

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT DAR ES SALAAM

MISC. ECONOMIC CAUSE NO. 40 OF 2018

*(Originating from the Economic Case No. 23 of 2018 of the Resident
Magistrate's Court of Dar es Salaam at KISUTU)*

- 1. MASOUD SAID OMAR 1ST APPLICANT**
2. MOHAMED AMINU MWANGE 2ND APPLICANT
3. SEIPH AMINU MWANGE@NGOLOANJE 3RD APPLICANT
4. FIKIRI YUSUFU MUHOMBA @MAGOSO 4TH APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

R U L I N G

Date of Last Order: - 25/09/2018

Date of Ruling: - 11/10/2018

L.L. MASHAKA, J

Before the court is an application for bail lodged by the applicants one Masoud Said Omar (referred as the 1st applicant), Mohamed Aminu Mwange (the 2nd applicant), Seph Aminu Mwange @ Ngoloanje (the 3rd applicant) and Fikiri Yusufu Muhomba @ Magoso (the 4th applicant) by way of chamber summons by virtue of section 29(4) (d) and 36(1) of the EOCCA, CAP 200 R.E 2002 and was supported by the affirmed joint affidavit of both applicants respectively.

The applicants were jointly arraigned before the Resident Magistrate's Court of Dar es salaam at Kisumu charged to wit, Leading organized crime contrary to paragraph 4(1) (d) of the 1st schedule to, and section 57(1) and 60(2) of the EOCCA, unlawful possession of Government trophy c/s 86(1)(2)(c)(ii) and (3) of the Wildlife Conservation Act No.5 of 2009 read together with paragraph 14 of the 1st Schedule to section 57(1) and 60(2) of the EOCCA, unlawful possession of ammunition for the 4th applicant and unlawful possession of firearms for the 2nd and 4th applicants respectively.

The application was opposed by the respondent Republic, apart from filing a counter affidavit as they were ordered to do so, they filed a certificate of the DPP under section 36(2) of the EOCCA, objecting grant of bail to the applicants. There being the certificate issued by the DPP objecting grant of bail to the applicants on the ground that the safety and interest of the Republic will be prejudiced, the court found that before venturing on the merits of the main application, it is important to consider the objection raised by the respondent Republic.

The applicants were jointly represented by Mr. Joseph Manzi, Advocate while the respondent was represented by Ms. Narindwa Sekimanga, State Attorney.

Ms. Sekimanga for the respondent submitted that, they filed a certificate objecting bail to the applicants under section 36(2) of the EOCCA, Cap 200 R.E 2002 on the ground that the safety and interest of the Republic will be prejudiced. That it is settled principle that, once the DPP's certificate has met the validity test, then the court shall not grant bail as held in the case of **DPP vs Ally Nur Dirie and Another (1988) TLR 254** and also referred

in the case of **DPP vs Li Ling Ling, Criminal Appeal No. 508 of 2015, CAT at DSM (unreported)**. That the conditions for the validity test were that, the DPP must certify in writing, secondly the DPP's certificate must be to the effect that the safety and interest of the Republic are likely to be prejudiced, lastly, the DPP's certificate must relate to a criminal case either pending trial or appeal. It was her contention that the filed certificate had met all the conditions as stipulated by the cited cases.

In addition to that, she cited another case of the Court of Appeal of Tanzania, **Emmanuel Simforian Massawe vs Republic, Criminal Appeal No. 252 of 2016, at DSM (unreported)**, where the Court underscored the conditions for validity test stipulated in **Nur Dirie's** case (Supra) and the went further by distinguishing it with the case of **Jeremiah Mtobesya vs AG, Civil Cause No. 29 of 2015, CAT at DSM (unreported)** that the said case was a constitutional petition which challenged the constitutionality of section 148(4) of the CPA and did not challenge section 36(2) of the EOCCA. Therefore, the applicants have to follow a proper channel if they want to challenge section 36(2) of the EOCCA. That in the same case of **Emmanuel Symphorian Massawe (Supra)** stated that it is not a mandatory requirement for the DPP to give reasons once a certificate is filed of denying bail as long as it has stated that the safety and interest of the Republic will be prejudiced. And this case added another condition that the certificate can be invalidated once it is proved that the DPP acted in bad faith or in abuse of court process.

It was their humble prayer that this Court finds the lodged certificate valid and the applicants be denied bail.

In reply, Learned Counsel Manzi for the applicants challenged the certificate filed on the following grounds that, the first issue addressed is that though Learned State Attorney claims that the lodged certificate is valid however it has no seal of the DPP hence it is not a valid certificate.

It was his contention that, the applicants were charged with several offences involving unlawful possession of Government trophies and firearms, that the applicants were caught with the government trophies hence it is unjustifiable how can the applicants prejudice the safety of the Republic while the trophies are no longer in their possession. Another issue raised is that the certificate of the DPP contravenes Article 13(6)(a) of the Constitution of the URT 1977.

Furthermore, Learned Counsel submitted that section 36(2) of EOCCA is *pari materia* with section 148(4) of the CPA, Cap 20 R.E 2002, which was declared unconstitutional in the case of **Jeremia Mtobesya vs AG (supra)**. Hence he prayed for the applicants to be admitted for bail.

In rejoinder, Learned State Attorney submitted regarding the absence of the seal as contended that there is no legal requirement for the certificate of the DPP to be sealed or have a stamp of the DPP and reiterated submission in chief.

Having heard the submissions of both parties and perused the certificate of the DPP objecting the grant of bail to the applicants, the Court has to determine the objection raised by the certificate of the DPP before venturing on the merits of the main application. I find that for the interest of justice it is paramount to address the issues raised by the applicants against the said certificate of the DPP. The first ground challenging the certificate of the DPP

was that, the certificate does not contain a seal of the DPP hence invalid, the second issue is that it is unjustifiable as to how the safety and interest of the Republic will be prejudiced while the government trophies and firearms are not in their possession and lastly that section 36(2) contravenes Article 13(6)(a) of the Constitution of URT. Before addressing this I think it is important to consider the powers of DPP vested under section 36(2) of the EOCCA CAP 200 RE 2002, which provides:

"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 interest of the Republic would be prejudiced."

As held in the case of **DPP vs Li Ling Ling, Criminal Appeal No 508 of 2015 (Supra)** and the provision cited above, the DPP is empowered to file a certificate in any court which has jurisdiction to hear and determine an application for bail. However, as earlier stated by the Learned State Attorney, the Court has to satisfy itself that the said certificate has met the validity test as stated in the case of **DPP vs Ally Nuru Dirie and Another (1988) TLR 254** and also adopted in the case of **DPP vs Li Ling Ling and Emmanuel Simforian Massawe (Supra)**, where the position of the law is that once the DPP's certificate has met the validity test the Court shall not grant bail. The conditions for validity of the DPP's certificate as stated in **DPP vs Ally Nuru Dirie's** case are that:

- i) **The DPP must certify in writing.**

In the present case the Director of Public Prosecutions certified in writing as it is stated that "*I Biswalo Eutropius Kachele Mganga, DPP, do hereby certify.....*" Hence, I find that this condition was met.

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.

This condition was well addressed in the present certificate.

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

This condition was well addressed in the present certificate, which relates to the accused persons in Economic Crime Case No. 23 of 2018 should not be granted bail. The accused persons are the applicants in this application.

Regarding the issue of DPP's seal in the certificate, I have perused the certificate and found that, it is true that there is no seal of the office of the DPP however there is a signature of the DPP. As contented by the Learned State Attorney for the respondent Republic, there is no requirement of the law that the said certificate must have a seal of the DPP in order to be valid. However, as a matter of practice it is proper for the said document to be sealed by the seal of the office of the DPP. Having considered the position of law under section 36(2), which covers the powers of the DPP is empowered to object granting bail once found it is likely to prejudice the safety and interest of the Republic and the cited

authorities of the CAT have stipulated how the DPP's certificate can be challenged hence I find that this ground lacks merit.

On the second issue that it was unjustifiable how the safety and interest of the Republic will be prejudiced since the government trophies and firearms were not in the hands of the respondents. It is a settled principle of law that once the DPP certificate is lodged and met the validity test, the DPP has no obligation to assign the reasons for objecting bail where he considers the safety or interest of the Republic are likely to be prejudiced as propounded in the cases of **Li Ling Ling and in Emmanuel Simforian Massawe(Supra)**.

Regarding the case of **Jeremia Mtobesya(supra)** Learned Counsel for the applicants prayed to the Court to declare unconstitutional since section 148(4) of CPA, Cap 20 is *pari materia* to section 36(2) of the EOCCA. I find that this case is distinguishable having addressed the constitutionality of the provision of the Criminal Procedure Code, Cap 20 and not section 36(2) of the EOCCA. The constitutionality of section 36(2) of the EOCCA was challenged in the in the case of **Gedion Wasonga and 3 Others vs, The Attorney General and 2 others, Misc. Civil Cause No. 14 of 2016, High Court at DSM** (unreported) where the High Court held that the said provision is constitutional. Basing on that decision, which has not been challenged to date the provision section 36(2) of the EOCCA is still constitutional. As it was held in the case of **Emmanuel Simforian Massawe (Supra)**, this Court also cannot apply the principle of statutes *parimateria* in the present case where the gist is

to challenge the certificate of the DPP and not the constitutionality of this provision.

Lastly, challenging the constitutionality of section 36(2) of EOCCA that it contravenes of Article 13(6)(a) of the Constitution, I find that this is not the proper forum for challenging it. However, in the case of **Gedion Wasonga and 3 Others V AG and 2 Others (Supra)** at p. 27 held that the provision of section 36(2) of EOCCA is constitutional.

Consequently, I find the certificate filed by the DPP to be sound and valid and there is no need to dwell on the merits of the main application at this juncture. As the position of the law in the cases of **Dirie's** and **Li Ling Ling (Supra)** case stated once the DPP's certificate has met the validity test, the Court shall not grant bail.

On the basis of the above stated reasons the bail application by the applicants is hereby denied until the time the certificate of DPP is withdrawn or any further orders by this Court. The applicants to remain in custody.

It is so ordered.





L.L. MASHAKA

JUDGE

11/10/2018