

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
THE CORRUPTION AND ECONOMIC CRIMES DIVISION
AT DAR ES SALAAM**

MISC. ECONOMIC CAUSE NO. 19 OF 2017

(Originating from Dar es Salaam Resident Magistrates' Court at Kisutu in
Economic Case No. 53 of 2016)

1. YUSUF ALI YUSUF @ SHEHE @ MPEMBA 1ST APPLICANT
2. CHARLES MAHUNGO MRUTU
@ MANGI MAPIKIPIKI @ MANGI MPARE 2ND APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

Date of Last Order: - 26/07/2017

Date of Ruling: - 17/08/2017

RULING

F.N. MATOGOLO, J.

In the Resident Magistrates' Court of Dar es salaam at Kisutu, the applicants Yusuf Ali Yusuf @ Shehe @ Mpemba and Charles Mahungu Mrutu @ Mangi Mapikipiki @ Mangi Mpare and four others, that is, Benedictus Vintus Kungwa, Jumanne Ramadhan Chima @ Jizzo @ JK, Ahmed Ambari Nyagongo and Pius Vicent Kulagwa stand charged with four counts as 1st, 2nd, 3rd, 4th, 5th and 6th accused respectively.

1st count: leading organized crime contrary to paragraph 4(1)(a) of the first schedule and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act, [CAP. 200 R.E, 2002] as amended where it was alleged that; on diverse dates between January, 2014 and October,

2016 at diverse places within Dar es Salaam, Morogoro, Iringa, Tanga and Mtwara regions, jointly and together with other persons not in Court; intentionally, the accused persons organized and furthered the objectives of a criminal racket by acquiring, possessing and selling Government trophies to wit; 50 pieces of elephant tusks valued at USD 180,000 equivalent to Tshs. 392,817,600/= the property of the United Republic of Tanzania without permit from the Director of Wildlife.

2nd count: unlawful possession of Government Trophy contrary to section 86(1) and (2) I (ii) and part I of the first schedule of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the first schedule and section 57(1) of the Economic and Organized Crime Control Act (supra) where it was alleged that; on 26th day of October, 2016 at Mbagala Zakhem area within Temeke District in Dar es Salaam region, the accused persons were found in unlawful possession of Government trophies to wit; ten (10) elephant tusks weighed at 13.85 kilograms valued at USD 30,000 equivalent to Tshs. 65,469,600/= the property of the United Republic of Tanzania without permit from the Director of Wildlife.

3rd count: unlawful possession of Government Trophy contrary to section 86(1) and (2)(c)(ii) and part I of the first schedule of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the first schedule and section 57(1) of the Economic and Organized Crime Control Act (supra) where it was alleged that; on 27/10/2016 at Tabata Kisukulu area within Ilala District in Dar es Salaam region, the accused were unlawfully found in possession of Government Trophies to wit; four (4) pieces of elephant tusks weighed at 11.1 kilograms valued at USD 15,000

equivalent to Tshs. 32,734,800/=, the property of the United Republic of Tanzania without permit from the Director of Wildlife.

4th count: unlawful possession of Government Trophy contrary to section 86(1) and (2)(c)(ii) and part I of the first schedule of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the first schedule and section 57(1) of the Economic and Organized Crimes Control Act (supra) where it was alleged that; on 29/10/2016 at Tabata Kisukulu area within Ilala District in Dar es Salaam region, the accused persons were found in unlawful possession of Government Trophies to wit; thirty six (36) pieces of elephant tusks weighed 58.55 kilograms valued at USD 135,000 equivalent to Tshs. 294,613,200/=, the property of the United Republic of Tanzania without permit from the Director of Wildlife.

Pending investigation and hearing of the charged offences, the applicants filed an application to this Court for bail. The application is by chamber summons made under sections 3(3)(a), 29(4)(d) and 36(1)(5)(7) of the Economic and Organized Crime Control Act, [CAP. 200 R.E, 2002] herein after referred to as the Act. The chamber summons is supported by an affidavit affirmed and sworn respectively by the applicants in person. In response, the Respondent filed a Counter Affidavit deposed by Florentina L. Sumawe, learned State Attorney. But also on 13/07/2017, the Director of Public Prosecutions filed a Certificate under section 36(2) of the Act objecting bail to the applicants on ground that safety and interests of the Republic will be prejudiced.

Following presentation of the said Certificate objecting bail to the applicants, the applicants' counsel preferred to argue against the DPP's Certificate.

The applicants were represented by Mr. Nehemiah Nkoko assisted by Mr. Hassan Kiangio learned advocates. The Respondent was represented by Ms. Elizabeth Mkunde, learned State Attorney.

At the hearing, the learned State Attorney raise a point of law that this Court lacks jurisdiction to entertain the application at hand for the Court is functus officio. This Court and counsel for the parties agreed that the issue of DPP's Certificate as well as the aspect of jurisdiction of this Court raised by the learned State Attorney be argued together.

Submitting on the preliminary point of law on the jurisdiction of this court, Ms. Elizabeth Mkunde learned State Attorney stated that, the applicants earlier came to this Court with another application for bail in Miscellaneous Economic Cause No. 5 of 2017 which was determined by Madam Justice W.B. Korosso. In the said application, the DPP filed a Certificate objecting bail to the applicants whereas on 08/05/2017 this court ruled that the Certificate by the DPP was valid thus denying bail to the applicants. In the circumstances, Ms. Mkunde learned State Attorney argued that, since the application at hand is on the same reliefs as to bail, the same cannot be heard by the same Court on ground that this Court is functus officio.

She referred this Court to the decision of the Court of Appeal where the Court has discussed circumstances rendering a Court functus officio.

That was in the case of **Chief Abdallah Saidi Fundikira vs. Hillal L. Hillal**, Civil Application No. 72 of 2002, (Dar es Salaam Registry), (Unreported) in which the case of **Kamundu vs. Republic**, [1973] E.A. 540 was cited, where the erstwhile Court of Appeal for East Africa had the following on functus officio:-

"A court becomes functus officio when it disposes of a case by a verdict of guilty or by passing sentence or making some orders finally disposing of the case".

Ms. Mkunde further argued, since this Court had already held the Certificate in Miscellaneous Application No. 5 of 2017 to be valid, then, the hands of this Court are tied up and cannot reopen and determine this bail application considering that the said Certificate has neither been withdrawn nor the matter has come into an end, and that the two being circumstances which can put at an end validity and enforcement of a Certificate by the DPP.

The learned State Attorney urged this Court to be guided by Court of Appeal decision in the case of **Jumuiya ya Wafanyakazi Tanzania vs. Kiwanda cha Uchapishaji cha Taifa**, [1988] T.L.R 146 where the Court held that, Courts and tribunals subordinate to the Court of Appeal are bound by its decisions regardless of their correctness.

Ms. Mkunde added that, this Court had already determined validity of the DPP's Certificate in its ruling dated 08/05/2017 that the Certificate complies with all the conditions specified in the case of **the Director of Public Prosecutions vs. Li Ling Ling**, Criminal Appeal No. 508 of 2015,

(Dar es Salaam Registry), (Unreported) rendering this Court **functus officio** to reopen and determine this application on the same reliefs.

In reply, Mr. Nehemiah Nkoko, learned advocate submitted that; in Miscellaneous Economic Cause No. 5 of 2017, the Court ruled on 30/3/2017 among other things after hearing both sides that, it would be in the interest of justice to provide time to the DPP to consider and determine whether the reasons for objection of bail provided as enshrined in the filed Certificate were still in place. The Court thus scheduled the matter for hearing on 02/05/2017 for the DPP to be in a position to tell if still there was need for the Certificate to remain.

He added that, in its ruling dated 08/05/2017, the Court found in the interest of justice for the DPP's Certificate to remain in force for one month from the date of ruling, after that period if the matter remains pending without committal for trial, then the Certificate of the DPP would be considered to have been lifted and the applicants would be at liberty to file a fresh application for bail consideration. It is from the above, Mr. Nkoko argued that this Court in respect of the application at hand cannot be said to have been rendered **functus officio**. He further argued that, the available remedy on part of the respondent was to prefer an appeal or revision against ruling of the Court in Miscellaneous Economic Cause No. 5 of 2017 rather than coming to this court with the argument that it is **functus officio**.

The learned advocate wondered how the respondent preferred another Certificate in this application if at all she was of the view that the

former Certificate was still valid. He thus urged for the cited case of **Jumuiya ya Wafanyakazi Tanzania vs. Kiwanda cha Uchapishaji cha Taifa** (supra) to be distinguished. Moreover, the applicants' counsel cited another case of **John Francis Shao vs. Republic**, Miscellaneous Criminal Application No. 24 of 2016 (Dar es Salaam Registry), (Unreported) where this Court (Arufani, J), faced a similar situation which ultimately granted bail to the applicant after lapse of the given one month period.

Mr. Nkoko further cited the case of **Hassan Othman Hassan @ Hasanoo vs. the Republic**, Criminal Appeal No. 193 of 2014, (Dar es Salaam Registry), (Unreported), where the Court of Appeal in addressing a similar aspect of **functus officio** observed that, the appellant having been acquitted in the case that formed ground for refusing him bail, there was no reason for not considering his bail application. The case was thus remitted to the High Court for bail consideration to the appellant.

In rejoinder, Ms. Mkunde submitted that, on 30/03/2017 this Court issued a ruling in which the Republic was given one month so that she could explain whether the reasons by the DPP objecting bail to the applicants were still plausible. On 08/05/2017, this Court delivered a ruling holding that the DPP's Certificate was valid. She added that, the other orders by this Court on that material date were decided per incuriam because the answer is under the law. And that as the DPP has not withdrawn the Certificate and the matter is yet to be determined. Besides, the Court has no power to give lifespan on validity of the Certificate by the DPP.

The learned State Attorney distinguished the cited case of **John Francis Shao vs. Republic (supra)** arguing that, in that case, the Court granted one month with an option for fresh application because the Republic did not object bail. In upshot, Ms. Mkunde summarized that, the Certificate in Miscellaneous Economic Cause No. 5 of 2017 is still valid as earlier declared by the Court rendering this application **functus officio** as underscored in the earlier cited case of **Li Ling Ling** (supra).

Having heard the submissions by the learned friends that is, Ms. Mkunde learned State Attorney and Mr. Nkoko learned advocate, and upon considering what is in the court record, there are only two issues to determine; that is whether this court is **functus officio** and whether the certificate by the DPP is valid one and good ground to deny bail to the applicants.

Starting with the issue as to whether or not this Court is functus officio to hear and determine the application at hand, it is pertinently unavoidable to refer to what transpired and ordered by this Court. In her ruling dated 8/3/2017, the learned judge (Korosso, J), at page 3, held as follows:-

"It suffices that this Court has already made a determination on the validity of the filed Certificate that it complies with all the conditions specified in DPP vs. Li Ling Ling, Criminal Appeal No. 508 of 2015 CAT Dar es Salaam. That being the position, having regard to the holding of the Court of Appeal especially consequences resultant to the validation of the DPP's Certificate that it is to deny bail to the applicants, the hands of the Court are tied. Therefore the Court cannot as prayed by the applicants'

counsel disregard the valid Certificate by the DPP objecting bail to the applicants and therefore the prayer for grant of bail shall not be considered at this juncture”.

From the above, it is clear that the above verdict by this Court in Miscellaneous Economic Cause No. 5 of 2017 determined the issue of DPP’s Certificate and its validity. Additionally; though not eloquently stated in the quoted ruling of the Court, the same refers to the very ruling referred to this Court by the learned friends dated 30/03/2017 at page 11:-

“ 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 the three conditions above. 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. But in view of the Certificate filed by the DPP to object the grant of bail for the applicants, the hands of this Court are tied and we at this juncture 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.”.

Moreover, clarifying finality on the aspect of the Certificate of the DPP objecting bail, the same learned judge had the following to say at page 2 of the Ruling delivered on 08/05/2017:-

“It is important to state at this juncture that the case cited by the applicants’ counsel of John Francis Shao vs. Republic

(supra) is distinguishable. In that case after hearing submissions by the parties on the DPP's certificate objecting to grant of bail, Hon. Munisi, J refrained to grant bail and ordered that the certificate by the DPP be in force for only one month and if after one month the applicants' case is not conducted the certificate of the DPP would be considered it has been lifted and the applicant would be at liberty to file afresh application for bail. From this it is clear that the said order was very conclusive of the effect of the DPP's Certificate after the one month while in this case that is not the case".

Thus, as correctly submitted by Ms. Mkunde learned State Attorney with reference to the cited case of **Kamundu vs. Republic (supra)**, this Court is of the considered view that it will be functus officio to reopen the matter regarding same sought reliefs for a verdict by way of an order that finally determined bail application has already been made by this Court in both its rulings dated 30/03/2017 and 08/05/2017.


It follows therefore that, in case any party is of the view that the two decisions by Korosso, J. in Miscellaneous Economic Cause No. 5 of 2017 dated 30/03/2017 and 08/05/2017 respectively were either contradictory, held per incuriam or that the Court exercised powers beyond its limits in respect of lifespan of the Certificate of the Director of Public Prosecutions, then it is not the role of this Court to address the same as the same were made by the same Court. Any anomaly (if any) should be addressed by the Court of Appeal through the available legal remedies.

This Court is bound by the cited decision of the Court of Appeal in **the Director of Public Prosecutions vs. Li Ling Ling (supra)** where the Court observed at page 15 of the typed Judgment 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".

From the above therefore, and since this Court has already determined the same, this Court finds the objection by the learned State Attorney meritorious in law and it is hereby sustained, for, the same issue has been determined by this Court in the referred rulings of 30/03/2017 and 08/05/2017 respectively. Consequently, the application at hand is incompetent and it is hereby struck out.

Order accordingly.


F.N. MATOGOLO
JUDGE
17/08/2017

Date: 17/08/2017.

Coram: Hon. F.N. Matogolo, J.

For Applicant: Mr. Hassan Kiangio Advocate

1st Applicant: Present

2nd Applicant: Present

Respondent: M/s Elizabeth Mkunde – State Attorney

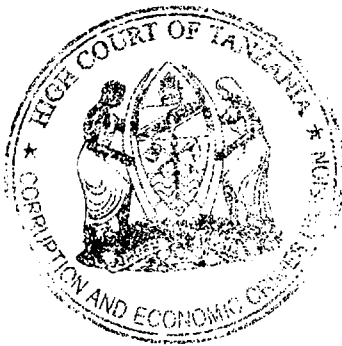
C/Clerk: Mr. N.C. Malela.

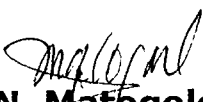
M/s Elizabeth Mkunde – State Attorney:-

My Lord I appear for the respondent. Mr. Kiangio advocate appears for the applicants. The matter is for ruling we are ready.

Court:

Ruling delivered this 17th day of August, 2017 in the presence of the applicants, and in the presence of their advocate. Mr. Hassan Kiangio. Also in the presence of M/s Elizabeth Mkunde learned State Attorney.




F.N. Matogolo
Judge
17/08/2017