

**IN THE RESIDENT MAGISTRATES' COURT OF DAR ES SALAAM AT
KISUTU**

ECONOMIC CRIMINAL CASE NO 1 OF 2007

REPUBLICPROSECUTOR

VERSUS

PROF: DR COSTA R. MAHALU.....1st ACCUSED PERSON

GRACE ALFRED MARTIN.....2ND ACCUSED PERSON

JUDGEMENT

It may sound odd to start a judgement with credentials of the accused persons. However, I find it irresistible because the same is a matter of fact which is now common knowledge. It is a fact that the accused persons are a part of the intellectual elite of this nation. The first accused person is a professor of law. He is called Prof. Dr. Costa Ricky Mahalu. The second accused person is called Grace Alfred Martin. She holds a master degree in International Relations. They now stand charged with six counts of divers description.

In principal it is alleged that they conspired and ultimately used documents to mislead the principal, steal and occasion loss to a specified authority. By so doing, it is charged, they violated the provision of the Prevention of corruption Act (herein after the PCA) [Cap.329.R.E.2002], the Penal Code

(hereinafter the PC) [Cap.16 R.E.2002] and the Economic and Organised Crimes Control Act (hereinafter the EOCCA) [Cap.200.R.E.2002]

The following are the charges against the accused persons without describing the offence's particulars. The particulars of each offence will be stated at a later stage to avoid unnecessary repetition of similar things.

The 1st count is conspiracy to commit an offence C/S 384 of the PC. The charges in the 2nd, 3rd and 4th counts are similar namely, use of document containing erroneous material particulars intended to mislead the principal. The 5th count is stealing C/S 265 and 270 of the PC and the 6th count is occasioning loss to a specified authority contrary to paragraph 10 of the 1st schedule to and section 57 (1) and 60, both of the EOCCA.

The Director of Public Prosecutions consented to both the prosecution of the accused persons and he issued a certificate of order for trial of this case, as an economic crime case, in this court as required under the EOCCA. According to the consent order the two documents were signed on 25th April, 2007.

After a protracted trial which has lasted for five years and at some stages the case went up to the Court of Appeal, finally on 8th May, 2012, the trial was concluded. On 16th June, 2012 the parties filed their final written submissions. This paved way for me to determine whether the accused person are guilty or not.

The following are brief undisputed facts of this case. I say brief facts because at this stage I am not going to allude to all the material facts

narrated by all witness but just what I consider to be undisputed facts of the case. I have chosen to take this course in order to present this case in a simple form so that even those who are not learned in law can easily follow. More details about the facts as adduced in evidence by the witnesses will be given when analyzing evidence in relation to charges in each count.

The accused persons were Public Servants of the Government of the United Republic of Tanzania. Therefore, in terms of section 2 of PCA they were agents and the Government of the United Republic of Tanzania their principal. Both accused persons worked at the Tanzania embassy in Rome, Italy. The first accused person worked as ambassador while the second accused worked as head of chancellery.

Sometimes in 2000 or 2001 the Government of the United Republic of Tanzania made a decision to purchase a chancellery in Rome, Italy. By virtue of their employment the accused persons together with Steward Migwano (PW3) were directly involved in the chancellery purchase process. And in fact PW3 had been charged together with the accused persons. The charges against him were later withdrawn and he was turned into a witness.

Finally, on 1st October, 2002 the chancellery was procured. It is premises situated at 185 via Cortina d' Ampezzo of CERES S.R.L, a Limited Liability company whose sole representative was Pagliuca Fiorella. The sale agreement was signed between the sole representative of CERES S.R.L and

the 1st accused as ambassador on behalf of the Government of the United Republic of Tanzania.

The decision which building should be purchased was made by the government of the United Republic of Tanzania vide a letter Ref. No. FAC/0.40/58/62 dated 11th September, 2001 which is marked (g) in exhibit D3.

The purchase was done through two contracts (exhibit P1 and P6). The two contracts were executed on the same day and they bear different prices. The first contract was executed before a Notary Public of Italy one Marco Papi (PW2). This contract shows that the sale price is Euro 1,032,913.80. The second contract (exhibit P6) was executed between the vendor and the ambassador and it is not witnessed by a notary Public. This contract shows that the purchase price was Euro 3,098,741.40

According to exhibit P4 which is a bank statement payments of the purchase price were made on 24th September, 2002 into two separate accounts both for CERES S.R.L. Exhibit P2 shows that payment for Euro 2,065,827.60 was made to account No. 106705 SWIFT CODE: CFMOMCMX of Monaco and another payment for Euro 1,032,913.80 was deposited into account No. 2182/51 SWIFT CODE: BROMITRDNOR of Rome.

Upon signing of the contracts and having confirmed receipt of the money, on 1st October, 2002, the vendor issued a payment receipt (exhibit P8) worth Euro 3,098,741.58. Prior, on 23rd September, 2002 the embassy had issued a payment voucher (exhibit P3) authorizing payment of Euro

3,098.741.40 to CERES S.R.L. On the same date the embassy instructed its banker Direzione Territoriale Italia Centrale, to effect payment by transfer of the said amount of money into the vendor's above stated accounts specifying the amount to be paid in each account. The instruction was made through a letter (exhibit P.2) which is signed by the 1st accused as ambassador, 2nd accused as Counselor and PW3 as Financial attaché. According to exhibit P4, the money was transferred the next date.

It is on the basis of the documents which were used in the process of purchasing the Embassy building the accused person now stand charged in this court. The relevant documents to these charges are exhibits P3, P6 and P8. Exhibit P3 is subject of the charge in the second count. Exhibit P6 is subject of the charge in the third count and exhibit P8 is subject of the charge in the fourth count. The difference of the purchase price in exhibits P1 and P6 namely Euro 2,065,827.60 is subject of the charges in the fifth and sixth counts.

The foregoing marks the end of the material evidential facts which are undisputed. Let me now give a general summary of the evidence as presented by the prosecution and the defence. This summary will be followed by issues for determination basing on the charges in each count.

The prosecution brought in court a total of seven witnesses. These are martin Lumbanga (PW1), Marco Papi (PW2), Steward Migwano (PW3), Simon Justin maingu (PW4), Isidory Kyando Frances (PW5), Edwin Pius Mikongoti (PW6) and Abubakar Rajab (PW7). Marco Papi (PW2) is an Italian national. He speaks neither English nor Kiswahili. So he testified

through an interpreter one Evarist John Defiyo who is a Roman Catholic priest. On the day he gave his evidence in chief he was not cross examined. Later, his attendance in court could not be easily procured so he was cross examined through video conference while in Italy.

The cumulative effect of the evidence by these prosecution witnesses, without giving details, is that in the process to procure the Tanzania chancellery in Rome the accused persons used false documents to mislead the principal and consequently, they pocketed and occasioned loss of Euro 2,065,827.60. The basis of the allegation is the use of exhibit P6 which is an unofficial document which is unattested. According to exhibit D7 (a book about sell of real estate in Italy) such documents are referred to as "scrittura Privata".

Exhibit P6 is the second purchase contract which was signed between the vendor and the first accused person. It is this document which shows that the purchase price was Euro 3,098,741.40. The prosecution, therefore, is concerned with the use of two separate contracts with different purchase prices. Now, despite the foregoing prosecution case's general summary, the following is what, in brief, each prosecution witness said in court.

In his evidence in chief the then Chief Secretary, Martin Lumbanga (PW1) testified that he did not remember to have authorized the purchase of the chancellery using two different contracts. Marco Papi (PW2) is the Attorney General of Rome. In his evidence he said he witnessed the signing of exhibit P1 only which shows that the purchase price of the building is Euro

1,032,913.80. He denied to have witnessed the signing of the Scrittura Privata (exhibit P6)

Steward Migwano (PW3) was the financial attaché when the chancellery was purchased. He testified that he signed exhibit P2 and prepared the payment vouchers (exhibit P3). He also tendered exhibit P4 which is a bank statement to show that payment were affected by the bank as directed in exhibit P2. He further testified that when he prepared the vouchers and signed the documents authorizing payment he had not seen the sale agreement and he did not even know the contract sum. He came to see exhibit P1 later on.

PW4 Simon Justin Maige tendered exhibit P.5 which are exchequer issue notification to show how money for purchase of the building were transferred from Tanzania to the embassy in Rome, Italy.

PW5 is Isidori Kyando Frances, who is a detective officer from the Prevention and Combating of Corruption Bureau (PCCB). He testified that in the course of his investigation into this case he discovered that the chancellery was purchased using two contracts. He tendered exhibit P6 (the scurittura Privata) and exhibit P7 which is a letter written by the 1st accused person informing the Government of the United Republic of Tanzania that the value of the building to be purchased was Euro 3,098,741.38. He said in Italy he met PW2 who told him that the building was purchased at Euro 1,032,913.80 per exhibit P1. PW5 also tendered exhibit P8 which is a payment receipt issued by the vendor upon receipt of the purchase price. Exhibit P8 shows that the vendor was paid Euro

3,098,741.40. From his investigation PW5 concluded that the official price of the building is that in exhibit P1 and exhibit P6 was prepared in order to defraud the Government. However, on cross examination PW5 admitted that he did not interview the purchaser in order to verify how much money was paid to her. He also admitted that all the money was transferred into the vendor's account and there is no evidence that the accused persons either retrieved the money or withdrew the same.

The next witness is Edwin Mikongoti who gave evidence as PW6. He testified that when the Embassy building in Rome was purchased, he was the Director of Administration and Personnel (DAP) in the Ministry of Foreign Affairs and International Cooperation (MFAIC). He said in that capacity he was charged with keeping records of all building and whenever there was a need to purchase a building through the Ministry he was to be involved. However, he testified, he was not involved in the purchase of the embassy in Rome. It is his further evidence that in all purchases process where he was involved only one contract was used. Copies of such contracts are kept by the DAP at the Ministry and originals are kept at the embassies. He concluded that at the Ministry there was not the contract involving the purchase of the embassy in Italy.

PW7 is Abubakar Rajab. He testified in court that he was the supervisor of all the building at the MFAIC since 2002. He also testified on the procedure for purchase of embassy buildings. He said ordinarily, the process involves a team from the Ministry visiting the respective country to see the earmarked building. Then the team consults local experts who assist to

evaluate the property in terms of its fitness and value. After this process, PW7 testified, his office would prepare a report to the Government. Then a contract will be signed involving the Ministry of Constitutional and Legal Affairs. He concluded that in the purchase of the embassy in Italy these procedures were not followed.

PW7 marked the end of the Prosecution's case. The following is a summary of the defence case. The first accused person testified as DW1 and he called one witness Benjamin William Mkapa who testified as DW2. The second accused person testified as DW3. Therefore, the defence evidence was adduced by three witnesses.

Generally, the evidence for the defence is to the effect that the purchase of the chancery followed the procedure and the ambassador obtained the requisite permission to buy the building using two contracts. DW2 testified that he was informed about the conditions imposed by the vendor about being paid through two different bank accounts and he gave a go ahead because what concerned him was the urgency to have a chancery. DW1 gave an elaborate account on the purchase process. He said on the issue of using two contracts he got oral permission from the Chief Secretary Marten Lumbanga (PW1). In order to support the defence case DW1 tendered several exhibits, which are mostly correspondences letters. I shall refer to each exhibit at a later stage where necessary. The evidence of DW3, as far as material facts are concerned is for all intents and purposes similar to that of DW1.

Having summarized the gist of the evidence of each side let me proceed to indicate points for my determination. These points are based on the charges in each count. They are:

1. Whether the accused persons conspired to steal.
2. Whether the accused person used documents containing erroneous material particulars intended to mislead the Principal.
3. Whether the accused person stole Euro 2,065,827.60 the property of the United Republic of Tanzania
4. Whether the accused persons occasioned loss to a specified authority by their willful acts and misconduct which caused the Government of the United Republic of Tanzania to suffer a pecuniary loss of euro 2,065,827.60.

Before I proceed, let me deal with one issue concerning a decision I made on 4th August, 2011 without giving reasons for the decision. On that day DW1 tendered exhibit D.2. The prosecution objected to its admission which objection I overruled without giving reasons. I stated that reasons shall be given in the main judgment and here are the reasons.

Exhibit D2 is a letter written by the first accused person to the Permanent Secretary of the MFAIC. It has reference numbers TER/A.10/1 and was written on 4th June 2001. The prosecution objected to its admission because it is a photocopy. Indeed this document is a photocopy and, therefore, it is not admissible under section 66 of the Evidence Act [Cap.6.R.E 2002] unless it meets one of the conditions specified under section 67 of the same Act. In this case exhibit D2 was admitted under

section 67 (1) (a) (i) and (iii) of the Evidence Act. This part of the law reads:-

67(1) secondary evidence may be given of the existence, condition or contents of a document in the following evidence cases:-

- (a) When the original is shown or appears to be in possession or power of:-
 - i. The person against who in the document is sought to be proved.
 - ii. A person legally bound to produce it, and when after the notice specified in section 68, such person does not produce

The first accused wrote exhibit D2 in his capacity as ambassador in the Tanzania embassy in Rome. It follows, therefore, that its original is in possession of the Republic either at the MFAIC or at the embassy in Rome. In that regard the first accused person is justified to tender a photocopy.

Another reason is that on 29th April, 2009 counsels for the accused persons issued a notice to produce under section 68 of the Evidence Act which was filed in court on 30th April 2009. The notice indicate numerous document including exhibit D2 which is number 1 in the list.

On 4th day of May, 2009 the Republic replied that it has not in its custody any of the documents listed. I have no doubt in my mind that the Republic was not upfront about its reply. It is not true that the Republic had not all the documents listed.

Two examples suffice to support my point. In the list of documents requested by the defence a letter Ref. No. TER/A.10/1 date 20th February, 2002 is listed at number 14. This document was tendered by the prosecution as exhibit P7. Another letter Ref.No.TEF/C.40/9/26 dated 05th March, 2002 which in the list is number 16 was tendered as exhibit P9. Where did they come from? If the Republic wished to use them as exhibit a polite reply that the documents will be tendered in court would have served the day. It is my finding, and I so hold that on the issue of documents to be tendered to support evidence in this case, the Republic have been playing the children's game famously known as "hide and seek". I will come to this point again at a later stage.

Upon conclusion of the trial the parties made their closing speeches under section 233 of the Criminal Procedure Act [Cap 20 R.E.2002]. This was done by way of filing written submissions. The submissions were filed on the same day and both parties complied with the schedule. At this juncture, let me comment briefly on the submissions filed, particularly the submission filed by the defence counsels. However, since I have not recognized the parties' representation, it is pertinent now to introduce lawyers who have been locking horns. The prosecution was led by Lukosi, learned Principal Stated Attorney insisted by Haule, Senior State Attorney and Benny, prosecutor from the (PCCB). The first accused person is represented by Marando, learned senior advocate who is lead counsel assisted by Mgongolwa, advocate. The second accused person enjoyed the

professional service of C. Tenga, advocate as lead counsel assisted by Malima, learned advocate.

The joint submission filed by counsels for the accused persons has given me a good reading because it has mingled poetry in legal writing. The learned counsels have presented their points in a "poetic" way through regular repetition of words. If I may be permitted to guess the reason, I can surely say they aimed at emphasizing their points. For example, counsels have submitted that in order to convict the accused persons, I must be sure they (accused persons) committed the offences charged. Then at page 2 of the submissions they emphasize their point thus:-

"Your honour, you must be sure, sure. Not suspicion. Not suspicious.

Not probably. Not probability. Sure certainty. That is the law. That is the test"

If my guest that this has been done for emphasis purpose is correct, then the learned counsels have over done it. This is because upon reading their submission I have understood, through the above quote that they are emphasizing a well known principle that it is upon the prosecution to prove the charge beyond reasonable doubts. On this principle Justice Rutakagwa (as he then was), in the case of **Republic vs. Kerstine Clifton Cameron**, Criminal session No. 51/2000, High Court Arusha registry (unreported) held that "this is a universally accepted principle of law which needs no authority to prop it up"

The prosecution also has dwelt in length on the same principle. They have cited the authority in the case of **Magendo Paul & Shaban Benjamin VS Republic**, criminal Appeal No. 19 of 1993 CAT (Unreported) where it was held that the “standard of proof beyond reasonable doubt does not extend to remote doubts and fanciful possibilities”. It suffices to say here that I am grateful to both the prosecution and the defence for reminding me about this elementary principle of criminal law. Let us move to the real issues.

I have said each issue framed correspond with a particular count in the charge sheet save for the second issue which cover the 2nd, 3rd and 4th counts. I will deal with the issues one after another. It is on dealing with these issues where I will deal with the evidence and the submissions in details.

I will start with the first issue which concerns the charge in the first count. I have already said that the first count is about conspiracy. The particulars of the offence are that the accused person and others who are not before this court, on divers dates and places within Italy and Tanzania and other places in the world, did conspire together with intent to commit an offence to wit, stealing from the United Republic of Tanzania.

I have indicate somewhere herein above that the charges centre on the use of two contracts (exhibits P1 and P6) to purchase the chancery in Italy. In the prosecutions written submissions at page 15 they have submitted thus:

“If the issue of using two set contracts could have been made for a good purpose, the vendor could have formerly informed the accused persons the reasons for that request or the accused persons could have insisted for a formal request with reasons as they insisted for a written illegal contract (exhibit P.6) as they allege, absence of such request makes this Honourable court and any other reasonable person not to think otherwise than to confirm conspiracy to either evade tax as suggested by PW2 and exhibit D.7 or to swindle the extra money from the Government”

In their submissions defence counsels have argued (page 5) that the facts in evidence do not disclose a secret plan between the accused persons to steal the sum of Euro 2,065,827.60 from their principal because common intent purpose, agreement or thought between the accused persons has not been proved. To support their argument the learned counsels have quoted the definition of conspiracy from the Black Law Dictionary and the Law Lexicon. The definitions from the two books suggest that conspiracy is about agreement by two or more person to do an unlawful act. The agreement of the two minds is what constitutes the “mens rea” and the agreement or plan itself constitute the “actus reus”. If the offence is actually committed that is mere manifestation or evidence of it.

Therefore, mere agreement to act unlawfully constitutes an offence of conspiracy. It does not matter whether the mission was accomplished or not.

In the case of **John Paul @Shida & another Vs the Republic**, criminal Appeal No.335 of 2009 Court of Appeal, it was held that conspiracy is an offence in its own right. It has its own ingredients which must be proved. What are those ingredients? They are three namely; an agreement of more than one person to do unlawful or a lawful act by unlawful means and the person charged must be part of the agreement. All the three ingredients must exist in order to prove a charge on conspiracy. It is upon the prosecution to prove.

Before I consider whether conspiracy, based on evidence on record, has been proved or not let me see if the conspiracy charge can stand together with the offence of stealing. I have found this issue pertinent because in the particulars of the offence it is stated that the accused persons conspired to steal. Further, I have raised this issue because in the course of preparing this judgment I came across the decision in John Paul's case (*supra*).

In John Paul's case the issue of charging conspiracy as a cognate offence was discussed. The accused persons had been charged with conspiracy and armed robbery in the same charge. There was no evidence at all to establish that the accused persons sat, met or communicated together somewhere and conspired to commit the offence of armed robbery. The evidence on record related to the offence of armed robbery without more.

Since in conspiracy count it was alleged that the accused persons conspired to commit armed robbery the Court of Appeal held that conspiracy was a cognate offence to armed robbery and it was not proper to prefer the two

counts in the same charge. It was further held that in such a situation once armed robbery is proved the conspiracy count ought to have died a natural death.

In this case it is charged that the accused persons conspired to steal. Therefore, if the stealing count is proved, the conspiracy count will die a natural death. It is crucial, therefore, that I have to consider the charge relating to stealing first.

This takes me to the fifth count. In this count the particulars of the offence alleges that on or about 1st October, 2002 at Tanzania Embassy in Rome, Italy the accused persons did steal euro 2,065,827.60, the property of the United Republic of Tanzania.

I have indicated somewhere, herein above; that the amount alleged to have been stolen is the difference between the purchase price mentioned in exhibit P1 and that one mentioned in exhibit P6. I have also said that this count concerns the third issue for my determination.

Did the accused persons steal the said money? The prosecution evidence over the issue is not straight forward. In Kerstine's case (supra) Justice Rutakangwa (as he then was) was faced with a situation where the case for the prosecution was based on disjointed factual story. Addressing such a situation he said:-

“I must confess ought right that the facts upon which the prosecution case is based do not admit of easy abridgment”

I wish to borrow those words and make them mine. If it was the law that the accused persons need to prove their innocence I would have used the same words as far as their case is concerned. But, since that is not the law, let me just say that in the context of the counts in the charge sheet, the facts upon which the prosecution case is founded do not admit of easy abridgement.

The prosecution's case is predicated on circumstantial evidence. There is no direct evidence which shows that the accused persons stole the money. The evidence available which is based on documents used to purchase the chancery is evidence of that nature which just suggest that the accused person possibly stole the money. It is for this reason I say that the evidence is circumstantial. The principle on the applicability of circumstantial evidence is now settled. That is that to ground a conviction on such evidence the same must be incapable of more than one interpretation. **Hassan Fadhili V.R** [1994] T.L.R 89.

Let us examine the evidence. I have said the chancery was bought using two contracts. This is undisputed facts. It is the defence case that this was done because it was a condition imposed by the vendor. DW1 testified that in Italy it is a common practice that vendor would always demand preparation of two contracts. These are the official one which will be signed and registered bearing the official price and the other one which would bear the commercial price. The second one is an agreement made without use of assistance of the government and PW2 testified that such contracts are done clandestinely. I think this testimony of PW2 melts the

challenge posed by the prosecution in the passage I have quoted above in their submission on the issue of conspiracy. The prosecution alleges that if it was a condition imposed by the vendor the accused person would have demanded for a formal request from the vendor. However, things done clandestinely cannot be done formerly. It remains to be seen if accused persons' engagement with clandestine things constitutes a criminal offence.

A document of such nature is referred to as *scrittura privata*. DW1 tendered a book authored by Tobias Jones entitled "The Dark Heart of Italy" which was admitted as exhibit D7. The book speaks of prevalence of this practice in Italy and for purposes of this case the court was referred to pages 139-140 of the book.

The prosecution has taken issue with the practice which forms the base of these charges. The reasons for the disagreement can be discerned from the evidence of PW6, PW7 and PW5. PW6 and PW7 were officials in the MFAIC. PW6 was DAP while PW7 was supervisor of building in MFAIC. The cumulative effect of their evidence is that procedures were violated in the process for purchase of the chancery in Italy. On the procedure PW6 and PW7 said that once the building to be purchase is identified, a team of experts would be sent to inspect the building before the principal secretary could send the money for payment and only one contract is involved and it is signed by involving the Ministry of constitutional and legal Affairs. At the respective area a team of experts sent would consult their local counter parts. They gave examples of purchase of chanceries in Lilongwe, Kampala, London and in the USA.

PW5 who is an investigator said the accused persons have been charged in court because they cheated to have bought the chancery at the price of Euro 3,098,741.40 while they bought it at Euro 1,032,913.80. Therefore, PW5 concluded they pocketed Euro 2,065,827.60. The evidence of PW5 that the chancery was bought at Euro 1,032,913.80, tallies with that of PW2, the Attorney General of Rome who attested exhibit P1.

To fortify his argument PW5 also tendered exhibits P6, P7 and PW9. Exhibit P7 is a letter with Ref. No.TER/A.10/1 dated 20/07/2002 written by the 1st accused person to the principal secretary MFAIC. In this letter the 1st accused person was telling the principal secretary MFAIC that the price of the building is Euro 3,098,741.38. Exhibit P9 is a letter with Ref. No. TER/C.40/9/26 dated 5th march, 2002 also written by the 1st accused person to the principal secretary MFAIC. In this letter the ambassador was requesting for extension of the period of stay in Rome of one Paul Nyotoka so that he can accomplish the valuation report of the building. Therefore PW5 concludes, if exhibit P9 was written after exhibit P7, then the price of Euro 3,098,741.40 mentioned therein was false because according to exhibit P9 the evaluation had not been done.

On cross examination PW5 testified that the accused person in their caution statement did say that they were authorized to use two contracts by the chief secretary which fact was denied by the chief secretary who testified as PW1. He was emphatic that he never authorized the use of two contracts. This denial was termed by the 1st accused person in his defence as a lie under oath. On further cross examination PW5 testified that he did

not interview the vendor to ascertain the actual payment she received. He also admitted that according to exhibit P3 the vendor received Euro 3,098,741.40 and there is no evidence to indicate that the vendor was paid Euro 1,032,913.80. He further admitted that payment vouchers and bank records show that Euro 3,098,741.40 was transferred into two accounts of the vendor and there is no evidence that the accused person did go to the bank and retrieve the said money.

From these facts, it would seem that the prosecutions conspiracy theory is based on the mere use of two contracts. I will not be prepared to buy their theory unless and until I am convinced beyond reasonable doubt that the use of two contracts to purchase the chancery by itself constituted a criminal offence.

I have found this issue to be germane to the facts of this case even if both sides in their evidence have brushed it aside with the contempt it does not deserve. The parties have concentrated on the issue whether there was permission to use two contracts or not. I do not think this is a relevant fact under the circumstance of this case. This is because if use of two contracts is an offence no permission can legalise it except by change of the relevant law.

It is understandable why the prosecution did not pursue or present evidence relating to this issue. This is because, in my opinion, tackling this case from this angle leads to an inevitable conclusion that there was not a need to charge. However, I cannot fathom of a reasonable explanation for the defence lawyer failure to appreciate the importance of this issue. They

also fell into a trap to think the issue is whether or not there was permission to use two contracts. Let me remind the parties that here we are dealing with a criminal charge and not a civil suit. I have already held if the use of two contracts is a criminal offence it shall so remain and no permission to authorize criminality will ever be accepted or tolerated.

In dealing with this issue let me start with the conclusion and reasoning of the investigator (PW5). He testified that since the price in exhibit P7, which turned out to be the purchase price per exhibit P6, was mentioned before exhibit P9 was written, then there was no base for the price hence the conspiracy between the vendor and the accused persons. Well and good. But if the evidence on record is thoroughly analyzed the argument becomes self defecting. Here are the reasons.

I will start with reverting to the hide and seek theory I have referred to earlier as far as documents tendered are concern. The prosecution would want us to believe that the price named in exhibit P.7 was arbitrary without a sound base. The contrary is true. Exhibit P7 is self explanatory that it had several annextures to support the contents therein. These are letters which are listed as "viambatanisho (a) (b) (c) (d) (e) (f) (g) (h) (i) (j) and (k). Other annextures are listed as "vivuli vya "valuation reports" and they are listed as (A) (B) (C). Further, the letter ends with this sentence "N.B": Valuation Report" yetu ilikuwa ni msingi wa makubaliano (sic) ya bei ya kulinunua jengo hilo"

For reasons not explained by the prosecution exhibit P7 was tendered without these annextures. This was done notwithstanding that the defence

had tendered a notice to produce which was replied to that the Republic does not have those documents. It is these annextures which the defence tendered as exhibit D3. They were admitted despite being copies and being objected to by the prosecution. Interestingly, during admission of exhibit D3 the Republic made the following admission:-

“Your honour this bundle indeed contains photocopies. However, it is not that we do not have all the originals. Some of the originals are there. We actually cross checked and got some of the originals. I have gone through the documents and they are okay”

It is the same Republic which in their reply to the notice to produce had said that the Republic is not in possession of the list of document which has been annexed to the notice to produce by counsels for the accused persons for reason that the Republic is neither the custodian nor the author of the list documents.

In the course of preparation of this judgment is when I realized that the Republic might have deliberately removed the annextures to exhibit P7 because submission of exhibit P7 in complete form would have been tantamount to a technical error of disclosing the fallacies upon which its circumstantial evidence is based.

It is a fallacy to argue that exhibit P7 and P9 are in conflict and they do not support each other. Indeed exhibit P7 was written before Paul Nyotoka prepared the valuation report if any. This beside, the price named in

exhibit P7 had a base in the valuation reports done by the vendor, the embassy and the report prepared by Kimweri. This is how it started.

Vide a letter marked (a) in exhibit D3 the embassy reported that it had started to look for a suitable building to be purchased for a chancery. The MFAIC replied that it would send a valuer to Rome once the embassy reported that a suitable building has been located. This was vide a letter marked (b) in exhibit D3. Vide a letter marked (c) in exhibit D3 the embassy reported that the buildings proposed for purchase has been earmarked and the embassy was ready to receive the valuer.

On 2/7/2001 the MFAIC vide a letter marked (d) in exhibit D3 demanded the price for the earmarked buildings so that necessary arrangements could be done before valuers were sent. On 9/7/2001 the embassy reported prices for three building per annexure marked (e) in exhibit D3. The price for the building which was finally purchased (via Cortina d' Ampezzo) was said to be Italian Lira Six billions. According to DW1 by this period Euro had not yet become the official currency of continental Europe. It would seem upon receipt of this letter one M.T. Kimweri was dispatched to Rome to inspect the building.

He prepared a report which is marked (A) in exhibit D3. On 30/8/2001 vide letter marked (F) in exhibit D3 the embassy instructed one Pasqual Giorgio to do necessary search in respect of the building. Finally, one Augustino Bruni presented a valuation report which indicated that the price of the building could be negotiated between Euro 2,840,512/94 up to Euro 3,098,741.39. The report is marked (C) in exhibit D3. In his testimony DW1

said they requested this information as a counter proposal to the valuation report presented by the vendor which put the price at Euro 5,741,451.34. The report of the vendor is marked (B) in exhibit D3. Vide a letter marked (g) in exhibit D.3 the MFAIC informed the embassy that it had decided to purchase the building at via Cortina d' Ampezzo 185-Rome. Then it ordered the embassy to commence negotiation with the vendor about the price. It would seem pursuant to these instructions the embassy negotiated the price at Euro 3,098,741.40. It is this price which is mention in exhibit P.7. Therefore, exhibit P.7 was written based on these facts.

The bottomline is the last sentence in exhibit P.7 which I have already quoted saying the valuation report commissioned by the embassy formed basis for the negotiation of the price. DW1 testified, and it is undisputed, that this valuation was done to counter that of the vendor. Unlike the report by the vendor which pegged the price at Euro 5,741,451.34 the same pegged it at from Euro 2,840,512.94 to 3,098,741.39. And finally the deal was stuck at Euro 3,098,741.38.

It would seem upon receipt of exhibit P7, the MFAIC sent one Nyotoka to make another valuation. No evidence has been tendered as to why this was done while M.T. Kimweri's report was already there. For the sake of argument I assume that what PW7 said about Kimweri is true. He testified that Kimweri is architecture and not a valuer. So I conclude that Paul Nyotoka was sent as a professional valuer. However, what baffles me is that his valuation report has never been tendered in court. This report is relevant as far as these charges are concerned. This notwithstanding I find

solace in the testimony of PW7 who said Nyotoka valued the building at Euro 5,000,000/=. If this is true, it is my view, and I so find, that by not producing this document, the Republic was praying again the hide and seek game because such a report could not further their course.

Up to this juncture it is abundantly clear that exhibit P7 and P9 are not in conflict at all. They were written for different purposes and they are not interdependent. In view of the foregoing the reasoning of the investigator that Exhibit P7 and P9 are conflicting has been proved to be neither self sustaining nor can it be substantiated by documents available. To this end one of the theory upon which the prosecution case is founded crumbles.

Now I go back to the issue of use of two contracts. On this issue the prosecution has tried to show that the ambassador did so without permission. The defence side has tried to show that the ambassador had permission of the chief secretary. The chief secretary (PW1) was unequivocal that he never issued that permission. I have said this issue is irrelevant. The real issue is whether the entering into two contracts formed a criminal offence. These are the reasons.

Exhibit D.5 contains a special power of attorney which appointed the first accused person so that for and on behalf, in the name and interest of the United Republic of Tanzania, he purchases from CERES-Societa a Responsabilita Limitata (Limited Company), with registered office in Rome, 185, via Cortina d'Ampezzo. It should be remembered that vide a letter Ref. No. FAC/0.40/58/62 dated 11/09/2001, the embassy was ordered to negotiate the price with the vendor. Vide exhibit P7 the embassy reported

that the price had been negotiated at Euro 3,098,741.38. According to exhibit D5, a letter Ref. No. TER/A20/1 dated 24/3/2004 the special valuer from the Ministry of Land and Human Settlements Development calculate the value at USD 5.5 Million. Reasonably, this special valuer is Paul Nyotoka. PW7 testified that Nyotoka valued the building to be worth Euro 5,000,000. In exhibit P7 the 1st accused also requested to be given power of attorney to purchase the building. The power of attorney was signed by the donor on 24th September, 2002. The question which follows is at what price the 1st accused person was authorized to purchase the building for which power attorney was granted? The whole evidence suggests no alternative price than that mentioned in exhibit P7. It follows, therefore, that MFAIC knew that the purchase price was Euro 3,098,741.38. That is why they transferred this amount for that purpose. PW3 testified that the money was received at the embassy in three installments that is in March, 2002, July, 2002 and August, 2002. PW4 tendered exhibit P5 which are exchequer issue notification showing transfer of funds to the embassy. For the foregoing I hold that the 1st accused was authorized to purchase the building at the price reported in exhibit P7. If this was not the case the government would have replied to exhibit P7 in the negative and it would not have transferred the equivalent sum for payment to the vendor.

Up to this juncture the mystery of using two contracts is unsolved. I have gone through the whole evidence on record and I have failed to trace a scintilla of evidence which directed how, upon being granted the power attorney, the 1st accused should enter into the purchase contract. PW7

testified that the practice in the MFAIC was to use a single contract. Therefore, it was wrong for the 1st accused person to use two contracts. Indeed it may be wrong but is that act unlawful to constitute a criminal offence? If yes, what is that offence in our criminal law books? I do not know any and that is why I have held that the 1st accused did not require obtaining a permission to use two contracts. The use of two contracts was just a modality towards purchasing the building depending on the market situation.

It is my considered opinion that once the government agreed upon the purchase price, released the funds and gave the power of attorney to the first accused person, the modalities of payment was subjected to contract practices which prevailed in Italy. DW1 testified that the practice in Italy in real estate market is of negotiating two contracts. The first one containing the official price and the second one with commercial price. The contract with official price is for registration and transfer process. It ordinarily carries a lesser sum than the actual price which is entered in the contract containing actual price. These are the conditions to which the vendor subjected the first accused person. DW2 testified that the wishes of the vendor were such that the country could grant and that is why he consented to payment into the vendors separate accounts. This evidence is uncontradicted.

The prosecution has submitted that the use of two contracts aimed either to swindle the money or to avoid tax. I agree on the later aspect. By any stretch of imagination this practice is always aimed at avoiding tax. Even

PW2 said that Italians are reluctant to pay taxes. For that matter it is the vendor who avoided tax because the embassy had obtained a tax exemption. So in strict terms by signing two contracts, the embassy facilitated the vendor to avoid tax. However, as argued by DW2, matters of tax avoidance are a problem of the Italian government. The interest of Tanzania was to obtain the building at the agreed price. On the issue of swindling the money there is no evidence to show that the money came back into possession of the accused persons.

I would have ended here but I shall proceed for the sake of completeness and to quench the prosecution's thirsty. PW6 and PW7 testified on the practice for purchasing buildings in the MFAIC. I have referred to these practices when I summarized the evidence of these witnesses. However, I cannot avoid repeating them here. These are that the embassy identifies the building and sends the request for purchase to the MFAIC. The management would sit to approve the request and form a team under an official team from the Ministry to go and inspect the building, evaluate it and then present a report to the government. Based on this report the government enters into contract involving the Ministry of Constitution and Legal Affairs. According to PW6 and PW7 these procedures were not followed.

With respect I am surprised these words came from mouths of very senior government officials. How were the accused persons who were in Rome, Italy concerned with practices and procedures which had to be complied with at the MFAIC? Who did not follow these procedures if not official at

the MFAIC including PW6 and PW7? Again let me remind everyone that this is a criminal charge and if the said practices and procedures are laws they were not breached by the accused persons in this court.

In light of the evidence on record for an official of the MFAIC to say that in the process to purchase the chancery in Rome procedures were not followed is like pulling the trigger of a cocked pistol with a barrel pointing at your chest. Follow me on this:-

One of the procedures was for embassy to send a request to the MFAIC. There is uncontradicted evidence of DW1 that he reported the need to have chancery to the permanent secretary MFAIC one Kibelo. There is also uncontradicted evidence of DW1 that in December, 2001 the then Minister for the MFAIC his excellence Jakaya Mrisho Kikwete visited the embassy in Rome and appreciated the fact there was a need to get a building which could reflect the face of Tanzania in Italy. The same matter was discussed in Brussels between the ambassador (DW1) and DW2. In my view these three incidences involving two top leaders of the MFAIC and the President of country constitute enough requests.

The other procedure is that the request would be discussed by the Management. There is no evidence if this was done. This gap in evidence leads to one important question; that if this process was not followed who appointed and sent M.T. Kimweri to Italy? I wish he was not sent by error! How about Paul Nyotoka? It may sound good if I assume he was sent on a tour in Rome and that is why it is unknown he prepared a report thereof or not. The bottom line is PW4 came to testify on how the money for

purchasing the chancery was transferred to Italy. He however, failed to tell us who authorized such payments. He also failed to tell the court, if the lawful payment was per exhibit P1 in exclusion of exhibit P6 why the transferred money was equivalent to exhibit P6? The list of questions may be long but I rest it there to turn to another more practical issue.

This time I assume that all the procedures at the MFAIC were violated. According to PW6 and PW7 the procedures are complied with at the Ministry. The accused persons were at the embassy in Italy. There is no evidence that they interfered with the compliance with the procedures at the Ministry. On cross examination PW7 categorically stated:-

“In our findings the procedure of procurement was not complied with. This was because the relevant persons were not involved for instance up to now there are no any Minutes concerning the process for the purchase of the said building”

This evidence is highly controversial. Firstly, it does not underscore the procurement procedures which were to be complied with. Secondly, two entities were involved in the procurement process if any. These are the embassy and the MFAIC. The evidence of PW7 does not state which entity did not comply with the procedures. If compliance was to be done at the embassy, I wonder if Tanzania's procurement laws could apply in Italy. If compliance was at the MFAIC the accused persons are not the responsible officers. To say the least, with all the deserving respect, the evidence of PW4, PW6 and PW7 as far as the procurement processes are concerned does not further the prosecution's case. Mind you, the accused persons are

neither charged of abuse of office nor violation of procurement laws. So I hold that by signing two contracts the first accused person did not violate any law. He did it to meet the agreement between the vendor and our country per the circumstances prevailing in Italy.

I think I have not answered the issue whether the accused stole the money. I have held that mere use of two contracts did not constitute a criminal offence unless it is proved beyond reasonable doubts that such act led to stealing. To prove stealing in this case two things must be established. The first one is that the account into which the allegedly stolen money was paid into belongs to the accused persons. Secondly, that the accused person did use that money for their personal gain.

Let me say outright that there is no evidence at all to substantiate the second issue. What I find in the prosecution's evidence is an admission by PW5 that after the Euro 2,065,827.59 was transferred into the account in Monaco, there is no evidence that the accused person retrieved the same. What about ownership of the account into which the money was deposited?

According to PW3 the Euro 2,065,827.59 was deposited into account No. 106705 of SOC.CERES S.R.L. It is not in dispute that this account is in Monaco and in their written submissions the Republic has submitted that Monaco is a safe haven for tax evaders. This may be true but words spoken from the bar are not evidence.

PW3 testified that the owner of the building is CERES S.R.L. Since the money was paid to SOC.CERES S.R.L then it was paid to a different person. What makes PW3 to feel the account belongs to a different person is the word SOC. In his evidence DW1 countered this argument in the following words:-

“Yes, according to exhibit P2 the money was sent into two different accounts. These are accounts for the same company. The difference in names appears at paragraph (A) where it is written SOC.CERES S.R.L. SOC is an abbreviation for society which in French represents a company. The account in paragraph (A) on exhibit P2 is in Monaco where they speak French. So the abbreviation SOC is used to stand for the word company”.

While the evidence of PW3 over the issue seems to be based on assumption, the evidence of DW1 is based on knowledge. It is a credible explanation. The evidence of DW1 was not countered and I find the same reliable. I therefore, hold that the account where Euro 2,065,827.60 was credited belongs to the vendor. The prosecution never interviewed the vendor to know if she received the same or not. All PW3, DW1 and DW3 testified that the money reached the intended destination. So, since there is no evidence that the accused person retrieved the money, the offence of stealing cannot be proved. The third issue is answered in the negative.

This takes me to the fourth issue which concerns the 6th count. I have decided to deal with this issue immediately after the third issue because the same are interrelated. The fifth count is about occasioning loss to a

specified authority. The relevant offence under paragraph 10 of the first schedule to the EOCCA states that “any person who whether or not he is an employee of a specified authority by any willful act or omission or by his negligence or misconduct or by reason of his failure to take reasonable care or to discharge his duties in a reasonable manner, causes any specified authority to suffer a pecuniary loss ... is guilty of an offence ...”

The pecuniary loss alleged to have been occasioned is Euro 2,065,827.60. I have already said this amount is the difference between the amount started in exhibit P1 and that which is stated in exhibit P6. The issue is did the accused person in executing exhibit P6 act negligently and occasioned the loss? Let us go to evidence. All along DW1 and DW3 has asserted their innocence. DW1 testified that when he acted he had the countries interest at his heart. In a letter to one Pasqual Giorgio which is marked (f) in exhibit D3, DW1 addressed this lawyer in Rome in the following words:-

“While following instructions from the government of the Government of the United Republic of Tanzania I am confident that you as a friend of Tanzania, will have the interest of the United Republic at heart, during the entire transaction.”

DW2 described DW1 as a diligent worker, a fair leader and an educated man with impeccable integrity. On cross examination it was put to him that DW1 benefited from the chancery purchase process. His reply was that he was surprised to hear that because he has no doubt about DW1’s integrity.

Let me say something about PW2 before I proceed with other issues. Upon assessing his evidence I have reached a conclusion that PW2 was very honest in his testimony. I can dare to say he knew why he had to come to court. He had to come to tell the truth and he spoke the truth. In his evidence in chief and on cross examination he maintained that he knew nothing about the two contracts. He said what he was informed about is payment into two accounts. In their submission the prosecution has submitted that the testimony of DW1 and DW2 is evidence of desperate men who deliberately try to evade justice. With respect this is not true. If DW2 was a desperate man he would have just danced to the wrong tune of thinking that the issue was permission to use two contracts and he would have, "out of desperation" simply said that. However, he just spoke what he knows and I can dare to say this comment against him is unfair. In this case the issue of paying into two accounts is critical.

Let us proceed. In their written submissions the Republic has submitted that character evidence is admissible substantially only on a "pertinent" (sick) character trait. They have submitted further that general character for being a law abiding person is not pertinent. I agree with this submission as far as relevance of character evidence is concern. However, I do not agree that evidence of character is not pertinent in this case. These are my reasons.

According to exhibit D5 the special valuer estimated the value of the building at Euro 5.5 million. I believe this special valuer is Paul Nyotoka who is referred to in exhibit P9. I have already indicated that his report

was not produced in court. PW7 testified that according to Nyotoka's report the estimated value was Euro 5,000,000/-

The vendor's valuation report pegged the price at Euro 5,741,451.34. Finally the building was purchased at Euro 3,098,741.40 per exhibit P6 and P8. The prosecution disputes this fact for the only reason that the official contractual document exhibit P1 indicates a lesser value. They ignore the testimony of DW1 that they were forced by circumstances to execute exhibit P6 in order to buy the building at a cheaper price. Brushing aside the argument as to why exhibit P6 was executed with the contempt it does not deserve is being indifferent to the accused person. If the 1st accused person's integrity was questionable he would have signed the contract per the valuation by Nyotoka and shared the benefits with whoever is privy to the deal. He never did that and that is why I find evidence as to his character relevant.

I have assessed the evidence on record and I am satisfied that in Italy transactions in real estate are dominated by black market conditions. This is a fact from the testimony of DW1 which I find to be credible. Exhibit D7 supports this position. This is a book, as DW1 put it, which is none fictional. It is a factual book which tells the situation on the ground. Now, where even the valuation by a government valuer who was sent specifically for that purpose put the price higher than that at which it was bought, higher for almost Euro 2,000,000, what loss did the accused persons occasion? I find their only sin to be the use of two contracts. However, not only they did so for a good cause but also that act in itself did not

constitute a criminal offence. It would have formed a criminal offence if the price in exhibit P6 was above the valuation report or evidence is tendered that the money did not reach the vendor or was paid to another person other than the vendor. Neither of the two is true. The forth issue is answered in the negative.

This takes me to the second issue which concerns the 2nd, 3rd and 4th counts. In these counts it is alleged that the accused persons used documents containing erroneous material particulars intended to mislead the principal. These documents are exhibit P.3 (payment vouchers) exhibit P6 (the scrittura privata) and exhibit P8 (the payment receipt). I will be very brief at this stage.

These documents are what support the payment of Euro 3,098,741.40 to the vendor. My finding in respect of these payments is that they are the actual payments which went to the vendor. For that matter these documents does not contain any misleading particulars. The charges based on these documents would have been relevant if any or both charges in the 5th and 6th counts were proved. Lack of such proof renders the document genuine and the transactions involved proper. The 2nd issue is therefore answered in the negative too.

It should be remembered I have not decided on the first issue. I have found and held that where conspiracy is charged together with another offence and, therefore, a cognate offence it dies a natural death if the main offence is proved. In this case the main offence is stealing which has not been proved hence the need to assess if conspiracy has been established.

I have gone through the whole evidence and I have failed to notice a scintilla of evidence that the accused person did sit anywhere in the world and agreed to commit an offence. For this reason the first issue is also answered in the negative.

Finally, let me say I have failed to appreciate why the second accused was charged and that is why, throughout in this judgement, I have refrained from touching on her evidence in defence. In conclusion, I hold that the prosecution has failed to prove the charge beyond reasonable doubts in all counts and both accused persons are hereby acquitted of charges in all counts.

I.C. MUGETA

SENIOR RESIDENT MAGISTRATE

09/08/2012

09/08/2012

Coram: Hon. I.C. Mugeta – SRM

S/A: Vicent Haule SSA assisted by Rizy Kiria from PCCB

Accused: 1st accused – Present

2nd accused – Present

CC: Caroline

Advocates: Marando and Mgongolwa for the 1st accused person and
Malima and Tausi for the 2nd accused person.

Court: Judgment delivered.

Sgd: I.C. Mugeta – SRM

09/08/2012

ORDER: Right of appeal fully explained

Sgd: I.C. Mugeta – SRM

09/08/2012