IN THE HIGH COURT OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT DAR ES SALAAM

MISC. ECONOMIC CAUSE NO. 5 OF 2017

(Originating from Economic Crimes Case No. 53 of 2016 Court of Resident Magistrate of Dar es Salaam at Kisutu)

YUSUF ALI YUSUF @ SHEHE @MPEMBA . . . 1ND APPLICANT

CHARLES MAHUNGO MRUTU@

MANGI MAPIKIPIKI @ MANGI MPARE. . . 2ND APPLICANT

VERSUS

THE REPUBLIC . . . . . RESPONDENT

RULING

Korosso, J.:

Yusuf Ali Yusuf and Charles Mahungo Mrutu the 1st and 2nd applicants have filed an application under a certificate of urgency through a chamber summons supported by an affidavit deposed jointly by the applicants. The filed application is pursuant to section 3(3)(a), 29(4)(d), 36(1)(5)(7) of the Economic and organized Crime Control Act, Cap 200 RE 2002. The applicant's relief sought is that the applicants be granted bail pending trial and any incidental order as may be

necessary to be made unfortunately there was no specification on the one to give the said orders.

The Respondent Republic filed a counter affidavit whereby most of the averments related to acknowledging what was stated in the applicant's affidavit regarding the charges facing the applicants and their arraignment and noting the particulars of the offence charged and the fact that the applicants have yet to be committed for trial to this Court. There is also an acknowledgment of the fact that the charges facing the applicants are serious and carry severe punishment.

There is also the fact that the supporting affidavit of the oral presentation of the applicants counsel cements there argument that they cited provisions were amplified and shown to be separate. Therefore the Court proceeds to find that the errors discerned in citing of the provisions to move the Court are curable and orders the applicants to amend by signoff and consequently thereafter we proceed with the ruling to address the issue before the Court, the competence of the Certificate filed by the DPP to object to bail.

There are several facts not disputed between the parties such as the fact that the 1st and 2nd applicants and 4 others face charges containing four counts at the Resident Magistrate Court of Dar es Salaam at Kisutu in Economic Crime Case No. 53 of 2016. The 1st count being leading Organized Crime contrary to Paragraph 4(1) (a) of the First Schedule to , and section 57(1) and 60(2) of the Economic and Organized Crime Control Act, Cap 200 RE 2002, where the value

of the elephant tusks being US $ 180,000.0 equivalent to Tshs. 392,817,600/-; 2nd Count being Unlawful Possession of Government Trophy contrary to section 86(1) and (2)(ii) Part 1 of the First Schedule of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14 of the First Schedule to, and section 57 of the EOCCA as amended concerning elephant tusks valued at USD 30000.0 equivalent to Tanzania shillings 65,469,600/-. The 3rd count is unlawful possession of Government Trophy with the elephant tusks valued at USD 15000.0 equivalent to Tshs. 32,734,800/- and the 4th count also Unlawful Possession of Government Trophy, elephant tusks valued at USD 135000.0 equivalent Tshs. 294,613,200/- all without permit from the Director of Wildlife.

While composing the ruling after hearing both parties, the Court discerned an issue related to the cited provisions to move the Court to hear the application and invited parties to address it on this. The Court had noted that the cited provision had no commas to separate the various provisions.

The applicants counsel upon being invited to address the Court on the issue, conceded to the fact that though they had cited various provisions in the chamber application to move the Court, that is, section 3(3)(a), 29(4)(d), 36(1), (5) (7) of the Economic and Organized Crime Control Act, Cap 200 RE 2002 and that through a human error the commas between the cited provision had not appeared and there was only space. They prayed to the Court to find the said space between the sections to be adequate to show they were separate and distinct sections cited. The applicants also cited various cases expressing a school

of thought that were there are topographical errors, which do not go to the root of the matter that is prejudice the substantive rights of the other parties, the Court should allow the parties to rectify the typographical errors through amendment. The case of ***Leila Jalaludin Haji Jamal vs Shaffin Jalaludin Haji Jamal,*** Civil Appeal No. 55 of 2016 were the Court took into account the contention by the appellants counsel that the erroneous citing of a case year was not a fundamental defect since it did not occasion injustice and holding that such an error is a curable defect.

The other cited case was a High Court case in ***Abubakar Bendera and 18 others vs. TPDC,*** Misc. Land Application No. 1 of 2012, where the Court held that an typographical error in the pleadings does not render it invalid or incompetent persuaded by the reasoning in the case of ***Samson Ngwalida vs. The Commissioner General of RA, Civil Application*** No. 86 of 2008, CAT that an error in not putting a coma did not occasion an injustice to the applicant. They beseeched the Court to address substantive justice as opposed to technical issues which do not go to the rights of the applicants and that the applicants should not be penalized for errors committed by their counsels.

On the other side, the respondent Republic in addressing the Court contended that the lack of commas in the cited provisions to move the Court lead to ambiguity on the cited provisions and that it was not upon the Court to determine what the applicants wanted to present to the Court. That even if they were to accept the applicants contention that it was a typographical error, as per

decisions of the Court of Appeal such errors surmount to wrong citation of the provisions to move the Court. The respondents cited the case of ***Chama cha Walimu Tanzania vs Attorney General*** Civil Application No. 151 of 2008, and ***Robert Leskar vs. Shibesh Abebe,*** Civil Application No. 4 of 2006 where the issue of the consequences of wrong and non- citation of relevant provisions to move the Court was addressed and found were proved to render the pleading incompetent and that such errors were fundamental and not mere technicalities and should be taken as such.

We have considered the submissions and the cited case law, and we are aware of both school of thoughts on the issue. Looking at the records before the Court and a fact also conceded by the counsel for both parties, there is no other explanation one can arrive at but that the absence of the comma's to separate the provision cited to move the court was due to lack of proper care on the part of the applicants counsel, since it is true that it is not the duty of the Court to enter the minds of the parties to discern what they wanted to express or present. That being the case, we are inclined to take the position of the Court of Appeal in the case cited by the Applicants counsel that the fundamental thing is to determine whether an error like the present case, that while acknowledging the fact that failure to cite properly and clearly the provisions to move the Court is fundamental but the test on whether the error occasion injustice on the part of the other party is crucial. In this case the matter was raised *suo motu* by the court itself showing that the respondent Republic did not discern the said errors and were therefore not affected by it.

We now move to the substance of the matter before the court, suffice to say on the date set for hearing of the application, the Court was availed with a Certificate issued by the Director of Public Prosecutions, Biswalo Eutropius Kachele Mganga under section 36(2) of the Economic and Organized Crime Control Act, [Cap 200 RE 2002] that Yusuf Ali Yusuf@ Shehe @Mpemba and Charles Mahugo Mrutu @Mangi Mapikipiki @ Mangi Mpare should not be granted bail on the ground that the safety and interests of the Republic will be prejudiced.

The applicants counsel objected to the DPP's certificate arguing the filing of it is an afterthought since there was no inclination or leaning towards objecting to bail in the counter affidavit filed by the Respondent Republic on 22nd March 2017 and that if the respondent had decided to file the DPP's certificate they should have intimated the same in their counter affidavit. That the counter affidavit should have averred incidents or facts related to safety and interests of the Republic alleged to be at risk of being prejudiced with the grant of bail to applicants. The applicants argued further that failure to show intent to object to the bail application and a few hours before hearing proceeding to file the DPP's certificate objecting to bail is an abuse of due process.

The applicants counsel also implored the Court to be guided by the Courts decision sitting with a panel of judges, in *Jeremiah Mtobesya vs. AG*, Misc. Civil Cause No. 29 of 2015 (unreported) where it was held that section 148(4) of the Criminal Procedure Code, Cap 20 RE 2002 is unconstitutional for failure to pass

the provided test. The counsel implored the court to adopt a purposive interpretation taking that section 148(4) is similar in content and rationale to section 36(2) of the EOCCA, on DPP's certificate to object to bail against applicants/accused persons. The Court was also referred to rules of statutory interpretation arguing that where two provision in different statutes/legislation are similar in content are said to have statutes in *impari maria*. The applicants argued therefore the having regard to the pertaining circumstances should hold and find the two provisions are *impari materia* and therefore the holding in Jeremiah Mtobesya's case (supra) should apply to the section 36(2) of EOCCA.

The applicants further contended that purposive interpretation should apply because by virtue of the fact that the EOCCA in addressing pretrial process it has under section 28 subjected itself to the procedures enshrined in the Criminal Procedure Act, Cap 20 RE 2002.

The learned State Attorney representing the Respondent Republic objected to the applicants submissions stated there is no law directing that when a counter affidavit is filed the DPP's Certificate should be filed also, and that in fact section 36(2) of CPA states that the Certificate of the DPP objecting to bail shall take effect on the date it is filed. On this point suffice to say, the Court finds the views expressed by the learned State Attorney to have substance, in that there is no rule prescribing that the Certificate of the DPP should only be filed with the Counter affidavit or that it should only b filed where the counter affidavit averments intimate intention to object to the bail application. It should be noted that the

offences charged facing the applicants are bailable. Under paragraph 8 and 9 of the counter affidavit they acknowledge the seriousness and graveness of the offence and the consequential results of acquisition of elephant tusks being the destruction of the environment. Therefore the Court while appreciating the arguments by the applicants counsel on this issue finds the issue not warranting much consideration.

It is also important as advanced by the respondents counsel, that the case of Jeremiah Mtobesya cannot be expected to automatic apply to economic offences. This is because economic offences have a specific statute governing its process. Though section 28 of the EOCCA acknowledges the application of the Criminal Procedure Act in proceedings, section 4 of the Criminal Procedure Act is clear that where there is a specific provision in another Act, then the provision of the specific statute should be exhausted before moving to the Criminal Procure Act. This being the case therefore it is not automatic once a provision in the CPA, having similar for any holding for the one statute to be applied similarly in the other statute.

Having established this, and having considered the submissions by counsels and cases cited then we proceed to address the validity of the Certificate by the DPP objecting bail to the applicants to consider whether it should not stand, not be considered. The applicants second argument being that whilst acknowledging the fact that the DPP is empowered to issue the certificate objecting to grant of bail to applicants under section 36(2) of the EOCCA Cap 200 RE 2002, they are

questioning the timing and motive for issuance of the said Certificate, arguing that is it unprecedented and un-procedural to file a counter affidavit and then use another process to block the Court to deal with a matter. That such an act shows bad faith and if the Court takes cognizance of the DPP's Certificate it will an act of succumbing to the DPP's machinations. That the fact that the respondent have not expounded on what interests of the Republic will be prejudiced is an act of bad faith.

The counsel further argued that the law does not clarify nor define when it should be given and thus they contended the timing for which the DPP's Certificate was filed cannot be challenged and that by the holding in the case of *DPP vs Li Ling Ling,* Criminal Appeal No. 508 of 2015 (CAT, at Dar es Salaam) on conditions of validity of the DPP's Certificate and that since they were complied with they can also not be challenged.

Therefore after going through the submissions by the learned counsels for the applicants and the Respondent Republic before this Court for consideration and determination at this juncture is the validity, status and impact of the DPP's Certificate objecting to the granting of bail for the 1st and 2nd applicants. Looking at the records before the Court, it is clear that the counter affidavit filed by the Respondent Republic on the 22nd of March 2017 from paragraph acknowledge the charges facing the applicants and the fact that they have yet to be committed to the High Court and notes the content of the applicants affidavit, that is paragraph 3, 4, 5, 6, 7, 8, 9, 10 and 11. It also acknowledges the fact that

the offence for which the applicants are charged with are serious and carry severe punishment that includes a long custodial sentence. But as argued by the applicants there is nothing relating to objection to the bail application. It is also clear upon consideration of section 36(2) of the EOCCA Cap 200 RE 2002 reads:

36(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 issue of the validity of the Certificate of the DPP has been discussed in various cases and recently in the case of ***DPP vs Li Ling Ling (supra).*** In that case *Li Ling Ling* and four other persons (supra) were jointly charged with four counts, the third count being unlawful dealing in Government trophies total value being 267,401,400/-. The DPP tendered a certificate under section 36(2) of EOCCA objecting to the grant of bail to the respondent on ground that release of bail would likely prejudice the interests of the Republic. The holding of the Court of Appeal was that under section 36(2) of the EOCCA any Court with jurisdiction to entertain and grant bail in an economic crime case. The DPP is empowered to file a certificate in any court which has jurisdiction to hear and determine an application for bail. That the DPP can only file the Certificate when the case is pending trial.

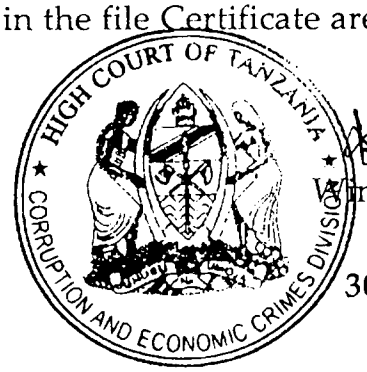
From the case of *Ally Nuru Dirie and Another* (1988) TLR 2002 whose holding is embraced in the case of ***DPP vs Li Ling Ling*** (supra), once the DPP's certificate has met a validity test then the Court shall not grant bail. The conditions for validity of DPP's certificate are that;

> *"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 ending appeal"*

Having considered the law and the authorities before me and applying the said test in ***Ally Nuru Dirie and Another*** (supra) adopted in ***DPP vs Li Ling Ling*** (supra) to the present matter, there is no doubt that the DPP's Certificate filed complies with the validity test on all of the three conditions above. It is important to understand that the said conditions do not relate to the time such a Certificate is filed. Though it is true that parties must stand and be guided by their pleadings, it is clear that section 36(2) of the EOCCA, does not provide room for invalidation of the DPPs certificate having regard to any inferred previous stance or position of those filing the Certificate. Therefore whether at filing of counter affidavit there was no averment as to the position to be taken by the respondents does not in itself lead to invalidation of the DPP's certificate. In the premises for the above reasons there is no doubt that the DPP's Certificate filed in this matter is valid and has to be considered by this Court.

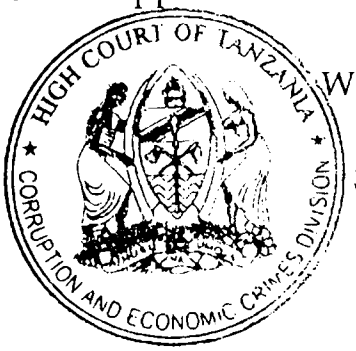
This Court takes cognizance of the principle governing granting of bail pending trial being a fundamental right and grounded by the presumption of innocence is a privilege of every accused person and the fact that the object of bail is to secure the appearance of the accused person at his trial. But in view of the Certificate filed by the DPP to object to the grant of bail for the applicants, the hands of this Court are tied and we at this juncture are refrained from consideration of the application for bail. In the event and for reasons stated above, by virtue of section 36(2) of the EOCCA, the Court refrains from proceeding to consider the prayers by the applicants to be admitted to bail pending committal proceedings.

Having regard to the position stated above we find that in the interest of justice it is important to provide time for the DPP to consider and determine whether the reasons provided for objecting to the grant of bail for the applicants enshrined in the file Certificate are still plausible. Therefore Hearing on the 2nd of May 2017.



Winfrida B. Korosso
JUDGE
30th March 2017

Ruling delivered in chambers this day in the presence of Ms. Sumawe learned State Attorney for the Respondent Republic and Mr. Nehemiah Nkoko learned advocate for the Applicants.



Winfrida B. Korosso
JUDGE
30th March 2017