IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CRIMINAL SESSIONS CASE NO. 121 OF 2020

REPUBLIC

VERSUS

1. **FARID HADI AHMED**
2. **MSELEM ALI MSELEM**
3. **KASSIM SALUM NASSORO**
4. **ABDALLAH SAID ALI @ MADAWA**
5. **NASSOR HAMAD ABDALLAH**
6. **HASSAN BAKAR SULEIMAN**
7. **ANTAR HAMOUD AHMED**
8. **MOHAMED ISHAKA YUSSUF**
9. **RASHID ALI NYANGE @ MAPARA**
10. **SALUM AMOUR SALUM**
11. **SULEIMAN OTHMAN MAULID**
12. **KASSIM MKADAM KHAMIS**
13. **SALUM ALI SALUM**
14. **HAROUB RASHID ALLY**
15. **ABDALLAH OMARY MZEE**
16. **HASSAN HAMIS HAMIS @ MBERA**
17. **MAGENI ALLI OMARY @ MASTE MGENI**
18. **EX. E6314 D/CPL HMIS MOHAMED @ ALQAEDA @ HAMIS WA UZI**
19. **TESHA RWIZA @ MURSHID @ABUU KATADA**

20. **TWAHA SAID KATUNDU @ DR. GWALUBA @ ADAM TWALIBU**
21. **ALLY KHAMIS ALLY**
22. **SHARIF SULEIMAN SHARIF @ SHEHE SHARIF**
23. **JAMAL NURDIN SWALEHE**
24. **ABDALLAH HASSAN HASSAN @ JIBABA**
25. **HUSSEIN MOHAMED ALI**
26. **JUMA SADALA JUMA**
27. **SAID KASSIM ALI**
28. **KHAMIS AMOUR SALUM**
29. **SAID AMOUR SALUM**
30. **ABUBAKAR IBRAHIM MNGODO**
31. **SALUM ALI SALUM @ AL QAEDA**
32. **ALAWI OTHMAN ABEID**
33. **AMIR KHAMIS JUMA**
34. **SAID SHEHE SHARRIF**
35. **ALLY MWINCHANDE SAID**
36. **MOHAMED MIRAJI IBRAHIM @ NGUSUSU**

RULING

21st, & 23rd April, 2021

ISMAIL, J.

At the instance of the counsel for the accused persons (the Defence), a couple of preliminary objections have been taken, challenging the competence of the charges preferred against the accused persons. These

objections were raised pursuant to a notice of objection in which the accused persons contend as follows:

(i) *That the Court has no jurisdiction to try charges in respect of the incidents that are alleged to have been committed in Zanzibar; and*

(ii) *That the proceedings in respect of counts 17, 18, 19, 20, 21, 24 and 25 have been commenced without consent of the Director of Public Prosecutions.*

It should be noted that the accused persons stand charged with assorted counts of offences preferred under the provisions of the Prevention of Terrorism Act, No. 21 of 2002; and the Armaments Control Act, Cap. 246, R.E. 2019. The offences they stand charged with were allegedly committed in 2013 and 2014. The Information reveals that, whilst some of the offences were committed in various places within the United Republic of Tanzania (URT), some of them were distinctly committed in different places within Mjini Magharibi in Zanzibar.

Noting that these objections bear a potential decisive importance that would determine the fate of the trial proceedings, it was ordered that the preliminary objections be argued and disposed of, before the accused

persons are called upon to take their pleas on the charges levelled against them.

Hearing of the objections pitted Messrs Daimu Khalfan, Juma Nassor, Jeremiah Mtobesya and Abubakar Salim, learned counsel for the accused persons, against Messrs Biswalo Mganga and Paul Kadushi, the Director of Public Prosecutions and Senior State Attorney, respectively, whose services were, as usual, enlisted by the Prosecution.

Getting us under way was Mr. Khalfan, learned counsel, who chose to argue the first limb of the objections. Mr. Khalfan went at it, hammer -and-tongs, arguing that this matter is a misplaced cause which is in this Court irregularly and improperly. The learned counsel was insistent that, this being a court whose territorial powers are confined to Mainland Tanzania, its operation is also limited to issues which arise within the territorial limits set by law. In this case, the counsel argued, the territorial limits of the High Court of the United Republic of Tanzania do not cover offences which were committed in Zanzibar where the High Court of Zanzibar, established under the provisions of the Constitution of Zanzibar and that of the United Republic of Tanzania, operates.

Turning on to the charges levelled against the accused persons, Mr. Khalfan contended that, save for a few, all other counts show that the

offences charged were committed in Zanzibar. The learned counsel further submitted that, the accused persons have been charged under the Prevention of Terrorism Act No. 21 of 2002 (POTA), whose section 34 provides that powers under the Act are vested in the High Court. The counsel argued that, in view of the fact that there are two courts in this Republic *i.e.* the High Court of the United Republic of Tanzania and the High Court of Zanzibar, then the latter has jurisdiction over the offences with which the accused persons are charged. This, in the counsel's contention, is consistent with section 3 of the POTA which contains the phrase ***"as the case may be"***, to connote that the High Court of Zanzibar caters for offences committed in Zanzibar.

Mr. Khalfan held the view that article 108 (1) of the Constitution of the United Republic of Tanzania clearly vests jurisdiction in the Court in matters which are specified in article 115 of the URT Constitution. The learned counsel submitted that article 115 (1) is in relation to powers of the High Court of Zanzibar as stated in the laws applicable in Zanzibar, and in relation to offences under the said laws. Mr. Khalfan further submitted that, in terms of article 93 (1) of the Constitution of Zanzibar, 2010, the High Court of Zanzibar has powers to hear and determine civil and criminal cases. The

defence counsel contended that, since this is a criminal case, whose charges were allegedly committed in Zanzibar, this Court has powers to try it.

Pitching a tent, further still, Mr. Khalfan argued that article 115 (1) of the URT Constitutions has used the word ***"yaweza"***, literally meaning ***"may"***, and that, making sense of the mandatory nature of the said provision would require resorting to sections 3 and 34 (1) of the POTA, the latter of which defines the Court. The counsel's further contention is that the cumulative effect of these provisions is to remove the discretion and place a mandatory requirement of trying the case in the High Court of Zanzibar. The counsel fortified his argument by citing article 151 of the URT Constitution which defines the Court to include the High Court of Zanzibar.

It was Mr. Khalfan's conclusion, in this respect, that the Court has no jurisdiction. He prayed that the matter be dismissed.

In what was bemoaned by the prosecution as a surreptitious introduction of a point which was not listed in the notice, Mr. Khalfan cast aspersions on the legitimacy of the 9th and 10th counts which are founded on the provisions of the Armaments Control Act, Cap. 246 R.E. 2019. The counsel's argument is that, in terms of Paragraph 31 of the 1st Schedule to the Economic and Organized Crimes Control Act, Cap. 200 R.E. 2019, all offences under Cap. 246 are economic offences which are exclusively triable

in the Corruption and Economic Crimes Division of the Court. Mr. Khalfan took a firm view that this Court is not vested with jurisdiction to try the said offences. He contended further that such offences require a consent, issued by the Director of Public Prosecutions under section 26 (1) of Cap. 200, prior to their commencement. The counsel stoutly argued that such consent is lacking in this case. In view of all this, the counsel urged the Court to dismiss the charges.

Weighing in for the defence was Mr. Salim, who argued the second limb of the objections. This ground decries what the counsel contended as lack of the DPP's consent in respect of 17th, 18th, 19th, 20th, 21st, 24th and 25th counts. Mr. Salim submitted that, on 15th September, 2020, the DPP issued a consent under section 34 (2) of the POTA. In the counsel's view, this consent excluded offences listed above. The learned counsel contended that failure, by the DPP, to consent to the prosecution of the accused in respect of the said counts, constituted an irregularity that renders the counts liable to striking out. The defence counsel fortified his argument by citing the decision in ***Matheo Ngua & 3 Others v. Republic***, CAT-Criminal Appeal No. 452 of 2017 (unreported) which cited, with approval, the decision in ***Adam Selemani Njalamoto v. Republic***, CAT-Criminal Appeal No. 126 of 2016 (unreported). In both of the said decisions, the trial proceedings

were adjudged illegal and a nullity for want of the DPP's consent. He, in consequence, prayed that the said counts be adjudged illegal, and liable to dismissal.

The prosecution's rebuttal was full of the usual gusto and razzmatazz that is exhibited in these kinds of trials. Mr. Kadushi, who threw the first jab, wasted no time in punching holes in the defence's submission. In his submission with respect to the first ground of objection, the counsel urged the Court to give the defence submissions a wide birth, and find no fault in the Court's jurisdiction.

The learned attorney argued that, whilst it is true that the powers of the Court are enshrined in article 108 (1) of the URT Constitution, the proper interpretation is that such powers are vested in it by the Constitution or any other law. He contended that, in terms of section 165 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2019 (CPA), offences other than those created by the Penal Code are tried by courts stated in the particular legislation. It is in view thereof, the counsel stated, that the prosecution has resorted to section 34 (1) of the POTA, which guides that the powers in respect of the offences in the said legislation are vested in the High Court.

Mr. Kadushi further argued that section 3 of the POTA defines the Court to mean the High Court of Tanzania, and, as the case may be, the

High Court of Zanzibar. He contended that this definition dwarfs or casts away what he considers as a flawed interpretation made by the defence. He invited the Court to hold that that the word ***"yaweza"*** used in article 115 (2) means ***"may"***, whose application is optional and it conveys the meaning that both of these courts enjoy concurrent powers. The learned attorney sought to solidify his argument by relying on the definition found in the Black's Law Dictionary, 8th Ed., p. 868, in which "concurrent jurisdiction" was defined to mean the simultaneous exercise of the powers by more than one court. In this case, Mr. Kadushi argued, article 115 (1) is intended to convey the meaning which implies that exercise of powers by these two courts is shared *i.e.*, concurrent, adding that, if the intention was different, then the law would expressly state so. It was the prosecution's argument that rules of statutory interpretation dictate that, where the words used in a statute are plain then such provision of the law must be interpreted as it is. On this, the learned counsel invited the Court to be guided by the holding in ***Republic v. Mwesige Geofrey & Another***, CAT-Criminal Appeal No. 355 of 2014 (unreported), in which it was held that courts must presume that statutes mean what they say and say what they mean. He was insistent that the provisions of the laws cited are clear, plain, and they ought to be

interpreted as they say. He implored the Court to reject the defence's contention out of hand.

Submitting in the alternative, Mr. Kadushi asserted that it is not correct to say that the word ***"may"*** is meant to have an imperative connotation, adding that such interpretation defies the clear intent of the substance of section 53 (1) and (2) of the Interpretation of Law and General Clauses Act, Cap. 1 R.E. 2019, in which the word ***"may"*** conveys the meaning that the doing of it is discretionary.

Mr. Mganga added some potency to the prosecution's argument. Besides decrying the defence's inclusion of the objection, midway through the proceedings, he took the solace from the fact that such inclusion constituted the defence's concession to the contention that jurisdiction is both statutory and evidential. He began by submitting that section 24 of the POTA vests powers in the High Court and that, since this provision does not specify the court, resort has to be had to article 64 (4) (a) of the URT Constitution which provides that a union law will not be applicable unless conditions for its applicability are met. The prosecution's counsel argued that section 2 (2) provides for a universal application that allows the Court to handle cases irrespective of where the offences leading to the such cases

were allegedly committed. He argued that, since Zanzibar is part of the URT, this Court is vested with powers to try the case.

Expounding further on the law, Mr. Mganga submitted that section 2 (2) of the POTA was enacted in consistence with the International Convention for Suppression of Terrorism Bombings which deals with terrorist attacks by means of explosives. The counsel took the view that, under the said Convention, the charges would still be tried by this or any other court, irrespective of the place at which such offences were allegedly committed. To buttress his contention, Mr. Mganga drew the Court's attention to the South African case of ***State National Prosecutions and Henry Emomotimi Okah***, Case No. CCT 315/16 & CCT No. 193/17, in which a suspect of the bombing in Nigeria was charged in a court in South Africa for the charges which were also a violation of the provisions of the Convention. In Mr. Mganga's view, the South African Constitutional Court found nothing irregular on that. The prosecution insisted that this position is in sync with the Court of Appeal's decision in ***Attorney General v. Mugesi Anthony & 2 Others***, CAT-Criminal Appeal No. 220 of 2011 (unreported). Inspired by the said decision, the learned attorney urged this Court to hold that the Court is vested with jurisdiction.

In yet another limb of the same ground of objection, Mr. Mganga submitted that jurisdiction of a court may also be factual or evidential, arguing that evidence or facts may govern jurisdiction, and that such jurisdiction can be ascertained by looking at the information and the available evidence. He held the view that, since offences in these proceedings are alleged to have been committed in multiple places, the elimination process of other jurisdictions would require adduction of evidence which is a subject of a later stage of the trial proceedings. The learned attorney argued that circumstances of this case are catered for by the provisions of section 181 of the CPA, and that in this case, the consequences of the actions complained about ensued in Zanzibar, but the concurrent jurisdiction enjoyed by both courts justifies trial of the offences by this Court. He argued that splitting the counts is a recipe for a couple disasters. The first is that the Court may find itself heading into a collision course with the Court in Zanzibar, an act that is bound to create disharmony in the credibility of the Courts. Mr. Mganga argued that this is the reason why section 181 of the CPA was brought into play. The second contention is that witnesses in the two cases will have to shuttle to and from both courts, thereby creating problems that may defeat ends of justice. The learned attorney cited the Indian case of ***Mahender Chawla & Others v. Union***

of India, Writ Petition (Criminal) No. 156 of 2016, in which the Supreme Court of India took the view that, in such circumstances, cases of that type should be tried in and by the same court.

Submitting with respect to 9th and 10th counts, the prosecution submitted that paragraph 31 of the 1st Schedule to Cap. 200 deals with fire arms and not armaments. Mr. Mganga was quick to add that the proper provision is paragraph 32. He argued that, even then, the question to be resolved is: when did the said offences become economic offences? He took the view that the offences were introduced to Cap. 200 through Act No. 3 of 2016, which became operational on 7th July, 2016. He argued that, in terms of section 57 (1) of Cap. 200, offences become economic offences when they are included in the 1st Schedule, by the law. Mr. Mganga held the view that, since the law did not have a retrospective effect, then its passage cannot affect offences which were committed in 2014. He was firm in his view, that the amendment carried substantive rights of the parties which included enhancement of the punishment from 7 and 15 years spelt out in section 18 of Cap. 246, to 20 and 30 years spelt out in section 60 of Cap. 200. He was of the contention that these offences are, in view thereof, non-economic. The prosecution fortified its argument by citing the decision of the upper

Bench in ***Lala Wino v. Karatu District Council***, CAT-Civil Application No. 132/02 of 2018 (unreported).

With respect to consent, Mr. Mganga submitted that offences charged fall under section 4 (1) of the POTA, while the rest of the cited provisions merely provide modes of commission of the offences. Based on that understanding, argued Mr. Mganga, institution of proceedings in respect of the said offences had been consented to. Maintaining that objectives of the criminal law and trial should be conformed to, Mr. Mganga argued that citing of nitty-gritty provisions of the law would only serve to inflict greater pain than is necessary.

Submitting on counts 24 and 25, the learned attorney laughed off the arguments raised by the defence counsel, and argued that section 15 (b) of the POTA has been cited, and that the consent issued in this case stated that substance of the consented charges were to be extracted from the particulars of the charges. He termed "a slip of the pen", citation of section 15 (b) citied as the basis for the issuance of the consent in respect of the offences, while the appropriate provision is section 15 (a) of the POTA. He blamed the slip on the use of marginal notes. He took the view that this anomaly was of a trifling effect, and curable by an amendment that is allowed under section 276 of the CPA. Mr. Mganga held the view that such

amendment would not occasion an injustice to any party. He urged the Court to be guided by Article 107A (2) (e) of the URT Constitution which shuns technicalities.

Rejoining on article 93 of the Zanzibar Constitution, the learned attorney argued that this was inapplicable to union issues, while with respect to ***Matheo Ngua's case***, the contention is that, in the said case no consent, whatsoever, was granted, while in the instant matter the requisite consent was issued, and a copy thereof has been served on the defence. With regards to the prayer for dismissal or striking out of the proceedings, Mr. Mganga's take is that this contention is utterly misplaced and militating against the reasoning in ***Cyprian Mamboleo Hizza v. Eva Kioso & Another***, CAT-Civil Application No. 3 of 2010 (unreported). He was of the view that none of the prayers is applicable to this case. The counsel urged the Court to overrule the objections.

In a swift rejoinder, the defence team poured cold water on the prosecution's arguments. Through Mr. Nassor, the defence began by conceding that it is true that this Court and its Zanzibar counterpart enjoy concurrent powers, but the difference is that, where offences are committed in Zanzibar, the same are only triable in Zanzibar. The learned counsel argued that the words ***"as the case may be"*** contained in section 3 of the

POTA are there for a purpose, and the purpose is to show that offences charged under the provisions cited by the prosecution do not touch on the territorial jurisdiction of the Court, where cases originate from Zanzibar. Mr. Nassor further argued that court issues at the level of the High Court are not union matters which would allow trial, by the Court, of the matters originating from Zanzibar. He took the view that article 115 (2) of the URT Constitution does not vest powers in the Court to deal with issues that arise from Zanzibar. The counsel maintained that jurisdiction is a creature of the statute, and that such jurisdiction ought not to be implied. Rather, the same ought to be expressly provided.

Revisiting the provisions of section 2 (2) of the POTA, the learned counsel argued that the same talk about offences committed outside the URT while, in this case, Zanzibar is part of the URT. Mr. Nassor argued that, if the law intended that such offences be covered, then the said law would have expressly stated so. He held the view that the Convention and the cases cited are of no consequence, maintaining that the powers conferred on the Zanzibar Court, by the POTA, cannot be wrestled from it by this Court, as doing that renders the phrase ***"as the case may be"*** useless.

With respect to convenience, Mr. Nassor asserted that that argument is lame, on the ground that jurisdiction is not dependent on the party's

convenience or availability of witnesses, while invocation of section 181 of the CPA was castigated, on the contention that the same is irrelevant, on account of the fact that such legislation is inapplicable in Zanzibar. He argued that the applicable law in Zanzibar is the Criminal Procedure Act, No. 7 of 2018.

Discounting the scope of applicability of section 34 of the POTA, the defence counsel argued that the said provision was not intended to serve as a blank cheque which would hand the prosecution a favourable choice of forum for institution of the proceedings, lest an absurdity is allowed to creep in. He argued that circumstances of these proceedings dictate that a control be put in place, and that, in this case, such control is the territorial jurisdiction. He wound up by arguing that it is the law which should determine jurisdiction of the Court and not the whims of the DPP, adding that the Court should not be allowed to meddle in the affairs or powers of the High Court of Zanzibar.

Mr. Mtobesya, another of the defence team, went for the jugular. He began by associating his submission with the decision in ***Mwesige Bushahu.*** He argued that the reasoning in the cited case fortifies the position that article 115 (2) of the URT Constitution and sections 3 and 34 of the POTA provide a plain meaning to the effect that it is the circumstances

which will determine jurisdiction of the Court. He submitted that the cumulative effect of these provisions is that both courts have concurrent jurisdiction on these matters. The counsel asserted that, in this case, the facts are clear that the offences were allegedly committed in Zanzibar, by virtue of fact of which they are an exclusive preserve of the Court in Zanzibar, where there is a complete criminal procedure regime distinct from what obtains in the Mainland. The counsel argued that concurrent jurisdiction was never intended to provide a leeway for forum shopping as the prosecution appears to do.

With regards to the South African case and the Convention, the contention by Mr. Mtobesya is that both of them are of a persuasive effect, arguing that, since our country is a dualist, it is a matter of necessity that the Convention be ratified and domesticated through a legislation. It was his argument that, as long as this is not contained in the POTA, the same is merely of persuasive effect with no need of resorting to it. He contended that, unlike the South African case where offences were said to have been committed else, the instant proceedings have 'impleaded' the accused persons who are alleged to have committed the offences in Zanzibar, a distinguishing factor that should not be discounted.

On the conferment of jurisdiction through facts and evidence, Mr. Mtobesya argued that preliminary objections, when raised, assume that facts as pleaded are correct, and that, in this case, what is gathered is that the offences were committed in Zanzibar. On the disharmony in the prosecution, the defence counsel found nothing tacky in the argument, arguing, instead, that the party's convenience cannot confer jurisdiction on a court. With regards to retroactivity of the law, the learned counsel contended that jurisdiction is a procedural aspect that has nothing to do with substantive issues of the case. He argued that, as a matter of law, procedural laws are of retrospective effect, unless the contrary is clearly stated. He reiterated the defence's rallying call that, in terms of section 3 of Cap. 200, this Court has no jurisdiction over the matter.

The defence closed its arguments through Mr. Salim who tackled the question of consent. While reiterating that prosecution of some of the counts was not consented, the counsel submitted that the prosecution's argument that hardships would be occasioned by consenting to every item of the charges, is hollow. The reason, Mr. Salim argued, is that when the DPP issued his consent under section 4 (3) (a) of the POTA, the alleged unnecessary hardship did not arise. The defence saw no reason to put hardship as an insulation against his failure to consent to the prosecution of

every offence, including those that are founded on sub-section 3 (a). He still maintained that the imperative requirement of doing so stems from section 34 (2) of the POTA.

Mr. Salim has also taken a serious exception to the prosecution's view point that the DPP's reliance on the marginal notes is a mere slip of the pen. The counsel argued that the DPP's reliance on the marginal notes was an affront to section 26 (2) of Cap. 1 which states that marginal notes are not part of the law.

On the proposal for amendment of the consent, the learned counsel's view is that, if acceded to, such amendment will have been made at the instance of the defence, an irregular conduct as is the amendment of a charge after a preliminary objection has been taken. He submitted that amendments which suit particulars of the consent are equally irregular and abhorrent. Mr. Salim fortified his argument by citing the decision of the Court in **Editha Sigar v. Alex Myovela & Another**, HC-Civil Appeal No. 10 of 2020 (unreported). The counsel urged the Court to strike out the anomalous charges.

Let me begin the unenviable task of making sense of the counsel's rival submissions by giving a note of commendation to them for the immense effort that they have exhibited in the course of the hearing. The potency of

their representations was nothing short of scintillating, and their conduct throughout the proceedings was top-notch and admirably splendid. The rival arguments were prolific and resounding.

Having meticulously leafed through the lengthy contending submissions, the profound question that emerges for determination by the Court is whether, on account of the raised objections, this Court is clothed with jurisdiction to entertain the present proceedings.

As I embark on the disposal journey, it is apposite that a general foundation on jurisdiction and the importance it carries, be laid. The trite position is that courts and tribunals are under obligation to satisfy themselves as to whether they are vested with jurisdiction to handle matters which are placed before them. This basic requirement is intended to guard courts and tribunals against possible involvement or meddling in the affairs in respect of which they have no power to determine. Emphasis in respect thereof was accentuated by the Court of Appeal of Tanzania in ***Fanuel Mantiri Ng'unda v. Herman M. Ng'unda***, CAT-Civil Appeal No. 8 of 1995 (unreported), in which the upper Bench held as follows:

> *"The jurisdiction of any court is basic, it goes to the very root of the authority of the Court to adjudicate upon cases of different nature ... the question of jurisdiction is so fundamental that courts must, as a matter of practice on the*

face of it, be certain and assured of their jurisdictional position at the commencement of the trial. ***It is risky and unsafe for the court to proceed on the assumption that the court has jurisdiction to adjudicate upon the case.***" [Emphasis supplied].

It is worth of a note, as well, that jurisdiction is vested in a court or tribunal by statute, or an instrument executed by the parties, conferring upon such body powers to admit and handle a dispute. It also implies that jurisdiction is not a matter that the parties can impose on a forum, severally or jointly, merely to suit their convenience. The fact that jurisdiction is often a statutory creation was underscored in ***Shyam Thanki and Others v. New Palace Hotel*** [1972] HCD No. 97, wherein it was stated:

> *"All the courts in Tanzania are created by statutes and their jurisdiction is purely statutory. It is an elementary principle of law that parties cannot by consent give a court jurisdiction which it does not possess."*

See also ***Consolidated Holding Corporation Ltd. V. Rajani Industries Ltd & Bank of Tanzania***, CAT-Civil Appeal No. 2 of 2003 (unreported).

Reverting to the subject of this ruling, I first choose to dispose of the disquieting issue of the Court's jurisdiction over the 9th and 10th counts which

have since attained an 'enhanced' status of economic offences. As stated earlier on, the issue of jurisdiction of the Court with respect to said counts featured midway through the proceedings, and the argument advanced by the defence is that the two counts, which arise from the Cap. 246, are economic offences that are, under section 3 of Cap. 200, triable by a specialized division of the Court on corruption and economic cases. This contention has been shrugged off by the prosecution, on the sole ground that these were not economic offences when they were committed, and that they were included in the 1st Schedule to Cap. 200, by an amendment introduced in 2016 (through Act No. 3 of 2016). This submission triggered yet another frontier for consternation by the parties. This is as to whether such amendment is in respect of a procedural law whose application has a retrospective effect. Not unexpectedly, the counsel for both sides have a varied opinion on this.

While there are no qualms on the retrospective effect of procedural laws, when introduced, the question that should engross my mind is whether the amendments introduced through Act No. 3 of 2016 are procedural in nature and, they, therefore, apply in retrospect. Of interest in these amendments is the introduction of Item 32 to the 1st Schedule to Cap. 200, and elevation of erstwhile normal offences under Cap. 246, to a new height

of being an economic offence. As correctly stated by the prosecution counsel, these amendments became operational on 7th July, 2016. I must state, at this point in time, that I am not oblivious to the fact that this reality, alone, would not have the effect of casting away, so early, the defence's contention that the commencement date notwithstanding, the law's operational effect stretches back to the date of the alleged commission, because of what is argued to be a procedural amendment. With utmost respect to the defence counsel, however, this is a flawed view that I decline to get along with. My divergence is premised on the fact that the amendments introduced to the law are far too wide, touching not only on jurisdiction of the Court which has been narrowed, but also the substantive rights of the parties, especially the would-be offenders. For instance, the amendments have altered the sentence from what was relatively modest to a much sterner custodial punishment and/or a hefty fine. In my view, even the structure of the trial of the proceedings has also been given a 'face lift' that it did not have before the amendment. For the first time, trial of the offences under Cap. 246 are subjected to issuance of the DPP's consent, whilst the charges are exclusively triable by the division of the Court, and not any other Court as was the case prior to the amendment.

The changes are, in my considered view, too radical and profoundly mammoth to be considered as paltry or procedural and, therefore, having a retroactivity in its application, in the same mould stated in ***Laia Wino v. Karatu District Council*** (supra), or in ***Gasper Peter v. MTUWASA***, CAT-Civil Appeal No. 35 of 2017 (unreported). I take the view that the amendments have introduced changes which are substantive, and I am in agreement with the prosecution's contention that the net of such amendments cannot be cast so wide as to include offences which, at the time of their alleged commission or institution of the preliminary inquiry matter, were not economic offences for which sections 3 and 26 (1) of Cap. 200 would apply.

As I consign the defence's objection to the dustbin of oblivion, I take the view that there is nothing untoward in the prosecution's conduct in these two counts. My view is bolstered by the decisions in two Indian cases of ***SMT Dayawati & Another v. Inderjit & Others***, AIR 1423, 1966 SCR (3) 275; and ***Pareed Lubha v. K.K. Nilambaram***, AIR 1967 Ker 155, 1967, which I consider to be of a high persuasive value. In the former, the Supreme Court guided as follows:

> *"Now as a general proposition it may be admitted that ordinarily a Court, cannot take into account a new law, brought into existence, as a new law ought to be prospective*

not retrospective in its operation, the law affecting procedure is always retrospective. If new law speaks in language, which expressly or by clear intendment in takes in even pending matters, the Court must regard to an intention so expressed and may give effect to such a law even after the judgment."

It is this same line of thinking which was adopted in the subsequent decision in ***Pareed Lubha*** (supra) wherein it was held:

"If the act was not an offence on the day it fell due, the defaulter could not be convicted for the omission to pay under a law passed subsequently even if it covered old dues. This protection covers against conviction or sentence for criminal offence."

See also: ***George Moshi v. Republic***, CAT-Criminal Appeal No. 517 of 2016 (TBR-unreported); and ***Republic v. Kenya Anti-Corruption Commission & Others*** [2006] 2 EA 275.

The other disputation resides in the defence's contention that prosecution of some of the counts falling under the provisions of the POTA has not been consented to as the law requires. The prosecution has conceded that this imperative requirement was skipped. The misstep is attributed to what Mr. Mganga has christened as "a slip of the pen", mainly

influenced by the prosecution's reliance on the marginal notices. While, for the reasons which will be apparent soon, I will not delve into the thick and thin of the substantive part of the objection, it behooves me to drop a liner or two on the status or significance of the marginal notes in a provision. I do that by attempting to define the words "Marginal Notes". They are defined by ***Black's Law Dictionary***, 8th edn., 2004 to mean:

> *"A brief notation, in the nature of a subheading, placed in the margin of a printed statute to give a brief indication of the matters dealt with in the section or subsection beside which it appears. For ease of reference, marginal notes are usu. in distinctive print.* ***Many jurisdictions hold that notes of this kind cannot be used as the basis for an argument about the interpretation of a statute.*** *— Also termed side note."* [Emphasis is added].

This definition highlights what is provided for in section 26 (2) of the Cap. 1, cited by Mr. Salim, which states as follows:

> *"A marginal note or footnote to a written law and, notwithstanding subsection (1), a heading to a section, regulation, rule, by-law, or clause of a written law shall be taken not to be part of the written law."*

A much clearer position on the subject can be gathered from an Indian case of ***Tata Power Company Ltd. and Others v. Maharashtra Electricity Regulatory Commission & Others***, Appeal No. 212 of 2013, in which the India's Appellate Tribunal for Electricity held as follows:

> *"Chapter headings and the marginal note are parts of the statute. They have also been enacted by the Parliament. There cannot, thus, be any doubt that it can be used in aid of the construction. It is, however, well settled that if the wordings of the statutory provision are clear and unambiguous, construction of the statute with the aid of 'chapter heading' and 'marginal note' may not arise. It may be that heading and marginal note, however, are of very limited use in interpretation because of its necessarily brief and inaccurate nature. They are, however, not irrelevant.* ***They certainly cannot be taken into consideration if they differ from the material they describe.***"

[Emphasis is supplied].

See also: ***Hubert Lyatuu v. TANESCO,*** HC-Revision No. 90 of 2018 (MZA-unreported); ***CIT v. Ahmedbhai Umarbhai and Co***. [AIR 1950 SC 134].

In view of the foregoing, I hold the view that, issuance of a consent on the basis of what was contained in the marginal notes was nothing short of an erroneous indulgence, and the justification given by the prosecution is

simply underwhelming. Whilst these authorities settle the matter in Mr. Salim's favour, I take the view that, this is the furthest I could go with respect to this point of objection, knowing that the merits in the first ground of objection will also address this ground of objection.

Reverting to the first ground of objection, the gravamen of the defence's complaint is that, since the offences constituting the charges were committed in Zanzibar, the impending trial proceedings in respect of the said charges ought to be conducted in a court in Zanzibar. Mr. Khalfan and his other defence colleagues take the unanimous view that this is the perfect opportunity in which the phrase "as the case may be", may be put into use, implying that it is the High Court of Zanzibar that is statutorily suited to handle the trial proceedings. The divergent view by the prosecution is premised on the provisions of Article 108 of the URT Constitution, sections 3 and 34 of the POTA and section 165 (1) of the CPA, all of which allegedly vest powers in the Court in matters of this nature. The prosecution has also made a resort to the Convention for Suppression of Terrorist Bombings, and the reasoning in a couple of judicial pronouncements in India and South Africa. The argument is that, if offences can be committed in a foreign country and the resultant trial is conducted in another country, then offences allegedly committed in Zanzibar are triable by this Court.

I have unfleetingly gone through the information that has instituted these proceedings. What comes out is that, out of the 25 counts that the accused persons are facing, 14 counts were allegedly committed in Zanzibar, while the rest of the offences had a chain of occurrences which touched on several places, in Tanzania Mainland and parts of Zanzibar. Those that were exclusively committed in Zanzibar are:

(i) *Participating in a terrorist meeting (4th count);*

(ii) *Possession of property intended for the commission of terrorist act (12th count);*

(iii) *Provision of a facility for a terrorist meeting (13th and 14th counts);*

(iv) *Causing death with terrorist intention (17th count);*

(v) *Causing serious bodily harm with terrorist intention (18th, 19th, 20th and 21st counts);*

(vi) *Causing serious damage to property with terrorist intention (22nd and 23rd counts); and*

(vii) *Use of property for commission of terrorist act (24th and 25th counts).*

It is also a unanimously shared fact that most, if not all, of the accused persons were apprehended and incarcerated in Zanzibar before they were

subsequently conveyed to Dar es Salaam where they were arraigned. The view taken by the defence is that, as long as the accused persons were apprehended in Zanzibar and have some of the offences committed outside Zanzibar, then their 'port of call' is, in terms of the cited provisions, the High Court of Zanzibar.

As stated above, in this case, jurisdiction of a court in which the proceedings should be tried is a creature of the Constitutions (URT and that of Zanzibar) and provisions of the POTA, the CPA, and Act No. 7 of 2018. In this respect, the starting point is article 115 (2) of the URT-Constitution, which states as follows:

> *"Bila kuathiri masharti ya Katiba hii au sheria nyingine yoyote iliyotungwa na Bunge, iwapo sheria yoyote iliyotungwa na Bunge inayotumika Tanzania Bara na vile vile Tanzania Visiwani imekabidhi madaraka yoyote kwa Mahakama Kuu, basi Mahakama Kuu ya Zanzibar yaweza kutekeleza madaraka hayo kwa kiasi kile kile inavyoweza kutekeleza Mahakama Kuu ya Jamhuri ya Muungano."*

This provision, as unitedly submitted by counsel for both sides, confers concurrent jurisdiction on this Court and the High Court of Zanzibar. The condition precedent, however, is that such jurisdiction must be in respect of a law whose application touches both sides of the isle *i.e.* Tanzania Mainland

and Tanzania Zanzibar. It is also in relation to offences commktted in that local limits of either of these Courts. The involvement of the High Court of Zanzibar is also reflected in the Constitution of Zanzibar, 1984 (as amended), whose article 93 (1) of provides as hereunder:

> *"Kutakuwa na Mahkama Kuu ya Zanzibar ambayo itakuwa ndio Mahkama ya kumbukumbu na kuwa na mamlaka yote ya kesi za jinai na madai na nguvu nyengine zitazopewa kwa mujibu wa Katiba hii au Sheria nyengine yoyote."*

With respect to offences triable under the POTA, Section 2 (1) is to the effect that:

> *"The Act shall apply to Mainland Tanzania as well as to Tanzania Zanzibar."*

Significantly, as contended by the defence, the definition of a court, captured in Section 3 of the POTA, factors in the High Court of Zanzibar, as the case may be, as a forum before which offences under the said law can be tried. I take the view that, by choosing the phrase "as the case may be", the statute intended to mean that "depending on the circumstances" a phrase that takes into account that there are several possible consequences or causes of action, or that either of the two things may be true.

In my humble view, this means that involvement of the Court in Zanzibar is dependent on the circumstances of the case, and one obvious circumstance is where offences with which the accused persons are charged were committed within the local limits of the Court. The view is given further credence by the substance of sections 180 and 181 of the CPA, read together with sections 85 and 86 of the Criminal Procedure Act of Zanzibar. Both sets of the law insist that, where it is alleged that offences have been committed then the same should be inquired into or tried by courts that are within the local limits of such occurrence. For ease of reference and clarity, it is apt that the substance of the said provisions be reproduced as hereunder:

Section 180 of the CPA:

> *"Subject to the provisions of section 178 and to the powers of transfer conferred by section 189, 190 and 191, every offence shall be inquired into and tried, as the case may be, by a court within the local limits of whose jurisdiction the accused person was apprehended, or is in custody on a charge for the offence, or has appeared in answer to a summons lawfully issued charging him with the offence."*

Section 181 of the CPA is to the effect that:

> *"Where a person is accused of the commission of any offence by reason of anything which has been done or of any consequence which has ensued, the offence may be*

inquired into or tried, as the case may be, by a court within the local limits of whose jurisdiction any such thing has been done or any such consequence has ensued."

Section 85 of the Criminal Procedure Act, 2018:

"Subject to the provisions of section 83 of this Act and to the powers of transfer conferred by section 95 and 97 of this Act, an offence shall ordinarily be inquired into or tried by a court within the local limits of whose jurisdiction it was committed."

Section 86 further underscores the following requirement:

"When a person is accused of the commission of any offence by reason of anything which has been done or of any consequence which has ensued, such offence may be inquired into or tried by a court within the local limits of whose jurisdiction any such thing has been done or any such consequence has ensued."

In the case of section 181 of the CPA, which was cited by the prosecution, the use of the words "***anything***" is meant to refer to an offence(s) allegedly committed by the accused. Thus, if one were to take an example of the 4th count, "***anything***", in that count, would refer to the act of participating in a terrorist meeting that is alleged to have been held at Imani Mosque, Kiembe-Samaki and Msumbiji Mosque, within Mjini Magharibi in Zanzibar. It comes out, as well, that the locations are also within the local

limits in which the consequence of the alleged meeting ensued. This would apply to other counts and, in my conviction, if such things occurred in multiple locations, then the courts in the local limits within which such things occurred, or consequences ensued, will enjoy concurrent jurisdiction. It will now be a matter of where the prosecution elects to institute the proceedings.

I take the view that, for offences which were allegedly committed in Zanzibar or the consequences thereof ensued in Zanzibar, the proper forum to inquire into or try the accused persons is the High Court of Zanzibar, and this is where the phrase ***"as the case may be"*** comes in handy. Inevitably, this will require crossing some of these counts off the list of the offences triable by this Court, and rid the Court of the hassles of having to inquire into or try the accused persons in respect of the issues which are not within its remit. The prosecution's contention would carry some form of plausibility or find purchase if the POTA, whose application in the Isles had not been approved or ratified by the Zanzibar House of Representatives. None of the parties addressed the Court on that, implying that such requirement was met.

The prosecution has set this matter in a trajectory which invites the applicability of the international law. It has done so by bringing into play the International Convention for Suppression of Terrorist Bombings, and the

Okah Case and the Indian case of ***Mahender Chawla*** (supra). While I take cognizance of the painstaking effort employed in traversing far and wide in fortifying its position, I, respectfully, take the view that circumstances of this case do not suit the like for like application of the said authorities. The reason for my contention is threefold. ***One***, there is no evidence that this Convention was, after the country's accession to the same (if it was), adopted in order to make it part of our law. ***Two***, there is no evidence that the said convention was domesticated by the Parliament subsequent to it accession. ***Three***, even if the said Convention was domesticated and made applicable here in Tanzania, its effectiveness cannot override that of the Municipal Law applicable in this respect, such as the Constitution, the CPA, POTA and the Criminal Procedure Act of Zanzibar. Since the Convention, if adopted and domesticated, would be of persuasive effect, I find nothing to persuade me to follow the path which is enshrined in it. With respect to the ***Okah case*** (supra), my further contention is that the circumstances in that case are dissimilar to the present proceedings, more so, since the offences in the said case were transnational, involving two jurisdictions in two distinct countries. In our case, Zanzibar is part of the United Republic of Tanzania and in respect of which a frame work for handling such cases is vibrant, and alive and kicking.

The defence has cited the hassles and inconveniences which will mar the conduct of proceedings in two jurisdictions. With immense respect to the prosecution's counsel, I hold that this argument lacking the necessary cutting edge that would resonate and justify the decision to grab jurisdiction from a court to another court. Convenience or lack of it is too light a justification to merit such a weighty statutory decision. I choose to give it a shrug.

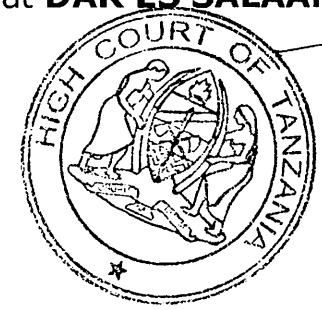
In view of the foregoing, I am convinced that this ground of objection raises a serious point of law that should partly succeed. The success is with respect to counts 4, 11, 12, 13, 14, 17, 18, 19, 20, 21, 22, 23, 24 and 25. As introduced earlier on, these counts are in relation to incidents which were alleged to have occurred exclusively within Mjini Magharibi Region, Zanzibar, within the local limits for which the High Court of Zanzibar has territorial jurisdiction. This means that, the rest of the counts whose alleged commission is a chain of multiple places and triable by this Court, shall continue to be tried by the High Court of Tanzania. Needless to say, this will entail this Court making an order, as I hereby do, consistent with section 276 (2) of the CPA, for an amendment of the information with a view to chalking off the counts which are not triable by the Court. This will leave the information with 11 counts that are triable by this Court. The amendment

order has to be complied with within three days from the date hereof, unless the parties appeal against this decision.

It is in view of the finding in the first objection, that I find that the objection on the propriety or otherwise of the consent plays second fiddle or rendered redundant.

It is so ordered.

DATED at **DAR ES SALAAM** this 23rd day of April, 2021.



M.K. ISMAIL

JUDGE

Date: 23/04/2021

Coram: Hon. M. K. Ismail, J

For the Republic: 1st Mr. Biswalo Mganga - DPP

2nd Paulo Kadushi - Principal State Attorney

3rd Ms. Pendo Makondo - Principal State Attorney

4th Mr. Faraja Nchimbi - Principal State Attorney

5th Ms. Mwaija Ahmed - Principal State Attorney

6th Mr. Abdallah Chavula - Senior State Attorney

7th Mr. Robert Kidando - Senior State Attorney

8th Mr. Salum Msemo - State Attorney

9th Mr. Ignas Mwinuka - State Attorney

For the Accused: 1st Mr. Juma Nassor, Advocate

2nd Mr. Aboubakr Salim, Advocate

3rd Mr. Jeremiah Mtobesya, Advocate

4th Mr. Abdallah Juma, Advocate

5th Mr. Jeremiah Mtobesya, Advocate

6th Mr. Abdulfatah Abdallah, Advocate

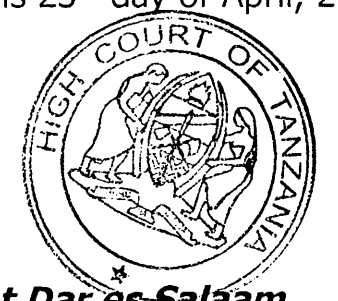
7th Mr. Hussein Hittu, Advocate

Accused persons: Present in Court

C/C: Salma

Court:

Ruling on Preliminary Objection delivered in camera, in the presence of the Counsel for both sides and in the presence of the accused persons, this 23rd day of April, 2021.



M. K. Ismail

JUDGE

At Dar es Salaam

23rd April, 2021