

TANZANIA / JUDGMENT

anold jifike nzali others vs republic

2023 tzhc 22778 25 september 2023

COURT
TZHCDECIDED
25 September 2023

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IN THE HIGH COURT OF TANZANIA MBEYA DISTRICT REGISTRY AT MBEYA CONSOLIDATED MISCELLANEOUS CRIMINAL APPLICATION NO. 73, 75 & 76 OF 2023 (Originating from Economic Crimes Case No. 3 of 2023 from the Resident Magistrate Court of Mbeya at Mbeya) ANORD JIFIKE NZALI..... 1stAPPLICANT BWIGANE SETH MWAMELO..... 2ndAPPLICANT PETR JOSEPH MANGA @ WEMA JOSEPH MANGALA.....3rdAPPLICANT BENEDICT SALVATORY MILLINGA..... 4thAPPLICANT ZUELI ABASI MKWAMA..... 5thAPPLICANT KHALID ABDALLAH HABIBU.....6thAPPLICANT FADHILI FRED LWESYA..... 7thAPPLICANT SHUKURU SIMBEYE..... 8thAPPLICANT EZEKIA ADAM MWAISUNGA..... 9thAPPLICANT DANIEL JUMA TWEVE..... 10thAPPLICANT TALIKI PAULO SAMSON..... 11th APPLICANT VERSUS REPUBLIC..... RESPONDENT

RULING

September 2023 Nongwa, J. This is a consolidated application for bail pursuant to order of the court dated 18th September 2023 that applications no. 73, 75 and 76 of 2023 be Page 1 of 11 consolidated as they originate from the same Economic Crimes Case No. 3 of 2023 from the Resident Magistrate Court of Mbeya at Mbeya. All three applications are brought before this Court pursuant to Section 29 (4)(d) and 36(1) of the Economic and Organized Crime Control Act No. 15 of 2015 [Cap 200 R.E. 2022]. It combines three applications, the first application is by 1st to 9th applicants, registered as Misc. Criminal Application no. 73 of 2023, second application is by 10th applicant registered as Misc. Criminal Application, no. 75 while the third application is by 11th applicant, registered as Misc. Criminal Application no. 76 of 2023. All the three applications are against the Republic praying for orders that, this court be pleased to grant bail to the Applicants on the conditions it may deem fit pending final determination of Economic Crimes Case No. 3 of 2023 pending in the Court of the Resident Magistrate of Mbeya at Mbeya and any other order which this Court may deem fit and just to grant. The background of the application

can be briefly stated as follows; the applicants together with others not party to this application, on 28th August were arrested and taken to the Resident Magistrate Court of Mbeya at Mbeya Page 2 of 11 where 16 counts under the Economic and Organized Crimes Control Act, Cyber Crimes Act and Money Laundering Act, were read to them. As for the applicants, they are all faced with one count of LEADING ORGANISED CRIME contrary to paragraph 4(1) (a) of the first Schedule to and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act, Cap. 200 R.E. 2022, where it is alleged that on divers dates between 3rd day of August, 2021 and August, 2023 in different places within the United Republic of Tanzania intentionally organized a criminal racket to wit; obtaining fraudulently three hundred eighty two million seven hundred sixty four thousand two hundred (Tshs.382,764,200/=) by using unauthorized devices to wit point of sale system. At the same time each of the applicant (save for 1st and 5th applicants), is facing one count of UNLAWFULL POSSESSION OF ILLEGAL DEVICE; Contrary to sections 10 (1) (a) of the Cyber Crimes No. 14 of 2015 read together with paragraph 36 to and section 57 (1) and 60 (1) of the Economic and Organized Crime Control Act (R. E. 2022). The facts in a nutshell are that, 2nd applicant, BWIGANE SETH MWAMELO on 9th day of August, 2023 being the revenue collector for Kandete Ward in Busokelo District Council within Rungwe District was found in Kandete Village, Kandete Ward within Rungwe District in possession of Page 3 of 11 illegal device to wit one point of sale machine with serial number ...60250195(sic), which was designed for purpose of committing an offence to wit obtaining fraudulently sum of TZS. 18,737,400.00/= by using the said illegal device. The 3rd applicant, PETR JOSEPH MANGALA @ WEMA JOSEPH MANGALA, on same dates, being the revenue collector for Mapogoro Ward within Mbarali District Council in Mbeya Region was found at Mlangali Village in Mapogoro Ward in Mbarali District within Mbeya Region in possession of illegal device to wit one point of sale machine made NFC which was designed for purpose of committing an offence to wit obtaining fraudulently sum of Tshs.21,936,000.00/= by using the said illegal device. As for 4th applicant BENEDICK SALVATORY MILINGA, on 15th day of August, 2023 being an employee of Mbeya District Council as the computer system operator was found in Mbalizi District within Mbeya Region in possession of illegal device to wit one point of sale .machine made TELPO with IMEI numbers 863779050138605 and 863379050158660 which were designed for purpose of committing an offence to wit obtaining fraudulently sum of Tshs. 14,759,250.00/= by using the said illegal device. For the 6th applicant, KHALID ABDALLAH HABIBU, on 28th day of July, 2023 being the revenue collector of Kapunga Ward in Mbarali District Council within Mbeya Region Page 4 of 11 was found Chansalaka village Chimala Ward in Mbarali District within Mbeya Region in possession of an illegal device to wit one point of sale machine with serial number 000056041010 E/05 which was designed for purpose of committing an offence to wit obtaining fraudulently sum of Tshs. 15,632,000.00/= by using the said illegal device. It has been elaborated further that, the 8th applicant, SHUKURU SEMBEYE on 5th day of August, 2023 being the revenue collector for Isongole Ward in Ileje District Council within Mbeya Region was found at Isongole village Isongole Ward in Ileje District within Mbeya Region in possession of an illegal device to wit one point of sale machine with IME number 000056041010 E10510000011 which was designed for purpose of committing an offence to wit obtaining fraudulently sum of TZS.57,845,050.00/= by using the said illegal device. The 9th applicant, EZEKIA ADAM MWAISUNGA is alleged that on 10th day of August, 2023 being the

revenue collector for Mbeya City Council in Mbeya Region was found at Itezi Ward within the District and Region of Mbeya in possession of illegal device to wit one point of sale machine made NFC which was designed for purpose of committing an offence to wit obtaining fraudulently sum of Tshs. 108,158,900.00/= by using the said illegal device. Page 5 of 11 As for the 10th applicant, DANIEL JUMA MTWEVE on 5th day of August, 2023 being the revenue collector for Tunduma District Council in Songwe Region was found at Majengo village in Majengo Ward in Tunduma District within Songwe Region in possession of illegal device to wit one point of sale machine with IME number 000056041100 E10510000023 which was designed for purpose of committing an offence to wit obtaining fraudulently sum of Tshs.47,843,600.00/= by using the said illegal device. Lastly is the 11th applicant, TALIKI PAUL SAMSON who is said to have on 10th day of August, 2023 being the revenue collector for Isonje Ward in Rungwe District Council in in Rungwe District within Mbeya Region was found at Isonje B in Isonje Ward in Rungwe District within Mbeya Region in possession of an illegal device to wit one point of sale machine with serial numbers A340320E00500285 with IME numbers 863379050138415 and 863379050158470 which were designed for purpose of committing an offence to wit obtaining fraudulently sum of Tshs. 15,085,000.00/= by using the said illegal device. The accused persons were not invited to plead thereto for the court had no jurisdiction to hear the case. The applicants have been represented by a team of six learned counsels led by Mr. Tasko Luambano. Others are Page 6 of 11 Ms. Gladness Luhwago, Ms. Joyce Kasebwa, Ms. Irene Mwakyusa, Mr. Maulid Muganyizi and Mr. Geoffrey Mwakatundu while the respondent enjoyed the service of the learned State Attorney, Mr. Lordgard Eliaman. At the hearing, Mr. Luambano, briefly submitted that all the applicants are faced with bailable offences before the resident magistrate court of Mbeya, and therefore, under Section 29 (4)(d) and 36(1) of the Economic and Organized Crime Control Act No. 15 of 2015 [Cap 200 R.E. 2022], they pray as a matter of right to be released on bail on the conditions that may deem fit pending final determination of Economic Crimes Case No. 3 of 2023 pending in the Court of the Resident Magistrate of Mbeya at Mbeya. He contended that the applicants together with others who are not part of this application have been in custody for more than two months The Republic had no objection to the application, simply urged to take into account the provisions of section 36 (5) of the Economic and Organized Crimes Control Act in imposing bail conditions to the Applicants. The said section provides: nWhere the Court decides to admit an accused person to bail, it shall impose the following conditions on the bail namely; Page 7 of 11

- (a) Where the offence with which the person is charged involves "actual money" or property whose value exceeds ten million shillings unless that person deposits cash or other property equivalent to half the amount or value of actual money or property involved and the rest is secured by execution of a bond It is the spirit under Article 13(6) (b) and 15 (1) (2) of the Constitution of the United Republic of Tanzania that, unless there is some compelling reason, an accused person has to be released on bail, as a matter of right, pending the hearing and determination of his/her case and no person charged with a criminal offence, shall be treated as guilty of that offence. This is a presumption of innocence which is a constitutional right as embodied under two articles above dictate that accused person should be released on bail or bond whenever possible. The principle also means that

pretrial detention should not constitute punishment, and the fact that accused persons are not convicts should be reflected in their treatment and management. So is the spirit under Section 36(1) of the Economic and Organized Crimes Act, which stipulates that, after a person is charged but before he is convicted by the Court, the court may on its own motion or upon application made by the accused person subject to the provisions of this section admit the accused person to bail. Page 8 of 11 Black's Law Dictionary 7th Edition by Bryan A. Garner at page 135, expresses the term bail as security such as cash or bond required by a court for release of a prisoner who must appear at a future time. Bail as a constitutional right, therefore allows the applicants to remain free until convicted of an offence and at the same time ensure their return to court. I have dispassionately, perused the charge sheet, affidavits and the application itself together with the counsel for applicants' submissions. I wish not to comment on value of actual money or property involved in the commission of the alleged offence as to whether it has been substantiated or not. This in itself would be sufficient reason to warrant court to exercise its discretionary powers and impose bail conditions which would reflect the spirit of the law which is simply to allow the accused person to remain free until convicted of a crime and at the same time ensure his or her return to court whenever so required.- I understand that other accused persons have not applied for bail at this juncture, simply because they are facing together with other counts which are nonbailable, however on the collective 1st count of leading organized crime, they are all charged with fraudulently obtaining the amount of Tshs.382,764,200/= (however the correct amount should be Tshs. Page 9 of 11 382,754,200/=) wherefore, as per charge sheet (save for miscalculations noted above) the total amount allegedly to have been fraudulently obtained by all 14 accused persons in the first count is Tshs.382,754,200/= of which half of the amount the applicants are required to deposit is Tshs. 191,377,100/= and upon considering sharing principle, all 14 accused persons are to share the amount, in which each accused will have to deposit cash Tshs. 13,669,792.85. The principle of sharing is on all fours with the Bail Guidelines issued by the Judiciary of Tanzania on 10th September, 2020, in particular paragraph 3.6.3, that where the law requires the accused to deposit half of the value or amount involved in the charge and there are more than one accused persons, that amount will be shared among them. In the premises and that being stated, and considering that the application is uncontested, it is my considered view all applicants in this case be admitted to bail upon fulfilling the following bail conditions: -

1. Each accused person must deposit with the court, cash Tanzania shillings Tshs. 13,669,792.85 or any immovable property worth the amount. Page 10 of 11
2. Each accused person must secure two reliable sureties who shall have introductory letters and any Identification cards, sureties be residents within Mbeya region and each shall sign bond of Tanzania Shillings ten million only (Tshs.10,000,000/=).
3. All accused persons are not allowed to go outside Mbeya Region without prior notice and grant of permission from the resident magistrate court of Mbeya.

4. These conditions for bail be executed before Resident Magistrate Court of Mbeya. It is so ordered. Dated at Delivered at Mbeya, this 25th Day of August, 2023. Page 11 of 11
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