

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

MISC. CRIMINAL APPLICATION NO. 41 OF 2021

ATHMAN EDWARD KITENANA 1ST APPLICANT

NICKSON ABALLA OPIYO 2ND APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

**(Arising from Economic Case No. 101 of 2021 pending in the
District Court of Serengeti at Mugumu)**

RULING

26th and 26th October, 2021

KISANYA J.:

This ruling emanates from the application for bail pending trial filed by Athman Edward Kitenana and Nickson Aballa Opiyo, the applicants herein. The application is made under sections 29 (4) and 36(1) and (5) (a) of the Economic and Organized Crimes Control Act [Cap.200, R.E.2002] (the EOCCA). It is supported by an affidavit of the applicants' counsel sworn on the 6th August, 2021.

In terms of the supporting affidavit, the first applicant is an employee of Butiama District Council, while the second applicant is a peasant residing at Marambora village within Rorya District. Both applicants were, on the 30th day of March, 2021, arraigned before the District Court of Serengeti at Mugumu for several counts of offences

namely, forgery, abuse of position, unlawful dealing Government Trophies and unlawful hunting of specified or scheduled animal. While the offences of forgery and abuse of position were levelled against the first applicant, the remaining offences were laid against both applicants. According to the charge appended to the affidavit, the value of properties involved in the offences is more than ten million shillings. Therefore, in view of section 29(4) (d) of the EOCCA, the applicants were inclined to lodge the present application for bail pending trial before this court.

Upon being served, the respondent did not file the counter affidavit to contest the application.

When this matter was called on for hearing today, the applicants were represented by Mr. Cosmas Tuthuru learned advocate, while Mr Yesse Temba, learned State Attorney was for the respondent.

Submitting in support of the application, Mr. Tuthuru urged the Court to grant the application. He reiterated what was deposed in the supporting affidavit that the applicants have reliable sureties and were ready to comply with the bail conditions. Mr. Tuthuru submitted further that the offence preferred against the applicants are bailable and that both applicants are entitled to bail.

Mr. Temba did not object the application. He urged the Court to impose the bail conditions that will ensure availability of the applicants during trial.

I have gone through the Chamber Summons, supporting affidavit and submission made by the counsel for both parties. The issue for consideration is whether the application is meritorious or otherwise.

It is common ground that the applicants are charged with economic and non-economic offences. Pursuant to the provision of section 29(4)(d) of the EOCCA, this Court is vested with the jurisdiction to hear the application and grant bail, where the value of property involved is more than ten million shillings. The above cited section 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.”(Emphasize supplied).

In the present case, the value of trophies involved in the economic offences (unlawful dealing in Government Trophies and unlawful hunting of specified or scheduled animal) is TZS 10,350,000. That being the case, the jurisdiction to hear the application and admit the applicants on bail pending trial is vested in this Court.

It is a constitutional principle that, an accused person is presumed not to be guilty until it is proved to the contrary. This is pursuant to the provisions of Article 13(6)(b) of the Constitution of the United Republic of Tanzania, 1977 (as amended). Further to that, an accused person is entitled to the right of freedom of movement enshrined under Article 15 of the Constitution (supra). Therefore, in view of the rights to presumption of innocence and freedom of movement, the accused person is entitled to bail. See also the case of **Patel v R [1978] HCD** cited by counsel Tuthuru, where this Court held that: -

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

However, bail is governed by the law and granted basing on the circumstances of each of the case. Some of the factors for consideration

include, availability of the accused to stand the trial, gravity of the offence and severity of the offence, security of the accused, protection of victim, preservation of public order to mention but a few. [See **Onasaa Shererengwa Mushi vs R** (1984) TLR 170].

I have considered that the following factors deposed in the supporting affidavit: **one**, the offences preferred against the applicants are bailable; **two**, the applicants have reliable sureties who will ensure their attendance during the trial; **three**, the applicant have no record of jumping bail deposed under oath that, they are reliable people; **four**, the prosecution has not objected the application; **five**, the applicants undertake to meet the bail conditions. In that regard, I find no cogent reasons for refusing this application.

Ultimately, guided by the provisions of section 36 of the EOCCA and the sharing principle stated in the case of **Silvester Hillu Dawi & Stephen Leons Mwambene vs The Director of Public Prosecutions**, Criminal Appeal No. 250 of 2006, CAT at DSM (Unreported), the applicants are hereby admitted on bail pending trial, on the following bail conditions:

1. Each applicant shall not travel outside Mara Region without prior approval of the District Court of Serengeti at Mugumu.

2. Each applicant shall deposit a sum of TZS 2,587,500/= or deposit to the custody of the Court, a title deed or evidence satisfactorily to prove existence of an immovable property valued at TZS 2,587,500/=.
3. Each applicant must have two reliable sureties with a fixed place of abode within the jurisdiction of the trial Court.
4. Each surety shall execute a bail bond in the sum of TZS 1,293,750/=.
5. Each surety shall produce an introductory letter from his or her employer or local government authorities and a copy of recognized identity card.
6. Each applicant is ordered to surrender his passport or any travelling documents in his name (if any).

The Resident Magistrate assigned with the case at the District Court of Serengeti will ascertain compliance with these bail conditions.

It is so ordered.

DATED and DELIVERED at MUSOMA this 26th day of October, 2021.




E.S. Kisanya
JUDGE