

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

MSC. CRIMINAL APPLICATION NO. 30 OF 2020

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

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

VERSUS

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

RULING

26th & 27th 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 27 of the 1st schedule to and sections 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 also were 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 29(4)(d) of the Economic and Organized Crime Control Act and also section 148(1) of the Criminal Procedure Act, Cap.20. It is supported by the affidavit of Geofrey Kalaka, learned Advocate sworn on 20th of November, 2020. On 26th of November, 2020 this application came for hearing. The two Applicants were present under the service of Mr. Deus Richard and Mr. Angelo James, both learned Advocates. Ms. Salome Mbuguni, learned Senior State Attorney appeared for the Respondent Republic.

Submitting in support of the application made under the provisions of section 29 (4)(d) of EOCCA, Cap.200 and section 148 (1) of CPA, Cap.20, 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 in the District Court of Kahama are bailable.

It was his further submissions that, the Applicants are ready to abide and comply with any bail conditions to be imposed by this court, should it do so and that, they have no any record to have had breached any bail conditions. He observed also that, the two Applicants have reliable sureties who will ensure

the Applicants appear to court when needed. It is upon those premises the learned counsel prayed that, the instant application be granted by admitting the two Applicants to bail.

Ms. Salome Mbuguni, learned Senior State Attorney supported the application, though submitted that, the court has been improperly moved through section 29(4)(d) of EOCCA, Cap. 200 which confers jurisdiction to the High Court where the value of the property involved in the offence is above ten (10) million Tanzanian Shillings. She arrived at this position for failure of the charge to disclose the value of the property involved in the offence. Her interpretations to the provisions of section 29(4) of EOCCA revolves around conferring jurisdiction to various court levels depending on the value of the property involved in the offence. As the charge is silent on the value, her view was that, unless this court invokes inherent powers, it won't have jurisdiction to determine bail of the Applicants.

Regarding the need to have the value of the property involved in the offence for application of section 29(4)(d) of EOCCA, Cap.200 to stand; the learned Senior State Attorney cited the case of **Mwita Joseph Ikoh & Two Others vs. Republic, Criminal Appeal No.60 of 2018** (unreported). As to the inherent powers of this court in determining the bail of the Applicants where the charge does not disclose the value of the property involved in the offence, Ms. Mbuguni referred me to the case of **Suleiman Masoud Suleiman & Aisha Khalfan Soud v. R, Criminal Application No.10 of 2020**(unreported)

She thus concluded that, there is a *lacuna* in the provisions of section 29(4) of EOCCA, Cap. 200 for want of specific provisions dealing with applications for bail where the charge is silent on the value of the property involved in the offence. She thus urged this court to invoke inherent powers and admit the Applicants on bail.

In rejoinder, Mr. Deus Richard submitted that, the concern regarding *lacuna* in the provisions of section 29(4) observed by the learned Senior State Attorney is relevant in so far as development of jurisprudence on bail in economic offences is concerned. While conceding that the provisions of section 29(4) of EOCCA won't suit the instant application, Mr. Deus thought that, as the value is not disclosed in the charge, then the same does not mean that application for bail of the Applicants herein may not be determined as the offences constituted in the charge are bailable.

In his view, if the charge is devoid of any value, as in the instant application, then the value is zero, meaning that, in terms of the law, there is no forum where the Applicant may deploy to have them heard as the provisions cited require the value of the property to be above ten thousand Tanzanian Shillings. In that, he thought, the court may go beyond the wordings of the statutes in determining rights of the parties. He thus urged me to invoke the provisions of **article 108(2) of the Constitutions of United Republic of Tanzania, 1977**, if this court sees to it that, the provisions of section 29 of EOCCA is not applicable under the circumstances. This was all from the parties.

In this application for bail, it is not disputed that the economic offences the Applicants stand charged with are bailable and that, the Respondent Republic did not contest towards the granting of bail to the Applicants. It is also not disputed that, the charge leading to incarceration of the Applicants is uncertain on the value of the property involved in the offence.

To shorten the discussion therefore, under the premises, the provisions of section 29(4) (d) of EOCCA, Cap. 200, cited by the Applicants in their chamber summons wont suit the current application. Counsels to this, concede, as I associate with their observation. In that consensus concession, and in my considered view, the reason is one, that is, the provisions can only apply where the value of the property in the offence is certain in the charge. In this, it has to be above ten million Tanzanian shillings. This was also the case in **Mwita Joseph Ikoh & Two Others vs. Republic**, (supra) where at page 10 of the judgment, the Court of Appeal had this to say:

*... 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."*

Much emphasis of interpretation of the provisions of section 29(4)(d) was pressed in the same case at page 15 through 16 of the judgment where, the Court of Appeal after having referred its decisions in the **Director of Public**

Prosecutions v. Aneth John Makame, Criminal Appeal No.127 of 2018(unreported) observed that:

The above apart, we are firm that even if the lower courts were a proper forum for hearing and determining bail applications under section 29(4)(d) of the EOCCA, its assumptions of jurisdiction over the Appellants' application would be questionable on the ground that the charge levelled against the Appellants does not indicate the threshold value of ten million shillings or more of the property involved in the offence charged.

With that position, I am now certain that, for want of the value of the property in the count of 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 the provisions of paragraph 27 of the 1st Schedule to and sections 57(1) and 60(2) of EOCCA, Cap.200, this court won't have jurisdiction to deal with the bail of the Applicants. As alluded, I and the counsels in this application are in consensus. Is the door on determining the bail of the Applicants closed?

In this, the learned Senior State Attorney asked me to use inherent powers of the court by referring to the case of **Suleiman Masoud Suleiman & Aisha Khalfan Soud v R**, (supra) decided by this court. According to the learned Senior State Attorney, this court granted bail to the Applicants where the value of the property involved in the charge is uncertain. Mr. Deus also in rejoinder had the same view and went ahead urging this court to invoke the

provisions of article 108(2) of the Constitution. In either cases, where the charge is uncertain on the value of the property involved in the economic offence, jurisdiction in determining application for bail before an accused person is committed to the Corruption and Economic Crimes Divisions of the High Court for trial, ought to be vested in the High Court. This was also the position in **Suleiman Masoud Suleiman & Aisha Khalfan Soud v R**, (supra) where my Brother, Mkeha J. after having reproduced sub article (2) of Article 108 of the Constitution of United Republic of Tanzania, 1977, observed the following at page 16 through 17 of his judgment:

On the strength of above cited sub article of the constitution, it is my holding that, it is the High Court that has jurisdiction to hear bail applications and grant bail at the time between the arrest and committal of the accused for trial by the Corruption and Economic Crimes Division of the High Court, if the value of the property(ies) involved in the economic offences charged is uncertain.

In my view, the underlining principle is that, since as observed in **Mwita Joseph Ikoh & Two Others vs. Republic**, (supra), that section 29(4) of EOCCA is the only section governing applications for bail to various courts depending on the stage the case has reached; and since there is no guidance as to where an accused person should go for bail application in circumstances where the value of the property in the offence charged is uncertain, then there is a *lacuna* in the said provisions. I hold so because, I do not think if the legislature in enacting that provisions intended that accused persons whose economic offences are bailable should not be admitted to bail on account that the value of

the property in the charged offence is uncertain. Had the Parliament foreseen this would have probably modified her words to suit the need. The role of the Court under the circumstances where the enacted provisions, as in this, is ambiguous, may be summarized in the following passage as quoted at page 103 in **Glanville Williams, Learning the Law, Eleventh Edition, London, Steven and Sons, 1982** when commenting on the case of **Duport Steels Ltd. V. Sirs (1980) 1 W.L.R. 157** that:

*"At time when more and more cases involve the application of legislation which give effect to policies that are the subject to bitter public and parliamentary controversy, it cannot too strongly have emphasized that the British Constitution, though largely unwritten, is firmly based upon the separation of powers; Parliament makes the laws, the judiciary interpret them. **When the Parliament legislate to remedy what the majority of its members at the time perceive to be a defect or a lacuna in the existing law** (whether it be the written enacted by the existing statutes or the unwritten common law as it has been expounded by the judges in decided cases), **the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention** what that intention was and to give effect to it. **Where the meaning of the statutory words is plain and unambiguous, it is not for the judges to invent fancied ambiguities as an excuse for failing to give effects to its plain meaning because they***

themselves consider that the consequences of doing so would be inexpedient or even unjust or immoral. In controversial matters such as are involved in industrial relations there is a room for differences of opinion as to what is expedient, what is just and what is morally justifiable. Under our constitution, it is Parliament opinion these matters that is paramount.

Lord Diplock went on to say that the principle applies even though there is reason to think that, if the Parliament had foreseen the situation before the court it would have modified the words it used. If this be the case, it is for the Parliament, not for the judiciary, to decide whether any changes should be made to the law as stated in the Acts. According to this, courts should not use the mischief rule when the statute is plain and unambiguous. They can use the mischief rule if the statute is ambiguous, but must not invent fancied ambiguities in order to do.


Applying the mischief rule in interpretation of the provisions of section 29(4) of EOCCA, of course with also a purposive approach interpretation, in a mixed grill, I may call, it has not been provided which court to determine application for bail of the accused in economic offence where the charge is uncertain on the value of the property involved before a person is committed to the Corruption and Economic Crimes Division of the High Court for trial. However, the legislature never intended such an accused person to have no forum. On that account, the relevant authorities in the Government should

remedy the mischief by taking legislative measures instead of leaving the court, as in this application, invoking inherent powers, much as is permissive.

For the foregoing reasons, this application is hereby granted. The District Court of Kahama is hereby directed to admit the Applicants to bail on the following conditions:


- a) Each Applicant to sign a bail bond of Tshs. 30,000,000/-
- b) Each applicant to have two reliable sureties who should sign a bail bond of Tshs. 5,000,000/-
- c) Each Applicant to surrender his passport or travel documents to the Police Station.
- d) The Applicants, on monthly basis should report to the police station till they are committed to the Economic and corruption Crimes Divisions of the High Court for trial, or till the District Court of Kahama is clothed with jurisdiction to try that economic offence.

It is so held and ordered accordingly.


Gerson J. Mdemu
JUDGE
27/11/2020

DATED at SHINYANGA this 27th day of November, 2020.




Gerson J. Mdemu
JUDGE
27/11/2020