IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 569 OF 2020

DIRECTOR OF PUBLIC PROSECUTIONS .... APPELLANT

VERSUS

1. **IBRAHIM HAMIS @ MULULA**
2. **AGIPITO MLWILO**
3. **PASCAL BALOHO**
4. **MG 314162 LAZARO EMMANUEL**
5. **BRENDAN EDWARD @ KIMU**
6. **FATUMA SHABAN**
7. **ANNA JOSEPH @ MPAMILA**
8. **LACKRES TEMU**
9. **ZUHURA HERY**
10. **NEEMA NG'ADI**
11. **JOYCE JACOB @ KITUNDU**
12. **SELINA JOSEPH @ RAHIM**
13. **MG. 377621 GERSON NKANA**

.. RESPONDENTS

(Appeal from the Judgment of the High Court of Tanzania, at Dodoma)

(Mansoor, J.)

dated the 9th of October, 2020
in
Criminal Appeal No. 118 of 2020

....

JUDGMENT OF THE COURT

7th June & 28th July, 2021

MWAMBEGELE, J.A.:

The thirteen respondents herein, Ibrahim Hamis @ Mulula, Agapito Mlwilo, Pascal Baloho, MG 314162 Lazaro Emmanuel, Brendan Edward @

Kimu, Fatuma Shaban, Anna Joseph @ Mpamila, Lackres Temu, Zuhura Hery, Neema Ng'adi, Joyce Jacob @ Kitundu, Selina Joseph @ Rahim and MG 377621 Gerson Nkana are facing charges in the Resident Magistrate's Court of Singida at Singida jointly, in the first two counts and severally, for some of the respondents, in the last two counts. While the charges were still pending in that court, the Director of Public Prosecutions (henceforth "the DPP") issued a certificate under the provisions of section 19 (1) and (2) of the National Security Act, Cap. 47 of the Revised Edition, 2002 (henceforth "the National Security Act") certifying in writing that the respondents should not be granted bail on account that the safety or interests of the Republic would be prejudiced if bail would be granted to them.

Basing on that certificate, the Resident Magistrate's Court refused the respondents bail. Dissatisfied, they petitioned the High Court challenging the refusal to bail by the Resident Magistrate's Court on the strength of the certificate of the DPP. Their petition to the High Court had only two grounds, namely; **one**, that the learned Magistrate erred in law and in fact by denying bail to the appellants for bailable offences, and, **two**, that the learned Magistrate erred in law to interpret the provisions used by the respondent to object bail.

The High Court (Mansoor, J.) in its judgment dated 09.10.2020 and delivered to the parties on the same date, allowed the appeal and released the respondents on bail. The DPP was aggrieved. He thus lodged this appeal to the Court on two grounds of grievance; **one**, that the first appellate court erred in law by holding that the DPP cannot object bail of bailable offences, **two**, that the first appellate court erred in law by holding that section 19 (1) of the National Security Act applies to police officers only.

When the appeal was placed before us for hearing on 07.06.2021, Mr. Tumaini Kweka, learned Principal State Attorney, Ms. Lina Magoma, learned Senior State Attorney and Mr. Harry Mbogoro, learned State Attorney, joined forces to represent the appellant the DPP. On the other hand, Ms. Zahra Chima and Mr. Emmanuel Bwile, learned advocates, like their adversaries, joined forces to represent the respondents who, except for the fourth, were also present in person. In terms of the provisions of rule 80 (6) of the Tanzania Court of Appeal Rules, we proceeded to hearing in the absence of the fourth respondent, he being represented by advocates.

Ms. Magoma was the first to kick the ball rolling. She submitted that the DPP has a duty of protecting the interests of the Republic. On this

premise, she submitted that he can object the granting of bail to bailable offences in situations when the interests of the Republic would be in jeopardy. When we prompted her on what she meant by complaining in the first ground of appeal that the first appellate court erred in law by holding that the DPP cannot object bail of bailable offences while the record of appeal bears out at p. 92 that the Judge qualified that he (the DPP) can do that "only for legally valid and factual reasons", Ms. Magoma changed the goal post and submitted that they meant to say in the first ground of appeal that the first appellate court erred in holding that the DPP acted malafide. She referred us to p. 94 of the record of appeal where the first appellate court so stated. To buttress the argument that the DPP's certificate was quite in order, she referred us to our unreported decisions in **The Director of Public Prosecutions v. Li Ling Ling**, Criminal appeal No. 508 of 2015 (at p. 14) and **Emmanuel Simforian Massawe v. Republic**, Criminal Appeal No. 252 of 2016 (at pp. 15 and 16). She thus concluded that the DPP's certificate was valid.

With regard to the second ground of appeal, Ms. Magoma submitted that the section was not unambiguous. She contended that while the provision refers to a police officer, the same provision has the words "while he is awaiting trial or appeal" which refers to courts of law. She faulted

the first appellate court for not reading in the word "court" in the provision. She added that the legislators intended the certificate of the DPP to bind the courts as well, and that they should have legislated so in express terms, hence the ambiguity complained of. Relying on our decision in **Joseph Warioba v. Stephen Wassira and Another** [1997] T.L.R. 272, Ms. Magoma urged us to hold that by using the words "awaiting trial or appeal", the provision of the law under discussion was meant to apply to courts as well.

Giving Ms. Magoma a helping hand, Mr. Kweka rose to intimate to the Court that the amendment to section 19 (1) of the National Security Act brought about by the Written Laws (Miscellaneous Amendments) (No. 2) Act, 1989 (hereinafter referred to as the 1989 Amendments) created ambiguity by deleting the reference to the court which appeared in the old section. He urged the Court to use the purposive approach of statutory interpretation to hold that the provision was also meant to prohibit the courts as well. Having so submitted, he implored us to allow the appeal.

In response, Ms. Chima submitted in respect of the first ground of appeal that the DPP cannot object bail to bailable offences by a certificate issued under section 19 (1) of the National Security Act. The learned counsel referred us to p. 85 of the record of appeal where Mr. Bwile, who

represented the respondents herein before the High Court, submitted that the certificate by the DPP to block bail was an abuse of the court process and filed in bad faith and in violation of the duties of the DPP to protect public interests and at p. 93 where the first appellate court agreed with him. The learned counsel concluded that the first ground of appeal was without merit.

Regarding the second ground of appeal, Ms. Chima submitted that section 19 (1) of the National Security Act was meant to apply to police officers only. That is the reason why no reference to the court is made in the subsection, she argued. She also submitted that the certificate at p. 7 of the record of appeal did not give reasons why the respondents should be refused bail.

Rendering support on Ms. Chima's submissions, Mr. Bwile added in respect of the second ground of appeal that section 19 (1) of the National Security Act is neither absurd nor ambiguous. As such, he argued, the **Joseph Warioba** case (supra) was not applicable in the present appeal. Before he rested his case, however, the learned counsel admitted that there was a slight ambiguity in that the section under the National Security Act before the amendment was equivalent to section 36 of the Economic and Organized Crime Control Act, Cap. 200 of the Revised Edition, 2019

(the Economic and Organized Crime Control Act) which refers to the courts as well. All the same, Mr. Bwile urged us to dismiss the appeal.

In a short rejoinder, Ms. Magoma submitted that the respondents have not shown how the DPP acted malafide. She reiterated that by using the words "awaiting trial or appeal" in the sub-section it was implied that it was not meant to apply to police officers only but to courts as well. She thus prayed that the appeal be allowed.

Having summarized the submissions for both parties above, we should now be in a position to determine the issues of contention in this appeal which we think are two; **one**, whether the appellant acted malafide or abused the court process in issuing the certificate to object the grant of bail to the respondents on bailable offences and, **two**, whether section 19 (1) applies to police officers only.

The best point of departure in deciding this matter before us, we think, is to first determine the second issue. That is, to determine whether section 19 (1) applies to police officers only. We are of that view because, if the second issue is answered in the affirmative, there will be no need to determine the first issue. However, if we find that the section applies to

courts as well, we will proceed to determine if, in issuing the certificate, the DPP acted malafide or in abuse of the court process.

We start our determination of the second issue by reproducing section 19 (1) and (2) of the National Security Act with a view to coming to grips with what it entails. It reads:

> *"(1) Notwithstanding anything in this section contained, no police officer, after a person is arrested and while he is awaiting trial or appeal may admit that person to bail if the Director of Public Prosecutions certifies in writing that it is likely that the safety or interests of the Republic would thereby be prejudiced.*
>
> *(2) The certificate issued by the Director of Public Prosecutions under this section shall take effect from the date it is filed in court or notified to the officer in charge of a police station and shall remain in effect until the proceedings concerned are concluded or the Director of Public Prosecutions withdraws it."*

This provision is a result of the 1989 Amendments. We agree with Mr. Kweka that we are called upon to interpret the 1989 Amendments to the National Security Act by invoking the purposeful approach of statutory

interpretation. This is also referred to as the mischief rule of statutory interpretation. This rule entails making an enquiry into what Parliament intended in legislating such a provision; in our case, the one brought about by the 1989 Amendments. Before the 1989 Amendments, the section read:

> *"Notwithstanding any written law to the contrary no person charged with an offence under this Act shall be admitted to bail, either pending trial or pending appeal, if the Director of Public Prosecutions certifies in writing that it is likely that the safety or interests of the United Republic would thereby be prejudiced."*

As obvious in the section, the section was applicable to persons charged with any offence under the National Security Act not to be granted bail by the court if the DPP so certified in writing. It was not applicable to persons under police custody prior to arraignment. The 1989 Amendments were intended to cover persons who are under police custody as well. This is deciphered from the objects and reasons of the Bill to the amendments. It read:

> *"The sixth law which it is proposed to amend is the National Security Act, 1970. The act is to be amended in section 19 so as to clarify the*

conditions pertaining to the situation where the Director of Public Prosecutions certifies that a person awaiting trial or appeal should not be granted bail. It is intended that the conditions under the National Security Act should be similar to those provided by the Criminal Procedure Act on the same subject."

And the Minister responsible for Justice affairs is recorded in the Hansard of 25.10.1989 as telling Parliament that:

"Ndugu Spika, rekebisho lingine lililomo kwenye Muswada huu kama ilivyoainishwa katika Nyongeza ya Mabadiliko iliyoambatanishwa katika Orodha ya Shughuli za Bunge, linahusu Sheria ya Usalama wa Taifa ya mwaka 1970. Kifungu cha 19, kifungu kidogo cha (i) cha Sheria hii kinarekebishwa ili haki ya Mkurugenzi wa Mashtaka kuhusu dhamana iweze kutolewa tokea mhalifu anapokamatwa na Polisi hadi atakapopelekwa Mahakamani, hadi kesi itakapokwisha au itakapoondolewa na Mkurugenzi wa Mashtaka.

Ndugu Spika, badiliko hilo limetokana na mambo mawili muhimu. ***Kwanza wakati Sheria ya Usalama wa Taifa ilipopitishwa ya mwaka 1970 Polisi walikuwa hawana uwezo wa kutoa dhamana kwa wahalifu wanaokamatwa kwani uwezo huu***

wameupata baada ya Sheria ya mwenendo wa jinai ya mwaka 1985 yaani Criminal Procedure Act iiipopitishwa. Ndio maana sasa inabidi haki ya Mkurugenzi wa Mashtaka kwa kuzuia dhamana iwaguse na Polisi pia, ikiwa kufanya hivyo ni kwa iengo ia kulinda usaiama wa nchi.

Pili, Ndugu Spika, Mahakama ya Rufaa ya Tanzania, imetoa tafsiri ya neno "Kesi bado haijamalizika" yaani pending trial lililotumiwa kwenye kifungu hiki kwa maana ya kesi kuanza kusikilizwa. Hivyo inabidi kifungu kidogo kipya kiongezwe kama inayopendekezwa katika Muswada huu, ***ili kuweza kutoa ufafanuzi zaidi juu ya haki ya Mkurugenzi wa Mashtaka kuweza kutoiewa toka mhalifu anapokamatwa hadi kesi kuanza kusikiiizwa na kufikia mwisho."***

[Emphasis ours].

Our literal translation of the above excerpt is:

"Mr. Speaker, another amendment in this Bill is on the National Security Act of 1970 as can be seen in the schedule of amendments that is appended to the Order Paper. Section 19(1) of this Act is amended to extend the DPP's powers to issue certificate for denying bail even before the

commencement of a case. That is, from the time a person is arrested by the police to when that person is taken to court and until the case is heard to its finality or where the DPP withdraws the charges.

Mr. Speaker, this amendment has been triggered by two main things; the first being that when the National Security Act was passed in 1970, the police had no powers to grant bail. They came to be availed with such powers in 1985 after the enactment of the Criminal Procedure Act, that is why it is now proposed that the power to deny bail by the DPP be extended to cover even the police, this is for the interest of the Nation's Security.

Secondly, Mr. Speaker, the Court of Appeal of Tanzania has interpreted the words "pending trial" that are used in this section. It is thus proposed in this Bill that a subsection be added to that effect, in order to provide a further explanation that the right of the DPP to deny bail can be exercised from the time a person is arrested to when the case is heard and determined to its finality."

It is apparent from the above objects and reasons and the Minister's speech that the mischief the 1989 Amendments intended to cure was to allow the DPP to object to bail when a suspect is under police custody and when awaiting trial or appeal for offending against the provisions of the

National Security Act. Parliament intended to enact a provision akin to that under the Criminal Procedure Act, 1985. The relevant provision of the Criminal Procedure Act, 1985 to which the objects and reasons and the Minister made reference was section 148 (4) and (4A) as it existed then. These subsections to section 148 were introduced by the Written Laws (Miscellaneous Amendments) Act, 1989 – Act No. 10 of 1989. They read:

> *"148 (4) Notwithstanding anything in this section contained, no police officer* ***or court*** *shall, after a person is arrested and while he is awaiting trial or appeal, admit that person to bail if the Director of Public Prosecutions certifies in writing that it is likely that the safety or interests of the Republic would thereby be prejudiced.*
> *(4A) A certificate issued by the Director of Public Prosecutions under this section shall take effect from the date it is filed in court or notified to the officer in charge of a police station and shall remain in effect until the proceedings concerned are concluded or the Director of Public Prosecutions withdraws it."*
> [Emphasis supplied].

Given the above, we respectfully think, through the 1989 Amendments, Parliament intended to prohibit a suspect under police custody, as well as when brought before a court of law, being accused of an offence to be granted bail if the DPP so certified in writing. The omission of the words "or court" in the 1989 Amendments was, in our considered view, a drafting inadvertence. As put by Mr. Kweka, and to our mind rightly so, the 1989 Amendments of the section was intended to read in subsection (1) as follows:

> "*1) Notwithstanding anything in this section contained, no police officer* ***or court****, after a person is arrested and while he is awaiting trial or appeal may admit that person to bail if the Director of Public Prosecutions certifies in writing that it is likely that the safety or interests of the Republic would thereby be prejudiced.*"

In view of the above discussion, we respectfully think, the learned High Court Judge ought to have used the mischief rule in interpreting the 1989 Amendments of the section under discussion. Had the learned High Court Judge done that, she certainly would have upheld the decision of the subordinate court refusing bail to the respondents after the certificate under the hand of the DPP was issued. We answer the second issue, as

posed above, in the negative; that is, section 19 (1) of the National Security Act is not applicable to police officers only, it is applicable to courts as well. Therefore, the second ground of appeal succeeds.

Having answered the second issue in the negative; that section 19 (1) of the National Security Act applies to both police officers and the court, we now turn to consider the first issue; that is, whether, in issuing the certificate to object bail to the respondents, the DPP acted malafide or in abuse of the court process. This issue was also posed by the High Court at pp. 91-92 of the record of appeal in the following terms:

> *"The law, in all statutes dealing with criminal prosecution and which the appellants are charged with requires the police officer and the Court to release the person on bail if the offence for which he has been detained is bailable in nature, of course, with certain conditions. It is beyond quibble that the Public Prosecutor is also interested in dispensation of justice in a criminal case and that can be made possible only if the prosecutor dispenses justice, he prevents the abuse of the court or legal process, and acts for the interests of public. Under the law and also in the Constitution, the accused has an indefeasible right to be released on bail in a bailable offence,* ***the question before the Court is whether the DPP in this case has***

been able to dispense justice or he has acted in bad faith**, and **whether he has abused the legal process by filing the Certificate in Court blocking the bail for offences which are bailable."

[Emphasis supplied].

The first appellate court went on at p. 92 of the record of appeal:

> *"Bail can be refused to a person if accused of a bailable offence only for legally valid and factual reasons."*

It is apparent in the above quoted excerpts that the nagging question before the High Court was whether the DPP acted malafide as shown in the bold expression above. We do not think, however, that there was enough evidence to establish that the DPP acted malafide in issuing the certificate. The learned counsel for the respondent did not canvass that point before us with sufficient details. Neither do we think the DPP ought to have given reasons why he thought the interests of the Republic would be at stake as Mr. Bwile would have us believe. We respectfully think that what was important was the validity test articulated by the Court in **The Director of Public Prosecutions v. Ally Nur Dirie & Another** [1988] T.L.R. 252 and restated in **Li Ling Ling** (supra). In the two cases, the Court grappled with identical provisions in the Criminal Procedure Act and the Economic

and Organized Crime Control Act, respectively. The Court held in the latter case that:

> *"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."*

And the Court went on to reproduce the conditions for validity of DPP's certificate as stated in the former that:

> *"(i) The DPP must certify in writing; and*
>
> *(ii) The certificate must be to the effect that the safety or interests 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."*

It should be noted that **Ally Nur Dirie** (supra) was interpreting section 36 (2) of the Economic and Organized Crime Control Act which reads:

> *"(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."

The foregoing provision applies to courts only; unlike section 19 (1) of the National Security Act, which applies to police officers as well. In this case, taking into account the 1989 Amendments, condition (iii) above should be interpreted *mutatis mutandis* to include the period when a suspect is under police custody.

The above stated, we are of the considered view that the certificate by the DPP in the matter before us was not issued malafide. Neither was it an abuse of the court process. On the contrary it met the validity test as articulated in **Ally Nur Dirie** (supra) and restated in **Li Ling Ling** (supra). The first issue posed above, the subject of the first ground of appeal, is therefore answered in the negative. The first ground of appeal, as modified, also succeeds.

As a result of the above discussion and verdict, we propose to the relevant authority that, as the purpose for which the 1989 Amendments were intended was not fully met, the words "or court" should be inserted between the words "officer" and a comma in section 19 (1) of the National Security Act.

For the reasons we have assigned, we find merit in this appeal and allow it. As a result, we quash the decision of the High Court and set aside the flanking orders made. We order that the respondents be remanded in custody to await their trial.

DATED at **DAR ES SALAAM** this 15th day of July, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 28th day of July, 2021 in the presence of Ms. Lina Magoma, Senior State Attorney for the Appellant/Director of Public Prosecution and Respondents in person represented by Mr. Emmanuel Bwile counsel for Respondents is hereby certified as the true copy of the original.

B. A MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL