IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 160 OF 2022

(Appeal from Arusha Resident Magistrate Misc. Criminal Application No 1 of 2020, Originating from Economic Case No 40 of 2020)

PETER MICHAEL MADELEKA _____ **APPELLANT**

VERSUS

REPUBLIC _____ **RESPONDENT**

17/05/2023 & 17/07/2023

JUDGMENT

BADE, J.

This is an appeal which is preferred by the appellant Mr. Peter Michael Madeleka, appealing from the Ruling of the RM's Court of Arusha through Mhenga, SRM who refused to set aside the plea bargain agreement emanating from Criminal Case No 40 of 2020. The same had been preferred through an Application by the Appellant as per section 194 G (2) of the Criminal Procedure Act [Cap 20 RE 2019], and Rule 23 of the Criminal Procedure (Plea Bargaining Agreement) Rules, 2021 [G.N. No 180 of 2021] filed as Miscellaneous Criminal Application No 1 of 2022.

When the matter was called for hearing, Mr. Peter Madeleka who has advanced 6 grounds of appeal had fended for himself, while the Republic

had been represented by Mr. Mahfoudh Mbagwa, aided by Ms. Eunice Makalla, State Attorneys.

A brief factual background to this matter is that on 14th May 2020, the appellant was charged with committing 10 counts of Economic Offences. Upon a letter initiated by the Appellant, he sought the DPP in engaging to plea bargain on an understanding that he will plead guilty to a lesser offense.

Submitting in support of the appeal and arguing the first ground of appeal that the trial court erred in law and fact for failure to consider dictates of the law under rule 21 (3), (a) Plea Bargaining Agreement Rules 2021 where the rules read:

> *21 (3) Where the plea agreement involves compensation,*
> *the court shall ensure compensation is paid to*
> *(a) in the case of government or a government institution, the Treasury Registrar*

The appellant argues that the wording of the above-cited law is unambiguous and hence has to be interpreted or given meaning. He cites the case of the **Board of Trustees of NSSF vs New Kilimanjaro Bazaar Ltd,** Civil Appeal No 16 of 2004 which was referred with approval in the case of **Dangote Industries vs Warnercom Ltd,** Civil Appeal no 13 of 2021 (unreported) where the Court of Appeal of Tanzania observed that "……where provisions of statutes are plain and unambiguous there is no reason to resort to rules of interpretation.

Since the plea bargaining with the appellant and the DPP who acted on behalf of the republic involved compensation, it was erroneous for the trial magistrate to ignore the dictates of the law under rule 21 (3)a of the rules supra which provides in mandatory terms that the court should ensure that compensation is paid to the Treasury Registrar on behalf of the government. According to trial court records, in Economic Case no 40 of 2020, the compensation was paid to the DPP contrary to rule 21(3)(a). Failure to consider the mandatory provisions of the above rules made the plea-bargaining agreement an illegal one.

He cites the case of **William Gilli vs Basley Hatibu Mrema**, Land Appeal no 06 of 2017, where this court observed (p8)

> "An agreement that breaks the law cannot be enforceable based on the doctrine of the sanctity of contract"

The act of the DPP to receive the compensation on behalf of the government contravenes the rule stated above and thus plea bargaining cannot be enforceable in the eyes of the law.

He also cites the case of **HH Hilal & Co Ltd vs Medical Store Department & Another,** Civil Case No 105 of 2015, that

> " ....there cannot be a wrong without a remedy..."

He further argues that the remedy to this is to nullify the two lower court proceedings, concluding his submission with Art 107 (b) of the Constitution of the United Republic of Tanzania, 1977 as amended, which reads:

> ".....mahakama zitakuwa huru na kuzingatia masharti ya katiba na yale ya sheria za nchi....."

While reckoning that failure to observe the said rule above is a gross violation of the country's constitution.

Arguing his second ground of appeal he maintains that in respect of Miscellaneous Criminal Application no 1 of 2022, since this is the first appellate court, it has the power to reevaluate the evidence on record and come up with its own findings. He cites to the court the case of **Kaimu Saidi vs R,** Criminal Appeal No 391 of 2019 where the Court of Appeal while citing with approval **Siza Patrice vs R,** Criminal Appeal No 19 of 2010 unreported, observed that:

> " .... A first appeal is in the form of rehearing. As such the first appellate court has a duty to evaluate the entire evidence in an objective manner and enter its own findings"

He argues that had the Trial Magistrate in Miscellaneous Criminal Application No 1 of 2022 considered annexure PMM1 and PMM2 as well as PMM6 of the applicants' affidavit (now appellant) she would not have arrived at her decision that "it is presumed that parties agreed to the payment of compensation to be affected before the plea agreement in respect of **Economic Case no 40 of 2020** was made on 27th April 2021.

There is nowhere in both lower court records where it is shown that parties agreed that the compensation has to be made before the plea bargain agreement was signed. He argues further that even if such evidence was available on record it would have been in breach of law supporting his stance with the case of **William Gilli** (supra) where the court had stated

"…. An agreement that breaks the law is unenforceable based on the sanctity of the contract."

He contends that while annexure PMM1 of the affidavit in support of the application then, introduces the appellant to the Bank of Tanzania (Benki Kuu) for purposes of payment of compensation, annexure PMM2 is exchequer receipt issued by DPP acknowledging payment of compensation on 30th March 2021, PMM6 proves at p4 that the plea bargaining agreement had been signed and registered on 27th April 2021, even though it is known that an agreement will not bind a party unless it is signed, and referred to section 194B (a) of the CPA.

He urges that the law governing the payment of compensation resulting from plea bargaining agreement is now settled, and it provides for procedures to be followed if compensation has to be paid. Under Section 194D (1) of the Criminal Procedure Act and Rule 11 of the Plea-Bargaining Rules, it is provided for the procedure that any plea-bargaining agreement signed between parties must be registered by the court. Further, as per Rule 13 of the Rules, once the court has registered the Plea-Bargaining Agreement, it shall set the hearing date. According to the record, payment was done before the agreement was signed and registered. The requirement of the rules was not adhered to, which he insists is a gross violation.

He maintains that the record shows that after registering the plea bargaining on 27th April 2021, then the court scheduled a hearing date. This requirement he argues, is not discretional as there is the use of the word "shall" which is

defined under section 53 (2) of Interpretation of Laws Act Cap 1, RE 2019. These anomalies make the Plea-Bargaining agreement entered in an illegal manner and had the trial Magistrate in Criminal Application no 1 of 2022 directed her mind properly in considering these shortfalls, her decision would have been to nullify the entire proceedings in Economic Case no 40 of 2020, setting aside the conviction and sentence to exonerate the appellant of Criminal Records resulting from Economic Case no 40 of 2020.

Regarding ground 3 the appellant argues that he was convicted of a lesser offense with which he was not charged upon.

He strongly put it that under the schedule of the Economic Crimes Act, all the economic offenses have been listed and is of the view that Obtaining money by false pretense is not one of the offenses in the schedule. The appellant maintains that this offended section 57(1) of the Economic Crimes Act and its 1st schedule. It has been held by the court time and again that a charge is the foundation of the criminal case. He cites to the court the case of **Mohamed Kamingo vs R,** [1980] TLR 279 stating

> "…. It is the duty of the prosecution to ensure that the charge is laid correctly.

He further referenced the case of **Oswald Abubakar Mangula vs R** [2000] TLR 271. He urges that it is the law under Criminal Procedure Act section 194 B (a) that consequent to the Plea Bargaining "...the Prosecution may charge the accused with a less offense, withdraw other counts or take any other appropriate measures depending on the case circumstances".

So, he reckons, under this law, the Prosecution is only given 3 options to charge the person under Plea Bargaining, but according to records as found on PMM6 on page 6 of the affidavit, the State Attorney opted to withdraw the charge; withdrawal meaning refrains to proceed with prosecuting an action. He urges that from the above definition, one may note that the prosecution had no more intention to charge the appellant as they withdrew all the economic charges, which means the DPP could not have charged the appellant again even with a lesser offense as to the one charged previously.

He argues that even if the appellant was to be charged with obtaining money by pretense, the trial Magistrate should have evaluated the evidence and would have found a variance of evidence and the charges leveled. Annexure PMM6 shows the appellant had obtained TZS 2 million from one Bjorn Michelson, Annexure PMM4 on page 10 para 2 shows that the appellant received TZS 1.2M and TZS 800,000 from one Sylvia Roman Hansson and Lars Tonny Hansson respectively. Nowhere in the record it is shown that the appellant received TZS 2M from Bjorn Michelson, and thus the charge of obtaining money by pretense had no evidence to support it as required by rule 15(2) of the Plea-Bargaining Rules. The said variance he reckons, between evidence and the recorded charge is sufficient to nullify the entire proceedings. Guided by the principle in **Issa Mwanjiku @ White vs R,** Criminal Appeal no 175 of 2018 in which the Court of Appeal said

> "Where there is variance between charge sheet and evidence, failure to amend charge sheet is fatal....."

Arguing ground 4 of the grounds of appeal which is about contravening Rule 15 (2,3) of the Plea-Bargaining Rules, the appellant points out that p16 of the typed ruling it is stated as he quotes "... there is no need to be availed with the substance of the prosecution evidence, as the case had not proceeded to trial..." which is to say, the magistrate admitted in principle that the applicant was not availed with the prosecution evidence as mandatorily dictated by Rule 15(2).

The appellant argues that there are no reasons advanced to justify non-compliance with rule 15(2) of the rules. In any case, the requirement of the law is that the prosecutor shall lay before the court the factual basis for the plea agreement and the court shall determine whether there exists a basis for the agreement, and this he argues, is a mandatory requirement; its compliance does not depend on whether the case proceeds to trial or not. Annexure PMM3 of the applicant's affidavit did not comply with section 194C (a) of the CPA.

In such a case, the Court if observing the principles above, would have noted the variance between charges and evidence and arrived at a different conclusion. Section 194C (a) of the CPA is also instructive of the foregoing argument. The Magistrate ignored the provision of Rule 15(3) of the rules requiring that the accused person to freely and voluntarily without threat or use of force execute the agreement with full understanding of the matters.

In **The Gilli** case supra, the Court observed:

> ".....in law, an agreement refers to every promise and every set of promises forming the consideration for each other, and the same

become contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object...."

Since the plea bargain between the appellant herein and the DPP is a contract under the eyes of the law, it could not have escaped the dictates of section 2 (1), of the Law of Contract Act, Cap 345, and Rule 15 (3) of the Rules in Plea Bargaining. Considering the fact that the appellant has not been availed of the evidence by the Prosecution, he argues that one cannot say the appellant signed the agreement freely. He proceeded to define "free consent" as is defined under section 14(1) a, b, c, d, e of the Law of Contract Act, Cap 345 of the laws.

The appellant maintains that the Plea bargaining between the appellant herein was entered by undue influence. He argues that Section 16(1) of the Law of Contract Act Cap 345 defines undue influence as being unfair and dominating the will of the other. He argues that the relationship between the appellant and the Director of Public Prosecution was of the accused and the prosecutor, suggesting:

i) DPP was in control of the prosecution
ii) Did not even bother to complete the case investigation until after signing the plea bargain
iii) Did not even tender the factual evidence to the appellant or the court
iv) The DPP ordered the appellant to pay even before the hearing of the case, and

v) The appellant lost his liberty as he stood charged with a non-bailable offense.

All the above-mentioned circumstances suggest in his view, that there was undue influence to impliedly compel the appellant to enter into the plea bargain agreement.

In support of ground 5 of the reasons for appeals, the appellant maintains that the plea bargain compensation was paid in contravention of Rule 21(3) (b) which stipulates that (If we agree that the money obtained by the appellant from the three persons as mentioned in the particulars of the charges) then it is these persons who were the actual victims. and if there was any compensation to be paid, the same should have been paid to them as per Rule 15(3) (b) of the Plea-Bargaining Rules.

Arguing ground 6 of the grounds of appeal, the appellant argues that the Plea-Bargaining Rules as per Rule 6(1) were not adhered to in concluding the Plea-Bargaining agreement deal, and since the law was violated, the said plea-bargaining agreement cannot stand enforceable. In conclusion, the appellant urges and prays that the court allows the appeal, quash the proceedings of the lower court, sets aside the conviction and sentence, and consequently orders the fine paid to the court and the money paid to the DPP as compensation be restored to the appellant forthwith.

Responding to the arguments put forth by the appellant, Mr. Mbagwa addressed the Court on behalf of the Respondent and proposed to respond to grounds 1 and 5 jointly, while the others be addressed in seriatim.

Mr. Mbagwa charged back with respect to grounds 1 and 5 maintaining that the appellant is misconceived in his arguments. He explained that the money that the appellant deposited in DPP's account which is held at the Bank of Tanzania, (BoT) despite not being paid to the Treasury Registrar; whose account is also with the Bank of Tanzania. He argues that the DPP's account is not his personal account, never in his name, and as a matter of fact, this account is also under the Treasury Registrar.

In further response, he is clear that it is the appellant who deposited the money of his own volition, and this appellant, in all intent and purpose, is not a lay person, so it would not have been tenable for the appellant to pay an institution that does not exist. Further, and in the alternative, he maintains that he does not see how the appellant has been prejudiced by the action of depositing the money with the DPP instead of the Treasury Registrar. He reckons that if at all, the appellant was condemned for depositing the money into the DPP's account, the Treasury Registrar should have been the one to complain as the money paid in its favor was now deposited with the DPP instead of the Treasury Registrar's account.

Arguing on the 5th ground of appeal in particular, Mr. Mbagwa reckons that the appellant has claimed that the trial magistrate erred as her decision was contravening Rule 21(3) of the Criminal Procedure (Plea Bargain Rules 2021). Further, he argues that the appellant says the money should have

been paid to the victim and not the DPP as there are actual victims that are supposedly offended.

He submits in response that there is no law dictating that the compensation on Plea Bargaining is to be paid to the individual victim. It is the Plea-Bargaining agreement that determines who is to be paid. Rule 10(1) of the Plea-Bargaining Rules states

> "..... the Plea-Bargaining agreement may include a clause for payment of compensation by an accused person"

The operative word the State Attorney argues is "may" – and the payment of compensation may be directed to either a government institution or a victim. In any case, if anything, then maybe the victim would have come forth to complain about the non-payment of the money to the victim by the appellant.

Turning to ground 4 as argued by the appellant, that the Plea-Bargaining agreement was signed in contravention of Rule 15(2) and (3) of the Rules, he maintains that the said agreement was signed by the appellant on his own volition, and he did not dispute these facts while at it despite the fact that there was no evidence as he alleges in his argument. The respondent counsel maintains that for the Court to conclude a Plea-Bargaining agreement, it must comply with Section 194 D (1) which state any agreement entered in accordance with section 194 A and B shall be registered by the court, the court would have to satisfy itself that the accused person has entered into the agreement voluntarily. So, we believe the court was satisfied that Rules 15(2) and (3) were not contravened.

The counsel retorts further that the appellant is the one who initiated the Plea-Bargaining procedure through his letter dated 07th Nov 2020, which the magistrate quoted on p12 of the Ruling that is being challenged. So based on the letter which is quoted, the state Attorney is strongly viewed that it is evident that he voluntarily entered Plea Bargaining Agreement and there is nowhere that he was not satisfied with the whole process at any time.

Responding to the pointed-out variance between the charge and the evidence in response to ground 6, where it is argued that Rule 6(1) of the Plea-Bargaining Rules requires the prosecution to disclose all the relevant information before an accused gets into a Plea-Bargaining agreement is contravened. The counsel for the respondent argues firmly that this matter was not an issue on the challenged decision, meaning the appellant has brought up a new issue that was not canvassed during the application. He maintains that the appellant should have brought up this issue in the previous court where he was trying to set aside the plea-bargaining agreement.

On further argument, Mr. Mbagwa reckons that it is unconscionably untrue to put forth an argument that the Court had contravened this provision as it did not. There is no evidence that the DPP wrote to the appellant to get him to plea bargain, but rather it is the appellant who had written to the DPP for that purpose. He maintains in earnest that this ground has no basis legal or factual.

Responding to ground 3 of the grounds of appeal as argued by the appellant, particularly on failing to consider that the appellant was convicted on a lesser offense. He reckons that the Prosecution is mandated to substitute a charge with a lesser offense where there is a Plea-Bargaining agreement. This mandate is under section 194B (a) of the CPA.

In any case, the learned State Attorney argues that if the appellant was not happy with the said lesser offense, he could have pleaded not guilty to the charge and could have withdrawn from the Plea-Bargaining agreement voluntarily the same way he entered it, and the court would have obliged its position. It is not recorded anywhere that he was dissatisfied with the process as per Rule 19 of the Criminal Procedure on the Plea-Bargaining Agreement Rules which stipulates that any party at any stage of the proceedings before the court passes sentence can withdraw from the plea-bargaining agreement. There is no record that the appellant wanted to withdraw from the said plea-bargaining agreement at any stage. He forthwith proceeded to plead guilty and was convicted and sentenced to a fine.

Arguing further in response, the learned State Attorney maintains that the issue of variance of evidence and charges is a completely new issue, and was a non-issue on the decision that was to set aside the plea bargaining agreement, which he is now appealing against. The cases he has cited are a testimony to the fact that when there is variance between evidence and

charge, the court has always decided on the benefit of the accused by nullifying all proceedings. But without a doubt, these are distinguishable in that these decisions are cases that were decided on merit, at a full trial; and not on the Plea-Bargaining evidence. He firmly maintains that the appellant is misconceived in his thinking and argument.

On further argument that the Plea Bargaining did not follow the provisions of the Law of Contract Act. He contends he is also misconceived in this thinking as well since Plea Bargaining is not governed by the Law of Contract Act. The law in question is Criminal Procedure Act, and the rules made thereto. Never the Law of Contract Act.

Arguing in respect of ground 2 of the grounds of appeal as argued by the appellant that compensation was paid before the Plea-Bargaining agreement was signed. He thinks this argument is without any basis since it was the appellant himself who opted to plea bargain, and maintains that if the appellant had felt prejudiced, he should have informed the court during the registering of the contract which would have allowed him to opt-out.

All in all, He firmly contends all that the appellant had submitted and urges the Court to find the appeal without any merit and dismiss it with costs.

Rejoining, the appellant particularly picked on grounds 1 and 5 maintaining that the Plea-Bargaining agreement is a matter of law, and is not governed by the parties' wishes. He referred to Rule 21(3)(a) of the Rules made under

the Plea Bargain, and retorts that the provisions are couched in mandatory terms. He reiterates his stance that the rules are explicit that it is the Registrar, of the Treasury, and not otherwise that was to be paid. That the evidence shows that it is the DPP who was paid the compensation, even though it is a government institution, it is clear that the said law was violated. Also, as per Rule 21(3) (b) where again the law provides that payment should be paid to the victim, and this compensation was not paid to them.

The issue he insists, is compliance with the law to the letter, not prejudicing or victimizing any. Art 26 (1) of the Constitution of the United Republic of Tanzania provides for compliance with the law, which has its constitutional root, including the Plea-Bargaining Rules, which the appellant, the DPP, and everybody ought to observe. He argues that the effect of noncompliance with the law cannot be cured by the fact that a victim has not been prejudiced by the said non-compliance.

In reply to ground 4 that the Plea Bargaining was initiated by the appellant himself, he contends that this factual account is misinterpreted. He maintains that it is granted and understood first and foremost that any party to a criminal proceeding has a right to initiate Plea Bargaining. But that doesn't in any way give a freeway for the Plea Bargaining to be conducted in violation of the law. He reiterates that he has supported this proposition with various case laws, and therefore he would like to believe for lack of any rebuttal cases, then the counsel for the respondent agrees that the cases presented are the correct stand of the law regarding the position so far.

Equally on ground 2, he responds that it cannot be a position of fact that since it is the appellant who initiated the Plea-Bargaining negotiations, other laws governing the process should be ignored without any remedy. He argues that granted that Rule 19 gives room for the accused to step out of the Plea Bargaining, but the same does not preclude the use of Rule 23 under the same rules, that an application can be preferred to set aside conviction or order made by chamber application supported by the affidavit. He thus contends that there was no mistake or offense to not have taken the initiative to step out at the stage of Plea Bargaining if it is found to be wanting in the procedure. Rule 23 gives the room at any time, for the accused to apply to set aside the conviction.

Replying to ground 4, that section 194B (a) empowers the Prosecution to charge the accused with a lesser offense, but the same he contends, should not have been any offense that was not part of the original offense that the accused was charged. He maintains that he was charged with 10 counts of Economic Offences, and it is expected that the lesser offense was to come from the Economic Offences, while the charge that he was charged with was that of obtaining money by false pretense, which he maintains to be erroneous.

Recanvassing ground 6, particularly on the **Kaimu Said** case (supra), he maintains that this court being the first appellate court, has the power to

evaluate the entire evidence on record and come up with its own findings regarding the issues.

And lastly, on ground 3 he contends that the Law of Contract Act is not ousted by any other law; and that since the Plea-Bargaining agreement is one of the "agreements", it follows that the Law of Contract Act is part of the laws and has to be referred to any of the agreements about any subject and has to be referred in so far as the governing principles of contracting are concerned. He thus submits that the rejoinder be taken as part and parcel of his submission in chief and find the appeal with merits.

As I was addressed by the parties herein, my mind was bugged by the issue whether the matter brought forth is appealable bearing in mind the ousting provision under the Criminal Procedure Act [Cap 20 RE 2019] narrows the setting aside of the order of the lower court on conviction and sentence only on the basis of involuntariness or misrepresentation. For purposes of the application that gave rise to this appeal, subsection 2 of section 194(G) provides:

> "An accused person may apply to the court which passed the sentence to have the conviction and sentence procured involuntarily or by misrepresentation according to a plea agreement be set aside"

This provision not only ousts a right to appeal by narrowing the action that can be taken by a dissatisfied accused person but also gives the parameters on which basis the dissatisfied accused can make the application to have the plea bargain agreement set aside.

Having satisfied myself that there can only be an appeal on the impugned Ruling based on the outlined grounds, Imperatively, I shall confine myself to consider issues emanating from the said Ruling of the RM's Court, on those bases only.

Furthermore, since this appeal is on a restrictive basis as prescribed by the law, the reevaluation of evidence proposed by the appellant would also be restrictive on the basis of the impugned Ruling of the RM's Court, which means to say the appellant does not have the avenue to turn the narrower grounds on which the conviction and sentencing on the plea bargain agreement into an appeal on any grounds.

In that regard then, the issue for my determination is whether, in the particular circumstances of this case, the appeal is meritorious. While at it, I propose to combine some grounds that are clustered together. So, I shall start to deliberate grounds 1 and 5 jointly.

The two grounds are both based on the statutory provision which encapsulates the use of the word "shall" which the appellant is adamant that the same is mandatory, and that its violation is a blatant contravention, and should thus be held to be illegal. Since the plea bargaining by the appellant and the DPP who acted on behalf of the republic involved compensation, it was erroneous for the trial magistrate to ignore the dictates of the law under Rule 21 (3) (a) of the Rules supra which in his opinion, provides in mandatory terms that the court should ensure that compensation is paid to the Treasury

Registrar on behalf of the government and that according to the trial court records, in Economic Case no 40 of 2020, the compensation was paid to the DPP contrary to the Rule above. It is the same contention for the 5th ground of appeal where the appellant insists that the compensation payment should be directed to the victims and not the DPP.

So obviously the contention lies in the use of the word "shall" in the conceiving of the statutory provisions as to who is to be paid / why. In my considered view, the word "shall" does not always mean a mandatory requirement and it is a gross inaccuracy to think any time the word shall appear it must mean a mandatory requirement. Often, it is true that "shall" can mean mandatory, yet the word frequently bears other meanings—sometimes even masquerading as a synonym of "may". Courts have held that "shall" can mean not just "must" and "may", but also "will" and "is" when it is directing an action.

While interpreting the question of whether a provision of law that contains the word 'may' or 'shall' is mandatory or directory, the prime rule that should be followed for such interpretation is ascertaining the true intention of the legislature considering the entire statute.

Salmond's on Statutory Interpretation was explicit that as quoted in an article authored by Sarda, Mukund, Important General Rules of Interpretation: A Study (available at https://ssrn.com/abstract=2758062):

> "While the essence of the law lies in the spirit, not in its letter, but letters are the only way in which intentions are expressed. The words are an external manifestation of intention that it involves. When there

is the possibility of one or more interpretations of statute, courts have to adopt that interpretation which reflects the 'true intention of the legislature' which can also be considered the legal meaning of the statutory provisions."

The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but by considering its nature, design, and the consequences which would follow from construing it one way or the other.

And there have been circumstances where a statute has been interpreted to be directory while the use of the word has been "shall". The Supreme Court of India in the case of **Mohan Singh and Others vs International Airport Authority of India and Others,** 1997 (9) SCC 132, where it was held the distinction of mandatory compliance or directory effect of the language depends upon the language couched in the statute under consideration and its object, purpose, and effect. The distinction reflected in the use of the word 'shall' or 'may' depends on the conferment of power.

And in another instance, in the case of the **State of Haryana and Anor. vs Raghubir Dayal (1995) 1 SCC 133,** the Supreme Court of India was elaborative when it explained that

"the use of the word 'shall' is ordinarily mandatory but it is sometimes not so interpreted if the scope of the enactment or consequences to flow from such construction would not so demand." [emphasis mine]

Normally, the word 'shall' prima facie ought to be considered mandatory but it is the function of the Court to ascertain the real intention of the legislature by a careful examination of the whole scope of the statute, the purpose it seeks to serve, and the consequences that would flow from the construction to be placed thereon. The word 'shall', therefore, ought to be construed not according to the language with which it is clothed but in the context in which it is used and the purpose it seeks to serve. The meaning must be described to the word "shall"; as mandatory or as directory accordingly.

Equally, it is settled law that when a statute is passed for the purpose of enabling the doing of something and prescribes the formalities which are to be attended for the purpose, those prescribed formalities which are essential to the validity of such thing, would be mandatory. However, if by holding them to be mandatory, serious general inconvenience is caused to innocent persons or the public, without very much furthering the object of the Act, the same would be construed as a directory.

The difference between a mandatory rule and a directory rule is that while the former must be strictly observed, substantial compliance in the latter should be sufficient to achieve the object regarding which the rule is enacted. These rules of interpretation have also found favor on the home ground when this Court in **Godrej Consumer Products Limited vs Hb Worldwide Limited,** Commercial Appeal No 2 of 2019 when it held

> ".....the use of the word "shall" in Regulation 37 on delivering the copies to the applicant, in my considered opinion is not imperative that

has to apply strictly and be a point of law that led to the consequences of dismissing the opposition."

This was also the position of the full bench of the Court of Appeal of Tanzania in the case of **Bahati Makeja vs The Republic,** Criminal Appeal No.118 of 2006 (CAT) DSM (Unreported) holding that the word "shall" in the Criminal Procedure Act is not imperative as provided by section 53 (2) of Cap 1, but is relative and subjective to section 338 of the CPA. Similarly, The Court of Appeal in **Director of Public Prosecutions vs Freeman Mbowe & Ester Nicholas Matiko,** Criminal Appeal No. 420 of 2018, increasingly insisted that the use of the word 'shall' is not always mandatory but relative and is subjective .....".

Now considering the circumstances of the rules that are being referred to in these two grounds of appeal, I disagree with the appellant that the said rules are mandatory despite being prescriptive of what needs to be done in the circumstances presented in plea bargaining negotiation and arrangements. This court finds no merits on the two grounds of appeal and it is my strong view that the Appellant is misconceived in his thinking that the two statutory provisions are mandatory on its terms. While it is not prejudicial to him that the money has been paid to the DPP instead of the TR, there would be no harm if the Court was to order that the money paid to DPP be remitted forthwith to the TR if that was to cure the conceived illegality under Plea Bargain Agreement as envisaged by the Appellant.

In any case, it should be noted albeit in passing, the DPP is not a holder of a separate and distinct account on his own right, since structurally, all money recoverable as assets and liability is for the TR account, which upon collection, would ultimately be remitted to the government consolidated fund. So I would certainly construe that the intention of the statute is to have the money paid ultimately destined to the Government Consolidated Fund.

Similarly, there is no law dictating that the compensation on a Plea-Bargaining arrangement is to be paid to the individual victim. I am inclined to agree with the learned counsel for the respondent that it is the Plea-Bargaining agreement that determines who is to be paid. Rule 10(1) of the Plea-Bargaining Rules is again directory, not only based on the use of the word "may", but also the whole import of the provision is discretional.

> "..... the Plea-Bargaining agreement may include a clause for payment of compensation by an accused person"

On the basis of the going analysis, I find the two grounds of appeal without any merit and they both fail.

Deliberating on ground 6 that there is a variance between the charge and the evidence where it is argued that Rule 6(1) of the Plea-Bargaining Rules requires the prosecution to disclose all the relevant information before an accused gets into a Plea-Bargaining agreement. But before delving on its merit or otherwise, there is first the issue of raising a new ground as canvassed in ground 6 whose facts were not at issue while this matter was raised at the court from which this appeal is now subject.

The matter of raising a new ground should not detain me at all as it is trite law that an issue that has not been raised for consideration previously can not be a subject of appeal as an appellate court derives its mandate from looking at a faulted decision of a previous tribunal. In the case of **Abdul Athuman vs R**, (2004) TLR 151 the issue of whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on the first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction, and the Court of Appeal proceeded to strike out the said ground of appeal. See also **Samwel Sawe vs Republic,** Criminal Appeal No. 135 of 2004; and **Omary Kassim Mbonde vs Republic,** Criminal Appeal No. 175 of 2016. The said ground is struck out.

Turning to the 2nd ground of appeal, whose gist is that compensation was paid by the appellant before the plea bargaining agreement was signed.
The appellant's contention is that had the trial magistrate in Miscellaneous Criminal Application no 1 of 2022 considered annexure PMM1 and PMM2 as well as PMM6 of the applicants' affidavit (now appellant) she would not have arrived at her decision that "it is presumed that parties agreed to the payment of compensation to be effected before the plea agreement is signed in respect of Economic Case no 40 of 2020 was made on 27th April 2021.
The appellant insists that the lower court records do not show that the parties agreed that the compensation has to be paid before the plea bargain agreement was signed. Even if such evidence was available on record it would have been in breach of law because that would mean the appellant

was compelled to make the payments before the actual signing of the plea bargain agreement.

The respondent on the other hand thinks this argument is without any basis since it was the appellant himself who opted to plea bargain, and maintains that if the appellant had felt prejudiced, he should have informed the court during the registering of the contract which would have allowed him to opt-out.

While the record does not testify to this fact as put forth by the appellant, as I have scrutinized them, I do think there is logic in the argument that those records will not be available on the lower courts, the main reason being that the trial court is not involved in the process of negotiating a plea bargain agreement. This was also the Court's view, a view to which I also subscribe to in the case of **Harry Msamire Kitilya & 2 others vs R,** Economic Case No 2 of 2022, at Dar es Salaam where my sister Banzi, J. held

> *"To be precise, under Section 194A (3) it is expressly stated that, the court shall not participate in the plea negotiations between the DPP and the accused persons. The fact that how, where, and when such negotiations and agreement were conducted and ultimately signed, as the case may be, are not part of the trial court's proceedings".*[emphasis mine]

In any case, it is my considered view that having to pay the negotiated compensation on plea bargaining before the plea bargain agreement is signed and registered is akin to equipping oneself with a bargaining tool. The essence is that the defendant is going forward with the negotiated arrangement and that he will not renege on it. See the case of **Guerrero**

Lugo Elvia Grisselv vs The State of Maharashtra reported in India Kanoon available on http://indiankanoon.org/doc/173657747/. While the above proposition was not the ratio in this case, there is a pretty good account of how the negotiation and payment were done culminating in the final disposition of the case in plea bargaining arrangement. This is not to say that the Prosecution will have a free ride on not following through with their side of the bargain, or not having to offer anything on the table because anything lawfully within the power of the prosecutor acting in good faith can be offered in exchange for a guilty plea during plea bargaining.

Also in my considered view, the argument that because the compensation was paid before the agreement was signed or registered does not amount to duress. Nor does the fact that one is in arduous circumstances and is faced with a situation that might curtail their liberty as explained by the appellant while trying to show how the unleveled the grounds were while signing the plea bargain agreement. As a matter of fact, even facing a death sentence as a possible consequence of the charges leveled against the accused should not and does not qualify as duress. Similarly, the fact that the defendant was facing charges that are unbailable under the law cannot pass as duress, implied or express, to taint the willingness to enter a plea-bargaining arrangement. See **Brady vs United States,** 397 U.S. 742 (1970).

That is to say that this ground is found without any merit and it thus fails.

Now turning to ground 3 that the accused then was convicted of a lesser offense. As per records, the 1st accused then now the appellant was arraigned in RM's Court in Arusha on 14th May 2020 accused of committing 10 counts of economic offenses under the Economic Crimes Act, however on 27th April 2021, the prosecution side substituted the charges by withdrawing all the counts in which they charged him and came up with a count of obtaining money by pretense, framed as an Economic Crime as per p3 of annexure PMM6 in Miscellaneous Criminal Application no 1 of 2022.

It is pertinent to note that the arguments on this ground are intertwined with issues of the variance of charge and evidence as per ground 6, which has already been struck out since it was found to be a non-issue at this stage as it was not raised previously. Nevertheless, in the wake of this petulance, I shall confine myself to looking at the issue of charging the accused with the lesser offense (and the consequent conviction by the trial court as it shall turn out) on the basis of the plea bargain agreement.

The learned State Attorney's position is that the Prosecution is mandated to substitute a charge with a lesser offense where there is a Plea-Bargaining agreement. This mandate is clear under Section 194B (a) of the Criminal Procedure Act.

The appellant thinks that as soon as the prosecution decided that it was going to withdraw the charges under section 194B(a), he becomes short of options to undertake the other action as enumerated under this section. In essence, his contentious view is that since the prosecution opted to withdraw

the charges, his action that would and should be confined to withdrawal, whose literal meaning is refraining to proceed with the prosecuting action. He narrowly interprets the term withdrawal and ignored the other options as provided by the said statutory provision with the above-contended definition, noting that the prosecution had no more intention to charge the appellant as they withdrew all the economic offenses charges. He insists that meant the DPP could not have charged the appellant again even with a lesser offense as to the one charged previously.

As the court processes the conceptions as put forth by both parties, it is worth noting that plea bargaining is factually a Pre-Trial initiative involving a process whereby a bargain or deal is struck between the the person accused of an offense and the prosecution; with less active participation of the court during the bargaining or negotiation stage. The process is summarily explained to include:

(i) Withdrawal of one or several charges against an accused in return for a plea of guilty,

(ii) Reduction of a charge from a more serious charge to a lesser charge in return for a plea of guilty.

(iii) Prosecutor being malleable to leniency on sentencing in lieu of plea of guilty.

It is now settled law that in plea bargaining, the prosecution has a multitude of options in the bargaining process as they can withdraw charges, reduce charges, stay charges, offer alternatives to prosecution such as becoming a prosecution witness, recommend a sentence that could be less than the minimum sentence provided by the law, recommend compensation and

rehabilitation of the accused, etc. Meanwhile, the accused would normally waive the right to a full trial, plead guilty to a lesser offense that is negotiated, and on that basis, readies himself for conviction on his plea, and become liable to some form of punishment which could imprisonment, fine, probation, community service, compensation, restitution, apology, supervision, etc.

Being offered a lesser offense is at the discretion of the prosecution. It cannot be said it is illegal to offer a lesser offense for which the defendant was to enter a guilty plea. Nor is it mandatory that the lesser offense should come from the category of the major offenses that the accused were initially charged with. It is the whole spirit of plea bargaining -which is an arrangement that leads to an agreement being registered on the basis of what has been negotiated and agreed upon.

In any case, because plea bargaining is akin to conviction on a plea of guilty, I reckon that while there is only little room to wiggle out of it, there is a lot of room to get to it since the accused is not coerced into a plea-bargaining arrangement. The main principle that has been emphasized by the Courts the world over where this practice has been incorporated into the criminal justice system is the assurance that the agreement is reached voluntarily, knowingly, and with a full mind as explained by the US Supreme Court in **Bradshaw v. Stumpf,** 545 U.S. 175 (2005),

> ".....the Sixth Circuit found that Defendant had not understood that specific intent to cause death was a necessary element ..... and that

his guilty plea, therefore, had not been knowing, voluntary, and intelligent."

This means to say that the person who is entering the guilty plea must be fully aware of the plea that he is making, and the consequences of the same and not just going through the motions. I might add, voluntariness for the purposes of entering a lawful plea to a criminal charge has never meant the absence of benefits influencing the defendant to plead, including being offered a lesser offense. And when these are put on the table through the discretion of the prosecution side, it cannot be said to amount to illegal acts involuntarily induced by the prosecution nor is it misrepresentation. Our own law is very clear on the Plea Bargaining Agreements as per the Criminal Proceedings Act sections 194A to 194G.

On the basis of the finding above, I do not see how the offering of a lesser offense to the accused can be termed by the appellant as illegal. In any case, I would agree with the learned State Attorney that the Appellant could have opted to not proceed with the arrangement as soon as he felt that the deal, he was going to strike was less favorable to himself. I find this ground without any merit and dismiss it as so.

The complaint on the fourth ground of appeal is about contravening Rule 15 (2 & 3) of the Plea-Bargaining Rules, which in my considered view, is the mainstay of the procedure on how plea bargaining is operated by the main actors when it reaches the Court.

For ease of reference, I reproduce Rule 15 (2), (3) which provides

(2) The prosecutor shall lay before the court the factual basis for the plea agreement and the court shall determine whether there exists a basis for the agreement.

(3) The accused person shall freely and voluntarily, without threat or use of force, execute the agreement with a full understanding of all matters.

Looking at page 16 of The Ruling of the Learned Magistrate, she states

> "... there is no need to be availed with the substance of the prosecution evidence, as the case had not proceeded to trial..."

I must agree with the Appellant that the learned magistrate indeed misdirected herself in thinking and holding that the applicant needed not to be availed with the prosecution evidence. In my considered opinion, the case would not have proceeded to trial since it was already treated under the plea bargain arrangement. But for the sake of argument, even if this thinking by the learned trial magistrate was correct, that the appellant needed not be availed with the substance of evidence by the prosecution, nonetheless, the Court is duty-bound to look at the factual basis of the agreement and satisfy itself. This is where the court comes in with a critically important supervisory role to determine whether there exists a factual basis for the agreement. I find this stage to be crucial because this is what is going to hold the conviction.

This court has held in **Harry Msamire Kitilya & 2 others vs R,** (supra) that:

"Reading closely at the import of Sections 194A to 194H of the CPA, it is apparent that apart from receiving notification from the parties on their intention to negotiate and enter into a plea agreement, **the involvement of the Court in the process begins after a signed plea agreement is presented before the Court for registration."** (Emphasis mine)

On further scrutiny of Rules 15 (2 & 3), it seems it is envisaged that the court will take an important role after the negotiation and signing of the agreement. It is certainly not simply rubber-stamping the agreement. There is this important test that the plea-bargaining agreement must pass before the same can be registered by the court.

While it is true as put forth by the learned counsel for the respondent that the appellant is the one who initiated the Plea-Bargaining procedure through his letter dated 07th November 2020, which the learned magistrate quoted on p12 of her Ruling. In his view, based on the letter that is quoted, it is evident that the appellant voluntarily entered the Plea Bargain and there is nowhere that he was not satisfied with the whole process at any time. He does not seem to be at issue with the fact that the learned trial magistrate was unwilling to have the factual basis of the agreement laid before the court during a trial or as the ground for the application to have the plea bargain agreement be set aside. It is no wonder to think could the learned magistrate's misconception on how she should proceed and treat the remainder of the procedure on plea bargain; which in my view was treated in a similar manner as it happens when an accused pleads guilty to an

offense per se since the court took the plea bargain process as the guilty plea.

My considered view and I am highly persuaded that the procedure under the plea-bargaining process while it will eventually culminate into conviction on own plea of guilt, the two are not and should not be treated the same way. To start with, Rule 15(2) requires the prosecution to lay the factual basis for the agreement, and the court would have to make a determination if there is such a basis for conviction. Only after this process will the court move to implement Rule 15(3); which requires ascertaining that the accused person has freely and voluntarily, without threat or use of force, executed the agreement with a full understanding of all matters. In my opinion, this has another face to it, that is if the court does determine and find out that the plea bargain agreement does not have such a factual basis, it can reject or refuse to convict based on the agreement. Rule 16 of the Rules is prescriptive on this as it provides:

> "The court may, for sufficient reasons to be recorded in the proceedings, reject the plea agreement, save that the rejection shall not operate as a bar to any subsequent negotiation by the parties."

I think the learned state attorney is also partly misconceived in his argument, and the misconception to start with has been brought about by the appellant in arguments on the Law of Contract Act, trying to explain the import of Rule 15 (2 & 3). In any case, I am of the considered view that while Plea Bargaining does follow the principles in the law of contract at reaching an agreement, it is certainly not based on the provisions of the Law of Contract

Act, but rather the law in question is the Criminal Procedure Act, and the Rules made thereto.

The Indian High Court in the **State of Gujarat vs Natwar Harchandji Thakor,** 2005 Criminal Law Journal 2957, [http://indiankanoon.org/doc/1439610/ (Ahmadabad High Court)] brought out the distinction between "plea of guilty" and "plea bargaining" where the Court said in persuasion: "...But the plea bargaining and the raising of "plea of guilty", both things should not have been treated as the same and common. There it appears to be mixed up. .... it cannot be overlooked that raising of "plea of guilty", at the appropriate stage, provided in the statutory procedure for the accused and to show the special and adequate reasons for the discretionary exercise of powers by the trial Court in awarding sentences cannot be admixed or should not be treated the same and similar. Whether a "plea of guilty" relying on facts is "plea bargaining" or not is a matter of proof.

Every "plea of guilty", which is a part of the statutory process in the criminal trial, cannot be said to be "plea bargaining" ipso facto. It is a matter requiring evaluation of the factual profile of each accused in a criminal trial before reaching a specific conclusion of it being only a "plea bargaining" and not a plea of guilty simpliciter. It must be based on facts and proof not on fanciful surmises without the necessary factual supporting profile for that.

In the circumstances presented in the matter before me, annexure PMM6 shows the appellant had obtained TZS 2 million from one Bjorn Michelson, Annexure PMM4 at p 10 shows that the appellant received TZS 1,2M and

TZS 800,000 from one Sylvia Roman Hansson and Lars Tonny Hansson respectively. Nowhere in the record it is shown the appellant received 2M from Bjorn Michelson, and thus the charge of Obtaining Money by False Pretense lacks the factual basis which should have been laid by the prosecution as required by rule 15(2) of the Plea-Bargaining Rules.

This is the basis in 3 separate jurisdictions to which this Court has had to look up to in understanding what it really means to have the Court oversee and be satisfied on whether the offense to which the accused is pleading guilty in the plea bargaining has a factual basis. The US Supreme Court in the case of **North Carolina vs Alford,** US 25, 39n, 10-11 (1970) held that the rule requires a judge to find a factual basis for the guilty plea before the court can enter a judgment against a defendant/accused.

This is a role that is mandatory for the court to play while administering justice. The judge/adjudicator must ensure that not only did they ascertain that the plea of the defendant (accused) was offered or accepted freely, but the charge must also ensure that there is a basis for the accused/ defendant's plea. This in effect will guarantee that the defendant/accused is not punished for an offense which they did not commit by the mere fact that they pleaded guilty to a charge. **[**See Andrew Hessick and Reshma M. Saujani, "Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defence Counsel, and the Judge (2002) 16 (2) BYU Journal of Public Law 224**]**

Similarly, further afield in another common law jurisdiction, Nigerian law requires that the judicial officer be satisfied that the defendant (accused) is

guilty of the offense to which has pleaded guilty on the plea bargaining agreement. This requirement is interpreted to mean that the judge should ensure that from the fact of the case which is presented by the prosecutor, the accused is guilty of the charge presented based on the available evidence. (See Nigerian Administration of Criminal Justice Act 2015, s. 270 (10) (a))

It is thus my finding that the 4th ground of appeal is merited and in that regard I allow it. As a result, the plea bargain agreement is hereby set aside.

Now the final dispositive question is would the consequences of setting aside the conviction and sentence in Economic Case no 40 of 2020 against the accused person/appellant herein imply in essence exonerating the appellant of the criminal record resulting from Economic Case no 40 of 2020? This is the prayer of the appellant, that he be acquitted and be exonerated of all criminal charges. I respectfully think not. I am convinced, and for good reason, that while the appellant has made prayers to have conviction and sentence set aside and be cleared of criminal liability, the law would not support such a stance.

Being exonerated of criminal record in my considered view, is a result of a trial. That one has undergone the process of criminal trial and is found not guilty by reason of the prosecution not being able to prove its case in the standard of proof required by the law. But in the plea bargain procedure, there had been no trial resulting in acquittal, neither had the prosecution conceded to have failed to prove its case, for which the remedy would have been discharging the accused. In the plea bargain process, the result was

an agreement, by both parties, with terms agreed upon and execution signifying a commitment to the bargain. Reneging by either side by setting aside the agreement would mean the parties would be going back and reverting to their original positions.

In the final analysis, this appeal is allowed, and consequently,

1. the proceedings of the lower court are hereby quashed
2. the Court orders of the plea bargain agreement are set aside
3. the parties revert to their original positions on the stage before the plea bargain was reached, and the accused be tried de novo.

It is so ordered.

Dated at **Arusha** this **17th** day of **July 2023**

A. Z. Bade
Judge
17/07/2023

Judgment delivered in the presence of the parties and their representatives in chambers on the **17th** day of **July 2023.**

A. Z. Bade
Judge
17/07/2023