THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

THE CORRUPTION AND ECONOMIC CRIMES DIVISION

DAR ES SALAAM REGISTRY

MISC. ECONOMIC CAUSE NO. 50 OF 2017

1. LUSTICK LIKONOKA
2. GERWINA ANDREAS MATANDA
3. MODESTUS JOSEPH @NDIMINI } **..... APPLICANTS**
4. VALENTINA NAMTWANGA

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

3/10/2017 & 11/1/2018

W.B. Korosso, J.

This application has been filed under certificate of urgency by the above named applicants pursuant to section 148(3) of the Criminal Procedure Act, Cap 20 RE 2002, Section 29(4)(d) of the Economic and Organized Crime Control Act, Cap 200 RE 2002 and any other enabling provisions of the law. The application comprises of a supporting affidavit sworn by Augustine Mathern Kusalika, learned Advocate for the applicants and sought for the Court to be pleased to grant bail pending determination of Economic Crime Case No. 6 of 2017 at the District Court of Kilombero at Ifakara.

Also prayed for any other relief and directions the Court may deem necessary to grant in the interest of justice.

The Respondents filed a counter affidavit sworn by Kenneth Sekwao, learned Senior State Attorney whose averments took note of a number of paragraphs in the affidavit supporting the application. The respondents stated further that the charges facing the applicants are of high public interest and that investigation are ongoing due to their complexity. Under paragraph 7 of the counter affidavit, it alludes to the fact that the Director of Public prosecutions has certified that granting of bail to the applicants is likely to prejudice the safety and the interest of the Republic, the certificate being annexed to the CA as annexure "D1".

In the reply to the counter affidavit averred to by Augustine Mathern Kusalika, counsel for the applicants, the applicants noted the contents of paragraphs 1, 2, 4 and 5 of the counter affidavit and disputed the contents of paragraph 3 and 7 of the CA. The applicants also challenged the contents of the DPP certificate denying grant of bail to the applicants on the ground that the respondents failed to specify the safety and public interest to be prejudiced upon grant of bail to the applicants. Mr. Augustine Mathern Kusalika, learned Advocate represented all the four applicants during the hearing of the matter and Mr. Kenneth Sekwao, Learned Senior State Attorney assisted by Mr. T. Majigo learned State Attorney represented the Respondent Republic.

In support of the application, the counsel for the applicants started by submitting on the competence of the application in terms of the provisions cited to move the Court to hear and determine the matter arguing that they were proper in view of the prayers before the Court and that the offence for which the applicants and the captured charged with in the cited economic case pending at Kilombero District Court. He also had no dispute with the date of arrest of the applicants and the charges facing them at Kilombero District Court. The applicants counsel then moved to challenge some other averments in the Respondents counter affidavit. First, he challenged the assertion by the Respondents that the offence for which the applicants are arraigned with is of high public interest requiring complex investigations. On this, the argument presented was that the respondents failed to reveal the alleged complexity of the said investigations nor they reveal the high public interest contended. The applicants counsel submitted that investigations of a case are internal matters which should not affect grant of bail to accused persons. That in this case having regard to the fact that the applicants were arrested on the 8/12/2016, a year to the date, the DPP's certificate is presented does not show the alleged complexity of investigations. That the charges against the applicants relate to unlawful possession of Government Trophy and particulars of the offence assert that the applicants were found with the charged Government trophies, therefore how does this lead to complexity in investigations? That at the same time the respondents failed to advance what amounts to public interests at risk to be prejudiced for bail to be objected to. That the narrated value of the property

charged alone cannot be said to infer the case is one of high public interest or high stake case.

The applicants then proceeded to challenge the presented certificate drawn by the Director of Public Prosecution objecting bail to the applicants that states that the safety and interest of the Republic will be prejudiced if applicants are granted bail. The point of contention being that the DPP's certificate was not properly filed/registered, since it was just an appendage to the counter affidavit and not filed separately as is the practice in such certificates. It was therefore the applicants' assertion that when the Court considers their submissions, the Certificate by the DPP objecting to bail should not be considered since it is incompetent before the Court for failure to be properly filed. That it was also invalid being issued under a provision, that is, section 36(2) of the EOCCA Cap 200 RE 2002 which in effect was rendered unconstitutional by this Court. The case of ***Jeremiah Mtobesya vs Attorney General*** (2015) TLR 468 was cited and the counsel for the applicants argued that though the said case dealt with section 148(4) of the Criminal Procedure Act, Cap 20 RE 2002 but that the wording in the said provision are similar to those in section 36(2) of the Economic Crimes Control Act, Cap 200 RE 2002 for which the certificate by the DPP objecting to bail was issued. The applicant's counsel argued that in ***Jeremiah Mtobesya's*** case, the High Court sitting as a panel stated that such a certificate that denies bail to accused for reasons of safety and public interest leave no room for the Court or police to grant bail and therefore, is contrary to the

constitutional right under Article 13(6)(a). That the Court stated further that the fact that section 148(4) of the CPA does not oblige the DPP to assign reasons washes away the constitutional mandate of the court as a neutral arbitrator contrary to Article 13(6)(a) of the Constitution of the United Republic of Tanzania. The applicants sought the Court to be persuaded by the said holding and find that in effect, section 36(2) of EOCCA being *impari materia* with section 148(4) of CPA is also unconstitutional.

On their part the Respondents through their counsels submitted that the certificate by the DPP was signed on the 15/12/2017 and filed on the 22/12/2017 and thus disputed the contention by the applicants that filing of the certificate was not properly done. They also contended that the certificate by the DPP objecting to grant of bail to the applicants has fulfilled all the legal requirements related to validity test as propounded in the case of ***Ally Nuru Dirie and another*** (1988) TLR 250 and restated ***in DPP vs. Li Ling Ling,*** Criminal Appeal No. 508 of 2015. The three conditions being first, that the DPP must certify in writing. Second, the certificate must be to the effect that the safety and interest of the Republic are likely to be prejudiced by granting bail and third, that the certificate relates to a pending criminal trial or appeal.

With regard to failure of the respondents to reveal grounds or reasons to support the assertion that grant of bail to applicants will prejudice safety and interests of the Republic, the learned State Attorneys argued that the law does not require the DPP to reveal the same. That in ***Ally Nuru Dirie's case (supra)***, the Court of Appeal

stated that the DPP is not required to state reasons with regard to filing of the certificate. The respondents thus prayed for the Court to find the argument devoid of merit. On the issue of ongoing complex investigations, they stated that criminal investigations are confidential and a process and there is no requirement to reveal what transpires during investigations.

The respondents contended further that there is no established procedure on how to file a certificate issued by the DPP objecting to grant of bail to applicants. That what is required is for the Court to be availed with the certificate and that the certificate was duly submitted to the Court and is now before the Court and the Court is expected to consider it in the determination of the application. The issue of a court clerk signing it or not they argued, is not a legal requirement and that in any case, the said certificate has the stamp of the Court and thus it is properly before the Court for consideration. They also contended that though the charges against the applicants particulars state that the applicants were found in unlawful possession of government trophy, further investigations are required to reveal were the tusks came from, their value and status and that the issue to bear in mind is that investigations are ongoing. Ending by prayers for the Court to consider the DPP's certificate and refrain from granting bail to the applicants for reasons stated therein.

In rejoinder the applicants counsel reiterated arguments from his submission in chief and contended that the Court should find the holding in ***Ally Nuru Dirie case and DPP vs Li Ling Ling case***

to be distinguishable. That in ***Li Ling Ling case*** the matter before the Court, he argued was whether the Court was right or premature in considering bail application and the manner of filing the certificate. The applicants prayed the Court to find the holding in ***Jeremiah Mtobesya's case*** persuasive and relevant since it dealt with the weight to be accorded to the DPP's certificate objecting to grant of bail to applicants.

This Court in consideration and determination of the assertions, contentions and prayers advanced by the counsels for the parties before the Court premises by addressing the competence of the application and jurisdiction of this Court to entertain the matter. The charges facing the applicants as discerned from the charge sheet averred to in the affidavit supporting the application as annexure "D1", it is clear that the offences are economic offences. This fact has not been disputed by the respondents as seen in paragraph 3 and 4 of the counter affidavit and we find it to be a matter of fact, that this Court has jurisdiction to entertain the application especially having regard to the amount of the charged property being above ten million shillings. The next issue we need to address before we move into the merits of the application is the competency of the application having regard to the provisions cited to move the Court.

The applicants cited section 148(3) of the Criminal Procedure Act, Cap 20 RE 2002 and Section 29(4)(d) of the Economic and Organized Crime Control Act, Cap 200 RE 2002 and any other enabling provisions of the Law to move this Court. Charges against

the applicants reveal that the offences charged against the applicants are economic offences emanating from violation of the Wildlife and Conservation Act, No. 5 of 2009 (Cap 283) and therefore it is without doubt that the applicable laws are the Wildlife Conservation Act and the Economic and Organized Crime Control Act, Cap 200 RE 2002. This Court is aware of the existence of Section 4 of the Criminal Procedure Act, Cap 20 RE 2002 and Section 28 of the EOCCA allowing for application of CPA on procedural matters in criminal proceedings.

The said provision (section 4 of CPA) asserts that the procedure enshrined within the CPA, shall apply to all offences under the Penal Code Cap 16 R.E 2002, and that all offences under any other law shall be inquired into, tried and otherwise dealt with according to the provisions of this Act (Criminal Procedure Act) except where that other law provides differently for the regulation of the manner or place of investigation into, trial or dealing in any other way with those offences.

We are also be reminded of section 28 of EOCCA, which addresses the application of the CPA in proceedings related to economic offence, that is offences under EOCCA "*Except as is provided in this Part to the contrary, the procedure for arraignment and for the hearing and determination of cases under this Act shall be in accordance with the provisions of the Criminal Procedure Act*". Therefore, it is necessary when addressing procedural issues on offences under EOCCA, that only where there is a gap in the

procedure laid down in this Act, then one may import the provisions of the CPA.

The question before us now then is, in terms of bail applications related to economic offences such as the present one, is there a gap in the EOCCA related to hearing and determination of such an application to lead us to resort to provisions of the CPA? The applicants have cited also section 29(4)(d) of the EOCCA Cap 200 RE 2002 which states:

"*(4) 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–*

(d) 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"

It is obvious that this provision only addresses the power of the Court to hear bail applications and grant bail while section 36(1) of the EOCCA Cap 200 RE 2002 which reads: "*After a person is charged but before he is convicted by the Court, the Court may on its own motion or upon an application made by the accused person, subject to the following provisions of this section, admit the accused person to bail*". This provision, that is section 36(1) of EOCCA is the one which the Court uses to admit persons to bail for the offence of

the like the one which faces the applicants. From the above, there is no argument that it is an important provision to cite in an application for bail on matters related to economic offences and not section 148(3) of the CPA as cited by the applicants. This is because the EOCCA has a specific provisions bestowing jurisdiction to the requisite Court to hear, grant bail and admit bail to accused persons. We thus find that failure to cite section 36(1) of EOCCA in the application was an error. Consequences of such errors such as non citation of appropriate sections to move the Court have been addressed by this Court and the Court of Appeal in various cases. There are decisions such as the holding in ***Sea Saigon shipping Limited Case*** where the Court stated that "*the applicant must cite the relevant provision from which the court derives the power to hear and determine the application, and that non-citation of the relevant provision renders the application incompetent*".

From our finding above though we could have ended this matter here, but bearing in mind the contents of section 29(4)(d) of EOCCA which can also be interpreted to also empower a hearing Court to grant bail, and in the interest of justice find it important to proceed and address other issues before the Court pertaining to the application.

Before the start of hearing of this matter, a certificate by the DPP objecting to bail to the applicants was filed. We shall therefore proceed to address the competence of this certificate as challenged by the applicants. That is, whether it is properly before the Court before we address the weight to be given to the said certificate. The

applicants contention being that it was not registered and it has no signature of the Court Clerk to signify that it was properly received and that as it is, it is a mere appendage of the counter affidavit since it was referred therein. The respondents disputed this assertion. This Court finds that it is true that the DPP certificate objecting to bail is made reference to vide averment in paragraph 7 of the counter affidavit filed by the respondents on the 15th of December 2017 and as per the learned State Attorneys oral submissions in Court. On perusal of the said certificate the Court noted that it was signed by the issuer- the DPP on the 15th of December 2017 and it has an official stamp of the High Court expressing that it was received on the 22nd of December 2017 the date the Counter affidavit was filed.

The Certificate by the DPP objecting to bail is filed under section 36(2) of the EOCCA and from the said provision we find that the most important matter for the certificate to take effect is that the DPP certifies that it is likely that the safety or interests of the Republic will be prejudiced. There is nothing stating how and modalities for the certificate to be filed or registered or tendered in Court. The other relevant section we find is section 36(3) of the EOCCA Cap 200 RE 2002. From this provision it is clear that the certificate takes effect from the time it is filed in Court or notified to the officer in charge of police station up to the time the DPP withdraws it.

The critical issue then is when is such a certificate seen as duly filed? It should be understood that a document may be filed by

various means. The most direct method is to present the document in person to the receiving trial court clerk who will then file stamp the document with the current date. This means upon the stamp filing of the document it is in effect the filing of the document... and not having the signature of the court clerk. In this case the certificate is stamped. There is no established procedure on how to file the certificate, and in any case sometimes it can even be tendered in Court. In this case this was not done so, and the applicants counsel conceded that they were served with the certificate prior to the start of hearing. Overall we find that there is no evidence that the applicants were prejudiced in any way by the certificate not having the signature of the court clerk. The certificate has been duly signed by the issuer, is dated and is contains the official stamp of the Court and the date it was stamped meaning received. We therefore overrule the objection and find that the certificate was duly filed and is properly in Court.

The next issue for consideration we find is the validity of the Certificate by the DPP objecting to bail as challenged by the applicants. We first start with arguments raised by the counsel for the applicants to challenge the validity of the DPP certificate objecting grant of bail to applicants. The first point being that that the DPP certificate issued under section 36(2) of the EOCCA Cap 200 RE 2002 violates Article 16(a) and (b) of the Constitution of the URT and in effect the right to a fair trial. The second ground is that by virtue of the fact that section 148 (4) of the Criminal Procedure Act, Cap 20 RE 2002 empowering the DPP to file a Certificate to

object bail was held by this Court to be unconstitutional, in a judgment by a panel of Hon. Judges in ***Jeremiah Mtobesya vs. the Attorney General,*** Misc. Civil Cause No. 29 of 2015 (2015) TLR 468 and that, in effect, with the said decision, it should be taken that the holding should lead this Court to a finding that section 36(2) of the Economic and Organized Crime Control Act (EOCCA), Cap 200 RE 2002 (a provision used to file the current certificate) which is in *pari materia* to Section 148(4) of the CPA, is also in effect rendered unconstitutional.

We find at this juncture that the important issue for determination should be the validity of the said issued certificate objecting to bail and whilst doing that ensuring there is consideration of the interests of the public and not whether or not it violates the URT Constitution since this is not the proper forum to challenge constitutionality of a provision. Suffice to say the issue whether the certificate filed is governed by consideration of the interests of the public will be considered when determining the validity of the said certificate.

With regard to the status of the DPP powers to issue the certificate objecting to the grant of bail, after having been challenged with success in a court of law and found to be unconstitutional in ***Jeremiah Mtobesya vs. the Attorney General,*** Misc. Civil Cause No. 29 of 2015. It was argued by the applicants that despite the fact that the said holding was addressing the powers of the DPP stipulated in section 148(4) of the Criminal Procedure Act, Cap 20 RE 2002, that this holding is relevant when

discussing the DPP's similar powers under section 36(2) and (3) of the EOCCA, Cap 200 RE 2002, since the powers therein are synonymous. That the only difference being that whereas in the CPA there is only one provision that is section 148(4) advancing certificate objecting to bail and pendency of the Certificate, in the EOCCA two provisions address the matter that is section 36(2) and (3).

Looking at the provisions of section 148(4) of the CPA Cap 20 RE 2002 and section 36(2) of the EOCCA, there is no doubt that they both address certification by the DPP objecting to bail. Importing the provisions, section 148(4) of CPA reads:

"Notwithstanding anything in this section contained, no police officer or court shall, after a person is arrested and while he is awaiting trial or appeal, admit that person to bail if the Director of Public Prosecutions, certifies in writing that it is likely that the safety or interests of the Republic would thereby be prejudiced; and a certificate issued by the Director of Public Prosecutions under this section shall take effect from the date it is filed 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".

Section 36(2) of the EOCCA, Cap 200 RE 2002 contents we have already imported hereinabove and Section 36(3) stipulates: " *A certificate issued by the Director of Public Prosecutions under subsection (2) shall take effect from the date it is filed 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"

The said two provisions we find, expound that while both sections enunciate the powers of the DPP to issue and file the certificate section 148(4) of CPA is more elaborate addressing also the issue of duration while in the EOCCA, section 36(2) addresses the issuance and filing of the certificate while section 36(3) addresses when the certificate takes effect and its duration to operate. It is thus clearly obvious that the two provisions cannot be said to be synonymous as presented by the learned counsel for the applicants.

Upon consideration of all the factors before this Court and for the above reasons we are persuaded and share the holding in the case of ***Manase Julius Philemon vs Republic***, Misc Criminal Application No. 173 of 2015 (HCT Dar es Salaam- Unreported) at pg. 8 stated that the provision of the law which was declared unconstitutional by the law in ***Jeremiah Mtobesya's*** case (supra) is section 148(4) of the CPA and not section 36(2) of the EOCCA. That section 36(2) of EOCCA will continue to be valid law until when it will be either declared unconstitutional by a competent court or repealed by parliament. It should also be borne in mind that despite the decision in ***Jeremiah Mtobesya case*** which we have found to be distinguishable, there is the decision of this Court in ***Gideon Wasonga and others vs Attorney General*** and others Misc. Civil CAuse No. 14 of 2016 is relevant were at pg 28 the Court found section 36(2) of the EOCCA not to violate the Constitutional

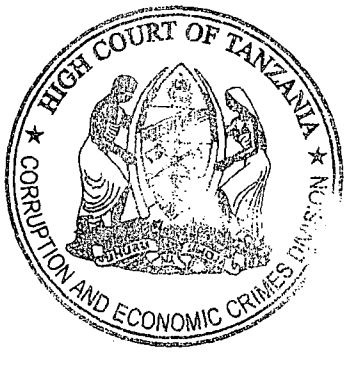
provisions as argued. That the DPP as per the conferring section is not required to provide reasons or explanation on the safety and interest of the Republic at risk to be prejudiced by applicants as outlined in a drawn certificate as also held in ***Ally Nuru Dirie's case*** (supra).

The issue of the validity of the Certificate of the DPP has been discussed in various cases. In the case of ***DPP vs Li Ling Ling (supra),*** where Li Ling Ling and four other persons were jointly charged with four counts, the third count being unlawful dealing in Government trophies total value being 267,401,400/-. The DPP tendered a certificate under section 36(2) of EOCCA objecting to the grant of bail to the respondent on ground that release of bail would likely prejudice the interests of the Republic. The Court of Appeal held that under section 36(2) of the EOCCA any Court with jurisdiction to entertain and grant bail in an economic crime case, the DPP is empowered to file a certificate in any court which has jurisdiction to hear and determine an application for bail. That the DPP can only file the Certificate when the case is pending trial. The Court of Appeal adopted the holding in the case of ***Ally Nuru Dirie and Another*** (1988) TLR 2002 stating that once the DPP's certificate has met a validity test then the Court shall not grant bail. The conditions for validity of DPP's certificate are that:

> *"i. The DPP must certify in writing and*
> *ii. The Certificate must be to the effect that the safety or interests 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 ending appeal".*

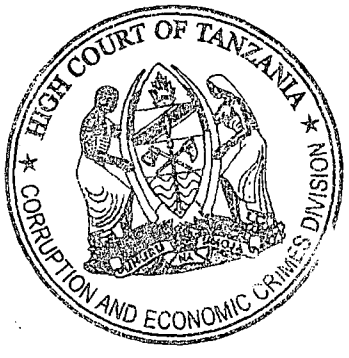
Thus, upon consideration of the law and the authorities before me and applying the said test in ***Ally Nuru Dirie and Another*** (supra) adopted in ***DPP vs Li Ling Ling*** (supra) to the present matter, there is no doubt that the DPP's Certificate filed complies with the validity test on all of the three conditions above. There is no doubt that the DPP's Certificate filed in this matter is valid having satisfied the propounded test. Upon the said finding therefore the argument by the applicants counsel that the DPP has to provide reasons for certifying for denial of bail for public interest fails and is not grounded on any legal standing because section 36(2) of the EOCCA does expound as a requirement for the DPP to provide any such information or notification to the other party of his intention to file the same.

Having found that the DPP's Certificate issued under section 36(2) of the Economic and Organized Control Act to be valid and there being nothing before the Court to persuade it to consider to disregard the Certificate by the DPP objecting to grant of bail to applicants. In the premises, this Court finds no need to proceed to consider granting of bail as prayed by the applicants. In the premises, the bail application is denied at this juncture and the DPP's Certificate objecting to bail shall remain in effect until the proceedings concerned are concluded or where the DPP withdraws the certificate or there being any other order of this Court. Ordered.



Winfrida B. Korosso
Judge
11th January 2018

Ruling delivered this day in Chambers in the presence of Mr. Augustine Kusalika, learned Advocate for all the applicants and Mr. Kenneth Sekwao, Learned State Attorney for the Respondent Republic. Also in the presence of Lustick Likonoka (1st applicant); Germana Andreas Matanda (2nd applicant); Modestus Joseph@ Ndimini (3rd applicant) and Valentina Namtwanga (4th applicant)



Winfrida B. Korosso
Judge
11th January 2018