IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

MISC. CRIMINAL APPLICATION NO. 43 OF 2020

(Originating from the Court of the Resident Magistrate of Lindi at Lindi in Criminal Case No.22 of 2020)

MAHADHY MMOTO.....1ST APPLICANT

AHAMDAD ISSA BILAL.....2ND APPLICANT

RAMADHAN MOHAMED CHIKAWE .....3RD APPLICANT

FADHIL SLIM AKRAM .....4TH APPLICANT

RASHID SAID KAUKUTU.....5TH APPLICANT

MARTIN DAVID KANANGU.....6TH APPLICANT

MARKO MAKOYE MPINA .....7TH APPLICANT

SALUM MOHAMED JABU.....8TH APPLICANT

SALUM MOHAMED PAHI.....9TH APPLICANT

ALLY SALUM LIOMENGE.....10TH APPLICANT

SHABANI SYLVESTOR MKANE.....11TH APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

7 & 10 December, 2020

DYANSOBERA, J.:

The applicants herein stand charged in the Resident Magistrates' Court of Lindi at Lindi with having in possession of offensive materials c/s 8 (1) and (2) of the National Security Act [Cap. 47 R.E.2002] in which it is alleged by the prosecution that on 28th October, 2020 at Boma Street, Boma Ward within Nachingwea District in Lindi Region, without lawful authority were found

having in possession of 40 litres of petrol, two face black masks and a machete.

In their endeavour to vindicating their rights to bail, the applicants have, through Ms Tekla Kimati, learned Advocate, come to this court armed with an application made under a certificate of urgency and preferred under sections 148 (3) and section and 392A (1) of the Criminal Procedure Act [Cap.20 R.E.2002] seeking for the following orders:

1. That the Honourable Court may be pleased to grant bail to the applicants on conditions it may deem it fit pending trial of Criminal Case No. 22 of 2020 at the Resident Magistrate Court of Lindi at Lindi.
2. Any other relief this Court may deem fit and /just to grant to the applicants.

The application is supported by an affidavit deponed to by Ms. Tekla Kimati, learned Advocate and contains a total of nine paragraphs.

The application has been resisted by the respondent Republic on whose behalf stands Mr. Paul Kimweri, learned Senior State Attorney. Apart from filing a counter affidavit, the respondent has also preferred a notice of preliminary objection on a pure point of law thus:

> "This application is barred by the law as the Director of Public Prosecutions has filed a Certificate to object bail to the accused persons/applicants herein."

During the hearing of the preliminary objection, Mr. Paul Kimweri, learned Senior State Attorney stood for the respondent and argued the preliminary objection whereas, the applicants were represented by Mr.

Rainery Songea, learned counsel who argued in opposition of the said preliminary objection.

Supporting the preliminary objection, Mr. Kimweri submitted that this application for bail is barred or restricted by the law as the DPP on behalf of the Republic has filed a certificate objecting bail of the applicants. He informed the court that a certificate by the DPP was filed in the RM's court, Lindi in respect if Criminal case No. 22 of 2020 which is the case for which the applicants are seeking bail before this Honourable court. He prayed the court to take judicial notice of the said certificate and which has been attached as an annexture in the counter affidavit. Noting that the said certificate has been made under section 19 (1) (2) of the National Security Act Cap 47 of the Laws of the land, learned Senior State Attorney laid emphasis on sub-section (2) of the said section and pressed that under section 19 of there are three elements which are very important to consider. He mentioned the elements which are also termed as valid tests to be; one that such certificate must relate to the pending trial or pending appeal. Two that the DPP must certify in writing in his own hand. Three, that the certificate must state that the safety or interest of the United Republic is likely to be prejudiced. To buttress his argument, he relied on the case of **DPP Versus Ally Naru Dirie and Anor**, [1988] TLR at page 2002 and argued that such valid tests apply to this case.

It was in his further submission that the certificate is still in force having not been withdrawn by DPP but also Criminal case No. 22 of 2020 under which the certificate has been filed and has not been withdrawn and therefore is still valid.

Admitting that bail is a constitutional right, learned Senior State Attorney argued, however, that such right is not automatic as clearly stated in

the case of **DPP v. Daud Pete** [1993] TLR at page 22 in that liberty and freedom of accused person may be curtailed under certain circumstances; for instance when the law forbids. He further argued that to the mind of Human Right activists this may sound awkward but that when the law is enacted by the legislature the duty of the court is to apply as it is and this position was well stated in the case of **NMB v. Mabigi Wanjagi** [1986] TR 37 on the authority that Judges and Magistrates are enjoined to apply the law as they find it even if they feel it is unjust. As one of the celebrated English CJ. Lord Mansfield had once said;

> "The court should apply the law even if the sky will fall. If the law is unjust it is for the Parliament to a mend it but not for the court to refuse to apply it."

Mr. Kimweri also relied on the case of **Leornard Johnes Igogo V.R, Criminal** Application No. 25 of 2019 High Court Mtwara in which this court refused to grant bail after satisfying itself that the mentioned three validity tests were established. He admitted that the validity test is applicable under section 36 of Cap 200 and should therefore, apply mutatis mutandis with S.19 of the National Security Act.

He concluded that since the certificate by DPP in respect of Criminal Case No. 22 of 2020 is still in force, the grant of bail is barred and the application on hand should be dismissed.

On his part, Mr. Songea holds belief that this court has power to grant bail and urged the court to apply the law as it is insisting that the court is not barred by the Certificate of DPP to grant bail but only police officer contending that if the Parliament intended to bar the court as well to grant bail, it would have clearly said so.

It was learned counsel's further contention that the argument by the Senior State Attorney that S.19 of National Security Act is in pari materia with Section 36 of the Economic and Organized Crime Control Act is not correct; only that the latter is pari materia with S.148 (4) of the Criminal Procedure Act and stressed that Section 19 of the National Security Act has no similarity with section 36 of Economic and Organisation Crime Control Act. Mr. Songea urged the court to interpret the words literally. He elaborated that the validity test applies if the DPP has filed a certificate under section 36 (4) Cap. 200 or section 148(4) of the CPA; that they knew that section 19 bars the police and not the court and that is why they came to court.

With respect to the cases cited by Mr. Kimweri, learned advocate argued that they are distinguishable from the present case and pressed that the applicants should be granted bail.

In a short rejoinder, Mr. Kimweri denied to have said that sections 19 of the National Security Act is the same as sections 36 of Cap. 200 and 148 of the Cap .20 but that the validity test applies to provisions of the laws. He, therefore, denied to have misled the court.

Admitting that section 19 of the National Security Act does not talk of the court barring the grant of bail upon the DPP filing a certificate, Mr. Kimweri laid emphasis under 19 (2) of the National Security Act and urged the court to give it a purposive interpretation and find that the court is also restricted to grant bail.

I have considered the affidavit filed in support of the application, the submissions by both the learned Senior State Attorney representing the respondent and the learned Counsel for the applicants. I have also taken into

account the case laws referred to me as well as the provisions of section 19 (1) and (2) of the National Security Act.

It is common ground that the Director of Public Prosecutions has filed before a Court of a Resident Magistrate at Lindi a Certificate under section 19 of the National Security Act [Cap. 47. R.E.2020] denying the applicants' admission to bail on the ground that the safety or interests of the Republic would be prejudiced.

The issue for consideration is whether the said provisions cover the court. Section 19 of the National Security Act provides:-

> (1) Notwithstanding anything in this section contained, no police officer, after a person is arrested and while he is awaiting trial or appeal may 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.
>
> (2) The 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.

There is no dispute that the wording of the said provision clearly refers to **a police officer**. Nowhere in both subsections is **a court** mentioned. I think it is trite that where the words have a plain meaning, the court is not to busy itself with supposed intention. Parliament intended what it said. Here I can do no better than borrow the wisdom of Justice G.P.Singh in his book

'Principle of Statutory Interpretation', 8th edn., Reprint 2002, **Wadhwa and Company, Nagpur,** where on page 11 stated:

> 'The question is not what may be supposed to have been intended but what has been said.'

Further, in **Sussex Peerage Case (1844) 11 Cl & Fin 85**, His Lordship Tindal CJ stated as follows**:**

> "..the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver."

With the above authorities, the words under section 19 of the National Security Act which cover a police officer, deliberately exclude a court and that was the best declaration of the law giver. That said, I am satisfied that the provisions under section 19 (1) and (2) of the National Security Act do not bar a court of law from granting bail to an accused person where the Director of Public Prosecution files a certificate.

The respondent's preliminary objection falls away.

I have considered the counter affidavit of Mr. Paul Kimweri which contains nine (9) paragraphs. I have noted that, apart from his reliance on the Certificate filed by the Director of Public Prosecutions as evidenced in paragraph 9 of the said counter affidavit, the application for bail has not been contested. In that respect and without wasting court's precious time, I embark on considering the merit or otherwise of the applicants' application.

In my view, the court, before remanding an accused, must be satisfied, on the material available, that there are cogent reasons for refusing the accused bail, hence refusal of bail should not be punitive. The Court of Appeal in the case of **Hassan Othman Hassan @ Hasanoo versus R**, Criminal Appeal No. 193 of 2014 observed at p. 8 of the typed judgment:-

> "Guided by the principle that an accused person is presumed innocent until proved guilty and the purpose of granting bail to an accused person is to let him enjoy his freedom so long as he does not default appearance in court when so required until his rights are determined in the criminal case.....".

This this presumption is also enshrined in our Constitution of the United Republic of Tanzania, 1977 [Cap. 2 R.E. 2002]. Article 13 (6) (b) of the said Constitution provide as hereunder:-

"(6) for purposes of ensuring equality before the law, the state shall make provisions:-

a) .....(not relevant)

b) Every person charged with a criminal offence shall be presumed innocent until he is proved guilty".

This provision was a subject on interpretation and elaboration by the Court of Appeal of Tanzania in the case of the **DPP v. Daud Pete**, Criminal Appeal No. 28 of 1990 reported in [1993] TLR 22. In that case, the Court of Appeal observed that the above English translation does not correctly reflect the Swahili version which is the controlling version and that the concept contained in the Swahili version is broader than the English translation. The

Court then gave a proper translation to be that "No one charged with a criminal offence shall be treated like a convict until his guilt is proved".

Denying bail to the applicants who are charged with a bailable offence would, in my view, be tantamount to treating them like convicts which treatment our Constitution prohibits.

Besides, I am under the impression that the Parliament, when enacting section 19 of the National Security Act was not unaware of Article 107A (1) of the Constitution of the United Republic of Tanzania, Cap. 2 (R.E.2002) which is to the effect that the Judiciary shall be the authority with final decision in dispensation of justice in the United Republic of Tanzania and knew that tying the hands of the court would be tantamount to violations of the Constitution of the United Republic of Tanzania which is the supreme law of the land.

It is my duty to consider the probability or otherwise of the accused persons, the applicants in this matter, answering to his bail and attending the trial; a very crucial consideration because, bail is contemplated to procure the release of a person from legal custody by undertaking that he shall appear at the time and place designated and submit himself to the jurisdiction of the court. As the record clearly shows, there is no suggestion, leave alone indication that the applicants are flight risk.

The sum total of the above is that I grant the application for bail and order the applicant to be admitted to bail on the following conditions:-

1. Each applicant to deposit in court a title deed or any document evidencing possession of immovable property situated within Lindi Region valued at not less than Tshs. 10,000,000/.

2. Each applicant to secure two reliable sureties each for executing a bond of Tshs. 10,000,000/=. The sureties to be approved by the Deputy Registrar, High Court, Mtwara Registry.
3. The applicants shall surrender a passport or any travel document to the police at Nachingwea Police Station.
4. The applicants are hereby restricted from travelling or visiting any place outside Lindi and Mtwara Regions until they seek and obtain written permissions from the Resident Magistrate in charge of Lindi Region.

Order accordingly.

W.P. Dyansobera

Judge

10.12.2020

This ruling has been delivered under my hand and the seal of the court this 10th day of December, 2020 in the presence of Mr. Paul Kimweri, learned Senior State Attorney for the respondent and in the presence of Mr. Rainery Songea, learned Counsel for the applicants.

W.P. Dyansobera

Judge