IN THE HIGH COURT OF TANZANIA

CORRUPTION AND ECONOMIC CRIME DIVISION

DAR ES SALAAM REGISTRY

MISC. ECONOMIC CAUSE NO. 03 & 04 OF 2016

(Arising from Economic Crime Case No. 10 of 2016, Resident Magistrate Court of Morogoro at Morogoro)

1. ALLY SAID AHMED

2. BENJAMIN GREGORY RUVUNDUKA

3. KIBONESE GOLAGOZA LUNDUNDUKA

4. SHUKURU JOEL MWAKALEBELA

5. GEOFREY GEORGE PELEUS

6. NICKSON GEORGE KARULAYA

7. OMBENI HANS NDEKWIRWA

Versus

REPUBLIC

Date last order 21/12/2016

Date of Ruling 23/12/2016

RULING

KOROSSO, J.

Before the Court, two applications filed under certificate of urgency, one by the 1st applicant Ally Said Ahmed (hereinafter referred to as the 1st applicant), Misc Economic Application No. 3 of 2016, filed pursuant to Section 29(4)(d) of the

Economic and Organized Crime Control Act, Cap 200 RE 2002 supported by an affidavit affirmed by the applicant Ally Said Ahmed. The Second application registered as Misc. Economic Application No. 4 of 2016 was filed by various applicants, that is, Benjamin G. Ruvunduka (to be known as 2nd applicant); Kibonese G. Lunduduka (to be known as 3rd applicant); Shukuru J. Mwakalebela (to be known as the 4th applicant); Geoffrey G. Peleus (to be known as the 5th applicant); Nickson G. Karulaya (to be known as the 6th applicant); and Ombeni H. Ndekwirwa (to be known as the 7th applicant) pursuant to section 29(4)(b) of the Economic and Organized Crime Control Act, Cap 2002 RE 2002 and was supported by the sworn affidavit of Astrida Kagashe learned Advocate for the said applicants.

On the 16th of December 2016, learned advocates for all applicants appeared in Court, and Ms. Astrida Kagashe learned counsel representing the 2nd, 3rd, 4th, 5th, 6th and to 7th applicants who were the 1st to 6th applicants in Misc Economic cause No. 4 of 2016 (which was before this Court) prayed to the Court to consolidate Misc. Economic Cause No. 3 and Misc. Economic Cause No. 4, since they all originated from Economic Crime Case No. 10 of 2016 pending in the District Court of Morogoro at Morogoro. The Learned advocate for the 1st applicant Mr. Melkior Sanga supported the prayer, and the learned State Attorney, Mr Eliah Kalonge Athanas did not object to the prayer. Consequently, the Court granted the prayer and ordered for Misc Economic Cause No. 3 of 2016 and Misc Economic Application No. 4 of 2016 to be consolidated.

The Respondents duly filed a Counter affidavit within the time specified sworn by Eliah Kalonge Athanas. We need to consider from the outset the fact that the said counter affidavit lists Ally Said Ahmed as the 8th applicant, but the Court notes that this is an error since having consolidated Misc Ec. Crime Application

No. 3 and 4 of 2016, then in effect Ally Said Ahmed, became number 1 applicant and Benjamin No. 2 and addressing the same order up to Applicant No. 7 who was now Ombeni Hans Ndekirwa. The Court also noted that the name William Casto Lumato listed as the 7th Applicant in the Certificate of the DPP is not one of the listed applicants in the original Misc. Economic Cause No. 3 or No. 4 of 2016 and therefore found that he is not one of the applicants in the applications before the Court . The same error can be detected from the Certificate of the Director of Public Prosecution, made under section 36(2) of the Economic and Organized Crime Control Act, Cap 200 RE 2002 dated 16th day of December 2016.

The filed Certificate by the DPP stated that, the DPP certifies that Benjamin Gregory Ruvunduka, Kibonese Golagoza Lundunduka, Shukuru Joel Mwakalebela, Geofrey George Peleus, Nickson George Karulaya, Ombeni Hans Ndekirwa, William Casto Lumato and Ally Said Ahmed who are the accused persons in Economic Crime Case No. 10 of 2015 in the District Court of Morogoro should not be granted bail on the ground that the safety and interests of the Republic will be prejudiced. Having considered the said error and the fact that the applicants counsel did not raise the matter which in effect meant they did not find it an issue and the fact that the Court finds that the said anomaly did not in any way prejudice any of the parties and finds the error curable in both the Counter affidavit and the Certificate by the Director of Public Prosecution.

The second issue the Court finds it relevant to highlight is the fact that whilst the 1st applicant in their original application Misc. Economic Cause No. 3 had filed the application pursuant to Section 29(4)(d) of the Economic and Organized Crime Control Act, Cap 200 RE 2002, and the 2nd to 7th applicants had filed Misc. Economic Cause No. 4 of 2016 pursuant to Section 29(4)(b), upon

consideration of the consolidated application, and in the interest of justice the Court will consider both provisions when considering and determining this application.

The applicants are praying for this Court to grant them bail and any other relief the Court may deem fit to grant them. At the hearing of the application, the applicants were represented by Mr. Mwesigwa Mwehingo learned Advocate assisted by Ms. Neema Mchunga learned Advocate, Mr. Melkior Sanga Learned Advocate, Mr. Marwa Masanga Learned Advocate and Ms. Astrida Kagashe Learned Advocate and for the Respondent Republic, Mr. Eliah Kalonge Athanas, Learned State Attorne represented them. It was agreed by the parties that hearing of the application proceed by way of oral submissions.

There being a Certificate issued by the DPP certifying that the applicants should not be granted bail on the ground that the safety and interests of the Republic will be prejudiced, we find that before venturing into the merits of the application it is important to consider how the said Certificate impacts on the present application. The applicants through their learned counsels submitted that the Court should not accord any weight to the said Certificate for the following reasons. First, that the Certificate has been filed prematurely since under Section 36(2) of the EOCCA Cap 200 RE 2002, the DPP is empowered to issue and file such a Certificate when the accused person is charged and that this is not the case in the current application since the applicants have not been charged in this Court. The applicants contended further that their understanding of the relevant provisions is that the Court referred in the said provision is the registry of the present Court. That under section 36(2) of the EOCCA it is clear when the Certificate can be issued and subsection (1) and (2) of section 36 of EOCCA all allude to where a person charged is before this Court.

The applicants also contended that their application is under section 29(4)(b) of the EOCCA which empowers this Court to determine applications before the accused person are charged. The applicants cited the case of ***DPP vs Ally Nuru Dirie and Another*** (1988) TLR 252, contending that the Court of Appeal of Tanzania (CAT) has already addressed the concern by holding that, "*a trial commences when accused person appears before a Court or tribunal competent to convict or acquit after being informed of a charge and required to plea*". That the Court of Appeal held where the respondent appears before a District Court incompetent to try the case, the filing of a DPP's Certificate objecting to grant of bail was premature. It was therefore the contention of the applicants counsel that the said decision of the CAT binds this Court and therefore it has to follow the holding by virtue of the doctrine of precedents and should therefore this Court has to disregard the current DPP Certificate filed because it is premature.

The other point raised by the applicants counsel was that the filed DPP's Certificate is too broad, by stating the reasons for issuance of the same being only for the safety and interest of the Republic without providing any details on the same. Arguing further that by doing that, the DPP failed to certify as required because certifying on how the safety and interest of the Republic will be prejudiced is essential. The counsel for the applicants shared the definition of certification from Blacks Dictionary, 9th edition which expresses the meaning to be "*to authenticate or verify*" and the ordinary meaning being "*to give reasons*". Building from the said definition, the Counsel contended that the DPP was supposed to certify by giving reasons so that this Court could measure the reasons for certifying that the applicants should be not be granted bail. The other argument presented by the applicants was that in any case the DPPs Certificate denial bail was held to be unconstitutional in ***Misc. Civil Cause No.***

35 of 2005, Prof. Costa Ricky Mahalu and another vs. Attorney General (unreported), where the High Court declared the certification by the DPP to be unconstitutional and the AG was directed to amend the provisions of the Criminal Procedure Act to capture the essence of the judgment of the Court. The case of ***Jeremia Mtobesya vs. AG, Misc. Civil Cause No. 29 of 2015*** (unreported) was also cited to cement this point.

It is important to note here, that at a later stage the counsel for the applicants withdrew this assertion that the certification of the DPP was unconstitutional, but then in rejoinder prayed the Court to revive this argument. The Court finds that it is an issue which is before the Court and averred in the affidavits and despite first having withdrawn it, the Court will address it though even in passing.

The State Attorney in his rival submissions stated that the argument by the applicants counsel on this issue that the filed Certificate of the DPP is premature is baseless and that the cited case of ***DPP vs. Nur Dirie*** is no longer applicable since the said case held that the DPP is not required to disclose reasons on the nature of the interest concerned. Mr. Athanas, learned State Attorney argued further that when challenging statutory provisions it is important to consider that the parliament intended a particular section to be as it is and in this particular section that is challenged, the reality being it does not require the DPP to provide reasons.

In rejoinder Ms. Neema Makunga who represented the applicants averred that this Court should consider the DPP Certificate in light of Article 13(6)(b) of the Constitution of the United Republic of Tanzania which provides for presumption of innocence of the accused and that the applicants should benefit from that. Alleging further that the certificate of the DPP referred, derogates the said

presumption of innocence and cited the case of ***Daudi Pete vs. Republic,*** [1993]TLR. 22, stating that though the case dealt with section 148 of the Criminal Procedure Act, Cap 20 RE 2002, but the said provision is similar in content to section 36 of the EOCCA. That the Court can also decide not to give weight to the DPP's certificate because S.36 of the EOCC is too broad and the DPP has failed to certify reasons thus Article 108 A of the Constitution is relevant where the Court is duty bound to exercise its jurisdiction judiciously.

Learned Advocate Melkior Sanga counsel for the applicants called upon the Court to jealously guide its inherent powers contending that the certificate by the DPP is an attempt to interfere with and to ouster the Court's inherent powers to issue and grant bail. In response to this issue when provided with an opportunity to respond, the State Attorney argued that the said provision has in no way ousted the jurisdiction of the Court because it is the Court which determines whether or not to grant bail, and in that determination the Court has to consider all the grounds including a certificate filed by the DPP. The State Attorney also challenged the contention that the case of ***Jeremiah Ntobesya*** (supra), stating that the case did not declare section 36(2) Unconstitutional.

We find it important to first address where the powers of the DPP to issue the certificate to deny bail originate from. Section 36(2) of the EOCCA, Cap 200 reads:

36 *(2) Notwithstanding anything in this section contained no person shall be admitted to bail pending trial, if the Director of Public Prosecutions certifies that it is likely that the safety or interests of the Republic would thereby be prejudiced.*

It is noted that various cases have discussed this provision including all the cited cases by the parties in this case with regard to the Certificate. There have been arguments that this provision is unconstitutional derogating the presumption of innocence of the accused. It is pertinent to understand from the outset that while addressing the issue in that context, we should bear in mind that under Article 30(2) of the URT Constitution enacted legal provisions which may seem to be derogative or restrictive of individual rights if it serves a legitimate purpose or aim to protect the society it would not be held to contravene the Constitution. This has been held by the Court of Appeal in various cases. (***DPP vs Daudi Peter (supra); Kukutia Ole Pumbun and Another vs. AG and Another (1993) TLR 159 and Julius Ishengoma Francis Ndyanabo vs AG (2004) TLR 38).***

The powers of the Director of Public Prosecution are Constitutional under Article 59(B). Under Article 59(B) of the URT Constitution, "*the DPP in exercising his powers, he shall be free, shall not be interfered with by any person or with any authority and shall have regard to the following:*
(a) the need to dispensing justice;
(b) prevention of misuse of procedures for dispensing justice; and
(c) public interest".

Therefore, while challenging any decision of the DPP it is important to also address the powers of the DPP and satisfy oneself whether the power being challenged are those going beyond what has been prescribed by statute(s). We find at this juncture this is not an issue which is before the Court. Article 59B of the United Republic of Tanzania Constitution provides that the DPP powers shall be expounded in various enactments. Looking at section 36(2) of the EOCCA, as

held in various cases it states categorically in even its choice of terms that where the Director of Public Prosecution has certified that the safety or interests of the Republic will be prejudiced if any person is granted bail then the Court shall not grant bail. The positions is cemented by various cases including ***Method Malyango Busogo and Another vs R., Misc. Criminal Application No. 51 of 2015; Lucas Galuma Nyagabati vs. R, Criminal Application No. 107 of 2015; and the DPP vs Li Ling Ling***, Criminal Appeal No. 508 of 2015, whereby in this case the Court of Appeal stated that *"the position of the law as stated in the Dirie case is that once the DPP's certificate has met a validity test, the court shall not grant bail*".

From this it is clear that, once there is a Certificate filed by the DPP like the case on hand, the Court has to satisfy itself that the said certificate has met the validity test. What is the validity test? the Court of Appeal of Tanzania in the case of ***DPP vs Li Ling Ling*** (supra) alluded to the conditions for validity of the DPP's Certificate as stated in ***Nur Dirie's*** case, and they are:

i. The DPP must certify in writing and

ii. The certificate must be to the effect that the safety or interest of the United Republic are likely to be prejudiced by granting bail in the case; and

iii. The certificate must relate to a Criminal case either pending trial or pending appeal.

Therefore from the above, the issue this Court has to satisfy itself is whether the above conditions have been fulfilled. On the First condition, it is clear since the filed certificate is in writing and it is a certification there is no need to dwell too much on this. The arguments presented by the learned counsel for the applicant on the issue of certification were not grounded on evidence, there being nothing

to challenge the certification...The Certificate states clearly that Biswalo Eutropius Kachele Mganga the DPP do hereby certify... We thus find that the test was met. There being no where stating that certification includes provision of reasons. Even if one was to consider, the definition provided by the applicants counsel, that is "*to authenticate or verify*" we do not find that the ordinary meaning of this is to give or provide reasons, since we hold to authenticate in ordinary context is to acknowledge the correctness, to confirm, to validate or to substantiate the same and not to give reasons. In any case it is clear that the reasons are provided by the relevant provisions itself and that being, by reason of safety and public interest. The test of whether that can be used arbitrary or not is another issue which has to be proved by those contending that is so by showing how it can be abused by the DPP and whether there are no procedures to ensure protect against such abuse or the risk of the abuse. Therefore we are satisfied that item 1 of the condition is fulfilled.

For number condition no. 2, we find there is no need to dwell on it much because the certificate is clear that this is addressed. On the third issue, which was also an argument raised by the applicants that the Certificate was filed prematurely, we resort first to the provisions cited to move the Court that is section 29(4)(b) and section 29(4) (d) of the EOCCA, Cap 200 RE 2002.

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–

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

Looking at the contents of Section 29(4)(b) and (d) of EOCCA, this Court shares the position stated by the Learned State Attorney that the case of ***DPP vs. Li iing Lang***, has cleared the misunderstandings on the application for bail. In the said case discussing the provision of Section 29(4)(d), the Court held that "*under this provision, the High Court has jurisdiction to hear and determine an application for bail at any stage of the proceedings before the accused persons trial has commenced. According to the provision therefore, it is only after commencement of trial that the High Court ceases to have jurisdiction*" They stated further that this provision augurs with section 36(2) which restricts the powers of the DPP of filing a certificate of objection to bail to the stage where the case is pending trial.

The Court discussed at length where the controversy arises saying it is form the words "Pending trial" under section 36(2) of the EOCCA, Cap 200, that since section 29 empowers the Court to entertain bail applications, section 36 provides for the manner in which such power should be exercised and that the two sections must be applied together in application of bail condition.

Having gone through the case, we find it important to also address the finding in the case of ***Jeremiah Mtobesya*** (supra) the applicants sought the Court to declare as unconstitutional the provisions of section 148(4) of the Criminal

Procedure Act, Cap 20 RE 2002 for offending Article 13(6)(a) of the Constitution of the United Republic of Tanzania of 1977. We find that the case of ***Jeremiah Mtobesya*** (supra) distinguishable having addressed the Criminal Procedure Act, Cap 200 in view of the fact that though the sections, that is 148 of the CPA may seem similar in content to Section 36 of the EOCCA, there are still different sections under different Acts. In any case the said decision is not binding to this Court being a High Court decision. We are inclined to be more persuaded by the views expressed by Hon. Msumi J. in ***Republic vs Peregrin Mrope, Criminal Case No. 43 of 1989*** (unreported) when he held that the right on an accused person to be released to bail is not absolute but could be enjoyed with necessary qualifications, a positions cemented by the Court of Appeal decision in ***Julius Ishengoma Francis Ndyanabo vs. AG*** (2004) TLR at pg 38 holding that any such limitations provided must not be arbitrary, which we find meant where there are necessary qualification they must be validated by derogation clauses.

We find that the fact that a person denied bail by virtue of S.36(2) of the EOCCA Cap 200 can appeal and challenge the decision in a higher Court or through Constitutional proceedings, or Judicial review under section 17 of the Law Reform (Fatal Accidents and Miscellaneous Provisions)Act, Cap 310 RE 2002 shows there other avenues open for one aggrieved with the denial of bail by virtue of the filing of the DPP's certificate.

On another issue before the Court, that the DPP's certificate denying grant of bail has been filed prematurely, we find the position is now settled. In ***DPP vs Li Ling Ling*** (supra) it was further held; " *The DPP derives the power of filing a certificate in the High Court notwithstanding the fact that eh case has not reached the trial stage and that he derives this from section 36(2) of EOCCA,*

Cap 300 RE 2002". Therefore applying this decision to the present case we find that the argument by the applicants that the certificate of objection to bail was filed prematurely, fails. Consequently, it suffices that the Certificate of the DPP in our case has passed the conditions is therefore a certification as prescribed. We are told by ***DPP vs Li Ling Lang*** (supra), "*the DPP is empowered to file a certificate in any court which has jurisdiction to hear and determine an application* for bail, being it the subordinate Court, the High Court or the Economic Crime Court".

With regard to the issue of providing reasons we find nowhere where such is required, and as e have already held the case of ***Jeremiah Mtobesya*** (supra) is distinguishable, relying on the provisions of the Criminal Procedure Act. We also find that interpreting that a certificate of objecting to bail amounts to abrogation of presumption of innocence is also too far-fetched because denial of bail does not necessarily lead to conviction of the applicant, the right to be heard, to provide his defence in the case has not been denied. The Court jealously guards and protects its inherent powers all the time, but the Court is also a creature of the Constitution and statute. The duty of the Court is to adjudicate and interpret laws, Courts do not legislate, and the Court role is to be judicious and advance justice.

The Certificate by the DPP is an instrument provided by the law and Courts are bound to follow the law. It should be remembered that Article 108 of the Constitution of Tanzania 1977 provides for the inherent jurisdiction of the High Court of Tanzania. Section 2 and 3 of the Judicature and Application of Laws Act Cap 358 expounds on this. But the said provisions do not in any way provide authority for the Court to go against the law enacted by Parliament unless it is

satisfied that the said law is too general and arbitrary and can be exercised to lead to injustice and has not been provided within any limitation where it has potential to abrogate the rights of individuals. This position is settled through case law where some of the cases have been propounded and discussed hereinabove.

Having found the Certificate filed by the DPP to be sound and legally based, there is no need to dwell on the merits of the application itself at this juncture. We thus proceed to hold that in view of the filed Certificate of the DPP, the Court refrains from granting the prayers advanced by the applicants and therefore bail application for the applicants is denied until the time the Certificate of the DPP is withdrawn or any further orders by this Court. Ordered.

HIGH COURT OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION

Winfrida B. Korosso

JUDGE

23rd December 2016