

IN THE HIGH COURT OF TANZANIA
THE CORRUPTION AND ECONOMIC CRIMES DIVISION
AT DAR ES SALAAM

MISC. ECONOMIC CAUSE NO. 15 OF 2017

(Originating from Economic case No.3/2016 of Ulanga District Court)

1. RICHARD MTOLELA 1ST APPLICANT

2. GASTOL MTOLELA..... 2ND APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

Date of Last Order: - 01/06/2017
Date of Ruling: - 08/6/2017

R U L I N G

MATOGOLO, J.

Richard Mtolela and Castol Mtolela are the applicants in this application, through their advocate Mr. Mussa Kulita have filed this application praying for the following orders:-

- a) That this honourable court be pleased to find that the applicants are entitled to bail for the offences they are charged with in economic case No.3 of 2016 pending at Ulanga District Court.
- b) That the applicants be admitted to bail
- c) Any other orders as this honourable court may deem fit or/and just to grant.

The application is made under S.36(1)(5)(6) and S.29(4)(d) of the Economic and Organized Crimes Control Act, Cap.200 RE 2002. The same is supported by the affidavit joint deposed by the applicants. The two are facing a charge of unlawful possession of Government Trophies c/s 86(1) (2) and (3) of the Wildlife conservation Act Cap.283 RE 2002 as read together with paragraph 14 of the first schedule to and sections 57(1) and 62(2) of the Economic and Organized crime control Act Cap.200 RE 2002. It was alleged that on 22nd January 2016 at Ebuyu village Ulanga District in Morogoro region the applicants were found in unlawful possession of one elephant tusk weighing 2 kgs valued at Tshs. 39,240,000/= the property of Tanzania Government without license or permit. The Republic was served with the chamber summons and filed counter-affidavit. But also filed a certificate by the DPP made under S.36(2) of the Economic and Organized Crimes Control Act Cap.200 RE 2002 certifying that Richard Mtolela and Gastol Mtolela should not be granted bail in Misc. Economic cause No.3 of 2016 on the ground that the safety and interests of the Republic will be prejudiced.

The case was scheduled for hearing with regard to the certificate filed by the DPP on 01/6/2017.

On the date of hearing Mr. Mussa Kulita advocate appeared for the applicants and Mr. Elias Athanas learned State Attorney appeared for the respondent/Republic.

Mr. Mussa Kulita learned advocate submitted that the certificate filed by the DPP is part of the Counter-affidavit. That the application was filed under sections 36(1)(5) and 29(4)(d) of the Act. The respondent has filed the certificate under S.36(2) of the same Act. He said the right to bail is provided under Article 13(6) (a)(b) of the URT constitution. The article provide for presumption of innocence of the accused. Likewise Article 107 A(2)(e) gives powers to this court as the organ with final decision making. Sub article(2) provides for rules which must be applied in dispensation of justice. But S.36(2) of the Economic and organized Crimes Control Act (ECOCCA) is the provision which hinders the courts to dispense justice. However he said in the counter-affidavit the respondent has indicated to have noted paragraphs 1,2,3,4 and 5 of the applicants' affidavit. In paragraph 5 the applicants have explained that they are mere peasants with good conduct and willing to abide to the bail conditions which will be prescribed by the court. He said as the respondent in his counter-affidavit has also noted paragraph 5 of the applicant's affidavit. They fail to understand why he has filed certificate objecting grant of bail to the

applicants. Mr. Mussa Kulita learned advocate submitted also that in the case of **Jeremiah Mtobesya Vs. Attorney General** Misc. civil case No.29/2015 High Court DSM main Registry, this court which sitted as a constitutional court declared S.148(4) of the Criminal Procedure Act Cap.20 RE.2002(CPA) unconstitutional as it violates Article 13(6) (a) of the URT constitution. S.36(2) ECOCCA applied by the respondent in his certificate was copied Mutatis Mutandis from S.148(4) CPA, by the decision in **Mtobesya case**, S.36(2) is also unconstitutional. He prayed to this court to view the applicants as entitled to bail as the section applied by the DPP in his certificate is unconstitutional. The same should be struck out. On his part Mr. Elias Athanas learned State Attorney submitted that the certificate by the DPP was filed under S.36(2) of the ECOCCA Cap.200 RE.2002.

But he said the same is not part of the counter-affidavit. It is an independent document filed by the DPP. The DPP is the only person who can file it. And that the act of the respondent to note contents of paragraph 5 of the affidavit does not preclude the DPP to file the certificate. As to the argument that S.148(4) CPA which was declared unconstitutional in **Jeremiah Mtobesya case** and since it is couched in similar terms to S.36(2) Cap.200, then the latter also is unconstitutional, Mr. Elia Athanas stated that this court in that case did not declared S.36(2)

unconstitutional. The same is still valid as it was held in the case of **Manase Julius v.R. Misc.** Criminal Cause No.13/2015 High Court DSM that the two sections are different provisions from two different pieces of legislation and that if the court had intended that S.36(2) is also unconstitutional it would have done so.

But it did not do so. As to this court to have final decision as provided under article 107A of the constitution, Mr. Elias Athanas submitted that the constitution recognizes several enacted laws including S.36(2) ECOCCA. In the ECOCCA there is no any provision which was declared unconstitutional. And that the conditions of validity of the certificate were given in the case of **DPP Vs. Ally Nur Dirie & Another (1988) TLR 252 CA** and in the case of **DPP Vs. Li ling Ling** criminal Appeal no.508/2015 CAT DSM. It is the the submission of Mr. Elia Athanas learned State Attorney that the certificate in question has passed the validity test as the same is in writing, certifying that the safety and interest of the Republic are likely to be prejudiced and that it relates to a criminal case pending in the subordinate court. He prayed to this court to treat the certificate as valid. Mr. Elias Athanas also cited the decision of this court in the case of Joshua Victor Mnonjela & Another v.R, Misc. Economic cause No.3/2017 to support his argument that there are no

circumstances in which the court can disregard the certification filed by the DPP to object bail to the applicants. Mr. Mussa Kulita learned advocate rejoined briefly in which he said the issue of validity of the DPP certificate is not brought in by the wording of the certificate. But is brought in by the actual situation and basis for the certificate itself. That this court has a duty to interpreter various pieces of legislation, the duty which has led to amendments of several legislation. The certificate is against Article 36(6)(a) of the constitution.

The only reason given in the certificate has no basis that this court is not precluded from interpreting the laws of this country and direct amendments when the need arises, he insisted that the applicants have right to bail and this court has powers to grant them bail. And prayed to this court to grant them bail.

After the DPP has filed a certificate following the application for bail filed by the applicants. There are arguments raised from both sides that is from the applicants who, through their advocate Mr. Mussa Kulita who has argued against the said certificate and in support of the application. And Mr. Elias Athanas on the other hand who support the certificate and thus is against the application filed by the applicants. There are about three

points Mr. Mussa Kulita has raised to demonstrate that the DPP certificate is uncalled for.

First that as in the respondents counter-affidavit, he has noted some of the paragraphs of the applicants affidavit particularly paragraph 5 in which the applicants stated that they are Tanzanian who involve in cultivation as peasants and have good character with no previous criminal records and that they are able to meet the conditions when the court admits prayers sought in the chamber summons and grant bail. He therefore failed to understand why then the DPP changed and filed certificate denying bail to the accused while in the counter-affidavit did not raise any objection. But it was correctly submitted by Mr. Elia Athanas learned State Attorney that the DPP certificate cannot depend on other document such as the counter-affidavit. Even if in the counter-affidavit the respondent did not object the bail but the certificate was filed by the DPP, and is the only person who is empowered to file the certificate under S,36(2) ECOCCA and can file it at any time when the need arises.

Although in his counter-affidavit the respondent did not object bail but that alone cannot preclude the DPP from filing the certificate objecting grant of bail to the accused.

The argument therefore lack merit. The second argument is that S.36(2) of the Act which was applied by the DPP to file the certificate is no longer valid. The reason is that S.148(4) of the CPA, which is couched in similar words to S.36(2) was declared unconstitutional by this court sitting as a constitutional court in the case of **Jeremiah Mtobesya Vs. The Attorney General** (supra).

But in that case the court did not discuss on S.36(2) of the ECOCCA and declare it unconstitutional. Mr. Elia Athanas in responding to that argument referred this court to the decision of this court in the case of **Manase Julius v.R** (supra) in which it was held that the two sections are from two different pieces of legislation. It is true that S.148(4) CPA and S.36(2) ECOCCA are two provisions from two different pieces of legislation. A mere fact that they are couched in similar terms cannot justify that as S.148(4) was declared unconstitutional then automatically S.36(2) ECOCCA is also unconstitutional. I understand the rule of statutory interpretation which require purposing interpretation of statutes, and the decision of the Court of Appeal in **Lausa Athman Salum v. AG**. Civil Appeal No.83/2010. However after the decision in **Mtobesya case** which was given in December 2015, there is a decision of the Court of Appeal in **DPP Vs. Li ling Ling** (supra) which was given in March 2016 that is after the decision

of this court in **Mtobesya case**. In that case, the Court of Appeal dealt specifically with S.36(2) ECOCCA which gives powers to the DPP to file certificate in court and its status once it is filed and held that once the certificate by the DPP is filed, a court cannot grant bail provided that such certificate has passed the validity test. In that case the court of Appeal referred to the conditions of validity of the certificate as were laid down, in Ally Nur Dirie case in which the same court was discussing on the validity of the certificate filed under section 148(4) CPA which was equally held to be valid law. But this court, which also sitted as a constitutional court upheld the two provisions that is S.148(4) CPA and S.36(2) ECOCCA as constitutional. The petitioners petitioned for declaratory order that both S.148(4) CPA and S.36(2) ECOCCA are unconstitutional. This court considered both decisions of the court of Appeal above cited along with others that is **Geofrey Eliawony & 3 others v. R.(1998) TLR 190** and **Jumuiya ya Wafanyakazi Tanzania Vs. Kiwanda cha Uchapaji cha Taifa (1988) TLR 146** in which the court of Appeal reminded this court of its obligation to adhere to the decision made by the Court of Appeal.

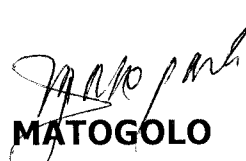
This case is none than Miscellaneous civil cause No.14/2016 between **Gidion Wasonga & 3 others Vs. The Attorney General & 2 others**. Miscellaneous civil cause No 14 of 2016, H/Court main registry DSM. That

decision was given on 25th April 2017. That is more recent compare to that of **Jeremiah Mtobesya** which was also discussed in this case. It is my firm view that S.36(2) ECOCCA is still valid law and thus not unconstitutional. The third point raised by Mr. Mussa Kulita learned advocate is on the powers of this court to interpret laws and when it find it proper can direct amendment and its powers of dispensation of justice conferred upon it by the URT constitution under Article 107A.

I agree with Mr. Mussa Kulita that the court is the only organ with powers of final decision making on matters brought before it. And that the courts have been performing this noble duty. However the same constitution confers powers to other Government organs for them to perform specific functions. But also the constitution recognizes other enacted laws conferring powers to other organs such as S.36(2) ECOCCA which empowers the DPP to file certificate. It is therefore not correct for Mr. Mussa Kulita learned advocate to asserts that S.36(2) is unconstitutional. First the provision has never been declared by any court of competent jurisdiction as unconstitutional but also there other provisions which completely deny accused to be granted bail in certain offences such as murder, trafficking in narcotic drugs, terrorism and money Laundering. Those provisions were enacted to serve certain purposes and in general is

to protect the society, and legislating such provisions which hinder grant of bail to the accused does not necessarily mean that the judicial functions have been taken away from courts and thus infringing article 107A of the constitution. And those provisions cannot be said unconstitutional. Having explained that, and on the basis of the decision of the court of Appeal in **Li Ling Ling case**, it follows therefore that this court cannot proceed to hear the application and grant bail to the applicant after the DPP has filed a certificate under S.36(2) ECOCCA. It is until when the DPP will decide to withdraw the same. Otherwise the application is dismissed.




F.N. MATOGOLO
JUDGE
08/6/2017