IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA SUB-REGISTRY)

ORIGINAL JURISDICTION

AT MWANZA

CRIMINAL SESSIONS CASE NO. 168 OF 2022

THE REPUBLIC

VERSUS

1. **SAID S/O ADAM @ SAID**
2. **NASIBU S/O OMARI @ HAMAHAMA**
3. **SAAD S/O ABIB @ ABDALLAH**
4. **HAMADI S/O ADAM MOHAMED @ TWALIB**
5. **ALLY S/O ISSA MUSA**
6. **RAMADHANI S/O MOHAMED MSANGI**
7. **ABUBAKARI S/O SULEIMAN OMARI**
8. **JUMANNE S/O ISSA SUWED**
9. **AMINI S/O AMIRI MSHARABA**
10. **ABDI S/O SHARIF HASSAN @ MSOMALI**
11. **MOHAMED S/O IBRAHIM JUMA @ LULANGE**

RULING

8th & 10th March, 2023

DYANSOBERA, J:.

This ruling is on some preliminary points of law raised by the defence side in respect of the criminal proceedings against the accused persons. The brief facts pertinent to the determination of this matter are that the eleven (11) accused persons are facing a charge of eight counts. In the 1st, 2nd, 3rd, 4th and 5th counts, they are charged under the

provisions of the Prevention of Terrorism Act, No. 21 of 2002 while counts Nos. 6, 7 and 8 on murder are under the Penal Code [Cap. 16 R.E.2002, currently, 2022]. After the accused persons were committed for trial to this court, plea taking and preliminary hearing proceedings were held and the matter was fixed for trial.

Before the trial commenced, the defence side informed this court that it had some important legal issues to be addressed some of which touch on the jurisdiction of this court to entertain this case. The case was scheduled for 8th March, 2023.

On 8th March, 2023, at the time of hearing this matter, the prosecution side was represented by a total of five State Attorneys while the defence side had the service of a total of thirteen Advocates. The defence side led by Messrs Nasimire, Mutalemwa and Tuthulu, learned Counsel for the 1st accused, 9th and 4th accused persons, in that order, submitted for the defence while for the prosecution Messrs Abdalla Chavula and Robert Kidando, learned Senior State Attorneys made their submissions.

Mr. Nasimire took ground by submitting on the jurisdiction of this court in hearing and deciding this case. He contended that the accused persons are charged with commission of terrorist acts under the

Prevention of Terrorism Act, No. 21 of 2002 and murder under the Penal Code [Cap. 16 R.E. 2022]. According him, despite the fact that the Prevention of Terrorism Act gives this court the power to hear terrorism offences under Section 34(1) of the Act, the Economic and Organized Crime Control Act ('EOCCA') under Section 3(1) establishes a court known as the Corruption and Economic Crimes Division of the High Court which empowers that Court, under section 3(3)(b) of the Act, to hear and determine cases involving economic offences. He pointed out that terrorism offences fall under paragraph 24 of the First Schedule to the EOCCA. He noted that there are two statutes which give this court power to hear economic crimes cases including terrorism, namely, the Prevention of Terrorism Act and the EOCCA. Nevertheless, Counsel argued, going by purposeful interpretation, the last enacted law that is Cap. 200 takes away from this normal High Court powers of hearing terrorism cases which are now under the EOCCA. Admitting that the Prevention of Terrorism Act was not amended by the Written Laws (Miscellaneous Amendments) Act, 2016, Act No. 3 of 2016 ('the amending Act'), Counsel for the 1st accused was of the view that the wisdom of the Parliament, in amending the EOCCA, included terrorism offences and established a special court called the Corruption and Economic Crimes Division of the High Court to cater for offences falling

under the Prevention of Terrorism Act. Not only that, Mr. Nasimire asserted, there was also made the Economic and Organized Crime Control (The Corruption and Economic Crimes Division) (Procedure) Rules GN. No. 267, published on 9th September, 2016. Counsel was confident that the procedure must be followed in cases like the present one where the accused are facing terrorism charges. In rendering support to his argument, Counsel cited the case of **R. v. Farid Hadi Ahmed & 36 Others,** Criminal Sessions Case No.121 of 2020 Dar Registry (unreported).

Mr. Nasimire was of the further view that it was not a question of choice or taste on part of the Republic to charge the accused under the EOCCA but the law obligated them to charge the accused persons under that Act. It is possible, he argued, the Republic might have decided to charge the accused under the Prevention of Terrorism Act, perhaps because the offence was committed before the amendment of the EOCCA, nonetheless, the information brought in court is dated 12.8.2022 while Government Notice No. 267 of 2016 had already been published. Counsel pressed that since the procedural changes are retrospective then the Government Notice No. 267 of 2016 goes way back to 2014 when the terrorist acts were, allegedly, committed by the accused. Supporting his argument, Mr. Nasimire cited two cases, that is **Lala Wino v. Karatu**

District Council, Civil Application No. 132/02/2018 and **Shear Illustration Limited v. Christina Ulawe Umiro,** Civil Appeal No. 114/2014.

On whether the terrorism charges against the accused are properly before this court, Mr. Nasimire pointed out that committal proceedings were conducted on 20th October, 2022 and that to show that the law respecting committal proceedings was taken aboard by the subordinate court, the Magistrate presiding over the committal proceedings indicated that section 246(5) and (6) was complied with. It is learned Counsel' further view that such committal proceedings were in respect of murder charges and not on terrorism charges in that for the accused to have been properly committed to the Corruption and Economic Crimes the Division of the High Court, the subordinate court ought to have taken into account the fact that the accused persons ought to have been committed under the rule made in Government Notice No. 267 of 2016 and the Court means not this normal High Court but the Corruption and Economic Crimes Division of the High Court. Counsel reported his position by citing the case of **Warioba Mwita v. R.**, Criminal Appeal No. 242 of 2018 (unreported).

Basing his opinion on the case of **Pascal Mwinuka v. R.**, Criminal Appeal No. 258 of 2019 (unreported), Mr. Nasimire submitted that where the charge is economic, the committing court must consider rule 8(1), (2), (3) and (4) of GN No. 267 of 2016. He pointed out that in this case, the accused were not committed to the High Court in accordance with GN No. 267 of 2016 and are, therefore, not properly before the court. It was his further contention that since the offence of murder is not cognate to the offence of terrorism, then even the charge was not properly framed and that prudence demanded the charges to be separate.

Supporting the points raised by the defence, Mr. Constantine Mutalemwa also argued on the competence or otherwise of the court to try this case. He contended that although Section 34 (1) of the Prevention of Terrorism Act empowers this court to hear and decide terrorism cases, the EOCCA also empowers this same court to hear terrorism cases as they are economic offences. His argument was that there are two statutes which confer jurisdiction to try terrorism offences. In his view, three principles apply. One, is that where there is inconsistency by two statutes enacted by the Parliament, the last statute prevails over the former. Two, where there is a general law like the Prevention of Terrorism and a specific law that is the EOCCA, the latter overrides the former and the third principle is that where there is specific law enacted

after the existence of the general law, the former repeals the latter. He highlighted that since the specific law was enacted to amend the EOCCA by establishing a special court, the powers of this court which were enshrined under Section 34 (1) of the Prevention of Terrorism Act were taken away. To buttress his argument, Counsel cited the case of **Tanzania Teachers Union v. Chief Secretary and 3 others**, Civil Appeal No. 96 of 2012. Mr. Mutalemwa, however, made *un quatre vingt (*one-eighty*)* when he submitted that the amending Act was substantive and, therefore, could not have retrospective effect to cover offences which were committed prior to the enactment and coming into force the amending Act. Although he was of the view that the terrorism offences under Counts 1, 2, 3, 4 and 5 in the charge facing the accused persons were not covered by the amending Act which was substantive and had prospective effect, he maintained that there was misjoinder of counts which deny this court jurisdiction to hear and decide this case on account that terrorism cases have its special Court. Regretting on the committal proceedings being improperly conducted, Mr. Mutalemwa argued that the Criminal Procedure Act was improperly invoked in holding the committal proceedings as there were counts charged under the Prevention of Terrorism Act and the provisions of Section 30 (1) of the EOCCA direct that the accused have to be committed to the Court which is the

Corruption and Economic Crimes Division of the High Court and not this court. Counsel lamented that this court lacks jurisdiction to entertain this case as there was no committal order. He prayed that this court invokes its inherent powers to order amendment of the charge to be of murder as the accused persons are yet to be committed to this court. It was also his prayer that the accused while under the charge of murder should be referred to the subordinate court to be committed to the Court which is envisaged under Section 3 (1) of the EOCCA.

On his part, Mr. Cosmas Tuthulu adopted the arguments of the former Counsel. He put emphasis on the argument that this court has no jurisdiction to try the terrorism offences which fall under the EOCCA as they are economic offences triable only by the Corruption and Economic Crimes Division of the High Court, the position adopted by this court in **R. v. Halfan Bwire Hassan, Adam Hassan Kasekwa@ Adamoo, Mohamed Abdillah Lingwenya and Freeman Aikael Mbowe,** Economic Case No. 16 of 2021. Admitting that this case is not binding on me, Counsel was of the opinion that it is persuasive and should be adopted to maintain consistency of court's decisions. He outlined that if the case is heard by this court, it will occasion miscarriage of justice as the accused persons were not committed to this court on terrorism offences but on murder charges but that even then, apart from the fact

that there was no committal order, the accused persons were not informed of the substance of their evidence. As to the way forward, Mr. Tuthulu adopted what Mr. Mutalemwa had suggested.

Responding to these submissions, Mr. Abdalla Chavula vehemently opposed the raised legal points which, according to him, have no any merit. He disputed all what Counsel for the defence had stated in their submissions save one aspect which is that the amendments brought to the EOCCA by the amending Act had two facets: procedural and substantive and did not, therefore, have retrospective effect to cover the offences allegedly committed by the accused in 2014 before the amending Act was enacted and came into force. He sought to distinguish the cases cited by the defence Advocates from the one under consideration. With regard to the case of **R. v. Farid Haji Ahmed & 36 Others** (supra), the learned Senior State Attorney told this court that it is inapplicable as the same was on territorial jurisdiction in that the Court was discussing whether the High Court had territorial jurisdiction to try offences committed in Zanzibar where there is a High Court. With respect to the cases of **Lala Wino** and **Shear Illustration Ltd** (supra), Mr. Chavula was of the view that they are, as well, inapplicable to the circumstances of this case because in those cases, the courts were discussing on retrospective effect of statutes on procedural issues. He

emphasized that the charges which the accused persons are facing are not economic as the amending Act had both procedural and substantive effect and could not operate retrospectively so as to cover incidents which occurred prior to its enactment and operation. The learned Senior State Attorney relied on the provisions of Article 13 (6) (c) of the Constitution of the United Republic, 1977 as amended from time to time.

Mr. Chavula sensed a danger of having separate charges and trials by two distinct courts. He warned that such adoption would mean charging the accused persons with the offences which were not economic at the time of their commission and this would amount to not only an unfair trial but also a breach of the Constitution.

As to the argument that the offences charged against the accused persons under the Prevention of Terrorism Act are economic offences on account that the case was formally instituted in 2022, Mr. Chavula was of the view that that is not the correct legal position as what counts is not when the information or charge was instituted but when the alleged offences were committed.

Insisting that the amending Act was substantive and could not operate retrospectively to cover offences committed prior to its enactment, learned Senior State Attorney invited this court to take into

account what was observed by the Court in **Paschal Kitigwa v. R.** [1994] TLR 65.

On the competence or other wise of the committal order by the subordinate court, Mr. Chavula contended that the committal proceedings conducted under the Criminal Procedure Act was in order. He gainsaid the defence argument that the committal proceedings were either irregular or there were no committal proceedings at all. He reasoned that the offences the accused persons are facing in counts 1 to 5 are not economic offence and the decisions cited by the defence side including that of **Pascal Mwinuka** (supra) are inapplicable to the circumstances of this case as they related to economic offences which is not the case here. He was of the view that the argument by the defence that the committal proceedings were improper has no substance as the subordinate court was correct to conduct committal proceedings under Section 246 of the Criminal Procedure Act.

With regard to the defence argument that the laws are contradictory on the jurisdiction of this court in that while the Prevention of Terrorism Act bestows jurisdiction to this court, the EOCCA confers jurisdiction upon the Corruption and Economic Division of the High Court and that where there is specific law and the general law, the former

prevails over the latter, Mr. Chavula asservated that there are no laws which are inconsistent. According to him, there are limitations on the application of those laws. He distinguished the case of **Tanzania Teachers Union** (supra) from the case under consideration on the ground that what was stated at p. 9 referred to this court was not the decision of the court but the arguments by the advocates.

Submitting in support of the information under counts 1 to 5 on Prevention of Terrorism Act and counts 6 to 8 under the Penal Code, Mr. Robert Kidando was confident that the information was properly filed and is in accord with the law. Basing his argument on the provisions of Section 133 (1) of the Criminal Procedure Act, the learned Senior State Attorney submitted that there is no misjoinder of the charges. In his view, the charges were properly joined and should be tried jointly. He levelheaded his argument by stating that the offences arose from the same facts.

Mr. Kidando also took a stand that the amending Act was substantive in that it did not only change the status of the offences by making them economic but also enhanced the sentence under Section 60 of the EOCCA. He was emphatic that the Republic was not prepared to break the Constitution which is the Supreme law of the land. He supported his argument by citing the case of **Pascal Kitigwa v.**

Republic (supra). He maintained that the changes brought in respect of the counts against the accused persons had substantive effect and could not, therefore, be retrospective in operation. He cited the case of **DPP v. Iddi Hassan Chumo & Another**, Criminal Appeal No. 430 of 2019 (unreported) where at page 10, 3rd paragraph the Court of Appeal had the following to observe: -.

> *'In dealing with this issue, we wish to begin with stating the position of the law regarding changes or enactment of the law. Ordinarily, in terms of section 14 of the Interpretation of Laws Act [Cap. 1 R.E.2002 now 2019] the law or Act comes in to operation on the date of publication in the Gazette except if the law provides otherwise. It is also important to note that the law would not apply retrospectively if it affects substantive rights of the victim/party. However, where such changes affect procedure only, it can operate retrospectively'.*

Mr. Kidando joined hands with Mr. Mutalemwa on the argument that the 2016 amending Act was both procedural and substantive as such it could not run retrospectively.

Further that at pp 11 and 12 the court cited the decisions of the erstwhile e East Africa Court of Appeal in **Municipality of Mombasa v. Nyari Limited** (1963) EA 372at p. 374 which reads (reads).

Learned Senior State Attorney referring this court to the saving section under the EOCCA, that is Section 66 (2)(b) and (c) brought about Act No. 3 of 2016, he placed reliance on the case of Republic **v. Joel Charles Lweyendera @ Joel Charles Macharia**, Misc. Criminal Application No. 87 of 2020 HC (T) at Dar (unreported) to support his argument.

On the incompetence of the Committal order and the cases of **Warioba Mwita and Pascal Mwinuka** (supra), learned Senior State Attorney took into consideration that in those cases, the offences were economic, which is not the case in the matter under consideration. He insisted that the defence argument that the committal proceedings were improper has no substance. In his view, the subordinate court was correct to conduct committal proceedings under S. 246 of Criminal Procedure Act.

Mr. Kidando refuted the defence argument that the two Statutes, that is the Prevention of Terrorism Act and the EOCCA are contradictory on the jurisdiction of this court. According to him, the jurisdiction of this

court for the offence under the Prevention of Terrorism Act which are not economic is vested in the High Court whereas, the EOCCA vests jurisdiction of economic offences in the special Corruption and Economic Division of the High Court. He sought to distinguish the case of **Tanzania Teachers Union** from the present case arguing that what was referred to at page 9 by the defence was not the court's ratio decidendi but the arguments by the advocate which could not form the basis of the court's decision.

Submitting in rejoinder, Mr. Mutalemwa insisted that the substantive law cannot have a retrospective effect more so if it affects the rights of the subjects and that terrorism acts are economic offences from the date the law was amended and that it has been correctly put by the Republic that the accused cannot be charged with terrorism as economic offences. He was of the opinion that the Constitution can be resorted to only where the law is silent and not for any legal problem. He insisted that the powers were not taken away save in respect of those proceedings which were still under way.

He concluded that the defence was inclined to have one conclusion without considering legal arguments that it is possible for the offence to be jointly tried if the particulars are the same.

For his part, Mr. Tuthulu stood on his ground that terrorism acts fall under the Corruption and Economic Crimes Division of the High Court and that the decision of this court (Luvanda, J) should be followed and advised the prosecution that when preparing information, the question of jurisdiction should be taken into account.

Lastly, learned Counsel adopted what Mr. Mutalemwa had submitted on the general interpretation as detailed in the case of **Chama cha Waalimu** (supra).

I have, with circumspection, given deserving attendance to the submissions of the learned Counsel of both sides. It is common cause that the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016 (the amending Act) effected some amendments to various laws, the Economic and Organised Crime Control Act, Cap. 200 R.E.2002 (the EOCCA), inclusive.

Part III of the amending Act amended the EOCCA by either repealing or making substitutions. Precisely, section 5 of the said Act provides that this Part shall be read as one with the EOCCA.

It is true that the word 'Court' which was earlier provided under Section 2 of the EOCCA has been amended under Section 2 (1) with the effect of deleting 'Court' which earlier meant 'the 'Court' sitting as the an

'Economic Court' and substituting it with the words 'Corruption and Economic Crimes Division of the High Court'.

Equally true is the fact that Section 8 which amended Section 3 of the EOCCA has designated categories of the offences which the Corruption and Economic Crimes Division of the High Court will have to hear and determine. Under the Frist Schedule to the EOCCA, paragraph 24 in particular, such offences include offences under the Prevention of Terrorism Act. Through the powers vested to the Chief Justice by Section 63A, there are rules made establishing the registry of the Corruption and Economic Crimes Division of the High Court. Further, under rule 6 of the Economic and Organised Crime Control (the Corruption and Economic Crimes Division) (Procedure) Rules, 2016 published in the Government Notice No. 267 on 9th September, 2016, the Chief Justice has established Registry and Sub-registries in respect of the said Court.

The first issue calling for determination is whether the amendment brought to the EOCCA by the amending Act has taken away the jurisdiction this High Court to hear and determine the offences falling under the Prevention of Terrorism Act. It is the argument by the defence that in terms of paragraph 24 of the First Schedule to the EOCCA, all offences under the Prevention of Terrorism Act, No. 21 of 2002 are

economic offences which are exclusively triable in the Corruption and Economic Crimes Division of the High Court and that the present case is not an exception. The defence is insisting that this High Court has no jurisdiction to hear and decide this case as counts 1 to 5 made under the Prevention of Terrorism Act are now economic offences triable by the Corruption and Economic Crimes Division of the High Court and not by this normal High Court. In buttressing this argument, the defence made reference to the decision of this court in **R. v. Halfan Bwire Hassan, Adam Hassan Kasekwa@ Adamoo, Mohamed Abdillah Lingwenya and Freeman Aikael Mbowe,** Economic Case No. 16 of 2021 and sought this court to be inspired by that decision**.**

On their part, the prosecution was not ready to buy that argument. It was the argument of the learned Senior State Attorneys that the 2016 amendments brought to the EOCCA did not affect the terrorist incidents which occurred before the enactment and the coming into operation of the amending Act. So, the terrorism charges under the Prevention of Terrorism Act which the accused persons are facing are not economic offences falling under the EOCCA, the prosecution insisted.

I think the prosecution is right. A statute which affects substantive rights is presumed to be prospective in operation unless made

retrospective either expressly or by necessary implication. Furthermore, a statute which not only changes the procedure but also affects vested rights, impose new burdens and impair existing rights and obligations shall be construed to be prospective unless otherwise provided either expressly or by necessary implication.

Newbold, J.A, in the erstwhile East Africa Court of Appeal in the case of **Municipality of Mombasa v. Nyali Limited** (1963) EA 371 at 374, observed:

> *'The general rule is that unless there is a clear indication either from the subject matter or from the working of Parliament that Act should not be given a retrospective construction. One of the rules of construction that a court uses to ascertain the intention behind the legislation is that if the legislation affects substantive rights, it will not be construed to have retrospective operation, unless a clear intention to that effect is manifested, whereas if it affects procedure only, prima facie it operates retrospectively unless there is good intention to the contrary'.*

The Court of Appeal adopted this position in **DPP v. Iddi Hassan Chumu and Ephraim Johnson Mmasa**, Criminal Appeal No. 430 of 2019.

In the case under question the amendment of the EOCCA brought by the amending Act had, as rightly submitted, both procedural and substantive effect and could not, therefore, operate retrospectively and the amendments there in contained no express stipulation that its operation was to be retrospective. The stand of this court has been as aptly expressed by my brother Ismail, J. in **R. v. Farid Hadi Ahmed and 35 others**, Criminal Sessions Case No. 121 of 2020. There he said, *inter alia*, the following: -

> *'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'.*

Although the court in that case was discussing on the territorial jurisdiction of the High Court and amendments made to two legislations, that is the Armaments Control Act [Cap. 246 R.E.2019] and the Prevention of Corruption Act, No. 21 of 2002, the principle in that case applies to the facts of this case partly because, the court was discussing on 2016

amendments brought by the amending Act not only to the Armaments Control Act but also to the Prevention of Terrorism Act, and partly because the incidents were alleged to have occurred in 2013 and 2014.

As was rightly submitted by the prosecution, the offences in counts 1, 2, 3, 4 and 5 are not economic.

On those premises, it is not, therefore, a correct legal proposition that all offences under the Prevention of Terrorism Act must be economic and hence covered under the EOCCA by virtue of sections 57 (1) read together with paragraph 24 of the Act. In my view, as far as the amendments brought about by Act No. 3 of 2016 are concerned, the time of occurrence of the incidents is also one of the determinant factors as whether or not the offences falling under the Prevention of Terrorism Act are economic offences. In the case under consideration, as rightly submitted by learned Counsel for both sides, the amending Act had both procedural and substantive effect as such the changes could not apply retrospectively to cover the offences allegedly committed by the accused persons two years back before the amending Act was enacted and came into force. It will be recalled that the amending Act became operational on 7th day of July, 2016 while the offences facing the accused persons were committed between 1st January and 6th September, 2014 (1st and

3rd Counts) and 6th September, 2014 (2nd, 4th, 5th, 6th, 7th and 8th Counts). It is true that while there is a presumption that statutes are not intended to have retrospective effect, there is no proscription where the intention to operate retrospectively is either expressly or impliedly clear from the wording of the statute. As both sides will agree with me, there is nowhere in the amending Act showing expressly or by implication that the amending Act was intended to operate retrospectively. Fortunately, both sides are at one that the amending Act which had substantive effect could not operate retrospectively but operated prospectively.

Further, it is not the law that all corruption and economic offences must be heard and determined by the Corruption and Economic Crime Division of the High Court established under Section 3 of the EOCCA. The reasons for this are not far-fetched.

In the first place, the Corruption and Economic Crimes Division of the High Court is covered under Part II of the EOCCA. Its establishment and composition are covered under Sections 3 to 10 while its jurisdiction and functions are covered under Sections 11 to 19. Of importance at present are Sections 3 and 11 of the EOCCA.

With regard to the Establishment, sub-section (1) of Section 3 provides as hereunder: -

3.-(1) There is established the Corruption and Economic Crimes Division of the High Court with the Registry and sub-registries as may be determined by the Chief Justice, in which proceedings concerning corruption and economic cases under this Act *may* be instituted.

Note that the word used is **'may'** and not **'shall'** meaning that it is permissive in the sense that it is not mandatory that all proceedings concerning corruption and economic cases under the Act should be heard and determined by the said Court.

This leads us to the jurisdiction and functions of the Court. While the powers of that Court to inquire into economic offences alleged to have been committed and make decisions and orders for purposes of the Act is derived from the provisions of sub-section (1) of Section 11 of the Act, sub-section (2) of Section 11 of the Act provides for the means the allegations of commission of any economic offence may be brought to the attention of the Court. According to those provisions, it is through two avenues only: one, by reference of any court subordinate to the High Court and two, by institution of proceedings before the said Court by the Director of Public Prosecutions. For clarity and ease of reference, I quote the said provisions as hereunder: -

11.-(1) The Court shall have power to inquire into economic offences alleged to have been committed, and to make such decisions and orders for the purposes of this Act as it may in each case find fit and just.

(2) Allegations of commission of any economic offence may be brought to the attention of the Court through-

(a) the reference by any court subordinate to the High Court, with copies of records being sent to the Director of Public Prosecutions, of any case involving economic offence or offences previously instituted before that court;

(b) the institution of proceedings before the Court by the Director of Public Prosecutions or by his representative duly appointed in accordance with section 82 of the Criminal Procedure Act.

Short of these two avenues, the allegations of commission of any economic offence cannot be brought to the attention of the Corruption and Economic Division of the High Court to exercise its powers under sub-section (1) of Section 11 of the EOCCA.

In the case under consideration, I have established that the offences the accused persons are alleged to have committed were not covered under the EOCCA as they were committed prior to the existence of the amending Act and the inclusion in the EOCCA to be known as economic offences. Equally very important is the fact that the amendment effected by the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016 did not affect the provisions of Sections 3 and 34 of the Prevention of Terrorism Act, No. 21 of 2002. These provisions were, 'purposely', left to remain intact. I say 'purposely' because, I am under the impression that in amending the EOCCA, the Parliament had in mind the provisions of Section 11 of the Prevention of Terrorism Act on overriding effect. To be precise, the said provisions enact as follows: -

> **'11. The provisions of this Act shall have effect notwithstanding anything inconsistent with this Act contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act'.**

The above law is supplemented by the clear provisions stipulated under Part VI of the Criminal Procedure Act [Cap. 20 R.E.2022] under the Heading: General Provisions Relating to Trials. According to Section 165 (1) of the said Act,

'Any offence under any law than the Penal Code shall, when any Court is specified in that behalf in that law, be tried by that court.'

In the case in question, the law that is the Prevention of Terrorism Act under Part VI on the Heading: Trial of Offences, section 34 (1) in particular, decidedly, provides that the High Court shall have jurisdiction to try offences under this Act. There is no dispute that this is the High Court prescribed under the said Act. I have closely considered the case of **R. v. Halfan Bwire Hassan** (supra) cited to me by Mr. C. Tuthulu, learned Counsel for the 4th accused. Although I cherish the Latin maxim *stare decisis non quieta movere* which, translated in English, means 'to stand by the decisions and not to disturb the undisturbed'; a legal principle by which courts are obliged to respect the precedent established by prior decisions, I am of the firm but considered view that the cited case must be confined to its own peculiar facts. After all, as the citation speaks itself, the cited case was an economic case and not a criminal sessions case as is the one under consideration. Further, the Director of Public Prosecutions had instituted proceedings to that Court while, as the record clearly shows, the Director of Public Prosecutions not only instituted the proceedings in this court but also gave his consent under

the provisions of Section 34 (2) of the Prevention of Terrorism Act. That case is, therefore, distinguishable from the case under consideration.

For those reasons the argument that this court has no jurisdiction to hear and determine this case has no any legal merit and falls away.

The second issue is the propriety or otherwise of holding a joint trial of two distinct offences of murder and terrorism. It is the argument on part of the defence that it is illegal to try such offences in one trial. While Mr. Nasimire argued that the offence of murder is not cognate to the offence of terrorism, Mr. Mutalemwa, learned Counsel for the 9th accused, asserted that there is a misjoinder of counts which cannot go together. He reasoned that this misjoinder denies this court its jurisdiction to try this case. He explained that since the committal proceedings relating to this case were conducted under the Criminal Procedure Act only, probably for counts respecting murder, the committal proceedings for counts on terrorism which are economic offences had to be conducted under the EOCCA and the Rules made thereunder. The defence, therefore, urged this court to have the said offences tried separately.

The prosecution has ardently refuted this argument.

I think the defence has missed the point. This is partly because, in their submissions, the learned defence Advocates, Mr. Mutalemwa in particular, are at one with the prosecution that the terrorism offences charged against the accused persons in counts No. 1, 2, 3, 4 and 5 were committed prior to the enactment and coming in operation of the 2016 amending Act. This means that such offences are not economic offences as the amending Act had both procedural and substantive effect and could not operate retrospectively. And partly because, though the normal rule is that for every distinct offence of which any person is accused, there shall be a separate charge and every such charge shall be tried separately except where such mode is covered by law, it is undeniable fact that when the accused persons commit several offences in the same transactions, they may be tried jointly and it is immaterial whether the offence is of the same kind or not. The issue is whether such mode of joint trial is covered by law. Fortunately, Mr. Robert Kidando, learned Senior State Attorney, came to the assistance. According to him, the mode of joint trial is covered under sub-section (1) of Section 133 of the Criminal Procedure Act [Cap. 20 R.E.2022].

With unfeigned respect, the prosecution is right. Sub-section (1) of Section 133 of the Criminal Procedure Act provides as follows: -

'133. -(1) 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, Criminal Procedure Act [CAP. 20 R.E. 2022] 88 s.8 a series of offences of the same or a similar character'

Further, it is provided under paragraph (c) of sub-section (1) of Section 134 of the Act as follows: -

'134. -(1) The following persons may be joined in one charge or information and may be tried together, namely-

(a) .....(not relevant);

(b) .....(not relevant);

(c) persons accused of different offences committed in the course of the same transaction; ....'

It is very clear from the above provisions that the accused persons were rightly joined in one charge and can properly be tried together in a joint trial.

Third, on whether or not the accused persons were properly committed for trial to this court, having observed that the offences the accused persons are facing under the Prevention of Terrorism Act were not economic and that this court is, by virtue of Section 34 of the said

Act, empowered to try this case, the accused were properly committed to this court under the Criminal Procedure Act.

Let me now examine the cases cited to me by learned Counsel for the parties.

The first one is **Lala Wino v. Karatu District Court**, Civil Application No. 132/02/2018 on the authority that once matters of procedural law has occurred, the same will have a retrospective effect for the matter which were pending before the occurrence of the changes. As rightly argued by Mr. Abdallah Chavula, the amendments made to the EOCCA had two facets, one was procedural and the other was substantive. This, the defence has admitted. The issue is, therefore, neither here nor there.

Second, in **Pascal Mwinuka v. R.**, Criminal Appeal No. 258 of 2019 (unreported), one of the complaints in that case was that the appellant was improperly committed by the subordinate court for trial before the High Court. The Court of Appeal found that Rule 8 (3) of GN No. 267 of 2016 had not been complied with in full as the Resident Magistrate had neither reproduced the exact words stated therein nor recorded the response of the appellant after being so addressed. The said Court noted that the crucial issue for determination at that point was

whether the omission was fatal. Admitting that compliance with the said provisions in full ensures that the accused has understood what transpired during the committal proceedings and what will be expected of him at the trial before the High Court, the Court of Appeal held that the omission of the committing magistrate to comply fully with the provisions of rule 8 (3) of GN No. 267 of 2016 did not occasion injustice to the appellant to the extent of rendering the entire proceedings being declared a nullity. This holding is found at p. 10 of the printed copy of judgment.

As it is apparent from the record, particularly the preferred charge sheet, the accused persons are not charged with economic case but a criminal sessions case. As stated above, the Director of Public Prosecutions gave consent under the provisions of Section 34 (2) of the Prevention of Corruption Act and not under the EOCCA.

For the reasons stated above, the case the accused persons are facing cannot, by any stretch of imagination, be heard and determined by the Corruption and Economic Crimes Division of the High Court.

In resume, I hereby find and hold that this court has jurisdiction to hear and determine this case. The accused persons were properly

committed to this court and there is a proper committal order by the subordinate court to this court.

With respect to the complaint by the defence on the statement of witnesses lacking sufficient information, there is no dispute that this court (Hon. Itemba, J) in Misc. Criminal Application No. 16 of 2022 between the **DPP v. Said Adam Said and 10 others**, did, on 6th day of May, 2022 order the prosecution to supply the defence with a summary of facts constituting the substance of the evidence intended to be relied upon. It would seem, the prosecution is yet to comply with that order.

Since already there is a court's order covering the complaint on part of the defence, the prosecution side is directed to immediately comply with that order before the trial of the case commences.

Save for the latter directions, the preliminary points are dismissed and the case should proceed as scheduled.

W.P. Dyansobera

Judge

10.03.2023

This ruling is delivered under my hand and the seal of this Court on this 10th day of March, 2023 in the presence of Mr. Robert Kidando and Mr. Abdallah Chavula, lead learned Senior State Attorneys, Ms. Margareth Mwaseba, learned Senior State Attorneys and Mr.

Tulumanywa Majigo, learned State Attorney, all for the Republic and Messrs. Nasimire, Mutalemwa and Tuthulu, lead defence Counsel for, respectively, the 1st, 9th and 4th accused persons. Present also are Messrs. S.M. Galati, Lenin Njau, Kassim, Abdallah Kessy for the 2nd, 3rd, 5th and 6th accused persons, in that order. Messrs. Mushobozi, A. Fundikira and A. Salum, learned Advocates for the 7th accused. Also Mr. Sijaona, learned Counsel for the 8th accused and Mr. Abdallah Kessy, learned Advocate for the 9th accused and Mr. Kalumuna, learned Advocate for the 10th accused and Messrs. Sekundi and Mr. A. Salum, both learned Counsel for the 11th accused persons.

THE HIGH COURT OF TANZANIA
MWANZA

W.P. Dyansobera
Judge