IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC CRIMINAL APPLICATION NO. 179 OF 2020

(Originating from Economic Case No. 83 of 2018 From Kisutu RM's Court at Kisutu Dar es Salaam)

JOEL EMMANUEL MALUGU .... 1ST APPLICANT
DEODATUS RWEGASIRA AUDAX .... 2ND APPLICANT
SHABANI SALIM ZUBERI .... 3RD APPLICANT
MAKAME HAJI KHAMIS .... 4TH APPLICANT
MUSSA ABDALLAH NKINDA .... 5TH APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS ... RESPONDENT

Date of last Order: ***19/04/2021***
Date of Ruling: ***04/05/2021***

R U L I N G

MGONYA, J.

The instant Application is originated from the **Economic Case No. 83 of 2018** before the Kisutu Magistrates' Court. The same is made under Section **44(1) (a) of the Magistrates' Court Act, Cap. 11 [R.E. 2002], section 372 of the Criminal Procedure Act, Cap. 20 [R.E. 2002], and section 2(1)(3) of the Judicature and Application of Laws Act, Cap. 358 [R.E. 2002],** seeking from this honorable court for the orders as herein below:

1. ***That this Honourable Court be pleased to call for and inspect as the case may be examine the records of Proceedings of the Economic Crime Case No. 83 of 2018 in the Resident Magistrate's Court of the Dar es Salaam Region at Kisutu for the purpose of satisfying itself as to correctness, legality or propriety of the findings and orders recorded passed in the Proceedings of the abovementioned Economic Case, and as to regularity of the Proceedings herein;***
2. ***That, this Honourable Court be pleased to give directions as it considers for such directions to be necessary in the interests of justice;***
3. ***That, this Honourable Court be pleased to grant any other reliefs as it may deem fit and just to grant.***

The chamber summons is brought at the instance of all Applicants, and it is supported by the Joint Affidavit of the Applicants herein which is annexed hereto.

When the matter came for hearing on 23rd December, 2020, as the proceedings were via virtual court, I ordered the same be disposed by way of written submissions.

In the cause of disposing this mater, the 2nd Applicant on behalf of the other Applicants, submitted to the effect that: Initially, before the Kisutu Resident Magistrate's court, all the

Applicants herein were charged with two counts appearing in the charge sheet as they appear hereunder:

1ST COUNT FOR ALL ACCUSED PERSONS STATEMENT OF OFFENCE,

LEADING ORGANIZED CRIME; *Contrary to paragraph 4 (1) (a) of the first schedule, read together with sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, Cap. 200 [R.E. 2002]*

PARTICUALRS OF OFFENCE

JOEL EMMANUEL MALUNGU, DEODATUS RWEGASIRA AUDAX, SHABAN SALIM ZUBERI, MAKAME HAJI KHAMIS and MUSSA ABDALLAH NKINDA, *on diverse dates between 01st of October, 2018 and 15th of October, 2018 at Pwani and Dar es Salaam Regions jointly and together, willfully managed a Criminal racket by organizing sale of government trophies to wit, 19 pieces of Elephant tusk valued at USD 150,000 equivalent to Tanzania Shillings Three Hundred and Thirty Two Million Eighty Hundred and Fifty Thousand [332,850,000] only, the property of the United Republic of Tanzania, without a permit from the Director of Wildlife Division.*

2ND COUNT – FOR ALL ACCUSED PERSONS STATEMENT OF OFFENCE

UNLAWFUL POSSESSION OF GOVERNMENT TROPHIES; Contrary to section 86 (1) (2) (c) (ii) and 3 (b) of the wildlife

Conservation Act No. 5 OF 2009 read together with paragraph 14 of the First Schedule to, and section 75 (1) and 60 (2) of the Economic and Organized Crime Control Act, Cap. 200 [R.E 2002]

PARTICULAR OF OFFENCE

JOEL EMMANUEL MALUGU, DEODATUS RWEGASIRA AUDAX, SHABAN SALIM ZUBERI, MAKAME HAJI KHAMIS and MUSSA ABDALLAH NKINDA, *on 15th of October, 2018 at Tegeta Kibaoni area in Kinondoni District within the City and Region of Dar es Salaam jointly and together, were found in possession of Government Trophies to wit, 19 pieces of Elephant tusk valued at USD 150,000 equivalent to Tanzania Shillings Three Hundred and Thirty Two Million Eighty Hundred and Fifty Thousand [332,850,000] only, the property of the United Republic of Tanzania, without permit from the Director of Wildlife Division.*

However, later after they were assured that their case is bail able, Prosecution came up with the third count of money laundering which in principle is ***unbailable****. The said count reads as follows:*

3COUNT – FOR ALL ACCUSED PERSONS STATEMENT OF OFFENCE

MONEY LAUNDERING; *Contrary to section 12 (a) and 13 (a) oaf the Anti- Money Laundering Act, No. 12 of 2006 read together with paragraph 22 of the First Schedule to and Section 57 (1) and 60 (2) of the Economic and Organized Crimes Control Act, Cap. 200 [R.E. 2002].*

PARTICULAR OF OFFENCE

JOEL EMMANUEL MALUGU, DEODATUS RWEGASIRA AUDAX, SHABAN SALIM ZUBERI, MAKAME HAJI KHAMIS and MUSSA ABDALLAH NKINDA, *on diverse dates between 01st of October, 2018 and 15th of October, 2018 at Pwani and Dar es Salaam Regions jointly and together, did acquire Tanzania Shillings Three Hundred and Thirty Two Million Eighty Hundred and Fifty Thousand [332,850,000] while they knew or ought to have known that at the time of receipt of the said money was the proceeds of a predicate offence namely, unlawful possession of Government trophies.*

From the same, it is the Applicants' concern that as they have been in remand for the more than two years before the formulation of the new count, and in the circumstances the 3rd count came unfairly and in deed is an afterthought from the Prosecution. The question is how did they manage to commit an act of money laundering while in remand for two years consecutively and also charged with the possession of the

Government trophies which are yet to be disposed. In that case, it is the Applicant's concern that, Prosecution have been malicious as they are about to obtain bail from the other economic offences which are bailable. Further, that the act of adding the third count is the one which intends to deprive their bail rights as they will not be able to obtain bail when charged with the Money Laundering.

Applicants prayed this court to strikeout the new count of Money Laundering in the charge sheet as the same is malicious.

On the other hand, Mr. Ulaya for the Director of Public Prosecution informed the court that the prayer before the court is interlocutory since does not dispose of the entire matter. Further, the additional offence came after the investigation of the case at hand which is still undergoing. Further, Mr. Ulaya informed the court that the procedure of adding counts to the charge sheet is a normal one and that the third count was not placed in the charge sheet for the intension of offending the Applicants' bail.

It is from the above submission, Mr. Ulaya prayed the court to dismiss the Applicant's Application as the same is meritless.

Before I determine parties' submissions in respect of this application, I have to show my disappointment as the learned State Attorney did not at all respond to the issue placed before

the court by the Applicant's Counsel. In fact I expected the learned State Attorney to respond on the Applicants' complains against the 3rd count and the clear motive to the same especially after raiding the matter of Money Laundering after the lapse of two years from the time the other counts were brought to court. The submission was not clear on that in the first submission and even in the second time when I recall the Counsel to reply on the Applicants' submission. However, let me now determine the instant Application.

For the Court to examine the charge sheet of **Economic Crime Case No. 83 of 2018** between the Applicants and the Respondent in order to satisfy itself as to the **correctness, legality or propriety** of the Charge Sheet particularly on the 3rd count of **MONEY LAUNDERING** filed by the Respondent after the period of two years, I saw it wise to search for the legal definition of the term **"Money Laundering". The same is found under section 3 of the Anti-Money Laundering Act, Cap. 423 as herein below:**

> ***"Money Laundering" means engagement of a person or persons, direct or indirectly in conversion, transfer, concealment, 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;".***

Further the provisions of the said **section 12** is as seen below:

12. A person who -

(a) engages, directly or indirectly, in a transaction that involves

property that is proceeds of a predicate offence while he knows or ought to know or ought to have known that the property is the proceeds of a predicate offence;

(b) converts, transfers, transports or transmits property while he knows or ought to know or ought to have known that such property is the proceeds of a predicate offence, for the

purposes of concealing, disguising the illicit origin of the property or of assisting any person who is involved in the commission of such offence to evade the legal consequences of his actions;

(c) conceals, disguises or impedes the establishment of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, while he knows or ought to know or ought to have known that such property is the proceeds of a predicate offence;

(d) acquires, possesses, uses or administers property, while he knows or ought to know or ought to have known at the time of receipt that such property is the proceeds of a predicate offence; or

(e) *participates in, associates with, conspires to commit, attempts to commit, aids and abets, or facilitates and counsels the commission of any of the acts described in paragraphs (a) to (d) of this section, commits an offence of money laundering.*

Now, after going through the particulars of the counts in the substituted Charge Sheet, I have noted the following:

First that the Applicants herein were apprehended and brought to remand and charged with two counts as appearing in the initial Charge Sheet sometimes in **2018**, being more than two years from the date of the substituted Charge Sheet.

Second that the offence of being in possession of the Government trophies was done on **15th October 2018**. Further, the third or rather the new offence of **MONEY LAUNDERING** took place between **1st of October 2018 and 15th of October 2018.**

If this is the case, I have some questions that I have to ask in order to determine this matter.

If by the definition of Money Laundering, the offence involves transaction that involves property, converts, transfers, transports or transmits property while he knows or ought to know or ought to have known that such property is the proceeds of a predicate offence; conceals, disguises or impedes the establishment of the true nature, source, location, disposition; conceals, disguises or impedes the establishment of

the true nature, source, location, disposition; acquires, possesses, uses or administers property, while he knows or ought to know or ought to have known at the time of receipt that such property is the proceeds of a predicate offence and participates in, associates with, conspires to commit, attempts to commit, aids and abets, or facilitates and counsels the commission, then the question comes:

First, that if the Applicants are charged with the offence of being held with the Government trophies of which the same are still in existence, then how can they be able to get proceed from something that is yet to be sold? That is the trophies of which I am sure that the same will be subject to evidence in proving the second count in the Applicants' Charge Sheet.

Looking at the dates, it seems that the offence of **Money Laundering** was done far back before the Applicants were apprehended for possession of the Government trophies. If this is the case now, how can the Applicants be held responsible for the offence of Money Laundering while they were in custody since November 2018?, Taking into consideration that the said trophies are yet to be sold for the to obtain proceeds of crime for Money Laundering?

Second, if at all the trophies were sold out, then obvious that there could be some proceeds from the same to supports the offence of money laundering in the first stance. I say so since, even if the said trophies were sold only and the money

was with the Applicants; still, there could not be any act of money laundering since the said money was supposed to be laundered from the illegal proceeds to another legitimate business as the case may be.

It is from the above, I am of the firm observation that indeed the count for Money Laundering cannot stand; or rather impossible under the circumstances. It is from here **I have to say without ado that the third count subject to this matter was placed in the Charge Sheet is mischievous, hence deserves to be struck out from the Applicant's Charge Sheet.** Referring to the 3rd Count of Money Laundering particulars and the definition of Money Laundering as seen above, it is my conviction that the main questions that are to be answered in order to formulate a proper Count of Money Laundering in the Applicants' Charge Sheet are: **Who, When, Where** and **What?**

It is from the particulars of the above count, the first question of two **Who,** is answered to be **ALL ACCUSED PERSONS** with their names as they appear in the said count.

As to the second question of **When**, the answer is to the effect that **"on the diverse dates between 1st October 2018 and 15th October 2018".** While on **Where** the answer is ***"at Pwani and D res Salaam Regions".***

As I am trying to get as to **What** was done by the Accused person as the Prosecution to rule out that the offence

is that of **MONEY LAUNDERING**, I only have the following on hand: ***"...jointly and together, did acquire Tanzania Shillings three Hundred and Thirty Two Million Eight Hundred and Fifty Thousand [332,850,000] while they knew or ought to have known that at the time of receipt of the said money was proceeds of a predicate offence namely unlawful possession of Government trophies.***

I have to confess that the wording on particulars as to what the Accused persons do not constitute the offence of Money Laundering. I say so, since, the above particulars from the said count, does not fit the provisions of **section 3 and 12** of the **Anti-Money Laundering Act, Cap. 423.** In the event therefore, **I proceed to struck out the said 3rd count from the Applicants' Charge Sheet for the above stated reasons.**

I have to remind the Prosecution that the Charge Sheet has to reflect the exact offences which the Accused is supposed to answer during trial. So the accused person has to prepare himself for whatever defense he/she might have in defeating the claim against him. In the event therefore, the charge sheet needed to be justly according to the particulars of the counts thereto.

From the above, I have to state without ado that the 3rd count in the Applicants' Charge Sheet before the lower court is

defective as I support the Applicants' views that, in that additional count, there is a possibility that the said count has just been placed to hold the accused person hence the said count is not bailable. Even if that was the case, or even if that was not the case, then the accuracy of the count was supposed to be taken into consideration especially on the dates of the commitment of the offences so as to waive the ill motive feelings towards the accused persons.

It is to my surprise that the issue of bail nowadays has become impossible and in many cases I have learnt that that in the cases like this one, I have noted the hard and deliberate moves to create surroundings that bail becomes impossible at any costs. That is why we are having this type of applications.

Sometimes I am trying to understand the Republic's fear and worries that in case some people are bailed out, then they can jump bail and their availability when needed will be in vain. On the other hand, I am mindful and it is at every Citizen of this Country who professes the Constitution of the United Republic of Tanzania (1977) that, bail is a matter of human right. Bail is not a privilege to an accused person but rather a **right.** This principle is enshrined in our **Constitution of the United Republic of Tanzania** under **Article 13 (6) (b)** which provides for the presumption of innocence of every persons charged with a criminal offence. So we have to abide

with this doctrine as far it comes from our own Constitution which is the Mother of all laws.

Bail being a right and not a privilege was clearly started by my Brother Mwesiumo J. (as he then was) in the case of ***TITO DOUGLAS LYIMO Vs. REPUBLIC*** where he pointed out that:

> ***"Bail is a right and not a privilege to an accused person, unless the court is convinced by concrete evidence emanating from the prosecution that grant would result in a failure of justice."***

From the above spirit, it is my view that it is high time now as we are all stakeholders to this noble profession of advocating justice we remind ourselves of these principles, observe the same and apply. We have to do so instead of looking for some other ways of trying to cage people out of our worries. I say this not only to this case but to many others which came across me in a same style. As we all know, in any bail there are some conditions that have to be placed or rather fixed for someone to be granted bail. Let the practice continue by placing the reasonable conditions and where a fear and worries arise, then let the tough bail condition be placed. This will enable us as the stakeholders observe the principles of human rights to every citizen of this Land.

I do understand that there are of course some offences which are unbailable according to the law. Fine, if the accused person fall under that category, then let it be. This will also

assist the 'cry" of both the Government and other stakeholders of congestion to remandees in our prisons which its infrastructure to many of them are those built and left behind by colonials.

The above precedent by Mwaisumo J. was echoing the sentiments of previous Judges like Wilson J. in 1945 in the case of ***ABDULLAH NASSOR V. REX (Supra)*** where it was observed that:

> ***"The test should be whether the granting of the application for bail will be detrimental to the interests of justice and good order. But such detriment must be satisfactorily substantiated by solid reasons and not based on vague fears or apprehensions or suspicions. And bail should not be lightly refused."***

To cement on this sentiment, finally I would like to refer to the wisdom of **Biron J.** in the case of ***PATEL V. R. [1971] H.C.D. No. 391,*** commented that:

> ***"A man whilst awaiting trial is as of right entitled to bail, there is a presumption of innocence until the contrary is proved."***

It is from the above sentiments, we have no option and since this is the Constitutional doctrine we have to abide with the same without finding any hindrance to the same.

Consequently, as stated above, **I have decided to grant the Application by striking out the 3rd Count in the Substituted Charge Sheet as it is undoubtedly added for reasons stated above.**

It is so ordered.

Right of Appeal Explained

L. E. MGONYA
JUDGE
04/05/2021

Court: Ruling delivered in chamber in the presence of Mr. Gernes Tesha, Senior State Attorney for the Respondent, the Appellants (through virtual court) and Ms. Salma Bench Clarke in open court today 04th May, 2021.

L. E. MGONYA
JUDGE
04/05/2021