IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., MZIRAY, J.A, And MKUYE, J.A.)

CRIMINAL APPEAL NO. 252 OF 2016

EMMANUEL SIMFORIAN MASSAWE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Ruling of the High of Tanzania at Dar es salaam)

(Arufani, J.)

Dated the 12th day of April, 2016
in
Misc Criminal Application No. 51 of 2016
.....

JUDGMENT OF THE COURT

13th & 23rd day of February, 2018

MZIRAY, J.A.:

This appeal emanates from the Ruling of the High Court of Tanzania at Dar es salaam [Arufani,J] in Misc Criminal Application No. 51 of 2016 delivered on 12/4/2016.

Briefly, the facts of the case are that the appellant Emmanuel Simforian Massawe and two other persons (Benhardard Mbaruku Tito and Kanji Muhando Mwinyijuma not subject to this appeal)

were charged at the Resident Magistrate's Court of Dar es salaam at Kisutu with offences ranging from conspiracy to commit crime and abuse of position under the Prevention and Combating of Corruption Act No 11 of 2007 and another single charge of occasioning loss to a specified Authority contrary to paragraph 10(1) of the First Schedule and Section 57(1) and 60(2) of the Economic and Organized Crime Control Act, Cap. 200 R.E 2002 (the Act).

The economic crime charge alleges that the appellant and his two co -accused persons, on divers dates between 1st March and 30th September, 2015 at the office of Reli Asset Holding Company within Ilala District in Dar es salaam Region, being the Managing Director of Reli Asset Holding Company, businessman and representative of Rothschild (South Africa) Proprietary Limited and Company Secretary respectively, by their willful acts, procured consultancy services from Rothschild (South Africa) Proprietary Limited without adhering to the procurement procedures and effected payment to the said Rothschild (South Africa) Proprietary Limited for consultancy services which was not rendered, thereby causing the Reli Asset Holding Company to suffer a pecuniary loss

of United States Dollars Five Hundred Twenty Seven Thousand and Forty (USD. 527,540) only which was paid as advance payment and bank transfer charges.

At the material time the appellant was the Company Secretary of the Reli Asset Holding Company.

Subsequent to the charges, the Director of Public Prosecutions (the DPP) filed a certificate under Section 36(2) of the Act stating that the offences are economic crime in nature hence, the appellant and his co- accused persons should not be granted bail on the ground that the safety and interest of the Republic will be prejudiced. Despite the filing of the certificate, the appellant together with his co- accused persons applied to the High Court to be admitted to bail pending trial.

In a well considered Ruling, the High Court refused the application for bail on a sole reason that, once the Director of Public Prosecutions files a certificate in terms of section 36(2) of the Act, objecting bail, then, the court cannot entertain application for bail and grant the same. The appellant being dissatisfied with the Ruling of the High Court, appealed to this Court.

In the memorandum of appeal, the appellant raised six grounds of complaints as hereunder reproduced:

1. *That, the judge erred in law and in fact when he ruled out that the High Court has no jurisdiction to grant bail once the Director of Public Prosecutions files certificate objecting bail to be granted to the applicant.*
2. *That, the judge erred in law and in fact by ruling that the High Court, once the Director of Public Prosecution files certificate objecting to the grant of bail, losses its powers to hear and determine the application for bail.*
3. *That, the judge erred in law to hold that the High Court needs not ascertain the reasons behind the certification of the Director of Public Prosecutions that the public policy and interests will be prejudiced by the appellant(applicant) so long as the validity tests are met as set by section 36(2) of the Economic and Organized Crime Control Act, Cap 200 R.E 2002.*
4. *That, the judge erred in law and in fact to refuse to grant bail to the appellant (Applicant), even though bail is the constitutional right of an accused person, based on the blanket statement made by the Director of Public Prosecutions, in the certificate, that public safety and interest will be prejudiced if the Appellant (Applicant) is granted bail.*

5. *That, the judge erred in law and in fact by denying bail to the appellant on the ground that the Director of Public Prosecutions has already certified that the appellant (Applicant) stood to prejudice the safety and interest of the Republic without showing how the appellant(Applicant) will prejudice the safety and interest of the Republic once he is granted bail.*

6. *That, the judge erred in law and in fact for holding that the Ruling of the High Court of Tanzania in* ***Jeremiah Mtobesya v. Attorney Genera****l, Misc Civil Cause No. 29 of 2015 on the unconstitutionality of of section 148(4) of the Criminal Procedure Code was not applicable to section 36(2) of the Economic and Organized Crime Control Act, Cap 200 R.E 2002 even though they are similarly worded.*

When the appeal was called on for hearing, both parties were represented. The appellant had the services of Dr. Rugemeleza Nshalla assisted by Mr. Jeremiah Mtobesya and Mr. Fulgence Massawe, all learned advocates, whereas Mr. Tumaini Kweka, learned Principal State Attorney assisted by Ms. Beata Kitau, learned Senior State Attorney and Mr. Faraji Nguka, learned State Attorney appeared for the respondent Republic.

Dr. Nshalla, learned advocate was the first to argue. He jointly argued the first, second and third grounds. Mr. Massawe, learned counsel also argued jointly the fourth and fifth ground, whereas the sixth ground was argued by Mr. Mutobesya, learned advocate. The learned counsel in arguing the appeal adopted both grounds of appeal and the submissions made in support of the same.

On his part, Dr. Nshalla, learned counsel, submitted that the right to a fair trial is fundamental to the rule of law and to democracy and that this right is absolute and cannot be limited. He stressed that it is the duty of the court to hear both parties to the case. Equally, the mandate to grant or refuse bail is in the hands of the court and not otherwise. It is a judicial function, he argued. He submitted further that in criminal trial, all parties must be equal and should be treated the same. The DPP being litigant and a party to the case should not hold monopoly rights to determine the liberty of the other. He argued that the DPP's certificate in the way put has illusory effects, which determines the outcome of the question of bail and, thus, does not confer opportunity to the accused person (a

party to the case) to exercise his or her constitutional right of being heard. The learned counsel citing and relying on the recent decision in **The Attorney General Vs. Mr. Jeremia Mtobesya**, Civil Appeal No. 65 of 2016 (unreported.) as authority, submitted that the appellant when he appeared in the High Court was not accorded with a right of hearing as required by the Constitution of the United Republic of Tanzania. He stated that the appellant was not given a chance to express his views on the certificate filed by the DPP. He said that the DPP's certificate of objection to bail, was totally unconstitutional for contravening Article 13(6)(a) of the Constitution. Dr. Nshalla cautioned that the Court being the ultimate protector of Constitution should not skid from its responsibility of nipping in the bud this constitutional power grab.

He pointed out that just like in **Mtobesya's** case (supra) in which section 148(4) of Criminal Procedure Act (the CPA), a replica to section 36(2) of the Act, under which the certificate of DPP was issued, the same was declared unconstitutional.

As pointed out earlier, the fourth and fifth grounds were argued by Mr. Massawe. He was brief and to the point. He

submitted that by issuing certificate under section 36(2) of the Act, the DPP encroached the power of the court conferred upon it under the provision of Article 107A of the Constitution, thereby denying the appellant's right to be heard. He contended that section 36(2) of the Act is an affront to the entire principle of separation of power and more so, gross violation of the power of the court.

Arguing the sixth ground of appeal, Mr. Mtobesya submitted that the constitutional right to be heard was not accorded by the High Court judge while arriving at the decision of the case. He insisted that if such right was to be denied then , the court ought to have been satisfied that the same meets the dictates of Article 30(2) of the Constitution. He pointed out that after observing that some rights were violated, the court could have not stopped there but should have gone further to satisfy itself whether or not the validity test was met.

The learned counsel however in his submission referred the Court to the doctrine of statutes or sections in *pari materia* as explained in a manual of **Principles of Statutory Interpretation** by Justice G.P Singh of Pradesh, India in which it is stated that the

construction of statutes in *pari materia* should be given similar interpretation by using an earlier statute to throw light on the meaning of a phrase used in a later statute in the same context. The learned counsel pointed out that the application of this principle has the merit of avoiding any apparent contradiction between a series of statutes dealing with the same subject. He argued that the scenario in the instant case is very similar to what transpired in the **Mtobesya's** case (supra) and on that basis, he urged the Court to apply the principles envisaged in the case *mutatis mutandis*. The learned counsel however, disassociated with any proposition suggesting that the arguments presented has the direction of challenging the constitutionality of section 36(2) of the Act.

Mr. Tumaini Kweka, learned Principal State Attorney in response to the submission made did not at the outset support the appeal. He commenced his submission on a comment to **Mtobesya's** case (supra) referred by the learned appellant's counsel. He submitted that **Mtobesya's** case (supra) was a constitutional petition challenging the constitutionality of section 148(4) of the CPA, whereas the instant appeal is of criminal in

nature and its gist is to challenge the certificate of DPP filed under section 36(2) of the Act objecting the right to bail. On that basis therefore, he was of the view that the applicable principle in this appeal is that set in the case of **DPP V. Li Ling Ling**, Criminal Appeal No. 508 of 2015, (unreported) which comprises similar features to the instant appeal as there was also a certificate issued under section 36(2) of the Act. He however dismissed entirely the argument that the appellant was not accorded with a right of hearing.

On the issue of certificate, he maintained that under the provision of section 36(2) of the Act, the DPP has mandate in law to issue certificate objecting bail provided that the issued certificate meets the validity test and that in issuing the same he has no obligation to assign reasons. In the case at hand, the certificate issued met the validity test as propounded in **Li Ling Ling** case (supra), he argued.

On the basis of his submission, the learned Principal State Attorney urged the Court to dismiss the appeal in its entirety for lack of merit.

In brief rejoinder, the appellant's learned counsel reiterated their earlier submissions insisting that the appellant was not given a chance to express his views on the certificate objecting bail filed by the DPP, one of the litigants in the case. They also reiterated the prayer to have the matter remitted to the High Court to be tried by another judge with competent jurisdiction on the reason that the appellant was not accorded with a right of hearing by the High Court judge who entertained the application.

We humbly appreciate the sound rivalry arguments which came out from the learned counsel who appeared in this appeal. There is no doubt that they brilliantly did their home work and certainly what came from them had assisted the Court to arrive at the decision which soon will be pronounced.

We have carefully considered the arguments advanced both in support and against the appeal. As the grounds of appeal replicate, it appears that the appellant in first place is challenging the constitutionality of section 36(2) of the Act, just as what section 148(4) of the CPA was challenged and that, in the application for

bail he was not afforded a right of hearing or given chance to comment on the certificate objecting bail filed by the DPP.

Before going further, we need first to comment on the impression created by the appellant's learned counsel when presenting their arguments before us. The *modus operandi* taken by the learned counsel for the appellant in their oral and written submissions gives an impression as if the Court is dealing with a constitutional case which is exactly what is not. We wish to make it clear and emphasize that this is not a constitutional matter but rather a criminal appeal premised on the subject of bail. We have all good reasons to say so because, at the High Court level the issue was an application for bail and upon hearing both parties a decision focused on that point was given. So as to satisfy ourselves as to whether the appellant was accorded a fair hearing, we meticulously went through the proceedings of the trial court dated 31/3/2016 as reflected at page 5 to 15 of the record of appeal. These proceedings leave no doubt that the bail application before the trial court was heard on merits. In those proceedings, both parties through their respective learned counsel were fairly given an opportunity to be heard. Mr. Jerome Msemwa and Mr. Melkior

Sanga, learned counsel who appeared for the appellant were afforded a chance to argue the application on behalf of the appellant. We find it strange when the three learned counsel for the appellant complained to the Court that the appellant was denied opportunity to be heard in the trial court. With respect, we don't agree with them. We are firm that the trial before the High Court was fairly conducted. The complaint that the appellant was not given a chance to express his views on the certificate objecting bail filed by the DPP is baseless and unfounded.

We have thoroughly re-visited the memorandum of appeal and the submissions presented by the parties through their learned counsel. During the hearing of the appeal we noted that the central issue which dominated counsel discussion was whether the DPP certificate filed under S. 36(2) of the Act objecting the grant of bail to the appellant on the ground that his release on bail would likely prejudice the safety and interests of the Republic was sufficient ground to deny bail. On the part of the appellant counsel, they are of the view that the certificate does not oust the discretion of the court to grant bail to an accused person. A contrary position has been taken by the respondent side to the effect that once a

certificate of the DPP is filed, the same is binding to the court unless is seen that the DPP acted *malafide*. The case of **DPP V. Nuru Dirie** and Another [1988] TLR 2002 has set the position of the law in respect of certificate by the DPP under Section 36(2) of the Act. Three conditions are made:-

1. The DPP must certify in writing and;
2. The certificate must be to the effect that the safety and Public interests of the United Republic are likely to be prejudiced by granting bail in the case;
3. The certificate must relate to a criminal case either pending trial or pending appeal.

The three conditions were fully endorsed by this Court in **Li Ling Ling** case (supra). Deducing from the decision in **Nuru Dirie** and **Li Ling Ling** (supra), we have no flicker of doubt that once the DPP's certificate has met the validity test, the court shall not grant bail.

The appellant learned counsel have attempted to persuade us to follow the recent decision of this Court in **Mtobesya** (supra) and in connection thereto apply the doctrine of statutes or sections in

pari materia as explained in the Manual of **Principles of Statutory Interpretation** by Justice G.P Singh. Their argument is that Section 148(4) of the CPA is quite similar to Section 36(2) of the Act, the subject matter in this appeal, hence it should be given similar interpretation and arrive at a conclusion that Section 36(2) is unconstitutional. With respect, as we pointed out earlier and as rightly argued by Mr. Kweka, learned Principal State Attorney, **Mtobesya's** case (supra) was a constitutional petition challenging the constitutionality of Section 148(4) of the CPA, whereas the present appeal is of criminal nature and its gist is to challenge the certificate of the DPP filed under Section 36(2) of the Act, objecting the right to bail. We therefore fail to buy and apply the statutes in *pari materia* principle as propounded by the appellant counsel in the circumstances of this case.

On the other hand, we are of settled view, just like the trial court, that once the certificate filed by the DPP under Section 36(2) of the Act, is found to have been validly filed, the same bars the trial court granting bail to the accused and we are of the considered view that it is not the requirement of the law for the DPP to give reasons for objecting bail where he considers that the safety or interests of the

Republic are likely to be prejudiced. The DPP's certificate could only be invalid where it is proved that he acted on bad faith or abuse of the court process, something which was not established and proved before the trial court.

For the immediately foregoing reasons, we find this appeal devoid of any semblance of merit. We accordingly dismiss it in its entirety.

DATED at **DAR ES SALAAM** this 21st of February, 2018.

M.S MBAROUK
JUSTICE OF APPEAL

R.E.S MZIRAY
JUSTICE OF APPEAL

R.K MKUYE
JUSTICE OF APPEAL

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

A.H.MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL