

IN THE HIGH COURT OF TANZANIA
AT IRINGA

MISCELLANEOUS CRIMINAL APPLICATION NO. 1 OF 2015
(Originating from Iringa District Court
Economic Case No. 34 of 2014)

ADAM S/O ISSA ----- APPLICANT

VERSUS

THE REPUBLIC ----- RESPONDENT

R U L I N G

The Applicant Adam Issa by way of Chamber Summons, supported by an Affidavit of Zuberi Hamissi Ngoda, Advocate, prays for orders that;

1. This Honourable Court be pleased to grant bail to the applicant to (sic) pending trial.

The application flows from the following facts. The Applicant and his two co-accused stands charged in Economic Case No. 34 of 2014 at Iringa District. The Applicant and his co-accused have been charged with an offence of being found in unlawful possession of Government Trophies Contrary to Section 86(1) and (2) (b) of the Wildlife Conservation Act 2009 (Act No. 5 of 2009) read together with paragraph 14(d) of the First Schedule

to and Sections 57(1) and 60(2) of the Economic and Organized Crime Control Act, Cap 200 RE 2002.

At the hearing before me the applicant had the services of Mr. Zuberi Ngoda, learned counsel. On the opposite, there was Mr. Alex Mwita, learned State Attorney. To express from the very outset, the submissions were approached with lucid arguments from both sides; to which I am, profoundly, grateful. It is pertinent to stress at this juncture that the learned State Attorney did not contest the granting of the bail but rather valiantly insisted that the court should be mindful of the conditions to be imposed upon the granting of the bail. I shall refer the rival arguments shortly. Nonetheless, ahead of summarizing and analyzing the rival arguments, I am anxious to make a single remark and that is related to the Counter Affidavit which was sworn by Adolf W. Maganda the station learned State Attorney filed on 8th April, 2015. The said Counter Affidavit is defective as the jurat did not show at what place and on what date the oath or affidavit was taken or made contrary to Section 8 of the Notaries Public and Commissioners for Oaths Act, Cap 12 RE 2002.

However, Mr. Mwita did not rely on the Counter Affidavit and in fact did not mention at all and the reason is simple Mr. Mwita did not oppose the application for bail.

With that brief remark by the way of a prelude I should now briefly point out the submissions made by the counsels.

Mr. Ngoda on his part in support of the application contended that this honourable court by virtue of Section 148(3) of the Criminal Procedure Act, Cap 20 RE 2002 and Section 29 and 36 of the Economic and Organized Crime Control Act, Cap 200 RE 2002 has powers to grant bail or reduce bail. Mr. Ngoda invited this court to refer to the case of **Edward Kimbuga V Republic** [1990] TLR 84 where the Court of Appeal of Tanzania discussed the unfettered powers of this court to grant bail.

Mr. Ngoda further submitted that bail is a constitutional right and argued that in a myriad occasion this court has held so and central to it is the presumption of innocence to an accused person which is guaranteed under Article 13(6) (b) of the Constitution of the United Republic of Tanzania 1977. To bring his point home he cited the case of **Tito Douglas Lyimo V Republic** (1978) LRT 55 in which the court held the said view. He further cited the case of **Patel V Republic** (1971) HCD 391 in which Biron J (as he then was) shared the same view as that of Mwesiumo J in **Tito's case** (supra) while laying grounds issues to be considered in granting bail.

Mr. Ngoda finally forcefully submitted that this honourable court is empowered to grant bail to the applicant who is a

person of good character and integrity and is unlikely to commit any other offence while on bail neither interfere with the investigation nor influence witnesses in the trial.

On his part Mr. Mwita, learned State Attorney did not oppose the application for bail on the simple reason that the offence to which the applicant and his co-accused stands charged is bailable. However, Mr. Mwita contended that in granting the application the court should take into account the provisions of Section 36 of the Economic and Organized Crime Control Act, Cap 200 RE 2002 which requires that in granting bail to the applicant one of the conditions to be fulfilled is that the applicant must deposit half an amount of the value of the trophies the accused were found in an unlawful possession.

Capitalising on the foregoing, Mr. Mwita wittily contended that the applicant and his two co-accused are jointly charged for being found in an unlawful possession of two pieces of Elephant Tusks valued at TShs. 25,500,000/- hence the said amount should be shared equally. Mr. Mwita arguably referred this court to the case of **Silvester Hillu Dawi & Another V The Director of Public Prosecutions**, Criminal Appeal No. 250 of 2006 in which the principle of sharing was discussed by the court.

Mr. Mwita finally contended that he was expecting that the court in granting bail will impose conditions as stipulated under Section 36 of the Economic and Organized Crime Control Act, Cap 2002.

In his very brief rejoinder submission Mr. Ngoda did not have much to say but rather to concede to the submission by the learned State Attorney as regards to the bail conditions.

I accorded the submissions of either side some most anxious considerations. It seems to me there is no controversy at all as the respondent do not object to the bail application while on the other hand the applicant do not object to propositions for bail conditions to be imposed by this court while granting the bail application. I therefore feel that I should not be detained by the issue of bail because as rightly pointed out by the counsels the offence to which the applicant stands charged is bailable.

The Court of Appeal of Tanzania in **Edward Kambuga** (supra) made it very clear that as the accused has been committed to the High Court and the value of the property is more than ten million shillings, the power to hear and grant bail is vested only in the High Court.

The only issue which requires to be resolved by this court is the question of the conditions for bail. Mr. Mwita sought to

convince this court that the provision of Section 36 of the Economic and Organized Crime Control Act Cap 200 RE 2002 and the decision in **Silvester Hillu Dawi** requires that the applicant and the co-accused shares equally the amount of TShs. 25,500,000/-.

I will, respectfully, decline the tempting invitation to hold that view as I shall explain below.

The Court of Appeal of Tanzania had an opportunity to discuss at length the provision of Section 148(5) (e) of the Criminal Procedure Act and Section 36(4) (e) of the Economic and Organized Crimes Control Act read together with Section 8(c) of the Interpretation of Laws Act, Cap 1 RE 2002. I am grateful to Mr. Mwita who graciously availed the said decision to this court.

In the **Silvester Hillu Dawi's** case the Court of Appeal of Tanzania held that;

"It goes without saying, therefore, that the words any "any person" or "that person" or "the person" appearing in the sections under scrutiny should be taken to mean "person"; "those persons" and/or "the persons."

Therefore Section 148(5) (e) of the Criminal Procedure Act, Cap 20 RE 2002 shall be accordingly construed to read that a court shall not admit persons jointly charged to bail if the

offence with which those persons are charged involves actual money or property whose value exceeds ten million shillings unless those persons jointly deposit cash or other property equivalent to half the amount or value of the actual money or property involved.

In my opinion therefore and based upon the reasoning of the Court of Appeal of Tanzania as stipulated then the provision of Section 36(4) (e) of the Economic and Organized Crime Control Act, Cap 200 RE 2002 shall be construed to read the offence for which persons who are jointly charged involves property whose value exceeds ten million shillings, unless those persons jointly pays cash deposit equivalent to half the value of the property, and the rest is secured by the execution of a bond.

Consequently, and for the reasons stated above the applicant is hereby granted bail on the following conditions:-

1. He deposits a cash equivalent to one third of the 50% of the value of the two Elephant Tusks (TShs. 25,500,000/-) which is equal to TShs. 4,250,000/-.
2. He secures two sureties who are employees of a reputable public institution or a civil servant each one executing a bond of TShs. 2,125,000/-.
3. He surrenders any travel documents in his possession.

4. He does not travel outside Iringa without the prior permission of the court.
5. He reports to a nearby police station every last Thursday of a month.

It is accordingly ordered.

P. F. KIHWELO

JUDGE

13/05/2015