

**IN THE HIGH COURT OF TANZANIA
DODOMA DISTRICT REGISTRY
AT DODOMA**

CRIMINAL APPELLATE JURISDICTION

DC CRIMINAL APPEAL NO. 111 of 2020

*(Originating from the District Court of Singida
CRIMINAL Case No. 115 of 2020)*

**NUSRATI SHABANI HANJE.....1ST APPELLANT
TWAHA SALIM MWAIPAYA.....2ND APPELLANT
YOHANA ANTONI IGHUMBU.....3RD APPELLANT
HASSAN CHAIMBO MTINANGI
KUGISI.....4TH APPELLANT
DANIEL ISMAIL MANDI.....5TH APPELLANT
ZAITUNI HAMISI JUMANNE.....6TH APPELLANT
AMARIA ALPHONSE.....7TH APPELLANT**

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Mansoor, J:

Date of Judgement- 26TH AUGUST 2020

The appellants herein have been charged in the District Court of Singida for the offences of unlawful assembly under section 74 and 75 of the Penal Code,

Cap 16 R:E 2019, the offence of insulting the National Flag under section 7 of the National Flag and Coat of Arms Act, Cap 10 R:E 2002, the offence of use of offensive conducts conducive to breach of peace under section 5 and 8 of the Public Order Act, Cap 385 and the offence of attempting to communicate classified information under section 11 of the National Security Act, Cap 47 R:E 2019. The accused persons were kept in remand custody pending Trial at the District Court.

The appellants filed an application before the Trial Court praying to be admitted to bail pending Trial, the DPP objected the bail by filing a Certificate under Section 19 (1) and (2) of the National Security Act, Cap 47 R:E 2019. The Magistrate while saying that she was bound by the decisions passed by the Court of Appeal, the case of **DPP VS Ally Nuru Dirie and another (1988) TLR 252**, and the case of **DPP vs Li Ling Ling, Criminal Appeal No. 508 of 2015** (unreported), in which the Justices of Appeal stated that once the DPP



has filed a certificate objecting bail, and if that certificate is in writing, and is to the effect that the safety or interests of the United Republic are likely to be prejudiced by granting bail, and that the certificate relates to a criminal case pending trial or pending appeal, then the courts cannot grant bail. The Trial Magistrate found that the Certificate filed by the DPP met the criterion set in the two cases, and therefore she refused to grant bail to the appellants.

Aggrieved by the decision of the District court, the appellant filed the present appeal on the ground that the Court erred in law and in fact by denying bail to the appellants for the offences which are bailable while relying on reasons advanced by the respondent which are not supported by law.

The appellants are represented by Advocate Kalonga whose arguments was wholly relying on the case of **AG vs Jeremiah Mtobesya, Civil Appeal No. 65 of 2016**

in which Section 148 (4) of the Criminal Procedure Act, Cap 20 R:E 2002 was declared unconstitutional by the Constitutional Court since the provision contravenes Article 13 (6) (a) of the constitution of the United Republic of Tanzania, the decision which was confirmed by the Full Bench of the Court of Appeal. Advocate Kalonga submits that since section 19 (1) and (2) of the National Security Act is in Pari Materia to section 148 (4) of the Criminal Procedure Act, under which the Certificate by the DPP was issued, its construction should be given similar interpretation to that of section 148 (4) of the Criminal Procedure Act, Cap 20 to which the constitutional court had declared it unconstitutional. Advocate Kalonga insists that the DPP certificate was in violation of the Court of Appeal decision in Mtobesya case, and asked the Court to allow the appeal and to submit the appellants before the Trial Court so that they can be admitted to bail.



The DPP represented by Pius Hila and Lina Magoma, the Senior State Attorneys have countered the arguments presented by counsel Kalonga by citing the recent case of **Emmanuel Simforian Massawe vs Republic, Criminal Appeal no. 252 of 2016** in which the Court of Appeal while appreciating that the Mtobesya case, the Court of Appeal Full Bench declared section 148 (4) of the Criminal Procedure Act, Cap 20 R:E 2002 to be unconstitutional for violating Article 13 (6) (a) of the Constitution, in that when the DPP files a certificate to object bail under section 148 (4) of CPA, the other party is not afforded any meaningful opportunity of being heard before he is denied bail by operation of DPP Certificate, thereby abrogating the principles of natural justice, the Court of Appeal in Masawe's case reasoned that while section 148 (4) of CPA is quite similar to section 36 (2) of the Economic and Organised Crimes Control Act, Cap 200 R:E 2002, hence it should be given the same interpretation as in section 148 (4) of the CPA. However, the Court of Appeal



stated that the Mtobesya case was a constitutional petition challenging the constitutionality of section 148 (4) of the Act whereas the appeal in Massawe's case is of criminal nature and its gist is to challenge the Certificate of the DPP filed under section 36 (2) of the Economic and Organised Crime Control Act objecting the bail. The Court of Appeal declined to apply the two provisions from the two statutes in Pari Materia principles, and said that the certificate of the DPP can be challenged if it did not satisfy the validity tests set in the case of Li Ling Ling and the case of Dirie. The Court of Appeal also added that the Certificate by the DPP objecting bail can be challenged if it is proved that the DPP acted in bad faith or was an abuse to court process. This is the High Court and it is bound by the decisions of the Court of Appeal. Similarly as argued in the Massawe's case, the District Court could not declare section 19 (1) and (2) of the National Security Act unconstitutional since there was no petition before the Court challenging the constitutionality of the provisions of Section 19 (1) and



(2) of the National Security Act, and again the principles of in Pari Materia cannot be applied by the District Court or this Court as the District Court or this Court cannot declare any provision of the law unconstitutional as it is not constituted as a Constitutional Court. The principle for which the Court of Appeal contended does mean that in deciding upon the constitutionality of an act of the legislature, there must be a petition for challenging the specific law and the petition must be presented and adjudicated by the Court composed and constituted as a Constitutional Court, and only the Constitutional Court is entrusted with the power of an interpretation of the specific constitutional clauses which the act is alleged to infringe, and that only where the fair interpretation of the latter is in conflict with the fair interpretation of the former, can the act be declared unconstitutional. That power is not conferred in normal criminal courts entertaining ordinary criminal causes.

The second argument by Counsel Kalonga which was raised by the leave of the court, and after affording a chance of responding to the DPP, is that the Certificate filed by the DPP did not meet the validity test set in the cases of Dirie and the case of Li ling Ling in that the law cited in the Certificate does not exist. The Certificate filed by the DPP objecting bail was made under section 19 (1) and (2) of the National Security Act (Cap 47 R: E 2019). Counsel Kalonga submits that the National Security Act was never revised in 2019 thus the certificate by the DPP was made under the non-existent law. To buttress his argument, the Counsel cited the case of **Elly Peter Sanya vs Ester Nelson, Civil Application No.3 of 2015 (unreported)**, in which the Court of Appeal had struck out the application for wrong citation of the law.

In responding to the argument, Pius Hila the State Attorney conceded that the law cited in the Certificate is wrong as the National Security Act was never revised in



2019. He however urged the Court to ignore the error as the error did not prejudice the rights of the appellants. He also said under section 20 of the Interpretation of Laws Act, the Act may be cited by the name of the Statute or by the number and year of the Act or by the Chapter Number and Edition, and thus the Citation in the Certificate although it mentioned the Revised Edition which did not exist, the name of the Statute was cited and that was a proper citation.

Section 20 of the Interpretation of Laws Act reads:

Section 20: In any Act a description or citation of a portion of Words to be included in portion of another Act, shall, unless the contrary intention appears, be citation of construed as including the word, section, or other part, mentioned or referred to as forming the beginning and as forming the end of the

portion comprised in the description or citation.”

While it is true that the Interpretation of Laws Act, Cap 1 allows the Court to interpret the statutes by employing the aid to statutory interpretation and provided the citation by a short title to statutes which the Act can only be cited by its name, and long title, but the Interpretation of Laws Act has given the two types of citation of the statutes for purposes of reference and identification and to give the general description about the object of the Act or Statutes, section 20 cited by the State Attorney is irrelevant in the present case as the Act cited in the Certificate is the National Security Act only and there are no portion of words from another Act which have been included therein. The DPP has opted to cite the short title in the Certificate, which is the name of the Statutes, and has also cited the year in which it was Revised. He conceded that the National Security Act

was never revised in the year 2019, and that was an error.

If the DPP intended to cite the Short Title to the Act, he should have cited the name and the year of the Act as provided in section 1 of the Act itself, which reads:

Section 1. This Act may be cited as the National Security Act, 1970.”

The short Title would have sufficed but citing the Revised Edition while the law was not revised in the year 2019 is fatal and misleading. When the law is Revised it means that there were amendments which were affected in that year, and there could be a different section added or altered. The wrong citation in this case has made the certificate invalid, and did not meet the tests set in the cases of Dirie, and Li Ling Ling



The DPP derives his powers to issue the Certificate under the National Security Act to object bail, and citing the non-existing law means that the DPP has acted in the exercise of his jurisdiction illegally and with material irregularity, as he has no powers given under the law known as the National Security Act, RE 2019 to issue such certificate. Prima facie, the DPP has no powers given in the Revised Edition of 2019. The simple reason is, that the National Security Act was never revised in 2019 thus the DPP acted "in the exercise of its jurisdiction illegally or with material irregularity"

The power of the DPP to issue the Certificate to object bail was given under section 19 (1) and (2) of the National Security Act, 1970, and this power is to be exercised most sparingly and only in appropriate cases in order to keep the Courts within the bounds of their authority and not for correcting errors. The Court is not empowered by the laws to correct errors made by the parties, whether of fact or of law. The error of citing the



correct law in the Certificate renders the Certificate by the DPP defective hence incompetent, and as held in the case cited by Counsel Kalonga, the case of Elly Peter Sanya (supra), the effect of wrong citation in a document it to render it incompetent, and the courts cannot act upon defective documents. It follows therefore the Defective Certificate is expunged, and it is as good as there is no Certificate filed by the DPP at all.

That being the case, the appeal succeeds. The appellants are remitted back before the Trial Court so that the Bail application could be considered as no Certificate to Object the bail legally exists.

**PRONOUNCED IN OPEN COURT AT DODOMA THIS 28TH DAY
OF AUGUST 2020**



L. MANSOOR

JUDGE

26TH AUGUST 2020

Judgement delivered in Court today in the presence of the Appellants, represented by Advocate Fred Kalonga, Ms. Magoma, State Attorney for the Respondent Republic and MRS MARIKI the Court Clerk.



L. Mansoor
L. MANSOOR
JUDGE

26th AUGUST, 2020