IN THE HIGH COURT OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT DAR ES SALAAM

ECONOMIC CASE NO. 16 OF 2021

REPUBLIC

VERSUS

1. **HALFAN BWIRE HASSAN**
2. **ADAM HASSAN KASEKWA @ ADAMOO**
3. **MOHAMED ABDILLAH LINGWENYA**
4. **FREEMAN AIKAEL MBOWE**

RULING

4/9/2021 to 6/9/2021

E.B. Luvanda, J

When the matter was scheduled for delivery of the ruling on 1/09/2021, soon thereafter the learned Counsel for the accused, Mr. Peter Kibatala (leading Counsel) presented a notice for another set of three preliminary objections on points of law, grounding that:

1. That, the information is defective for the reason that the provisions of section 4(3)(i)(i) make it mandatory that any act or threat subject of an information be disclosed as having been made for the purpose of advancing or supporting act which constitutes terrorism within the meaning of the Act. Failure to disclose the foregoing as required by the law renders the information/count fatally defective, and liable to be struck out.

2. The information is defective for the reason that the provisions of section 4 of the Prevention of Terrorism Act, Act No.21 of 2002, which are the prohibitory provisions against terrorism offences in Tanzania, do not define what constitutes '*terrorist intention*', thus no offence is created under its auspices. All terrorist offences under the Act are subjected to the prohibition under section 4, and 'terrorist intention' is central to the creation of all offences under the Act.

3. The information is defective for the reason that it is illegal, unlawful and prohibited to charge a person with conspiracy to commit offences together with actual/substantive offences subject of the conspiracy. The said counts suffer from, inter alia, duplicity viz a viz (sic, vis-à-vis) other counts. Count No.1 and 2 are, thus, liable to be struck out.

The objection was argued by way of oral argument, where Mr. Kibatala learned Counsel and Mr. Jeremiah Mtobesya learned advocate argued on behalf of the defence team who are Mr. John Malya, Mr. Fredrick Kihwelo, Mr. Jebra Kambole, Mr. Sisti Aloyce, Mr. Seleman Matauka, Mr. Nashoni Nkungu, Mr. Michael Lugina, Miss Bonifacia Mapunda, Mr. Alex Masaba, Mr. Faraj Mangula, Mr. Michael Mwangasa, Mr. Gaston Shundu Galubindi, Hadija Aaron, Pasiance Mlowe, Dickson Matata learned Advocates. Mr. Robert Kidando Senior State Attorney and Mr. Nassoro Katuga learned Senior State Attorney argued on behalf of prosecuting officers team comprised of Mr.

Ignas Mwinuka, Ms. Esther Martin, learned Senior State Attorneys and Ms. Turumanya Majigu learned State Attorney.

I will start with the third point of preliminary objection. Mr. Mtobesya learned Counsel argued this point by splitting into two limbs; one charging an offence of conspiracy with actual or substantive offences; two, duplicity which was split into another sub-module of multiplicity.

It was the argument of Mr. Mtobesya that an offence of conspiracy cannot be charged with a substantive charge. He cited **Magobo Njige and Bpina Mihayo vs Republic**, Criminal Appeal No. 442/2017 C.A.T. Shinyanga (unreported) pages 10 to 11; **Steven Salvatory vs Republic**, Criminal Appeal No. 275 of 2018, C.A.T. Mtwara (unreported) at page 9. That in the instant information, whatever was alleged to have taken place in the act of conspiracy is actually what culminated to the other offences which are result of conspiracy. Arguing on second aspect of duplicity, the learned defence Counsel submitted that the same can arise where two offences are charged in one count or two separate and distinct offences are charged from the facts emanating from one instance, which is termed by the court as duplicity, he cited count number one and four, for his proposition that facts and instances are the same. That the rule against duplicity or multiplicity preclude the

accused to be subjected to double jeopardy. That the two offences of conspiracy and participating in a terrorist meeting cover the same aspect or issues. That to prove conspiracy, meeting must be in place. He argued the court to find the two counts defective and be struck out from the information.

In reply, Mr. Nasoro Katuga learned Senior State Attorney submitted that a count of conspiracy and the rest of counts from third to six counts inclusive, no any count is substantive to an offence of conspiracy. He submitted that the first count pertains to conspire to blow petrol station and it was expected the substantive offence to be to blow station. That the second count is conspiracy to cause bodily harm, the intended actual offence could be causing bodily harm. But from count three to six, nowhere it is alleged that the accused blow petrol stations, gathered or caused bodily harm. He distinguished **Steven Salvatory** (supra), that therein C.A.T. was discussing an offence of conspiracy to commit armed robbery and armed robbery itself, at page 8; **Magobo Njige** (supra) still C.A.T. was discussing armed robbery and conspiracy. That the case above does not fall in the circumstances of this case, because herein the third to six counts are complete offences according to law. The learned Senior State Attorney submitted that in the information from count one to six, nowhere they have joined two offences

in one count which is the essence of duplicity. He cited **DPP vs Morgan Maliki and Nyaisa Makori**, Criminal Appeal No.133 of 2013 C.A.T. Tanga, page 8 second paragraph. That duplicity is only when distinct offences are contained in the same count. That what the learned defence Counsel said to the effects that, to charge conspiracy (first count) and participating in the meeting for planning terrorist called it multiplicity, it is the same as duplicity. That the two offences are two separate counts. That sections 27(c) for first count and section 5(a) for fourth count, constitute two distinct offences which are complete. That even particulars of offence its coaching is different and there is no need to prove meeting of the accused in order to prove conspiracy, rather what you need to prove is common intention. He cited **Black's Law Dictionary**, 8th edition, page 329 to define conspiracy. He cited **DPP vs Morgan** (supra) that the C.A.T. ruled that forgery and uttering are two different offences ought to be charged on separate counts, at page 8. That you can go to conspire and end up there without going to a meeting. He therefore argued that there is no duplicity, multiplicity or double jeopardy. He asked for the objection to be overruled.

I have gone through the first count of conspiracy vis-à-vis the third, fifth and sixth counts, where in the first count it is alleged that the accused persons

did conspire to commit a terrorist act of blowing petrol stations and other public gatherings in Dar es Salaam, Arusha and Mwanza regions. In the third, fifth and sixth counts, it is true that some particulars are the same as reflected in the first count above. However, the third count pertain to an offence of provision of funds to commit terrorist acts; fifth count is an offence of possession of property for commission of a terrorist act; sixth count is an offence of possession of property for commission of terrorist act. To my view, it cannot be said that the third, fifth and six counts are inchoate offence to that of conspiracy on the first count. The rule of duplex is well articulated in the case of **DPP vs Morgan Maliki** (supra), at page 8, the Court of Appeal of Tanzania had this to say, I quote,

> *'A charge is said to be duplex if, for instance, two distinct offences are contained in the same count, or where an actual offence is charged along with an attempt to convict (sic, commit) the same'*

The Court of Appeal did not say that duplex is when two offences are founded on the same facts. To make it clear, at the preceding paragraph in **Morgan Maliki** (supra), the Court of Appeal, made the following obiter, I quote,

'In the present case, the offences of forgery and uttering false documents were alleged to have been founded on the same facts, and as the two are distinct offences, were correctly charged in separate counts in the same charge. So, with respect, we agree with the learned counsel that there was no duplicity of charges here, and the learned first appellate judge erred in law in so holding'

As it can be seen above, the high court judge therein was faulted for pegging duplicity rule on the ground that the offence of forgery and uttering false documents were founded on the same facts.

In the cited cases by defence Counsel: **Steven Salvatory** (supra) which cited **Magobo Njige** (supra), even in **John Paulo @ Shida & Another**, Criminal Appeal No. 335/2009 C.A.T. (unreported) which was cited in **Steven Salvatory** (supra), in all three cases the apex Court of the land was dealing in a situation where an offence of conspiracy to commit armed robbery was charged along with an actual offence of armed robbery. Therefore, these cases are totally inapplicable to the facts of this case. That said, the first limb of third objection, succumb.

With regard, to the second limb, it is true that particulars of offence in count one and four are replica. But it is to be noted here that meeting (actual or

visual meeting) is not a direct prerequisite for an offence of conspiracy. In **Black's Law Dictionary**, 8th ed. 2004, at page 933, when amplifying the definition of conspiracy which is defined primarily as an agreement to do unlawful act or lawful act by unlawful means, the author had this to say, I quote,

> *'[Conspiracy is an] elastic, sprawling and pervasive offense, ... so vague that it almost defies definition. Despite certain elementary and essential elements, it also, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid. It is always 'predominantly mental in composition' because it consists primarily of a meeting of minds and an intent." Krulewitch v. United States. 336 U.S. 440, 445–48, 69 S.Ct. 716, 719–20 (1949)(Jackson, J., concurring)'*

In a quote above, Justice Jackson was referring to meeting of minds and not actual or visual meeting.

The first point of objection, the learned defence Counsel submitted in a nut shell that in counts number one, three, four and six, the acts which constitute and entail the purpose of advancing or supporting terrorism, are missing. The learned defence Counsel cited Anti Terrorism Act No. 26 of 2005 of Trinidad and Tobago inparticular section 2, of Anti Terrorism Act No. 21/2007

of Zambia and section 7(2) of The Terrorism Act of Uganda (2000), for his proposition that there must be disclosure of the purpose of advancing political, ideological, and religion which aim not only to constitute elements of terrorism in section 4(3)(i)(i) of Act No. 21 of 2002, but also to remove terrorism offences from the ambit of other penal offences. On rebuttal, the learned Senior State Attorney submitted that the defect is not there, as those acts are found and confined within the meaning of the Act, he cited sub section (3) of section 4 Act No 21/2002, that it limit their particulars to be limited on acts mentioned in the law alone. That acts in count number one, three, four and six complained of, are complete likewise in count number two and five. He cited **Attorney General vs Mugesi Anthony and two others**, Criminal Appeal No. 220/2011 C.A.T. Mwanza to support his proposition that the defence Counsel ought to cite decision and not statute in parimateria alone from Uganda, Zambia and Trinidad and Tobago. He cited Model Legislative Provisions on Measures to Combat Terrorism, that it provided guideline on crafting Terrorism Act, which provide for option and Tanzania opted for the first option, where there are no criteria of saying those acts committed were further geared for purpose of furthering political, religion or ideological which is found in option two. To my view this debate

can take us long. While I appreciate an argument by the learned defence Counsel that in case our laws are not self sufficient, a call for good practice from other countries with similar legal system to ours which is based on the common law system, are inevitable. But this is not limited to reliance on foreign courts' decision alone, as the learned Senior State Attorney was attempting to narrow and limit the scope of aspiration or borrowing from other countries (see **The Attorney General vs Mugesi Anthony** (supra) at page 34). To my opinion the cited statutes from the three foreign states which are in parimateria, including the guideline that is Model Legislative Provisions are not enough to deliberate on this point. Reference ought to be made from the Hansard of Parliament on the discussion of Honorable Members of Parliament on the enactment of Act No 21/2002, as to why they opted for the first option on the Model and why did not opt to cast and align the definition of terrorism acts in conjunction with purpose of advancing political, ideological, and religion. The answer might be simple, that the Parliament on its wisdom considered the set up of our community in the context of political, social and economic ferment of our nation in which we are living vis-à-vis the option made available on the so called guidelines (Model Legislative Provisions). To my view, the Parliament did not only

choose to adopt the first option as a matter of flexibility on the Model Legislative Provisions. In other words, it is not enough to say we have a similar legal system with the three mentioned countries, rather we must go beyond on searching whether their historical background and community set up economically, socially and politically are the same with ours. Of course, I appreciate an argument by the learned defence Counsel that if that could be done, would possibly create a yard stick of what acts actually constitute terrorist acts per-se and thereby remove terrorism offences from the ambit of other penal offences. But record of Hansard could be still of great assistance to this subject under discussion. Unfortunately, the matter is attended by parties as of urgency, I think that is why parties failed to have ample time to look for the aid of Hansard. But still I argue as the proceedings go along, either of the side can take initiative to seek for the aid of Hansard as a matter of knowing why the Parliament eliminated those so called acts furthering ideological, religion and political from the ambit of definition of what acts constitute terrorism. Needless to say, bills like for this Act, normally attract hot debate in the House. But for the sake of our discussion at this preliminary stage, I mark it to had ended here. I will revamp later to tackle the remained portion of the first objection.

On ground number two, the learned defence Counsel submitted that no terrorism offence is created under section 4 Act No. 21/2002, on explanation that the phrase terrorism intention is not defined. The learned defence Counsel inferred the same to Parliamentary forgetfulness or inadvertent. The learned defence Counsel was of the view that the same affect validity of the information and render the individual counts defective. On reply the learned Senior State Attorney submitted that section 4 its wordings are clear and it create an offence. That even at international level, the Model Legislative Provisions did not define terrorist intention. He cited section 4(2)(a)(b)(c) that it shows acts which indicate terrorism intention. Essentially the defence Counsels were challenging the law, although in their argument they submitted that they are arguing it in line that the accused persons cannot be charged and tried under nonexistence offence. But to say the provision of the law does not define terrorist intention, by implication they are saying there is a lacuna in that provision. This can be grasped from the nature of relief sought when winding up on rejoinder, the learned defence Counsel invited this Court to make a note to the Parliament to rectify that situation. To my view this is not a proper forum for the court to make such a note, slightly. I also decline to an invitation by the learned defence Counsel to

make a verdict that no offence is created and there is no valid information on account of definition of what is terrorism intention.

Be as it may, I nod with the learned defence Counsel that there is a problem in drafting counts number one, four and six. What was stated by Mr. Kibatala learned Counsel is a correct position that, for counts charged under section 4(1) and (3)(i)(i), the charge sheet must plead or show that the acts charged also made for the purpose of advancing or supporting act which constitutes terrorism. An argument by the learned Senior State Attorney that they could not use the word "made for a purpose" in verbatim, is without base. As alluded by Mr. Kibatala learned Counsel, those are the words which make distinction and demarcate between the terrorism offence and other offences. A case of **Paulo Dioniz vs Republic**, Criminal Appeal No. 171 of 2018, C.A.T. Dar es Salaam (unreported), is distinguishable. As therein the C.A.T. was confronted with the use of the word "carnal knowledge" which was used in the particular of offence (charge sheet) but was not stated in the law. But the C.A.T. held that carnal knowledge means sexual intercourse. Again the C.A.T. said the word "unlawful" which was missing in the charge was immaterial on account that there is no lawful sexual intercourse to a child aged 8 years. In our case at hand, counts number one, four and six it was

crafted for the phrase "intend" instead of "purpose" as reflected in the statute. Although **Black's Law Dictionary**, 8th ed. 2004 at page 2364, define intend, to mean *to have in mind a fixed purpose to reach a desired objective; to have as one's purpose*. But at page 3900 definition to a phrase 'purpose' is given a broader meaning, to the extent that the phrase purpose is defined to mean *an objective, goal, or end; specif., the business activity that a corporation is chartered to engage in*.

In view of that, the use of word purpose is more desirable. It is elementary that the remedy to the defects of this nature, can be cured by way of amendment. This is in line with the argument (opening statement) of the defence Counsel, although he made a caveat to the effects that prosecution should not be allowed to amend the information for the second time. But as argued by the learned Senior State Attorney, there is no rule to that effect. In the circumstances, the prosecuting officers are directed to amend the information specifically on counts number one, four and six to reflect the above suggestion. And this is not novel by the way, as count number three, was crafted properly. Therefore, the preliminary objection is sustained to this extent.

Save for ground number one of preliminary objection which is partly sustained to the extent adumbrated above, the second and third objections are overruled.

E.B. Luvanda
Judge
06/09/2021