IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MUSSA, J.A., MWANGESI, J.A. And NDIKA, J.A.)

CRIMINAL APPEAL NO. 60 OF 2018

1. **MWITA JOSEPH IKOH**
2. **CHOLA JOSEPH MAGINGA** ..... **APPELLANTS**
3. **JAMAL SULEIMAN KULUSANGA**

VERSUS

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

[Appeal from the Ruling of the High Court of Tanzania, Corruption and Economic Crime Division at Mwanza Sub-Registry]

(Matogolo, J.)

dated the 7th day of February, 2018

in

Misc. Economic Crime Cause No. 2 of 2018

JUDGMENT OF THE COURT

11th December, 2018 & 12th April, 2019

NDIKA, J.A.:

In the Resident Magistrate's Court of Mwanza at Mwanza, the appellants, along with three other persons, stand jointly charged with the offence of trafficking in precursor chemicals contrary to section 15 (1) (b) of the Drug Control and Enforcement Act, No. 5 of 2015 (DCEA) as amended by the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016 and the Drug Control and Enforcement (Amendment) Act, No. 15 of

2017. The accusation by the prosecution is that the appellants and their co-accused, on 13th December, 2017 at Kigongo Ferry area within Missungwi District, Mwanza Region, using a motor vehicle make Mercedes Benz with Registration No. T.360 AEX and its trailer with Registration No. T.957 AXF, trafficked in 200 drums of precursor chemicals known as ethyl alcohol with a total volume of 50,000 litres.

While awaiting committal for trial, the appellants took out a chamber summons under a certificate of urgency applying for bail from the High Court, Corruption and Economic Crimes Division, Mwanza Sub-Registry under sections 29 (4) (d) and 36 (1) of the Economic and Organised Crimes Control Act, Cap. 200 RE 2002 (EOCCA) as amended by the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016. In determining the application, the court addressed three issues: one, whether the court was properly moved to consider and determine the application; two, whether the court had jurisdiction at that stage to examine the charge sheet in order to ascertain its correctness; and finally, whether the charge sheet discloses a bailable offence.

In its decision dated 6th February, 2018, the High Court (Matogolo, J.) held that it was properly moved to consider and determine the

application; that the offence charged was triable by the court but the court would have mandate to examine and determine the correctness of the charge sheet when the appellants are committed to it for trial and not during the application for bail; and finally, that the offence with which the appellants stand charged was unbailable.

Being dissatisfied by the High Court's decision, the appellants preferred an appeal to this Court on two grounds as follows:

1. *That, the learned High Court Judge erred in law in holding that the offence with which the appellants are charged is not bailable.*
2. *That, the learned High Court Judge erred in law when he failed to examine the charge and satisfy himself that the appellants are legally held in custody.*

At the hearing before us, Mr. Deya Paul Outa and Mr. Fidelis Mtewele, both learned counsel, prosecuted the appeal for the appellants whereas Mr. Juma Sarige, learned Senior State Attorney, teamed up with Ms. Subira Mwandambo, learned State Attorney, to represent the respondent Republic.

Mr. Mtewele argued the first ground of appeal. He submitted that although the offence with which the appellants are charged is stated as trafficking in precursor chemicals, its particulars disclose ethyl alcohol as the allegedly trafficked substance but it is not one of the listed precursor chemicals in the Second Schedule to the DCEA as defined by section 2. While acknowledging that in terms of section 29 (1) (c) of DCEA the offence of trafficking in precursor chemicals is explicitly unbailable, he contended that the offence laid against the appellants was bailable on the reason that it relates to an unscheduled precursor chemical. The learned counsel, therefore, faulted the learned Judge for failing to direct himself properly to the provisions of section 29. He thus urged us to reverse the learned Judge's holding that the offence charged was unbailable and remit the matter to the court below for consideration of bail.

When asked by the Court whether the lower court had jurisdiction to take cognizance of the application for bail in view of the decisions of this Court in **Republic v. Dodoli Kapufi & Another**, Criminal Revision Nos. 1 & 2 of 2008 and **the DPP v. Bashiri Waziri & Another**, Criminal Appeal No. 168 of 2012 (both unreported), Mr. Outa rose and submitted that the court, indeed, had jurisdiction to deal with the matter pursuant to section

29 (4) (d) of the EOCCA, which was cited as an enabling provision in the chamber summons. He contended that the two cases concerned the grant of bail by a committing court in terms of the provisions of the Criminal Procedure Act, Cap. 20 RE 2002 (CPA) and that they were inapplicable to the present matter. He added that section 29 (4) (d) of the EOCCA specifically and expressly vests bail granting powers to the High Court and, so, the lower court had jurisdiction in this matter to deal with the application for bail.

Mr. Outa also addressed us on the second ground of complaint, which, as already indicated, faults the learned Judge for failing to examine the charge and satisfy himself that the appellants are legally held in custody. He contended that it was the duty of the court to ensure that the charge was correct and proper but the court wrongly refrained from doing so on the ground that the appellants had not yet been committed to it for trial. Although he admitted that the chamber summons did not challenge the correctness or validity of the charge, he insisted that in course of his consideration of the application for bail the learned Judge had to satisfy himself as to the soundness of the charge. If the court had done so, it would have established that the charge was improper for citing a chemical

that was not listed under the law as a precursor chemical. Reliance was placed on this Court's decision in **Oswald Abubakari Mangula v. Republic** [2000] TLR 271 for its holding that a trial magistrate is legally bound to satisfy himself as the correctness of the charge. Accordingly, Mr. Outa urged us to vacate the learned Judge's position that he had no powers to deal with the correctness of the charge even if the case had not yet been committed for trial.

On the other hand, Mr. Sarige contended, on the first ground of appeal, that the offence of trafficking in precursor chemicals is unbailable as per section 29 (1) (c) of the DCEA if the prohibited substance involved is, at least, thirty litres in liquid form or thirty kilogrammes in solid form. However, he admitted that the substance alleged to have been trafficked by the appellants, namely, ethyl alcohol, was not listed or scheduled as a precursor chemical.

On being probed by the Court whether the lower court had jurisdiction to take cognizance of the application for bail, Mr. Sarige, quite unreservedly even though briefly, agreed that the court had mandate to do so.

As regards the second ground of appeal, Mr. Sarige supported the learned Judge's refusal to examine and determine the propriety or soundness of the charge because the appellants had not yet been committed for trial. It was premature for the court to do so, he added. He sought to distinguish the decision in **Oswald Abubakari Mangula** (supra) on the reason that it concerned the duty of a magistrate in the course of trial; not that of a judge prior to committal for trial.

Rejoining, Mr. Outa embraced Mr. Sarige's concession that ethyl alcohol alleged to have been trafficked by the appellants was not listed as a precursor chemical and submitted, initially on the strength of that admission, that the offence charged was, for that reason, bailable. On reflection, he submitted that the charge was invalid for alleging trafficking in a substance that was explicitly not listed as a precursor chemical. Accordingly, he prayed that the charge be struck out due to its invalidity.

Having examined the record of appeal and dispassionately considered the learned contending submissions, we think it is necessary for us, at first, to address the question whether the lower court (that is, the Corruption and Economic Crimes Court) had jurisdiction to take cognizance of the application for bail by the appellants.

At the outset, we think it is necessary to remark that in his reasoned judgment the learned Judge confronted the issue whether the court was properly moved to consider and determine the application but he did not specifically address the question whether the court could take cognizance of the application. The court answered that question in the affirmative holding that the application, having been predicated upon sections 29 (4) (d) and 36 (1) of the EOCCA, was properly before the Court and that the omission to cite the provisions under which the charge facing the appellants is laid was inconsequential

We recall that Mr. Outa submitted to us that section 29 (4) (d) cited in the chamber application as enabling provisions vests in the lower court the requisite jurisdiction to deal with the application. Mr. Sarige took the same stance. For ease of reference, we reproduce the entire subsection (4) of section 29, as amended by the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016, as follows:

> *"(4) After the accused has been addressed as required by subsection (3) the magistrate shall, before ordering that he be held in remand prison where bail is not petitioned for or is not granted, explain to the accused person his right if he wishes,*

to petition for bail and for the purposes of this section the power to hear bail applications and grant bail–

(a) between the arrest and the committal of the accused for trial by the Court, is hereby vested in the district court and the court of a resident magistrate if the value of any property involved in the offence charged is less than ten million shillings;

(b) after committal of the accused for trial but before commencement of the trial before the court, is hereby vested in the High Court;

(c) after the trial has commenced before the Court, is hereby vested in the Court;

(d) in all cases where the ***value of any property involved in the offence charged is ten million shillings or more at any stage before commencement of the trial before the Court is hereby vested in the High Court.*** *" [Emphasis added]*

The essence of the above-quoted subsection is that it vests in different courts the power to hear and determine bail applications under the EOCCA depending on the stage the proceeding concerned has reached

as well as the value of the property involved in the offence charged. For a start, section 29 (4) (a) empowers the district court and the court of a resident magistrate to hear and determine bail applications between the arrest and the committal of the accused for trial by the "Court" if the value of any property involved in the offence charged is less than Ten Million Shillings. While in terms of section 29 (4) (b) the granting of bail after committal of the accused for trial but before commencement of the trial before the court is vested in the High Court regardless of the value of the property involved, after commencement of the trial in the "Court", jurisdiction is vested in the "Court" in terms of section 29 (4) (c), again regardless of the value of the property. It should be noted that the word "Court" in terms of section 2 of the EOCCA means the Corruption and Economic Crimes Division of the High Court established under section 3 as amended by section 8 of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016. Of particular interest and relevance in this matter is section 29 (4) (d). It confers on the **High Court** the jurisdiction to grant bail where the value of any property involved in the offence charged is Ten Million Shillings or more at any stage before commencement of the trial in the Corruption ahd Economic Crimes Division of the High Court.

It should be recalled that along with section 29 (4) (d) of EOCCA, the appellants cited section 36 (1) of EOCCA in their chamber application as another enabling provision. Section 36 (1) reads thus:

> *"After a person is charged but before he is convicted by the **Court**, the **Court** may on its own motion or upon an application made by the accused person, subject to the following provisions of this section, admit the accused person to bail."* [Emphasis added]

The word "Court" in the above subsection is defined in subsection (7) of the same section thus:

> *"For the purposes of this section, 'the Court' includes every court which has jurisdiction to hear a petition for and grant bail to a person under charges triable or being tried under this Act."*

Accordingly, when sub-sections (1) and (7) of section 36 are read together it is notable that in essence section 36 only seeks to regulate the exercise of the bail granting powers given to the courts under section 29 (4) of EOCCA. It is only a directory provision that stipulates restrictions and conditions under subsections (2) to (6) of that section for the grant of bail

by the courts. Consequently, in the instant case section 36 (1) of the EOCCA could not on its own be the source of the bail granting jurisdiction on the part of the lower court.

Reverting to section 29 (4) (d) of the EOCCA, we wish to observe briefly that there has been a raging debate at the High Court level on whether or not the Corruption and Economic Crimes Division of the High Court is vested with exclusive or concurrent powers under section 29 (4) (d) to consider and grant applications for bail: see the following unreported decisions **Jeremiah Madale Kerenge and Another v. Republic**, Miscellaneous Economic Cause No. 1 of 2016, the Corruption and Economic Crimes Division of the High Court, Dar es Salaam Registry; **Josephat Joseph Mushi and 8 Others v. Republic**, Miscellaneous Economic Case No. 1 of 2017, High Court, Mbeya Registry; **Kelvin Rajabu Ungele & 3 Others v. Republic**, Consolidated Miscellaneous Economic Applications Nos. 1 and 2 of 2017; and **Aneth John Makame v. Republic**, Miscellaneous Economic Cause No. 1 of 2018.

Apart from the Corruption and Economic Crimes Division deciding both in **Jeremiah Madale Kerenge** (supra) and **Aneth John Makame** (supra) that it has jurisdiction to grant bail under section 29 (4) (d), the

High Court in **Kelvin Rajab Ungele** (supra) was of the considered view that the said Division has exclusive jurisdiction to hear and determine bail applications under the aforesaid provisions. By and large, the courts reasoned that section 29 (4) (d) was not amended by Act No. 3 of 2016 rather inadvertently to reflect the Division as the court with exclusive jurisdiction to hear and determine bail applications. That by employing a purposive construction of the said provision, the court intended to be vested with that jurisdiction was "the Corruption and the Economic Crimes Division of the High Court", not the "High Court." On the other hand, the High Court in **Josephat Joseph Mushi** (supra) took the contrary view as it affirmed its bail jurisdiction in exclusion of the said Division. In that case, the Court reached that conclusion upon a plain and ordinary textual construction coupled with a rejection of the claim that purposive construction of section 29 (4) (d) was necessary so as to avoid an apparent absurdity.

The foregoing legal question was subsequently considered by this Court in its recent decision in **Director of Public Prosecutions v. Aneth John Makame**, Criminal Appeal No. 127 of 2018 (unreported), which was an appeal from the decision in Corruption and Economic Crimes Division in

Aneth John Makame (supra). In that case, the respondent had been before the Muheza District Court at Muheza awaiting committal as she was charged with an economic offence of occasioning loss of TZS. 30,273,000.00 to a specified authority contrary to sections 57 (1) and 60 (2) read together with Paragraph 10 (1) and (4) of the First Schedule to the EOCCA. On an application for bail under section 29 (4) (d) and 36 (1) of the EOCCA before the Corruption and Economic Crimes Division, the court (Korosso, J. as she then was) affirmed its exclusive jurisdiction on the matter thereby dismissing a preliminary objection raised by the respondent's Republic to the jurisdiction of that court. Before this Court, the appellant Director of Public Prosecutions vigorously contended that the power under section 29 (4) (d) was exclusively exercisable by the High Court, not by the Division.

In its decision, the Court allowed the appeal as it found that:

> *"neither the Muheza District Court nor the Economic and Organised Crimes Division of the High Court had jurisdiction to hear and determine the respondent's application for bail. According to section 29 (4) (d) of the EOCCA,* ***it is the High Court and not the Economic and Organised***

> ***Crimes Division of the High Court*** *which has been vested with the powers to deal with the petition of bail in all economic offence cases where the value of any property involved is ten million shillings or more."* [Emphasis added]

The Court added that:

> *"It is our considered view that* ***section 29 (4) (d) of the EOCCA was deliberately not amended in order to enable all High Court sub-registries to entertain the related bail applications promptly*** *instead of those applications being determined solely by the Corruption and Economic Crimes Decision of the High Court."* [Emphasis added]

We are of the considered view that we are bound to follow the above decision. In consequence, we have no difficulty to hold that the lower court (the Corruption and Economic Crimes Division of the High Court) in the instant case had no jurisdiction under section 29 (4) (d) of the EOCCA to take cognizance of the appellants' quest for bail.

The above apart, we are firm that even if the lower court were a proper forum for hearing and determining bail applications under section

29 (4) (d) of the EOCCA, its assumption of jurisdiction over the appellants' application would be questionable on the ground that the charge levelled against the appellants does not indicate the threshold value of Ten Million shillings or more of the property involved in the offence charged. It is vivid that the charge sheet is sim ply silent on the value of the chemicals allegedly trafficked by the appellants.

In view of the foregoing analysis, we hold that the proceedings before the lower court and the decision thereon are a nullity for want of jurisdiction. We this invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 RE 2018 to nullity and set aside the said offending proceedings and the decision thereon.

It is so ordered.

DATED at **DAR ES SALAAM** this 8th day of March, 2019

K. M. MUSSA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

I certify that this is a true copy of the original

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL