THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT MWANZA -SUB REGISTRY

MISCELLANEOUS ECONOMIC CAUSE NO. 01 OF 2018

(Originating from economic crime case No 3 of 2018 of RM's Court - Mwanza)

ANTONIA ZAKARIA WAMBURA

TIMOTHY DANIEL KILUMILE ..... APPLICANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

R U L I N G

5/2/2018 & 26/2/2018

MATOGOLO, J.

The applicants, Antonia Zakaria Wambura and Timoth Daniel Kilumile, were arraigned in the Court of Resident Magistrate of Mwanza Region in Economic Crime case No.03/2018. They are charged with three, counts that is conspiracy to commit an offence c/s 384 of the Penal code, obtaining property by falsepretences c/s 301 and 302 of the Penal code and occasioning loss to a specified Authority contrary to paragraph 10(1) of the first schedule to, and sections 57(1) and 60(1) of the Economic and Organized Crime Control Act Cap 200 R.E 2002 as first, second and third count respectively.

They have come to this court with their application for bail. The application was drawn and filed by Mr. Kassim S. Gilla Advocate from Nexus Associates (Attorneys at law).

The application is by chamber summons made under sections 29(4)(d) and 36(1) of the Economic and Organized Crime Control Act, cap.200 R.E.2002, as amended by the Written Laws (Miscellaneous Amendments) Act, No.3/2016.

It is supported by an affidavit taken by Kassim S. Gilla, who is the applicants' advocate. The respondent was served with the chamber summons and the accompanying affidavit. He filed counter-affidavit taken by Shadrack Martin Kimaro, Senior State Attorney.

At the hearing, which took place on 05/2/2018, the applicants were represented by Mr. Kassim S. Gilla and Mr. Rutahindurwa learned advocates. Mr. Setty Mkemwa learned Principal State Attorney and Mr. Shadrack Kimaro Senior State Attorney appeared for the respondent/ Republic. On the same day, the Director of Public Prosecutions (DPP) filed a certificate to the effect that the applicants should not be granted bail on the ground that the safely and interest of the Republic would be prejudiced.

Mr. Mkemwa learned Principal State Attorney toid this court that by virtue of that certificate which was filed under Section 36(1) of the Economic and Organized Crime Control Act, (herein after referred to as the Act), the applicants cannot be granted bail.

The applicants'learned counsel, Mr. Rutahindurwa responding thereto, he admitted that they were served with the said certificate that morning. But contended that according to the recent decision of the Court of Appeal in **The Attorney General vs. Jeremiah Mtobesya**, civil Appeal No.65/2016, which was delivered on 02/2/2018, the powers of the DPP to deny bail to the applicant is no longer valid. He said in that case the issue was the legality or constitutionality of the powers of the DPP to deny bail to accused by filing a certificate. The learned advocate argued, what was before the court was Section 148(4) of the Criminal Procedure Act (CPA) which has similar wording to Section 36(2) of the Act. Mr. Rutahindurwa learned advocate read last paragraph of page 53 up to page 54 of the judgment to bolster his argument. He said on the same reasons, what Section 148(4) CPA give powers to the DPP to deny bail, Section 36(2) of the Act, in similar way was declared unconstitutional. Picking up from where Mr. Rutahindurwa ended, Mr. KassimGilla learned advocate, submitted that looking at the constitutionality of Section 148(4) of the CPA, on powers of the DPP to deny bail, the court did not discuss section 148(4) CPA in isolation. But touched other laws denying bail to the accused including Section 36(2) of the Act and the provisions in the Drug Control and Enforcement Act, No.5/2015. He said these provisions were discussed in relation to Article 30(1) of the United Republic of Tanzania constitution (The constitution).

Mr. Gilla said as all these provisions from different legislation were discussed and as all apply *Mutatis mutandis*, and as the Court of Appeal sitting as a full bench has declared them unconstitutional, the DPP

therefore has no powers to issue certificate denying bail to the applicants. The same should not be accorded any weight, as it is no longer good law, Mr. Kassim Gilla emphasized.

Responding thereto, Mr. Shadrack Kimaro learned Senior State Attorney argued that what the learned advocates for the applicants have submitted has no legal basis. He said the authority relied up does not relate to what the DPP has certified.

He said it is true that the Court of Appeal has decided on the issue of DPP certificate in **Mtobesya case** (supra)

But the Court impugned Section 148(4) of the CPA, although the Court of Appeal mentioned other laws, at the end that is , at page 70, it insisted on the impugned provision, that is Section 148(4) of the CPA. The other provisions in other laws though were mentioned, were left to the legislature to decide.

On that basis Mr. Kimaro learned Senior State Attorney said what the learned counsel for the applicants have submitted did not address on the issue at stake.

Mr. Kimaro learned Senior State Attorney, for purposes of laying a foundation on the applicability of the CPA, he submitted further that Section 28 of the Act, explains when the CPA may be applied in economic offences. That can only apply where the Act has no such corresponding provision. And that was interpreted by the Court of Appeal in **Edward E. Kambuga & Another V.R.(1990) TLR 84** where it was held that the

procedure of granting bail is provided for in the Economic and Organized Crime Control Act. Section 148(4) of the CPA did not apply.

He emphasized that where there are clear provisions in the Act, the CPA does not apply. Even the judgment cited by the counsel for the applicants does not apply. Even the wording used though appear to be similar but are not the same. And that Section 148(4) of the CPA is not an omnibus provision. Mr. Kimaro learned Senior State Attorney further submitted that this court had an opportunity to discuss on the applicability of Section 148(4) of the CPA in Miscellaneous Criminal Application No.173/2015 **Manase Julius Philemon V.R.** High Court DSM Registry in which it decided at pages 8 and 9 that the provision declared unconstitutional, that is section 148(4) CPA, is not the same as Section 36(2) of the Act. He said the constitutionality of Section 36(2) of the Act was also challenged before the High Court sitting as a Constitutional Court in Miscellaneous civil cause No.14/2016 **Gideon Wasonga and 3 others vs.The Attorney General and Another** in which the court held that Section 36(2) of the Act is constitutional. Basing on that decision which was not quashed to date it was the submission of the learned Senior State Attorney that section 36(2) of the Act is still constitutional and the certificate filed by the DPP is valid and constitutional.

On his part Mr. Setty Henry Mkemwa learned Principal State Attorney added that the DPP certificate under scrutiny is valid one, it has passed the validity test as laid down in the case of **DPP vs. Li Ling Ling,** criminal

Appeal No.508/2015 Court of Appeal of Tanzania. He therefore prayed to this Court to dismiss the application.

In rejoinder, Mr. Kassim Gilla learned advocate first stated that Section 28 of the Act is very clear that the procedure for arrest, hearing and determination of cases under the Act shall be in accordance to the CPA.

Mr. Gilla distinguished the decision in **Kambuga case** (supra) to the case at hand. In that case the appellant was charged under the Act, and applied bail under Section 148(5)(a) of the CPA. The court held, the Act has provision governing application for bail. So there was no need to invoke the CPA.

Regarding the argument that the Court of Appeal in **Mtobesya case** declared Section 148(4) CPA only unconstitutional, he said the court while discussing Section 148 of the CPA, the same was not discussed in isolation. But all three mentioned laws, were discussed together and clearly held that the DPP act of filing a certificate does not conform to the requirements of Article 30 of the constitution. Mr. Gilla said had the Court wanted to discuss Section 148(4) of the CPA alone, they could not have discussed other provisions.

He said under harmonization principle, statutes with similar provisions cannot be construed differently. That is why the court touched other provisions with similar effect.

Mr. Gilla learned advocate also said this court is not bound by the decisions in **Gideon Wasonga** and **Manase Julius Philemon cases** (supra). But also these decisions were delivered before the decision of the Court of Appeal in **Mtobesya case**.

He said the Court of Appeal decision therefore takes precedence.

In regard to the decision in **Li Ling Ling case**, Mr. Gilla learned advocate argued that the decision is distinguishable. The same was on the validity test of the DPP certificate. The test would be meaningful had the decision of the Court of Appeal in **Mtobesya case** would have not been delivered.

Mr. Gilla said generally the discussion and decision of the Court of Appeal in **Mtobesya case** was on the constitutionality and legality of powers of the DPP who is also a party to the case and his interference with the powers of the High Court.

In that discussion, they discussed essence of Section 148(4) CPA, Section 36(2) of the Act and the corresponding provision in the Drugs Control and Enforcement Act. That is why in their decision, the court held that the DPP's act does not conform to the requirements of Article 30 of the constitution, he concluded.

That is the rival arguments from both the applicants learned advocates and the learned State Attorneys.

From the foregoing submissions, there are issues which were raised by the learned State Attorneys and the learned advocates respectively worthy to be resolved by this Court in determination of the application.

> As I have pointed out earlier above, after the applicants have filed their application for bail, the DPP filed a certificate under Section 36(2) of the Act certifying that the safety and interests of the Republic will be prejudiced if the applicants are released on bail. Ordinarily where the DPP files a certificate in Court certifying that the safety and interests of the Republic will be prejudiced, that would be the end of the story. The Court cannot further inquire into the application for bail. In other words the hands of the Courts are tied up.

However the learned advocates for the applicants have not conceded to that position. They are of the view that such legal position is no longer valid. This is because the Court of Appeal has declared unconstitutional Section 148(4) of the CPA for violating requirements of Article 13(6)(a) of the Constitution.

And, as Section 148(4) of the CPA is in *parimateria* with Section 36(2) of the Act under which the certificate was made, the same is also unconstitutional. They further argued that generally the discussion and decision of the Court of Appeal in **Mtobesya case** was on the constitutionality and legality of the powers of the DPP who is also a party to the case and his interference with the powers of the High Court. The respondent raised the issue of inapplicability

of Section 148(4) of the CPA in bail applications and supported his argument by citing the decision in **Edward Kambuga case** (supra). He also cited **Manase Philemon case** (supra) to demonstrate that Section 36(2) of the Act, is not the same to Section 148(4) of the CPA.

The basis of the argument by the applicants' learned counsel is that Section 36(2) of the Act is in *parimateria* to Section 148(4) of the CPA.

For purposes of clarity the two provisions are reproduced here in below:

Section 36(1)---

> *(2)Notwithstanding anything in this section contained, no person shall be admitted to bail pending trial if the Director of Public Prosecution certifies that it is likely that the safety or interest of the Republic Would thereby be prejudiced"*

"Section 148(4) 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 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

ornotified to the officer incharge of a police station and shall remain in effect until the proceedings concerned are concluded or the Director of Public Prosecutions withdraws it".

The two provisions quoted above although are not couched in same words, but they are similar and have the same effect. That is to deny bail to the applicants if the safety or interests of the Republic would thereby be prejudiced. And once the said certificate by the DPP is filed in court, the same will remain inforce until when he withdraw it or where the proceedings concerned are concluded.

It means therefore that once the certificate is filed, the court cannot do anything with the bail application before it. It appears, this is the reason Section 148(4) CPA was challenged in a constitutional court as unconstitutional.

The court declared it unconstitutional in **Mtobesya case,** the position which was also confirmed by the Court of Appeal. But the Court of Appeal unlike the High court, went further by mentioning other provisions with similar effect, that is one found in the Act (section 36(2)) and the other in the Drugs Control and Enforcement Act with corresponding effect. If you look at both section 36(2) of the Act and Section 148(4) of the CPA, although the words used are not the same, but they are similar, and are of the same effect.

These provisions are to be construed together and harmonized wherever possible so as to ascertain the

legislative intendment and give effect to. Reading between lines of the two provisions, there is no doubt that their wordings are similar but also have same effect.

Now going to subject, a certificate filed by the DPP either under section 148(4) of the CPA or Section 36(2) of the Act is aimed at denying bail to the applicants. The only reason the DPP is bound to give is that the safety and interests of the Republic would thereby be prejudiced. It has been a practice for Courts of law not to grant bail to the accused once the DPP file a certificate. It is unfortunately that the DPP is not required to give reason.

However in exercising such powers, the DPP should be guided by the principles mentioned under Section 8 of the National Prosecution Services Act, No. 27/2008, which were also clearly elaborated by this Court in **Raza Hussein ladha and9 others Vs. Director of Public prosecutions**, Miscellaneous criminal Applications No.32 R 43 of 2014 (Dar es Salaam Registry), that is :-

"(a) The need to do justice,

(b) The need to prevent abuse of legal process; and

© The public interest."

To start with, there is no dispute that the offences which the applicants are charged with are bailable offences. They are not among the offences in which the laws prohibit bail. The incident giving rise to the

applicants to be arraigned occurred about 16 years ago, that is between June and August 2002. From that time the applicants have been free continuing with their daily activities. It is possible the prosecution mounted investigations of the case from the beginning, but did not charge the applicants immediately. Recentlythey decided to charge them. Understandbly the delay to charge them legally has no problem. But Iam not quite sure if the applicants were not informed that the prosecution had intention to charge them, nor were there any signs for their prosecution. If they were so informed or noticed such possibility, then the present certificate will serve no meaningful purpose.

But under normal circumstances it does not urgur well in any one's mind, that while the applicants have been out since the incident had occurred, there was no any danger caused by them until when they were arrested in January, 2018. It is not explained or in other words it is not clear as to what danger or effect the applicants are now likely to cause, or what acts the applicants are likely to do at the moment which is dangerous to the safety and interest of the Republic than during the whole period from 2002 when the incident is alleged to have happened.

This has tasked me a lot and it is doubtful if the first and second principles of Section 8 of the National Prosecution ServicesAct, were fully complied with by the DPP before he decided to prepare and file in Court the certificate under Section 36(2) of the Act to deny bail to the applicants. He may have acted on his own whims to do what was not even intended by the legislature. He might have done so knowing that he is not bound to

give reasons. The said certificate was not even filed immediately after the applicants were arraigned. But it was filed on the very day this application was fixed for hearing.

The applicants were arraigned in the Court of Resident Magistrate of Mwanza on 17/01/2018, and this application was filed on 19/01/2018 and respondent was served on 29/01/2018. Although the counter-affidavit was filed on 02/02/2018, but the certificate was filed in Court on 05/02/2018.

The principles enumerated under Section 8 of the National prosecution Services Act were designed to guide the DPP in the discharge of his functions. But the circumstances in which the said certificate was filed do not suggest that the DPP was so guided.

The Court of Appeal in **Jeremiah Mtobesya case** at page 68 of the judgment second paragraph stated as follows:

> *"Turning now to the requirement that the law must not be drafted too widely, it is obvious, once again, that the impugned provision does not pass that test either. The provision is too broadly drafted and overbroad, much as it applies to all offences irrespective of their seriousness. As such, it may easily give way to an abuse of the powers conferred by it as the exercise of that power wholly depends on the DPP's whims. In this regard, we are reminded of a treatise by* ***Chaskalson Woolman and Bishop*** *in Constitutional Law of South Africa, Juta,*

2nd ed.2014 at page 49 where the learned authors stated that:-

"Laws may not grant officials largely unfettered discretion to use their power as they wish, nor may laws be so vaguely worded as to lead reasonable people to differ fundamentally over their extension."

The Court of Appeal therefore stated so to emphasize the possibility of the DPP to misuse the powers conferred upon him on those provisions as the same were drafted broadly. It is because of that this court sitting as a constitution Court in **Mtobesya case** declared Section 148(4) CPA unconstitutional, the decision which was upheld by the Court of Appeal.

There is an argument by Mr. Shadrack Kimaro, learned Senior State Attorney that, in its judgment the Court of Appeal did not declare Section 36(2) of the Act, and another corresponding provision in the Drugs Control and Enforcement Act unconstitutional. It left them to the legislature to take necessary steps. I think the Court of Appeal did so on a simple reason that after saw those provisions also falling in the same category to Section 148(4) of the CPA, it could not declare them so because they were not impugned in the trial court. But the court had an observation that those provisions have the same effect and through these provisions, the DPP files certificate like in Section 148(4) of the CPA. That is why the Court of Appeal put it clearly that the legislature will take necessary steps. The Court also did so in compliance to Article 30(5) of the constitution. Otherwise it could have not noted that and remain silent about them.

What affected Section 148(4) of the CPA in the Court of Appeal judgment did not spare the other two provisions. So by virtue of the decision of the Court of Appeal in **Mtobesya case**, Section 36(2) of the Act which is in *parimateria* with Section 148(4) of the CPA should be looked at for purpose bringing harmony.

However this alone suffices to see that the two provisions are not worth to remain in the statutes books, the question is for how long the same can be spared? This is why we apply the principle of *parimateria,* which, as explained above should be construed similarly and given same effect. This Court while sitting as a constitutional Court,and while dealing with Section 119(2)and (3) of the National Elections Act, popularly known as "*Takrima*" provisions. After declare them unconstitutional and struck them out from the statute books, went further by also declaring Section 130(b) and(c) unconstitutional although the Court was not asked to so declare it. The Court did so in order to avoid absurdities. (see **Legal and Human Rights Centre(LHRC) and 2 others V. The Attorney General** [2006] TLR 240).

This also apply to the provision under scrutiny, provided that it has the same effect to the impugned provision in **Mtobesya case**, that was declared unconstitutional, in order not to cause absurdity, Section 36(2) of the Act ought not to be accorded any weight, likewise the certificate filed under it because of the circumstances under which it was filed.

The cited cases of **Manase Philemon and Edward Kambuga**(supra) are distinguishable to the case at hand. In **Manase**

Philemon case the applicant was arrested immediately after the incident and charged before a Court of Law where the applicant filed an application to the High Court praying to be released on bail. In **Kambuga case,** despite the presence of a provision in the Act catering for bail the appellants used Section 148 of the CPA. But for the case at hand I am trying to imagine the interest of the public likely to be prejudiced by the applicants now for an offence alleged to have been committed in 2002 about 16 years ago, and in the circumstances in which the applicants have been all the time since then out proceeding with their own activities. The applicants were just recently arrested on 14th January 2018. I am aware of the recent decision of the Court of Appeal in **Emmanuel Simphoria Massawe Vs. The Republic**, Criminal Appeal No 252/2016. But like the case of **Manase Philemon (**supra), the circumstances of the case at hand and of that case are different.

Although in issuing the certificate denying bail to the accused, the DPP is not required to give reasons. This has attracted criticism from members of legal fraternity and question its rationality. It is therefore very important for good explanation to be provided in order to demonstrate whether the circumstances have changed compelling detention of the applicantsin remand custody for purposes of protecting safety and interest of the public which would be prejudiced for them to remain out on bail pending trial and determination of the case facing them although from 2002 they have been free. Even if the issue is investigation, the same would have been completed long ago. As the learned counsel for the applicants have correctly submitted, the applicants are mere suspects. So

far theyhave not been convicted, they are presumed innocent pursuant to Article 13(6)(b) of the constitution. To deny them bail and let them languish in the remand prison for unknown period amounts to punishing them before their guilty is legally established by a court of law competent to try them, and this not acceptable in criminal justice. Bail is their constitutional rights protected under Article 15(2). It does not sound well that a person who is alleged to have committed an offence in 2002, and who has been out all that time, then now is denied bail on the pretex that the safety and interest of the Republic will be prejudiced for him to be out. This therefore demonstrate how powers conferred by the law upon public officials may be misused. Which on the other hand demonstrates uterior motive by a public official who did so knowingly that no Court will venture to inquire on the applicants bail.

It is a cardinal principle of statutory interpretation that statutes which are in *parimateria* and which have same effect must be construed together. Courts often do use this principle of *parimateria* in interpreting statutes. It is an external aid of statutory interpretation where it happens that internal aid is not useful. The reason behind Courts to use this principle is to avoid contradiction.

For instance the Court of Appeal of Tanzania in **Kimbute Otiniel V.R.** Criminal Appeal No.300/2011 at Arusha while interpreting Section 127(1) of the Evidence Act Cap.6 RE. 2002, borrowed a leaf from Section 118 of the Indian Evidence Act which is in *parimateria* with Section 127 (1) of Evidence Act, to quote them, the Court held at page 54:

"We commence with Section 127(1) it provides that every person shall be competent to testify unless the Court considers that in the case of a child witness by reason of tender age he or she is incapable of understanding the questions put across or of giving rational answers to them. ***Given that Section 127(1) is in parimateria with Section 118 of the Indian Evidence Act, we think that Sarkar's Law of Evidence 17th Ed.P.2131 best summarize the position" ----------*** *----------"*(emphasis supplied)

Again at page 61 of the same judgment, while referring to G.P.Sing's Principles of Statutory Interpretation, 9th Ed P.3, the Court emphasized on the need to read a section in its context which means to read:-

*"**The statute as a whole**, the previous state of the law, **other statutes in parimateria** general scope of the statute and the mischief that it was intended to remedy."*

The same principle was applied by the Court of Appeal in ***Lausa Athuman Salum Vs. Attorney General,*** Civil case No.83/2010 at pages 10,11 and 12. I cited the two cases to demonstrate that the statutes/provisions in *parimateria* are construed together, if the Court of Appeal in **Mtobesya case** has declared Section 148(4) of the CPA unconstitutional provided that Section 36(2) of the Act is couched in similar words, and has the same effect, that is the two provisions were aimed to cure the same mischief, then Section 36(2) of the Act in that circumstances cannot have legal force upon which the DPP could safely rely. And more

so taking into account that the certificate was filed on 5/2/2018 after the decision in **Mtobesya case** was delivered, which was delivered on 02/2/2018. Even if Section 148(4) would not have been declared unconstitutional. But I have pointed out herein above, that it is illogical for the DPP to file a certificate denying bail to the applicants for the offence alleged to have been committed between June and August, 2002. It should be born in mind that, that law, Section 36(2) of the Act was not made for the purpose of punishing people. This Court in the case of **Prof. Dr. Costa Ricky Mahalu and Another vs. The Hon. Attorney General** miscellaneous civil cause No.35 of 2007 (DSM main Registry) (unreported) observed that courts should notremand suspects in order to punish them. They have constitutional right to freedom of movement. The applicants are mere suspects, and they should not be considered as convicts to be denied even their rights to bail.

But again laws should be interpreted with a view to dispense justice to all (see **Rashid Ndimbe vs. Republic** Revision No.22/2014 (H/Court DSM Registry).

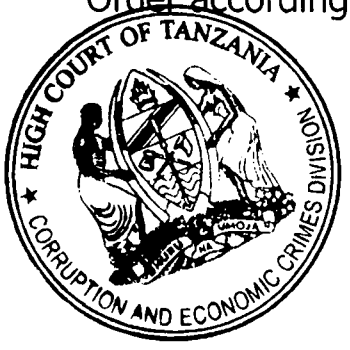
Above all, as I have stated now and then, the incident leading to the prosecution of the applicants occurred 16 years ago. If the applicants have been out for such a prolonged period, now, after their arrest they cannot cause any harm to the safety and interests of the Republic. If they are in a position to prejudice such safety and interest they would have done long time ago from the date the offence is alleged to have been committed.

The DPP's acts to file the certificate denying bail to theapplicants I can say is just an expression of fear. But expression of feeling or fear cannot oust jurisdiction of Court (see the case of **MT 80186 PTE Henry Mwisongo V.R,** criminal application No.19/2008 (High Court DSM Registry).

The fear by the DPP if there is unjustified because, by the nature of the offences the applicants are facing, and the amount involved, already the law prescribes conditions for bail which are prohibitive. The DPP therefore has no reason to fear.

Having so explained as above, and taking into account the decision of the Court of Appeal and the fact that the DPP is also a party to the case, filing a certificate for purpose of denying bail the other party to the case is unjustifiable. This Court agrees with what the applicants learned advocates have submitted. In the circumstances of this case the DPP`s certificate is accorded no weight, the application is to be heard on merit.

Order accordingly.



F.N.MATOGOLO
JUDGE
26/02/2018