

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

MISC. ECONOMIC CAUSE NO. 46 OF 2017

(Originating from Dar es Salaam Resident Magistrates' Court at
Kisutu in Economic Case No. 70 of 2017)

- 1. EMILIAN JOHANES MLOWE 1ST APPLICANT**
- 2. BASHIRU ATHUMAN NGELA 2ND APPLICANT**
- 3. BARNABAS CONSTATINE MASSALY 3RD APPLICANT**
- 4. SHAKILA BASHIRI NGELA 4TH APPLICANT**
- 5. MKAMA LAWRENCE MAIRA 5TH APPLICANT**
- 6. YARED JONAS 6TH APPLICANT**

VERSUS

THE REPUBLIC RESPONDENT

Date of Last Order: - 30/11/2017

Date of Ruling: - 07/12/2017

RULING

MATOGOLO, J.

This ruling is in respect of a Certificate filed by the Director of Public Prosecutions (DPP) preferred under section 36(2) of the Economic and Organized Crimes Control Act, [CAP. 200 R.E, 2002] barring grant of bail to the applicants following an application for bail filed by the applicants. The application is by way of chamber summons made under sections 29(4) (d) and 36(1) of the Economic and Organized Crimes Control Act dated 17/11/2017. The applicants pray to be released on bail pending determination of Economic case No 70/2017 preferred against them together and or jointly now pending in the Resident Magistrates' Court of

Dar es Salaam at Kisutu. The said chamber summons is supported by an affidavit deposed by one Mr. Reuben Simwanza, learned advocate.

On the other hand, on 29/11/2017 the Respondent/Republic filed a Counter Affidavit sworn by Mr. Tulumanywa Majigo, State Attorney. On the same date, the Director of Public Prosecutions (DPP) lodged a Certificate in terms of section 36(2) of the Economic and Organized Crimes Control Act dated 27/11/2017 objecting grant of bail on ground that, safety and interest of the Republic will be prejudiced.

At the hearing regarding the DPP's Certificate, the Republic was represented by Mr. Wankyo Simon assisted by Mr. Tulumanywa Majigo, learned State Attorneys while the applicants engaged Mr. Edward P. Chuwa assisted by Mr. Gideon Opanda, learned advocates.

Addressing merits of the DPP's Certificate, Mr. Wankyo learned State Attorney submitted that; the DPP has filed a Certificate under section 36(2) of the Economic and Organized Crimes Act for the applicants not to be granted bail in respect of Economic Case No. 70 of 2017 pending in Dar es Salaam Resident Magistrates' Court at Kisutu on ground that grant of the same will prejudice safety and public interest. He cited a decision of this Court in the case of **Deogratius Antony Kisinda & 2 Others vs. the Republic**, Misc. Economic Cause No. 24 of 2017 in which after lodging of DPP's Certificate, the applicants were not granted bail. The learned State Attorney further referred the case of **Manase Julius Philemon vs. Republic**, Misc. Criminal Application No. 173 of 2015 to that effect.

Besides; Mr. Wankyo cited the case of **Gidion Wasonga & 3 Others vs. the Attorney General & 2 Others**, Misc. Civil Cause No. 14 of 2016 whereas the High Court sitting as a Constitutional Court declared section 36(2) of the Economic and Organized Crimes Act to be Constitutional.

The learned State Attorney argued that the DPP's Certificate has fulfilled the validity test as held by the Court of Appeal in **the Director of Public Prosecutions vs. Li Ling Ling**, Criminal Appeal No. 508 of 2015, (Dar es Salaam Registry), (Unreported) setting three conditions to the effect that: the DPP must certify in writing, the Certificate must be to the effect that the safety or interest of the Republic is likely be prejudiced if the accused is granted bail and that the Certificate must be in relation to the case either pending trial or pending appeal, the same which have been met in the Certificate under scrutiny. Mr. Wankyo, learned State Attorney also cited the case of **Jumuiya ya Wafanyakazi Tanzania vs. Kiwanda cha Uchapishaji Tanzania**, [1988] T.L.R 146 where the Court of Appeal held that, a decision of the Court of Appeal is binding to all Courts and Tribunals subordinate to it regardless of its correctness.

Furthermore, Mr. Wankyo submitted that; the DPP has exercised his powers vested to him in terms of Article 59B of the Constitution of the United Republic of Tanzania, [CAP. 2 R.E, 2002] in objecting grant of bail to the applicants. From the foregoing, the learned State Attorney urged this Court to declare the DPP's Certificate valid and dismiss the bail application.

In reply, Mr. Edward Peter Chuwa, learned advocate submitted that; issuance of DPP's Certificate in terms of section 36(2) of the Economic and Organized Crimes Act is tenable when the accused or convict is awaiting trial or appeal respectively unlike in the present Certificate against the

applicants because their trial has not commenced, hence arguing the DPP's Certificate to have been prematurely preferred. Mr. Chuwa learned advocate cited to this Court the celebrated case of the **Director of Public Prosecutions vs. Ally Nuru Dirie and Another** [1988] T.L.R 252 where the Court of Appeal underscored that a trial commences when the accused appears before a Court or Tribunal competent to convict or acquit him.

It was Mr. Chuwa's argument that, the DPP filed the Certificate under scrutiny before trial has commenced, thus premature considering that when the accused persons were arraigned before Dar es Salaam Resident Magistrates' Court at Kisutu, they were not allowed to plead meaning that, the trial is yet to commence. The applicants' counsel argued for the cited case of **Director of Public Prosecutions vs. Li Ling Ling** to be distinguished because the Court did not overrule its earlier interpretation in **Director of Public Prosecutions vs. Ally Nuru Dirie and Another** and that the same did not accord a definition of the phrase "pending trial".

Thus; Mr. Chuwa urged for this Court to accord a strict interpretation to the referred section in accordance with the canons of interpretation regarding penal statutes and by looking at the intention of the legislature.

Additionally; Mr. Gideon Opanda, learned advocate submitted that; the DPP's Certificate is incurably defective for non-citation of an enabling provision, that is, section 36(3) of the Economic and Organized Crimes Control Act. He referred the case of **Chama cha Walimu Tanzania vs. the Attorney General**, [2008] 2 E.A.L.R 57 where the Court of Appeal held that wrong or non-citation of the proper provisions renders the proceedings incompetent. In the alternative, Mr. Opanda argued that the applicants are mere suspects thus innocent and that the DPP deliberately

filed the Certificate to deny bail to the applicants without disclosing the nature of safety and interest to be prejudiced now by granting bail considering that the applicants have been reporting to Police since 2015.

Mr. Oponda urged this Court to exercise its guaranteed freedom in exercising its powers vested under articles 107A & 107B of the Constitution of the United Republic of Tanzania. Furthermore; he argued that article 59B of the Constitution does not empower the DPP to deny bail to applicants on pretext that safety and interest of the Republic will be prejudiced.

In rejoinder, Mr. Majigo learned State Attorney submitted that; the DPP's Certificate was not filed prematurely because in the case of **Director of Public Prosecutions vs. Li Ling Ling**, the Court of Appeal underscored that, a Certificate can be filed at any time from the date of the accused's arrest and after he has been committed for trial. Mr. Majigo argued that, this Court is not bound by the decision in **Director of Public Prosecutions vs. Ally Nuru Dirie and another** regarding the accorded interpretation and extent of coverage to the phrase "pending trial".

Regarding citation, Mr. Majigo submitted that the referred section 36(2) of the Economic and Organized Crimes Act is the proper enabling provision with regard to the DPP's Certificate and that subsection (3) only prescribes life span within which the Certificate exists. Mr. Wankyo added, the DPP could not have cited sections 36(2) & (3) of the Economic and Organized Crimes Act because subsection (2) caters for objection to bail while subsection (3) caters for withdrawal of the said Certificate. In the circumstances, the two subsections could not have been cited altogether.

As to the DPP's Certificate to disclose the nature of safety and interest it intends to protect, Mr. Majigo argued that that is not a legal requirement, Mr. Wankyo added by making reference to the case of **Director of Public Prosecutions vs. Ally Nuru Dirie and Another** where the Court of Appeal held that the DPP is not obligated to disclose such safety and or interest.

After considering the Court record on one hand and the submissions by the respective learned friends, the following are the deliberations of this Court on the filed Certificate by Director of Public Prosecutions.

Starting with the point of law raised by Mr. Opanda, advocate that the DPP's Certificate suffers non-citation of an enabling provision, that is, non-citation of section 36(3) of Economic and Organized Crimes Control Act which according to Mr. Opanda, the same also ought to have been cited, the provisions of the said section 36(2) and (3) read as follows:-

"(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.

(3) A certificate issued by the Director of Public Prosecutions under subsection (2) shall take effect from the date it is fixed in Court or notified to the officer in charge of a police station and shall remain in effect until the proceedings concerned are concluded or the Director of Public Prosecutions withdraws it".

From the above wordings of the section; as correctly submitted by Mr. Majigo learned State Attorney, it goes without much ado that the proper subsection to be cited for the purposes of the DPP's Certificate is the

referred section 36(2) and not both section 36(2) & (3) as submitted by Mr. Opanda, for the said sub-section (3) caters for life span of the DPP's Certificate. In the circumstances, the case of **Chama cha Walimu Tanzania vs. the Attorney General** stands a good law but misconceived and or referred in a wrong context by Mr. Opanda, advocate for the applicants.

Going to the issue of prematurity in lodging the DPP's Certificate barring grant of bail to the applicants, as correctly submitted by the learned friends; the issue as to what amounts to "pending trial" was discussed by the Court of Appeal in the cited case of **Director of Public Prosecutions vs. Ally Nuru Dirie and another** to encapsulate the time from when an accused has been arraigned before a competent Court or Tribunal vested with jurisdiction to convict and or convict and on appeal.

But both Mr. Wankyo and Mr. Majigo learned State Attorneys, have correctly pointed out that the said scope was widened in the cited case of **Director of Public Prosecutions vs. Li Ling Ling** to the extent of covering time from arrest of the accused, committal proceedings, trial and appeal. The Court of Appeal in **Li Ling Ling case** expressly had the following at pages 14 & 15 of its ruling:-

"In our considered view, the words "pending trial" under subsection (2) of section 36, if read in the context of sub-section (7) of the same section, cannot be taken to have been meant to defeat the effect of the latter provision. The latter sub-section gives power to the DPP to file a certificate in any court which has jurisdiction to entertain and determine an application for bail".

The above provision, that is section 36(2) is the proper provision that gives powers to the DPP to file a certificate in any Court which has jurisdiction to entertain and determine an application for bail” also includes powers of the DPP to issue Certificate with regard to matters not ready for trial, that is, matter awaiting committal but in which the applicant has preferred an application for bail as in this matter.

Mr. Chuwa learned counsel has argued that; the Court of Appeal in **Li Ling Ling case** did not overrule or rather declare its earlier findings in **Ally Nuru Dirie and another case** to have been decided per incuriam, hence calling this Court to confine itself to such interpretation for it still binding to this Court. He further argued that in the latter case the Court did not define the word “pending trial”. With due respect, this Court is of the considered view that the said interpretation in **Li Ling Ling case** did not conflict with the decision in **Ally Nuru Dirie case**, rather; what the Court did was just to widen or rather expand the context. In other words, the Court did not, and ought not to have declared **Dirie’s** case per incuriam for everything in **Dirie’s** case remained intact only to expand the interpretation context. The Court of Appeal in **Li Ling Ling** discussed at length on the words “pending trial” from page 11 to page 15, referring also subsection 7 of section 36, and held that the DPP is empowered to file a certificate in any Court which has jurisdiction to entertain and grant bail in an economic case.

It is well established canons and principles of interpretation that the latter decision is to be followed, since the interpretation by the Court of Appeal regarding meaning and context of “pending trial” in the cited case of **Director of Public Prosecutions vs. Li Ling Ling** was recently decided, this Court therefore subscribes to such findings and interpretation. The


reason is obvious, while deciding the latter case the Court of Appeal was not only aware of its previous decision but it made reference to it.

Regarding validity of the DPP's Certificate, as correctly submitted by the learned State Attorneys, the laid down conditions/test with respect to DPP's Certificate as set out in **Li Ling Ling case** have been properly established in the lodged DPP's Certificate. This Court also agrees with the learned State Attorney that the DPP is not legally required to disclose the nature of safety and/ or interest that he intends to protect or that which will be prejudiced. That stance was put clear in **Ally Nuru Dirie case**.

Hence; in the circumstances, this Court finds the Certificate by the DPP to be valid, consequently, it cannot proceed with hearing of the bail application. Consequently, the bail application is hereby dismissed.

Order accordingly.




F.N. MATOGOLO
JUDGE
07/12/2017