

IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA.

CORAM: NYALALI, C.J., MAKAME, J.A. and OMAR, J.A.

CRIMINAL APPEAL NOS. 44 & 45 OF 1985

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

AND

1. ALLY HAJI AHMED
2. YONA KAPORE & 9 OTHERS RESPONDENTS

(Appeal from the Rulings of the High Court of
Tanzania at Mbeya) (Mtenga, J.) dated the
19th, 20th, 21st and 31st days of December, 1984

in

Criminal App 1. Case No. 1 and 2 of 1984

JUDGMENT OF THE COURT

MAKAME, J.A.:

These two appeals were consolidated for hearing. They are both by the learned Director of Public Prosecutions, against the decisions of the High Court, (Mtenga, J.), in bail applications by the eleven respondents in cases against them under the Economic and Organized Crime Control Act, 1984. The appellant was represented by Mr. Teemba, learned Senior State Attorney. The respondent in Criminal Appeal No. 44 of 1985 was represented by Mr. Mwakisingwe, learned advocate, while those in Criminal Appeal No. 45 of 1985 were represented by Mr. Mwakisingwe, assisted by Mr. Mwakasungula and Mr. Lateyunga, learned advocates.

The various respondents successfully made bail applications before the learned High Court judge and the appellant was dissatisfied by this outcome. There is only one ground of appeal to this court, namely:-

"That as the Honourable Judge sat alone without two lay members, as required by the law the court was not properly constituted".

Before us Mr. Teemba put up strenuous arguments. He submitted, quite correctly, that under Section 3 of the Economic and Organized Crime Control Act, the jurisdiction to hear and determine cases involving economic offences under this Act is vested in the High Court when

it sits as an Economic Crimes Court, the composition of which is set out in the next section, section 4, which provides:-

"The Economic Crimes Court shall consist of a Judge of the High Court and two lay members".

Mr. Teemba submitted that because of the foregoing, it was illegal for Mtengo, J. to sit alone and hear the bail applications. He sought to fortify this by drawing our attention to Section 16 which provides:-

"All questions to be decided by the Court including the decision whether it finds the accused guilty or not guilty, shall be decided by agreement of the majority of members ..."

During the course of argument Mr. Teemba suggested that whenever and wherever the word "High Court" appears in the Act it refers to the Economic Crimes Court as defined, but when a few instances, picked at random, the term 'High Court' is used, were brought to his attention, Mr. Teemba conceded that his very broad proposition cannot hold water. He said he also felt that the term 'High Court' is ambiguously employed in the Act and confessed to having difficulties as a result. He however suggested that Section 29 (4) and Section 35, to which we shall later revert, should be read together, with the result that bail applications, at any stage, can only be made to the Economic Crimes Court and not to a judge of the High Court sitting alone. He lastly tried to buttress his thesis by submitting that the High Court judge's decisions cannot be sustained because the bail applications were brought under section 29 (4) and Section 35 and, in some of them, the learned judge specifically purported to invoke Section 35 in granting bail, which Mr. Teemba says, the learned judge could not do.

Mr. Mwakingwe, learned Counsel, submitted that the term "High Court" is nowhere ambiguously used in the Act. The Legislature clearly intended that bail applications be provided for at two different stages - under Section 29 (4), as well as under Section 35. He submitted that at both stages a judge of the High Court sitting alone can grant bail under the Act and that, in any case, in the present cases, if the learned judge erred in making a reference to Section 35, the error is curable. He further submitted that bail was properly granted because such an exercise ~~such an exercise~~ does not involve the hearing and determination of cases envisaged by Section 3 (1).

We have been greatly assisted by useful arguments by both learned counsel. Having said so however, we wish to remark at the outset that, on our part, we are clear in our minds that if there is any ambiguity in the Act, it is not with regard to the intendment of the term "High Court". We think that 'High Court' means 'High Court' as it means in the Constitution and that it becomes an Economic Crimes Court only when it hears and determines cases involving economic offences. That it becomes the Court under the Act and whatever else it does, such as to grant bail under section 35, it is clearly referred to as the Court.

We wish briefly to look at the relevant parts ~~in~~ the scheme of the Act. When a person is brought before a District Court in pursuance of section 29 the charge is read over and explained to him. At that stage he is not required to plead, or make a reply. He is told, in accordance with sub-section (3):- "This is not your trial. If it is so decided, you will be tried later in the High Court Sitting as an Economic Crimes Court .."

Immediately after this, the magistrate must explain to him, in terms of sub-section (4), his right to petition the High Court for bail pending the decision whether or not he will be put on trial. It should be noted here, and we think this is not without significance, that the accused person is not told of his right to go to the court referred to in the sub-section immediately proceeding, that is the High Court sitting as an Economic Crimes Court, or to the Economic Crimes Court, or even simply to the court (as defined). He is told to go to the High Court, in these instant cases the accused persons found Mtenga, J., of the High Court, where Mtenga, J. does not sit, and is not required to sit, with lay members. We find no difficulty, no ambiguity, no contradiction, in this clear provision by the Legislature. In hearing such an application a High Court judge does not infringe the law and trespass the province of the Economic Crimes Court, hereafter referred to as the Court. The court has to hear and determine a case properly before it, which at this stage it is not. At this stage the Director of Public Prosecutions has not yet filed an information, and he may decide not to. It is only after he files an information and a copy of the information and of the Notice of trial is sent to the District Court by the Registrar of the High Court, that the accused is committed for trial by the Court. Such a person now before the court, may be granted bail by the Court, on its own motion or upon the accused's application, under section 35.

.✓4

As we have said, we find no doubt in this interpretation of the intention of the Legislature and, if we may so, we think that its rationale is sound. At the section 29 (4) stage things may have not been as finely sorted out as they would be at the later, section 35, stage. At the section 35 stage the court will have been 'informed' by the Director of Public Prosecutions and the accused person will now be before the court. We wish to say emphatically that the flow of the sections, and the wording of section 35 itself, do not accommodate Mr. Mwakingwe's bold assertion that even under section 35 a judge of the High Court may grant bail. We are satisfied that at that stage only the Court, that is a High Court judge with two lay members, ~~has~~ powers to do so. To the extent that the learned judge purported to act under section 35 he clearly erred.

Admittedly section 16 provides that all questions to be decided by the court (including the decision whether it finds the accused person guilty) shall be decided by agreement of the majority of the members. The court here necessarily means the Economic Crimes Court, the members of which are a High Court judge and two lay members. At first glance one may be tempted to argue from this, as indeed Mr. Teemba spiritedly did, that bail applications too, at any stage, can only be dealt with by the Economic Crimes Court. With respect, that would be the result of a superficial reading, out of context, of the provision. The questions which must be dealt with by the Economic Crimes Court under section 16 are not all questions without qualification, but rather all questions to be decided by the court, and such questions are spelt out under section 3 - to hear and determine cases etc. The learned judge who heard the bail applications held that such an exercise did not involve the hearing and determination of cases, and Mr. Mwakingwe made the same submissions. We are of the same opinion and, as we have indicated, the Court hears bail applications under section 35 only because that section specifically provides for that. We are satisfied that at the section 29 (4) stage only a High Court judge, sitting alone, has powers to hear bail applications and grant bail. Mtenga, J. therefore acted properly and within his jurisdiction.

As already indicated, Mr. Teemba is right, and Mr. Mwakingwe erred on the question as to whether a High Court judge can grant bail under section 35. Some of the applications purported to be under both section 29 (4) and 35, some under section 35 alone.

The errors are curable as they did not occasion a miscarriage of justice. If the bail conditions imposed in the applications giving rise to the present appeals are stiff, the learned Director of Public Prosecutions can hardly complain. In any event, acting under section 25 (4), there is nothing to prevent a High Court judge, in his discretion, from imposing conditions akin to those spelt out in section 35. In exercising his discretion, to judge will of ~~course~~ ^{course} take into account the principle of equality before the law, embodied under the constitution, by imposing bail conditions which do not differ too much from those applied by the court under section 35.

In the event we dismiss the appeals.

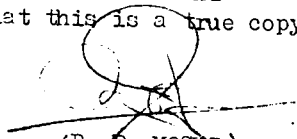
DAED at MBEYA this 10th day of July, 1985.

F.L. NYALALI
CHIEF JUSTICE

L.M. MAKAME
JUSTICE OF APPEAL

A.M.A. OMAR
JUSTICE OF APPEAL

B. P. MOSHI
I certify that this is a true copy of the original


(B. P. MOSHI)
SENIOR DEPUTY REGISTRAR