IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

MISC. CRIMINAL APPLICATION NO. 10 OF 2020

(Arising from PI Economic Crime Case No.10 of 2020 of the District Court of Shinyanga at Shinyanga)

SULEIMAN MASOUD SULEIMAN.....1ST APPLICANT

AISHA KHALFAN SOUD.....2ND APPLICANT

Versus

THE REPUBLIC.....RESPONDENT

Date of Last Order: 13/05/2020

Date of Ruling: 15/05/2020

RULING

C. P. MKEHA, J

The applicants are husband and wife. On 8th May, 2020 the duo were arraigned before the District Court of Shinyanga for distinct economic offences under different provisions of the Firearms and Ammunitions Act, No.2 of 2015.

In the 1st and 10th counts, the applicants are jointly being charged with an offence of being found in unlawful possession of firearms contrary to section 20(1)(b) of the Firearms and Ammunitions Act, No.2 of 2015 read together with paragraph 31 of the First Schedule to and sections 57(1) and

60(2) both of the Economic and Organized CrimesControl Act (Cap. 200 RE 2002) as amended. The two are also being jointly charged in respect of the 5th, 6th, 7th, 8th, 11th, and 12th counts, with an offence of being found in unlawful possession of ammunitions contrary to section 21 of the Firearms and Ammunitions Act, No.2 of 2015 read together with paragraph 31 of the First Schedule to and sections 57(1) and 60(2) both of the Economic and Organized Crimes Control Act (Cap. 200 RE 2002) as amended.

On the other hand, the first applicant is lonely being charged in respect of the 2nd and 9th counts with an offence of being found in unlawful possession of ammunitions contrary to section 22(1) of the Firearms and Ammunitions Act, No.2 of 2015. The first applicant is also being charged in respect of the 3rd count with an offence of being found in possession of more firearms contrary to Regulation 5(1)(c) of the Firearms and Ammunitions Control Regulations, 2016 read together with sections 10(8)(c) and 60(1) both of the Firearms Act, No.2 of 2015. Finally, the first applicant is being charged in respect of the 4th count with an offence of being found in possession of a rifle with calibre beyond three hundred seventy five millimeters contrary to Regulation 5(2) of the Firearms and

Ammunitions Control Regulations, 2016 read together with sections 10(8)(c) and 60(1) both of the Fire Arms Act, No.2 of 2015.

Before this court, the applicants were represented by Mr. Frank Mwalongo learned advocate. Ms. Ndaweka learned Senior State Attorney represented the respondent. The application is made under section 29(4)(d) of the Economic and Organized Crimes Control Act. The applicants are asking this court to be pleased to grant them bail in PI Economic Crime Case No.10 of 2020 pending at the District Court of Shinyanga.

The application is supported with an affidavit sworn by the applicants' advocate. In terms of the affidavit in support of the application, the applicants' petition for bail before the District Court was dismissed on the ground that, as the charge sheet does not state the value, the District Court was not in a position to know whether the value exceeds or is less than ten million shillings, hence the court (District Court) is not vested with jurisdiction to entertain the applicants' bail application. Because of the said holding by the District Court of Shinyanga, the applicants are before this court, in their endeavour to restore their freedom of movement.

It is deponed in the affidavit supporting the application that, the charge sheet in PI Economic Crime Case No.10 of 2020 does not state the value in monetary terms in all the twelve counts; that, all the twelve counts facing the applicants are bailable and that, it is in the interests of justice that the applicants be granted bail.

It is important to note that, the respondent did not file an affidavit in reply/counter affidavit. As such, in terms of the obtaining principles, factual issues emanating from the applicants' affidavit stand uncontroverted.

Submitting in support of the application, Mr. Frank Mwalongo learned advocate commenced by adopting the contents of the affidavit supporting the application. He then went on to submit that, at first instance, the application for bail was made before the District Court of Shinyanga.

According to the learned advocate for the applicants, the Honourable Committal Magistrate declined to grant bail on one main reason that, the charge sheet does not state the value in which case, the District Court was not sure on whether it has jurisdiction to entertain bail application in such an economic case which was before her pending investigation. The learned advocate went on to submit that, the learned Senior Resident Magistrate's

hesitation was because of the wording of section 29(4)(a) of the EOCCA which restricts jurisdiction of District and Resident Magistrate's Courts to cases in which the value of property involved in the offence charged is less than ten million shillings.

The learned advocate had no doubt that the High Court has powers to entertain bail applications in economic cases where the subject matter is TZS. 10,000,000/= or more. In the learned advocate's words, apart from being statutorily provided under section 29(4)(d) of the EOCCA, there was unbroken chain of Court of Appeal decisions confirming the position that, it is the High Court that is empowered to entertain bail applications 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 trial before the Corruption and Economic Crimes Division of the High Court. Among others, the case of **DPP Vs Anneth John Makame, Criminal Appeal No.127 of 2018** was cited.

It was the learned advocate's submission that, since the value of the subject matter is not made certain in the charge sheet, the High Court has jurisdiction to determine the application. The learned advocate added that

the applicants can not be left unattended, merely because, the value of the subject matter is not stated in the charge sheet.

The learned advocate for the applicants finally submitted that, given the fact that all the counts are bailable and in the circumstances where the DPP had not filed a certificate objecting the applicants' bail, it was in the interests of justice that, the applicants be released on bail.

Ms. Ndaweka learned Senior State Attorney commenced her submissions by laying a foundation as to why the respondent was resisting the application, notwithstanding the fact that an affidavit in reply had not been filed. The learned advocate referred this court to the decision in **Editor Msanii Africa Newspaper Vs Zacharia Kabengwe, Civil Application No.2 of 2009.** It was held in the above cited case that, if the respondent decides not to file an affidavit in reply, that should not be taken to mean that the application is uncontested. On the contrary, in the absence of an affidavit in reply the respondent may still appear and contest the application. Therefore, believing in full protection of the holding hereinabove, the learned Senior State Attorney went on to challenge the present application.

The learned Senior State Attorney submitted that, although the DPP did not file a certificate for objecting bail, the offences charged are still under preliminary stages of investigation. It was further submitted that, other suspects are still at large and that efforts were being made to arrest them so as to get supporting evidence to prove the offences charged. In view of the learned Senior State Attorney, an act of releasing the applicants on bail at this stage, would definitely be detrimental to the respondent's case as the applicants would interfere with the ongoing investigation.

The learned Senior State Attorney went on to submit that, upon going through the applicants' application, it would appear that bail is being asked as a matter of urgency because of COVID – 19 outbreak. In view of the learned Senior State Attorney, the disease should not be taken as a ground for releasing the applicants on bail.

The learned Senior State Attorney finally submitted that, whereas the learned advocate for the applicants held a view that, this court has jurisdiction to entertain the application, the learned advocate was not specific as to whether, in the circumstances of this case, where value of the subject matter is uncertain, a proper provision would be section 29(4)(a) or section 29(4)(d) of the EOCCA.

When Mr. Mwalongo learned advocate rose to rejoin, his insistence was that, given the fact that COVI – 19 outbreak was undisputed fact, it was in the interests of justice and that of public health that, whenever an offence is bailable, as it is in the present matter, the accused persons in question be granted bail.

The learned advocate went on to submit that, the respondent's fear that the applicants would interfere with the ongoing investigation was unfounded. In view of the learned advocate, there was no justification for denying bail to the applicants where the offences themselves are bailable. The learned advocate insisted that, the Republic has sufficient machinery to conduct investigation even when the applicants are out on bail. A prayer for grantof bail was finally reiterated.

As indicated earlier in this ruling, the learned Senior Resident Magistrate hesitated granting bail to the applicants because of the fact that, the charge sheet does not bear value of the subject matter. The parties are in agreement that indeed, the charge sheet does not indicate the value of the subject matter. The learned counsel for the parties invited the court to give a direction on which court should entertain bail applications in situations

where an accused person is charged with an economic offence, value of subject matter of the offence charged, being uncertain.

The learned advocate for the applicants submitted that, given the fact that all the counts charged are bailable and in circumstances where the DPP had not filed a certificate restricting this court from granting bail to the applicants, it was in the interests of justice that, the applicants be released on bail.

On the other hand, the learned Senior State Attorney objected the applicants' bail on the ground that the offences charged are serious and still under preliminary stages of investigation. The other reason for objecting the applicants' bail was that, other suspects are still at large and that, the act of releasing the applicants on bail would definitely be detrimental to the respondent's case as the applicants would interfere with the ongoing investigation. The learned Senior State Attorney did not consider COVIC-19 outbreak as one of the factors ought to be considered before granting or refusing to grant bail to the applicants. All these are matters of fact.

Considering the rival arguments of the learned counsel, the following issues emerge for consideration of this court:

(i) Whether it is the Committal Court or 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 property (ies) involved in the economic offences charged is uncertain. If it is the High Court;

(ii) Whether there is sufficient material put on record to the effect that, the applicants, if released on bail, would tamper with the ongoing investigation of the offences with which they (the applicants) stand charged.

As it was held by the Court of Appeal in the case of **Mwita Joseph Ikoh and Two Others versus The Republic, Criminal Appeal No.60 of 2018**, CAT, at Mwanza, section 29(4) (a) to (d) of the EOCCA vests in different courts the power to hear and determine bail applications **depending on the stage the proceeding concerned has reached as well as the value of the property involved in the offence charged.**

Section 29 of the EOCCA as amended by the Written Laws (Miscellaneous Amendments) Act, No.3 of 2016 provides:

"(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 hisright if he wishes, to petition for bail and for 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".

Reading from the above cited provision, jurisdiction of committal courts to hear bail applications and grant bail to accused persons held for Preliminary Inquiries involving economic offences is restricted to cases in which value of properties involved in the offences charged is made certain in the charge sheets, it being less than ten million shillings. Therefore, the learned Senior Resident Magistrate's hesitation to grant bail to the applicants was not without justifiable reasons. She had no jurisdiction to hear and determine bail application in a case where value of the properties involved in the offences charged is uncertain.

Neither does the above cited provision specifically state that it is the High Court that has powers 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, in cases where the value of properties involved in the offences charged, is uncertain.

This question was determined by this court in the case of **Shaibu Hussein Twalibu @ Mambosafi Vs The Republic, Miscellaneous Criminal Application No.33 of 2019**at Songea District Registry of the High Court. It was the holding of the court that where the charge sheet does not

indicate value of the property involved, it is the committal court that has jurisdiction to determine bail application pending committal of the accused. I took time to read the ruling in that case and the reasoning therein. Not without respect, I hold a different view. For what reasons do I hold a different view? These I will tell.

There is no denial that the offences with which the applicants are being held are all bailable. In the case of **The Republic Versus Dodoli Kapufi and Patson Tusalile, Criminal Revision No.1 of 2008,** while interpreting sections 148(1), 148(5)(a), 244, 245(1), 245(4) and 248(4) of the Criminal Procedure Act, the Court of Appeal held that, a subordinate court at the stage of committal proceedings has power to grant bail for any bailable offence. The Court added that, the High Court, in those cases has only got powers of superintendence with regard to bail as provided for in section 148(3) of the Criminal Procedure Act.

The powers of superintendence are emphasized in section 149 of the Criminal Procedure Act. Similar holding was arrived at in the case of **The DPP Versus Bashiri Waziri and Mugesi Antony, Criminal Appeal No.168 of 2012,** CAT, at Mwanza.

However, it is important to take note that both, the case of **Republic vs Dodoli Kapufi & Another,** (supra) and **DPP Vs Bashiri Waziri & Another** (supra) were concerned with grant of bail by a committing court in terms of the provisions of the Criminal Procedure Act. And, although in the case of **DPP Vs Bashiri Waziri & Another** the accused persons were being held for trafficking in narcotic drugs, which is currently an economic offence, when the case was decided, on 12th August, 2014, the First Schedule to the Economic and Organized Crimes Control Act, was yet to be amended by the Written Laws (Miscellaneous Amendments) Act, No.3 of 2016. The said Act, among other things widened the scope of economic offences thereby reducing number of cases triable by the High Court, and bailable before subordinate courts. The case of **DPP Vs Bashiri Waziri & Another** is not therefore in my considered opinion, an authority to the effect that the committal court has jurisdiction to hear and determine bail application involving an economic offence where value of the subject matter is uncertain.

The decision in **Mwita Joseph Ikoh & Two Others Vs The Republic** (supra) did not in my humble opinion, directly decide a specific issue regarding the court having jurisdiction to hear and determine bail

application at the time between the arrest and committal of the accused for trial, where the value of the property involved in the offence charged is uncertain.

This issue is pegged on jurisdiction of courts in hearing and granting bail in economic cases at the period between arrest and committal of the accused for trial, where value of the subject matter is uncertain. As demonstrated hereinabove, section 29(4)(a) to (d) of the EOCCA does not provide an answer to this issue. Neither is the issue dealt with elsewhere under the said Act. One thing is however certain, that a special scheme for matters pertaining to bail in economic cases, at different stages, is dealt with under Part IV of the EOCCA, the specific provision being section 29(4)(a) to (d) of the said Act.

It has been held times without number that, jurisdiction is a creature of statutes. As such, jurisdiction can not be assumed. **See: Shyam Thanki and Others Vs New Palace Hotel (1972) HCD No.92.** I am mindful that, it is advisable not to refer to the Constitution where there is a specific statute catering for a particular issue. **See: OTTU on Behalf of P. L.**

ASSENGA and 109 Others Vs AMI TANZANIA LIMITED, CIVIL APPLICATION NO.35 OF 2011, CAT at Dar es Salaam.

In my considered opinion, this is a fit case in which resort to the Constitution is permissible. Article 108(2) of the Constitution of the United Republic of Tanzania provides:

" Where this Constitution or any other law does not expressly provide that any specified matter shall first be heard by a court specified for that purpose, then the High Court shall have jurisdiction to hear every matter of such type. Similarly, the High Court shall have jurisdiction to deal with any matter which according to legal traditions obtaining in Tanzania, is ordinarily dealt with by a High Court provided that, the provisions of this sub article shall apply without prejudice to the jurisdiction of the Court of Appeal of Tanzania as provided for in this Constitution or in any other law".

On strength of the 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 property(ies) involved in the economic offences charged is uncertain.

Apart from the legal objection by the learned Senior State Attorney, which I have already considered and determined in the foregoing paragraphs, the rest of the grounds upon which the objection to bail is based, are factual in nature. The respondent chose not to file an affidavit in reply. Although in so doing she retained her right to appear and contest the application as it happened, such an endeavour, has its own disadvantages. Where the respondent does not lodge an affidavit in reply despite being served, it is taken that he does not dispute the contents of the applicant's affidavit. Therefore, the respondent who appears at the hearing without having lodged an affidavit in reply is precluded from challenging matters of fact, but he can challenge the application on matters of law. **See:** 1. **Yokobeti Simon Sanga Vs Yohana Sanga, Civil Application No.1 of 2011, CAT (Unreported)** 2. **Finn Wurden Pertersen & Mlimani Farmers Limited Vs Arusha District Council, Civil Application No.562 of 2017.**

In paragraph 6 of the affidavit in support of the application it is deponed that all the twelve counts facing the applicants are bailable. In paragraph 7 of the same affidavit, it is deponed that, it is in the interests of justice that the applicants be granted bail. In principle, these matters stand uncontroverted.

A mere allegation by the learned Senior State Attorney, that, the applicants would, if granted bail, interfere with the ongoing investigation, is in my respectful opinion not sufficient to be a basis of denial of bail to the applicants. The offences charged, being bailable offences.

In the neighbouring jurisdiction, in a case similar to the one before me, the Supreme Court of Malawi, in **M. LUNGUZI VS. THE REPUBLIC, MSCA APPEAL NO.1 OF 1995,** held that: "*In my judgment the practice should rather be to require the State to prove to the satisfaction of the court that in the circumstances of the case, the interests of justice requires that the accused be deprived of his right to release from detention. This is what we have always upheld in our courts. If the State wants the accused to be detained pending his trial then it is upon the State to prove so that the*

court should make such an order." I am highly persuaded by these words. No doubt, the position is the same here at home.

It is the holding of the court that no sufficient materials have been put on record in support of the contention that, if released on bail, the applicants, would tamper with the ongoing investigation of the offences with which they (the applicants) stand charged. For failure of the respondent to prove the grounds for objecting the applicants' bail, the objection stands overruled.

For the reasons I have endeavoured to offer, I accordingly grant the applicants' bail application. I proceed to direct the Committal Court to admit the applicants on bail on fulfilling the following bail conditions:

1. Each applicant to sign a bail bond to the tune of TZS. 50,000,000/=.
2. Each applicant to have one reliable surety who should sign a bail bond in the sum of TSZ. 10,000,000/=.
3. Each applicant to surrender his/her passport or any other travelling document to the police. It is so held.

Dated at **SHINYANGA** this **15th day of May, 2020.**

C. P. MKEHA
JUDGE
15/05/2020

Court: Ruling is delivered in the presence of the applicants, Mr. Frank Mwalongofor the applicants and Ms. Ndaweka learned Senior State Attorney for the respondent.

C. P. MKEHA
JUDGE
15/05/2020

Court: Right of appeal to the Court of Appeal of Tanzania is fully explained.

THE HIGH COURT OF TANZANIA

C. P. MKEHA
JUDGE
15/05/2020