qaeda ideology of Global Jihad in Somalia'*; *'Al-Shabaab has been an affiliate of Al-Qaeda since 2005'*; *'Al-Shabaab swore allegiance to Al-Qaeda's Osama bin Laden in September 2009'*; *'Al-Shabaab leadership made a formal alliance with Al-Qaeda in February 2010'*; *'Al-Shabaab is a self-declared ally of Al-Qaeda'*, to mean that Al-Shabaab is in fact part of Al-Qaeda; and so, by reason of that, it was a terrorist organization covered by the 2nd Schedule of the Act in 2010 when the Kampala attacks took place.

I must confess. I never had the time to read the works by these learned authors; so, I did not directly benefit from them. I had to rely on the quotations and submissions made by learned State Counsels. Fortunately, in their submissions on these works, State Counsels succinctly brought out the relationship or link between the Al-Shabaab and the Al-Qaeda. The key phrases, from these books, which characterize the link between the two organizations, are: *"Al-Shabaab being an affiliate of Al-Qaeda"*, *"Al-Shabaab having sworn allegiance to Al-Qaeda"*, *"Al-Shabaab leadership having made a formal alliance with Al-Qaeda"* and *"Al-Shabaab being a self declared ally of Al-*

Qaeda". Thus, the key and determinant words from these phrases are '*affiliate*', '*allegiance*', '*alliance*' and '*ally*'.

However, the relevant provisions of section 10(1) of the Anti Terrorism Act, with regard to the organizations specified in the 2nd Schedule to the Act, are that: –

> "*any organisation passing under a name mentioned in that Schedule shall be treated as terrorist organisation whatever relationship (if any) it has to any other organisation bearing the same name*".

It therefore follows that for an organization to qualify or be treated as belonging to a terrorist organisation within the meaning assigned to the term by the Act, it must either be listed in the 2nd Schedule to the Act, or alternatively pass under a name mentioned in that Schedule. Unfortunately, at the material time, Al–Shabaab was not listed in the 2nd Schedule to the Act, and did not pass under a name of any of the organizations listed in the said Schedule.

The ***Oxford Dictionary of English*** (2nd Edn., O.U.P.) defines the noun '*affiliate*', to mean: '*a person or organization officially attached to a larger body*'. It defines the noun '*allegiance*', to mean: '*loyalty or commitment to a superior or to a group or cause*'. It defines the word '*alliance*' to mean: 'a union or association formed for mutual benefit, especially between countries or organizations'. It defines the noun '*ally*' to mean: 'a person or organization that cooperates with or helps another in a particular activity'. Even if one applies the most liberal rule of construction, I am unable to see how any, of the references to Al–Shabaab being "*an affiliate of Al Qaeda*", "*having sworn allegiance to Al–Qaeda*", "*made a formal alliance with Al–Qaeda*" and "*a self–declared ally of Al–Qaeda*", with which the treatises cited have classified the relationship between the two organizations, could be

construed to mean Al-Shabaab was '*passing under the name*' of Al-Qaeda.

In the case of ***Noor Mohamed Jiwa v. Rex (1951)18 E.A.C.A. 155***, Court was confronted with the task of construing whether the word *'and'* was the same as *'or'* in the enactment. The Court referred to ***Maxwell on Interpretation of Statutes 9th (1946) Edition***, on how to avoid absurdity in giving effect to the intention of the legislature. It cited the passage on page 212 of the book, which stated as follows:-

> *"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence.*
>
> *This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, by altering their collocation, by rejecting them altogether, or by interpolating other words, under the influence, no doubt, of an irresistible conviction that the Legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language and really give the true meaning.*
>
> *Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. The rules of grammar yield readily in such cases to those of common sense."*

From a careful perusal of the wordings of section 10(1) of the Anti Terrorism Act, it is clear that the words do not in their ordinary

meaning and grammatical construction, lead to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship, or injustice, presumably not intended by the legislature. The words are quite clear, from their ordinary meanings, that it is either organizations listed in the 2nd Schedule to the Act, or those passing under the name of such organizations, that are covered by the term '*terrorist organization*' within the meaning assigned to that term by the Act. I therefore fail to see how the learned treatises cited above could qualify the Al-Shabaab as a terrorist organization within the meaning attached to the term *'terrorist organization'* by section 10 of the Act.

I believe it is organizations such as the Al-Qaeda in Yemen, Al Qaeda in the Islamic Maghreb, or any other organization passing under the name of a listed terrorist organization, even though they may in fact enjoy operational or strategic independence from the mainstream organization under whose name they pass, that are covered by the very clear and unambiguous provisions of the Act. It was, certainly, owing to the realization that no stretch of construction could bring the Al Shabaab under the 2nd Schedule to the Act, as it was then, that Parliament had to amend that Schedule to expressly include the Al-Shabaab as a terrorist organization; and thereby fulfil its intention.

It follows from the above, that the prosecution has failed to prove the charge against any of the accused, from **A1** to **A12**, of belonging to a terrorist organization in contravention of the Anti Terrorism Act. Having found that the provision in the Act, regarding terrorist organization, does not cover Al-Shabaab, which the Accused persons are charged with having belonged to, I find it pointless to determine whether, or not, the accused persons were members of a terrorist organization; which is the third ingredient of the offence. I take

cognizance of the fact that, under the Act, the offence of terrorism is not limited to '*belonging to a terrorist organization*' within the meaning assigned to it by the Act. It also includes the commission of a terrorist act; without the need to belong to any organization at all.

The offence of committing a terrorist act, and that of belonging to a terrorist organization, are distinct and separate from, and as well independent of, each other; and neither of them is contingent on the other. In the event, I strike out the charge of belonging to a terrorist organization with which **A1** to **A12** have been jointly indicted.

THE OFFENCE OF TERRORISM

The ingredients, or what constitutes the offence, of terrorism are set out in section 7(2) of the Anti Terrorism Act; which provides that the offence is committed when a person:–

"for purposes of influencing the Government or intimidating the public or a section of the public and for a political, religious, social or economic aim, indiscriminately without due regard to the safety of others or property, carries out all or any of the following acts" (**emphasis added**).

These acts are then enumerated in section 7(2) (a) – (j) of the Act. Thus, the key provisions of section 7(2) of the Act, for consideration to determine the ingredients of the offence of terrorism are: –

(a) The purpose or purposes for carrying out the act or acts;

(b) The manner the act is, or acts are, carried out;

(c) The nature of the act that is, or acts that are, carried out.

In the three counts of terrorism in the indictment, the act for which the Accused persons have been charged, and which the Prosecution

was under duty to establish, is that contained in section 7(2) (a) of the Act; namely: –

"intentional and unlawful manufacture, delivery, placement, discharge or detonation of an explosive or other lethal device, whether attempted or actual, in, into or against a place of public use, a State or Government facility, a public transportation system or an infrastructure facility, with the intent to cause death or serious bodily injury, or extensive destruction likely to or actually resulting in major economic loss".

This is because section 7(2) of the Act provides expressly that the offence of terrorism is committed when a person carries out *"all or any"* of the acts set out in section 7(2) (a) – (j) of the Act. Accordingly then, the ingredients of the offence of terrorism contained in section 7(2) (a) of the Act, each of which the Prosecution was under duty to establish in order to prove the offence charged, are: –

(i) intentional and unlawful attempted or actual manufacture, delivery, discharge or detonation of explosive or lethal device, in, into, or against a place of public use, State or Government facility, a public transportation system or an infrastructure facility;

(ii) the intentional and unlawful attempted or actual perpetration of the act should be for the purpose of causing death, or serious bodily injury, or extensive destruction likely to or actually resulting in major economic loss;

(iii) the intentional and unlawful attempted or actual act is done for political, religious, social or economic aim;

(iv) intentional and unlawful attempted or actual perpetration of the act is indiscriminate, and done without due regard to safety of others or property;

(v) the intentional and unlawful attempted or actual perpetration of the act is done to influence Government, or intimidate the public or a section of the public;

(vi) the participation of the Accused persons in the attempted or actual perpetration of the act above.

Section 2 of the Anti Terrorism Act, defines *'explosive or other lethal device'* to mean: –

"(a) an explosive or incendiary weapon or device that is designed or has the capability to cause death, serious bodily injury or substantial material damage, or

(b) a weapon or device that is designed, or has the capability to cause death, serious bodily injury or substantial material damage through the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material."

On the other hand, section 1 of the Explosives Act (Cap. 298 Laws of Uganda – Revised Edn. 2000) defines *'explosives'* to mean, inter alia, every substance which is used with a view to produce a practical effect by explosion. Section 1 of the Firearms Act (Cap 299, Laws of Uganda – Revised Edn. 2000), defines ammunition to include grenades, bombs and cartridges, amongst other things.

THE EVIDENCE ADDUCED FOR THE OFFENCE OF TERRORISM.

Ingredient (i):–

'Intentional and unlawful attempted or actual manufacture, delivery, discharge or detonation of explosive or lethal device, in, into, or against a place of public use, State or Government facility, a public transportation system or an infrastructure facility'.

The prosecution adduced evidence that the twin explosions in Kampala and the placement of the unexploded bomb devices in the Makindye house were the consequence of an intentional manufacture, delivery, and detonation of lethal devices in places of public use. First, was the evidence of PW1 that the decision to attack Kampala was deliberate as it was hatched in Somalia by the Al-Shabaab, whose leaders handed the explosives over to them to deliver into Uganda. In **A3**'s confession, contained in his extrajudicial statement to PW3, he also made the same revelation, as PW1 did, that the decision to attack Uganda was made in Somalia; where the explosives used in the Kampala attacks originated from, and were ferried through Kenya.

PW2's testimony was that he took custody of the explosive devices at his Najjanakumbi rented residence, delivered some of the devices to the Kyadondo Rugby Club grounds, and from there detonated the devices by use of a phone call. **A3** in his extra-judicial statement to PW3 revealed that one Hanifa did the final wiring, and connection, of the explosive devices from his (**A3**'s) Namasuba rented residence. PW2, in his testimony, and **A3**, as well as **A4**, revealed in their extra-judicial statements, that they engaged in the identification of public places in Kampala best suited for the placement and detonation of the explosives devices. They identified the Kyadondo Rugby Club, Ethiopian Village Restaurant, and Makindye House, as the public places that were suitable for the purpose of the Uganda mission.

It is certainly evident that PW1 and PW2 were accomplices in the commission of the offence of terrorism; while **A3** and **A4** retracted their confessions contained in their respective extra-judicial statements. I did warn the assessors of the danger in acting on the uncorroborated accomplice evidence of PW1 and PW2, as well as the retracted extrajudicial statements of **A3** and **A4**. However, I pointed

out to them that even in the absence of evidence in corroboration, they and Court may nevertheless place reliance on the accomplice, or retracted evidence, and convict the Accused; as long as, after a proper consideration of the accomplice or retracted evidence, they and the Court are satisfied that such evidence is in fact credible.

The various witnesses, who were either at Kyadondo Rugby Club or at Ethiopian Village Restaurant when the explosives went off, all attest to the fact that the explosives were placed in the midst of people who had gathered for the final game of the World Cup; and the number of fatalities, and injured victims, evidences this. PW17, PW18, PW41, and PW42 who saw the unexploded device at the Makindye House, testified that the device was placed in a restaurant/bar; which is definitely a public place by any account. These pieces of evidence provide the requisite corroboration of the evidence of PW2, and the retracted confessions in the extra-judicial statements of **A3** and **A4**, that the explosive devices were deliberately placed in places of public use to ensure maximum impact.

Ingredient (ii):-

'The intentional and unlawful attempted or actual perpetration of the act should be for the purpose of causing death, or serious bodily injury, or extensive destruction likely to or actually resulting in major economic loss'.

PW2 testified that he and **A3** surveyed various places in Kampala for the intended attack (e.g. Bohemia Pub Munyonyo, which however **A3** rejected on grounds that few people gathered there, so attacking it would only achieve minimal impact). PW2 also testified that the Somali suicide bomber, wearing his belt and explosives, seated himself in the midst of the people gathered at the Kyadondo Rugby

Club watching the final of the world cup. He (PW2) himself had also wanted to take the bomb, he had intended to detonate, in the midst of the people gathered; but he forgot with it on a table at the entrance where those entering were being subjected to a security check before entry. He was not able to shift it to the place he had intended to take it; so he left the bomb at the entrance, from where he detonated it by making a call from a distance as he had been instructed to do.

Various prosecution witnesses such as Kigundu Yususf (PW7), David Coleb Muwemba (PW9), Nakato Bonita (PW21), were revelers at the Kyadondo Rugby Club. Similarly, Muzamir Ramadhan (PW8), and Francis Mugoya (PW20) were revelers at Ethiopian Village Restaurant. They all witnessed the explosions at the two places, first hand; and gave evidence painting a sordid and heart–rending picture of total devastation, deaths, and grave injuries at each of the two places. Police officers SP Kagarura Herbert (PW10), ASP Namukasa Prossy (PW11), AIP Tagoya Bernard (PW13), SP Chemonges (PW14), D/AIP Icoot Robert (PW68), and D/SP Pius Can'ingom (PW69), who either witnessed the blasts first hand, or responded thereto immediately, testified to how nasty, gruesome, devastating, harrowing, and traumatizing the two scenes, littered with dead bodies and injured persons, were.

The Mulago Hospital pathologist (PW32), testified to having received bodies, including the head of a male person (*exhibit PE104*), and amputated limbs; and from the light complexion, and curly hair, he was of the opinion that the probable origin of the person whose body this was, could be the Horn of Africa. He also examined the head of a person of dark skinned complexion (*exhibit PE105*) and two legs of the same complexion. There was no torso for both heads and limbs; and he stated the cause of death to have been devastating blast injuries. D/AIP Aluma Charles (PW33) who was the mortuary attendant at

Mulago Hospital also testified to having received a total of 75 (seventy five) bodies on the night of the blasts; and witnessed several post mortem examinations by doctors on the dead bodies.

The FBI Special Agent (PW35) who examined various items (*exhibits PE185 to PE277*) recovered from the Kyadondo Rugby Club, Ethiopian Village Restaurant, and Makindye House, revealed in his report (*exhibit PE109*) that he found them to be improvised explosive devices (IEDs) of similar build, functioning, and detonation impact. The manner of their construction including the materials used, and the chemical compounds used in them were strikingly similar. He compared these items with those recovered from Somalia, which he had also examined, and found them to be extensively similar in build, materials and chemical compounds used, manner of construction, fusing system, and mode of functioning.

Police officer IP Kigenyi Saad (PW41), a bomb expert, rendered the object found at the Makindye House, safe; and established that components of the object were an electric detonator, two packs of ball bearings of various designs, a powdered substance, and a mobile phone. All were contained in specially designed vests. Police officer IP Okurut Vincent (PW42) also visited the Makindye House scenes and saw what PW41 has described; which he exhibited at Katwe Police Station, together with other items recovered from that scene. Joseph Buzoya (PW17), and D/Sgt. Isaac Namwanza (PW18), who saw the explosive devices discovered at the Makindye House, attested to their lethal nature.

It is quite evident from the several pieces of evidence above that whoever placed the explosive devices in these public places, and or detonated them, knew that death or serious bodily injuries were most probable; if not inevitable. The evidence above attest to the fact that

the explosives were strategically placed in the midst of the gathered public; as evidenced by the concentration and nature of the injuries suffered by the victims, and the evidence of PW17, PW18, PW41, and PW42 that the unexploded device found at Makindye House was placed in a restaurant/bar. The devices used comprised ball bearings and other explosives with capacity for serious impact. These provide the requisite corroboration of the evidence by PW2 that the explosive devices were deliberately placed in places of public use to ensure maximum and indiscriminate impact (causation of injuries and death).

Ingredient (iii):-

'The intentional and unlawful attempted or actual act is done for political, religious, social or economic aim'.

PW1 testified that Al-Shabaab was a movement of Muslims for Jihad; and further that the planned attack on Uganda was in response to Uganda's deployment of troops in Somalia to fight the Al Shabaab. **A3** in his extra judicial statement to PW3 also explained that the attack ordered on Uganda was intended to compel Uganda Government to withdraw her troops from Somalia (AMISOM). PW2 testified that he was recruited by **A3** who urged him to support Al-Shabaab Jihad as a religious obligation; and that the intended attack on Uganda was to punish her for deploying troops in Somalia to fight Al-Shabaab. PW78 (Director Counter Terrorism) testified that Al Shabaab had, earlier, threatened to attack Uganda; and when the Kampala blasts of 2010 took place, Al-Shabaab claimed responsibility for them.

Ingredient (iv):-

'Intentional and unlawful attempted or actual perpetration of the act is indiscriminate; and done without due regard to safety of others or property'.

PW2 testified that **A3** preferred a place with many people whether Ugandans or not; and approved of Kyadondo Rugby Club because of the many people using it, as this would cause more impact. He (PW2) went with **A4** and identified Ethiopian Village Restaurant and Link Discotheque Makindye. He delivered explosives in the public place in the Kyadondo Rugby Club. He testified further that the Somali suicide bomber, donned in the jacket containing explosives, sat in the midst of people at Kyadondo Rugby Club; and that both of them detonated their explosives from there. Joseph Buzoya (PW17), and Police Officers No. 19259 D/Sgt Isaac Namwanza (PW18), I.P. Kigenyi Saad (PW41), and S.P. Vincent Okurut (PW42), all testified that the bomb found in the Makindye House was placed in a bar and restaurant.

Places such as bars, restaurants and other places where people hang out are public places. They are visited by people of all nationalities, races, occupations and station in life, political beliefs, and religious affiliations; and so, the delivery or placement of explosives in such places and detonating them would most certainly be intended to, and actually, achieve the widest and most indiscriminate impact. This was clearly the intention behind the placement of the explosives at Kyadondo Rugby Club, and Ethiopian Village Restaurant where the perpetrators of the evil deed knew all categories of people would converge to watch the final game of the World Cup being staged in South Africa that time; and the Makindye House Restaurant, which was apparently a popular destination.

Ingredient (v) :-

'The intentional and unlawful attempted or actual perpetration of the act is done to influence Government, or intimidate the public or a section of the public'.

PW1's testimony was that the plan hatched in Somalia to attack Uganda was in response to her having deployed troops in Somalia to fight the Al-Shabaab. PW2 testified that **A3** who recruited him into the mission had told him that the reason for the intended attack on Uganda was because of the deployment of Ugandan troops in Somalia, where they have fought against the Al-Shabaab. **A3** himself disclosed, in his extra-judicial statement to PW3, that the blasts in Kampala were perpetrated in order to punish, and compel, Uganda to withdraw her troops from Somalia where they have been deployed and have fought against the Al-Shabaab.

Ingredient (vi): -
'Participation of each of the Accused persons'

The Accused are charged jointly with the offence of terrorism. In determining whether or not they have played any role in the crimes charged, section 19 of the Penal Code Act, which provides on the principles of criminal responsibility, and is self-explanatory, will be applicable. It provides as follows: -

"(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it-

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence.

(2) Any person who procures another to do or omit to do any act of such nature that if he or she had done the act or made the omission the act or omission would have constituted an offence on his or her part is guilty of an offence of the same kind and is liable to the same punishment as if he or she had done the act or made the omission; and he or she may be charged with doing the act or making the omission."

DOCTRINE OF COMMON INTENTION

(Joint offenders in prosecution of common purpose)

Similarly, since the Accused are charged jointly for the commission of the same offence, the doctrine of common intention has to be considered. Section 20 of the Penal Code Act provides as follows: –

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence."

The overriding element, here, is that for the accused persons to be considered as joint offenders, there must be proof that they had formed a common intention, either before or in the course of events, to prosecute an unlawful purpose in conjunction with one another. In this regard, what is required is evidence tending to show that the individual accused person was in fact part of, and active in a group of two or more people; sharing a common purpose, with the other or others, in the execution or perpetration of the criminal enterprise.

In the case of ***Ismael Kisegerwa & Anor. vs Uganda; C.A. Crim. Appeal No. 6 of 1978***, the Court gave an authoritative explanation on the doctrine of common intention as follows: –

> *"In order to make the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose, which led to the commission of the offence. If it can be shown that the accused persons shared with one another a common intention to pursue a specific unlawful purpose, and in the prosecution of that unlawful purpose an offence was committed, the doctrine of common intention would apply irrespective of whether the offence committed was murder or manslaughter.*
>
> *It is now settled that an unlawful common intention does not imply a pre–arranged plan. Common intention may be inferred from the presence of the accused persons, their actions, and the omission of any of them to disassociate himself from the assault ... it can develop in the course of events though it might not have been present from the start. ... it is immaterial whether the original common intention was lawful so long as an unlawful purpose develops in the course of events. It is also irrelevant whether the two participated in the commission of the offence. Where the doctrine of common intention applies, it is not necessary to make a finding as to who actually caused the death.*"

In ***Abdi Alli v. R (1956) 23 E.A.C.A. 573***, the Court of Appeal held at p. 575 that:

> *"... the existence of a common intention being the sole test of joint responsibility it must be proved what the common intention was and that the common act for which the accused were to be made*

responsible was acted upon in furtherance of that common intention. The presumption of common intention must not be too readily applied or pushed too far."

... ...

It is only when a court can, with some judicial certitude, hold that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with others in order to bring about that result that this section [of the Penal Code] *can be applied."*

(i) <u>Participation of Issa Ahmed Luyima</u> (A3)

The Prosecution adduced evidence intended to prove the participation of each of the Accused persons in the offence charged. I will not necessarily follow the chronological order of the listing of the Accused persons. Regarding Issa Ahmed Luyima (**A3**), Mamoud Mugisha (PW1) testified that he and others were in Somalia in Al-Shabaab camps with **A3** whom he knew then by the name Baseyevu. They received military training together from there; and fought battles together in Somalia. He and **A3** were identified by the Al-Shabaab leadership and sent together on a mission to plan attacks on Kampala, after they had been given special training for that purpose. He identified and rented a house at Nakulabye for the purpose; but **A3** rejected it, fearing the security personnel guarding a government Minister who was resident nearby. Instead, **A3** rented another house at Para Zone Namasuba.

Idris Nsubuga (PW2), for his part, testified that **A3** recruited him in the scheme to carry out attacks in Kampala; and that he and $\mathbf{A_3}$ surveyed various locations in Kampala for the intended attacks. Out of these, **A3** approved of Kyadondo Rugby Club. He also testified that **A3** phoned

him to wait for, and receive, items which had been brought into Uganda from Nairobi; and later, **A3** and **A10** delivered a sealed green bag at his (PW2's) home in Najjanakumbi. After this, **A3** booked a room for **A10** in Naigara Hotel, using the fictitious name of Moses. **A3** later showed him the items in the bag that he (**A3**) and **A10** had delivered to his (PW2's) Najjanakumbi house, and identified them as explosives; and then he **A3** took them away to his house at Para Zone Namasuba.

He further testified that in the Namasuba house, **A3** kept the two persons who later exploded the bombs at Kyadondo Club and Ethiopian Village Restaurant as suicide bombers. His further evidence was that the final wiring or connection of the explosives was done from **A3**'s Namasuba house; and that **A3** explained to him his role in the detonation of the explosives. **A3** told him that he feared he would be arrested if the intended bombings took place when he was in Kampala; so, he left Kampala for Kenya the day before the bombings took place. After the bombings, **A3** sent money to him (PW2) from Mombasa through Biashara Forex Bureau, with instructions to him (PW2) to remove **A3**'s properties from, and vacate, the Namasuba house. **A3** also sent him money from Mombasa for bailing out PW1.

However, **A3** vehemently refuted the allegation in the charge; and denied the allegations PW1 and PW2 made against him that he had involved himself in the acts of terrorism, with which he has been indicted, and has stood trial. He contended that the prosecution has wrongly painted him as the architect of the Kampala attacks; and he labeled PW1 as a self–confessed liar. He pointed out that there was no evidence in corroboration of PW1's evidence regarding his **A3**'s and PW1's alleged exploits under the Al–Shabaab in Somalia together with other persons. He claimed that he had once, spent a night at PW2's home; so, this could possibly explain the FBI's finding of the presence

of his DNA on the mattress cover recovered from PW2' home. He denied that he ever booked for accommodation at Naigara Hotel.

He also denied that he has ever gone by the name Moses Huku; and challenged the prosecution for not retrieving and producing in evidence the e-mail communication, which PW2 claimed the two of them had exchanged in the aftermath of the Kampala blasts, while using one password. He however admitted that he knew PW2; and also conceded that he was arrested from Mombasa. PW1 and PW2 were clearly accomplices in the crime of terrorism with which **A1** to **A12** herein have been indicted. Section 132 of the Evidence Act (Cap. 6 Laws of Uganda, 2000 Edn.) provides as follows:-

> *"An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."*

The import of this provision is that Court can, acting solely on the evidence of an accomplice, convict an accused person; even in the absence of evidence corroborating that of the accomplice, as long as the Court warns itself and the assessors of the danger in acting or relying on the uncorroborated evidence of an accomplice. In the case of ***Rasikial Jamnadas Davda vs Republic [1965] E.A. 201***, at p. 2017, the Court laid down the rule as to who an accomplice is, as follows: -

> *"We think that the question whether Fatehali was an accomplice can shortly be determined by reference to the decision in the well known case of* ***Davies vs Director of Public Prosecutions [1954] 2 W.L.R. 343; [1954] 1 All E.R. 507;*** *which has been applied by this Court in numerous cases ever since it was decided. In that case the House of Lords defined the word 'accomplice', and in the opinion of Lord*

Simonds, L.C., the natural and primary meaning of the term covers witnesses called for the prosecution who are:

> *'participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies), or persons committing, procuring or aiding and abetting (in the case of misdemeanours)'.*

*Having defined the term 'accomplice', the Lord Chancellor posed the question, who is to decide or how is it to be decided, whether a particular witness was 'a participes criminis'? he answered the question thus (**[1954] 2 W.L.R. at p. 353**):*

> *'In many or most cases this question answers itself, or, to be more exact is answered by the witness in question himself, by confessing to participation, by pleading guilty to it, or by being convicted of it. ... ... and a judge should direct* [the jury] *that if they consider, on the evidence, that the witness was an accomplice, it is dangerous for them to act on his evidence unless corroborated, though it is competent for them to do so if, after that warning, they still think fit to do so.'"*

In ***The King vs Baskerville [1916] 2 K.B. 658***, the Court held that there is no doubt the uncorroborated evidence of an accomplice is admissible in law. In ***Nassolo vs Uganda [2003] 1 E.A. 177***, the Court restated the position that a judge must warn himself and the assessors of the dangers in relying on the uncorroborated evidence of an accomplice; but having done that, the Court may convict if satisfied of the strength of the uncorroborated evidence. In the instant case before me, both PW1 and PW2 admitted in their sworn testimonies that they participated in the commission of the offence of terrorism at different stages. Indeed, when he was indicted of this offence, I convicted PW2

on his own plea of guilty when he confessed to having played a central role in perpetrating the crime. He testified at the trial while serving a twenty–five year sentence I had earlier imposed on him.

He did not seek to exculpate himself in any way, from any wrongdoing in the commission of the offence. PW1 was only charged with the offence of conspiracy to commit the offence of terrorism. However, at the trial, after having served his sentence, he still fully maintained his culpability in the offence of terrorism, which he had admitted in his extra–judicial statement; and this, notwithstanding that he had not been charged with that offence but instead of the lesser offence of conspiracy. I believe the testimonies of PW1 and PW2 in this regard; owing to their consistence right from their respective extra–judicial statements up to their sworn testimonies in Court. Furthermore, they have not at all sought to exculpate themselves from participation in the commission of the offence of terrorism.

To the contrary, they both fully incriminated themselves as participants in the offence; and in doing so, they had nothing to gain personally. If anything, PW2 consistently manifested his remorse and expressed his plea for forgiveness; as is evidenced by his confession in his extra–judicial statement, his plea of guilt at the commencement of the trial, and when he appeared as a prosecution witness at the trial. He firmly expressed his wish to see that justice is done to the victims of his most regrettable acts; and in this regard, from his demeanour, I found him to be quite genuine and persuasive. Nevertheless, notwithstanding that I have found both PW1 and PW2 to be credible witnesses, they are, without doubt, accomplices in the crimes for which **A1** to **A12** have been indicted; and so, I am bound to treat their evidence with the greatest caution, as is required of me.

I find useful guidance for this, in the case of ***Uganda vs Khimchand Kalidas Shah & 2 Ors [1966] E.A. 30***, where the trial Magistrate had first believed the witness; then looked for corroboration of the evidence. The High Court, on appeal, held that the trial Magistrate had '*put the cart before the horse*' by believing the witness before any corroboration. However, on a second appeal, the Court disagreed with the view expressed by the High Court; and stated at p. 31 as follows: –

> *"With respect, we cannot agree; and we think that there was nothing wrong in the learned Magistrate's approach. The absence of corroboration or the inadequacy of the corroboration of the evidence of an accomplice is not of itself a reason for disbelieving that evidence but merely precludes the Court (save in exceptional circumstances) from basing a conviction on it. ... ... When* [Court] *accepts the evidence of an accomplice, it then, save as aforesaid, looks at the other evidence which it has accepted to see if it affords corroboration of the evidence of the accomplice.*"

At p. 34, the Court of Appeal added as follows: –

> *"Evidence to be corroborative must be independent and it must implicate or tend to implicate the individual accused in the offence. This is a matter of fact in each case. It seems to us that when one is dealing with a small private company, a family company, evidence that stolen property was found on its premises must tend to implicate the directors in the alleged offence of receiving and retaining. It could not, of course, of itself be enough to sustain a conviction but we think it is enough to corroborate accomplice evidence which has been found credible.*"

In the case of ***Kibale Ishma vs Uganda, Cr. A. No. 21 of 1998***, the Supreme Court of Uganda followed the principles enunciated above, and

defined corroborative evidence to mean independent evidence, which affects the accused person by connecting, or tending to connect, him with the crime; and confirming in some material particulars, not only the evidence that the crime has been committed, but also, that the accused person committed it.

In the Indian case of ***Ramashaw vs The State of Rajasthan, AIR [1959] SC 54***, which the prosecution cited to me, the Court clarified on corroboration; and paraphrased, it states as follows: –

(i) It is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain a conviction.

(ii) What is required is some additional evidence rendering it probable that the story of the accomplice (or complainant) is true; and that it is reasonably safe to act on it.

(iii) Corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with crime.

In the case of ***Susan Kigula & Anor vs Uganda, S.C.Cr.A. No. 1 of 2004***, the Court held that: –

> *"Corroboration in part corroborates the whole. Therefore, if a material part of the child's evidence is corroborated, not only may that part of his evidence be relied upon but also that part which is not corroborated; the corroboration of a material part being a guarantee of the truth of this evidence as a whole."*

In the instant case before me, regarding the participation of **A3** in the commission of the crime of terrorism, I have subjected the testimonies of PW1 and PW2, as accomplices, to very close scrutiny as shown above; and found them both credible. Even without any evidence in corroboration, I am persuaded to act on their evidence regarding the participation of **A3** in the commission of the offence of terrorism for which he has been indicted; despite **A3**'s vehement denial of any participation. However, there is a huge corpus of overwhelming evidence adduced at the trial, as is shown below, corroborating the evidence adduced by PW1 and PW2, of **A3**'s guilt.

Corroboration of evidence adduced by PW1 and PW2 against A3.

Police Officers Sgt. Christopher Oguso (PW59) and AIGP John Ndungutse Ngaruye (PW78) both testified that upon the arrest of **A1**, they found him with a phone in whose phone book was saved telephone No. 254732812681 as the contact for 'Basa'; whom **A1** identified to the Police Officers as **A3**. He (**A1**) informed the Police Officers that **A3** also had another telephone whose No. was 254719706497. It is the law that where information given to the Police in the course of their investigations leads them to the discovery of admissible evidence, then such information itself has evidential value in accordance with the provision of section 29 of the Evidence Act (Cap. 6 Laws of Uganda, 2000 Edn.), which states as follows: –

> *"Notwithstanding sections 23 and 24, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, so much of that information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."*

An examination of the Call Data Record (CDR) for telephone No. 254732812681, which **A1** informed the police as belonging to **A3**, revealed that on the 10th July 2010, at 17.10.10 hrs (5:10:10 p.m.), and 17:11:46 hrs (5:11:46 p.m.) it made a call each to Somalian tel. Nos. 252615624981 and 25250460706, from the Namasuba geo-location. The CDR for telephone No. 254732812681 also showed that it called **A11**, and a Ugandan telephone No. 256772528289, which on investigation PW31 established to belong to one Aidah Nabwami. PW31 testified that when he traced Aidah Nabwami, she disclosed to him that the tel. Nos. 254732812681 and 2547199706497 belonged to her brother in law, one Issa Luyima who was living in Mombasa. This led to the arrest of **A3** from Mombasa by Police Officer Superintendent of Police (S.P.) Zackaria Kiplagat Bitok (PW51). This arrest is confirmed by **A3** himself.

PW31 also established that the two Kenyan tel. Nos. 254732812681 and 2547199706497, which Aidah Nabwami had disclosed as belonging to **A3** had, while roaming in Uganda, shared a phone handset (*exhibit PE299*) having IMEI (Serial No.) 35832403756470, with the Ugandan tel. No. 256772528289 which belonged to Aidah Nabwami. This handset (*exhibit PE299*) was recovered from Aidah Nabwami. Since the CDRs for the tel. Nos. 254732812681 (*exhibit PE145*) and 2547199706497 (*exhibit PE137*) show that they made calls from the geo-location of Namasuba, they bolster the evidence of Juliet Kato (PW12) who was **A3**'s landlady for the Namasuba rented house, and that of Christine Ahumuza (PW15) who was **A3**'s neighbour at the Namasuba rented house, as corroborative of the evidence adduced by PW1 and PW2, that indeed **A3** had rented a house in Namasuba.

The disclosure by the CDR of tel. No. 254732812681 that it called tel. No. 252615624981 of Somalia corroborates PW1's testimony that **A3**

had dealings with that country. Furthermore, the revelation by the CDR that the call to Somalia was made on the 10th July, 2010 at 17:11:46 hrs (which is 5:11 p.m. of the eve of the Kampala blasts,) compels an irresistible inference that most probably, the call was with regard to the impending Kampala bomb blasts; which **A3** and PW1 had been assigned from Somalia to carry out in Uganda. This is strong circumstantial evidence, which is corroborative of the evidence by PW1 and PW2 that **A3** had a central and lead role in the perpetration of the terrorist acts that were visited on Kampala on the 11th July 2010; and for which **A3** and others are now standing trial in this Court.

The evidence that **A3** was arrested from Mombasa, which **A3** conceded to, afforded corroboration of the information obtained from Aidah Nabwami by the Police that **A3** (her brother in law), who she said was living in Mombasa at the time she gave the information, was the person who had used her phone hand–set in Uganda. Similarly, this arrest corroborated the evidence by PW2 that just before the Kampala blasts, **A3** left for Nairobi; and thereafter sent him money using Biashara Forex Bureau co carry out certain specific instructions. The evidence that **A1** had saved telephone No. 254732812681 in his phone book as the contact for Basa, whom he identified to the Police Officers as **A3**, corroborated the evidence by PW1 that while in Somalia he knew **A3** as Basayevu. For sure, 'Basa' was a short form for Basayevu.

Juliet Kato (PW12) who was **A3**'s Namasuba landlady, and Christine Ahumuza (PW15) who was a tenant of PW12 at Namasuba, and **A3**'s Namasuba neighbour, both testified that they knew **A3** as Moses; and that **A3**, left the rented Namasuba house prematurely, and without giving notice to the landlady. This of course corroborates the evidence by PW2 that **A3**, calling himself Moses, booked **A10** for the night at the Naigara Hotel; and that **A3**, referring to himself as Moses

Huku, remitted monies to him (PW2) from Mombasa. The evidence by Salat Mohammed Ahmed (PW52), of Biashara Forex Bureau, Mombasa, is that from the Mombasa branch of the Forex Bureau, one Moses Huku had remitted monies, on a number of occasions, to one Idris Nsubuga in Kampala; as is shown by the record of the remittances (*exhibit PE128*). This also corroborated the evidence of PW2 in that regard.

Further corroboration of the evidence of PW2 about the remittances of money to him by **A3**, is provided by Ismail Kizito (PW23), an accountant at the Kampala branch of Biashara Forex Bureau. He testified that from the Kampala branch of the Forex Bureau, one Idriss Nsubuga (PW2) did collect monies sent to him (PW2) by one Moses Huku from the Mombasa branch of the Forex Bureau; as evidenced by *exhibits PE100 (a), (b),* and *(c)*. The other evidence corroborative of that of PW2, that **A3** went by the name of Moses, is that of Police Officer No. 19345 D/Sgt Okaro Ronald (PW30) who, in the course of his investigations, saw vouchers at Biashara Forex Bureau in Kampala showing money remittances from Moses Huku to Idris Nsubuga between 16th July 2010 and 29th July 2010; which he also verified with PW52 at Biashara Forex Bureau, Mombasa branch.

The evidence adduced by these witnesses, Juliet Kato (PW12) who was **A3**'s Namasuba landlady, and Christine Ahumuza (PW15) who was **A3**'s neighbour at Namasuba, as well as that of the handwriting expert (PW27), do not only corroborate PW2's evidence that indeed **A3** operated under the name of Moses in the execution of the Kampala bombing mission and thereafter, as has been pointed out above. They also corroborate PW2's evidence that it was **A3**, going under the name of Moses Huku, who remitted monies to him (PW2) on a number of occasions from Mombasa after the Kampala blasts, for him to collect from Biashara Forex Bureau, Kampala, and disburse them in

accordance with the specific instructions **A3** had given him; such as collecting **A3**'s properties from, and vacating, the Namasuba house.

The evidence from the computer records at Malaba Immigration station, shows that **A10** crossed to Uganda through Malaba on 9th May 2010; and this is admitted by **A10.** It was seized upon by the defence to controvert the evidence by PW1 that he travelled with **A10** from Nairobi up to Malaba at the end of April 2010; from where, he (PW1) was arrested by Kenyan authorities. Defence Counsel urged Court to find that PW1 had lied to Court in this regard, as from the immigration record the two must have travelled to Malaba on different dates. I have given this matter deep consideration; but I am unable to attach much importance to the disparity between the dates given by PW1 and **A10** for coming to Malaba from Nairobi en route to Uganda.

First, PW1 in his testimony never referred to any document regarding his coming to Malaba from Nairobi. It was more of a recollection of the date he came to, and was arrested at, Malaba. On the other hand, **A10** had the benefit of his passport, as well as the record at the Ugandan Immigration station at Malaba, from which he established the specific date he crossed into Uganda. Be it as it may, what is of importance here is that both PW1 and **A10** have given a date before the Kampala bomb blasts as the date of their coming to Uganda from Kenya through Malaba. The precise date as to when they came to Malaba together, or when **A10** came alone as he maintains, is not that crucial for determining the truth or otherwise of their respective assertion.

In ***Karsan Velji vs R. [1957] E.A. 702***, the appellant had made a statement to the immigration officer about the time certain events had taken place. On the importance to attach to the dates the crime is alleged to have taken place, the Court stated at p. 705 as follows: –

"It is not, of course necessary to lay the date of an offence with precision, unless it is of the essence of the offence. ***R vs Dossi 13 Cr. App. R. 158; Archibold (33rd Edn.) 49; Kamau s/o Gikera and Others vs R. (1955) 22 E.A.C.A. 539.***"

The admission by **A10** that he crossed into Uganda from Malaba on the 9th May, which is early May, despite his denial that he travelled together with PW1, corroborates that of PW1 that he and **A10** travelled together up to Malaba at the end of April; before he (PW1) was arrested by Kenyan authorities. Otherwise how, on earth, could PW1 have known that **A10** – whom he would not have known – had travelled to Uganda, and through Malaba, around that time? Furthermore, the admission by **A10** about his crossing into Uganda also corroborates that of PW2 that after **A3** called him to expect a visitor he (**A3**) came to his (PW2's) house at Najjanakumbi, with **A10** and delivered a bag, which later he (**A3**) showed him was containing explosives.

The handwriting expert (PW27) who examined a known sample of the handwriting of **A3**, against the handwriting in the Guest Registration book of Naigara Hotel (*exhibit PE279*) made on the 9th May 2010, by one Moses, concluded in his report (*exhibit PE102*) that the two samples were written by the same person. In the case of ***Hassan Salum vs Republic [1964] E.A. 126***, the handwriting expert had in his evidence before the trial Magistrate, stated that he had '*no doubt whatever*' that the 'Question handwriting' was that of the appellant. The trial Magistrate treated the expert evidence as an opinion only; but nonetheless convicted the appellant based on it. On appeal, Spry J (as he then was) explained at p. 127 as follows: –

"The only reported case which I have discovered which is of assistance in the present case is ***Wakefield vs Lincoln (Bishop) (1921) 90 L.J.P.C. 174*** *in which Lord Birkenhead observed:*

'The expert called for the prosecution gave his evidence with great candour. "It is not possible,' he says, 'to say definitely that anybody wrote a particular thing. All you can do is to point out the similarities and draw conclusions from them'. This is the manner in which expert evidence on matters of this kind ought to be presented to the Court, who have to make up their minds, with such assistance as can be furnished to them by those who have made a study of such matters, whether a particular writing is to be assigned to a particular person'.

I would refer also to a passage from the summing up of Lord Hewart in the trial of ***William Henry Podmore*** *(I quote from the FAMOUS TRIALS SERIES as the only source available to me), when he said:*

'Let me say a word about hand writing experts. ... ... A handwriting expert is not a person who tells you this is the handwriting of such and such a man. He is a person who, habituated to the examination of handwriting, practised in the task of making minute examination of handwriting, directs the attention of others to things which he suggests are similarities. That, and no more than that, is his legitimate province.'

I think the true answer was given by the witness in the ***Bishop of Lincoln*** *case that 'it is not possible to say definitely that anybody wrote a particular thing'. I think an expert can properly say, in an appropriate case, that he does not believe that a particular writing was by a particular person. On the positive side, however, the most he could ever say is that two writings are so similar as to be indistinguishable and he could, of course, comment on unusual features which make similarity the more remarkable. But that falls far short of saying that they were written by the same hand.*

... ... There is a presumption that no two persons have identical fingerprints, but there is no presumption that no two persons have similar handwritings." (**emphasis added**).

The handwriting expert (PW27) definitely exceeded his legitimate limits in the instant case before me when he stated with certitude that the two handwriting samples he examined were made by the same person. Upon my own scrutiny and comparison of the two samples, I have come to the irresistible conclusion that they are indeed markedly and almost indistinguishably similar. This is circumstantial evidence; but because PW2 testified, that he saw **A3** write in the booking Register, the evidence is not entirely circumstantial. In ***Barland Singh v. Reginam (1954) 21 E.A.C.A. 209,*** at p. 211, the Court held that this type of circumstantial evidence, though not entirely inconsistent with innocence, may corroborate other evidence; as it is only where circumstantial evidence stands alone, that it must be inconsistent with any other hypothesis other than guilt, and there must be no co-existing circumstance that would weaken or altogether negate it.

The 'other evidence' that goes alongside this circumstantial evidence is in the testimony by PW2 that **A3** personally booked **A10** in the Naigara Hotel; and that **A3** used the name Moses when remitting money to PW2 through Biashara Forex Bureau. The person who booked at the Naigara Hotel Guest Register book for the night in issue, and whose writing is similar with the sample known to belong to **A3**, signed therein as Moses. This circumstantial evidence, though not entirely inconsistent with innocence, suffices to prove the guilt of **A3**, without the need to show the absence of a negating co-existing circumstance. In this regard therefore, the report by PW27 (*exhibit PE102*), except for his excessive opinion, corroborates the evidence by PW2 that **A3** booked **A10** into Naigara Hotel for one night.

'Witness I' (PW39), an FBI special Agent, tendered in evidence forensic examination findings by one FBI scientist known as Richard Striker, that **A3**'s DNA was predominantly present in the mattress cover obtained from Ugandan officials. Police Officers S.P Vincent Okurut (PW42) who made the certificate of the search at PW2's residence (*exhibit PE117*), and D/AIP Icoot Robert (PW68) and D/SP Pius Caningom (PW69) all testified that from there, they had recovered a mattress as well as other items they listed in the search certificate (*exhibit PE117*). This is the evidence which **A3** seized upon to support his contention that the discovery of his DNA in the mattress cover, which was recovered from PW2's home, could possibly be explained by the fact that he had spent a night at PW2's house; albeit only once.

However, the FBI report of the forensic examination also showed the finding of traces of explosives on the mattress cover; thus corroborating PW2's evidence that he collected the mattress from **A3**'s Namasuba residence where **A3** had kept the explosives, and they were exposed for final connections and wiring, before their delivery to the three sites for detonation. On the other hand, I view **A3**'s assertion that he spent a night at PW2's residence once, when they were from a wedding party, with incredulity. This is owing to the fact that at the time, his own brother Hassan Haruna Luyima (**A4**) lived at Namasuba. His choice of PW2's home, and not his own brother's home, was rather strange; since he has, in denying that he recruited PW2 into any terrorist activities, contended that he only knew PW2 casually.

The contention by **A3** that he in fact spent a night at PW2's home at Najjanakumbi, which he claims could explain the presence of his DNA on the cover of the mattress recovered there from, may in fact achieve an unintended adverse consequence if it is believed. It would instead mean that he and PW2 were not mere acquaintances, as he would want

Court to believe; but rather that they enjoyed a close relationship. This would then corroborate PW2's evidence that with regard to the Kampala mission, **A3** recruited him and made him his (**A3**'s) confidante in the execution of the terrorist mission in Kampala; and to carry out certain instructions after the July 2010 twin blasts, as has been shown above in his testimony. Accordingly then, **A3** should not be allowed to eat his bread and still hope to have it at the same time.

A3 made an extra-judicial statement to His Worship Francis Kobusheshe (PW3) on the 10th of August 2010; and it was admitted in evidence as *exhibit PE94*. In it, **A3** confessed that he joined the Al-Shabaab in Somalia in 2009. He disclosed that he underwent military training with the Al-Shabaab; and then fought together with them in Mogadishu and Kismayu against the forces of the Transitional Federal Government (TFG), which were being supported by the forces of the African Union Mission in Somalia (AMISOM), which had a Ugandan Peoples' Defence Forces (UPDF) contingent as part of it. He revealed that the leadership of Al-Shabaab chose him to be part of a mission to come to Uganda and execute a plan to carry out an attack on her from within; in order to compel her to withdraw her troops from Somalia.

Pursuant to this, he came to Uganda in January 2010 to carry out surveillance for the best places to execute the mission; and in May 2010, he rented a house in Namasuba for the mission. He disclosed further therein that he recruited PW2, and his brother **A4** to participate in the mission. He collected explosives from National Theatre Kampala, delivered by **A10** in a Toyota Land Cruiser, for the mission; and took them to Namasuba. He also received cell members, who included one Kaka, and Kakasule. After a week, Kakasule left for Kenya and in June returned with a Somali; and they lived in the Namasuba safe house awaiting the execution of the mission. He also disclosed

that in June, one Hanif carried out final connections and wiring of the explosives from the Namasuba safe house.

Together with Hanif and others, he surveyed locations in Kampala for the attacks; and identified Kyadondo Rugby Club, Ethiopian Village Restaurant, and Makindye House as suitable venues. He further revealed that he assigned **A4** to take Kakasule the suicide bomber to Ethiopian Village Restaurant, and also to take a vest with explosives to Makindye House and place it there. He also disclosed that he assigned PW2 to take the Somali boy (suicide bomber) to Kyadondo Rugby Club. The final assignment he gave to **A4** and PW2 was to evacuate his Namasuba house upon the planned bomb blasts having taken place. After all this, he then left for Nairobi Kenya the day before the planned blasts; to avoid being arrested. He was, however, arrested from Mombasa, by Kenya Police; and was deported to Uganda.

Her Worship Agnes Nabafu (PW4) recorded the extra-judicial statement of **A4**; who revealed that he is brother to **A3** and **A13**. He disclosed that two weeks before the Kampala July blasts 2010, **A3** recruited him into the mission to attack Kampala; and briefed him on what he (**A3**) wanted him (**A4**) to do. He accompanied **A3** and PW2 to carry out the surveillance on the Makindye House, and **A3** showed him Ethiopian Village Restaurant also, where **A3** wanted him to take the explosives to. **A3** then took him to Namasuba house, and introduced him as Abdul Karim to two people he found staying there; and he (**A3**) told him that these two (one of whom was a Somali looking person and the other a dark coloured person) were the persons he would be staying with at the Namasuba house.

After this, **A3** showed him the bags he (**A4**) was to take and drop, one each, at Makindye House and Ethiopian Village Restaurant respectively. He also showed him the jackets, which was to be used in

the mission. He and **A3** then came to town; where from, **A3** gave him money and instructed him to buy two used phones for the mission. He bought the phones as he had been instructed; and then went back to the Namasuba safe house. On the 11th July 2010, the explosives were assembled; after which he left with his partner for Kabalagala, while PW2 also went with his partner for their selected scene. He dropped his partner (the suicide bomber) at Kabalagala, then went to Makindye House and placed a bag there and then left on a motorcycle.

However, at the trial, both **A3**, and **A4**, retracted their respective extrajudicial statements. I then had to conduct a trial within a trial in each case; at the end of which I made a finding that the judicial officer (PW3) who recorded **A3**'s statement, satisfactorily complied with the procedure required for recording such extra-judicial statement. The assertion by **A3** that he confessed in his statement out of fear of the ramifications that would result, if he did not do as he had been told to do, does not convince me. In fact, there is absolutely no evidence that at the time he was giving his statement to PW3, whatever threat that had been exacted on him, if any, still persisted or bore on him up to that time. To the contrary, his statement is a detailed narrative. It brings out material particulars, leaving me in no doubt that it was voluntarily made; and I believe it must be true.

As for **A4**, his extra-judicial statement was admittedly, in certain respects**,** recorded by PW4 in a manner not compliant with the procedure laid down for recording a charge in such a statement. However, this did not occasion any injustice to **A4**, because although PW4 did not record any caution as having been administered to him, **A4** himself testified that he accepted the charges against him, though out of fear; thereby disclosing that he was in fact informed of the charges against him. At the trial, **A4** retracted the confession he had

made to PW4; and shed tears as he narrated that from detention, he was forced to eat pork, which is gravely offensive to his religious belief. He stated that he successfully resisted a concerted attempt to sodomize him; by kicking one of his assailants down. However, one of the them seized his genitals; which paralyzed and overpowered him.

Due to the resulting pain, he accepted the charges against him. He claims that at Nakawa Court, from where he gave the extra-judicial statement, he was hooded, was in pain, dusty, and hungry. I fail to understand why, apparently without a fight, **A4** succumbed to eating pork, which he knows to be an abomination; but on the other hand, he vigorously fought and overcame the attempt to sodomize him. I find his assertion that police officer Godi (now deceased) sat next to the Magistrate when he gave his extra-judicial statement to the Magistrate (PW4), and kept on prompting him on what to state to the Magistrate, rather wild and outrageous. There might have been some element or possibility of truth in the assertion that Godi intervened in the process, if a police officer had recorded the cautioned statement.

With regard to the instant extra-judicial statement, which **A4** now retracts, I would have probably believed him if the non-compliance by the judicial officer were merely procedural; such as forgetting to have **A4** sign it after the caution had been administered to him. Certainly, any act of condoning an intervention in, or blatant interference with, the statement making process, by a third party to the statement making process, would be gravely outrageous, and incurable. However, a procedural non-compliance with the statement making process, such as forgetting to have a suspect sign to certify that the charge or caution was indeed administered to him or her, would not necessarily result in the statement being held to be invalid for non-compliance with the rule laid down for recording such statement.

In their respective extra-judicial statements, which they have each retracted, but I have admitted in evidence as having been voluntarily made by each of them, **A3** and **A4** have made confessions amounting to '*a full admission of their individual guilt*' in the commission of the offence charged. In it, they do not only fully, and unreservedly, incriminate themselves as being guilty of committing the offence for which they have jointly been charged; but they both also implicate other persons jointly facing the instant trial with them, as having participated in the commission of the offence. Section 27 of the Evidence Act, provides as follows:-

"When more persons than one are being tried jointly for the same offence, and a confession made by one of those persons affecting himself or herself and some other of those persons is proved, the Court may take into consideration such confession as against that other person as well as against the person who makes the confession."

I find it imperative, for the determination of the instant matter before me, to review some of the salient authorities that have dealt with retracted confession statements; as these will guide me on how to deal with the retracted extrajudicial statements made by **A3** and **A4**. In ***Ezera Kyabanamaizi & Ors vs R. [1962] E.A. 309***, none of the appellants had given evidence on oath; but they had, each, only made an unsworn confession statements. The Court distinguished between a sworn and an unsworn statement, at p. 314, as follows: -

> *"Had they done so at the trial, their evidence on oath could properly have been taken into account as accomplice evidence. Their statements not on oath, however, are not 'accomplice evidence'. The authority for taking such statements into account at all against the co-accused is s. 28 of the Evidence Ordinance, which is identical with section 30 of the Indian Evidence Act ... reads as follows:*

'28. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.'

At best such statements can only be 'taken into consideration' against a co-accused and used only to supplement an otherwise substantial case against an accused person; ***Muthige vs R. (1954) 21 E.A.C.A. 267****. They can never be the basis for a conviction, as, on a proper direction, accomplice evidence can. Further, a statement cannot be considered at all against a co-accused unless there has been a full admission of guilt in the statement. We think the law is correctly stated in the following passage from SARKAR ON EVIDENCE (10th Edn.) at p. 295:*

'It is abundantly clear from the relevant cases on the point, that in order that the statement of an accused may be taken into consideration against his co-accused tried jointly for the same offence, it must implicate himself substantially to the same extent as others, and must expose himself to the same risk along with the fellow prisoners; otherwise the confession cannot be taken into consideration under this section. If the statement implicates him as fully as the others or in a greater degree, it is then only that it can afford a sort of safeguard for truth.

If the statement criminates the maker partially or in a lesser degree, or throws the main burden of the blame on others, it cannot be used against his co-accused. Statements however criminating, made in self-exculpation or in mitigation of guilt, are self-serving statements and are not admissible. A statement

falling short of actual admission of guilt would be a mere inculpatory admission and not a confession at all within the meaning of s. 30. All that section requires is that it must be a 'confession' and that the statement of the confessing prisoner must implicate himself substantially to the same extent as it implicates the others.

It appears that the real test is not whether the confessing accused ascribes to himself a major or minor part in the crime, but whether when implicating his co-accused he gives a full and true account of the crime and unreservedly confesses his own share of the guilt, i.e., implicates him as fully and substantially as his co-accused. It may be that the part assigned to him was not a leading or major one; but in any case, there must be a confession to the fullest extent of whatever part he took in the commission of the crime. It is in this sense, that the confession must affect them both equally.

It is only a statement of this kind that can be said to implicate the confessing accused 'substantially to the same extent' as it implicates the others. When there is no full and complete confession of his own guilt and the part taken by him in the crime, but an embroidered story spun out with the object of clearing himself or reducing his own guilt at the expense of others, it is nothing but an explanation of an exculpatory nature or a self-serving statement.'"

In their respective confession statements, **A3** and **A4** fully and unreservedly admitted their own individual guilt; as well as pointing out the role of each of the co-accused they have named therein, in perpetrating the crime they are jointly standing trial for. They were, before making their respective confessions, fully aware of the risk

attendant to doing so; but, nonetheless, proceeded to lay bare their individual souls in disclosing their own participation in the commission of the crime for which they have been charged, and as well disclosing the participation of the co-accused they named therein. I find that each of them made their confessions voluntarily; hence, their confessions must be true. Accordingly, I take their confessions into consideration as against them individually, and also against each of the implicated co-accused, in accordance with the provision of section 27 of the Evidence Act, cited above.

However, I am quite mindful of the fact that each of the confessions I am taking into consideration can never be the basis for a conviction; as, on a proper direction, accomplice evidence can be. I can only find out if, from other independent evidence proved in Court, either of the confessions supplements a substantial case existing against the individual confessor or the co-accused persons named therein. I find that **A3**'s confession that he joined the Al-Shabaab in Somalia, fought alongside them, and was tasked with others to carry out a mission to attack Uganda, pursuant to which he came to Uganda and rented a safe house in Namasuba, supplements and lends assurance to the evidence adduced by PW1 at the trial, regarding the participation of **A3,** in this regard.

A3's detailed narrative in his confession on how he recruited PW2 and **A4** into the mission, and deployed them in the execution of the Kampala attacks, supplements the evidence by PW2, and the confession by **A4**, on how **A3** recruited and deployed them for that purpose. It also supplements the evidence by PW2 that **A3** delivered a bag containing explosives to him at Najjanakumbi. **A3**'s confession also supplements that of Juliet Kato (PW12) who was **A3**'s Namasuba landlady, and Christine Ahumuza (PW15) who was a tenant of PW12,

and **A3**'s Namasuba neighbour. Both of them testified that they knew **A3** as Moses; and that **A3** left the rented Namasuba house prematurely, and without giving notice to the landlady. **A3**'s confession also supplements the evidence by PW2, and the confession by **A4**, that he (**A3**) kept suicide bombers in the Namasuba safe house.

This confession by **A3** also supplements the evidence by PW2, and the confession by **A4**, that after instructing them to evacuate his properties from the Namasuba house, he (**A3**) left Kampala for Nairobi the day before the Kampala twin blasts. It also supplements the evidence by PW31, PW59, and PW78 that the Kenyan tel. Nos. attributed to **A3** by **A1** had, while roaming in Uganda, mainly operated from the Namasuba geo–location; from where one of them was shown to have called Somalia. His confession that he sent money to PW2 from Mombasa, supplements the evidence by PW2 that **A3**, using the name Moses Huku, remitted funds to him from Mombasa; and also the evidence by the Mombasa manager of Biashara Forex Bureau (PW52), and the Kampala branch Accountant for the Forex Bureau (PW23), regarding the money transfers made by Moses Huku from Mombasa.

Finally, his confession that he was arrested from Mombasa is corroborated by his admission in his unsworn statement at the trial. Thus, his confession lends assurance to the evidence by PW2, and the confession by **A4**, that he (**A3**) left Kampala for Kenya the day before the Kampala blasts, due to his fear that, owing to his record with the police, they would arrest him if the blasts took place when he was in Kampala. The confession by **A4** on his dealings with **A3**, supplements and lends assurance to the evidence by PW12 (the Namasuba landlady) that **A3** rented her house at Pala Zone Namasuba; but left prematurely, and without giving her any notice. It also supplements that of PW2 that it was in this house that **A3** kept the explosives, as well as the cell

members including the suicide bombers who were later deployed at Kyadondo Rugby Club and Ethiopian Village Restaurant.

A4's confession equally supplements PW2's evidence on **A3**'s role in the surveillance of various places in Kampala to identify those suitable for the mission; as well as the deployments, to specific places, of PW2 and **A4,** together with the respective suicide bombers assigned to each of them, with the explosives, for the execution of the mission. This confession also supplements that of **A3** himself, which details his (**A3**'s) role, together with **A4** and PW2, in the execution of the Kampala attacks; as has been shown above by other independent evidence. **A4**'s confession, further still, supplements the evidence by PW2 that he removed **A3**'s mattress and other items from **A3**'s rented Namasuba house, and took them to his (PW2's) house in Najjanakumbi, pursuant to **A3**'s instructions before he left for Nairobi.

True, **A3** first kept the explosives at PW2's Najjanakumbi; but later relocated them to his (**A3**'s) Namasuba house; where they were finally connected and wired from. This therefore serves to negate the contention by **A3** in his unsworn statement at the trial that the fact that he had once spent a night at PW2's residence, after attending a party together with PW2, explains the discovery by the FBI of a predominant presence of his DNA on the mattress cover recovered from PW2's house at Najjanakumbi. The confession by **A4** also supplements PW2's testimony that after **A3** had issued the instructions for the final execution of the mission, he left Kampala for Nairobi one day before the impending bomb blasts were to occur.

It is manifest from the confessions made by **A3** and **A4,** that they are both accomplices in the crime for which they have jointly stood trial with the other accused persons. However, both **A3** and **A4** did not make their confessions on oath; so it would be improper and

inadvisable to treat them in the category of the other accomplices, such as PW1 and PW2, who testified on oath about their participation in the crime. Although I believed the accomplice evidence of PW1 and PW2, I preferred to look for possible corroborative evidence to augment them; owing to the knowledge that their evidence was of the weakest type in law. In like manner, although the confessions by **A3** and **A4** would not form the basis of a conviction, but instead serve to supplement and lend assurance to some substantial evidence adduced, I am permitted to look for corroboration of the confessions.

In this I am bolstered by the case of ***Girisomu Bakaye and Others vs Uganda [1965] E.A. 621***, where the trial judge had failed to direct the assessors on how to treat a retracted confession statement; but had, nevertheless, convicted the appellants. On appeal, the Court stated, at p. 622, that: –

> *"Although there is no rule of law which requires corroboration of a retracted statement, it is a salutary rule of practice to seek such corroboration, and a Court should direct itself and the assessors to that effect, and that great caution should be exercised before relying on an uncorroborated retracted statement. Where no such direction has been given, this Court will not normally give effect to an uncorroborated retracted statement.*
>
> *In this case ... the trial judge did find corroboration, so far as the first and second appellants are concerned, from the fact that they subsequently led the police to the scene of the crime and showed where the deceased had been killed and thrown into the water. ... we agree that the retracted confession statements of the first and second appellants were in fact corroborated."*

In the matter before me, prosecution adduced evidence that **A4** led the police to his Namasuba home, and identified for them the pit latrine where he had thrown the phones he had used in the execution of the bombing mission. The recovery of these phones from the latrine indeed corroborated **A4**'s retracted confession that he did participate in the Kampala bombing mission. In the ***Ezera Kyabanamaizi & Ors vs R.*** case (supra), the Court made a distinction between a confession made on oath and one made not on oath; and with regard to the confessions the appellants had made, not on oath, the Court stated, at p. 314, as follows: –

> *"Had they done so at the trial, their evidence on oath could properly have been taken into account as accomplice evidence. Their statements not on oath, however, are not 'accomplice evidence'.*

At p. 318, the Court further stated as follows: –

> *"This Court has held that a retracted statement, whether a confession or not, may in a proper case amount to a corroboration of accomplice evidence (**Bassam and Another vs R. [1961] E.A. 521 (C.A.) at p. 530**). In considering whether a retracted statement can amount to corroboration of accomplice evidence, the circumstances in which it was made must be considered, and the reason given for the retraction is an important relevant factor.*

In ***Asoka vs Republic [1973] E.A. 222***, the trial judge stated that even without supporting evidence, he would have founded the conviction of the appellant on the confession of the appellant's co-accused, which implicated the appellant. The Court of Appeal pointed out that this was a misdirection; and stated on p. 224 as follows: –

> *"This apparent misdirection rose apparently because the judge used the confession of the co-accused as he would that of a confession by*

the appellant himself ... ... In the case of ***Anyango vs Republic [1968] E.A. 239****, this Court said at p. 322:*

> *'If it is a confession and implicates a co-accused it may, in a joint trial, be 'taken into consideration' against that co-accused. It is however not only accomplice evidence but evidence of the 'weakest kind' (****Anyuna s/o Omolo vs R. (1953) 20 E.A.C.A. 218****); and can only be used as lending assurance to the other evidence against the co-accused (****Gopa s/o Gidamebanya vs R. (1953) 20 EACA 318****).'*

... ... In the judgment of this Court in the ***Gopa*** *case, this Court ... ... after approving various quotations from* ***Sarkar on Evidence****, 9th Ed, and of* ***Monir's Evidence****, 3rd Ed., said at p. 322:*

> *'Returning now to the submission by the appellant's counsel that the learned trial judge misdirected himself in treating the confession as the basis of the evidence against a co-accused and thus looking for corroboration, we are abundantly satisfied from the authorities cited above that that approach is the wrong one and that a confession can only be used as lending assurance to other evidence against the aco-accused, evidence which only falls short by a very narrow margin of the standard of proof necessary for a conviction.'*

It is correct to say that each case must be considered in the different circumstances of that case, and the weight to be placed on the involvement of an accused person by his co-accused's confession will differ in each case."

In the instant case before me, I have warned myself on the danger of acting on the retracted confessions by **A3** and **A4**, without corroboration. It is evident that the two confessions do not only lend

assurance to the other evidence adduced before Court, pointing to the participation of **A3** (as well as other accused persons to whom I will advert) in the commission of the crime for which they have been indicted. They are, also, corroborated by independent evidence, which I have identified above. Such evidence includes that of Police Officers (PW59 and PW78), on the use of the name Basayevu by **A3**; the Namasuba landlady (PW12), on the renting and unexplained premature vacating of her rented house by **A3** without notice; the Biashara Forex Bureau officials (PW23 and PW52) on the remittances of monies from Mombasa to Kampala; and others discussed herein above, all showing that **A3** participated in committing the crime of terrorism.

In ***Karsan Velji vs R. [1957] E.A. 702***, the appellant had made a statement to the immigration officer. At the close of the prosecution case, he elected not to give evidence; and called no witness. He stated from the dock that he wished to withdraw the statement he had given at the immigration offices. On appeal, the Court stated at p. 705 that: –

> *"In **Robert Sinoya and David Sinoya vs R. (1939) 6 E.A.C.A. 155,** it was suggested by the Court of Appeal for Eastern Africa that the danger of acting on a retracted confession in the absence of corroboration must depend to some extent upon the manner in which the retraction is made. ... In the circumstances of the case ... the learned Magistrate should ... have ...* [given] *himself a direction as to the danger of acting upon a retracted confession unless it is corroborated in material particulars or unless the Court after full consideration of the circumstances is satisfied of its truth (**Miligwa s/o Mwinje vs R. (1953) 20 E.A.C.A. 255**); and he should have looked for independent corroborative evidence implicating the appellant in a material particular."*

In ***Fabiano Obeli and Others vs Uganda [1965] E.A. 622***, the trial judge had convicted the appellants; but without having directed himself or the assessors on the need for corroboration of the evidence of Misaki (an accomplice). He had merely referred to the assessors and himself to the need to consider the evidence of the accomplice *'with the greatest caution*'. On appeal, the Court stated at p. 623 as follows: –

> *"It is unfortunate that the learned trial judge does not appear to have directed the assessors or himself as to this need for corroboration: he merely referred, both in his direction to the assessors and in his judgment, to the need to consider the evidence of this witness 'with the greatest caution'. That is not enough.*
>
> *The case of the other appellant, Benedicto Okai, was different, because in his case there was evidence of a full confession made by him while in prison to a fellow prisoner, Sebastiano Lwanga. ... We have ourselves scrutinized that evidence, bearing in mind that Sebastiano is himself a man of bad character and that, on his own evidence, he had heard something, at least, of the murder before he went to prison.*
>
> *In spite of some curious features concerning this evidence, particularly in the cross–examination ... Sebastiano's evidence is capable in law of affording corroboration of the accomplice evidence of Misaki. As was said by this Court in* ***Bassan and Wathobia vs R. [1961] E.A. 521****, at p.530:*
>
> > *'We think that a statement made by an accused person, whether amounting to a confession or not, may in a proper case amount to corroboration of accomplice evidence.'."*

In ***Tuwamoi vs Uganda [1967] E.A. 84*** the appellant had made two statements. The first was a confession; but the day after he made a

further statement, which was a complete denial of the crime. He was convicted pursuant to his confession. On appeal, the Court explained, at p. 88, the difference between a retracted and repudiated statement as follows: –

> *"The basic difference is, of course, that a retracted statement occurs when an accused person admits that he made the statement recorded but now seeks to recant, to take back what he said, generally on the ground that he had been forced or induced to make the statement, in other words that the statement was not a voluntary one. On the other hand a repudiated statement is one which the accused person avers he never made."*

At p. 89, the Court stated as follows: –

> *"The present rule then as applied in East Africa in regard to a retracted confession, is that as a matter of practice or prudence the trial Court should direct itself that it is dangerous to act upon a statement which has been retracted in the absence of corroboration in some material particular; but that the Court might do so if it is fully satisfied in the circumstances of the case that the confession must be true."*

With regard to whether a retracted statement should be treated differently from a repudiated one, the Court stated from pp. 90–91 as follows: –

> *"On reconsideration of the position, we find it difficult to accept that there is any real distinction in principle between a repudiated and a retracted confession. ... ... We would summarise 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 circumstance of the case that the confession is true. ... Court will only act on the confession if corroborated in material particulars by independent evidence .... 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."

Conduct incompatible with innocence, as corroboration.

PW2 testified, and **A4** also stated in his extrajudicial-statement admitted in evidence, that **A3** gave them instructions, then departed for Nairobi the day before the execution of the scheduled explosions at Kyadondo Rugby Club, Ethiopian Village Restaurant, and Makindye House to avoid being connected with the events. He explained to PW2 that owing to his past record, he feared that he would be arrested if the explosions took place when he was in Uganda. Second, as was testified to by **A3**'s landlady (PW12), and PW2, and stated by **A4** in his extra-judicial statement, **A3** left his rented premises at Namasuba prematurely, and without informing PW12 of his termination of the tenancy. He instead left it to PW2 and **A4** to collect his properties from the rented premises.

A3's conduct was entirely incompatible with innocence; and it corroborates the evidence adduced by PW1 and PW2, as well as the extrajudicial statements he and **A4** made, about his **A3**'s central role in the execution of the mission. In the event, I am satisfied that the prosecution has discharged the burden that lay on it; by proving, beyond any reasonable doubt, that Issa Ahmed Luyima (**A3**) was the mastermind and central character in the execution in Kampala of the heinous plan, hatched in Somalia by the Al-Shabaab, to attack Uganda, and thus punish her, for having contributed to the AMISOM forces in

Somalia. Issa Ahmed Luyima (**A3**) is certainly guilty of the offence of terrorism c/s section 7(2) of the Anti Terrorism Act, 2002, as charged; and I accordingly convict him of that offence.

(ii) Participation of Hussein Hassan Agade (A1)

The evidence adduced by PW1 is that when he went to Somalia in 2009, among those he found at an Al-Shabaab camp in Kismayu was **A1**, who he knew then as Hassan. He and **A1** had their military training together at Kismayu and Barawe; in all undergoing training together for seven months. After the training, they fought a number of battles in Somalia together under the Al-Shabaab. Police officer Christopher Oguso (PW59) who is a phone call and phone set analyst, testified that a Nokia phone bearing IMEI (Serial No.) 351528042707070 (*exhibit PE185*) was reportedly found attached to the unexploded explosive device found at Makindye House. From his analysis, he established that this phone had used two IMSIs (tel. Nos.) in Kenya; namely, tel. Nos. 254732783568 and 254734045678.

These two Kenyan tel. Nos., had constantly been in communication with tel. Nos. 254737588445 and 254732812681 in the period immediately before the Kampala blasts; using the SMS (Short Messaging System (text)) mode of communication only. He established that tel. No. 254732783568 was switched off on 6th July 2010 after use at Kawangare – Nairobi; while tel. No. 254734045678 was switched off on 23rd July 2010 after use at Githithia, Nairobi. He also established that tel No. 254737588445 was switched off on 10th July 2010 after use at Pangani, Nairobi; while tel. No. 254732812681 was also switched off just before the Kampala blasts. He established from analyzing the call data records (CDRs) of these tel. Nos., that tel. No. 254737588445 had queried Kenya Power & Lighting Company over electricity bill for meter A/c No. 2759149-01 (*exhibit PE159*).

This meter was traced to the property of 'Witness L' (PW53) who identified its user as his tenant then, Hussein Hassan. PW53 provided Police with the tenancy agreement between himself and Hussein Hassan (*exhibit PE129*), and the tel. No. for Hussein Hassan as 254715855449; which the police established was registered in the name of Hussein Hassan; and the CDR of this tel. No. is *exhibit PE135*. Hussein Hassan (**A1**) was arrested by Police officer No. 58309 Sgt. Kenedy Osare Rasugu (PW48), and was found with a phone (*exhibit PE295*) having a Sim card bearing this tel. No. 254715855449; and he made a handwritten inventory, and a typed one, both of which **A1** duly signed (*exhibits PE123(a)* and *PE123(b)*). Upon his arrest, **A1** disclosed to PW59 that tel. No. 254732812681 belonged to Basa, a Ugandan he had trained with in Somalia, and had a house in Namasuba. Basa was later arrested and identified as **A3**.

Police officer AIGP John Ndungutse Ngaruye (PW78) testified that he was availed a Nokia phone handset, recovered from the unexploded device found at Makindye House. The phone handset bore IMEI (Serial No.) 351528042707070. Upon checking with the MTN Uganda, he established that the handset had been used by Sim card for Ugandan tel. No. 256788377743, which had also shared another phone set bearing IMEI (Serial No.) 359338035921630 with two Kenyan tel. Nos.; namely 254715855449 and 254732812681 when they were roaming in Uganda; as is shown by the CDRs for the two Kenyan tel. Nos. (*exhibits PE322* and *PE350 respectively*). The CDRs for tel. Nos. 254715855449 and 254732812681 also showed that both had been used in the Namasuba area (Uganda) between May and July 2010.

The analysis showed that the two Kenyan tel. No. 254715855449 (registered in the name of **A1**, and found in his possession on arrest), and tel. No. 254732812681, as well as the Ugandan tel. No.

256788377743, were all switched off just before 11th July 2010. The analysis also established that **A1**'s tel. No. 254715855449 had roamed in Uganda and shared a phone bearing IMEI (Serial No.) 358324037568470 with tel. No. 254723457803 (later identified as that of **A5**), and also with tel. No. 254719706497 belonging to **A3**. Furthermore, **A1**'s tel. No. 254715855449 also shared another phone bearing IMEI (Serial No.) 35933803898908 with **A3**'s tel. No. 254719706497. **A1**'s tel. No. 254715855449 had also shared another phone bearing IMEI (Serial No.) 35822903686264 with **A3**'s tel. No. 254719706497.

All these phone handsets were shared by the various tel. Nos. when the tel. Nos. were roaming in Uganda between 5th May 2010 and 30th June 2010; with the geo-location of all the calls mainly being at the Namasuba area. Police officer Christopher Oguso (PW59) testified that **A1** informed police that **A3** was the user of tel. Nos. 254719706497 and 254732812681. Further analysis by PW59 established that **A1**'s tel. No. 254737588445 communicated with three tel. Nos. between 22nd June 2010 and 10th July 2010. It communicated eight times with **A3**'s tel. No. 254732812681 between 30th June 2010 and 1st July 2010; twenty four times with tel. No. 254732783568 between 3rd July 2010 and 10th July 2010; and nineteen times with tel. No. 254734045678 between 22nd June 2010 and 23rd June 2010. All these communications were by SMS only.

Analysis of the CDR of **A1**'s tel. No. 254715855449 shows it communicated forty nine times with **A2**'s tel. No. 254720945298 (*exhibit PE134*) between 1st June 2010 and 10th July 2010. It communicated 49 times with **A3**'s tel. No. 254719706497 (*exhibit PE137*) between 1st of June 2010 to 10th of July 2010. It also communicated fifteen times with **A3**'s tel. No. 254700745965 between

1st of June 2010 to 10th July 2010. It communicated fourteen times with **A7**'s tel. No. 254771666668, and also communicated nine times with **A11**'s tel. No. 254735766637. It also communicated once with **A6**'s tel. No. 254737367444 on 19th June 2010. All these communications were by the SMS mode of communication; and not by the voice mode of communication.

In his cautioned statement, which, despite his retraction, I admitted in evidence as having been voluntarily given and without the application of any inducement or force on him, Habib Suleiman Njoroge (**A7**), confessed his role in the terrorist activities. He also revealed that on the day the explosives were being transported to Kampala, **A10** called him and informed him of the arrest of PW1 over his documents; and requested him to call **A11** to give the contact of another person in Kampala to receive the bags containing the explosives. He called and met **A11** in Nairobi; and gave him the information from **A10** regarding PW1. At the request of **A11**, he called **A1** who joined them. After a discussion between **A1**, **A11**, and one Jabir, which he did not attend, they asked him for **A10**'s phone contact.

In his unsworn statement at the trial, **A1** who testified as DW9 denied the offence. He also denied that he implicated others upon his arrest; and wondered why the police never took a statement from him if indeed he was as cooperative to the police, as prosecution witnesses have stated. He admitted knowing **A2**; but as his fellow street preacher. He however denied any prior knowledge of **A3** and **A11** before he met them in prison. He denied ever being in Somalia; and pointed out that in fact PW1, whom he reminded Court was a confessed liar, had not named him in his (PW1's) extra-judicial statement (*exhibit DE1*) as one of the persons he (PW1) claims to have been with in Somalia.

He also denied ever telling PW1 names of the suicide bombers from Luzira prison. He however admitted the recovery of phones from him upon his arrest. **A1** also admitted that he was a tenant of PW53; but contended that utility money was paid to the landlord for payment to Kenya Power, so the request for the electricity bill was not made by him. He admitted that the phone with the IMEI (Serial No.) 359338035921630 was his. He also admitted that tel. No. 254715855449 was his registered No.; but denied owning tel. No. 254737588445. As I have pointed out herein above, PW1 is an accomplice; and so, his evidence requires corroboration, although since I have warned myself of the danger of acting on his evidence, I can safely act on it even without any corroboration.

The prosecution has however urged me to consider evidence adduced in Court, which it contends corroborates the evidence of PW1 about the participation of **A1** in the commission of the offence of terrorism with which he has been charged. These include the trail of telephone calls showing a beehive of activities between the phone sets and telephone numbers which the police officers analyzed and linked **A1** to **A3**, and to Namasuba where **A3** had a safe house. From this beehive of activities, a pattern is clearly discernible; revealing a trail beginning with the SIM card found in the phone recovered from Makindye House, which linked the phone and SIM card therein to phones as well as SIM cards (tel. Nos.), including those of **A1**, which have been established to have been used by, and or found with, **A3**.

The analysis of the cobweb of phone activities reveal that during the period leading to the Kamplala blasts, the phone traced to **A1** was quite busy linking up with a particular group of people, from the Namasuba geo–location; and using the SMS (text) mode of communication only. It cannot be by coincidence that all these tel.

Nos. went off air just before the Kampala blasts. PW1 testified that he and **A1**, together with other persons, trained and fought in Somalia; and further, that it was **A1** who, from prison, revealed to him the names of the Kampala suicide bombers as Kakasule and Mursal. In his confession statement, **A7** implicates **A1** of participation in the Kampala mission; thereby supplementing and lending assurance to the evidence by PW1 of **A1**'s participation. His participation is also corroborated by the trail of his phone calls, linking him to **A3** and to the phone and SIM card recovered from the Makindye House.

The irresistible inference one would naturally draw from the use of SMS, and the geo–location of the calls being mainly the Namasuba area, where **A3** had a safe house for the Kampala attack mission, is that **A1** must have been playing a coordinating role in the mission. Tel. Nos. 254719706497 and 254732812681, which according to Police officer Christopher Oguso (PW59), **A1** had revealed to police as belonging to **A3**, are the very tel. Nos. Aidah Nabwami had also revealed to Namara Robinson (PW31) as belonging to her brother in law (**A3**). PW31 also testified that Aidah Nabwami, from whom the phone set (*exhibit PE299*) was recovered, told him that she had been given the phone by (**A3**); thus corroborating **A1**'s information to PW59 and PW78 about his dealings with **A3**. It also corroborates PW1's evidence that he (PW1), **A1**, and **A3**, were together in Somalia with, and fighting for, the Al–Shabaab.

The revelation of the names of the suicide bombers by **A1** to PW2, from prison, means first that he was deeply involved in the Kampala mission; and second, it gives credence to PW1's evidence that he and **A1** were together in Somalia and were together involved in the mission to attack Uganda. It is worthy of note that the period between May to July, when the Kenyan tel. Nos. were roaming in Uganda, operating

mainly from the Namasuba geo-location, was the period when, from the testimonies of PW1 and PW2, cell members, suicide bombers, and the explosives, were delivered at **A3**'s Namasuba house; from where they were eventually dispatched to the various venues for detonation. This corroborates PW1's and PW2's evidence that preparations for the blasts were made during this period when **A3**, whom evidence shows **A1** was linked to, was based at the Namasuba house coordinating and supervising the preparations for the blasts.

It is also noteworthy that the various tel. Nos. hitherto in use, were switched off just before the Kampala blasts; as it strongly points at a design meant to lose their trail, and thereby dissociate the users from the Kampala bombings. The circumstantial evidence provided by **A1**'s phone details and activities linking him to **A3** and the Namasuba geo-location, therefore corroborates that of PW1 regarding **A1**'s participation in the Kampala mission. The use of SMS, as well as the changing of phone sets, and the switching off, of the phones around the date of the blasts, must indeed have been done pursuant to, and in keeping with, the training PW1 testified had been given to them from Somalia in the use of phone codes for the execution of the mission. It must have been designed to avoid possible eavesdropping by State security apparatus; that could compromise the mission.

Owing to the damning evidence linking his phone and tel. Nos. to **A3** and the phone recovered from the unexploded explosive device found at Makindye House, I think it was in **A1**'s interest to explain the circumstances under which his SIM cards were interchangeably used in phones which are shown to have shared the use of SIM cards with the phone recovered from Makindye House, or with the phones being used around Namasuba. In the case of ***Abdu Ngobi vs Uganda,*** *(supra)*, the

Supreme Court expressed itself as follows, with regard to the need for the defence to provide some explanatory evidence: –

> *"The proper approach is to consider the strength and weaknesses of each side, weigh the evidence as a whole, apply the burden of proof as always resting upon the prosecution, and decide whether the defence has raised a reasonable doubt. If the defence has successfully done so, the accused must be acquitted; but if the defence has not raised a doubt that the prosecution case is true and accurate, then the witnesses can be found to have correctly identified the appellant as the person who was at the scene of the incidents as charged."*

In the two combined appeals of ***(1) R. v. Sharmpal Singh s/o Pritam Singh; (2) Sharmal Singh s/o Pritam Singh v. R*** (supra), the Privy Council stated at pp. 17 –18 that: –

> *"This is the sort of case in which a not incredible explanation given by the accused in the witness box might have created a reasonable doubt. But there is no explanation; and the prisoner's silence is emphasised by his consequent conduct. How did he come to squeeze his wife's throat? When the prisoner, who is given the right to answer this question, chooses not to do so, the court must not be deterred by the incompleteness of the tale from drawing the inferences that properly flow from the evidence it has got nor dissuaded from reaching a firm conclusion by speculation upon what the accused might have said if he had testified."*

I have to categorically reiterate here that the burden of proof in the matter before me lies perpetually on the prosecution; to prove each of the Accused persons' guilt; as charged. The requirement for **A1** to offer an explanation in response to the otherwise damning evidence

adduced by the prosecution, pointing to his participation in the crime charged, does not at all amount to a shift in the burden of proof to him. It merely affords him the opportunity to punch a hole in an otherwise strong prosecution case against him; and thus enable Court to also look at the other side of the coin, as it were. It certainly avoids the risk of Court having to determine his guilt, or otherwise, basing on the evidence adduced by the prosecution alone.

I have no doubt whatever in my mind that the prosecution has adduced the requisite evidence and proved beyond reasonable doubt that Hussein Hassan Agade (**A1**) participated in the commission of the offence of terrorism, for which he has been indicted and has stood trial. I accordingly find him guilty as charged; and therefore, convict him of that offence.

(iii) Participation of Idris Magondu (A2)

Police officers PW59 and PW78 testified that upon arrest of **A1** his phone book was found to have tel. No. 254720945298, which he revealed was the contact for **A2**, whom he revealed was his accomplice in the Kampala bombing mission. This tel. No. was established to be registered in the name of **A2.** Police officer No. 72600 Sgt. Stephen Musyoki Munyao (PW55) testified that he tracked this Safaricom tel. No. 254720945298; and it led him to **A2** whom he arrested, and from whom he recovered a phone (*exhibit PE297*) with a SIM card of that tel. No. 254720945298. The inventory for the recovery of the phone, which PW55 made is *exhibit PE305*. The call data record (CDR) of tel. No. 254720945298 is *exhibit PE134*, and the report of the analysis of the call data record (CDR) for this tel. No., is *exhibit PE157*.

Analysis of *exhibits PE134* and *PE297*, and consideration of the testimony of PW59, show extensive communication between **A2**'s tel.

No. 254720945298 and **A1**'s tel. No. 254715855449. The two tel. Nos. communicated forty nine times between themselves in the period from 1st June 2010 to 10th July 2010; using both voice and SMS modes of communication. This was the period just before the Kampala blasts. **A2**'s tel. No. 254720945298 communicated 18 times, between 2009 to 2010, with tel. No. 254722366634 (registered in **A9**'s name). Police officer (PW59) testified further that **A2** led them (police) to the house of **A11**'s mother in Nairobi where they learnt from one Jaffer Ali, a brother to **A11**, that **A11** had gone to Tanzania with wife; and this led to the arrest of **A11** from Tanzania.

In his defence, **A2** gave an unsworn evidence in Court as (DW2); in which he denied ownership of tel. No. +254720945298 and also denied ownership of tel. No. 2547320945290. He contended instead that his tel. No. was +254724376909; which he used for communication with **A1**, a fellow street preacher in Nairobi. He conceded having communicated with **A9**; but explained that this was because **A9** was a driver of a truck, which ferried his kids to school. He contended that no evidence was adduced in Court that tel. No. +254720945298 was registered in his name. He also pointed out that neither did PW55 record the IMEI (Serial No.) of the phone recovered from him, nor the SIM for the tel. No. found in it. He pointed out that only **A1** had told police that he (**A2**) was responsible for organizing transportation of suicide bombers to Kampala. He admitted the evidence of PW55 regarding the search at his place, and his arrest.

The recovery of a phone containing a SIM of tel. No. +254720945298 from **A2** was strong evidence that he was owner of that phone; and corroborated **A1**'s information to police that **A2** was the owner of that tel. No. Since **A2** led Police to the house in Nairobi, from where police got information that **A11** had gone to Tanzania, leading to the arrest of

A11 there from, it further corroborates **A1**'s information to police that **A2** was his accomplice in the mission to attack Kampala. The contention by **A2** that no one else, apart from **A1** in his information to police, had associated him with having arranged the transportation of the suicide bombers to Kampala, is not of any consequence. First, there is no rule requiring a plurality of witnesses to prove a case.

Second, in the instant case before me, there is the evidence that upon **A1** leading police to him as an accomplice, **A2** was found in possession of a phone containing the SIM of the tel. No. +254720945298, which was established to be registered in his name. Furthermore, he (**A2)** himself led police which was looking for **A11**, to **A11**'s mother; and this led to the arrest of **A11**. Third, as was pointed out in the case of ***Wainaina & Others vs Republic [1973] E.A. 182***, at p. 184, there is no requirement for corroboration of evidence by the police. Once the police adduces evidence, which Court finds to be cogent, as is the case here, with regard to the issue of **A2** being the registered user of tel. No. +254720945298, then in the absence of evidence to controvert it, Court will, as I hereby do, take the evidence as the truth.

In any case even if the police evidence were not reliable, I would still have applied the decision in the case of ***Oketcho Richard vs Uganda S.C. Crim. Appeal No. 26 of 1995,*** which is authority for the proposition that: –

> *"Where there is no reliable independent evidence to support the complainant's claim, it is the duty of the court to very carefully weigh the available evidence."*

In the event, I find that there is ample evidence pinning Idris Magondu (**A2**) as having fully participated in the execution of the Kampala attacks; for which he has been charged with the offence of terrorism. I find him guilty as charged; and accordingly convict him.

(iv) Participation of Yahya Suleiman Mbuthia (A6)

Charles Kyalo (PW45) the Caretaker of Kaigokem Apartments at Kawangare Nairobi, testified that in 2010 **A11**, who introduced himself to him as Mustafa, came and inspected an apartment to rent. **A11** was in the company of someone whom he (PW45) identified in Court as **A6**. Later, however, Benson Mutisya (PW44) the Managing Estate Agent for Kaigokem Apartments, told him (PW45) that **A11** had executed a tenancy agreement and paid rent under the name of Mohamed Ali Mohamed. Indeed, when **A11** came to occupy the apartment, his receipt for payment of rent had the name Mohamed Ali. Later, **A6** came with the keys to the apartment, collected Mohamed Ali's properties there from; and left the keys to the apartment with him (P45).

Benson Mutisya (PW44) testified that around the 28th June 2010, **A11** executed a tenancy agreement (*exhibit PE341*) with him for one month in respect of one of the apartments of Kaigokem Apartments. However, two weeks later, **A11** sent his brother whom he (PW44) identified in Court as **A6**, to vacate the apartment and collect the refund of the balance of the rent paid. He (PW44) authorized the clearing of the house, drew a cheque (*exhibit PE343*) in favour of **A11**, and gave a covering letter (*exhibit PE342*) for it. Police officer No. 61437 Sgt. Ezekiel Lulei (PW47) testified that he searched the house of **A6** at Dagoreti, when he ((PW45)) had already been arrested; and recovered a cheque, and a letter authorising evacuation, from a Koran.

Police officer (PW59) testified that Amina Shamsi (wife to **A11**) informed police that her husband had introduced **A6** to her as someone to contact in case of any problem. She gave the police, tel. No. 254737367444 as **A6**'s contact. The analysis of the call data record (CDR) for **A6**'s tel. No. 254737367444 (*exhibit PE151*) shows that it communicated with **A11**'s tel. No. 254732485079 between 4th August

2010 to 12th August 2010; using the SMS mode of communication only. The analysis of the call data record (CDR) for **A11**'s tel. No. 254732485079 shows that it was activated on 4th August 2010, and was switched off on 12th August 2010; and it communicated only with **A6**'s tel. No. 254737367444, and using the SMS mode of communication only, as has been pointed out above.

In his defence, **A6** gave his statement not on oath; and made a blanket denial of participation in the Kampala bombings. He admitted that Habib Suleiman Njoroge (**A7**) and Selemani Hijjar Nyamandondo (**A10**) are his brothers. He denied that he and **A11** had known each other, or that he collected **A11**'s properties from **A11**'s vacated rented house, and the rental refund. He even denied that the house in Dagoreti, where these cheque and covering letter were found, was his; or that the lady, Lydia, found in the house was his wife. He pointed out that the police did not involve him in the search of this home; and yet he was already in their custody. He denied that tel. No. 254737367444, which communicated with tel. No. 254732485079 only, was his. He also denied communicating with **A9**; and contended that at the material time, he was in Juba working with an NGO.

I must be quite clear here that I reject the blanket denial by **A6** as a pack of lies. I am fully convinced by the prosecution evidence that **A6** accompanied **A11** in the search for an apartment at the Kagokem apartments; and later when **A11** prematurely terminated the tenancy, he (**A6)** returned the keys for the apartment, and collected the cheque for the balance of the rent on behalf of **A11**. I also believe that indeed **A11** introduced **A6** to his wife Amina Shamshi, as someone she could rely on in his absence; in case of need. Furthermore, I do believe that tel. No. 254737367444 belonged to **A6**; and that in the period stated

by the prosecution, it communicated with tel. No. 254732485079 only; and by SMS mode of communication only.

However, in my considered view, the evidence above does not without more, pin **A6** as having participated in the commission of the Kampala bombings. Unlike with **A7**, where there is some other evidence independent of **A11** having advised his wife to rely on him in times of need, the case of **A6** is just the word of mouth of Amina Shamsi to the police; and no more. It is quite probable that indeed, **A6** knew of some criminal activities of **A11**; but there is no evidence that such criminal activity was the mission to attack Uganda. Furthermore, **A11** could have been engaged in some other criminal activity, which **A6** was aware of, but different from his participation in the execution of the Kampala bombings, which **A6** might not have known of. Even if **A6** knew of **A11**'s activities regarding the Kampala bombings, he might have been either just sympathetic to, or unconcerned with, it.

In the case of ***Khatijabai Jiwa Hasham v. Zenab d/o Chandu Nansi [1957] E.A. 38***, the Court had to deal with a situation where the Defendant had lied to Court. Sir R. Sinclair, V.P. stated, at p. 51, as follows: –

> *"It seems clear that, on a most material point his original evidence was deliberately untruthful, and if the case were to be decided on a mere balance of probabilities this would weigh very heavily against him. But the burden of establishing fraud lay on the appellant and was a heavy burden as it must always be. It could not be discharged merely by showing that the respondent was unreliable."*

In ***Omari s/o Hassani v. Reginam (1956) 23 E.A.C.A. 580***, the appellant had been convicted on the statement of the deceased; and the trial Judge had drawn an adverse inference of guilt from his refusal to testify on oath, when the prosecution had according to the trial Judge *'raised a*

fairly strong case against the accused'. The Court of Appeal disagreed; and clarified, at p. 581, that: –

> *"... a 'fairly strong' case is not in ordinary language the same as a case proved beyond reasonable doubt. ... A Judge is, of course, entitled to take into account an accused person's refusal to give evidence on oath, but not to use such refusal to bolster up a weak case or to relieve the prosecution from proving its case beyond reasonable doubt. Nor can such a refusal amount of itself to corroboration of evidence which requires to be corroborated"*

In the case of ***Gas Ibrahim v. Rex (1946) 13 E.A.C.A. 104***, the appellant had offered evidence in defence, which the trial judge had characterized as 'nonsensical'; and had convicted him. In quashing the conviction, the Court of appeal, stated at p. 106 as follows: –

> *"It is our view that where the prosecution case failed on its merits owing to the lack of the corroboration which the learned Judge found was necessary, that lack of corroboration cannot be remedied by the mere fact that the appellant put up a false and perjured defence. If an accused person in giving evidence in his defence commits perjury he can be punished for that offence. But his perjury cannot be prayed in aid to secure a conviction for murder where the evidence for the prosecution does not justify that conviction."*

It is also important to take cognizance of the fact that although he is a brother to Habib Suleiman Njoroge (**A7**) and Selemani Hijjar Nyamandondo (**A10**), there is no evidence that he (**A6**) participated in any way in the planning, or execution of the plan to attack Uganda; which was given effect to by the Kampala bomb blasts. It is therefore my considered view that the evidence adduced against **A6,** does not

cross that requisite legal threshold necessary to amount to proof beyond reasonable doubt that he participated in the planning or execution of the Kampala bombings. Hence, it is my finding that the prosecution has failed to discharge the burden, that lay on it, to establish the guilt of **A6**; and for this reason, I have to acquit him of the offence of terrorism; with which he has been indicted.

(v) Participation of Habib Suleiman Njoroge (A7)

PW1 testified that he first met **A7** in 2009 is Somalia; where they underwent military training with **A7** and others at Al Shabaab camps. They fought several battles together under the Al Shabaab. In Somalia, **A7** was known as Imam; and he (PW1) learnt of **A7**'s name as Habib from prison. In Somalia, **A11** was called Julaibib; while **A3** was known as Basayev, and **A1** was known as Hassan. He (PW1), **A7**, **A3**, and **A11**, were members of the team constituted to attack Uganda; and they were given special training for that mission. On the second occasion when he (PW1) went to Somalia, he travelled on a bus together with **A7**. Later, when he was called to Nairobi to collect the explosives for use in Uganda, **A7** was the one who opened the gate to the house at South B; where explosives were loaded into the motor vehicle of **A10**.

Police officer Onencan Clix (PW5) recorded a charge and caution statement from **A7** on the 13th September 2010; but which however he repudiated, stating that he was forced to sign it after he had been subjected to physical and mental torture. I admitted it in evidence as a statement, which **A7** had in fact voluntarily made. The reasons for my doing so, include that the medical examination carried out on **A7** by a doctor did not reveal any injuries or evidence of physical torture on him. Second, Police officer Onencan Clix was in fact not based at the place where **A7** was being detained and claims he was tortured from; but was instead detailed from the CID Headquarters to record

A7's cautioned statement. Third, the statement he (**A7**) made to PW5 is in fact not entirely a confession; as at the end he denies any guilt.

In ***Usin & Anor vs Republic [1973] E.A. 467,*** in convicting the appellant, the trial judge relied on an unsworn but exculpatory statement made by the appellant's co-accused in his defence. The appellate Court pointed out that these were grave misdirection; and held, at p. 468, that: -

> *"... an unsworn statement by a co-accused is not evidence against another accused (**Patrisi Ozia vs R. [1957] E.A. 36**), nor does it amount to accomplice evidence capable of acceptance after corroboration (**Ezera Kyabanamaizi vs R. [1962] E.A. 309**). Furthermore, the second appellant's unsworn statement was entirely exculpatory, and could not be taken into consideration against the first appellant s. 28 of the Evidence Act, which applies only to confessions."*

In ***Kantar Singh Bharaj & Anor vs Reginam (1953) 20 EACA 134***, there were only two unimportant discrepancies between the witness' statement and his evidence in Court. After laying down the procedure trial Courts should follow in such a situation to admit the statement, the Court of Appeal pointed out as follows: -

> *"But that does not make what is said in the statement substantive evidence at the trial. Its only purpose and value is to show that on a previous occasion, the witness has said something different from what he has said in evidence at the trial, which fact may lead the Court to feel that his evidence at the trial is unworthy of belief."*

In the instant case before me, it makes no sense for the police to fabricate a statement for use to pin a suspect in the crime charged; and yet, include in the statement material which in effect exculpates the suspect it is otherwise designed to crucify, by instead suggesting

such a person's innocence. I therefore reject that part of the statement where **A7** seeks to exculpate himself; and accept the rest of the statement where he actually incriminates himself and implicates others with regard to their exploits in Somalia, and of participation in the mission to attack Uganda.

In his cautioned statement, **A7** confessed that he joined Al–Shabaab in Somalia in 2006 on the persuasion of one Hanif. He received military training in Somalia with **A11**. He went back (to Kenya) leaving **A11** in Somalia; but he returned to Somalia in 2009, where he rejoined **A11**. They fought several battles together there. He left Somalia and came back to Kenya; and in January 2010, he saw **A11** at a mosque in Mombasa. In April/May 2010, **A11** and one Jabir informed him that they wanted to hire his brother's (**A10**'s) Toyota Land Cruiser. He called his brother **A10** to bring the vehicle; which **A10** did, and they met at Dagoreti, Kawangware. **A11** and Jabir brought PW1 whom they introduced as their client; and then Jabir brought four green bags and loaded them in the boot of **A10**'s vehicle, with instructions that no one should tamper with them.

The following day, on a Sunday, **A11** and Jabir came with PW1; and then PW1 and **A10** left for Kampala. Later **A10** called and informed him of the arrest of PW1; and requested him to call **A11** to give the contact of another person in Kampala to receive the bags. He called **A11** who came with **A1** to him in Nairobi; and he gave them the tel. No. of **A10**, then he left for Mombasa. Police officers Sgt. Christopher Oguso (PW59) and ACP Robert Mayala (PW71) testified that Amina Shamsi told them during investigations that tel. No. 254771666668 belonged to **A7** whom she was advised by her husband (**A11**) to refer to in case of any problem. She told them that it was her husband (**A11**) who informed her that tel. No. 254771666668 belonged to **A7**.

The call data records (CDRs) for **A10**'s tel. No. +255786065651, and tel. No. +256785268359 show that **A7**, using tel. No. +254771666668, was in constant communication with **A10**'s +255786065651 and +256785268359 between the 8th May to 10th May, 2010. The CDRs for tel. No. 255786065651 and tel. No. 256785268359 also show that tel. No. 2540713286523 (registered in the name of **A7**) communicated with tel. No. 25471159619 (registered in the name of one Hawa Musa) five times, by SMS, between 29th May 2010 and 18th July 2010 when it went off air. Police officer SP Simon Murage (PW49) testified that he made a search at **A7**'s apartment in Mombasa; and recovered **A11**'s documents, which included a photocopy of **A11**'s national identity card and others (*exhibits PE346, PE347,* and *PE348*) from there.

In his unsworn statement, in his defence as DW7, **A7** admitted that **A6** and **A10** are his brothers. He denied that he was a preacher; but was instead a radio presenter in Mombasa. He denied that he has been Somalia; and noted that PW1 did not mention him in his extra judicial statement as being one of those chosen for the Uganda mission. He also contended that there is no evidence that tel. No. 2540713286523 was his; or that he owned tel. No. +254771666668 (*exhibit PE143*), which is shown to have called **A10** even after 9th October 2010 when he had already been arrested. He also denied ever going to Kawangware; and contended that there is no inventory for **A11**'s properties allegedly recovered from his home. He contended that there was no proof of PW1's evidence that he transported the bombs to Kenya from Somalia; as **A3**'s extrajudicial statement does not state so.

With regard to PW1 not having mentioned **A7** in his extrajudicial statement, I note that PW1 does not state in it that the persons he named therein were the only ones with him in Somalia; or that he specifically stated that **A7** was not there. For instance, he testified in

Court that eight persons were assigned to carry out the Uganda mission; but he names only five of them, including **A7**; and also stated that he would only remember some of the persons he was with in Somalia upon seeing them. To my mind then, failure on the part of PW1 to name **A7** in his extrajudicial statement does not render his evidence in Court unreliable or unworthy of belief. It is my finding that the extrajudicial statement is, in fact, not inconsistent with his sworn evidence; which merely gives a more detailed account.

Learned defence Counsel pointed out that **A7** and **A10** are brothers; hence, even if it is true that in fact using tel. No. +254771666668 communicated with **A10** on **A10**'s tel. Nos. +255786065651 and +2567885268359, there would be no crime in this. I however think otherwise. To me, the communication between the two accused persons should not be explained simply by their blood relationship. It should, instead, be considered in the light of the evidence that **A7** had to call his brother (**A10**) to come all the way from Arusha, Tanzania, and ferry some items from Nairobi to Kampala; instead of identifying a person from Nairobi where the items were, or from Mombasa where he (**A7**) was resident, to do so. This could only have been because the mission was one of great secrecy; and so, demanded utmost trust and confidence. This, as has been shown by evidence, was the highly secretive transportation of explosives for a criminal purpose.

I should point out that it is manifest that the telephone communications took place at the very time it is shown that **A10** travelled to Uganda, allegedly for the sole purpose of delivering the explosives that were to be used in the Kampala bombings. These telephone communications should also be considered in the light of the evidence adduced, that it was **A7** who notified **A11** of the hitch in the plan to deliver the explosives to Kampala, caused by the arrest of

PW1 at Malaba; which necessitated the identification of another person in Kampala to receive the explosives. Accordingly, the communication between **A7** and **A10** at the material time was certainly neither ordinary nor innocent. It is my finding that it was part, and parcel, of the criminal enterprise of delivering the explosives intended for the planned attack on Uganda.

The cautioned statement made by **A7**, in which he incriminates himself of participating in the Kampala bombings, supplements and lends assurance to a whole range of evidence adduced to prove his participation. Such evidence includes the accomplice evidence of PW1, the fact of the crossing into Uganda by **A10**, and the delivery of the explosives to **A3** in Kampala. It also includes the evidence regarding the recovery of **A11**'s documents from **A7**'s house in Mombasa; showing that **A7** closely knew **A11**, with whom he was deeply involved in the execution of the Kampala bombing mission. I am, therefore, satisfied that the prosecution has presented overwhelming evidence proving beyond reasonable doubt that **A7** was deeply involved in the execution of the plan to explode bombs in Kampala; for which I find him guilty as charged; and accordingly convict him.

(vi) Participation of Hassan Haruna Luyima (A4)

PW2 testified that **A3** recruited him (PW2) and **A4** into the scheme to explode bombs in Kampala; and gave both of them keys to his (**A3**'s) Namasuba safe house. **A3** gave **A4** money with which **A4** purchased a Nokia 3510 and a Kabiriti phone, from Kafero Plaza in Kampala; then **A4**, took him (PW2) to the Namasuba safe house where he (**A4**) introduced him to the suicide bombers in the house as a brother. After they had conducted their separate surveillance, **A4** berated PW2 for returning to the Namasuba house late; as he had missed the connections of the explosives. A demonstration was done for PW2,

following which **A4** encouraged him not to fear detonating the explosives using a phone; as all that he needed to do was to make a phone call. **A4** also cautioned him to avoid being arrested; and advised him to blow himself up if he was faced with an arrest.

He testified further that after the connections of the explosives, **A4** left with one of the suicide bombers to take to the Ethiopian Village Restaurant, and for **A4** to proceed to the Makindye house; while PW2 left with the other suicide bomber for the Kyadondo Rugby Club. The day after the blasts **A4** comforted him over the blasts; and informed him that however, he had learnt that the Makindye House bomb had not detonated. **A4** told him that he feared he (**A4**) could be arrested; so he had booked a bus to go to South Sudan. Later, **A4** called him from South Sudan complaining of living conditions there; so he was preparing to come back to Uganda. He testified further that **A4** was with the police who arrested him from his Najjanakumbi home in the evening of his arrest; and identified him to the police.

In **A3**'s extra judicial statement (*exhibit PE94*), he confessed that he recruited his brother **A4** in the execution of the Kampala mission; and assigned him to take Kakasule, the suicide bomber, to Ethiopian Village Restaurant, and to deliver explosives at Makindye House. He gave **A4** the keys for the Namasuba house where the final wiring of the explosives were done from; and gave him final instructions before he **A3** left for Nairobi. **A4** made an extra judicial statement (exhibit PE95), to Her Worship Agnes Nabafu (PW4) from Nakawa Chief Magistrate's Court, which he retracted; but I admitted in evidence for reasons I have already given in the course of dealing with **A3**'s participation. **A4**'s statement is consistent with that of **A3** and the evidence of PW2 regarding his (**A4**'s) role in the Kampala bombings.

In his unsworn statement made in his defence, as DW11, **A4** generally denied most of the evidence adduced by the prosecution against him. He attacked PW2's evidence against him as weak accomplice evidence. He retracted his confession; and attacked the document showing his mobile phone sets purchase from Majestic Plaza; pointing out that it shows a hire purchase transaction instead of it being a receipt for payment made for the phones. He contended that at the time he allegedly bought the phones, he was also dealing in the sale of phones; so there was no need for him to buy phones from another person. He however admitted that he travelled to South Sudan after blasts; but contended that this was a routine business trip to Juba. He also admitted that he was arrested from a shop in the Pioneer Mall.

As was the case with the retracted confession by **A3**, I have had to warn both the assessors and myself of the danger of acting on the uncorroborated confession by **A4**. I am however aware that upon exercising the necessary caution, I can nonetheless act on the confession, even without corroboration, if I am satisfied that the confession can only be the truth. I find that **A4**'s confession supplements, and lends assurance to, an array of evidence, which the prosecution has adduced against him. Such evidence includes that of Joseph Makubuya (PW19) that he sold two phones (a Nokia and a Kabiriti) to **A4** from Majestic Plaza on 9th July 2010. It also lends assurance to the accomplice evidence of PW2 that **A4** fled to South Sudan soon after the twin blasts, and after expressing fears that he might be arrested since the Makindye bomb, containing the phone he had bought from PW19, had failed to explode.

On the other hand, I find corroboration of **A4**'s confession, and PW2's evidence on **A4**'s flight to Juba, in the evidence of retired Police Sgt. James Owor (PW64) that from **A4**'s home, he recovered two bus tickets

for trip to and from Juba (*exhibits PE290 and PE291*), and two temporary travel permits issued to **A4** by South Sudan Government (*exhibits PE288* and *PE289*). Further evidence of his trip to South Sudan, is in the evidence of Senior Immigration officer Daniel Ambaku Berra (PW26) that the record at Elegu border crossing point shows that **A4** crossed to South Sudan on 13th July 2010; which was two days after the blasts. This is so although **A4**, while conceding in his defence that he travelled to South Sudan soon after the Kampala blasts, claimed that it was not an escape; but a routine business trip to Juba. I instead view this as conduct inconsistent with innocence.

The confession by **A4**, and PW2's evidence, is also corroborated by the evidence adduced by PW17, PW18, PW41, PW42, and PW65, regarding the discovery of the explosive device whose components are (*exhibits PE256, PE258, PE260,* and *PE262*), and a Nokia phone (*exhibit PE185*), which had been placed at Makindye house. Further evidence, corroborative of **A4**'s, is in the remark from the Pioneer Mall shop No. 20 by **A13,** to PW31 and his team, that it was **A4** who knew more about the bombs. Further corroboration still, of **A4**'s confession and PW2's testimony, is in the fact that **A4** disclosed the role PW2 performed in the crime, and led Police to the home of PW2; leading to PW2's arrest. It was also **A4**, who led police to **A3**'s safe house at Namasuba; where the suicide bombers and the explosives had been kept, and the final preparations for the Kampala bomb attacks had been made from.

Similarly, it was also **A4** who led police to the home he had rented at Namasuba; from where the police recovered a ZTE Kabiriti phone (*exhibit PE273*) with a Warid SIM card (*exhibit PE274*), and a Nokia Katosi phone cover, from a pit latrine which he had disclosed to police that he had thrown the phones in. Therefore, it is my finding that the prosecution has adduced sufficient direct and circumstantial

evidence, which proves beyond reasonable doubt that **A4** was involved in the execution of the mission hatched in Somalia to attack Uganda. He fully participated in the delivery of the explosive devices at the Makindye House; and the delivery of the suicide bomber and explosives at the Ethiopian Village Restaurant. Hence, I find him guilty; and convict him of the offence of terrorism as charged.

(vii) Participation of Omar Awadh Omar (A8)

Police officer SP Paul Maingo (PW61) testified that in 2009, the police got information that Omar Awadh Omar (**A8**) was involved in recruiting for the Al-Shabaab, as well as financing and coordinating their activities. The police placed (**A8**) under surveillance; and in 2010 police got information of possible recruitment taking place at the home of **A8** at Kalimani. The police carried out a search at that home; and recovered military items such as uniform, sleeping bags, and boots. The search also found **A8** with ten Kenyan passports bearing different names. **A8** was interrogated; but was, however, released. In 2010 he (PW61) interrogated **A1** personally, upon **A1**'s arrest; and **A1** revealed to him that the person saved in his (**A1**'s) phonebook as 'Boss' under tel. No. 254727555555, was Omar Awadh Omar; who was the financier of their operations for the Kampala attacks.

He (PW61) received information from the U.K. that money was sent to **A8** from the U.K. through Qarani Forex Bureau in Eastleigh, Nairobi. PW61 and Police officer No. 74734 Cpl. Jackson Merengo Chacha (PW67) obtained a printout of the transactions of the Forex Bureau (*exhibit PE174*) from the Manager Mohamed Mahdi. The record of the transactions shows that between 19th November 2009 and 3rd June 2010, eleven remittances, in the total sum of US$35,990, was made by one Omar Aziz Omar of the U.K. to Musa Ali of tel. No. 254727555555 as recipient. Ten of the eleven remittances were collected by one Musa

Dere, a wanted Al-Shabaab member, who the Manager of the Forex Bureau told (PW67), had been introduced to him by **A8** to collect them.

The Manager of the Forex Bureau told PW67 that Mohamed Hamid Suleiman (**A9**), whose tel. No. 07222236664 was captured in the record of the Forex Bureau transactions, collected the other remittance in the sum of US$660. A search at Safaricom established that tel. No. 254727555555 was registered in the name of Omar Omar; and its CDR (*exhibit PE142*) shows that calls were made from it to a number of U.K. telephone contacts every time the remittances in issue were sent to Qarani Forex Bureau; beginning with the call to U.K. tel. No. +447908239425 made on the 19th November 2009. Prosecution *exhibit PE326* shows that tel. No. 254727555555 was roaming in Uganda on the MTN network between 7th May 2010 and 22nd June 2010.

Police officer ACP Aguma Joel (PW66) testified that he intercepted and arrested **A8** at Malaba on 18th September 2010; and found **A8** with three phones, tendered in evidence as exhibits *PE281, PE282,* and *PE283*. The CDR of tel. No. 254727555555 (*exhibit PE142*) shows that the Nokia 1208 phone with IMEI (Serial No.) 356028036441427 (*PE281*), which was recovered from **A8** by PW66, had used the Sim for tel. No. 254727555555 from 17th November 2009 up to 1st September 2010. Nokia 6233 phone with IMEI (Serial No.) 352749014839340 (*exhibit PE282*) which was also recovered from **A8** by PW66, had also used the Sim for tel. No. 254727555555 on 7th March 2009.

A8 gave an unsworn statement in his defence as DW8; in which he admitted close association with **A9**, whom he once lived with, in the same estate, and communicated with regularly; but denied that he sent him to Qaran Forex Bureau. He also admitted that he came to Uganda just before the Kampala bomb attacks. He however denied that tel. No. 254727555555 was his; and instead gave his tel. No. as

254722516950. He also pointed out that PW2 never mentioned having seen him (**A8**) in Uganda. He claimed that he is on trial because his organization 'Muslims' Human Rights Forum' had released a document exposing abuse of rights by the Kenyan government, in conjunction with foreign government agencies like the FBI. He had researched and handed over materials to one Alamin, the Director, who signed it.

He stated that he was arrested from Nairobi; and was hooded, handcuffed, and shackled, then driven to Malaba and handed over to Ugandan police. **A8**'s denial of ownership of tel. No. 254727555555, was supported by **A9** who informed Court in his unsworn statement in his defence, that tel. No. 254727555555 belongs to another person called Omar Omar Salim. However, the recovery of phones upon his arrest at Malaba, showing that they had used Sim for tel. No. 254727555555, corroborates the information given to police by the Manager of Qarani Forex Bureau that this was **A8**'s telephone contact. Amina Shamsi's information to PW59 that it was **A8** who collected the key to their house from Kitangela when her husband (**A11**) had left for Tanzania, was supported by **A6**'s information to PW59 that it was **A8** who gave him the key to evacuate **A11**'s house at Kawangware.

It was following this information, that the police recovered a cheque and a covering letter in the name of **A11** from **A6**'s home. This shows not only that Amina Shamsi is a reliable informant; but also that **A6** and **A11** were close to, and confided in, one another. I believe the information Mohamed Mahdi (the Manager for Qarani Forex Bureau), who could not be produced in Court because he has vanished, and his Forex Bureau closed, gave the police that he disbursed the remittances to Musa Dere, and Mohamed Hamid Suleiman on the instructions of **A8**. It was submitted for the defence that tel. No. 254727555555 was

registered in the name of Omar Omar; which is not the same as Omar Awadh Omar.

I should however point out that tel. No. 254722366634 (*exhibit PE143*), which belongs to Mohamed Hamid Suleiman (**A9**), was instead registered in the name of Moahmed Hamid; leaving out the name Suleiman. This incomplete registration of **A9**'s name as user of this tel. No. makes it probable that the service providers may not have been that strict in recording the names of their registered users. Second, if I were to believe **A9** that tel. No. 254727555555 belonged to a Mombasa businessman called Omar Omar Salim, then since this name is not the same as Omar Omar (the registered owner of tel. No. 254727555555), the same contention, which has been raised with regard to **A8** being the registered user of that tel. No., would equally arise.

This would then, and in the light of the evidence that it was **A8** who was authorizing the manager of Qarani Forex Bureau, through tel. No. 254727555555, to disburse funds to particular persons, present a very high probability that the person registered as user of tel. No. 254727555555 was in fact **A8**; notwithstanding that he was not registered by his full name. Even then, this offered nothing more than circumstantial evidence; and since, on this, the prosecution case is grounded exclusively on circumstantial evidence, before any conviction can be justified, there is need to narrowly examine the evidence and establish whether the inculpatory facts are incompatible with the innocence of the Accused (**A8**), and are incapable of explanation upon any reasonable hypothesis other than that of guilt.

Further, there must be no co-existing circumstances that would weaken or altogether destroy the inference of guilt. I however have difficulty with the prosecution's evidence regarding **A8**'s alleged participation in recruiting for the Al-Shabaab. I find it most surprising

and utterly inexplicable, and it defies all logic, that a person who is a known point man for the Al–Shabaab, as the prosecution claims **A8** was, is found red handed with military materials, and in questionable possession of a number of passports; but is not brought to book. There is the real possibility that indeed **A8** was still a linkman for the Al–Shabaab; and so, the money remitted to him and collected by Musa Dere, a known Al–Shabaab operative who was reportedly killed in Somalia, could possibly have been meant for operations in Somalia.

A8's shadowy operation could have been out of fear of arrest again by the Kenyan police. This to me is a reasonable hypothesis that could explain his clandestine activities. However, there is the strong possibility that in all this, he had nothing to do with the Kampala bombings; and this would explain why neither **A3** nor **A4** in their extrajudicial confessions, nor PW1 or PW2 who testified that a group of visitors came to Uganda for surveillance and coordination of the mission, named him amongst them. In fact, none of the prosecution witnesses named him as having attended any of the meetings for the planning or execution of the Kampala attacks. True, he was aware that **A11** was leaving Kenya for Tanzania; and executed the evacuation of **A11**'s house.

Nonetheless, there is no evidence that he was aware that **A11** was guilty of participating in the Kampala blasts; or that he urged or assisted **A11** to flee to Tanzania. In any case, he is not being charged with the offence of being an accessory after the fact. He has given an explanation for his having come to Uganda; that he was born and partly raised in Uganda, and his mother a Ugandan lives here. It is quite plausible that indeed, as he claims, he came to Uganda to visit his family members and to arrange for his relocation to Uganda from Kenya. It is noteworthy that neither does PW2, in his evidence, nor do

A3 and **A4** in their confession statements, mention **A8** as having played any role at all in executing the bomb blasts in Kampala.

I agree that the prosecution has produced a fairly strong case against **A8**; which casts serious suspicion on him. But to my mind, that is not sufficient to prove beyond reasonable doubt that he participated in the execution of the Kampala mission. Because I find it quite instructive with regard to determining whether the prosecution has adduced evidence, which proves beyond reasonable doubt that **A8** is guilty, I must again refer to the case of ***Omari s/o Hassani v. Reginam*** (supra), where the trial Judge made a finding that the prosecution had *'raised a fairly strong case against the accused*'; and had drawn an adverse inference of guilt, from the Accused person's refusal to testify on oath, and convicted him. The Court of Appeal quashed the conviction; and made quite a strong statement, at p. 581, that: –

> *"... a 'fairly strong' case is not in ordinary language the same as a case proved beyond reasonable doubt. ... A Judge is, of course, entitled to take into account an accused person's refusal to give evidence on oath, but not to use such refusal to bolster up a weak case or to relieve the prosecution from proving its case beyond reasonable doubt. Nor can such a refusal amount of itself to corroboration of evidence which requires to be corroborated"*

I can only, here, repeat the words of the Supreme Court of Uganda in the case of ***Kazibwe Kassim vs Uganda, S. C. Crim. Appeal No. 1 of 2003; [2005] 1 U.L.S.R. 1*** at p.5; where the Court stated that:-

> *"In the instant case, like the case of* ***R. vs. Israeli – Epuku s/o Achietu (1934)1 E.A.C.A. 166,*** *we are of the opinion that the evidence did not reach the standard of proof requisite for cases based entirely on circumstantial evidence. We are unable to hold that the evidence*

contains any facts which, taken alone amounts to proof of guilt... Although there was suspicion, there was no prosecution evidence on record from which the Court could draw an inference that the accused caused the death of the deceased to justify the verdict of manslaughter."

In the light of the authority of the case cited above, I am not satisfied that the prosecution has adduced the requisite evidence to prove beyond reasonable doubt that indeed **A8** participated in any way in the planning or execution of the Kampala bomb blasts. I therefore acquit him of the offence of terrorism for which he has been charged.

(viii) Participation of Mohamed Hamid Suleiman (A9)

The CDR for tel. No. 254722366634 (*exhibit PE143*), shows that it is registered in the name of Mohamed Hamid (**A9**). The printout of the transactions at Qaran Forex Bureau (*exhibit PE174*) shows that **A9** collected money from the Forex Bureau once; on behalf of the user of tel. No. 254727555555. The CDR for **A9**'s tel. No. 254722366634 shows that it communicated with tel. No. 254727555555, one hundred and seventy two times from the year 2009. The CDR also shows that it communicated twelve times with tel. No. 254720945298 (for **A2**); and twenty four times with tel. No. 254713286523 (for **A7**). It communicated eight hundred and sixty seven times with tel. No. +254722516950 (which **A8** admits is his); and also communicated six times, with a U.K. tel. No. +447939067121. It also communicated three times with tel. No. 254715855449 (registered in **A1**'s name). Most of the communication were by SMS mode of communication.

In his unsworn statement in his defence as DW5, **A9** admitted ownership of tel. No. +254722366634. He stated that **A8 w**as his colleague in the organisation known as Muslims' Human Rights Forum,

and they had a close relationship. He also stated he knew **A2** as a driver in the school, which his children attended; and **A11** as a security officer at the Saudi Embassy. He however denied knowing **A1** and **A7**. He claimed that tel. No. 254727555555 did not belong to Omar Awadh Omar; but to one Omar Omar Salim, a Mombasa businessman. He contended that nobody, not even PW1, named him as having been involved in the mission to attack Uganda. He also claimed that he had not known **A6** before their arrest; and pointed out that his CDR does not show anywhere that he communicated with **A6**.

I agree with the prosecution that **A9** is merely denying having had knowledge of **A1** and **A7**, before their arrest. The evidence from the CDR of his tel. No. shows that he communicated with them numerous times; using the SMS mode of communication, which it has been shown was the mode the Accused persons I have found guilty of the crime of terrorism had adopted. I also agree with the prosecution that **A9** lied when he stated that tel. No. 254727555555 belonged to a Mombasa business man; and yet it was recovered from **A8** in addition to other evidence I have discussed above, pointing to **A8** as the user of that tel. No. The prosecution has also urged me to consider the resistance by **A9** during arrest as conduct inconsistent with innocence.

I have given the evidence adduced and the prosecution submission considerable thought. I agree that lies by an accused may corroborate the prosecution case in that it would point towards his or her guilt. However, such lies can only be useful when it is made by an accused against the backdrop of a strong prosecution case against him or her. In the case of ***Gas Ibrahim v. Rex (1946) 13 E.A.C.A. 104***, the appellant had offered evidence in defence, which the trial judge had characterized as 'nonsensical'; and had convicted him. In quashing the conviction, the Court of appeal, stated at p. 106 as follows: –

"It is our view that where the prosecution case failed on its merits owing to the lack of the corroboration which the learned Judge found was necessary, that lack of corroboration cannot be remedied by the mere fact that the appellant put up a false and perjured defence. If an accused person in giving evidence in his defence commits perjury he can be punished for that offence. But his perjury cannot be prayed in aid to secure a conviction for murder where the evidence for the prosecution does not justify that conviction."

With regard to the instant case before me, the burden of establishing the guilt of **A9**, as charged, needless to say, lay squarely on the prosecution. This, I must admit, was quite a heavy burden, as it had to be, in view of the gravity of the offence with which **A9** has been indicted; and has stood trial. The burden cannot be taken to have been discharged by the mere fact that this Court has found **A9** to have been unreliable, or even that he indulged in deliberate falsehood. The prosecution has, I am afraid, failed to discharge this burden in a manner required by law; namely by adducing evidence proving beyond reasonable doubt that **A9** is guilty of participating in the Kampala bombings. Accordingly then, I acquit him of the offence of terrorism; with which he has been charged.

(ix) Participation of Mohamed Ali Mohamed (A11)

It was PW1's testimony that he was in Somalia together with **A11** who was known from there as Julabaid; and was one of his instructors at the Al–Shabaab camp in Kismayu. They fought many battles together alongside the Al–Shabaab. He (PW1) and **A11** were among the persons chosen to carry out the plan hatched in Somalia to attack Uganda; and were both present at the planning in Somalia for the attack. They were given a special training for the mission. He (PW1) left Somalia with

A11, **A3**, Amal, and Jaberi; and they had explosives for the Kampala mission. At Mandera border, Jaberi handed over the bag containing the explosives to **A11** who crossed into Kenya with the explosives. **A11** then instructed him (PW1) to go and rent a house in Kampala; which both of them would live in for the execution of the mission.

Later, Jaberi called him (PW1) to Nairobi; where he (PW1), Jaberi, Amal, and **A11** planned together how to smuggle the explosives into Uganda. They proceeded to Kawangware, to a house at South B, where they met **A7** and **A10**. In his cautioned statement, recorded by PW5, **A7** discloses that he (**A7)** he went to Somalia with **A11**, in 2006; where they received military training together. He came back to Kenya; leaving **A11** behind in Somalia. In April or May 2010, **A11** and Jaberi contacted him (**A7**) that they wanted to hire his brother's (**A10**'s) Toyota Land Cruiser. He called his brother **A10** who came with the vehicle; and he (**A7**), **A11**, Jaberi, and PW1 (who was brought by **A11** and Jabir, and was introduced as their client), met **A10** at Dagoreti, Kawangware.

From there, Jaberi put four plastic bags in the boot of **A10**'s Land Cruiser; with the directive that no one should tamper with the bags. The following day, which was a Sunday, **A11** and Jabir brought PW1 very early in the morning; and then PW1 together with **A10**, left for Kampala. Later, **A10** called him (**A7**) and informed him about the arrest of PW1 at the border; and requested him to call **A11** to give him the contact of another person in Kampala who could receive the bags. He (**A7**) called **A11** and met him in Nairobi; and upon briefing him of what had happened to PW1, he (**A11**) asked him to call **A1**; which he did, and **A1** joined them. After a brief discussion between **A1** and Jaberi, which he (**A7**) however did not follow, they asked him for the contact of **A10**; which he gave them, and then he left for Mombasa.

PW44, PW45, PW47, PW49, and PW73, testified that **A11** had rented a house in Kaigokem Apartments; but left within 2 weeks before the tenancy period had expired. He left his properties in the house; and sent **A6** to clear the house and collect the rent refund. Police officer (PW47) checked three apartments in Nairobi which **A11** had rented in Kawangare and Joy Park; but found that **A11** had vacated all of them. Police officer PW73 arrested Amina Shamsi, wife of **A11**; who led him to the houses **A11** had rented in Nairobi and Mombasa, but he found that **A11** had vacated all of them. A search conducted by Police officer (PW49) at the house of **A7** yielded some items belonging to **A11**. These included utility agreements, and tenancy agreements, for rentals in Mombasa; and a photocopy of **A11**'s national identity card.

Police officers PW59 and PW78 testified that upon the arrest of **A1**, he was the first person to inform police that **A11** was one of his accomplices. He (**A1**) gave **A11**'s phone contact as 254770451980; which was confirmed by Amina Shamsi (**A11**'s wife) as her husband's contact. She also gave them **A6**'s contact as 254737367444; and **A6** gave them tel. No. 254732485079 as **A11**'s contact. The CDR for tel. No. 254732485079 (*exhibit PE150*) shows that between 4th to 12th August 2010, it was in contact with tel. No. 254737367444 only; using the SMS mode of communication only. All the calls from **A11**'s tel. No. 254732485079 were made from the Kitangela geo-location only.

Police officer (PW59) traced **A11** up to Tanzania. He left his wife in Kenya after the Kampala bombings; and the wife did not know where he had gone, yet he was in Tanzania working for a private company. Police officer ACP Robert Mayala (PW71) arrested **A11** from Tanga, in Tanzania; and found that he was going by the name Ukasa Ali as shown by his Co. employee I.D. (*exhibit PE308*). However, his passport (*exhibit PE302*), Kenyan national identity card (*exhibit PE303*), and

driving permit (*exhibit PE304*) all showed he was Mohamed Ali. Police officer ACP David Hiza (PW73) testified that he established from Amina Shamsi (wife to **A11**) that she had been in Somalia with her husband in 2009, when her husband was fighting there.

She admitted that she had used her brother's phone, from Tanzania, to call Somalia; and that her husband, whose whereabouts she did not know, had told her from Kenya that the police were looking for him so he had to go back to Tanzania. In his unsworn statement made in his defence as DW12, **A11** denied the allegations made against him; contending that PW1 did not mention him at all in his extra judicial statement; nothing on his alleged Somalia role, his being chosen for Uganda mission, or his arranging for transportation of the bombs to Kampala. He pointed out that PW1 could not have feared him (in not naming him in his extrajudicial statement) since he had not yet been arrested at the time he made that statement. He also contended that, similarly, **A7** did not mention him in his cautioned statement.

He admitted having rented several apartments in Kenya, and vacating them before expiry of term. He however denied sending **A6** (whom he never knew), but instead his brother Jaffery Ali Mohamed, to collect the refund of the balance of the rent from the landlord. He knew **A9** from Saudi Embassy; but never communicated with him. He only knew **A3** from Luzira prison. He knew no one in the U.K.; and never communicated with anyone there. He admitted that he was arrested from Tanzania. As with the confession statements considered herein, regarding the other accused persons, **A7**'s retracted confession can only supplement and give assurance to, and may corroborate, such evidence as has been adduced against **A11**. Such evidence includes that of PW1 about their exploits in Somalia, with **A11** and others.

It also includes evidence by PW1 that he, **A11**, Jaberi, and Amal planned from Nairobi on how to smuggle into Uganda, the explosives to be used in the attacks therein. It also includes PW1's evidence that he and **A10** left with the explosives for delivery in Kampala. It also includes the confession by **A7** that he notified **A11** of the hitch in the plan to deliver the explosives to Kampala, owing to the arrest of PW1 at Malaba; which necessitated the identification of another person in Kampala to receive the explosives. It similarly includes the evidence by PW2 that explosives were first delivered to his home by **A3** and **A10**, and then later relocated by **A3** to Namasuba. It includes also the evidence that **A11** rented several houses in Nairobi, which he however left prematurely and under suspicious circumstances.

It also includes the recovery of **A11**'s properties at the home of **A7** in Mombasa. It also includes the evidence that **A11** fled to and was arrested from Tanzania; where he was passing under an assumed name of Ukasa Ali. The CDR for telephone No. 254732812681, which **A1** informed the police as belonging to **A3,** shows that it made a call to a Somalian tel. No. 252615624981, and to **A11**'s tel. No. 254732812681, from the Namasuba geo-location where from the evidence **A3** resided during the planning period. This, and the information **A1** gave police about their exploits with **A11** and others in Somalia, as well as the call **A11**'s wife made to a Somalian tel. No. from Tanzania, and her admission that she was in Somalia in 2009 with her husband (**A11**), is also corroborated by the retracted confession of **A7**, implicating **A11** of participation in the Kampala bombing mission.

I am therefore satisfied that the prosecution has, through direct and circumstantial evidence, proved beyond reasonable doubt that **A11** participated in the terrorism act, for which he has been charged; and

so the prosecution has discharged the burden of proof that lay on it. I therefore convict him for that offence.

(x) Participation of Selemani Hijar Nyamandondo (A10)

In his cautioned statement, **A7** confessed that he called his brother (**A10**) from Tanzania to come over to him in Nairobi; and **A10** responded. He (**A7**) saw four green bags being loaded onto the boot of **A10**'s Toyota Land Cruiser, and instructions were given that they should not be tampered with. **A10** and PW1 then left in the Land Cruiser for Kampala; but later, **A10** called him (**A7**) seeking an alternative contact in Kampala for the delivery of the bags as PW1 had been arrested in Malaba. PW1 testified that he saw the bags being loaded into **A10**'s Land Cruiser from Nairobi; and later they left for Kampala, but he was arrested at Malaba, and **A10** proceeded alone. **A3** stated in his extra-judicial statement, that **A10** delivered the bags of explosives to him at National Theatre Kampala. PW2 testified that **A3** and **A10** delivered bags containing explosives to his house at Najjanakumbi; and then **A3** booked **A10** at Naigara Hotel for the night.

The Immigration records at Namanga, Malaba, and Busia show that **A10** entered and exited Uganda (8th and 10th May 2010 respectively) in Land Cruiser, which from **A10**'s admission was registered as T595 ADH. This is supported by the evidence of Witness 'A' (PW22) the Immigration officer of Malaba, Charles Nuwamanya (PW24) the Senior immigration officer in charge of Malaba, Rafael Muntinda (PW46) the Immigration officer of Busia but previously of Namanga, Tom Eleve (PW56) presently a Customs officer at the Jomo Kenyatta International Airport but formerly of Busia Customs point, Police officer SSP Alfred Majimbo (PW54), and Priscilla Michael Seleki (PW72) of Tanzania Revenue Authority Arusha. Further evidence of **A10**'s travel up to

Uganda can be gathered from *exhibits PE132*, *PE163*, *PE122*, *PE101*, *PE131*, *PE301*, and *PE338*; and as well **A10**'s own admission.

Police officers PW59 and PW73 testified that they got information from Amina Shamsi that **A10**'s contact was 255786065651; and this was confirmed by **A10**. The CDR of **A10**'s tel. No. 255786065651 (*exhibit PE155*) shows movement from geo-locations in Tanzania to Kampala Uganda, through Nairobi Kenya; and back to Tanzania, from 8th – 10th May 2010. **A10**'s tel. No. 255786065651 was in constant contact with **A7**'s tel. No. 254771666668. The Call Data Record (CDR) for tel. No. 256785268359 (*exhibit PE328*) shows that it used phone set with IMEI (serial No.) 356931034892 in the period when **A10** was in Uganda; and communicated with **A10**'s tel. No. 254771666668 using it. This was the same phone set, which **A10** was using the Tanzanian tel. No. 255786065651 in, between 8th May 2010 to 10th May 2010.

In his defence, **A10**, who gave an unsworn statement as (DW10), admitted that he travelled to Uganda through Kenya between 8th May 2010 to 10th May 2010; and confirmed that he used his Land Cruiser, No. T595 ADH, which he identified as the very vehicle the prosecution attempted but failed to tender in evidence. He however contended that this was not the only time he had come to Uganda, since he had been transporting tourists all over the region, as owner of a Travel and Tour company. He however denied that he came up to Kampala in May 2010; contending, instead, that he stopped in Jinja. He denied that he travelled with PW1; and pointed out that PW1 does not in his extra-judicial statement name him as having travelled together with from Nairobi to come to Uganda. He also pointed out that PW1 claims they travelled in April; whereas he, instead, travelled in May.

He also pointed out that from PW1's evidence, he (PW1) did not see the items in the bags that were allegedly loaded into his (**A10**'s) Land

Cruiser from Nairobi. He denied carrying explosives in his vehicle when he came to Uganda in May 2010; and contended that the FBI forensic analysis supported him as it found no trace of explosives in his motor vehicle. He also denied that he was the owner of tel. No. 255786065651 (*exhibit PE155*). However, from the fact this tel. No. and tel. No. 256785268359 having used the same phone handset for calling **A7**'s tel. No., when **A10** was in Uganda, the irresistible inference one is compelled to draw is that it was **A10** who was using both tel. Nos. This neatly links with the fact that it was **A7** who had summoned **A10** from Tanzania, to deliver the explosives to Kampala.

The claim by **A10** that he terminated his journey in Jinja is negatived by evidence that the geo-locations of his calls, as is seen from the CDR for tel. No. 256785268359 (*exhibit PE328*), included Kampala. This evidence corroborates that of PW2 that **A3** and **A10** delivered the explosives to his Najjanakumbi house. The retracted confessions by **A3** and **A7** also supplement and give assurance to the evidence that **A10** in fact came up to Kampala. I do not place much evidential value in the failure by the FBI to find any trace of explosives in the vehicle **A10** used to travel to Uganda. This is simply because while the mattress, which **A3** used, may not have been washed from the time he used it, the case of **A10**'s vehicle, which he was using for his tour business, was different. He must have, all the time, subjected it to meticulous washing and cleaning to impress and attract customers; and this could have tampered with any trace of explosives in it.

Furthermore, the explosives were safely enclosed in suicide vests contained in bags, during their transportation to Kampala from Nairobi; and were kept in this state at PW2's Najjanakumbi house. They were, however, exposed at Namasuba house for wiring and connection; which must have left traces of explosives on items there.

Owing to the secrecy surrounding the mission, it obviously demanded that it be entrusted with a confidante. I therefore have no reservation whatever that **A10** was not only aware of the packages he transported and delivered to Kampala; but also of the purpose for their delivery. In the premises then, the prosecution has adduced overwhelming evidence, proving beyond any reasonable doubt, that **A10** participated in executing the Kampala mission; and so I convict him of the offence of terrorism as charged.

(xi) Participation of Abubakari Batemyeto (A5).

Police officer SP Martin Otieno Omumbo (PW63) testified that **A3** disclosed, on arrest, that **A5** was his accomplice; and led PW63 to **A5**. PW63 recovered several phones from **A5** including exhibit PE284; and a Sim card for tel. No. 254723457803, whose CDR showed it was a Safaricom No. registered in **A5**'s name. This tel. No. 254723457803 roamed in Uganda between 1st May 2010 and 8th July 2010; during which time it shared a phone set having IMEI (Serial No.) 358324037568470, with **A1**'s tel. No. 254715855449, and **A3**'s tel. No. 254719706497 The CDR for tel. No. 254723457803 shows that it communicated to **A3** on **A3**'s tel. Nos. 254719706497 and 254700745965; mostly using the SMS mode of communication, which was the common mode of communication used by the Accused persons in the period leading to, and after, the Kampala bombings.

Police officer D/AIP David Kitongo (PW29) testified that **A5** left Uganda through Malaba border point on 12th July 2010; which **A5** admits. In his defence, **A5** gave an unsworn statement as (DW6), in which he admitted that he was arrested from Mombasa; and that he was found with a phone upon his arrest. He admitted that tel. No. 254723457803 was his. He stated that he came to Uganda on 18th June 2010, and went back to Kenya on 12th July 2010; but that this was a routine trip, and

that he came to get a maid for **A3**. He further pointed out that the CDR for his tel. No. 254723457803 (*exhibit PE140*) shows that he made over sixty calls using the SMS mode of communication; but the prosecution chose only two messages out of them. He pointed out the absence of any evidence that he communicated with **A1**. He however corroborated the testimony of PW31 that **A1** has a brother called Dumba.

While there is, indeed, evidence that **A5** shared a phone handset with **A1** and **A3**, when they were in Uganda, that alone is not sufficient to prove the information **A3** gave to PW63 that **A5** was his accomplice. **A1** and **A3** were people **A5** knew from Mombasa; and they might have requested to use his phone handset; and **A5** might not have suspected anything. For a crime of the gravity, which terrorism is, I think the prosecution needed to provide more concrete evidence, direct or circumstantial, that indeed **A5** was a participant in the execution of the Kampala bombing mission; in order to pass the test for proof of **A5**'s guilt beyond any reasonable doubt. This, however, the prosecution has failed to do; and so, I have to acquit **A5** of the charge of terrorism with which he was charged, and has stood trial.

(xii) Participation of Dr. Ismail Kalule (A12).

Idris Nsubuga (PW2) testified that at end of July 2010, **A3** sent him to **A12** at Alidina mosque with a coded message inquiring about a patient; whom **A12** told him was PW1, who had earlier been arraigned at Nakawa Court for illegal possession of a Ugandan passport. **A12**, who was happy to see him, told him that when one Issa Senkumba had been arrested, he had feared it was **A3**, but was happy to learn that **A3** was fine. **A12** told him that **A3** and PW1 operated together. He (**A12**) also told him that PW1 was arrested by JAT; and was detained at JAT headquarters in Kololo. He told PW2 that he had sent some Shabaab (young men) to PW1 in prison; and of his plan to get false documents

to enable PW1 get bail. He also told PW2 that he would work on PW1's bail, and meet the costs as long as **A3** would refund him.

Later, PW2 went back to **A12** who told him that PW1 had not been released because the Magistrate was on maternity leave; and that since the case was minor and not connected with the Kampala bomb explosions, he would arrange for a production warrant for PW1 the following day. After the release of PW1, he was sent by **A3** with money to pay back the money **A12** had used for bailing out PW1; and to pass his (**A3**'s) phone contact to **A12**. On his part, PW1 testified that he knew **A12** as teacher/scholar of Islam and a medical person. Before the bomb attacks in Kampala, he and **A3** agreed to use **A12**'s place as their contact point; and he was arrested from **A12**'s place when he had gone to thank him for bailing him out. PW31 testified that he arrested both PW1 and **A12** from **A12**'s Clinic.

In his unsworn statement in his defence, as DW1, in which he denied any participation in the offence of terrorism, **A12** went into an explanation of his complex professional attainment and occupation as a medical officer; stating that his duty is to save life. He denied any knowledge of, or dealing with, **A3** or PW2. He admitted dealing with PW1 from his clinic; but as an ulcers patient. He denied the allegation that he arranged for PW1's bail; and explained that he always loaned monies to authorities of the nearby mosque, who would later refund the monies to him. I must confess that from the prosecution evidence, I am unable to discern any link between **A12** and the Kampala bombings. His knowledge of **A3**, and PW2, and his fears for the arrest of **A3**, does not make him a participant in the Kampala bombings.

Equally, his involvement in securing bail for **PW1**, which I believe he did despite his denial, was with regard to the offence of being in possession of an illegal Ugandan passport; not over the charge of

terrorism. An intervention, either by providing funds or standing as surety, to secure bail for a remand prisoner is not criminal at all; as the right to apply for bail is a constitutional right. He was not privy to either the arrangement, or agreement, between **A3** and PW1 to meet at his Clinic; and in fact did not attend it. He can therefore not be held culpable if the meeting was for a criminal enterprise; since it was held in his place without his knowledge or consent. In the event, I acquit him of the charge of terrorism, with which he has been indicted.

For those of the Accused persons I have convicted, the doctrine of common intention, the authorities for which I cited earlier, applies to them. Each of them was actively involved, at different levels, and in different places, and time, in the execution of the plan hatched in Somalia to harm Uganda for having contributed troops to the AMISOM undertaking. It does not matter that not all of them came together at any one time to confer on what to do, and how to do it. This was an enterprise whose members were far–flung all over the region. Nonetheless, they had a consensus ad idem on what they desired to do. They acted in concert, with each performing a crucial part and role in the execution of the crime; which complemented the action of, or the roles performed by, the others.

It is clearly manifest that they all prosecuted their criminal purpose knowingly; and with determination. It does not matter that ultimately only PW2 and the suicide bombers detonated the bombs that caused the deaths and injuries to so many. The convicts all played a part either in the planning, surveillance, delivery of the lethal explosives, or actual detonation of the explosives. They all knew that deadly attacks would be executed on Ugandan soil; and this came to pass, with the heart–rending consequence we now know resulted there from. Their seemingly separate actions were in fact joint and

coordinated; and led ultimately to the disastrous deeds. They pursued the enterprise as a common purpose; which they did achieve, and for which they have stood trial, and been found guilty.

THE OFFENCE OF MURDER

A1 to **A12** were each indicted of 76 counts of murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of the offence in each count alleged that on the 11th day of July 2010, the respective Accused murdered the person named in the count. Each count named the specific place where each murder was committed; which was either at Kyadondo Rugby Club, or Ethipian Village Retaurant. Each Accused denied the charges; and a plea of not guilty was entered against each of them. It was submitted for the accused persons that the charges for the offence of murder should be struck off for being wrongly brought jointly with those of terrorism. I agree with the prosecution that neither the Trial on Indictments Act, nor the Antiterrorism Act, nor any other law, prohibits joinder of charges.

To the contrary, section 23(1) of the Trial on Indictments Act provides that all offences, whether they are felonies or misdemeanors, may be charged together in the same indictment as long as the offences charged are founded on the same facts, or form, or are part of a series of offences of the same or similar character. The offences of terrorism and murder are distinct; with different elements to constitute each offence. In fact, it is a wise thing to do, to charge all the offences together; as the evidence sought to be relied upon is adduced once, and covers all the relevant charges. Second, neither murder nor terrorism is a minor cognate offence to the other. In fact, to constitute the offence of terrorism, death need not result from the terrorist act. Terrorism resulting in death is only one of the many instances where a person may be charged with the offence of terrorism.

Although the word death is used in section 7(1)(a) of the Antiterrorism Act, this is not necessarily the same as murder. The elements needed to be established, to prove the death in the Antiterrorism Act, are based on the elements for terrorism; and only add death as a consequence of such act of terrorism. What is important here is that an act of terrorism that results in death, categorizes the gravity of the offence; and is relevant for sentencing the convicted person. Such sentence would then be put into consideration when sentencing the same person for murder arising from the same act of terrorism. The prosecution had preferred 76 (seventy six) counts of murder, against **A1** to **12**; but it abandoned four counts; namely counts 21, 62, 78, and 79, thereby leaving only 72 which it endeavored to prove.

For each of the 72 counts, it was the duty of the prosecution to prove beyond reasonable doubt the following ingredients: –

(i) Death of each of the persons.
(ii) Unlawful causation of the death.
(iii) Malice aforethought in causing the death.
(iv) Participation of the accused in causing the death.

Ingredient (i) – (Fact of Death).

The law, as was stated in ***Kimweri vs. Republic [1968] E.A. 452***, is that proof of death may be achieved by presentation of a report of medical examination on such body; or, inter alia, by a person who physically saw the dead body. Prosecution proved the death of each of the 72 persons whose counts remained on the charge, as the defence never contested them; and they were each admitted in evidence by consent under the provisions of section 66 of the Trial on Indictments Act. These are persons named from count 4 up to count 79 (see *exhibits*

PE1 to *PE74*); save for counts 21, 62, 78, and 79, which the prosecution abandoned, as stated above.

Ingredient (ii) – (unlawfulness causation of Death).

It is a presumption of law, which has been restated in numerous cases such as ***R. vs. Gusambizi s/o Wesonga (1948) 15 E.A.C.A. 65; Uganda vs. Bosco Okello alias Anyanya, H.C. Crim. Sess. Case No. 143 of 1991 - [1992 - 1993] H.C.B. 68;*** and ***Uganda vs. Francis Gayira & Anor. H.C. Crim. Sess. Case No. 470 of 1995 – [1994 - 1995] H.C.B. 16,*** that any incident of homicide is a felony; hence unlawful. However, as was stated in ***Festo Shirabu s/o Musungu vs. R. (1955) 22 E.A.C.A. 454***, this presumption may be rebutted by the accused establishing, on a mere balance of probabilities, that the homicide is either justifiable or excusable.

Justifiable homicide is dictated by duty. Such, include the execution of a lawful sentence of death, or the termination of a patient's life-support by a family member or medical personnel (euthanasia) in a manner prescribed by law. It may also include fatality resulting from an attempt to arrest an escaping dangerous felon, when carried out in a manner not criminally careless or reckless. It is an absolute defence to any charge. Excusable homicide, on the other hand, is not owing to any evil design; but may occur under such instances as defence of self, or of a family member, or proportionate response to some offending provocation. It is dictated either by necessity, or is accidental. This reduces such homicide from murder, to a lesser offence; which, while still punishable, is only so to a lesser degree.

From the evidence adduced by the prosecution a deliberate plan was hatched in Somalia to attack Uganda to punish her for deploying troops in Somalia to protect the legitimate government of that country; which meant fighting the Al-Shabaab. This plan was ultimately executed by the deliberate delivery and detonation of

explosives not in military encampments, but in places where ordinary members of the public were known to assemble. It is therefore quite clear that the multiple homicides, that resulted from the execution of this plan, were neither justified nor excusable. Accordingly then, in the absence of any evidence in rebuttal – and this was rightly conceded by the defence – the presumption that the multiple deaths were, all, unlawful homicides is well founded.

Ingredient (iii) – (Malice aforethought).

Section 191 of the Penal Code Act provides as follows:

"191. Malice aforethought.

Malice aforethought shall be deemed to be established by evidence providing either of the following circumstances:

(a) an intention to cause the death of any person, whether that person is the person killed or not, or

(b) knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused."

Unless the perpetrator of the causation of death has expressly declared his or her intention to cause death, malice aforethought would remain an element of the mind; and can only be established by inference, derived from the conduct of the perpetrator, or the circumstances surrounding the causation of such death. This position of the law is well explained in the case of ***H.K. Bwire vs Uganda [1965] E.A. 606***, where Sir Udo Udoma C.J., sitting on appeal, stated at p. 609 as follows: –

"I think it is a well–established principle of law that a man's intention in doing an act can seldom be capable of positive proof. Such an intention can only be implied from the overt acts of the person concerned; or to put it another way: where an intent is an essential ingredient in the commission of an offence such an intent in most cases can only be inferred as a necessary conclusion from the acts done by the person concerned. As a general rule, however, a man is taken to intend the natural and probable consequences of his own act. See ***R. vs Farrington (1881) R. & R. 207*** *and* ***R. vs Harvey (1823) 2 B. & C. 257.***"

The factors from which malice may be inferred, has authoritatively been laid down in the case of ***R. vs. Tubere s/o Ochen (1945) 12 E.A.C.A. 63;*** and followed in such cases as ***Uganda vs. Fabian Senzah [1975] H.C.B. 136; Lutwama & Others vs. Uganda, S.C. Crim. Appeal No. 38 of 1989.***

The factors include whether the weapon that was used to inflict the fatal injury was lethal or not; whether the parts of the body of the victim targeted were vulnerable or not; whether the nature of injury pointed to an intention to cause grave damage, as for instance where the injuries are inflicted repeatedly, or not; whether the conduct of the assailant, before, during, and after the attack, points to guilt or not. In the case of ***Nanyonjo Harriet & Anor. vs. Uganda, S.C.Cr. Appeal No. 24 of 2002***, the Supreme Court reiterated the same factors stated above; and added that for a Court to infer that there was malice aforethought, death must have been a natural consequence of the act resulting in death, and the accused must be shown to have seen, or ought to have seen, it as a natural consequence of that act.

In the instant case before me, following the decided cases cited above, there is overwhelming evidence adduced by the prosecution, pointing at the homicides committed at the Kyadondo Rugby Club and

Ethiopian Village Restaurant as having been perpetrated with malice aforethought. The perpetrators must, surely, have intended and known, or ought to have known, the natural consequence of their acts; namely that either grievous harm would result, or that death was inevitable. As was also conceded by the defence, and on the authority of ***Uganda vs. Turwomwe [1978] H.C.B. 16,*** whoever placed the explosives in the three venues did so with malicious intent.

It matters not that from the evidence adduced, the perpetrators did not target any specific known person; or that another person, other than the one intended, was killed. All that is required, to establish the existence of malice aforethought, is that indeed death of a human being resulted following the intended unlawful act of killing a human being. It follows that on the principle of collective responsibility, which I have explained above, each of the accused persons, namely **A1**, **A2**, **A3**, **A4**, **A7**, **A10**, and **A11**, whom I have hereinabove found guilty of the offence of terrorism, is equally guilty of the offence of murder of the 72 persons, as charged,. Similarly, **A5**, **A6**, **A8**, **A9**, and **A12**, whom I acquitted of the offence of terrorism, are also each acquitted of the charges of murder of the 72 persons.

OFFENCE OF ATTEMPTED MURDER

Section 204 (a) of the Penal Code Act, provides that any person who attempts, unlawfully, to cause the death of another person commits a felony; and is liable to imprisonment for life. Section 386 (1) of the Act defines an attempt as follows: –

"When a person, intending to commit an offence, begins to put his or her intention into execution by means adapted to its fulfilment, and manifests his or her intention by some overt act, but does not fulfil his

or her intention to such an extent as to commit the offence, he or she is deemed to attempt to commit the offence.

(2) It is immaterial–

(a) except so far as regards punishment, whether the offendor does all that is necessary on his or her part for completing the commission of the offence, or whether the complete fulfilment of his or her intention is prevented by circumstances independent of his or her will, or whether the offendor desists of his or her own motion from the further prosecution of his or her intention;

(b) that by reason of the circumstances not known to the offender, it is impossible in fact to commit the offence."

Accordingly then, the ingredients of the offence are: –

(i) Intention to cause death of another person (malice aforethought)
(ii) Manifestation of the intention by an overt act.
(iii) Participation of the accused.

From the evidence I have considered above, while determining the commission of the offence of terrorism, and murder, it is quite evident that the delivery of the explosives in a place popular with revelers was intended to cause death; as it did, to many victims. Second, the several persons who received grievous injuries, including the ten named in the counts constituting this charge, were victims of that intention to unlawfully kill them. This also applies to the explosives, which were delivered at the Makindye house but, fortunately, did not explode. Accordingly then, the intention was put into action by the overt acts of **A1**, **A2**, **A3**, **A4**, **A7**, **A10**, and **A11**, whom I

have convicted in the charges of terrorism and murder. I therefore convict each of them of the offence of attempting to cause the death of the respective persons named in each of the ten counts of the charge.

Similarly, for **A5**, **A6**, **A8**, **A9**, and **A12**, whom I acquitted of the offence of murder, I acquit each of them of the offence of attempted murder of the ten persons with which they have been charged.

OFFENCE OF AIDING & ABETTING.

Section 8 of the Antiterrorism Act provides as follows: –

"Any person who aids or abets or finances or harbours, or renders support to any person, knowing or having reason to believe that the support will be applied or used for or in connection with preparation or commission or instigation of acts of terrorism, commits an offence and shall, on conviction be liable to suffer death."

The ingredients of the offence are: –

(a) aiding, or abetting, or financing, or harbouring, or rendering support to any person;

(b) knowing, or having reason to believe, that the support would be applied in connection with, or used for, the preparation or commission or instigation of acts of terrorism;

(c) the participation of the accused.

A12 has been charged alone; and with one count of the offence. However, the evidence adduced by PW1 and PW2 against **A12**, which I have already analyzed above, does not point at his having either aided, or abetted, or financed, or harbored, or rendered support to any person for the commission of the offence of terrorism or any

other. The money he disbursed for bailing out PW1 was with regard to the offence of being in unlawful possession of a Ugandan passport. This is not an offence under the Antiterrorism Act. I have already pointed out, herein above, that standing surety for an Accused, or providing funds for the Accused's bail, is not an offence as it is provided for under the Constitution.

Indeed, I am unable to see how money, which is deposited with the State, as bail money is, could be said to either aid, abet, or finance the commission of the offence of terrorism; or that in providing the funds, one would be harbouring or rendering support for the commission of the offence of terrorism or any other. For the reasons stated above, it is my finding that the prosecution has failed to prove beyond reasonable doubt, that **A12** committed that offence; and so, I acquit him of it.

OFFENCE OF BEING AN ACCESSORY AFTER THE FACT.

A13 was charged alone with two Counts of being an accessory after the fact; with the particulars stating that he received and assisted **A4** and PW2 in order to enable them escape punishment. Section 29 of the Antiterrorism Act provides as follows: –

"Any person who becomes an accessory after the fact to an offence under this Act commits an offence and is liable, if no other punishment is provided, to imprisonment not exceeding three years or a fine not exceeding one hundred and fifty currency points; or both."

Section 28 (1) of the Act defines the offence of being an accessory after the fact of an offence as follows: –

"A person who receives or assists another who, to his or her knowledge, has committed an offence, in order to enable him or her to escape punishment."

The ingredients of the offence are: –

(i) A person has committed an offence.

(ii) Another person has knowledge that the perpetrator has committed an offence.

(iii) The person with the knowledge that the perpetrator has committed an offence receives or assists the perpetrator.

(iv) The person who receives, or assists, the perpetrator, does so with the intention of enabling the perpetrator to escape punishment.

(v) The Accused is the person who, with the knowledge that another person has perpetrated a crime, receives and assists the perpetrator to escape punishment.

From the evidence of PW1 and PW2, and the retracted confession by **A3** and **A4**, as has been seen hereinabove, PW2 and **A4** had committed acts of terror in participating in the Kampala bombings. PW2 testified that after the blasts, he met **A13** who told him that **A4** had briefed him (**A13**) about **A4**'s and PW2's involvement in the bomb blasts; and he **A13** approved of the attacks, and expressed regrets that the Makindye bomb had not exploded. He (**A13**) expressed the fear that police could arrest PW2 and **A4**; and so he advised PW2 to escape from the country. The two (**A13** and PW2) later discussed about the bomb blasts in **A13**'s car. PW31 testified that when police went to shop No. 20 at the Pioneer Mall, it was **A13** who identified **A4** as the culprit; thus leading to the arrest of **A4** from the shop.

From the evidence adduced, all the ingredients of the offence of being an accessory after the fact have been established. In ***Wanja Kanyoro Mamau vs Republic [1965] E.A. 501***, the Court stated at p. 504, that: –

> *"We think it is quite clear that a passive attitude while a crime is being committed or following the commission of a crime will not ordinarily, of itself, make a person a principal offender, in the former case, or an accessory after the fact, in the latter. ... ...* ***Zuberi Rashid vs R. [1957] E.A. 455*** *... ... ... lays down the general rule that:*
>
> > *'it is not sufficient to constitute a person a principal in the second degree that he should tacitly acquiesce in the crime, or that he should fail to endeavour to prevent the crime or to apprehend the offenders, but that it is essential that there should be some participation in the act, either by actual assistance or by countenance and encouragement.'*
>
> *... ... ... It follows ... ... in our view, that while a person who aids and abets the commission of a crime or assists the guilty person to escape punishment is always an accomplice, a person who merely acquiesces in what is happening or who fails to report a crime is not normally an accomplice ..."*

In the instant case before me, **A13** did not merely acquiesce in the bomb blasts which he knew **A4** and PW2 had participated in; he went further and advised PW2 to flee the country, to escape punishment. He was therefore an accomplice who aided and abetted the commission of the crime of terrorism by **A4** and PW2. I am, therefore, satisfied that the prosecution has proved his guilt beyond reasonable doubt; and so, I convict him as charged.

In the result then, and for the reasons I have already given, but in partial agreement only with the lady and gentleman assessors, I find

that only **Hussein Hassan Agade** (A1), **Idris Magondu** (A2), **Issa Ahmed Luyima** (A3), **Hassan Haruna Luyima** (A4), **Habib Suleiman Njoroge** (A7), **Selemani Hijar Nyamandondo** (A10), and **Mohamed Ali Mohamed** (A11), are each guilty of committing the offences of terrorism, murder, and attempted murder, with which they have been indicted. I have, accordingly, convicted them for each of the counts of terrorism, murder, and attempted murder. I also find **Muzafar Luyima** (A13) guilty of the offence of being an accessory after the fact; and accordingly convict him.

However, and in agreement with the lady assessor with regard to **A6** only, I find that **Abubakari Batemyeto** (A5), **Yahya Suleiman Mbuthia** (A6), **Omar Awadh Omar** (A8), **Mohamed Hamid Suleiman** (A9), and **Dr. Ismail Kalule** (A12), are each not guilty of the offences of terrorism, murder, and attempted murder, with which they have been indicted. Similarly, I find **Dr. Ismail Kalule** (A12), not guilty of the offence of aiding and abetting the offence of terrorism with which he was charged. Accordingly, I set each of them free forthwith; unless they are being held for some lawful purpose.

Alfonse Chigamoy Owiny – Dollo

JUDGE

26 – 05 – 2016