

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

MISC. ECONOMIC CAUSE NO. 65 OF 2018

*(Originating from Economic Crime Case no. 71 of 2017 of the Resident
Magistrate's Court at Kisutu at Dar es Salaam)*

1. SALUM YASSIN MTANI 1st APPLICANT
2. HASHIM HASSAN OMARY @KALULU 2nd APPLICANT
3. ZAMBA PINAU @LIKOTI 3rd APPLICANT
4. SALUM RAMADHAN ZONGO 4th APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

R U L I N G

Date of Last order: - 04/12/2018
Date of Ruling: - 10/12/2018

W.B. Korosso, J.

Salum Yassin Mtani (1st applicant), Hashim Hassan Omary @Kalulu (2nd applicant), Zamba Pinau @Likoti (3rd applicant) and Salum Ramadhan Zongo (4th applicant) have filed an application by way of chamber summons, supported by an affidavit, jointly affirmed by the applicants. The application is made under sections 29(4)(d) and 36(1) of the Economic and Organized Crimes Control Act, Cap 200 RE 2002 as amended (hereinafter referred to as EOCCA). The relief sought is that this Court be please to grant bail to the applicants regarding the charges the applicants face in Economic Case No.

71 of 2017 pending at the Resident Magistrate's Court of Dar es Salaam Region at Kisutu.

At the date fixed for hearing, the Court marked the notice of preliminary notice as withdrawn upon the prayers by the respondents to withdraw the same. The Court also before start of hearing of the submissions from the applicants and respondents, invited the parties to address it on a point of law. That is whether this Court has jurisdiction to hear and determine the application, filed under section 29(4)(d) of the EOCCA Cap 200, having regard to the recent decision by the Court of Appeal decision in ***DPP vs Aneth John Makame***, Criminal Appeal No. 127 of 2015, that held that section 29(4)(d) of EOCCA confers jurisdiction to hear and determine relevant bail applications on the High Court and not the Division of Corruption and Economic Crimes, that is, this Court. The High Court within the meaning of the said Act. Also whether this being the position, the other remaining section that is, section 36(1) is adequate and by itself confers jurisdiction on this Court to determine the application before the Court.

For the applicants, who were unrepresented, they did not have anything substantive to submit on the said point of law raised by the Court, and stated that having no knowledge of law they had nothing to expound on this issue but presented the fact that they have been incarcerated for a long time and that the Court should be guided by Article 107(2)(a) of the Constitution and that it should not be bogged down by technical issues but deal with substantive matters to ensure justice is effected and thus proceed to consider and grant bail to them.

On the part of the respondents, represented by Ms. Batilda Mushi, learned State Attorney, they submitted that the charges of Stealing and Unlawful possession of firearms- an economic offence for which the applicants stand charged at the Resident Magistrate's Court Kisumu, are grounded on a holding charge, there being no committal or certificate from the Director of Public Prosecutions conferring jurisdiction to the Resident Magistrate's Court proceed with trial of the case.

That the application before the Court filed by the applicants, is by virtue of section 29(4)(d) and 36(1) of the EOCCA. That section 29(4)(d) of EOCCA, vide the decision of the Court of Appeal in ***DPP vs Aneth John Makame (supra)*** ousted the jurisdiction of the Division of Corruption and Economic Crimes of the High Court to hear and determine such an application when the amount is above ten million shillings which is also the position in the case facing the applicants. That although the Court of Appeal did not discuss section 36(1) of the EOCCA, the said provision empowers the Division of Corruption and Economic Crimes of the High Court to grant bail before conviction of an accused person, that this means, the matter must be before the said Court for this section to apply. That the case for which the applicants face is one where no committal proceedings have been conducted and therefore the trial of the case is yet to have been initiated- and thus it is not before this Court for section 36(1) of EOCCA to apply. The learned State Attorney thus concluded that this Court has no jurisdiction to hear and determine the application before the Court. That the Court should struck out the application and in any case the applicants still have room to file a fresh

application in the High Court general registry as provided under section 29(4)(d) of the EOCCA Cap 200.

The Court having heard the submissions from the applicants and the respondents on the issue raised by the Court, that is, whether or not the Court has jurisdiction to determine the application, now proceeds to cogitate and then decide on the matter.

There is no contention that the application has been filed under section 29(4)(d) and 36(1) of the EOCCA. These provisions are the one cited to move the Court to hear and determine the application filed by the applicants which is before the Court. It is also true that section 29(4)(d) provides that;

*"After the accused has been addressed as required by subsection (3) the magistrate shall, before ordering that he be held in remand prison where bail is not petitioned for or is not granted, explain to the accused person his right if he wishes, to petition for bail and for the purposes of this section the power to hear bail applications and grant bail- in all cases where the value of any property involved in the offence charged is ten million shillings or more at any stage before commencement of the trial before the Court is hereby vested in the **High Court**".* (Emphasis is mine)

The Court of Appeal, in **DPP vs Aneth John Makame** (supra) stated that before the amendments, that is, Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016, determination of economic crimes cases were solely vested with the High Court sitting as an Economic Crimes Court in terms of section 3(1) of the EOCCA or by a court subordinate to the Economic Crimes Court. That this to some extent was to the extent of

powers conferred to the Director of Public Prosecutions or his delegates after issuing a Certificate in terms of section 12(5) of EOCCA.

The Court of Appeal stated further that, "*the situation before and after the amendments vide Act No. 3 of 2016, the High Court had been vested with jurisdiction to hear and determine an application for bail in all cases where the value of any property involved in the offence charged is ten million shillings or more*". They went on to state that, section 29(4)(d) was not amended by Act No. 3 of 2016 and this left the jurisdiction to hear and determine bail application which involves an economic crimes offence which is ten million shillings or more to the High Court. That, "*on the basis of the above stated reasons, we find that neither the Muheza District Court nor the Economic and Organized Crimes Division of the High Court had jurisdiction to hear and determine the application for bail*".

Applying the said holding to the current situation, it is clear being in the same situation, where the charges against the applicants pending at the RM's Court Kisumu being economic offences with the offence charged property being above ten million shillings it renders section 29(4)(d) of the EOCCA not proper to move this Court to hear and determine the application since it does not confer jurisdiction to this Court to determine the application.

Having dealt with section 29(4)(d) of EOCCA, we now move to the other provision cited that is, section 36(1) of EOCCA whether it moves and confers jurisdiction to this Court to hear and determine the current application. Section 36(1) was not discussed in the cited case of **DPP vs. Aneth John Makame** (supra). The Court of Appeal had an opportunity to discuss the

import of this provision in ***Hassan Othman Hassan@Hassanoo vs Rep.***, Criminal Appeal No. 193 of 2014 (unreported) deliberated on February 2016, prior to the amendments in Act No. 3 of 2016. The gist of the issue discussed was whether or not the High Court was *functus officio* in determining a bail application, the applications arising from Economic Crime Case No. 8 of 2012 where the applicants were charged pending at the Resident Magistrate's Court at Kisumu. The Court when discussing section 36(1) of Cap 200 stated. *"Section 36(1) is clear. It empowers the Court (meaning the High Court sitting as an Economic Crimes Court pursuant to section 3) to grant bail to an accused person."* And went on to say at pg. 8 of the Judgment: *"Section 36(1) is clear. Bail can be granted by the Court on its own motion or upon an application by the accused person"*.

Another decision which also discussed the provisions being considered is ***DPP vs. Li Ling Ling***, Criminal Appeal NO 508 of 2015, delivered on 18th March 2018, before the amendments to the EOCCA, that is, Act No. 3 of 2016. The Court of Appeal sitting at Dar es Salaam, at pg. 11 of the Judgment held; *"It is the position of the law that in an economic crime case, matters of bail are governed by ss. 29 and 36 of the Act. Whereas s.29 empowers the courts to entertain bail applications, s. 36 provides for the manner in which such power should be exercised. In principle therefore, the two sections must be applied together when an application for bail is under consideration"*. The Court of appeal then adopted a finding in the case of ***Edward D. Kambuga*** (1990) TLR 84, where the Court stated;

"We agree with Mr. N.D who argued for the Republic that sections 29 and 35(now 36) serve different purposes. Section 29 provides the powers to

grant bail in economic cases whereas section 35 lays down the extent to which that power should be exercised. The two sections should therefore be read and applied in tandem. They cannot be separated.."

Applying the principle enshrined in **DPP vs. Li Ling Ling** (supra) and **Edward Kambuga's case** (supra) it suffices that the provision granting jurisdiction to a Court to entertain a bail application upon the arrest of an accused person is section 29, that is including section 29(4)(d) of EOCCA which we have already found that under the circumstances the said provision confers jurisdiction on the High Court and not this Division of the High Court. Section 36 inclusive of Section 36(1) of the EOCCA lays down the extent to which the power to grant bail should be exercised.

At the same time section 36 provides for the rights to bail upon laid down conditions as also expounded in **Hassan Othman Hassan @Hassanoo vs Rep case** (supra). The addition is that now with the amendment enshrined in Act No. 3 of 2016, it is the Division of Corruption and Economic Crimes of the High Court as defined under section 3, which on its own motion or upon an application made by an accused person, subject to specified conditions therein admit the person to bail, but the proviso under section 36(1) of EOCCA is that, this may be effected only after a person is charged but before he is convicted by the Court (that now means, the Division of Corruption and Economic Crimes of the High Court).

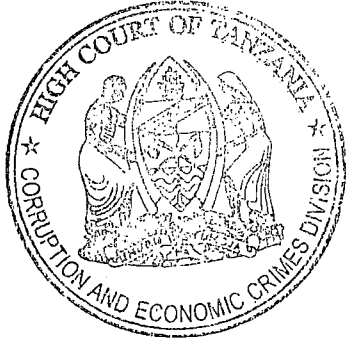
The question becomes now, when is a person charged before the Court? This is without doubt upon the charges expounded in section 29 of EOCCA, since he is expected to be taken to Court with charges, and not necessary

charges within the confines of section 30 of the EOCCA as expounded by the learned State Attorney. This is because if that was the case, then conditions to be imposed after a court grants bail under section 36 of EOCCA would not have been imposed upon grant of bail under section 29(4) of the EOCCA. Section 29(4) of EOCCA expounds on who (that is which court) can grant bail and when (that is situations) those given powers can grant bail. How such power to grant bail is exercised is provided under section 36 of EOCCA.

Therefore section 36(1) is dependent on section 29(4), where the charges have not been filed in the Court under section 30 of EOCCA. But where an information has been filed to the Court it is now empowered to hear and determine bail on its own motion or upon an application by the accused person. This means, this application before the Court, where the applicants case is still pending at the RM's Court Kisutu and not filed within this Division, this Court cannot use section 36(1) of EOCCA to empower this Court to hear and determine bail, where section 29(4) does not empower it. This Court has therefore no jurisdiction to hear and entertain the current application for reasons stated hereinabove.

Matters addressing the jurisdiction of a Court are very important and without doubt it is not within the matters envisaged under Article 107(2)(a) of the Constitution cited by the applicants, where it is stated that the Court should not be bogged by technicalities as opposed to substantive justice. Jurisdiction is what empowers a Court to hear and determine a matter before it. Therefore in this case, the issue discussed goes to the substance of the matter before the Court and is not mere technicality.

This therefore renders the application before the Court to lack competence. The application is therefore struck out. Applicants bearing the stage, the case they face economic offence charges is at, that is, it is before committal, are at liberty to file a fresh application in a Court with competent Jurisdiction within the confines of Section 29(4)(d) of the EOCCA. Ordered.



Winfrida B. Korosso

JUDGE

10th December 2018