IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

MISC. CRIMINAL APPLICATION NO. 29 OF 2020

(Arising from Economic Case No. 5 of 2020, the District Court of Kahama)

1. **WANG TAO**
2. **YASSIR MUSSA HUSSEIN** } ..... **APPLLICANTS**

VERSUS

THE REPUBLIC.....**RESPONDENT**

RULING

18th & 20th November,2020

Mdemu, J.:

This is an application for bail pending trial of the two Applicants in Economic Case No.5 of 2020 in the District Court of Kahama. According to the holding charge, the two Applicants are jointly and together charged with two counts to wit: unlawful possession of minerals contrary to the provisions of section 18(1) (4) (b) of the Mining Act, Cap.123 R.E 2019, read together with paragraph 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, Cap.200 R.E 2019 in the 1st count. With regard to the 2nd count, the two Applicants are charged with processing of minerals without authority contrary to the provisions of section 6 (1)(3)(b) and (4) of the Mining Act, Cap.123 R.E 2019.

In both counts, on or about the night of 29th day of September, 2020, at Manzese area within Kahama District, the Applicants were found in possession and processing minerals without permit from the Commissioner of Minerals.

To date, the Applicants have neither being committed to the Corruption and Economic Crimes Division of the High Court for trial nor the Director of Public Prosecutions issued consent and certificate of transfer to confer jurisdiction to the District Court of Kahama, hence the instant application for bail.

This application is under the provisions of section 36 (1) of the Economic and Organized Crime Control Act and section 148(1) of the Criminal Procedure Act, Cap.20. It is supported by the affidavit of Geofrey Kalaka, learned Advocate sworn on 22nd of October, 2020. The application is also under the certificate of urgency.

On 18th of November, 2020, this application came for hearing. The two Applicants were present under the service of Mr. Geoffrey Kalaka and Mr. Angelo James, both learned Advocates. Mr. Jukael Jairo, learned State Attorney appeared for the Respondent Republic.

Submitting in support of the application, Mr. Angelo James first urged this court to adopt the affidavit of one Geofrey Kalaka to form part of his submissions. He then told the court that, the offences the Applicants stand charged in Economic Case No. 5 of 2020 are bailable. He stated further that, this court, in terms of the provisions of section 36 (1) of EOCCA, Cap.200 and section 148 (1) of CPA, Cap.20 has jurisdiction to determine bail of the Applicants.

It was his further submissions that, the Applicants are ready to abide and comply with bail conditions to be imposed by this court, should it do so and

that, they have no any record to have breached any bail condition. He observed also that, the two Applicants have reliable sureties who will ensure the Applicants will appear to court when needed. It is upon those premises the learned counsel prayed that the instant application be granted by admitting the Applicants to bail pending their trial.

Mr. Jukaeli Jairo had a very brief reply. He did not file an affidavit in reply. In his view, the exercise is not necessary if the application is not contested. He did not therefore resist the application, though submitted that, the court has been improperly moved through section 36(1) of EOCCA, Cap. 200 which confers jurisdiction to the Corruption and Economic Crimes Division of the High Court. The proper section to be deployed in the application according to Mr. Jairo, was section 29(4) of EOCCA, Cap.200.

He emphasized that, had the charge comprises the value of the properties, and if the same is below ten (10) million, then the District Court of Kahama would have been clothed with jurisdiction. As the value of the property is not disclosed in the charge, the learned State Attorney, by citing the case of **Suleiman Masoud Suleiman & Aisha Khalfan Soud v R, Criminal Application No.10 of 2020**(unreported) stated that, this court has jurisdiction to determine the bail of the two Applicants.

In rejoinder, the learned counsel for the Applicants rejoined briefly by associating himself to the submissions of the learned State Attorney. He therefore reiterated his prayer to have the two Applicants admitted on bail.

This was all from what parties told this court in support of this application for bail pending trial of the Applicants.

In this application, it is not disputed that, the Applicants are charged with bailable economic offences and that, to date, neither the Director of Public Prosecutions issued consent and certificate of transfer conferring jurisdiction to the District Court of Kahama to try them nor did the District Court of Kahama committed the Applicants for trial by the Corruption and Economic Crime Division of the High Court. That being the case, the question for exploration is whether this Court has jurisdiction to admit the Applicants on bail pending their trial.

To begin with, this application has been brought under the provisions of section 36 (1) of EOCCA, Cap.200 and section 148(1) of CPA, Cap.20. For clarity, the section reads; for section 36 (1) of EOCCA, the law states:

> *"36 (1) After a person is charged but before he is convicted by the Court, the Court may on its own motion or upon an application made by the accused person, subject to the following provisions of this section, admit the accused person to bail."*

The court referred to in this section is defined in the provisions of section 3 of the EOCCA, Cap. 200 as hereunder:

> *Court means the Corruption and Economic Crimes Division of the High Court.*

With regard to the provision of section 148 (1) of the CPA, Cap.20, it is stated that:

"148 (1) When any person is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a court and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail the officer or the court, as the case may be, may, subject to the following provisions of this section, admit that person to bail; save that the officer or the court may, instead of taking bail from that person, release him on his executing a bond with or without sureties for his appearance as provided in this section."

Apparently, these are the two provisions that moved this court to deal with the bail of the Applicants. Mr. Jairo noted the anomaly and fronted that, the Applicants could have invoked the provisions of section 29 (4) of EOCCA, Cap.200. Before I consider this version of the learned State Attorney, I think I should also reproduce the provisions of that section as hereunder:

"29(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) between the arrest and the committal of the accused for trial by the Court, is hereby vested in the district

court and the court of a resident magistrate if the value of any property involved in the offence charged is less than ten million shillings;

(b) after committal of the accused for trial but before commencement of the trial before the court, is hereby vested in the High Court;

(c) after the trial has commenced before the Court, is hereby vested in the Court;

(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.

From the quoted provisions above, that is sections 36(1) and 29(4) of EOCCA, Cap.200, the question of bail has been elaborated in terms of jurisdiction of the Corruption and Economic Crimes Division of the High Court, the High Court, the Resident Magistrates' Court and District Courts. The court of Appeal in **Mwita Joseph Ikoh & Two Others vs. Republic, Criminal Appela No.60 of 2018** (unreported) gave interpretation to the two provisions at page 11-12 of judgment in the following version:

It should be recalled that along with section 29(4)(d) of EOCCA, the Appellants cited section 36(1) of EOCCA in their chamber application as another enabling provision. Section 36(1) reads:

"After a person is charged but before he is convicted by the ***Court****, the* ***Court*** *may on its own motion or upon an application made by the accused person, subject to the following provisions of this section, admit the accused person to bail."[emphasis added]*

The word Court in the above subsection is defined in subsection (7) of the same section thus:

"For purposes of this section, the court includes every court which has jurisdiction to hear a petition for and grant bail to a person under charges triable or being tried under this Act."

Accordingly, when subsections (1) and (7) of section 36 are read together, it is notable that in essence, section 36 only seeks to regulate the exercise of the bail granting powers given to the courts under section 29(4) of EOCCA. It is only a directory provision that stipulates restrictions and conditions under subsections (2) to (6) of that section for the grant of bail by the courts. ***Consequently, in the instant case, section 36(1) of EOCCA could not on its own be the source of the bail granting jurisdiction on the part of the lower court.****" (emphasis mine)*

Given the above legal position, it is on record that, in the instant application, section 36(1) of EOCCA was deployed in the chamber summons to move this court to grant bail of the Applicants. As stated in **Mwita Joseph Ikoh & Two Others vs. Republic** (supra), the said provision is a directory one and may not be the source of granting bail jurisdiction of the two Applicants in the instant application. In more emphasis that the section cannot confer

jurisdiction on matters of bail, again in **Ikoh's case,** the court went further to interpret the provisions of section 29(4) of EOCCA on how it confers jurisdiction to various courts on matters of bail. After having quoted the section, the Court of Appeal went on to guide at page 9 through 10 of the judgment that:

> *"The essence of the above quoted subsection is that, it vests in different courts power to hear and determine bail applications under EOCCA depending on the stage the proceeding concerned has reached as well as the value of the property involved in the offence charged. For a state, section 29 (4) (a) empowers the district court and the court of resident magistrate to hear and determine bail applications between the arrest and committal of the accused for trial by the "court" if the value of the property involved in the offence charged is less than Ten Million Shillings. While in terms of section 29(4)(b) the granting of bail after committal of the accused for trial but before commencement of the trial before the court is vested in the High Court regardless of the value of the property involved. After commencement of trial in the "court" jurisdiction is vested in the "court" in terms of section 29(4)(c), again, regardless of the value of property..... Of particular interest and relevance in this matter is section 29(4)(d). it confers on the* ***High Court*** *jurisdiction to grant bail 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 in the Corruption and Economic Crimes Division of the High Court."

In that understanding, and as the chamber summons omitted in total the provisions of section 29(4) of EOCCA, it is obvious that, this court has not been moved properly. In other words, the provisions of section 36(1) of EOCCA cited in the chamber summons did not vest this court with requisite jurisdiction to determine bail of the Applicants. What is the remedy available to such an application?

As said, Mr. Jairo simply noted the wrong citation and resorted to urge the court to admit the Applicants to bail because, there is no court, save for the High Court, that can deal with the bail of the Applicants at this stage for want of value of the property involved in the offence. If I understood correctly the learned state Attorney, in the granting of bail to economic offences where the value of property is unknown and before an accused is committed for trial to the court, then, bail jurisdiction is vested to the High. I would not wish to stretch my muscles that much far. The reason is one, that, the court should be properly moved first. The two counsels never guided on it.

In essence, this area on procedural impropriety has been termed as non-citation or wrong citation of the enabling provisions. The Court of Appeal extensively guided a lot on their curability to the proceedings before and after the coming into effect of the Written Laws (Miscellaneous Amendment) Act No.8 of 2018 that introduced the overriding objective principles in various procedural laws. In fact, the Amendment just insisted and emphasized on the

contents of the provisions of Article 107A (2) (e) of the Constitution of United Republic of Tanzania, 1977 in which, it is enacted that:

> *"107A (2) Katika kutoa uamuzi wa mashauri ya madai na jinai kwa kuzingatia sheria, Mahakama zitafuata kanuni zifuatazo, yaani–*
>
> *a) N/A*
>
> *b) N/A*
>
> *c) N/A*
>
> *d) N/A*
>
> *e) kutenda haki bila kufungwa kupita kiasi na masharti ya kiufundi yanayoweza kukwamisha haki kutendeka*

The calling therefore to courts is the need to uphold substantive justice in dispensation of justice by not being tied up with matters of technicalities. In the instant application, as said, the Applicants omitted to cite the enabling provisions. The omitted provisions [section 29 (4) of EOCCA], as alluded is what coffers jurisdiction to this court to deal with bail of the Applicants. Is the omission curable through application of overriding objective principles? In my considered view, is not, because it goes to the jurisdiction of this court on bail matters. In the case of **District Executive Director, Kilwa District Council vs Bogeta Engineering Limited, Civil Appeal No.37 of 2017**(unreported), the Court of Appeal had this to say at page 15 of the judgment regarding application of the principles of overriding objective:

We think the issue of time limit is not a technicality which goes against the just determination of the case or undermines the application of the overriding objective principle contained in sections 3A (1) and (2) and 3B(1)(a) of Act No.8 of 2018.

In this regard, we agree with what the court stated in ***1.Mandolosi Village Council, 2.Sukenya Village Council, 3.Soitsambu Village Council v.1.Tanzania Breweries Limited,2. Tanzania Conservation Limited, 3.Ngorongoro District Council 4.Commissioner for Lands 5.The Attorney General, Civil Appeal No.66 of 2017*** *(unreported) that, the overriding objective principle cannot be applied blindly against the mandatory provisions of the procedural law which goes to the very foundation of the case.(See also* ***Njake Enterprises Limited v. Blue Rock Limited and Another, Civil Appeal No.69 of 2017*** *(unreported).*

In particular, section 29 (4) of EOCCA on jurisdiction of courts to determine matters of bail in economic offence is coached in mandatory terms. It has not given options to applicants on choice of court forums. The section prescribes for procedures where should the applicant for bail go and when depending on the stage the case has reached, that is before, during and after he is committed for trial to the Corruption and Economic Crimes Division of the High Court. If this is left at the whims of accused persons to choose where to apply for bail in the name of the principle of overriding objective, then it will result into chaotic in our legal system.

Again, procedural laws conferring jurisdiction are meant and must strictly be applied and greatly complied. Otherwise, there would be no need of legislating procedural laws if litigants are left to decide what to comply and what not. Litigants are neither coming to court for window shopping nor for shopping, as in it, they have discretion what to purchase. Mandatory procedural laws should compel them to model their litigations so as to capture and accommodate what forms the contents of those claims/applications. That discretion would result into laxity and greatly would eliminate standardization in litigations.

It is therefore my considered view that, the principle of overriding objective better left to be applicable on a case to case bases and not in whole sale. Having that in mind, I am left with this, that is, the effect of failure to cite enabling provisions of the law was stated in the case of **Almas Iddie Mwinyi v NBC and Mrs. Ngeme Mbita (2001) TLR 83** that:

> *As wrong citation of the law renders an application incompetent, non citation of law is worse and equally renders an application incompetent. Application struck out.*

This court, going by the above authority, holds that, it was improperly moved. Failure to cite the proper enabling provisions that confers jurisdiction to this court to deal with bail applications, as stated in District **Executive Director, Kilwa District Council vs Bogeta Engineering Limited** (supra), goes to the foundation of the matter. Determining the application basing on unlimited jurisdiction of this court on the thinking that the charge does not

disclose the value of the property guided by the learned state Attorney, depends or whether the court has been properly moved. Much as this court in **Suleiman Madoud Suleiman & Aisha Khalfan Soud v R** (supra) determined application for bail in a charge not disclosing value of the property, it does not however mean that the Applicant may come the way he wishes. The court must be properly moved.

In that stance, and for the foregoing analysis, this application is incompetent and is accordingly struck out. Order accordingly.

Gerson J. Mdemu

JUDGE

20/11/2020

DATED at **SHINYANGA** this 20th day of November, 2020.

Gerson J. Mdemu

JUDGE

20/11/2020