

- A that they knew of the default. As directors, they were supposed to know the activities of their company. It is not sufficient to say that they did not involve themselves in the daily activities of their company or furthermore (as alleged by the third defendant) that they have since lost interest in the company. The two had guaranteed the loan. They knew of the default. They were under duty as directors, to put things in order. They did not do so. They cannot escape liability for the consequences. It is equally important to note that those two defendants did not raise this averment in their written statement of defence. They cannot successfully do so now as parties are bound by their pleadings. *Ultra petita* evidence cannot help their case.

Therefore judgment is entered in favour of the plaintiff against all the defendants jointly and/or severally. They (the defendants) are ordered as follows:

1. To pay the plaintiff, the sum of TZS. 25 477 684-30.
- E 2. The above sum to carry a 23% per annum interest from date of filing of this suit (3 April 2002) to date.
3. Interest in the decretal sum at the rate of 7% per annum interest from the date hereof until full satisfaction.
- F 4. Failure to satisfy 1-3 above, then vacant possession and sale by the plaintiff of the mortgaged property over CT. Number 3452 Plot Number 135 Block "E" Unga Ltd, Arusha.
- G 5. Each party to bear its costs of this suit.

H

I

REPUBLIC v. RASHID SALEHE HEMEDI

HIGH COURT OF TANZANIA AT DAR ES SALAAM

(E.M.E. Mushi, J.)

CRIMINAL SESSIONS CASE No. 11 OF 2000

Terrorism – Conspiracy to commit murder – Accused had no knowledge of plans and activities of conspirators – Whether there is a basis for inferring guilt of accused

Criminal law – Terrorism – Conspiracy to commit murder – Accused had no knowledge of plans and activities of conspirators – Whether there is a basis for inferring guilt of accused

Evidence – Circumstantial evidence – Accused was a friend of conspirators – Accused had no knowledge and activities of conspirators – Whether accused guilty of conspiracy to commit murder

On 7 August 1998 an act of terrorism was mounted on the United States Embassy in Dar es Salaam. The Embassy was bombed leading to the death of eleven people and a great deal of damage to property. Following the bombing of the Embassy the accused was charged with conspiracy to commit murder contrary to section 215 of the Penal Code.

The prosecution built its case around five factual areas namely, first that the accused was a friend of alleged conspirators and therefore his acquaintance with the alleged conspirators made him a participatory in all the activities of the bombing. Secondly, some physical Exhibits used in the preparation of the bomb were found in the accused's house and shop thus proving that he participated in the preparation of the bomb. Thirdly, remains of explosive materials were found on the accused's clothes thus establishing the accused's involvement in the bombing. Fourthly, the accused had common possession and use of a Suzuki Samarai vehicle with the alleged conspirators thus connecting the accused with the conspirators. And fifthly, after the bombing the conduct of the accused of evading the police tended to connect him with the alleged conspirators.

A The prosecution submitted that conspiracy presupposes an agreement between two or more persons to commit a crime; an agreement between the accused and the other conspirators should be inferred from the factual areas produced by the prosecution.

B The defence asserted that the evidence adduced by the prosecution left so many doubts that it could not be held that a case had been proved against the accused.

C **Held:** (i) Since conspiracy is an agreement between two or more persons to do an unlawful act or a lawful act by unlawful means, it is sufficient to prove that each conspirator knows that there is in existence or coming into existence of such scheme;

(ii) The nature of the evidence that is commonly used by the courts to find whether or not accused committed the offence of conspiracy is purely circumstantial;

D (iii) Circumstantial evidence must be such as to produce moral certainty to the exclusion of every reasonable doubt;

E (iv) While there is ample evidence from both the prosecution and defence witnesses to show that the accused, knew most of the alleged conspirators suspected of the bombing of the U.S. Embassy, yet he himself had taken no part in the alleged conspiracy;

F (v) The accused person was not aware of the bombing activities of the alleged conspirators and therefore there is no evidence from which it can properly be inferred that he was a party to the conspiracy of the bombing of the U.S. Embassy.

Accused not guilty

Cases referred to

- G
1. *R. v. Golkadas Kanji Kana* 16 E.A.C.A 116
 2. *R. v. Whitchurch* (1890) 24 Q.B.D 420
 3. *Ongodia and Erima v. Uganda* [1967] E.A. 137
 - H 4. *Hassani Fadhili v. R.* [1994] T.L.R. 89
 5. *Teper v. R.* [1952] A.C. 480
 - I 6. *Ndunguru v. R.* [2006] E.A. 179

Statutes referred to

1. The Evidence Act 1967, sections 12 and 114(1)
2. The Penal Code, section 215

Mr Mulokozi for Prosecution

Dr Fauz for the Accused

JUDGEMENT

(Delivered 22 December 2004)

E.M.E. Mushi, J.: In the morning of 7 August 1998, for the first time, Tanzania experienced the bitterness of the most feared new wave of international crime, known as "terrorism". On that day, at about 10:45 a.m. the United States Embassy at Dar es Salaam was bombed. The bombing, no doubt about that was in all respects, an act of terrorist attack committed by a highly organised and sophisticated "gang" of terrorists. It is believed, from the forensic evidence collected, that the terrorists used a "home made" bomb, made of high explosive materials, initiated by an electronic detonator connected to motor batteries.

The bombing caused a great deal of damage, both to human beings and property. Eleven people died as a result thereof, and many others were left seriously wounded. Buildings and vehicles in and around the United States Embassy (The U.S. Embassy) premises were destroyed, several of them beyond repair.

After the bombing, the Government of Tanzania formed a special committee to conduct an investigation. The Committee was chaired by the Director of Criminal Investigations (DCI) of Tanzania. Several Senior Police Officers were assigned to the Committee, including, ASP Ahmed Stambuli (who testified for the Republic as PWI), SP Valentino Mlowola (PWII), one SSP Samson Kassala, and others.

A Due to the novelty, the magnitude and the seriousness of the crime, the Tanzania Criminal Investigation Department (The Department) found itself just too incapable of handling the investigation alone. The Department simply lacked the personnel conversant with the proper knowledge and skills. The Department was inadequately equipped with the necessary facilities and equipment with which to conduct that kind of investigation. Much of the investigation needed could appropriately be termed as forensic investigation and engineering. B
C Due to these deficiencies, the Department had to require the assistance of the U.S.A.'s Federal Bureau of Investigation (FBI). The U.S. Embassy was too happy to assist, since some of the people killed as a result of the bombing included United States nationals. Hence, some F.B.I. special agents were included in the investigation Committee. D

The investigation commenced almost immediately after the commission of the horrendous crime. The immediate problem that confronted the investigators was how to locate the suspects, for, immediately after or before the commission of the offence, all the suspects virtually vanished into thin air. However, despite that setback, S.P. Valentino testified that through intelligence reports, a list of suspects believed to be linked with terrorists "gang" was supplied by the F.B.I. Of course, it is common knowledge that the F.B.I. is quite good at keeping tabs of these terrorist suspects. Movements of these suspects were traced and it was revealed that some of them had, indeed, been frequenting Nairobi, Mombasa, Zanzibar and Dar es Salaam. Movements of these terrorist suspects were traced at Dar es Salaam also. The places they had visited were known, even the places they resided and their guests were identified. And it came to be, as if by coincidence, that all these suspects were of "Arabic descent". But perhaps the most remarkable revelation is that all these suspects were centred around the accused person who is also, perhaps again by coincidence, of "Arabic origin". The accused person has his origins from Pemba Island. At the end of the day, to cut a long story short, the Investigation Committee had eventually established I

a "ring" of terrorist suspects and the accused person was glaringly at the centre of it. A

At least six (6) names of suspects featured on the list. Evidence recorded reveals the existence of at least two key suspects, with almost identical names, known as "Ahmed". Photographs of these two Ahmeds (Exh P.3(a) and (b) were shown to witnesses, which led to the disclosure of their true identities (at least as they were known in Dar es Salaam, for these terrorist suspects go by different assumed names). So we had one Ahmed s/o Khalifan Ghailan, identified as "Ahmedi Mfupi/Mnene" (short and stout Ahmed). The other one goes by the name of Ahmed Mohamed alias Burger, otherwise "Ahmedi Mrefu/Mwembamba" (tall and slim Ahmed). B
C

The said Ahmed Khalifani Ghailani (Ahmed Mfupi), is undoubtedly a long time friend of the accused person. His origins are said to be in Chake Chake, Pemba. However, it seems he moved to Mombasa, Kenya, where he found permanent residence. He used to visit the accused quite frequently, since 1996. In fact the accused and this Ahmed Ghailani were business associates. Ahmed Ghailani used to bring articles of clothing from Mombasa to a Dar es Salaam shop, wherein he (Ahmed Ghailani) also acted as a shopkeeper. Evidence also indicates that Ahmed Ghailani used to visit Dar es Salaam and Nairobi and, of course, some of the Arabic countries. It is recorded that the said Ahmed Ghailani was in Dar es Salaam in July, 1998, and he used to live at the accused's house, first at Narung'ombe Street, Kariakoo, and they later moved to another house, situated at Ilala, Amani street, House No. 15. It is also a fact recorded that the said Ahmedi Ghailan disappeared just a few days before the bombing incident. D
E
F
G

Evidence recorded reveals that the other Ahmed Mohamed alias Burger (Ahmed Mrefu), also originates from Chake Chake Pemba. Again, like Ahmed Ghailan, he moved to Mombasa, Kenya, where he also used to reside. He used to frequent Dar es Salaam, Nairobi as well as London. Like the other Ahmed, Burger was also an acquaintance I

A of the accused person. Whenever he visited Dar es Salaam, he used to hang out at the accused's shop during daytime and spent nights at his house. It is recorded in evidence that both Ahmeds used to be together, whenever they visited accused person.

B Then we have other names on the list, also believed to be friends of the accused. There is one Khamisi Khalifani Mohamedi, also a resident of Mombasa, Kenya, Fahadi Mohamedi Ali, again a resident of Majengo – Chini, Mombasa. The accused definitely has a lot of friends, no doubt about that, including one Hussein Hassan @ Mustapha Fadhili, again, a resident of Mombasa. There are others more, like Mohamed Sultan Zaidi and Seleman s/o Abdallah, both residents of Mombasa. We may also add to the list one Hafadhi s/o Mbaruku and D Issa s/o Lombo, both residents of Unguja.

In summary, the so-called friends of the accused person are said to be "business men", operating between Unguja, Pemba, Dar es Salaam, Mombasa, Nairobi, Dubai, Yemen and some other Arabic countries. E They used to visit him frequently, on and off, bringing some assorted articles of trade in which they were engaged. Evidence on record shows that some of these "friends" visited the accused as late as July, 1998, just a few days before the bombing. However, soon before F or after the bombing of the US Embassy, practically all of them disappeared into thin air. It is believed that they disappeared either immediately before the bombing or immediately thereafter. And it is sad to say that since the bombing incident, only one of these terrorist G suspects, one Khalifani Khamisi Mohamedi, has been captured, and the arrest was made in South Africa. We have been informed that after his arrest the suspect was extradited to the United States of America, where he was charged and later on found guilty. He is now H serving a long imprisonment sentence.

Despite the fact that these mysterious "friends" of the accused have yet to be captured, the accused has been charged, nonetheless. The charges facing him are those of conspiracy to Murder, c/s 384 I of the Penal Code. The indictment for murder, apparently, could not

hold due to what was said to be "lack of sufficient evidence" to support the charges of culpable homicide. A

At the initial stage of the proceedings, during the preliminary inquiry, the accused was charged with eleven (11) counts of murder. However, upon completion of investigations, conducted jointly by B the Tanzania Police Investigation Department (C.I.D.) and the American Federal Bureau of Investigations (FBI), the charges of 11 counts of murder were reduced to a single count of conspiracy to murder. C

The prosecution alleges that even if the accused person was not directly involved in the commission of the offence, however, he did conspire with his "friends/business associates" to commit the offence of murder. The Prosecution adduced evidence purporting D to demonstrate how these conspirators committed the offence of bombing with the clear knowledge of the accused. The evidence produced by the Prosecution is directed towards establishing the fact that the offence of conspiracy can only, in most cases, be inferred from the conduct of the accused person and the conspirators, and that the E inference must be drawn from the facts produced and admitted by the court. A total of 18 witnesses for the Prosecution did testify in that endeavour.

There is no doubt that the incident that took place on 8 July 1998, F at the U.S. Embassy, was a terrorist attack. All the pieces of evidence, both physical and non-physical, gathered by the C.I.D., in collaboration with the F.B.I., led to that conclusion. Evidence recorded shows that G the bomb was planted in a motor vehicle, which was driven and parked in front of the main gate of the U. S. Embassy's premises.

Both SSP Ahmed Stambuli (PWI) and SP Valentino (PWII) testified H to what they experienced on that fateful morning of 7 August 1998, round about 10:45a.m. from their Kinondoni District C.I.D.'s headquarters, located along Salender Bridge Street, both heard a horrifying blast, coming from the direction of the United States Embassy (which then was not very far from the said Police Station). The explosion made I the neighbouring surroundings and skies filled with black and heavy

A "clouds" of dust and smoke, full of metal and other bits of objects flying around. They visited the scene, and to their utter disbelief and shock, they saw the extent of damage that had been caused to the Embassy. The front portion of the Embassy had been completely destroyed; a good number of vehicles had been damaged beyond repair. Some parts of the premises were on fire. The situation was so horrific that one of the Police Officers could only compare it with the "Hiroshima's Atomic Bomb explosion!" It was an explosion caused by a bomb, all right, the Police Officers satisfied themselves.

The Police had to do something, quick and fast. Together, with a squad of several Police Officers and Field Forces Unit, they had to do some extra job to manage the situation around, including the control of the panic stricken mob of people that had gathered around. They assisted the U.S. Marines to remove the wounded from the rubble and organised transport to ferry them to Muhimbili hospital. By then all the Senior Police Officers, including the Director of Criminal Investigations (DCI), the Regional Police Commander (RPC), and the others who mattered, had arrived at the scene. Appropriate orders and instructions were issued and duties were assigned to different groups of officers and individuals. Police investigation had began. Witnesses were located and interrogated. The scene of the blast was investigated. Physical material evidence was collected, to be analysed and used as evidence/exhibits later on.

One piece of a metal plate was of particular interest, and this proved to be a vital lead to the investigation. It was a piece of the chassis of the motor vehicle believed to have housed the bomb. The piece of metal had some numbers on it, No MH40 – 06050 (Exhibit P.6). ASP Valentino (PWII) and his colleagues visited several companies dealing with importation of motor vehicles into the country. They traced the company believed to have imported that vehicle. It was the JABA Motors Company. Yes! The company had imported such a vehicle, a Nissan Atlas, two-toner truck, Model MH 40, Engine No. ED 33-50626, and Chassis No. MH 40-06050, and whose registration

No. was TZH 6134. The truck had been sold to one Amani Juma Kasinya.

ASP Valentino (PWII) contacted the said Amani Kasinya. True, he had purchased the said truck, however, he had long since sold it to one Mohamed Sultan Said, who testified for the Prosecution, as PW5. He confirmed to have purchased the said Nissan Atlas Truck from Amani Kasinya, for a price of TZS. 3 500 000. He produced an agreement of Purchase, dated 17 June 1998. This has been admitted in evidence, as Exh. P 2. It is the testimony of PW5 that the truck was used for the transportation of fresh fish from Tanga to Dar es Salaam. For this type of business, therefore, the truck had been equipped with cold storage facilities, such as air conditioners and freezers. Sadly, however, PW5 was no longer in possession of the truck, since, he in turn, had sold it to two individuals, of "Arabic origin". The sale had been made through the agency of one Sleyyum Suleiman Salum Juma.

Sleyyum Suleiman Juma testified for the Republic, as PW15. He confirmed that he sold the said Nissan Atlas truck to two "Arab youths". Sleyyum identified the photograph of Ahmed Khalifan Ghailan (Ahmed Mfupi). The photograph of Ahmed Khalfani has been produced as Exh P3(a). PW15 further testified that he sold the truck at TZS. 4 300 000. The sale was conducted at Al-Noor Hotel, on 27 July 1998. The sale was witnessed by PW6, one Said Salum Said, who has also identified the photograph of "Ahmed Mfupi". They had prepared two copies of purchase agreement, testified PW15, but both of these documents had been taken by "Ahmed Mfupi" for purpose of photocopying. But of course, "Ahmed Mfupi" never returned to give Sleyyum a copy.

After the purchase of the Nissan Atlas truck, the truck was prepared for the installation of the bomb. For this purpose, several alterations had to be made on the truck. These alterations were done by different technicians, on different occasions and locations and at appropriate timing. To effect the changes, without creating any suspicion, the

A two Ahmeds had to do it secretly and involving as few people as possible. That is why different jobs had to be done by different technicians and mechanics. Besides, the Ahmeds had to purchase some of the necessary materials either by themselves or through agents.

B Evidence recorded indicates that after the sale the said Ahmed Ghilan requested PW15 to recommend him a good mechanic to service the truck. One Anold Kessy was recommended. The truck was sent to his garage, at Kidongo Chekundu. The said Anold Kessy testified for the Prosecution, as PW8. He testified to the effect that PW 15 did introduce the said "Ahmed Mfupi" to him. He was required to service the vehicle, check the alternator, the braking system, engine oil, tyres, etc. PW8 testified further that he was also required to remove the cold storage facilities that had been built inside the "box body" like trunk of the vehicle. PW8 had removed the old compressor (air conditioner) and the cold chambers that had been used for fish storage. PW8 also testified that the service had been supervised by the said "Ahmed Mrefu". At last, when this part of the job was done, PW8 got paid, and that was the last time he saw "Ahmed Mrefu".

The next piece of job done on the truck was to fix compartments (in shelves like). This was done by two gas-welding technicians, one Frank Marley (PW9) and Julius Karoli Kisingo (PW10). Both testified to the effect that they were contracted to fix compartments (shelves like), about for (4), of them around the box body of the truck. Of course, before the fixing they had to scrap clean the old linings of the body of the truck. To install the "shelves", they used iron flat bars of three inches wide. Both mechanics testified further that they used a sketch plan with specific instructions, in terms of dimensions of the "shelves" and how to weld (join) the metal bars. Having fixed the "shelve" like compartments, the technicians prepared some kind of a cradle (seat), whose base could accommodate two motor vehicle batteries. The battery seats were joined together. Then followed the job of drilling holes on the body of the truck, some on the walls and some on the floor. The holes were made at the rear part of the truck, near the back door. When the modifications on the truck were completed,

PW10 and the said "Arab owner," drove the truck up to Nyamwezi/ Uhuru Road. That was the last time he ever saw the truck, testified PW10. Evidence on record would reveal that all along the truck had been hidden in the backyard of a house that had been rented by the said Ahmeds, along Nyamwezi Street, Ilala.

At these premises, more "odd jobs" had been done on the truck. The truck had then been installed with the "home made" bomb devices. The explosives, from which the bomb was made, were identified to be the kind used in military operations. These explosives are technically known as "trinitrotoluene" (TNT) and "pentaerythritol tetra nitrate" (PETN). These are, according to the F.B.I. agents, very powerful and high explosives materials. Evidence on record indicates that these explosives were compressed in several gas cylinders. The gas cylinders, we have been informed, were purchased by the said Ahmeds, through the agency of three gas vendors and technicians; including Flenan Abel Shayo (PW2), Felix John Lekule (PW3) and one Fred Lyimo (PW4).

These three witnesses did testify to the effect that, on different occasions, they were approached by the two "Ahmeds" for the supply of empty gas cylinders. It is the testimony of PW2 that he sold the Ahmeds a total of seven (7) cylinders, whereas PW3 sold them ten (10). The two Ahmeds, definitely had to tell a lie to PW3, in order to hide their sinister clandestine activities. When PW3 quizzed them about the uses of so many empty gas cylinders, the Ahmeds had replied to the effect that they wanted the empty cylinders for sale, as "scrap metal".

By this time the Prosecution had collected enough evidence to locate and confront the accused person. ASP Valentino (PW11) first traced him to his shop – "Sera Auto Parts", but he wasn't there. They tried his house, located at Ilala, - Amani Street, 15. Again, he wasn't there. But at least PW11 managed to find another significant witness, at the accused's house, one Amina Rashid (PW17), the accused's housemaid. PW17 had given ASP Valentino the mobile phone number

A of the accused. It is the testimony of ASP Valentino that at first he did talk with the accused, and instructed him to meet him (ASP Valentino) at his (accused's) house. But the accused wouldn't do as instructed. ASP Valentino had to phone the accused again, but this time the phone
B was answered by a different person altogether. He was informed that the accused was at a mosque, praying.

Just when ASP Valentino was about to be tired of waiting, alas! He was met with another person, instead of the accused. This individual
C came driving a motor vehicle, a Suzuki, with Registration No. TZG 7575. The visitor introduced himself to ASP Valentino as one Hamisi Saidi Hamisi. He was another friend of the accused. The said Hamisi had informed ASP Valentino, that the accused was at Ilala. ASP Valentino
D sent one of his Police Officers to go and collect the accused. But no sooner had he sent this Officer, than yet another friend of the accused came along, driving a saloon car. He introduced himself as one Issa Salum Mattra. The said Issa Mattra delivered a different
E message to ASP Valentino. That the accused was no longer at Ilala, but he was at some other place. ASP Valentino had to request this one Issa to go and collect the accused.

Meanwhile, the Police Officer who had been sent to collect the
F accused from Ilala, had come back, but without the accused, since he was nowhere to be seen. It was at this juncture when ASP Valentino and the other Officers decided to search the accused's premises.

It was on 26 July 1998, about 10:00 p.m., when the first search
G was conducted. It is in the testimony of PWII that they could not risk to wait until the morning to do the search (as required by the law), since the nature of the offence was too serious to abide by this procedure! And in any case, the accused himself had proved to
H be un-cooperative. But at least the search was witnessed by a number of witnesses, including the said Amina Rashid (PW17), one Said s/o Mtali, Hamisi Othman Saidini and one of the accused's friend, Hamisi Issa Mattra.

I

The testimony of PWII reveals that when the search was conducted
A a number of exhibits vital for the prosecution's case were found, including a Mobile Customer Application Form and two photographs. These documents were admitted in evidence as Exhibits P3 (collectively).
B The Prosecution alleged that the Diary contains a list of names of individuals like Ghailan, Fahadhi, etc, who are alleged to be connected with the bombing. The Mobile phone application form is made out in the name of Ahmed Khalfani (the suspected mastermind of the bombing). The customer declaration on the form was made by the
C accused, Rashid Saleh Hamisi Saidi. About the Suzuki vehicle, PWII testified that he was informed that the Suzuki belonged to one Fahadhi. And that the said Fahadhi was one amongst the suspected terrorist conspirators on the F.B.I. list. This made ASP Valentino to order the Suzuki to be sent to Central Police Station for custody and further
D investigations.

Meanwhile, the F.B.I. Agents had arrived in Dar es Salaam to assist the investigations. Three of them, namely, Gregory Carl, Robert Fricke and Michael Gough analysed the scene of crime as well as the debris and other physical exhibits that had been collected. Together with the intelligence reports they had relating terrorists activities being carried out within the Eastern African Countries, they had no
E difficulty identifying the explosive materials used in making the bomb. The FBI Agents carried more investigations. The Suzuki vehicle was then searched, some explosive materials were found on it. This led to the second search in the house of the accused, at Amana Street,
F No. 15, on 29 August 1998.

The second search team included ASP Valentino and several Tanzanian Policemen and two FBI Agents. It was witnessed by several independent civilian witnesses, including one Amiri Ally (PW18). The whole premise
H was searched: As a result of this search, several articles related to the preparations of the bomb were found, and the same have been admitted in evidence as exhibits.

I

A The first category of items included, articles of clothing allegedly taken from the bedroom of the accused. They consisted of 36 shirts, 25 pair of trousers, one T-shirt, one "Kanzu", and one pair of jeans. These have been admitted in evidence as Exhibit P4(a) (36 shirts, T-shirts and "Kanzu"). As for the trousers and jeans, they were marked Exhibit P4 (b). B

C Another group of exhibits included the following: six (6) glass beakers, a roll of aluminium foil paper, four (4) medium size dry cells (batteries), a box of carbon switch brushes. Collectively, these were admitted in evidence and marked Ex P.4 (c) There was also found a detonator (blasting cap) in one of the rooms. This has been photographed, since it is still with the F.B.I. Laboratories, Washington. D Its photograph has been produced as exhibit and accordingly marked, P4(d).

E There was also found a document purporting to be an agreement of sale of the Suzuki Vehicle TZG 7575, between one A. J. Rutahirwa and one of the accused's Arab friends, - one Khalifan Khamisi Mohamedi. The document is dated 09.06.1998. The said Khalifan is said to have purchased the said Suzuki for a price of TZS. 2 300 000. Again, the agreement of sale has been admitted as Exhibit P5(b). Of course, F the Suzuki itself was produced in evidence as Exhibit P5(a).

G These physical exhibits were sent over to the F.B.I. Laboratories, Washington, for forensic examinations. F.B.I. agent Ronald Kelly testified as PW13. This FBI Agent is said to be a Chemist with the FBI Laboratories, Explosives Unit. He has been on the job for the past twenty five (25) years. He performs chemical analysis of the materials found on scenes of bombing. He did examine the exhibits found on the scene of bombing of the U.S. Embassy, and the ones H collected from the accused's house (15 Amani Street), some parts of the Suzuki vehicle and other materials from other locations, but related to the case. After his careful and thorough analysis, Agent Kelly did compile a report of his findings. Briefly, his report would I indicate the following findings; first, regarding the items collected

A from the accused's house, 15 Amani Street: The F.B.I. report indicates that the pair of blue jeans [Exhibit P (a)], the 25 pairs of trousers [P4(b)] and the 36 shirts, and a *kanzu* [P4(b)], were found with traces of the deadly explosive materials known as *Pentaerythritol tetra nitrate* (PETN). The report was admitted in evidence as Exhibit P7(a). B

C Several parts of the Suzuki vehicle were examined. About 59 swabbing specimen were examined for explosives and explosive residues. Out of the 59 specimen, about 29 of them were detected with trinitrotoluene (TNT) explosive materials. The part of the vehicle contaminated with these TNT explosives, included the driver's seat cover and the covers of the other seats, the steering wheel, the window frames, and the wheels. The report for this Exhibit was admitted as Exhibit P7(b). Agent Kelly (PW13), further testified that the items D were sent to him in sealed plastic bags and they were accordingly marked. He did examine them in the order and manner they were sent to him. And furthermore, he was the first person to open the seals. E

F The Prosecution is about to wrap up the case against the accused and his alleged absentee conspirators. In doing so, at least a few more, important witnesses testified in detail, with the purpose of connecting up the relationships between the accused and the conspirators. One such witness was Kassim Juma Abdallah, who testified as PW7. As a matter of fact, PW7 is the accused's step-father (*Baba Mdogo*). He once was a secondary school teacher, in Pemba, between 1971-1994, when he was re-trenched from his teaching duties. He had to G turn into business, to make a living. He came to Dar es Saalam in 1996 and joined the accused in his business. It is the testimony of PW7 that, at that time, the accused had a garments' shop. That the shop-keeper of this shop was one Ahmed Khalifan (Ahmed Mfupi). H That the accused and the said Ahmed and PW7 lived together in the same house.

I PW7 further testified that the accused had a lot of friends and visitors. They used to come and go. They would stay for a day or I

A two, and then they would be gone. PW7 also testified that, even the
 said "Ahmed Mfupi", had friends of his own. These would include
 one Khalifan and one Hussein and one Fahadhi. All of these were
 residents of Mombasa, Kenya. That the said Ahmed used to visit
 B Mombasa, on and off, for shopping. But more significant is that,
 the said "Ahmed Mfupi" went to Mombasa in 1997, only to come
 back in 1998.

C The testimony of PW7 would further reveal that Fahadhi owned
 a pick-up. The said Hussein purchased a Suzuki vehicle. When Hussein
 left, he left the Suzuki to the accused. It is also in his testimony
 that, even before the departure of Hussein, the accused sometimes
 used to drive the said Suzuki in his business activities in Dar es
 D Salaam. PW7 further testified that Ahmed Khalifan left Dar es Salaam
 on 4.8.1998, for Yemen (that is 3 days before the bombing).

E The testimony of PW7 is closely linked with that of PW16 (Salim
 Issa Mohamed). Salim was a sales clerk at the accused's Auto Spare
 Shop (SERA), situated along Sikukuu Street, Kariakoo. He had his
 assistants, one Abdallah Ally and Nassid Ally. It is the testimony of
 PW16 that at the accused's garments shop, one Ahmed Khalifan Ghailan
 (Ahmed Mfupi) used to assist the selling, along with, Kassimu Juma
 F Abdallah, PW7). PW7 further testified that the said "Ahmed Mfupi"
 used to live in the accused's house, together with PW7. Ahmed used
 to travel to Mombasa, Nairobi and other places, apparently to collect
 articles of clothing for their shop.

G Almost echoing the testimony of PW7, it is the testimony of
 PW16, who testified to the effect that the accused had several friends,
 as well as the said "Ahmed Mfupi". These friends would include
 one Fahadhi, who was always in the company of Ahmed whenever he
 H (Fahadhi) visited them. PW16 further testified that he came to know
 Ahmed since he used to visit him at the spares shop, for an occasional
 chat or whenever he (Ahmed) wanted to have a talk with the accused.

I The testimony of PW16 further reveals that just before his departure,
 for good, the said "Ahmed Mfupi" had brought to the accused's shop

A some second hand articles, purportedly for sale. These included an
 air conditioner (compressor), two motor vehicle batteries and two
 pieces of bed rails (*chagga*). But of course, these items were never
 sold since the police did confiscate some of them, including the air
 conditioner and the batteries. PW16 did testify that the police and
 B the FBI had come to the shop inquiring about the said "Ahmed Mfupi".
 Out of fear of being connected with the bombing, PW16 testified,
 he had given the compressor to one Feza Ali in order to throw it
 away. But Feza could not do so, since the Police impounded them. C

D The Prosecution would not leave out the testimony of the accused's
 house maid. Amina Rashid. She would testify as PW17, with the
 hope that she would give some inside story of the accused's domestic
 activities. Amina had been the accused's house maid from 1997 to
 1998 (up to the time of the bombing). Her duties included the buying
 of groceries at the market, the cooking, the washing and doing the
 other normal domestic chores. PW17 used to report for job at six
 (6) in the morning and she would leave for her home at Tandika, at
 E six in the evening.

F In her testimony, PW17 testified that the accused used to live
 with Mwalimu Kassimu (PW7) and one Ahmed (she knew him by
 one name only). The accused house, she testified, had three bed rooms
 and a store. The accused had his own room, likewise, both Mwalimu
 Kassimu and the said Ahmed, each had a room of his own. And each
 of these occupants, including the accused himself, had his own friends.
 And each one would be visited by their respective friends. G

H PW17 would also testify of what she recalled about the bombing
 of the U.S. Embassy. She had heard the terrifying blast, and she had
 hurried back home (the accused's house). At about 11 am., the accused
 had come back home, and had informed her that the U.S. Embassy
 had been bombed. They had watched the live pictures being shown
 in the television then. That the accused had then left only to come
 back at about 1:00 p.m., for his usual lunch. I

A Three days later, PW17 witnessed the first police search. The search was conducted about 9 p.m. in the evening, PW17 testified that the accused was not present then. The police had searched each of the rooms. The rooms were not locked. After the search, PW17
B testified, the police took with them some items. When the accused was arrested, PW17's job came to an end. She was paid her wages by the accused's brother, now deceased, PW17 concluded her testimony.

C Having completed the investigation, all the bits and pieces of evidence were compiled together. The accused was arrested and had been remanded for about two years, during which period he was extensively interrogated by both the Tanzanian Police and the F.B.I. At the end of the day, the accused was charged with the offence of conspiracy
D to commit murder, C/S 215 of the Penal Code.

E At the close of the prosecution's case, the accused was required to defend himself. He did so through his Advocate, Dr Fauz Twaib. The accused lives at Ilala, Amani Street, House No.15, in a three bed-room House. He is a businessman, deals with motor-vehicle spare parts. He owns a shop for that kind of business, known as Sera Auto Parts. "SERA" stands for "Seif and Rashid", since the accused owns the shop jointly with one Seif, so testified the accused.

F His business ventures began way back in 1995, when he and one Sued, both had a garments shop. Sued's shopkeeper was one Suleman Abdallah. Then in 1996, the said Sued closed down his shop and moved to Saudi Arabia. But the accused stayed on. The accused used
G to do shopping (consisting of garments, shoes, etc.) from Zanzibar and Dubai and sold them in his shop and to other vendors. The accused used to travel to Zanzibar with the said Suleiman.

H The accused came to know the mysterious - Ahmed Khalifani Ghailani (Ahmed Mfupi) through this Suleiman. During one of his trips to Zanzibar, Suleiman had come back with this "Ahmed Mfupi". The accused was introduced to "Ahmed Mfupi". His friend, Suleiman, had requested him to give Ahmed some accommodation.
I

A The accused's connection with the Mombasa business counterparts also was made by this very Suleiman. The accused contended that the said Suleiman had introduced him to one Mohamed Blazari. They had agreed to do joint business. Mohamed agreed to provide the
B required capital. The money would be payable at Dubai, through the accused's agent, one Jakubu. But did this business deal work out? It seems the answer is in the negative! How come? This Mohamed had borrowed USDollar 10,000 from the accused. He had promised to re-pay at Dubai, through his (accused's) agent, Jakubu. But when
C the accused arrived at Dubai, he could not get the money. But he was informed that the said Mohamed had died. The accused had returned to Dar es Salaam, empty handed. However, a few days thereafter, the accused was phoned by the wife of the deceased Mohamed, and
D she had instructed him to go to collect his 10,000 dollars from one Abdallah Bazaar, at Dar es Salaam. The accused did as he was instructed and, indeed, he got his money back.

E Strangely, the 10,000 dollars seems to have brought together the accused with one Fahadi. You would think it was pre-arranged (or was it?), as one day this person (who introduced himself to the accused as Fahad), from Mombasa, visited the accused. Fahadi had
F inquired from the accused whether he had been paid the 10,000 U.S. Dollars he had lent to the deceased Mohamed. From then onwards, the accused and this Fahad had known each other, and had become close friends. Therefore, whenever, the accused visited Mombasa in his business trips, he would stay at Fahad's house. Likewise, this
G Fahad would stay at the accused's house, whenever he visited Dar es Salaam.

H The accused admitted to have met the said Fahadi and Ahmed Khalifan Ghailani (Ahmed Mfupi) in June 1998. Both had visited him, as they had been doing in the past, they had stayed at his house. However, later, these Fahad and "Ahmed Mfupi" had rented their own house at Magomeni Makuti. The accused even visited this house. But even after renting their own house, Fahad and "Ahmed Mfupi"
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G Fahad would stay at the accused's house, whenever he visited Dar es Salaam.

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I

- A would still visit the accused on and off. They would rest and eat and chat, as they used to do in the past. The accused further admitted to have seen these two just a few days before the bombing incident, in late July 1998. That the two had come to sort of bid him farewell.
- B "Ahmed Mfupi" had informed him that he was traveling to Germany, while Fahadi had told him he was off for Yemen. The accused further testified that, from that day he never saw them again. The accused denied to have ever met the said "Ahmed Mrefu"; let alone to have known him.
- C

- As for the bombing, the accused claimed that he saw the news on the television, just like anybody else. He admitted to have gone back home at about 10.30 a.m., to check on his brother, whom he was expecting to arrive from Zanzibar. At his house, he had instructed his house maid (PW17) to switch on the television set and went on watching the then "breaking news" i.e. the bombing. Having missed his brother at the house, he had gone back to his shop. He had met his brother at about 12:00 noon. In the afternoon, the accused testified, he had again gone back home for lunch, as usual. After lunch, he had gone back to his shop. In the evening, he also came back to his house. Even for a number of days subsequent to the bombing, before his arrest, the accused stayed around, going about with his business as usual. He never travelled outside Dar es Salaam, or Tanzania, for that matter, the accused testified.
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- The accused also testified as to how he was arrested, searched and interrogated by the police and F.B.I. He was first contacted by the Police on 26 August 1998 (about twenty days after the bombing). The contact was through a mobile phone, (by the number that had been supplied to the police by the house maid PW17). For quite sometime, the accused testified, he stalled meeting the police, as they had required him to do so, since he was afraid of the Tanzania Revenue Authority (TRA) officials from Tanga. The accused had instructed his friends, first Khamis and later on one Issa, to investigate for him who actually were those people looking for him. When Issa confirmed to him that they were not the T.R.A. officials but the F.B.I.,
- G
- H
- I

who were investigating the bombing incident, the accused then decided to surrender himself to the police headquarters (within the Home Affairs Headquarters), for questioning.

A

The accused would testify that he did admit, both to the C.I.D. and the F.B.I., to have known both the said "Ahmed Mfupi" and Fahadi. But he also denied to have known or met one "Ahmed Mrefu". He denied to have known the existence of the Nissan Pick-up. He denied to have known the fact that these alleged "conspirator friends" of his had a house at Ilala. He would also deny to have even known of the existence of the bombing plot of the U.S. Embassy.

B

C

The accused lamented that his house was searched on several occasions. That his house, at Amani Street 15, was searched at least three times. His shop was also searched. On the first search, the accused was not present. However, during the second search, he was around. The accused claimed that the police, in collaboration with the F.B.I., searched from one room to another. They searched every place, everywhere. In his bedroom he found clothes being kept in one place. They had been removed from the wardrobe. The clothes included his and, those of "Ahmed Mfupi" and Mwalimu Kassimu. He did sort them out, identifying those clothes alleged to belong to "Ahmed Mfupi", those belonging to Kassim and his own. Later, the clothes were taken by the Police, in one heap, the accused alleged. The accused identified the assortment of clothes, marked Exh. P.4(a) and (b).

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Some other items were also confiscated by the police and FBI, including the contents of Exhibits P.4 (c) (batteries, laboratories, beakers, and the foil paper). These items, the accused testified, were found in Mwalimu Kassimu's (PW7) bedroom, in a utensils cupboard. The testimony of the accused is that the cupboard had two compartments, each compartment being used by "Ahmed Mfupi" and Kassim. The accused denied to have the knowledge of the existence of these items in the house. He also denied to have the knowledge of the existence of the detonator Blasting Cap (Exh.P.4 (a), also found in "Ahmed Mfupi's" room.

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H

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A As for the Suzuki vehicle (Exh. P. 5 (c), the accused testified that the vehicle was jointly being used by Fahadi; "Ahmedi Mfupi" and himself. When Fahadi left, he (Fahadi) had left it to him. The keys to the vehicle were given to Mwalimu Kassimu. The accused
B contended that the Suzuki vehicle was left with him for safe custody, as it had been done before, whenever Fahadi travelled.

The lengthy testimony of the accused was considerably supported by that of his four (4) witnesses, including, Mohamedi Sulemani Chatwanga (DW 1), Issa Said (DW 2) Ahmed Muslim Salim (DW3) and one Add Masony (DW4). These defence witnesses, by and large, testified favourably for the accused.

Mohamed Suleman Chatwanga - (DW1) is a real estate agent.
D He acts as a broker between landlords and prospective tenants, since 1995. He lives at Ilala Street No. 17. His testimony is to the effect that on 15.06.1998, he did rent a house of one Ibrahim Kitwana, situated at Ilala Bungoni, to one Khalifani Mohamedi Khamisi, whom
E he knew. The tenancy agreement was for one year. The rent was TZS. 65 000 per month, accordingly, the annual rent was TZS.760 000. That the said Khalifan Khamisi had paid the annual rent in cash. DW1 was paid TZS.65 000 by way of commission.

F DW1 further testified that sometimes after the bombing incident he was required by the FBI, in New York, to testify against the said Khalifan Khamisi, who had been arrested in South Africa and charged with the offence of the bombing of the U.S. Embassy in Tanzania.
G DW1 did testify for FBI. He did identify the said Khalifan Khamisi as the one who had rented the Ilala Bungoni house. DW1 further testified that it was his first time to have ever seen the accused in the dock.

H Ahmed Muslim Salim also testified favourably for the accused as DW3. As a matter of fact DW3 is a brother-in law (*shemeji*) of the said Khalifan Hamisi Mohamedi (now a prisoner in one of the USA maximum security prisons). DW3 did also testify against Khalifan Khamisi in the New York court, in respect of Khalifan's involvement
I

in the bombing of the U.S. Embassy. His testimony was to the effect that at the material time, in June 1998, he (DW3) was residing at Ubungu Maziwa. The said Khalifan had visited him. He (Khalifan) had wanted to send over DW3 to Ilala to show him the house that "his friends had rented". That his friends were about to leave, meaning that, the house was about to fall vacant, therefore, Khalifan had wanted DW3 to re-rent it to other interested tenants in due course. DW3 had gone to view the Ilala house. It was a three bed roomed house, testified (DW3), that the backyard rooms, four of them, were still under construction. But DW3 did not see any of the tenants of the said house, who were about to leave soon, as he was told by the said Khalifan.

It is in the testimony of DW3 that a period of about three weeks went by, but he never saw the said Khalifan. He had to search for him for three days, but in vain. And then, DW3 further testified, on the night of the bombing of the Embassy, one Suleiman reported at his house, Ubungu. He had brought him the keys of the Ilala Bungoni house, together with some other domestic appliances, alleged to have been given to him (Suleiman) by the said Khalifan Khamisi. These items included a Milone domestic flour mill. DW3 had gone to the house and had removed from it three (3) mattresses and two (2) blankets. DW3 further testified that about three days after the bombing, he got news that Khalifani had been arrested by the FBI in South Africa. DW3 was later required by FBI to identify the items brought to him by Suleiman and sent them to the Ilala house. It is also the testimony of DW3 that he never even once saw the said Khalifani with the accused. As a matter of fact he never knew the accused prior to seeing him in the dock.

DW4, Add Masony, would testify for the defence to this effect; that he is a businessman, in transportation, based in Tanga. He has known the accused through their transport business ventures. The accused used to hire his services to clear his goods at Tanga port. It is the testimony of DW4 that sometime in July 1998, he cleared a Mitsubishi Canter vehicle for the accused. That in the vehicle, there

A were hidden some used motor vehicle spare parts. These goods were not cleared (that is to say, the necessary custom duties were not paid), accordingly the T.R.A. had to impound both the vehicle and the goods therein. However, before the T.R.A. could seize the vehicle, B the accused did manage to "steal it" away. And so, the T.R.A. officials had been looking for the accused ever since in order to make him face the necessary charges for evading the payment of the required customs duties. But of course, DW.4 would not know whether or C not the accused was engaged in activities other than the importation of used vehicles and spare parts.

At the end of his defence, the accused contended vehemently claiming that he did not conspire with the said two Ahmeds or Khalifan D Khamisi Mohamed, or Fahadi, nor had he ever conspired with any other person to commit the act of bombing of the US Embassy, or to commit any of the charges facing him.

E Having closed the presentation of their cases, both the prosecution and the defence were given the opportunity to make their final submissions. From their submissions, it is clear that there emerged a set of facts which are undisputed. It is not contested that in the morning of 7 August 1998, a bomb exploded outside the United States of America F Embassy, in Dar es Salaam. A total of eleven (11) people lost their lives. Subsequent investigations carried out by the F.B.I and the Tanzania C.I.D, established that the huge explosion was caused by a home-made bomb, using high explosive materials. A piece of a motor vehicle G chassis found at the scene established the fact that the bomb was transported in a vehicle, a Nissan Atlas truck, with Registration No. TZH 6134, which was itself destroyed by the bomb.

H It is also not disputed that the Nissan Atlas truck was purchased about a week before the bombing, by two individuals with Arabic features, who both went by the name "Ahmed". One of them was short and stout, nick-named - "Ahmed Mfupi", while the other, tall and slender, was referred to as "Ahmed Mrefu". The sale of the truck I was made through the agency (dalali) of one Sleyum Suleiman Sahim

(PW15). The deal was concluded at Alnoor Hotel, Dar es Salaam, on or about 26.7.1998. A

It is not disputed either that after the purchase of the Nissan Atlas truck, the two "Ahmeds" made substantial alterations within the internal designs of the truck. PW15 sent the Ahmeds to Gerezani B garages. PW15 introduced some welders, Fleman (PW2) and Felix Lekule (PW3), to Ahmeds. These welders, with the instructions of the two Ahmeds, carried out the alternations. Later, the same Ahmeds C purchased some empty gas cylinders from one Freddy Lyimo (PW4).

At Gerezani garages, the truck's compressor was removed; some sort of "metal shelves" was fabricated and fixed within the body. The said gas cylinders were accordingly installed. Two new batteries D were fixed at the back of the body, the tyres were replaced and thorough general service was conducted to the vehicle.

The evidence has also established that the two Ahmeds were working together with several other individuals, including one Fahad E Mohamed and Khalfan Khamis Mohamed. It is not disputed that both Ahmed and Fahad and Khalfan were present in Dar es Salam, at about the time of the bombing, the end of July and early August 1998. It is also a fact that just before or immediately after the bombing incident, F the alleged four conspirators disappeared. Of these four, only one of them, Khalfani, has been arrested. The remaining three are still at large. The foregoing facts are not disputed, but the remaining ones are highly controversial. G

It is upon these disputable facts that the case for prosecution is built. At least five (5) main areas are contended by the Prosecution: First, that the Accused's acquaintance with the alleged conspirators makes him a participatory in all the activities of the bombing, hence H equally a conspirator with the others though not present in court. Secondly, the fact that some physical exhibits used in the preparation of the bomb were found in the accused's house and shop, this proves that he participated in the preparation of the bomb. I

A Thirdly, the presence of the remains of explosive materials found on the accused's clothes, further establishes the accused's involvement in the bombing. Fourthly, the common possession and use of the Suzuki Samurai's vehicle between the alleged conspirators and the
 B accused, further complicates his position. The fifth, aspects is in relation to the conduct of the accused, during the time of the bombing and when he was being required by the Police and FBI for questioning and the searching of his house. The Prosecution contends that the
 C accused was evading the Police.

The Prosecution submitted, partly, that conspiracy presupposes an agreement between two or more persons to commit a crime. That the agreement between accused and the other conspirators involved
 D in this case should be inferred from the facts produced by the Prosecution. Once the conspiracy is reasonably believed to exist, claims the Prosecution, then the accused becomes responsible for all the acts committed by his co-conspirators even in the absence of proof of
 E his direct involvement therein. The Prosecution referred to the provisions of section 12 of the Evidence Act 1967, which states as follows:

Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong,
 F anything said, done or written by any one of such person referring to or in execution or furtherance of their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each such persons believed to be so conspiring, as well as for
 G the purpose of proving the existence of the conspiracy and for the purpose of showing that any such person was party to it.

The prosecution concluded their submissions with the contentions that there is sufficient evidence to connect the accused with the
 H bombing of the US Embassy. However, the defence claims to the contrary. They assert that the evidence provided by the prosecution leaves a lot of doubts that it cannot be held that a case has been proved against the accused. The defence submitted a number of counter-
 I claims, in the attempt to challenge and weaken the case for the prosecution. We shall look at these assertions, but shortly.

Any person who conspires with another to commit any felony or to do
 A any act in any part of the world which if done in Tanganyika would be a felony and in which is an offence under the laws in force in the place where it is proposed to be done, is guilty of felony....

In other words, conspiracy is an **agreement** between two or more
 B persons to do an unlawful act or a lawful act by unlawful means. It is not necessary that the conspirators, should know each other. It is not even essential that all the conspirators should know all the details
 C of the plans or operations of the conspiracy. But it is sufficient to prove that each conspirator knows that there is in existence or coming into existence of such scheme (see generally: *R. v. Kana* (1)).

Therefore, it is imperative that each conspirator must know the
 D purpose or the aim of the conspiracy and must agree to become one of the members to carry out that unlawful purpose *R. v. Whitchurch* (2).

By its very nature, the offence of conspiracy is committed under
 E acts of high secrecy. Rarely do conspirators meet together and execute a common plan. Under such circumstances, therefore, quite unlikely does direct evidence become available to prove the unlawful agreement.
 F In most cases proof of conspiracy depends on inferences to be drawn from the acts and conduct of the parties. Accordingly, the nature of evidence that is commonly used by the courts to find whether or not the accused(s) committed the offence of conspiracy is purely
 G circumstantial (see general discussion in *Orgadia and Erima v. Uganda* (3) and *R. v. Golkadas Kanji, Kana* (1)).

Admittedly, in all the authorities referred to above, and a series of
 H others, the courts have laid down principles upon which circumstantial evidence is to be applicable. One such standard is that the circumstantial evidence must be such that it is incapable of any other explanation but the accused is guilty of the offence charged. The Prosecution is required
 I to prove, through the circumstantial evidence, that there was in fact and in law a "meeting of the minds", under circumstances that can only be described as anything other than the existence of an unlawful agreement to commit a crime. And such evidence must point irresistibly

A to the accused's involvement in the commission of the offence. In other words, circumstantial evidence must be such as to produce moral certainty to the exclusion of every reasonable doubt.

B Having set the appropriate legal position in its perspective, the defence submits that in order to arrive at a fair verdict, the court should ask itself the following questions(s):

C Did the conduct of the accused provide the circumstantial evidence which the inculpatory facts are incompatible with the innocence of the (accused) and incapable of explanation upon any other hypothesis than that of guilt? *Hassan Fadhili v. R.* (4).

D The defence submitted that the case of the prosecution against the accused is not supported by any tangible evidence other than the nebulous inference to be drawn from the pieces of evidence, which evidence is weakened considerably by contrary evidence from several witnesses, including their own prosecution witnesses. In his submission, the defence counsel, Dr Fauz, has been very insistent on this aspect. E He would refer us to the decision of Privy Council, in the case of *Teper v. R.* (5) whereby it was held that:

F It is also necessary before drawing any inference of the accused's guilt from circumstantial evidence that there are no other co-existing circumstances which would weaken or destroy the inference.

G In this case, I was assisted by three assessors, including one lady assessor, Zuhura d/o Faraja and two gentlemen assessors, Ibrahim s/o Ally and Bakari s/o Issa. As usual, after the submissions, I did sum up the evidence to them. As usual, I requested them to avail me of their opinion in respect of the guilt or otherwise of the accused. They dutifully did so. Of course, according to the law, their opinion H is only advisory, it is not binding to this court. It is interesting to note that the three assessors arrived at a unanimous decision, to the effect that, taking into consideration the evidence produced in court, it was their humble opinion that the accused was not guilty of the I offence he was charged with.

A Each of the assessors gave reasons for arriving at such a finding. One of the reasons given by the assessors was that the accused did not have knowledge of the plans for the bombing of the U.S. Embassy by the alleged conspirators. They had arrived at this conclusion, explained B the assessors, after looking at some of the activities done by the alleged conspirators which totally shut the accused out of the picture. For example, the accused was not involved in the purchase of the Nissan Atlas truck, which transported the bomb to the U.S. Embassy. C Neither was he informed about the said purchase. Likewise, the conspirators, secretly had rented the Bungoni Ilala house (whose premises the bomb is believed to have been assembled), without the knowledge of the accused.

D The assessors gave other reasons too, including that the accused could have run away, but he did not; he could have hidden or destroyed the exhibits found in his house; but he did not do so, not because the accused decided not to do so, but simply because he had no idea of their existence. And besides, reasoned the assessors, if the accused E was really involved in the affair, the F.B.I. would have found out, especially having subjected the accused to their thorough, methodical and lengthy sessions of interrogations. Or at least, the said Khalifan (one of the conspirators now serving a life sentence in U.S. prisons, after a conviction of plea of guilty), could have easily named the F accused, as one of the conspirators. But even then the said Khalifani did not implicate the accused in the bombing.

G In the course of writing this lengthy judgment, I gave a lot of thought to the reasons given by my lady and gentlemen assessors, for arriving at such a unanimous verdict. On several occasions, I went over and over, again and over again, the evidence adduced by both sides and the submissions made by the learned counsel. I did, H in the preceding paragraphs, summarize the main points relied upon by the prosecution. The defence, as expected of them, likewise presented quite a few issues with an attempt to weaken the prosecution's case. It is time we looked at these claims before we pronounce our verdict. I

A One area which was substantially exploited by the prosecution, as we have seen, is the friendship and the association of the accused with some of the alleged conspirators, especially the said "Ahmed Mfupi" (Ahmed Khalifani Ghailan) and Khalifani Hamisi Mohamed B and one Fahadi Mohamed. The accused, as we have demonstrated, does not deny his acquaintance with these alleged conspirators. Indeed it was by virtue of this long time friendship of theirs that led to some of them visiting him and on many occasions putting up at his residence, having free accommodation and meals. Indeed, the accused admits the fact that the said three, "Ahmed Mfupi", Khalifani and Fahad, were in Dar es Salaam, at about the time of the bombing. C However, the accused contended, unlike the previous visits, this time these "friends" of his were not residing at his house, Amani Street D No. 15, since they had rented their own house, at Ubungo.

E But the Prosecution would insist that the accused knew the activities of these conspirators and in-fact, the accused did actively participate in the initial stages of the preparations (construction) of the bomb. Submitting on this, Mr Mulokozi, a Senior State Attorney, asserted that, first, it was the accused who introduced the two Ahmeds to the mechanics, Abel Shayo (PW2) and Felix Likule (PW3), for the purpose F of effecting alterations in the Nissan Pickup and the purchase of the gas cylinders. Secondly, it was the accused who sheltered, fed and introduced them to various areas and places around and about in Dar es Salaam.

G Of course, some of these allegations and inferences by the Prosecution have been denied and disputed by the defence. Dr Fauz, for the Defence, submitted and contends that, the accused did not know of the clandestine activities of his friends (the alleged conspirators), neither was he involved in the preparations of the bomb, nor the actual plans for bombing of the US Embassy. Dr Fauz maintains that all that took place was the work done by people whom the accused had trusted, H helped and considered as friends, or friends of his friends.

I Dr Fauz further maintains that most of the activities and conduct of the alleged conspirators (friends of the accused) sufficiently

A demonstrate the fact that the accused was not meant to know or to be made a member of the heinous plot designed by the alleged conspirators to bomb the US Embassy. Citing some of these clandestine activities, Dr Fauz maintains that, the evidence on record clearly reveals that the accused was not involved in the following dealings; that the accused B did not know some of the alleged conspirators, especially the said "Ahmed Mrefu"; the accused was not involved in the purchase of the Nissan Atlas truck; neither was he involved in the making of the alterations in the truck nor the buying of the gas cylinders; that the C accused was neither aware of the leasing of the Ilala Bungoni house, nor of the tenancy arrangements that followed subsequent to the secret departure of the alleged conspirators.

D The evidence on record reveals that it was not the accused who introduced the two Ahmeds to the technicians (PW2, PW3, PW4, PW8 and PW9), contrary to the prosecution's assertions. PW2 testified to the effect that, when the accused was in Dubai his shopkeeper, Ahmed Khalifan Ghailan (Ahmedi Mfupi), visited him (PW2) at his E garage. He had wanted to purchase gas cylinders. But because PW2 had none, PW2 then referred the said Ahmed to PW3. When cross-examined by Dr Fauz as to whether the said Ahmedi Mfupi went to his garage with the accused, PW2 replied in the negative: "... I did F not see the accused with the said Ahmed!"

G PW3 testified, on cross - examination, that he did not know the accused: "... I do not know the accused. I do not know his name ... The guys who purchased the gas cylinders from me, I do not see them here ..."

H The accused was not amongst them ... "Even PW4, Fred Shayo, testified to the effect that - he did know the accused, neither was he amongst the "Arab youths" who had purchased gas cylinders from him.

I The evidence on record further reveals that the accused was not involved in the purchase of the Nissan Atlas truck. PW5, Mohamedi Sultan Said, the owner of the Nissan Atlas truck, testified that he

A sold the truck to two persons. "... They were two, of Arabic origin... their names were Ahmed... Both of them had the same surname ..."
 On cross-examination, PW5 testified to the effect that he did not know the accused "... I do not know the accused. He is not one amongst
 B the two Ahmeds who bought the vehicle."

The Nissan truck was sold through the agency of one Sleyyum, PW15. He did corroborate what PW5 testified. But PW15 further testified that after the two Ahmeds had purchased the Nissan truck,
 C they had to service it. He, PW15, did buy a new alternator for the truck, and later sent them to Kidongo Chekundu garage. Therefore, it was PW15 who did introduce the Ahmeds to the mechanic Anold Kessy, PW8. But PW15, testified even further, on cross-examination,
 D to the effect that "Ahmed Mfupi" warned him (PW15) not to inform the accused that he had purchased a vehicle. "... All this time I did not see the accused. But one "Ahmed Mfupi" told me that he did not want Rashid (the accused) to know that he (Ahmed) had bought a
 E vehicle ..."

It is on evidence that the accused was not involved in the carrying out the service on the truck. These were effected by PW8, who testified that the service negotiations were conducted between him and PW15,
 F on the first day. But on the second and the third day, they were made by "Ahmed Mrefu". "... for three days I serviced the vehicle, I did not see the accused. The accused was not the "Arab owner "of the vehicle.

G The alterations in the truck were partly made by PW9, Frank Marley and PW10, Julius Kisingo. PW9 testified that he did fix flat bars and angles (in order to fabricate metal shelves) to the interior of the body of the truck. The flat bars had been brought to him by
 H PW10. Besides, PW9 testified that he did not see the accused, nor was the accused with the Arab owner of the vehicle. PW10 removed the compressor from the truck and fixed two batteries seats. It was PW10 and one individual, a Msambaa, who purchased the flat bars.
 I PW10 further testified that the instructions for these works were

provided by the Arab owner of the truck (but not the accused). He even testified that when he (PW10) inquired from this Arab owner as to what use would the truck be put (having made such odd alterations), he was informed by the "Arab owner" that - "...the truck was for the purpose of transporting different types of fish in each of the compartments
 B ... of course, the Arab owner of the now re-altered truck, had lied to PW10. But he had lied to PW10 previously, when he did tell him that he "... was from Tanga Mwambao. And that he deals in fish business."
 C After the job on the truck was done, both PW10 and the Arab owner had driven up to Nyamwezi/Uhuru Road, "... and that was the last time I saw the said Arab and the vehicle ..." testified PW10.

Carrying further the issue of the accused's acquaintance with his alleged Arab conspirators, Dr Fauz submitted that these "Arab friends" of the accused stopped visiting him a few weeks before the bombing. And this was the time when they rented a house at Magomeni (a fact they had told the accused). However, later on, they moved to the house at Ilala Bungoni, about which the accused never knew.
 E

The evidence on vehicle record reveals that DW1, Mohamed Suleiman, rented a house to one of the said conspirators, Khalifan Khamisi, at Ilala Bungoni. "... on 15 June 1998, I did rent the said house to some people, one Khalifan ... and another person, whom I
 F do not recall. They were two..." DW1 further testified that at least the accused was not one amongst these tenants: "... The accused person in the dock is neither the said Khalifan nor the other guy. I have seen the accused, ever..."
 G

It is also "recorded that the accused was not involved in the arrangements of maintaining the Ilala house, after the sudden vacant possession of the same by the said Khalifan and the others. DW3, Ahmed Muslim testified to the effect that Khalifan had approached
 H him with the intention of, first showing him the Ilala Bungoni House, secondly, with a request that, if he, DW3, could be willing to look for tenants for the house, since his friends (Khalifan) were about to leave.".... He (Khalifan) wanted me to go to Ilala to show me the
 I

A (commission) for his involvement in their bombing affairs, as it seemed to be intimidated by the prosecution. However, it would be much safer and more credible to entertain a holding that the vehicle was left to the accused in the normal way as it was used to be done by the said Khalifan, for the purpose of safe custody, with an implied permission that the accused could go on using it in his business activities. That is the finding of this court.

C Another aspects of evidence produced by the prosecution to be considered is the presence of physical explosive materials found in the accused's house and shop, together with remnants of explosive materials found on some of his clothings. The following physical exhibits were found in the room, which was normally used by the D said "Ahmed Mfupi": an electric detonator, glass beakers, and aluminium foil paper, dry cell batteries and carbon brushes. The prosecution maintains that these physical materials, can be used to prepare a home made bomb. Mr Mulokozi would further contend that some of these gadgets are highly and inherently dangerous, likely to explode on slightest careless handling, and yet they were safely kept in the house of the accused person. Mulokozi would ask himself a question - whether it could be said that this dangerous material was left un-attended in the accused's house or that the accused did not know that there was something of this nature left in his house!

G But the accused person has denied knowledge of the existence of these materials, which were kept in the room used to be occupied by "Ahmed Mfupi". The question is - can it be inferred from the facts and evidence on record that the accused knew or should have known the presence of these items in "Ahmed Mfupi's" room? I find it is very difficult to make such an inference. My hesitation is founded on the fact that, so far we have no concrete evidence to link the knowledge of the accused with the activities of "Ahmed Mfupi". These items, together with some documentary exhibits (a diary, an agreement for purchase of the motor vehicle Suzuki, "Ahmed's" photographs and a mobile phone customer application form), were found in a cupboard, jointly shared by "Ahmedi Mfupi" and Mwalimu

Kassim (PW7), in the room normally used by the said "Ahmed Mfupi". If the accused was not aware of his (their) clandestine activities, likewise, there should be no justification to make an inference that the accused knew or should have known or should have even contemplated the idea that his friends would be "hiding" dangerous items in the room.

How about the remains of explosive materials on some of the clothes of the accused? The prosecution, of course, would like this court to draw a conclusion that the explosive remains on the accused's clothes (Exhibit P4(b) and 4(c) collectively), found their way to the clothes during the preparation of the bomb just like the clothes of the alleged conspirator, "Ahmed Mfupi" (Exhibit 1 P4(a) (- a pair of blue jeans and a polo shirt):

Dr Fauz contends that the remains on the accused clothing could be explained by the fact that there was not much care taken during the search conducted in the first evening at the accused's house. He would maintain that the search was chaotic and hazardous, as a result thereof, all the clothes, those belonging to the accused and the ones belonging to "Ahmed Mfupi" and those of Kasim (PW7), were thrown on the floor in a single heap, until the next day, when they were properly identified and then sorted out by the accused. Dr Fauz's contentions are that, according to the FBI Agent, Ronald Kelly (PW13), there was a possibility that the mixing up of the clothes could have contaminated all of them, including those of the accused. Besides, the remains on the clothes were of small quantity!

However, Mr Mulokozi would still insist that PW13 had testified to the effect that the search was properly conducted and the clothes were carefully collected; that they were taken from different rooms separately with special care and then packed in different plastic bags and then sealed. There was no possibility, therefore, argues Mr Mulokozi, that one heap of clothes could have contaminated the other.

The stand-off between Mr Mulokozi and Dr Fauz can only be resolved by the evidence on record. In the first place, when the first

A search was made, August 26th 1998, during the evening hours, the accused was not present. He was yet to be arrested, the police were then looking for him. Secondly, even the said FBI Agent, Robert Kelly, was not present during this search. The fact is, PW13 was not in Tanzania during the material time. Indeed, he was in the FBI Labs in Washington D.C. His testimony was to the effect that sometime in September, 1998, he received several sealed plastic bags containing the clothes in question and other items purportedly collected from the scene of crime, for analysis. PW13 was cross-examined as to how the clothes were collected, handled and subsequently packed in the plastic bags. In reply he did admit that he had no first hand information regarding those issues: "... I do not have the first hand knowledge how they were handled before they were brought for analysis I do not know who sealed them The investigators on the scene were the ones who handled them I do not re-call how each plastic bag was sealed". Clearly, PW13 cannot, in law, testify on the facts that took place during the search. Neither did PW13 testify the way Mr Mulokozi would have us believe. Besides, neither did FBI Agent Gregory Carl (PW12) testify on anything to do with the search of the house of the accused or on the collection and handling of the clothes.

However, ASP Valentino (PW11) did testify on the searches conducted in the accused's house. The collection in respect of the clothes was done during the second search. His testimony on this aspect is to the effect that: "...the whole house was searched.. the search revealed the following:.... (c) clothing articles, from the room of Rashid (accused), including - 36 shirts, 25 trousers, 1 T-shirt and 1 jeans... The accused did admit that the shirts and the trousers belongs to him. But the T-shirt and the jeans belonged to Ahmed Ghailano ..."

PW11 further testified that "...in respect of the clothes and the other items identified by the FBI, they were carefully sealed...."

But rather strangely the testimony of the housemaid, Amina Rashid (PW17), seems to be at variance with that of PW11. PW17 said that "The police searched the room of the accused. They broke the wardrobe.

They took clothes from it. The clothes were on the floor. They did search them. The Police were in uniform. The Police did not put on gloves. I did not see themAfter the search, the clothes were lamped togetherWhen I left in the morning of the search, I left them like that" PW17 went on testifying that ".... As a house maid, I used to wash the clothes of the accused, Ahmed and Mwalimu Kassim used to wash them together and press (iron) them"

DW2, one Issa, who witnessed the first search, testified to the effect that the Police wanted him to witness the search. He would recall that "...they broke into his (accused's) room. The whole house was searched. The Police did break into the cupboards as well The Police searched about four rooms The Police also searched some clothes They were not dressed in special gear.... They did not put on hand gloves...." But when DW2 was cross-examined by the Senior State Attorney, Mulokozi, DW2 testified that he was not sure as to whether the Police and the FBI put on special gear or wore gloves. "...I do not recall whether they were dressed in special gear. I do not recall that, but they were not dressed in gloves.... "

Testifying on this issue, the accused maintained that when the second search was conducted in the house (after he had reported to the Police the next day), he could not witness the search in each room, but at least he found his clothes in his room, "...heaped in one place. They had been removed from the cupboard. Also the clothes of the other persons, Ahmed and Kassim, were also heaped in one place. I did identify my clothes and those of Ahmed and those of Kassim. It is me who sorted them out. They were mixed up The cupboard had been emptied. The cupboard doors had been broken"

Definitely, the testimony outlined on the preceeding paragraphs clearly indicates the existence of some sort of confusion surrounding the handling of the clothes, especially during the first search, which was conducted during the night. To me the evidence does not seem to support the prosecution's' assertion that the clothes were taken

A from different rooms with special care and then packed in different plastic bags and then sealed. But the opposite counter assertions are more plausible, that the search during that evening was definitely conducted in a hurried way, with plenty of expectation to reveal some of the materials connected with the bombing. And, naturally, in such a situation, one cannot be too careful!

C The amount of explosive remains found on the accused's clothes was quite small. FBI Agent Kelly (PW13) told us that, when he testified that "...Explosive residue can be transferred to another item either by direct contact or by contact with other item with explosive residue: Example, a cloth can contact explosive residue with other items... We did not test the quantity of residue. But they were quite small...."

D Dr Fauz posed a question to us, which we must respond to: Can it be safely said that the remnants of explosives found in the clothes, which the FBI Agent (PW13) said were of small quantity, meant that the accused was involved in the preparations of the bomb? Isn't it possible that the contamination resulted from the mix-up done on the first day of the search?

F The most logical response to the question is that, taking into consideration the evidence on record, coupled with the scant amount of explosives remains found on the clothes of the accused, it would be very reckless of us to make a firm finding that the accused was actively involved in the preparations of the bomb. At least probable possibilities have been advanced-as to how the contamination might have been brought about onto the accused's clothes - either through the use of the Samurai Suzuki (which was also contaminated with the explosives residue), but more probably so, by the mixing up of the clothes together, those of the accused and those of "Ahmed Mfupi" in one heap, on the first search of the house, during the night.

I We now move to the presence of the refrigerator compressor in the shop of the accused. The evidence on record is to the effect that the compressor that was removed from the Nissan Atlas truck was later taken by "Ahmed Mfupi" to the shop of the accused for sale.

A The compressor was not sold, however, since the Police later detained it, after unsuccessful attempts to dispose of it by PW16. The Prosecution's theory is that it should be taken that the accused knew that the compressor was the one removed from the Nissan Atlas truck, and therefore, he must have known that the truck was being used for the "housing" of the bomb.

C But the defence holds to the contrary. They contend that, firstly, when the compressor was sent to the shop, the accused was not present. And when he was shown the compressor, he was astonished, and wondered whether the same could be sold at all. Dr Fauz argues that this should be taken to mean that the accused had no idea of the item he was looking at, or where it came from, what it was for and whether it was even saleable.

E This aspect should not detain us more than necessary. It is a fact that when the compressor was sent to the accused's shop, by "Ahmed Mfupi", the accused was not present. PW16, Salim Issa Mohamedi, testified that ".... When the compressor was brought to the shop, the accused did not know. But he (Ahmed "Mfupi") told me that, I should tell the accused...."

F The genuine surprise shown by the accused when he saw the compressor simply does not sound as if the accused knew beforehand that the compressor came from the Nissan Atlas truck. Neither can the attempted disposal of it be associated by the accused, since when this attempt was made, the accused was already in custody, under high security, by both the Police and the FBI. It was almost impossible to communicate with PW16.

H The prosecution has also argued, quite extensively, against the conduct of the accused, when he was required to report to his house on the first day of contact. The prosecution contends that the accused was hiding away from the Police Officers who had gone to his house. The inference is that the accused was suffering from guilty conscience since he had participated in the bombing. The argument is further extended that the accused's hiding was meant to prevent the possibility

- A of a search being conducted at his house. And that he was afraid of the search because he knew what could be found in the house. The prosecution moves this court to dismiss the accused's story that he was hiding from T.R.A. Officers from Tanga, who were looking for him for an alleged customs duty tax evasion.

B But the accused would insist on his story, that his failure to return home during the evening of the first search was due to his main fear that the persons who were looking for him might have been from TRA Tanga. Then, Dr Fauz would argue, soon after the accused had been satisfied that those looking for him were not TRA Officials but real Police Officers and FBI Agents, he immediately reported to the Police Headquarters.

- C You would recall that the accused was arrested about three weeks after the bombing incident. It is true that when he was first contacted by the Police, requiring him to report at his house for the purpose of searching, he did not do so, despite the efforts of ASP Valentino (PW11) wishing him to do so. The accused has given some explanation for this attitude and behaviour. The question is - was he hiding away from the Police and the F.B.I. or the TRA Officials from Tanga?

- D At the material time, July 1998, the TRA Officials, Tanga, were looking for the accused, for the purpose of answering charges in relation to customs tax evasions. The accused, in assistance of his Clearing Agent, Add Masony (DW4), had removed a customs bounded Mitsubishi Canter truck from the Tanga Port without the proper authorisation of the TRA Officials. DW4 testified that "... the TRA impounded the vehicle until the goods in the vehicle had been cleared as well But before the TRA could capture the vehicle, the said Rashid (accused) had taken the motor vehicle, plus the goods in the vehicle....
- E Rashid took both the motor vehicle and the goods in it to Dar es Salaam ... the TRA did not arrest Rashid. Later on, I met the T.R.A. Officials and gave them the phone number of Rashid...." What took place thereafter, DW4 would not know, so he testified.

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Which of the versions is more plausible! The accused's story or that of the prosecution? I would go along with the accused's story! It is more probable to accept the fact that the accused was hiding away from the Tanga TRA Officers rather than the Police, following his subsequent conduct, - the next day. On his own, he reported to the Police Headquarters and the FBI. It would not make much sense to assume that the accused was afraid of the search being conducted at his house for fear of what might be found in it, for the accused could have disposed of whatever he might have been afraid of, well in advance, since he had plenty of time to do so. Besides, during the period the Police were looking for him (less than twenty four hours) there is no evidence to show that the accused did or even attempted to hide or remove any article from his house or his shop. This would further indicate that the accused had no knowledge of the existence of the materials (exhibits) found in his house.

The Prosecutions has also attacked the accused's reaction to the news related to the bombing incident. They alleged that the manner the accused received the news proves that he knew something like that was going to take place. On the morning of the day that the bombing took place, the accused had returned home at about 10:30 a.m., and had instructed his house maid (PW17) to switch on the television, and had watched the activities taking place at the U.S. Embassy. The prosecution asked the following question, for which we have to respond to: One has got to query as to what was so special to push him to watch television at his house! It was unusual, of him, contends the prosecution, to come back home at such a time to watch television! The accused could have watched it somewhere else around his business area. Mr Mulokozi would insist that for the accused to come back home, at that precise timing; only to watch television and go back to his business just after the bombing incident must have been premeditated. Mr Mulokozi would require this court to draw an inference that the accused went home to see and satisfy himself how successful their mission had been.

I

A The accused gave some explanations as to why he had gone back home that morning. He testified that "I went home to check my brother, Salum He had come from Zanzibar to get a VISA from the U.S.A. Embassy. When I got home, he was not there.... I saw him
B at 12:00 noon ... by that time he had already gone to the U.S.A. Embassy. When I got home I met my housemaid, Amina. We also talked of the news. We also watched the television"

C Well! What can we say about this! Will it be a reasonable inference that the accused knew of the bombing and that he had gone home to watch the bombing news as they unfolded on the television screen, thereby having the gratification for the successful completion of their mission? If we answer that question in the positive, we should
D also satisfy ourselves that the accused must have had all along known about the bombing activities. However, such a finding has had no tangible basis so far. That being the case, therefore, it would be more logical to accept the accused's explanation that, perhaps he might
E have gone back home to check on his brother, whom he was expecting from Zanzibar. Having accepted that to be a good explanation, it would equally be fair to reach a conclusion that there was nothing wrong for the accused to watch the bombing incident news on the
F T.V.set, at his own house, together with his housemaid. After all, that was the "breaking news" of the "century", since nothing like that had ever taken place in Tanzania. No one could have afforded to miss that kind of news! Never!

G Having traversed the main areas of controversy, still Dr Fauz would further submit that the accused was interrogated by F.B.I and the Tanzania Police for several days and for long periods, about his alleged involvement in the bombing. The contention is that the F.B.I
H would have arrested him and taken him to the U.S. for trial had they been convinced that he was in any way involved in the conspiracy. Dr Fauz still maintained that even after arresting Khalfan Khamis Mohamed, who had confessed to the crime and thereafter convicted,
I the F.B.I. did not find it necessary or essential to have the accused sent to U.S for trial or for some other legal action. Having failed to

hold the accused responsible for any of the bombing activities, the F.B.I. left the fate of the accused into the hands of the Tanzania Police, who then decided to reduce the initial murder charges into a single count of conspiracy to murder! Dr Fauz wondered whether it was conceivable for the accused to be charged with this offence, when people actually died, eleven of them, as a result of the alleged conspiracy!

When the Senior State Attorney, Mr Mulokozi, was winding up him submissions, he reiterated the prosecution's case that there was sufficient evidence to connect the accused with the bombing of the U.S. Embassy in Tanzania. However, as I did remark earlier on, my gentlemen and lady assessors were not convinced with the evidence adduced to make them return a verdict of "guilty", instead, however, they unanimously find the accused "not guilty" of the offence of conspiracy.

In reaching their verdict, my gentlemen and lady assessors must have applied the cardinal principle of evidence embodied in section 114 (1) of the Evidence Act 1967, which states that:

any person shall be entitled to be acquitted of the offence charged if the court is satisfied that the evidence produced by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

The question before this court is this: Can it be said, from the totality of the evidence produced in court, that there is no doubt at all that the accused was one of the conspirators in the bombing? Isn't there a possibility that he might not have been involved at all? To answer this question, perhaps I should remind you of the principle which has to be satisfied before circumstantial evidence forms a basis of conviction. The principle was expounded in the case of *Ndunguru v. R.* (6), where it was stated that:

... in order for circumstantial evidence to form the basis of a conviction, it had to point to the guilty of accused, exclude any other reasonable hypothesis than that of guilty as well as exclude co-existing circumstance which would tend to weaken or destroy such an inference.

- A Let us now go back to the question that was posed by the defence at the beginning of this analysis, the question was - "... Did the conduct of the accused provide the circumstantial evidence which the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt?"
- B

- C I have no hesitation to agree with my gentlemen and lady assessors, that upon the evidence adduced, I can hardly find the accused guilty of the offence of conspiracy. The evidence; certainly, creates a heavy cloud of doubt, thus falling far short of the criteria established by law. A lot of suspicion, for sure, has been created in relation to the involvement of the accused in the bombing incident. But then, suspicion alone cannot be a basis of conviction. That was the decision in the case of *Ongondia and Erima v. Uganda* (3), in which it was stated that:
- D

- E ... however, grave may the suspicion that the [second appellant] was acting in concert with [the first appellant], we do not consider that this was evidence from which it could properly be inferred that he was a part to the conspiracy.

- F The evidence on record provides more than one plausible explanations for the accused's conduct wherever suspicious evidence is available. There is ample evidence from both the prosecution witnesses and defence witnesses to show that the accused, though he knew most of the alleged conspirators suspected for the bombing of the U.S. Embassy, yet he himself had taken no part in the alleged conspiracy.
- G Indeed, the evidence simply casts too much doubt in the prosecution's case only to leave a lot of substantial questions unanswered. These would include questions like, why didn't the alleged conspirators, all of fleeing whom were non-residents of Dar es Salaam, while the accused was, involve him in the buying of the Nissan Atlas truck? Or in the making of the alterations thereto? Or in buying the gas cylinders? Or renting of the Ilala Bungoni house? Or arrangements for the re-renting the said house? Or in the disposal of the flour mill? The alleged conspirators simply decided to use other people
- I

A in all these activities, but not the accused person. The question still remains, if the accused was a fellow conspirator, why not involve him?

B Again, another question nagging us is this, why didn't the accused, who had a passport and all the necessary means and time of fleeing the country, leave the country, even after twenty days after the bombing incident had gone by, and yet the accused willfully surrendered himself to the police on 25th August, 1998? Indeed, the accused could have disappeared just like his alleged conspirators, some of whom are still at large up to-date.

C

D There are a number of other unresolved questions, as outlined and discussed in the judgment whose effect is to create circumstances of the accused's guilt. Evidence on record abundantly suggests and demonstrates that the accused was used by the very people he trusted, helped and considered as friends, or friends of his friends, to provide them with safe haven, whereby they could camouflage their sinister activities without creating any suspicion. That is typical of conspirators and much more so, the terrorists. The alleged conspirators (terrorists) kept the accused away from their activities. The accused was not brought into the plan nor was he supposed to know anything about their bombing plot.

E

F

G The evidence on record demonstrates that although the accused and some of the alleged conspirators were very close, the three of them however, began to distance themselves from him as the "bombing day" approached. Their regular visits gradually become occasional, then they stopped visiting the accused's residence, just a few days before the bombing. And then the bombing, on that fateful, unforgettable morning of 7 August 1998, the alleged conspirators had virtually disappeared, while the accused, quite unaware of the events, completely in the dark, was left "high and dry" to face the consequences of the bombing of the U.S. Embassy. He was betrayed by the very people he had trusted and called "friends".

H

I