

**IN THE HIGH COURT OF TANZANIA
AT MWANZA**

ORIGINAL JURISDICTION

(Mwanza Registry)

CRIMINAL SESSIONS CASE NO.22 OF 1998

THE REPUBLIC

VERSUS

1. CAPT. JUMANNE RUME MWEIRU

2. GILBERT MOKIWA

3. ALPHONCE SAMBO

4. PROSPER RUGUMILA

JUDGMENT

MLAY, J:

The four accused persons, (1) CAPTAIN JUMANNE RUME MWIRU, (2) GILBERT MOKIWA, (3) ALPHONCE SAMBO and (4) PROSPER RUGUMILA, stand charged with 159 counts of the offence of Manslaughter, contrary to section 195 of the Penal Code, Cap 16 of the Laws of Tanzania. In the particulars of the offence it is alleged that; "on the 21st day of May, 1996 at

about 7.30 hours near the entrance of Mwanza Gulf in Lake Victoria within the Municipality and Region of Mwanza did unlawfully kill [each of the persons specified in the 159 counts]".

All the four accused persons, pleaded not guilty to all the 159 counts contained in the information.

During trial, the prosecution was conducted by Mr. W.C. Magoma, learned Principal State Attorney, ably assisted by Mr. Feleshi, learned State Attorney and all the four accused were defended by Mr. Magongo learned advocate ably assisted by Mr. Galati, learned advocate.

To prove its case, the prosecution called a total of 32 witnesses and produced 15 documentary exhibits. By the evidence from the 31 witnesses and the documentary evidence, the prosecution intended to prove that the 1st, 3rd and 4th accused persons, being employees of the Tanzania Railways Corporation, MARINE DIVISION in their positions of Captain, Port Officer at Bukoba and Port Officer at Kemondo Bay respectively, and 2nd accused as Harbour-master and Ship-surveyor, by their acts or omissions amounting to culpable negligence in relation to the ship MV. BUKOBA, caused the ship to capsize on 21/5/1996 while on its way from Bukoba to Mwanza, causing the death of the 159 persons named in the 159 count of the Information.

The first Prosecution witness was CAPTAIN CLEOPHAS MAGOGE (PW1). He told the court that he worked as a Ship Captain for the Tanzania Railways Corporation at Mwanza, from 1977 to 1987 rising through the ranks of Marine Superintendent to Shipping Manager and then Principal Marine Operations Manager, Assistant Divisional Marine Manager and finally to Marine Divisional Manager. PW1 told the court that as Divisional Marine Manager, he was in charge of Branch Manager at Mwanza, Kigoma and Kyela. He said the Branch Manager at Mwanza was responsible for the port of Mwanza, Bukoba, Kemondo Bay, Musoma, Nansio and other small ports in Lake Victoria. He told the court that the Port Manager of Mwanza was one OSCAR MUNISI. PW1 stated that as Marine Divisional Manager, he was the over-all in-charge of the Division and his duties were to liaise with the port managers on the management of the ports, running and maintenance of ships.

PW1 said that he knew Captain JUMANNE RUME MWIRU the 1st accused who was the Captain of MV. BUKOBA in 1996. He also knew the 3rd and 4th accused who were respectively, Port officers of Bukoba Port and Kemondo Bay Port and also the 2nd accused who was the Government Ship surveyor for Tanzania Railway Corporation ships.

PW1 stated that MV. Bukoba was both a passenger and cargo ship built in 1979 by a firm called Belgium Shipping Corporation. He said that the ship MV. Bukoba capsized and sank on 21st May 1996, about 12 kilometres or 6.5 nautical miles from Mwanza and that the 1st accused was the captain of the ship when it capsized. PW1 stated that, together with MV. Bukoba there were a total of 11 ships at Mwanza. PW1 stated that he had never captained the ship MV Bukoba.

In explaining the conditions of operating a ship, PW1 said that before a ship is allowed to operate, it has to be inspected by a Government ship Surveyor and granted a certificate of seaworthiness. He said a ship is also required to be registered but the registration is the responsibility of the Ministry of Communication and Transport. PW1 told the court that until 1997 when he left TRC, all the ships belonging to TRC, had not been registered.

PW1 told this court that the ship MV BUKOBA was last surveyed by the 2nd accused Gilbert Mokiwa who issued a Certificate of Seaworthiness ships on 1st March 1996. The Certificate of Seaworthiness Exh. P8 shows that 2nd accused authorized MV BUKOBA to carry 85 tons of cargo and 400 passengers and 22 members of crew. PW1 stated that only one certificate

of seaworthiness is issued for a ship at one time and that he had never received another Certificate of Seaworthiness of the same date for the same ship MV Bukoba.

Perhaps it is necessary at this early stage for me to say that the evidence of PW1 regarding the issue of two certificates of seaworthiness issued for MV Bukoba, is significant in that the prosecution for some reason, believed that the 2nd accused had issued two different certificates of seaworthiness for MV Bukoba on the same date. This belief was disproved and abandoned by the prosecution after this piece of evidence from PW1.

Coming back to the evidence of PW1, he said that in his experience as Captain of a ship, he had never seen two certificates of seaworthiness issued by a ship surveyor for the same ship. He stated that prior to the certificate of seaworthiness issued for MV Bukoba on 1st March, 1996, the 2nd accused had made inspections of MV Bukoba in previous years and issued certificates of seaworthiness. PW1 told the court that if a certificate of seaworthiness did not indicate the volume of weight of cargo or number of passengers and crew, he would not accept it as a captain of the ship

and that such certificate of seaworthiness, would not be valid because it is incomplete.

PW1 told the court that from the records in his office, he knew that Danish Experts made an **"inclination test"** of Mv. Bukoba and made a report which is Exh. P5, in which they recommended that Mv. Bukoba should continue carrying the full load of 400 passengers but only 35 tons of cargo. He said that the report Exh. P5 was sent to the Belgium Shipping Corporation which built the ship and the Belgium Shipping Corporation, disputed the findings of the Danish Experts. PW1 told the court that the recommendations of the Danish Experts were not implemented. He went on to state that when MV. Bukoba was built, according to the certificate of seaworthiness issued by Surveyor to Lloyds Register of Shipping Exh. P7, the ship was authorized to carry 400 passengers and 200 tons of cargo.

PW1 told the court that on 4th May 1994 another Danish Expert one SORREN sailed on MV. Bukoba to Port Bell in Uganda. Upon his return from Port Bell the expert reported that the ship MV. Bukoba was **"listing"** or swaying to one side. The expert suspected that the ship was carrying too much cargo. PW1 stated that when the cargo carried on the ship was weighed, it was found to be only 144.2 tons. According to PW1, a meeting

attended by himself, the Danish Expert and the Branch Manager one Captain Kasselo who is now deceased. The meeting reviewed the cargo which was being carried by Mv. Bukoba and the record showed that the cargo averaged on most occasions, 100 tons. PW1 said they agreed that for the safety of the ship MV. Bukoba, it should not carry more than 85 tons of cargo. PW1 said he then issued instructions to that effect by a letter dated 11/5/94 Exh. P6, which was copied to the Captain of MV. Bukoba and Passenger Agent. PW1 stated that after issuing the instructions Exh. P6, he did not receive any report from the Branch Manager of any problem on MV. Bukoba.

PW1 told this court there was another "**inclination test**" made on MV. Bukoba. He stated that he was informed by the Director General of TRC that Belgium experts would conduct an "**inclination test**" on MV. Bukoba on 1st May, 1996. He said preparations were made for the test by stopping the operations of MV. Bukoba but when the tests were conducted he was away on safari and the Shipyard Manager JOSEPH HIZA PW29, assisted the experts when carrying out the "**stability test**". According to PW1, after the test the Belgium experts did not make any recommendations but said that they would submit their report later. PW1

stated that it was the Branch Manager PW25 who authorized MV. Bukoba to resume operations after the **"inclination test"** and that MV Bukoba made two trips between Mwanza and Port Bell in Uganda under the captainship of the 1st accused. PW1 did not receive a report from 1st accused regarding any problems on the ship on these two trips.

PW1 went on to state that at the material time MV. Victoria was the ship assigned to sail between Mwanza and Bukoba. During the material time a new engine was fitted on MV. Victoria and according to the obtaining procedures, when a new engine has been fitted to a ship it has to be inspected and overhauled after a specific period. PW1 stated that he was informed by the Shipyard Manager PW29 that the time specified from the inspection and overhaul of the engine fitted on Mv. Victoria had arrived and he ordered the operation of MV. Victoria to stop for the inspection and overhaul.

PW1 stated that since Mv. Victoria had stopped operations, he had to find an alternative ship to serve the Mwanza/Bukoba route and he assigned Mv. Bukoba to replace Mv. Victoria on the Mwanza/Bukoba route. PW1 told this court that Mv. Victoria was bigger than Mv. Bukoba and carried 1,200 passengers and 200 tons of cargo. PW1 stated that on 19/5/1996

Mv Bukoba left Mwanza for Bukoba under the captainship of the 1st accused. PW1 went on to say that he did not know if the Port officers at Bukoba and Kemonondo Bay were informed on this change of ships. He said it was the duty of the Branch Manager PW25 to inform these port officers by radio communication and the Control at Mwanza, was required to inform the Headquarters at Dar es Salaam of the change.

I find it necessary to pause here and point out at this juncture, that this piece of evidence regarding the change of ship; the difference in their capacity particularly for carrying passengers and the question whether the change was communicated to the Port officers at Bukoba and Kemonondo, is very significant in this case, as it raises an assumption that, in anticipation of the bigger ship MV Victoria, the Port Managers may have sold tickets for more passengers and accepted more cargo; than MV. Bukoba had the capacity or authority to carry. By extension of this assumption, more passengers and probably more cargo was actually carried on MV. Bukoba on its return journey, than that ship had the capacity or authority to carry. It is important to keep this assumption in mind, as the subsequent events leading to the tragic sinking of Mv. Bukoba, unfold, the issue being whether these two assumptions will be confirmed by evidence.

To continue with the evidence, PW1 told the court that when Mv. Bukoba capsized on 21/5/1996, he was at Mwanza. Narrating the events of that fateful day, PW1 stated that on the morning of 21/5/96 he was in his office at 8.15 a Passenger Agent at Northern Port Mwanza arrived and informed him that he had received reports that MV. Bukoba had capsized. PW1 said he immediately went to the South Port to take MV. Victoria which was undergoing engine overhauls having instructed his Secretary to transmit the report on the capsizing of MV. Bukoba to TRC headquarters and to other authorities.

PW1 went on to say that he steered Mv. Victoria slowly to the same to avoid damaging the engine which had been reassembled quickly. Upon coming at the scene at about 10.00 am he said he saw Mv. Bukoba which had capsized upside-down and also saw dead bodies and survivors floating around within an area of one mile. He said he found another ship MV. Butiama already at the scene and other small boats.

PW1 said there was confusion at the scene as every vessel and the people at the scene tried to do what they could to rescue the survivors and also to pick up the dead bodies and send them ashore. Describing MV. Bukoba PW1 explained that the whole superstructure was submerged with

only part of the bottom (keel) being above water but continuing to sink slowly.

PW1 told this court that the Regional authorities including the police arrived at the scene and reports on the state of the ship were being communicated to the headquarters of various authorities. PW1 went on to say that he did not get any instructions from his headquarters as to what measures he should take in relation to the ship. He said they had no equipment to pull the ship ashore as the only tug stationed at Mwanza "**Mv. Ukerewe**" was at Kisumu and the only two divers employed by TRC at Mwanza were on other duties in Kigoma port.

PW1 told the court that on ordinary ship other than a tug could not be used to drag the sinking MV. Bukoba as ordinary ships do not have the mechanism to disengage the ship being pulled in the event of sinking. He said a tug had such a mechanism which would in such circumstances eject the sinking ship whereas an ordinary ship would be in the danger of being dragged down with the sinking ship.

PW1 went on to say that while he was at the scene he could hear banging from inside the capsized ship. He therefore instructed holes to be bored on the ship to rescue the people who were inside. He stated that

the boring started at 2.30 pm because equipment and gas had to be found. PW1 explained that two holes were bored on the ship and from the first hole only one person came out alive. When he heard people knocking from another part of the Keel a second hole was bored at that place and two more people came out alive.

PW1 told this court that after boring the second hole, a lot of air escaped from the submerged ship and the lake was developing large waves and the ship sank completely. PW1 stated that he saw the 1st accused among the people who were clinging to the keel of the ship when he arrived at the scene. He also said that the Chief Engineer of the ship one ADOLF MKUDE LUCIEN PW30 was another officer who survived the accident. PW1 went on to say that there were other people who survived the accident in addition to the people who came out through the two holes made on the ship.

PW1 told the court on the day of the accident they did not get any assistance until the second day when some divers from the Tanzania Harbours Authority arrived and efforts to retrieve bodies from the ship continued. On the third day more divers from the Kenyan Navy arrived and the exercise of seeking dead bodies continued. PW1 stated that on

the 4th day he was arrested. He stated that prior to the arrest he had made a preliminary report of the accident to TRC headquarters but he did not get the opportunity to make a thorough investigation of the incident and for that reason he did not know the cause of the accident. He said prior to the MV Bukoba there had not been another accident where a ship had sunk. PW1 ended by stating that he was later released from custody and interdicted by his employer but after an enquiry he was reinstated in his employment and in 1997 he requested to retire from employment.

PW1 was cross examined by both Mr. Magongo and Mr. Galati who were representing the four accused persons. In reply to Mr. Magongo, PW1 stated that he did not know who was in actual control of the ship when the accident occurred. He said when the Chief Officer is **"on watch"** he is in overall control of the ship and is fully responsible for the decisions he makes while he is **"on watch"**. PW1 told the court that he had participated in the inspection of ship with the 2nd accused but he did not remember how many times he had done so but once it was on a ship in Lake Nyasa. PW1 said that in surveying a ship, the surveyor inspects the life saving appliances which include life boats, life rafts and life jackets. He also inspects fire appliances such as fire extinguishers and navigational

aids such as compass and the steering. He stated that a surveyor also inspected radio communication, pilot chairs such as rocket parachutes, hand flares and smoke bombs. He also inspects whether there are any holes or badly loaded parts of the ship and such places as the engine room etc. He stated that in the course of the inspection the surveyor makes notes before the Certificate of Seaworthiness is prepared.

PW1 told the court that the operations of the ship are not suspended until the Certificate of Seaworthiness is prepared and issued. He said for as long as the Surveyor is satisfied that the ship can operate the ship continues to operate until the certificate is issued. After the survey it is the surveyor who informs the Captain of the ship verbally that the ship can operate. He said a new captain has to inspect the Certificate of Seaworthiness and if it has expired he can ask the Branch Manager for the Marine Superintendent how he can operate a ship whose Certificate of Seaworthiness had expired.

PW1 told the court that when a ship is built, it is the ship builder who issues the initial Certificate of Seaworthiness specifying the number of passengers, weight of the cargo and the size of the crew to be carried on the ship. PW1 said if there are any changes as to the capacity of the ship

it is the management of the ship which makes the decision and not the surveyor. PW1 said a Certificate of Seaworthiness contains a list of matters which the Surveyor is required to check.

As it will become apparent later on, there was no dispute that at the time of the accident; MV. Bukoba had a valid certificate issued by the second accused Exh. P8. The Survey of MV. Bukoba and the issuing of the Certificate of Seaworthiness is the chain which links the second accused GILBERT MOKIWA with the offences charged. The issue will then be whether the accused was criminally negligent in the survey of this ship or in issuing it with a Certificate of Seaworthiness. It is necessary to have this link in mind in order to properly understand the evidence in so far as it relates to the second accused.

Coming back again to the evidence of PW1 in cross-examination, PW1 stated that a passenger ship operates according to a timetable while a cargo ship operates on a "**sailing order**" which is a directive to sail to a specified port. PW1 stated where a ship operating according to a timetable is unable to do so, another ship can be slotted in to sail that route.

PW1 told the court that radio communication is for communication between the ship and ports and with other ships and it is among of the

items which are inspected during survey of a ship. He said as a Divisional Manager he would not know if radio communication at ports was not working if he was not given a report to that effect.

On passengers, PW1 stated their number can be ascertained at the port of disembarking by making a head count. He said the Steamer Clerk would normally have a passengers' manifest to show the number of passengers who were on the ship and the class in which they travelled. PW1 said a Captain of the ship has access to the passengers' manifest which is prepared at the port of embarkation and handed over to the Steamer Clerk who was at to allocate rooms to passengers. He said a copy of the passengers' manifest is left at the port of embarkation. PW1 told the court that there are ship standing orders giving guidelines to employees on how to perform their duties and there are also International Maritime Regulations which they need and they are like the ships' standing orders.

On further cross-examination by Mr. Galati, PW1 stated that it is the ship builder or Management of a ship who determines the capacity of a ship and not a Ship Surveyor. He said they decided in a meeting that Mv. Bukoba should carry 85 tons of Cargo. He stated that he saw the

Certificate of Seaworthiness for MV. Bukoba Exh.P8 showing that the ship is authorized to carry 85 tons of Cargo. He said the Surveyor 2nd accused, issued the certificate according to their decision and there was nothing wrong under Exh.P8.

PW1 went on to say that Danish experts had recommended that MV. Bukoba should carry 35 tons of Cargo only and the recommendation was made after the experts had made tests. PW1 said that their non decision that the ship should carry 85 tons of Cargo was made after they had found from their records of MV Bukoba that the ship had been carrying out 100 tons but they did not make any tests.

PW1 told the court that "**sinking**" means "**rolling over**". He said if a ship is unstable it may capsize and later it may sink. He told the court that this is what happened to MV. Bukoba. He said MV. Bukoba had a stability proven which was present and known to TRC even before the Certificate of Seaworthiness Exh. P8 was prepared. He said he did not know if TRC was negligent to continue operating the ship after the problem was known because no expert directive or advice had been given to stop operating the ship.

PW1 went on to say that if a ship is overloaded it may capsize and sink or sink directly. PW1 ended by saying that 1st accused was subordinate to him and that the drilling of the ship was done on his instructions.

PW2 Captain MANASSE EPHRAIM KOMBO told this court that he was a ship Captain employed by Marine Services Company Ltd. a subsidiary company of the Tanzania Railways Corporation (TRC). He stated that he had worked on MV. Bukoba as a Second Officer, on MV. Serengeti also as a Second Officer and as Chief Officer on MV. Nyangumi. He was also the Chief Officer on MV. Bukoba until 30th January 1996 and finally became the Captain of MV. Butiama. He said MV. Butiama was sailing between Mwanza and Nansio ports and the ship has the capacity to carry 200 passengers and 100 tons of Cargo and 20 members of the crew.

PW2 said that he knew about the capacity of MV. Butiama from the ship drawings supplied by the builder of the ship and from the stability booklet and the Certificate of Seaworthiness. He said that he remembered to have seen the ship drawings of Mr. BUKOBA but not the stability Booklet or the Certificate of Seaworthiness of that ship. He went on to say that it

was wrong to sail a ship without having its Certificate of Seaworthiness and it would be the fault of the Captain and owner, if a ship sailed without it.

PW2 stated that the Captain has the duty to ensure that the ship was safe for the purpose of the journey being undertaken and that the Captain receives reports from his officers such as the Chief Officer regarding the loading of passengers and Cargo; from the Chief Engineer on safely, engines and fuel. From the Chief Stewart he receives reports on catering facilities on the ship. He said the "**officer on watch**" informs the Captain on radio communication. PW2 said radio communication is important for the safety of the ship to communicate with ports and to issue distress signals in case there are problems. He said MV. Bukoba had two radio systems VHF which has a range of about 25- nautical miles or 50 kilometres and HF which has a longer range. He said similar radio systems were on MV. Bukoba and also the ports of Mwanza, Bukoba and Kemondo Bay. He said he did not know the state of the radio systems at Bukoba and Kemondo Bay when the accident of Mv. Bukoba occurred.

PW2 told this court that every passenger ship operates on a time table which is known to the port of call. He said half an hour before a ship leaves port it has to make, one long hoot which shows that the ship will

depart within $\frac{1}{2}$ hour and then makes another short hoot five minutes before departure. After the five minutes have expired the ship sails out of the port under the direction of the Captain (casting off). He said the duty of the Captain is to safeguard the interests of the ship-owner, the interests of the crew and safety of the ship. He went onto say that the First Officer is responsible for the loading of cargo and passengers and servicing of deck machinery and cargo gear. In carrying out his duties the First Officer collaborates with port staff. The First officer receives the Passengers Manifest and the Cargo manifest from the Steamer Clerk. These documents are prepared in the office of the Port Officer by traffic clerks. PW1 said the Chief Officer remains on the ship during loading to ensure that the ship will have good stability and also reinsure that the number of passengers is in accordance with the capacity of the ship and that the passengers stay in their assigned deck. He said even if the passengers are in accordance with the capacity of the ship it may be dangerous if too many passengers move to one deck of the ship. PW2 told the court that in his work, the Chief Officer is assisted by the Steamer Clerk and police officers who are on the ship to ensure that passengers stay remain in their appropriate decks.

PW2 told the court that the capacity of the ship enables the ship to attain the proper draught on load line, which is the line to which the ship sinks when it is loaded according to its maximum capacity. He said both the loading and offloading of the ship may endanger the stability of the ship. He said if a ship has fewer passengers than the capacity of the ship more cargo can be loaded on to the ship above its authorized cargo capacity; if the space permits and also if, the stability conditions permit. PW1 said however that more passengers cannot be taken to compensate for cargo. He said to do so would endanger the safety of the passengers as there would not for example be sufficient life jackets and other safety equipment such as rafts and life boats to accommodate the additional passengers if there was an accident. He said the Inland water laws prohibit overloading and both the Captain of the ship and the owner are liable under the law for overloading.

PW2 told the court that in sailing a ship there are three officers who are assigned the responsibility, in accordance with a time table. He said the Captain took the responsibility between 8.00 am and 12.00 noon; the Second Officer took over from 12.00 noon to 4.00 pm and the Chief Officer takes over from 4.00 pm to 8.00 pm from 8.00 pm to 12.00 midnight, it is

the Captain again while the Second Officer takes over from 12.00 midnight to 4.00 am (dogwatch) and the Chief Officer takes over from 4.00 am to 8.00 am. PW1 said the responsibility of the "**officer on watch**" is to make sure that his ship follows the track and if something unusual happens he should report to the Captain. He said unusual circumstances include another ship coming too close to the ship and likely to cause an accident, or if the weather becomes bad for example affecting visibility or if the ship leaves its course and also any specific matters which the Captain may have given to be reported to him. Specific matters to be reported are recorded in a register. The breakdown of the radio communication is a matter to be reported to the Captain.

PW2 told this court that a ship may sway ("**kuyumba**") in many ways. He said if a ship swayed on its side for reasons arising from inside the ship e.g movement of passengers, the swaying is called "listing and if the ship sways for reasons external to the ship, the movement to one side is called "**heeling**". He said if the ship sways from one side to the other by reason of waves, the movement is termed "rolling" and if the ship moves up and down by reason of waves, the movement is called "pitching".

PW2 stated that if these movements reached a certain degree which is not allowed for the specific ship, the movement has to be reported to the Captain. He said when he was first assigned to MV. Bukoba as Second Officer the ship was assigned to go to Port Bell in Uganda. He said there were few passengers on the route who never reached the passenger capacity. He also said the cargo capacity left MV. Bukoba was 200 tons but the Captain of the ship then one William Bosi now retired, had informed him that the ship should not carry more than 85 tons because it had stability problem. PW2 said because of the stability problem the ballast tanks of the ship had to have water all the time.

PW2 told the court that because of the instability MV. Bukoba **"listed"** even if only a few passengers moved to one side. He said for a ship which did not have an instability problem it would take the movement of a large number of passengers for the ship to **"list"**. He went on to say that instability problem on MV. Bukoba was long standing and an adjustment was made by reducing the cargo in order to allow for carriage of water in the ballast tanks. He said while he was on the ship two of the four boats were removed from the boat deck to improve the stability of the

ship. PW2 told the court that hatch covers which were heavy were changed for wooden and canvas covers.

Describing MV. Bukoba PW2 said it had two cargo holds on the fore but at the bottom, which were loaded from hatches on the second deck. He said the third class was on the main deck in the fore and behind it was the Dining Saloon and behind the saloon was the second class while the first class cabins were on the upper deck.

PW2 said on land the Port Officer was responsible for the amount of cargo and the number of passengers authorized to be taken on the ship while on the trip it was the Chief Officer who as responsible for the amount of cargo and the number of passengers who actually get on the ship. He said if a passenger enters the ship without having a ticket, if the ship has left port, he is fined and also pays for the ticket. If there are already enough passengers on the ship the passenger can be put off the ship. He said if the Captain is aware of excessive passengers in the ship he has the responsibility to ensure that they are removed if the ship has not left port. He said both the Captain and the Chief Officer have the responsibility to ensure that there are no excessive passengers in the ship before the ship sails.

PW2 went on to say that when he was assigned to MV. Butiama from his position as Chief (first) Officer on MV. Bukoba one LAURENT now deceased, took his position. He said at the beginning of May 1996 MV. Bukoba stopped operations because it was being tested for stability by experts who had come to Mwanza. He said MV. Bukoba stopped operations for two weeks during which MV. Butiama was assigned the route to Port Bell and Kisumu ports.

PW2 told this court that on 18/5/1996 a new timetable was issued/because MV. Victoria which was sailing three times a week between Mwanza and Bukoba was to undergo a major overhaul at Mwanza South Port. In the new timetable, MV. Bukoba was assigned the Mwanza-Bukoba route. He said the time table for passenger ships is ordinarily issued by the Branch Manager and it is issued to the Captain of the ship and to the ports between which the ship sails. Meanwhile, MV. Butiama was assigned the route previously operated by MV. Bukoba. PW2 stated under the new time table on 19th May 1996 he captioned MV. Butiama to Port Bell arriving there in the morning of 21st May, 1996.. He said he did not know if Port Bell was aware of the change of ship and he did not take the new time table to Port Bell. He also stated that he did not know if there was any

radio communication between Mwanza and Port Bell on the change of ships.

PW2 told this court that MV. Butiama left Port Bell for Mwanza at 6.00 pm under his command as the **"officer on watch"** until 12.00 midnight when he left command to his second officer. He said on 21st May 1996 when MV. Butiama was on its way to Mwanza, he woke up at 6.00 am and at 6.20 am he went to the bridge to **"take watch"** from his Chief Officer one BENSON who told him he had not communicated by radio with Mwanza. PW2 then radioed Mwanza to inform them that MV. Butiama would arrive at Mwanza Port at about 9.30 am. He communicated with one MPANGALA who was on duty at Mwanza Control. PW2 said after talking to MPANGALA he heard over their radio on MV. Butiama the Chief Officer on MV. Bukoba one LAURENT communicating with Mwanza Control informing Mwanza Control that MV. Bukoba would arrive at Mwanza Port at 8.00 am that morning. PW2 said he did not hear LAURENT communicating any problem on MV. Bukoba to Mwanza Control.

PW2 told this court that the Chief Officer of MV. Bukoba LAURENT called him and asked if he could talk to the Second Officer on MV. Butiama one P. NAZAEL LAURENT told him he wanted to ask P. NAZAEL about an

"IC" for his video. PW2 told this court that Laurent the Chief Officer on MV. Bukoba told him that when they arrived at Mwanza he would take PW2 to his friend at Idrisa. Laurent then said PW2, "WELL COME TO MWANZA" and according to PW2, this was the end of the communication between LAURENT and him.

PW2 told this court that at about 8.00 am or 8.05 am he heard North Port Mwanza calling MV. Bukoba over the radio but there was no reply. PW2 said when he heard the communication from Mwanza Port, he advised North Port to look out in the Port for MV. Bukoba. At 8.30 am PW2 heard North Port calling MV. Bukoba again without getting any reply. PW2 then informed North Port that it was not MV. Bukoba which was arriving from Port Bell that day so it must have arrived in port. North Port then informed PW2 that MV. Bukoba had not arrived in the port. PW2 stated that he got worried and twice called MV. Bukoba over his radio without getting any reply. He said he got more worried and started looking out over the horizon if he could locate the ship. PW2 said he said he saw something unusual on the water in the distance. He then took out binoculars and through them saw something which was submerged with people on top of it and other people swimming around.

PW2 then sent out the distress signal MAY DAY, MAY DAY and reported that MV. Bukoba had sunk. He said after sending out the distress message many centres wanted more information and he communicated with various stations, including the Divisional Marine Manager. PW2 then steered MV. Butiama towards the scene where he found two small boats trying to rescue the people who were swimming about and he joined in the exercise. PW2 said he saw the 1st accused who was the Captain of MV. Bukoba clinging to the keel of the capsized ship. PW2 told the court that while they were rescuing the people at the scene, the ship MV. Victoria arrived and the people who had been rescued and put on MV. Butiama, were transferred to MV. Victoria. PW2 said about 52 people were rescued and some three bodies were picked up. PW2 said Captain Magoge PW1 had come on MV. Victoria and other ships like the CLARIUS, ORION and a Police boat also arrived. PW2 went on to say that at 10.00 am he left the scene on MV. Butiama to take some of the people rescued ashore for medical treatment as he was sailing towards the port, PW2 heard over the radio that there were people in MV. Bukoba who were knocking from inside the ship. He heard in the conversation about looking for acetylene gas.

PW2 said when he arrived at port he went to collect acetylene gas and returned to the scene only to find MV. Bukoba had completely sunk.

On being cross-examined by Mr. Magongo, PW2 told this court that if a ship carried more than its capacity the indication will be that the water level will be about the "**load line**" and if the captain sees that the "**load line**" is about the water he will not be worried that the ship has overloaded.

PW2 stated that regarding passengers, there is a specific space for passengers and therefore there are different consideration regarding overload of passengers from overload of cargo. He said overload of passengers will not necessarily affect the "**load line**". He stated that passengers can be counted on the ship or they can be taken off the ship and re-counted as they enter the ship. He said it is the responsibility of the Chief Officer to ensure that the correct number of passengers is on the ship and the Chief Officer is assisted by the³ Steamer Clerk and Police Officers. PW2 stated the cargo to be carried on MV. Bukoba was 200 tons but he did not remember the capacity for carrying passengers.

PW2 went on to say that in TRC ships, every person above the age of 3 years is considered to be a passenger but those below the aged of 3

years are not recorded on passengers manifest. He said that prior to the accident of MV. Bukoba, only the total number of passengers in 3rd class was recorded on the Manifest but only the names of passengers in the 2nd and 1st class were recorded on the manifest. He stated that up to the moment, persons below the age of 3 years are not recorded on the Manifest. He went on to say that passengers between the ages of 3 years and 12 years are considered to be ½ passengers. PW2 said considering that persons below the age of 3 years are not recorded and that those between 3 years and 12 years are considered to be ½ passengers, a ship whose capacity is to carry 200 passengers may be carrying more than that number, even 600 people. PW2 also stated that he had never heard of "post dated" tickets and those passengers on 1st and 2nd class make their bookings and purchase tickets before the day of travel. PW2 told the court that as the ship sails the water of the ship decreased due to consumption of full and fresh water and the decrease of weight may affect the stability of the ship. He said full and fresh water tanks are at the bottom of the ship so the decrease of water or fuel may make the ship less stable. PW2 identified the Passengers Manifest for 1st and second class passengers on MV. Bukoba on 20/5/96, Exh. P.13. He said it was on original manifest and

that he did not know if it is the original which remains with the Port office as given to the Chief Officer through the Steamer Clerk.

On re-examination by Mr. Magoma, PW2 stated that third class tickets are sold on the day of travel but he did not know if they are sold before or after the ship has arrived. He said if there are too many passengers it is this Chief Officer who should determine whether or not the ship should take the passengers. He said if a ship which arrives in port is smaller than the ship expected, the Captain and the Port Officer have the duty to consult.

In order to paint a clearer picture of the background of MV. Bukoba and the events immediately before the last voyage it made to Bukoba on 19/5/96, I will skip the evidence of PW3-PW24 and proceed to consider the evidence of the BRANCH MANAGER then the SHIPYARD MANAGER.

The Branch Manager was OSCAR MUNISI, PW25. He told this court he was a business man but previously, he was working as the Branch Manager of TRC Marine, Mwanza Port, Musoma Port, Bukoba Port, Kemondo and Nansio ports. He said he was a Marine Engineer.

He said he was transferred to Mwanza in 1988 as a Marine Superintendent and he found there were 11 ships of Mwanza. He said as a

Marine Superintendent he worked with an expatriate counter-part and the Branch Manager then, was one ISAAC MWAKAJILA and the Divisional Marine Manager was one KAJIRU.

It will help to state now that, neither ISAACK MWAKAJILA nor KAJIRU gave evidence in these proceedings.

PW25 testified that, his duty as a Marine Superintendent was the maintenance of all [TRC] ships in Lake Victoria, Lake Tanganyika and in Lake Nyasa and he worked in collaboration with the Shipyard Manager at Mwanza and the Maintenance Managers in Lakes Tanganyika and Nyasa. He said at that time, the Shipyard Manager in Mwanza was one MABALAZA (mabalaza is not – witness) PW25 said that in 1989 he was promoted to the position of Shipyard Manager which is a higher position than that of Marine Superintendent. He said as Shipyard Manager he dealt with the Maintenance of all ships in Lake Victoria. He told this court that in October 1995 he was again promoted to become the Branch Manager.

PW25 said when he first came to Mwanza in 1988 he found Mv. Bukoba was among the passenger ships in Lake Victoria. He said that when he was the Marine Superintendent and Shipyard Manager, he heard about the problem on MV. Bukoba. He said that MV. Bukoba had a stability

problem. The Branch Manager told this court that the problems were on record in general correspondence between the Marine Division and captains of the ship, instructing them on capacity of the ship. He said the original capacity of MV. Bukoba, was to carry 200 tons of Cargo and 400 passengers. He said the cargo capacity was reduced from 200 tons to 85 tons but the passenger capacity remained at 400 passengers. He said the decreased capacity to 85 tons was reminded by Danish experts but when he arrived in Mwanza in 1988, the change in capacity had already been made.

PW25 said he knew the four accused persons. He said the 1st accused Capt. Jumanne Rume Mwiru was the Captain of MV. Bukoba when the ship sank. He said the 2nd accused Capt. GILBERT MOKIWA was the Government Marine Surveyor employed by the Tanzania Harbours Authority. He went on to say that the 3rd accused ALFRED SAMBO was the Port Officer at Bukoba while the 4th Accused PROSPER RUGUMILA is the Port Officer at Kemondo Bay. He said he did not know if the TRC ships in Lake Victoria had been registered was the obligation as on the Government through the Ministry of Communications and Transport.

The Branch Manager told this court that before any ship can sail it has to be seaworthy and there was a Seaworthiness Certificate issued by the Government Marine Surveyor. He said the Certificate of Seaworthiness was valid for one year. He said the 2nd accused issued the last certificate of seaworthiness for MV. Bukoba in 1996. He stated that the 2nd accused had inspected the ship with the Marine Superintendent one ALEX MCHAURU (Alex Mchauru did not give evidence). PW25 said that after inspecting MV. Bukoba, the 2nd accused did not issue a Certificate of Seaworthiness. Immediately after inspection he went to Dar es Salaam and later sent the Certificate of Seaworthiness. He stated that operations of MV. Bukoba did not stop because his certificate had been issued. He said this was because if there had been any problems found during the inspection, instructions are given to stop operating the ship. He said the 2nd accused had not given any such instructions after inspection. He said it was the practice that if the surveyor did not find anything wrong with the ship during the inspection, he allowed the ship to operate before the Certificate of Seaworthiness is issued. He stated that the issuing of the Certificate of Seaworthiness did not take long.

PW25 stated that he did not know if the 1st accused was present during the inspection but he was informed by the Marine Division Manager after the inspection that the ship could operate. He said in his experience a ship could not sail without a Certificate of Seaworthiness. He went on to say that the certificate of Seaworthiness for MV. Bukoba had been received before the accident. He said he received only one Certificate of Seaworthiness of MV. Bukoba from the Marine Divisional Manager, PW1. The Certificate indicated that the ship was authorised to carry 400 passengers and 85 tons of cargo. He said the Original Certificate of Seaworthiness is kept on the ship and photocopies are kept in the office for record.

The witness told this court that he never sent another Certificate of Seaworthiness of MV Bukoba, indicating that the ship was authorised to carry more passengers or cargo than those contained in the Certificate of Seaworthiness he had referred to earlier. He said in his experience, it had never happened for two certificates of seaworthiness to be issued at the same time in relation to the same ship but containing different capacity for passengers and cargo. He said if such an event had occurred he would have consulted the Government Ship Surveyor responsible. The witness

identified Exh. P8 as the Certificate of Seaworthiness of MV. Bukoba. He said the certificate Exh. P8 was dated 1/3/1996 and it had been prepared and issued by the 2nd accused. He said Exh. P8 showed the capacity of MV. Bukoba was to carry 85 tons, of cargo and 400 passengers. He said that a Certificate of Seaworthiness is a technical document for use by the Captain of the ship and his officers and not meant for Port Officers. He said Port Officers were given summary information on the capacity of each ship.

He went on to say that while he was the Branch Manager, he did not get any complaint on the stability of MV. Bukoba and he never sent any such complaint to the Marine Divisional Manager PW1.

PW25 stated that at the beginning of May 1996, MV. Bukoba stopped operations to undergo "Stability test" by Belgian Experts. He said the ship MV. Bukoba had been built by Belgians. He stated that he was not present during the tests as he was in Nairobi. He said the Shipyard Manager JOSEPH HIZA [PW29] who also acted as Branch Manager when he was away, was present. He said when he returned from Nairobi PW29 told him that the stability tests had been completed and that the experts would

send their report on the stability test later. PW29 did not tell him that the experts had stopped the operations of MV. BUKOBA.

The witness told this court that PW1 called a management meeting which he attended and it was agreed that MV. Bukoba should be diverted from its route in order to go to Bukoba, because MV Victoria was undergoing overhaul. The Branch manager said he informed the Port Managers of the change by writing to them.

He said that MV Victoria carries 1,200 passengers and 200 tons of cargo while MV. Bukoba carried only 400 passengers and 85 tons of cargo. He told the court that there was no problem whether valid communication between Mwanza and other ports or on MV Bukoba prior to the accident. The Port Manager said that on May 18, 19, 20th and 21st May 1996 he did not attend duty because he was sick. He informed PW1 and PW29 by phone that he was sick and had been excused duty.

The witness went on to say that TRC had regulations on division of duties. He said to his knowledge, the Chief Officer supervised the loading of cargo and passengers on the ship and that the Captain is the overall in charge of the ship and he represents the TRC on the ship. He said when the accident of MV. BUKOBA occurred he was sick and that he did not

know the cause of the accident. He said to his knowledge as a Marine Engineer, the speed of a ship cannot be the cause of an accident and that if the engines of the ship stalled, that cannot cause the ship to capsize. He stated that if the wheel is turned to "hard starboard" or to "hard part" that is to say, including a complete turn while at 11 knots speed, the ship may capsize if it is not stable. He also said that if the cargo has not been properly placed it may contribute to instability.

PW25 testified that if the ship had carried more passengers than its capacity and cargo beyond its capacity, it would have sunk at the port where the passengers or cargo got on the ships. Say if the passengers were 1,000,000 but if they were about 700, the ship would not have sunk at the port. He said however that if the passengers were more than the capacity of the ship and if they moved to one side, that movement could cause the ship to capsize.

Upon cross-examination by Mr. Galati advocate for the accused persons, PW25 stated that there is a difference between "to capsize" and "to sink". He said a ship which is stable will sink if it is overloaded. He agreed that if at the time of the accident MV Bukoba had an overload it would have sunk. He said instability of a ship will lead to a ship to capsize.

When the witness was shown Exh. P3 an album of photographs of the MV. Bukoba accident in particular the 5th photograph, he said the picture shows that MV Bukoba had capsized. He said if it is said that MV Bukoba capsized because of overloading, it would depend on the loading conditions and he did not know the loading conditions of MV. Bukoba before the accident. Upon being shown the Certificate of Seaworthiness Exh. P8; PW25 said it was alright exception for the number of life jackets.

The witness said that the experts on stability were called to examine MV Bukoba because the Surveyor was not competent to deal with problems of stability. He said this was a matter within the competence of raise architects. The witness agreed with the advocate that if any person blames the Ship Surveyor for issuing a certificate to MV Bukoba when it had instability problems, that person would not be right. He said that if the Belgian experts had brought a report to say that the ship was unfit for sailing, the management would have carried the blame for allowing the ship to sail. He said there was another test carried out by Danish experts and the Management at the Headquarters decided to call the Belgian experts to nullify the findings of the Danish experts.

Upon being cross-examined by the 3rd Assessor, PW25 said there were 11 ships in Lake Victoria but of the 11 ships, stability tests were carried out on MV Bukoba only. He said according to the records, stability tests were carried out on MV. Bukoba twice. He said the first test was by Danish experts and later by Belgian Experts. He said the experts on stability were not called after the accident.

It will be observed at this stage that neither the Danish nor the Belgian experts were called to testify during this trial. However, it will be made apparent later on in this Judgment, two documents from Danish Experts were produced by the prosecution as Exhibits P5 and P12.

JOSEPH PETER HIZA who was the Shipyard Manager Mwanza, testified as PW29. He told this court that he is a Ship Engineer employed by Sea Star Services since 1999. He said before that he was employed by TRC which he joined in 1979 also as a ship engineer working on a different ships. In November 1995 he was promoted to the position of Shipyard Manager at Mwanza South Port. He said he holds a Diploma in Marine Engineering from Finland, a Certificate of Competence Class III in Marine Engineering from the Dar es Salaam Marine Institute, a Chief Engineers

endeavourment and an Advanced Certificate in Marine Engineering from Denmark.

He told this court that as Shipyard Manager he was in charge of the Workshop of the Marine Division and the workshop dealt with the repair of ships, vehicles, plant and houses, also with the repair of radio communication systems. He said maintenance programmes were prepared by the Branch Manager's Office assisted by the Marine Superintendent.

He stated that the Branch Manager was OSCAR MUNISI PW 25. He said in April 1996 PW25 travelled to Nairobi and he became the Acting Branch Manager. He said when leaving for Nairobi PW25 informed him that Belgian experts would come to perform stability tests on MV. Bukoba. PW29 stated that he knew that MV. Bukoba had stability problems even before he was informed by the Branch Manager. He said the instability caused the ship to lean to one side before returning to normal position.

The Shipyard Manager stated that TRC had previously asked Danish experts to investigate the instability problem of MV. Bukoba. He told the court that he/did not remember exactly when the investigation by Danish experts was done but the Danish experts found the instability problem of MV. Bukoba to be bad and recommended that it should be rectified. The

experts advised the TRC Headquarters to ask the Belgian, ship-builders to rectify the instability. He went on to say that the Belgian experts came to study the instability of MV Bukoba towards the end of April and that they arrived just one day after he started acting as Branch Manager. The Shipyard Manager said the Belgian experts carried out tests on MV Bukoba and they worked with captain of the ship who is the 1st accused and members of the crew. He said that he prepared the equipment which was required by the Belgian Experts and that he used to go to see how the tests were progressing and he talked to the 1st accused. The test took between five and six days.

He told the court that it became difficult to perform the tests in the port and MV. Bukoba had to be sent to Karumo, where the tests were completed. He said he did not go to Karumo but he used to receive reports from the 1st accused. He said he saw the experts after they had completed their tests and they told him that they would prepare their report in Belgium and they would send it to the TRC headquarters in July. The Shipyard Manager said that the experts told him that they could continue using the ship MV. Bukoba in the same way they were using it. He said the ship was being used according to the instructions issued from

the Office of the Branch Manager which were given to the Captain of the ship. He told the court that MV. Bukoba was to carry 85 tons of cargo and 400 passengers. He said, after the stability tests carried out by Belgian experts, MV. Bukoba started operating again on 12th May 1996. It sailed to Port Bell two times and once to Kisumu. He stated that the route of MV. Bukoba was changed when MV. Victoria which used to sail to Bukoba, was to undergo repairs. He said before MV. Bukoba sailed to Bukoba he did not receive any complaints regarding the ship and the ship had communication system both internal and external and that the communication system between Mwanza and Bukoba and Kemono ports were in working condition. He said he had not received any reports that there was any problem in the communication system.

The Shipyard Manager told this court that on 21st May 1996 he received reports that MV. Bukoba had sunk. He was in his office at the ship yard. He said at that time the Branch Manager OSCA MUNISI (PW25) was at home because he was sick. The witness stated that he received the report of the accident from the Captain of MV. Butiama PW2. He said he heard PW2 communicating by radio with Mwanza Port and that is when he communicated with PW2. After receiving the report he informed the

MARINE DIVISIONAL MANAGER PW1, who instructed him to prepare MV. Victoria and the crew ready to go to the scene of the accident. He prepared the ship and PW1 joined him and they sailed to the scene of the accident.

He told the court that at the scene he saw MV. Bukoba which had capsized and there were bodies floating and people swimming around the ship. He said they then sent out life boats and life rafts to rescue the survivors. He said they found MV. Butiama and small boats at the scene and other ships later came to the scene of the accident.

Coming back to the stability tests, the shipyard Manager said before the stability tests were performed, the Belgium experts directed that the tanks on the ship should be subjected to "**sounding**". He said he was present when **sounding**" was performed by the First Officer of the ship. He stated that "**sounding**" tests the water level in the tanks. He said "**sounding**" was not done on all the tanks. He said the cap of one of the tanks got stuck and as the result "**sounding**" could not be done. He said although he did not go to Karumo he received progress reports from the 1st accused. He told this court that the 1st accused did not tell him of any instructions given by the Belgian Experts regarding the quantity of water

in the tanks. He said the 1st Officer was the person responsible for the filling and complying of the tanks on the ship. He told this court that the 1st Officer writes ORDERS in the TANKS ORDER BOOK regarding the tanks to be filled or emptied and the relevant quantity of water. The tanks order book is placed at the Bridge and no person can fill or empty the tanks without an order from the 1st Officer. He said other tanks which are placed at the bridge are NIGHTS ORDER BOOK, STABILITY BOOK and other books showing the operation of equipment on the ship.

Two more witnesses gave evidence on the state of the ship MV. Bukoba before the accident and also on the events immediately before the ship capsized. The two witnesses are ADOLF MKUDE LUCIAN, the Chief Engineer of MV. Bukoba who gave evidence as PW30 and LAURENT IDUDU, the 1st Engineer who testified as PW31.

ADOLF MKUDE LUCIAN the Chief Engineer (PW 30) told this court that he was first employed by the TRC as Engineer Trainee at Mwanza in 1985 and in 1988 studied at the Dar es Salaam Marine Institute obtaining a Class III certificate of Competence in engineering. He returned to Mwanza and was assigned to work on different TRC Ships as First Engineer assisting the Chief Engineer before he trained as and appointed Chief Engineer. He

said he was assigned to MV. Bukoba as Chief Engineer in March 1996 where he found LAURENT ILULU (PW31) working as the first Engineer and one YUSUFU MASAMBA who died in the accident, working as Second Engineer. He said the Captain of the ship was JUMANNE MWIRU the 1st accused.

The Chief Engineer stated that when he was assigned to MV. Bukoba he was not informed it had any problems. He sailed two times to Port Bell and once to Kisumu. His duties on MV. Bukoba was to ensure that the machines on the ship were in good working condition. He stated that at one time when sailing from Port Bell the ship had a problem with the **"Governor of the Engine"**. He said this was towards the end of April, 1996. He informed the Branch Manager's office and another engine governor was fitted on MV. Bukoba. He said after this event the ship continued to operate until it was stopped for stability tests by Belgian Experts. He said the stability tests were conducted at the beginning of May 1996. He told this court that during the tests he was on the ship with the 1st and 2nd Engineer, the Captain, 1st accused and all the officers of the ship. He said the first **"sounding"** was performed by the officers of the ship while the Belgium experts were taking readings. He said "sounding"

was performed on all tanks except tanks Nos. 8 and 9. He told this court that MV. Bukoba had 14 tanks and tanks Nos. 8 and 9 were not subjected to "**sounding**" because the caps could not be opened. The Belgian experts said they would determine the water levels of the two tanks by calculations. He said later the experts told him that by their calculations, there were about 100 tons in excess which they thought could be attributed to the contents of tanks Nos. 8 and 9.

The Chief Engineer told this court that after the "**sounding tests**" the Chief Officer instructed him through the TANK ORDER BOOK, to fill tanks No. 10-14. These were ballast tanks but tanks No.1 which was also for ballast had water in it so it was not filled. He said tank No.2 was for water tank (fresh water tank). He stated that stability tests were first carried out at Mwanza South Port and then at Mwanza North Port. He said the Belgian experts were not happy with the tests which had been performed and adduced that the ship be taken to calmer waters and the second day MV. Bukoba was taken to KARUMO where the water is calm.

During the stability tests the experts used a pendulum and bricks, moving the bricks to different positions and taking measurements from the pendulum. He said the tests took two days, one day at the South and

North Ports and one day at Karumo. He stated that after the tests he did not ask the experts about their findings but the experts said they could continue with operating the ship. He said the experts did not give any directions regarding the filling of tanks. The Chief Engineer went on to say that later the Chief Officer LAURENT BATATA (died in the accident) ordered the removal of the water in Tanks No.10-14 and he carried out the instructions. After the removal of the water MV. Bukoba commenced operations again. The ship sailed to Port Bell two times and once to Kisumu after the tests and he was on MV. Bukoba on all these trips.

The Chief Engineer told this court on their way from Kisumu, the Captain who is 1st accused informed him that MV. Bukoba would be sailing to Bukoba instead of the usual Port Bell and Kisumu route. He said while on MV. Bukoba sailing to Port Bell and Kisumu ports he did not experience any problem on the ship and its floatation was normal. He said on 19th May 1996 he sailed on MV. Bukoba the journey which was the normal route for MV. Victoria. He said the capacity of MV. Bukoba was 85 tons of cargo and 400 passengers.

According to this witness MV. Bukoba arrived at Bukoba via Kemondo Bay at about 7.00 am on 20th May 1996. He sailed back from Bukoba on

MV Bukoba on 20th May 1996 at about 9.00 pm. He said he was in the engine room when the ship left Bukoba and arrived at Kemondo Bay at 10.00 pm and when the ship was travelling between the two ports he did not notice MV Bukoba swaying. He said that he got out of the engine room at Kemondo Bay and he saw passengers getting on the ship and cargo being loaded. He went on to say that he walked to the quay and he observed there was supervision of passengers getting on the ship and the Chief Officer was supervising the loading of cargo from the deck. He said he did not see the captain 1st accused.

The Chief Engineer said he knew the Port Officer of Kemondo before that day, he is the 4th accused. He said at Kemondo he saw bananas being loaded on MV Bukoba and there was one motor vehicle which had been loaded at Bukoba. He went on to say that MV. Bukoba left Kemondo at about 11.20 pm and that the ship left Kemondo without any problems and he did not experience the ship swaying. The Chief Engineer said he completed his duty at 12.00 midnight and was relieved by the second Engineer YUSUF MASHIMBA who was to be on duty until 4.00 am. When he would be relieved by the First Engineer LAURENT KIDURU (PW31). He

said after completing his duty he went to sleep and he woke up at 6.30 am and did not experience any problem until about 7.30 am.

He said the ship suddenly leaned to the right (Starboard). At that time he was in his cabin and he saw items in the cabin being thrown to one side. He said he quickly left his cabin using the port side and went to the bridge where he found the Chief Officer, the officer on the wheel of the ship and other seamen. He said he asked the Chief Officer what had happened but before he could reply, the ship suddenly shifted to lean to the left. He said there was a very short period between his arrival at the bridge and the sudden shift of the ship to the left. He said the Captain of the ship (1st accused) arrived at the bridge and directed the Chief Officer to reduce the speed of the ship. He said he heard the Captain say in Kiswahili "punguza mwendo" "punguza mwendo". He said at this time the bridge was already in the water. He went on to say that MV Bukoba was travelling at 10 knots and the weather was fine. He said when the ship was capsizing towards the portside, he was moving towards the opposite side and when it capsized he found himself on the "keel" of the ship.

The Chief Engineer said the stability of the ship is the responsibility of the deck officers who have guiding manuals just as Engineers have guiding

manuals on different machines on the ship. He said ballast is performed at the beginning of the journey and can be performed on any port where the Chief Officer determines it is necessary to do so. He said he did not receive any directive to perform ballast at Bukoba or at Kemondo Bay. He also stated that he had never received any order to perform ballast on MV. Bukoba and did not know if MV Bukoba had ballast for all loading conditions.

When examined by this court, the Chief Engineer stated when he was on duty he did not receive any orders regarding the filling of water in the tanks and when he left his position to 2nd Engineer YUSUF MASHIMBA no such instructions had been given.

LAURENT IDUDU the 2nd Engineer (PW31) told this court that he was assigned to MV. Bukoba in March 1996. He said the Captain was 1st accused and PW30 has the Chief Engineer while YUSUF MASHIMBA now deceased, was the 2nd Engineer. He said they had three assistants in the engine room called "motormen". When he was assigned to MV. Bukoba he was not told of any problems on the ship although it was said it had stability problems.

He said the capacity of MV. Bukoba was to carry 400 passengers and 85 tons of cargo. He stated that MV. Bukoba timetable was to sail between Mwanza, Port Bell and Kisumu Ports and his duties as 1st Engineer was maintenance and repair of machine on the ship and to perform any specific issues assigned by the Chief engineer, PW30. He said he did not experience any problems on MV Bukoba when sailing between Mwanza, Port Bell and Kisumu ports. He said the ship did stop operations to undergo stability tests. He and other deck officers were present during the tests. He said during the tests a number of them were due to be low, the ship behaved but he did not know the technical value of the tests.

He said he saw the ship tanks being filled a test performed by deck officers in collaboration with the Engine Room. He said the test was to determine the amount of water in the tanks. He told the court that some of the caps to the "sounding pipes" of some of the tanks could not be opened and as the result, not all the tanks were subjected to the "**sounding test**". After the "**sounding test**" there was the filling of tanks with water and there was also the use of bricks and taking measurements. He said the test was carried out at South Port, North Port and Karumo. He stated that the tests were to establish the extent to which MV. Bukoba

leaned towards the water. He said the exercise took about seven days. He said he did not know whether the experts advised that MV. Bukoba should not operate.

The 1st Engineer stated that MV. Bukoba resumed its operations on 12th May 1996 and the Ship sailed to Port Bell two times and to Port Kisumu one time. He said in all these trips MV. Bukoba sailed normally. He told this court that after these trips MV. Bukoba was assigned to sail to Bukoba to replace MV. Victoria, which was undergoing repairs. He told this court that MV. Bukoba sailed from Mwanza to Bukoba via Kemondo Bay on 19th May 1996. He said the ship left Mwanza at 10.00 p.m and he did not notice any problem in this ship. He went on to say that he left Bukoba on MV. Bukoba on 20th May 1996 at about 9.00 pm. He said he did not get any instructions before leaving Bukoba to fill water in the ship for ballast. He said after the stability tests by the Belgian experts they removed the water from two tanks and the situation of the water in the tanks restored to the position before the tests.

The first Engineer went on to say that when MV. Bukoba left Bukoba on 20/5/96, he was on the ship. On that day he was on duty from 4.00 pm and did not leave the ship. He was on duty up to 8.00 pm. He said he

found the passenger situation at Bukoba normal and passengers moved about the ship as they normally do before departure. He said MV. Bukoba left Bukoba at 9.00 pm and the Chief Engineer PW30 was on duty in the engine room. They arrived at Kemondo Bay at 10.00 pm where cargo consisting of bananas and beans was loaded. He said a motor vehicle had been loaded at Bukoba. He went on to say that MV. Bukoba left Kemondo Bay at 11.00 pm.

He said that at Kemondo he went out of the ship. He said he did not know who was supervising the loading of cargo and passengers at Kemondo Bay. He stated that when MV. Bukoba was leaving Kemondo it leaned a little to the right (star load) and then returned to normal position. He said when the ship left Kemondo he was in the corridor of First Class and after the ship left the Port he went to sleep in his cabin which was at the same level as the first class cabins.

He said he slept without experiencing any problems but when he went to the toilet at 2.00 am he heard passengers saying that the ship had swayed a lot . He said when he had been on duty there had been no problems and there were no orders given regarding ballast. The 1st Engineer said he went on duty again at 4.00 am but did not experience any

problem until about 7.45 am. when the ship leaned to the right and then suddenly to the left and capsized. He said when the ship swayed he left the engine room and as he was leaving the engine room, the ship capsized. He said he jumped into the water and climbed on to the "keel" of the ship which was then facing upwards. He added by saying that MV. BUTIAMA was the first ship to arrive at the scene of the accident. He said the Chief Engineer is responsible for ballast and the Captain as the overall in charge, was supposed to know about ballast.

Two sailors of MV. Bukoba who were on the last voyage gave evidences. These were SHABAN HASSAN NDEGE PW3 and NICOLAS STANSLAUS MUTUNGI PW5.

SHABAN HASSAN NDEGE PW3 told the court that he was employed by the Marine Division of TRC as a sailor on 6th July 1983. He had no formal training but learned on the job. His duties were to throw out the ropes to secure the ship when it gets to port and assists the Quarter Master and the officer on watch to spot any unusual objects on the water from the bridge. Sometimes he helps to handle the wheel getting instructions from the officer as watch on the degrees to turn the wheel.

He said he was a sailor on MV. Bukoba in May 1996. He said he saw the ship when it left Mwanza on 19th May, 1996 and arrived at Bukoba Port on 20th May 1996 in the morning at about 7.30 am. He said MV. Bukoba left Bukoba on 20th May 1996 at about 9.00 pm. And he was at the entrance of the ship with another sailor assisting old people and other passengers who were carrying bags. He said he did not know how many passengers got on the ship at Bukoba as it was not their duty as sailors. He said the number of passengers on the ship was not extraordinary. He said the ship arrived at Kemondo at 9.30 pm and he was on the deck and was able to see the port. He said passengers got on the ship at Kemondo and there was also Cargo consisting of bananas but the cargo was not big. He said he saw a Bank motor vehicle on the ship. He said when the ship left Kemondo he did not see anything unusual and he went to sleep from 10.00 pm. He said he woke up at 6.00 am. and went to the bathroom. He then returned to the cabin to dress ready to go on deck when the ship suddenly leaned to the left and then to the right and capsized to the upsidedown.

He stated that he was on his way to the deck when the ship swayed and he and his fellow sailor one JUMANNE IDDI who is now dead, started

throwing life jackets to passengers. He said he also took a life jacket and jumped into the water. He then saw MV. Butiama coming to the scene of the accident.

NICHOLAUS STANSLAS MUTUNGI PW4 Like PW3 was also a sailor who was on MV. Bukoba on the fateful trip and his evidence was similar to that of PW3.

A number of passengers (10) who were on MV. Bukoba on its last trip to Mwanza and survived the accident, gave evidence. These were YAHAYA ATHUMANI RUSHAKA (PW5), ANAF HUSSEIN IBRAHIM PUNJA (PW7), MLAGE KUTEMBA MELEMBO (PW8), LAURENSIA EMANUEL (PW9), GULAM ATMAN (PW10) ZABRON KASINDIRANO (PW14), NOVATUS KAILOMA (PW5), MOHAMED NZELELA (PW18), CLEOPHAS JOSEPH (PW20) and MUGANDA VEDASTUS PW (21).

Yahaya Athuman Rushaka (PW5) said on 20/5/96 he was in Bukoba and waited to return to Mwanza as he lived in Bwiru. He bought a ticket at 10.00 am at Bukoba, it was a 3rd class ticket No. 01742. He said the ship had arrived and it was MV. Bukoba. He boarded the ship at 9.00 pm and he said the ship was leaning to the left which he said was not normal in his experience. He said he found some passengers already on the ship.

He told the court that passengers entering the ship were being lined up in a queue of a single line and the queue was being supervised by TRC employees and one Police officer. He said that the number of passengers he saw was normal and when he entered the ship he was asked to show his ticket. After entering the gate there was no further checking.

He stated that when he was entering the ship he saw a cargo of bananas which he said were not many. He said he saw some police officers in uniform at the Bukoba Port and he did not see any commotion at the Port among passengers. He said the ship sailed to Kemondo where it picked up a cargo of bananas and passengers. He said that number of passengers who got on the ship was normal but he could not say how many they were. When the ship left Bukoba Port he did not notice any problem and when it left Kemondo Bay it tilted slightly to the left but employees of TRC on the ship told him the tilting was normal.

He said on the way he asked why the ship was swaying to one side, and he was told that there was one ballast tank which had been emptied of water. He went to the saloon at 11.00 pm and while he was there the ship suddenly swayed and a refrigerator in the saloon fell down as well as bottles which were on the tables. He said there were other passengers in

the saloon but he got scared and climbed to the upper deck because there were life jackets there just in case an accident occurred. He said there were other people on the deck including police officers who were guarding some boxes. The witness said at 5.00 am in the morning he said his prayers as he normally does every morning at that time. After finishing his prayers he saw other people putting on life jackets. He said the ship was swaying from one side to the other. He said he was scared and asked for a life jacket which was provided by one police officer. He said there were employees of the ship on the deck who told them not to worry and that if there was a problem they would instruct them to put on life jackets. He said these occurred at 7.30 am. He said after the assistance he returned the life jacket and then the ship suddenly weighed to the right and he again grabbed a life jacket and climbed up, using the left side of the ship as the ship continued to capsize. He said the ship capsized between 7.45 and 8.00 am.

He said he saw people and bunches of bananas floating around and people crying out for help. He told the court that other ships arrived at the scene and MV. Butiama was the first ship MV. on the scene. Later other ships like MV. Victoria and the Kamanga Ferry arrived. He said he was

rescued at around 11.00 am. by a boat from MV. Victoria which took him to another ship which brought him ashore.

MUNAF HUSSEIN IBRAHIM PUNJA (PW7) said on 18/5/96 he left Mwanza for Bukoba on the ship MV. Bukoba and travelled on 3rd class. He said he had bought a ticket himself at 11.00 a.m and the ship left Mwanza at 10.00. he said he did not notice any problem except that the ship was leaning to one side. He said he had travelled on MV. Bukoba many times but the only time he noticed the ship leaning to one side. He said MV. Bukoba arrived at Bukoba at 7.154 am but he did not know the exact time as he was asleep. He went on to say that he went home and at 3.00 pm asked his assistant to go to the port to buy a 3rd class ticket on the ship for his return to Mwanza. He said he boarded the ship at around 9.25 pm. He said at the Customs Area he saw many people.

He told the court that he saw the Port Officer of Bukoba who is the 3rd accused at the 3rd gate. He said he knew him as he were to travel via Bukoba Port. He said he saw 3rd accused talking to the Captain Mr. Rume who is 1st accused and he greeted them. He said he asked 3rd accused as to when this ship would depart and he told him it was at 9.00 pm.

He said he saw some passengers being prevented from boarding the ship. He said he could not say if there were too many passengers. He told the court that when the ship left Bukoba, he was in the corridor of 1st class and he did not see any passengers struggling to get on the ship. He said that when MV. Bukoba reached Kemondo Bay, he was on the side facing the Port. He said he saw bananas, a car and passengers being loaded on this ship but he could not tell how many passengers were at Kemondo.

The witness said at Kemondo he saw two passengers DAVID and MUTAYOBA what he knew were businessmen at Bukoba. They told him that they had been prevented to board the ship at Bukoba and they had taken a taxi to Kemondo. He stated that when the ship left for Mwanza, it was swaying from left to the right. He said at about 12.30pm he went to the Dinning Saloon and bought soda. He stayed there for quarter an hour, and while he was there he saw crates of soda fall as well as a refrigerator. When he saw things falling he went to the bridge where he slept and woke up at 6.45 am in the morning of 21st May 1996. He said he went to the bathroom to brush his teeth and as time passed, passengers were coming up to the bridge.

He said he left the bridge and found an officer of the ship called SAID telling about four people who were on the corridor of First Class to move to the right. He said he was not ordering them but telling them and he did not know why. At 7.45 am he went again to the bridge and the ship swayed to the right and then to the left and he said he found himself in the water. He said he saw a life jacket floating about and swam to it but as there were other passengers struggling for the life jacket he left it above and swam. He saw his assistant one RAZAK hanging on the back of the ship holding a life jacket which he asked RAZAK to throw it towards him and then he swam towards the ship and climbed up to the back of the ship. He said he saw bananas and people floating around including a number of dead people.

He ended by saying that MV. Butiama came to the scene and also other ships including MV. Victoria. PW8 MIAGA KUTEMA MELEMBO said on 20th May 1996 he sailed on MV. Bukoba from Bukoba to Mwanza. He said he arrived at Bukoba town from Kanyigo at about 3.00 pm and bought a third class ticket. He said he also bought three other tickets for the children of his bereaved friend. He said the children were AIDES BERNADO, ISHABAKI who were 16 years old, REGASIRA BERNADO

ISHEBAKI aged 12 and MWENEZI BERNADO ISHEBAKI aged 10. He said when he was buying other tickets, there were other people also buying tickets. He said he was with the children and after buying the tickets he went to town and come back at 8.00 pm. He said he found the ship in the port and boarded it with the children. He stated that they were showing tickets before entering the ship and there were many people standing in a queue but he could not tell how many they were.

He said he entered the 3rd class area but did not stay there but went to the upper deck where there was some cargo. He said when he was in queue he did not look back to see if there were passengers being presented from entering the ship. He said he found the passengers on the ship and the ship left Bukoba Port at about 9.30 pm. He said the ship hooted twice before departure. He stated that when the ship left port he noticed it was leaning to one side. He said the ship sailed to Kemondo

where other passengers boarded the ship. He said the number of passengers who boarded MV. Bukoba at Kemondo was just average and Cargo many bananas was also loaded. PW9 LAURENSIA EMANUEL gave evidence that on 20/5/1996 she arrived at Bukoba Campus area at 4.00 pm and bought a third class ticket to travel to Mwanza. When purchasing the

ticket there were other people also buying tickets. After buying the ticket he went home and came back at 8.00 pm. At the gate he met people entering with their luggage saying that it had been difficult to travel as the ship was full. Meanwhile, there were other passengers boarding the ship and the procedure was to show tickets before being allowed to board the ship.

The witness said that between 1.00 am and 2.00 am he fell asleep and woke up at sunrise around 6.00 am and found the situation on the ship was calm. He said he went to the toilet to wash and as he came out, he met someone at the door who asked him to wait for him. He said while he was waiting for the man, the ship suddenly leaned to the left towards the water and people started running towards the right side. He stated that he climbed to the deck and to get there he had to climb on bananas and the ship sank and he found himself flooding on the bananas. He said he was rescued with four others by a boat and put on MV. Butiama which had just arrived.

PW10 GULAM ATHMAN said on 20/5/96 he left Kemachumu for Kemonondo to buy a ticket for Mwanza where he was going to buy gas. He said he bought a second class ticket and went to Bukoba to pick up a gas

cylinder which he loaded at Bukoba Port and returned to Kemondo as he was not allowed to board the ship at Bukoba. He said his ticket was for boarding at Kemondo.

He stated that there were other passengers who were also refused to board the ship at Bukoba port and the five of them took a taxi to Kemondo Bay where they arrived at 10.00 pm before MV. Bukoba had arrived. He said he saw other passengers waiting and estimated them to be about 200 passengers. After boarding the ship he was not able to see if there were any passengers who were stopped from boarding the ship at Bukoba. He said his ticket was for boarding at Kemondo.

He stated that there were other passengers who were also refused to board the ship at Bukoba port and the five of them took a taxi to Kemondo Bay where he arrived at 10.00 pm. before MV. Bukoba had arrived. He said he saw other passengers waiting and estimated them to be about 200 passengers. After boarding the ship he was not able to see if there were any passengers who were stopped from boarding the ship.

He stated that he stayed on the corridor and when it became cold he moved to the back of the ship which he said was warmer because of the heat from the engine room. He said the ship was swaying from

right to left and then stabilising. He said that while he was on that part of the ship he saw an employee filling water into the tank of the ship. PW10 said he talked to the employee who told him that his name was YUSUF MASHIMBA. PW1 stated that he asked the employee why he was putting water into the tank and he told PW10 that if he did not do so the ship would not reach its destination. He said the said YUSUFU MASHIMBA remained at the spot until 4.00 pm and he told PW10 that he was going to sleep. He said the ship leaned to the right and water was coming into the ship, so he moved to the back of the ship and the next to the engine room where he found another employee on duty. PW10 said he asked this employee why he was not putting water into the pipe like YUSUF MASHIMBA did but the employee kept quiet. He said he went to the back of the ship where the ropes were placed. He stated that while they were on the ship they were not given any safety instructions. He said the ship leaned on its side to the right and then to its left side and capsized. He said before the ship capsized he had gone to the toilet in the open deck. . He said at this part he found other people and he advised them that they should all go to the higher deck where there were life jackets and he said he distributed life jackets to them. He said after he had issued out jackets

the people left and he was left with one woman ZENAT. He said it was at this time that the ship leaned to its left side and capsized. He said he heard a noise like an explosion and he was holding on to the sailings of the ship which became hot and he released the sailings and fell into the water. He said he was rescued by fishermen who came in boats.

ZABRON KASINDIRANO gave evidence as PW14. He said on 20/5/96 he travelled from Bukoba to Mwanza on MV Bukoba. He said he purchased a third class ticket at 5.00 pm on that day and he found other passengers buying tickets. He said they were many. He said he brought his cargo at 4.30 pm and he was stopped because he was late in bringing in the cargo. He said he requested the employees to allow his cargo in and they agreed. The cargo was then weighed and loaded in the ship.

He stated that he boarded the ship at 9.00 pm and he said he stood on the deck when the ship left Bukoba Port and he saw a big number of passengers who had been left behind. PW14 said he did not go to the 3rd class because it was full of people and he went to stay in the dining saloon where he found other people some sitting and others standing.

He said the ship arrived at Kemondo at 10.00 pm and he returned to the deck from where he could see a cargo of bananas on the Port and the cargo was loaded on the ship. He said he was surprised to see his in-law one FRANCIS JUSTISU KAGANJI at Kemondo as he had left him at Bukoba. He stated that his in-law told him that he managed to sneak through without a ticket at Kemondo. He said the loading of bananas at Kemondo was haphazard and he did not see any officer from the ship supervising the young men who were loading the bananas. He told this court that he went back to the saloon and tried to go up on the table but it became difficult because the ship was moving up and down (rolling). He said he saw a drum floating in water in the corridor but did not know how the water had come in. He said the ship sailed leaning from one side to the other until morning.

He told this court that at 7.00 am he heard the news on the ship and after the news the ship was leaning badly to one side and a certain youngman came to say that they should put on life jackets because the situation was bad. He said he did not take a life jacket because some women who were present booed the youngman saying he was a coward. He stated that he climbed to the upper deck and bananas started to roll

off the ship from the deck and people were rolling from one side to the other making noise. The ship leaned to the opposite side and capsized and he found himself in the water where he caught on a rope and then reached a life jacket and later he was rescued by fishermen with boats before MV. Butiama arrived and took him ashore.

Apart from NOVATUS KAILAOWA PW15 who claimed to have travelled on second class on a ticket purchased by his brother the remaining passengers who gave evidence MOHAMED MZELELA (PW18), CLEOPHAS JOSEPH (PW20) and MUGANGA VEDASTUS (PW21) gave similar evidence. They all purchased third class tickets around 3.00 pm on 20/5/96 and travelled on MV. Bukoba on the same day and were resscued after the accident. They all stated that they had no difficulty in getting tickets on that day.

Four TRC employees working at Bukoba and Kemondo Bay ports gave evidence on the sale of tickets for passengers and loading of cargo on MV. Bukoba for that fateful journey which started at Bukoba on 20/5/96 and ended with the capsizing of the ship in the morning hours of 21st May, 1996.

The employees JUMA SEIF (PW22) and ELIASIKIA MGONJA (PW23) and MATHEW MATHIAS (PW27) were stationed at Bukoba Port.

PW22 JUMA SEIF told this court that he was a Parcels, Goods and Luggage clerk, whose duty was to weigh the passengers' luggage and parcels consigned through the Supervisor of TRC. He said on 20th May 1996 he was stationed at Bukoba Port and he was in charge of the Parcels, Goods and Luggage section. He testified that on that day the goods received and weighed included bags of beans, bananas, one Land rover and one Motorcycle-Trail 110. He said the goods were to be transported to Mwanza.

He said the procedure was to issue **Luggage ticket** made in quadruplicate and a Goods Weigh Bill was issued for goods while a Parcel Weigh Bill was issued for parcels and both bills were made in quadruplicate. The original was given to the customer, the duplicate is retained for auditing and the triplicate is attached to the goods while the quadruplicate remained in the receipt book for record. He said the luggage ticket, or Weight Bill shows the **name** of the customer, **destination** of goods, **weight** of goods, **fees** paid and **description** of the goods.

He stated that after issuing the tickets and Weigh Bills, the documents are referred to the ship clerk who prepares the MANIFEST called the GOODS MANIFEST which was prepared by ELAIASIKIA MGONJA (PW23).

He told this court that on 20th May, 1996 he received goods which were in the form of parcel which was one Landrover and the rest were luggage. He said even the motor cycle and Bananas were transported as luggage and the goods were transported on MV. BUKOBA. He stated that when he received the goods MV. Bukoba was already in Bukoba Port. He said he knew the goods carrying capacity of MV Bukoba, was 85 tons. He told this court that the total goods which he received and weighed on 20/5/96 were **9 tons** and he issued receipts for all the goods.

He said he did not take part in the loading of the goods and that the goods being mostly luggage, was loaded on the ship by the owners, including the Landrover which was a parcel. He stated that on 20/5/96 the time table was for the Ship MV. Victoria but they were told that MV. Victoria was undergoing repairs. He said when he arrived at the Port he found MV. Bukoba had already arrived at the port. He said on that day he did not have any goods pending from previous trips. He told the

court that he was not responsible for selling passenger tickets and that MATHIAS MATHEW (PW27) was the one who was responsible for selling 1st and 2nd Class tickets while JOSHUA NDOWA was responsible for selling 3rd class tickets.

It will be noted that JOSHUA NDOWA was not available to give evidence and he had been relieved of his duties.

The witness said his in-charge was the Port Officer Mr. ALPHONCE SAMBO who is the 3rd accused. He said he did not inform the 3rd accused of the goods which he received that day because he had a maximum of 40 tons of goods which he could receive at Bukoba. He said before the ship left that day he saw the 3rd accused at the port supervising activities at the port.

Upon being cross-examined by Mr. Galati, PW22 stated that he sold 3rd class tickets prior to 20/5/96 and he obtained the tickets from the Port Officer. He said he entered the tickets sold and the money received in a certain book called **COUCHING SUMMARY CASH BOOK**". He said entries are made in the Couching Summary Cash book, shows the tickets sold on a given date and not the actual passengers who travelled on that date.

PW 23 ELIASIIA MGONJA told this court that he is a clerk employed by TRC and his duties were to receive goods unloaded from the ship, goods to be transported on a ship and also to check passenger tickets for passengers disembarking from or embarking on a ship. He said he started to perform those duties in 1968 and he was transferred to Bukoba Port from Kemondo in February 1996. He told the court that his superior officer at Bukoba was ALPHONCE SAMBO, 3rd accused.

He said goods were weighed by the PARCELS CLERK Juma Seif PW (22) who was senior to him. He stated that his function was to take the luggage copy of the goods weighed, and prepare a Cargo Manifest which was all the goods transported and the weight. He took the documents prepared by PW22 and prepared one cargo Manifest which shows the type of goods, weight, destination from which all goods are coming and to which destination they are going and the consignee. He said a Cargo Manifest is prepared in triplicate, the original being left for filing and the remaining two copies, together with the copies, together with the copies of the documents relating to the goods, he takes to the Steamer Clerk.

He said he is not responsible for loading goods on the ship but if there are goods to be loaded by TRC or carried at TRC's risk, he hands over the parcels to the Steamer Clerk. The witness said on 20/5/96 there were no goods to be loaded by TRC or to be carried on TRC risk. He told the court that the cargo Manifest for that day showed the ship carried 8.891 kgs of goods.

He said that on 20/5/96 he reported for duty at 6.00 am and he was expecting the ship MV. Victoria because the time table was for the arrival of MV. Victoria. He said that he saw the ship MV. Bukoba arriving and he checked the tickets of disembarking passengers until the last passenger left the ship. He completed his inspection at 7.30 am. he then inspected the goods which were being embarked from the ship until 1.00 pm. From 2.00 pm he dealt with the goods which were to be transported by the ship until 7.00 pm. At 7.30 pm passengers started boarding the ship and he was at the gate through which passengers passed to get on the ship. The witness told this court that he first went to see the clerk responsible for selling tickets one JOSHUA NDOWA, to obtain the numbers of the tickets sold to enable him to check fake tickets. He said this was for 3rd class tickets. He said he only took the number of the 1st ticket sold to

passengers going to Mwanza. He said he did not obtain the last number of the last ticket sold and he did not count the passengers. He stated that this occurred some connection of the gate but it was calculated by the police who were at the gate. He said it was normal to have connections at the gate because passengers were anxious to board the ship. He went on to say that they stopped many people who did not have tickets from boarding the ship but did not prevent any person who had a ticket. He said it is the people who said they were told the ship was full. The witness said he saw the Post Officer 3rd accused at the Port before MV Bukoba left the Port of Bukoba. He said JOSHUA NDOWA did not inform him of the number of tickets which he had sold.

PW 27 MATHEW MATHIAS gave evidence that he was a Parcels Clerk and that he was transferred from Kemondo Bay to Bukoba Port for a second time, at the beginning of 1996 as a Booking Clerk for 1st and 2nd Class. His duty was to sale tickets for 1st and 2nd classes according to the capacity of the ship. He was selling such tickets for all ships. He said MV. Bukoba had capacity for 36 First Class and 44 for 2nd class. Out of the 36 for class positions, 32 were reserved for Bukoba Port and 4 for Kemondo Bay and 40 2nd class for Bukoba and 4 for Kemondo Bay. He

said after the selling tickets, he prepared the Passengers Manifest for passenger travelling on that day and handed it over to the Steamer Clerk. He said the Passengers Manifest was prepared in triplicate. He said the original and duplicate are given to the Steamer Clerk and the triplicate remains at the station. He told the court that tickets sold for 1st and 2nd class are recorded in the Reservation Book and the contents of the Reservation Book are copied in the Passengers Manifest. He said the content of the reservation Book and of the Passengers Manifest are the same, unless a passenger comes after the position of the Manifest and there is room, the passenger can be entered in the Manifest but will not appear in the Reservation Book.

He also stated that the Steamer Clerk can also sell a ticket to a passenger on this ship, for example if a 3rd class passenger wishes to change the class of travel and there is room. He said it is therefore possible for a Steamer Clerk to have a list of passengers different from the list via the possession of the Booking Clerk.

He said his duty was to hand over the Passengers Manifest to the Steamer Clerk and to post the triplicate at the Port, he does not count the passengers. He said it is not possible for a passenger who does not

have a ticket for 1st and 2nd class to be allowed on the ships there would not be room for such passenger. He told the court that A Coaching Summary Book is a record of tickets sold every day and it has two parts, one for the upper classes of 1st and 2nd classes and the second part for 3rd class. He said he only completed the first part. He said the Coaching Summary book does not show the names of the passengers but the description of the ticket sold and the destinations of travel.

After completing the first part of the Coaching Summary Book, it is loaded over to the Chief Booking Clerk who is also responsible for 3rd class and Parcels. He said in May 1996, the Chief Booking Clerk was JOSHUA NDOWA.

Joshua Ndowa, the Booking Clerk (PW27) said on 19th and 20th May 1996 he was at the Bukoba Port. He sold tickets for travel on MV. Serengeti on 19/5/96 and also sold tickets for travel by MV. Bukoba on 20th May 1996. He said because these were 1st and 2nd class tickets, he did not necessarily sell the tickets on 19/5/96 or on 20th May 1996. After the sale of tickets for travel on 20/5/96, he prepared a passengers Manifest original and two copies. He said according to the time table, the ship which was expected was MV. Victoria. He said he had 30 passengers for 1st class and

3rd for 2nd class. He said he remembered that two passengers cancelled their travel because of the change of ship, one of them being one K. KADEGE. At that point the Passengers Manifest had already been given to the Steamer Clerk. He said there was no passenger who came to seek to travel 1st class or 2nd class, other than those who were recorded on the Passengers Manifest.

He stated that he did not inform the Steamer Clerk of the passengers who had cancelled their travel and after the ship left, he removed the triplicate posted at the Port and kept it for record. He said he gave the triplicate to the police who photocopies it and gave the photocopy to him but kept the triplicate.

When he was shown Exh. P13 the Passengers Manifest on 20/5/96 PW27 said exh. P13 was not the triplicate which he gave to the police. He said Exh. P13 is a copy which he had from the triplicate for the KISANGA Commission.

It will be observed here that on this evidence, Exh. P13 is worthless as evidence and should not have been readmitted in evidence as it is not the Passengers Manifest Prepared by PW27 on 20/5/96.

The Booking Clerk went on to say that T. KABETE and STEVE OLSEW are the two passengers on 1st class, who came to cancel their travel on 20596. He said T. KABETE came with the two tickets but he told him that he could not refund the money unless he wrote to the TRC. He also said that on Exh. P13 there are tickets which have the same numbers. He said these were "Single Fare". Tickets which contain more than one name on one ticket.

As for Kemondo Bay Port there were two employees at the port who gave evidence and one police officer.

EUSTACE RWEHALUGWA PW24 gave evidence that he was employed by TRC in 1969 and worked on various stations including Bukoba Port. He said he was transferred to Kemondo Bay from Musoma in January 1995 as Assistant Port Officer. Between May 1995 and November 1995 he worked at the Bukoba Port, first as Parcels clerk and as Acting Port Officer until November 1995 when the 3rd Accused came as Port Officer. He was then transferred back to Kemondo Bay to assume the post of Assistant Port Officer until the added responsibility of selling Passenger tickets. He said during this time the Port Officer at Kemondo Bay was PROSPER RUGUMILA, the 4th accused.

PW24 told this court that he was selling passenger tickets for MV. Victoria, MV. Serengeti and MV. Bukoba for all classes. He said he issued two types of tickets, "Printed Card Ticket" and "Single Fare Ticket". He said that "Printed Card Tickets" are issued in relation to stations listed on the ticket and single fare tickets were issued for stations not listed. He told this court that if single fare tickets are issued it is possible to have more passengers than the number of tickets issued. He said after the sale of tickets, he entered the tickets sold and the money paid in a "Coaching Summary of Tickets Book".

He said on 19/5/96 there was the ship MV. Serengeti which came to Kemondo Bay. He said he sold 27 tickets for 3rd class and I, sold second class sitting ticket. He said there was no booking for 2nd or 1st class and so he sold no tickets. He told the court that on that day he did not prepare a Coaching Summary of Tickets (CST) but prepared it on 20/5/96 and on this day he sold tickets for passengers travelling on MV. BUKOBA.

He said passenger travelling on 2nd and 1st class made reservations and a passenger could decide on any date preferred for travel. The names of those who made reservations are recorded in a Reservation Register, indicating the date of travel. He said a person who has made a

reservation but has not purchased a ticket is not a passenger. He said on the day of travel he prepares a Berthing List which shows the names of the passengers of 1st and 2nd classes and their destination and the compartments assigned to them. He told this court that 3rd class passengers do not make reservations but buy tickets on the day of travel and there is no berthing list for 3rd class passengers.

PW24 told this court that there was a division of passengers for who tickets could be sold at Bukoba and at Kemondo for each class. He said the division was communicated by the Divisional Manager at Mwanza. He said for MV. Victoria the division was known. For Kemondo it was assigned 200 passengers on 3rd class. He said there was no such established division for MV. Bukoba but the formula was $\frac{1}{4}$ for Kemondo. He said he knew that the capacity of MV. Bukoba was 80 tons of cargo and 400 passengers.

He told the court that when he left the port on 19/5/96 he knew that the following day the ship would be MV. Victoria. He said MV. Victoria used to come at 4.30 am. On 20/5/96 he went to the Port at 4.30 am. So when the ship MV Bukoba arrived he was already at the port. He noticed that MV. Bukoba was leaning to the left and he said it was normal

for the ship. He went on to say that some cargo and passengers who offloaded at Kemondo and the Port Officer who is the 4th accused, arrived at the port as the ship was leaving. The witness said he told 4th accused that the ship which had arrived was MV Bukoba but the 4th accused did not give him any different instructions. He said 4th accused told him to sell the number of tickets as directed by the Chief Officer of MV. Bukoba. PW24 said that on that day he sold tickets. He sold 4 1st class tickets and issued single fare tickets for 4 passengers and sold 4 printed cards type tickets for 2nd class. He said on that day he also sold tickets for two passengers to travel 1st class on 22/5/96. For 3rd class he sold 96 tickets. He said the total number of tickets which he sold that day exceeded the 100 tickets as instructed by the Chief Officer of MV. Bukoba.

He said that after he had sold 100 tickets, four police officers in uniforms and some came to him and told him that they had their motor vehicle on MV. Bukoba but they were late to board the ship at Bukoba. He said considering the importance of their work he gave them four tickets making the total number of tickets sold by him 104. He said he did not inform the Port Officer 4th accused of the additional passenger, because when the police officers came, he had already taken leave of the Port

Officer. He said he left the Port to see his sick mother before preparing the Coaching Summary of Tickets. He said he locked up his office and took the keys. He told the court that he prepared the Coaching Summary of Tickets for both 19/5/96 and 20/5/96 on 21/5/96. He said that because the passengers on MV. Serengeti were few, he included them in the Travelling Summary of Tickets for MV. Bukoba. He said he had prepared the CST before he received the report on the accident of MV. Bukoba at 12.00 on 21/5/96. He said the CST was taken by police officers three days later but they brought it back. He said when he went to see his sick mother no officer could buy tickets for travel on MV. Bukoba that day.

PW28 JOSEPHAT NGOBYA gave evidence that in May 1996 he was the Parcels Clerk at Kemondo Bay and his duty was to weigh and transport goods. He said there were three types of goods. The first type was heavy cargo which weighted one ton and upwards and the second type was parcels which weighed less than one ton and unaccompanied. The third type of goods was luggage which is carried by passengers. He said JUSTICE RUGALULILA PW25 dealt with the sale of tickets. He told this court that he was answerable to the port Officer who was the 4th accused.

He said after receiving payment for goods to be transported he issued receipts which showed the type and quality of goods, the destination to which they are going and for which they came, weight description and name of the customer and amount paid. After issuing receipts he prepares a Cargo Manifest in triplicate. The original is sent to the receiving station, the duplicate is for the ship carrying the cargo and the triplicate remains at the station. He said both the original and duplicate of the Cargo Manifest is handed over to the Steamer Clerk on the ship.

He said he was at Kemondo Bay on 20/5/96 when MV. Bukoba arrived from Mwanza. He had no information that the arriving ship was MV. Bukoba. He said he was expecting MV. Victoria. He said on that day he did not have any left nor cargo. He said he know the capacity of MV. Victoria was 250 tons of cargo while for MV. BUKOBA it was 85 tons. he said he did not remember the weight of cargo assigned to Kemondo.

PW28 told this court that on 20/5/96 he weighed the cargo to be transported on that date. He said he did not consult the Port Manager 4th accused as to how much cargo he should receive because he knew the cargo capacity of MV. Bukoba. He said the cargo which he received

included bananas empty beer crates and two empty gas cylinders. He said he did not receive any motor vehicles and the total weight of cargo received was 11.14 tons. He said when MV. Bukoba arrived at Kemondo from Bukoba he was at Kemondo he was in his office and the Port officer 4th accused was on duty.

He went on to say that when MV. Bukoba arrived from Bukoba EUSTACE RUGARULILA PW4 had left to see his sick mother. He said PW24 had left with him the Passengers Manifest for 1st accused 2nd class and instructed him to hand it over to the Steamer Clerk, on MV. Bukoba.

He went on to say that he left his office to hand over the cargo Manifest and the Passenger manifest to the Steamer Clerk. At this time cargo was already being loaded. He stated that he handed over the Manifests to the Steamer Clerk one RASHIDI MATWILI who is now dead, he died on MV. Bukoba during the accident.

He said he did not know if there was any person supervising the loading of cargo but he saw the captain of the ship 1st accused and NASSIAU the Quarter Master on the deck. He said the two were instructing on the consignment of cargo on the deck. He said he saw 1st accused was in uniform but he did not remember if he saw the Chief

Officer one LAUREONS. He also said there was no cargo which was received and was left on the Port. He also said he could not tell if the number of passengers on MV Bukoba were more than the capacity of the ship. He said he saw MV. Bukoba leaving Kemondo Bay and he did not notice any problem and the ship was being handled by the 1st accused.

PW26 ASSIST. INSP. FORTUNATUS ALPHONCE gave evidence that on 20/5/96 he was the police officer in charge of Kemondo Bay Police station assisted by station Sergeant and 7 police officers. He went on duty at 2.00 pm and remained on duty until 10.30 pm. He said he went to see the Port Officer at 9.45 pm for private matters and while he was with him 4th accused communicated with 1st accused asking when he was expected at Kemondo.

He said he then left the office of 4th accused and went to the Port. He said 4th accused did not tell him there were any problems. He said he saw passengers at the Port but they were not very many. He said he also saw the cargo to be loaded on MV. Bukoba which consisted of bananas, crates of beer and gas cylinders.

He said he saw when MV. Bukoba arrived and he saw passengers boarding the ship and cargo being loaded. He stated that he

saw 1st accused instructing where cargo should be placed. The Port Officer 4th accused was also present. He said he did not see any passenger without a ticket boarding the ship. He also said nobody asked him to assist any person to travel. PW26 said he was present when MV Bukoba left Kemondo, it was under the captainship of 1st accused.

The last category of witnesses are those who came into the picture after the accident. One was the police officer assigned to investigate this case Ex. SSP Kimoto, and others who mainly participated in the exercise to perform rescue activities, mainly to recover dead bodies from the dead from the sunken ship.

PW13 SSP PAULO KIKOTO told this court that on 21/5/96 the report of the accident of MV Bukoba was received at CID Headquarters in Dar es Salaam. He was instructed to travel to Mwanza to join in the investigation of the incident. He arrived at Mwanza on 23/5/96 and found his superior officers including the Director of Criminal Investigations had already arrived and he instructed him to go to Bukoba to investigate the number of passengers who had boarded MV. Bukoba and the amount of cargo loaded at Bukoba and at Kemondo Bay. He said he was not able to travel to Bukoba until 25/5/96 because of transportation problems. He said

because of the delay, he communicated with the acting Regional Police Commander to search for the ticket clerks at both Bukoba and Kemondo and also obtain documents relating to the passengers and cargo on MV. Bukoba from both ports.

He said when he arrived at Bukoba on 25/5/96 he found that the employees of TRC at Bukoba had been interviewed by police officers at Bukoba. He said he was also given documents on the cargo loaded and the Passengers Manifest for 1st class and 2nd class passengers. PW13 interviewed the 3rd accused who showed him the Passengers Manifest Exh. P13. He said he was not satisfied with it as in places ticket appeared to have been issued to more than one passenger and in places the passengers were identified as "AND FAMILY"

He said he also interviewed the Port Officer of Kemondo Bay who is the 4th accused how many people travelled from Kemondo and he told him that there were documents on passengers and luggage and showed photocopies from the office of 4th accused.

He said 4th accused told him that 8 passengers travelled from Kemondo on 1st and 2nd class and 128 passengers on third class. He also said that 4th accused told him that there were 20 members of crew and 22

catering staff from Tem Hotels. SSP Kikoto stated that on the basis of the information obtained in the course of his investigations at Bukoba and at Kemondo Bay, Ports, he got a total of 729 passengers who travelled on MV. Bukoba on 20/5/96, excluding the crew and catering staff. He said if these were added there were 771 people. He said if children below three 3 were included and the people referred to as "family", the number could be more.

Upon cross-examination by Mr. Magongo, Kikoto stated that he did not investigate to find out if any passengers who purchased tickets did not travel. He said he only investigated the number of tickets sold. He said he had heard of single fare tickets and printed card ticket but looking at Exh. P13 he cannot tell which passengers were issued with single fare paper ticket or printed card tickets. He did not know if passengers KABETE and STEVE ASSON in Cabin number 2 did not travel that day. He said he has been informed by the clerks that they made a summary of the tickets sold but he said it would not be possible to tell from the summary when a passenger would actually travel. He said he was told of a Passenger Agent at Kemondo but he did not interview the person. He said he did not know if MV. Serengeti travelled from Kemondo on 19/5/96 and

he did not know that the passengers who travelled on MV. Serengeti were included on the list of passengers who travelled on MV. Bukoba on 20/5/96.

In reply to Mr. Galati who took over from MV. Magongo who was not feeling well, ASP Kikoto said the number of passengers on exhibit P13 is preferable to establish the number of passengers who travelled. He said in his own statement recorded by himself he had stated that he had been told many passengers did not travel on 20/5/96. He said if this fact is taken into account then the number of people whom he said travelled in MV. Bukoba can be less. He said he could not say less by how much. He went on to say the exact number of passengers on the ship could have been established if the records which were on the ship were not lost. He said no record of the exact number of passengers who were on MV. Bukoba which exists. He stated further that it is possible to purchase a ticket on one day and to travel on another day. He said he was not able to tell from the Summary of tickets sold exactly how many passengers actually travelled.

At the close of the case for the prosecution all four accused persons were addressed in terms of Section 293 of the Criminal Procedure

Act, 1985 and they elected to give their defence on oath and to call one witness. However later on the intention to call the witness was abandoned.

In their defence all the accused denied the charges against them and each gave evidence on oath and none called a witness.

The 1st accused testified that he was at the material time the Captain of MV. Bukoba and that he used to sail from Mwanza to Port Bell and Kisumu and back. He said that he did not experience any problem in navigating Mv. Bukoba and that the swaying of the ship was due to its design.

He testified that an inclination test was conducted on MV. Bukoba in early May by Belgium Experts on instructions from the Tanzania Railways Corporation headquarters in Dar es Salaam. He said after the tests the experts did not issue any report on instructions to stay operations of the ship. He was instructed to continue operations on the Mwanza Port Bell route before being asked to sail to Kemonondo and Bukoba on 19/5/96. The 1st accused stated that he was given the instructions by a Messenger upon his return from Port Bell and it was on Sunday.

1st Accused said he captained Mv. Bukoba which arrived at Kemondo and Bukoba Ports in the morning of 20/5/96. He testified that the watch was taken on rational basis at fixed times by himself, 1st officer and the Chief Officer. He testified that the Chief Officer and Steamer Clerk were responsible for loading passengers and cargo and that although the Captain had overall responsibility, on the ship, the officer for the time being on touch was in control of the ship.

1st accused stated that he did not receive any report from the Chief Officer or Steamer Clerk regarding excess passengers on Mv. Bukoba. According to the 1st accused he piloted Mv. Bukoba north of Bukoba Port to Kemondo and north of Kemondo and later landed over the ship to other officer on watch and went to sleep in his cabin.

While he slept in his cabin he did not receive any report from the officer on watch. The 1st accused woke up in the morning and prepared to take watch. He ordered his tea which did not arrive on time. When he enquired into the delay he was told that it was being brought. As he waited suddenly the ship swayed violently and he ran out of the cabin to go to the bridge and the ship swayed and persisted. The officer on watch at the material time was the Chief Officer one LAURENT. 1st

accused was one of the survivors who found themselves on the keel of Mv. Bukoba after it has capsized. He was taken too culpable and later arrested and charged with the present officers. The Second accuseds GILBERT MOKIWA told this court that he was appointed Ship Surveyor by virtue of the position he holds in the Tanzania Harbours Authority. He said his duty as a Ship Surveyor is to inspect ships to check on the items specified in exhibit P8 and if he finds them satisfactory he issues a Certificate of Seaworthiness. He said that as a Ship Surveyor he is not qualified or required to tackle issues of stability of a ship. Second accused said he inspected Mv. Bukoba and issued the Certificate of Seaworthiness exhibit P8. The accused denies to have been negligent or to have done anything wrong.

The evidence of 3rd and 4th accuseds ALPHONE SAMBO and PROSPER RUGUMILA is essentially similar. They were respectively, Port Officers for Bukoba and Kemondo Bay Ports. They said they had overall responsibility for the personnel and performance of duties on their ports. However, specific tasks like the sale of tickets was carried out by booking clerks after obtaining tickets to sell from them as Port Officers. They stated if the booking clerks had sold tickets to more passengers than MV.

Bukoba was authorized to carry; it was the booking clerks who were to blame. After the sale of tickets the booking clerks prepared a coaching summary of tickets sold and submitted to them the proceeds of the sale of tickets and transporting of cargo for banking. It was the duty of auditors to verify the correctness of the sales and the money banked.

They denied that excessive passengers boarded Mv. Bukoba on 20/5/96 from the respective ports. They also denied that they were negligent or did anything wrong which led to the capsizing of Mv. Bukoba.

After the submissions, I summed up the case to the three gentlemen assessors and all these assessors were of the view that:-

1. There was no act of negligence proved on the part of any of the accused
2. The evidence show that the accident was caused by the instability of the ship
3. All the four accused persons not guilty of any of the charges.

The offence of Manslaughter as set out in Section 195 of the Penal Code is stated as follows:-

"Any person who by an unlawful act or omission cause the death of another is guilty of the felony termed

"Manslaughter. An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm".

In the present case, there has not been any evidence or argument advanced that any of the four accused persons committed any unlawful act which caused the death of any of the deceased persons listed in the 159 counts. An unlawful act would mean an act which was contrary to law and there has not been any suggestion that any of the accused persons contravened any law and which contravention led to the death of the deceased persons. The totality of the evidence is built on the second limb of the offence of Manslaughter of "an unlawful omission amounting to culpable negligence" to discharge a duty, tending to the preservation of life or health".

In short it rests on proving culpable negligence."

What then amounts to culpable "negligence" which is punishable as the offence of Manslaughter under section 195 of the Penal Code?

In the case of ALBERT KIRUMBI and Another, V. Republic, Criminal Appeal No. 98 of 1991 (unreported) which also involved an accident of TRC transport, this time the collision of trains, the Court of Appeal stated that:-

"In reference to this case we think that punishable negligence consists of the neglect of the application of ordinary prudence as supplemented by more particular directives that were made by TRC."

In the present case we are told that the four accused persons were respectively Captain of MV. Bukoba, Ship Surveyor, Port Officers of Bukoba and Kemondo Bay.

It is undisputed fact that MV. Bukoba capsized and sank. It may even be accepted as undisputed that a big number of people died as the result of the ship capsizing and sinking. The issue is what did each one of the four accused persons neglected to do or what ordinary prudence did any of the four accused persons failed to apply which led to the accident?

There are three assumptions on theories which appear to be the converse of the prosecution's case. The first assumption relates only to the 2nd accused who is the Government Ship Surveyor. This assumption is that he was negligent in issuing a Certificate of Seaworthiness to MV

Bukoba when it was known to be unstable. There was a parallel assumption which was subsequently abandoned by the prosecution after clear evidence. This was that the 2nd accused had issued two separate Certificates of Seaworthiness on the same date for MV. Bukoba, showing different capacities to carry passengers and cargo. The evidence of PW1, PW2 and PW29 clearly laid this theory to rest. There were no two such certificates issued by 2nd accused. The remaining theory was also laid to rest by the evidence of the same witnesses that the ship surveying had a specific check list which they said accused compulsorily adhered to. If the ship had any instability, the fault was structural which could not be determined by a Ship Surveyor. What then is left against the Ship Surveyor? Like the gentlemen assessors, I am unable to find any evidence of an act of negligence amounting to culpable negligence on the part of the 2nd accused.

I therefore find the 2nd accused not guilty of any of the 159 counts for which he stands charged with the other accused persons. Accordingly, I acquit the 2nd accused of all 159 counts as charged.

The second assumption is that more cargo was loaded on MV. Bukoba at Bukoba Port and at Kemondo Bay, beyond the 85 tons

authorised by the Certificate of Seaworthiness Exh. P8. If this is proved it would implicate 3rd and 4th accused for failing to supervise their clerks who received the cargo and prepared the cargo manifests. It would also implicate the 1st accused as he admitted in his defence the cargo was under both the Deck Department and the Traffic Departments. He was himself in-charge of the Deck Department.

However, the weight of the evidence was that less than 25 tons of cargo was loaded on MV. Bukoba at Bukoba Port and Kemondo Bay on 20/5/99. This assumption in so far as it relates to cargo, is not confirmed by the evidence.

The third assumption is that MV. Bukoba carried more passengers than its authorized capacity of 400 passengers.

The theory is built on the proposition that, since MV. Victoria which carried about 1,200 passengers was expected at Bukoba and Kemondo, more passengers had purchased tickets than MV. Bukoba could carry. It is also assumed that even people who did not have tickets but were ready to travel because they had hoped – bigger ship would come, could have got on the ship with real tickets under the chaos which was caused by a big number of prospective passengers.

The weight of the evidence shows that, whereas it is true that officials expected MV. Victoria at both Bukoba and Kemondo, the biggest number of passengers travelled on 3rd class. The weight of evidence showed that 3rd class tickets were sold and bought on the day the ship arrived. All prosecution witnesses who were surviving passengers who travelled 3rd class PW7, PW8 PW9, PW10, PW18 and PW21, all testified that they bought their tickets on 20/5/96 and mainly all of them bought the tickets late in the day. This suggests there was no servable for tickets. All these witnesses testified on the orderly manner of queuing and inspection of tickets before entering the ship. This evidence punches holes in the theory that the expectation of a bigger ship led to the presence of more prospective passengers. The orderly manner in which tickets were purchased and checked as passengers entered the ship, is not consistent with this theory. At Kemondo, Inspector Fortunatus ALPHONCE PW26 disputed the suggestion of there being many passengers sitting on the ship in a disorderly manner at Kemondo Bay.

It is however in evidence which is admitted by PW24 EUSTACE MWEBALULILA that he issued four tickets to four police officers in excess of the 100 passengers. However, this is far from the avoidance of

passengers suggested by EX SSP Kikoto PW3. At any rate all these were prosecution witnesses and any contradiction in the evidence of prosecution witnesses can only be resolved in favour of the accused persons.

There was the evidence of PW12 Ignas Utara on the number of bodies which were retrieved from the scene. Apart from the many contradictions between the prosecution witnesses, it appears the situation obtaining during the retrieval identification of bodies, did not permit for a reliable and formal record to be kept of bodies recovered. There was no document produced as to official or authenticated list of bodies recovered.

As EX SSP Kikoto readily admitted after cross-examination by both Mr. Magongo and Mr. Galati, it was not possible to establish with any degree of accuracy the number of passengers who entered MV. Bukoba at Bukoba or Kemonondo, depending on the Passengers' Manifests or Coaching Summary of Tickets.

On Exhibit P13, it transpired that it was not even the triplicate kept by the Port Officer at Bukoba. It is suggested by the evidence that the triplicate may have either got lost or misplaced as there was a parallel enquiry referred to, in the evidence as the Kisanga's Commission. Exh.

P13 is not only unreliable, but worthless as evidence as it was a copy made by hand from the said triplicate.

The prosecution abandoned producing the photocopy of the Coaching Summary of Tickets sold at Kemondo for the same reason that it is not known who made the photocopy and where the copy from which the photocopy was made is.

In the circumstances we can ask, where the evidence is proving beyond reasonable fact that more passengers got on MV. Bukoba than the authorized capacity of 400 passengers?

If there was no credible evidence that there was more cargo above the authorized capacity of 88 tons or passengers who travelled on the ship were above the authorized 400 passengers the prosecution has no basis to allege there was negligence much less, culpable negligence, in doing or failing to do what has not been proved.

If the fact of excessive passengers and cargo was proved, which it was not, there would then be the task of establishing whether the excessive cargo or passengers did cause the accident. The prosecution did not offer any credible evidence as to how the excessive cargo or alleged excessive passengers led to the capsizing of the ship.

At the end of the day Mr. Magoma learned Principal State Attorney clung to a straw on the evidence that the 1st accused was heard giving an order to the Chief Officer to turn the wheel, when the ship was at 11 knots Mr. Magoma suggested that the turning of the wheel at that speed of 11 Knots, caused the ship to capsize and this proved the negligence on the part of the 1st Accused.

With respect I do not agree, in fact this evidence on the record is to the effect that the 1st accused was heard shouting "punguza mwendo" "punguza mwendo" and by that time the ship had already capsized.

In the final analysis there was no credible evidence for the prosecution that excessive passengers caused the ship to capsize. The evidence of PW2 CAPT. MANASE EPHRAIM KOMBE the Captain of MV. Butiama is that he talked to the Chief Officer on MV. BUKOBA the late EUSTACE, after minutes before MV Bukoba disappeared from radio contact with Control at Mwanza. EUSTACE who was the Officer on watch was cheerful and even offered to take PW2 to his friend when they landed at Mwanza. The last words which the late EUSTACE said to PW2, were "WELCOME TO MWANZA" (KARIBU MWANZA). This evidence is inconsistent with any theory of negligence which led to the sudden

capsizing of MV. Bukoba. Little did the cheerful EUSTACE think of the tragedy which met King Dancun in Macbeth

"Hear it not Dancun, for it is a kneel, which summons thee to hell or to heaven".

It would be our prayer that the cheerful EUSTACE was welcomed to heaven together with the passengers who died on the ship.

There was no question or dispute that MV. Bukoba had a long worrying and carrying state of instability. There are two Danish Reports, recommending restructuring of the ship Exh. P5 and Exh. P9. There is evidence that just two weeks before the accident another stability test was carried out by Belgian experts. The report was expected in July but the accident occurred nearly two months before the report was recovered.

The gentlemen assessors attributed the accident to the instability. One cannot blame anybody who has heard this evidence offered in this case for reaching such a conclusion. In the absence of evidence from the experts who tested the ship, court, I am not prepared to go as far as to conclude that the instability caused the accident. However, I am persuaded that it is more likely that this accident was

caused by the instability than the negligence of any or all of the accused persons.

What happened on 21/5/96 was undoubtedly a tragic and shocking event. Many people lost their loved ones and property. Individuals, families whole communities and the whole nation mourned and grieved. The sadness and scope of the tragedy cannot be described by words.

However, our mourning people and nation, respect and live under the rule of law, which presumes every individual innocent no matter how grave the offence may be until proved by credible and clear evidence that he is guilty. The prosecution's evidence has not established the guilt of any of the accused persons beyond reasonable doubt. In our system of criminal justice, they are entitled to be acquitted of all charges contained in the information.

Accordingly, I find the 1st, 2nd, 3rd and 4th accused not guilty of all charges. All the accused persons shall be set free with immediate effect

unless they are otherwise lawfully detained.

J.I. Mlay

JUDGE.

29/11/2002

Right of Appeal explained

J.I. Mlay

JUDGE.

29/11/2002

Delivered in the presence of Mr. Feleshi learned State Attorney and Mr. Magongo learned Advocate for the accuseds this 29th day of November 2002.

J.I. Mlay

JUDGE.

29/11/2002