

**IN THE HIGH COURT OF TANZANIA**  
**CORRUPTION AND ECONOMIC CRIME DIVISION**  
**DAR ES SALAAM REGISTRY**

**MISC ECONOMIC CAUSE NO. 12 OF 2017**

(Arising from Economic Crimes Case No. 7 of 2017, Resident Magistrate's  
Court of Dar es Salaam at Kisutu)

**ABDALLAH MOHAMED NDALANGA . . . . 1<sup>ST</sup> APPLICANT**  
**YAHAYA MOHAMED LUKUMBI . . . . . 2<sup>ND</sup> APPLICANT**

**Versus**

**REPUBLIC . . . . . RESPONDENT**

Date of last order    - 28/4/2017  
Date of Ruling        - 4/5/2012

**RULING**

**W.B. Korosso, J.**

This Ruling is against the prayer by the applicants for the Court to reject and not consider the Certificate of objection to bail filed by the Director of Public Prosecutions against the 1st and 2nd applicant in the application before the Court and proceed to hear the application for bail on merit.

It is important to highlight the fact that before the Court is an application filed under Certificate of urgency via a chamber summon supported by an affidavit sworn by Hekima Mwasipu, the advocate for the applicants. The application is

filed pursuant to section 29(4)(d) of the Economic and Organized Crime Control Act, Cap 200 RE 2002. The relief sought is first, that the Court be pleased to grant bail pending trial of the applicants in this application and second any other relief the court deem fit to grant.

The Respondent Republic filed a counter affidavit as ordered before on 24th of April 2017 and on the 28th of April 2017, a date fixed for hearing the application the Director of Public Prosecution filed a Certificate under section 36(2) of the EOCCA, Cap 200 RE 2002 objecting to the grant of bail to the 1st and 2nd applicant on the ground that the safety and interests of the Republic will be prejudiced.

The counsel for the applicants objected to the last minute filing of the Certificate praying that the Court disregard the said Certificate for the following reasons. First that they had only been served the said certificate in the morning of the hearing date without having any notice of an objection to the bail application or being provided with any inclination of the DPP's intention to file the Certificate objecting to bail. That since the respondents had filed a counter affidavit it would have been reasonable for them to show in the said counter affidavit the respondent's intention to object to the grant of bail to the applicants. Second that though the applicants conceded the fact that the DPP is mandated under section 36(2) of EOCCA Cap 200 RE 2002 to issue the Certificate of objecting to bail, the applicants expectations were that such a certificate should reveal or expound explicitly the interests and safety of the Republic anticipated to be prejudiced. The counsel's argument relied on the case of *Mtobesya* (which unfortunately he failed to provide proper citation).

The counsel for the applicants submitted further that though he was aware that *Mtobesya's* case holding that section 148 of the Criminal Procedure Act, Cap 20 is unconstitutional is persuasive to the Court and the Criminal Procedure Act is a different legislation to the EOCCA, but because the relevant provision held to be unconstitutional in the cited case also dealt with the validity of the DPP's Certificate objecting to grant of bail, consequently it is reasonable and prudent that the reasoning in *Mtobesya's* case on the issue of the DPP's Certificate objecting bail should be applied to the present case. Arguing that the Criminal Procedure Act is the procedural Act for all criminal offences and that section 36(2) is not adequate by itself needing the application of the relevant procedures enshrined in the Criminal Procedure Act, Cap 20 RE 2002.

The Respondent Republic response though was that the issue of the DPP's failure to notify the applicants on his intention to issue and file the Certificate objecting to grant of bail to the applicants does not hold water and is misconceived in law. Arguing that since the DPP's certificate is not part of the counter affidavit and in any case the counter affidavit and the DPP's certificate are separate documents each with its own specific purpose which were in any case filed on separate dates. The Counter affidavit having been filed on the 24th April 2017 and the Certificate objecting to bail filed on 28th April 2017. That a Certificate by the DPP under section 36(2) of the EOCCA can be filed any time before hearing of an application and that this has been discussed in the case of **DPP vs Li Ling Ling** Criminal Appeal No. 508 of 2015 (unreported). That the case discussed the conditions of the validity of the DPP's certificate objecting to grant of bail cementing on the position stated in *Ali Dirie's* case.

The State Attorney submitted further that the current certificate fulfils the three conditions outlined in the *Ali Dirie's* case to lead to determination on the validity of the Certificate objecting to bail. On the application of *Mtobesya's* case, the State Attorney submitted that the said case referred to section 148 of the Criminal Procedure Act, Cap 20 RE 2002 and the certificate filed in the present application has been issued under section 36(2) of the EOCCA Cap 200 RE 2002 and that the two provisions are different arising from two separate legislations as outlined. The Court was referred to the case of *Manase Julius Philemon vs Republic*, Misc. Criminal Application 173 of 2015 where the High Court stated the two legislations are different and separate laws and therefore declaring section 148 of CPA unconstitutional cannot be applied to section 36(2) of EOCCA is also unconstitutional.

On the issue raised by the counsel for the applicants that the DPP should have provided reasons or explanation for the contention raised in the certificate that the interest and safety of the Republic will be prejudiced, the Respondent Republic counsel stated that this issue has been discussed and determined in various cases such as **Misc. Criminal Application No. 3 of 2017** which stated the law does not require the DPP to state reasons that justified his reason to certify that granting of bail to applicants will prejudice the safety and interest of the Republic. It was thus their contention that the seriousness of the offence charged against the applicants has warranted the DPP to issue the certificate objecting to grant of bail to applicants so as not to prejudice the safety and interest of the Republic and thus prayed the Court to uphold and consider the said certificate

by the DPP and refrain from granting bail until the case is fully determined or the DPP so finds and informs the Court otherwise.

The applicants rejoinder reiterated their submissions in chief cementing arguments seeking the Court's indulgence and praying for the Court to disregard the filed DPP's certificate because in the absence of any explanation provided by the DPP on reasons of objecting to the grant of bail that if the Court proceeds to consider the said certificate it will amount to denying the applicants the right to be heard.

In consideration of the submissions before the Court we start by grounding the current application. The applicants are charged with Unlawful Possession of Government Trophies contrary to section 86(1)(2) (ii) and part 1 of the first schedule of Wildlife Conservation Act No. 5 of 2009 read together with Paragraph 14 of the First Schedule to, and Section 57(1) of the Economic and Organized Crime Control Act, Cap 200 R.E 2002. Particularly the elephant tusks valued at USD 30000.0 equivalent to Tshs. 66,750,000/-.

The Court is vested with the duty to consider whether the filed certificate objecting to grant of bail to the applicants as advanced by the Respondent Republic or on the other hand disregard the said Certificate as invited by the learned counsel for the applicants. Our starting point will be consideration of the first issue raised by the applicants on the fact that there was no information provided to the applicants on the DPP's intention to file the certificate, that there was no such information even in the counter affidavit. It is also clear that the

applicant's assertion goes to the root of the validity of the Certificate issued by the DPP. 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)* whereby Li Ling Ling and four other persons 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. The said conditions do not relate to the time such a Certificate is filed. Though it is true that a parties must stand and be guided by their pleadings, it is clear taking a purposive interpretation of section 36(2) of the EOCCA, any previous stance or position does not invalidate the DPP's Certificate once filed. Therefore from for the above reasons there is no doubt that the DPP's Certificate filed in this matter is valid. Upon the said finding therefore on this issue we share the views advanced by the learned State Attorney for the Respondent Republic that the argument does not hold water since the relevant provision does not outline or demand for the DPP to provide any such information or notification to the other party.

On the second issue raised by the applicants counsel that the holding in *Mtobesya's* case should be upheld so that the file certificate be found to be unconstitutional. we find the case of The case of *Jeremia Mtobesya vs. AG*, Misc. Civil Cause No. 29 of 2015 was also cited to cement the applicants point we find

is distinguishable having addressed the Criminal Procedure Act, Cap 200 in view of the fact that though the sections, that is 148 of the CPA may seem similarly to Section 36 of the EOCCA, there are still different and independent sections under separate Acts. The EOCCA has a specific provision providing procedure for bail and therefore one cannot resort to the CPA unless there is a lacuna which we find there being no such lacuna which will lead this court to resort to procedures in the CPA. The constitutionality of section 36(2) of the EOCCA Cap 200 RE 2002, has yet to be determined by this Court or the Court of Appeal. Section 4(2) of the CPA contents are also applicable to cement this position

In any case it should be understood that the powers of the Director of Public Prosecution are Constitutional under Article 59(B). Under Article 59(B) of the URT Constitution,

*"the DPP in exercising his powers, he shall be free, shall not be interfered with by any person or with any authority and shall have regard to the following:*

*(a) the need to dispensing justice;*

*(b) prevention of misuse of procedures for dispensing justice;*

*and*

*(c) public interest".*

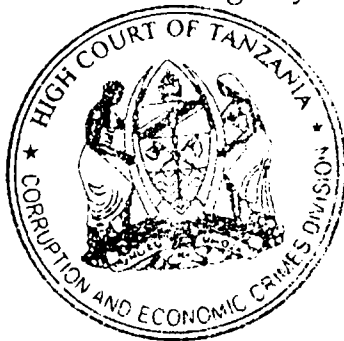
Article 59B of the Constitution provides that the DPP powers shall be expounded in various enactments. Looking at section 36(2) of the EOCCA, as held in various cases it states categorically in even its choice of terms that where the Director of Public Prosecution has certified that the safety or interests of the Republic will be



prejudiced if any person is granted bail then the Court shall not grant bail. The position is cemented by various cases including *Method Malyango Busogo and Another vs R.*, Misc. Criminal Application No. 51 of 2015; *Lucas Galuma Nyagabati vs. R*, Criminal Application No. 107 of 2015; and *the DPP vs Li Ling Ling*, Criminal Appeal No. 508 of 2015, whereby in this case the Court of Appeal stated that "*the position of the law as stated in the Dirie's case is that once the DPP's certificate has met a validity test, the court shall not grant bail*". Further consideration of the above factors makes it clear that, once there is a Certificate filed by the DPP like the case on hand, the Court has to satisfy itself that the said certificate has met the validity test geared at also testing whether the principles guiding the functions of the DPP have been complied with within the fountains of administration of justice and advancing the rule of law.

The other point raised by the applicants counsel was that the Certificate is too broad only stating the reasons for issuance of the same is for safety and interest of the Republic without providing any details so that this Court could measure the reasons.. The case of *Jeremia Mtobesya vs. AG*, Misc. Civil Cause No. 29 of 2015 was also cited to cement this point. As stated earlier section 36(2) of the EOCCA does not demand for provision of any explanation by the DPP upon issuance of Certificate objecting grant of bail. Though rationally it might seem the best scenario in such cases for the DPP to expound on the matters leading him to certify that the safety and interest of Republic will be prejudiced unfortunately the law does not demand for this. As stated in *DPP vs Li Ling Ling* case the underlying issue for consideration where there is a DPP's Certificate is whether it is valid.

Having found that the DPP's Certificate issued under section 36(2) of the Economic and Organized Control Act to be valid and there being no special circumstances or matters which the Court might be persuaded to consider to move it to disregard the filed Certificate despite finding it is valid. In the premises, this Court finds no need to proceed to consider granting of bail as prayed by the applicants. In the premises, the bail application is denied at this juncture and the DPP's Certificate objecting to bail shall remain in effect until the proceedings concerned are concluded; or where the DPP withdraws the certificate or there being any other order of this Court. Ordered.

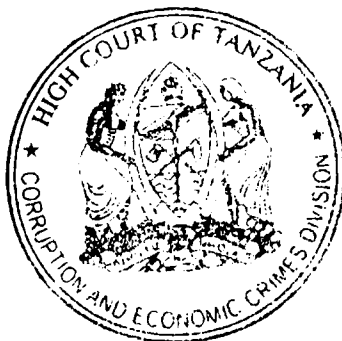


Winfrida B. Korosso

Judge

4th May 2017

Ruling delivered in chambers this day in the presence of Mr. Eliah Athanas Learned State Attorney for the Respondent Republic and Mr. Hekima Mwasipu, Learned Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> applicant. Also in the presence of the 1<sup>st</sup> and 2<sup>nd</sup> applicants Abdallah Mohamed Ndalanga and Yahya Mohamed Lukumbi.



Winfrida B. Korosso

Judge

4th May 2017