IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: LILA, J.A., MWANDAMBO, J.A., And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 325 OF 2019

BONIFACE THOMAS MWIMBWA .....1ST APPELLANT

ELIAS PANCRAS NDEJEMBI.....2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Maige, J.)

dated the 09th & 10th day of May, 2019

in

Criminal Sessions Case No. 77 of 2017

.....

JUDGMENT OF THE COURT

5th October 2022 & 19th April, 2023

MWANDAMBO, J.A.:

The High Court, sitting at Arusha convicted the appellants herein with the offence of money laundering to which they stood charged and sentenced to pay a fine of TZS 100,000,000.00 each failing which, serve five years' imprisonment.

The appellants were the third and fourth accused persons before the trial court charged jointly with two counts of conspiracy to commit an offence contrary to section 384 of the Penal Code and money

laundering contrary to sections 12 (e) and 13 (a) of the Anti-Money Laundering Act (the AMLA) to which they pleaded not guilty. They were charged along with Median Boastice Mwale and Don Bosco Ooga Gichana, first and second accused respectively who faced numerous other counts not directly relevant to the determination of the appeal. The particulars of the offence in count No. 29 in the amended information alleged that:

> "*Boniface Thomas Mwimbwa and Elias Pancras Ndejembi, on divers dates between November, 2009 and February, 2011 within the District, Municipality and Region of Arusha aided and abetted transmission of seventeen (17) United States Treasury checks amounting to United States Dollars Five Million Four Hundred Sixty Eight Thousand Six Hundred Ninety Nine and Twenty Five Cents (USD 5,468,699.25) by authorizing opening of Bank Account No. 02J1036325000 maintained by MOYALE PRECIOUS GEMS & MINERALS ENTERPRISES, Account No. 02J2036310500 maintained by OGEMBO MITCHEL CHACHA and Account No. 02J2036310600 maintained by GREGG MOTACHWA MWITA at CRDB Bank, Meru Branch*

and processing payments of the said checks amounting to United States Dollars Five Million Four Hundred Sixty Eight Thousand Six Hundred Ninety Nine and Twenty Five Cents (USD 5,468,699.25) while they ought to know that the said checks were proceeds of forgery, which is a predicate offence".

Before the trial took off, Median Boastice Mwaie and Don Bosco Ooga Gichan who were also charged with numerous other counts pertaining to predicate offences to money laundering pleaded guilty to the count of conspiracy to commit an offence and to some counts of money laundering and were convicted as such and ultimately sentenced. The trial continued with the appellants herein on the two counts as aforesaid.

After the completion of the hearing, the trial court (Maige, J. -as he then was) discharged the appellants of the count of conspiracy upon being satisfied that it was irregular to charge the appellants with conspiracy to commit an offence along with the actual offence; money laundering guided by the Court's decision in **John Paulo @ Shida & Another v. Republic,** Civil Appeal No. 335 of 2009 (unreported).

The facts on which the information was pegged are sufficiently set out in the judgment of the trial court and we think it will be quite appropriate to adopt them in this judgment with necessary modifications. They go as follows: The appellants were at the material dates the Branch Manager and Customer Service Manager respectively with CRDB Bank Limited, Meru Branch in Arusha. They were accused of aiding and abetting the principal offenders of the predicate offence (first and second accused persons) by authorising the opening of three accounts termed as vehicle accounts and processing clearance of fraudulent cheques in the first place and processing of payments of such cheques knowingly that the said cheques were proceeds of forgery. The monies alleged to have been laundered by the principal offenders emanated from USA Treasury cheques worth Five Million Six Hundred Sixty-Eight Thousand Six Hundred Ninety-Nine and Twenty-Five Cents United States Dollars (USD 5,668,699.25). The first and second accused persons admitted that, the said cheques were procured after the second accused and his conspirators residing in the USA had submitted to the United States Department of Treasury false tax returns admitted in evidence as exhibit PC46. Considering that most of the victims were

either incarcerated or dead, the conspirators having obtained information as to their identities including their social security numbers, impersonated themselves as such and claimed for tax refunds. Believing that the said tax returns were genuine, the US Department of Treasury issued the said cheques. Thereafter, the first accused joined the criminal enterprises by assisting the conspirators to open the three vehicle accounts at the CRDB Meru Branch using false mandate documents. It was through the said vehicle accounts that the cheques in question were transmitted and eventually credited into account number 02J1007569802 maintained by the first accused at CRDB Bank Meru Branch. Soon thereafter, the credited monies were withdrawn by the first accused under the authorization of the third and fourth accused persons.

Initially, all accused persons pleaded not guilty to the offences but subsequently, the first and second accused persons changed their respective pleas and each pleaded guilty to the offences they stood charged in particular, money laundering. The trial court convicted and sentenced them as alluded to earlier on. That notwithstanding, the appellants maintained their stance denying accusations against them.

The prosecution led evidence through ten witnesses who tendered 47 documentary exhibits to prove that the appellants were guilty as charged. Despite the appellants' defence exonerating themselves from the accusations, the trial court found the prosecution evidence watertight to support a finding of guilt and ultimately, the conviction. In its judgment, the trial court found no difficulty in concluding that the predicate offences; forgery and money laundering had been proved based on the principal offenders' convictions on pieas of guilty which was admissible against the appellants as aiders and abetters. After drawing inspiration from the decision of the Supreme Court of Canada in **Republic v. Vinette** [1975] 25 CR 222, the learned trial judge took the view that, the appellants could not escape from the consequences of conviction on the principal offenders' pleas of guilty to the predicate offence made in their presence without any objection or any demand for cross-examination. Besides, the trial court found sufficient evidence to prove the first ingredient in the charged offence from the testimonies of PW1 and PW10 which was found to have been corroborated by documentary evidence by way of exhibits PC45, PC46 and PC47. Even though the defence had challenged the legality of the said documents

allegedly because there was a broken chain of custody, the learned trial judge dismissed the objection as misconceived guided by the Court's decision in **Republic v. Median Boastice Mwale & 3 Others,** Criminal Appeal No. 2 of 2016 (unreported) in support of the proposition that the impugned exhibits passed the test of legality and properly authenticated regardless of the production in evidence of a letter requesting certification to the Attorney General of the United States of America from his counterpart in Tanzania.

As to the second ingredient; positive action or participation in the commission of the offence, the trial court found the prosecution proved it through the evidence of PW1, PW2, PW3, PW4, PW10, exhibits PC1, PC11, PC15 and PC 16 as well as the appellants' cautioned statements, (exhibits PC 11 and PC 43) out of the pieces of evidence led by the respondent Republic. The trial court made a finding that there was sufficient evidence proving that in doing what they did; aiding and abetting, the appellants did so with knowledge that the transactions and documents used to open accounts at CRDB Bank Meru Branch and processing of the dubious cheques were fraudulent. Specifically, the trial court found the appellants in flagrant violation of Regulation 16 of the

Anti-Money Laundering Regulations, Government Notice No. 195 of 2007 which prohibits transactions into an account without sufficient evidence of the customer's identity.

From the above findings, the learned trial judge found the appellants guilty as charged, convicted and sentenced them accordingly. Apparently, the lay assessors who sat with the learned trial judge had returned a unanimous verdict of guilty. This appeal is against both convictions and sentences. The appellants lodged separate notices of appeal. Their memoranda of appeals raise common grievances as shall be seen later. Suffice that the memorandum of appeal by the first appellant who was unrepresented raises 11 grounds plus four grounds in the supplementary memorandum. The second appellant who was represented by Mr. Moses Mahuna and Ms. Hellen Mahuna raises seven grounds. However, Mr. Mahuna prayed to abandon the third ground which complained that the conviction of the second appellant was grounded on a poorly investigated case.

The first ground in the second appellant's memorandum complains that the information on which the appellants stood trial was defective. This features as ground one in the first appellant's supplementary

memorandum. The essence of Mr. Mahuna's submission subscribed by the first appellant was that, charging the appellants in count one; conspiracy to commit with the actual offence of money laundering was offensive the more so because conspiracy was a cognate offence to money laundering. It was argued d that, as there was no amendment of the information, it remained defective for duplicity which could have resulted into an order acquitting the appellants and not discharging them as the trial court did. Mr. Mahuna called to his aid the Court's decision in **Emmanuel Magembe v. Republic**, Criminal Appeal No. 35 of 2018 in which it cited its previous decision in **Director of Public Prosecutions v. Morgan Maliki and Nyaisa Makori**, Criminal Appeal No. 133 of 2013 (both unreported) urging the Court to hold that the appellants were unfairly tried for standing a trial involving compounded offences. He invited the Court to quash conviction and acquit the appellants.

The respondent Republic had Mr. Zacharia Ndaskoi, learned Principal State Attorney appearing with Messrs. Achiles Mulisa and Ladislaus Komanya both learned Senior State Attorneys to resist the appeal. Mr. Ndaskoi addressed the Court on behalf of the respondent's

team. Whilst conceding that the charging of conspiracy to commit an offence with the actual offence was irregular, he argued that that did not render the information defective because this was not a case for duplicity in which two distinct offences are contained in the same count. The Court was argued to hold that the decision in **Emmanuel Magembe** (supra) is distinguishable. Responding to the complaint on unfair trial by reason of the irregular charging of the appellants, Mr. Ndaskoi could not agree that there was such unfair trial in the absence of evidence showing the extent of the prejudice considering that the appellants were duly represented by counsel. Mr. Ndaskoi reinforced his submissions with the Court's decisions in **Stanley Murithi Mwaura v. Republic**, Criminal Appeal No. 144 of 2019, **Ally Hussein v. Republic**, Criminal Appeal No. 293 of 2018 and **Joseph Maganga Mlezi & Another v. Republic**, Criminal Appeal Nos. 536 and 537 of 2015 (all unreported). The first decision was cited to argue that the information on which the appellants were tried and convicted was not bad for being duplicitous whereas the rest are relevant to reinforce the argument that the irregularity in relation to the charging of conspiracy along with the

actual offence was curable under section 388 (1) of the Criminal Procedure Act (the CPA).

As rightly submitted by Mr. Mahuna and conceded by Mr. Ndaskoi, it was wrong for the prosecution to charge an inchoate offence of conspiracy with the actual offence of money laundering. There is hardly any dispute as argued by Mr. Mahuna that conspiracy is a cognate offence to money laundering. Nevertheless, we agree with Mr. Ndaskoi that, since the appellants were charged with aiding and abetting the commission of the predicate offences to money laundering, there is no basis in the complaint that the offence with which the appellants were charged and convicted of was a cognate offence similar to the situation in **Emmanuel Maganga** (supra). It is glaring in that decision that, unlike here, not only the appellants were charged with conspiracy to commit an offence but also, they stood charged with armed robbery and stealing in the same charge. It is significant that, stealing is a cognate offence to armed robbery and hence the Court's holding that the charge was defective unless amended under section 234 (1) of the CPA. That being the case, we have not been able to see any basis for the argument that the appellants were unfairly tried for facing a trial on an

information consisting of a count on an inchoate offence and the actual offence, warranting an order nullifying the trial. The trial court struck out the count on conspiracy and discharged the appellants on it and that was perfectly within the confines of the law consistent with our decision in **John Paulo @ Shida and Another**, Criminal Appeal No. 335 of 2009 (unreported). In any case, for completeness's sake only, it was not suggested that in the circumstances of the case in which the appellants were ably represented by counsel they were prejudiced in any way by facing a trial on the two counts.

As submitted by Mr. Ndaskoi, if there was any prejudice, same was too insignificant to vitiate the trial. We respectfully agree that, such an error was curable under section 388 (1) of the CPA consistent with the cases cited to us by the learned Principal State Attorney. This ground lacks merit and we dismiss it.

Next, Mr. Mahuna addressed us on the alleged irregularities in the proceedings before the trial court vitiating the appellants' convictions. This was the second appellants' complaint in ground two of his memorandum of appeal. Mr. Mahuna cited four instances characterising the complaint namely; differentiating the two committal proceedings

prior to withdrawal of the information under section 91 (1) and (2) of the CPA and after; failure to read the information to all accused persons following its amendment; failure to explain the role of assessors after their selection and omission to read the memorandum of agreed and disputed facts during the preliminary hearing.

On the fate of the committal proceedings preceding in Criminal Sessions Case No. 61 of 2015 subsequently withdrawn followed by Criminal Sessions Case No. 77 of 2017, subject of this appeal, Mr. Mahuna argued that, the former proceedings were still intact notwithstanding the entering of a nolle prosequi by the prosecution. He cited to us a decision of the Privy Council in an appeal from the Supreme Court of Kenya in **Peter Harold Poole v. Republic** [1960] EA 644 for the proposition that, a nolle prosequi does not discharge the proceedings in a Preliminary Inquiry (PI) neither does it preclude the filing of another information based on the facts disclosed at the PI. Mr. Ndaskoi had a different argument with which we agree. The nolle prosequi was entered in Criminal Sessions Case No. 61 of 2015 arising from PI No. 60 of 2015 and that was the end of everything in connection with it. There was nothing left of the committal proceedings from which

the prosecution could file a fresh information based on the same proceedings in the PI.

It is our firm view that, the case cited by Mr. Mahuna is distinguishable in so far as it was decided on the basis of a different legal regime obtaining in Kenya in 1960 different from the procedure obtaining under the CPA. A closer examination of the decision reveals that under section 233 (1) of the Criminal Procedure Code of Kenya, 1948, a Magistrate conducting a Preliminary Inquiry had power to examine witnesses for the prosecution and if satisfied that the evidence justified committing an accused for trial before the Supreme Court, he could frame a charge declaring which offence the accused is charged before making a committal order. With respect, that is not the position obtaining under the CPA and so that decision cannot apply to support the proposition canvassed by Mr. Mahuna. Consequently, we are unable to sustain his argument that there was an irregularity in the trial by reason of disregarding the proceedings in Criminal Sessions Case No. 61 of 2015 which had gone with the proceedings in PI No. 60 of 2015 upon the Director of Public Prosecutions (the DPP) entering a nolle prosequi.

The second in list of the alleged irregularities relates to omission to read the information to all accused persons after its amendment which Mr. Mahuna argued that it vitiated the appellants' convictions. Mr. Ndaskoi did not dispute that the appellants were not called upon to plead to the amended information following a plea bargain agreement between the DPP and the first accused; Median Boastice Mwale. That is the position as reflected at page 1159 of the record of appeal. Needless to say, it is equally true that the appellants pleaded not guilty to the amended information before the commencement of the prosecution case. It has not been suggested to what extent were the appellants prejudiced by the failure to ask them to plead to the amended information which was, for all intents and purposes, intended to enter conviction against the first accused person on his own plea of guilty following a plea agreement with the DPP. Besides, the appellants had legal representations throughout the trial and, had it been deemed necessary, it is not clear why their advocates kept mum at the time when the first accused was called upon to make his plea.

We are firmly of the view that the omission was curable under section 388 (1) of the CPA considering all the obtaining circumstances

including; pleading not guilty to the amended information at a subsequent date and the fact that the appellants enjoyed legal representation. That takes us to the third complaint directed against the trial judge's failure to select the assessors and explain their roles.

Mr. Ndaskoi argued that, the assessors were selected but their roles not explained but they fully participated in the trial by asking questions for clarifications as and when it became opportune to do so. We agree with Mr. Mahuna on the desirability for the trial judge to explain to the assessors their role before assuming their duties in the trial as per the practice of the High Court in such cases. It is plain that before the trial commenced, the learned trial judge introduced persons whose names appear at page 1193 of the record of appeal as the assessors. Neither of the appellants had any objection to any of the assessors. Going by the practice of the High Court in cases conducted with the aid of assessors, it was incumbent upon the learned trial judge to formally make a selection of the assessors following no objection from the appellants followed by explanation of their roles.

Be it as it may, we do not agree that the omission was necessarily fatal to the trial. This is because we are satisfied that notwithstanding

the omission, the record shows clearly that the assessors fully participated in the trial by asking questions as expected of them in pursuance of section 177 of the Evidence Act. It is equally plain that they gave their opinion returning a unanimous verdict of guilty.

Without derogating from the principle that cases must be decided alike, we are also mindful of yet another pillar underlying the doctrine of precedent; each case must be decided on its our peculiar facts. It is for this reason, we hold the view that the facts in **Abdallah Juma @ Bupale v. Republic,** Criminal Appeal No. 537 of 2017 and **Boniface Marcel Tairo @ Sijali v. Republic,** Criminal Appeal No. 289 of 2017 (both unreported) are distinguishable from the instant appeal. This is so because, unlike here, there was a clear evidence of non-participation of the assessors in the two cases which warranted the nullification of the trials. On the contrary, we shall follow our unreported decision in **Ernest Jackson @Mwandikaupesi and Another v. Republic**, Criminal Appeal No. 408 of 2019 in which the Court condoned the trial judge's omission to explain the roles of assessors upon being satisfied of their full participation in the trial. It stated:

> *"That cannot be said of the situation in the instant case. Having scrutinized the entire trial proceedings, our impression is that the assessors were fully alert and that they actively participated in the proceedings. Their incisive opinions and verdicts of not guilty recorded after the learned trial Magistrate's summing up, as shown at pages 132 to 134 of the record of appeal, confirm that the assessors knew their duties and that they devotedly discharged them despite having not been informed of them before the trial commenced. We would, therefore, dismiss the third ground of appeal as we find the omission complained of having not occasioned any failure of justice". [at page 15]*

We accordingly reject the complaint.

Last on this ground relates to the alleged omission to read the memorandum of agreed facts during the preliminary hearing. It was argued by Mr. Mahuna that the omission contravened section 192 (3) of the CPA rendering the proceedings a nullity calling to his aid the Court's decision in **Republic v. Abdallah Salum Haji,** Criminal Revision No. 4 of 2019 (unreported). The learned Principal State Attorney argued that

the memorandum of facts was read as required downplaying the application of **Republic v. Abdallah Salum Haji** (supra) as distinguishable.

From our own reading of page 1153 of the record of appeal, it is clear that, after the trial court had conducted a preliminary hearing, it prepared a memorandum of agreed and disputed facts and had the appellants as well as the prosecuting attorneys sign them in pursuance of section 192 (3) of the CPA. However, the record does not show that the memorandum of agreed facts was read over and explained to the appellants in the language they understand in compliance with section 192 (3) of the CPA.

Be it as it may, from the authorities we have landed our eyes on including **Republic v. Abdallah Salum Haji** (supra), omission to read the memorandum of agreed facts to an accused person in the language he understands is a fatal irregularity. However, upon a close examination of the authorities it seems to us that the omission can only be incurably fatal where such matters contain admissions of incriminating facts and not just any other facts, for that will be prejudicial to the accused person who may not have an opportunity to

cross examine witnesses on such admitted facts. The position in the instant appeal is that the appellants made no admission to any fact except their names, employment and their arraignment in court on the information on which they were convicted of at the end of their trial. With respect, we are not prepared to accept that the parliament intended to render the omission to read the agreed facts fatal even when such facts cannot form the basis of the accused's conviction.

In our respectful view, it is clear to us that the authority cited to us along with those referred therein are only relevant to the cases involving admissions on incriminating facts and not otherwise. This complaint is also rejected. On the whole, we find no merit in any of the complaints characterising ground two in the second appellant's ground two of appeal and dismiss it.

The next ground relates to the complaint on the variance between the information and evidence adduced before the trial court on the basis of which the trial court convicted the appellants on count No. 29 involving aiding and abetting.

Mr. Mahuna had two arguments in support of this ground. First, he argued that a look at exhibits PC 28 and PC 45 shows that there were

a total of 17 cheques with an amount of USD 5,296,327.25 as opposed to USD 5,468,699.25 reflected in the information reflecting a variance of USD 172,372 unaccounted for. Second, the learned advocate contended that at any rate, if the prosecution evidence had anything to go by, the second appellant authorised five cheques only whilst the first appellant authorised ten cheques leaving a balance of two unaccounted cheques. Finally, it was argued that the first appellant neither authorised the opening of the three accounts nor did he authorise processing of such accounts. He concluded by urging that, in view of the variance in the amount and the number of cheques, the prosecution did not prove the case beyond reasonable doubt on the strength of the Court's decisions in **Abel Masikiti v. Republic** [2015] T.L.R 21 and an unreported decision in **Issa Mwanjiku v. Republic**, Criminal Appeal No. 175 of 2018.

Mr. Ndaskoi for his part argued that, contrary to the appellants' complaint, no such variance existed with regard to the amount shown in the information and the evidence led by the prosecution attracting a conclusion that the case for the prosecution was not proved to the required standard. Making reference to exhibits PC 35, 36, 37 and 38,

he contended that, the trial court found the prosecution evidence sufficiently proved 17 fraudulent cheques including those which are reflected in the electronic bank statements admitted in evidence as exhibits. As to the appellant's involvement in opening the contentious accounts, the learned Principal State Attorney argued that, it was proved through PW1 and the appellants' cautioned statements (exhibits PC 11 and PC 43) that the appellants aided and abetted the first and second accused persons in the opening of the said accounts. Besides, it was argued that, through PW1, PW2 and PW3, despite the glaring inadequacies in the documentation coupled with doubtful passports, the appellants went ahead and authorised the opening of the said accounts.

Mr. Ndaskoi invited the Court to hold that the complaint on variance between the information and evidence is baseless and dismiss it.

In addressing this complaint, we take note that it is settled law that variance between the charge and evidence on essential particulars amounts to the prosecution failing to prove its case beyond reasonable doubt. The Court's decisions in **Issa Mwanjiku v. Republic** and **Abel Masikiti v. Republic** (supra) cited by the learned advocate for the

second appellant are instructive on this aspect. See also: **Ntobangi Kelya and Another v. Republic**, Criminal Appeal No. 256 of 2017 (unreported). If it be accepted that there was indeed a variance in the manner submitted by Mr. Mahuna, the inevitable conclusion will be to hold that the appellants' convictions were wrongful.

The prosecution alleged in the particulars of the offence that the appellants aided and abetted the transmission of 17 US Treasury Cheques in the sum of 5,468,699.25 by authorising the opening of dubious accounts at CRDB Bank Meru Branch and thereafter processed payments of the said cheques on the specified amount with knowledge that the said cheques were proceeds of a predicate offence of forgery. In convicting the appellants on the offence, the trial court relied on the testimonies of SSP Fadhili Said Mdemu (PW1), Seleman Enock Nyakulinga (PW10), exhibits PC45, PC46 and PC47 including the appellants' cautioned statements admitted as exhibits PC11 and PC43. It also relied on the conviction of the first accused person on his own plea of guilty as a prima facie evidence against the appellants after drawing inspiration from the decisions of the Supreme Court of the USA in **Colosacco v. United States** [1952] 196 2d 165, the Supreme Court

of Canada in **Republic v. Vinette** [1975] 25 CR 222 which decisions were found to be highly persuasive.

The record demonstrates that, the defence raised an issue contending that the evidence from the prosecution could only prove transmission of 15 cheques as against 17 shown in the particulars of the offence. The learned trial judge rejected it having taken the view that, the evidence established that the processing of the foreign cheques started with CRDB Bank Meru Branch through OFBC forms before being sent for clearance at the CRDB's Headquarters by the International Payment Unit and Central Accounting Division. The trial court appears to have been satisfied that the evidence sufficiently established transmission of 17 cheques, subject of the charge. With respect, the learned trial judge's reasoning does not answer the variance in not only the number of cheques, subject of the charge, but also the amount involved the more so considering the naked fact that the alleged forgeries of US Treasury cheques originated neither with CRDB's Meru Branch nor its International Payment Unit and Central Accounting Division. The evidence is so plain that the forgeries started elsewhere and by persons not connected with CRDB.

The foregoing aside, the trial court made the finding amidst evidence through PW1 showing that, upon searching the first accused's premises, several items were seized from him including two cheques; PC11 and PC12 and that such cheques were not among those in which the appellants were involved in authorising payment. Certainly, the two cheques could not have been included in the particulars in the count 29 on which the appellants were charged with and ultimately convicted. Furthermore, it is plain from the record that, the conviction of the first accused on the second count of money laundering did not specify the number of cheques rather the amount involved; USD 5,296,327.25 which is not the same amount in count No. 29.

That means that the trial court did not address and resolve the issue regarding variance between the particulars in the information in relation to the number of cheques as well as the amount involved on the basis of which it found the appellants guilty as charged and convicted them. The evidence adduced by the prosecution shows that the amount shown in count No. 29 in the amended information was allegedly a total sum of USD 5,468,699.25 from different transactions involving forgeries of 17 US Treasury cheques. Out of the total number of the cheques, the

prosecution was able to prove forgeries of 15 involving USD 5,296,327.25 as opposed to USD 5,468,699.25 reflected in the amended information. There was a variance of two cheques and USD 172,372 irrespective of Mr. Ndaskoi's attempt to downplay it.

The problem did not end there. The amount shown in count No. 29 in the amended information was allegedly derived from 17 different transactions involving forgeries of US Treasury cheques. It is elementary that, each transaction constituted a distinct offence attracting separate counts in the information. However, the prosecution saw it expedient to lump all the transactions into one charge with one count regardless of the dictates of section 133 (1) and (2) of the CPA which stipulates:

> *"133. -(1) Any offences may be charged together in the same charge or information if the offences charged are founded on the same facts or if they form or are a part of, a series of offences of the same or a similar character.*
> *(2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count".*

In view of the above, it was incumbent upon the prosecution to amend the information in terms of section 276 (2) of the CPA. This was not done and, consistent with the numerous decisions of the Court, that was fatal to the appellants' convictions. In **Chesco Kagari & 2 Others v. The Republic**, Criminal Appeal No. 107 of 2007 for instance, the Court reiterated what it said in **Kimwaga Athuman & 2 Others v. The Republic**, Criminal Appeal No. 24 of 2006 (Unreported) thus:

> *" Variance between the amounts stolen stated in the charge sheet and the amount stated in evidence creates doubt to the prosecution's case which should benefit the accused."*

A similar situation obtains in this appeal as explained above involving a clear variance between the particulars in the information and the evidence which remained unrectified by amendment of the information before the closure of the case for the prosecution or at all. We have observed in the preceding paragraph that, the problem was compounded by the prosecution lumping the amounts in one count even though they arose from 17 different transactions. Besides, we also agree with Mr. Mahuma that the evidence fell short of proving that each of the

appellants was involved in aiding and abetting the principal offenders in all 15 cheques as alleged by the prosecution.

We are mindful that the trial court relied on the first accused's confession as one of the pieces of evidence to ground conviction but all we can say is that, in view of the evidence on record, the confession was only relevant to the extent it related to the commission of the predicate offence of forgery. As it turned out, there are yawning gaps in the confession regarding the number of cheques and the amount involved. Under the circumstances, it cannot be said that the prosecution proved the guilt of each of the appellants beyond reasonable doubt as charged warranting conviction in the manner the trial court did.

The upshot of the foregoing is that this ground succeeds and this will be sufficient to dispose of the appeal in favour of the appellants. Since, our evaluation of the evidence on record shows that the findings of guilt were erroneous having resulted from misapprehension of the evidence on record, we set them aside and substitute with findings of not guilty. The appellants' convictions are hereby quashed and sentences set aside. It is hereby ordered that the appellants shall be set

free forthwith unless their continued detention is for another lawful cause and, any fine paid in connection with the convictions shall be refunded to the party who paid the same.

DATED at **DAR ES SALAAM** this 18th day of April, 2023.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 19th day of April, 2023 in the presence of the 1st appellant in person, Mr. Moses Mahuna, learned counsel for the 2nd appellant and Ms. Jacqueline Linus, learned State Attorney for the republic/Respondent, is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL