IN THE EAST AFRICAN COURT OF JUSTICE
AT ARUSHA
FIRST INSTANCE DIVISION

(***Coram:*** *Yohane B. Masara, PJ; Charles A. Nyachae, Richard Muhumuza, Richard* Wabwire Wejuli, & *Léonard Gacuko, JJ)*

REFERENCE NO. 2 OF 2020

TITO ELIAS MAGOTI ..... 1ST APPLICANT

THEODORY FAUSTIN GIYAN ..... 2ND APPLICANT

VERSUS

THE ATTORNEY GENERAL OF
THE UNITED REPUBLIC OF TANZANIA ..... RESPONDENT

30TH NOVEMBER 2023

JUDGEMENT OF THE COURT

A. INTRODUCTION

1. This **Reference No. 2 of 2020** was filed on 19th February 2020, by Tito Elias Magoti and Theodory Faustin Giyan ("the Applicants"), and is made under Articles 6(d), 7(2), 8(1)(c), 27(1) and 30(1) of the Treaty for the Establishment of the East African Community ("the Treaty") and Rules 24(1), (2), (3), (4) and (5) of the East African Court of Justice Rules of Procedure, 2013 ("the Rules").

2. The Applicants are natural persons who are citizens of, and reside in, the United Republic of Tanzania, a Partner State of the East African Community. Their address of service for the purposes of the Reference is: *c/o Fulgence T. Massawe, Advocate, Legal and Human Rights Centre, Legal Aid Clinic Kinondoni, Justice Mwalusanya House, Isere Street, P.O. Box 79633, Dar es Salaam, Tanzania and Jebra Kambole, Advocate, Law Guards Advocates, Kinondoni, Togo Towers, 2nd Floor, Manyanya Street, P.O. Box 763, Dar es Salaam, Tanzania* and the address for electronic website is: www.lawguards.co.tz.

3. The Respondent is the Attorney General of the United Republic of Tanzania, and is sued in the representative capacity of Chief Legal Advisor of the said Partner State. The Respondent's address of service for the purposes of the Reference is: c/o *The Solicitor General, Office of the Solicitor General, 10 Kivukoni Road, P.O. Box 71554, 11492 Dar es Salaam* and the address for electronic email is: info@osg.go.tz.

B. REPRESENTATION

4. The Applicants were represented by Mr Jebra Kambole and Mr Amani Joachim, learned Advocates. The Respondent was represented by Mr Nasoro Katuga, learned Senior State Attorney, and Mr Daniel Nyakia, Ms Pauline Mdendemi and Ms Jacqueline Kinyasi, all learned State Attorneys.

C. BACKGROUND

5. This Reference is based on the Applicants claim that on diverse dates in December 2019, they were abducted by agents of the Respondent, held at an unknown location, and subsequently, arraigned in Court, where they were charged with crimes under the following statutory provisions of laws of the Respondent State:

    i. **Paragraph 4(1)(a) of the First Schedule and sections 57(1) and 60(2) of the Economic and Organized Crimes Control Act (Cap. 200 RE 2002);**

    ii. **Section 10(1)(a) of the Cyber Crimes Act No. 14 of 2015 as read together with paragraph 36 of the First Schedule to, and sections 57(1) and 60(2) of the Economic and Organized Crimes Control Act; and**

    iii. **Sections 12(d) and 13(c) of the Anti Money Laundering Act 2006, read together with paragraph 22 of the First Schedule to, and sections 57(1) and 60(2) of the Economic and Organized Crimes Control Act.**

6. That, under section 148(5)(v) of the Criminal Procedure Act, Cap. 20 RE 2002, bail is not available to persons charged with money laundering offence. That accordingly, the Applicants were denied bail

as a matter of law, and were held at Segerea Prison in Dar es Salaam from 24th December 2019.

7. The Applicants further claim, that when they were arrested, they were held in solitary confinement and not allowed to contact their families or lawyers.

8. The Applicants, therefore, brought this Reference contending that the actions of the Respondent State were a violation of the Treaty, specifically, Articles 6(d) and 7(2) thereof.

9. The Applicants seek the following orders from this Court:

   i) **A Declaration that the Applicants' pre-trial detention violates the United Republic of Tanzania's obligation under the Treaty to uphold and protect the Community principles of democracy, rule of law, accountability, transparency and good governance and universally accepted standards of human rights as specified in Articles 6(d) and 7(2) of the Treaty;**

   ii) **A Declaration that section 148(5) of the Criminal Procedure Act, Cap. 20 R.E. 2002 is inoperative and has no force of law as of the date of entry into force of the Treaty as law applicable in the United Republic of Tanzania;**

   iii) **A Declaration that the application of the provisions of section 36(2) of the Economic and Organised Crimes Control Act, Cap. 200 on the Applicant violates the United Republic of Tanzania's obligation under the Treaty, to uphold and protect the Community principles of democracy, rule of law, accountability, transparency and**

good governance and universally accepted standards of human rights as specified in Articles 6(d) and 7(2) of the Treaty;

iv) **A Declaration that section 36(2) of the Economic and Organised Crime Control Act, Cap. 200 is inoperative and has not force of law as of the date of entry into force of the Treaty in the United Republic of Tanzania;**

v) **A Declaration that each Applicant is entitled to compensation to the tune of USD 50,000 for violation of the Treaty and affect (sic) their rights by the United Republic of Tanzania;**

vi) **An Order for the Respondent to pay the Applicant's costs for this Reference; and**

vii) **Any other relief that the Court deems appropriate.**

D. THE APPLICANT'S CASE

10. The Reference is supported by the respective Affidavits of the Applicants, both sworn on 19th February 2020.

11. The Applicants contend that the Respondent State, by arresting the Applicants, not allowing them to contact their lawyers, holding them in solitary confinement, harassing them and then denying them the right to seek bail, failed to comply with the fundamental principles that govern the achievement of the objectives of the Community, as set out in Article 6(d) of the Treaty.

12. The Applicants further contend that by the same actions, the Respondent State failed to comply with its obligations under Article 7(2) of the Treaty.

13. That, the Respondent State contravened Articles 6(d) and 7(2) of the Treaty by arbitrarily detaining the Applicants in breach of Article 6 of the African Charter on Human and Peoples' Rights and Article 9 of the Universal Declaration on Human Rights.

14. That, further, the Respondent State imposed on the Applicants mandatory pre-trial detention under the provisions of section 148(5)(v) of the Criminal Procedure Act, and in so doing violated Article 7(2) of the Treaty.

15. That further, the Respondent State violated Article 7(2) of the Treaty by failing to empower a judicial authority to review the Applicants' detention.

16. Furthermore, that the Respondent State failed to provide procedural safeguards against pre-trial detention.

17. That, the Respondent State failed to bring the Applicants before a Judge promptly and that this was contrary to the provisions of Article 7(2) of the Treaty.

D. THE RESPONDENTS' CASE

18. The Respondent filed a Reply to the Reference in this Court on 15th May 2020. On the same day, the Respondent filed two Affidavits in Reply, deponed by Inspector Nicolaus Edward Mhagama.

19. The Respondent challenged the jurisdiction of the Court to entertain the subject Reference; firstly, as the Court has no jurisdiction under

the Treaty to sit as an Appellate Court for the Act or Omission done by the organs of the Partner States.

20. Further, that the Applicants were arrested and charged in accordance with the law of the Respondent State, specifically in accordance with the Criminal Procedure Act. They were charged under the Economic and Organized Crime Control Act, No. 14 of 2015 and the Anti Money Laundering Act, No. 12 of 2006. That the offence of money laundering under the latter Act is not bailable by virtue of the said Criminal Procedure Act.

21. The Respondent contended that the right to bail as claimed by the Applicants in the Reference, is not absolute, and the Applicants were denied bail under the clear provisions of the law, being the said Criminal Procedure Act.

22. The Respondent further contended that neither its laws nor its actions pursuant to those laws, were inconsistent with Articles 6(d) and 7(2) of the Treaty nor indeed with any of the other international instruments referred to in the Reference, and under which the Respondent State is obligated.

23. Specifically, the Respondent disputed the Applicant's allegation that the Respondent failed to empower a judicial authority to review the Applicant's detention. That, the Applicants were lawfully detained and subsequently arraigned in Court, in accordance with the requirements of the Respondent State's Constitution and its laws.

24. That, the Respondent State, contrary to the allegations in the Reference, does, in its Constitution and procedural laws, provide for procedural safeguards against pre-trial detention.

25. That, the Respondent State acted within the provisions of its Constitution and laws as regards bringing the accused persons promptly before a Judge.

26. The Respondent, therefore, sought the following reliefs:

    i. **A declaration that pre-trial detention by the Applicants under the laws of the United Republic of Tanzania are compatible with principles of democracy, rule of law, accountability, transparency and good governance as specified in the EAC Treaty;**

    ii. **A declaration that the Court has no jurisdiction to declare a lawful enacted law of the Partner States inoperative and has no force of law and hence, the Criminal Procedure Act and the Economic and Organized Crime Act are valid law;**

    iii. **A declaration that the Reference is baseless and devoid of merit; and**

    iv. **Dismissal of the Reference with Costs.**

E. ISSUES FOR DETERMINATION

27. At the Scheduling Conference held on 4th November 2022, the following were agreed as issues for determination:

    1. **Whether the Court has jurisdiction to declare Section 148(5) of the Criminal Procedure Act and Section 36(2) of the Economic and Organized Crime Control Act, Cap. 200 are in violation of the Treaty for the Establishment of the East African Community;**

2. **Whether the challenged actions and cited sections of the laws are a violation of the cited Articles 6(d) and 7(2) of the Treaty; and**

3. **Whether the parties are entitled to the remedies sought.**

F. COURT'S DETERMINATION

28. At the hearing of submission highlights, the Court directed the parties to make oral submissions on the jurisdictional issue, in addition to the comprehensive filed written submissions.

29. On the issue of jurisdiction as framed, the essence of the Respondents position was that this Court lacks jurisdiction to consider whether the impugned statutory provisions are in violation of the Treaty because the said impugned Acts were enacted on 1st November 1985 (The Criminal Procedure Act, No. 9 of 1985) and 25th September 1984 (The Economic and Organized Crime Control Act, No. 13 of 1984) respectively, whilst in terms of Article 30(2) of the Treaty, the Reference alleging the violation of the Treaty ought to have been filed within two months of the respective dates of enactment.

30. The Respondent's Counsel submitted, therefore, that the Court does not have jurisdiction to consider the alleged breach by the Respondent State in enacting the impugned laws.

31. The Applicants, through Counsel, submitted a view diametrically opposed to that of the Respondent. The Applicants contended that in the circumstances of this matter, the point of reckoning for purposes of Article 30(2), is the date on which the respective statutory provisions were applied to the Applicants. That taking that date, the

Applicants complied with Article 30(2) and the Court has jurisdiction to declare the impugned statutory provisions as being violative of the Treaty.

32. We have carefully considered the rival cases, submissions and arguments on the jurisdictional issue. We are obliged to first make a determination on this issue, before we can consider issue number (ii) namely, "whether the challenged actions and cited sections of the law are a violation of the cited Articles 6(d) and 7(2) of the Treaty".

33. The primacy of the issue of jurisdiction and that issue being settled at the outset where it arises, is now settled law in this Court, as indeed in other International and domestic Courts. In **The Honourable Attorney General of the United Republic of Tanzania vs African Network for Animal Welfare (ANAW), EACJ Appeal No. 3 of 2011**. The Appellate Division of this Court stated:

> **"Jurisdiction is a most, if not the most fundamental issue that a court faces in any trial. It is the very foundation upon which springs the flow of the judicial process. Without jurisdiction, a court cannot take even the proverbial first Chinese step in its judicial journey to hear and dispose of the case – for, as NYARANGI, JA so aptly opined:**
>
> **"Without jurisdiction, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction" – (See Owners of the Motor**

Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) KLR1 at 14)."

34. Further, in **Eric Kabalisa Makala vs The Attorney General of the Republic of Rwanda, EACJ Reference No. 1 of 2017**, this Court stated:

> **"Thus, to succeed on a claim of lack of jurisdiction in this Court, a party must demonstrate the absence of any of the three (3) types of jurisdiction, *ratione personae/locus standi, ratione materiae and ratione temporis.* Simply stated these three jurisdictional elements respectively translate into jurisdiction** on **account of the person concerned, matter involved and the time element."**

35. As regards the issue before us in this Reference, the jurisdiction under consideration is that of the time element, *ratione temporis*. Article 30 of the Treaty provides as follows:

> **"1. Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.**
>
> **2. The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of,**

or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be;

3. The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State."

36. For purposes of Article 30(1), what the Applicants impugn are the specific provisions of the Respondent States' Acts, section 48(5) of the Criminal Procedure Act and Section 36 of the Economic and Organized Crime Control Act. That the said legal provisions are an infringement of the provisions of the Treaty, specifically Articles 6(d) and 7(2) thereof.

37. It is not contested that the Applicants are natural persons who are resident in a Partner State, and that they refer for determination by the Court, the legality of the legal provisions referred to in the preceding paragraph of this judgement, on the grounds that the same are an infringement of the Treaty. Thus, the Court's jurisdiction *ratione personae* is not contested.

38. What is contested is the time element. Does the Court have jurisdiction *ratione temporis?*

39. As to the meaning and effect of Article 30(2), this Court has consistently stated a strict interpretation. In **The Attorney General of the Republic of Kenya vs Independent Medical Legal Unit, EACJ Appeal No. 1 of 2011,** the Appellate Division stated:

"It is clear that the Treaty limits References over such matters like these to two months after the action or

decision was first taken or made, or when the Claimant first became aware of it. In our view, the Treaty does not grant this Court any express or implied jurisdiction to extend the time set in the Article above".

40. The Court went further to state:

> **"In our view, there is no enabling provision in the Treaty to disregard the time limit set by Article 30(2). Moreover, that Article does not recognize any continuing breach or violation of the Treaty outside the two months after a relevant action comes to the knowledge of the Claimant; nor is there any power to extend that time limit – see Case 24/69 Nebec vs EC Commission (1975) ECR 145 at 151, ECJ. Again, no such intention can be ascertained from the ordinary and plain meaning of the said Article or any other provision of the Treaty. The reason for this short time limit is critical – it is to ensure legal certainty among the diverse membership of the Community: see Case 209/83 Ferriera Valsabbia Spa v EC Commission OJ C2009, 9.8.84 p.6, para 14, ECJ quoted in Halsbury's Laws (supra) Para 2.43."**

41. At the oral submissions stage, Counsel for the Applicants argued that the impugned provisions were violative of the Treaty even prior to them being applied against the Applicants, but that for the purposes of Article 30(2), the two-month period is counted from the point of application of the provisions against the Applicants. That, therefore, the Reference was filed within the two months period contemplated in Article 30(2).

42. In making the latter argument Counsel sought to place the Applicants within the second limb of Article 30(2), **"... the day in which it came to the knowledge of the complainant ..."**

43. This, however, was a convoluted, indeed, a contradictory position. Upon inquiry from the Court, on the one hand Counsel submitted that the said impugned provisions were violative of the Treaty *ab initio.* On the other hand, that the provisions came to the knowledge of the Applicants when they were allegedly abducted and that, therefore, that point when **"the violative"** provisions **"were used upon"** the Applicants is the point at which time begins to run for the purposes of the second limb of Article 30(2).

44. With respect, that argument is disingenuous. What are impugned are the specific statutory provisions set out above. These are laws which are, in any event, deemed to be in the public domain upon enactment. If the provisions are impugned, as they are in this Reference, of necessity that challenge relates to when they came into existence, that is, when the laws were enacted.

45. In **Rashid Salim Ady and 39,999 Others vs Attorney General of the Revolutionary Government of Zanzibar and Two Others, EACJ Reference No. 9 of 2016**, this Court stated:

> **"For purposes of computation of time, in The Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit (Supra), the Court held that time would start to run 'two months after the action or decision was first taken or made.' This position was affirmed in The Attorney General of the Republic of Uganda & Another vs. Omar Awadh & 6 Others, where it was held that 'the**

starting date of an act complained of under Article 30(2) ... is not the day the act ends, but the day it is first effected."

46. The Court went further to state:

"This Court has had occasion to pronounce itself on the interpretation and application of Article 30 (2) of the Treaty. In the Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit (Supra), the Appellate Division of this Court ruled out the possibility of the extension of the time set in Article 30 (2), or the notion of continuing violations. It was held:

> ***'In our view, there is no enabling provision in the Treaty to disregard the time limit set by Article 30 (2). Moreover, that Article does not recognise any continuous breach or violation of the Treaty outside the two months; nor is there any power to extend that time limit ... Again, no such intention can be ascertained from the ordinary and plain meaning of the said Article or any other provision of the Treaty.'***

This position was reiterated in the Omar Awadh case (supra) in the following terms:

> **'Moreover, the principle of legal certainty requires strict application of the time limit in Article 30(2) of the Treaty. Furthermore, nowhere does the Treaty provide any power to the Court to extend or to**

condone to waive or modify the prescribed time limit for any reason, including for continued violation'."

47. On the plain reading of the Treaty provisions and on the authority of previous decisions of this Court, we have no difficulty in adopting the view that where, as in this case, the Court is called upon to determine if it has jurisdiction to consider whether a statute enacted by a Partner State is in violation of the Treaty, the point of reckoning the two-month period contemplated in Article 30(2) is the date of enactment.

48. On that consideration, the Court is bound to conclude that it lacks jurisdiction, *ratione temporis,* to entertain the instant Reference.

49. That said, the Court was invited to consider whether domestic legislations of a Partner State enacted in 1984 and 1985 respectively are in violation of the Treaty, which came into effect, (as the Court takes the Judicial notice), in July 2000. The invitation therefore is to apply the Treaty retrospectively.

50. In **Emmanuel Mwakisha Mjawasi and 748 Others vs The Attorney General of the Republic of Kenya, EACJ Appeal No. 4 of 2011**, the Appellate Division of this Court had opportunity to pronounce itself, on the principles of non-retroactivity, thus:

> **"The principle of non-retroactivity is a well-known doctrine. It is generally applied in the jurisprudence of Public International Law. It constitutes a limit on the scope of a Treaty *ratione temporis* [See: O. DORR and K SCHMALENHACK (eds)], Vienna Convention on the Law of Treaties, Springs – Verlag Berlin Heldelberg 2012; A. BUYESE: "A Lifeline in Time- Non retroactivity and**

Continuing Violations under the ECHR." In Nordic Journal of International Law, 75: 63-88, 2006, Pr Dr J. WOUTERS, Dr. D. COPPENS, D. GERAETS: "The Influence of General Principles of International Law" http://www.kuleuven.be.

When a treaty is not retroactive, the consequence is that it cannot apply to any act or fact which took place or any situation which ceased to exist before the date of its entry into force.

Retroactivity of a treaty may derive either explicitly from the provisions of the treaty itself, or it may implicitly be deducted from its interpretation.

Upon closely and carefully reading the EAC Treaty, we did not find any provisions explicitly stating that the Treaty may be applied retroactively. We, then, turned to its interpretation in a bid to determine whether the framers of the Treaty had any intention to make the EAC Treaty retroactive.

The performance of this Court's duty in this regard, is guided by the Vienna Convention on the Law of Treaties. Article 2(1)(a) of that Convention defines the instruments/treaties to which the Convention applies. The Article states as follows:

> **'For the purposes of the present Convention:**
>
> **a. 'treaty' means an international agreement concluded between states in written form and**

governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.

On the specific issue of non-retroactivity, Article 28 of the Vienna Convention provides as follows:

'Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or, any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party'.

That Article helps in establishing the intention of the parties where this intention is not explicitly expressed in a particular Treaty. Such is the case with the EAC Treaty in the instant case.

This Court, therefore, needed to interpret the Treaty in order to establish whether the EAC founders manifested any intention to make their Treaty retroactive. Moreover, further guidance in this lies in Article 31 of the Vienna Convention which provides, inter alia, as follows:

i) A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

ii) **The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:**

a) **Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; and**

b) **Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by other parties as an instrument related to the treaty..."**

Consistent with the above guidelines, this Court interpreted the provisions of the EAC Treaty: it placed them against the objectives and purposes of the Treaty. We find that the intention of the framers of the new EAC Treaty of 2000 was to turn the page of the past and to build a new project for the future."

51. In its analysis, the Court concluded that: **"Accordingly, this Court agrees with the finding of the Court below that the EAC Treaty 2000 cannot be applied retrospectively."**

52. Similarly, in **Alcon International Ltd vs the Standard Bank of Uganda and 2 Others, EACJ Appeal No. 3 of 2013,** the Appellate Division of this Court stated:

"The Trial Court noted there was a nexus between non-retroactivity of a Treaty and its jurisdiction. It took into account the Appellate Division's decision in Emmanuel

Mwakisha Mjawasi & 748 Others (Supra) where the Court delivered itself as follows:

> **"...Where then, one may ask, did the Court derive its jurisdiction since the Treaty which normally confers the jurisdiction on the Court did not apply? Non retroactivity is a strong objection: when it is upheld, it disposes of the case there and then. As non-retroactivity renders the Treaty inapplicable forthwith, what else can confer jurisdiction on the Court?"**

53. Applying these authorities, here again the Court has no hesitation in finding that on the principle of non-retroactivity of the Treaty, the Court lacks jurisdiction *ratione temporis* to entertain the Reference, impugning as it does, Acts that were enacted before the Treaty came into force.

54. We find therefore, that this Court has no jurisdiction to entertain the Reference; firstly, because the Respondent does not meet the requirement of Article 30(2) and secondly, and in any event, the Acts complained of were enacted prior to the coming into force of the Treaty, and the jurisprudence of this Court is that the Treaty does not have retroactive application.

55. Having decided as we have on the first issue, that of jurisdiction, this Court has no basis to consider the second issue agreed for determination. We must down our tools.

G. COSTS

56. Rule 127 (1) of the Rules provides as follows:

> **"Costs in any proceedings shall follow the event unless the Court shall for good reasons otherwise order."**

57. In the circumstances, and in exercise of our said discretion, we see no basis for departing from the principle and we accordingly award costs to the Respondent.

H. CONCLUSION

58. From what we have endeavoured to state above, we make the order as follows:

> **a) This Court lacks jurisdiction to entertain the Reference and the same is, therefore, dismissed.**
> **b) The costs of the Reference are awarded to the Respondent.**

59. It is so ordered.

Dated, signed and delivered at Arusha this 30th day of November, 2023.

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Hon. Justice Yohane B. Masara
PRINCIPAL JUDGE

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Hon. Justice Charles A. Nyachae
JUDGE

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Hon. Justice Richard Muhumuza
JUDGE

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Wabwire Hon Justice Richard Wejuli
JUDGE

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Hon. Justice Dr Léonard Gacuko
JUDGE