

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 55 OF 2021**

(Originating from the Resident Magistrate's Court of Dar es Salaam at Kisutu in  
Economic Crime Case No. 28 of 2020)

BETWEEN

**VIETEL TANZANIA PLC ----- APPELLANT**

VERSUS

**REPUBLIC ----- RESPONDENT**

**JUDGMENT**

**L. M. MLACHA, J.**

The appellant, **VIETEL TANZANIA PLC**, with five (5) others namely: **SON ANH NGUYEN, NGUYEN BINH MINH, HA MINH TUAN, VU VAN TIEP** and **NGUYEN THANH CONG** were charged at the Resident Magistrates Court of Dar es Salaam at Kisutu in Economic Crime Case No. 28 of 2020 with ten (10) counts. The charges are reproduced hereunder for easy of reference: -

***"IN THE RESIDENT MAGISTRATE'S COURT OF DAR ES SALAAM***

**AT KISUTU**

**ECONOMIC CRIME CASE NO. 28 OF 2020**

**REPUBLIC**

**VERSUS**

1. SON ANH NGUYEN
2. NGUYEN BINH MINH
3. HA MINH TUAN
4. VU VAN TIEP
5. NGUYEN THANH CONG
6. VIETTEL TANZANIA PLC

## CHARGE

### 1<sup>ST</sup> COUNT FOR ALL ACCUSED PERSONS

#### STATEMENT OF OFFENCE

**LEADING ORGANISED CRIME:** *Contrary to paragraph 4(1)(a) of the First Schedule to, and sections 57(1) and 60(2) both of the Economic and Organised Crime Control Act, [Cap. 200 R.E 2002] as amended.*

#### PARTICULARS OF OFFENCE

**SON ANH NGUYEN, NGUYEN BINH MINH, HA MINH TUAN, VU VAN TIEP, NGUYEN THANH CONG and VIETTEL TANZANIA PLC** on divers between 8<sup>th</sup> June, 2017 and 26<sup>th</sup> March, 2020 at Mikocheni area within Kinondoni District in Dar es Salaam Region and at various places within the United Republic of Tanzania, jointly and together, with intent to reap profit, intentionally organised a criminal racket.

### 2<sup>ND</sup> COUNT FOR ALL ACCUSED PERSONS

#### STATEMENT OF OFFENCE

**FAILURE TO OBSERVE ASSIGNMENT REQUIREMENTS:** *Contrary to section 117(1) of the Electronic and Postal Communications Act, No. 3 of 2010 as amended.*

#### PARTICULARS OF OFFENCE

**SON ANH NGUYEN, NGUYEN BINH MINH, HA MINH TUAN, VU VAN TIEP, NGUYEN THANH CONG and VIETTEL TANZANIA PLC** on divers between

8<sup>th</sup> June, 2017 and 26<sup>th</sup> March, 2020 at Mikocheni area within Kinondoni District in Dar es Salaam Region and at various places within the United Republic of Tanzania, jointly and together, used radio frequency spectrum to wit; microwave frequency channels 18442.5/19452.5MHz and 18497.5/19507.MHz without obtaining relevant individual assignment from the Tanzania Communications Regulatory Authority (TCRA).

### **3<sup>RD</sup> COUNT FOR ALL ACCUSED PERSONS**

#### **STATEMENT OF OFFENCE**

**FRAUDULENT USE OF NETWORK FACILITY:** Contrary to section 122(b) of the Electronic and Postal Communications Act, No. 3 of 2010 as amended, read together with paragraph 37 of the First Schedule to, and sections 57(1) and 60(2) both of Economic and Organized Control Act, [Cap. 200 R.E 2002] as amended.

#### **PARTICULARS OF OFFENCE**

**SON ANH NGUYEN, NGUYEN BINH MINH, HA MINH TUAN, VU VAN TIEP, NGUYEN THANH CONG and VIETTEL TANZANIA PLC** on divers dates between 7<sup>th</sup> July, 2016 and 26<sup>th</sup> March, 2020 at Mikocheni area within Kinondoni District in Dar es Salaam Region and at various places within the United Republic of Tanzania and at unknown places within the Socialist Republic of Vietnam, jointly and together, created a system designed to fraudulently use network facility to wit; Virtual Private Network (VPN).

### **4<sup>TH</sup> COUNT FOR ALL ACCUSED PERSONS**

#### **STATEMENT OF OFFENCE**

**FRAUDULENT TRAFFIC:** Contrary to Regulation 7(1)(a) of the Electronic and Postal Communications (Tele-traffic) Regulations, 2018 read together with paragraph 37 of the First Schedule to, and sections

57(1) and 60(2) of the Economic and Organized Control Act, [Cap. 200 R.E 2002] as amended.

**PARTICULARS OF OFFENCE**

**SON ANH NGUYEN, NGUYEN BINH MINH, HA MINH TUAN, VU VAN TIEP, NGUYEN THANH CONG and VIETTEL TANZANIA PLC** on diverse dates between 7<sup>th</sup> July, 2016 and 26<sup>th</sup> March, 2020 at Mikocheni area within Kinondoni District in Dar es Salaam Region and at various places within the United Republic of Tanzania, jointly and together, with intent to avoid payment to the Tanzania Communications Regulatory Authority (ICRA), fraudulently used telecommunication facilities by setting up a Virtual Private Network (VPN) connection between Viettel Tanzania PLC and Viettel Vietnam.

**5<sup>TH</sup> COUNT FOR ALL ACCUSED PERSONS**

**STATEMENT OF OFFENCE**

**OCCASSIONING LOSS TO THE SPECIFIED AUTHORITY:** Contrary to paragraph 10(1) of the First Schedule to, and sections 57(1) and 60(2) of the Economic and Organized Control Act, [Cap. 200 R.E 2002] as amended.

**PARTICULARS OF OFFENCE**

**SON ANH NGUYEN, NGUYEN BINH MINH, HA MINH TUAN, VU VAN TIEP, NGUYEN THANH CONG and VIETTEL TANZANIA PLC,** on divers dates between 8<sup>th</sup> June, 2017 and 26<sup>th</sup> March, 2020 at Mikocheni area within Kinondoni District in Dar es Salaam Region and at various places within the United Republic of Tanzania, jointly and together, by their wilful acts, used radio frequency spectrum to wit; microwave frequency channels 18442.5/19452.5MHz and 18497.5/19507.MHz without obtaining relevant individual assignment thereby causing the Tanzania Communications Regulatory Authority to suffer a pecuniary

loss of Seventy Five Billion Tanzania Shillings (TZS 75,000,000,000/=) only.

#### **6<sup>TH</sup> COUNT FOR ALL ACCUSED PERSONS**

##### **STATEMENT OF OFFENCE**

**OCCASSIONING LOSS TO THE SPECIFIED AUTHORITY:** Contrary to paragraph 10(1) of the First Schedule to, and sections 57(1) and 60(2) of the Economic and Organized Control Act, [Cap. 200 R.E 2002] as amended.

##### **PARTICULARS OF OFFENCE**

**SON ANH NGUYEN, NGUYEN BINH MINH, HA MINH TUAN, VU VAN TIEP, NGUYEN THANH CONG** and **VIETTEL TANZANIA PLC**, on diverse dates between 7<sup>th</sup> July, 2016 and 26<sup>th</sup> March, 2020 at Mikocheni area within Kinondoni District in Dar es Salaam Region and at various places within the United Republic of Tanzania, jointly and together, by their wilful acts, created a system designed to fraudulently use network facility to wit: Virtual Private Network (VPN) to Socialist Republic of Vietnam thereby occasioning loss of Three Billion, Thirty Six Million Tanzanian Shillings (TZS 3,036,000,000/=) only to the Tanzania Communications Regulatory Authority (TCRA).

#### **7<sup>TH</sup> COUNT FOR 1<sup>ST</sup>, 2<sup>ND</sup> 3<sup>RD</sup>, 4<sup>TH</sup> AND 5<sup>TH</sup> ACCUSED PERSONS**

##### **STATEMENT OF OFFENCE**

**MONEY LAUNDERING:** Contrary to section 12(d) and 13(a) of Anti-Money Laundering Act, read together with paragraph 22 of the First Schedule to, and section 57(1) and 60(2) of the Economic and Organized Control Act, [Cap. 200 R.E 2002] as amended.

##### **PARTICULARS OF OFFENCE**

**SON ANH NGUYEN, NGUYEN BINH MINH, HA MINH TUAN, VU VAN TIEP, NGUYEN THANH CONG** and **VIETTEL TANZANIA PLC**, on diverse dates between 7<sup>th</sup> July, 2016 and 26<sup>th</sup> March, 2020 at Mikocheni area within

Kinondoni District in Dar es Salaam Region and at various places within the United Republic of Tanzania, jointly and together, acquired Three Billion, Thirty Six Million Tanzanian Shillings (TZS 3,036,000,000/=) only, while they knew at the time of acquisition that the said money is proceeds of predicate offence namely fraud and related offences and participating in an organised criminal group and racketeering.

#### **8<sup>TH</sup> COUNT FOR 6<sup>TH</sup> ACCUSED PERSONS**

##### **STATEMENT OF OFFENCE**

**MONEY LAUNDERING:** Contrary to section 12(d) and 13(b) of Anti-Money Laundering Act, read together with paragraph 22 of the First Schedule to, and section 57(1) and 60(2) of the Economic and Organized Control Act, [Cap. 200 R.E 2002] as amended.

##### **PARTICULARS OF OFFENCE**

**VIETTEL TANZANIA PLC**, on diverse dates between 7<sup>th</sup> July, 2016 and 26<sup>th</sup> March, 2020 at Mikocheni area within Kinondoni District in Dar es Salaam Region and at various places within the United Republic of Tanzania, acquired Three Billion, Thirty-Six Million Tanzanian Shillings (TZS 3,036,000,000/=) only, while knowing at the time of acquisition that the said money is proceeds of predicate offence namely fraud and related offences and participating in an organised criminal group and racketeering.

#### **9<sup>TH</sup> COUNT FOR 1<sup>ST</sup>, 2<sup>ND</sup>, 3<sup>RD</sup>, 4<sup>TH</sup> AND 5<sup>TH</sup> ACCUSED PERSONS**

##### **STATEMENT OF OFFENCE**

**MONEY LAUNDERING:** Contrary to section 12(d) and 13(a) of Anti-Money Laundering Act, read together with paragraph 22 of the First Schedule to, and section 57(1) and 60(2) of the Economic and Organized Control Act, [Cap. 200 R.E 2002] as amended.

**PARTICULARS OF OFFENCE**

**SON ANH NGUYEN, NGUYEN BINH MINH, HA MINH TUAN, VU VAN TIEP, NGUYEN THANH CONG**, on diverse dates between 8<sup>th</sup> June, 2017 and 26<sup>th</sup> March, 2020 at Mikocheni area within Kinondoni District in Dar es Salaam Region and at various places within the United Republic of Tanzania, jointly and together, acquired Seventy Five Billion Tanzanian Shillings (TZS 75,000,000,000/=) only, while they knew at the time of acquisition that the said money is proceeds of predicate offence namely participating in an organised criminal group and racketeering.

**10<sup>TH</sup> COUNT FOR 6<sup>TH</sup> ACCUSED PERSONS**

**STATEMENT OF OFFENCE**

**MONEY LAUNDERING:** Contrary to section 12(d) and 13(b) of Anti-Money Laundering Act, read together with paragraph 22 of the First Schedule to, and section 57(1) and 60(2) of the Economic and Organized Control Act, [Cap. 200 R.E 2002] as amended.

**PARTICULARS OF OFFENCE**

**VIETTEL TANZANIA PLC**, on diverse dates between 8<sup>th</sup> June, 2017 and 26<sup>th</sup> March, 2020 at Mikocheni area within Kinondoni District in Dar es Salaam Region and at various places within the United Republic of Tanzania, acquired Seventy Five Billion Tanzanian Shillings (TZS 75,000,000,000/=) only, while knowing at the time of acquisition that the said money is proceeds of predicate offence namely participating in an organised criminal group and racketeering.

Dated at Dar es Salaam this 27<sup>th</sup> day of March, 2020.

**SIGNED BY STATE ATTORNEY"**

The charges were read over and fully explained to the accused through an interpreter one Do Thi Hien who interpreted English to Vietnamese and vice versa. They were not allowed to plead for the court had no jurisdiction to try the offences at the time. The charges involved charges of money laundering which were not bailable. The first, second, third, fourth and fifth accused were remanded in custody at Segera Prison. The case remained on mentions from 27/03/2020 when they first appeared in court, up to 04/05/2020 when Mr. Majura Magafu, who appeared for the accused persons, informed the court that the accused had written a letter to the Director of Public Prosecutions (the DPP) requesting to enter into a plea-bargaining agreement. Mr. Wankyo, Senior State Attorney who appeared for the Republic prayed for 14 days to allow the parties to move into negotiations. The matter could not be finalized within 14 days. The case remained on mentions for some time. The interpreter, Ms. Do Thi Hien kept on attending the court interpreting English to Vietnamese and vice versa for the benefit of the accused who did not understand English or Swahili.

On 22/12/2020 Mr. Wankyo Simon, Senior State Attorney filed the consent of the Director of Public Prosecutions Biswalo Europius Kachele Mganga under section 26 (1) of the Economic and Organised Crimes Control Act, Cap. 200 R.E 2019 and the certificate thereof conferring jurisdiction to the court under section 12 (3) and (4) of the Act. Mr. T. K. Simba, PRM who had the conduct of the matter, received them and marked them to be part of the record.

Thereafter, Mr. Wankyo Simon informed the court that the DPP and the accused had entered into a plea Agreement. He prayed to submit it to the court for registration under section 194 (1) of the Criminal Procedure Act, Cap. 20 R.E 2020 (the CPA). The accused were then addressed in terms of section 194 (1) (1) and (2) and 194E (a) of the CPA as amended by Act No. 4 of 2019 and were placed under oath. They told the court that they had voluntarily entered into the plea Agreement. The statement of the 6<sup>th</sup> accused who is a legal person was made by the first accused who is its Managing Director. They all signed to signify their consent. Mr. Wankyo, Jacqueline Nyantori and Ester Martin signed for the Republic. The defence counsels Augustine Shio and Benedict Ishabakaki signed also. The court made an endorsement that it had complied to section 194D (2)(3)(4)(5) and section 194E and proceeded to register the Plea-Bargaining Agreement.

Ms. Nyantori addressed the court saying that in line with the Plea Agreement, she prayed to substitute the charge under section 234(1) of the CPA. Mr. Shio had no objection so the charge was substituted. The court granted the prayer. A new charge was substituted in place of the original charge. The counts were reduced from 10 to 4. I will reproduce the charge for easy of reference as under:

**"IN THE RESIDENT MAGISTRATE'S COURT OF DAR ES SALAAM**

**AT KISUTU**

**ECONOMIC CRIMES CASE NO. 28 OF 2020**

**REPUBLIC**

**VERSUS**

1. SON ANH NGUYEN
2. NGUYEN BINH MINH
3. HA MINH TUAN
4. VU VAN TIEP
5. NGUYEN THANH CONG
6. VIETTEL TANZANIA PLC

## **CHARGE**

### **1<sup>ST</sup> COUNT FOR ALL ACCUSED PERSONS**

#### **STATEMENT OF OFFENCE**

**FAILURE TO OBSERVE ASSIGNMENT REQUIREMENTS:** *Contrary to section 117(1) of the Electronic and Postal Communications Act, No. 3 of 2010 as amended.*

#### **PARTICULARS OF OFFENCE**

**SON ANH NGUYEN, NGUYEN BINH MINH, HA MINH TUAN, VU VAN TIEP, NGUYEN THANH CONG and VIETTEL TANZANIA PLC** on divers dates between 8<sup>th</sup> June, 2017 and 26<sup>th</sup> March, 2020 at Mikocheni area within Kinondoni District in Dar es Salaam Region and at various places within the United Republic of Tanzania, jointly and together, used radio frequency spectrum to wit; microwave frequency channels 18442.5/19452.5MHz and 18497.5/19507.MHz without obtaining relevant individual assignment from the Tanzania Communications Regulatory Authority (TCRA).

### **2<sup>ND</sup> COUNT FOR ALL ACCUSED PERSONS**

#### **STATEMENT OF OFFENCE**

**FRAUDULENT USE OF NETWORK FACILITY:** *Contrary to section 122 (b) of the Electronic and Postal Communications Act, No. 3 of 2010 as amended, read together with paragraph 37 of the First Schedule to, and sections 57(1) and 60(2) both of Economic and Organized Control Act, [Cap. 200 R.E 2002] as amended.*

**PARTICULARS OF OFFENCE**

**SON ANH NGUYEN, NGUYEN BINH MINH, HA MINH TUAN, VU VAN TIEP, NGUYEN THANH CONG and VIETTEL TANZANIA PLC** on divers dates between 7<sup>th</sup> July, 2016 and 26<sup>th</sup> March, 2020 at Mikocheni area within Kinondoni District in Dar es Salaam Region and at various places within the United Republic of Tanzania and at unknown places within the Republic of Vietnam, jointly and together, created a system designed to fraudulently use network facility to wit: Virtual Private Network (VPN).

**3<sup>RD</sup> COUNT FOR ALL ACCUSED PERSONS**

**STATEMENT OF OFFENCE**

**FRAUDULENT TRAFFIC:** Contrary to Regulation 7(1) (a) of the Electronic and Postal Communications (Tele-traffic) Regulations, 2018 read together with paragraph 37 of the First Schedule to, and sections 57(1) and 60(2) of the Economic and Organized Control Act, [Cap. 200 R.E 2002] as amended.

**PARTICULARS OF OFFENCE**

**SON ANH NGUYEN, NGUYEN BINH MINH, HA MINH TUAN, VU VAN TIEP, NGUYEN THANH CONG and VIETTEL TANZANIA PLC** on divers dates between 7<sup>th</sup> July, 2016 and 26<sup>th</sup> March, 2020 at Mikocheni area within Kinondoni District in Dar es Salaam Region and at various places within the United Republic of Tanzania, jointly and together, with intent to avoid payment to the Tanzania Communications Regulatory Authority (TCRA), fraudulently used telecommunication facilities by setting up a Virtual Private Network (VPN) connection between Viettel Tanzania PLC and Viettel Vietnam.

**4<sup>TH</sup> COUNT FOR ALL ACCUSED PERSONS**

**STATEMENT OF OFFENCE**

**OCCASSIONING LOSS TO THE SPECIFIED AUTHORITY:** Contrary to paragraph 10 (1) of the First Schedule to, and sections 57(1) and 60(2)

of the Economic and Organized Control Act, [Cap. 200 R.E 2002] as amended.

**PARTICULARS OF OFFENCE**

**SON ANH NGUYEN, NGUYEN BINH MINH, HA MINH TUAN, VU VAN TIEP, NGUYEN THANH CONG and VIETTEL TANZANIA PLC** on divers dates between 8<sup>th</sup> June, 2017 and 26<sup>th</sup> March, 2020 at Mikocheni area within Kinondoni District in Dar es Salaam Region and at various places within the United Republic of Tanzania, jointly and together, by their wilful acts, radio frequency spectrum to wit; microwave frequency channels 18442.5/19452.5MHz and 18497.5/19507.MHz without obtaining relevant individual assignment thereby causing the Tanzania Communications Regulatory Authority to suffer a pecuniary loss of Seventy Five Billion Tanzania Shillings (TZS 75,000,000,000/=) only.

*Dated at Dar es Salaam this 22<sup>nd</sup> day of December, 2020.*

**SIGNED BY STATE ATTORNEY"**

The accused persons pleaded guilty to the charge through the services of the interpreter. The magistrate recorded the plea of each of them in English as "It is true". A plea of guilty was entered accordingly. The facts were read to the accused who accepted them. The Republic tendered two exhibits namely; Pecuniary Loss to the Government and Tanzania Communications Regulatory Authority on Fraudulent Termination of International Incoming Traffic and Pecuniary Loss to the Government and Tanzania Communication Regulatory Authority on case of unassigned frequency. They were received as Exhibits marked Exhibit "P1 and P2" respectively. On being satisfied that the plea was unequivocal, the court convicted the

accused on their own plea of guilty. It recorded previous records, mitigations and passed the sentence.

For a better understanding of issues which are the subject of this appeal, I will reproduce the sentence and orders which followed as under:

### **"SENTENCE**

*The accused persons in this case have been convicted as stipulated in the charge sheet and in these proceedings today. I have heard the submissions from the Republic and by the defence side. Indeed, the offences in which the accused persons have been convicted are very serious offences which in fact they have direct impact to the economy of the country. The sixth accused VIETTEL TANZANIA PLC is an habitual offender as this is the third time the company is being convicted of the same offences. After considering what I have stated herein above, I sentence the accused persons as follows: -*

**1<sup>st</sup> Count:** *Each accused to pay fine at the tune of Tanzania Shillings One Million (Tshs. 1,000,000/=) or to serve a term of one year imprisonment in default.*

**2<sup>nd</sup> Count:** *Each accused to pay fine at the tune of Tanzania Shillings One Million (Tshs. 1,000,000/=) or to serve term of one year imprisonment in default.*

**3<sup>rd</sup> Count:** *Each accused to pay fine at the tune of Tanzania Shillings One Million (Tshs. 1,000,000/=) or to serve term of one year imprisonment in default.*

**4<sup>th</sup> Count:** *Each accused to pay fine at the tune of Tanzania Shillings One Million (Tshs. 1,000,000/=) or to serve term of one year imprisonment in default.*

**Court:** Sentences of fine for the 6<sup>th</sup> accused VIETTEL TANZANIA PLC to be paid by the 1<sup>st</sup> accused failure of which the 1<sup>st</sup> accused shall serve a term of one year imprisonment in default.

**Court:** Sentences of fine to run consecutively and those of imprisonment to run concurrently.

**Sgd: T. K. Simba – PRM**

**22/12/2019**

**Court:** The accused persons to pay compensation of Tanzanian Shillings Twelve Billion (Tshs. 12,000,000,000/-) in the Plea Agreement. The money has already been deposited in the account of the Director of Public Prosecutions as shown earlier in these proceedings.

**Sgd: T. K. Simba – PRM**

**22/12/2019**

**Court:** The six accused to pay compensation of Tanzanian Shillings Thirty Billion (30,000,000,000). The money to be deposited in the account of the Director of Public Prosecutions. The money is to be paid within twelve months as from today.

The 6<sup>th</sup> accused has to produce to the Director of Public Prosecutions deposit slips showing his deposits of the money in the Account of the DPP maintained in the Bank of Tanzania and copy of receipt to be supplied to the court for records.

**Sgd: T. K. Simba – PRM**

**22/12/2019**

**Court:** Right of appeal explained.

**Sgd: T. K. Simba – PRM**

**22/12/2019**

The 6<sup>th</sup> accused (now the appellant) did not see justice in the second order of compensation. They have now come to this court by way of appeal on the following grounds: -

1. That the trial Court erred in law by ordering the appellant to pay addition of Tanzania Shillings Thirty Billion (TZS 30,000,000,000/=) as compensation, thereby disregarding the Plea Bargain Agreement that was registered before the trial Court as per the provisions of section 194D of the Criminal Procedure Act, [Cap. 20 R.E 2019].
2. That the trial court erred in law by failure to interpret the provision of section 194B (c) of the Criminal Procedure Act. [Cap. 20 R.E 2019].

Mr. Benedict Ishabakaki and Augustine Shio Advocates appeared for the appellant, while the respondent Republic was represented by the DPP Mr. Biswalo Mganga. Hearing was done by oral submissions.

Submitting for the appellant, Mr. Shio told the court that the appellant and the other accused persons entered into a Plea-Bargaining Agreement with the DPP which was duly registered by the court. The accused who are directors of the appellant company agreed to pay Tshs. 12,000,000,000/= as compensation to the Government due to crimes they committed. That was done after the DPP had agreed to change the charges. Counsel proceeded to say that the money was actually paid to the Government through the Bank of Tanzania (BOT) a day earlier, that is on 21/12/2020. The DPP acknowledged receipt of

the money and issued receipts Nos. 28787620 and 28787619, he said. The court was fully aware and dully notified. It sentenced them to fine of Tshs. 1,000,000/= each which was dully paid. The first accused was ordered to pay for the appellant company and he paid. Counsel proceeded to say that they were surprised when they received a second order from the Magistrate which had a second compensation of Tshs. 30,000,000,000/= which was to be paid by the appellant. The money was to be paid within 12 months. Counsel does not see legal base of this second payment. He submitted that it was made against section 194B (c) of the CPA. He went on to say that the magistrate was *functus officio*, he had no mandate to make the order.

Counsel proceeded to submit that, the case was heard before the issue of the Criminal Procedure (Plea Bargaining Agreement) Rules, 2021, (GGN 180/2021 published on 05/02/2021) but it was clearly against the rules. He said that the order was uncalled for and defected the purpose of sitting with the DPP. It discouraged the appellants who are foreign investors. He requested the court to allow the appeal by vacating and setting aside the second order of compensation issued by the lower court.

Mr. Biswalo, the DPP, replied saying that, the case has a lot of public interest calling for his personal attendance. He made a reference to section 8 of the National Prosecution Services Act and the provision of the Constitution which he said, contain principles which should guide the DPP in the conduct of his duties. He proceeded to say that he entered into the Plea-Bargaining Agreement with the accused who were to pay Tshs. 12,000,000,000 as compensation to the Government.

On whether payment of Tshs. 30,000,000,000/= was legal or not, the DPP had the view that it was not legal. He said that it was not proper for the court to order double compensation. Instead, if the issue was that they had previous convictions, the court could sentence them to a bigger fine than the others. He supported the appeal but argued the court to sentence the appellant to a higher sentence because it was not disputed that they were habitual offenders.

Mr. Shio made a short rejoinder and joined hands with the DPP. That, if the court thought that they deserved a bigger punishment, it should have enhanced the sentence rather than ordering a second compensation.

I have considered the background of the matter and the counsel submission carefully. I think I should start by revisiting the Law for this is a green area. My research could not come across any decision of this court or the Court of Appeal on the matter. It is an area which is relatively new, making it important to make a general discussion before going to examine the grounds of appeal for guidance to the lower courts.

According to an article by John H. Langbein entitled **Understanding the Short History of Plea Bargaining**, available on line at <https://www.jstor.org/3053252seq=1>, Plea Bargaining was unknown in Common Law of England prior to the 19<sup>th</sup> century. It started to feature in court in the 19<sup>th</sup> Century in England and America. The author is saying that it developed over the years and in Modern Times it has become the primary procedure through which vast proportion of

cases of serious crimes are disposed in England and the United States. See **Lafler v. Cooper** 566.US 156(2012) and **Missouri v Frye** 566 US. (2012) both decisions of the Supreme Court of the United States.

My research has revealed that Plea Bargaining as part of the judicial system is new in Africa. Kenya and Uganda started earlier than Tanzania. See, **State V Isalah Goro Maloa**, Criminal Case No. 8 of 2020 and **Eddleld Mandi Jilani and 2 others V Republic**, Criminal Case No. 24 of 2018 (High Court of Kenya) and **Luwaga Suleiman Alias Katongole v Uganda**, Criminal Appeal No. 88 of 2014 and **Inesinko Adams V Uganda**, Criminal Appeal No. 004 of 2017 (High Court Uganda) to mention a few. In Kenya it is regulated by section 137A – O of their Criminal Procedure Code Act. In Uganda it is regulated by the Judicature (Plea Bargain) Rules, 2016 made under section 41 (1)(2) of their Judicature Act. In Tanzania plea bargaining came with the amendment of the Criminal Procedure Act which was done through The Written Laws (Miscellaneous Amendments) (No.4) Act 2019. This Act amended section 194 of the CPA by introducing new sections 194A, 194B, 194C, 194D, 194E, 194F, 194G and 194H. In the exercise of his power given under section 194H, the Chief Justice have made The Criminal Procedure (Plea Bargain Agreement) Rules 2021, GN 180 of 2021. This shows clearly that Plea Bargaining as a means of solving disputes in our courts is something which is relatively new. The relevant law is thus the CPA and the Rules.

But history will tell us that this is not something new in the society. It has been in existence in many tribes long before colonialism and has

continued to exist in some tribes to-date. In Maasai and Kuria tribes for example, according to my own personal experience, plea bargaining is practiced to negotiate crimes, even serious crimes like murder. The offender pleads guilty to some elders and agrees to pay some compensation to the victim. The matter is solved and marked settled. If the police will not be in picture, they may end up not knowing if there was any crime committed.

A Plea Agreement is defined under section 3 of the CPA (as amended) to mean an agreement entered into between the prosecution and the accused in a criminal trial in accordance to section 194A, 194B and 194C. On the other hand, a 'Plea Bargaining' is defined to mean a negotiation in a criminal case between a prosecutor and the accused whereby the accused agrees to plead guilty to a particular offence or a lesser offence or to a particular count or counts in a charge with multiple counts or cooperate with the prosecutor in the provisions of information that may lead to a discovery of other information relating to the offence or count charged, in return for concession from the prosecutor which may lead to a lenient sentence or withdrawal of other counts.

It starts with a negotiation, a process of discussions between the prosecution and the accused. Both have an interest in the matter. The accused in most cases is looking for leniency in sentence and compensation while the Prosecutor is seeking for an early disposal of the matter and compensation to the victim of crime. The prosecution agrees to drop some charges or reduce the offence to a lesser offence to attract the accused to plead guilty. The accused agrees

to plead guilty to some offences or to a lesser offence in exchange of some favours. The accused may also agree to co-operate with the Prosecutor to volunteer some information for some purposes. In some cases, he may also agree to be converted to a prosecution witness. Negotiations will be done and the parties may reach an agreement. This is the plea bargaining agreement. Like all other agreements, this agreement is binding on the parties on the terms contained therein.

The process starts with section 194A. This section carries the Plea-Bargaining process. It gives rights to the Public Prosecutor and the accused to enter into the Plea-Bargaining arrangement. The process may start at any time before judgment. The accused will act with his advocate or relative/friend. They will then jointly or any of them (Prosecutor or accused) inform the court of their intention to enter into the arrangement. If this happens, the court must stay the proceedings (the practice is put the case on mentions) to allow the parties to enter into negotiations.

Section 194A (3), unlike the position in Uganda, bars the court to participate in the negotiations. The parties will act without any influence from the court which will wait for the agreement. Subsection (4) provides that where the prosecution is conducted privately, there will be no plea agreement without the written consent of the DPP.

Section 194B carry the consequences of Plea Bargaining. That, following the agreement, the Public Prosecutor may charge the accused with a lesser offence, withdraw other counts or take any other measure as it can be appropriate. The accused may then

plead to the lesser offence or to the new offence charged. He may also be ordered to pay compensation as was done in this case.

Section 194C carry the requirements of the Plea Agreement. It shall state the terms and the relevant facts clearly. It must be read and explained to the accused in the language he understands. It must then be accepted by the accused whose signature must be seen. The Prosecutor and the accused's Advocate or relative must also sign. Section 194C(3) requires a prior written consent of the DPP or any other officer authorised by him in writing.

All that done, the court will register it under section 194D. The court will satisfy itself that the agreement was entered voluntarily and that the accused was competent to enter the agreement before proceeding to register it.

The court has power to reject the document under section 194D (3) on sufficient reasons which will be recorded but the rejection will not operate as a bar to subsequent negotiations by the parties. Subsection (4) carry the binding nature of the agreement. All being done, the court will then proceed to convict as provided under subsection (5).

The registration procedure is regulated by section 194E. Section 194F carry offences which cannot be subjected to the Plea-Bargaining Scheme. They are i) sexual offences whose punishment exceed 5 years or involving victims under 18 years, ii) treason and treasonable offences, iii) possession or trafficking in narcotic drugs whose market value exceeds 20M, iv) terrorism, v) possession of Government trophy

whose value is above 20M without the consent of DPP and vi) any offence which the Minister may prescribe. So far the Minister has not prescribed any offence.

Section 194G shows the procedure of setting aside the agreement where there is fraud, misdirection or misrepresentation. Both DPP or accused can move the court to do so.

Having said so, can we now say that, the orders of Simba, PRM making the second compensation of 30,000,000,000/= over and above the 12,000,000,000/= which was agreed by the DPP and the accused was legal? Both Mr. Shio and Mr. Biswalo who appeared before me are saying No. I agree with them. I will give my reasons as follows.

The Law has directions on what should be done by the parties and the court at all stages. The duty of the court in the plea-bargaining process is this; **one**, to allow the parties to enter into Plea Bargaining discussions. This happens after being notified by the Prosecution, the accused or both of them. Once the court is informed of the intention to enter into the plea-bargaining, it has to stay the proceedings or put the case on mentions to allow the parties to proceed with negotiations. There is no time limit in which it should be finished but I think the court should give a reasonable time. If it takes a long time so as to bring a picture that it has failed or render the discussion meaningless, it has the mandate, in its discretion to put the discussion to an end and move the case to trial. **Two**, to receive and register the Plea Agreement. If the parties have reached an agreement voluntarily, the court on being moved and be satisfied that the

accused had capacity and entered into the agreement voluntarily, it will register the agreement. **Three**, to reject the agreement or decline to register it. This can happen when the court has the view that the accused did not have capacity to enter into the agreement or did not enter into the agreement voluntarily. It can also happen in my view, where the interests of the victim and or the public were not taken into account properly. Here is where issues of the amount of compensation comes public policy come in. The agreement must reflect the reality on the ground. If it fails short of that, in my view, it must be rejected. For example, the DPP is not expected to enter into an agreement to set a person who has committed economic crimes or murder free without paying any compensation or paying something which does not reflect the reality. If it happens, the court may reject the agreement and refer the parties to further negotiations. It is not correct to imagine, as it is sometimes taken to be, that the court should always agree with the DPP. It has a duty to examine the agreement and be satisfied that it meets the justice of the case. It must see that the compensation amount meets the interests of the victim and the society. If it will not be properly convinced, it must exercise its powers of rejection without hesitation. **Three**, to convict the accused on the plea of guilty, record the previous records, mitigations and pass the sentence. The sentence is passed at the discretion of the court but must take into account the purpose behind the Plea Bargain, the previous records and mitigations. It is not expected to be excessive. **Four**, to order compensation. Compensation unlike the sentence, is not done at the

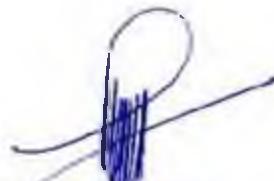
discretion of the court. It is done according to the terms of the Plea Agreement. The court will make its order in accordance to the Plea Agreement which it has registered and which is part of its records. It is not expected therefore to make an order for compensation below or above what has been negotiated, agreed and registered by the same court. It is not also expected to make additional orders. If it makes an order for compensation below or above what has been registered or if it makes additional orders for compensation, its orders will be illegal for it will be against the law and defeats the purpose behind the Plea- bargaining process.

In this case the magistrate made an order for compensation over and above what was agreed by the parties. He made it as an additional order. He did not assign reasons for doing so. He did not say so, but I think, he had the opinion that, the compensation of Tshs. 12,000,000,000/= was far below taking into account that the accused had agreed to occasion loss to the tune of Tshs. 75,000,000,000. His intentions might have been good, taking into account the nature of the crimes and the loss which had been suffered by the government and Tanzania Telecommunication Authority, but with respect, he had no power to do so. He was already *fuctus officio* and had no jurisdiction to make the orders at that stage. He ought to have acted at an early stage by rejecting the agreement for he had power to do so. He could reject the agreement with a direction to the parties to sit again and consider the amount of compensation. The parties could be bound to go back to the negotiation table and come later to the court with a second agreement.

It is important to note that the court is not expected to act at the direction and or wishes of the DPP in Plea Bargaining issues. The DPP has his role as defined under the Law and the court has its role. The court must act independently and impartial. It must maintain this status throughout.

That said, the orders of the Resident Magistrate of Dar es Salaam at Kisutu making a compensation of Tshs. 30,000,000,000/= over and above the amount which had been agreed by the parties in the Plea Agreement and registered by the court is declared to be illegal, null and void. It is vacated and set aside.

It is ordered so.



L. M. MACHA

**JUDGE**

**17/05/2021**

**Court:** Judgment delivered in presence of Augustine Shio, Advocate for the Appellant and Veronica Matikila, Senior State Attorney for the Respondent. Right of appeal explained.



L. M. MACHA

**JUDGE**

**17/05/2021**