

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**AT TABORA**

**HC MISC. CRIMINAL APPLICATION NO 02 OF 2021**

*(Originating from Economic Crime Case No. 98 of 2020 pending in the  
Resident Magistrate Court of Tabora at Tabora)*

- 1. PASTORY BUDUNO@PANDUJI .....1<sup>ST</sup> APPLICANT**  
**2. MOHAMED MAKLOBELA NYANDA..... 2<sup>ND</sup> APPLICANT**  
**3. JUMANNE EMAMANUEL@KABUDYO.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

28/01 & 05/02/2021

**BAHATI, J.**

Pastory Buduno @Panduji, Mohamed Makolobela Nyanda and Jumanne Emmanuel @ Kabudyo were arraigned in the Resident Magistrate's Court of Tabora for unlawful possession of Government trophy contrary to section 86(i) and (2)(ii) of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14 of the Schedule to,

and Section 57(1) and (2) of the Economic and Organized Crime Control Act, (Cap 200 R.E.2019).

The particulars of the charge show that on the 16<sup>th</sup> day of December, 2020 at Songambebe Village within Kaliua District jointly and together were found in unlawful possession of government trophy, to wit, two elephant tusks valued at Tshs. 34,788,600/= without a permit from the Director of wildlife.

Pending trial of the Economic Crime Case No. 98 of 2020 currently pending in the Resident Magistrate's Court of Tabora, the three accused moved this Court under a certificate of urgency, to release them on bail.

The application was made by Chamber Summons under Section 29(4)(d) and section 36(1) of the Economic and Organized Crime Control Act, Cap. 200[R.E. 2019] as amended by written laws (Misc. amendments) Act no. 3 of 2016 and any other enabling provision of the laws.

The Chamber Summons was accompanied by an affidavit sworn by Ms. Flavia Francis, learned counsel, dully instructed to represent the applicants. Ms.Francis deposed that the charge against the applicants wasailable and the law had placed the jurisdiction to determine bail upon the High Court.



She averred that the applicants were Tanzanians, with credible and reliable sureties' residents in Tabora who were ready to meet bail conditions. The learned counsel further averred that it was in the interest of justice to grant the application as bail is a statutory and constitutional right to the applicants. She added that the applicants were presumed innocent until proven otherwise.

In reply, through a counter-affidavit affirmed by Mr. Miraji Kajiru, learned Senior State Attorney, the Republic contested the application. Mr. Kajiru admitted Ms. Francis's averments on the nature of the charges pending in the trial Court but generally disputed the allegations on availability of sureties.

During the day of the hearing, Mr. Miraji Kajiru, learned Senior State Attorney, appeared for the Republic while Ms. Flavia Francis learned counsel, dutifully acted for the applicants.

Arguing the application, Ms. Francis prayed to adopt the contents of her affidavit and prayed for a grant of the application. Also, she added that in the case of **Geoffrey Sandalala v. Republic, Misc Criminal Application No. 2 of 2019 in Silvester Hillu Dawi and Stephen Leons Mwambene V.The DPP, Criminal Appeal No. 250 of 2006(AT DSM REGISTRY) Unreported**, where it set guidelines of how the amount should be shared equally to all applicants.

Mr. Kajiru challenged the application on the ground that the applicants were charged with Government trophy, to wit, elephant tusks amount to Tshs. 34,785,600/=

Further, Mr. Kajiru contended that granting them bail will make them repeat the same offence which will lead to the destruction of our government, also he prayed to consider section 148(5)(e) of Criminal Procedure Act, Cap 20 [R.E 2019].

In rejoinder, Ms. Francis forcefully submitted that the respondent has not objected to the issue of bail.

Having gone through both arguments, the main issue for determination to this court is *whether the applicants be released on bail pending the determination of the criminal charges against them?*

The law presumes that an accused person is innocent until proved guilty by a competent court with competent jurisdiction and or until such accused pleads guilty to the charge voluntarily.

Bail is a temporary release of an accused person awaiting trial on conditions set by the Court which may include a deposit of a sum of money in Court to guarantee his/her appearance in Court. The powers of this Court to grant bail on economic offences whose value exceeds



Tshs. Ten Million are spelt out in section 29(4)(d) of the Economic And Organized Crime Control Act, Cap.200 [R.E 2019]which reads;

*“29(4) After the accused has been addressed as required by subsection (1) the magistrate shall, before ordering that he be held in remand prison where bail is not petitioned for is not granted, explain to the accused person his right if he wishes, to petition for bail and for the purpose of this section the power to hear bail applications and grant bail;*

*(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”*

Ms.Francis contended that on account the applicants are Tanzanians and have credible and reliable sureties residing in Tabora region who will meet the conditions to be set by this Court, they would not jump bail or abscond from the court’s jurisdiction. This court is aware that the availability of an accused to stand trial is a major, but not a solitary test to be applied in considering whether or not to grant bail.

In **Tito Douglas Lyimo V Republic (1978) LTR No.55**, this Court held that;



*"The Court may refuse bail on evidence that the granting of bail would result in failure of justice or abuse of the process of the Court"*

In **Patel V Republic (1971) HCD No.391**, four principles to be considered in granting bail were enumerated, thus;

*"I would say that the Court should be guided by four main principles on the granting of bail pending trial. The first and foremost is that the Court should ask itself whether the accused would be available at the trial. Another principle which the court should consider is whether the accused is likely to commit further offence if he is allowed out on bail in which case his character is certainly not irrelevant. A further principle is whether the accused is likely to interfere with the investigation by influencing witnesses or otherwise, and finally the gravity of the accusation and the severity of the punishment of conviction results, as to whether that in itself would prompt an accused to jump his bail."*

In the present case, the applicants readily offered presence of independent and reliable sureties and insisted that all have fixed places of abode in Tabora region, within the jurisdiction of the trial Court.

Further, whereas no evidence was given by the respondent to suggest that the applicants were not of good character or had a history

of criminality, it was not suggested that the applicants would abscond from the proceedings if released on bail.

Having regard to contents of the affidavit in support of the application and a counter-affidavit thereof, I am convinced that there is no likelihood of the applicants to jump bail or commit other offence(s) while out on bail.

The next issue for determination is on the bail conditions. It is trite law that the powers to set bail conditions have to be exercised in accordance with the applicable law.

Section 36 (5) (a) and (b) of the Economic and Organized Crime Control Act (supra) provides that:

*“36(5) where the court decides to admit an accused person to bail, it shall impose the following conditions on the bail, namely;*

*(a) Execution of a bond to pay such sum of money as is commensurate to the monetary value and the gravity of the offence concerned;*

*-provided that where the offence involves property whose value is ten million shillings or more, the court shall require that cash deposit equal to half the value be paid and the rest be secured by the execution of a bond.*



*(b) Appearance by the accused before the court on a specified time and place.”*

The above provision is parametrial with Section 148(5)(e) of the Criminal Procedure Act, Cap.20[R.E 2019] which reads;

*“148 (5) A police officer in charge of a police station or a Court before whom an accused person is brought or appears, shall not admit that person to bail if:*

*(e) the offence with which the person is charge involves actual money or property whose value exceeds ten million shillings unless that person deposits cash or other property 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 the existence of the property; save that this provision shall not apply in the case of police bail.”*

In discharging this duty setting bail conditions, I will also be guided by the decision of this Court in **Julius S/O John Mwita & 3 Others v Republic Misc. Criminal Application No. 11 2019 (unreported)** wherein, it was held that:



*“.... Further taking into account that the applicants are 4 in number, this Court will swim and go into the veins and spirit of the holding of the decision of the case of **Silver Hillu Dawi and Another V. DPP** (Supra) in setting bail conditions.”*

In the referred to the case of **Silvester Hillu Dawi and Another V DPP, Criminal Appeal No. 250 OF 2006 (Unreported)** the Court of Appeal had this to say:

*“.....therefore Section 148 (5) (e) of the Criminal Procedure Act, Cap. 20, R.E. 2002 shall be accordingly construed, to read that a Court shall not admit person jointly charged to bail if the offence with which these persons are charged involves actual money or property whose value exceeds 10 million unless the person jointly deposits cash or other property(ies).”*

In the present case, there are three (3) accused persons/applicants and the amount involved in the case is a total of applicants and the amount involved in the case is a total of Tshs. 34,788,600/=.

Half of that amount is Tshs. 17,394,300/= which going by the principle stated in **Silvester Hillu Dawi And Julius S/O John Mwita** (supra), has to be jointly apportioned between the three (3) applicants.


Consequently, and for the fore stated reasons, I grant the application and admit the applicants to bail on the following conditions.



1. That the applicants shall jointly deposit in court a sum of Tshs. 17,394,300/= in cash or immovable properties of equivalent value situated within Tabora region.
2. Each applicant shall have two reliable sureties who will execute a bail bond of T.shs. 8,697,150/= meaning that each surety shall execute a bond of Tshs. 4,348,575/=.
3. Each applicant shall be duty bound to appear in court on all dates that shall be scheduled by the court.
4. The Applicant is restricted from traveling outside Tabora region without prior written consent sought and granted by the Deputy Registrar –Tabora High Court.
5. The Applicant must surrender his traveling documents to the RCO-Tabora.
6. The sureties to be approved by the Deputy Registrar-Tabora zone.

Order accordingly.



  
**A.A. BAHATI**  
**JUDGE**  
**05/02/2021**



Ruling delivered under my hand and seal of the court in chamber,  
this 5<sup>th</sup> day February, 2021 in the presence of both parties



A handwritten signature in blue ink, appearing to read "A. A. Bahati", is written over the printed name.

**A. A. BAHATI**

**JUDGE**

**05/2/2021**

