IN THE HIGH COURT OF TANZANIA
AT MTWARA
CRIMINAL APPEAL NO. 58 OF 2006
FROM ORIGINAL ECONOMIC CRIME CASE NO. 8/2004
OF THE DISTRICT COURT OF MTWARA
AT MTWARA
BEFORE: HON. A.H. KALLI, RESIDENT MAGISTRATE
THE D.P.P ----------APPELLANT
VERSUS
SILVESTER S/O HILLU DAWI & TEN(10) OTHERS- - -RESPONDENTS

Date of Last Order: 27/07/2006
Date of Judgement :21/08/2006

RULING

SHANGALI,J.

In this appeal the Director of Public Prosecutions is appealing against the ruling of the District Court of Mtwara in the Economic Crime case No. 8 of 2004 in which the bail conditions for the first and second respondents were reviewed and lessened by the Learned Trial Resident Magistrate.

The applications for bail in that case started from the very iniatial stage of the case but were thwarted by the position of the law under the Economic and organized Crime control Act,1984 until the matter was finaly plaved under the jurisdiction of the Trial Court.

To put the matter abreast let me state briefly the facts of the matter as follows: There is a pending Economic crime case No. 8 of 2004 before the District Court at Mtwara filed on 6th August 2004. The accused persons are:

1.SILVESTER S/O HILLU DAWI
2.STEPHEN S/O LEONS MWAMBENE
3. FADHILI S/O OMARY MRABIA
4.ABDALLAH S/O HALFAN MANGALE
5.MSHAMU S/O AHMAD NALOLAVANA @ NALOLA

6.OMARY S/O SAID NNKO @ SIMON SENEUNI NNKO @MANGI
7. ABDULRAHAMAN HASSAN KASSIMU
8.EX.E.9511 PC. CONRAD MWINGIRA
9.EX.E.3147.PC. OSWARD NGONYANI
10.ALLY S/O HAMISI SIGA
11.EX.D 8261 PC. CLEMENT SENEUNI NNKO

The said accused person has been charged with 6 counts interchangeably as follows:

The first count is **Conspiracy** Contrary to section 384 of the Penal Code, Cap 16: which is against the 1st,2nd,3rd,4th,5th,6th,7th,8th,9th, and 10th accused persons.

- The second count is **theft** Contrary to sections 258 and 265 of the Penal Code, Cap 16; against the 1st,2nd,3rd,4th,5th,6th,7th,8th,9th and 10th accused persons.

- The third count which is an altenative to the 2nd count is **Leading Organized Crime** Contrary to paragraph 4 (1) (a) of the first Schedule to and section 59 of the Economic and Organized Crime Control Act, No. 13 of 1984 as amended. The Count is against 1st,3rd,4th,5th,6th,7th,8th,9th and 10th accused persons.

- The fourth count is **receiving stolen property** contrary to section 311(1) of the Penal Code, Cap 16, against the 10th accused person.

- The fifth count is **Conspiracy** contrary to section 384 of the Penal Code,Cap 16 against the 6th and 11th accused persons.

- The Sixth count is **Being an accessory after the fact to stealing** contrary to section 387 and 388 of the Penal Code Cap 16 against the 11th accused person.

After protracted requests for bail, the trial Magistrate was finaly satisfied that the charges against the accused persons are bailable and granted them bail in her ruling dated 18/05/2005. In that ruling the accused persons were granted bail on two main conditions, one, that each accused person with two sureties having immovable properties worth Tshs.650

million and, two, as per section 148(5)(e) of the Criminal Procedure Act as amended by Act No.27 of 1991, each accused to deposit half of the amount stolen. The amount alleged stolen is Tsh.460.711.282.00.

It appears that first respondent who is also the 1st accused in the pending case was dissatisfied with the decision of the Trial Resident Magistrate. As a result he wrote a letter to the District Registrar High Court-Mtwara complaining of the stringent bail conditions imposed by the Trial Magistrate. The first respondent was adviced to consult his Advocate and employ his legal services on how to go about his complaints. At the sametime Mr. Nyange Learned Advocate for the 1st and 2nd respondent's wrote another letter to the District Registrar High Court-Mtwara dated 4th May 2006 requessting him to bring the Economic case No.8 of 2004 before the Hon. Judge-in-charge for revision. In his letter Mr. Nyange complained that after the amendment of the charge sheet the trial Magistrate granted the accused bail on conditions that each accused deposit half of the amount of money involved and to deposit title deeds supposedly pursuant to section 148(5)(e) of the Criminal Procedure Act; as a result the trial Magistrate had wrongly applied two conditions contrary to the law. In the letter with reference No. MH/CS/42/VOL.II/116 dated 12th May 2006 from the District Registrar, High Court-Mtwara, Mr. Nyange was adviced to make an application before the Trial Magistrate to re-visit or vary the bail conditions depending on the prevailing circumstances of the case or file a formal appeal against the decision of the Trial Magistrate in accordance with the laid down procedure.

Mr. Nyange, Learned Advocate for the respondents, opted for the former advice and on 30/05/2006 he requested the trial Court to review the conditions of bail impossed in the ruling dated 18/05/2005. Mr. Nyange was successful to convince the trial Court that there were plausible reasons and circumstances to warrant relaxation of the bail conditions against the respondents. In her ruling dated 30/05/2006 both the respondents were re-granted bail-bond on the sum of Tshs.10,000,000 each, with two sureties each to deposit title deed of his property. The trial Court also ordered the respondents to surrender their passports and were barred from going out of Mtwara Region without prior permission of the Trial Court.

The Director of Public Prosecution was dissatisfied with that decision of the trial Court and preferred this appeal. Mr. Hyera, Learned State Attorney appeared for the appellant/Republic while Mr. Nyange, Learned

Advocate appeared for the respondents. For the purpose of the record it appears that the appellant, the Director of Public Prosecutions filed this appeal against eleven respondents (accused persons) while it is clear that the application for review was made by Mr. Nyange who represented the first and second accused persons who are now the respondents. At the sametime the order dated 30/05/2006 was pronounced in favour of the 1st and 2nd accused/respondents only.

Be as it may, the petition of appeal filed by Mr. Hyera has two main grounds of appeal namely;That the trial Resident Magistrate grossly erred in law in granting bail to the first and second accused persons on conditions which are contrary to the clear provision of the law; and two, the trial Resident Magistrate misdirected herself in law when granting bail basing on extraneous considerations.

During the hearing of the appeal Mr. Hyera submitted that he have no quarrel with the fact that the offences against the respondents are bailable. He argued that his main quarrel is that the Principles of granting bail were not followed in granting new bail conditions. Mr. Hyera submitted that the respondents/accused persons are facing offences under both the Economic and Organized Crime Control Act, 1984 and the Penal Code. He stated that two laws are involved in the matter because section 36 of the Economic and Organized Crime Control Act and section 148 of the Crimional Procedure Act provide for procedures of granting bail including bail conditions; Mr. Hyera submitted that on the second count the respondents have been charged with the offence of theft contrary to section 258 and 265 of the Penal Code. The amount involved or suspected to have been stolen is about Tsh.460 millions. He contended that under section 148(5)(e) of the Criminal Procedure Act the Court is not allowed to grant bail to persons involved in the theft of more than Tsh.10 million unless such person deposits cash or other property equivalent to half the amount stolen. Mr Hyera contended that section 36(4)(e) and 5(a) of the Economic and organize Crime Control Act provide for the similar conditions regarding to the amount to be deposited. The Learned State Attorney submitted that, in her ruling the Trial Resident Magistrate granted bail contrary to the clear provision of the law. He contended that the cited provision of the law are mandatory and the bail conditions should have been in accordance to the law.

On the second ground of appeal Mr. Hyera submitted that the trial Resident Magistrate employed extraneous considerations in granting bail to

the respondents when she relied on the party recorded evidence of few prosecution witnesses and stated that the first and second accused persons were probably guilty because of the circumstances of being the Manager and Accountant of the Bank respectively. Mr. Hyera contended that it was premature and out of point for the Trial Magistrate to come out with such conclusion before receiving all prosecution evidence.

In conclusion Mr. Hyera hinted that the purported revision was conducted without formal application filed by the respondents or their Advocate to move the Court. The Learned State Attorney requested the Court to allow the appeal and nullify the decision of the trial Resident Magistrate.

In response, Mr. Nyange, Learned Advocate for the respondents submitted that there are only two important issues to be determined by this court namely whether the trial Court was wrong in law in granting bail during review and secondly whether the trial Magistrate used extraneous considerations in granting bail.

On the question of legality of the application before the trial Resident Magistrate, the counsel submitted that such ground was not in the petition of appeal. Nevertheless, he argued that the application was lawful because according to law the presiding Magistrate have powers to review or very or cancel the bail conditions at any stage provided there are sufficient reasons to do so. He cited the case of HAMISI MASISI and 6 OTHERS VS. (1985) TLR. Mr. Nyange contended that, the letter from the District Registrar High Court-Mtwara Ref. No. MH/C.S/42/VOL.II/116 dated 12/05/2006 intimated to the respondents on that position of the law and consequently the respondents applied for review of bail conditions before the trial Magistrate. Mr. Nyange also contended that there is no provision under the Criminal Procedure Act, 1985 which provide on how bail application should be made before the lower Courts. He stated that according to the practice bail application is made orally before the Court and the Court is not restricted to review its bail conditions suo motu.

Submitting on the first ground of appeal, Mr. Nyange stated that the trial Resident Magistrate was not wrong in law in granting bail conditions because section 148 of the Criminal Procedure Act and section 36 of the Economic and Organized Crime Control Act were complied with because the respondents were required to deposit their title deeds of immovable

properties in accordance to the law. Regarding to the requirement of cash deposit of the amount equivalent to half the amount involved (on the charge sheet) Mr. Nyange introduced "the Principle of sharing" arguing that since the amount involved in the case is Tsh.460 millions and there are eleven (11) accused persons then, the half required should not be half of the whole amount for every accused person. He contended that the whole amount should be shared and divided to each accused person equally and each accused should pay in cash the half of his amount as required under the law. In his submission Mr. Nyange divided Tshs.460 millions by 11 (accused person) and got Tsh.45 millions and then concluded that the amount required to be paid by each of his cliets is Tsh.22.5 million Mr. Nyange stated that the principle of sharing is applicable under section 148(5) because all the accused persons are facing the same charges.

On the second ground, Mr. Nyange submitted that there were no extraneous considerations used by the trial Magistrate in granting bail to the respondents. He contended that on the first day when the respondents were charged before the Court, the trial Magistrate used the charge sheet alone to consider the bail and employed section 148(5)(e) to the letter. He further submitted that later when there were changes on the charge sheet and the court having received the evidence of several prosecution witnesses especially that of the Principal investigator (PW6) the trial Court had obtained the whole picture of the case and part played by each accused person. Mr. Nyange argues that such evidence which is on the trial Court record indicate that the respondents were not directly involved in the Commissions of the offences nor participated in the division of the loot. The Learned Advocate contended that the trial Magistrate was justified to use such available evidencial circumstances of the case and find that the respondents were not directly involved hence reviewed the bail conditions. Mr. Nyange submitted that in such circumstances the issue of extraneous consideration is irrelevant in this appeal because the trial Magistrate was entitled to review the bail conditions on the second stage by using the circumstances of the case.

In reply Mr. Hyera insisted that bail conditions fixed by the trial Resident Magistrate are contrary to the law and the same should be removed. He also submitted that the law requires each accused to comply with the bail conditions without sharing the amount alleged stolen. The Learned State Attorney contended that the parliament never intended the amount to be shared by the accused persons, otherwise it would have said so in clear terms.

Having given due consideration to the arguments advanced by both sides and having regard to the provision of the law Iam now settled to determine the matter. On the issue of the mode employed to move the trial Court in the application, I earnestly concur with Mr. Nyange, that the respondents were legally entitled to make their application or request before the learned Trial Resident Magistrate for their bail conditions to be reviewed or varied. The Trial Magistrate have powers to vary or concell the bail conditions where there are sufficient reasons as stated in the case of HAMISI MASISI and 6 OTHERS (Supra) and also THE DIRECTOR OF PUBLIC PROSECUTIONS VS. ALLY NUR-DIRIE AND ANOTHER (1988) TLR 252. Therefore a formal application is not mandatory for bail review application in the course of proceedings of the case in Court.

Comming to the first ground of appeal, there is no dispute that the respondents are facing charges under both Ecomonic and Organized Crime control Act, 1984 and the Penal Code, Cap 16. On count two they have been charged with the offence of theft contrary to section 258 and 265 of the Penal Code; and the amount involved is Tsh.460 millions. Count three which is the altenative to count two is leading organized crimes contrary to paragraph 4(1)(a) of the first schedule and section 59 of the Economic and Organized Crime control Act, 1984. Furthermore, the procedure for granting bail are fully provided for in both Economic and Organized Crime control Act under section 36 and the Criminal Procedure Act, under section 148.

The first important question is to determine which one among the above laws should be used to determine bail conditions for the respondents. This is because whether section 148(5)(e) of the Criminal Procedure Act and section 36(4)(e) and (5) of the Economic and Organized Crime control Act are similar or not, we have to justify the application of either one to determined the respondents bail. The trial Magistrate used section 148(5)(a) and unfortunately this matter was not adequetly discussed by the counsels.

Nevertheless, in my considered view the correct applicable law should have been section 36(4)(e) and (5) of the Economic and organized Crime control Act. The reason behind is not only that the case has been filed as Economic Crime case but the principle that where the accused persons have been charged with several counts falling under different laws which provide for separate procedure, and condition for granting bail, the court is supposed to apply the provision of the law which provide for the

most stringent bail conditions; otherwise the whole exercise would be superflours. In otherwards bail conditions depend on the seriousness of the offence committed and therefore where the accused persons are charged with several counts, the determination of their bail should be based on the count having the most serious bail conditions.

In the instant matter the law applicable is section 36(4)(e) and (5) of the Economic and Organized crime control Act, 1984 because in my view it carries harsh bail conditions than section 148(5)(e) of the Criminal Procedure Act. The fact that one count in the charge sheet is an altenative to another count does not degrade the seriousness of that count because in law an altenative charge have the same legal status as any other count on the charge sheet.

The next question is whether the trial resident Magistrate complied with the mandatory conditions stipulated under section 36(4) and(5) of the Economic and Organized Crime control Act in dererming the bail review application. The answer is obvious in negative. Neither the mandatory requirements under section 184(5)(e) nor that of section 36(4)(e) and (5) were complied with.

The mandatory provision of section 36(4)(e) and (5) of the Economic and Organized Crime control Act provide that the court shall not admit any person to bail if the offence for which the person is charged involves property whose value exceeds ten million shillings, unless that person pays cash deposit equivalent to half the value of the property and the rest is secured by execution of a bond. Subsection (5) is more apparent and it provide four mandatory, conditions to be employed when the court decides to admit an accused person to bail. Then, under subsection(6) the court have discreation to impose the additional conditions as stipulated thereunder. The amount involved in the instant case is Tsh.460 millions and therefore each accused person including the respondents are required to pay cash deposit equivalent to half the value of the property and the rest to be secured by execution of a bond as required by the law.

The Principle of sharing and its arithmetic calculations introduced by Mr. Nyange is not provided anywhere under the law and indeed it is foreign to our Criminal Procedure. I therefore agree with Mr. Hyera Learned State Attorney that the Learned trial Resident magistrate erred in law in granting bail or condition which are contrary to the clear provision of the law.

On the second ground of appeal, I am comfortable convinced that the learned Resident Magistrate employed extraneous considerations in granting bail to the respondents when she relied on the partly recorded evidence of few prosecution witnesses and pre-determined the fate of the respondent even before recording the whole prosecution evidence. With due respect to the Learned trial Resident Magistrate, that type of approach is dangerous and pre-judicial to the whole concept of administration of the Criminal Justice system. Likewise the "Sufficcient reasons" or "Circumstances of the case" which empowers the Magistrate to vary or review the bail conditions are not supposed to be based on the weight of the recorded prosecution or defence evidence but on the possibility and availability of the accused to attend the court while on bail. Apparently where the law regarding to bail is specific and mandatory like in this case the question of variation and review does not arise because a Magistrate can not make a review on a matter which is mandatoriry provided under the law. Review is possible where there is discreation.

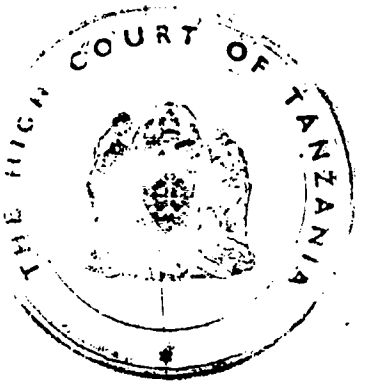
In her ruling it appears that the learned trial Resident Magistrate purported to rely on the District Registrar's letter dated 12th May 2006. Again, with due respect to the Learned Trial Resident Magistrate, administrative correspondences, however composed are not meant to amend the law of the land nor to suggest a departure form the Court practice. Always the law should be interpreted, applied and complied with to the letter.

In the upshot and for the foregoing reasons this appeal is allowed. The decision of the trial Court dated 30/05/2006 granting bail to the respondents on revised conditions is set aside. The respondents shall remain in custody to a date to be fixed by the Learned Trial Resident Magistrate to pronounce the mandatory bail conditions as provided under section 36(4)(e) and (5) of the Economic and Organized Crime control Act 1984; and thereafter to proceed with the hearing of the pending Economic Crime case.

It is so ordered.

M.S.Shangali
JUDGE
21/8/2006.

Ruling delivered todate 21 August 2006 in the presence of Mr. Luena, Learned State Attorney for the Appellant and the respondents in person.



M.S. Shangali
JUDGE
21/8/2006.