IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

CRIMINAL SESSION NO. 63 OF 2022

REPUBLIC

VERSUS

1. **ABDALLAH ATHMANI LABIA@BROTHER MOHAMED**
2. **ALLY HAMISI KIDAANYA**
3. **ABDALLAH MAGINGA WAMBURA**
4. **RAJABU PIRI AHMED**
5. **HASSAN ZUBERI SAID**
6. **ALU HAMISI JUMANNE**
7. **YASSIN HASHIM SANGA**
8. **SHABANI ABDALLAH WAWA**
9. **IBRAHIM LEONARD HERMAN@ABUU ISMAIL**

RULING

09.05.2023

Rwizile, J

In this ruling, there are two issues to determine. First, the prosecution asked for an amendment of the information to include **ABDALLAH MAGINGA WAMBURA** and **YASSIN HASHIM SANGA,** 3rd and 7th accused persons respectively in the first 14 counts that arose from the Prevention of Terrorism Act. Second, in objection, the defense has raised to two points, touching on

the jurisdiction of this court and the defectiveness of the information before the court.

Submitting, why the amendment of the charge, MS Ajuaye Bilishanga Principle State Attorney gauged his point under section 276(2) of the Criminal Procedure Act.

According to her, the law allows amendment of the charge at any time if it is found that the charge is defective. She said the reason for the amendment is that the two accused persons were only charged on alternative counts that is 15 to 26. In her view, this is the defect in the information.

Further, it was argued that no justice failure will be occasioned since there is no new evidence to be brought. What is present in the records according to her was brought in under section 178 of the CPA and so section 276(3) of the CPA solves the problem raised by the defense.

Mr. Peter Madeleka learned counsel who stood for the defence side, submitted that the terms of section 276 are clear. He said an amendment can be allowed when the court is satisfied that the charge is defective. In this case, it was stated, the prosecution did not prove that the charge is defective. It is not, in his view, without evidence that it is defective,

amenable for amendment. He said, charging the two accused persons with or without alternative counts does not render the charge defective.

Mr. Madeleka was clear that based on the nature of this case, there is no way the amendment sought can be done without occasioning a failure of justice on the accused persons. The learned counsel held the view that this does not only conflict with section 276 of the CPA but also article 13(6)(a) of the constitution of the United Republic of Tanzania, since there won't be a fair trial, the accused persons will be taken by surprise. He added, it is against the principles of natural justice.

Further, the learned counsel argued, it is a legal requirement under section 176 of the CPA, that all offenses triable by the High Court, come before it through committal proceedings. He said the accused persons in this respect did not plead on the stated counts. This means the learned counsel added, allowing an amendment, the accused persons will be required to take plea. That in itself, in the view of the learned counsel will lead to failure of justice.

On the jurisdictional issue, he said, this court has no requisite jurisdiction to try this case. According to him, the 1st to 14th count is charged under the Prevention of Terrorism Act, which under section 57(1) of the Economic and Organized Crimes Control Act, [Cap 200 R.E 2022] to be referred to as

EOCCA, all offenses under para 24 of the first schedule are economic offenses. The offenses are triable by the Corruption and Economic Crimes Division of the High Court under section 3(1) of the EOCCA. In support, I was referred to the cases of **Jumanne Leonard Nagana vs R,** Criminal Appeal No.515 of 2019 (CA) on page 13, and the case of **Tanzania Electric Supply Company (TANESCO) vs IPTL and** Others [2000] TLR 324 at page 345.

On the defects of the charge, it was his view that there is a misjoinder of counts that is 1st to 14th counts are economic offenses under EOCCA, triable by the Corruption and Economic Crimes Division of the High Court, and the succeeding 15th to 26th count under the Penal Code (PC) triable by this court. In his view, under section 128 of the CPA, the charge is the foundation of the trial, therefore, these offenses cannot be tried together in one trial and so this court has no jurisdiction. He asked, I have to dismiss the charge and acquit the accused persons.

In addition, Mr. Joshua learned counsel argued that since section 276(2) of the CPA allows amendment of the charge provided there is no failure of justice, the court must be mindful of that test. He argued further that the amendment should not be allowed because the accused persons have not

pleaded anything so far. Doing so, at this point, the learned counsel held the view, injustice will be occasioned.

MS Ajuaye learned State Attorney responded on the jurisdiction of this court that, the offenses alleged were committed on 7th April 2014. She said under the Act, the 1st to 14th counts are terrorism offenses which at that time, were not economic offences. She further argued the same was made so in 2016 when the EOCCA was amended via Miscellaneous Amendment Act No. 3 of 2016 under section 16 of the Act. It was commented that the amendment came into force on 8th July 2016. She also added that the Corruption and Economic Crimes Division of the High Court was not established yet. In her view, since the time of the commission of the offence, in accordance with section 34(1) of the Prevention of Terrorism Act, terrorism offences were not economic offences. They could not, therefore, be charged in a court that was not existing at that time.

By way of rejoinder, Mr. Madeleka was brief that the prosecutor has merely opined but did not provide the position of the law. In his view, section 57 of EOCCA stated that offences under the first schedule are economic offences with effect from the 25th day of September 1984, any amendment thereafter notwithstanding.

He asked this court to apply the case of **Jumannne Nagana**(supra) on the jurisdictional issue and therefore dismiss the entire charge and acquit the accused persons.

Having heard and carefully considered the parties' submissions, I think I have to first deal with issues raised by the defence, on jurisdiction and defectiveness of the charge. In terms of the case of **Jumanne Leonard Nagana**(supra), on page 13, the jurisdiction of any court is something basic to be decided before delving into any other matter. The Court of Appeal held that the question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial. It would be risky as it held to proceed to hear the case on the assumption that the court has jurisdiction.

As submitted, section 57(1) of the EOCCA clearly provided that:

> *"With effect from the 25th day of September 1984, the offenses prescribed in the First Schedule to this Act shall be known as economic offenses and triable by the Court in accordance with the provisions of this Act."*

Going by the wording of the law and the submission of Mr. Madeleka, all offences listed under the first schedule to the EOCCA are economic offences,

the time the same were so listed, and the amendment that enacted them into the listed scheduled offences notwithstanding.

MS Ajuaye plainly stated that offences of terrorism under the Prevention of Terrorism Act were not economic offences until 8th July 2016. Admittedly, it can be stated that there was no offence of terrorism in our laws. The original text of the EOCCA did not have such a crime. It is as clear as crystal that it was in 2002 that the offense of terrorism was enacted into the law by Act No. 21 of 2002 which came into force on 14th December 2002. Section 34(1) of the Act provided that the offenses as submitted by the learned State Attorney are triable by the High Court upon the consent of the Director of Public Prosecutions.

It can be argued with certainty therefore that, the law did not in 1984 envisage a terrorist act to be an economic offence. Perhaps acting in the doctrine of retrospectivity which demands that when the law affects substantive justice, it cannot operate retrospectively save where it is on procedure only. In the case of **Simon Nchagwa vs Majaliwa Bande**, Civil Appeal No. 126 of 2008 at page 8, the Court of Appeal Held;

> "*... the question of whether legislation operates retrospectively or not was discussed in the case of* ***Patel v Ben Bros Motors Tanganyika***

Ltd *Civil Appeal No. 5 of 1968. In the said case Sir Charles Newbold P, had an occasion to discuss the issue of retrospective law. He cited with approval the case of* ***Municipal of Mombasa v Nyali Limited*** *1963 E.A. 371 at page 373 where he said: - "Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation the courts are guided by certain rules of construction. One of these rules 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 reason to the contrary. But in the last resort, it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must have in order to ascertain that intention..."*

This means terrorism offences are not economic as the amendment had both procedural and substantive effects and could not operate retrospectively. The objection is therefore dismissed.

The second point, in that line, is the defectiveness of the charge. The law is clear that the charge is bad for duplicity if it contains two distinct offences in one count. 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 offence is covered by the law, it

is an 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.

This is governed by section 133 of the CPA which provides that 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 part of the same or a similar character. In this regard, therefore, the defence point here is baseless and cannot be left to hold.

The Court of Appeal has held so in the case of **Director of Public Prosecutions vs. Morgan Maliki and Another,** Criminal Appeal No. 133 of 2013 (unreported) in which, with lucidity, the Court stated that: -

> *"our view, the situation is governed by sections 133(1) and 135(b)(1) of the Criminal Procedure Act, Cap 20 R. £ 2002 (the CPA). And sections 337 and 342 of the Pena! Code Cap 16 R. E 2002. The total effect of these provisions is that any offenses may be charged in the same charge or information, if the offenses charged are founded on the same facts or if they form or are part of a series of offenses of the same or similar character. If an enactment constituting an offense consists of the doing of any different acts in the alternative, the charges may state any one of those others in alternative counts. In the present case save for the punishments, the offenses of forgery and*

uttering false documents are distinct offenses; and there is nothing in the wording of sections 337 and 342 of the Penal Code, to suggest that, they were intended to be alternatives to each other. A charge is said to be duplex if, for instance, two distinct offenses are contained in the same count, or where an actual offense is charged along with an attempt to commit the same offense..."

In the present matter, there are counts of committing terrorist acts, murder, and attempted murder, although they are all founded on the same transaction under different laws, sufficiently in my view, informed the accused persons of the nature, time, and manner in which they were committed. This sufficiently, provides information for the accused persons to put up a focused defence. In that regard, the charge is not incurably defective. This point as well lacks merit.

Having determined the two issues, raised by the defense, it is now opportune to see if the prosecution has justification for an amendment. The defence, of course, has said, this is not allowed.

The law governing the amendment of the charge before this court is section 276(2) of the CPA as it has been rightly submitted by both parties. For ease of reference, the section provides that

(2) Where before a trial upon information or at any stage of the trial, it appears to the court that the information is defective, the court shall make an order for the amendment of the information as it thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendment cannot be made without injustice, and all such amendments shall be made upon such terms as the court shall seem just

From the provisions, it can be discerned that amendment of the information before this court is allowed provided the court is satisfied that the charge is defective and that the amendment does not cause any injustice to the accused persons. It can also be added here that a charge worth an amendment must be with curable defects.

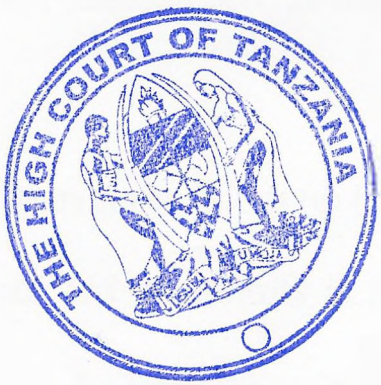
I have shown before that the charge which is bad for duplicity is that which contains distinct offences in one count which is not the case here. The present situation is clearly posing a different scenario. The accused persons have been charged on different counts.

The 3rd and 7th accused persons were only charged on the alternative counts. It is the prayer of the prosecution that charging in alternative has to have both sets of counts, which is the case with other accused persons. For the prosecution, this is a defect. I entirely agree with the prosecution that it is so. Faced with a similar situation, the Court of Appeal, in the case of **Bahati**

Bukombe and Two others vs The Republic, Criminal Appeal No. 568 of 2017, held

> *"...According to the above provisions of the law, the court can order an amendment of the information, if necessary, on the terms which it deems just. If the court makes such an order, it is required under subsection (3) to endorse the information, to enable such information to be treated for the purpose of all proceedings in connection therewith as having been filed in the amended form..."*

It is to be noted that section 276 is under part VIII of the CPA which deals with trials before the High Court. For the foregoing reasons, I find no reason to reject the prosecution's prayer of amending the charge. The prayer is therefore granted as prayed.



A.K. RWIZILE

JUDGE

09.05. 2023