

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT COURT OF ARUSHA

AT ARUSHA

MISC. CRIMINAL APPLICATION NO. 05 OF 2022

(Originating from Economic Case No. 15 of 2020 at the High Court of the United Republic of Tanzania at Arusha.)

LENGAWO S/O MOISARI KITESHO @ LEKENI.....1ST APPLICANT

NAMAYAI S/O MELUBO MOISA @ NICODEM@ROSIEKUU.....2ND APPLICANT

DAVID STEPHANO FUPE @ JEREMIAH.....3RD APPLICANT

KALANGA S/O MELUBO.....4TH APPLICANT

VERSUS

THE D.P.P.....RESPONDENT

RULING

21/04/2022 & 21/04/2022

GWAE, J

In the High Court of the United Republic of Tanzania at Arusha, there is an Economic charge leveled against the applicants mentioned above together with four others. The Economic charge against the applicants is in seven counts, namely; **first count**, Unlawful hunting of scheduled animals without permit contrary to section 47(a) and (a) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the first schedule to,

and sections 57(1) and 60(2) both of the Economic and Organized Crimes Control Act, Cap 200 R.E 2002 as amended by section 16 (a) and 13(b) respectively of the Written Laws (Miscellaneous amendments) Act No. 3 of 2016,

In the 2nd count, Unlawful dealing in Government Trophy contrary to sections 86 (1) and (2) (b) of the of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the first schedule to, and sections 57(1) and 60(2) both of the Economic and Organized Crimes Control Act, Cap 200 Revised Edition, 2002 as amended by section 16 (a) and 13(b) respectively of the Written Laws (Misc. amendments) Act No. 3 of 2016.

3rd count, Unlawful Possession of Fire Arms contrary to sections 20 (1) (b) and (2) of the Firearms and Ammunitions Control Act No. 2 of 2015 read together with paragraph 31 of the first schedule to and sections 57(1) and 60(2) both of the Economic and Organized Crimes Control Act, Cap 200 R.E 2002 as amended by section 16 (a) and 13(b) respectively of the Written Laws (Misc. amendments) Act No. 3 of 2016.

4th count, Unlawful Possession of Ammunition contrary to section 21 (b) of the Firearms and Ammunitions Control Act No. 2 of 2015 read together

with paragraph 31 of the first schedule to and sections 57(1) and 60(2) both of the Economic and Organized Crimes Control Act, Cap 200 R.E 2002 as amended by section 16 (a) and 13(b) respectively of the Written Laws (Misc. amendments) Act No. 3 of 2016.

5th count, on diverse dates between 1st day of April 2017 and 31st day of May 2018 at Olorien forest in Ngorongoro Conservation Area Authority within Ngorongoro District, Arusha Region the applicants named above jointly and together did unlawfully hunt and kill one black rhinoceros valued at USD 38,000 which is equivalent to Tshs. 86, 521, 060/= the property of the Government of the United Republic of Tanzania.

6th count, that on dates stated above the 3rd applicant bought two horns and four (4) hooves of black rhinoceros equivalent to one killed from one Jonathan s/o William Silangei @ Jenaa (3rd accused) black rhinoceros valued at USD 38,000 which is equivalent to Tshs. 86,521,060/= the property of the Government of the United Republic of Tanzania and

The **7th count** relating to the 2nd and the 4th applicants who are alleged to have been found in possession of one firearm make SMG with serial No. 5628038358 and nine SMG rounds of ammunition without authorization from

an authorized Authority. Further to that the charge also states that the 1st 2nd together with three other accused persons jointly and together were found in unlawfully possession of one fire arm make rifle 375mm with serial No.58771 TZ CAR 81069 without authorization from an authorized authority.

In their joint affidavit the applicants stated that the offences to which they stand charged are bailable and that their release on bail will not prejudice the interests of the Republic. The applicants further urged this court to grant them bail as they have reliable sureties. The respondent on the other hand objected the application by filing the counter affidavit duly sworn by the learned state attorney Mis. Alice Clement Mtenga.

Before the court, the applicants are seeking an order granting them bail pending defence hearing at the High Court of the United republic of Tanzania at Arusha. Their application is brought under the provisions of Sections 149 of the Criminal Procedure Act Cap 20 R.E 2019, sections 29 (4) (d) and Section 36 (1) of the Economic and Organized Crime Act (supra) as amended by section 10 of the Written Laws (Misc. Amendments) Act No. 3 of 2016.

On the date fixed for hearing of this application, the applicants were unrepresented while the respondent was represented by **Ms. Alice Mtenga**, learned State Attorney who opposed the application. However, before the hearing commenced, the 3rd and 4th applicant prayed to have their application for bail withdrawn on the ground that the case against them is now at the defence hearing which is going to be conducted on the 27th -28th April 2022 and when the learned state attorney stated that, the defence hearing is going to be held on the 27th-28th April 2022, the 1st applicant also joined hands with his colleagues (3rd and 4th applicant) by stating that his application for bail be marked as withdrawn.

It is now for the determination of the application on whether the prayer by the 2nd applicant for the court's grant of bail pending defence hearing and determination of the charge against him and his colleagues is meritorious or not. It is the contention by the learned counsel for the Republic that, the 2nd applicant's application be dismissed since the matter is now at the stage of defence hearing to be held on 27th and 28th April 2022 and that there is likelihood of its final disposal. According to her, the grant of bail in the 2nd applicant's favour may result into an abscondment whereas the 2nd applicant merely argued that he should be released on bail.

I am alive of the principle that, the liberty of an individual must be guarded, protected and promoted but the interests of the society, of which the individual is component, must also be taken into account. According to the wording of Section 29 (4) and 36 of the Act, the offences mentioned above are patently bailable subject to conditions stipulated under Section 36 (5) of the Act as amended by Section 10 of the Written Law (Miscellaneous Amendment) Act, No. 3 of 2016. More so, 2nd applicant and his colleagues are still presumed innocent till found otherwise. I would like to subscribe my holding by the decision of the Supreme Court of Uganda in **Busiku Thomas vs. Uganda** Criminal Appeal No. 33 of 2011 (unreported had these to say;

"It should also be further noted that the presumption of innocence guaranteed to a person accused of a crime, ends when the accused person is found by an impartial Court guilty of the offence he or she was charged with. From this point onward, the interests of justice demand that the Courts should not only take into account the rights of the convicted person, but also the interests of the victim and the society as a whole."

In our case, it goes without saying that the 2nd applicant's guilt has not been proved as the trial is yet to be concluded and the offences against him are equally bailable save to the trial stage that has so far been arrived at

(defence hearing) and date for conclusion of trial particularly defence is known for both the accused persons, applicant inclusive and the prosecution. Issue to tackled here, is whether the grant of bail to the 2nd applicant at this stage may be prejudicial to the public interest which has also been stressed in the case of **Busiku Thomas** cited above.

Despite the fact that, bail is a constitutional right and above all the relevant piece of legislation does not ban the court's grant of the same yet I am bound to look at the other factors notably; that, the prosecution has already closed its case and the defence has commenced its defence hearing which has been fixed on the 27th and 28th April 2022 (six days to come from today), Perhaps in this situation I may be guided by the Bail Guidelines, 2020 which require our courts while observing provisions of section 148 (5) (a) to (e) of the CPA, section 36(4) of the OCCA or section 16 of the PCCPC, as the case may be. In addition to the conditions prescribed under the provisions of the law above named, the court shall take into account of the following factors:

- “(a) gravity of the offence and severity of the sentence;
- (b) security of the accused person;
- (c) protection of the victim;


- (d) **possibility that the accused might abscond;**
- (e) prevention of furtherance of crime;
- (f) preservation of public order;
- (g) nationality of the accused;
- (h) the nature of the accused person in terms of his social standing, ties with the community, etc.;
- (i) special circumstances of the accused e.g. illness or vulnerability;
- (j) **period during which the accused may be in remand;**
- (k) possibility of the accused interfering with the investigation process and
- (l) age of the accused (minor or old age) (bold mine)''

In our instant application, it is undisputable fact that, the 2nd applicant and his colleagues had been in prison custody since 2018 and that the charge against them is about to be concluded probably not later than the end of April 2022 or earlier May 2022. Hence, the remaining period of stay in the prison remand by the applicants before their fate is very minimal compared to the period spent, in other words, it is not desirable to a release the 2nd applicant on bail since it sounds more prejudicial to the Republic as there is a clear possibility or likelihood of the 2nd applicant to abscond before or after he makes his defence taking into account of severity of the sentence if he is found guilty or his absence may prevent the court from concluding the trial

as expected. At this stage and considering the above factors accumulatively, I am therefore of the firm view, that it is safer to decline granting bail in favour of the 2nd applicant.


In the light of the above, the 2nd applicant's application is dismissed, the 2nd applicant shall remain under prison custody till a conclusion of the case against him and his colleagues.

It is so ordered,



**M.R. GWAE,
JUDGE.
21/04/2022**

Court: Right of appeal fully explained



**M.R. GWAE,
JUDGE.
21/04/2022**