

TANZANIA / JUDGMENT

deogratius antony kisinda others vs republic 2017 tzhcced 12 18 august 2017

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA THE CORRUPTION AND ECONOMIC CRIMES DIVISION AT DAR ES SALAAM MISC. ECONOMIC CAUSE NO. 24 OF 2017 (Originating from Dar es Salaam Resident Magistrates' Court at Kisutu in Economic Case No. 33 of 2017)

1. DEOGRATIUS ANTONY KISINDA 1st APPLICANT
2. ABDALLAH AHMED SAN GEY..... 2nd APPLICANT
3. THOBIAS ZAKAYO FW ER E..... 3rd APPLICANT VERSUS THE REPUBLIC RESPONDENT
Date of Last Order: - 29/08/2017 Date of Ruling: - 18/09/2017

RULING

F.N. MATOGOLO. J. The applicants namely; Deogratius Antony Kisinda, Abdallah Ahmed and Thobias Zakayo Fwere, first, second and third applicant respectively through their advocate Mr Hudson Ndusyepo, filed an application to this court for bail. The application is by way of chamber summons made under sections 29(4) (d) and 36(1) of the Economic and Organized Crimes Control Act, [CAP. 200 R.E, 2002]. The applicants pray to be admitted to bail pending committal before the Resident Magistrates' Court of Dar es Salaam at Kisutu. The said chamber summons is supported by an affidavit jointly deposed by the applicants. After being served with the chamber summons and the accompanying affidavit, the Respondent/Republic filed a Counter Affidavit sworn by Mr. Wankyo Simon, learned State Attorney followed by a reply to Counter Affidavit sworn by Mr Hudson Bernard Ndyusepo, learned counsel for the applicants. On 16/08/2017, the Director of Public Prosecutions (DPP) filed a Certificate in terms of section 36(2) of the Economic and Organized Crimes Control Act, [CAP. 200 R.E, 2002] objecting grant of bail to the applicants on the ground that safety and interest of the Republic will be prejudiced. Hearing with regard to the DPP's Certificate was conducted orally whereas the Respondent/Republic was represented by Mr. Wankyo Simon assisted by Mr. Turumanya Majigo, learned State Attorneys. The applicants engaged legal services of Mr. Hudson Bernard Ndyusepo, Mr Seni Malimi and Mr Alex Mushumbusi learned advocates. Addressing this court on the merits of the DPP's Certificate, Mr. Wankyo Simon, learned State Attorney submitted that, the DPP has issued a Certificate to the effect that the applicants should not be granted bail. He referred this Court to decided cases on

similar situations where the High Court refrained from granting bail relying on the Certificate of the DPP. These are:- Richard Mtolela & Another vs. the Republic, Misc. Economic Cause No. 15 of 2017, Ramadhani Mussa Hamis @ Ukwaju V. Republic, Misc. Economic Cause No. 11 of 2017 both of the High Court, Corruption and Economic Crimes Division (Dar es Salaam Registry) and Manase Julius Philemon vs. Republic, Misc. Criminal Application No. 173 of 2015 the High Court Dar es Salaam, registry. Mr. Wankyo learned State Attorney argued that, the DPP's Certificate is proper as the High Court in Gedion Wasonga & 3 Others vs. the Attorney General & 2 others, Miscellaneous Civil Cause No H o f 2016, High Court (Dar es Salaam Main Registry), (Unreported) found that section 36(2) of the Economic and Organized Crimes Control Act is constitutional. 2 Besides, the Court of Appeal in the Director of Public Prosecutions vs. Li Ling Ling, Criminal Appeal No. 508 of 2015, (Dar es Salaam Registry), (Unreported) was clear that once a Certificate of the DPP has been filed and found to be valid, then, an application for bail cannot be considered. He argued that, the validity test was affirmed in the above case, at page 15, the Court mentioned the conditions for validity of the DPP certificate as follows:- "(i) The DPP must certify in writing and (ii) The certificate must be to the effect that the safety or interest 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 pending appeal". Mr. Wankyo cited the case of Jumuiya ya Wafanyakazi Tanzania vs. Kiwanda cha Uchapishaji cha Taifa [1988] T.L.R 146 where the Court of Appeal held that decisions of the Court of Appeal are binding to all Courts and tribunals subordinate to it regardless of their correctness. Mr. Turumanya Majigo, learned State Attorney added that; contents of the DPP's Certificate are compatible with the provisions of section 36(2) of the Economic and Organized Crimes Act and have met the validity test to the effect that the interest of the Republic will be prejudiced by granting bail to the applicants. Mr. Wankyo urged this Court to dismiss the application. In reply, Mr. Ndyusepo learned advocate submitted that, the cited cases are distinguishable because the manifested defects in the present charged offences go to the roots of the charges. According to Circular No. 1 of 2009 of the DPP issued in terms of section 8 of the National Prosecutions Act, 2008 requires State Attorneys drafting charges to particularize in every count on how the accused participated in the crime so that he may know the charges levelled against him. He argued that, this case is different as the applicants were not given chance to answer the charges because the Court before which they were arraigned has no jurisdiction to hear the case. Mr. Ndyusepo invited this Court to look at the particulars of the charge sheet which goes to the effect that, there was unlawful possession of acquired goods contrary to paragraph 7(l)(b) of the first schedule and sections 57(1) and 60(2) of the Economic and Organized Crimes Control Act as well as unlawful possession of Government stamp contrary to section 6(l)(f) of the National Security Act, [CAP. 47 R.E, 2002]. He stressed, failure to show actus reus connected to each individual, the applicants did not comprehend the charge against them considering that the DPP's office is bound to disclose how the accused were involved in the charged offence. The applicants' counsel further argued that, the provisions of section 8(1) & (2) of the National Prosecutions Act which require to do justice and avoid abuse of process were not adhered to. He referred this Court to the case of Mussa Mwaikunda vs. Republic, [1996] T.L.R 387 where the Court insisted that failure to disclose in the charge sheet the act which is alleged to have been committed by the accused and the contravened law, denies the accused with his right

to know the charges before him. This is the basis of the applicants learned advocates' argument whether the DPP is correct or not to file the certificate. Besides, they argued, the applicants are mere employees and that the charge sheet does not show where the goods were found and how the applicants got involved. On his part, Mr. Malimi learned counsel submitted that the DPP filed the certificate by ill motive to deny bail to the applicants. He added, the deponent in her Counter Affidavit stated that the goods said to have been unlawfully possessed were imported by a company known as Quality Trade and Distributors Ltd on 01/03/2014, the fact which does not feature in the particulars of the charged offence. He listed three principles stated under section 8(1) of the National Prosecutions Services Act regarding:-

- (a) The need to do justice;
- (b) The need to prevent abuse of legal process; and
- (c) The public interest". Mr. Malimi added, the Court of Appeal was clear in the case of Mehboob cited in Li Ling Ling case that whenever there is an abuse of office, Certificate of the DPP cannot stand notwithstanding its validity. On similar argument on abuse of office, he referred the court to the case of Raza Hussein Ladha & 9 Others vs. Director of Public Prosecutions, Misc. Criminal Applications No. 32 & 43/2014, (Dar es Salaam Registry), (Unreported) where the High Court observed that the DPP should not act with ulterior motive. The learned advocate further cited Jeremiah Mtobesya vs. Attorney General, Miscellaneous Criminal Cause No. 29/2015 in which the court declared section 148 of the Criminal Procedure Act which is similar to section 36(2) of the Economic and Organized Crimes Control Act unconstitutional, arguing that the worries pointed out in Mtobesya's case have featured in the present case. Additionally, Mr. Alex Mushumbusi learned counsel submitted that; there is no public interest that will be prejudiced as stated in Li Ling Ling case with regard to the charge sheet and the Certificate by the DPP. He thus urged this Court to disregard the Certificate filed by the DPP and proceed to hear the application and grant bail to the applicants, for, the Certificate was issued maliciously. In rejoinder, Mr. Wankyo learned State Attorney submitted that in issuing the Certificate, the DPP acted pursuant to article 59B of the constitution. That this Court cannot examine the charge sheet for this Court is not the trial Court considering that the charge is still before Dar es Salaam Resident Magistrates' Court at Kisutu pending investigation. He distinguished the cited case of Mussa Mwaikunda vs. Republic arguing that in that case, the matter was before the Court on appeal unlike the present matter. He argued, the charge sheet is proper for disclosing the requisite particulars of the charged offence. He distinguished the case of Mehboob for in that case, the DPP withdrew Certificate under section 91(1) of the Criminal Procedure Act then filed a Certificate under section 148 of the Criminal Procedure Act to deny bail to the applicant, hence abuse of office which was not the case both in Li Ling Ling and in this case. The same situation happened in Raza Hussein Ladha & 9 Others vs. Director of Public Prosecutions where the prosecution substituted a charge of manslaughter with murder for the purposes of denying bail to the applicants which is not the case in this application. Mr. Majigo on his part submitted that; the issue of validity of the DPP's Certificate was not challenged by the

applicants' counsel. He argued that whatever was done by the DPP in this matter is in compliance with the law. From the above, Mr. Wankyo urged this Court to strike out the preferred bail application on the basis of the DPP's Certificate. Having considered the Court record and the respective submissions by learned counsel for the applicants on one hand and learned State Attorneys for the Republic/Respondent on the other hand, there are issues which need to be deliberated by this Court for purpose of resolving the two conflicting position by the learned State Attorneys and the learned advocates for the applicants in respect the certificate filed by the DPP. Starting with the invitation made to this Court by the applicants' counsel for this Court to see to it whether the availed particulars of the offence discloses the charged offences, as clearly submitted by the learned State Attorneys, this Court has been constituted for the purposes of bail application and not else. It is a common ground that, the applicants and one Yusufally Mehboob Manji are arraigned before the Resident Magistrates' Court of Dar es Salaam at Kisutu charged with seven counts of which one; do not constitute pecuniary jurisdiction of this Court in terms of section 8 of the Written Laws (Miscellaneous Amendments) Act No. 3/2016 which repealed section 3 of the Economic and Organized Crime Control Act and replacing it with amongst section 3(3) of the Economic and Organized Crime Control Act that confers jurisdiction to this Court with regard to charges whose value is not less than one billion Tanzanian shillings (Tshs. 1,000,000,000/=) in respect of corruption and economic offences specified under paragraphs 3 to 21 and 27, 29 and 38 of the first schedule. Two; again do not fall in the category of economic offences specified under paragraphs 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 39 of the schedule which are triable by this Court regardless of their value. For purposes of clarity the relevant provision is reproduced here in below;- "3(3) The court shall have jurisdiction to hear and determine cases involving-

- (a) Corruption and economic offences specified in paragraphs 3 to 21 and paragraphs 27, 29, and 38 of the first schedule whose value is not less than one billion shillings, save for paragraph 14;
- (b) Economic offences specified under paragraphs 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37 and 39 of the schedule regardless of their value; and
- (c) Such other offences as may be referred to, or instituted in the court in terms of the provisions of this Act." The copy of charge sheet annexed to the applicant's affidavit does not disclose the offences listed in the above reproduced provision. It means therefore that, the charges preferred against the applicants do not fall within trial jurisdiction of this Court. Understandably, the DPP is mandated, and can exercise powers under section 12(3) and (4) of the Economic and Organized Crime Control Act to issue Certificate transferring matters from the Court vested with trial jurisdiction to other Courts. But since the DPP has not exercised such powers for the purposes of the present case, this Court is not clothed with trial jurisdiction when it is ripe for trial though the DPP can do if he so wishes. This court thought, it is proper to revisit provisions conferring jurisdiction to it due to the prayers made by the applicants' counsel inviting this Court to look at the particulars of the charges to

see whether they disclose the charged offences. From the above observations, the next question is whether this Court, not being the trial Court, is vested with powers to go into the particulars of the charge sheet to see to it whether it discloses the offence. With due respect to the applicants' counsel, correctness or legality of the charge is determined by the trial Court unlike in the present matter which is only for bail application. In the circumstances, powers of this Court with regard to the charge sheet as to correctness, legality or propriety of any findings, sentence or order recorded or passed and as to regularity and or correctness of any proceeding, extends only to revision. Even the cases of Raza Hussein Ladha & 9 others v. DPP and Mussa Mwaikunda V. R. cited above, were on revision and appeal respectively. The courts were not dealing with bail application that is why they are distinguished to the case at hand. Admittedly, this Court would have jurisdiction to examine the correctness or otherwise of the charge sheet if the applicants would have been committed to this Court that is, when the case is pending before this Court ready for trial. At the moment, the applicants have not been committed before this Court to answer the charges leveled against them. As the applicants are not before this Court for trial, it is premature for this Court to step in and examine correctness of the charge sheet which is an obligation exercisable by a trial Court. Ascertaining the correctness of the charge sheet is a prerequisite of utmost importance before trial commences. It is absurd that the prayers were not placed at right place and right time. Regarding validity of the DPP's Certificate, as correctly submitted by Mr. Majigo learned State Attorney; the applicants' learned advocates did not address the court on the validity of the DPP's Certificate, instead dwelt much on challenging the abuse of powers exercised by the DPP. The DPP powers to file certificate objecting grant of bail to accused persons are obtained from Section 36(2) of the Economic and Organized Crimes Control Act. The section is very clear that:- "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 above wordings are also couched under section 148(4) of the Criminal Procedure Act that reads that:- "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 it is likely 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 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". It thus follows, once a Certificate issued by the DPP is declared to have passed validity test as set in DPP vs. Ally Nur Dirie & Another (1988) TLR 252 and approved by the Court of Appeal in Li Ling Ling case that is: that the DPP must certify in writing, that the Certificate must be to the effect that the safety or interest of the United Republic are likely to be prejudiced by granting bail to the accused persons in that case and 10 that the Certificate must relate to a criminal case either pending trial or pending appeal. All of the three conditions have been met in the present application and considering the fact that the applicants' counsel did not argue to the contrary, then; this Court finds the DPP's Certificate

to be valid in law. The next question is, given the above circumstances, whether this court can disregard the said certificate and proceed to determine the application. S. 36(2) of the Act prevent this court to do so. This court is also bound by the decision of the Court of Appeal in Li Ling Ling case, in which at page 15 it was held;- "With regard to the second issue, we agree with Mr. IMchimbi that the decisions which were relied upon by the learned judge were applied out of context. The position of the law as stated in the Dirie case is that once the DPP's certificate has met a validity test, the court shall not grant bail". It is also worthy to state here in compliment that; the DPP is not compelled to disclose the nature of the interest concerned. This was made clear by the Court of Appeal in the cited case of the Director of Public Prosecutions vs. Ally Nur Dirie and Another that:- "(ii) section 148(4) does not require the DPP to specify or disclose the nature of the interest concerned". From the above in upshot therefore, this Court cannot grant bail to the applicants for reasons explained here in above. The present application for bail by the applicants is thus unmaintainable and consequently; it is hereby dismissed. Order accordingly. 13/09/2017 Date: 15/09/2017 Coram: Hon. W.B. Korosso, J. For Applicant: Asia Charly - Advocate 1st Applicant: ~ 2nd Applicant: - Absent 3rd Applicant: - Respondent: Ms. Elizabeth Mkunde - State Attorney C/Clerk: Mr. N.C. Malela. Court: The presiding Judge is out of Dar es Salaam for other duties. Therefore Ruling to be on Monday 18th September 2017. Parties present and informed. Sgd: W. Koroso Judge 15/09/2017 Date: 18/09/2017 Coram: Hon. F.N. Matogolo, J. For Applicant: Asia Chali - Advocate 1st Applicant: 2nd Applicant: - Absent 3rd Applicant: ~ Respondent: Mr. Faraji Ngukah- State Attorney C/Clerk: Mr. M. Lukindo Mr. Faraji Ngukah - State Attorney My Lord I appear for the respondent. The applicants are represented by M/s Asia Chali Advocate Assisted by Judith Kiamba legal officer. My Lord the matter is coming for ruling today. But the Respondent wish to inform you that the economic case No.33 of 2017 which was pending at Kisumu RM's court was withdrawn for Public interests. However as the ruling is ready we are ready to receive it. That is all. M/s Asia Chali Advocate My Lord we are ready to receive the ruling. Court Ruling delivered. Q tti /1 F.N. PtATOGOLO Judge' 18/09/2017

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