IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MASSATI, J.A., MWARIJA, J.A. And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 508 OF 2015

THE DIRECTOR OF PUBLIC PROSECTIONS.....APPELLANT

VERSUS

LI LING LING .....RESPONDENT

(Appeal from the ruling of the High Court of Tanzania

at Dar es Salaam.)

(Dyansobera, J.)

Dated the 9th day of November, 2015

in

Application No. 129 of 2015

JUDGMENT OF THE COURT

1st & 18th March, 2016

MWARIJA, J.A.:

The respondent, Li Ling Ling and other four persons (the other persons), were jointly charged in the Resident Magistrate's Court of Dar es Salaam at Kisutu, with four counts. Two of the counts (the 2nd and 3rd), were preferred under the Economic and Organized Crime control Act [Cap. 200 R.E. 2002] (the Act). In the 2nd count, they were charged with the offence of leading organized crime contrary to paragraph 4(1)(d) of the 1st schedule to, and section 57 (1)

and 60 (2) of the Act. The 3rd count is unlawful dealing in trophies contrary to sections 82(1) and 84(1) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14(b) of the 1st schedule to, and sections 57 and 60(2) of the Act.

The 1stcount was preferred under the Penal Code [Cap. 16 RE 2002] while the 4th count in which the other persons were charged separately, was preferred under the Prevention and Combating of Corruption Act, No. 11 of 2007.

It is alleged in the 2nd and 3rd counts that, between 2/7/2015 and 6/7/2015 at Julius Nyerere International Airport in Temeke District, Dar es Salaam Region, the respondent, a Chinese national and the other persons, who were until the material time, Public Officials working with the Tanzania Airport Authority as Security Officers, furthered a criminal racket thereby facilitating the export of various types of Government trophies total valued at Tshs. 267, 401,400/= without trophy export certificate or permit.

After the charges had been read over, the respondent and the other persons were remanded in custody. The question of bail was not considered for the obvious reason that the value of the properties involved in the charge exceeded ten million shillings. At that stage of proceedings, it was the High Court which, under s. 29(4) (d) of the Act, had power to entertain bail.

The provision states as follows:-

"In all cases where the value of any property involved in the offence charged is ten million shillings or more at any stage before commencement of the trial before the Court is hereby vested in the High Court."

In exercise of the right to apply for bail conferred by s. 29 of the Act, through the services of her learned counsel, the respondent filed a chamber summons seeking to be released on bail. The application was opposed by the appellant. Apart from filing a counter affidavit, it filed a certificate of the Director of Public Prosecutions (the DPP) under s. 36 (2) of the Act objecting grant of bail to the respondent on the ground that her release on bail would likely prejudice the interests of the Republic.

Two issues arose during the hearing of the application for bail, first whether or not the certificate fettered the Court's discretion to entertain the application and second, whether or not under s. 36(2), the DPP is vested with power to file a certificate before an accused person is committed for trial by the Economic CrimesCourt. On the first issue, it was argued for the appellant that once a certificate of the DPP is filed, the same is binding on the court. On the part of the respondent, it was argued that the certificate does not fetter the Court's discretion to decide whether or not to grant bail. As to the second issue, the contention by the respondent was that the certificate was filed prematurely

and for that reason it was invalid to bar the respondent from being granted bail. Relying on the words "... no persons shall be admitted to bail **pending trial ...**" used under s. 36(2), the counsel who represented the respondent argued that the certificate was prematurely filed because the respondent had not been committed for trial and her case was not therefore pending trial. The learned counsel relied on the case of **DPP v. Ally Nuru Dirie & Another** (1988) TLR 2002 to substantiate his argument.

On its part, while agreeing with the position that the powers vested to the DPP by s.36 (2) are applicable when the case is pending trial, the learned State Attorney urged the court to apply a purposive interpretation to the section and read into it the words "awaiting trial or appeal" appearing in s. 148 (4) of the Criminal Procedure Act [Cap. 20 RE. 2002] (the CPA). He argued that at the time when those words were inserted in that section by an amendment to the CPA, the Parliament forgot to effect similar amended to s. 36 (2) of the Act. The argument was countered by the respondent's counsel taking it to be speculative and an afterthought.

After hearing the application, the High Court (Dyansobera, J.) was satisfied that the respondent was entitled to be released on bail. He agreed with the respondent's counsel that the DPP'S certificate was invalid because the same was filed prematurely. The learned judge relied on s.36 (2) and this Court's decision

in **Ally Nuru Dirie** case (supra). He found further, in the alternative, that even if the certificate was not filed prematurely, the same was not binding on the Court. He relied *inter alia* on the case of **DPP v Mehboob Akber Haji & Anr.,** Criminal Appeal No. 28 of 1992 (unreported).Having so held, he proceeded to consider the application on merit.He looked into the contents of the affidavits and concluded as follows;

> *"It is true that the more cogent the evidence the greater the likelihood of conviction and consequently the greater the likelihood of the accused attempting to evade justice. However in view of what I have discussed above, the nature of the evidence in support of the charge according to the uncontroverted affidavital evidence by the applicant, does not pose to be cogent."*

On the basis of that consideration, the learned judge granted the application and admitted the respondent to bail.

The appellant was aggrieved, hence this appeal. In the memorandum of appeal, the appellant raised three grounds which can be consolidated into two:-

1. That the learned High Court judge erred in law in holding that the certificate of the DPP was filed prematurely.
2. That the learned High Court judge erred in law in holding that s. 36(2) of the Act allows the Court to exercise discretion whether or not to grant bail thereby proceeding to grant bail to the respondent despite the DPP's certificate objecting bail.

At the hearing of the appeal, the appellant was represented by Mr. Faraja Nchimbi, learned Principal State Attorney assisted by Mr. Paul Kadushi, learned State Attorney. On her part, the respondent was advocated for by Mr. Lloyd Nchunga assisted by Mr. Emmanuel Kessy, learned counsel. Since she did not understand the language of the Court (English or Kiswahili), the respondent was afforded the services of an interpreter, Mr. Manfred Kioto (Kiswahili – Chinese and vice versa).

Submitting in support of the 2nd ground of appeal, Mr. Nchimbi argued that the learned High Court judge erred in disregarding the certificate of the DPP which was filed under s. 36 (2) of the Act. According to the learned Principal State Attorney, the certificate had the effect of barring the Court from granting bail to the respondent. With regard to the case of **Ally Nuru Dirie**, (supra), relied upon by the learned judge as an authority that the certificate of the DPP is not binding on the Court, Mr. Nchimbi argued that the decision was misapplied

because after having found that the certificate met the conditions stated in that case, the learned judge should not have disregarded it. The learned Principal State Attorney added that according to that case, once the certificate is found to have been validly filed, the same bars granting of bail. He argued further that the DPP is not even required to give reasons for objecting bail.

As to the 1st ground, Mr. Kadushi argued that the learned judge erred in holding that the certificate was filed prematurely. He faulted the learned judge for applying a literal interpretation to s. 36(2) of the Act thus acting on the words "pending trial" to hold that the certificate was filed prematurely. He argued that although the words "pending trial" are used in that section, it was not the intention of the Parliament to restrict the DPP's power of objecting bail only to the stage after accused person's committal for trial. It was for this reason, he argued, s. 148 (4) of the CPA which was a replica of s. 36 (2) of the Act was amended so as to read that the DPP can file a certificate barring grant of bail to any person "while he is awaiting trial or appeal." Mr. Kadushi reiterated his argument that s. 36(2) should have been given a purposive interpretation thereby importing into it the words "awaiting trial or appeal" so as to remove inconsistence in the two provisions. He said that the court should have taken cognizance of amendment of s. 148(4) of the CPA and hold that the Parliament forgot to also amend s. 36(2) of the Act. This he said, is because the two sections, although they appear in two different statutes, empower the DPP to bar

grant of bail where the safely or interests of the Republic are likely to be prejudiced. To bolster his argument, the learned State Attorney cited the case of **R.v. Mwesige Godfrey & Another,** Criminal Appeal No. 355 of 2014 in which the Court directed that the words "to the trial subordinate court" be inserted in s. 361 (1) (a) of the CPA. The words which appear under s. 379 (1) (a) of the CPA were missing in s. 361 (1) (a) hence creating a lacuna in that section as regards the Court in which a notice of intention to appeal should be filed.

In reply, Mr. Nchunga argued that the decision in the **Dirie case** does at most, support the finding of the learned High Court judge, that the DPP's certificate was filed prematurely. He argued further that under the doctrine of separation of powers, the DPP's certificate cannot fetter the Court's discretion to consider on merit, an accused person's bail application. He based his argument on the **Mehboob case** (supra).On the argument that s. 36 (2) should have been given a purposive interpretation so as to remove inconsistence or absurdity, Mr. Nchunga opposed that argument stating that since the two sections are in two different statutes, the contention that there is an ambiguity or inconsistence is without merit. Regarding the contention that the Parliament forgot to amend s. 36(2) of the Act, he took that to be an afterthought. He argued that if that was the case, it should not have taken that long to effect amendment.

In rejoinder, Mr. Nchimbi distinguished Mehboob **case** stating that, what was at issue in that case was whether the certificate could be valid where the DPP acts **malafide.** In this case, he argued, a similar situation did not arise.

Having heard the appeal and reserved our judgment and after re-considering the submissions made by the learned counsel for the parties, we deemed it proper to re-open the hearing so that the learned counsel for the parties could address us on the application of s. 29 of the Act, one of the provisions cited by the respondent in her application before the High Court.

Mr. Nchimbi argued that in dealing with the issue of bail in an economic crime case, both sections 29 and 36 of the Act must be applied. For that reason, he said, the two sections cannot be read in isolation. He argued however that although in the present case, the applicable provision is s. 29(4) (d) of the Act because the certificate was filed at the stage where the trial of the respondent had not commenced, the conditions stated under s. 36(2) of the Act are nonetheless applicable and for that reason, the DPP properly exercised his powers under that section.

In response, Mr. Nchunga contended that since the case was not pending trial, the applicable provision was section 29(d) of the Act, and for that reason, the DPP could not exercise the powers conferred to him by s. 36 (2) of the Act.

From the grounds of appeal and the submissions made by the learned counsel for the parties, two issues arise for determination. First, is whether or not the DPP's certificate was filed prematurely and second is whether the learned High Court judge erred in admitting the respondent to bail despite the certificate filed by the DPP under s. 36 (2) of the Act. There is no dispute that at the time when the DPP filed the certificate objecting bail, the respondent had not been committed for trial. It is not disputed further that, because the value of the properties involved in the charge is more than ten million shillings, it was the High Court which had jurisdiction to entertain the respondent's application for bail.

Section 29 (4) (d) of the Act provides as follows:-

> *"In all cases where the value of any property involved in the offence charged is ten million shillings or more at any* ***stage before commencement of the trial*** *before the court is hereby vested in the High Court."*

Under this provision, the High Court has jurisdiction to hear and determine an application for bail at any stage of the proceedings before the accused person's trial has commenced. This means the period between the arrest and after committal of an accused person. According to the provision therefore, it is only after commencement of trial that the High Court ceases to have jurisdiction.

The learned counsel for the parties agree also that section 36 (2) of the Act restricts the powers of the DPP of filing a certificate of objection to bail to the stage where the case is pending trial.

The basic issue in controversy however, arises from the words "pending trial" under s. 36(2) of the Act. The learned counsel for the parties agree that in its plain meaning, the section provides that the certificate of the DPP contemplated therein must be only filed after the accused person has been committed for trial, in other words when the case is pending trial. It is for this reason that Mr. Kadushi argued strenuously that the section should have been given a purposive interpretation by reading into it the words "while he is awaiting trial or appeal" appearing under the corresponding section 148 (4) of the CPA.

It is the position of the law that in an economic crime case, matters of bail are governed by ss. 29 and 36 of the Act. Whereas s.29 empowers the courts to entertain bail applications, s.36 provides for the manner in which such power should be exercised. In principle therefore, the two sections must be applied together when an application for bail is under consideration. In the case of **Edward D. Kambuga** (1990) TLR 84, this Court stated as follows:-

> *"We agree with Mr. N.D. who argued for the Republic that sections 29 and 35 [now 36] serve different purposes. Section 29*

provides the powers to grant bail in economic case whereas section 35 lays down the extent to which that power should be exercised. The two sections should therefore be read and applied ***in tandem****. They cannot be separated ... The learned judge was therefore correct in using the power to grant bail under section 29 against the mandatory additions stipulated under section 35."*

Section 36 of the Act which provides for the right to bail also lays down the conditions governing grant of bail. One of the conditions governing the Court's power in granting bail under s. 29 is that which appears under sub-section (2) of s. 36.That provision empowers the DPP to bar an accused person from being granted bail. Section 36 (1) and (2) provides as follows:-

"36 -

(1) After a person is charged but before he is convicted by the court, the court may on its own motion or upon an application made by the accused person, subject to the following provisions of this section, admit the accused person to bail.

(2) Notwithstanding anything in this section contained no person shall be admitted to bail ***pending trial,*** *if the Director of Public Prosecutions certifies that it is likely*

that the safety or interests of the Republic would thereby be prejudiced." (Emphasis added).

The stage at which the proceedings had reached is the genesis of the first issue .Under this section, unlike under section 148(4) of the CPA as it stood before amendment, the DPP has the power of filing a certificate in the High Court notwithstanding the fact that the case has not reached the trial stage. The DPP derives that power under sub-section (7) of s. 36 of the Act which states as follows:-

"For the purpose of this section, the "court" includes ***every court which has jurisdiction to hear a petition for and grant bail*** *to a person under charges triable or being tried under this Act."*

By operation of the above quoted provision, the condition under s. 36 (2) of the Act applies to every court which has jurisdiction to entertain and grant bail in an economic crime case. This means that the DPP is empowered to file a certificate in any court which has jurisdiction to hear and determine an application for bail, being it the subordinate Court, the High Court or the Economic Crimes Court.

It would seem however, that the two sub-sections are conflicting because as stated above, under sub-section (2) of s. 36 and according to the **Dirie case,** the DPP is only empowered to file a certificate when a case is pending trial. By virtue of sub-section (7) however, since the word 'Court' under s. 36 of the Act means every court which has jurisdiction to hear and determine an application for bail, apart from being vested with the power of filing a certificate in the Economic Crimes Court to object grant of bail pending trial, the DPP is similarly empowered to file a certificate in the subordinate Court and the High Court notwithstanding the fact that the case is not pending trial.

It is trite principle of statutory interpretation that one section of a statute cannot be used to defeat the other. The statute must instead, be read as a whole. In his book **Principles of Statutory Interpretation,** 12th Ed., Lexis Nexis, Butterworths Nadhwa Nagpur, at page 145, Justice G.P. Sigh States that:-

> *"The provisions of one section of a Statute cannot be used to defeat those of another 'unless it is impossible to effect reconciliation between them.' The same rule applies to sub-sections of section".*

In our considered view, the words "pending trial" under sub-section (2) of section 36, if read in the context of sub-section (7) of the same section, cannot

be taken to have been meant to defeat the effect of the latter provision. The latter sub-section gives power to the DPP to file a certificate in any court which has jurisdiction to entertain and determine an application for bail. We therefore answer the 1st issue in the negative.

With regard to the second issue, we agree with Mr. Nchimbi that the decisions which were relied upon by the learned judge were applied out of context. The position of the law as stated in the **Dirie case** is that once the DPP's certificate has met a validity test, the court shall not grant bail. The conditions for validity of DPP's certificate as stated in that case are the following:

> *"(i) The DPP must certify in writing and*
>
> *(ii) The certificate must be to the effect that the safety or interesting of the United Republic are likely to be prejudiced by granting bail in the case; and*
>
> *(iii) The certificate must relate to a Criminal case either pending trial or pending appeal."*

Although in the case at hand, the case was not pending trial, as found above, the certificate was valid by virtue of the provisions of sub-section (7) of s. 36 of the Act. The **Dirie case** is under the circumstances, distinguishable on that aspect because in that case, the certificate was filed under s. 148 of the CPA

which does not have a corresponding provision to sub-section (7) of section 36 of the Act. The decision was based on the interpretation of subsection (4) of s. 148 of the CPA. We also agree with Mr. Nchimbi that the decision in the **Mehboob case** is distinguishable: In that case, the DPP wanted to file a certificate on the date set for delivery of ruling on the respondent's bail application. The magistrate upheld the objection raised by the respondents' counsel that the certificate should not be admitted at that stage, the DPP having failed to file it before. The respondents were successful in their application. The Kisutu Resident Magistrate's Court admitted them to bail. The DPP was apparently dissatisfied. However, instead of appealing against the ruling, he exercised his powers under s. 91 of the CPA and entered a **nolle prosequi.** On that same day, after their discharge, the respondents were re-arrested and charged afresh with the same offence but in a different court, Kivukoni Resident Magistrate's Court.

The DPP filed a certificate objecting bail resulting into the respondents being remanded in custody. They however, successfully appealed to the High Court which revised the proceedings of both the Kisutu and Kivukoni Resident Magistrate's Courts on the ground that the motion by the DPP was an abuse of the process of the Court. The DPP unsuccessfully appealed to this Court. The Court held that the acts of the DPP amounted to manipulation of his powers under s. 91 of the CPA and for that reason, he abused the Court process. As

stated above therefore, the particular circumstances under which the certificate of the DPP was found to be invalid are different from the facts of the present case. For these reasons therefore, we find that the learned High Court judge erred in admitting the respondent to bail.

On the basis of the above stated reasons, we hereby allow the appeal. We quash and set aside the decision of the High Court and order that the respondent be remanded in custody.

DATED at **DAR ES SALAAM** this 14th day of March, 2016.

S.S. MASSATI
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

S. MUGASHA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

J. R. KAHYOZA
REGISTRAR COURT OF APPEAL