

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA
AT MUSOMA**

CRIMINAL APPLICATION NO. 29 OF 2020

(Originating from Economic Crime Case No. 2 of 2020 in the District
Court of Musoma at Musoma)

1. HUSSEIN S/O JUMA@ MZUZU 1ST APPLICANT
2. MBAGIRA S/O MASHAURI 2ND APPLICANT
3. MARANDE S/O MATARUMA @RULE.....3RD APPLICANT
4. PETRO S/O BWIRE @CHIGUSU4TH APPLICANT
5. JAPET S/MABEO @CHOGELO.....5TH APPLICANT
6. MAKI S/O MASHENENE MAJINGE.....6TH APPLICANT
7. SADICK S/O MUGINI.....7TH APPLICANT
8. DICKSON S/O JORAMU.....8TH APPLICANT
9. DULLA S/O EMANUEL.....9TH APPLICANT
10. DAUDI S/O MABIGI.....10TH APPLICANT
11. BUJEI S/O PATRICE11TH APPLICANT
12. JABU S/O PIUS @MABAGALA12TH APPLICANT
13. ELIAS S/O JULIUS @ MASHAURI.....13TH APPLICANT
14. MASATU S/O KAIGA..... 14TH APPLICANT
15. MAKURWA S/O KAIGA.....15TH APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

29th and 30th July, 2020

KISANYA J.:

This Court has been moved under sections 29(4)(d) and 36(1)(5) of the Economic and Organized Crime Control Act, Cap. 200, R.E. 2019 (the EOCCA) to be pleased to grant the applicants bail pending trial and determination of Economic Crime Case No. 2 of 2020 filed before the District Court of Musoma at Musoma. This application is supported by an affidavit sworn by Mr. Cosmass Tuthuru, learned advocate for the

applicants.

According to the charge sheet appended to the affidavit in support of the application, the above named applicants have been arraigned before the District Court of Musoma at Musoma for six counts of offence. The first, third and fifth counts relate to offence of malicious damage to property contrary to section 326(1) of the Penal Code, Cap. 16, R.E. 2019. It is alleged that, on 4th September, 2019 at Bwai Kumusoma area within the District and Municipality of Musoma, the applicants willfully and unlawfully destroyed motor vehicle valued Tshs 13, 965,000 (for the first count), various crops valued at Tshs, 5, 278,300 (for third count) and various school properties valued at Tshs 10,130, 551.08 (for the fifth count).

Also, the applicants are jointly and together charged with three counts of occasioning loss to a specified authority contrary to paragraph 10(1) of the First Schedule to and section 57(1) and 60(2) of the EOCCA. The prosecution alleged that, on 4th September, 2019 at Bwai Kumusoma area within the District and Musoma Municipality, the applicants caused loss of Tshs 13, 965,000 to Tanzania Police Force (for the second count) and Tshs, 5, 278,300 and Tshs 10,130, 551.08 to Bwai "A" Primary School (for the fourth and sixth counts respectively). Thus, the value involved in the economic offence at hand is Tshs. 29, 823,851.08. Since the offence which the applicants are charged with involves properties whose value exceeds ten millions, they have filed the present application for bail pending trial.

When this application was called on for hearing, the applicants were present and represented by Mr. Cosmass Tuthuru, learned advocate while the respondent was represented by Mr. Nimrod Byamungu, learned State Attorney.

Submitting in support of the application, Mr. Tuthuru, learned advocate argued that, this Court is empowered to determine the application for bail as the value of property involved in the offences at hand exceeds ten million. The learned advocate was of the firm view that, the respondent was not objecting the application because she had not filed a counter affidavit or a certificate to oppose the application.

Mr. Tuthuru went on to submit that, the applicants are ready to comply with the provisions of section 36(5) of the EOCCA by depositing evidence as to existence of immovable property equivalent to half the value of property involved and that, each applicant has reliable surety. He submitted further that, bail is a constitutional right enshrined under Article 13(6)(b) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution) which provides for presumption of innocence and cited the case of **Patel vs R** (1971) HCT No. 361 to support his argument. That said, Mr. Tuthuru urged the Court to grant the application.

In response, Mr. Byamungu, learned State Attorney conceded that, the respondent had not filed the counter affidavit. However, the learned State Attorney argued that, the omission to file counter affidavit should not be taken to imply that the respondent was not contesting the application. Citing the case of **Suleiman Masoud Suleiman and Another vs R**, Misc Criminal Application No. 10 of 2020, HCT at Shinyanga (unreported), the learned State Attorney was of the considered view that the respondent is entitled to object the application.

In his submission, Mr. Byamungu was in agreement with Mr. Tuthuru that, bail is a constitutional right. However, he argued that, bail is granted in accordance with the law. The learned State Attorney urged the Court not to grant the application on ground that, the pending case has public interest as the applicants damaged motor vehicle and properties of the Tanzania Police Force and Bwai "A" Primary School, respectively.

Mr. Byamungu went on to submit that, the applicants should comply with the provision of section 36(4) (e) of the EOCCA by depositing half of the value of property involved and subsection (5) thereto which requires the applicant to deposit title deed of the property equivalent to half of the amount or property involved. Upon reflection, he conceded that the Court must be satisfied that, the applicant owns an immovable property. However, he argued that it must be proved that the said property has the required value depending on the charged offence.

In his rejoinder, Mr. Tuthuru, learned advocate submitted that, section 36(4)(e) of the EOCCA had been declared unconstitutional in the case of **Prof. Costa Rica Mahalu and Another vs the Attorney General**, Misc. Crim. Cause No. 35 of 2007. The learned advocate was of the firm that, pursuant to section 36 5(a) of the EOCCA, it is not mandatory for the applicant to deposit title deed of the immovable property.

I have considered the submission by both parties and noted that, the jurisdiction of the Court to determine bail application is not at issue. The applicants are charged with economic offence which involves properties whose value exceeds ten millions shillings. The power to hear and determine application for bail in such a case is vested in this Court as provided for under section 29(4)(d) of the EOCCA which reads:

“(4) After the accused has been addressed as required by subsection (3) the magistrate shall, before ordering that he be held in remand prison where bail is not petitioned for or is not granted, explain to the accused person his right if he wishes, to petition for bail and for the purposes of this section the power to hear bail applications and grant bail-

(a) NA;

(b) NA;

(c) NA;

(d) in all cases where the value of any property involved in the offence charged is ten million shillings or more at any stage before commencement of the trial before the Court is hereby vested in the High Court.”

Furthermore, both parties are in agreement that, bail is a constitutional right to the accused person. It is granted basing on the principle of presumption innocence and the right to freedom of movement which are provided for under Articles 13(6) (b) and 15 of the Constitution respectively. This position was also stated by this Court (Biron J, (as he then was)) in **Patel v R [1978] HCD** cited by counsel Tuthuru, where it was held *inter alia* that:-

“...whilst awaiting trial is as of right entitled to bail, as there is presumption of innocence until contrary proved...”

It is also gathered from the submission by the parties that, bail is granted subject to conditions to imposed by the Court in accordance with the law. The relevant law in the instant case is section 36 of the EOCCA. However, the learned State Attorney contested the application on the ground that, the pending case has public interest. I must say that, an objection to granting bail is a fact which must be proved before the Court. It should not be

premised on a mere suspicion.

The fact that the pending case has public interest was stated from the bar. It was not adduced in evidence as the respondent neglected to file the counter affidavit. Since that fact was not given in evidence, it cannot be considered by the Court. Also, pursuant to section 36(2) of the EOCCA, a person cannot be admitted to bail pending trial when the Director of Public Prosecutions files a certificate to the effect that the safety or interest of the Republic would be prejudiced if bail is granted. Such certificate was not filed by Republic. In absence of the affidavit or certificate that, this case is of public interest and that, the interest of the Republic is likely to be prejudiced if the applicants are admitted to bail, the objection by the respondent is devoid of merit.

The issue whether to admit the accused person on bail depends on the circumstances of the case. In the present case, the applicants face bailable offences of malicious damage to property and occasioning loss to a specified authority. This being an economic offence, bail conditions are set under section 36 of the EOCCA. Subsections (4) and (5) thereto obliges the applicant to pay cash bond or deposit to court, the security whose value is at least half of the value of the property and the rest be executed by promissory bond. I am of the considered opinion that, it is not mandatory for the applicant to deposit title deed of the immovable property. In the event the applicant has no title deed, he can deposit other evidence satisfactory to the court in proof of existence of the immovable property. This is pursuant to the provisor of section 36(5)(a) of the EOCCA which provides 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.”

I have stated herein that, the economic offence preferred against the applicants involves properties whose value is Tshs.29,823,851.08/=. Therefore, half of the amount required to be deposited by applicants for purposes of bail is Tshs. 14,911,925.54/=. However, the case involves 15 accused persons (applicants). Applying the principle of sharing which was underscored by the Court of Appeal in the case of **Silvester Hillu Dawi & Stephen Leons Mwambene v The Director of Public Prosecutions**, Criminal Appeal No. 250 of 2006 (Unreported), (Dar es Salaam Registry), each applicant is entitled to deposit Tshs. 994, 128.36/=.

In view of the above, the application for bail pending trial is hereby granted. The applicants are admitted to bail on the following conditions:

1. Applicants should not travel outside Mara Region without prior approval of the District Court of Musoma at Musoma.
2. Each applicant should deposit a sum of Tshs. 994, 128.36 in cash. In the alternative, each applicant should deposit to the custody of the Court, a title deed or evidence satisfactorily to prove existence of an immovable property valued at Tshs. 994, 128.36/=.
3. Each applicant should have two reliable sureties with fixed abode within the jurisdiction of the trial Court;
4. Each surety shall execute a bail bond in the sum of Tshs. 1,000,000/=.
5. Each surety shall produce an introductory letter from his or her employer or local authorities and a copy of recognized identity card.

6. Each applicant to surrender his passport or any travelling documents in his name (if any);
7. The Magistrate assigned with the case at the District Court of Musoma to ascertain compliance with these conditions.

Order accordingly.

DATED at MUSOMA this 30th day of July, 2020.




E.S. Kisanya
JUDGE