

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

MISCELLANEOUS CRIMINAL APPLICATION NO 13 OF 2020

BETWEEN

1. MORISI JOSEPH BUNDE OCHIENG' _____ 1st APPLICANT

2. MAGORI MAKORE MAGORI _____ 2nd APPLICANT

VERSUS

THE REPUBLIC _____ RESPONDENT

(Arising from economic case no 4 of 2019 pending at the resident Magistrates' court of Musoma at Musoma)

RULING

Date of last order; 30.06.2020

Date of Ruling; 24.07.2020

GALEBA, J.

This application has been made under sections 29(4)(d) of the **Economic and Organized Crime Control Act [CAP 200 RE 2002]** (the EOCA) as amended. The application is for bail pending trial of economic crime case no. 4 of 2019 filed at the resident magistrates' court of Musoma. In that pending matter the applicants are charged on two counts of being found in **UNLAWFUL POSSESSION OF GOVERNMENT TROPHIES** contrary to Section 86(1) and (2)(c)(iii) of the **Wildlife Conservation Act, No 5 of 2009** (the WCA) as amended by the **Written Laws (Miscellaneous Amendments) Act No. 2 of 2016**

read together with Paragraph 14 of the first schedule to the EOCA as amended by **Written Laws (Miscellaneous Amendments) Act No. 3 of 2016**.

According to the charge, the applicants were found in unlawful possession of twenty one hippopotamus teeth valued at Tshs 71,631,000/= on the first count. The applicants are also alleged to have been found in unlawful possession of one lower jaw of a hippopotamus and five teeth of the same animal both worthy Tshs 3,411,000/= on the second count. It is the allegations of the respondent that the offences were committed by the applicants at Tamau village, Bunda district in Mara region on 03.10.2019.

The application is supported by the affidavit sworn jointly by both applicants in which they swear that because the amount of value of the trophies exceed Tshs 10,000,000/= then the resident magistrates' court has no jurisdiction to entertain their application so they had to file it to this court. They also swear that bail is a constitutional right.

When the application came up for hearing on 30.06.2020, Mr. Frank Nchanila learned state attorney submitted that the Republic is not objecting to the facts that is why he did not file a counter affidavit, but there are matters of law to be addressed. He submitted further that the republic is not objecting to grant of the bail as prayed, but that he would have some points to submit upon in terms of section 36(4)(e) of the EOCA. He submitted that according to that section a

person cannot be admitted to bail unless he deposits half of the money in cash and then secure another half with a commitment in terms of the bond. Essentially that was his argument. On his part Mr. Edison Philipo, learned advocate for the applicants submitted that section 36(4)(e) of the EOCA was amended by the **Written Laws (Miscellaneous Amendments) Act No 3 of 2016** such that in alternative to cash, the applicant may as well pledge security. When I asked Mr. Philipo, to point to the exact section of that Act which amended section 36(4)(e) of the EOCA, he stated that the law was section 10 of the above 2016 Act. When advised that section 10 did not amend section 36(4)(e) but amends section 36(5)(a) of the EOCA, he ran out of words. In rejoinder Mr. Nchanila insisted that section 36(4)(e) of the EOCA which requires depositing half of the money has never been amended.

Neither Mr. Philipo nor Mr. Nchanila referred me to any decided cases to back their respective contending positions. Anyhow, at least there is one important issue that is not disputed; and the issue is that based on the presumption of innocence, bail is a constitutional right and its grant in this application is not contested. What was hotly debated in this case are conditions to be attached to the bail once granted to the applicants. Mr. Nchanila's view was that one of the conditions for grant of the bail should be that each applicant must pay in court Tshs. 37,521,000/= as half of the value of the trophies in the charge sheet and the other half be secured by a bond

executed by each applicant. For his position as stated above he cited section 36(4)(e) of the EOCA. The position of Mr. Philipo, was that the amount of money in the charge must be shared by the applicants and that it is not mandatory that it must be cash, the cash deposit can be substituted with real property. In other words the issues before this court were two;

1. Whether for the applicants to be released on bail, half of the security should be cash and the other have be secured by bond or the cash can be substituted with property of the same value.
2. Whether the applicants can share the money or the property required as part of the security.
3. Which other conditions of bail will be required for the applicant to be released on bail.

To begin with, this court must make it clear that, the right to bail in offences in which bail is not barred by statute, is a Constitutional right enshrined in, and protected by Article 13(6)(b) of the **Constitution of the United Republic of Tanzania [CAP 2 RE 2002], (the Constitution)**.

That provision states in Kiswahili as follows;

“(b) ni marufuku kwa mtu aliyeshitakiwa kwa kosa la jinai kutendewa kama mtu mwenye kosa hilo mpaka itakapothibitika kuwa anayo hatia ya kutenda kosa hilo.”

The close English translation could be;

"(b) It is forbidden for any person who has been charged of a criminal offence to be treated as if he is guilty of the offence he is charged with until it is proved that he committed the offence."

This important Constitutional pronouncement upholds, and it is meant to cherish what is also referred to as the Presumption of Innocence in our legal system. This, therefore, is the basis of all bail applications, to ensure that a person accused of an offence is not treated as if he is guilty by being detained.

With that in mind, I will now proceed to the issues. The first is whether, half of the security must be cash or it may be cash or real property and then the second be execution of a bond. On this each advocate had his position, and I must state that both positions are statutory. One position is **conservative** and the other **liberal**. I will now turn to observing the two positions.

The conservative position is the one provided for in section 36(4)(e) of the EOCA. That section provides as follows;

"36(4) The Court shall not admit any person to bail if–

(a) to (d) N/A

(e) the offence for which the person is charged involves property whose value exceeds ten million shillings, unless that person pays cash deposit equivalent to half the value of the property, and the rest is secured by execution of a bond;"

This is the conservative position of the law and it was this law that Mr. Nchanila impressed upon the court that it should be followed.

The liberal position is enacted in section 36(5)(a) of the same Act as amended by section 10 of the **Written Laws (Miscellaneous Amendments) Act No 3 of 2016**. It provides;

"36(5) The Court shall not admit any person to bail if–

(a) where the offence with which the person is charged involves actual money or property whose value exceeds ten million shillings, unless that person deposits cash or other property deposit equivalent to half the amount or value of actual money or property involved and the rest is secured by execution of a bond;–

Provided that where the property to be deposited is immovable, it shall be sufficient to deposit the title deed, or if the title deed is not available such other evidence as is satisfactory to the court in proof of existence of the property; save that this provision shall not apply in case of police bail."

In the latter position, the court can accept evidence of ownership of real property in the place of cash and release a person on bail and this is the position that was preferred by Mr. Philipo.

This court has to choose one of the two. The cardinal principal obtaining in Tanzania in decision making is that courts should always make decisions that are harmonious when dealing with similar facts unless it is extremely necessary to depart from a position taken previously by the same court see **ULC (TANZANIA) LTD VERSUS NATIONAL INSURANCE CORPORATION AND ANOTHER [2003] TLR 212**.

In this case, this court has on two occasions opted for a liberal position and set bail conditions substituting cash for real property. This court has taken the liberal approach, and this court was lucky to lie hands on the decisions in **MISCELLANEOUS ECONOMIC**

APPLICATIONS 53 OF 2019 AND NO 2 OF 2020; GETRO CHULA MSAFIRI, DAMIAN JONAS MSOLOPA AND EMMANUEL BAHATI SANDI VERSUS THE REPUBLIC, HC at IRINGA as per Ngwala J. and **MISCELLANEOUS ECONOMIC CAUSES NO 22, 25, 26 AND 27 of 2018; AUGUSTINO JOSEPH MALILA AND FOUR OTHERS VERSUS THE REPUBLIC, HC (CORRUPTION AND ECONOMIC CRIMES DIVISION)** at DSM as per Matogoro J, both unreported. In these decisions the this court decided that instead of the money, the court can apply section 36(5)(a) of the EOCA to substitute the money with property as security for half of the value of the money involved. Before this court there are no circumstances compelling this court to depart from the position taken by this court in the above cited matters. Mr. Nchanila did not impress on me the reasons why was the section 36(5)(a) of the EOCA was enacted if it was not to be used by courts in circumstances obtaining in the present case. So I will impose property and the bond instead of the cash and the bond, which as I have indicated, is quite lawful. That disposes of the 1st issue.

The 2nd issue deals with the principal of more than one bail applicants to share in contributing to the security needed to meet a set bail condition. This issue shall pose no difficulty to resolve because we already have a clear direction from the Court of Appeal. In **CRIMINAL APPEAL NO 250 OF 2006 BETWEEN SILVESTER HILLU DAWI AND STEPHEN LEONS MWAMBENE VERSUS THE DIRECTOR OF PUBLIC**

PROSECUTIONS, CA UNREPORTED, at page 13 the Court of Appeal held that;

"On this legal point we are with respect in agreement with both Mr. Nyange and Mr. Boniface in their contention that the learned first appellate judge erred in hold that the principal of sharing is foreign in the laws of this country. We may as well observe in passing that these are the sort of situations wherein the courts are permitted to employ ingenuity to enhance the quality of our criminal justice."

To me, that means the principal of sharing was approved by the court of appeal. In brief, that disposes of the 2nd issue.

The third issue will be sorted out as I will be setting the bail conditions, which conditions will be based on the fact that the case in the subordinate court is an economic case and the value of the government trophies involved in that case is a total of Tshs 75,042,000/= and its half is Tshs 37,521,000/=.

Finally, as the application for bail was not contested, the same is granted on the following conditions;

1. Each applicant shall deposit with the subordinate court Tshs 37,521,000/= cash, or
2. In alternative to the cash deposit referred to at item (1) above, each applicant shall deposit with the court a Certificate of Title to land owned by him or owned by any third party situated within the territorial jurisdiction of the Resident Magistrates' Court of Musoma.

- (a) If the land subject of the Certificate of Title shall be owned by the applicant, his spouse shall deliver to court a written undertaking attested by a commissioner for oaths stating that she will have no objection to sale of the land by the government in case the applicant to whom the security relates jumps bail.
 - (b) If the land subject of the Certificate of Title shall be the property owned by any person other than the applicant, that person and his or her spouse shall deliver to court a written undertaking attested by a commissioner for oaths stating that they will have no objection to sale of the land by the government in case the applicant to whom the security relates jumps bail.
 - (c) The value of the land subject of the Certificate of Title for purposes of granting bail to any applicant shall not be below Tshs 37,521,000/=. In other words the title deed shall be accompanied with a valuation report, from a registered valuer whose details and contacts should be mentioned in the report.
- 3. Each applicant shall execute a bond, as required by section 36(5)(a) of the EOCA to secure the balance of Tshs 37,521,000/= not secured under items (1 or 2) above, and
 - 4. Each applicant will present to court, two sureties who will, each commit to court that the applicant he is standing surety, will at

all times attend to court when required, and in case the applicant does not, that surety may be committed to jail as per the law. These sureties must be employed by, either the central government, the local government or any reputable limited liability company with business within the territorial limits of the Resident Magistrates' Court of Musoma, and

5. Once admitted on bail none of the applicants shall travel outside the territorial jurisdiction of the Resident Magistrates' Court of Musoma, without a prior permission of that court, and
6. Each applicant shall surrender to court the following documents (in case he possess them); National Identity Card, the Tanzania Driving Licence and any Travel Document including Passports, and
7. The applicants shall attend to court on all days that the matter will be called before the subordinate court, and
8. Once the Resident Magistrates' Court of Musoma is satisfied that the above bail conditions have been fully fulfilled, it shall release on bail the applicant who has so fulfilled the conditions.

DATED at MUSOMA this 24th July 2020



Z. N. Galeba
JUDGE
24.07.2020

Court; This ruling has been delivered today on 24th July 2020 in the absence of parties but with leave not to attend court.




Z. N. Galeba
JUDGE
24.07.2020