

TANZANIA / JUDGMENT

shabani juma ramadhan another vs republic 2017 tzhcced 14 20 november 2017

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA THE CORRUPTION AND ECONOMIC CRIMES DIVISION AT PAR ES SALAAM MISC. ECONOMIC CAUSE NO. 33 OF 2017 (Originating from Dar es Salaam Resident Magistrates' Court at Kisutu in Economic Case No. 49 of 2017)

1. SHABANI JUMA RAMADHAN..... 1st APPLICANT
2. OCTAVIAN ALOYSE NGUNWA..... 2nd APPLICANT VERSUS THE
REPUBLIC.....RESPONDENT Date of Last Order: - 27/10/2017
Date of Ruling: - 20/11/2017

RULING

F.N. MATOGOLO, J. This ruling emanates from an application filed by the applicants. The application, 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 determination of their charged currently pending before the Resident Magistrates' Court of Dar es Salaam at Kisutu. The said chamber summons was supported by an affidavit deposed by one Astrida K. Kagashe, advocate for the applicants. On the other hand, the Respondent/Republic filed a Counter Affidavit sworn by Ms. Elizabeth Mkunde, State Attorney dated 03/10/2017. On the same date that is, on 03/10/2017, the Director of Public Prosecutions (DPP) lodged a Certificate in terms of section 36(2) of the Economic and Organized Crimes Control Act, [CAP. 200 R.E, 2002] dated on 29/09/2017 barring the applicants from been granted bail on ground that, safety and interest of the Republic will be prejudiced by granting bail. Hearing with regard to the DPP's Certificate was conducted orally whereas the Respondent/Republic was represented by Ms. Elizabeth Mkunde learned State Attorney assisted by Ms. Nalindwa Sekimanga, learned State Attorneys while the applicants engaged services of Maxim Advocates of which Ms. Astrida K. Kagashe, learned counsel appeared. Addressing the court on merits of the DPP's Certificate, Ms. Mkunde learned State Attorney submitted that; the DPP has issued a Certificate for the applicants not to be granted bail for, grant of the same will prejudice

safety and public interest. The learned State Attorney referred the case of Director of Public Prosecutions vs. Li Ling Ling, Criminal Appeal No. 508 of 2015 and Director of Public Prosecutions vs. Ally Nuru Dirie and Another, [1988] T.L.R 252 where the Court of Appeal laid down conditions for validity of the DPP's Certificate that is: one; that the DPP must certify in writing, two; the Certificate must be to the effect that safety or interest of the United Republic is likely to be prejudiced by granting bail and three; the Certificate must relate to criminal case pending either trial or appeal. Ms. Mkunde learned State Attorney thus argued; the DPP's Certificate filed in Court complied with the law requirement thus urging for the Court not to grant bail to the applicants on basis of the said DPP's Certificate. In reply, Ms. Kagashe learned advocate submitted that; bail is a Constitutional right whereas article 13(6)(b) of the Constitution of the United Republic of Tanzania, [CAP. 2 R.E, 2002] guarantees presumption of innocence. She added that, section 36(2) of the Economic and Organized Crimes Control Act violates the Constitution for being unconstitutional. Furthermore, the DPP's Certificate is premature in terms of section 148(4) of the Criminal Procedure Act, [CAP. 20 R.E, 2002]. Likewise, the Certificate in question was filed before commencement of trial whereas the applicants appeared before Kisumu Resident Magistrates' Court which has no jurisdiction to entertain the case. According to sections 29 and 30 of the Economic and Organized Crimes Control Act, trial of this case has not commenced as the applicants have not been called to enter their plea. Ms. Kagashe cited DPP vs. Ally Nuru Dirie where the Court of Appeal underscored that trial commences when an accused appears before a competent Court/Tribunal with jurisdiction to acquit or convict. She concluded that; the referred Certificate was filed prematurely that is, before commencement of the trial under which the applicants are charged. The applicants' counsel argued that, the offences under which the applicants are charged are bailable whereas in terms of section 36(1) of the Economic and Organized Crimes Control Act, an accused is at liberty to apply for and be granted bail. She invoked section 3 of the Economic and Organized Crimes Control Act that this Court is the proper forum to grant bail to the applicants considering that the involved amount is Tshs. 15,722,000/= until the law takes effect, that is, when trial commences. In rejoinder, Ms. Mkunde learned State Attorney submitted with regard to constitutionality of section 36(2) of the Economic and Organized Crimes Control Act that; this Court is not the proper forum for the same has to be determined by a Constitutional Court. Besides, constitutionality of section 36(2) of the Economic and Organized Crimes Control Act and section 148(5) of the Criminal Procedure Act were dealt in Gedion Wasonga and 3 others vs. the Attorney General and 2 Others, Misc. Civil Cause No. 14/2016, (Dar es Salaam Main Registry), (Unreported) where the High Court ruled that such subsection is constitutional. Furthermore, Ms. Mkunde submitted that; the Court of Appeal in the case of Li Ling Ling ruled out that bail can be granted in circumstances of the present case. She added that, the respondent does not dispute that the charged offences are bailable, rather; the raised concern is that there is already in place a valid Certificate by the DPP tying hands of the Court from entertaining and granting bail to the applicants in the circumstances. After considering the Court record on one hand and the submissions by the respective learned counsel, the following are the deliberations of this Court on the filed Certificate by Director of Public Prosecutions. To start with; Ms. Kagashe learned advocate argued that, this Court can grant bail to the applicants for the DPP's Certificate was lodged prematurely considering that trial

has not commenced. Notably; conditions for a valid DPP's Certificate were set in the cited case of the Director of Public Prosecutions vs. Li Ling Ling at page 15 that:- "(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". On the face of it, under the third item immediately above quoted; a Certificate by the DPP objecting grant of bail has to be in respect of a criminal case either pending trial or pending appeal. But on the basis of the decision of the Court of Appeal in Li Ling Ling case, this Court finds no merit in the applicants' counsel contention that the Certificate was filed prematurely on ground that trial has not commenced. Besides; considering that the filed Economic Crime Case No. 49 of 2017 in the Dar-es-Salaam Resident Magistrates' Court at Kisumu is pending trial before the subordinate Court and considering that the involved amount exceeds Tshs. 10,000,000/=, then, there is no way in case the DPP finds pertinent to file a Certificate barring grant of bail to prefer the same by filing it in the proper forum before which bail jurisdiction is vested. The Court of Appeal in the case of the Director of Public Prosecutions vs. Li Ling Ling was clear that, once a Certificate of the DPP has been filed and declared to be valid, bail should not be granted. Ms. Kagashe argued that denying bail to the applicants violates article 13(6) (b) of the Constitution which guarantee presumption of innocence in criminal cases. Understandably, presumption of innocence is crucial and that is why it has been guaranteed under the Constitution. It should also be clear that, the Court of Appeal in setting conditions in the cited case of the Director of Public Prosecutions vs. Li Ling Ling had in mind the requirements of article 13(6)(b) of the URT Constitution. In other words, the said DPP's Certificate is an exception to the general rule which in the like manner such powers have to be exercised for safety and public interest though in compliment; the DPP is not mandated 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 Nuru Dirie and Another that:- "(ii) section 148(4) does not require the DPP to specify or disclose the nature of the interest concerned". Notably; Ms. Kagashe learned advocate did not account for validity of the DPP's Certificate which she ought in alternative. Leaving that aside, section 36(2) of the Economic and Organized Crimes Control Act is clear:- "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 the provisions of section 148(4) of the Criminal Procedure Act that reads:- "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 that, once a Certificate is issued by the DPP and the same is declared to have passed validity test as held in Dirie's case and approved by the Court of Appeal in Li Ling Ling 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 that the Certificate must relate to a criminal case either pending trial or pending appeal which have all been established in the present application and considering the applicants' counsel did not argue to the contrary, then; this Court finds the DPP's Certificate to be valid. From the above in upshot therefore, this Court cannot grant bail to the applicants. The present application for bail by the applicants is thus unmaintainable and consequently; it is hereby dismissed. Order accordingly.

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