IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 105 OF 2016

(Originating from the Decision of Resident Magistrate's Court of Dar es Salaam at Kisutu in Criminal case No. 121/2016)

THE DIRECTOR OF PUBLIC PROSECUTIONS .....APPELLANT

VERSUS

1. **HARRY MSAMIRE KITILYA**
2. **SHOSE MORI SINARE** **.....RESPONDENT**
3. **SIOI GRAHAM SALOM**

JUDGMENT

MKASIMONGWA, J

Before the Resident Magistrate's Court of Dar es Salaam at Kisutu, the Respondents stand jointly charged with Conspiracy to commit an offence contrary to section 384 of the Penal code (First count); Forgery contrary to Sections 333, 335 (a) and 337 of the Penal Code (Sixth count); Obtaining money by False Pretences contrary to Section 302 of the Penal Code (Seventh count); and Money Laundering contrary to Sections 12(a) and 13(a) of the anti-Money Laundering Act No. 12 of 2006 (AMLA) (Eighth Count) in a Charge Sheet comprised of eight counts. Individually, the second Respondent stands charged with two counts of Forgery Contrary to Sections 333, 335(a) and 337 of the Penal Code (Second and

Fourth Counts); and two counts of Uttering false documents contrary to section 342 of the Penal Code (third and fifth counts).

When the charges were read over and explained to them on 1st of April, 2016 they all pleaded not guilty to all their respective charges. For the reason that the investigation was still in progress Mr. Oswald Tibabyekomya, learned State Attorney, who had the conduct of the prosecution prayed for an adjournment. Dr. Ringo Tenga, Mr Semu, Dr. Ringo Tenga and Mr. Nyaisa, the learned advocates for the first, second and third respondents, respectively, requested for bail through a joint oral submission that was presented by. Mr. Tibakyekomya resisted to the request which was eventually dismissed by the court in a ruling pronounced on the 8th of April, 2016. The court reasoned that the offence of Money laundering charged under the 8th count is not bailable.

Following the ruling of the court Mr. Alex Mgongolwa, who was then representation the third respondent argued another joint application by the defence counsels. The learned counsel contended, on behalf of his client and other respondents, that the eighth count was incurably defective for failure to disclose the predicate offence of Money Laundering. This contention was also contested by Mr. Tibakyekomya as being misconceived. On the 27th of April, 2016 the court pronounced a ruling in which it sustained the contest. The court found the eighth count to be defective in substance. The trial court was also of the opinion that it had no powers, at that stage, to order an amendment, substitution or alteration of the defective count under the provisions of Section 234 (1) of the

Criminal Procedure Act (CPA) for such alteration may be made at a stage when the evidence has been given before the trial court.

The Appellant being aggrieved by that decision of the court preferred this appeal based on the following grounds:-

"1. That the presiding Magistrate erred in law in holding that each paragraph of Section 12 of the Anti-Money Laundering Act, Cap. 423 create a distinct offence.

2. That the presiding Magistrate erred in law in holding that the 8th count is defective and is so confusing the accused (respondents) may not be in a position of understanding clearly what offence they are specifically being charged with so as to be able to prepare themselves for defence.

3. That the presiding Magistrate erred in law in holding that a charge cannot be amended, substituted or altered under Section 234(1) of the Criminal Procedure Act unless the prosecutions' evidence has been led.

4. That, the presiding Magistrate erred in law in holding that the subordinate courts have inherent powers to control proceedings before them when the need arises.

5. That the presiding Magistrate erred in law in striking out the 8th count of Money laundering".

The Appellant then prays the court that:-

(i) The Appeal be allowed,

(ii) The order striking out the 8th count be quashed,

(iii) The court be pleased to order the continuation of proceedings before a different magistrate.

At the hearing of the appeal, before me the Appellant was represented by Mr. Tibabyekomya, the learned Assistant DPP assisted by Mr. Awamu Mbagwa, Learned State Attorney and Miss Jaquiline Nyantori, learned State Attorney. On the other hand the Respondents were, respectively, represented by Mr. Majura Magafu, Dr. Ringo Tenga and Mr. Alex Mgongolwa (learned advocates). These were, respectively, being assisted by Mr. Steven Akwexo, Miss Nsangi Nzihaulula and Mr. Godwin Nyaisa (learned advocates).

Mr. Tibabyekomya argued the appeal on behalf of the appellant. He proposed to consolidate his submissions in respect of the fourth and fifth grounds of appeal. On the first ground of appeal the learned Assistant DPP stated that the appellant's complaint is over the construction given by the learned trial Senior Resident Magistrate (SRM) on Section 12 of the AMLA. The analysis of the section by the SRM made him conclude that Paragraphs (a) – (e) of Section 12 of the AMLA each creates a separate and distinct offence from other. He submitted that, that was a wrong interpretation of the section. The section creates only one offence of Money Laundering. What is provided for under paragraphs (a) – (e) of the section are the modes by which the offence is committed. A person who does any act

under any of paragraphs commits an offence of Money Laundering as it is clearly shown under the closing paragraph/sentence in the section which applies to all Paragraphs (a) - (e) of section 12 of the AMLA.

Coming to the second ground of appeal, the learned Assistant DPP contended that in essence, in holding that the eighth count is defective and is so confusing the accused (respondents) may not be in a position to understand clearly what offence they are specifically being charged with so as to be able to prepare themselves for defence, the learned SRM was of the view that the count was defective for the prosecution has alleged two offences in one. He, the Assistant DPP, submitted that, that finding of the court is wrong for it is wrongly premised. In analyzing the particulars of the offence under this count the trial court relied on a few selected particulars leaving the essential ones in reaching the conclusion. In the analysis by the court there was no reference to the term "Engagement" which is an act alleged to have been done by the accused persons (respondents). In the analysis also the trial court did omit the preposition "by" used in the particulars which omission had distorted the whole meaning of the particulars in the count. He said, the proposition is used to explain how the accused persons had engaged themselves in a transaction involving the property.

As to the term "Engagement" the learned Assistant DPP stated that it is a generic one. The same has not been defined by the AMLA. Under Section 132 of the CPA the charge should contain such particulars that may be necessary for giving reasonable information as to the nature of the offence charged. In that regard, as the term "Engagement" is a generic

one and that it has not been defined by the law, it was necessary to give more particulars that would give reasonable information to the accused persons as to the nature of the offence they were facing in court.

In respect of the third ground of appeal, Mr. Tibabyekomya contended that the same is related to the interpretation the trial SRM had accorded to Section 234(1) of the CPA which interpretation he submits that is wrong for the reason that it is based on misapprehension as to when trial commences. In interpreting the section the trial SRM had relied on the marginal note of the section which reads "Variance between charge and evidence and amendment of charge". As a result he concluded that trial commences when evidence is given to the court and not before. Mr. Tibabyekomya referred the court to Section 26(1) of the Interpretation of Laws Act [Cap 1 R. E. 2002] and a decision in the case of **EMMANUEL MARANGAKIS (As Attorney of ANASTASIOS ANAGNASTOV) Vs. THE ADMINISTRATOR GENERAL, CIVIL CASE NO. 1 OF 2011** (Unreported) and submitted that marginal notes are only meant to provide guidance and by relying on it, the trial court had grossly misdirected himself hence reached at that lost conclusion. He submitted further that trial commences when the accused person is called to appear to the court and plead to the charges as it was held in the case of **THE DPP VS. ALLY NUR AND ANOTHER (1989) TLR 252,** a position which also the Court of Appeal of Tanzania had taken in the case of **KIGUNDU FRANCIS AND JACKSON MUSSA VS. R; CRIMINAL APPEAL NO. 314 OF 2010 (Mwanza Registry) (Unreported).** In the case at hand pleas were taken on 1st of April, 2016. It is on that date in law trial had commenced.

Basing on this what he says to be the law, the Assistant DPP submitted that it was wrong for the trial court when it held that the charge could not be amended because trial had not commenced.

Coming to the fourth and fifth grounds of appeal which were jointly argued, Mr. Tibabyekomya submitted the trial court erred in law when it invoked inherent powers which, unlike the High Court, it does not possess. He contended that Magistrates courts are created by statutes and their powers and mandates are provided by the statues. The learned Assistant DPP added that powers of the Magistrates courts are limited and procedures applied by them are regulated. To that effect the learned Assistant DPP referred that court to Section 42 of the Magistrates Courts Ac [Cap 11 R. E. 2002]. He added that eve the CPA does not provide for inherent powers to the Magistrates Courts. With a view to emphasize on the fact Mr. Tibabyekomya referred the court to its decision in the case of **THE DPP VS. ALEXANDER DUNIA, MISC. CRIM. REVISION NO. 3 OF 2007, TABORA REGISTRY** (Unreported) where it held that the Magistrates courts' powers are limited to those that are granted by the legislation. On the basis of the provisions of the law and authorities cited Mr. Tibabyekomya submitted that it is evident that the trial SRM had no inherent powers which he could invoke to strike out the eighth count.

Alternatively, Mr. Tibabyekomya submitted that even if the lower court had inherent powers the same could not be invoked in the circumstances of this case to strike out the eighth count. Why? Because the law, Section 234 of the CPA provides for what should be done in case the court finds that the charge is defective. In law wahat the trial court did

is good as nothing as it was held in the case of **BASAI VS. WASAMA (1967) EA 351 at page 353.**

Based on the above arguments advanced in support of the appeal, the learned Assistant DPP prays the court that it allows the appeal and quashes the decision given by the trial court.

On the other hand, Mr. Majura Magafu, Dr. Ringo Tenga and Mr. Mgongolwa, learned advocates submitted on behalf of the first, second and third respondents, respectively. Although in different words, in most cases, the learned advocates had the same and similar submissions. I will therefor combine their submissions.

In his submissions Dr. Tenga referred the court to Section 3 of the AMLA which also provides for the definition of "Money Laundering". According to the definition, contrary to what has been submitted by the learned Assistant DPP, the section creates to categories of offences. The first category is that which refers to principal offenders covered under section 12(a) – (d) of the AMLA. The second category is that which refers to the third parties that are the aiders and abettors covered under section 12(e) of the AMLA. According to the learned advocates for the principal offender to be successfully charged with Money laundering four elements stated under Section 12(a) – (d) of the AMLA must be established. They mentioned the elements to be the illicit origin (Section 12 (a)), Placement (Section 12 (b)), Layering (Section 12 (c)), and Integration (Section 12 (d)). According to Mr. Mgongolwa these constitute the *Actus Reus* of the crime and the *Mens Rea* is derived from Section 3 of the Act. The learned

advocates contend that the offence of Money laundering is not a strict liability one. Particulars to this offence must clearly show the *mens rea.* Particulars of the offence given under the eighth count do not reveal the *Mens rea* and for that reason the charge is fatally defective. Mr. Mgongolwa referred the court to the decision in a case of **OSWALD A. MANGULA VS. R (2000) TLR 271** where the court held that where particulars of the offence do not disclose the offence, the accused person is denied an opportunity to have a meaningful defence. In fact such a charge is a nullity.

On the ground also Dr. Tenga and Mr. Magafu contended that in the lower court the appellant had invited the court to hold that there are five distinct offences created under Section 12 of the AMLA. In his ruling the trial SRM agreed with the appellant's position. It is a new submission by the appellant at this stage that of the case that the section creates only one offence. Mr. Mgongolwa added that this is not acceptable for, save for the issue of jurisdiction of the court which can be raised at any stage of the case, any issue not raised in the lower court cannot be raised in the appellate court. Dr. Tenga submitted that if there are separate offence established under Section 12 of the AMLA, then the charge in respect of the eighth count is bad in law for duplicity as the particulars of the offence therein fall under the offences established by paragraphs (a) and (b) os section 12 of the AMLA. The defence counsels submit that the first ground of appeal is irrelevant and it should be dismissed.

Coming to the second ground of appeal, Dr. Tenga contended that the same emanates from the alternative arguments made in the

subordinate court in event it holds that paragraphs (a) - (e) of Section 12 of the AMLA each creates a separate and distinct offence then there will be a legal problem as Section 12(a) of the AMLA does not include the act of "Transferring". It is Section 12 (b) of the Act which so provides. Mr. Magafu submitted that under such circumstances the charge is bad for duplicity a result of which it does not lead the accused persons to understand well the nature of the charge and therefore meaningfully plead thereto. He referred the court to the decision in the case of **MUSSA MWAIKUNDA VS. R (2006) TLR 387 at Pg 390.**

Dr. Tenga stated also that it has been submitted by the Appellant that the term "Transferring" as it is used in the particulars of the offence in the eighth count is just an interpretation of the act of "Engagement" referred to in Section 12(a) of the Act. He submitted that the law uses the term only once under Section 12(b) of the Act and Mr. Mgongolwa subscribed to the submission and added that if "Transferring" is one of the modes of committing the offence of Money Laundering as the Appellant the same is provided for under Section 12(b) of the AMLA. In such a situation the learned counsels for the respondent concluded that the lower court did rightly find that the particulars of the offence under discussion are confusing and it was proper when the court struck out the count.

As for the third ground of appeal, Mr. Mgongolwa contended that it arises from the trial court's statement that it may not have powers to order for amendment of the charge under Section 234(1) of the CPA. Mr. Magafu stated that in interpreting Section 234(1) of the CPA the trial SRM did not rely on the marginal note as the appellant tries to put it. The appellant

convinces the court by citing cases on the interpretation of the term "Trial" as it is used in the section. In giving the meaning of the term the larned advocate referred the court to the Black's Law Dictionary which at its page 1543 the term "Trial' is defined as ***"A formal judicial examination and determination of legal claims in an adversary proceedings".*** Mr. Magafu submitted that a **trial** is about consideration of the merits of the case. As to when a trial commences Mr. Magafu submitted that it is when evidence is given to the court and in terms of Section 192 of the CPA trial commences after the preliminary hearing for "No preliminary hearing no trial". When deciding the cases cited by the appellant Mr. Magafu said that the courts did not consider the provisions of section 192 of the CPA. On when the trial commences Mr. Mgongolwa sided with the appellant that it commences when the accused is called upon to plead to the charge. However section 234(1) of the CPA requires that trial commences when evidence is commenced. In this matter as the evidence was yet to be produced the court could not order for amendment, substitution or alteration of the charge under Section 234(1) of the CPA. The court could not do so as again the prosecution did not even apply to that effect. The counseis added that as the charge sheet had been already admitted the court could not reject it in terms of Section 129 of the CPA. Since Sections 234(1) and 129 of the CPA could not invoked, the court was remained only with its inherent powers in determining the matter which powers it had invoked and went on striking out the eighth count. They pray the court that it dismisses the third ground of appeal.

As it was for the Appellant, the learned advocates for the respondents did argue the fourth and fifth altogether. They contended that the ground leads to the question whether the lower court had inherent powers which it invoked to strike out the eighth count. In answering the question Mr. Magafu submitted that the charge sheet under discussion was admitted and filed in court on 1st of April, 2016. Following the admission of the charge sheet the trial SRM could not reject it at that stage. The CPA does not provide the court with powers to strike out a charge sheet once admitted. Under such a situation what course should the court take? The counsels submit that it has to invoke the inherent powers it is possessed with. According to Dr. Tenga inherent powers allow the court to administer justice where there are no expressed provisions of the law to be applied in a particular situation. The court derives such powers from two sources namely; the statute and/or He referred the court to the decision in a case of **HADI AHMED AND OTHERS VS. R; MISC. CRIM. APPL. NO. 101 OF 2014** which held that Magistrates courts have inherent powers. Mr. Magafu is of the view. He referred the court to the decision in the case of **ISMAIL BUSHAIJA VS. R (1991) TLR 100** where the court held that Magistrates courts have inherent powers to prevent abuse of its process. Mr. Mgongolwa also shared views of his colleagues, counsels for the respondents. He added that there was an alternative argument by the appellant that even if the trial court had inherent powers it ought to have acted upon them in consideration of Section 234 of the CPA. He said the section applies only where there is an application to amend the charge sheet.

As to the prayers made to the court by the appellant, Mr. Mgongolwa submitted that the appellant has three prayers set out in the petition of appeal. In his submission the appellant did not submit in respect of two prayers and prays the court that it considers the two prayers abandoned and the court should not act upon them. All in all the respondents pray the court that it dismisses the appeal.

By way of rejoinder Mr. Tibabyekomya contended that there has been argument that the appellant has changed his submissions from those he made before the lower court. He said, going by the record the appellant had submitted before the lower court that what is under paragraphs (a) – (e) of section 12 of the AMLA constitute the offence of Money laundering under each of those paragraphs. It is the same argument he has made to this court. As to submissions by Mr. Magafu and Dr. Tenga, learned advocates for the first and second respondents, respectively, that paragraphs (a) – (e) of section 12 of the AMLA should be combined for they complete the four stages of Money laundering, the learned Assistant DPP contended that those submissions are misconceived for the reason that are based on Money Laundering Concept and not the law. Section 12 (a) – (d) of the AMLA does not refer to any stages of the concept of Money laundering. As an offence Money laundering is defined under Section 3 of the AMLA. According to the section the offence is divided into five paragraphs. Each paragraph consists of an act prohibited by the law and which is linked to the transaction involving a property. Each paragraph also consists of a *mens rea* in different words. The section ends up with a sentence "commits an offence of money laundering". That is why the

appellant says that Section 12 of the AMLA creates only one offence of Money laundering which can be committee in different forms.

Again Mr. Tibabyekomya stated that the the counel for the third respondent submitted that paragraphs (a) – (d) of section 12 of the AMLA create the *Actus reus* of the crime and the *Mens rea* element of the same is derived from section 3 of the Act which provides for the definition of "Money laundering". According to Mr. Tibabyekomya this is not correct. What is defined under section 3 of the Act is "Money laundering" as a concept. When it comes to the definition of "Money laundering" as an offence, section 3 makes reference to Section 12 of the Act. The learned Assistant DPP, submitted that in order to identify the ingredients of the offence one has to section 12 and not 3 of the Act. Section 12(a) of the Act speaks of "Engagement in Transaction that involves the property that is the proceed of an offence" as an *Actus reus* and "Knowledge that the property is the proceed of a predicate offence" as the *Mens rea.*

On the second ground of appeal Mr. Tibabyekomya contended in rejoinder that the defence counsels submitted in agreement with the finding of the trial SRM that the word "Transferring" that appears in the particulars of the offence in the eighth count is an "act" prohibited by Section 12(b) of the AMLA. He submitted that his learned brothers have taken the word "Transferring" out of context. In the particulars of the offence the word is preceded by the act of "Engagement". It is not used as an act but rather to provide an explanation on how the accused persons involved themselves in the "Engagement". The particulars of the offence under the eighth count therefore show only one act of "Engagement".

Coming to the third ground of appeal Mr. Tibabyekomya does not dispute to the status of marginal notes in a statute as it has been clearly shown by the respective learned advocates for the respondents. However a marginal note cannot be used in contravention of the express provision of the statute. Section 234 of the CPA provides for two situations under which it can be applied. The section can be applied where there is defect in the "For of the Charge" and where there is defect in the "Substance of the Charge". Looking at the words used in the section it is clear that the marginal note does not capture all elements that appear in the section. It is for that reason the appellant challenges the interpretation the trial SRM had accorded to the section. If he had read the words in the section and without relying on the marginal note, the trial SRM could not have reached to the decision he made in this regard. At that stage the noted defect was on the "form" and not the "substance" of the charge. For that reason Mr. Tibabyekomya differs with the learned advocates for the respondents in their submission that it was premature for the court to order for amendment of the charge on ground that evidence was yet to be produced to the court.

Mr. Tibabyekomya also contended that the respondents have submitted that the prosecution did not apply for amendment of the charge sheet. In response, the learned Assistant DPP submitted that the prosecution could not, at that stage, apply for amendment of the charge for there was already a preliminary objection raised by the respondents. The prayer to amend the charge at that stage could have meant the admission to the objection by the prosecution. That could not, however,

have denied the trial from invoking the provision of Section 234(1) of the CPA which is to the effect that the court can order for amendment of a charge sheet where it appears the same to be defective.

As regards to grounds of appeal number four and five, Mr. Tibabyekomya stated in submission that the trial court has inherent powers, the respective counsels for the respondents relied on the provisions of Sections 2 and 6 of the Judicature and Application of Laws Act (JALA) and the decision in the case of **FARID AHMED AND OTHERS (Supra).** The Learned Assistant DPP responded that Sections 2 and 6 of the JALA do not support the submission by the Respondents. Section 2 is applicable to the High Court. Section 6 which is related to Magistrates Courts is subjected to any written laws. There are no laws (as he had submitted in submission in chief) which provide for the inherent powers of the Magistrates Courts, and the decision in **FARID AHMED case (Supra)** should be limited to the facts of that case only. In that case there were irregularities that came out of committal proceedings of that case and which is not a case here. Mr. Tibakyekomya reiterates his submission that subordinate courts have no inherent powers and the decision in **DPP V/S ALEZANDER DUMA (Supra)** remains valid.

In the alternative, the Learned Assistant DPP reiterated his submission in chief that even if the lower court had inherent powers it could not invoke that jurisdiction against the provisions of Section 234 of the CPA under which the court can act *suo motto*.

As to the prayers made by the Appellant, Mr. Tibakyekomya submitted that in Criminal appeals it is not necessary that the appellant should make prayers to the court as it is a case for civil proceedings. Orders in Criminal proceedings are given by the court in accordance to the outcomes of the appeal.

On the basis of his submission in chief and the rejoinder submission the appellant prays the court to find merit in this appeal and accordingly grant the orders sought.

That is all from the parties. From the records and submissions made to the court it not disputed that the Respondents stood jointly and together charged with Money Laundering Contrary to Section 12(a) and 13(a) of the AMLA. This is shown under the eighth count of the charge sheet filed on the 1st day of April, 2016 in the Resident Magistrates Court of Dar es Salaam at Kisutu. Particulars of this offence read as follows:-

> *"HARRY MSAMIRE KITILYA, SHOSE MORI SINARE and SICI GRAHAM SOLOMON, on divers dates between March, 2013 and September, 2015 within the City and Region of Dar es Salaam, directly engaged themselves in a transaction involving United States Dollars Six Million (USD 6,000,000) by transferring, drawing and depositing money relating to that transaction in bank accounts numbers 0240026633702, 0240026633701 and bank account No. 9120001251935 maintained by Enterprise Growth Market Advisors (EGMA) Limited at Stanbic Bank Tanzania Ltd, bank account No. 3300605539 and account No. 3300603692 maintained by Growth*

Market Advisors (EGMA) Ltd at KCB Bank Limited, while they ought to have known that the said money was the proceeds of a predicate offence namely forgery"

As it has been shown herein above, in the ruling of the trial court delivered on 27th of April, 2016 the count was struck out for want of competence and for reasons of being defective in its substance. In reaching to that conclusion the lower found that Section 12 of the AMCA creates five distinct offences and that the act of "Transferring the money" is an offence created under section 12(6) of the AMLA. By alleging it in an offence established under Section 12(a) of the AMLA as it was in this matter, made the count confusing and the accused persons could not be in a position of understanding clearly the offence with which they were charged and enable them prepare themselves for defence.

As to what to do with the defective charge, the trial court considered the provisions of Section 129 of the CPA and found it being not relevant at that stage of the matter as the charge sheet had already been admitted and filed. The court also considered the provisions Section 234(1) of the CPA which provide for room to alter the charge. In his consideration to the section the ward "Trial" used in the section captured the eyes of the trial SRM. In considering the meaning of the term "Trial" and guided by the marginal note to Section 234 of the CPA that *"Variance between charge and evidence"* the court below was of the opinion that at the stage where the investigation of the case is said to be not completed the court may not have powers to order for amendment, substitution or alternation of the charge which it has found to be defective. An order for amendment,

substitution or alteration of charge can only be made by the court at such a time when evidence has been given to the court and not before.

As the statutory provisions above were of no assistance in answering the question what is to be done with the defective charge at that stage of the case, the trial SRM resorted to case law and managed to locate the case of **FARID HADI AHMED AND 21 OTHERS VS. R, MISC. CRIM. APPL. NO. 101 OF 2014, DAR ES SALAAM REGISTRY OF THE HIGH COURT (unreported).** Here the court (His lordship Dr. Fauz Twaib, J) held that even where there is no specific statutory law empowering the court to act on the error, the court can invoke its interest powers to get rid of the error which brings absurdity. From this decision which is binding to the trial court, the court invoked the powers and went on striking out the count.

It is such findings by the court that gave rise to this appeal. Going by the grounds of appeal listed herein above I think it is important for this court to respond to the following issues/questions.

1. Whether or not the trial court erred in law in holding that each paragraph of section 12 of the AMLA creates a distinct offence.
2. Whether or not the trial court was wrong in holding that the eighth count is defective and is so confusing that the accused (respondents) may not be in a position of understanding clearly what offence they are specifically being charged with so as to be able to prepare themselves for defence.

3. Whether or not the trial court erred in law in holding that the charge cannot be amended, substituted or altered under section 234 (1) of the CPA unless the prosecution evidence has been led.
4. Whether or not the trial court was wrong in law in holding that the subordinate courts have inherent powers to control proceeding before them when the need arises.
5. Whether the trial court erred in law in striking out the eighth count of Money Laundering.

In determining the issues I prefer to start with the second one. One way of instituting criminal proceedings in subordinate court is by bringing before a magistrate a person who has been arrested. When an accused person who has been arrested without a warrant is brought before a Magistrate, the Public Prosecutor must present a formal charge containing the statement of the offence with which the accused is charged duly signed by him/her. The mandatory contents of the charge are: **One:** a statement of the specific offence or offences with which the accused person is charged. **Two:** such particulars as may be necessary for giving reasonable information as to the nature of the offence charged (Sect 132 of the CPA). The particulars of the offence/charge must disclose essential elements of offence in order to give the accused a fair trial in enabling him to prepare his defence. This was clearly stated in the case of **ISIDORY PATRICE V/S R. CRIMINAL APPEAL NO. 224 OF 2007, CAT AT ARUSHA** (unreported) and the court held that the charge which does not disclose any offence is fatally defective. In the case of **MUSSA MWAIKUNDA V/S R (2006) TLR 387** the Court of Appeal of Tanzania held that:-

"the principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge discloses the essential elements of the offence ... In the absence of disclosure it occurs to us that the nature of the case facing the appellant was not adequately disclosed to him. The charge was, therefore defective in our view."

Upon considering the above authorities it is my view that a charge which does not lead the accused person to know the case he is facing in court for him to prepare his defence, be it for failure to disclose the essential elements of the offence or bad for duplicity is fatally defective. As to whether the eights count in the case under discussion was suffering such a defect, that depends on the determination of the first ground of appeal and particularly the question whether the word "Transferring" as used in the particulars of the offence under this count constitutes an independent *Actus Rens".* Before responding to the question I find it important to trace that in the subordinate court, it was submitted by Mr. Tibabyekomya (ASS. DPP) that Section 12 of the Anti-Money Laundering Act creates different offences listed under paragraphs (a) – (e) of the section. The trial court agreed with him and it held to that effect. This was, however, not the view of the defence which had maintained that Section 12(a) – (d), which reflect the illicit origin, placement, layering and integration of the property elements of Money Laundering constitute the *Actus reus* part of the crime of Money Laundering committed by the Principal offenders whereas Section 12(e) are acts committed by the aiders and abettors. In this court the Appellant submitted that Section 12 creates only one offence known as

"Money Laundering" and what is under Paragraphs (a) – (e) are the manners in which the offence can be committed. Section 3 of the AMLA defines "Money laundering" as

> *"engagement of a person or persons, direct or indirectly in conversion, transfer, conccalment, disguising, use or acquisition of money or property known to be of illicit origin and in which such engagement intends to avoid the legal consequence of such action and includes offences referred in section 12*

My understanding to the definition the term "Money Laundering" is being inter-changeably used to refer the process which the learned counsels for both sides said has four stages that is; illicit origin, placement, layering and integration of a property and to the offences created under section 12 of the AMLA. As it has been, rightly, stated by the learned counsels, a none-strict liability offence is composed of an *"Actus Reus"* and the *"Means Rea"* that is the act complained of and the mental status of the accused person at the time of commission of the alleged crime. Section 12 has five paragraphs. (Paragraph (a) – (e)). Each paragraph provides for an act *(Actus reus)* and the necessary mental element *(means rea).* For purposes of constituting an offence, the acts and the mental knowledge identified in each paragraph of section 12 of the AMLA suffice. I will, therefore, agree with the trial court that each paragraph under section 12 of the AMLA creates a district offence. I am disassociating, therefore, myself from the submissions to the effect that paragraphs (a) – (d) of the section comprise the *actus reus* of Money Laundering and that section 3 provides for the necessary *means rea.* By the way the *mens rea* element of the offence

must be provided/stated in the section of the law that creates the offence. It cannot be derived from the definitional provision unless such a provision defines such an offence. Again, I will agree with the appellant to the extent that each offence established under Section 12(a) – (a) of the AMLA is called "Money Laundering".

The Respondents' counsels submitted in the alternative that if each paragraph under Section 12 of the AMLA creates an independent offence, then the eighth count is defective for duplicity. They argued that the particulars of the offence under Section 12(a) have borrowed those provided and fit for the offence under Section 12(b) of the AMLA. To be specific, the counsels had submitted that as "Transferring" is an act that constitutes part of the offence established under Section 12(b) it could not be used in the particulars of offence under Section 12(a) of the AMLA. In my view the grave act complained of, according to the particulars is "Engagement". What amounts to "engagement" is not certainly provided for under the Act. In a charge where "engagement" is alleged there must be provided an explanation as to how the accused had engaged directly or indirectly in the transaction of that involves property that is proceeds of a predicate offence. Otherwise there will be remaining a question "How?" unanswered. As used in the particulars of the offence under count number eight the term "Transferring" explains how the accused had engaged in the transaction. It does not stand in itself as an *actus reus* in the offence under Section 12(a) of the AMLA. In the light of this after holding that it was proper for the trial court to hold that each paragraph of Section 12 of the AMLA creates a distinct offence I will answer the second issue, above,

that it was not proper for the trial court to hold the eighth count was defective for it confused the accused persons hence could not comprehend the offence they were facing so as to be able to prepare themselves for defence.

Alternatively, suppose the charge is bad in law for duplicity. Could it be amended, substituted or altered under Section 234(1) of the CPA? Wit a view to answer this question let me first revisit Section 234(1) of the CPA which reads as follows:-

> *"234.-(1) Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as to the court shall seem just'.*

From this provision there was a contest as to when "trial" commences. Mr. Magafu referred the court to the definition of the term as provided for by the Blacks Law Dictionary and submitted that a trial commences when evidence is given in court. The term was also judicially considered by the Court of Appeal of Tanzania in the cases of **THE DPP VS. ALLY NUR DIRIE AND ANOTHER (1988) TLR 252** and **KIGUNDU FRANCIS AND ANOTHER VS. R. CRIMINAL APPEAL No. 134 of**

2010, MWANZA REGISTRY (Unreported). In the former case the court stated as follows:-

> *"A trial commences when an accused person appears before a court or tribunal competent to convict or acquit and after he has been informed of the charge and required to plead".*

In the latter case the court had the following to say:-

> *"In Tanzania, a trial in criminal cases in a subordinate court is governed by the criminal procedure Act and the process begins with the taking of a plea under Section 228".*

Mr. Mgongolwa submitted that, technically, trial commences when accused person is called upon to plead. However Section 234(1) of the CPA requires that the trial commences when evidence is entertained. With due respect, nothing is in the section that attracts for such construction of the section. Section 234(1) of the CPA covers two situations. **One:** the Section provides for a remedy in respect of a defective charge which was never rejected in terms of Section 129 of the CPA where the defect is on the form of the charge. **Two:** the section also provides for a remedy where there is variance between the charge and the evidence received by the court. This the law refers to as the defect in substance. Where the defect in the charge is on the form of the charge, it is not necessary that evidence must have been produced in order for the court to order for amendment, substitution or alteration of the charge. It is also not necessary under this a situation that the prosecution should make an application to amend, substitute or alter the charge. The court may order for the amendment,

substitution or alternation of the charge suo motto. Defect of the charge in substance, is revealed by the variance between the charge and the adduced evidence. Here presupposes that there is material evidence which varies with the charges leveled against the accused person. The court may in such a situation order for amendment, substitution or alternation of the charge. It will do so however upon being satisfied that by the amendment, substitution or alteration there will be no injustice occasioned in the case. The defect of the charge under discussion, if any, did not involve discrepancy between the evidence and the particulars of the offence. It was on the Form of the charge for duplicity was alleged. This, the court could have ordered for amendment without going into the merits of the case. The trial court therefore erred in law in holding that the charge could be amended, substituted or altered under Section 234(1) of the CPA unless the prosecution evidence has been led.

As to whether subordinate courts have inherent powers, Mr. Tibabyekomya submitted that magistrate's courts are the creatures of a statute. The statutes also provide for their mandates. Procedures in the courts also are regulated by legislations. As such subordinate courts have not inherent powers. Referring to Sections 2 and 6 of the Judicature and Application of Laws Act, Dr. Tenga submitted that subordinate courts are possessed with inherent powers which are derived from two sources namely statutes and the common law. One may ask what an inherent power is. The Blacks' Law Dictionary, 8th Edition at Page 1208 defines "Inherent Power" as ***"A power that necessarily derives from an office, position or status."*** The Essential Law Dictionary, By Amy

Hackney Blackwell, at page 247, defines "Interest Powers" ***"Powers and authority that are intrinsic part of an office or position and that exist without being expressly granted."*** These are in-born powers. In our jurisdiction Courts have a Constitutional duty of administering justice in the society. In administering justice courts must have powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. It is not expected that there will be a statute(s) that will provide for every powers necessarily required by the Court, to the Courts. There may be some gaps in which case Courts by virtue of being a Court has inherent powers to necessarily act in such situations for the ends of justice or else the court will remain impotent. For that reason, I will humbly depart from our decision in **MISC. CRIM. REVISION NO. 8 OF 1996, (Tabora Registry), THE DPP Vs. ALEXANDER DUNIA** where the court (Mujulizi, J) held that:-

> *"Now, neither the CPA nor the Penal Code has reserved any Inherent powers of the District Court to exercise a jurisdiction not expressly granted in either Acts. The jurisdiction of the District Court is limited to that it has been granted by statute. In the foregoing premises the learned Senior District Magistrate did not have any inherent powers to act contrary to the express provisions of the law."*

I have demonstrated herein above that the court below was correct when it held that each paragraph under Section 12 of the AMLA creates a distinct offence from another and that each offence under the paragraphs is called "Money Laundering". Although "Transferring" property as an *Actus Reus* in the offence of Money Laundering created under section 12(b) of

Hackney Blackwell, at page 247, defines "Interest Powers" ***"Powers and authority that are intrinsic part of an office or position and that exist without being expressly granted."*** These are in-born powers. In our jurisdiction Courts have a Constitutional duty of administering justice in the society. In administering justice courts must have powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. It is not expected that there will be a statute(s) that will provide for every powers necessarily required by the Court, to the Courts. There may be some gaps in which case Courts by virtue of being a Court has inherent powers to necessarily act in such situations for the ends of justice or else the court will remain impotent. For that reason, I will humbly depart from our decision in **MISC. CRIM. REVISION NO. 8 OF 1996, (Tabora Registry), THE DPP Vs. ALEXANDER DUNIA** where the court (Mujulizi, J) held that:-

> *"Now, neither the CPA nor the Penal Code has reserved any Inherent powers of the District Court to exercise a jurisdiction not expressly granted in either Acts. The jurisdiction of the District Court is limited to that it has been granted by statute. In the foregoing premises the learned Senior District Magistrate did not have any inherent powers to act contrary to the express provisions of the law."*

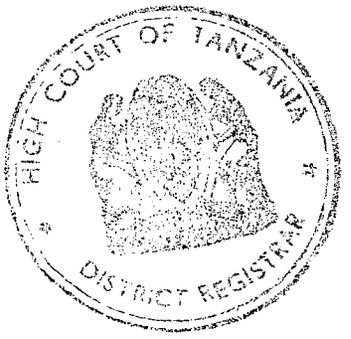
I have demonstrated herein above that the court below was correct when it held that each paragraph under Section 12 of the AMLA creates a distinct offence from another and that each offence under the paragraphs is called "Money Laundering". Although "Transferring" property as an *Actus Reus* in the offence of Money Laundering created under section 12(b) of

the AMLA, it has been used in the particulars of offence under the eighth count to express how "Engagement" which is the *Actus Reus* in an offence established under section 12(a) of the AMLA was. As such, the use of the word "Transferring" in the Particulars did not render the charge defective for duplicity. Even if it were so, the court had powers under section 234(1) of the CPA to order for amendment, substitute or alteration of the charge without considering the merits of the case which necessitate to have evidence been adduced. This is because the defect, if any, was in the "Form" and not the "Substance" of the charge. I have also demonstrated and held that subordinate courts by virtue of being a **Court** are possessed with inherent powers and the trial Senior Resident Registered had rightly so held. The inherent powers as stated above are invoked where there is no the express provision of the statute to cover the situation at hand. They are intended to ensure the ends of justice or to prevent abuse of the process of the court. In exercising the powers the trial court struck out the eighth court. He did so without assigning reasons why he could not invoke the same to order for the amendment of the count it found to be defective. The ends of justice here in any view demand that the trial court ought to have ordered for amendment of the count found to be defective. For these reasons it is my opinion that the trial court erred in law when it struck out the eighth count.

In a result I find merits in the appeal. Accordingly, I allow it and consequently quash the order of the trial court striking out the eighth count. The lower court's record should be returned to the originating for continuation of proceedings. As the matter was not decided on its merits I

will not order that it continues before another magistrate. If there are reasons why it should continue before another magistrate such reasons should be brought before the trial magistrate for his consideration.

Dated at Dar es Salaam this 11th day of August, 2016.



E. J. Mkasimongwa

JUDGE

11/8/2016