IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

CRIMINAL SESSION CASE NO.77 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

MEDIAN BOASTICE MWALE.....1ST ACCUSSED

DON BOSCO OOGA GICHANA.....2ND ACCUSSED

BONIFACE THOMAS MWIMBWA..... 3RD ACCUSSED

ELIAS PANCRAS NDEJEMBI .....4TH ACCUSSED

JUDGMENT

BEFORE: MAIGE, J

The third and fourth accused persons, BONIFACE THOMAS MWIMBWA and ELIAS PANCRAS NDEJEMBI are charged with two counts. First, Conspiracy to Commit an Offence Contrary to section 384 of the Penal Code, Cap. 16 R.E. 2002, ("PC"). Two, Money Laundering Contrary to sections 12(e) and 13 (a) of the Anti-Money Laundering No. 12 of 2006 ("AMLA").

The particulars of the first count was that; MEDIAN BOASTICE MWALE, DON BOSCO OOGA GICHANA, BONIFACE THOMAS MWIMBWA and ELIAS PANCRAS NDEJEMBI, on divers dates between November, 2009 and February, 2011 within the City of Nairobi, Kenya and Municipality, District and Region of Arusha Tanzania, conspired together and with other persons not in Court to

commit an offence namely, Money Laundering; Contrary to Section 12 of the **AMLA**.

For the second count, the particulars are such that; on divers dates between November, 2009 and February, 2011 within the District, Municipality and Region of Arusha, the second and third accused persons herein aided and abetted transmission of seventeen (17) United States Treasury Checks amounting to USD 5,468,699.25 by authorizing the opening of Bank Account Nos. 02J1036325000 maintained by MOYALE PRECIOUS GEMS & MINERALS ENTERPRISES ("Moyale account"), 02J2036310500 maintained by OGEMBO MITCHEL CHACHA ("Ogembo account") and 02J2036310600 maintained by GREGG MOTACHWA MWITA at CRDB Bank ("Motachwa account)", at Meru Branch (together "the three vehicle accounts") and processing payments of the said checks while they knew or ought to know that the same were proceeds of forgery, which is a predicate offence.

Initially, the instant case was preferred against the four accused persons. It was in respect to the count of Conspiracy to Commit an Offence that the last two accused persons were jointly and together charged with the first two accused persons. Aside from the count of Conspiracy to Commit an Offence, the first two accused persons were charged with numerous counts pertaining to money laundering contrary to sections 12(b) and (d) and 13(a) of **AMLA** and its predicate offences of forgery, uttering false documents and being found in possession of properties suspected of being unlawfully acquired contrary to sections 333,335(a), 337,338,342 and 321(1) (b), respectively of the Penal Code, Cap. 16, R.E., 2002.

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On 18th September 2018, the second accused was convicted, on his own plea of guilty, of the count of Conspiracy to Commit an Offence Contrary to section 384 of the **PC** and Money Laundering Contrary to section 12(b) and 13 (a) of the **AMLA**. He was sentenced accordingly. On his part, the first accused was, on 3rd day of December, 2018, convicted, on his own pleas of guilty, of one count of conspiracy to commit an offence contrary to section 384 of the **PC**, two counts of money laundering Contrary to section 12(b) and 13(a) of **AMLA**; five counts of forgery contrary to sections 333,335(a) and 337 of the **PC**; one count of forgery contrary to sections 333,335(a) and 338 of the **PC**; fifteen counts of forgery contrary to sections 333,335(d) (i) and 338 of the **PC**; five counts of uttering false documents contrary to sections 342 and 337 of the **PC**; and one count of being in possession of property suspected to have been unlawfully acquired contrary to section 312(1) (b) of the **PC**. He was sentenced accordingly.

The monies alleged to have been laundered emanated from USA Treasury checks worth Five Million Six Hundred Sixty Eight Thousand Six Hundred Ninety Nine and Twenty Five Cents United Sates Dollars (USD 5,668,699.25) It is claimed, and the first two accused persons admit that, the said checks were procured after the second accused and his conspirators residing in the USA had submitted to the US Department of Treasury false tax returns (exhibit PC46). Understanding that most of the victims were either incarcerated or dead, the conspirators having obtained information as to their identities including their social security numbers, impersonated themselves as such and claimed for tax refunds. Believing that the said tax returns were genuine, the US Department of Treasury issued the said checks. There after,

the first accused joined the criminal enterprises by assisting the conspirators to open the **three vehicle accounts** at the CRDB Meru Branch using false mandate documents. It is through the said **vehicle accounts** that the checks in question were transmitted and eventually credited into the account number **02J1007569802** maintained by the first accused at CRDB Meru Branch. Sooner than longer, the credited monies were withdrawn by the first accused under the authorization of the third and fourth accused persons.

On the second count, the third and fourth accused persons are accused of aiding and abetting the principal offenders in two main ways. First, by authorizing the opening of the **three vehicle accounts** and processing clearance of the defrauded checks; Second, by processing for the payment of the checks, at the time of the transmission while they knew or ought to know that the said checks were proceeds of forgery.

When the charges were read over and explained to the third and fourth accused persons, they pleaded not guilty to both of them. On examination of the prosecution case in totality, this Court made a ruling, on 20th February 2014, that the third and forth accused persons had a case to answer. Both the accused persons expressed their desire to give their evidence in rebuttal on aoths.

In a bid to establish the charges, the prosecution paraded ten (10) witnesses and exhibited about forty seven (47) exhibits.

SSP FADHILI SAID MDEMU (PW1) is working with the Financial Intelligent Unit of the Tanzania Police Force. His responsibilities includes investigation into money laundering crimes and fraud. He was a member of a team of

police officers which was assigned, in July 2011, to investigate into a suspicious bank account at CRDB Meru branch operating under the name of East African Malaria and HIV Support Programme. The said account was suspected, by the Financial Intelligent Unit, to have been used to fraudulently deviate USD 17.5 billion donated to the Government by Global Fund for elimination of malaria and HIV. He said that in the course of their investigation, they established that one of the signatories of the said account was a signatory of the bank account held by Mayole Minerals and Precious Germs Enterprises. They therefore, requested for mandate file of the said account which were supplied to them by the third accused (**PC1**). They were also supplied with a general power of attorney (**PC2**).

He testified further that upon examination of the documents, they established that the account was opened with insufficient documents. He clarified that, though the account was operated by a firm, there was neither registration certificate nor business license. He clarified further that, on official search to the registry of companies and the Commissioner for Minerals, they established that the holder of the account was not registered in any of the registries (exhibits **PC13** and **PC14**).

He testified further that, the documents as to the identity of the signatories had so may discrepancies. While the photocopies of the US passports indicated that the two signatories of the account were citizens of US, their residential identity cards indicated that they were both Tanzanian citizens. He testified further that, both US passports had similar registration numbers which was unusual. It was further in his testimony that; their attempt to trace the operators of the account through a mobile number exhibited in the

mandate file, led them to the residence of the first accused. On official search at his residence on 2nd August 2011 and 5th August 2011, they discovered many documents related to the said account which are itemized in the certificates of seizure dated 2nd August 2011 and 5th August 2011 (**PC3** and **PC5**, respectively). He further mentioned the items seized as to include bank statements of Mayole account (PC4 and PC7), bank statements of the account of the first accused (PC8), deposit slips on account number 3300195969 (**PC10**) and unpaid US treasury checks (**PC12**). The items seized in the first search are itemized in the certificate of seizure in exhibit **PC 3** whereas those seized in the second search on the certificate of seizure in exhibit **PC4**.

He testified further that, their scrutiny of the various transactional documents seized from the first accused revealed of there being suspicious transections in the said account involving a colossal amount of money emanating from USA treasury checks. He added that, the transactional documents indicated that the money credited into the said account were being quickly transferred into the account of the first accused and eventually withdrawn. He claims further to have recorded the cautioned statement of the fourth accused (exhibit PC11) who confessed to have authorized opening opened **three vehicle accounts** and payments of some of the checks. He admitted further to have authorized transfer of funds from the said account to the account of the first accused.

On cross examination by advocate Mahuna, he admitted that the request letter for mandate file has not been exhibited. He admitted further that, although their initial assignment was to investigate into the Malaria and HIV project account, he has not tendered any document therefor.

The second witness was **FATUMA ABDUL MRUSADI (PW2).** She is currently working at the CRDB Meru branch as branch operation manager. On the material times, she was a bank officer. Her duties included opening accounts, receiving checks and processing for payment of the same. She claims to have been involved in the opening of **Motachwa** and **Ogembo** accounts upon obtaining the account opening documents from the fourth accused on instruction by the third accused.

The account opening form she received from the fourth accused, she clarified, indicated that the applicants were Tanzanians living in the USA while the residential identity cards indicated that they were residents of Arusha. Having noted the discrepancy, she testified, she raised it to the fourth accused and advise him to request for copies of passports. As the copies of the passports were merely additional documents, she further testified, she posted the information into the system and on approval by the fourth accused, she completed the process.

She narrated further that, on the next day, she received two photocopies of passports certified by the fourth accused with the relevant account numbers inserted thereon. As the procedure had been completed, she had to put them in the mandate files and forward the same again to the fourth accused for approval. She produced into evidence the mandate files for the two individual accounts (**PC15** and **PC16)**.

She claims further to have taken part in processing money transfer from the two individual accounts to the account of the first accused on instruction and approval of the third accused (**PC17** and **PC18**).

She further claims to have, in different occasions, received USA Treasury checks from the first accused for depositing into **Moyale Account**. What she noticed from the said checks was that, the names of the payees were different from the name of the account holders. On inquiry, she was informed by the first and third accused persons that the payees were partners to the account. She produced into evidence checks deposit slips dated 8/02/2010 and 25/2/2010 which were admitted as **PC 19** and **PC 20**, respectively. She also produced treasury checks numbers 231004538394, 231002578467 and 450054305245 which were admitted as , **PC 21,PC22** and **PC23** respectively.

She claims further to have been involved in processing three local checks issued by **Moyale** in favour of the first accused upon being requested by the third accused. She produced the three checks into evidence and were admitted as **PC 24**, **PC25** and **PC26**. The transfer of the checks in exhibits **PC 24** and **PC 25** was approved by the third accused while in exhibit **PC 26** by the fourth accused, she testified further.

On cross examination by advocate Mahuna, she admitted that some of the documents which were in the two mandate files were missing. She equally admitted that the opening of the individual accounts observed the procedure. She further admitted to have made a police statement which was admitted as **D-1**. She admitted that in accordance with **D-1**, from 2008 to 2009 she was a branch controller of CRDB Meru branch. She admitted further that in

accordance with page 4 of D1, the said accounts were opened when she was a branch controller.

The next prosecution witness was ASHA ABDALLAH RAMADHANI (**PW:3**) . She testified that from 2007 to 2013, she was working as a bank officer at Meru branch. Her duties included, opening accounts, issuing bank statements, and receiving and processing checks. She testified briefly on the procedure of opening accounts at the CRDB. For partnership account, she testified, the procedure starts by submission of among other, passport side photos of signatories, identity cards and deed of partnership. On submissions of those documents, the customer is caused to complete account opening forms. On completion, the forms are received by a bank officer and upon being sealed and signed, they are submitted to the immediate supervisor for approval. On approval, the account information is posted into the system by a bank officer. Thereafter, the supervisor has to authorize the opening of the account by inserting his user name and passwords. She testified further that, on completion of the process, the mandate file is kept in the custody of the customer service manager.

She confirmed to have taken part in the opening **Moyale Account** having received the relevant documents from the fourth accused. She mentioned the documents she received as spacemen signature cards, accounting opening forms, terms and conditions, copies residential identity cards and USA passports. She testified further that, although the account sought to be created was partnership account, no deed of partnership was submitted.

She confirmed to have been involved in processing some of the foreign checks under discussion. The procedure for dealing with foreign checks, she testified, was such that, on receipt of the same, and upon the client filling in a deposit slip, the bank officer receiving the check would fix a seal unto the slip and the check and put his signature on both sides. He would then fill the particulars of the check in OFBC forms. He would also record the particulars of the checks into the register. On completion, the OFBC forms, checks and deposit slips would be submitted to either the branch manager or customer service manager for authorization. She clarified that, the authorization was done by signing and putting signature numbers into the OFBC forms. She clarified that, the first signature in the OFBC form is that of maker and the second of the checker. On approval of the OFBC forms, she testified further, the same together with the relevant checks are forwarded to the HQ at the Department of International Payment Unit ("IPU")for further clearance.

She claims to have processed about 8 USA Treasury checks by filling and signing in OFBC forms as the maker. She tendered the relevant OFBC forms (**PC 27)** and the relevant checks (**PC28).** She further produced the relevant deposit slips (**PC29).** It is suggestive in her evidence that, of the 8 checks reflected in exhibits **PC 27**, **PC28** and **PC 29**, five of them were approved by the fourth accused and three by the third accused.

She confirms further to have taken part in the transfer of funds from **Moyale Account** to that of the first accused through CRDB checks. She said, the respective checks were being submitted by the first accused. She tendered into evidence a check with its deposit slip dated 24.12.2010 (**PC 30).** She also produced a check dated 2.11.2010 with its slip which (**PC 31)**.

On cross examination, she admitted that, for sometime when the fourth accused was on live, she happened to act as a customer service manager. She admitted further that neither of the two accused persons signed into **PC 29**. She admitted further that it was not wrong for the third accused to authorize payment of the checks in **PC 30** and **31**.

WINSTON REMINGTON MAKULI was the fourth prosecution witness. On the material dates, he was working at CRDB Meru branch as a bank officer at the customer service department. His duties included to receive and deposit checks, provide account balance to the customers and to process check of various types. It was his evidence that he happened to receive some foreign checks under discussion for processing. These included a check dated 18th December 2009 in favour of Motachwa Gregg valued USD 76,536 and another one dated 17th December 2009 in favour of Ogembo Mitchell worth 95,836 USD. (collectively **PC32**).

He further happened to prepare OFBC forms for USA Treasury checks with serial numbers 30/09/2010, 30/08/2 and 30/07/2010 worth USD 290.000. 79, USD 104,408. 93 and 55,386. 35, respectively (**PC 33**). He testified that the name of the payee in all the three checks was Moyale Precious Germs and Minerals Enterprises. He testified further that the reference numbers of the OFBC forms emanated from OFBC (**PC 34)**.

On cross examination by advocate Omari, he admitted to have not tendered a check reflected in PC **32**. He admitted that he was given the forms in exhibits **PC32** and **PC33** by the state attorney. He admitted further that the signatures of the third and fourth accused persons are not in **PC32**. He admitted further that, although the last column in **PC 34** is entitled supervisor, there is no signature of any supervisor.

SHUKRANI BABWEWE (PW-5) is the current branch customer service manager of CRDB Meru branch. Between 2013 and 2015, she was a bank officer and bank controller at the same branch. She testified that, as a branch controller, her main duty was to insure observance of bank procedure.

She testified further that, in 2014 when she was a branch controller, she was requested by some investigators to explain the procedure involved in processing foreign checks and in the process, she was requested, by one of the investigators, for bank statements of the three vehicle accounts. She printed out the same from the bank system and having satisfied herself as to the accuracy of the same, she signed thereunto and supplied the investigators with the same. She identified the bank statements in exhibits **PC35**, **PC36**, **PC37** and **PC 38.**

On cross examination by Mr. Mahuna, she admitted that the certification seal of the bank statements does not bear dates. She admitted that in dealing with foreign checks, the duty of the branch ends up after submitting the OFBC forms to the HQ.

The next prosecution witness was **AGNESS SEVERINE NGALO** (PW6). She testified that between June 2008 and September 2011, she was working at the **IPU** department. Among her duties was to process foreign checks and transmit them to the corresponding banks for payment. She testified further that, processing of foreign checks at the Unit starts upon receiving OFBC forms and the relevant checks from the branches. On receipt of the same, the Unit would scan the checks and record the information in OFBC forms in their register. The scanned checks together with the OFBC forms are then dispatched to the corresponding banks with a list of schedule. She said, upon being cleared, the proceeds of checks are credited into a special CRDB accounts in corresponding banks (Nestro account). She testified further that, upon being informed of the clearance of checks through swift message, her Unit issues advise of payment forms and forward them to the Central Clearance Unit together with a list of schedule and OFBC forms for further processing. She said that it is the advice of payment form which authorizes payment of money to the beneficiary. She produced into evidence 9 advise for payment forms that she prepared (**PC 39)**.

On cross examination by advocate Omari, she admitted that the clearance of checks was made by the corresponding bank on behalf of the CRDB. She said, the amount of check is paid to the Central Processing Unit account at the HQ.

JOHN RICHARD MDACHI (PW7) is an education officer at the President Secretarial Services Office. On the material time herein, he was working at IPU as a bank officer. Among his duties was to prepare advise for payment forms. He produced three advise of payment forms which he approved and were

received as PC 40 collectively. All the advise of forms in exhibits PC40, he clarified, concerned checks whose proceeds were credited into **Moyale account**.

On cross examination by advocate Mahuna he admitted that it is the list of schedule that goes to the corresponding bank. He further admitted that in the absence of advice form the proceeds of the foreign checks would remain in the CRDB account abroad.

BENJAMIN AUGUST KOMAB is a bank officer from the Central Clearance Unit at the HQ of the CRDB. He testified that on the material dates, he was the head of **IPU**. His main duty was to sign into the list of schedule and advise of payment forms. He produced three copies of the advise of payment forms which he processed and (**PC 41)**.

On cross examination, he clarified that what is prepared at the Unit upon receipt of OFBC forms is outward schedule. He said, there is nothing like a list of schedule in the CRDB. He said, the OFBC forms are not send to the HQ. What are send are checks and schedules.

VELINTINE LOCKS MASAWE (PW9), is a senior manager from the CRDB Central Account Division. He testifies that on the material dates herein he was the manager of the division. His duties included to clear checks between CRDB and other banks and to post payment of the clients into their accounts. He said, at the division, they would receive advice of payment forms from **IPU** attached with OFBC forms. He said, before posting the payment to the client account, he had to satisfy himself if what is paid reflects what is credited into the CRDB account abroad. He identified the advise of payment forms in

exhibits **PC 39,40 and 41** to be the ones which he signed into the second signature space.

On cross examination by advocate Omari, he clarified that "account payee only" means the account to be credited is the name on the face of the checks in the payee's column. In the absence of the said words, he admitted, it is an open check which can only be cleared if it is a domestic check. He admitted that the HQ has a duty to supervise the branch managers so that they comply with the procedure. He admitted to have written a police statement which was received in evidence as D2. He admitted of there being differences between exhibit D2 and his testimony. He explained the reason being that he wrote D2 under pressure.

The last prosecution witness was **SELEMAN ENOCK MWAKILINGA (PW10).** He is working at the HQ of the Police Force as commanding officer of the system appraisal. He testified that, on the material time herein, he was working at the Financial Crime Unit of the Police Force. The Unit deals with financial crimes including money laundering, forgeries, terrorist financing and tax evasion. He was a leader of a team of police officers who investigated into the crime under discussion. He supports the testimony of **PW1** that, initially they were assigned to investigate into the bank account of East Africa and HIV Programme Limited. His narration on how the task changed from the said account into the **three vehicle accounts** as well as how they obtained the relevant documents from CRDB Meru branch documents is materially similar with that of **PW1.** Equally so for the investigative findings drawn from the appraisal of the said documents and interrogation of the two accused persons and some bank officers.

He testified further that, after examining the 17 treasury checks, OFBC forms, advice of payment forms, local checks and other transactional documents pertaining to the three **vehicle accounts**, he established that, the transfer of money from the **three vehicle accounts** into the account of the first accused was not supported by any economic activities despite the amount being very huge. Equally so, for cash withdrawal from the account of the first accused. He testified further that the cash flow trend in the four accounts was such that whatever was credited into the accounts would quickly be transferred to the account of the first accused and sooner than longer withdrawn. In his understanding, that is a sign of a vehicle account.

The witness gave detailed account on how they mutually cooperated with the USA Financial Crime Control Network to gather information on the illicit origins of the 17 USA treasury checks. He said, they did so through mutual legal assistance. They requested the evidence through the offices of the Attorney General in 2012. In response, he testified, the USA intelligence authority availed them with information from time to time. Among the evidence they were supplied were 15 check images and deposit slips submitted for clearance (**PC45**); the proceedings of the trial of Moseti with the judgment and superseding indictments thereof (**PC47**); report pertaining to the passports submitted to the relevant authority in the USA (**PC44**) and print out of tax returns of the victims of the frauds (**PC46**).

He clarified that, the certificates in exhibit **PC 44** indicate that the two passports were not in the records of the USA passports authority. On exhibit

PC 47, he clarified, one of the conspirators Moseti was charged with conspiracy and found guilty of an offence of fraudulently procuring money from USA treasury. He drew the attention of the Court to the proceedings that Moseti admitted that three of the checks involved were send to the second accused. He disclosed the names of the payees of the checks as Magala Nolali (USD 327,188), Mseti O Hai USD (275,426) and Reuliga Johnson (USD 355,964). He clarified further that the said Moseti admitted in evidence that she was a girl friend to the first accused.

Exhibits **PC 46** and **47,** he clarified, indicate that the source of the various checks paid into the three vehicle accounts were the filing of false tax returns to the USA treasury. He testified further that the names of the victims of the crime in exhibit **PC47** were similar with those in the 17 US treasury checks deposited into the three vehicle accounts.

It was further his evidence that, in the course of the investigation, he happened to record the cautioned statement of the third accused who confessed to have aided and abated commission of the offence of money laundering (**PC43**).

On cross examination by advocate Omari, he admitted that **PW-2** was also involved in opening the individual **vehicle accounts** but he said she was just directed. He admitted further that, opening an account is a process which involves more than one persons.

In their defense evidence, the fourth accused testified as **DW1** and the third accused as **DW2**. In essence, their testimony was denial of the two charges. While **DW1** admitted to have participated in the opening of the **three**

vehicle accounts, it was his evidence that account opening is a process which involved many staffs. On his part, **DW2** denied to have been involved in opening the accounts maintaining that opening an account is not among the duties of a branch manager.

On the processing of the foreign checks under discussion, while **DW2** admitted to have taken part in processing about 10 of them, **DW1** admitted taking part in processing 5 of them. They both clarified in evidence that, the initial procedure of processing foreign checks and filling in OFBC forms does not involve a single bank officer alone. Neither does it end at the level of the branch. They commonly testified further that, the final processing of the same leading to encashment is within the mandate of the head quarter of the CRDB and the issuing bank abroad.

On authorization of payment of some local checks, it was their testimony that what they did was within the legal parameters. **DW1** further exhibited some documents suggesting that he was absent in office on leave since May 2010 and he never resumed to work (exhibit **DI, D2** and **D3**). On the face of it, that aspect of evidence would raise the defense of *alibi.* I will consider the defense evidence as I will be scrutinizing the evidence.

In the conduct of this matter, the Republic was represented by a team of four state attorneys led by **Messrs. Oswald Tibabyekomya, (PSA), Hashimu Ngole**, (PSA), **Pius Hilla**, (SSA) and **Awamu Mbangwa**, SSA. The third accused was represented by **Messrs. Omari Idd** and **Innocent Mwanga**, learned advocates whereas **Mr. Mosses Mahuna**, learned advocate, represented the fourth accused.

On their joint submissions through advocate Mahuna, the counsel for the defendants have criticized the prosecution for charging the third and fourth accused persons with both inchoate offence of conspiracy and the substantive offence of Money Laundering. In their view, once the accused is charged with the substantive offence, he cannot, in addition, be charged with an incomplete offence of conspiracy to commit the same offence. The counsel placed reliance on the authorities in **SHANTILAL GORDHANBHAI PATEL AND OTHERS VS REPUBLIC (1957) E.A.881** and the decision of the Court of Appeal of Tanzania in **SHIDA AND ANOTHER VS. REPUBLIC (2012) 2 E.A. 444**.

In rebuttal, it was submitted for the prosecution that, since section 12 of the **AMLA** does not create a single offence, conspiracy is a separate and independent offence from the offence of money laundering. In their view therefore, the joinder of the counts of conspiracy and money laundering does not amount to double jeopardy.

On my part, I have gone through the authorities cited by the defense counsel. With respect, I entirely agree with them that where the facts of the case are such that the accused has committed both the offence of conspiracy and the principle offence, he cannot be charged with both. This position is clearly stated in the two authorities just referred.

In this case, the third and fourth accused persons were charged jointly and together with the first and second accused persons with the offence of conspiracy to commit an offence of Money Laundering country to section 12 of **AMLA**. In addition to the incomplete offence, the accused persons have also been charged with an offence of aiding and abetting commission of the

offences under items (a) to (d) contrary to section 12 (e) of the **AMLA**. It may be useful to observe that under the respective provision, aiding and abetting amount to money laundering offence.

Therefore, even if it was to be assumed, for the argument sake that; the count as to conspiracy relates to the money laundering offences in items (a) to (d) and not the aspect of aiding and abetting in item (e), the objection raised by the prosecution would still sound meritorious. The reason being that, under section 12 (e) of the **AMLA**, conspiracy to commit an offences under items (a) to (c) of the **AMLA** amounts to a complete money laundering offence. In any event, the particulars of the offence in the count suggests that it was conspiracy to commit an offence under section 12 of **AMLA**. Therefore, even if the facts establishing the count of conspiracy to commit the offence of money laundering were different from those of aiding and abetting, the count would for the reason of being preferred under the provision of the Criminal Procedure Act be irrelevant.

Therefore, if I can apply the principle set out in the above authorities, it was not proper for the accused persons to be charged with both the offences without offending the principle of double jeopardy. Consequently, the third and fourth accused persons must be and are hereby discharged with the count of conspiracy. This is in line with the decision of the Court of Appeal in **JOHN PAULO @ SHIDA AND ANOTHER CRIMINAL APPEAL NO. 335 OF 2009, CAT TANGA.**

With that therefore, I am left with the second count of money laundering. In his submissions, Mr. Oswald was of the humble opinion that the case against

the accused persons has been proved beyond reasonable doubt. He submits that the oral testimony of PW10 and the evidence in exhibit PC46 establishes that the foreign checks in exhibit PC 47 were obtained fraudulently. He submits further that the same is established by the convictions of the first and second accused persons on their own pleas of guilty to the same offence. On involvement of the third and fourth accused persons in aiding and abetting into the commission of the offence, the counsel placed heavy reliance on the confessional statements in exhibits **PC13** and **PC 42**. In his view, the confessional statements establish beyond reasonable doubt that the accused persons authorized for the opening of the three vehicle accounts and participated in the processing of the defrauded checks for clearance. He submits further that, the confessional statements establishes beyond reasonable doubts that the accused persons approved for payments of the proceeds of the said checks to the first accused. The prosecution further relied on the oral evidence of PW2,PW3,PW4 and PW5 on this aspect as well as the documentary evidence exhibited.

On whether the accused persons were or ought to have been aware that the money involved emanated from proceeds of predicate offence, he submits that there is irresistible circumstantial evidence to establish the same. The fact that the accused persons authorized for the opening the three vehicle accounts without establishing the proper identity of the account holders as mandatorily required by regulations 15(1)(a) and 16 of the Anti Money Laundering Regulations, lead to an inference that the accused persons were aware of the illicit origin of the property. He clarified further that, on the face of them, the documents purporting to establish the identities of the holders of the **three vehicle accounts**, were apparently misrepresentative on the

nationality and residence of the signatories. The counsel wonders how possible could it be for the third and fourth accused persons to allow transections into the said account while pertinent documents as to the identities of the account holders were missing.

On what is the test for establishing knowledge, the counsel relied on the authority in **MAJUTO SAMSON VS. R, CRIMINAL APPEAL NO. 61/02 and SAID ALI MATOLA CHIMILA VS R. CRIMINAL APPEAL NO. 26/05** to the effect that the same is established by circumstantial evidence. In money laundering proceedings, the counsel submitted, the test to be applied is objective test. To substantiate his contention, the counsel referred the Court to the authority of the High Court of Malawi in **R VS. ANJELA KATENGEZA, CRIMINAL CASE NO. 26/2013, HC MALAWI**. He pinpointed six circumstances which establishes knowledge on the part of the accused persons. **First**, the three vehicle accounts were established without following the procedure. **Two**, the documents used in all the three accounts were forged. **Three**, the checks paid for were brought by a person who is not a payee. **Four**, there was no instructions in the said checks that the proceeds thereof should be paid in the said accounts. **Five**, the accused persons authorized payment into the said accounts, while the introductory document and account opening documents were incomplete. **Six**, the proceeds of the checks were transferred into Mwale account who was neither the holder of the account nor authorized person. **Seven**, the payment paid to Mwale were involving a huge amount of money but there were no accompanying documentation to support the transections.

On their joint submissions through advocate Mahuna, the defense counsel submit, in the first place that, there has not been adduced any evidence to establish that the checks in question were proceeds of crime. In the absence of the testimony of the victims of the crime, they submit, it cannot be established that the said checks were defrauded as alleged by the prosecution or at all. The Court was invited to draw a negative inference against the prosecution for the unreasonable failure to call such material witnesses. Reliance was placed on the authority in **LUGENDO VS. R, EALR, 180**.

On top of that, the defense counsel doubted the legality of the procurement of documents from CRDB branch. The reason being that **PW1** and **PW10** who tendered the documents into evidence did not explain how did they obtain the documents from the CRDB. Equally questioned was the legality of procurement of the documentary evidence in exhibits **PC 44** and **47.** The gist of the contention is that; while under section 10 of the Mutual Assistance in Criminal Matters Act, the said documents would not be procured in the absence of a request letter from the Attorney General, no such request letter has been exhibited. With that, the counsel submitted, there was no proper chain of custody of the said documents. The Court was invited to the considered the principle in **PAULO MADUKA CASE** and **MALIKI HASSAN SULEIMAN VS. R, TLR 2005**.

Still on legality of procurement of some documentary exhibits, the counsel attacked the evidence in bank statements in exhibits PC 35, 36, 37 and 38 for non-compliance of the provisions of section 18 of the Electronic Transections Act which provides for authentication of electronically retrieved evidence.

Commenting on the evidence in exhibit PC1, it was the counsel's submission that the same did not amount to a mandate file. They referred the Court on the evidence PW2 of there missing page 6 of the account opening form. The prosecution is also criticized for failure to give a plausible explanation as to who removed the identity cards and passports from the individual accounts to Moyale account. In their humble opinions, the discrepancies raise reasonable doubts which should be applied in favour of the accused persons.

On whether the accused persons were responsible for processing and clearance of the checks in question, it was their contention that in view of the evidence from both sides, the Meru branch was incapable of processing and clearing any foreign checks. They submitted that, the process was done at the Head Quarter through the IPU and CAU departments. It is through the said departments that processing of the checks and authorization of the crediting of the proceeds of the checks into the relevant accounts is made. The counsel referred the Court on the testimony of PW6 to PW9 on this aspect.

He submitted in the alternative that, the accused persons cannot be said to have jointly committed the offence while the fourth accused dealt with only five checks and the fourth one ten checks. In any event, the counsel submits, the prosecution evidence establishes 15 checks as opposed to 17 checks alleged in the Information. He submits that in accordance with the authority in **DPP VS. R. MKOBA, 1990, TLR** the accused persons are supposed to be acquitted.

With the exposition of the facts of the case, it is desirable to consider if the charge of money laundering against the accused persons or either of them has

been proved. The position of law on burden of proof in criminal cases is not unsettled. The prosecution is bound to prove each and every element of the charge beyond reasonable doubt. Where any reasonable doubt arises, a benefit must be given to the accused person. I agree with the prosecution attorney that; in determining whether a case against the accused has been proved, the Court should not expect the prosecution to prove the case beyond any shadow of doubt. The following remark by Lord Denning in **MILLER VS. MINISTER OF PENSIONS (1947) 2 All E.R. 372** may be useful;

> *'The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible but not in the least probable", the case is proved beyond reasonable doubt but nothing short of that will suffer'.*

The above proposition of the law was given judicial recognition by the Court of Appeal of Tanzania in **MAGENDO PAULO & SHABAN BENJAMIN VS. REPUBLIC [1993] T.L.R 219** where it was held that, if the evidence is strong against the accused as to leave remote possibility in his favour, the case is proved beyond reasonable doubt.

The third and fourth accused persons are charged with an offence of money laundering contrary to section 12 (e) of the AMLA. Under section 12 (a) to (d) of the **AMLA**, the offence of Money Laundering can be committed if a person or persons engage in any of the following events:- **First**, engaging directly or indirectly in a transection that involves property that is proceeds of a predicate

offence while he knows or ought to have known that the property is the proceeds of a predicate offence; **Two**, converts , transfers, transports, or transmit property while he knows or ought to have known that such property is the proceeds of a predicate offence, for the purposes of concealing, disguising the illicit origin of the property or of assisting any person who is involved in commission of such an offence to evade the legal consequence of the action; **Three**, conceals, disguises, or impedes the establishment of the true nature, source, location, disposition, movement, or ownership of or right with respect to property, while he knows or ought to know or ought to have known that such property is the proceeds of a predicate offence; **Four**, acquire, posses , uses, or administer property, while he knows or ought to know or ought to have known at the time of receipt that such property is the proceeds of a predicate offence. Under item (e) thereof, the offence can be committed if the accused participate in, associate with, conspires to commit, attempts to commit, aids and abets , or facilitate and counsels the commission of any of the acts in items (a) to (d).

What amount to predicate offence are enumerated in section 2 as to include; illicit trafficking under the law relating to narcotic drags, terrorism, illicit arms trafficking, organized crimes, trafficking of human beings and smuggling immigrants, sexual exploitation, corruption, counterfeiting, armed robbery, theft, forgery, piracy, hijacking, tax evasion, illegal mining, environmental crime and so on.

Section 3 of the AMLA defines money laundering as *"engagement of a person or persons, directly or indirectly in conversion, transfer, concealment, disguising, use or acquisition of money or property known to be of illicit origin*

and in which such engagement intends to avoid the legal consequence of such action and includes offences referred in section 12".

I am in absolute agreement with my learned brother Mkasimonga J in **THE DIRECTOR OF PUBLIC PROSECUTION VS. HARRY MSAMIRE KITILYA AND TWO OTHERS, CRIMINAL APPEAL NO. 105 OF 2016** that, the commission of an offence of money laundering passes through three stages namely; placement, layering and integration. The first stage involves the physical movement of currency or other funds derived from illegal activities to a form that is less suspicious to law enforcement authorities. The second one involves separation of proceeds from their illegal source by using multiple complex financial transections. In the last stage, illegal proceeds are converted into apparently legitimate business earnings through normal financial or commercial operations.

It is perhaps important to state right away that the three stages captured in the definition entails the manifestation of the offence of money laundering from its inception to the end. For the offence to be committed however, it is not necessary that the perpetrators must have participated in all stages.

The present case arises under section 12(e) of AMLA which provides as follows:-

> *"12. Any person who-*
>
> *(e) Participate in, associate with, conspire to commit, attempts to commit, aid and abets, or facilitate and counsels the commission of any of the acts described in paragraph (a) to (d) of this section, commit offence of money laundering"*

Admittedly, the provision, while enumerates the elements of actus reu of the offence, it is silent on the mental element. Much as it is true and the counsel concur that; each of the elements constitutes a distinct and separate offence, it is clear from the express provision of section 12(e) that the offence created therein relates to the offences in items (a) to (d). If I can put it in appropriate words, the offence under item (e) is accessory to those in items (a),(b),(c) and (b). In each of the offences under items (a) to (d), I have observed, the mental element is identical. It is actual or constructive knowledge of the illicit origin of the property . In the circumstance therefore, it can reasonably be implied that the intention of the legislature was that knowledge whether actual or constructive of the illicit origin of the property involved would be the mental element in any of money laundering offences under the Act. This also seems to be reflected in the definition of the offence under section 3 of the Act.

Therefore, to establish the offence of aiding and abetting under the respective provision, three elements must be established. First, there must be a principal offender who committed any of the money laundering offences enumerated in items (a) to (d) of the **AMLA**. Two, the accused person must have helped the principal offender to commit the crime. Three, the accused person must have been aware whether actually or constructively that the property involved is the proceeds of crime.

In this matter, the third and fourth accused persons are accused of aiding and abetting transmission of 17 US Treasury Checks amounting to USD 5,468, 699.25 by authorizing the opening of the **three vehicle accounts** and processing payments of the said checks while they knew or ought to know that the same were proceeds of the crime. In accordance with facts and

evidence, among the principal offenders whom the third and fourth accused assisted to commit the offence were the first and second accused persons. They were, in this case, charged together with the third and fourth accused persons.

It is apparent and this Court takes judicial notice that, each of them was convicted, on his plea of guilty, to the principle offence of money laundering under section 12 (b) of **AMLA** and they were punished accordingly. The prosecution, it would seem, partly rely on the conviction of the first and second accused persons to establish the first element. They also rely on the conviction of one conspirator Mseti in USA as per the judgment, superseded Indictment and Proceedings in exhibit **PC47**.

On their parts, the defence counsel submits that, the first element has not been established because there has not been adduced any evidence to establish that the 17 checks under discussion were proceeds of crime. In their evidence on cross examination however, both the accused persons admit to be aware of the convictions of the first and second accused persons of the principal offence. In their submissions however, the defence counsel did not make any remark on the relevancy of the convictions of the first two accused persons in establishing the first element. The position of law on the relevancy of criminal judgment in a subsequent proceeding is stated in under section 43A of the Evidence Act in the following words:-

> *43A.A final judgment of a court in any criminal proceedings shall, after the expiry of the time limit for an appeal against that judgment or after the date of the decision of an appeal in those proceedings, whichever is*

the later, be taken as conclusive evidence that the person convicted or acquitted was guilty or innocent of the offence to which the judgment relates.

My understanding of the above provision is that, the conclusiveness of a criminal judgment in a subsequent proceeding is limited to the extent of guiltiness or innocence of a person convicted or acquitted. In this matter, the third and fourth accused persons are charged as accessories to the offences committed by the first and second accused persons among others. It follows therefore that; as accessories to the commission of the offence, their liability is derivative in that, it derives from and is dependent upon the liability of the principal. Therefore, for the purpose of establishing that the principle offence has been committed, the convictions of the first and second accused persons are conclusive evidence.

Admittedly, my quick research could not come across with relevant domestic authorities discussing similar issue. Nevertheless, experience from other common law jurisdictions may be relevant. The Supreme Court of the United States of America dealing with more or less a similar issue had the following to remark in **COLOSACCO VS. UNITED STATES (1952), 196 2d 165** at page 167 thereof:

Conviction of the principal is prima facie evidence of the principal's guilt on the trial of the aider and abettor. Other evidence which would have been admissible against the principal may be admitted in evidence to prove the guilt of the principal on the trial of the aider and abettor.

I am aware that the convictions under discussion were not on trial. It was based on pleas of guilty on the part of the ~~first~~ and second accused persons.

The definition of what is a judgment in the Criminal Procedure Act does not sound to be broader enough to include a judgment on admission as it is in civil cases. Nevertheless, since the principle of Autrefois Acquit and Autrefois Convict applies in a conviction on pleas of guilty in as much as it applies in a conviction on trial, the conviction of the first and second accused persons is admissible evidence to establish that the first and second accused persons committed the principle offence of money laundering.

On this, the opinion of the Supreme Court of Canada **R V. VINETTE, (1975) 2 SCR 222,** is very inspirational. In the said case, the respondent was convicted of an offence of aiding and abetting to the commission of the offence of manslaughter. On appeal to the Court of Appeal of Quebec, the conviction was quashed and set aside on account that it was not proper for the trial Court to place reliance on the plea of guilty of the principal offender to establish commission of the principal offence. On appeal to the Supreme Court of Canada, the decision of the first appellate court was set aside and that of the trial court reaffirmed. In making its decision, the Supreme Court of Canada differentiated between an accomplice and an accessory. In the opinion of the Supreme Court, much as such conviction cannot be conclusive in a case against an accomplice, in a case against an accessory, it is relevant in establishing commission of the principal offence. In his words, His Lordship PIGEON, J, has the following to say at pages 231 and 232 of the report:

> *A plea of guilty is obviously admissible evidence against the person who made it. It must therefore be admitted against an accessory after the fact for the purpose of proving the principal crime, once the rule is accepted that, in such a case, evidence admissible against the principal is equally admissible against an accessory after the fact, in view of the*

nature of the offence and the particular rules applicable to it. Moreover, in the case at bar I do not think the majority of the Court of Appeal was correct in regarding the evidence in question herein as evidence of a confession made in other proceedings. The testimony in question was not that of a third party, but that of Henri Vincent, the principal himself. Called as a witness he said: I plea guilty to the charge of manslaughter. In my view this clearly meant that Vincent admitted his guilt. One who says " I have confessed" ipso facto admits guilt, because confessions are not presumed to have been made in error. Authorities were cited to establish that a plea of guilty is not necessarily decisive, and that an accused may be allowed to withdraw it. This is true, but does not mean that such a confession is worthless. In the present case, there is proof that it was a true confession because Vincent went on to say that he had been sentenced to a nine years imprisonment. If the defence had any reason to question the validity of the confession made by VINCENT, It could have cross-examined him or called witnesses to dispute his statement. This it did not attempt to do".

I am highly persuaded by the above authority and I take it to be the correct principle of law on relevancy of conviction of the principal offender in establishing, as against the accessory, that the principal offence has been committed. If I can apply the principle in the instant case, it is obvious that the pleas of guilty of the first and second accused persons was made in the presence of both the third and fourth accused persons and more so, in the same proceedings. In their testimony, both the third and fourth accused persons were reminded, by way of cross examination, of the said conviction.

The facts was repeated also in the evidence of PW1 and PW10. Neither of the accused persons drew the attention of the Court that he was intending to contest the validity of the convictions of the first two accused persons. That being the case therefore, the convictions of the first and second accused persons is sufficient evidence to establish commission of the principal offence. The first element is thus proved.

Assuming, which is not, that the convictions of the first two accused persons would not be conclusive, yet there is adequate evidence from the oral testimony of PW1 and PW10 supported by the documentary evidence in exhibits PC45, PC46, AND 47 to establish commission of the principal offence.

In their submissions, the defence counsel questions the legality of the said documents for non-compliance of section 10 of the Mutual Assistance in Criminal Matters Act, Cap. 254, R.E. 2002. They submit that, the respective provision presupposes the existence of the request by Tanzania through the Attorney General under section 8 of the Act which has never been tendered into evidence. They submit further that in the absence of the request letter, there is a break of chain of custody of the exhibits.

With respect, I cannot accept this submission. The provision of section 8 of the Mutual Assistance in Criminal Matters Act (Cap. 254 R.E.2002) does not impose any condition for admissibility and reliability of documents. The relevant provision is section 38 (1) and (2). The Court of Appeal in **THE REPUBLIC VS. MEDIAN BOASTICE MWALE AND THREE OTHERS, CRIMINAL APPEAL NO. 2 OF 2016 (CAT (UNREPORTED) ARUSHA)** judicially considered the scope of the application of said section. It outlined twelve categories of authentication of foreign documents under the respective

provision. Signing and authentication by an Officer of a foreign country and Signing or certification by an Officer of a foreign country by an official public seal of a foreign countries are among such categories. Having so outlined, the Court of Appeal made the following remark at page 18 of the judgment:-

> *A document from a foreign country which is sought to be admitted in evidence under Mutual Assistance in Criminal Matters Act must satisfy one of the listed twelve categories.*

In this matter, the documents in exhibits PC45, PC46 and PC47 have been signed and authenticated by the Associate Director, Office of International Affairs, United States Department of Justice with his public seal. It was then certified by the Hon. Attorney General of the United States. As the documents in question comply with one of the categories of authentication outlined by the Court of Appeal of Tanzania in the authority just referred, non-production of the request letter cannot in anyway affect the integrity of the documents.

In my opinion therefore, where the document in question falls within the purview of section 38 of the Mutual Assistance in Criminal Matters Act, the principle of proper chain of custody of exhibits is deemed to have been complied if any of the conditions enumerated the **Mwale's case *supra*** is observed. The reason being that the conditions set out in the respective provision are there to protect the integrity of document and establish a proper chain of custody.

This now takes me to the second element as to positive action or participation of the accused persons in assisting commission of the offence. The prosecution, it would seem to me, have used three propositions to establish

the element. First, authorization by the third and fourth accused persons of the opening of the three accounts in the absence of sufficient account opening documents. The prosecution has relied on the oral evidence of PW2, PW3 and the documentary evidence in exhibits PC1, PC15 and PC 16 to establish this assertion. More so, they have relied on the confessional statements of the third and fourth accused persons in exhibits PC 43 and PC 11 respectively.

In his defense evidence, the third accused denied to have taken part in authorization of either of the three accounts. He testified further that, it is not the duty of the branch manager to authorize opening of an account. On his part, the fourth accused while admitting to have authorized for the opening of the account, it is his defense that he was not alone since opening an account is a process.

In their submissions, the defence counsel have questioned the authenticity of the mandate files in exhibits PC1, PC15 and PC16 for lack of proper chain of custody. They submit that; while the witnesses who tendered the documents admit to have been supplied with the documents by the state attorneys, there was not adduced any evidence as to how the said evidence were collected from the bank, kept and then supplied to the witnesses. The defense counsel has placed reliance on the authority of the Court of Appeal of Tanzania in **PAULO MADUKA AND ANOTHER v. R; CRIMINAL APPEAL NO. 110 of 2007 (UNREPORTED)**.

On their submission on this issue, the prosecution counsel contended that; in view of the recent decision of the Court of Appeal in **ISSA HASSAN UKI VS. R.**, the application of the principle in **PAULO MADUKA** is limited to items

which can easily be tempered with. They submit that mandate documents do not fall under the typology of such documents.

In **PAULO MADUKA (*SUPRA*)** the Court of Appeal of Tanzania stated the principle of proper chain of custody of exhibits in the following words;-

> *By chain of "a chain of custody" we have in mind the chronological documentation and/or paper trail, showing the seizure, custody, control, transfer analysis and disposition of evidence be it physical or electronic. The idea behind recording the chain of custody, is to establish that the alleged evidence is in fact related to the alleged crime –rather than, for instance, having been planted fraudulently to make someone appear guilty....the chain of custody requires that from the moment the evidence is collected, its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it."*

From the wordings of the decision of the Court of Appeal above extracted, the principle of proper chain of custody applies in both physical and electronic evidence. The rationale behind establishing chronological documentation of the transfer and disposition of exhibits is to establish nexus between the exhibit and the crime and avert possibility of the exhibit being tempered with.

In **ISSA HASSAN UKI VS. R** (*supra*), I have read, the Court of Appeal did not depart from its decision in **PAUL MADUKA**. But it narrowed down the principle so that it could not strictly apply to items which can easily be tempered with. Appreciating the relevancy of the principle in **PAUL MADUKA**

CASE (***supra***), the Court of Appeal stated at page 11 of the judgment as hereunder:-

> *We have read the cases referred to us by both learned counsel. Having so done, we respectfully agree that they were about chain of custody and underlined correct principle on the point. With equal great respect, we think they are distinguishable from the present case.*

Having remarked as such, the Court of Appeal stated the principle of law on the scope of the application of the rule of chain of custody in the following words:-

> *We are of the considered view that elephant tusks cannot change hands easily and therefore not easy to temper with. In cases relating to chain of custody, it is important to distinguish items which change hands easily in which the principle stated in* ***Paulo Maduka*** *and followed in* ***Makoye Samwel @ Kashinje and Kashindye Bundala*** *would apply. In cases relating to items which cannot change hands easily and therefore not easy to temper with, the principle laid down in the above case can be relaxed.*

It is apparent from the above passage that in cases like the instant one where the item involved cannot change hand easily, the principle is not applied strictly. It has to be applied with relaxation as the facts of the case may dictate. In the circumstance of this case and considering the nature of the exhibits involved and the evidence adduced in totality, I think the principle in **PAUL MADUKA** cannot be applied as strictly as the defense counsel expects. For, the mischief sought to be addressed by the principle of proper chain of custody is taken care of by the oral testimony of PW-1, PW2, PW3

and PW10 as well as the confessional statements of the accused persons in exhibits **PC 11** and **PC 43**.

In this case, PW1 and PW10 told the Court that they sought the documents from the CRDB Meru branch after adhering to all formalities. They testified further that, it was the third accused who authorized for the supply of the documents to them. In his evidence on cross examination,the third accused admits to have instructed one of his subordinates to make the said documents available to the PW10 and his team after confirming that they have observed the procedure. On top of that, both the accused persons recognized their signatures appearing in most of the documents constituting the mandate files. I have also considered the fact that in their confessional statements, both the accused persons admit inadequacies in the mandate file of **Moyale account**. More so, they admit, in their evidence discrepancies in the identity cards and passports of the signatories of the **three vehicle accounts** contained in the so called mandate files. Indeed, that was the main the purpose behind the evidence. Therefore, even if the evidence in exhibits **PC1**, **PC15** and **PC 16**, was to be discarded, the evidence in the confessional statements of the accused persons would suffice to establish insufficiency of pertinent documents in the mandate files in question.

Admittedly, the evidence on the record does not establish direct involvement of the third accused in the authorization of the opening of either of the three accounts. However, there is ample evidence of his indirect participation. The testimony of PW2 and PW3 irrefutably establishes that the signatories of the

three vehicle accounts and the first accused were all introduced to PW2 and PW3 by the third accused. It is also irrefutable that it is the third accused person who instructed the fourth accused to process for the opening of the said three accounts. The evidence in the confessional statement of the third accused also establishes awareness of the inadequacies in the mandate files. In my view, this evidence suffices to establish participation of the third accused in opening of the three vehicle accounts.

On the fourth accused, I am satisfied without any reasonable doubt that, he was the one who approved the opening of the three accounts. In the first place, the spacemen signature cards in exhibits PC1, PC15 and PC 16 speak for themselves. It is clear therein that the fourth accused in his capacity as the branch customer manager, signed into the spacemen signature cards as an authorizer. In his testimony in defense much as it is in his confessional statement in exhibit PC 11, the fourth accused seems to be admissive of the said fact in material respects. Much as it is true that PW2 and PW3 also participated into the opening of the said accounts, their roles were only receiving account opening documents and submitting them for approval to the fourth accused. The fourth accused admitted in evidence that without his approval neither of the accounts could be opened. In the circumstance therefore, I will establish as a point of fact that the fourth accused authorized the opening of all the three accounts.

Perhaps, the issue which has to be considered further is whether the said accounts were opened in the absence of some mandatory account opening documents. In respect to the two individual accounts, I hastate to hold so but not in the **Moyale account**. In their evidence through PW1,PW2,PW3 and

PW10, the prosecution established that though the said account was a partnership account, it was opened without there being submitted certificate of registration and partnership deed among other documents. They testified further that; identity cards and the passports submitted by the signatories of the account were *prima facie* forged. Elaborating on this fact, PW10 and PW3 testified that, while the passports described the signatories of the account as American nationals, the identity cards described them as Tanzanians. They testified further that, the two passports bear the same registration number signifying that they have been forged.

In his testimony, the fourth accused on cross admits that neither certificate of registration nor partnership deed was submitted during the opening of the said account. He has made a similar admission in his confessional statement which was admitted as **PC 11**. He explained however that the first accused promised to produce the same subsequently. I have no hesitation from the oral evidence of PW10, PW3 and PW10 as supplemented by the confessional statement of the fourth accused that, the account of the Moyole was opened in the absence of certificate of registration and partnership which according to the irrefutable evidence of PW2 and PW3 are mandatory documents for opening of a partnership account. The requirement is also imposed by the Anti Money Laundering Regulations.

It is also irrefutable according to the oral testimony of PW2, PW3 and PW10 and the documentary evidence in exhibit PC 1 that, the identity cards and passports purporting to be of the signatories of the said accounts were forged. Even without the evidence from the USA authority in exhibit PC 44, the two passports of the signatories were on the face of them forged since it was

more than impossible for two passports to bear the same serial number. It was also impossible for the two signatories to be Tanzanians and Americans at the same time.

The next proposition was processing of payments of the 17 US Treasury checks. It is common ground that, the processing for clearance of foreign checks starts at the level of the branch by receiving the said foreign checks and filling the details of the checks in OFBC forms. It is also not in dispute that the final procedure for processing and clearance of foreign checks is done at the HQ of the CRDB by the departments of International Payment Unit and Central Accounting Division. It is also not in dispute that the advise to credit the proceeds of foreign checks into the client account is made by the International Payment Unit in collaboration with the Central Accounting system. Equally not in dispute is the fact that the information used by the HQ to finally process for clearance of foreign checks emanate from the OFBC forms processed at the level of the branch. The oral testimony of PW2,PW3,PW4 and PW10 establishes that; while the third accused approved about 10 OFBC forms, the fourth accused approved about 15 forms. I can therefore hold without hesitation that, the third accused processed 10 of the 17 checks by filling in OFBC forms and the fourth accused 5 forms.

I agree also with the prosecution that the receiving of the said checks and filling the information therein by the accused persons aided and abetted to the transmission of the said checks. The reason being that, without the foreign checks being received and processed at the level of the branch by way of filling the checks details in OFBC forms, the same could not be processed by the IPU and CAD.

The last proposition is approval of transfer of money from the said three accounts to the account of the first accused. On this, the banks statements in PC 35, 36, PC37 and PC38 speak for themselves. In addition, both the third and fourth accused admit both in their evidence in defense and their confessional statements to have authorized such transfer without any documents to support the economic activities involved.

The contention that the said banks statements offended the provision of section 18 (2) of the Electronic Transections Act, 2015 is baseless. The testimony of PW5 on how she printed out the said statements from the system coupled with her position in the CRDB Meru branch at that particular time would lead to substantial compliance of the requirements under the respective section. Indeed, her introductory evidence on the extraction of the statements from the bank system leaves no reasonable doubt as to authenticity and integrity of the same.

In my view therefore, the prosecution has been able to establish, beyond reasonable doubt, the two elements of the *actus reus* of the offence involved.

This now takes me to mental element of the offence. I agree with the defense counsel that knowledge of the illicit origin of the property involved constitutes *mens rea* of the offence under section 12(e) of Anti-Money Laundering Act, 2006. Therefore, the prosecution is bound to establish beyond reasonable doubts that the third and forth accused persons knew or ought to have known that the US Treasury Checks were proceeds of crime.

Knowledge being a mental element cannot be established by direct evidence. As held in **MAJUTO SAMSON v. REPUBLIC, CRIMINAL APPEAL NO. 61 of 2002 (CAT MWANZA),** the element can be inferred from the actions of the accused persons.

In determining the mental element for money laundering offence, the UNCAC states that judges should be able to rely on objective factual circumstances and to infer the mental element from those circumstances. (Article 28 of the UN Convention against Corruption (2003).

As rightly held by the High Court of Malawi **REPUBLIC V. ANGELLA KATENGEZA *(supra)*** in determining the aspect of knowledge in the offence of money laundering, the question to be addressed is not merely whether the accused person has in fact acted dishonestly but whether he or she was aware that what she or he was doing was dishonest. In its own words, the High Court of Malawi stated as follows:-

> *The test of knowledge or belief required for the offence of money laundering having been elaborately argued by the defence and set out above, requires two limbs. The first limb is an objective one. The objective test depends on the assessments of what ordinary people consider as honest. The question then becomes, is the accused to be judged on corrupt objective standard or an honest one, even though the standard is not ordinarily held. As the law stands, the answer is simple, an objective test is always based on a standard of the 'the reasonable man", traditionally, the man on the 'Clapham Omnibus". Regardless of how common the corrupt view is in the society, the reasonable man will*

always stand for what is right, even if he is the sole voice of reason... The fact is, such conduct in breach of the law, can never be the conduct of a reasonable man".

Explaining on what is the second limb of the test, the High Court of Malawi further remarked that:

'The second limb of the test is the subjective one. Once the objective threshold has been passed, i.e. the court is satisfied that the conduct was dishonest according to the standard of reasonable man, the subjective limb requires that the accused be aware that what he or she was doing was dishonest by those standards; given his or her actual subjective knowledge and the accused must have fallen below ordinary objective standards of honesty having been aware that he or she was doing so".

In this matter, while there is irrefutable evidence that the **Moyale account** was opened with incomplete documents as to the identity of the business operation of the account, both the third and forth accused persons allowed the operations of the account without any question. That was so, notwithstanding that the information in the account opening documents manifested apparent fraudulent misrepresentations. Whereas in the application form, the signatories of the account represented themselves as Tanzanians, copies of the passports submitted indicated that they were Americans. I agree with the prosecution attorney that, such conduct exhibits

willful blindness on the part of the third and fourth accused persons calculated to avoid the truth that they would prefer to know.

The above discrepancies notwithstanding, the evidence on the record reveals that though the foreign checks under scrutiny were in the names of third parties, they were in all cases brought by the first accused without any representative instrument of either the owners of the checks or Moyale Enterprises. It is further in evidence that the third and fourth accused persons authorized payment of the said checks into **Moyale account** without there being authorization by the check owners. It is further in evidence that, the amount credited into the said account was within short intervals transferred into the account of the same first accused and soon thereafter withdrawn without any document to support the business transections for which they were paid. It is worthy of note that, the amount involved was colossal. In some transections, as much as *USD 1,000, 735* would be disbursed in a single trench. Both the third and fourth accused persons admit that the amount was above the alerting figure under the **Anti Money Laundering Regulations**.

In the absence of sufficient document as to the identity of the business operation of the account, and for the reason of the information as to the identity of the signatories of the account being *prima facie* suspicious, it was not expected for the senior bank officers of the caliber of the third and fourth accused persons to allow such huge transections to take place in the said account without ascertaining the business operation of the accounts and the relationship between the first accused person on the one hand and the owners of the accounts and checks in question on the other.

In their defence, the third and fourth accused persons claim that the payment of the said checks into the Moyale account was authorized by General Power of Attorney. Assuming, without deciding that, the claim is genuine, yet it cannot be relevant to justify the transfer of the said amount from Moyale Account to the account of the first accused without any supporting document of the economic transections for which the amount was withdrawn. It can also not justify, permission of transfer of such huge amount of money from the said account without the missing documents of identity of the owner of the account being provided while the third accused was aware that under regulation 16 of the **Anti Money Laundering Regulations, GN No. 195/ 2007** it is strictly prohibited any transection into an account without sufficient evidence as to the client's identity.

There was also a defense that the third and fourth accused persons trusted the first accused because he was an advocate. Again, I will not accept this defense. The reason being that in their evidence on cross examination much as in their confessional statements, the third and fourth accused persons admit that the first accused did not have any representative instrument suggesting that he was an agent or advocate of either the account holder or the checks owners. Therefore, in the absence of special instruction, an advocate cannot be an advocate for every one. I do not think that the third and fourth accused persons were blind enough to assume such a risk.

In his defense, the third accused testified, that he was not aware that the checks in question emanated from proceeds of crime. He demonstrated how the office of branch manager was occupied. He had to manage three more branches apart from his Meru branch. He concluded in the circumstance that,

he could not establish which accounts were opened at the Meru branch. On the issue of processing and clearing the checks he said, that was a process involving the branch and the head quarter. The branch was in no way involved in clearing the checks. A similar defense was made by the fourth accused.

From his confessional statement, the third accused admitted knowledge of there being no sufficient documents as to the identity of the holders of **Moyale accounts** since April 2010. He expressly admitted that neither certificate of registration of Moyale Enterprises nor partnership deed was submitted. In his evidence as DW2, the third accused exhibited to be a very experienced and skilled banker. He had until the date of the action in question, been in the field for more than twenty years. He admitted in evidence to be aware of Anti Money Laundering Regulations on the importance of the bankers to ascertain identity of the account holders. That apart, the evidence in exhibit PC 27 and 28 as well as his confessional statement in exhibit PC 43 establishes that subsequent to April 2010 and regardless of absence of such mandatory documents, the third accused authorized transfer of huge amount of money from the said account to the account of the first accused. That was so regardless of the fact that there was not submitted any document to support any business transection or economic activity for which such huge amount of money was being disbursed. In his own words, the third accused testified, on cross examination by Mr. Hilla, learned state attorney, as follows:-

> *Referred at page 17 (karatasi ya 8): Yes, I said that I authorized payment from Moyale to Mwale account. The highest amount involved was USD 1,244, 735. Yes, that was a colossal figure. It was a large*

transection in accordance with money laundering transections. Yes, I approved it. Yes, there is no any document produced to support the transection. Yes, no document to establish the economic activity for which the payment was made. I cannot recall what was the alerting figure by then. I can agree with you that ***TZS 5,000,000*** *is an alerting figure for the purpose of money laundering. The figure above could be more that* ***TZS 2 billion****. That cheque is dated 16.2.2010.* ***Referred at page 17*** *("karatasi ya 9"): There is a cheque of USD 808,000. It is dated 7.1.2011. It was paid to Mwale. I authorized payment of the same. There is neither document of economic activity involved nor any document to justify the payment.*

I entertain no doubt that, the evidence taken as the whole would lead to a logical inference that the third accused knew or ought to have known the nature of the transaction he was dealing with. Indeed, the facts of the case reveals a classic blind eye dishonest on the part of the third accused. No honest bank officer would have simply implemented the instructions received from the first accused without question. In my view, the conduct of the third accused was dishonest as soon as he allowed operation of **Moyale account** while aware that the said account was without essential documentations of the identity of its business operation and was supported by dubious documents as to the identity of the account operators. He became more dishonest when he permitted payment of such huge amount of money from the said account into the account of the first accused without any document to justify the economic activity for which such huge amount of money was being disbursed.

The defense by the fourth accused that he had ceased to be in office since February 2010 does not hold water for a number of reasons. First, in accordance with his confessional statement in exhibit PC11, the fourth accused person was, until 30th March 2010 in office and he signed CRDB check number 136254 in favour of the first accused. Secondly, even if is true that he was not in office, the fact that he approved for the opening of **Moyale account** despite the apparent discrepancies on the identities of the signatories of the said account would suffice to impute dishonest on his part. The fourth accused has expressly admitted on this at page 5 of his confessional statements as reflected here below:-

> *SWALI: Waweka saini hao katika akaunti ya MOYALE PRECIOUS GERMS MINERALS ENTERPRISES katika fomu za kufungulia wamejitaja kuwa ni raia wa nchi gani? JIBU: Wamejitaja kuwa ni raia wa Tanzania. SWALI: Sasa kama ni raia wa Tanzania kwanini walikuletea passport zinazoonyesha ni Wamarekani? JIBU: kimya."*

With the signatories whose nationalities were Americans and Tanzanians at the same time, no reasonable man would have not looked at the information as to the identity of the signatories of these accounts suspiciously. The suspicion would become more apparent on the fact that the holder of the account though represented itself as a partnership trading under such name, did not present any document of registration. Neither did it produce any Tin certificate. In his evidence, the fourth accuse appears to be aware of the mandatory requirement under Ant Money Laundering Regulations which prohibit operation of a bank account with inadequate documents as to its identity. Yet, he allowed payment from and into the account of huge

unexplainable amount of money. There is no doubt that his blind was not honest.

It was submitted for the defense that the evidence adduced substantially departs from the particulars of the charge. In the first place, the counsel submits, while the factual allegations in the information was such that the third and fourth accused persons jointly aided and abetted transmission of 17 US Treasury checks worth **USD 5,468,699.25**, in the documentary evidence in exhibit PC45, the fourth accused processed only five checks and the third accused only 10 checks. They submitted further that the prosecution evidence does not suggest that the third accused was with the fourth accused when he was processing the five checks and the vice versa.

In the second place, it was their submission that, while the factual allegation in the information suggest that the third and fourth accused jointly and together authorized the opening of the three accounts, the evidence adduced was such that it was only the fourth accused who authorized for the opening of the said account. Relying on the authorities in **DPP VS. ELIAS LAURENT MKOBA & ANOTHER (1990) T.L.R at page 119**, **JOHN STEPHEN AND OBEID JOHN VS. THE REPUBLIC, CRIMINAL APPEAL NO. 292 of 2013** AND **JUSTINE KAKURU KASUSURA @ JOHN LAIZER VS. THE REPUBLIC, CRIMINAL APPEAL NO. 175/2010**, they have invited the Court to acquit the accused persons.

I have gone through the Information and the Memorandum of Facts. With deepest respect to the defense counsel, there is nowhere the prosecution has pleaded that the offence was jointly and together committed by the third and fourth accused persons. Admittedly, the count, the way it is framed, would

appear to be duplicitous. The accused persons can however not claim to have in any way been prejudiced by the reason of the charge being duplicitous.

In any event, the rule against duplicity is not absolute. One of such exceptions is, where the different acts, viewed realistically, would form only one transection. This rule is discussed in details in among other authorities, **DPP VS. MERRIMAN, AC, 584** and **JEMMISON VS. PRIDDLE (1972), QB 489**.

In this matter, the accused persons are accused of aiding and abetting transmission of 17 checks emanating from the same source. Though the foreign checks were initially transmitted into the three vehicle accounts, the proceeds of the same were finally transmitted into the account of the first accused who eventually withdrew it for his use and that of his conspirators. In the circumstance therefore, different acts involved in the transmissions of the checks, viewed realistically, would only form one transaction.

In any event, I agree with the prosecution counsel that the prosecution evidence in totality suggests of there being a common plan by the third and fourth accused persons to execute the offence.

I do not agree with the defence counsel that the prosecution evidence addressed only 15 USD checks. Exhibit PC 45 was not the only evidence relied upon by the prosecution to prove the proposition. The evidence on transmission of the checks is clearly reflected in the bank statements of the three vehicle accounts in exhibits PC 35, PC37 and PC 38. Equally so for the evidence in OFBC forms and OFBC register. Whether the evidence was partly

improbable, is a question of fact which cannot be the basis for determining defectiveness of a charge.

From the evidence adduced in totality and for the reasons I have exhibited herein, I am settled, in my mind that, the prosecution has proved, beyond reasonable doubts that; the third and fourth accused persons had reasonable grounds to believe that the checks under discussion were proceeds of crime.

In the final results and for the foregoing reasons therefore, I agree with the gentleman and Lady assessors Luka Nderingo Sarakikya, Ester Ndukai Pallangyo and Elia Ndesauro Sumari that the accused person and each of them are guilty of the offence of Money Laundering contrary to sections 12(e) and 13(a) of Anti-Money Laundering Act No. 12 of 2006. The third accused, Mr. Boniface Thomas Mwimbwa and the fourth accused person Elias Pancras Ndejembi are each of them convicted of the offence of Money Laundering contrary to sections 12(e) and 13(a) of the the Anti-Money Laundering Act No. 12 of 2006.

I.MAIGE

JUDGE

At Arusha

9/ 05/2019

Judgment delivered in Open Court this 9th day of May 2019 in the presence of Mr. Marandu, Principal State Attorney who represented the Republic and Mr. Innocent Mwanga, learned advocate for the third accused and Mr. Mosses Mahuna, learned advocate for the fourth accused.

I.MAIGE

JUDGE

At Arusha

9/ 05/2019

MR. Innocent Mwanga: My Lord, we pray for adjournment so that we can prepare our submissions on mitigation.

I.MAIGE

JUDGE

At Arusha

9/ 05/2019

MR. Marandu: My Lord, I have no objection.

I.MAIGE

JUDGE

At Arusha

9/ 05/2019

ORDER: Let the matter comes for mitigation on 10/05/2019

HIGH COURT OF TANZANIA

I.MAIGE

JUDGE

At Arusha

9/ 05/2019