

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

ECONOMIC CRIME REGISTRY

AT DAR ES SALAAM

MISC. ECONOMIC CAUSE NO. 52 OF 2017

(Arising from Economic Crime Case No 72 of 2017 pending at Resident Magistrate Court of Dar es Salaam at Kisutu)

1. DONATHA PETER KASSOLO
2. ZHANG ZHILAI }**APPLICANTS**

VERSUS

REPUBLIC**RESPONDENT**

RULING

Korosso, J.

Before the Court for determination is an application filed by the Donatha Peter Kassolo (1st applicant) and Zhang Zhilai (2nd applicant) under Certificate of urgency pursuant to section 29(4)(d) and 36(1) of the Economic Crimes Control Act, Cap 200 RE 2002 (as amended) (EOCCA) and Article 13(6)(a) and (b) of the Constitution of the United Republic of Tanzania 1977 (as amended from time to time) and any other enabling provisions of the law. The application is supported by an affidavit sworn by Symporian Revelian Kitare, Learned advocate averring to be duly instructed by the two applicants to represent them in the application.

The application sought for the Court first, to release the applicants on bail pending hearing and final determination of the Economic Crime Case No. 72 of 2017 pending at the Resident Magistrate's Court of Dar es Salaam Region at Kisutu. Second, for costs for the application abide the results of this application and third for any other order the Court may deem fit and just to grant. The applicants upon being authorised by the Court also filed a supplementary affidavit and reply to the Counter affidavit filed by the respondents. At the hearing of the application, the applicants counsel prayed for the Court to adopt the supporting affidavit so that it forms part of their submissions. The affidavit also appended a copy of the charge sheet containing charges facing the applicants in the above mentioned economic crime case pending at RM's Court at Kisutu.

On the part of the Respondent Republic upon service of the application, filed a counter affidavit sworn by Tulumanywa Majigo, learned State Attorney also averring to be duly authorized to represent the Republic. The Counter affidavit in context took note of the contents of some paragraphs in the affidavit and supplementary affidavit of the applicants and disputed contents of paragraphs 5, 7 of the affidavit and put the applicants to strict proof. The respondents also filed a Certificate issued by the Director of Public Prosecutions under section 36(2) of the EOCCA Cap 200 RE 2002 certifying that the applicants should not be granted bail because if bail is granted, the safety and interest of the Republic will be prejudiced.

Upon prayers by the parties the Court preceded to hear the merits of the application and the weight to be accorded to the DPP's Certificate objecting to grant of bail to the applicants. To support the application the counsel for the applicants contended first that the fact that the Court has jurisdiction to hear the application and that the application is competent having regard to the provisions cited to move the Court and the fact that there was a pending economic case awaiting committal proceedings and that the charged amount was above ten million shillings and thus vesting the power to determine the matter before this Court by virtue of section 29(4)(d) of the EOCCA, Cap 200 RE 2002. The applicants counsel also submitted that the applicants were husband and wife whose issues presently had no one to care for them upon the arrest of the parents- that is the applicants.

With regard to the Certificate denying bail issued by the Director of Public Prosecutions, the applicants counsel had two points of contention of this. First that the provision empowering the DPP to issue such a Certificate was declared to be unconstitutional as held in the case of ***Daudi Pete vs Rep*** (1995) TLR 22 at pg. 22 where the Court of Appeal stated a provision denying bail or where offences are unbailable that such provision violate freedom of individuals and separation of powers between organs of the state and therefore are null and void. That a certificate denying bail on pretext that granting of bail will prejudice the safety and interest of the Republic as is the case in the present matter, the issuer of such certificate has a duty

to explain how the accused will likely prejudice the safety and interest of the Republic.

The applicants counsel argued that the Respondents have failed to provide any such explanation and that in any case, previously the applicants were arraigned and granted bail on similar charges before the case was withdrawn. That at no time when the applicants were on bail then did they jump bail or disappear. That they applicants upon being granted bail then had surrendered their passports which are still retained by the Resident Magistrate Court of Dar es Salaam at Kisutu. That this in itself should guarantee their availability when granted bail and also show the Court that there is no likelihood of the applicant to endanger the safety or interest of the Republic as alleged in the Certificate by the DPP.

The applicant counsel also reminded the Court that granting of bail is a discretion of the Court upon being satisfied that the accused persons or applicants will appear to stand their trial while on bail as pronounced in ***Onasaa Mushi vs. Republic*** (1980) TLR 170, that it is the unavailability of the accused which determines whether or not to grant bail it being discretionary upon the Court.

The respondent's rival submissions premised by presenting their objection to grant of bail to the applicants for reason that the applicants have failed to advance any substantive reasons for the Court to grant bail nor to invalidate the certificate by the DPP denying grant of bail to the applicants. The learned State Attorney contended further that the issue of there being no one to care for the applicants

children should not be a relevant issue for consideration together with the fact that the applicants failure to show any evidence to prove that the applicants are spouses or that they have children apart from the oral submission presented by the applicants counsel in Court.

That the oral submissions cannot be taken to be plausible evidence and in any case the personal information for the applicants in the affidavit is not properly verified the counsel having failed to show where he gathered the information from since it cannot be from his own knowledge as verified. The learned State Attorney conceded the fact that the applicants had been charged previously but contended that they had jumped bail leading to withdraw of charges and filing of new charges by the Republic. The learned State Attorney sought the Court to find the holding in **Daudi Pete's case** to be distinguishable since it dealt with different provisions of the law and the circumstances were different.

The respondents argued further that section 36(2) of EOCCA used to issue the DPP certificate complies to the three conditions pronounced in **Ally Nuru Dirie's case** (1988)TLR 282 so as to determine the validity of the issued DPP certificate. That the Court of Appeal in the said case stated that where the Court is satisfied that the said conditions are fulfilled then it should not grant bail. The case of **DPP vs Li Ling Ling**, Criminal Appeal No. 508 of 2008, the Court of Appeal adopted the stated three conditions and added that the Court upon determination of the validity of the certificate should end there. That any argument that the certificate by the DPP violates

basic rights or separation of powers, the case of Manase Julius Philemon vs Republic, Misc Criminal Application No. 173 of 2015 addressed this stating such contention has no merit because the DPP issues the Certificate exercising his duties as enshrined under Article 59B of the Constitution and section 8 of the National Prosecution Service Act 2008.

The learned State Attorney did contend that the case of **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 respondents also contended that the challenge of the legal provisions on their constitutionality should be done in a proper forum and not in a bail application. They thus prayed for the Court to dismiss the application.

In rejoinder, the applicants counsel reiterated their submissions in chief and denied the respondents claim and denied that the applicants have ever jumped bail to any offence charged and that the said assertion by the learned State Attorney was a misrepresentation of facts since there was nowhere in the proceedings annexed to the applicants affidavit stating this allegation. That the Court should also consider the potential abuse

of power by the DPP if the Court will consider the argument by the learned State Attorney that the DPP is not required to provide reasons for drawing the certificate.

We have gone through and considered all the evidence and supporting documents before the Court from the parties and also the oral submissions by the counsels for the parties. First and foremost we are satisfied that this Court has jurisdiction to entertain the application having regard to the fact that the charges against the applicants are yet to undergo committal proceedings, that is, there is a pending economic case at RM's Court Dar es Salaam at Kisumu and that the amount charged is above ten million shillings. We are also satisfied that the provisions cited to move the Court to hear and determine the matter that is, section 29(4)(d) and Section 36(1) of the EOCCA, Cap 200 RE 2002 are proper. We have also noted the fact that the second prayer by the applicants which states that costs for the application abide the results of the application, is not a proper prayer in a criminal application and therefore we move to strike it out.

A copy of the charge sheet referred to in paragraph 3 of the annexure to the application supporting affidavit KCA-1 it reveals that the applicants face 5 counts. Leading Organized Crime; Unlawful Possession of Government Trophy at USD 304720.0 equivalent to Tshs. 396,136,000/-, all being economic offences. From annexure KCA-2 referred to in paragraph 6 of the affidavit, reveals that the applicants were previously charged in economic case No. 2 of 2009

and then Economic Crimes case No. 10 of 2012. Economic case No. 10 of 2012 from the Court proceedings showed that it was withdrawn by the State Attorney vide Section 91(1) of the Criminal Procedure Act, Cap 20 RE 2002. There is nowhere that it shows that the applicants absconded or jumped bail and the assertion in paragraph 7 of the counter affidavit are not supported by any proof from Court records. Therefore we shall not take the assertion by the respondents that the applicants had previously jumped bail into context.

In this matter, the Director of Public Prosecution filed a certificate under section 36(2) of the EOCCA stating that the applicants should not be granted bail because grant of bail to them will prejudice the safety and interest of the Republic. It is important at the outset to state that, as also alluded to by the applicant's advocate, bail is a constitutional right and the offences which the applicants are charged with are bailable. The position of law reiterated and restated in various holdings of the Court of Appeal and this Court is that bail is a right, and in bailable offences there is no question of discretion in granting bail is vested in the Court and that Courts are expected when considering bail applications to be guided by law and to consider the availability of the applicant to appear during hearing of the trial if granted bail. In effect the Court's discretion is left in determining the value of the bond and the nature of sureties and consideration of the mandatory conditions.

We now move to the other argument by the counsel for the applicants that the DPP's certificate denying bail to the applicants

without advancing reasons for the same was an arbitrarily act aimed at interfering with the powers of the Court in exercising its discretion to grant bail. On this assertion, we share the views expressed by the learned State Attorney on this that the issuance of the Certificate is within the powers of the DPP which he derives from the Constitution- Article 59B and expounded in relevant legislation advancing the powers of the DPP. We thus find that since judicial powers are also derived from the Constitution vide Article 107, it is clear that each organ executes powers within the boundaries of law and there is no interference can be shown between the two organs. That the filing of the certificate denying bail by the DPP cannot in itself be said to lead to the DPP powers to be seen to interfere with the Courts discretion, since the powers of both organs are expounded by the law. Section 36(2) of the EOCCA empowers the DPP to issue such a certificate and the said certificate according to section 36(3) is to exist until it is withdrawn or the case runs its Course.

The issue for consideration therefore becomes what is the effect of such a certificate once issued and filed before the Court? The counsels for both parties having expounded their positions and prayers and we have considered their contentions. 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; (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.

With regard to the holding in ***Daudi Pete case***, it should be borne in mind that this case dealt with the right to bail and circumstances and procedure for denying bail to an accused person, that is, addressing section 148(5)(e) of the Criminal Procedure Act, 1985 and also whether such denial was violation of the presumption of innocence and right of equality before the law. All in all it dealt with unbailable offences. In fact the Court held that, Section 148(5)(e) of CPA does not violate Article 13(6)(b) of the Constitution which prohibits treating an accused person like a convicted person because denying bail to an accused person does not necessarily amount to treating such a person like a convicted person. Therefore we find that the said holding is distinguishable having addressed the Criminal Procedure Act, 1985.

The contents of section 148 of CPA and 36 of EOCCA and may seem similar, there are still different and independent sections under separate legislations. The EOCCA has a specific provision providing procedure for bail and therefore one cannot resort to the CPA unless there is a lacuna which we find there being no such lacuna which will lead this court to resort to procedures in the CPA. The constitutionality of section 36(2) of the EOCCA Cap 200 RE 2002, has yet to be determined by this Court or the Court of Appeal. Section 4(2) of the CPA contents are also applicable to cement this position.

We find that, challenging the fact that a provision violates the Constitution has a different procedure which is open to the applicants. Therefore the applicants may proceed accordingly.

There is also another avenue they can process if they are so inclined. It should be understood that the powers of the Director of Public Prosecution are Constitutional under Article 59(B) where it states that, "*the DPP in exercising his powers, he shall be free, shall not be interfered with by any person or with any authority and shall have regard to the following: (a) the need to dispensing justice; (b) prevention of misuse of procedures for dispensing justice; and (c) public interest*".

Therefore if the applicants feel that the DPP Certificate contravenes the principles outlined above they also may proceed to challenge this through a proper forum- challenging abuse of authority by public officials.

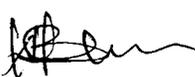
Looking at section 36(2) of the EOCCA, it states categorically in even its choice of words that where the Director of Public Prosecution has certified that the safety or interests of the Republic will be prejudiced if any person is granted bail then the Court shall not grant bail. The position is cemented by various cases including ***Method Malyango Busogo and Another vs R., Misc. Criminal Application No. 51 of 2015; Lucas Galuma Nyagabati vs. R, Criminal Application No. 107 of 2015; and the DPP vs Li Ling Ling, Criminal Appeal No. 508 of 2015***, whereby in this case the Court of

Appeal stated that *"the position of the law as stated in the **Ally Nuru Dirie's** case is that once the DPP's certificate has met a validity test, the court shall not grant bail"*.

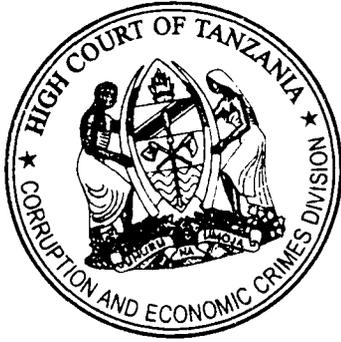
Further consideration of the above factors makes it clear that, once there is a Certificate filed by the DPP like the case on hand, the Court has to satisfy itself that the said certificate has met the validity test geared at also testing whether the principles guiding the functions of the DPP have been complied with within the fountains of administration of justice and advancing the rule of law.

Having found that the DPP's Certificate issued under section 36(2) of the Economic and Organized Control Act to be valid. In the premises, the bail application is denied 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. Ordered.




Winfrida B. Korosso
Judge
8th January 2018

Ruling is delivered this day in chambers in the presence of Mr. T. Majigo, learned State Attorney for the respondents and Mr. S. Kitare, Learned Advocate for the 1st and 2nd applicants. Also present were the 1st and 2nd applicants.



Winfrida B. Korosso

Winfrida B. Korosso
Judge
8th January 2018