

TANZANIA / JUDGMENT

Robert Simon Kisena

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA CORRUPTION AND ECONOMIC
CRIMES DIVISION AT DAR ES SALAAM ECONOMIC CASE NO. 24871 OF 2024 THE REPUBLIC
VERSUS

1. ROBERT SIMON KISENA
2. CHARLES SELEMAN NEWE
3. KULWA SIMONI KISENA
4. SIMON LOGISTICS GROUP
5. SIMON GROUP LIMITED

RULING

15th and 29th November 2024 KISANYA, J.: On August 30, 2024, the Republic lodged an information consisting of twenty-seven counts. Among these are one count each of leading organized crime, money laundering, and occasioning loss to a specified authority involving all accused persons; one count each of forgery and uttering false documents against the first, second, and third accused; and twenty-three additional counts of money laundering targeting the first and second accused. 1 On November 8, 2024, the accused persons appeared for plea-taking. While all accused persons pleaded not guilty to the offences leveled against them, the first accused person raised a plea of autrefois acquit in relation to the offences of forgery and uttering false documents contained in the second and third counts. He indicated that the fourth and fifth counts in Economic Case No. 10 of 2022, presided over by this Court (Luvanda, J.), directly addressed the second and third counts now under scrutiny, resulting in his acquittal on both counts. Invoking Section 280 of the Criminal Procedure Act [Cap. 20, R.E. 2022] (CPA), the Court found it necessary to determine the plea before proceeding further. Since the previous case was adjudicated by this Court, with all relevant records readily accessible, I invited the parties to address the plea of autrefois acquit. The Republic was represented by Mr. Hebel Kihaka, Senior State Attorney and Mr. Nickson Shayo, State Attorney, while the accused persons secured the legal services of Mr. Ndurumah Majembe, learned Advocate assisted by Mr. Deusdedit Luteja, Dr. Antidius Kaitu, Mr. Habibu Kassim, also learned Advocates Mr. Majembe was the first to address the Court. He submitted that the plea of autrefois acquit raised by the first accused person is

anchored in Section 137 of the CPA. The learned counsel argued that the second and third counts in the current case were adjudicated in Economic Case No. 10 of 2022, where they 2 featured as the fourth and fifth counts, respectively. Referring to page 38 of the judgment in the previous case, he pointed out that the fourth and fifth counts were dismissed due to insufficient evidence regarding the forgery and uttering of "extract resolution" dated June 11, 2015, which was part of Exhibit P6. He further asserted that the minutes of the board of directors' meeting dated June 11, 2015, included in Exhibit P6, were also addressed by the Court, which observed the failure to summon the signatories of the minutes as witnesses, thus effectively settling the forgery claim. Mr. Majembe contended that the prosecution's reliance on the minutes of the board of directors' meeting dated June 11, 2015, in the second and third counts represents an effort to reopen and litigate the same matter decided in the earlier case. His argument was based on the ground that the committal bundle discloses the prosecution's plan to present witnesses not called in the prior case, signaling an attempt to reopen matters that were conclusively resolved. The learned counsel was of the firm view that this constitutes an abuse of prosecutorial powers and contravenes Section 137 of the CPA. Mr. Luteja supported Mr. Majembe's submission, arguing that the plea of *autrefois acquit* can be established by showing that the prior proceedings directly concerned the accused, the charges in both cases are substantially the same, and the matter was conclusively determined. He cited the cases of DPP vs 3 Christopher Kikubwa and Another [1980] TLR 162 and Baraka Steven vs Republic, Criminal Appeal No. 541 of 2020, to support his argument. Mr. Luteja emphasized that the Court's previous determination of events surrounding the UDA Rapid Transit Limited (UDART) Board meeting held on June 11, 2015, precludes the prosecution from revisiting the same facts. He submitted that reopening such matters constitutes an abuse of court process and that if the plea is upheld for the second and third counts, other related counts, including the first and twenty-seventh counts, must also collapse. He, therefore, concluded by urging the court to affirm the plea and dismiss the charges against all accused persons. In response, Mr. Shayo opposed the plea, arguing that the current case involves forgery and uttering of minutes of the board of directors minutes, which are distinct from the extract resolution adjudicated in Economic Case No. 10 of

2022. It was his further contention that while the prior case focused solely on the first accused person and the extract resolution, the current case involves three accused persons and the minutes of a UDART Board meeting. Furthermore, he argued that the uttering alleged in the current case took place on June 22, 2015, a distinct date from the earlier case, where the uttering occurred on June 19, 2015. 4 Mr. Shayo went on to submit that while some overlap exists between the documents, the minutes of a UDART Board meeting in this case were used to commit other offences subject to the present case. He argued that, even assuming forgery had been determined, the counts of money laundering, as standalone offences, do not necessarily depend on the predicate offence of forgery. To support his submissions, he cited DPP vs. Justice Rumima Katiti and Others, Criminal Appeal No. 15 of 2018 (unreported) and prayed for the plea to be dismissed so the case could proceed to trial. In rejoinder, Mr. Luteja argued that money laundering charges are predicated on proving forgery, and without establishing the latter, the foundation of the former collapses.

He distinguished the facts of this case from those in Justice Rumima Katiti and Others (supra) emphasizing that the alleged forgery at hand had already been adjudicated. He contended that the prosecution should have consolidated all charges arising from the same transaction in the previous case and that their failure to do so should not prejudice the accused persons. Mr. Luteja concluded that the facts and documents in question are identical to those in the prior case, and the prosecution's attempt to re-litigate them violates the principle of estoppel. He urged the court to uphold the plea of *autrefois acquit* and discharge the accused. 5 Based on the competing submissions, the court is tasked with deciding whether the pleas of *autrefois acquit* has been successfully established for the first and second counts and, established, whether this precludes the prosecution from proceeding with the other counts in this case. As a starting point, and as Mr. Majembe rightly argued, the first accused person's plea of *autrefois acquit* is governed by Section 137 of the CPA, which is worded as follows: "A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal has not been reversed or set aside, not be tried again on the same facts for the same offence." From the language of this provision, and as reaffirmed in the case of Baraka Steven (supra), the plea or defence of *autrefois acquit* is absolute and serves as a complete bar to the prosecution of an accused person for an offence that has already been adjudicated, whether resulting in acquittal or conviction. In this regard, it is essential for the defence to be raised without delay, as the first accused person has done, so that, if upheld, the proceedings can be terminated at the earliest stage, thus preventing unnecessary litigation and conserving judicial resources. 6 To succeed with a plea of *autrefois acquit*, it must be established that the accused person was a party to the earlier trial, the present charge arises from the same or a closely related issue, and the matter was resolved by a competent court. This stance was reiterated in Christopher Kikubwa (supra), with the Court of Appeal holding: "He is required to prove that he was the same accused in the previous trial, that the second charge related to the same or substantially the same issue and that the issue has been decided by a competent court." In considering the first issue, regarding whether the pleas of *autrefois acquit* has been established for the first and second counts, I will be guided by the principles outlined in the cited cases and the provisions of Section 137 of the CPA. Upon a thorough review of the records from Economic Case No. 10 of 2022, it is clear that the first accused person was involved in the fourth and fifth counts, which are now being raised as the second and third counts in the current case. While the present case includes the second and third accused persons who were not part of the prior trial, this does not preclude the first accused from invoking the plea of *autrefois acquit*. In my view, the addition of new parties does not invalidate the plea concerning the counts in which the first accused person is involved. As such, the prosecution's contention regarding the inclusion 7 of new accused persons is unfounded and does not override the plea of *autrefois acquit*. For these reasons, I am convinced that the first element of the plea or defence of *autrefois acquit*, namely that the accused person was a party to the earlier trial, has been substantiated. Turning to the second and third elements of the plea of *autrefois acquit*, the key questions are whether

the charges in the present case, specifically the second and third counts, arise from the same or closely related matters as those in Economic Case No. 10 of 2022, where forgery and uttering a false document were part of the fourth and fifth counts, and whether the matter was resolved by a competent court. In order to answer these questions, I find it necessary to reproduce the particulars of the fourth and fifth counts in Economic Case No. 10 of 2022. The particulars of the fourth count in the previous case (Economic Case No 10 of 2022) read as follows: "ROBERT SIMON KISENA on 11th day of June, 2015 at Msimbazi Street Ex Kamata Complex with Ilala District in Dar es Salaam Region, with intent to defraud, made a false document namely, EXTRACT RESOLUTION dated 11th June, 2015, purporting to show that UDA RAPID TRANSIT LIMITED Board of Directors appointed Robert Simon Kisenia and Charles Seleman Newe as Signatories and Operators of the Bank Accounts opened in the name of UDA 8 Rapid Transit Limited with NMB Bank PLC, Bank House Branch, the facts they knew to be false." As for the fifth count, I agree with Mr. Luteja's assertion that it was amended on October 17, 2022, as evidenced on page 33 of the typed proceedings. After the amendment, the particulars of the offence of the fifth count are as follows: "ROBERT SIMON KISENA, on 22nd day of June, 2015 at National Microfinance Bank, Bank House Branch within Ilala District in Dar es Salaam Region, knowingly and fraudulently, uttered to NMB Bank a false document namely, Extract Resolution dated 11th June, 2015, purporting to show that UDA RAPID TRANSIT LIMITED Board of Directors appointed Robert Simon Kisenia and Charles Seleman Newe as Signatories and operator to the Bank Accounts opened in the name of UDA Rapid Transit Limited with NMB Bank PLC, Bank House Branch, the facts they knew to be false." As can be observed from the above counts, the issue in the previous case revolved around the "Extract of Resolution" dated June 11, 2015, alleged to have been forged on the same date at Msimbazi Street, Ilala District, Dar es Salaam Region, and uttered to NMB Bank on June 22, 2015, respectively. In contrast, the particulars of the offences in the second and third counts of the current case involve a different document, namely the "UDA RAPID 9 TRANSIT LIMITED titled MINUTES OF THE BOARD OF DIRECTORS MEETING OF THE ABOVE NAMED COMPANY HELD ON 11TH JUNE 2015 AT THE COMPANY OFFICES AT PLOT NO. 2364/208, EX-KAMATA COMPLEX, MSIMBAZI STREET/NYERERE ROAD, DAR ES SALAAM, COMMENCING AT 3:00 PM." In my firm opinion, no glasses or microscope are required to clearly discern that the Extract of Resolution dated 11th June 2015, which was at issue in the fourth and fifth counts of the previous case, is separate from the Minutes of the Board of Directors Meeting dated 11th June 2015, which are now the subject of the current case. The defence has maintained that both the Extract of Resolution and the Minutes of the Board of Directors Meeting were introduced in the prior case, and that, in the course of determining the offences of forgery and uttering, the Court held that the prosecution failed to establish the forgery of the Minutes due to the failure to summon the signatories as witnesses. To verify this assertion, I reviewed the judgment in Economic Case No. 10 of 2022. The Court observed the following in relation to the evidence for the fourth and fifth counts: "Regarding count number four for the First Accused, the same was not proved on the required standard because the alleged William Masanja Mlenge and

Sabri Mabrouk Ayesh were not summoned to vindicate the particulars of alleged forgery in the extract resolution for UDA Rapid Transit Limited dated 11/06/2015 10 part of Exhibit P6, where the duo indicate are among directors who attended and appended signatures in the minutes of directors alleged to have passed a resolution appointing the First and Second Accused as signatories to operate the Company's bank account in the name of UDA Rapid Limited with NMB Bank PLC, Bank House Branch. In a similar vein, count number five for uttering the said Extract Resolution is taken as having not been proved as well." From the above excerpt, it is clear that this Court addressed and determined the forgery and uttering of the Extract of Resolution for UDA Rapid Transit Limited dated 11th June 2015. There is no indication that the Court made any determination regarding the forgery or uttering of the Minutes of the Board of Directors Meeting, which is the subject of the present case. Conversely, the court clearly pointed out that William Masanja Mlenge and Sabri Mabrouk Ayesh, who were purportedly present at the meeting, had not been summoned to substantiate the details of the alleged forgery linked to the Extract of Resolution. There was no mention that they were to address the particulars of the alleged forgery concerning the Minutes of the Board of Directors Meeting. Having carefully considered the distinction, I find that the second and third elements required to uphold the pleas of autrefois acquit are not satisfied for the first and second counts. As the pleas of autrefois acquit have not been 11 substantiated, it is unnecessary to delve into the second issue about whether the prosecution is restricted from advancing the other counts in this case. In conclusion, given that the plea raised by the first accused serves as a preliminary objection, it is hereby dismissed, and the case will proceed from its present stage. DATED at DAR ES SALAAM this 29th day of November, 2024. S.E. KISANYA JUDGE Delivered this 29th day of November 2024 in the presence of Mr. Nickson Shayo, learned State Attorney for the Republic, the accused persons, Mr. Deudedit Luteja, learned Advocate for the accused persons, Hon. S. Minja, Judge's Law Assistant and Ms. Angel Abasy, RMA. S.E. KISANYA JUDGE 29/11/2024

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