

IN THE HIGH COURT OF TANZANIA
THE CORRUPTION AND ECONOMIC CRIMES DIVISION
MTWARA SUB-REGISTRY

AT MTWARA

MISC. ECONOMIC CRIMES APPL. CASE NO. 01 OF 2017

*(Arising out of Economic Crimes Case No.1/2017 of the District court
of Masasi at Masasi)*

RAMADHANI YASSIN NAMAKWETO AND ANOTHER

Versus

THE REPUBLIC

R U L I N G

25/4 & 27/4/2017

MATOGOLO, J.

The two applicants namely Ramadhani Yassin Namakweto and Yusuph Athuman Namkukula 1st and 2nd applicant respectively are facing an Economic case No.1 of 2017 in the district court of Masasi. In that court, the two are charged with two counts: conspiracy to commit an offence contrary to section 384 of the penal code Cap.16 R.E 2002 as the first count, and occasioning loss to a specified authority contrary to paragraph 10(1) of the First schedule to, and sections 57(1) and (60) (1) of the Economic and organized crime control Act, Cap 200 RE 2002 as the second count. The allegations against them are that on divers dates between 28th October, 2016 and 6th January, 2017 within Masasi District Mtwara region the applicants conspired and occasioned loss of Tshs. five billion, two hundred million, six

hundred sixty Five Thousand. Six hundred thirty four to the Masasi and Mtwara cooperative union.

The applicants have filed an application, by chamber summons through their advocate Mr. Adolf Wenceslaus Mahai which is supported by the affidavit deponed by Mr. Mahai. The application was made under section 29(4)(d) of the Economic and organized crime control Act Cap.200 R.E 2002 as amended by Act No.3 of 2016 and section 148(1) & (3) of the Criminal Procedure Act, Cap.20 RE 2002. The applicants are seeking for the following orders:

- (i) That the Applicants be granted bail on the conditions the honourable court will deem fit.
- (ii) Incidental orders as may be necessary to be made.

After the respondent/Republic was served with the chamber summons and affidavit of the applicants; he filed counter affidavit with a notice of preliminary objection on point of law to the effect that the application is incompetent because it is supported by a defective affidavit. The respondent also filed a certificate, which was filed by the DPP under section 36(2) of the Economic and organized control Act.

As usual, as there is notice of preliminary objection on point of law as well as the certificate filed by the DPP objecting for the applicants grant of bail, the preliminary objection is to be resolved first before we go to the substantive application. Likewise we have to consider the validity or otherwise of the certificate filed by the DPP.

In that line we decided to address the two issues first.

Submitting in support of the preliminary objection and the validity of the certificate, Mr. Ladislaus Komanya Senior State Attorney pointed out that

the affidavit which supports the application is incurably defective because paragraphs 2,3,4,5 and 6 of the affidavit contain legal arguments conclusions and opinion which he said are not allowed to be included in the affidavit because they violate the principles on how affidavits should be. He said that principles were enunciated in the famous case of **Uganda Vs. Commissioner of Prisons, Exparte Matovu (1966) EA 520**

He said paragraph 2 contains conclusion that the applicants are citizens of Tanzania who are not criminals, this statement may attracts arguments thus violates the legal principles. In paragraph 3, Mr. Komanya said the deponent has raised legal arguments by including the words that all that exist against the applicant is suspicion, this is the legal argument which require proof and also they concluded by saying there is no genuine allegation against them.

With regard to paragraphs 4 and 5 he said they contain legal arguments and conclusion. He mentioned the words that the applicants are entitled to bail but the District court of Masasi has no jurisdiction to grant them bail. For paragraph 5 he said there is issue of conclusion that the offences which the applicants are facing, are only triable by this court and is the same court can grant them bail. Mr. Komanya stated further that paragraph 6 contains argument and conclusion which the learned Senior State Attorney said violated the principles of affidavit and thus rendered the affidavit incurably defective and thus the application before this court is incompetent. He therefore asked this court to strike out the application.

With regard to the certificate filed by the DPP, although Mr. Komanya learned Senior State Attorney appeared a bit reluctant to address it arguing that he would go to the substantive application, finally he addressed the court briefly on the same.

He said the certificate was filed under section 36(2) of the Economic and organized crime control Act, Cap.200 RE.2002.

In that certificate the DPP has informed the court that it should not grant bail to the accused on the ground that the safety and interest of the Republic will be prejudiced.

He said it is a legal requirement under S.36(3) of the law that once the certificate is filed, the accused should remain in custody. That the law requires that after the certificate is filed, it become in force from the date it was filed until when the case will be finalized or until the DPP decides to withdraw it. He concluded by saying as there is a certificate filed by the DPP, this court cannot consider the applicants bail application unless the DPP decide to withdraw it.

On his part, Mr. Magai advocate responding to what was submitted by Mr. Komanya in support of the preliminary objection as well as the status of the certificate filed by the DPP, he decided to begin with the certificate. He said the certificate filed under S.36(2) of the Act would be proper had the applicants were being charged in the competent court to try the case. To him the applicants are yet to be charged before this court but are facing allegations in the district court of Masasi, the court which has no jurisdiction to try the case nor to grant bail. Jurisdiction to try that case is vested to this court.

That section 29 (4) (d) of the Economic and organized crime control Act empowers this court to determine application for bail even before the accused are charged before this court. He said trial commences after the accused is brought before that court which has competency to convict or acquit the accused. To support his argument, Mr. Mahai cited the case of

DPP Vs. Ally Nur Dirie & Another (1988) TLR 252 CA. He stated further that the charge against the applicants is not before this court. With regard to the legal force of the certificate filed by the DPP, Mr. Mahai advocate is of the view that it is not correct to take that once the certificate is filed in court, then the courts hands are tied up. The court has to consider each case in its own circumstances.

That the case at hand is peculiar not identical to other cases where the applicant can be denied bail. He said the certificate is not proper, the applicants had executed a bond for warehouse operator. They deposited sum of money as commitment bond which is a guarantee in case of any loss or anything which may happen. To emphasize his point he cited the case of **MT 80186 PTE Henry Mwisongo v. R.**, criminal application No.19/2008 High court Dar es Salaam (unreported) in which Lugazia, J while discussing on the DPP certificate, he said that expression of feeling or fear cannot oust jurisdiction of the court. Mr. Magai learned counsel went on submitting that what was submitted by the learned Senior State Attorney and on the basis of what was held in **Henry Mwisongo case** those are mere feelings which cannot fetter the court's jurisdiction. He therefore asked this court to invoke its power and grant bail to the applicants after it has considered the circumstances of the case that the applicants have furnished commitment bond. Mr. Mahai did not end there, he further referred this court to Article 13(6) of the constitution of the United Republic of Tanzania which he said guarantee right to bail. That the applicant are just suspected. That the DPP certificate go against that article of the constitution, to emphasize his point Mr. Mahai cited the case of **Festo s/o Stephen Ghumpi v.R.** Misc. Economic crimes application No.13 of 2007 High Court Dar es Salaam (unreported), in

which this court, Makaramba, J while citing the case of **DPP v. Daud Peter** held that *"bail is a constitutional right, a person facing a criminal charge is presumed innocent until proved guilty by a competent court. This time tested legal maxim find expression not only in the criminal procedure Act but also in the constitution."*

Mr. Mahai also quoted from a book of Ruhangisa, J titled **Human Rights in Tanzania, the Role of the Judiciary**, in which it was stated *"in considering bail application the court hears both sides and finally grant or reject the application after weighing the submissions. It means bail can be refused by the court after the accused person had been given chance to reply to the submission. All in all such prosecution objection should be strong enough to warrant the court earlier pronouncement restricting the liberty of the accused"*.

The learned counsel said the section under which the certificate was filed lack such qualities because it takes away powers of the court to hear the application Mr. Mahai also asked this court while deciding in this case to consider that S.148 of the CPA which was giving powers to the DPP to deny bail to accused has already being declared invalid as was against Article 13(6) (a) of the constitution. And that as Section 148(4) of the CPA is in pari materia to section 36(2) of the Economic and organized crimes control Act Cap.200 R.E.2002 used by the DPP to file certificate in this case, by considering the similarities of the two provisions and being guided by the decision of this court, Dr. Twaib, J in the case of **Kelvin Rajabu Ungele & 3 others v.R** consolidated Misc. Economic crimes Applications No. 1&2 of 2017 High court Mtwara, DPP has no reason to issue certificate under S.36(2) of Cap 200 which is also against the constitution as has the similar effect to

S.148(4) CPA which was declared unconstitutional, thus this court should treat S.36(2) as unconstitutional.

Mr. Mahai prayed to this court to disregard the certificate by the DPP as it is against the constitution and proceed to hear the applicant's application and grant them bail.

With regard to the notice of preliminary objection on point of law, that the supporting affidavit is defective, Mr. Mahai advocate said the verification clause in the affidavit is according to the law as the learned Senior State Attorney has stated. Paragraphs 1-6 of the affidavit which the learned Senior State Attorney has said has problem these relate to unascertained facts which cannot form basis for preliminary objection. The preliminary objection should be based on a point of law and not on facts which need to be ascertained. He supported his argument by citing the case of **Mukisa Biscuit Manufacturing Co.Ltd Vs. West End Distributors Ltd (1969) TEA 696**.

He stated further that the whole issue of affidavit have been discussed in the case of **Simon Kimaro Vs. Hidaya Didas**, Civil Application No.20 of 2012 CAT MZA in which the Court of Appeal cited section 8 of the Notary Public and commissioners for oath Act cap.12 R.E.2002. The court did not go to other matters of date and place, where the affidavit was taken, which are indicated in the present affidavit.

Mr. Mahai said what the learned State Attorney has submitted need to be discussed in the main application not in the Preliminary Objection.

He said the Preliminary Objection is not on points of law and prayed the same be dismissed. Mr. Komanya Senior State Attorney made a long rejoinder. He said their argument is not on the defect in verification clause, and Jurat of attestation, but failure of the deponent to comply with the

principles regarding affidavits by entertaining legal issues arguments and conclusions which they see the only remedy is to strike out the whole application for being incompetent. He said this is a point of law worth to be raised as preliminary objection and the case of **Mukisa Biscuit** (supra) emphasizes as the point of law, likewise they have raised in their preliminary objection. Mr. Komanya therefore emphasized that the affidavit contravened the laid down principles regarding affidavits and prayed the same to be struck out.

On the issue of certificate, Mr. Komanya expressed his feeling on what Mr. Mahai meant with regard to the jurisdiction of this court to hear the matter as he cited section 29(4)(d) of the Act which confers jurisdiction to this court to entertain the application. Mr. Komanya said this court is special for corruption and economic cases and was established under Act No.3/2016 Section 8 give jurisdiction to this court to entertain this application. But also the court under section 36(7) has jurisdiction to hear and determine applications for bail that is why the DPP has filed certificate objecting bail knowing that he has such mandate.

Mr. Komanya stated further that the issue of certificate by the DPP, and whether this court has jurisdiction to question it was discussed in the case of **DPP Vs. Li Ling Ling**, criminal Appeal No.508/2015 CAT DSM, the decision which was given in March 2016.

It is their argument that the certificate under consideration was filed in a proper court competent to hear and determine the case under S.36(7) of the Act. On the issue that S.148(4) CPA and section 36(2) of Cap.200 that the two provisions are in parimateria and should be read together and not in isolation and that each case should be determined in its own circumstances

Mr. Komanya agree with Mr. Mahai and that is what was decided in **Ally Nur Dirie** case (supra)

But he said the circumstances which led to the grant of bail in **Ally Nur Dirie** case are totally different to the circumstances of the case at hand. In that case the consideration was section 148(4) CPA, but the provision under consideration in this case is 36(2) of Cap.200. He said the difference in circumstances was discussed in the case of **Manase Julius Pholemon v.R**, Criminal Application No.173/2015 High Court Dar es Salaam and in the case of **MT 80186 PTE Henry Mwisongo** (supra) at the end it was held that S.36(2) will remain valid unless amended or repealed. On the argument that S.36(2) is used in violation of Article 59 and Article 13(6) (a) of the constitution, Mr. Komanya said the answer is provided in the decision in the case of **Manase Julius Philemon v.R**. Mr. Komanya learned Senior State Attorney further stated that the DPP while performing his functions he do so with good faith. That under the National prosecutions Act, Section 8, there are laid down principles which the DPP has to observe while performing his functions and that is what he did in this case. There is no any abuse or violation made by the DPP. Mr. Komanya did not rejoin to the phrase from the book authored by Ruhangisa, J. as the citation was incomplete. As to whether section 36(2) of the Act removes powers to the court to hear and determine certain matters, Mr. Komanya said they understand that this court has immense powers. But in exercising such powers this court, under Article 106 of the constitution respects other laws of the land. The powers of the DPP under S36(2) are not removing powers of the court to grant bail. There are other laws such as those totally denying bail to accused in certain offences, this cannot be said also infringing court's jurisdiction. He said it is

not true that section 36(2) removes court's jurisdiction to hear and grant bail. With regard to the referred case of **Kelvin & others** (supra) on the importance of reading the provisions not in isolation to other provision and the case of **Prakash Kumar Prakash Bhutto V. State of Gujarat (2005) INSC 35**; the learned Senior State Attorney said in the cited case, there is nowhere the issue of certificate of the DPP was mentioned so he fail to link the decision to the matter at hand.

The learned State Attorney concluded by saying the certificate of the DPP is there temporarily and for the purpose. The law is clear when the same may be vacated as provided for under section 36(3) of the Act. And that once the DPP certificate is filed, the same should be left to stand as the same is valid.

Having heard the lengthy submissions by the parties, I propose to start with the issue of the affidavit; Mr. Komanya learned Senior State Attorney argued that the affidavit particularly paragraphs 2,3,4,5 and 6 contain legal arguments and conclusions. Starting with paragraph 2, the complained statement is that part of the statement which read "*the applicants are Tanzanian national, innocent who on 11th January 2017 were arraigned with two others.---*" This is what is alleged to be legal argument. On his part Mr. Mahai learned Advocate has stated that the statement is the true fact, existed at the time of their arrest. I do not see legal argument here. These are facts obtaining at the time of the arrest of the applicants and based on presumption of innocence until when it is proved otherwise.

In the third paragraph, the statement complained against as conclusion read as follows: "*That all that exist against them are suspicions and the investigations are yet to be completed.*" What does this statement mean,

the applicant were arrested **suspected** to have committed the offences levelled against them in the charge sheets. It means therefore that the offences against them are not yet established, I do not see any wrong for them to state that those are mere suspicions. This is a true fact, what they have stated is the true position.

They will remain as suspects until when proved otherwise. That therefore cannot be said legal argument. In the paragraphs 4 and 5 the learned Senior State Attorney alleged that what is stated is argument and conclusion, for purpose of clarity and easy of reference, the two paragraphs are reproduced herein below:

"4. That the Applicants are entitled to bail, but the District court of Masasi at Masasi has no jurisdiction to entertain this case because the alleged occasioned loss is over Tshs. 5,200,665, 634/=

5. That following what is stated under paragraph 4 herein above, the offence with which the Applicants are charged are triable in this court and that it is this court only which can grant bail to the applicants because of the amount involved'

Mr. Komanya learned Senior State Attorney has viewed these statements as arguments and conclusion. But in my view these are statements explaining the true position.

The affidavit was taken by Mr. Mahai an advocate who knows the jurisdiction of both the District court as well as of this court. And it is a legal condition that a party/deponent has to depone the facts which he is able on his own knowledge to prove. **(0.X1X.(3) of the CPC)**. I am sure Mr. Mahai is aware of the legal position as far as the jurisdiction relating to the case

against the applicants is concerned. And what he stated in paragraphs 4 and 5 is the true position. Those are facts and not legal argument nor conclusion as Mr. Komanya wants this court to believe. The Court of Appeal of Tanzania in the case of **Judicate Rumishael Shoo & 64 others Vs. The Guardian Limited**; Civil Application No.43 of 2016 saw the need of defining those words in order to be clear as to what amounts to arguments and conclusion. The two words have been used as basis of several preliminary objections. After defining those words, the Court of Appeal came to the conclusion that the words complained of were not arguments or conclusion but they explain the situation obtaining in the application. It equally apply to the case at hand. What the learned Senior State Attorney argue that the words he pointed out are arguments and conclusion they are not as such but are facts which explain the facts and position obtaining in the case. The same therefore cannot be said to have violated principles relating to affidavits.

This apply to paragraph 6 in which it is stated that *"the applicants are Tanzanian by nation and innocent men having a place of abode at Masasi district Mtwara Region. Have good record in their life, thus should the court grant them bail they undertake to attend all proceedings at which their case will be litigated and shall abide to all conditions the court may prescribe.* What is stated is their promise, what they intend to do in case the court grant them bail. In no way this can be said to be argument or conclusion. Even if the issue of jurisdiction may fall in the legal argument category but that alone cannot make the whole affidavit defective. While I can safely hold that there are no arguments and conclusion in the impugned paragraphs of the affidavit of the applicant, I do not subscribe to the position explained by Mr. Mahai

learned advocate that once the verification clause and jurat of attestation are found to be in order then the affidavit become competent. The verification clause and jurat of attestation may be in order but still the paragraphs of the affidavit may offend the principles relating to affidavits and may lead for them to be expunged. If it happens so then it will depend on the remaining paragraphs if can save the purpose then the affidavit will be acted upon (see **Phantom modern Transport (1985) Ltd Vs. D.T Dobie (Tanzania) Ltd**, Civil Reference No.15/2001 and 3 of 2005. Having so observed I find no good ground for the preliminary objection raised by the Senior State Attorney, the same is hereby rejected.

Having resolved the preliminary objection I now turn to the second issue of certificate file by the DPP.

I must point out from the outset that I am very thankful to the learned counsels for their industrious arguments they put forward and the law and decided cases they have cited which has made my task a bit easier.

The certificate by the DPP has been a tasking issue in many cases as it tends to curtail freedom of individuals and cause them to languish behind the bar for prolonged periods. In relation to this, Mr. Mahai learned counsel has raised the issue of jurisdiction. That the applicants are not formerly charged before this court. But they are just held before the district court of Masasi on the allegations disclosed in the charge sheet. But the district court of Masasi has no jurisdiction in respect of that charge. Jurisdiction in respect of that charge is vested to this court. If I understood properly Mr. Mahai, his argument is that as there is no formal charge before this court, then it is not proper for the DPP to file certificate to this court objecting bail. But I think Mr. Komanya learned Senior State Attorney has put the thing in a

proper way. That this court is special for corruption and economic cases and was established under Act No.3 of 2016, and section 8 confers jurisdiction to this court to entertain this application. Under S.36(7), this court has jurisdiction to hear and determine application for bail. It is on that basis the DPP filed the certificate to this court. But also section 29(4) (d) of the Economic and organized crimes control Act empowers this court to hear and determine bail applications even before the accused persons are charged in this court.

Mr. Mahai learned advocate cited the case of **DPP vs. Ally Nur Dirie and another** (supra) contending that the Court of Appeal in this case held that a trial commences when accused appears before a court or tribunal competent to convict or acquit after being informed of the charge and required to plea.

And that if, the accused appears before the district court which is incompetent to try the case, then the filing of the certificate by the DPP objecting grant of bail is premature;

It is the contention of the learned counsel that this court is bound by that decision and that it should disregard the certificate filed by the DPP.

I find it important to address myself as to where the powers of the DPP to issue certificate to object bail are derived from, the relevant provision, that is section 36(2) of the Economic and organized crime control Act, Cap.200 R.E.2002. reads as follows:-

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

There is no dispute that there are various cases in which this provision has been discussed including those cited by the parties, the contention is that this provision is unconstitutional as it takes away the presumption of innocence of the accused guaranteed under article 13(6)(b) of the United Republic constitution. However it should also be born in mind that there are other Articles of the constitution which provide for enactment of other laws which in effect may appear to be derogative or restricting individual's rights. But such laws are made purposely in order to protect the interest of the society. Such laws or provisions cannot be taken to contravene the constitution. Take for example Article 30(2) of the constitution which explain that the individual rights and freedom cannot render other enacted laws aimed at protecting the right of the entire society and keeping peace and order unconstitutional. Mr. Mahai has cited several cases in a bid to justify the argument that despite the powers conferred to the DPP under S.36(2) that alone does not remove the powers of the court to hear and determine bail applications filed before it . I have gone through all those cases. But the position of the law now as far as certificate by the DPP filed under S.36(2) is concerned is as provided in the decision of the Court of Appeal in the case of **Li Ling Ling** (supra). In that case the decision of the case of **Nur Dirie** was considered.

However the Court of Appeal decided that once the DPP has filed a certificate objecting grant of bail and the court is satisfied itself that the said certificate has met the validity test then the court cannot grant bail. The validity test was laid down in **Nuru Dirie** case which were also approved in **Li Ling Ling** case. These are that:

- i. The DPP must certify in writing
- 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

It follows therefore that what the court has to do is to satisfy itself that the above conditions have been fulfilled. If the conditions are met then the court cannot grant bail, it is until when the DPP decides to withdraw the certificate or when the case came to an end.

On the basis of the decision of the court of Appeal in the **Li ling Ling** case which is binding on me, the issue of unconstitutionality of section 36(2) cannot arise. I am aware of the decision of this court, which sitted as a constitutional court in the case of **Jeremiah Mtobesya Vs. AG**. Miscellaneous civil case No.29/2015 H/Court DSM and declared S.148(4) CPA as unconstitutional, But that decision was given prior to the decision of the Court of Appeal in **Li Ling Ling** case, which is more recent decision. I therefore find unnecessary to discuss the issue S.36(2) being in parimateria to S.148(4) CPA at this juncture. The least I can say is that at the time this court deciding in **Mtobesya case** in respect of s. 148(4), was aware of the existence of S. 36(2) and that the two provisions are couched in almost similar words, but did not touch s. 36(2). The same ^{apply} to the Court of Appeal in Li Ling Ling. It is my considered opinion under such circumstances therefore it is the Court of Appeal only which will put things in a proper perspective. Under such scenario this court cannot disregard the certificate

provided that it has passed the validity test. In the case at hand the certificate in question has passed such validity test. It follows therefore that this court cannot grant bail to the applicants at the moment for the reasons explained above, until when the certificate will be withdrawn.

It is so ordered.



F.N. Matogolo
F.N. Matogolo
Judge
27/4/2017

Date

: 27/4/2017

Coram

: Hon. F.N. Matogolo, J.

For the Republic – Mr. Ladislaus Komanya (SSA being assisted by Mr.

Peter Mseti SA

For the Accused- Mr Alex Msalenge Advocate

Court clerk: Zuena (RMA)

Mr. Ladislaus Komanya – Senior State Attorney

My Lord I appear for the Respondent Republic being assisted by Mr. Mseti State Attorney

Mr. Alex Msalenge Advocate

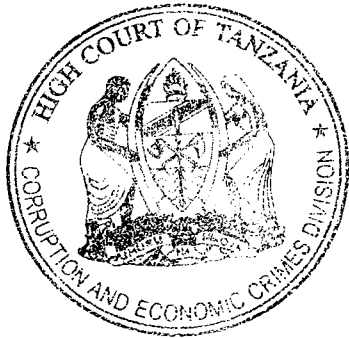
My Lord I appear for the applicant

Mr. Ladislaus Komanya Senior State Attorney

My Lord the case is for ruling, on our party we are ready. The advocate of the applicants is also ready.

Court:

Ruling delivered on 27th April 2017 in the presence of the applicants and in the presence of Mr. Ladislaus Komanya Senior State Attorney and Mr. Mseti State Attorney and in the presence of Mr. Alex Msalenge advocates for the applicants.



F.N. Matogolo
F.N. Matogolo
Judge
27/4/2017