IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

MISCELLANEOUS CRIMINAL APPLICATION NO 187 OF 2021

(Originating From Economic Organized Crime Case No. 62 of 2021 of the Resident Magistrate Court of Dar Es Salaam at Kisutu)

Between

NASIB MMBAGGA.....1st APPLICANT

EDWARD SIMON HAULE.....2nd APPLICANT

LEE DONG LEE.....3rd APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

MRUMA J;.

This is an application for bail. It was brought before this Court pursuant to **Section 29 (4)(d)** and 36(1) of the **Economic and Organized Crime Control Act No. 15 of 2015 [Cap 200 R.E. 2019].**

The background of the application can be briefly stated as follows; the three Applicants namely Nasib Mmbagga, Edward Simon Haule and Lee Dong Lee, were arrested and taken to the Resident Magistrate Court of Dar Es Salaam at Kisutu where two counts under the Economic and Organized Crimes Control Act and the Prevention and Combating of Corruption Act

[Cap 329 R.E. 2019] were read to them. The accused persons were not asked to plead thereto as according to the Presiding Magistrate his court had no jurisdiction to hear the case. In other words a formal accusation which is a preliminary step to prosecution has been made against them and because they were not invited to plead thereto, it means that in law they have not been formally charged with those offences.

In the first count the 1st and 2nd Applicants are being charged of the offence of **Abuse of Position Contrary to Section 31 of the Prevention and Combating of Corruption Act** as read together with **paragraph 21 of the First Schedule and Section 57(1)** of the **Economic and Organized Crime Control Act, Chapter 200** of the Laws of Tanzania**.** The particulars of that offence alleges that on diverse dates between January to December 2017 in Temeke Municipality within Dar Es Salaam Region in the course of discharging their duties as District Executive Director and DMDP Project Coordinator of Temeke Municipality Council respectively and intentionally abused their position in violation of Section 33(1)(b) of the Public Procurement Act No 7 of 2011 and caused CRJE East Africa Limited to obtain undue advantage of Tanzania Shillings Six Billion Four Hundred Fifty Two Million Five Hundred forty Eight Five Hundred Sixteen (6,452,548,516/=)

In the second count the trio is charged jointly and together with the offence 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. 2019].** The particulars of the offence alleges that on diverse dates

between January to December 2017 at Temeke Municipality within Dar Es Salaam Region in the course of discharging of their duties as District Executive Director, DMDP Project Coordinator and Chief Resident Engineer of Kyondong Company Limited failed to take reasonable care in rehabilitation and upgrading of selected local roads in Temeke Municipality by willful acts caused Temeke Municipality Council to suffer a pecuniary loss of Tanzania Shillings Six Billion, Four Hundred Fifty Two Million Five Hundred Forty Eight Five Hundred Sixteen (6,452,548,516/=).

The "proprietariness" and/ or legality of the particulars of these offences are not the subject of this ruling therefore I will not comment anything further to avoid prejudice of the pending case at Kisutu.

Before I invited the parties' attorneys to address me on this application and because I was sceptical that there may be some other accused persons who are jointly and together charged with the present Applicants but who for one reason or another have not applied for bail, I asked the learned counsel also to address me as to whether the bail and bail conditions that will be granted to the Applicants in this application will also apply to co-accused persons who are jointly charged with the present applicants but who have not applied for bail.

I thought that the issue needed to be addressed in light of the current situation after the Director of Public Prosecution (DPP) has decided to drop Money Laundering counts in many of the charges filed at the Resident Magistrate Court of Dar Es Salaam at Kisutu and many other subordinate courts which has opened doors to multiple bail applications to the High Court. However, for different reasons being economical or other reasons

each accused person struggles on his/her own to seek for his/her release. The net result is that in a case pending before subordinate court which may have ten (10) accused persons this court may receive ten different bail applications, filed by different applicants or their lawyers on different dates. Due to the fact that the original case file remains with the subordinate court it is difficult for the registry of the High Court and the judge in charge to know that in such a case bail had already been granted to some of the co-accused and the conditions of such grant. When such a case is assigned to a different judge, (sometimes even the same judge who determined the earlier application), conflicting decisions and different conditions of bail may be imposed in the same case. Giving conflicting decisions in the same case, same issue by the same court contravenes the doctrine of parity which requires like case to be treated alike and different cases to be treated differently [See **Green Versus The Queen (2011) 244 CLR 426**], where it was held that:

> "*Parity is a common sense rule which aims to ensure consistency and equality before the law*"

This principle is embodied by Article 13(1) of our Constitution. It is a fundamental element in any rational and fair criminal justice system.

Now counsel for the parties started to address me by submitting on the law regarding bail. As stated hereinbefore, the Applicants' Counsel, **Mr, Alex Mgongolwa of Excellent Attorneys (Advocates), Mr. Stephen Mosha of Neptune Law Attorneys and Mr. Benedict Ishabakaki of Victory Attorneys & Consultants** have lodged this application on their

behalf, seeking that they be admitted to bail pending the "inquiry" of their case and consequently their trial.

Mr. Alex Mgongolwa Learned counsel who took the floor as a lead counsel, urged the Court to release the Applicants on favourable bail terms, contending that the first and second Applicants are reliable personalities and senior officers of the Government of the United Republic of Tanzania both being executive directors. He said that the 1st Applicant has recently been appointed to a position of District Executive Director for Muheza District in Tanga Region.

Regarding the third Applicant, Mr. Mgongolwa informed the court that the third Applicant is a Resident Engineer of a foreign company who oversees all road projects in Temeke Municipal council. Mr. Mgongolwa contended that granting bail is discretion powers of the court and like any other court's discretion it must be used judicially. He said that court's discretion must not be arbitrarily used or be vague. He said that it is trite law of practice that when bail is available it must be availed to the beneficiaries at the shortest time and simplest conditions possible.

Addressing the court on the issue raised by it *suo motu* which is whether bail conditions apply even to co-accused persons who didn't apply for it but who are jointly charged together with the present Applicants, the learned counsel contended that bail being a constitutional right of accused is granted in a case in which the offence charged is bailable and that bail is not to an individual accused person who applied for it. He said that bail is a right and therefore should be available to the accused person whether he applied for it or not.

Responding to Mr. Mgongolwa's submissions, Mr. **Nasoro Katuga learned Senior State Attorney** who appeared for the Respondent/Republic in this matter submitted that the Respondent /Republic does not have objection to the grant of bail to the Applicants. He, however invited the court to set bail conditions in accordance with the requirements of Section 36(5) (a) of the Economic and Organized Crimes Control Act.

Submitting on the issue whether bail granted to the accused person who applied for it can be extended to accused persons who are jointly charged with the Applicant but didn't apply, the learned State Attorney contended that bail being a constitutional right is optional; one can decide to exercise or not to exercise it. He said that in his view court cannot grant bail to an accused person who didn't apply for it, though he added that under Section 36(1) of the Economic and Organized Crimes Act court can grant bail *suo motu.*

I beg to start with the issue of bail as of right to any person charged with criminal offence. There is no gainsaying, and both parties agree that bail is a constitutional right. **Article 13(6) (b) and 15 (1) (2)** of the Constitution are explicit and are to the effect that, unless there is some compelling reason, an accused person [be he a citizen or foreigner], has to be released on bail, as a matter of right, pending the hearing and determination of his/her case. For instance Article 15(1) provides that:

> *"Every person has the right to freedom and to live as a free person"*

Under Sub-Article (2) of the same Article, the grand norm provides that:-

> *"For purposes of preserving individual freedom and the right to live as a free person, no person shall be arrested, imprisoned, confined, detained, deported or otherwise be deprived of his freedom save only-*
>
> *(a) Under circumstances and in accordance with procedures prescribed by the law;"*

On the other hand **Article 13 (6) (b) of the Constitution** provides that:-

"To ensure equality before the law, state authority shall make procedures which are appropriate or which take into account the following principles, namely;-

(b) No person charged with the a criminal offence, shall be treated as guilty of that offence;

This is a presumption of innocence which is a constitutional right. The presumption of innocence embodied under the two articles above dictates that accused person should be released on bail or bond whenever possible**.** The presumption of innocence also means that pretrial detention should not constitute punishment, and the fact that accused persons are not convicts should be reflected in their treatment and management. No wonder Section 36(1) of the ***Economic and***

Organized Crimes Act, Chapter 200 of the Laws of Tanzania, stipulates that:

> *(1) after a person is charged but before he is convicted by the Court the court may on its own motion or upon application made by the accused person subject to the provisions of this section admit the accused person to bail"*

The term bail is not defined in the Act, but **Black's Law Dictionary 7th Edition by Bryan A. Garner at page 135** defines it as a security such as cash or bond required by a court for release of a prisoner who must appear at a future time. The purpose of bail therefore is simply to ensure that the accused will appear for trial and all pretrial hearings. It is not a fine. Bail as a constitutional right, therefore allows the arrested person to remain free until convicted of an offence and at the same time ensure his or her return to court.

The presumption of innocence was accommodated in the Bail Guidelines formulated by the Judiciary of Tanzania and it is restated as a general guideline in Paragraph 1.1 that:

> *"These Guidelines have been developed for use by Judges and Magistrates in criminal proceedings in handling bail matters with a view to realizing the accused person's right and freedom of liberty guaranteed under the Constitution"*

The Guidelines then offer the following non-exhaustive factors for consideration in bail applications:

[a] The 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 that the accused may interfering with the investigations process and;

[L] Age of the accused [Minor age or old age]

[l] Protection of the accused persons.

Now taking into consideration the foregoing parameters in the light of the averments set out in the joint affidavit of **Kennedy Alex, Stephen Mosha and Benedict Ishabakaki, Counsel for the Applicants** as well as the submissions made by learned counsel, it is plain that no adverse

allegation was made about the character or antecedents of the three accused persons. There is no assertion that either the accused was previously granted bail and breached bail conditions setting forth their possibility of absconding. To the contrary it has been submitted by Mr. Mgongolwa, and opposed by Mr Katuga that one of the accused who is jointly charged with the present Applicant in another case is out on bail. I therefore agree with Mr. Mgongolwa the trio is big personalities and therefore the question of misbehaving after they are granted bail cannot arise.

In the premises, the key issues which need to be considered connection with the bail conditions therefore are:

[a] The gravity of the charge or offence and the severity or seriousness of the sentence and;

[d] Nationality of the third Applicant and whether he is a flight risk.

As to the gravity of the offence and the severity of the sentence likely to be meted if the accused persons are ultimately found guilty, there is no gainsaying that the offence of Occasioning Loss to a Specified Authority under the Economic and Organized Crimes Control Act is one of the most serious offences in the land and that in terms of Section 60(2) thereof it entails a minimum sentence of not less than twenty (20) years and a maximum sentence of 30 years. Thus, given the seriousness of the charge and the possible outcome of a conviction, the temptation to jump bail if released on bond should be a key consideration. There is no doubt that the seriousness of the offence has a clear bearing which court has to bear in

mind before setting bail conditions, without losing sight of the prism of **Article 13(6)(b) and 15(1) and (2) (a)** of the **Constitution of the United Republic of Tanzania** and the key question that has to be determined is whether the accused persons will turn up for their trial if released on bond.

Counsel for the Applicants contended that Applicants being high ranking government officials are persons of integrity and they will turn up for their trial. The Respondent/Republic didn't object to the grant of bail which means that they have no fear that the accused will turn up for their trial in the event they are consequently formerly charged. The Republic simply urged to take into account the provisions of section 36 (5) of the Economic and Organized Crimes Control Act in imposing bail conditions to the Applicants. The said section provides:

> *"Where the Court decides to admit an accused person to bail, it shall impose the following conditions on the bail namely ;*
>
> *(a) Where the offence with which the person is charged involves "actual money" or property whose value exceeds ten million shillings unless that person deposits cash or other property equivalent to half the amount or value of actual money or property involved and the rest is secured by execution of a bond*

It is noteworthy here that the above quoted section makes reference to:-

> "*.....where the offence with which the person is charged involves actual money.....*"

The term 'actual money' is not defined in the Act, but **Black's Law Dictionary 8th edition (2004)**, defines it as something real or something which is existing in fact. It follows therefore that the term "actual money" denotes a situation where the amount involved has been proved or at least there is prima facie evidence that it is real. The question that follows is whether the amount stated in the charge sheet which is T.shs. 6,452,548,516/= is actual money or real amount. An amount of money can be proved to be real when it is accompanied with a statement of audited account of the transaction involved. In the present case there is no such audited statement of account of the loss alleged to be caused to the Temeke Municipal counsel. In my view therefore actual money or actual value of the property can only be that which has been duly proved, tested and formally admitted before the Court, either by way of affidavits or *viva voce* evidence or there is prima facie evidence to that effect. It is dangerous for the court to rely whole on mere statement of the person who drafted the charge and believe that the amount stated therein is real or "actual money" involved. Like in drug trafficking cases where certificate of value of the drugs is crucial, it my view that statement of account of the loss or amount involved or at least affidavit to that effect is essential for purposes of considering bail which is a constitutional right. Accordingly, in **Lulu Victor Kayombo and Lilian Onael Kileo Versus The Republic**

Miscellaneous Economic Application No. 140 of 2021 I explained that the amount stated in the charge sheet lacked sufficient particulars to enable the court to believe that it was actual or real and as it is a trite law that accused person should not be subjected to pretrial detention where the evidence against him or her is tenuous, even if the charge was (like in the present case) serious. Court justifiably assessed bail amount which it believed was sufficient to bind the accused person to appear before the trial court wherever he/she is so required. Conversely, it may only be justifiable to subject an accused person to pretrial detention where the evidence of the amount involved in the charge is seemingly strong. For example, where there is a certificate of value or affidavit confirming that the amount stated in the charge sheet is real amount or value of the subject matter.

The principle of sharing cited by Mr Katuga, is on all fours with the Bail Guidelines issued by the Judiciary of Tanzania on 10th September, 2020. Paragraph 3.6.3 which provides to the effect that where the law requires the accused to deposit half of the value or amount involved in the charge and there are more than one accused persons, that amount will be shared among them. However, this may be realistic where the amount or value involved has been prima facie established. Otherwise to leave it to the drafters of the charge sheet to decide the amount involved may be abused and allow some corrupt elements in the department to decide to put colossal amount of money in the charge sheet with purpose of technically denying bail to the aimed persons. But because under Article 107A(1) of the Constitution, the Judiciary (Court) is the authority with final decision in

dispensation of justice, courts have powers in dispensing justice to require some better and further particulars of any matter, to rely wholly on the unproved statement of the prosecution is to surrender those powers to other organs of the state.

In the present case, having perused the charge sheet, I am prepared to say that the value of actual money or property involved in the commission of the alleged offence is tenuous. I do not wish to say more for the fear of embarrassing the pending trial and pre-judging issues. This in itself would be sufficient reason to warrant court to exercise its discretionary powers and impose bail conditions which would reflect the spirit of the law which is simply to allow the accused person to remain free until convicted of a crime and at the same time ensure his or her return to court whenever so required.

Coming to the issue raised *suo motu* by the court which is whether a co-accused having role similar to the Applicant but who didn't apply for bail should also be granted bail. In **Lulu Victor Kayombo's case** (supra), at the time Lulu and another filed their application for bail other co-accused persons had already been granted bail and given bail conditions. The presiding judge without being aware of bail conditions imposed in the earlier application (s) before another judge, imposed bail conditions which happened to be different from the bail conditions imposed on other accused persons.

Mr. Mgonglowa for the Applicants emphatically argued that in such a situation the accused who didn't apply for bail may be released on bail on the ground of parity, consistency and predictable.

Mr. Katuga, learned Senior State Attorney, slightly differed. He submitted that bail being a constitutional right is optional. An accused person has the right to exercise.

Whereas I agree with Mr. Katuga that bail as a constitutional right is optional and the accused has the right to exercise or not to exercise it, but I differ with him on how it should be exercised. My view is that once bail is granted in a case it is available to all co-accused in that case. An accused who doesn't wish to exercise his right to be released on bail should simply refrain from complying with bail conditions for instance by simply refraining from securing sureties required for his release or signing a bail bond. This is so because being released on bail implies exercising the right to be released on bail. And there is no law which mandatorily requires a person charged with criminal offence to be released on bail. This is, however far from saying that when bail is granted to the co-accused, another co-accused is entitled to the same grant and same bail conditons. In the Indian case of **Salim Versus State of UP (2003) ALL LJ,625**, the Allahabad High Court when faced with somewhat similar situation like the one at hand had this to say:-

> *"There is no absolute hidebound rule that bail must necessarily be granted to the co- accused where another co-accused has been granted bail"*

It may happen that though more than two persons are facing the same charge, they have different characters or backgrounds. For instance it may happen like in the present case that one or more of the accused are none citizens, bail conditions imposed may differ to reflect that background etc.

Needless to say that the doctrine of parity is desirable principle that can be deduced from both Article 13(1) of the Constitution which is to the effect that all persons are equal before the law and are entitled without any discrimination to protection and equality before the law and Section 36 (1) of the Economic and Organized Crime Control Act Chapter 200 of the laws which gives discretion to the court to admit the accused person to bail even if he didn't apply for it. The said law provides:-

> "After a person is charged but before he is convicted by the Court, the court may *on its own motion* or upon application made by the accused person subject to the following provisions admit the accused person to bail"

In view of the above it is desirable that in a situation like the one we are presently facing where subordinate courts do not have jurisdiction to hear bail applications and where applications for bail are instituted in the High Court while original records are in the subordinate courts, the court granting bail should exercise its discretion powers under Section 36(1) of the Economic and Organized Crime Control Act and Section 148(1) and (5) of the Criminal Procedure Act, and on its own motion grant bail to co – accused persons who are jointly charged with the Applicant (s). I am of the view that parity is crucial in such a circumstance. The exercise of discretion embodied under Section 36(1) quoted above will assist court to avoid multiplicity of actions on the same cause and conflicting decisions regarding grant or none

grant of bail and bail conditions. Needless to say further that the prosecution will have the right to object granting bail to a specific accused person for reasons to be considered and deliberated upon by the court and/or request specific bail conditions for an accused person on the same ground. In other words, a magistrate or judge is bound to impose conditions of bail on the ground of parity except where circumstances attract different conditions for different co accused persons for instance (like in the present case) where a co-accused is foreigner or is a minor. Slightly different conditions may be imposed to cater for such a situation. It is no wonder then that, the **Bail Guidelines,** accommodate such a situation under paragraph 3.3.2 under the head "Additional Conditions"

In the premises and that being said, it is my considered view all the accused persons in this case be admitted to bail upon fulfilling the following bail conditions:-

1. Each accused person must sign with the court (The Dar Es Salaam Resident Magistrate Court at Kisutu) a bail bond of Tanzania shillings 6,452, 548,516/= not cash;
2. Each accused person must secure two reliable sureties working in the Government or any other reputable organization within the country;
3. Each accused (Save for the 3rd Applicant who is a foreigner therefore cannot own immovable property within Tanzania as per law) or any of his surety must deposit with the court (The Resident Magistrate Court of Dar Es Salaam at Kisutu) a title deed exhibiting that he/she

owns within the United Republic of Tanzania an immovable property worth not less than T.shs 250, 000,000/=.

4. The 3rd Applicant must secure a letter of assurance of his appearance from the Embassy or any Diplomatic Representative of his country in Tanzania, assuring the court that he shall appear in court till conclusion of his case;
5. All accused are directed to surrender their passports (if any) to the Immigration Department provided that in the event they obtain leave of this court for their travel abroad the Immigration upon order of this court shall return the passport for that purpose.

It is so ordered.

A.R. MRUMA

JUDGE

Dated at Dar Es Salaam, this 27th Day of August 2021

Order:

This ruling and orders shall immediately be dully certified and transmitted to the Resident Magistrate Court of Dar Es Salaam at Kisutu for approval of sureties by that court.

A.R. Mruma

Judge.