

THE ROLE OF CRIMINAL INVESTIGATION IN FACILITATING ASSET RECOVERY IN ECONOMIC CRIME IN TANZANIA

*Abdulrahman O.J. Kaniki**

Abstract

This paper seeks to discuss the role of investigation in facilitating asset recovery process in Tanzania. In so doing, it gives an overview of the conceptual, legal and practical aspects tied to investigation of asset recovery cases and looks at the extent to which they facilitate asset recovery in the country. There cannot be successful asset recovery if no proper and adequate investigation is conducted. It is through investigation that watertight evidence is gathered and collected whereupon it is adduced in court against accused persons who stand charged with money laundering and/or any of predicate offences. Prosecution cannot secure conviction, which is a pre-condition for asset forfeiture if both criminal and financial investigations are not adequately or thoroughly well done. Equally important, application for forfeiture order process in court after conviction depends on what was revealed by investigators in respect of assets that are subject to forfeiture. The paper finds that the legal-institutional framework on dealing with asset recovery cases in Tanzania is inadequate thereby causing

* LL.B (Hons), LL.M (Dar); Master Degree in Security and Strategic Studies (National Defence College-Tanzania); PhD (Law), Dar. This author can be contacted at abdulkaniki@yahoo.com.

investigation to face several challenges. Having identified those challenges, the paper makes some recommendations aimed at remedying the situation. The recommendations focus on reforming the laws so that they adequately address asset recovery issues in the country.

Keywords: criminal investigation, investigators, predicate offences, conviction-based forfeiture, asset recovery.

1. INTRODUCTION

Crime has nowadays become a complex issue to handle.¹ Criminals, who are now highly sophisticated in terms of capacity and capability, well-coordinated and technologically conscious, adapt and take advantage of changes that occur in the society. They are currently becoming increasingly mobile and often take deliberate advantage of internal borders and, indeed, they are disregarding the borders between countries. This calls for investigators to painstakingly carry out their assignments thoroughly well in the course of pursuing cases so that they gather all necessary information.

2. CONCEPTUAL DIMENSIONS

2.1 Defining the term “Criminal Investigation”

The role of the law enforcement machinery is to protect society against wrongdoers. This noble duty can be achieved by law enforcement agencies through, among other things, conducting

¹ Crime has so far increased and expanded within national boundaries and across international frontiers thereby posing threats to human security, peace and sustainable development.

effective investigative functions as envisaged in what investigation is all about. The term “investigation” is defined in relation to criminal law by a number of authors. According to John Horgan, an investigation is an observation or inquiry into allegations, circumstances, or relationships in order to obtain factual information.² In the same vein, Steven Brandl refers to an investigation as the process of collecting information in order to reach some goal. Applied to the criminal realm a criminal investigation refers to the process of collecting information (or evidence) about a crime in order to: (1) determine if a crime has been committed; (2) identify the perpetrator; (3) apprehend the perpetrator; and (4) provide evidence to support a conviction in court.³ According to him, if the first three objectives are successfully attained, then the crime can be said to be solved. Several other outcomes such as recovering stolen property, deterring individuals from engaging in criminal behaviours, and satisfying crime victims have also been associated with the process.⁴ Similarly, when police officers gather facts and evidence necessary to establish the truth or otherwise, they are in fact conducting investigation.⁵

On the same footing, the High Court of Tanzania once described the term “investigation” in the case of *Simon v. R.*⁶ to include collection of evidence by a police officer, which primarily consists of facts and circumstances of the case. If upon completion of

² Horgan, J.J., *Criminal Investigation*, 2nd Edn., New York: McGraw-Hill, Inc., 1979, p.1.

³ Brandl, S.G., *Police: Criminal Investigation*, Encyclopedia of Crime and Justice, 2002.

⁴ *Ibid.*

⁵ Mchome, S.E., *Due Process of the Law: The Rights of Suspects and Accused Persons*, in Peter, C.M. and Juma, I.H. (Eds.), *Fundamental Rights and Freedoms in Tanzania*, Dar es Salaam: Mkuki na Nyota Publishers, 1998, p.155, at p.155.

⁶ (1970) HCD 335.

investigation it appears to the officer conducting investigation that there is no sufficient evidence or reasonable ground, he may decide to release the suspected person.

Noting from what is stated above, it may be argued that criminal investigation is essentially a process through which investigators, mainly police officers who are the major actors of criminal law in terms of detection and prevention of crime, gather facts and evidence necessary to establish the truth or otherwise in respect of reported crime incidents or intelligence-driven proactive works targeting suspects or illegal activities.⁷ It is searching for truth; that is the investigator has to find whether the allegations are true or false. The completed investigation process determines what further actions should be taken as far as criminal justice administration is concerned.

2.2 Asset Recovery Investigation: General Overview

Asset recovery investigation sets in motion asset forfeiture processes. In fact, as Lasich notes, the investigative process is the core activity that must form the basis for any asset recovery effort.⁸ Such investigation enables collection of evidence that will prove commission of predicate offences or money laundering and also support application for forfeiture order in court upon conviction of an accused person. It strives to identify the criminal networks and

⁷*Police General Orders (PGOs) of the Tanzania Police Force, 2nd Edn, 2006, state under PGO No.1, para. 19 that:*

“The purpose of police investigations is generally to unveil all facts relating to information of a reported or imminent crime incidence for appropriate decision and action.”

⁸Lasich, T., *The Investigative Process-A Practical Approach*, in Basel Institute on Governance, International Centre for Asset Recovery, *Tracing Stolen Assets: A Practitioner’s Handbook*, Basel Institute on Governance, Basel, Switzerland, 2009, p.49, at p.49.

extent to which they are linked to the criminality at hand; identify and tracing the proceeds and instrumentalities of crime that are subject to forfeiture; and develop evidence which can be used in criminal proceedings.⁹ It has been stated that only a serious and deep investigation of assets can lead to a good outcome in the fight against the criminality generating high profits.¹⁰ Therefore, an investigator of an asset recovery case should right from an initial stage of investigation to the end bear in mind that he has to effectively conduct an investigation, which has the potential of building a strong case in terms of, *inter alia*, identifying serious and organised criminality that is alleged to have generated illicit assets; identifying, tracing and locating assets; identifying ownership and use of assets; tracking movements some of which might be destined to remove or dissipate the assets; and linking offenders with criminality and those assets alleged to have been unlawfully acquired.

It is apparent that the purpose of investigating asset recovery cases is mainly to ensure that adequate evidence is collected so that all mechanisms and processes that are involved in asset recovery proceedings sail through smoothly. The collected evidence should be able to identify and document money flow during criminal activities. That is to say it should discover where the money comes from (origin), how it is transformed, used and where it flows.¹¹ The

⁹See FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, The FATF Recommendations, February 2012, Interpretative Note to Recommendation 30, at p.96, para. 2.

¹⁰European Union, *White Paper on Best Practices in Asset Recovery*, CEART Project, Published by Ministerio Del Interior, Madrid, Spain, 2009, p.33. Source: www.projectceart.org, accessed on 30th August, 2017.

¹¹Republic of Serbia, *Financial Investigation Strategy for the Period from 2015 through 2016- Proposal*. Source: <https://www.mpravde.gov.rs/.../financial->

connection between the origin of money, beneficiaries, the moment when the money is received and the place where it is deposited can provide information about criminal activities and evidence about the committed criminal offence.¹² In achieving all these therefore, asset recovery investigation should aim at identification, tracing, freezing and seizing.

2.2.1 The Role of Criminal and Financial Investigations in the Asset Recovery Process

It needs to be appreciated at the outset that asset recovery is a process, which incorporates several integrated stages. Those stages should be fully followed; otherwise the process cannot be completed, and chances for having successful asset recoveries fade away. It is in this understanding that investigation of asset recovery cases is somehow distinguished from the one that is involved in ordinary criminal offences. Whereas ordinary cases, where evidence is adequately and effectively investigated end up with conviction, asset recovery cases go beyond that. There is a further forfeiture process that should take place upon conviction. Therefore, investigators and prosecutors have to take note of this right from initial to final stages of the investigation. This explains why financial investigation, has been established to operate alongside the (traditional) criminal investigation. Its aim is to identify, trace, seize and confiscate proceeds from crime in parallel to a criminal investigation of a criminal offence resulting in a material benefit.¹³ It means that there should be parallel

investigation-strategy-for-the-period-from-2015-through-2016, accessed on 2nd September, 2017.

¹²*Ibid.*

¹³ Golobinek, R., *Financial Investigations and Confiscation of Proceeds from Crime: Training Manual for Law Enforcement and Judiciary*, CARDS Regional

investigations focusing on the predicate offence and revealing assets illicitly acquire simultaneously. It has so far been noted that with financial and economic crimes featuring prominently in our societies, the ordinary criminal investigation alone appears to be inadequate in addressing them. Since investigators in the ordinary criminal investigation tend to concentrate much on establishing elements necessary to prove substantive offences, there is a risk of giving room for assets that are liable to forfeiture to be hidden or dissipated. Conducting financial investigation alongside an ordinary criminal investigation is considered to be a good timing and more effective for minimising chances of concealing or dissipating the assets.

Moreover, majority of crimes committed within and outside national boundaries have financial gain as the motive behind. As such criminals use the latest technologies to provide themselves with links between criminals all over the world without concrete need of physical contact. They easily build international connections for planning and the perpetration of crimes, with the use of new technical know-how and equipment.¹⁴ That means whereas the role of traditional criminal investigation of searching evidence to prove predicate offences cannot be underestimated, financial investigation is very instrumental in building up an asset recovery case in terms of identification and tracing of assets, gathering evidence and securing the assets so that later on forfeiture thereof is effected. As a matter of fact, financial investigation is regarded as

Programme 2002/2003, Council of Europe, European Commission, France, August 2006, p.28. In fact majority of criminal activities fall under economic crime.
¹⁴Adegbie, F.F. and Fakile, A.S., *Economic and Financial Crime in Nigeria: Forensic Accounting as Antidote*, British Journal of Arts and Social Sciences, Vol.6 No.1 (2012), pp.37-50, p.42. Source: <http://www.bjournal.co.uk/BJASS.aspx>, accessed on 8th August, 2017.

a basic instrument for asset recovery. This stems out from the reality that only a serious and deep investigation of assets can lead to a good outcome in the fight against the criminality generating high profits.¹⁵

According to Financial Action Task Force on Money Laundering [FATF], financial investigation refers to an inquiry into the financial affairs related to a criminal activity with a view to identifying the extent of criminal networks and the scale of criminality; identifying and tracing the proceeds of crime, terrorist funds or any other assets that are, or may become, subject to confiscation; and developing evidence which can be used in criminal proceedings.¹⁶ Brown *et al* sum it up by arguing that financial investigation refers to the collection, analysis and use of financial information in its broadest sense, by law enforcement organisations.¹⁷ To them, it is one of many specialist investigative approaches employed by law enforcement when tackling organised crime and it is increasingly well-established discipline.¹⁸ All in all, much as traditional criminal investigation has instrumental role to play, financial investigation features prominently in investigation of asset recovery cases. In fact financial investigation is an essential supplement to the traditional criminal investigation,¹⁹ as it also assists parallel investigation into predicate offences by identifying motives, associations and links to people and places; identifying the use of

¹⁵ European Union, *White Paper on Best Practices in Asset Recovery*, above note 10.

¹⁶ FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, above note 10, at p.96, para. 2.

¹⁷ Brown, R. *et al.*, *The Contribution of Financial Investigation to Tackling Organised Crime: A Qualitative Study*, Research Report 65, Home Office, London, September 2012, p.2.

¹⁸ *Id.*, p.1.

¹⁹ European Union, *White Paper on Best Practices in Asset Recovery*, above note 10, at p.39.

other services such as phones, transport and amenities relevant to the case; locating or identifying suspects, witnesses or victims; providing information on suspect's movements (proactive covert use of financial information); providing information to address the issue of prolific and priority offenders where no previous method has been successful and tracing persons.²⁰

2.2.2. *Investigation Stages*

This part ventures on stages that asset recovery investigation has to pass through. It needs to be noted at the outset that moving from one stage to the next depends much on each prior stage being properly dealt with. As such there is no way any of them can be skipped. Moreover, a successful investigation of each of the stages involved in the whole asset recovery investigation requires adequate knowledge and skills on the part of investigators. Another precondition is that investigators should abide by legal conditions and practice that apply in the criminal justice system within and outside the country. In fact the six basic questions maxim: "who, what, where, when, how and why" comes in. The maxim has an important role to play in setting in motion the administration of criminal justice system. This is because the evidence collected therefrom assists to answer questions crucial to investigation namely, what has happened (offence); where did it happen (location); how did it happen (*modus operandi*); when did it happen (time factor); who did it (the offender) and why (motive). It was held in the case of *Simon Abonyo v. R.*²¹ that it is not proper for a court to convict an accused person of the crime which it is not known when and where it took place. The principles should therefore be strictly adhered to.

²⁰ FATF, *Investigations Guidance*, FATF Report, June 2012, p.9, para.23.

²¹ Court of Appeal of Tanzania at Mwanza, Criminal Appeal No.144 of 2005 (Unreported). See also the case of *Mwita Nyamhanga v. R.* (1992) TLR 118.

Criminal investigation plays a contributory role not only in crime prevention and crime solving but also in the administration of criminal justice system. When a crime occurs, investigation is immediately conducted. At the conclusion of the investigation and upon the truth coming out, the offender is sent to court to answer criminal charges against him. It is from the charges, the offender is made aware of the case he is facing with regard to the time of the incident and place so that he would be able to prepare his defence. However, at this point in time the offender is presumed innocent until he is proved guilty. The presumption of innocence is in fact a fundamental principle underlying the criminal law and enforceable under the Bills of Rights as enshrined in several constitutions the world over, including the Constitution of the United Republic of Tanzania.²² Thus under this basic right, a person is presumed to be innocent until he is proved guilty by a competent court through a due process. The burden of proving guilt is entirely on the prosecution. The standard of proof is beyond reasonable doubt. The accused does not have the duty to prove his innocence. This is so because the presumption of innocence always remains with a suspected person until he is proved guilty by a court of law. Investigators should therefore bear in mind that they have the duty to gather facts and evidence to uncover the truth, while bearing in their minds that the offenders before them are presumed innocent until they are proved guilty by courts of law.

Otherwise the truth of the matter under investigation will not be uncovered thereby defeating the delivery of appropriate justice.

²² Bill of Rights in Tanzania is provided under Part III of Chapter One of the Constitution of the United Republic, which covers Articles 12-32. Presumption of innocence is provided under Article 13(6)(b) of the Constitution.

On this note, investigators should understand that the collected evidence will be adduced in court to prove cases against offenders beyond reasonable doubt. Thus in order to prove or disprove the commission of offence, evidence is required. Putting it in other words, investigation is conducted to search for those facts which will lead one to conclude whether something mischievous has happened or not. To achieve all this, there are some basic principles, which investigators should abide by in the course of conducting investigation especially at the scene of crime.²³

Those investigation stages are as follows.

2.2.1.1. Identification and Tracing of Assets

Upon receipt and analysis of preliminary information from several sources regarding the illegally obtained assets, investigators' next move is beginning an investigation. The starting point is identification and tracing of the assets, which form the basis of asset recovery efforts. Identification of assets coming from the crime is of paramount importance because if the unlawfully acquired assets are unknown, they are unlikely to be forfeited in future.²⁴ Thus once assets are identified, they must be traced, that is to say, their location (physical or legal) because identification is meaningless if their location is not known.²⁵ According to Monteith and Dornbierer, asset tracing refers to the process whereby an investigator tracks, identifies, and locates proceeds of crime.²⁶ Allen points out some of

²³ Crime scene means a place, premises, location or anywhere an alleged crime/incident has been committed. It may be indoor, outdoor or involving automobiles, vessels or other carriages, etc.

²⁴ European Union, *White Paper on Best Practices in Asset Recovery*, above note 10, at p.33.

²⁵ *Ibid.*

²⁶ Monteith, C. and Dornbierer, A., *Tracking and Tracing Stolen Assets in Foreign Jurisdictions*, International Centre for Asset Recovery, Basel Institute on

the inquiries to be considered namely, (a) where are the perpetrator and diverted assets likely to be? (b) Does the perpetrator have connections in other domestic or foreign locations? (c) How sophisticated is the perpetrator? (d) If an individual, does the perpetrator's particular lifestyles offer any clues as to where he or she might disperse or hide assets? (e) Are there individuals who worked with know the perpetrator who could provide information on a confidential basis? And lastly, (f) if assets are offshore and a judgment can be obtained in one jurisdiction, can it be enforced easily where the assets are located?²⁷ Thus tracing should involve locating of assets and identifying persons, organisations or legal entities, which are connected with or linked to those assets at issue. In this endeavour, investigators should try their level best to establish either directly or indirectly traceability and nexus of the assets to the underlying crime alleged to have been committed and perpetrators. The reason behind is that forfeiture is limited to assets involved in the predicate offences upon conviction. Therefore, as Crag Gaumer points out, as part of every criminal case, investigators should consider forfeiture, examine the connection between the assets to forfeit and the offences to be charged, and find out early on to whom the assets belong in title and in fact.²⁸ The tracing should also include an analysis of the assets and financial flows. Useful sources through which assets can be identified and

Governance, Basel, Switzerland, Working Paper Series No.15, 2013, p.10. Source: <http://www.fatf-gafi.org/pages/faq/Moneylaundering>, accessed on 10th November, 2015.

²⁷ Allen, R., "The Art of Asset Recovery," 135(10) *CA Magazine*, December 2002, at p.28. Source: An article by Donoho III, C.R., "International Asset Recovery: A Model Plan," Stroock & Stroock & Lavan LLP, New York, NY, p.4, <https://www.ibanet.org/Document/Default.aspx?DocumentUid=0E3CE61F-2A5E...>, accessed on 16th September, 2017.

²⁸Gaumer, C., "Criminal Forfeiture," 55(6) *United States Attorneys' Bulletin*, November 2007, p.21, at p.22.

traced include various but relevant documents, electronic data, informants, accounting, information from banks and various government institutions. Government institutions' records from registers or databases provide useful sources for formal information that can be of assistance in asset tracing. They include land registry, company register, tax records, vehicle registration register, criminal records, immigration records, border crossing and customs records, register of non-profit organisations, etc.

Asset tracing aims at achieving three main objectives namely, locating the assets, linking them to an unlawful activity so as to obtain freezing and forfeiture orders, and proving the commission of the relevant offences.²⁹

This is a very important stage because it determines whether an investigation will be successful or not. The better investigators are at identifying and tracing illicitly acquired assets and ultimately collects sufficient and relevant evidence, the greater chances to secure criminal convictions of predicate offences and support for applications of forfeiture orders in court. It is fundamentally crucial to identify all the assets that are under direct control of persons alleged to have acquired them through unlawful means or under their control but through third parties and then trace them. Tracing should be undertaken in time or immediately or else assets "can be easily and speedily moved between places, or across borders."³⁰

²⁹ Monteith C. and Dornbierer, A., "Case Strategy and Investigation Planning," in Basel Institute on Governance, *Tracing Illegal Assets – A Practitioner's Guide*, International Centre for Asset Recovery, Switzerland: Basel, 2015, pp.25, at p.25. Source: <http://www.baselgovernance.org/sites/collective...pdf>, accessed on 5th September, 2017.

³⁰ Goredema, C., "Tracing Proceeds of Crime in Southern Africa: Challenges and Milestones," in Goredema, C. (Ed.), *Money Laundering Experiences*, Institute for Security Studies, Africa, Monograph No.124, June 2006, p. 121, at p.121.

Moreover, utmost confidentiality of all the people who might be involved in the tracking process is highly needed. The moment criminals learn that their illegally acquired assets are tracked down; they are ready to frustrate the process at any cost.

However, it is not all that easy for investigators to identify and locate assets. There are several barriers that are encountered in the process. Criminals are always exploring new ways of concealing their illicitly acquired assets within and outside the country in order to hide their true origin. As Monteith and Dornbierer put it, they are becoming increasingly skilled at developing new and innovative ways to disguise illegally obtained assets.³¹ Eventually it can be very difficult to identify and locate the assets especially in an electronic age when funds can be moved around the world with pressing of a button. To say the least, asset tracing poses a challenge to investigators.

2.2.1.2. Some Barriers to Identification and Tracing of Assets

Much as investigators strive to use all available tools within national and across borders in order to discover and crack those ways thereby dispose of those assets and criminals as well, investigation of some cases end up without identifying and locating the assets due to a number of barriers. Some of the barriers are as follows:

(a) Bank Secrecy Laws

Bank secrecy laws appear to be a hurdle for timely and effective investigation that would lead to identify and locates assets alleged to have been obtained through unlawful means. It is well settled that usually a considerable part of proceeds of crime ends up deposited in domestic or foreign banks. Traditionally information held by

³¹ Monteith, C. and Dornbierer, A., *Tracking and Tracing Stolen Assets in Foreign Jurisdictions*, above note 12, at p.12.

banks is held in confidence on behalf of account holders. In order to identify and locate the proceeds of crime, investigators need to have access to bank accounts and other relevant bank records. However, investigators encounter difficulties as a lot of hurdles are ahead of them especially when assets cross borders. The difficulties emanate from the fact that proceeds of crime need to be traced in the course of investigation, which is before any trial. The perpetrator of the underlying crime may abuse principles of presumption of innocence and banking secrecy to stash the assets.

In many jurisdictions, investigators must obtain court orders prior to the access. This is a bottleneck because during the time when a court order is applied for, anything may happen thereby risking removing or dissipating the proceeds.

(b) Difficulties in Interpreting Documentation

Asset recovery investigation involves physical and electronic documentation that are at times in volumes with detailed information. As such investigators encounter difficulties in interpreting some of the documents correctly thereby subjecting asset tracing processes to a dead end. Take for instance bank documentation, it is argued that there is nothing to distinguish a criminal financial flow from a legal one, except for its economic justification.³² In order to establish economic justification or otherwise in respect of a person alleged to have been connected with illegal assets, an investigator needs to deeply go through the documents with “follow the money trail” in mind. To accomplish this mission, an asset recovery investigator needs to have accounting skills so that he can navigate through financial transactions with

³² Chirati, H., *Financial Investigations*, Unpublished Paper Presented at East African Association of Anti-Corruption Authorities [EAAACA] Training held in Kampala on 27th January, 2012, p.2.

focused mind. The investigator should know that global financial system has brought some developments and innovations in the financial sector. He should be conversant on how such financial system operates and extent to which criminals can use it to hide assets.

(c) Difficulties in determining the beneficial owner of assets

Criminals always come up with several techniques to conceal identities in respect of ownership of their unlawfully obtained assets. They do everything possible to cover their tracks.³³ Apart from moving the assets from one place to another within national frontiers or across borders, they may at times put assets in the names of their families, friends, or close associates. In such situations, asset tracing which is aimed at revealing true origin, ownership of assets and linking them with serious offences alleged to have been committed becomes an uphill task. Putting it in other words, investigators face difficulties not only in locating assets but also determining the beneficial owners thereof. Lack of centralised assets registration has also a share in making it difficult to determine the beneficial owners of assets under investigation. Things become worse with cash-based economy in most of developing economies. It is not mandatory to conduct large transactions through banks.³⁴ Tanzania, being one of the developing economies, is largely a cash based economy. This means that most financial transactions are carried out in cash. It is estimated that 60% of money in the country are kept outside

³³ Pieth, M., "Recovering Stolen Assets- A New Issue," in Pieth, M. (Ed.), *Recovering Stolen Assets*, Peter Oxford: Lang, 2008, p.3, at p.10.

³⁴ Pereira, P.G. et al., *Using Money Laundering to Fight Corruption in Developing Countries: Domestic Obstacles and Strategies to Overcome Them*, Basel: Basel Institute on Governance, Working Paper Series No.14, December 2012, p.49.

banks.³⁵ This means that most financial transactions are carried out in cash, thereby posing a big challenge in tracing and identification of beneficial asset owners.³⁶ As a result, an investigation of predicate offences of such nature, that is assets whose acquisition involved cash transactions, becomes difficult to carry out. Dealing in cash tends to leave little or no audit trail, and for this reason criminals love to deal in cash. Cash transactions leave the law enforcement agencies with disjoint or no information to work with. It becomes difficult for investigators and other actors to trace and track proceeds of crime. The seriousness of the matter is exacerbated by the fact that there is no mechanism that would enable assets to be registered thereby making it easy for investigators to trace and identify those assets that are alleged to have been illegally acquired. This is because apart from cash transactions, a substantial part of assets are registered in names of suspects' relatives such as spouses, brothers, sisters, children, friends, agents and the like, thereby making it difficult to connect ownership versus suspects. Obviously this poses a big challenge in the fight against most of the predicate offences. Dealing in cash tends to leave little or no audit trail, and for this reason criminals love to deal in cash. Cash transactions leave the crime busters and other stakeholders with disjoint or no information to work with.³⁷

³⁵ According to Prof. Benno Ndulu, then Governor of Bank of Tanzania (BoT), in his unpublished address to the 18th Conference of Financial Institutions he made on 24th November, 2016 in Arusha, six out of ten shillings held in cash is outside banking system. Source: *Guardian Newspaper* (Dar es Salaam), Friday, 25 November 2016, The Guardian Limited, Dar es Salaam, p.1.

³⁶ Moreover, cash transactions also create conducive environment for tax evasion and avoidance. This is because most of the transactions are conducted in an informal manner and they are not registered as formal enterprises at all. As such it is not possible to trace them with a view to see whether taxes were genuinely paid out of those transactions.

³⁷ The United Republic of Tanzania, Ministry of Finance, *Financial Intelligence Unit Annual Report 2012/2013*, p.16.

(d) *Multi-jurisdictional Complexities*

While part of the proceeds of crime may remain in the country, the rest may cross the national boundaries. Having identified the jurisdictions where the assets are suspected to have been located, the next move is to initiate a process of physically tracing them. As such mutual assistance between two countries is inevitably required. However, the fact that nation states jealously safeguard their jurisdictions³⁸ over criminal justice matters has produced a world where criminal justice policies, institutions, procedures and laws vary widely and deeply between the many countries of the world. Eventually there are existing multi-jurisdictional complexities. This has eventually been a snag to effective asset tracing. It needs to be understood that effective international responses are affected by insufficient cooperation among states, weak coordination among international agencies; and inadequate compliance by many states.

2.2.1.3. *Gathering the Evidence: Establishing the Illegality of Assets*

Once an investigator identifies and traces the assets, the next move is to gather evidence in order to establish illegality of the assets. Gathering the evidence is in line with the fact that mere identifying and tracing the assets alone do not enable investigators to forfeit and return the assets to rightful owners. There must be actual evidence to establish illegality of the assets. Therefore, the evidence to be gathered is geared at establishing a link between the assets reported as suspicious and their criminal origin. This is so because there is always a connection between the assets and crimes committed by criminals with a motive of economic gain. In

³⁸ The dual notions of national sovereignty and exclusive state jurisdiction over criminal law matters, which continue to be supported by the United Nations Charter and by international law in general, still feature prominently in the development of modern criminal justice systems, whereas national borders are becoming increasingly obsolete and irrelevant to criminal activities.

addition, the gathering of evidence may also lead to the next stage namely, freezing and seizure of assets alleged to have been illegally acquired. Moreover, it is this evidence that will be used to prosecute the offender against the predicate offences that generated the illicit assets and support forfeiture application order in court following a conviction. It is therefore upon an investigator to know who to approach for information; where, in and outside the country, such information can be found; what can be used to create a financial profile and how to manage the collated information in the most efficient and effective manner.³⁹ To underscore this noble responsibility of evidence gathering, investigators should possess specialised skills and knowledge necessary to adequately carry out asset recovery investigation. In addition, they should use all available avenues in and outside the country in order to achieve tracing objectives. Otherwise they are doomed to a dead end because they may face difficulties in establishing an evidential link between assets capable of being forfeited and the crimes.

2.2.1.4. Securing the Assets: Asset Freezing and Seizure

When assets have been identified and located, efforts must be focused on freezing or seizing them. This is a stage aimed at securing assets temporarily for a period necessary for carrying out investigation into their supposed link to criminal activity and eventually allow forfeiture procedures and processes to be brought to a judicial end.⁴⁰ Failure to do so may give rise to asset disperse

³⁹ Atkinson, P., "Effective Investigation of Assets, Practical Application of Mutual Legal Assistance and Asset Recovery," in OECD Anti-Corruption Network for Eastern Europe and Central Asia, *Unpublished Proceedings of the Seminar "Effective Means of Investigation and Prosecution,"* held in Bucharest, Romania, 20-22 October 2010, p.87, at p.89.

⁴⁰ Schmid, J-B., "Seizure," in Pieth, M.(Ed.), *Recovering Stolen Assets*, Peter Lang, Bern, 2008, p.231 at p.231.

thereby frustrating any forfeiture order that would be made by court in later stages. Freezing is a preventive measure applicable to bank accounts and other financial products that prevents the nominative owner of such products from moving, transferring or converting these assets.⁴¹ It is a preventive measure in the sense that there may be a real or perceived risk that the criminal will dissipate the assets or there are possibilities for the criminals to move assets out of the jurisdiction. All these are good reasons for the assets to be frozen or else they may be in danger if left in possession or control of the criminals. The most important thing is to maintain confidentiality until freeze is in place, and also to gain cooperation with other foreign jurisdictions, where necessary.⁴²

Investigators should however, note that freezing has to be approached carefully. Proper timing should be observed on when to effect asset freezing. Otherwise investigators can lose some more important evidence. Thus, before freezing takes place, an analysis of evidence that has already been collected should be undertaken. Then a conclusion should be made whether or not freezing at that time will affect gathering the other evidence which has not yet been retrieved.

Whereas freezing is much based on bank accounts and other financial products, seizure is as well a preventive measure but applicable to movable and immovable assets. Its main purpose is

⁴¹ Atkinson, P. "Effective Investigation of Assets, Practical Application of Mutual Legal Assistance and Asset Recovery," above note 47, at p.91.

⁴² Marshall, A., *What's Yours Is Mine: New Actors and New Approaches to Asset Recovery in Global Corruption Cases*, CGD Policy Paper 018, Washington DC: Center for Global Development, April 2013, p.8. Source: <http://www.org/content/publication/whats-yours-is-mine>, accessed on 22nd September, 2017.

to deprive owners thereof from selling or transferring them. Such assets are not only part of evidence to be collected and which is tendered in court as exhibits during trials of predicate offences but also subject matter of forfeiture orders. As a matter of fact, one of the most important aspects of forfeiture procedure is the ability, before trial, to secure the availability of assets for forfeiture.⁴³ It is for these reasons that emphasis is put that once assets have been seized, the investigation must be carried out to validate the measure and collect the elements of proof for possible further forfeiture.⁴⁴ Thus, assets that could be seized include those objects that can be considered as evidence of crime; instruments of the crime; proceeds of crime and other assets with illicit origin that cannot be proven but that may be useful for forfeiture of equivalent value.⁴⁵ However, all this will depend on whether the seized or frozen assets are safely kept or stored. Otherwise the intended assets can deteriorate and thus lose the economic value.

3. ASSET RECOVERY INVESTIGATION IN TANZANIA

3.1. The Role of Investigators

Just as in other jurisdictions, investigators from law enforcement and other investigative authorities in Tanzania have the role to investigate asset recovery cases. Serious and organised crimes have permeated the fabrics of the country. As such, investigators have no choice but to embark on dealing with these profit generating crimes. There is no doubt that these are predicate offences, which have domestic and international dimensions. With

⁴³ Gaumer, C., "Criminal Forfeiture," 55(6) *United States Attorneys' Bulletin*, November 2007, p.21, at p.25.

⁴⁴ Schmid, J-B. "Seizure," above note 44, at p.237.

⁴⁵ European Union, *White Paper on Best Practices in Asset Recovery*, above note 11, at pp.38-39.

domestic dimension, focus is on those illegal activities that generate illegal proceeds within the national borders that target local sectors of the economy into which illegal proceeds are channeled or where they are invested. International dimension encompasses all aspects that facilitate stashing away of looted assets across borders and mostly deposited in offshore bank accounts and in some cases in countries where no mutual legal assistance agreements exist with Tanzania.⁴⁶ Normally criminals have strong linkages and connections in abroad, which enable them to hide their ill-gotten gains.

Much as criminals go on developing complex and sophisticated means of diverting criminally acquired assets, recovery of assets requires high level technical capacity to take pace with. Expertise is required in conducting financial investigation, forensic accounting and understanding the legal requirements when requesting mutual legal assistance from foreign jurisdictions. Investigators are therefore expected to be skilled, knowledgeable and well resourced in order to adequately investigate these cases. The resources required range from human and financial resources to adequate working tools and equipment. Moreover, there should be a well developed financial investigative system, which is a precondition for a successful forfeiture proceeding.

Being part of criminal justice administration, asset recovery investigation in Tanzania involves various law enforcement and investigative authorities. It means that the Tanzania Police Force, which has a central role to play in this endeavour is not the sole

⁴⁶Amani, N.P., "Civil Forfeiture in Tanzania: A Panacea for Recovering Illicitly Acquired Property by Politically Exposed Persons (PEPs)?" 41(2) *Eastern Africa Law Review*, December, 2014, p.125, at p.144.

organ to conduct criminal investigation. However, primarily the Tanzania Police Force is the lead investigative organ. It is the only one law enforcement agency mandated with different laws such as the Criminal Procedure Act,⁴⁷ and the Police Force and Auxiliary Service Act,⁴⁸ to conduct investigation of all kinds of crimes falling under the Penal Code,⁴⁹ and other penal laws. Those other penal laws include the Economic and Organised Crime Control Act,⁵⁰ the Prevention of Terrorism Act, 2002,⁵¹ the Anti-Money Laundering Act, 2006,⁵² the Anti-Trafficking in Persons Act, 2008,⁵³ and the Proceeds of Crime Act, 1991,⁵⁴ to mention but just a few.

Other law enforcement agencies have been conferred powers to duly conduct investigation but to specific areas in accordance with specific laws. Such agencies include the Prevention and Combating Corruption Bureau, which is mandated by the Prevention and Combating of Corruption Act, 2007⁵⁵ to conduct investigation and prosecution on corruption and other related offences; the Drug Control and Enforcement Authority, which is established by the Drug Control and Enforcement Act, 2015,⁵⁶ to undertake, among other things, investigation on drug related matters; and the Tanzania Revenue Authority is empowered by various tax laws to investigate on tax criminal offences.⁵⁷ Others include the

⁴⁷ Cap. 20 [R.E.2019], ss. 5 and 10.

⁴⁸ Cap. 322 [R.E.2002], s.5.

⁴⁹ Cap. 16 [R.E.2019].

⁵⁰ Cap. 200 [R.E.2019].

⁵¹ Cap. 19 [R.E.2002].

⁵² Cap. 423 [R.E.2019].

⁵³ Act No. 6 of 2008.

⁵⁴ Cap. 256 [R.E.2019].

⁵⁵ Cap. 329 [R.E.2019].

⁵⁶ Cap. 95 [R.E.2019], s.4.

⁵⁷ Those laws include the Income Tax Act, Act No.11 of 2004; the Value Added Act, Cap. 148 [R.E.2019]; Stamp Duty Act, Cap.189 [R.E.2019]; the East African

Immigration Services Department,⁵⁸ Tanzania National Parks Authority [TANAPA],⁵⁹ Ngorongoro Conservation Area Authority [NCAA],⁶⁰ Tanzania Wildlife Management Authority [TAWA],⁶¹ Forest Department⁶² and Fisheries Department,⁶³ which are responsible for and empowered to carrying out investigations in respect of various offences set out in various pieces of legislation governing daily activities in their respective areas of operation.⁶⁴ The bottom-line is that it is only where a specific penal law expressly and specifically mentions a specific law enforcement organ or authority to undertake investigation, the Tanzania Police Force shall be relieved from conducting investigation. Otherwise it remains a fact that most of the asset recovery investigation is conducted by the Tanzania Police Force.

The National Prosecutions Service comes in to work very closely with all the above mentioned investigative law enforcement organs in the area of investigation under the auspices of prosecution-led investigations. The Service, whose head is the DPP, is empowered

Community Customs Management Act, 2005, Act No.1 of 2005, and the Tax Administration Act, Cap. 438 [R.E. 2019].

⁵⁸ The Immigration Act, Cap.54 [R.E.2002]; the Tanzania Citizenship Act, 1995, Act No.6 of 1995; the Tanzania Passports and Travel Documents Act, 2002, Act No.20 of 2002, and their respective subsequent Regulations.

⁵⁹ The Tanzania National Parks Act, Cap. 282 [R.E.2002].

⁶⁰ The Ngorongoro Conservation Area Act, Cap. 284 [R.E.2002].

⁶¹ Tanzania Wildlife Management Authority [TAWA] was established under the Wildlife Conservation (The Tanzania Wildlife Management Authority) Establishment Order, 2014, Government Notice No. 135 of 9th May, 2014; read together as one with the Wildlife Conservation (The Tanzania Wildlife Management Authority)(Amendment) Establishment Order, 2015, Government Notice No. 20 of 23rd January, 2015.

⁶² The Forest Act, Cap.323 [R.E.2002].

⁶³ The Fisheries Act, 2003, Act No.22 of 2003.

⁶⁴ Feleshi, E.M., "Prosecution-led Investigation in Tanzania: The Role of the National Prosecutions Service in Criminal Investigations," *National Prosecutions Service (NPS) Journal*, Issue No.002, April-June 2013, p.4, at p.6.

by the National Prosecutions Service Act, 2008⁶⁵ to guide and coordinate, or even to take part in the investigations of some reported serious cases.⁶⁶ Prosecution-led investigation is premised on the standpoint that the ultimate goal of both the investigation and the prosecution is to fight crime through ensuring that all the material evidence is gathered at right time. It is that evidence that will help a trial court to dispense justice the moment a criminal charge or information is preferred against an offender. The need for prosecution-led investigation in Tanzania cannot in any way be underestimated.

3.1 Investigation Performance in Respect of Predicate Offences

Asset forfeiture regime in Tanzania is conviction-based. That means the prosecution must first prove predicate offences beyond reasonable doubt before illicitly acquired assets are forfeited. Putting it in other words, forfeiture orders must be preceded by conviction of an accused.⁶⁷ Upon conviction, the prosecutors apply for forfeiture orders before the court. Indeed, the orders are in addition to any punishment the court may impose for an offence. All this is aimed to ensuring that the convict is denied enjoyment of the fruits of his criminal acts. It also serves as a deterrent and shows the state resolves to suppress the conditions that lead to unlawful activities. Indeed, the Proceeds of Crime Act⁶⁸ and other related pieces of legislation have elaborate provisions regulating

⁶⁵ Cap.430 [R.E.2019].

⁶⁶ *Ibid.*, ss.16 and 17.

⁶⁷ See sections 9 and 14 of the Proceeds of Crime Act, Cap. 256 [R.E.2019], which provide that conviction is one of the preconditions for the forfeiture order to be issued by the court.

⁶⁸ Cap. 256 [R.E.2019].

confiscation of criminal proceeds, which are generated by predicate offences.

It has been argued that most of the predicate offences are very complex and investigators require specialised expertise to investigate them. Thus an investigator who conducts investigation of a predicate offence without letting financial investigation operate parallel to traditional criminal investigation should be rest assured that he is doomed to fail. This is so because no sufficient facts that enable identification and tracing of illicit assets are expected to be gathered through employing financial investigation techniques. Eventually, chances for such kind of cases that are mainly investigated under traditional criminal investigation only to enable successful forfeitures are too mean. It has been underscored that the investigation of serious and organised crime,⁶⁹ which mostly is destined to illicit income generation has some unique characters. First, it involves carrying out complex and tedious assignments due to several criminal activities involved; and hence a lengthy investigation. Second, as opposed to traditional investigative techniques, it also requires specialised expertise and the use of financial investigative techniques. All these should be in place in order to have effective and adequate asset recovery investigation.

In view of the above, investigators have therefore the noble duty of gathering evidence, which will prove the criminal offences and thereafter support applications for forfeiture orders. They should exploit all available investigative techniques such as electronic surveillance and others to identify and trace assets. However, they

⁶⁹According to Palmiotto, M.J., *Criminal Investigation*, Austin and Winfield Publishers, Atlanta, 1998, p.508, organised crime is the continuing criminal enterprise that rationally works to profit from illicit activities that are in great public demand.

face several challenges in the course of investigation. Some of those challenges are enumerated in the following part of the discussion.

3.2 Challenges to the Effective Asset Recovery Investigation

Asset recovery investigation, which is supposed to comprise the conventional or traditional criminal investigation and financial investigation in Tanzania faces a lot of challenges. They include the following:

3.2.1 Challenges Faced by Tanzanian Law Enforcement Agencies within the International Context

It has so far been noted that little can be achieved without the effective cooperation and goodwill of countries where proceeds of crime are hidden. It is true that the legal system in Tanzania provides for cooperation with other countries in such areas as mutual assistance in criminal matters as well as extradition of criminals who are alleged to have committed predicate offences. However, there are a number of challenges, which affect the international efforts in facilitating recovery of illegally acquired assets in Tanzania. They include the following:

(a) Differences in Legal Systems: Procedural Hurdles Related to Mutual Legal Assistance

Mutual legal assistance is one of the reliefs expected from international cooperation. However, it is often hindered by the fact that procedural laws of cooperating countries may vary considerably due to differences in legal systems and historical backgrounds. For instance, the requesting state may require special procedures that are not recognised under the law of the requested state, or the latter may provide evidence in a form or

manner which is unacceptable under the procedural law of the requesting state.⁷⁰ Such hindrance renders all efforts aimed to make mutual legal assistance practically a reality frustrated.

(b) Lack of Common Understanding on the Standard of Evidence Required to Issue Extradition Order

Some courts in foreign jurisdictions over-demand the evidence when hearing extradition applications. At times they go to the extent of regarding the extradition proceedings in the same manner as full criminal trials. As such they expect much beyond the required standard of evidence to be tendered in extradition proceedings. It would be noted that in both *Torroha Mohamed Torroha v. R.*⁷¹ and *R. v. Wilfred Onyango Nganyi & Another*⁷² cases, extradition orders were issued at appellate levels in Kenya. Magistrates who dealt with proceedings refused the extradition applications on various grounds related to full criminal trials.

3.2.2 Lack of Strong Institutional Mechanisms to Ensure Compliance

There are no strong institutional mechanisms to ensure country's compliance and accountability not only with domestic legal provisions but also international instruments on asset recovery. Moreover, whereas international legal instruments mandatorily obligate state parties to request for mutual assistance to requested states, domestic law in Tanzania makes it optional for the same.

⁷⁰ UNODC, *Cross-cutting Issues: International Cooperation, op cit.*, p.10.

⁷¹ [1989] eKLR (Court of Appeal of Kenya at Nairobi, Criminal Appeal No. 163 of 1988).

⁷² [2008] eKLR (High Court of Kenya at Nairobi (Nairobi Law Courts), Criminal Appeal No.96 of 2005).

3.2.3 *Difficulties in Investigating a Bank Account*

Part of proceeds of crime usually ends up as deposits in domestic or foreign banks or is concealed by acquiring other assets. Moreover, when assets flow through the financial system, the transfer of funds in and out of the accounts usually leaves an audit trail, which can be tracked and detected.⁷³ Therefore investigators need to have access to bank accounts and bank records of persons who are alleged to have assets that were acquired through criminal activities. In order to identify and locate the proceeds of crime, investigators need to have access to bank accounts and other relevant bank records.

However, there are legal and practical difficulties, which greatly affect investigating an aspect of a bank account in connection with predicate offence that are allegedly to have been committed.

3.2.4 *Existence of Illegally Acquired Real Property in Squatter Areas*

Existence of illegally acquired real property in squatter areas makes it difficult for asset recovery process to be effective. Most of urban centres in Tanzania are unplanned. It is estimated that about 70% of urban centres are squatter areas.⁷⁴ The inadequacy in shelter delivery system in Tanzania to cater for the urban population leads to an extensive development of squatter or unplanned

⁷³ Monteith, C. and Dornbierer, A., *Tracking and Tracing Stolen Assets in Foreign Jurisdictions*, International Centre for Asset Recovery, Basel Institute on Governance, Basel, Switzerland, Working Paper Series No.15, 2013. Source: <http://www.fatf-gafi.org/pages/faq/Moneylaundering>, accessed on 10th November, 2015. p.13.

⁷⁴ Seleki, B.A., *Urban Housing Problems in Tanzania: Some Possible Policy Interventions*. Source: <https://assets.publishing.service.gov.uk/media/.../HQ1231.pdf>; Accessed on 13th June, 2018.

settlements.⁷⁵ This state of affairs is escalating as days go on. This is due to the fact that urban population is growing fast as demand for shelters does not match with government efforts to facilitate availability of planned settlements.

3.2.5 *Failure by Some Investigators, Prosecutors and Trial Courts to Follow Laid Down Criminal Practices and Procedures*

There are several procedural errors occasioned by some investigators, prosecutors or magistrates in the course of administration of criminal justice system. As a result cases have been failing either at trial or appellate stages. These errors range from, among other things, failure to follow some legal requirements during investigations, lack of jurisdiction by the trial courts, irregularities in tendering evidence during the trial to defective charges.

3.2.6 *Cash Based Economy*

It would be noted that only part of proceeds of crime is deposited in banks, while the rest remains in individuals' hands. One of the challenging factors to most developing countries, including Tanzania, is that they have cash-based economy where funds do not often flow through established financial systems.⁷⁶ It is not mandatory to conduct large transactions through banks.⁷⁷ It is

⁷⁵ *Ibid.*

⁷⁶ See the United Republic of Tanzania, Ministry of Finance, *Financial Intelligence Unit Annual Reports 2011/2012*, p.4; *2012/2013*, pp.16-17 and *2013/2014*, pp.23-24.

⁷⁷ Pereira, P.G., et al., *Using Money Laundering to Fight Corruption in Developing Countries: Domestic Obstacles and Strategies to Overcome Them*, Basel Institute on Governance, Basel, Switzerland, Working Paper Series No.14, December 2012, p.49.

estimated that 60% of money in Tanzania is kept outside banks.⁷⁸ This means that most financial transactions are carried out in cash. This poses a big challenge in the fight against most of predicate offences such as money laundering, terrorist financing and other serious and organised crimes. The reason behind is that dealing in cash tends to leave little or no audit trail, and for this reason criminals love to deal in cash. Cash transactions leave the crime busters and other stakeholders with disjoint or no information to work with.⁷⁹ As such efforts to trace and track suspected financial flows may not succeed; it would thus be difficult to realise efforts on asset recovery. Cash transactions leave the law enforcement agencies with disjoint or no information to work with. Eventually gathering evidence which links the assets to criminal activities or those assets that are a benefit derived by an offence alleged to have been committed by the offender may at times become a very difficult assignment. It becomes difficult for investigators and other actors to trace proceeds of crime. This explains why the task of identifying and tracing the proceeds of crime requires a multi-sectored approach.

So far there is no law or regulations to reduce the need to use cash for various transactions in the economy. According to the Bank of Tanzania Act, 2006,⁸⁰ BoT has the principal function of exercising the functions of a central bank.⁸¹ Among the functions is to regulate

⁷⁸ According to Prof. Benno Ndulu, then Governor of Bank of Tanzania (BoT), in his address to the 18th Conference of Financial Institutions he made on 24th November, 2016 in Arusha, six out of ten shillings held in cash is outside banking system. Source: *Guardian Newspaper*, Friday, 25th November, 2016, The Guardian Limited, Dar es Salaam, p.1.

⁷⁹ The United Republic of Tanzania, Ministry of Finance, *Financial Intelligence Unit Annual Report 2012/2013*, p.16.

⁸⁰ Act No.4 of 2006.

⁸¹ *Ibid.*, s.5(1).

and supervise payment systems.⁸² However, the Act is silent on putting a limit to cash payment.

3.2.7 *Limited Number of Predicate Offences*

One of the fundamental objectives of asset recovery is to ensure that crime does not pay. Criminals should not benefit from their illegal activities. However, looking at the penal law, it is only those predicate offences as listed under the Anti-Money Laundering Act that are covered. Under section 3, the Act provides a list of predicate offences. It means that it is only those listed offences that are said to generate illicit income under the law. Short of that, no matter how huge the profits are made as a result of commission of criminal activities other than those in the list, those profits are not proceeds of crime! The reason is simple: such criminal activities are not predicate offences as envisaged by the law. But it is a fact that there are a lot of crimes, which generate illegal income that would attract forfeiture. Those offences which are not included in the list of predicate offences but generate illicit income include offences relating to trade in forest produce such as trading in illegal logging,⁸³ cybercrime offences,⁸⁴ living on earnings of prostitution [such as running secret brothels],⁸⁵ unlawful compulsory labour⁸⁶ and receiving stolen property.⁸⁷ This omission, it is argued, is a drawback that needs to be addressed as a matter of urgency.

⁸² *Ibid.*, s.6(1).

⁸³ See section 89 of the Forest Act, Cap. 323 [R.E.2002].

⁸⁴ The Cybercrime Act, 2015, Act No.14 of 2015, ss.4-29.

⁸⁵ C/ss. 139, 145, 146 and 148 of the Penal Code, Cap. 16 [R.E. 2019].

⁸⁶ C/s. 256 of the Penal Code, Cap. 16 [R.E. 2019].

⁸⁷ C/s. 311(1) of the Penal Code, Cap. 16 [R.E. 2019].

It is true that the Minister responsible for legal affairs is empowered under the Act from time to time to add to the existing list of offences any emerging predicate offence.⁸⁸ However, with emerging crime dimensions, it is very dangerous to continue maintaining such a selective and restrictive list of what should be predicate offences. Equally important, leaving the power to add new emerging predicate offences under the power of the minister alone does not guarantee effective addressing criminality in the country.

3.2.8 *A Multifaceted Legal-institutional Framework*

The current legal-institutional and regulatory framework on asset recovery in Tanzania is multifaceted. So far there is no single, specific and comprehensive legislation on one and same issue namely, asset recovery. The legislation has been made piece-meal, is fragmented and scattered.

Apart from the Proceeds of Crime Act, all specific pieces of legislation that deal with specific predicate offences have forfeiture provisions. Only a few of the specific pieces of legislation make cross-reference to the Proceeds of Crime Act.⁸⁹ They include the Anti-Money Laundering Act,⁹⁰ the Drug Control and Enforcement Act,⁹¹ the Prevention and Combating of Corruption Act⁹² and the Immigration Act, 1995.⁹³ Those specific pieces of legislation, which do not refer to the Proceeds of Crime Act include the Tanzania National Parks Act,⁹⁴ the Wildlife Conservation Act,⁹⁵ the Forest

⁸⁸ The Anti-Money Laundering Act, Cap. 423 [R.E.2019]. s.3.

⁸⁹ Cap. 256 [R.E.2019].

⁹⁰ Cap. 423 [R.E.2019].

⁹¹ Cap. 95 [R.E. 2019]

⁹² Cap. 329 [R.E. 2019].

⁹³ Cap. 54 [R.E. 2002].

⁹⁴ Cap. 282 [R.E. 2002].

⁹⁵ Cap. 283 [R.E. 2002].

Act,⁹⁶ the Prevention of Terrorism Act, 2002,⁹⁷ the Fisheries Act, 2003⁹⁸ and the Trafficking in Persons Act, 2008.⁹⁹

3.2.9 *Discretion by Prosecutors in Applying for Forfeiture Orders*

There is concern over the wide and unchecked discretion conferred upon the prosecution either to apply or not to apply for forfeiture order following a conviction of an accused charged with a predicate offence. So far there is nobody or legal mechanism in place to check for reasonable grounds for the prosecutors not to apply for forfeiture orders. The law in Tanzania does not provide “watch-dog” provisions to check for effective asset recovery.

4 CONCLUSION

In conclusion, it may be argued that the discussion in this paper has attempted to give a snapshot of investigation of asset recovery cases in Tanzania. It has briefly looked at the legal-institutional framework and capacity of investigators in dealing with these cases. It was revealed that the capacity of most of investigators to conduct financial investigation, which is the centre of asset recovery investigation, is inadequate. This kind of investigation appears to be still new to them and very few among the investigators have been exposed to some financial investigation training courses. Recovery of illegally acquired public assets by a few individuals has not always been easy. Such individuals who are criminals have powerful networks. Much as they use most advanced technologies and sophisticated methods to commit profit generating crimes, they at the same time employ complicated techniques to hide their ill-

⁹⁶ Cap. 323 [R.E. 2002].

⁹⁷ Act No.21 of 2002.

⁹⁸ Act No.22 of 2002.

⁹⁹ Act No.6 of 2008.

gotten wealth. For such assets to be recovered there has to be in place adequate legal and institutional framework with well trained and skilled law enforcement personnel.

It is true that with effect from 2008 the prosecution-led investigation was introduced in the country with a hope that it would play an instrumental role of guiding and coordinating, providing legal advices or even taking part in the investigations of some reported serious cases, predicate ones included. It is expected that in order to successfully investigate and prosecute cases of this kind, investigative bodies and the office of the DPP should continuously work closely from early to final stages of investigation. This argument hinges on the fact that investigation plays a very big role in enabling both tracing and recovery of illicitly acquires assets. As a matter of fact, investigation makes the foundation of the asset recovery process. Investigation sets in motion the administration of criminal justice system. It is within this system that asset recovery process takes place. It is therefore expected that thorough or adequate traditional criminal and financial investigations should be conducted. To realise all this, investigators should be competent enough to trace the assets; otherwise they are doomed to fail. Moreover, legal and institutional framework should be strong enough to enable thorough and in-depth inquiries into identifying and tracing the assets. Short of that there shall be no successful asset recovery.

5 RECOMMENDATIONS

In view of the above challenges, there is an urgent need to review the existing laws in order to ensure that they take pace with the way asset recovery cases should be addressed. In order to have a better law to cater for asset recovery issues, law reform bodies and other

stakeholders should review the current laws on asset recovery with a view to addressing a number of issues, which include the following:

- (a) To harmonise several, scattered and fragmented laws on asset recovery, where practically possible, so that there is only one comprehensive law capable of dealing with all asset recovery matters. A single forfeiture law simplifies the work of law enforcement agencies and other institutions dealing with asset recovery and avoids conflict of law and/or interpretations. It also encourages easy application of the law.
- (b) Procedural laws should be amended to reflect current developments in ICT and cyberspace crime commission, taking into consideration the fast developments in ICT and cross-border/cyberspace criminal activities.
- (c) To amend laws on asset recovery that are not compatible with some provisions of international instruments on asset recovery of which Tanzania is state party.
- (d) To make it mandatory for the prosecution to lodge application for forfeiture orders upon conviction of accused persons who stand charged with predicate offences.
- (e) To abandon the concept of “predicate offence” and only remain with “unlawful activities” provided that they generate illegal income.