

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**  
**THE CORRUPTION AND ECONOMIC CRIMES DIVISION**  
**AT DAR ES SALAAM**

**MISC. ECONOMIC CAUSE NO. 5 OF 2018**

(Originating from Economic Crimes Case No. 54 of 2017 - Resident  
Magistrate's Court of Dar es Salaam at Kisutu)

**1. ARCHARD ALPHONCE KALUGENDO**  
**2. EDWARD JOSEPH RWEYEMAMU** } ..... **APPLICANT(S)**  
VERSUS

**THE REPUBLIC..... RESPONDENT**

Date of Last Order:-05/04/2018

Date of Ruling:-17/04/2018

**R U L I N G**

**W.B. KOROSSO, J**

Archard Alphonse Kalugendo and Edward Joseph Rweyemamu who face criminal charges in Misc. Economic Crime Case No. 54 of 2017 in the Resident Magistrate's Court of Dar es Salaam at Kisutu have filed an application under a certificate of Urgency via chamber summons, pursuant to Section 3(a), 29(4)(d), 36(1), (5), (7) of the Economic and Organized Crime Control Act, Cap 200 RE 2002 (hereinafter referred to as EOCCA or

the Act. The application is supported by an affidavit deposed by Nehemiah Geoffrey Nkoko, learned advocate for the applicants who averred reasons for the Court to grant bail to the applicants. The application sought the following reliefs that:

1. The applicants be granted bail pending trial
2. The applicants have reliable sureties who are ready and willing to receive and adhere/comply to all bail conditions which may be imposed
3. Incidental orders as may be necessary be made

The Respondent Republic in response filed a counter affidavit sworn by Tully James Helela, Learned State Attorney. The respondents also filed a certificate issued by the Director of Public Prosecution under section 36(2) of the Economic and Organized Crime Control Act, Cap 200 RE 2002 objecting to grant of bail on the ground that the safety and interests of the Republic will be prejudiced.

Before the Court for Ruling is the weight to be accorded by the Court and the consequences thereto with regard to the certificate issued and filed in Court by the DPP objecting to grant of bail to the applicants. The Republic represented by Ms. Elizabeth Mkunde assisted by Ms. Nalindwa Sekimanga, Learned State Attorneys respectively, prayed that the Court find the certificate to be valid and therefore refrain from granting bail to the applicants. The respondents contended that the Court find that the DPP certificate complies with the guiding principles on issuance of such a certificate as propounded in the case of ***DPP vs Ally Nuru Dirie and***

**another** (1988) TLR 252 - CAT. That the Court of Appeal in **DPP vs. Li Ling Ling**, Criminal Appeal No. 508 of 2015 endorsed the conditions set to validate a certificate objecting to bail issued and filed by the DPP in Court. The conditions set are that First, that the DPP has to certify in writing. Second, the certificate must allude that the safety and interest of the Republic are likely to be prejudiced and third, that the certificate must relate to a criminal case either pending trial or pending appeal.

The Learned State Attorney submitted therefore that the certificate filed by the DPP against the applicants has complied with all the said three conditions. That the certificate relates to a pending criminal case, that is economic case no. 54 of 2017 pending at Resident Magistrate's Court at Kisumu. That despite as argued in the Preliminary objection hearing already decided, that the certificate alludes to pending case Economic Case No. 54 of 2018 and not of 2017, the names of the applicants are the same and the relevant case number is as attached in Annexure A of the applicants affidavit. They prayed that the Court finds that wrong citation of the year is a typing error and thus curable. Therefore they prayed that the Court finds the certificate filed valid.

On the part of the applicants, they argued that the three test raised in **Ally Nuru Dirie's case** (supra) have not been met. The applicants counsel cited the holding in the case of **Emmanuel Senkoro Massawe vs DPP**, Criminal Appeal No. 252 of 2016 and argued that in this case a fourth test was added, and that is whether the DPP acted in bad faith and

that all the four tests must be considered when assessing the validity of the certificate filed by the DPP objecting to grant of bail to applicants. It was their contention that the certificate is invalid since it has failed to comply to the tests /conditions outlined by the Court of Appeal in cases cited by the respondents and ***Emmanuel Massawe case*** (supra). That on the issue of the DPP certifying in writing, this was not complied with because he has certified on a case which is not in Court, that is the certification of Economic crime case No. 54 of 2018 pending at Kisumu RM's Court and that the present application originates from that case while the case cited is not the relevant case and thus in effect no case has been made reference to as required by the conditions on validity of the DPP's certificate. The applicant argued that the respondents' contention that failure to record the correct year is a typing error is an afterthought and should not be accorded any weight.

To cement this line of argument, the applicants counsel stated that this can be discerned from the counter affidavit, which also states that the matter relates to an Economic Case No. 54 of 2018 pending at Kisumu RM's Court. They argued further that the DPP certificate is erroneous and therefore there is no certificate before the Court which should lead to no other consequence but a finding that the first validity test has failed, with regard or in view of the certificate before the Court for consideration. Moving to the second test, the applicants counsel argued that this requires reference to a pending case or an appeal. That when you apply the test to what is before the Court, it is clear that the present case originates from a

criminal case No. 54 of 2017 and not Criminal case No. 54 of 2018 as recorded, therefore they argued the DPP certificate does not relate to any case and thus the test has not been fulfilled. It was there prayer then for the Court to find that the certificate does not relate to any pending trial or appeal.

Regarding the argument exposed by the respondents expounded in paragraph 5 of the counter affidavit that applicants are charged with serious offences related to environment and wildlife, it seems the certificate relates to another matter and not the charges facing the applicants, charges of occasioning loss to a specified authority, it is clear they argued that then the second test is not met. Moving to the third test, on the certificate relating to public interest being at risk, the applicants contended that there is no evidence of any public interest at risk to being compromised by the applicants. That this is the second time the applicants have appeared before the Court, and the DPP was expected to show how alleged public interest at risk of being compromised may be prejudiced, must provide reasons and that this has been provided in numerous cases when considering bail. The case of ***Nicholas Sarongi and another vs Republic*** (1975)LRT 58 was cited. That in this case the Court at pg. 245 narrated criteria for consideration, where on number 6 they stated that, in an application for bail the fact that an accused person facing charges is not in itself a bar to grant of bail. In no.7 the Court stated; "*before bail is granted, the Court must be satisfied that the accused if released will not abscond, endanger the public safety and properly or in anyway interfere*

*with the cause of justice'*. and that at pg. 247 on the 3rd paragraph the Court stated: " *The learned State Attorney as argued the Court to reject the application on ground the offence facing the accused is a serious offence'*."

That the Court upon consideration of the acts relating to the seriousness of offence which was use of dynamite- is what led the Court to deny bail against the applicant. That this is not the case in the present case where the applicants are charged with occasioning loss. The applicants counsel submitted further, that this alone cannot in anyway be said to risk to compromise public safety and interest. That the applicants have served the Public Service for more than 27 years. They applicants counsel thus argued that the certification that the applicants may compromised public interest does not hold having been no attempt made by the applicants to interfere with investigations. The case of ***Antonia Zakaria Wambura and another vs. Rep***, Misc. Economic Cause No. 01 of 2018 (HCT-Mwanza), where the Court at pg. 12 paragraph 3 stated: "*But under normal circumstances, it does not augur in anyone's mind when the applicants have been outside, there was any danger until they were arrested... it is not clear what acts or danger the applicants may cause to the endanger interest of the Republic which they did not do from 2002'*".

The applicants acknowledged some facts in the above cited case that are not similar to the facts in the present case, for instance, the fact that the applicants in that case were out since 2002 until the arrest in 2017 but

the issue of both serving the public dutifully for a long time. That in the present case the applicants had originally filed an application and then upon the filing of the certificate withdrawn the application and awaited for change in circumstances to reapply. The applicants believe that reasons provided by the DPP objecting to grant of bail to applicants should not be the same one as the first time. That in the case of ***Zakaria Wambura's*** case (supra), the Court stated that to deny bail to applicants and leave them in custody when they are only charged is unacceptable in criminal justice. That in the case of *Costa Ricky Mahalu*, Civil Cause No. 35 of 2007 (unreported) the High Court observed that Courts should not put suspects in remand to punish them but they have freedom and rights that should be observed and that they should not be punished by denying them their right to bail, and the Court proceed to disregard the certificate by the DPP. The respondents also prayed the Court find the decision of the Court of Appeal in ***Attorney General vs Jeremiah Mtobesya***, Civil Appeal No. 65 of 2016 relevant and hold that Section 148(4) of the Criminal Procedure Act, discussed there is in *pari materia* to section 36(2) of the EOCCA, Cap 200 RE 2002. That the Court then proceed to disregard the certificate filed by the DPP in this case based on the said holding despite refusal by the Court of Appeal in ***Emmanuel Simforian Massawe vs Rep.***, Criminal Appeal No. 252 of 2016. The respondents stated that despite the various conflicting decisions on whether section 148(4) of CPA is *impari materia* to section 36(2) of EOCCA and prayed the Court find the two provisions *impari materia*.

Applicants counsel also challenged the fact that in filing the certificate the DPP did not comply with guidelines in conduct of his duties as outlined in Article 59(B) of the United Republic Constitution and section 8 of the National Prosecutions Service Act, No. 1 of 2018. They thus contended that the Court find that the certificate is not valid failing to comply with the conditions set in case law cited and proceed to hear the application for bail on merit.

The Respondent Republic rejoinder was brief. First reiterating that the points raised in the submission in chief should be considered and that the DPP certificate complies with the validity test expounded introduced by case cited. That the error in the citation of the year number is minor and should not invalidate the certificate and cited the case of ***Leila Jalladin Haji Jamal***, Civil Appeal No. 55 of 2003 to cement this point. That in that case the Court stated "*that an error in citing a year is a minor curable defect*". On the issue of providing reasons on certification that grant of bail will prejudice interest and safety of the Republic, it was there argument that, there is no legal provision requiring the DPP to provide reasons for issuing a certificate. That at this juncture, investigations are ongoing and since the DPP not required to provide reasons for filing a certificate no one should speculate on whether or not the applicants may interfere in investigations. They also found the cases cited by the applicants counsel distinguishable, That the Court of Appeal case of AG vs Mtobesya (supra) the provision considered was 148(4) of CPA and the current certificate is issued vide section 36(2) of the EOCCA and this being the case there is no



need to consider application of section 28 of EOCCA, there being no lacunae in the said legislation related to the matter under consideration to warrant this

They also contended that at this juncture any issue related to counter affidavit of the respondents should not be a matter for consideration since the Court is addressing the certificate filed and not the application. The respondents reiterated their prayers for the Court to find the certificate filed by the DPP valid and to refrain from granting bail therefrom.

The applicants and the respondents have vigorously presented their cases regarding the Certificate filed by the DPP under section 36(2) of EOCCA, objecting to grant of bail to applicants. It is important to remind ourselves that before hearing the parties on this matter, there was a preliminary objection raised by the applicants with regard to the said certificate. The objection was on the fact that the Certificate filed by the DPP objecting to grant of bail to the applicants was erroneous. Stating that the said certificate states that the charges facing the applicants at Resident Magistrate's Court of Dar es Salaam at Kisutu are in Economic Crime Case No. 54 of 2018, while in reality the originating case is Economic Crime Case No. 54 of 2017.

This Court decided that that the preliminary objection raised was not purely a point of law and determination of the raised objection was dependent on other factors outside the ambit of the pleadings before this

Court. Consequently the Court ordered that when determining matters related to the certificate, the raised objection, will also be determined by this Court upon consideration of the weight to be given to the Certificate itself.

From case law cited by the applicants and the respondents, there is no question that they all acknowledge the fact that bail is the right of an accused person and may be denied at the discretion of the Court, if there are doubts on his appearance on a date set for hearing or at risk to jump bail or for his own safety. The applicants and the respondents have also from their submissions have no quarrel with the position that a Certificate filed by the DPP objecting to bail has to undergo and pass the tests/conditions propounded in ***DPP vs Ally Nuru Dirie and another case*** (supra) and endorsed in ***DPP vs Li Ling Ling*** (supra) and ***Emmanuel Simforian Massawe*** (supra). That is:

- i. *the DPP must certify in writing and*
- ii. *the certificate must be to the effect that the safety or interests of the United Republic are likely to be prejudiced by granting bail in the case; and*
- iii. *the certificate must related to a criminal case awaiting trial or appeal:*

And generated from ***Emmanuel Simforian Massawe case*** (supra):

- iv. *where it is proved that the DPP acted on bad faith or abuse of Court process (added by (supra))*

Before we venture into consideration of whether or not the current certificate filed complies with the said conditions we will first consider some

general matters raised which we feel need to be addressed. There is the challenge that the DPP in filing the certificate abused the principles expected to guide him in the conduct of his duties prescribed under Art. 59B of the URT Constitution and Section 8 of National Prosecutions Act, Act No. 1 of 2018. It suffices to remember that this might not be a proper forum to challenge this. There is available remedy through the judicial review process where a party feels the DPP has abused his powers, and we are of the view that in such a case that is the proper channel to undertake if the applicants feel inclined to do so.

At the same time, for reasons which will be shown later herein, we will not at this juncture venture into discussions and consideration (though we were invited by the applicants), on whether or not section 36(2) of the EOCCA is *impari materia* to section 148(4) of CPA. Suffice to know that there is no doubt that the provisions are situated in separate legislations and they all empower the DPP to issue a certificate objecting to grant of bail to accused for reasons stated therein but that we are also aware of the principle of interpretation of *pari materia* provisions.

We find that there is rich case law and it is settled that once the certificate filed by the DPP under section 36(2), if found to be valid then the Court should not proceed to grant bail. In **Emmanuel S. Massawe's case** (supra) at pg. 15 last paragraph this was emphasized when the Court of Appeal held:

*" we are of settled view, just like the trial Court, that one 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".* This position was also acknowledged by the Court in ***AG vs Jeremiah Mtobesya's case*** (supra) Court of Appeal at pgs. 46 and 61 when narrating the position of other court of appeal cases on this issue. What we are saying is that that is the position of the law, and ***Jeremiah Mtobesya's case*** (supra) did not go further to consider further implications of this position related to a certificate issued under section 148(4) of the CPA and not section 36(2) of the EOCCA.

That being the position, we move to consider whether the certificate before us, filed by the DPP vide section 36(2) of the EOCCA has complied or fulfilled the said conditions to determine whether it is valid or not. We start with the 2nd condition. Suffice to say, the wordings in the certificate are that:

*"I, BISWALO EUTROPIUS KACHELE MGANGA, Director of Public Prosecutions, DO HEREBY, CERTIFY that ARCHARD ALPHONCE KALUGENDO and EDWARD JOSEPH RWEYEMAMU who are accused person in the above mentioned Economic Crime Case should not be granted bail on the ground that the safety and interests of the Republic will be prejudiced".*

Therefore there is a declaration *".... should not be granted bail on the ground that the safety and interests of the Republic will be prejudiced"*. Therefore without doubt condition number 2 has been fulfilled. It should also be noted that the law does not prescribe for reasons or an explanation

on what interests of the Republic will be prejudiced. The only test is that this should not be done with bad faith or by abusing justice.

Having gone through the cited cases with regard to presented arguments on this point by the applicants, we find most of them are distinguishable in view of the different circumstances and the fact they were discussing the rights to bail in general context- that is on well established principles and not within the context of the specific provisions that have empowered the DPP to issue such certificates. In the case of ***Emmanuel Simforian Massawe*** the CAT states: "... *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 position is cemented by various cases including ***Method Malyango Busogo and Another vs R., Misc. Criminal Application No. 51 of 2015; Lucas Gaiuma Nyagabati vs. R, Criminal Application No. 107 of 2015; and the DPP vs Li Ling Ling***, Criminal Appeal No. 508 of 2015, whereby in this case the Court of Appeal stated that "*the position of the law as stated in the **Dirie's** case is that once the DPP's certificate has met a validity test, the court shall not grant bail*".

We move to the 4th conditions, whether the DPP acted on bad faith or abuse of the court process. We find this is subject to provision of evidence by one who alleges and we find that this was unavailable before the Court. Therefore with what is available before the Court, we find no evidence that

the DPP acted on bad faith or abuse of court process. Therefore we find not need to dwell further on this and that the condition is fulfilled.

We shall now move to consider whether the 1<sup>st</sup> and 2<sup>nd</sup> condition on validity of the certificate has been fulfilled together. For the 1<sup>st</sup> condition it requires that the DPP must certify in writing. We find that by ordinary construction the word certify is, to "*to authenticate or verify*". At the same time our understanding is that to authenticate in ordinary context is to acknowledge the correctness, to confirm, to validate or to substantiate the same. The fact that the year of the originating case is erroneous has not been disputed by the respondents. It is not in doubt that the originating case is Economic Crime Case No. 54 of 2017 and not Economic Crime Case No. 54 of 2018. It becomes serious because the certification states; "... *Archard Alphonse Kalugendo and Edward Joseph Rweyemamu who are accused persons in the **above mentioned Crime Case** should not ...*". The argument by the respondents is that this is a minor defect. While it is true that the attached copy of the charge reveals the correct case number, this in itself does not diffuse the default in the Certificate filed by the DPP.

We have been invited to find the error to be minor and take into consideration the holding in ***Leila Jalaludin Hajl Jamai vs Shaffin J. H. Jamal*** (supra). In the case a preliminary objection was raised and one of the ground was that the record of appeal are defective because of incorrect citation of the case number of the lower court. We find the holding that the error in citing ear 2002 instead of 2001 is a minor and curable defect was

appropriate in the cited case of Leila Jamal (supra) because it does not go to the substance of the case. In the present case we find it is important, especially in a certificate which refers the pending case and where it is a condition for validity that the certificate must relate to a case awaiting trial or pending appeal. The reference to a pending case must be clear and should not be faulted, because otherwise this condition will not be fulfilled. The certification in the present case gives the names of the applicants and states “.. *who are accused persons in the above mentioned Economic Crime case...*” nothing else. The above mentioned case is Economic Crime case No. 54 of 2018, referred under the number of the current application.

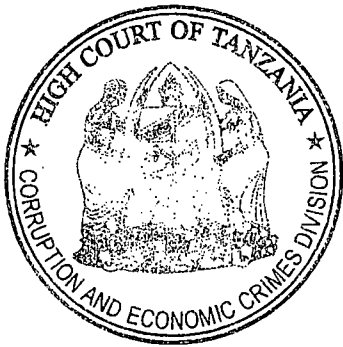
In actual fact when you scrutinize the certificate further, there may be an issue in how the case awaiting trial is referred and whether this is adequate and outlines the proper way to do this and whether it presents the contents and purpose of the certificate itself. Since we are of the view that the contents of the certificate should sustain itself. That is where certification starts in the certificate. But this is an issue for another time and maybe the DPP needs to carefully examine how the whole certificate is drafted and whether under scrutiny it is adequate to show that all the requisite conditions are fulfilled. Since even an amendment cannot be made without the permission of the DPP himself. The DPP being the one who has to certify the contents of the certificate. We thus find that the certification to be defective from the face of it. Having to make reference to the referred to case above. The question is which of the above cited

cases are being referred to? The current application or that referred to in smaller fonts under the cited misc. economic cause as originating from.....”

Going to the 3rd condition that the certificate must related to a criminal case awaiting trial or appeal. Having regard to the error in the year of the cited case pending at Kisutu, the question being can certification based on non-existent case be validated? Can one say in the current application, the filed certificate objecting to grant of bail to applicants relates to a criminal case awaiting trial or appeal- which is the case? While there may be no query that the applicants face a criminal offence, the problem is that the said criminal case which they face is not the one referred to in the current certificate. What is recorded in the certificate is erroneous, there being no such case with the names of the applicants? That is, there being no Economic Case No. 54 of 2018 pending at Resident Magistrate Dar es Salaam at Kisutu for which the applicants are charged. This is not just a typographical error and therefore a minor issue, since it relates to a certification of matters, therefore it goes to the substance of the matters. This is also cemented by the fact, there is a condition for validity of the certificate requiring reference to a case awaiting trial or pending appeal. Error in citing the proper case number (upon failure to cite the proper case year) of the case pending trial against the applicants in the certificate we find is an incurable defect. We thus find that the certificate before us as also failed to satisfy condition 3.



That being the case, we find that the Certificate has failed to pass the validity test and therefore, the Court will not consider the document filed by the DPP in the name of a Certificate by the DPP. That being the case, the matter will proceed with hearing of the application on merit.



Winfrida B. Korosso

**JUDGE**

17th April 2018