

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

MISC. ECONOMIC CAUSE NO. 16 OF 2018

(Originating from Economic Crimes Case No. 76 of 2017 - Resident Magistrate's Court of
Dar es Salaam at Kisutu)

**1. MAHAD AHAMAD SALAT
2. FAUDHIA MOHAMED ABDI
3. ALLY YUSUF ALLY** } **APPLICANTS**

VERSUS

THE REPUBLIC RESPONDENT

Date of Last order: - 04/04/2018

Date of Ruling: - 05/04/2018

R U L I N G

W.B. KOROSSO, J.

Before the Court is an application filed under Certificate of Urgency, by the above named applicants. The application is filed via chambers summons supported by an affidavit jointly affirmed by the three applicants pursuant to Section 29(4)(d) and 36(1),(5) and (7) of the Economic and Organized Crimes Act, Cap 200 RE 2002 (hereinafter referred to as "the Act" or EOCCA). The applicants sought for the Court to grant them bail pending trial of the pending case at the Resident Magistrate Court of Dar es Salaam at Kisutu as presented above.

The applicants' case was as submitted via affidavital evidence and oral submissions by their counsel, Dr. M. Lamwai, learned Advocate. The applicants alluded to the fact that they were arraigned and face charges in Economic Crime Case No. 76 of 2017 pending at Kisutu RM's Court. They contended that the charges

they face contain offences which are bailable and that this Court is the one with jurisdiction to consider and determine the relief sought in their application. They prayed the Court be guided by the fact that in the eyes of the law, they being accused persons are innocent until proven guilty. Therefore they are entitled to bail at this stage where their case is pending hearing and determination of the charges laid down against them in the subordinate Court.

The applicants also averred that they have never been charged or imprisoned nor been granted bail by any Court before and failed to comply with conditions provided for bail or absconded. They also stated that they have reliable sureties and are willing to receive and comply to bail conditions which may be imposed by this Court. The applicants via paragraph 10 of their affidavit also averred that they reside and work for gain in Temeke and that the 3rd applicant (3rd accused) Ally Yusuf Ally is a student at the Harbor Institute College located at Tandika Temeke.

In response to the filed counter affidavit of the respondents which had questioned the availability of the 1st accused person to appear for hearing, if granted bail in view of the fact that he is not a national of Tanzania, the applicants counsel disputed this. The counsel for applicants whilst conceding that the 1st applicant is not Tanzanian, submitted that this fact should not be a consideration to deny him bail, since the 1st applicant is a business man who conducts business in Tanzania and that the prosecution are aware of his whereabouts. This assertion, the counsel stated is grounded on the fact that the contents of the charge sheet against the applicants reveal their addresses. That there is also the fact that the 1st applicant is married to the 2nd applicant.

On why these facts were not challenged or brought to the attention of the Court through affidavital evidence, the counsel stated that they were not able to respond to this with affidavital evidence due to the fact that they had received the counter affidavit very late and they did not want to delay the matter further knowing the

busy schedule of the Court and he thus sought the Court indulgence so that their oral submissions on this should be considered.

The applicants also submitted that in bail applications, the main consideration should be the availability of the accused persons on dates set for hearing, and that the Court regardless of the nationality of the applicant, has a duty to impose conditions which will ensure the availability of applicants and the nationality of the applicants should not be a factor for consideration for the Court when exercising its jurisdiction whether or not to grant bail to applicants. The applicants thus prayed for the Court to grant bail to all the applicants alluding to the fact that, from the counter affidavit, the respondents seem not to have any serious objection to grant of bail to 2nd and 3rd applicants but seem to have issue with grant of bail to the 1st applicant for reason already alluded to hereinabove.

The respondents filed a counter affidavit sworn by Elizabeth Mkunde Learned State Attorney and also presented oral submissions in Court. In effect conceding to the charges facing the applicants as contained in the Charge sheet at RM's Court Kisutu and that the relevant offences are economic offences and are bailable but serious carrying a severe punishment that includes custodial sentence. That the applicants have yet to be committed to the High Court for trial and the fact that the issue of reliability of sureties should be determined by the Court upon grant of bail. In paragraph 6 of the counter affidavit the respondents alluded to the fact that the 1st applicant is a foreigner, a national of Somali and that he has no permanent fixed abode in Tanzania. The respondents also cited various cases to cement their points of contention and they will be discussed later.

In rejoinder, the applicants counsel reiterated their earlier submissions and prayed that the Court find that the applicants will be readily available to attend hearing if granted bail and to discard all the contention and fears expressed by the respondents. They also prayed for the Court to find the cases cited by the

respondents to be distinguishable in view of the different circumstances obtaining in the said cases.

Having heard the applicants and the respondents we find the main issue for consideration is whether the applicants should be granted bail as prayed. We also find that having considered all the prayers and arguments the following facts are not disputed. First, the fact that this Court has jurisdiction to hear and determine this application. This is averred to in paragraph 5 of the applicants affidavit and the effect of paragraph 3 and 4 of the counter affidavit, that is, the fact that the offence charged are economic offences, over ten million shillings and the case they face is pending committal proceedings, which all in all vests jurisdiction upon this Court. Second, that the three applicants face charges as averred in paragraph 1 and 3 of the applicants affidavit and as contained in annexure and forming part of the affidavit-UPA1 and paragraph 3 of the Counter affidavit. Third, the fact that the offence charged are bailable, this is alluded in paragraph 4 of the applicants affidavit and the oral submissions presented by the respondents counsel. From the oral submissions we find that there was no real objection advanced to the granting of bail to the 2nd and 3rd applicant. The respondents prayed to the Court to consider the severity of the offence charged and the punishment for the said offences.

From the evidence and submissions before the Court the main point of contention seem to be whether or not the 1st applicant should be granted bail, due to the fact that he is not a national of Tanzania and allegations that he has not shown he has fixed abode in Tanzania. The applicants have contended that, this is not the case and that in any case, the prosecution are aware of his place of residence since the charge sheet alludes to the fact that the 1st applicant lives in Temeke. Unfortunately this contention is not supported by any other evidence from the applicants apart from the oral submissions. The Court reminds counsels that it is a well known fact that affidavital evidence cannot be responded to by oral evidence only. The allegations that the respondents failed to do this due to lack of time having received the counter

affidavit late is not supported by evidence on record. It is on record that on the 21st of March 2018 it was ordered by this Court that the respondents file counter affidavit by 28th March 2018 and the applicants file reply to Counter affidavit if any by 3rd of April 2018. During oral submissions the counsel for the applicants conceded that one of the applicants' counsels received the counter affidavit on the 29th of March 2018. Before the start of hearing of the application on the 4th of April, the applicants did not advance any prayer for extension of time to file reply to counter affidavit, so in effect it is clear that they found no need to respond to the counter affidavit on the issue raised with regard to the residence of the 1st applicant.

There is no argument that bail is a right of an accused person hence penal legislations provide modalities for that. Bail was amply defined in Criminal Appeal No. 168 of 2012, **DPP vs Bashiri Waziri and Mugesi Anthony**, Court of Appeal at that bail is: *"a mechanism designed to ensure that a person who is subject to the strictures of the law stays out of confinement while the process of inquiry into his/her liability in the criminal process is being investigated, or if he has been charged in a court of law, his/her personal freedom is guaranteed before the end of the trial through him/her furnishing security as part of, the undertaking to turn up whenever called up. The institution of bail, therefore, falls on the positive side of the principle of presumption of innocence which we all cherish. As we remarked earlier, this principle can only be derogated from on public policy, and only when the public policy is backed by clear provisions of the law"*.

Therefore from above it is clear that the underlying consideration in granting bail where there is no provision of law prohibiting grant of bail is an undertaking by the applicant to turn up whenever called up and furnishing adequate security for that purpose. In this application, we are informed by the respondents counsel that the 1st applicant Mahad Ahmad Salat is a national of Somali and therefore a foreigner. This fact has not been denied by the applicants. We are also informed by the

respondents that there is no evidence of his fixed abode. Again, unfortunately there is no evidence from the applicants to dispute the issue of whether or not the 1st applicant has fixed abode apart from oral submissions that he lives and conducts business in Temeke. But even the oral submissions did not specify the whereabouts in terms of the specific address. The argument by the applicants' counsel that the charge sheet alludes to this is not strictly the case, since looking at the charge sheet it just states the 1st applicant's occupation is business and that he lives in Temeke.

We are aware that the position is that foreigners should not be treated differently when considering bail. In the case of ***Edward Kambuga and anor vs. Republic (1990) TLR 84***, discussing this issue they stated "*while we agree that foreigners should not be treated differently in our courts merely because they are foreigners, we think the High Court was entitled to take into account past experience when deciding finally whether or not to grant bail*". This we find shows the importance of the Court to use its discretion to adjudge this and warn itself while not treating a foreigner differently but to consider past experience on availability of the applicant/accused to determine whether or not to grant bail. In the present case we find no evidence to show that the 1st applicants or the other two applicants had been arraigned or charged before with any other offence apart from the current ones they face or that they had previously failed to fulfil conditions for bail imposed by any Court or jumped bail before.

We have also considered the holding in the case of ***Hsu Chin Tai and In others vs Republic***, Criminal Application No. 2 of 2011, where the issue of applicants being foreigners and having or not having fixed abode was an issue for consideration. While it is true as submitted by the applicants counsel that the applicants were seaman living in a fishing ship, it is a fact also that while in the present case, there is no dispute that the 1st applicant is not a national of Tanzania we also have no evidence of him having a fixed abode. Even the assertion that he is married to the 2nd applicant was made orally and in any case, for the sake of argument there is also

no concrete evidence of the fixed abode for the 2nd applicant either although at least there was no dispute that she is a national of Tanzania.

The issue of severity of offence and punishment is also an important issue for consideration but we are also aware that the offence charged are bailable and the law as put mandatory conditions if the Court is so inclined to grant bail. Conditions which in effect are there to ensure availability of the accused persons for their hearing and the Court is also empowered to impose other conditions if it is inclined to do so.

All in all we are also aware that each case should be adjudged from its own specific circumstances. That being the case, and having considered and having properly warned ourselves of all the matters pertaining to this case and the consequences thereto we order as follows:

1. FAUDHIA MOHAMED ABDI (2nd applicant) and ALLY YUSUF ALLY (3rd applicant) are hereby admitted to bail subject to the following conditions hereunder:

- a. Subject to the principle of sharing, Faudhia Mohamed Abdi and Ally Yusuf Ally, each to deposit cash Tshs. 61, 689,600/- or immovable property of equivalent amount.
- b. Each of the applicants to provide two reliable sureties who are to execute a bond of Tshs 10,000,000/- each. One of the two sureties for each applicant must be employed in the service of the Government of United Republic of Tanzania or her Institutions.
- c. The applicants not to leave the jurisdiction of this Court without permission from the Resident Magistrate of the Court of Resident Magistrate of Dar es Salaam at Kisutu.

d. Each of the applicants to surrender all travel documents including passports to the Resident Magistrate, Resident Magistrate Court of Dar es Salaam at Kisutu

e. The applicants to Report to RCO Dar es Salaam upon a schedule provided by the RCO Dar es Salaam

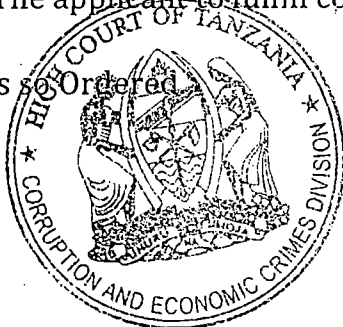
f. The Resident Magistrate, Resident Magistrate Court of Dar es Salaam at Kisutu to verify sureties and all relevant bond documents.

2. The 1st applicant, MAHAD AHMAD SALAT is to be admitted to bail upon the following conditions:

a. The applicant must provide evidence to the satisfaction of the Resident Magistrate, Resident Magistrate Court of Dar es Salaam at Kisutu related to his fixed abode, that is, the address of his residential and business premises.

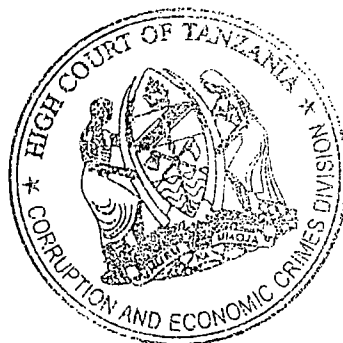
b. The applicant to fulfill conditions stated hereinabove in paragraph 1(a) to 1(f).

It is so Ordered



Winfrida B. Korosso
Judge
5th April 2018

Ruling delivered this day in Chambers in the present of Samuel Shadrack, learned Advocate for all the applicants and Ms. Elizabeth Mkunde and Ms. Sekimanga learned State Attorneys respectively for the Respondent Republic. In presence also of 1st and 2nd applicant.



Winfrida B. Korosso
Judge
5th April 2018