

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

**MISC. ECONOMIC CAUSE NO. 11 OF 2018**

(Originating from Economic Case No. 29/2016 of Kisutu RM's Court)

**ABBAS HASSAN @ JABU & OTHERS..... APPLICANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**RULING**

12/3 & 15/3/2018

**F.N. Matogolo, J.**

Victor Serafini Mawalla and Calisti Serafini Mawalla on 12<sup>th</sup> February 2018 filed this application for bail vide miscellaneous Economic Cause No.4/2018. The two along with one Abbas Hassan @ Jabu are arraigned in Economic case No.29 of 2016 in the Court of Resident Magistrate of Dar es Salaam at Kisutu along with eight others charged with three counts.

In the first count they are all charged with leading organized crime contrary to paragraph 4(1) of the first schedule to, and Sections 57(1) and 60(2) of the Economic and Organized Crime Control Act [Cap.200 RE 200] as amended.

In the second count all were charged with unlawful dealing in Trophies contrary to Sections 80(1) and 84(1) and part 1 of the first schedule to the wildlife conservation Act, No.5/2009 together with

paragraph 14 of the first schedule to, sections 57(1) and 60(2) of the Economic and Organized Crime Control Act, [Cap.200 R.E.2002] as amended. In the third count, the applicants along with Ally Anguzuu Sharif and Haruna Abdallah Kassa were charged with unlawful possession of Government Trophy contrary to section 86(1) and (2) (ii) and Part I of the First schedule to the wild conservation Act, No.5/2009 read together with paragraph 14 of the first schedule to, and section 57(1) of the Economic and organized crime control Act, Cap.200 RE [2002] as amended.

On 21<sup>st</sup> February, 2018 Abbas Hassan @ Jabu filed Miscellaneous Economic cause No.11/2018

On 12/3/2018 the two application came in Court for hearing. The applicants were represented by Mr. Jeremiah Nkoko and Mr. Dominicus Nkwera learned advocates. Mr. Elia Kalonge and Mr. Candid Nasua learned State Attorneys appear for the respondents.

The two applications were consolidated and heard as one as they emanate from the same case, Economic case No.29/2016.

Mr. Elia State Attorney submitted before this court that in both applications, the Director of Public prosecutions (DPP) has filed a certificate denying bail to the applicants. That the certificates were filed under Section 36(2) of the Economic and Organized Crime Control Act, Cap.200 R.E.2002 (The Act) certifying that the safety and interests of the Republic may be prejudiced if the applicants will be released on bail.

He prayed to this Court not to grant bail to the applicants. He said Section 36(2) of the Act permits the DPP to file a certificate in Court in a situation where he sees or believe that the safety and interest of the Republic is likely to be prejudiced. And once the certificate is filed, cannot

grant bail to the applicants. That once the certificate filed met all the validity test as held in different courts decisions then the accused cannot be granted bail. Mr. Elia buttressed his point by citing the Court of Appeal decision in the case of **Emmanuel Simforian Massawe vs. Republic**, criminal Appeal No.252/2016 in which apart from discussing the three conditions for validity of a certificate as in **Li Ling Ling V.R.** Criminal Appeal No.508/015 added one condition that the certificate could only be invalid if it is proved that the DPP acted on bad faith or abuse of Court process.

He mention the other three conditions to be:

1. The DPP must certify in writing
2. That the safety and interest of the Republic will be prejudiced by granting bail in a case.
3. The certificate must relate to a criminal case either pending trial or pending appeal.

Mr. Elia therefore emphasized that the certificates in question have met all conditions above listed.

For the fourth condition, the learned State Attorney argued that in issuing the certificates the DPP acted under Article 59B, of the constitution, freely and without being interfered. He also referred this Court to the decided cases; Miscellaneous Economic cause No.12 of 2017 **Abdallah Mohamed Ngalanga & Another v.R. and Ramadhan Mussa Hamis v.R.** Miscellaneous Economic cause No.11/2017. Mr. Elia learned State Attorney concluded by saying, from what he has submitted, and on the basis of the decision of the Court of Appeal in **Emmanuel Simforian**

**Massawe** (supra), the certificates filed by the DPP should be considered and the applicants should not be granted bail.

Mr. Nehemiah Nkoko learned Advocate on his part argued that the two certificates filed by the DPP do not pass the validity test set in **Ally Nur Dirie v.R.(1988) TLR 522**. The same were unprocedurally filed in Court. He said it is trite that every document filed in Court must show the date it was filed and must be endorsed by the officer of the Court who received it. But the certificates in question do not show when were filed nor were they endorsed by the receiving officer. It was just stamped but that alone is not sufficient to prove that the certificates were properly received. The word "presented for filing this day..." are missing. On the issue of safety and interests of the Republic, Mr. Nkoko said there is no any safety or interest of the Republic are likely to be prejudiced if the applicants are granted bail. There has been no such danger before the applicants were arrested, and there would not be present even after the applicants will be released on bail.

He said for one to be released on bail, there are conditions which must be met as were spelt out in **Nicholaus Saranji & Another v.R (1975) LRT 58**, in which Mwakasendo, J. as he then was, at page 7 held:

*"before bail is granted the Court must be satisfied that the accused if released on bail will not abscond*

*(II) endanger the Public safety and property, or in any way interfere with the course of justice."*

He said this is not the first time the applicants filed bail application they first filed it in January 2017. But on 13<sup>th</sup> January 2017, the DPP filed a certificate denying bail. But the application was withdrawn after the

prosecution has promised to finalize investigations within a short time and the applicants would be committed to this court for trial soon. But since then it is more than one years the case is still pending at Kisumu. He said the chronological events in respect of the case applicants are facing even the second condition was not met.

Mr. Nkoko challenged the respondent by relying on the decision in **Abdallah Mohamed Ndalanga** (supra) to argue that once the certificate is filed it cannot be questioned and said that is highly misconception. He said in **DPP vs. Daud Pete (1913) TLR 10** it was held that the accused person has the right to question the certificate filed in Court. Even in the case of **Emmanuel Simforian Massawe** (supra), the Court of Appeal insisted that the applicant must be given chance to be heard but also he said the circumstances in the cited cases of **Emmanuel S. Massawe and Abdallah Ndalanga** are different to the case at hand, as in this case the applicants have come to this Court twice with similar application. Mr. Nkoko said they believe the reasons given in the first application cannot be same. There must be change of circumstances. Thus for not explaining how the safety and interest of the Republic will be prejudicial to the applicants, the second test cannot be said to have been met. Mr. Nkoko referred this Court to its decision in miscellaneous Economic cause No.1/2018 between **Anthony Zacharia and Aother vs Timoth Kilumile** at Mwanza in which this court questioned how the DPP can file a certificate on the ground that the safety and interest of the Republic if the applicants have been out since 2002. Equally he said the DPP should have stated how the present applicants would affect the safety and interest of the Republic for them being out on bail. Regarding the fourth condition Mr.

Nkoko said the DPP's certificates are invalid for contravening the National Prosecutions Services Act and Article 59 B of the United Republic of Tanzania constitution because Section 8 of the National prosecutions services Act is in parimateria with Article 59 B of the constitution. That in discharge of his function, the DPP must comply with the following:

- 1) The need to do justice,
- 2) Prevention of misuse of powers or to avoid misuse of Court process,
- 3) Public interest.

Mr. Nkoko submitted that there is nowhere the DPP acted in the need to dispense justice to the applicants for blocking heir bail since July 2016 todate. The applicants are prejudiced for not been given fair trial. That what the DPP is doing is an abuse of Court process. He is using the Court to deny bail to the applicants. In the counter-affidavit, the respondent did not state that he intended to object bail, the certificates therefore have come as afterthought. The learned advocate submitted further that it is a cardinal principle that parties are bound by their own pleadings. The DPP is therefore bound with what he stated in the Counter-affidavit. The DPP is abusing Court process only that Section 36(2) gives him powers to do what he like.

On public interest, Mr. Nkoko said it is the public interest that litigation must come to an end as early as possible and that is also the complaint by the president. He questioned as to why Economic case No.29/2016 has remained in Court for almost two years now. That the DPP as a justice stake holder must make sure that justice is done on both sides. The DPP has also failed to comply with the third condition for not

expediting investigation of the case so that the applicants can be committed for trial.

That it was not the intention of the legislature to enact Section 36(2) giving powers to the DPP for him to act in malafide. The learned advocate submitted further that in **Li Ling Ling case** the learned State Attorney submitted that Section 148(4) of the CPA is a replica of Section 36(2) of the Act and should be purposive interpretation. The argument which was accepted by the Court of Appeal. The Court even went further by adding the word "awaiting trial". Mr. Nkoko learned advocate prayed to this court to note that, the decisions in **Ally Nur Dirie and Li Ling Ling** with regard to the DPP's certificate emanated from Section 148(4) of the CPA and its similarities to Section 36(2) and what was decided in Jeremiah Mtobesya case Section 36(2) be given purpose interpretation as is in pari materia with Section 148(4) of the CPA.

That Section 28 of Act provides situation where the CPA can apply in Economic offences including bail applications. In **Jeremiah Mtobesya case** Section 148(4) CPA was declared unconstitutional although in **Emmanuel Masawe** the Court tried to distinguish it. But did not declare the decision in the former case invalid. He went further and stated, the complaint in **Mtobesya case** was the applicability and enforcement of Section 148(4) of the CPA and what is now before this Court is the applicability and enforcement of Section 36(2) of the Act, which are the same thing. Mr. Nkoko concluded by saying the validity test was not met by the DPP in this case and prayed for the two certificates be disregarded.

On his part Mr. Dominicus Nkwera learned Advocate to some extent repeated what his colleague Mr. Nkoko has submitted. But he said the

charged offences are bailable one. That, despite presence of the DPP'S certificates the applicants are to be treated as innocent they have their constitutional right to free movement. He said there are circumstances which may lead to denial of bail citing the case of **Daudi Pete**. But he said for the present applicants, there are no such circumstances. The learned advocate while citing the case of **Mussa Seif V.R(1983) TLR 228**, submitted further that where there is ambiguity, the same should benefit the accused. In the counter-affidavit there is nowhere stated that the applicants are dangerous people. They have never been convicted and sentenced to custodial sentence.

In rejoinder, Mr. Elia learned State Attorney started with the issue of Counter-affidavit, that the same did not mention issue of safety and interest of the Republic to be prejudiced.

He said the counter-affidavit and certificate are not the same, there is no law or any Court decision where it was held that the certificate must be mentioned in counter-affidavit. It is that is why in Section 36(2) of the Act it is stated "at any time". He therefore said it is not a legal requirement for the certificate to be mentioned in the counter-affidavit. That is why even the learned advocate did not mention any provision.

Regarding absence of words "presented for filing this day of ...." Or endorsement by the officer of the court on the certificate, he said there is no any prescribed format how the certificate should look like. He said the applicants counsel have mixed up things because of the words used. In the certificate it is stated "the DPP issued". He did not use the word "filed".

The learned State Attorney submitted that the DPP has been filing certificates in that format and the same were recognized by the Courts. He added that the issued certificates are in crested paper which is recognized to be issued by the Republic everywhere presented. But the certificates in question they are also stamped with a Court stamp proving that it was received by this court.

On the application of the decision of the Court of Appeal in **Jeremiah Mtobesya** and not to apply the decision in **Emmanuel Simforian Massawe**, the learned State Attorney argued that the issue of "*pari materia*" principle was discussed at length in the latter case from page 14-16. The Court of Appeal concluded that the issue of statute in *pari materia* cannot be applied in that case which is of criminal nature unlike **Mtobesya case** which was constitutional Petition. This case being of a criminal nature the principle laid in **Emmanuel Masawe case** must be followed.

On the issue of parties to be bound by pleadings, Mr. Elia quickly responded that the DPP certificate is not a pleading. But the law provides that the DPP can file a certificate at any time, even after he has filed counter-affidavit.

Regarding the issue of DPP acting on powers conferred upon him under Article 59B of the constitution, the learned State Attorney rejoined that the learned advocate referred to the promise by the Republic that they were going to finalize investigations soon the fact which led them to withdraw their first application, he said there is no evidence that they withdrew their application following such promise, he denied the Republic to have made such a promise. So he said whatever the DPP has done he

acted in good faith and not in abuse of Court process. The learned State Attorney submitted on the issue of fair trial that the issuing of certificates by the DPP is legal established by law and there is nowhere stated that the DPP has to give reason as to what interest of the Republic is likely to be prejudiced. That being the legal position the applicant's right to a fair trial has not been violated.

On the issue of precedent the learned State Attorney said even if there are several decisions of the higher Court the Court has to follow the more recent one, he urged this court to follow the decision in **Emmanuel Massawe** case. He insisted this Court to consider the certificates by the DPP.

Those are rival submissions made by the parties to this Court. The only issue for determination by this Court is whether or not given the facts of the case the certificates filed by the DPP can be upheld. The parties each has submitted at length in regard to the two certificates filed by the DPP in respect of the two consolidated applications filed by the applicants.

It is the contention by the respondent that as long as there are certificates filed by the DPP, then this court cannot proceed to hear the applications and grant the reliefs sought. On the other hand, the advocates for the applicants though admit that there are certificates filed by the DPP, and appreciate their effect once fixed in Court, they have argued that the said certificate were not properly filed. It is not indicated when the same was filed, it only bear Court stamp without signature of the officer of the Court who received them so it is doubtful whether the certificate were properly filed.

The learned State Attorney has put it clear and straight forward that there is no agreed format as to how the DPP's certificate should be. But the said certificate is in the Court record which appears to be received in Court on 12/3/2018 according to the date appearing on the affixed stamp of this Court. But not only that the certificate, (original copy) is in a crested paper which is officially recognized. The said certificate cannot be said not properly filed simply because the word "presented for filing this .... Day of .... March 2018" are not there. This is only formalism, which normally preferred when filing pleadings. But the certificate, cannot be said to be pleadings. As in pleadings, once is filed in Court, the same is to be served to the adverse party for him/her to reply. But for a DPP's certificate there is no such requirement. Although a copy of that certificate is served to the other party to the proceedings, that alone does not mean that he/she has to file a reply thereto. The adverse party is served just for purpose of notifying him/her. There is no doubt that the certificates in question, were properly presented in Court.

The second question is whether they are valid.

In order for a certificate to be valid, it must met all the three conditions as set in **Ally Nur Dirie Case** and also approved in **Li Ling Ling case**. In that case, three conditions were laid down for purpose of establishing validity of the certificate, viz:

1. That the DPP must certify in writing.
2. The certificate must be to the effect that the safety and interest of the Republic may be prejudiced by granting bail
3. The certificate must relate to a criminal case either pending trial or pending appeal.

In **Li Ling Ling**, the third condition was modified to the effect that a criminal case must be pending trial or awaiting trial.

There is no doubt that in the certificate in question, the above mentioned three conditions were met. The same are in writing, certifying that the safety and interest of the Republic are likely to be prejudiced by granting bail to the applicants and there is no doubt that the certificates in question are in respect of a criminal case that is economic case No.29/2016 pending at Kisumu RM's Court awaiting trial.

There is an argument by counsel for the applicants that in discharging his functions, the DPP did not comply to the requirements of Article 59B of the constitution. Likewise Section 8 of the National Prosecutions Services Act, No.1/2008 as the two provisions have similar wording. In Section 8 there are three principles guiding the DPP in discharge of his functions that is:-

- (a) The need to do justice
- (b) The need to prevent abuse of legal process and
- (c) The public interest.

This argument is premised on the fact that the applicants have been in remand prison for more than one year now. After their arraignment in the Court of Resident magistrate at Kisumu in economic case No.29/2016, on January, 13<sup>th</sup> 2017 they filed bail application to this Court. But the DPP filed a certificate under Section 36(2) of the Act, certifying that if bail is granted, the safety and interest of the Republic will be prejudiced. And that the prosecution promised to expedite investigations. So that the applicants would be committed to this Court for trial. Basing on that promise, the applicants decided to withdraw their application.

Now they have filed the same application, the DPP again has filed a certificate certifying the same thing. They believe circumstances have changed that is why they are saying the DPP has not complied with Article 59 B of the constitution as well as S.8 of the National prosecutions services Act.

Section 36(2) of the Act under which the DPP's certificates were filed 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 interests of the Republic, would thereby be prejudiced"

The DPP has certified in the two certificates that if the applicants will be granted bail, the safety and interests of the Republic is likely to be prejudiced. The challenge by the applicants advocates on the certificates is lack of explanation that from the time the first certificate was filed after the applicants have filed their first application which was incidentally withdrawn the circumstances have not changed, otherwise to them they believe circumstances have changed. But as the learned State Attorney pointed out, the certificates were filed according to the law. The law does not provide for the DPP while filing certificates, has also to assign reasons for doing so. There is no such legal requirement. Mr. Elia learned State Attorney denied for the prosecution to have promised to finalize investigation of the case and basing on that promise the applicants decided to withdraw their application. The applicants themselves did not attach any copy of the order of this Court or Court proceedings showing that the

withdrawal of their first application was because of the promise the prosecution made.

So it is difficult to state with certainty that there was misuse of Court process by the DPP. The one who alleges must prove, the applicants have failed to prove such an allegation. The DPP can file certificate at any time when he sees it proper. Failure to mention in the counter-affidavit that the respondent also intend to file a certificate cannot in any way be interpreted as an afterthought and thus misuse of Court process. The need to file a certificate may arise at any time even after the respondent has filed counter affidavit. This argument by the learned advocates for the applicant lack merit.


The learned counsel for the applicants have asked this Court to have a purposive interpretation of Section 36(2) of the Act basing on the decision of the Court of Appeal in **Jeremiah Mtobesya case**. However, there is a more recent decision with regard to the provision in **Emmanuel Simforian Massawe** in which the Court clearly stated, could not apply the principle of statutes in *pari materia* because the case was of criminal nature unlike what it did in **Jeremiah Mtobesya case** which was a constitutional petition. This also apply to this Court. The issue before the Court in **Emmanuel S. Massawe** case is the same to the case at hand. The decision was given by the Court of Appeal which is a superior Court this court is bound to follow. (See **Jumuiya ya Wafanyakazi Tanzania Vs. Kiwanda cha Uchapaji cha Taifa [1988] TLR 146**).

In their argument the learned advocate also cited the case of **Daud Pete** (supra) in which it was held that the accused has the right to question the filed certificate. I think questioning of the DPP certificate

entails questioning if it is valid one and has passed the validity test. But not to question as to why the same was filed. Mr. Nkoko also cited the decision of this Court in **Antonia Zacharia and another** (supra) in which the Court questioned the essence of the certificate. That case is distinguishable as the accused in that case have been out for 16 years from the alleged date of incident which is a very longtime unlike in the case at hand.

Having stated as above, and after found the two certificates filed by the DPP to be valid, there are no special and compelling circumstances which can make this Court to disregard the filed certificate despite its validity. In the premises this Court cannot proceed to hear and determine the application until when the DPP will withdraw it or where circumstances will change warranting vacation of this position.

Order accordingly.

  
**F.N. Matogolo**  
**Judge**  
**15/03/2018**

**Date:** 15/03/2018

**Coram:** Hon. F.N. Matogolo, Judge

**For Applicant:** Mr. Nkoko & Mr.Nkwera - Advocates

**Applicant:** Present

**Respondent:** Mr. Candid Nasua – State Attorney

**C/Clerk:** Lukindo

**Mr. Nasua Candid – State Attorney**

My Lord I appear for the respondent.

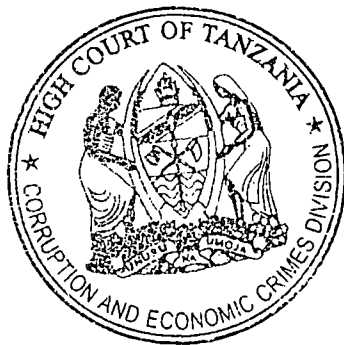
**Mr. Nehemia Nkoko and Mr. Nkwera Advocate**


My Lord we appear for the applicants.

**Mr. Candid Nasua State Attorney**

My Lord the application is for ruling today we are ready.

**Court:** Ruling delivered today the 15<sup>th</sup> day of March 2018 in the presence of the applicants and their advocates Mr. Nkoko and Mr. Nkwera learned advocates and in the presence of Mr. Candid Nasua learned State Attorney.



  
**F.N. Matogolo**  
**Judge**  
**15/03/2018**